**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Jordan Insull**

**Respondent:** **Hood Group Limited**

**Heard at:** **East London Hearing Centre**

**On:** **4-6 & 10-11 July 2018**

**Before:** **Employment Judge Ferguson**

**Members:** **Mr D Sutton**
**Mrs B Saund**

**Representation**

**Claimant:** **In person**

**Respondent:** **Mr T Webb (Counsel)**

## RESERVED JUDGMENT

**It is the unanimous judgment of the Tribunal that:-**

1. **The Claimant's holiday pay claim is dismissed upon withdrawal.**

2. **The remainder of the Claimant's claims are dismissed.**

# REASONS

**INTRODUCTION**

1. By an ET1 presented on 6 October 2017, following an early conciliation period from 12 August to 12 September 2017, the Claimant brought complaints of unfair dismissal, automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("ERA"), detriments on grounds of having made protected disclosures under s.47B ERA, holiday pay, wrongful dismissal and unauthorised deduction of wages. The claim is essentially that the Claimant was subject to series of disciplinary processes ending

with his dismissal that he contends were motivated by the fact that he had disclosed information to his manager. The Respondent defended the claims, asserting that the Claimant was guilty of the misconduct for which he was disciplined.

2. The issues were agreed at a preliminary hearing on 19 December 2017 and the Respondent was permitted to submit further grounds of resistance. At a further preliminary hearing the Claimant was permitted to add a complaint of victimisation. At the start of the final hearing the Claimant withdrew his holiday pay claim and the following final list of issues was agreed:

Ordinary unfair dismissal

3. Has the Respondent proved that there was a potentially fair reason for dismissal under section 98(1) ERA? The Respondent relies on the Claimant's conduct.

4. If so, was the dismissal fair or unfair in all the circumstances under section 98(4) ERA, including:

4.1 Did the Respondent have a genuine belief in the misconduct?

4.1.1 The Respondent relies on the alleged conduct set out at paragraph 13 of the ET3. In brief:

4.1.1.1 Unreasonable refusal to attend work;

4.1.1.2 Unauthorised disclosure of confidential information;

4.1.1.3 Failing to substantiate serious allegations made against the Respondent;

4.1.1.4 Bringing the company name into disrepute.

4.1.2 The Claimant contends that there was another reason for the dismissal, namely that he made alleged disclosures (see below) and/or that he refused to fabricate sales calls.

4.2 Was that belief based on reasonable grounds?

4.3 Did the belief arise following such investigation as was reasonable in the circumstances? The Claimant contends no investigation took place.

4.4 Did the disciplinary procedure lie within a band of reasonable procedures? The Claimant alleges that:

4.4.1 The Respondent failed to give him proper notice of disciplinary and appeal meetings prior to dismissal;

4.4.2 He was disciplined in respect of a manager's contract in respect of the period where the Claimant had been demoted;

4.4.3 New evidence was relied upon by the Respondent that he had not

been given the opportunity to comment on;

4.4.4 The Respondent refused to provide him with legible or accurate copies of meeting notes;

4.4.5 The Respondent did not address his grievances.

4.5 Did the decision to dismiss lie within a band of reasonable responses to the conduct?

4.6 If the dismissal was unfair: what is the percentage chance that but for procedural or other default, the Claimant would have been dismissed in any event (Polkey)?

4.7 If the dismissal was unfair: to what extent, if any, did the Claimant contribute to his dismissal (s.123 ERA).

Public interest disclosures claims (detriment and dismissal)

5. Did the Claimant make one or more of the disclosures as follows:

5.1 Did the Claimant ask Mr Tims, the Claimant's manager, whether it was appropriate for him to ask the Claimant to fabricate sales calls in or around November-December 2016?

5.2 On or about Monday 19 December 2016, did the Claimant inform Mr Tims about a sexual assault he had witnessed by a company director towards a member of the Claimant's team? And throughout end December 2016 and in January 2017 did the Claimant ask Mr Tims what had happened about his allegation?

5.3 Did the Claimant tell Mr Tims on a number of occasions that the Respondent had failed to honour its contractual obligations to clients, James Hallam and ASDA, in that promises were made to them that they would have dedicated staff or platforms on which their products could be sold but that this was not in fact occurring?

5.4 In about end November 2016, December 2016 and January 2017, did the Claimant tell Mr Tims that the Respondent was falsifying quality control figures and data to be provided to ASDA?

5.5 In August, September, November and December 2016, did the Claimant raise concerns with Mr Tims that the Respondent was failing to comply with regulations regarding the recording and storing of card details?

6. If the disclosures were made, did each amount to a protected disclosure in that:

6.1 Was it a disclosure of information?

6.2 Did the Claimant reasonably believe that it was made in the public interest?

6.3 Did the Claimant reasonably believe that the information tended to show that:

6.3.1 A criminal offence, that of a sexual assault, had been committed;

6.3.2 That a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject;

6.3.3 Either of the above was likely to be concealed.

6.4 Were the disclosures made to the employer?

7. Was the Claimant subject to the following alleged detriments (included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the Claimant as a matter of law):

7.1 Being the subject of spurious disciplinary allegations in early February 2017;

7.2 Being told not to appeal the first disciplinary outcome, a final written warning;

7.3 Being the subject of a second set of spurious disciplinary charges on 31 March 2017;

7.4 Being suspended on 31 March 2017;

7.5 The failure to follow proper disciplinary procedures, in particular:

7.5.1 Not providing proper notice of hearings;

7.5.2 Holding the appeal on the second process on a date not convenient to the Claimant;

7.5.3 Changing the allegations in the second process;

7.5.4 Not addressing grievances;

7.5.5 Failing to explore an informal procedure first;

7.5.6 Coaching witnesses in investigation meetings;

7.5.7 Failing to acknowledge that some witnesses were not impartial;

7.5.8 Ms House established the Claimant was not guilty but found against him in any event;

7.5.9 Not informing the Claimant he could call witnesses;

7.5.10 Ignoring evidence that the Claimant put forward;

7.5.11 The third disciplinary procedure's alleged unfairness as alleged above.

7.6 If so, can the Respondent show that the detriment was not done on the grounds that the disclosures or each of them was made? Including but not limited to was the relevant disciplinary officer aware of the alleged disclosures.

7.7 What was the principal reason the Claimant was dismissed and was it that he had made a protected disclosure?

7.8 Were the disclosures made in good faith (relevant to remedy only)?

Victimisation, s.27 of the Equality Act 2010 ("EqA")

8. Did the Claimant do a protected act? The Claimant relies on the conversation with Mr Tims on or about Monday 19 December 2016 in which the Claimant informed Mr Tims about a sexual assault he had witnessed by a company director towards a member of the Claimant's team.

9. Did the Respondent subject the Claimant to any of the detriments claimed above because the Claimant had done the protected act?

Breach of contract/ wrongful dismissal

10. What was the contractual notice period (or if none the statutory minimum period of notice)? The Respondent contends the contractual notice period was 3 months.

11. Was the Claimant guilty of gross misconduct?

Unlawful deductions of wages, s.23 ERA

12. Was the Claimant paid less in wages than he was entitled to be paid and if so, how much less?

13. If so was the deduction authorised by a statutory provision or relevant written contractual provisions or agreed to in writing by the Claimant beforehand?

Time limits

14. Were all of the Claimant's complaints presented within the time limits set out in the ERA and EqA?

15. In relation to remedy, it was agreed that the final hearing would cover only the issues of principle identified above, as well as whether any adjustment should be made for either party's failure to comply with the ACAS Codes of Conduct.

16. We heard evidence from the Claimant and, on behalf of the Respondent, from Philip Tims, Jessica Langston, Kelly House, James Wallis, Karen Otton, Claire Foster and Paul Firkins.

17. At the preliminary hearings the Claimant was represented by his father. At the start of the final hearing the Claimant said that he and his father had planned to share the cross-examination of the Respondents' witnesses between them. When it came to it, however, the Claimant conducted almost all of the cross-examination and made submissions himself. His father was present throughout and effectively acted as a McKenzie friend.

## FACTS

18. The Respondent is a company that provides IT, data and other services to the insurance industry, including selling insurance products over the telephone.

19. The Claimant commenced employment with the Respondent as a Sales and Retentions Executive on 23 June 2014. In around February 2016 the Claimant was seconded the role of Sales and Retentions Manager in the Respondent's Residential Department. His line manager from this point onwards was Philip Tims, Operations Manager. The Claimant managed a team of eleven sales executives.

20. The Claimant claims that in August 2016 and in the months that followed he made the first of a number of protected disclosures. The Claimant's witness statement states as follows:

> "18. Having spent months gaining experience and knowledge and having been told by Mr Tims to take ownership of my department, I began to question things a lot more. Data protection breaches were regularly in the news at this stage and I was aware that new laws were being put into place to ensure companies take more responsibility for safely and securely holding data.
>
> 19. The first of these was in August when I began to question why the Respondent had been storing card details on some of the platforms my sales teams (and others) were using. I explained to Mr Tims my concerns. I recall saying: I was concerned the Respondent had not fully complied with the regulations, as I understood them, and that they had not thought about all of the products they were selling and how the platforms would comply. I thought this was a significant breach of the Respondent's data protection obligations.
>
> 20. This was brushed off my Mr Tims and I was told that this is something I should not worry about… I recall raising my concerns that the platform we used to sell Select & Protect insurance products were also used by external brokers working on behalf of the Respondent. I did not see a solution for allowing brokers to access it and sell the products without access to our technology that stopped the recording of card details… I believe I raised my concerns in email as well as verbally."

21. Mr Tims's evidence was that he had no recollection of any such conversation with the Claimant. The Respondent did not dispute, however, that there had been internal discussions around this time about its compliance with an industry standard called the "Payment Card Information: Data Security Standard" ("PCI DSS"). A document produced in September 2016 entitled "Incident update" acknowledges a risk

that the Respondent could lose its "attestation of compliance" with PCI DSS and that compliance was a requirement of at least two of the Respondent's clients. Potential solutions to ensure compliance were suggested. The Claimant accepted in cross-examination that this document showed that the Respondent was taking the issue seriously.

22. It is significant that the Claimant did not mention this issue in his claim form. Nor is there any documentary evidence of the Claimant having raised it with anyone. We note that the Claimant did not put to Mr Tims in cross-examination that conversations along the lines set out in his witness statement took place, but also that Mr Tims did not expressly deny in his witness statement that such conversations took place; he simply did not remember any.

23. On balance we do not accept the suggestion in the Claimant's witness statement that the Respondent was avoiding these issues or not taking them seriously; the only documentary evidence on this issue suggests the contrary. Nor do we accept that the Claimant raised any concerns by email, or that he did so orally in any concerted way. We find that at most the Claimant was party to internal conversations in the latter half of 2016 during which the issue of potential non-compliance with PCI DSS was discussed. The Claimant has not established that he raised any specific concern with Mr Tims about the consequences of certain platforms being used by brokers. Further, even on the Claimant's own evidence it is not clear what the purported breach of legal obligation was in relation to this alleged concern.

24. The Claimant also alleges that around the same time, from September 2016 onwards, he made the second protected disclosure. In his witness statement he alleges that he believed the Respondent was deliberately misselling its services by making promises to clients that it had no intention of honouring. He claims that he mentioned to Mr Tims on "multiple occasions", on a monthly basis, that one client, James Hallam, expected that they would have a dedicated team and a dedicated platform and that this was not being delivered. He claims that Mr Tims would "laugh it off". He also says he raised concerns with Mr Tims that another client, ASDA, was not on aggregator sites (price comparison sites) as they had been promised.

25. Mr Tims denied that the Claimant raised any such concerns with him, although he acknowledged that the issue of ASDA not being on aggregator sites was a matter of general concern to the Respondent around that time. Again, the Claimant did not put it to Mr Tims directly in cross-examination that the alleged conversations took place. The Claimant relied on the fact that he raised this issue in an email of 18 April 2017 (considered in more detail below). The relevant part of the email states:

> "I believe now, the reason I have been targeted with these spurious allegations is because, on a number of occasions, I raised my concerns over Hood Group's failure to properly honour its commitments to a number of its clients and customers. At the time I did not recognise the significance of what is going on, or that I should have been more forceful in demanding that things be done properly. I do now."

26. We accept that that email is supportive of the Claimant's contention that he previously raised the issues he claims to have raised, but it does not say anything about the concerns being raised with Mr Tims and the Claimant says in his evidence

that he discussed these issues with another manager, Kerry Victory, on a number of occasions.

27. In the absence of any contemporaneous documentary evidence of the Claimant having raised these issues with Mr Tims, we are not satisfied that the conversations took place as claimed. We consider that, at most, the issue of ASDA not being on aggregator sites was the subject of wider discussion in the office and that the Claimant discussed it on occasion with Mr Tims. We do not accept that he disclosed anything to Mr Tims.

28. On 1 November 2016 the Claimant was officially appointed to the role of Sales and Retention Manager, having been interviewed for the role by Mr Tims and another manager. His contract provided for a six-month probationary period.

29. The Claimant alleges that in November 2016 Mr Tims asked him to "fake" a sales call so that the recording of it could be submitted as an example to the client. The Claimant says the suggestion was that he should ask his girlfriend to call in, pretending to buy insurance, and that the Claimant was to take the call himself. The Claimant says he refused to do this and challenged Mr Tims on the appropriateness of the request. Mr Tims denies that this conversation took place and says that the allegation is illogical because the Claimant was not operating telephone calls in November 2016.

30. We have concluded that it is unnecessary to resolve this factual dispute in light of our conclusions below.

31. It is not in dispute that on Monday 19 December 2016 the Claimant asked to speak to Mr Tims and told him that a senior male employee, to whom we shall refer as Mr X, had sexually assaulted a member of the Claimant's team, Ms A, at the Respondent's Christmas party the previous Saturday. The Claimant said he had seen Mr X put his hand up Ms A's dress and grab her while she was bending over to pick up her bag. Ms A was upset and the Claimant took her home in a taxi.

32. There is a factual dispute about what happened after 19 December 2016. Mr Tims says he reported the conversation straight away to his line manager, Ursula White, who asked Mr Tims to find out whether Ms A wanted to pursue the matter. Mr Tims says he then asked the Claimant to speak to Ms A about it and that the Claimant reported back to him that Ms A did not want to take the matter any further. Mr Tims passed this on to Ms White and left the matter in her hands. The Claimant denies that any of that took place and claims that he did not hear anything further after he reported the matter to Mr Tims on 19 December. He also says that he asked Mr Tims on at least two occasions over the following two months what was being done about the issue.

33. We prefer Mr Tims's version of events, in that we accept that Mr Tims asked the Claimant whether Ms A wanted to pursue the matter and the Claimant said she did not. The Respondent accepts that the matter was not investigated at the time, but after the Claimant raised it again in April 2017, Ms A was interviewed on 24 May 2017. The record of that interview says that Ms A "advised that her Line Manager [i.e. the Claimant] spoke to her and [she] brushed it off and didn't want to take it further at that stage". A WhatsApp exchange between the Claimant and Ms A in May 2017 also suggests that Ms A did not consider it to be a significant incident and did not make any

complaint.

34. The Claimant believes that from January 2017 onwards Mr Tims saw the Claimant as a troublemaker because of the disclosures and was looking for ways to undermine him. Mr Tims conducted an annual review with the Claimant in January 2017. The written record of the meeting contains the following comments from Mr Tims:

> "Jordan has had highs and lows for 2016 and moving into [2017], I have fed back that he can at times be really efficient can produce some great results and work.
>
> A good example of this is the Asda work, where we achieved contact awards for the second year running. Also his work in getting Select over the line and ensuring that all the work is complete for it.
>
> On other occasions he can be very distant and excuse driven. Sometimes I feel Jordan isn't very managerial and can be inconsistent with how he deals with his members of staff on his team.
>
> I question Jordans skills as a people manager and I feel this is his main area for development in 2017. He needs to demonstrate that he is really managing his team and driving Household forward…
>
> Jordan really needs to demonstrate that he can do all aspects of management now, not only completing the tasks but truly running the team as a people manager. I have fedback that if he remains at this level then he will not pass his probation, so there is a lot of pressure on Jordan to demonstrate the above as well as use all resources available to him to allow him to do so."

35. The Claimant says that these negative comments came as a surprise to him as he had been in the job for a year and although he had "taken time to grow into the role", he had always been told he was doing a good job.

36. Dealing specifically with the annual review, we do not accept that Mr Tims was motivated by the disclosures or by any perception of the Claimant as a troublemaker. The comments are measured and balanced with praise for some aspects of the Claimant's work. Nor do we accept that these comments came out of the blue. The bundle contained three emails, dated 3, 13 and 24 January 2017, from Mr Tims to the Claimant raising, broadly, issues to do with the Claimant's management style. In the first Mr Tims said he had looked at the Claimant twice and both times he was laughing with a female member of his team. Mr Tims asked for her to be moved away, noting "perception Mr Insull is everything". In the second email Mr Tims said that the CEO had walked past the Claimant's team and they were all chatting. In the last Mr Tims said he had had "another" complaint about the Claimant talking to the receptionist.

37. We find that by the middle of January 2017 Mr Tims had genuine concerns about the Claimant's management style, reflected in the annual review document.

38. Towards the end of January 2017 the Claimant was informed that several members of his team said the Claimant had not been conducting "121s" with them.

Mr Tims's evidence, which we accept, is that another manager, Aaron Jones, reported to Mr Tims that he had overheard members of the Claimant's team discussing the issue. Mr Tims then checked the internal online "hub", where records of 121s are stored, and found several documents uploaded by the Claimant that appeared to be records of 121s he had conducted. Mr Tims challenged the Claimant about this and asked whether he had falsified the documents. The Claimant denied that he had done anything wrong.

39. Mr Tims's evidence is that he contacted HR about this issue and decided to open a formal investigation because he believed it was potentially very serious.

40. The Claimant believes that Mr Tims concocted this issue as a means of making the Claimant's life difficult, having formed a negative view of the Claimant following the disclosures.

41. Although we query whether this issue truly merited a formal investigation, since it was arguably an issue of management competence rather than misconduct, we accept Mr Tims's evidence that he genuinely believed a formal investigation was merited. The evidence before him at that stage included reports of the Claimant's team saying the Claimant had not conducted any 121s and documents uploaded on the system that purported to be records of 121s. On one view, that potentially amounts to falsification of documents. The matter had not been instigated by Mr Tims, but by another manager, Mr Jones. The Claimant has not alleged that Mr Jones knew of the disclosures or was motivated by them. In those circumstances, and given the context of Mr Tims's more general concerns about the Claimant's management style, we accept that Mr Tims was in no way motivated by the disclosures in deciding to institute a formal investigation.

42. On 6 February 2017 the Claimant was invited to an investigatory meeting the following day to discuss alleged misconduct, namely "your failure to carry out reviews with your team".

43. During the investigatory meeting the Claimant denied that he had not been conducting 121s. He said that the meetings were "ad hoc", but that they tended to take 20-30 minutes. He would go through the employee's statistics and any updates in the department. He would complete the paperwork and upload it onto the staff hub. When asked if the staff had seen the forms he had uploaded he said they had.

44. Mr Tims also interviewed seven members of the Claimant's team. The overall picture from those interviews was that the Claimant had not been conducting regular 121s between August and December 2016. All of those interviewed said they had not seen "scorecards" that were uploaded onto the staff hub in that period. There also appear to have been quarterly review documents from October 2016 on the staff hub, which they said they had not seen. Most said that no quarterly review took place. One employee, however, said that there were "inconsistencies across the business" in the way that 121s were conducted and that she was happy with the way in which she was managed.

45. The investigatory meeting with the Claimant was reconvened on 9 February 2016 and Mr Tims reported what members of the Claimant's team had said in their interviews. The Claimant maintained that he had been conducting regular 121s and the

staff had seen the documents that were uploaded onto the hub. When asked about one member of staff who said there were five or six he had not seen, the Claimant said "Not sure why not. I know I sent them out to the agents via email." He also maintained that the staff saw the paperwork during the 121 meetings. He questioned the memories of the people in his team "as it is a long time ago".

46. Mr Tims also looked into the Claimant's training on 121s and established that he had attended training in December 2016. Mr Tims's evidence was that he was aware that his deputy manager had assisted the Claimant with 121 training during his secondment. The Claimant agreed with that, and said that the deputy manager had developed the "scorecard" form with him.

47. Mr Tims completed an investigation report on 10 February 2017. He summarised the interviews and under "facts established", he stated, "All agents confirmed that 121's saved were not real". He recommended formal disciplinary action, noting that the Claimant claimed to have conducted 121s and reviews and stating,

> "He has also falsified these reviews and it looks like in order that he is not exposed for not having carried his management duties. We need to be able to trust our managers, and this does leave us feeling that we can't."

48. The matter was then referred to Kelly House, Business Change Manager, who was appointed as the disciplinary manager. On 13 February 2017 the Claimant was invited to a disciplinary hearing "in relation to the alleged gross misconduct in that over the previous 6 months, you failed to carry out staff reviews and subsequently deliberately falsified documents and uploaded to the system, indicated that they had been completed. This is a wilful disregard of management duties and is a serious breach of trust that needs to exist between the Company and its employees." The Claimant was warned that the outcome could be summary dismissal. Copies of the minutes of all investigatory meetings were provided.

49. The disciplinary hearing took place on 17 February 2017. The Claimant said that he was on secondment to the role at the time and had not had any training. He maintained, however, that he had held regular 121s and that the scorecards were discussed in the meetings. The Claimant was asked why he thought the team were saying they had not seen the documents. He said he did not know, but mentioned that two of the team had applied for his job and said it "may be the way I've conducted the reviews". He acknowledged that communication could have been poor. When asked if he felt he had done anything wrong, the Claimant said "No – I've done something wrong by my team and not by the company. I understand why [Mr Tims] done it. I feel like I've let him down – he took a punt on me. I know my reputation needs to be rebuilt."

50. Ms House adjourned the meeting to consider her decision and reconvened on 20 February 2017. At the reconvened meeting she informed the Claimant he would be given a final written warning and a personal improvement plan ("PIP") would be put in place. She noted that the Claimant had not taken responsibility for his actions. When the Claimant objected to his integrity being impugned, Ms House noted that seven people had said something contrary to what the Claimant had said. At the end of the meeting the Claimant said he was not happy, "but I understand that it is a fair decision".

51. The Claimant says in his witness statement that Ms House "made a finding that I did not falsify documents". That does not accurately reflect her conclusion. It is true that she did not clearly set out her findings at the reconvened meeting and she focused on the Claimant's communication with his team, but she certainly did not make any express finding that the Claimant did not falsify documents. In her oral evidence she said she had concluded it was probable there were documents uploaded as 121s that were "not reflective of any conversation the staff had had". As noted above, we consider it might have been possible for the Respondent to have dealt with this issue as a matter of management competency and training, rather than a disciplinary matter, but we accept Ms House's evidence as to her conclusion and that she genuinely believed a final written warning was warranted. It was significant that during the disciplinary process the Claimant consistently claimed that the documents uploaded on the hub were genuine records of 121s. It was certainly open to Ms House on the evidence before her to conclude that many of them were not. There were, therefore, reasonable grounds for concern as to the Claimant's honesty and the Respondent's ability to trust him more generally. We also note that the PIP was a way of supporting the Claimant in the future, which tempers the imposition of a final written warning to some extent.

52. The Claimant was informed of his right to appeal, but did not do so. The Claimant alleges that Mr Tims advised him not to, saying that he had been lucky not to be dismissed. Mr Tims denies such a conversation and on balance we prefer his evidence. We note that the Claimant expressly admitted in the outcome meeting that it was "a fair decision". We consider that that is the most likely explanation for the Claimant's decision not to appeal, and that he made this allegation against Mr Tims because he recognised his failure to appeal could be unhelpful to his claim in the Tribunal.

53. The Claimant does not allege that Ms House was motivated by the disclosures. Indeed he accepts that she did not know about them at this stage. Given that Mr Tims reached materially identical conclusions in the investigatory process, based on the same evidence, we are satisfied that he was not motivated by the disclosures at any time during the disciplinary process. We also consider that, given Mr Tims had only recently decided to promote the Claimant to the management role on a permanent basis, it is unlikely that he would deliberately seek to undermine the Claimant so soon afterwards. Mr Tims said in his oral evidence that the Claimant failing his probation would not have been a good outcome for either of them. We accept that.

54. The Claimant contends that he made the last of his protected disclosures during the course of the disciplinary process. The context for the alleged disclosure is that one of the Respondent's largest clients, ASDA, operates a "leader board" for ranking the companies it uses to sell insurance products. They are ranked based on the quality of calls, which is assessed based on recordings of calls submitted to ASDA for review. Each year, the winning sales team is rewarded with a trophy and small prizes. The Respondent was the winning company two years in a row. At a meeting on or around 15 February 2017 a representative from ASDA discovered that the Respondent had been "cherry picking" the calls to send for review and told the Respondent that they should not be doing this. The Claimant alleges that he discussed the issue with Mr Tims after the meeting and Mr Tims indicated that they would continue to cherry pick calls. The Claimant said he raised concerns about this a week or so later and Mr Tims told him they had had confirmation that cherry picking was "ok". Mr Tims's evidence is

that after the meeting on 15 February 2017 the Respondent changed its practices and stopped cherry picking calls. He denies the alleged conversations with the Claimant.

55. In light of our conclusions below, we consider it unnecessary to resolve that factual dispute. It is sufficient to say that whatever conversations took place, we do not accept that Mr Tims bore any grudge against the Claimant in relation to this matter.

56. On 28 March 2017 a member of the Claimant's team, Kayleigh Skin, raised a grievance against the Claimant. The grievance was sent by email to Aaron Jones. Ms Skin refers to having raised issues about the Claimant previously and says that she would now like to raise a formal grievance. She then includes what appears to be the text of three earlier emails, dating from mid-February onwards. It is unclear to whom the earlier emails were sent. The main complaint in the first email relates to the Claimant's romantic involvement with another member of the team, Ms A. Ms Skin said that the Claimant talked to her about Ms A regularly and told Ms Skin that she must not tell anyone about the relationship. She also referred to a particular occasion when, after the relationship had ended, Ms A had got upset because the Claimant had been talking openly about other girls. Ms Skin had to comfort Ms A and after this the Claimant had taken Ms Skin into a room to ask her why Ms A was upset. Ms Skin describes feeling "uncomfortable" and being put "in a difficult situation".

57. It is not entirely clear what Ms Skin's complaint is in the second email. She refers to two conversations with the Claimant, shortly after the outcome of the disciplinary process, one when he said he did not trust anyone, and another when he mentioned that he was being questioned over Christmas about not doing his work. She says these conversation and the matters referred to in her previous email were making her feel like she has doing something wrong and that the Claimant was having conversations with Mr Tims about her. She says it was making her feel "low".

58. In the third email Ms Skin claims that the behaviour from the Claimant "has continued". She refers to the Claimant having asked her whether she had told anyone that he had recently stayed the night at Ms A's house. She says she did not feel comfortable having this conversation with him. She also complains about the Claimant having granted several last minute holiday requests to other members of the team, which had an impact on her.

59. Ms Skin's complaint was referred to HR and Mr Tims. Mr Tims's evidence was that he had become aware of a rumour circulating that the Claimant was involved in a relationship with Ms A. He discussed these rumours with the Claimant in January 2017 because although there was no policy regarding relationships in the workplace, he was concerned that it could impact on the Claimant's management of her as it could cause difficulties with her or the team as a whole. The Claimant denied that there had been any relationship.

60. Having received Ms Skin's grievance, Mr Tims decided, in consultation with HR, to instigate formal disciplinary proceedings. We accept that Mr Tims genuinely believed it warranted a formal investigation. The Claimant had been warned previously about blurring the boundary between the personal and professional, and a member of his team had now alleged that she was made to feel uncomfortable by the Claimant having numerous private conversations with her.

61. Mr Tims spoke to Ms Skin and the Claimant. The Claimant admitted that he told Ms Skin not to tell anyone about his relationship with Ms A, and that he put "a little bit" of pressure on her. He said that this was just to avoid gossip and denied that she felt under any pressure or told him that she did. He denied doing anything wrong.

62. Mr Tims decided to suspend the Claimant pending further investigation. Again, it is arguable that this was not a necessary step, but the Claimant accepted in cross-examination that it was reasonable to suspend him pending the investigation and we accept that Mr Tims did so in good faith, believing that a junior member of staff felt intimidated by her manager.

63. Mr Tims obtained a statement from Ms A, which broadly corroborated what Ms Skin had said. She also said that she felt uncomfortable knowing that Ms Skin and the Claimant were talking about her. Mr Tims also spoke to Mr Jones, who confirmed he had witnessed the incident when Ms A became upset.

64. Mr Tims produced an investigation report dated 3 April 2017. Under the heading "facts established", it states:

> "Jordan has bought a personal issue into work and clearly used work time to do this.
>
> Jordan has made his senior agent remain quiet about a unprofessional relationship with another staff member.
>
> Jordan has behaved unprofessional and clearly had put Kayleigh in a vulnerable position as more people became aware.
>
> Kayleigh feels vulnerable and used by Jordan."

He recommended formal action be taken on the basis that the Claimant had

> "clearly been highly unprofessional in a relationship with a team member not only just happening but also spilling into the work forum. He had abused the trust of his position by using it to gain personal information about his relationship over large periods of work time. Kayleigh has clearly been put in a vulnerable position which even when asked she couldn't manage to stop from him. He has clearly put his own feelings and relationship first over his duty of care with Kayleigh."

65. Kelly House was again appointed as the disciplinary manager and on 4 April 2017 the Claimant was invited to a disciplinary hearing

> "in relation to your management behaviours in the workplace toward a member of your team which is alleged to be intimidating conduct, which has led to a formal grievance being raised. In addition, it is alleged you spent excessive company time discussing personal issues whilst on duty, with another member of your team, resulting in the residential team not having a manager fully present on the floor. This is a serious and deliberate breach of confidence and trust which needs to exist between the company and it's managers, and could lead to the Company's name being brought into disrepute. This is despite receiving a

> Final Written Warning on 21st February 2017, regarding your conduct as a manager."

66. The Claimant was given copies of Ms Skin's grievance and notes of the investigation meetings and statements. He was not given a copy of Mr Tims's investigation report.

67. The disciplinary hearing took place on 10 April 2017. The Claimant submitted a statement in which he denied that he had spent excessive company time discussing personal issues. He also did not accept that Ms Skin felt intimidated by him. He provided copies of text messages between himself and Ms Skin which showed that they messaged each other frequently and in a very friendly tone. They included several messages on 7 March 2017, beginning with one from Ms Skin saying "Thanks for the chat today btw…". The Claimant argued that the tone of these conversations was not what would be expected from someone who felt in any way threatened.

68. On 11 April 2017 Ms House interviewed Ms Skin, who confirmed that she felt under pressure to keep the relationship between the Claimant and Ms A secret.

69. Ms House reconvened the disciplinary hearing on 12 April 2017. Shortly before the meeting the Claimant submitted a further statement in which he reiterated his "total denial of all wrongdoing in respect of both the allegations that have been brought against me". He noted that Ms House had suggested that Ms Skin may have been prompted to submit the grievance by the Claimant accusing her of telling Mr Tims that the Claimant had spent a night at Ms A's house. The Claimant accepted in the statement that he was "not pleased" that Mr Tims had found out about this before he had had the opportunity to tell him himself, but said that Ms Skin's only complaint was that the conversation took place publicly, not that his behaviour was intimidating or bullying. He concluded the statement by saying,

> "As mentioned previously, I believe I have struggled in making the transition from team member to manager because primarily, I felt I was still working with people I had come to think of as friends. If I have made any mistake, this was it."

70. At the hearing on 12 April Ms House provided the Claimant with the notes of her conversation with Ms Skin. By this stage Ms House had decided that the appropriate outcome was for the Claimant to be demoted, but she allowed the Claimant further time to consider Ms Skin's comments and reconvened the hearing on 13 April. The Claimant submitted a third statement in which he argued that there was no evidence of Ms Skin having felt intimidated by him.

71. On 13 April 2017 the Claimant was notified of Ms House's decision to demote him to the grade of sales and service executive, on his previous salary of £18,500. In an email to HR on 12 April 2017 Ms House explained her view that both disciplinary allegations had been made out. She believed that the Claimant lacked self-awareness and that overall his conduct fell short of what was expected from managers. She felt it would be a risk to the company to allow him to continue in that role.

72. The Claimant has not argued that Ms House was motivated by the protected disclosures; she cannot have been because she did not know about them. For the avoidance of doubt, we accept that she genuinely believed that demotion was the

appropriate outcome and had no ulterior motive. She gave convincing oral evidence as to her reasons for the decision. She believed that the Claimant had been naïve. She said that although he was under probation for the manager role, she did not take that into account at the time. She treated it as a disciplinary matter and felt that the two disciplinary outcomes showed that the Claimant could not continue at management level at that time.

73. The Claimant's case is that Ms Skin's allegations were "orchestrated by Mr Tims in the hope that I would be dismissed and he could wash his hands with what he now viewed as a troublemaker". There is no evidence to support that and we do not accept it. We note that Ms Skin was very friendly with the Claimant in text messages, but it is not implausible that she would be friendly with him in that context, while simultaneously having concerns about his conduct as a manager. Ms Skin may have been motivated by her personal friendship with Ms A, or by some annoyance at the Claimant accusing her of telling Mr Tims about the relationship, but both Mr Tims and Ms House were aware of that context and took it into account. Overall the investigation suggested that Ms Skin had been put in a difficult position as a result of her friendships with both the Claimant and Ms A, particularly after the relationship ended. Even on the Claimant's own account, in which he accepted putting a little bit of pressure on Ms Skin to keep the relationship secret, the whole episode did not reflect well on his professionalism. We accept that Mr Tims's conclusion in his investigation report was genuine and not motivated by any perception of the Claimant as a troublemaker.

74. The Claimant was informed that he should return to work in the demoted role on 18 April 2017.

75. On 18 April 2017 the Claimant appealed against the decision to demote him. In the email he said that he would not be attending work because he understood that if he did so this could be construed as acceptance of a change to his terms of employment. He went on to say,

> "As a result of the unbelievable approach that I have been subjected to throughout this process I have begun to wonder why the company might so desperately want me out. I believe now, the reason I have been targeted with these spurious allegations is because, on a number of occasions, I raised my concerns over Hood Group's failure to properly honour its commitments to a number of its clients and customers. At the time I did not recognise the significance of what is going on, or that I should have been more forceful in demanding that things be done properly. I do now.
>
> I also, repeatedly raised concerns over a sexual assault perpetrated against one of my team, by one of the company Directors, at the Christmas party. I was told by Phil not to mention it to anyone else, as it was being investigated. I have seen no evidence that any action was taken, despite my raising these concerns and it may well have become apparent that I had started to question the company's integrity."

76. The appeal email was sent to Ursula White, cc'd to Simon Hood (Managing Director) and James Wallis (Director and Chief Operations Officer). It was also cc'd to "newsdesk@live.co.uk".

77. On 20 April 2017 Karen Otton, Head of HR, responded to the Claimant confirming that his appeal would be heard by James Wallis. She also said that the Claimant was required to attend work in the demoted role and that his refusal to do so amounted to refusal of a reasonable management instruction. She also referred to the fact that the appeal email had been sent to newsdesk@live.co.uk. She explained that the Claimant has a duty of confidentiality and that the Respondent needed to understand "what information has been sent to this address, for what purpose and who receives this information".

78. The Claimant replied the following day confirming that he would not be attending work. He also said that newsdesk@live.co.uk was his father's email address. On 24 April 2017 he sent a further email to Mr Wallis in which he set out his grounds of appeal. This was copied to Karen Otton and to newsdesk@live.co.uk. He also said he wanted to raise grievances against Mr Tims, Ms Skin and Ms House. He said that Mr Tims had "for motives best known to him" not conducted the investigations with integrity. He also said that Ms House had used the process "to achieve some undisclosed agenda" and that Ms Skin had deliberately lied in order to cause trouble.

79. Ms Otton emailed the Claimant on 24 April 2017. She referred to the Claimant's assertion that previous concerns he had raised were the reason for the disciplinary action. She noted that the Claimant had not raised any formal grievances or raised any concern pursuant to the whistleblowing policy. She said she would continue to look into the allegations and that the company would want to discuss these as part of the appeal hearing. She said, "The Company will require you to provide further details of your public interest concerns in order to comply with its responsibilities."

80. As to newsdesk@live.co.uk, she stressed that confidential company matters should not be disclosed via email to a third party, even if it is family. She said that this constitutes unauthorised disclosure of confidential information, which is potentially gross misconduct.

81. Ms Otton also confirmed that the Claimant's pay would be stopped with immediate effect due to his refusal to attend work.

82. Ms Otton also said that the company proposed to deal with the Claimant's grievances as part of the appeal process as far as they are relevant to the disciplinary matter under consideration.

83. Mr Wallis wrote to the Claimant on 28 April 2017 inviting him to an appeal hearing on 2 May 2017. The Claimant sent a lengthy email on the morning of 2 May, again copied to newsdesk@live.co.uk, saying among other things that the hearing time was not convenient for him and asking for it to be rescheduled. At the end of the email the Claimant made a specific request to know the outcome of the investigation into the sexual assault he witnessed at the Christmas party. He said he remained concerned as to why he was never interviewed by the Respondent or the police.

84. Ms Otton responded to that email on 3 May 2017. She agreed to reschedule the meeting to 5 May 2017. Referring to the "public interest matters", she said that the company needed specific examples and expected the Claimant to provide these at the appeal hearing. The disclosure of confidential information was again referred to and Ms Otton said that the company reserved the right to deal with the matter separately. She

also enclosed a copy of Mr Tims's investigation report from the second disciplinary process, which she said was the only document the Claimant had not seen before.

85. The Claimant sent a further email on 4 May 2017, still copying in newsdesk@live.co.uk, saying among other things that he could not attend on 5 May due to "a prior engagement". He suggested 9 May as an alternative.

86. Ms Otton refused to reschedule the appeal hearing and it took place on 5 May in the Claimant's absence.

87. Mr Wallis informed the Claimant on 12 May 2017 that his appeal was rejected. In a six-page written decision Mr Wallis dismissed each of the Claimant's grounds of appeal. He concluded:

> "It is my belief that the facts have been interpreted correctly. As for the sanction, my opinion is the decision reached by Kelly House to demote you was lenient, given the evidence, the fact that you were on a final written warning and on probation. The decision to demote you is upheld."

88. The Claimant alleges that Mr Wallis was motivated by the protected disclosures. We do not accept this. The appeal outcome document was thorough and fair. For example, he said he believed it was not helpful to have described the Claimant's conduct as "intimidating" because there was little or no evidence to suggest that there was wilfully intimidating behaviour. He considered, however, that the Claimant's failure to acknowledge that his behaviour was inappropriate and unprofessional showed a lack of integrity and a lack of consideration for his team. Mr Wallis also recognised a need for training on bullying and harassment matters, and on the need to separate the personal and professional. He also said that Ms House's reasoning on the second disciplinary was "confusing and should have been phrased better". Overall, however, he considered that the decision to demote the Claimant was clearly justified by his conduct. We find no evidence of any ulterior motive.

89. The Claimant was expected to return to work on 16 May 2017. He did not do so and on the same date Claire Foster, Head of IT, wrote to invite him to a disciplinary hearing on 18 May. The allegations were:

89.1 Unreasonable refusal to follow an instruction issued by a manager, namely his refusal to attend work. This was said to be a serious and deliberate breach of his contract of employment.

89.2 Unauthorised use or disclosure of information, namely copying emails to newsdesk@live.co.uk despite repeated requests not to do so. This was said to be contrary to the Claimant's contract of employment.

89.3 Breach of confidence. It was said that the Claimant had made serious allegations against colleagues, managers and the company and despite repeated requests had not been prepared to substantiate these.

89.4 Bringing Company name into disrepute. The Claimant had made serious allegations regarding the Company's failure to honour its commitments to clients, customers and the law, but despite repeated requests had not

been prepared to substantiate this.

90. The Claimant provided a statement at the hearing on 18 May, in which he complained that there had been no investigation and said that he did not feel it was appropriate to participate any further. He said,

> "This process was obviously flawed from the very start. It is, in my view, just the latest episode, in the very distressing campaign, of victimisation that Hood Group and its representatives, have been waging against me."

91. Ms Foster responded that the company did not consider that an investigation was necessary. The hearing was adjourned to 30 May, however, because the Claimant had been given less than 48 hours' notice of the hearing. At that hearing the Claimant simply answered "nothing further at this time" to each question he was asked. The hearing was adjourned again and resumed on 9 June 2017 when Ms Foster informed the Claimant of her decision to dismiss him without notice. Her evidence was that before making her decision HR confirmed that no complaint had been made to the whistleblowing inbox and provided her with a copy of the Claimant's signed confidentiality agreement. Copies of these documents were provided to the Claimant at the resumed hearing on 9 June.

92. The Claimant appealed on 14 June 2017, primarily complaining about the disciplinary process and in particular the lack of an investigation. The appeal was heard by Paul Firkins on 10 July and was dismissed on 31 July.

93. The Claimant contends that his dismissal was motivated by the protected disclosures. He claimed that each of Ms Otton, Ms Foster and Mr Firkins were aware of the protected disclosures and were influenced by them in their conduct of the third disciplinary process. We do not accept that. Apart of the allegation of sexual assault, of which all three were aware, none of them knew of the other matters now relied upon by the Claimant as protected disclosures. The decision to dismiss was not surprising or unreasonable, given that the Claimant had refused to attend work and had continued to copy his father into confidential emails despite having been asked not to. Nor was there anything obviously unfair about the disciplinary process. There is no reason to doubt that all three managers dealt with the matter in good faith and we find no evidence that any of them was influenced by the disclosure about the sexual assault.

## THE LAW

94. As regards protected disclosures, the ERA provides, so far as relevant:

> **43A Meaning of "protected disclosure"**
>
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
…

**43C Disclosure to employer or other responsible person**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—

(a) to his employer, …

**47B Protected disclosures**

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
…

**103A Protected disclosure**

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

95. As to s.43B, the definition has both a subjective and an objective element: the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1), and that belief must be reasonable. A belief may be reasonable even if it is wrong (Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026).

96. Pursuant to s.48(2) ERA, on a complaint under s.47B it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The employer must prove on the balance of probabilities that the protected act did not materially influence the employer's treatment of the employee (Fecitt v NHS Manchester [2012] ICR 372).

97. Under s.103A ERA the burden of proving the reason or principal reason for dismissal is on the employer.

98. Section 27 of the EqA provides:

**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
-

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

99. As to unfair dismissal, pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of an employee is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

100. In misconduct cases the Tribunal should apply a three stage test first set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 to the question of reasonableness. An employer will have acted reasonably in this context if:-

100.1 It had a genuine belief in the employee's guilt;

100.2 based on reasonable grounds

100.3 and following a reasonable investigation.

The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal in respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

101. If the Tribunal finds that the dismissal was procedurally unfair, it should assess the chance that the employee would have been dismissed following a fair procedure and take that into account when calculating the compensation to be paid (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503).

102. The time limit for presenting a complaint to the Employment Tribunal, in respect of each of the causes of action above, is three months less one day from the date of dismissal or the act complained of. In respect of victimisation, s.123 EqA provides that "conduct extending over a period is to be treated as done at the end of the period". As

to detriment on grounds of protected disclosures, if the act or failure is part of a series of similar acts or failures, time runs from the last act (s.48(3)(a) ERA). S.48(4) ERA further provides that where the act extends over a period, time runs from the last day of that period.

103. The EAT confirmed in Royal Mail Group Ltd v Jhuti UKEAT/0020/16 that in order for a detriment claim to be in time, the act from which time begins to run must be actionable under s.47B, i.e. the act or deliberate failure must be proved to have been done on the ground that the worker made a protected disclosure. Simler J stated (at para 43):

> "In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s 48(3)(a) ERA. Acts relied on but on which the claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes."

In Jhuti, as the latest proven act or failure occurred over six months prior to the last date that could be relied upon as giving rise to a detriment under s.47B, the claim was held to be out of time.

104. In respect of unfair dismissal and detriment on grounds of protected disclosures, the Tribunal has a discretion to extend the time limit where the Claimant can show that it was not reasonably practicable to present the claim in time and the claim was presented within a further reasonable period. In respect of victimisation, the Tribunal has a discretion to extend the time limit if it considers it just and equitable to do so. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the Claimant to show that it is just and equitable to extend the time limit.

## CONCLUSIONS

Detriments on grounds of protected disclosures & Victimisation

105. The Respondent argues that the detriment and victimisation claims should be dismissed on the basis that the conduct of the third disciplinary process cannot be said to have been motivated by the disclosures because Mr Tims was not involved and the relevant managers did not know about the disclosures. All other alleged detriments are out of time. Mr Webb relies on Jhuti and argues that unless the Claimant can establish an "in-time" unlawful act, there is nothing upon which to hang a course of conduct (victimisation) or act extending over a period or a series of similar events (whistleblowing).

106. We accept that, early conciliation having commenced on 12 August 2017, in principle all acts before 13 May 2017 are out of time. The second disciplinary process ended on 12 May 2017. Although it is not accurate to say that none of the managers involved in the third disciplinary process knew of any of the alleged disclosures – each of them admits that they knew the Claimant had raised the sexual assault matter – we

have made factual findings that none of them was motivated by any of the claimed protected disclosures.

107. We agree with the Respondent that that disposes of the complaint of detriments on grounds of making protected disclosures. There is no basis on which we could find that it was not reasonably practicable for the Claimant to bring his complaints about the earlier matters in time. The detriments complaint must therefore be dismissed.

108. The victimisation complaint is different. The Claimant did not expressly argue that the relevant time limits should be extended, but he did say in submissions that he was under the impression that internal procedures had to be exhausted before commencing Tribunal proceedings. He has always contended that his treatment from the first disciplinary onwards was an attempt to force him out of the company because he had become to be seen as a troublemaker. Even if a clear line can be drawn between the second and third disciplinaries on the basis that Mr Tims ceased to be involved, the second disciplinary ended on 12 May 2017, so the claim in respect of the earlier period is only one day out of time. We would be inclined to extend time in respect of the victimisation complaint on the basis that it is just and equitable to do so. There has been no prejudice to the Respondent and it has been able to defend all of the alleged acts of victimisation. We therefore proceed on the basis that we have jurisdiction to consider the victimisation complaint.

109. The Respondent accepts that the Claimant reporting the sexual assault allegation to Mr Tims on 19 December 2016 amounted to a protected act. We have found above, however, that none of the managers involved in any of the disciplinary proceedings was motivated by it. The Claimant was very critical of the Respondent's handling of the allegation. He suggested that senior management sought to brush the matter under the carpet, and were therefore annoyed by his repeated questions about the progress of the investigation. We find no evidence of a deliberate cover-up, such as the Claimant suggests. The Respondent accepts that the matter was not investigated at the time, but explains this on the basis that Ms A did not want to pursue the matter. Whether the Respondent should have investigated the matter anyway is not an issue we have to decide. We accept that Ms A's indication that she did not want to pursue it was genuinely the reason why nothing was done at the time and we find no evidence of any bad feeling towards the Claimant by management as a result of him having reported the allegation, or making further enquiries about it.

110. Insofar as we have found that the alleged detriments occurred, we find that none of them was done on the ground that the Claimant had done a protected act. The disciplinary proceedings were pursued in good faith and had nothing to do with the Claimant having reported an alleged sexual assault. The victimisation complaint is dismissed.

Unfair dismissal

111. In light of the factual findings above, we also do not accept that the Claimant's dismissal was motivated by any of the claimed protected disclosures. It is therefore unnecessary to make findings as to whether they amounted to protected disclosures, but for completeness we should say that with the exception of the allegation of sexual assault, which the Respondent accepts was a protected disclosure (as well as a protected act) we do not consider that the statutory tests are met. In particular, none of

the four other claimed disclosures amounted to a disclosure of *information*. Further, apart from the credit card storage issue, we do not accept that the Claimant reasonably believed that he was raising these matters in the public interest.

112. We accept the evidence of Ms Foster that the Claimant's conduct, as outlined in the third disciplinary procedure, was the reason for the dismissal. We also accept that she had a genuine belief in the Claimant's guilt on reasonable grounds. Indeed there was no dispute that the Claimant had not attended work and that he had no authorisation to be absent. It was also not in dispute that the Claimant consistently copied his emails relating to his appeal against the outcome of the second disciplinary procedure to an email address he said belonged to his father, despite having been instructed on more than one occasion not to do so. The emails named Ms Skin, as well as several other members of staff, and referred to "a sexual assault perpetrated against one of my team". They therefore obviously contained confidential information which was disclosed to a person outside the company. The Claimant now says that he did this to enable him to print the messages, but he did not say this at the time and in any event it does not explain why he persisted in cc'ing the address, rather than forwarding any emails he needed to print. The impression given by the correspondence is that the Claimant openly included the "newsdesk" email as an implied threat against the Respondent and he deliberately disobeyed the instruction to cease doing so. The Claimant said nothing in the course of the disciplinary proceedings to negate that impression.

113. The third and fourth disciplinary charges were less clear-cut, but again there was no dispute that the Claimant had made serious allegations during the course of his appeal against the decision to demote him. He was told that he would be expected to give details in his appeal hearing, but he did not attend the appeal and did not substantiate the allegations in any other way. It was certainly not unreasonable for Ms Foster to conclude that that amounted to a breach of confidence (in the "trust and confidence" sense) and that it brought the company into disrepute, despite the limited circulation of the emails.

114. The Claimant claims that it was unreasonable not to conduct an investigation. It is misleading to say that no investigation was conducted, simply because neither the Claimant nor anyone else was interviewed. Ms Foster's evidence, which was not challenged and which we accept, was that she had been informed by HR that the Claimant had not attended work since the second disciplinary outcome despite repeated requests. She was also given copies of the emails relating to the appeal. She considered that the evidence was "self explanatory" and therefore it was appropriate to proceed straight to a disciplinary hearing. We do not consider that that was unreasonable in the circumstances. Indeed the Claimant has not been able to identify anything that would have been achieved by conducting a separate investigation. Further, the effect of the initial disciplinary hearing being adjourned was that the Claimant had ample opportunity to respond to the allegations and to suggest any line of enquiry he considered relevant. Ms Foster used that time to check two matters. HR confirmed that the Claimant had not sent any email to the whistleblowing inbox (a matter that the Claimant had never disputed) and she obtained a copy of the confidentiality agreement signed by the Claimant. In all the circumstances we consider that the Respondent conducted a reasonable investigation.

115. The procedural complaints made by the Claimant are considered in turn.

116. The Claimant alleges that the Respondent failed to give him proper notice of disciplinary and appeal meetings prior to dismissal. The only meeting that could be said to have been called at short notice was the original disciplinary meeting. 47.5 hours' notice was given. The Claimant made no complaint about that until the disciplinary hearing itself, at which point it was adjourned until 12 days later. We do not accept that this gave rise to any unfairness.

117. The Claimant says that he was disciplined in respect of a manager's contract for a period when he had been demoted. He claims that the confidentiality agreement he signed applied only to his role as a manager and once he had been demoted on 13 April 2017 the agreement did not apply. This is in fact a claim about the substance of the disciplinary findings, rather than the procedure, but we do not consider it to be well founded. The confidentiality agreement states that it is applicable to "those members of staff who have special obligations to the Company, its clients, customers and other employees because they are party to confidential information on a day-to-day basis". Although it was the Claimant's promotion to a management role that prompted the agreement, there is nothing to say that it only applies to managers or that it may cease to apply in any circumstances. The agreement states:

> "The disclosure of confidential information outside the Company or its unauthorised or careless use within the Company could cause damage and will be treated as a very serious matter. A breach of confidentiality constitutes serious misconduct and will be treated as a disciplinary matter and may lead to dismissal."

It was certainly reasonable for Ms Foster to proceed on the basis that the agreement applied at the time that the Claimant copied "newsdesk" into his emails and that doing so amounted to a breach of the agreement. Even without the agreement, however, it would have been reasonable for Ms Foster to conclude that the Claimant's actions, copying an external party into sensitive internal email correspondence, constituted misconduct.

118. The Claimant also says that new evidence was relied upon by the Respondent that he had not been given the opportunity to comment on. This complaint appears to relate to the confidentiality agreement and the correspondence with HR about the whistleblowing inbox which, the Respondent accepts, were not given to the Claimant until the meeting on 9 June 2017 when he was informed of the decision to dismiss. The confidentiality agreement is a document the Claimant was aware of, having signed it in October 2016. The failure to supply the Claimant with a copy before 9 June 2017 did not, in the circumstances of this case, give rise to any unfairness. He had not requested a copy and he has not suggested that there is anything further he could have said if it had been provided sooner. As to the whistleblowing inbox, as noted above the Claimant has never claimed that he did raise his concerns by email to this inbox, so it was unnecessary for Ms Foster to obtain this information and the fact that she did so did not give rise to any unfairness.

119. The Claimant complains that the Respondent refused to provide him with legible or accurate copies of meeting notes. It is not clear which meetings this complaint relates to, but we observe that all of the handwritten notes in the bundle are legible, with some minor exceptions. They were referred to extensively in the Tribunal

proceedings without difficulty. The Claimant has not demonstrated any substantial inaccuracies. No unfairness arose from the failure to provide notes in any other form.

120. Finally, the Claimant says that the Respondent did not address his grievances. This complaint is misplaced. The Claimant raised grievances in the course of his appeal against the second disciplinary outcome. They were not fully articulated, but appeared to relate to Ms Skin's conduct in bringing her grievance and the conduct of the second disciplinary process by Mr Tims and Ms House. The Respondent quite properly suggested that these matters could be considered as part of the appeal process and the Claimant agreed. His failure to attend the appeal meeting must be viewed as a matter of choice. The meeting was rearranged at his request and then he failed to attend, citing a "prior commitment". It was not unreasonable for the Respondent to consider the grievances to be withdrawn or concluded in those circumstances.

121. The final matter to consider is whether the decision to dismiss lay within a band of reasonable responses to the Claimant's conduct. We conclude that it did. A deliberate unauthorised absence of several weeks is obviously conduct that merits dismissal. It is arguable that if the decision to demote the Claimant was unreasonable then it must follow that a decision to dismiss based on his refusal to attend work in the more junior role was also unreasonable. It is unnecessary to consider such an argument, however, because we do not consider that the decision to demote the Claimant was unreasonable. We have accepted that Ms House approached the matter in good faith. She concluded that the Claimant's conduct was so serious that he could not be trusted to continue in a management role. Even on his own account he had acted unprofessionally and had allowed a personal relationship to interfere with his work. Given that he was already on a final written warning (which had not been appealed) and within his probationary period for the management role, demotion was an entirely reasonable sanction. There is therefore no basis on which to impugn a decision to dismiss based on the Claimant's refusal to attend work.

122. Since the first disciplinary charge justified dismissal in itself, it follows that dismissal was a reasonable sanction for the four charges cumulatively.

<u>Wrongful dismissal/ wages</u>

123. There is no dispute that the Claimant refused to attend work without authorisation. That constitutes a fundamental breach of contract and therefore the Respondent was entitled to dismiss without notice. There was also no obligation to pay the Claimant for the time that he was refusing to attend work.

Employment Judge Ferguson

6 September 2018