EMPLOYMENT TRIBUNALS

Claimant: Mrs S A Wallace

Respondent: Cheshire East Borough Council

Heard at: Manchester **On:** 5-8 June, 11-15 June and in chambers on 18 June 2018

Before: Employment Judge Franey
Ms CS Jammeh
Mr AJ Gill

REPRESENTATION:

Claimant: In person
Respondent: Mr J Lewis, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of detriment in employment on the ground of a protected disclosure contrary to section 47B Employment Rights Act 1996 fails and is dismissed.

2. The complaint of unfair dismissal contrary to section 103A Employment Rights Act 1996 fails and is dismissed.

3. The complaint of a failure to pay holiday pay is dismissed upon withdrawal by the claimant.

4. The complaint of breach of contract in relation to notice is dismissed on withdrawal by the claimant.

5. All claims in respect of “other payments” are dismissed on withdrawal by the claimant.

REASONS

Introduction

1. By a claim form presented on 21 April 2017 the claimant complained that because of protected disclosures about a breach of the national minimum wage ("NMW") she was subjected to detriments and unfairly dismissed with effect from 31 December 2016 from her post as a Senior Human Resources ("HR") Officer with the respondent.

2. By its response form of 19 May 2017 the respondent indicated that the proceedings would be defended. It denied that the claimant had made any protected disclosure and pointed out that as the claimant had rejected a permanent role and an extension to her fixed term contract, there was no alternative but for her employment to come to an end on 31 December 2016. All claims were denied.

3. At a preliminary hearing before Employment Judge Dawson on 21 June 2017 the claimant withdrew her complaints in respect of holiday pay, notice pay and "other payments". Those complaints are formally dismissed in this judgment. Three protected disclosures were identified and the claimant was required to provide further particulars of the detrimental treatment prior to dismissal.

4. The further particulars subsequently provided identified 16 occasions on which the claimant said she had been subjected to detrimental treatment on the ground of a protected disclosure.

5. There was a further preliminary hearing before Employment Judge Howard on 17 October 2017. Witness statements by some of the witnesses were prepared for that hearing, but the question of whether the claimant had made a protected disclosure was not determined. The claimant was granted permission to amend so as to rely on a fourth protected disclosure (chronologically, the first), and provision made for an amended response. The amended response was filed on 3 November 2017 and denied that the additional disclosure was protected.

6. Disputes about disclosure were resolved by Employment Judge Warren at a preliminary hearing on 3 April 2018. Employment Judge Warren subsequently issued three witness orders on the application of the claimant.

7. On 31 May 2018 the respondent indicated that the claimant's witness statement for the final hearing contained material which was legally privileged and without prejudice and should be redacted. That led to a preliminary hearing before Employment Judge Warren on the afternoon of 4 June 2018, which was the first day of the final hearing. Employment Judge Warren dealt with the preliminary hearing whilst this Tribunal continued with its reading. Some passages were redacted from the claimant's witness statement and further redactions agreed before we began to hear oral evidence.

The Issues

8. Both parties had prepared a draft List of Issues. We discussed the issues further at the start of our hearing and on 7 June 2018 the List of Issues was agreed.

Detriment 7 was withdrawn by the claimant at the end of Mr Thompson's evidence. Detriments 2, 3, 6, 10 and 12 were withdrawn during the claimant's oral evidence on 13 June 2018. That left the following issues on liability:

Protected Disclosures s43B(1) Employment Rights Act 1996

1. **Can the claimant establish that she made a protected disclosure about payment for sleep-ins and the national minimum wage on any of the following occasions?**

    1.1 PD1 In her email of 28 November 2016 to Mark Palethorpe attaching a paper on sleep-ins. The respondent accepts that the claimant disclosed information which she reasonably believed tended to show a breach of a legal obligation relating to the national minimum wage. In dispute is whether the claimant had a reasonable belief that her disclosure was made in the public interest.

    1.2 PD2 In her email of 30 November 2016 to Mike Suarez with attached document headed "Whistleblowing Disclosure". In dispute is -

    (a) whether this document contained any information which the claimant reasonably believed tended to show a breach of a legal obligation relating to the national minimum wage, and

    (b) if so, whether the claimant had a reasonable belief that her disclosure was made in the public interest.

    1.3 PD3 In a verbal disclosure to Peter Bates on 15 December 2015. In dispute is

    (a) whether the claimant disclosed any information about sleep ins and the national minimum wage;

    (b) if so, whether the claimant reasonably believed that information tended to show a breach of a legal obligation relating to the national minimum wage, and

    (c) if so, whether the claimant had a reasonable belief that her disclosure was made in the public interest.

    1.4 PD4 In a verbal disclosure to Frank Jordan on 16 December 2015. In dispute is

    (a) whether the claimant disclosed any information about sleep ins and the national minimum wage;

    (b) if so, whether the claimant reasonably believed that information tended to show a breach of a legal obligation relating to the national minimum wage; and

    (c) if so, whether the claimant had a reasonable belief that her disclosure was made in the public interest.

Detriment in Employment s47B Employment Rights Act 1996

2. If one or more protected disclosures were made, was the claimant subjected to a detriment by any act or deliberate failure to act on the grounds of one or more of any protected disclosures in any of the following alleged respects (drawn from the Further Particulars page 40):

2.1 D1 By email of 30 November 2016 Peter Bates tried to deter the claimant from continuing her whistleblowing concerns by asking if it would help to have a discussion with him first.

2.2 D2 *withdrawn*

2.3 D3 *withdrawn*

2.4 D4 By email on 7 December and verbally on 15 December 2016 Peter Bates sought to bully the claimant into withdrawing her whistleblowing concerns by implying that the permanent job offer was contingent on those concerns being withdrawn.

2.5 D5 By email of 6 December 2016 Sara Barker offered the claimant permanent status in order to discourage her from continuing with her whistleblowing complaint.

2.6 D6 *withdrawn*

2.7 D7 *withdrawn*

2.8 D8 Between 16 December and his report of 22 December 2016 Frank Jordan failed properly to investigate the whistleblowing grievance, and attempted to collate all the grievances together.

2.9 D9 By letter of 18 January 2017[1] Bill Norman informed the claimant that the matters raised with Mr Jordan fell within the grievance procedure not the whistleblowing policy.

2.10 D10 *withdrawn*

2.11 D11 In a telephone call on 21 December 2016 Peter Bates notified the claimant that she was dismissed[2] and then put the claimant on garden leave.

2.12 D12 *withdrawn*

2.13 D13 By email of 22 December 2016 Mike Suarez dismissed the claimant's concerns and did not respond to an email asking for clarification.

2.14 D14 By letter of 23 December 2016 Peter Bates dismissed the claimant's concerns when he said he would consider the claimant's email of 22 December 2016 when he returned from the Christmas and New Year break.

[1] Page 40 referred to 18.12.16 but this was clearly an error as the letter of 18.01.17 was also mentioned.

[2] In so far as this was a complaint about the decision to dismiss (as opposed to the manner of communication), it fell under section 103A not section 47B – see section 47B(2).

2.15 D15 By email of 24 January 2017 Paul Bayley dismissed the claimant's concerns and inaccurately recorded their meeting of the previous day, thereby failing properly to investigate her grievances.

2.16 D16 By email of 3 March 2017 Bill Norman refused to allow Peter Marren to participate in a meeting about the claimant's whistleblowing concerns.

Unfair Dismissal s103A Employment Rights Act 1996

3. If one or more protected disclosures were made, was the reason or principal reason for the dismissal of the claimant with effect from 31 December 2016 one or more of those protected disclosures? If so, the dismissal was unfair.

Evidence

2. The parties had agreed a bundle of documents in four lever arch files which exceeded 1,300 pages. A number of pages were added to that bundle by agreement during the course of the hearing. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

3. In had been agreed in the case management process that the respondent's evidence would be heard first. All of the witnesses gave evidence pursuant to a written witness statement. The respondent called Sara Barker, the Head of Strategic HR; Peter Bates, the Chief Operating Officer; Mike Suarez, the Chief Executive; Nina Lingard, the Consultant Employment Solicitor advising the respondent; Francis Jordan, the Executive Director and Acting Deputy Chief Executive; Alex Thompson, the Head of Finance; Paul Bayley, the Head of Customer Services; Mark Palethorpe, the Director of Adult and Children's Services; Daniel Dickinson, the Acting Director of Legal Services from March 2017; Peter Kelleher, the Head of Care4CE (the respondent's internal provider of adult social care support); and Craig Hughes, the HR Business Partner for Education Consultancy Services.

4. The claimant gave evidence herself and also called her former colleague as a senior HR Officer, Deborah Owen. We had written witness statements from two Councillors, David Marren and Sam Corcoran, but there was no dispute about the facts contained in their statements and we accepted their evidence in written form.

Witness Orders

5. We also had to address applications by the claimant for witness orders. Her applications were first made in relation to three witnesses on 2 April 2018. On 8 April she indicated that she pursued such orders only for two of them, but in error witness orders for all three were subsequently issued by the Tribunal on 30 May 2018.

6. At the start of our hearing the claimant confirmed that she no longer wanted a witness order for Janet Clowes or Howard Murray. Those witness orders were discharged.

7. The claimant still wished to call Barry Moran to give evidence. The Tribunal had concerns about whether his evidence would be sufficiently relevant. The claimant made three points. Firstly, she submitted that he would have been a member of the appeals panel had she been allowed to appeal her dismissal and would be able to give evidence that she would have been reinstated. That seemed to us to be speculation and not a matter within the scope of the issues before the Tribunal.

8. Secondly, the claimant said that as Chair of the Staffing Committee Councillor Moran would be able to give evidence about the relevant procedures. That did not appear to us to be appropriate: the procedures appeared in the bundle and we would form our own view about whether the respondent complied with them, and if not why not.

9. Thirdly, the claimant said that when Mr Suarez wrote to the claimant on 20 February 2017 (page 553) saying that she could not progress to the appeal stage of her grievances until a decision had been made at the first stage, he said that was a decision taken by Mr Moran. As we were hearing from Mr Suarez in any event, and as that decision did not form one of the allegations of detrimental treatment because of a protected disclosure, we decided that evidence from Mr Moran was insufficiently relevant to justify summoning him to attend against his will. Unanimously, therefore, the Tribunal discharged his witness order too.

Possible Recusal

10. On the morning of 8 June 2018 (the fifth day of the hearing) Mr Lewis informed the Tribunal that the respondent's witness Sara Barker was married to one of the non- legal members in the North West region. He apologised for not having informed the Tribunal and the claimant of that fact at the outset of the hearing. The Tribunal had not previously been aware of this.

11. The claimant was advised of her right to apply for the Tribunal to recuse itself and for the hearing to recommence with a Tribunal panel from a different region, although no indication was given as to whether any such application would succeed. The claimant said that she wanted to continue with the hearing as presently constituted. She was advised that she was free to revisit the matter, but that delay in raising it again might impact adversely on her prospects of such an application succeeding. The hearing continued that day.

12. Mr Lewis raised the matter with us again at the start of the next hearing day on Monday 11 June. He provided the Tribunal and the claimant with a copy of paragraphs 906-924 of the current version of *Harvey on Industrial Relations and Employment Law* dealing with bias and the appearance of bias. He also provided a copy of the decision of the Court of Appeal in **Bhardwaj v FDA & others [2016] IRLR 789**. He took us through the relevant provisions and emphasised that if the claimant elected to continue with the Tribunal as currently constituted she should be taken to have waived her right to raise that objection in future as long as she had been made aware of all the material facts, the consequences of her choice, and given a fair opportunity to reach an unpressured decision. He informed the Tribunal that Sara Barker's husband, Grahame Barker, had been a non-legal member in the North West region for ten years as a member of the employer's panel.

13. Based on that information the Tribunal was able to confirm to the parties that Employment Judge Franey had sat with Mr Barker on many occasions, that Ms Jammeh had never done so (being from the employer's panel herself) and that Mr Gill had no recollection of sitting with Mr Barker. However, Mr Barker would have participated in non-legal member training days with both Mr Gill and Ms Jammeh, and was likely to do so in future. It was also possible that he would be sitting with Mr Gill and EJ Franey in future.

14. At the end of that discussion the claimant said she wanted more time to consider whether to object to the hearing continuing with this Tribunal or to elect to continue in a way which amounted to a waiver of her rights. The Tribunal adjourned at 10.45am until 2.00pm.

15. At 2.00pm the claimant confirmed that she did not wish to apply for the Tribunal to recuse itself but was content to continue. It was explained that this amounted to a waiver of her right to make any such application based only on what she already new. The claimant accepted this but reserved her position in the event that anything in the remainder of the hearing raised a concern about bias.

16. The matter was not raised again.

Relevant Legal Principles

Part One: Protected Disclosures

17. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: 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.**
>
> **s43B(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) …**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**

18. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**

> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."**[3]

19. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal considered when information could reasonably be considered in the public interest. In this case information about possible breaches of the NMW by a local authority plainly met that test. However, s43B(1) requires the claimant to have a reasonable belief that the disclosure is made in the public interest. Information of interest to the public could be disclosed for wholly private purposes. In **Chesterton** Underhill LJ addressed that issue in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

20. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the employer (section 43C).

Part Two: Detriment in Employment

21. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

22. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

23. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

[3] This case was decided before the decision of the Court of Appeal in **Kilraine** was handed down on 21 June 2018: [2018] EWCA Civ 1436.

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

24. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test in paragraph 115 as follows:

> **"..I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> > **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**
> >
> > **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140] at paragraph 20.**
> >
> > **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

Part Three: Unfair Dismissal

25. Section 103A of the Act deals with protected disclosures and reads as follows:-

> **"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".**

26. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

27. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: **Jackson v ICS Group Ltd UKEAT/499/97.**

Relevant Findings of Fact

28. This section of our reasons sets out the findings of fact necessary for us to make our decision on the List of Issues. Not all the evidence we read and heard is included as its relevance was limited. Some disputes of primary fact will not be resolved in this section but in our discussion and conclusions later on.

Background

29. The respondent is a Local Authority with approximately 3,000 employees. Its employed staff were led by the Chief Executive, Mike Suarez. The second most senior executive was the Chief Operating Officer, Peter Bates. To him reported the Head of Strategic HR, Sara Barker, who led the HR Department.

30. The claimant was an experienced HR professional. After a brief period of agency work with the respondent she was employed with effect from 2 February 2015. Her contract appeared at pages 99-103. The contract said:

> **"Your appointment is temporary due to a review and is expected to end on 8 January 2016 or when the review is complete, whichever is earlier."**

31. The role was a grade 11 Senior HR Officer.

32. On 4 December 2015 the contract was extended to 31 March 2016 (page 105) and was extended on 23 March 2016 to 30 September 2016 (page 113). On each occasion the extension was to a fixed date or to when the review was complete, whichever was earlier.

33. By a letter of 21 September 2016 (page 123) the temporary appointment was extended until 31 December 2016 or the completion of the review, if earlier. The claimant expected that her appointment would be extended again, being aware that it was policy not to offer extensions for any more than three months at a time. The work on which she was engaged, a restructure of Care4CE, was continuing. However, there was no contractual right to such an extension.

Respondent's Policies

34. Two versions of the Whistleblowing Policy appeared in our bundle. The first was at pages 759A-759I and the second at pages 760-768. They both sought to describe what would be regarded as whistleblowing and what types of concern should be raised through other procedures. Appropriate contacts for raising a concern included the Chief Executive, the Head of Legal Services, who would also be the Monitoring Officer, or the Corporate Manager Governance and Audit. Clause 8.3 in the policy at page 759E said:

> **"In exceptional circumstances you may not feel able to contact any of the officers detailed above. Where this is the case you may approach the Chair, Vice Chair or any member of the Audit and Governance Committee with your concerns."**

35. The Grievance Procedure appeared at pages 788-793. It set out timescales for each stage of the procedure. For a formal grievance management ought to acknowledge it within five working days and have a meeting with the employee and make a decision within 20 working days. Clause 15 of the procedure said:

> **"Such timescales should be followed unless both management and the employee or their trade union representative mutually agree that speed is not essential or where there are exceptional circumstances. An extension may be necessary where a detailed investigation of the allegations made in a grievance is required."**

36. Clause 62 provided for appeals to be progressed on certain grounds. The appeal would not be a re-hearing. Appendix 4 set out the procedure for grievance appeals. They were heard by the staffing subcommittee of the Council.

37. The Restructuring Procedure appeared at pages 796-803. Where a new structure was proposed there would be consultation with all affected employees. If there was only a minor change to an employee's job between the current structure and the new structure, he or she would be "slotted in". On occasion it might be necessary to "ringfence" a number of jobholders who would then complete for posts in the new structure in preference to any candidates from outside the ringfence. The provisions about temporary employees (page 800) and a Managers' Guidance Note at page 224 made clear that they would be included in a restructuring exercise except where the exclusion could be objectively justified. The Council would consult with recognised trade unions before making any decision on whether employees were to be lawfully excluded from the ringfence.

38. The Redeployment Procedure appeared at pages 773-778. It applied to employees at risk of losing their employment due to a reorganisation. On page 774 the procedure specified that employees whose contracts were temporary or fixed term because of an anticipated reorganisation would not be eligible for inclusion on the redeployment list.

39. The Dismissal Procedure appeared at pages 769-772. The policy expressly applied to the expiry of fixed term or temporary contracts. The procedure required the manager to write to the employee detailing the circumstances that may result in their dismissal and invite the employee to a meeting. Following the meeting any decision would be confirmed in writing and there was a right of appeal to the Head of Service. Termination of employment would not be delayed pending an appeal, but if an appeal succeeded employment would be backdated so as to maintain continuity of service.

Sleep-ins

40. Like many Local Authorities the respondent engaged staff to provide round the clock care in Adult and Children Services, and in general terms staff would receive an allowance for a night spent sleeping in, together with payment for any hours actually worked during the night.

41. By 2014 it was clear that there was an issue about whether a sleep-in shift counted as working time under the Working Time Regulations 1998 ("WTR"), and/or for NMW purposes. Some work was done on this for the respondent by Stuart Horwood in June 2014, and sent to Mr Kelleher as Head of Care4CE (pages 69N-69O). Although only working on an agency basis the claimant provided her own input as to what was happening in Cumbria (page 75C). An external consultancy, Red Quadrant, did some more analysis for the respondent in October 2015 (page 952). Broadly the approach taken was to await legal developments but to try to limit the number of sleep-ins that an employee would do in a month in order to ensure compliance with the NMW (page 106). The lower the pay grade of the employee, the fewer the number of sleep-ins that could be worked without a breach.

42. It was the claimant's case that because of four protected disclosures about this issue ("sleep-ins/NMW") between 28 November and 16 December 2015 she was

subjected to detrimental treatment and dismissed at the expiry of her fixed term contract.

October 2016

43. On 24 October 2016 the claimant emailed two colleagues (copying it to her line manager, Karen Begley) a draft discussion paper about sleep-ins (page 142). The email explained that the reason she had looked at it again was her concern that the rise in the NMW that month meant that there was a greater risk of staff falling below NMW when sleep-ins were taken into account. Her draft report had sections still to be completed but explained clearly the basis for the concern.

44. The claimant raised this matter at the end of an HR management team meeting about attendance management on 28 October 2016. There was a brief discussion and she was asked to do more work on her paper. She emailed her draft sleep-in paper to Sara Barker on 3 November 2016 (pages 162-171). This draft contained more detail about Children's' Services in the section explaining where it seemed likely that there had been breaches of the NMW because of the number of sleep-ins carried out by individual staff. The claimant emailed that incomplete draft to her colleagues the same day for comments (page 172).

45. On 9 November Mrs Barker forwarded the claimant's email to Clive Walsh (page 201) asking him to consider it. She did not tell the claimant she had done this.

46. The same day Mike Suarez emailed all staff about the budget strategy for the next three years. His email appeared at page 183. It made clear that there would be a 3.99% increase in council tax, half of which would go to Adult Social Care. There would be productivity savings and consideration of staffing structures.

Restructuring Consultation

47. On 3 November Sara Barker emailed the HR team to confirm that consultation on a proposed new structure would now begin. There was to be a meeting on 7 November. Her email appeared at page 158.

48. A consultation document was finalised the following day. It appeared at pages 236-250. An important point for present purposes was that the two grade 11 posts in HR Operations currently filled on a temporary basis by the claimant and Deborah Owen would not exist in the new structure. At the consultation meeting on 7 November it was said (presentation slide page 1093) that current temporary staff would have their personal positions reviewed outside of the consultation process by their manager in the immediate future.

49. Pausing there, the effect of this announcement was that the claimant faced uncertainty in two respects. Her position as a person on a contact ending on 31 December 2016 was to be reviewed by her manager, and even if she remained in employment after that date she would be affected by the restructuring.

50. A few days later the claimant told her manager, Karen Begley, that she was interested in a grade 12 role in the new structure. Nothing came of that. Ms Begley told the claimant that it was not confirmed yet within the HR management team that the claimant would be included in the restructure pools because she was a fixed

term employee. The claimant was under the impression that this would require objective justification if the respondent was not to be in breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the FTR"), and queried what the objective justification would be. No answer was given by Ms Begley in those discussions.

51. Following a management meeting on 15 November which the claimant attended on behalf of the HR department, the claimant emailed her sleep-in paper to Peter Kelleher (page 213A). He responded the following day (pages 225-226) having obtained a summary of sleep-ins prepared by a colleague across the different centres within his service area. The figures were broadly in line with the analysis based on the September payroll information which the claimant had carried out. They showed a potentially significant problem. The claimant also spoke to Mark Palethorpe briefly about the issue in mid-November. She referred to this discussion when she later emailed him the paper (page 251).

52. On 16 November 2016 Mrs Barker updated HR staff on the consultation process. One-to-one meetings were ongoing and consultation was due to conclude on 14 December 2016. Matters would be discussed at an HR team meeting on 2 December. The email said:

> **"In addition for those of you on temporary contracts this email confirms you are currently part of the restructuring and consultation process and your contractual arrangements are also under formal review."**

53. On or around 24 November 20916, however, the HR management team decided that fixed term contracts would be allowed to expire on 31 December. The Organisational Development Manager, Rosie Ottewill, confirmed this to Karen Begley by email the same day at page 231A, telling managers there would need to be formal dismissal meetings. Karen Begley acknowledged the email within a few minutes (page 232) and said that she would speak to both of her fixed term contract staff (the claimant and Deborah Owen) as soon as possible.

54. At almost the same time the claimant lodged the first of six grievances. It is convenient to call them Grievance 1, Grievance 2, etc. Grievance 6 was only ever a draft and the final grievance was Grievance 7.

55. Grievance 1 appeared at pages 1001-1002. It was against Sara Barker. It alleged that she had failed to give clarification through Karen Begley of the claimant's status in the consultation process. The claimant sought a written response, seeking either the objective justification basis of her exclusion from the new structure or an "at risk" status letter giving her access to redeployment. The grievance was acknowledged the next day by Peter Bates (page 233) who said that Alex Thompson, the Head of Finance, would consider and respond to it.

56. On 25 November Ms Begley communicated to the claimant verbally that the decision had been taken that her fixed term contract would not be renewed or extended after it expired on 31 December. Ms Begley told her that the council was moving to dismiss her as one of the four fixed term employees. There was going to be a letter with an invitation to a formal meeting.

57. As for the grievance investigation, although Mr Bates had told the claimant by email at 10:34 that Mr Thompson would investigate her grievance, in the early evening he told Mr Thompson not to take any action for the moment. Early in the following week he told Mr Thompson that he was no longer investigating the grievance. This was not communicated to the claimant who remained under the impression that Mr Thompson would be in touch with her to arrange a grievance meeting.

58. The claimant and Mr Kelleher had a brief discussion on Friday 25 November and on Monday 28 November the claimant sent an email to him (pages 234-235) saying that there was a serious risk some individuals would be paid below the minimum wage. She did not think that any action had been taken since she sent her report to Sara Barker at the start of November. She also told him that she and Deborah Owen were "being finished". She expressed some concerns about the proposed new structure.

PD1 28 November 2016

59. At just after 11.00am the claimant sent an email to Mark Palethorpe (page 251) enclosing her draft paper on sleep-ins (pages 253-261). It was the same paper emailed on 3 November to Mrs Barker. This was said to be **PD1** and we will return to it in our conclusions. The covering email said:

> **"As I was informed on Friday that I will be finished in December and therefore will not be around to ensure follow through on this, I wanted to make you aware that although I have passed on the 'sleep-in' report to Sara Barker, I do not think that at this point any action has been taken to move this forward.**
>
> **I wanted to raise my concerns to you around this area as I feel we are seriously at risk of paying some individuals below the minimum wage in any given pay period. This puts the Council at risk of breaching legal requirements and [of] damage to Council reputation as well as potential risk of ET claims for not meeting the minimum pay threshold and also risk of claims of discriminating against part-time/temporary/casual workers. Part-time, temporary and casual workers are a significant proportion of the workforce in Care4CE."**

60. Mark Palethorpe responded promptly within a couple of hours (page 262). He asked two colleagues, Linda Couchman and Loraine Goude, to work on it together.

61. About half an hour later the claimant supplied Grievance 2 to Mr Bates. Her email appeared at page 282 and the grievance at pages 1006-1007. It was about unfair selection of fixed term contracts in the HR restructure. She said that permanent employees at grade 11 had been included in the "at risk" pool and were eligible to be ringfenced to apply for roles in the new structure, but she as a fixed term employee had not been. She accused Sara Barker of discrimination and victimisation. Her desired outcome was full compliance with legislation around fixed term contracts and for the consultation process to restart with fixed term employees included.

62. At just after 3.00pm Mr Bates emailed the claimant to ask whether Grievance 2 was a new grievance or whether it superseded Grievance 1. Eighteen minutes later she submitted Grievance 3 by email at page 286. She confirmed that each grievance stood in its own right.

63. Grievance 3 itself appeared at pages 1009-1010. It alleged there had been a failure to undertake meaningful consultation about the HR restructure. The claimant queried how meaningful consultation could have started on 7 November when the pools for inclusion had not been identified before 25 November. Her desired outcome was for the consultation period to be restarted once sufficient information had been provided so that it could be meaningful.

64. On 29 November 2016 the claimant emailed Mr Bates with Grievance 4 (page 309). The grievance appeared at pages 1012-1013. The claimant had received confirmation that day that she would not be given the same consideration for redeployment opportunities, and she regarded this as a breach of the FTR. She wanted the redeployment procedure reviewed and an equal opportunity to obtain suitable permanent employment as the permanent employees were given.

PD2 30 November 2016

65. On 30 November 2016 at 09:15 the claimant emailed the Chief Executive, Mr Suarez, attaching a document which she described as a "whistleblowing disclosure". Her email appeared at page 295 and the document at page 296. This was said to amount to **PD2** and we will return to it in our conclusions.

66. The document said that she believed that the whistleblowing disclosure was covered under failure to comply with legal obligations, unethical conduct, and danger to health and safety, including risk to the public as well as other employees. She drew attention to what she described as "professional incompetence" of Sara Barker, and what she described as the "practice, culture and bullying management style" within the HR department. She made clear that she was not providing specific details in the document and wanted to meet in person to expand upon it. She directed Mr Suarez to have a "protected conversations" with Karen Begley regarding behaviour towards herself and others, and with Pete Kelleher regarding standards of professionalism.

67. There was no express mention in the document of sleep-ins or the NMW. The claimant maintained that there was still information about those matters which made it a protected disclosure. We will deal with that in our conclusions.

D1 Bates email 30 November 2016

68. Mr Bates responded to the further grievances in an email at page 309. This was said to be the first detriment. His email formally acknowledged receipt of the four grievances and said:

> **"Do you think it would help if you have a discussion with me first about the issues you are raising?**
>
> **My logic around initially giving your first grievance to Alex [Thompson] as another Head of Service to review and discuss with you was to keep open the opportunity to refer to me if a satisfactory conclusion to your initial grievance could not be achieved.**
>
> **I'll need to seek some advice on the process."**

69. We will return to this matter in our conclusions.

Rationale Document

70. That same morning Craig Hughes prepared a paper setting out the rationale for the position taken on temporary staff. He emailed it to Karen Begley and Rosie Ottewill (page 297). The rationale document appeared at pages 298-300. It made the point that one of the grade 11 temporary post holders had more than two years' service (Ms Owen) but the other did not (the claimant). The contracts had been extended to 31 December 2016 pending a review which had now been conducted. There was no expectation that the post would be made permanent. If temporary staff were included in the ringfence it could put permanent staff at a risk of redundancy. He recorded that Unison had expressed the view that temporary contracts should be ended. The pros and cons of including temporary staff in the ringfence, and of extending contracts if necessary, were considered.

71. On 30 November Ms Begley invited the claimant to meet on 9 December under the dismissal procedure. Her email appeared at page 315 and her letter at page 315. The letter said there was a right of appeal if the claimant considered she had been unfairly treated. The purpose of the meeting was to discuss the potential dismissal so that Ms Begley could consider any issues raised by the claimant before confirming a decision.

72. On 1 December 2016 the claimant emailed Mr Bates Grievance 5 (pages 1015-1017). It challenged the decision of Sara Barker to exclude the claimant from the HR restructure. She alleged a breach of the Part Time Workers (Prevention of Les Favourable Treatment) Regulations 2000. She referred to the joint application made with Deborah Owen for flexible working by way of a job share. In her covering email (page 316) she emphasised that the grievance stood in its own right and did not supersede any other previous grievances.

73. Later that same day Mr Suarez acknowledged the claimant's email of 30 November with her whistleblowing paper (page 323). He said the Monitoring Officer (Bill Norman) had been informed and that another member of management would be in touch to clarify her concerns.

74. Mr Bates acknowledged Grievance 5 on 2 December (page 325). He said he was taking advice on how best to proceed. Later that day there was an HR meeting at which the restructuring was discussed. The claimant raised concerns that the unions had not been invited.

75. On Monday 5 December the claimant was unable to continue at work due to stress. By email at 9.05am (pages 333-334) she informed Karen Begley that she was going to see her GP and requested an Occupational Health ("OH") referral. She commenced a period of sick leave. She was not to return to work.

76. On Tuesday 6 December the claimant submitted Grievance 7. This was sent to Mr Suarez rather than Mr Bates. The grievance itself appeared at pages 1019-1023. It was about the claimant being victimised during the consultation process because of having a temporary contract. It was primarily brought against Sara Barker. She asserted that dismissing fixed term workers before permanent employees were made redundant would be unlawful and discriminatory. She sought a review of how she had been treated and a written response to explain why that

was. Her covering email (page 335) made it clear that she did not consider that informal action was appropriate.

77. That afternoon Sara Barker emailed all staff to say that the consultation period for the HR restructure had been paused until January (pages 342-343). The email said that additional workload pressures in the New Year had been identified and therefore the structure would need to be revised. Consultation would begin again in late January. The review status of temporary staff contractual arrangements would continue in the meantime.

D5 Offer of Permanent Contract 6 December 2016

78. A few minutes later Sara Barker emailed the claimant to offer her a permanent contract. The email appeared at page 344. This email was said to constitute **Detriment 5** and we will return to it in our conclusions. The email said:

> **"…Recent feedback from the consultation process indicates further review of the structure is likely to provide additional opportunities and diminish the risk of permanent staff being at risk of redundancy as a consequence. I am able to cease the review of your current contractual arrangements and I am pleased to be able to offer you permanent status in the Council with effect from today's date. Your manager has been asked to meet with you to discuss this further and respond to any outstanding questions/issues you may have. You will therefore remain part of the restructuring consultation."**

79. The email was copied to Karen Begley, and about an hour later she emailed the claimant (page 345) saying that the invitation to meet under the dismissal procedure was retracted, and an OH referral would be done. Plainly she anticipated that the offer would be accepted. The claimant spoke to Karen Begley and requested clarification of the details of the role. She understood that the details would be provided when she and Karen Begley met.

80. On 7 December (page 346) Frank Jordan emailed the claimant to say that he had been asked by Mike Suarez to consider the whistleblowing matter from 30 November. He wanted to meet the claimant. The meeting was eventually arranged for 16 December (see below).

D4 Bates Email 7 December 2018

81. That same afternoon Mr Bates emailed the claimant responding to the email about grievance 5. His email appeared at page 457. He said:

> **"I am happy to meet with you to discuss the issues you have raised but given the developments this week – do you want to reconsider any of the grievances you have submitted? I appreciate that you will reserve the right to either resubmit later or press ahead now but I wanted to check with you. Please let me know what you want to do because I am trying to follow the suggested timelines in our policy and given the fact that the HR structure consultation is now paused to take stock of all the feedback that has been received, do you want to wait until you receive more clarity on the potential changes in the New Year?"**

82. This email was said to constitute **Detriment 4** and we will return to it in our conclusions.

83. On 8 December the claimant was certified unfit for work due to stress by her General Practitioner to 31 December 2016 (page 403).

9 December 2016

84. On Friday 9 December the claimant sent an email to Mr Bates (pages 351-352) responding to his email of 7 December. She said there had been incompetence and professional malpractice in the HR restructure. She posed a number of questions about the process, including how the consultation had been paused and how there had been meaningful consultation. She asked how it was acceptable to offer her a permanent contract to a role that did not exist in the new structure. Her email said:

> **"Is it really perceived that I am daft enough to accept a permanent contract in December to be made redundant in January?**
>
> **I further perceive that the offer of a permanent contract is a miscalculated attempt at mind games to bully or bribe me to 'back off' and demonstrates negative behaviours identified in my grievances…**
>
> **….At this point in time, on so many levels, the offer of a permanent contract is reprehensible and I cannot even begin to consider it as sincere."**

85. Mr Bates responded promptly (page 350) assuring the claimant that he was seeking to act positively and honestly and saying that a meeting would be arranged. That meeting eventually took place on 15 December (see below).

86. The HR department had a computerised system known as Oracle. On 9 December at 12.30 Karen Bagley made an entry (page 358a) in the following terms:

> **"This person is offered a permanent contract on 37 hours with a temporary variation to 30 hours per week, please ensure this variation is referenced in the contract documentation. Happy for you to send this to me first before sending."**

87. That entry referred to an offer, not to an acceptance.

88. A short while later there was an exchange of emails between the claimant and Karen Begley at pages 356-358. The claimant raised her queries about the proposal to offer a permanent contract. She reiterated that she thought it was a miscalculated attempt at mind games to bully or bribe her to back off. She said she could not even begin to consider the offer as sincere. In her reply Ms Begley assured the claimant that she was part of any future consultation and included in ringfence arrangements. She said the claimant was a valued member of the team.

89. The claimant spoke to Karen Begley later that day. In paragraph 71 of her witness statement she said that Ms Begley told her that Sara Barker had been unable to identify the details of the permanent role. Her witness statement said:

> **"I asked how the offer had been made without details of what was being offered, Karen [Begley] said "with difficulty". We both agreed that we would go with it and confirm the role details when it was clearer."**

90. The claimant maintained that she had accepted the offer of the permanent contract in this discussion. We will return to that in our conclusions.

91. On 12 December Sara Barker endorsed Oracle to approve the offer of the permanent contract to the claimant (page 358a).

92. On 13 December Mr Suarez acknowledged Grievance 7 (page 363) and said that it would be investigated by Alex Thompson, the Head of Finance.

93. The sleep-in discussion paper prepared by Ms Couchman and Ms Goude was considered at a Directorate Management Team meeting that same day (page 364).

PD3 and **D4** Meeting 15 December 2016

94. The claimant and Mr Bates met at a motorway service station on 15 December. Mr Bates had received from Clive Walsh a summary of the grievances at pages 368aa-368g. The claimant prepared herself a prompt for that meeting which appeared at pages 368a and 368b. Although she had it with her during the meeting she did not give Mr Bates a copy. The prompt was a list of bullet points which ran to four pages and which on the final page under the heading *"Behaviours Demonstrated in a Wider Context by [Sara Barker]"* contained the following as point 19 of 20:

> **"Sleep-in payments – paper/time…not even acknowledged…potential breach of min wage."**

95. It was the claimant's case that during this meeting she made **PD3** to Mr Bates about the sleep-in issue. He denied that she raised that with him. We will return to that in our conclusions.

96. It was also alleged that during the meeting he subjected her to detriment 4 by asking her to reconsider her grievances now she had a permanent contract. Again we will return to that in our conclusions.

97. No contemporaneous notes were kept of that meeting by either side, but the following day Mr Bates typed a note of it at page 368h. His note contained no reference to the sleep-in issue. The claimant did not believe that note was prepared then because in January 2017 his PA told her there were no notes of the meeting.

PD4 and **D8** Meeting 16 December 2016

98. The claimant met Mr Jordan in Nantwich on 16 December to discuss her whistleblowing complaint to Mr Suarez of 30 November 2016. Mr Jordan was accompanied by Jill Perkins. Jill Perkins took a handwritten note at pages 379-400 (a typed version appeared at pages 378A-378F) and Mr Jordan took manuscript notes at pages 374-378. The typed note of the meeting based on those notes appeared at pages 369-373. The claimant maintained that in this meeting she made **PD4** about the sleep-ins. Mr Jordan denied that. We will return to it in our conclusions.

99. It was also the claimant's case that following this meeting she was subjected to **Detriment 8** by Mr Jordan in that he failed to investigate properly and looked to collate everything together in her grievances. We will return to that in our conclusions.

100. After the meeting Mr Jordan rang Mr Bates to tell him that there was no urgent action Mr Bates needed to take. The claimant maintained that this showed a breach

of confidentiality. Mr Jordan said he did it only because as Chief Operating Officer Mr Bates would want to know if anything had been raised which might call for the suspension of a senior officer. We will return to that in our conclusions.

101. 16 December was Karen Begley's last day in work before she went off sick. She returned for a couple of days in January but otherwise was absent on sick leave. On 19 December (page 400) Rosie Ottewill emailed a colleague to say that she had spoken to Karen Begley and that the "temp to perm letters" to the claimant and Deborah Owen were not to go out until Karen Begley returned to work in the New Year.

102. On 20 December the OH report was produced (page 402) which said that the claimant was unfit for work due to stress and anxiety but a return would be anticipated once the management issues were resolved.

103. That same day Mr Bates received some legal advice from the newly appointed employment law solicitor for the respondent, Nina Lingard. The email appeared at page 403A. It said:

> **"Sue has less than two years' service and as a gesture of goodwill you extended the offer of a perm contract to her. This she rejected in writing on 9 December 2016 in her email. She also confirmed this I understand to you verbally.**
>
> **Her current contract ends on 31 December 2016 or at the completion of the review, whichever falls as the sooner. She will have two years' service on 2 Feb 2017.**
>
> **I would advise that there is no legal basis to offer her a perm position, neither is an extension of her contract to 31 March advisable as this will only strengthen her potential position within an Employment Tribunal, with two years' service.**
>
> **Notwithstanding the grievances and any concerns that may be justified over the consultation process, you are within your rights to treat the end of her contract as you normally would (notice/termination)…"**

D11 and **Dismissal** Bates telephone call 21 December 2016

104. At around 3.00pm on 21 December 2016 Mr Bates rang the claimant and confirmed that her contract would be ending on 31 December. There was no note kept of this call save for a handwritten note he made on his copy of the email from Mrs Lingard the previous day. Mrs Lingard listened to the call, although the claimant was not told of this.

105. The claimant alleged that he dismissed her on notice and then put her on garden leave and that this constituted **Detriment 11** (in so far as it was not covered by the unfair dismissal complaint). We will return to that issue in our conclusions. It was clear that the claimant was made aware in that telephone call that her employment would end at the end of the year.

106. Mr Bates followed this up with a letter at page 404. He confirmed the decision to terminate employment on 31 December 2016 being the end of the contractual period. His letter said:

> **"I note that you are currently absent on sick leave, however, for the avoidance of doubt I will consider that you are on garden leave and are no longer required to attend work, unless specifically requested to do so, for the duration of your contract."**

107. That evening the claimant sent an email to Mike Suarez at pages 407-408. She referred to the history of her grievances and the whistleblowing matter, which had led to her meeting with Frank Jordan. She said she had been summarily dismissed by telephone that day. She said:

> **"I also raised a whistleblowing concern with you around the practice, culture and bullying management style demonstrated by senior management of the HR function…**
>
> **I believe that my dismissal directly links to raising grievance for information that has been withheld, challenging the Senior HR Manager around unethical practice and bullying me and for raising the whistleblowing concern."**

D13 Suarez Email 22 December 2016

108. On Thursday 22 December Ms Barker emailed the claimant the dismissal letter (page 427). The claimant emailed Mike Suarez that afternoon (pages 428-429). She asked him whether he would allow this to stand. He did a brief response (page 428) saying:

> **"This matter has been taken very seriously and assigned to Frank Jordan to review your case, the outcome of which will be communicated to you by Bill Norman as Monitoring Officer. This Council does not tolerate bullying nor harassment and protects whistle-blowers as per our policy."**

109. This response was said to amount to **Detriment 13** and we will return to it in our conclusions.

110. In the early evening of 22 December Mr Jordan emailed Bill Norman, the Monitoring Officer, attaching a note of his conclusions about the claimant's whistleblowing complaints. His note appeared at pages 433-436. It provided a summary of his meeting with the claimant on 16 December. It then summarised the issues that she had raised with him. There was no mention of sleep-ins. He said that the claimant had asked him to meet and discuss matters with nine individuals, but he was seeking a decision about whether the matters were to be investigated as whistleblowing matters. His suggestion was that they fell under the grievance procedure not the whistleblowing procedure. This was said to be part of **Detriment 8** and we will return to it in our conclusions.

D14 Grievance Outcome 23 December 2016

111. On 23 December Mr Bates issued a grievance outcome letter to the claimant (pages 438-439) accompanied by a written response at pages 440-447. He responded to each of Grievances 1 - 5 and rejected each one. Effectively he found the actions of management to have been reasonable in relation to each matter raised by the claimant.

112. In his covering letter he offered the claimant a right of appeal to the appeal staffing subcommittee of the Council. The claimant had ten working days to appeal.

113. He had also been made aware of the claimant's email to the Chief Executive about her dismissal. His letter said:

> **"I have also been advised today by the Chief Executive of your email of 22 December received at 16.39pm in which you raise a number of issues regarding your dismissal.**

> **He has asked me to consider this email as part of your grievance and therefore I will consider your further representations when I return from the Christmas and New Year break and respond to you in early January."**

114. **Detriment 14** was that in this letter Mr Bates dismissed the claimant's concerns and said they would be considered after Christmas. We will return to that in our conclusions.

115. On 23 December 2016 Karen Begley emailed the claimant copies of the relevant policies and procedures. The claimant responded on 28 December (page 449) informing her of the grievance outcome. She asked to meet up in early January so she could hand back the work computer and phone. Ms Begley responded (page 448) to say that it was the claimant's decision on whether to appeal. The staffing committee was currently chaired by Councillor Moran.

116. On 31 December 2016 the claimant ceased to be an employee of the respondent.

5-13 January 2017

117. On 5 January 2017 Mr Bates responded to the claimant's email of 22 December to the Chief Executive. He emphasised that the fixed term contract came to an end on 31 December 2016, and was surprised at the complaint that no right of appeal had been offered. He said:

> **"I was surprised you have raised this when it was your decision not to accept the Council's offer of a permanent contract or a three month extension to your contract which would then both fall into the suspended restructuring process. As a result of your rejection of what I was able to offer you, I confirmed over the phone that I was left with no alternative but to reiterate that your contract would cease on 31 December 2016…Had you been able to let me finish the call I would have reiterated if you had accepted what had been offered, we would have continued with Council policy as part of the restructure."**

118. The letter ended by saying that the further issues raised in the email of 22 December would be treated as part of the grievance process and an appeal to elected council members would be allowed.

119. The claimant responded on 9 January (pages 458-460). She said that all her grievances had been "formal". She drew attention to a failure to follow the formal part of the grievance procedure. She wanted to appeal grievances 1-5 on procedural grounds and because the conclusions reached were unreasonable.

120. That same day Mr Bates made an addition to his note of the meeting on 15 December. The additional paragraph (page 368I) recorded that he said on 15 December that he was aware the claimant had sent other correspondence to the Chief Executive. His note recorded a denial that the sole purpose of that meeting was for him to find out more information about a whistleblowing complaint.

121. It was during January that the respondent decided to undertake an independent review of sleep-in payments. It was to be undertaken by an external consultancy.

122. On 11 January Mrs Lingard asked Frank Jordan to review the emails from the claimant of 21 and 22 December and 9 January and prepare an addendum to his report. He provided with Mr Norman with his amended note on 13 January. The addendum (page 474) confirmed that even despite those emails he still considered matters fell under the grievance procedure not the whistleblowing procedure.

123. In the meantime the claimant was pursuing Mr Suarez for news about grievance 7. She emailed him on 9 January (page 461) and he responded on 10 January to say it was being addressed (page 461). On 12 January (page 467) she asked whether Mr Thompson was investigating it or someone else. She mentioned that grievances 1-5 were going to appeal.

124. On 13 January 2017 Mr Bates wrote to the claimant about all her grievances. In relation to Grievances 1-5 he said:

> **"I have considered the matter further and I have come to the conclusion that it was not best practice to deal with them in an informal manner. This route was only utilised given the timeframe and pending Christmas closure.**
>
> **I therefore have instructed Paul Bayley to investigate grievances 1-5, and he will be in contact with you in this regard. Once the outcome of the investigation is known, a decision will be reached and you will have the right of appeal against this decision should you so wish. I trust this meets with your agreement as a way forward."**

125. In relation to Grievance 7 he said he had not personally had sight of it but Mike Suarez had instructed Paul Bayley to investigate that grievance as well.

126. Mr Bayley made some enquiries of Mr Bates' PA about the timeline (pages 479A-479B) and on 18 January he emailed the claimant arranging to meet her on 23 January (page 486).

127. The following day Mr Suarez emailed the claimant about her grievances (pages 487). He said that the meeting she had with Mr Bates had nothing to do with her subsequent meeting with Mr Jordan. He confirmed Mr Bates had full authority to decide that the claimant's contract would terminate, and that Paul Bayley was investigating the grievances.

D9 Norman Letter 18 January 2017

128. His email also said that Mr Norman as Monitoring Officer had responded to the whistleblowing concerns by a letter of 18 January. The claimant did not receive that letter until the morning of 23 January. The letter appeared at page 480. It enclosed a copy of the amended note from Mr Jordan. Mr Norman accepted Mr Jordan's recommendation that the matters raised fell within the grievance procedure not the whistleblowing policy. We will return to this in our conclusions on **Detriment 9**.

Bayley Meeting 23 January 2017 and **D15**

129. Prior to his meeting with the claimant on 23 January Mr Bailey prepared a table setting out what he understood to be the desired outcome from each of the six grievances (pages 490-491). The desired outcome for Grievance 4 included a

reference to the claimant having an equal opportunity to obtain suitable permanent employment with the respondent.

130. Their meeting of 23 January took place at Chester Services on the M56. Mr Bayley made some handwritten notes at pages 491A-C.

131. On 24 January he emailed the claimant to confirm what he regarded as the "exam questions" for him to answer in the investigation. His email appeared at pages 499-500. The contents of this email formed the basis of **Detriment 15** and we will return to it in our conclusions. He set out in a table the desired outcome from each grievance. The outcome for Grievance 4 referred to reviewing the redeployment procedure but made no reference to the claimant wanting an equal opportunity to have a permanent contract. His email recorded that the claimant did not want to discuss Grievance 7 with him.

132. He also spoke to Bill Norman that day, and at 6.30pm (page 489a) Mr Norman emailed Mr Bayley to say that the dismissal was a matter included in the whistleblowing by the claimant. His email said that all purported whistleblowing had been found by him to fall within the grievance procedure.

<u>26-30 January 2017</u>

133. On 26 January the claimant emailed Mr Norman in reply to his letter of 18 January. Her email appeared at pages 492-494. Most of it was concerned with her whistleblowing about the HR department, although she noted that the summary of her concerns prepared by Mr Jordan made no reference to the failure to meet minimum wage obligations around sleep-ins. She made a number of points about detail missing from Mr Jordan's summary. She suggested that these were whistleblowing issues not grievance issues. None of the individuals she had identified to Mr Jordan had been spoken to. She believed that her dismissal by telephone was directly linked to her whistleblowing disclosure.

134. On 30 January the claimant responded to Mr Bayley's email of 24 January. Her email appeared at pages 501-503. She said that his summary of the meeting of 23 January was not accurate. There was a conflict of interest because his direct manager was Peter Bates. He had misunderstood what she was looking for in her grievances. She said she had asked him at the meeting to speak to Mike Suarez about the whistleblowing disclosure. She concluded with the following:

> **"In view of, but not limited by, the above, I believe that the investigation is already fundamentally flawed and therefore as Peter Bates has already provided his deliberations that we proceed directly to members appeal on grievances 1-5 and include the informal grievance(s) raised with Peter Bates.**
>
> **Although no formal deliberation has taken place around grievance 7, I believe as you report directly to Peter Bates and on the points identified above, including point 10, that there is a possible conflict of interest in you investigating grievance 7 and request that this either, also, separately, proceeds directly to members appeal or a different investigating officer is appointed."**

135. That email was copied to Mike Suarez. He acknowledged it later that afternoon saying he would consider the issues and respond as soon as possible.

February 2017

136. On 3 February 2017 Mrs Barker emailed the HR department to say that an additional senior HR officer had been commissioned and would be starting in the next few days (page 508).

137. On 6 February 2017 the claimant emailed Councillor David Marren (page 509). She informed him that she had been dismissed within three days of speaking to an investigating officer about her grievances and whistleblowing disclosure. She said there was no justifiable reason to dismiss her. This led to a meeting with Councillor Marren on 14 February and he was copied in to some of the subsequent emails.

138. On 9 February Mrs Barker emailed the department to confirm there would now be fresh consultation (pages 514-515). Decisions putting people at risk or slotting them into a post made in 2016 were to be rescinded.

139. That same day Mr Norman responded to the claimant's email of 26 January (page 516). He asked her to provide more details about the unethical conduct and failure to comply with a legal obligation which might fall within the scope of the whistleblowing policy. He also asked her for details of her allegation of illegality regarding sleep-in payments.

140. On 10 February (page 520) Mr Suarez emailed the claimant to say that he would write to her about her request for the grievances to go to members appeal.

141. On 16 February the claimant responded to Bill Norman about the information he sought regarding whistleblowing. She said she had provided significant and specific detail to Frank Jordan in December and that the minimum wage issue would have been very easy to have investigated. She also made clear her concerns about breach of legal obligations regarding the HR restructure, and unethical conduct in a job evaluation process. She alleged that there was culture of bullying within the HR directorate. She reiterated her view that her dismissal was linked to her whistleblowing disclosure.

142. On 19 February 2017 (pages 545-549) the claimant emailed Mr Suarez saying she was unhappy with the progress, action and omission of action taken to resolve her concerns and grievances going back to October 2016. Her email contained over 50 questions to which she wanted a response by the end of February.

143. On 20 February Mr Suarez wrote to the claimant to inform her that she could not go to members' appeal on her grievances because there had not yet been an initial decision (page 553). That was based on what he had been told by Councillor Moran. He said he had taken on board her comments about Peter Bates and himself determining the outcome of the grievances and proposed that Mark Palethorpe be the determining officer in the matter.

144. Bill Norman responded to the claimant's email about whistleblowing on 24 February (page 568). He said he was working through the issues she raised but needed more information from colleagues. He had been asked to share a copy of

her October 2016 report on sleep-ins but was concerned that it might mean that she was identified as a whistleblower. His email said:

> **"Do you wish me to try to preserve your anonymity as a whistleblower, or are you content for me to be open with colleagues that it's you who've raised the concerns?"**

D16 1 March 2017

145. On 1 March 2017 the claimant responded suggesting that Bill Norman meet herself and Councillor Marren to discuss the whistleblowing and the best way forward. Mr Norman replied on 3 March saying it was not appropriate for Councillor Marren to attend (page 597). His reason was that it would not be in line with the whistleblowing policy for Councillor Marren to be involved in the meeting. This formed the basis of **Detriment 16** and we will return to it in our conclusions.

146. That was the last detrimental action of which the claimant complained in this case and therefore we can summarise subsequent events briefly.

147. The claimant continued to press for Mr Marren to be involved in the meeting, as did Mr Marren himself (pages 605 and 607).

Grievances

148. Mark Palethorpe confirmed to the claimant that despite the concerns she had raised about Paul Bayley he should continue and complete his investigation of her grievances. Mr Bayley prepared a report on 10 March (pages 628A) and met Mr Palethorpe to discuss it. His report said that it provided the explanation for the claimant that she sought as to whether she had been treated less favourably because she was a temporary worker, and it recommended a review of the redeployment procedure. However, the grievances were not upheld. Mr Palethorpe wrote to the claimant on 27 March 2017 (pages 627-628) enclosing the report and confirming that the grievance was now concluded. The claimant was given the right of appeal which she exercised on 5 April 2017. After some delay there was a reinvestigation of her grievances rather than an appeal, but the claimant declined to participate in that.

Dismissal Appeal

149. On 27 March 2017 Mr Bates wrote to the claimant (page 629) to confirm that although she was significantly out of time for a formal appeal against her dismissal, he was prepared to exercise his discretion and allow her ten working days to appeal. The claimant provided her appeal on 6 April (pages 635-637). She drew attention to procedural errors and asserted that her dismissal was a result of the whistleblowing disclosure three days earlier. Her desired outcomes began with reinstatement. In May 2017, however, the claimant was informed that her appeal would not be allowed to proceed because she had presented her Employment Tribunal complaint on 21 April.

Minimum Wage Review

150. The external review of sleep-in payments and the National Minimum Wage had initially concluded that there was no significant problem. However, the consultant concerned identified at the end of May 2017 that his calculations had

been incorrect. It turned out that there were significant arrears due to staff which were eventually paid later in 2017.

Submissions

151. At the conclusion of the evidence each party summarised its case.

Respondent's Submission

152. In addition to his written opening note Mr Lewis helpfully prepared a speaking note which ran to 50 paragraphs over 19 pages. Reference should be made to that speaking note for full details of the position taken on each of the issues. What follows is a broad summary.

153. Mr Lewis said that the sharp differences over factual events really centred on the meetings on 15 and 16 December, and possibly the dismissal call of 21 December 2016. However, if the Tribunal concluded the claimant had mentioned sleep-ins on 15 and 16 December, her case should still fail on causation.

154. Mr Lewis then reviewed in some detail the documentary evidence relating to the meetings on 15 and 16 December and submitted that it provided no support at all for the claimant's case that she had raised sleep-ins on those occasions. The matter did not appear in the notes made by Mr Bates the day after his meeting nor in the notes made by Mr Jordan and Ms Perkins during the meeting of 16 December. Nor did it feature in what the claimant subsequently said in her emails. Nor did her own prompt prepared for the meeting at pages 368A and 368B help her because the mention of sleep-ins came almost at the very end of that note, as number 19 in the list of 20 issues relating to Sara Barker. The significance of sleep-ins as a matter to be raised at these meetings was very limited in her own mind, as was the fact that she did not provide a copy of her sleep-in report to Mr Bates or Mr Jordan either at or after their meetings. We were invited to conclude that sleep-ins had not been raised on these occasions, or that if they were it was only a passing reference which did not register with either Mr Bates or Mr Jordan, and therefore played no part in their mental processes thereafter.

155. Turning to the List of Issues, Mr Lewis submitted that PD1 was not protected because the claimant did not believe her disclosure was in the public interest. She made her disclosure to Mr Palethorpe on 28 November in order to further her campaign against Mrs Barker. That was evident, he submitted, from her email to Mr Kelleher earlier that morning at page 234.

156. PD 2 was not protected because it contained no information about sleep-ins.

157. PD3 and PD4 related to events on 15 and 16 December and we were invited to conclude that there had been no mention of sleep-ins at all on either occasion.

158. Turning to the detriments, detriment 1 was an offer to meet the claimant not capable of amounting to a detriment and not influenced in any way by a protected disclosure. The same was true of detriment 4: Mr Bates was not seeking to bully the claimant into withdrawing her concerns and his email was explicable by the change of circumstances in early December. The offer of permanent status in detriment 5 was not capable of being a detriment and nor was there any causal link to a

protected disclosure. The position taken by Mr Jordan in relation to his involvement had nothing to do with sleep-ins even if they had been raised on 16 December. Detriment 9 was simply Mr Norman actioning the report of Mr Jordan, and there was no evidence Mr Norman was influenced by any protected disclosure.

159. Detriment 11 was the termination of employment on the telephone. Mr Lewis highlighted the input from Mrs Lingard to Mr Bates. There was no evidence this had anything to do with a protected disclosure. Putting the claimant on garden leave was entirely innocent given that it was only for a few days while the office was closed anyway, and there was no prohibition on the claimant contacting colleagues or using her work emails.

160. Detriment 13 was simply an instance of Mr Suarez allocating appropriate resources to deal with the matters arising. It was not linked to any protected disclosure. Nor was detriment 14: Mr Bates took the position he did because of the pressure on time as he was about to go on leave. He dealt with matters properly in the New Year.

161. Although the claimant had been unhappy with how Mr Bayley recorded their meeting of 23 January, there was nothing to suggest that his conduct was influenced by any protected disclosure.

162. Finally, although the Tribunal had not heard evidence from Mr Norman the facts did not justify an inference that he was influenced by any protected disclosure because he explained the reason for this position on the attendance of Councillor Marren in his email of 3 March 2017 at page 597.

Claimant's Submission

163. At the start of the hearing the claimant had prepared a skeleton argument running to 59 pages which we re-read prior to oral submissions. After the evidence the claimant made an oral submission which can be summarised as follows.

164. In relation to PD1, she emphasised the public interest in the proper payment of the NMW by a public authority, and submitted that her reason for raising it with Mr Palethorpe was not the furtherance of any campaign against Mrs Barker, but rather the reason set out in her covering email at page 251.

165. In relation to PD2 the claimant accepted that the document did not itself contain any information about sleep-ins but emphasised that it was intended to result in a discussion at which that information would have been provided.

166. In relation to PD3 and PD4 the claimant urged us to accept her evidence that she had raised sleep-in issues with Mr Bates and then Mr Jordan. The prompt document she prepared prior to the first of those two documents was not a document which she went through in order. The meeting with Mr Bates lasted over two hours and she aired all her concerns. It would not be credible to think she failed to mention the NMW. It was also a surprise to hear Mr Bates mention Mr Kelleher before she did, and she was sure that Mr Bates had known about the meeting the following day with Mr Jordan because he tried to dissuade her from going to it. That was supported by the fact that Mr Jordan rang Mr Bates immediately after his meeting on 16

December. Effectively Mr Bates was "fishing for information" on behalf of Mr Jordan the following day.

167. As to the meeting on 16 December, the purpose of the meeting was to discuss her whistle-blowing and it would be odd if she had not mentioned the minimum wage issue. It was not a complex matter that would take very long to explain. Her case was that Mr Bates and Mr Jordan both knew that the sleep-in issue was a significant one and decided to hide it by making no reference to it in the notes they subsequently compiled. The authenticity of Mr Bates' note made on 16 December was questionable given that a month later his PA said there were no notes of that meeting. The claimant also drew attention to how Mr Jordan had changed his position on when he first knew about the protected disclosure from 30 November 2016 (his witness statement for the October 2017 preliminary hearing) to 7 December 2016 (his witness statement for this hearing). The claimant also emphasised that Mr Jordan took no steps to investigate what she had raised or to speak to any of the people she raised in her meeting. It was also significant that although the notes recorded what she said about the CQC, that was omitted from his report as well for the same reason: it was potentially a significant issue for the respondent.

168. The claimant then reviewed some of the evidence given by witnesses before addressing the individual detriments. She emphasised how unusual it was for Mr Bates to be involved in dismissing someone three levels below him without any proper procedure, particularly when he was CIPD qualified. His own letter to the claimant after dismissal recorded that she had accused him of bullying her in that telephone call. The fact that Karen Begley had no knowledge of why she had been dismissed supported her case that she had agreed to a permanent contract. The dismissal could not properly be characterised as simply the ending of a fixed term contract because there would have been no need for this approach to have been taken. The Oracle entry approving the permanent contract had never been revoked. Further, the evidence of Mr Bates that the claimant had refused both a permanent contract and an extension was not credible given that all the claimant's efforts were directed at preserving her employment.

169. In January 2017 he had selected Mr Bayley to investigate the grievances because his investigation skills were weak. It was odd that Mrs Barker had not challenged Mr Bates over the decision to dismiss the claimant and there was no discussion with Karen Begley either (even though she was off sick she was still contactable). Mrs Lingard had failed to show the "belt and braces" approach she claimed to adopt, having advised without any knowledge of the relevant procedures. Effectively she had simply been used to get the advice Mr Bates wanted: the claimant could be dismissed.

170. The claimant then turned to the individual detriments. In relation to detriment 1 she said that Mr Bates knew of her disclosure to Mr Suarez at 9.15am because there was a leadership team meeting before his email at 12.40pm[4]. He was seeking

[4] This suggestion was not put by the claimant to Mr Bates or to Mr Suarez in cross-examination. In response to a question from the Tribunal at the end of his evidence Mr Bates said he had not been aware of the email to Mr Suarez of 30 November 2016 (PD2). It appeared to be speculation by the claimant. However, the point was academic since we found that PD2 was not a protected disclosure – see below.

to dissuade her from pursuing those matters. She referred again to the change in Mr Jordan's witness statement.

171. In relation to detriment 4 the claimant reiterated that Mr Bates had been engaged in an effort to persuade her to drop her concerns by email on 7 December and in their meeting on 15 December. The offer of a permanent contract was intended to pressure her into dropping those concerns. She perceived the same to be true of detriment 5, the email of 6 December 2016 offering her permanent status.

172. The failure of Mr Jordan to investigate anything she told him on 16 December or the contents of PD2, but instead to suggest that everything should form part of the grievance investigation, was not credible. It was clear that he had omitted the CQC from his report, and that the same was true of the NMW even though his meeting notes did not record the NMW being raised. Detriment 9 would stand or fall with detriment 8, but the claimant emphasised that Mr Norman had failed to challenge how Mr Jordan had put his report together. He should have ensured that Mr Jordan did the investigation before reaching a conclusion.

173. Detriment 11 concerned the telephone call of 21 December 2016. The claimant emphasised it was outside policy and procedures, and was a rushed approach which overrode her right to be redeployed. The work she was doing was going to continue in the New Year, as evidenced by the recruitment of a replacement.

174. Detriment 13 showed that Mr Suarez had abdicated his responsibilities. It was not credible that he would do so in good faith but it must have been because of her protected disclosure. Similarly Mr Bates had subjected her to a detriment because of her protected disclosure when he said he would consider her email after the New Year: knowing full well that the claimant would have ceased to have been in employment by then.

175. The approach of Mr Bayley was flawed from the outset. There was a presumption the claimant would not cooperate with his investigation. There was no proper investigation of her concerns. She did not get further information from Mr Suarez. He failed to recognise that she was entitled to have the grievance procedure followed.

176. Detriment 16 was also an instance of unreasonable conduct by Mr Norman. He had already made a determination and the claimant was entitled to escalate it to Mr Marren. There was no good reason for excluding Mr Marren from the meeting and it was a further instance of whistle-blowing detriment.

177. In summary the claimant said she had been consistent throughout in her actions and her evidence, and her concerns about the sleep-ins issue were demonstrated by the fact that she raised it informally then formally within the HR department and then with the Chief Executive and then with Councillor Marren. The denial by the respondent during 2017 that there was any risk on this point was not credible. The evidence given by witnesses for the respondent who were unable to recall relevant matters was also not credible. The claimant submitted that she had shown that the reason for the dismissal and the reason for her detrimental treatment was one or more of her protected disclosures about sleep-ins.

Discussion and Conclusions – Protected Disclosures

178. The Tribunal addressed each alleged protected disclosure in turn, making additional factual findings where necessary.

PD 1

179. There was little dispute about this matter. The respondent accepted that the claimant had disclosed information which she reasonably believed tended to show a breach of a legal obligation when she emailed her sleep-in discussion paper to Mark Palethorpe on 28 November 2016. The sole dispute was whether she also had a reasonable belief that her disclosure was made in the public interest. Mr Lewis accepted that the information contained in the paper was capable of being the subject of a disclosure in the public interest, but argued that this was an instance of the claimant raising the matter to further her personal concerns about Mrs Barker rather than raising the issue believing that to do so was in the public interest because she wanted something done about it.

180. We considered that submission carefully but rejected it. We noted that the claimant had not been told that Mrs Barker had sent her draft paper to Clive Walsh on 9 November (page 201). The claimant thought in mid-November that nothing was happening about the paper she tabled on 28 October at the HR team meeting and which she emailed to Mrs Barker on 3 November. We also accepted the claimant's evidence that she raised this matter at a senior management meeting on 15 November, emailing her paper to Pete Kelleher later the same day (page 213A). Further, we also accepted her evidence that she spoke to Mr Palethorpe about this in mid-November, which explained why her email to him of 28 November referred to them having had a discussion a week or so earlier.

181. Understandably Mr Lewis placed emphasis on the terms of the claimant's email at 08:35 on 28 November to Pete Kelleher in which she made clear her negative view of the restructuring. She described it as “ill conceived”. That email made reference to what she saw as the lack of action by Mrs Barker on her sleep-in report. However, we accepted that the reason the claimant raised the sleep-ins matter with Mark Palethorpe some 2½ hours later (page 251) was because (as her email stated) she had been informed on Friday 25 November that she would no longer be employed after the end of December. We concluded that her concerns about the risk of breaching the NMW were genuine and that her purpose in raising them with Mr Palethorpe was to ensure that something was done about it, because of her perception that Mrs Barker was taking no action. She also made reference to the work being done by Linda Couchman on the review of service delivery which would require accurate financial information.

182. The Tribunal therefore unanimously concluded that this was a disclosure which the claimant reasonably believed was made in the public interest, and therefore that it was a protected disclosure.

PD 2

183. This disclosure appeared at page 296. It was headed “Whistleblowing disclosure” but went on to deal with a number of allegations about Sara Barker. The

claimant made clear in the fourth paragraph that she was undertaking the disclosure to bring to Mr Suarez's attention:

> **"…the professional incompetence, behaviours and activities of your Head of HR, Sara Barker."**

184. It is important to note that the claimant's case has always been that her protected disclosures were made about sleep-ins and the NMW. The Tribunal was satisfied that this page contained no information about those matters. The claimant also conceded that point in her evidence and in submissions.

185. The claimant argued, however, that her reference to a failure to comply with legal obligations in the third paragraph was intended to be a reference to the NMW issue, and that she intended to raise that with Mr Suarez when she met with him. She relied on the principle in the **Norbrook Laboratories** case that it is possible to aggregate more than one communication together to identify whether a protected disclosure has been made. However, although that principle is applicable where the disclosure is said to be different communications taken together, so that the recipient can be taken to understand an oblique reference in one email because of what is said elsewhere, in this instance the claimant did not claim to have told Mr Suarez about the NMW in any other communication. We rejected her contention that the same principle could apply in this situation.

186. In any event the claimant's email of 21 December 2016 at page 407 showed that she regarded her "whistleblowing concerns" as relating to HR management.

187. Accordingly, the Tribunal unanimously concluded that the disclosure did not contain any information about sleep-ins which the claimant reasonably believed tended to show a breach of a legal obligation. Even if the claimant intended to make any reference to the NMW in referring to a breach of a legal obligation, which we doubted, that was simply a bare allegation devoid of any factual information. This was not a protected disclosure.

PD 3

188. There was a conflict of evidence about whether the claimant raised the NMW in her meeting with Mr Bates on 15 December 2016. The claimant said it was raised and discussed; Mr Bates said it was not.

189. There was no-one else present at the meeting. Neither party kept any notes during the meeting. Mr Bates produced a note dated 16 December at page 368H. It recorded no mention of this issue. He maintained that note was prepared the following day. The claimant doubted this. In mid-January 2017 Mr Bates' PA, Lorna Shackleton, told the claimant there were no notes of her meeting on 15 December with him. However, Mr Bates explained that he had typed the note himself on his laptop. He was not aware that his PA had been asked about a month later if there were any notes of the meeting. This was a difficult and important meeting with a member of the HR team who had lodged five grievances and who was making allegations about the Head of HR. Although it was surprising that he met the claimant without any notes being taken, we considered it likely he would have made a note the following day and on balance we found that his note was prepared on 16 December (save for the additional page done on 9 January 2017).

190. The only document which supported the claimant's contention that she raised the NMW with him was her four page prompt document which appeared at pages 368A-368B. There was a reference to sleep-in payments towards the end of the final page, in a section of the document setting out behaviours demonstrated by Mrs Barker. It formed the nineteenth of twenty points under that heading. Mr Bates was not provided with a copy of that document. It was not the claimant's case that the meeting progressed through that document in order. Although the claimant made some pencil notes on the document during the meeting, there was no systematic ticking off of matters as they were discussed and no pencil note against this matter in particular. It was a dense document raising a large number of different points of which this formed a very small component. Seeking some action on the NMW issue was not one of the questions posed by the claimant at the end of the document. We also noted that the claimant did not provide Mr Bates with a copy of the sleep-in paper either at the meeting, or by email before or after it.

191. Accordingly, the documentary evidence alone supported the recollection of Mr Bates that there was no mention of NMW or sleep-ins during this meeting.

192. The claimant also relied, however, on the evidence of her former colleague, Deborah Owen. Her witness statement said that the claimant told her before the meeting that she would raise the whistleblowing disclosure with Mr Bates, and told her after the meeting that she had done so. However, we concluded that the phrase "whistleblowing disclosure" at that stage was simply a reference to the matters set out in the email to Mr Suarez of 30 November 2016. Those matters did not include the sleep-ins/NMW issue itself. They were the allegations about Mrs Barker. Indeed, we noted that the claimant did not seek to identify her email to Mr Palethorpe about the NMW as a protected disclosure until October 2017, by way of amendment. We concluded at the time that the claimant understood her term "whistleblowing disclosure" to relate to her allegations about Mrs Barker, of which her perceived inaction on the sleep-in paper formed a very small part.

193. Putting these matters together the Tribunal concluded unanimously on the balance of probabilities that sleep-ins/NMW were not raised in this meeting with Mr Bates. Any belief in the claimant's mind that there was collusion between Mr Suarez, Mr Bates and Mr Jordan (a matter to which we will return) to head off her complaints to Mr Suarez was to do with the "whistleblowing disclosure" about Mrs Barker, not related in any way to the sleep-ins/NMW issue.

194. Accordingly, the Tribunal concluded that the claimant had failed to establish that she made a protected disclosure on this occasion.

PD4

195. The claimant maintained that she made her fourth protected disclosure about sleep-ins/NMW to Mr Jordan in their meeting on 16 December 2016. This time there was another person present: Jill Perkins. We did not hear evidence from Ms Perkins but we had a copy of her manuscript notes at pages 379-400 and the typed version at pages 378A-378F. In addition we had Mr Jordan's manuscript notes at pages 374-378 and the composite note of the meeting at pages 369-373. The notes were detailed and apparently comprehensive, and they made no mention of sleep-ins or the National Minimum Wage.

196. In contrast the claimant produced no notes of this meeting. The only document she had on which she relied was the prompt document prepared for her meeting with Mr Bates the previous day, which mentioned sleep-ins and the NMW but gave it very limited prominence (see above). The claimant also accepted in cross examination about this meeting that she did not go through every point on her prompt with Mr Jordan. Accordingly, the documents alone strongly favoured the respondent's case that this was simply not mentioned.

197. Despite that the claimant maintained that she did raise it with Mr Jordan. She said she did so in part because he had responsibility for the Tatton area where NMW was a particular problem because of the Grade 2 employees who were undertaking sleep-ins. In cross examination she said that their discussion about the NMW took seven or eight minutes, but under pressure she retracted that, saying she had said it took longer than it had in order to make it sound bigger. Even so, she maintained that there had been a discussion about the NMW. Her case was that Mr Jordan had deliberately taken steps to remove this matter from the notes and to make no mention of it in his report because he knew that the NMW was such a big issue for the respondent. She made the same point about the CQC issue, which also did not feature in Mr Jordan's report. The CQC matter, however, did feature in the notes of the meeting. It would be odd if Mr Jordan had excluded the NMW from those notes to hide it but had failed to do the same for the CQC when hiding that matter.

198. We also noted that Mrs Lingard gave evidence that Mr Jordan did not mention the NMW to her when they met on 22 December 2016.

199. The claimant attached great significance to the fact that Mr Jordan rang Mr Bates after the meeting. She urged us to conclude that this showed that Mr Suarez, Mr Bates and Mr Jordan had all been in communication about the NMW issue. However, Mr Jordan explained that he rang Mr Bates because Mr Bates was the line manager of Sara Barker and he wanted to tell Mr Bates there was no need for any immediate action such as a neutral suspension. That seemed to us a much more plausible explanation for that contact than the claimant's theory that there were discussions about the NMW behind the scenes. We rejected her case that there was collusion in an attempt to bury the NMW concerns. Mr Suarez had not been aware of the NMW concerns because PD2 made no mention of them. For reasons set out above we found that they were not raised with Mr Bates either. They did not form part of the respondent's thinking.

200. We concluded that the claimant had convinced herself that the sleep-ins/NMW was the main issue, but that was not so at the time even in her own mind. Her disclosure to Mr Suarez of 30 November was plainly focussed on her concerns about the handling of the restructure and other matters by Mrs Barker, and the prominence which sleep-ins and the NMW bore in these proceedings was not an accurate reflection of her state of mind at the time.

201. For those reasons the Tribunal concluded unanimously that there had been no mention of sleep-ins/NMW to Mr Jordan on 16 December and therefore there was no protected disclosure made on that occasion.

Discussion and Conclusions – Detriments

202. Having determined that the claimant made a protected disclosure only on 28 November 2016 (PD1), the Tribunal moved to consider the detriment complaints.

203. In relation to each detriment it was necessary first to consider whether the claimant had been subjected to a detriment by any act or deliberate failure to act by the respondent. An unjustified sense of grievance cannot amount to a detriment. It must be something which an employee acting reasonably could view as detrimental.

204. If a detriment were established, it was then a question of considering the mental processes (conscious or subconscious) of the person or persons responsible to identify whether the protected disclosure had any material influence on the act or failure to act. Although the burden lay on the respondent to show the ground for the act or failure to act under section 48(2), as explained in paragraph 115 of **Osipov** a failure by the respondent to do that would not automatically lead to success for the claimant unless the circumstances justified an inference in her favour.

> **D1: By email of 30 November 2016 Peter Bates tried to deter the claimant from continuing her whistleblowing concerns by asking if it would help to have a discussion with him first.**

205. Between Thursday 24 November 2016 and Tuesday 29 November 2016 the claimant lodged four grievances with Mr Bates. They were primarily directed against Sara Barker and related to the handling of the consultation process. They came from a senior HR officer.

206. On Wednesday 30 November Mr Bates emailed the claimant formally recognising receipt of those grievances and asking her if she thought it would help if she had a discussion with him first about the issues she was raising.

207. That was hardly surprising given the flurry of grievances and the subject matter. They were presented in the context of an ongoing restructure. We concluded that this could not reasonably be viewed as a detriment by Mr Bates. It was a sensible pragmatic step. If the claimant took it as detrimental treatment that was not a reasonable perception. It would have been entirely proper for her simply to have replied indicating that she did not want to meet save under a formal grievance process. Instead she did agree to meet him and they eventually met on 15 December. As this could not reasonably be seen as a detriment the complaint failed.

208. Even if the email could be seen as a detriment, however, it would have failed on causation. There was no evidence Mr Bates knew of PD1 to Mr Palethorpe of 28 November 2016. That protected disclosure therefore played no part in his decision to send this email. This complaint failed.

> **D4: By email on 7 December and verbally on 15 December 2016 Peter Bates sought to bully the claimant into withdrawing her whistleblowing concerns by implying that the permanent job offer was contingent on those concerns being withdrawn.**

209. Detriment 4 fell into two parts. The first concerned an email sent on 7 December by Mr Bates. The second was about the meeting on 15 December 2015.

7 December 2016

210. We noted that after Mr Bates' email of 30 November, there had been a number of developments. On 1 December the claimant lodged Grievance five and told Mr Bates she was happy to meet him to discuss. On 2 December he acknowledged Grievance 5 and said he was taking advice. On 5 December the claimant went off sick with stress. On 6 December there were two important emails from Mrs Barker. The first informed all HR staff that the consultation was being paused and would resume in January. The second offered the claimant a permanent contract.

211. Mr Bates sent his email in the early afternoon of the following day. It appeared at page 347. In the first paragraph he referred to both of the emails from Mrs Barker. He said he was happy to meet the claimant but asked whether she wanted to reconsider any of the grievances she had submitted. His second paragraph went on to say that she could reserve the right to re-submit later or press ahead now, but he wanted to check. He was conscious of timescales in the policy and was asking whether she wanted to wait with her grievances about the restructuring until the position was more clear in the New Year.

212. We concluded unanimously that this email could not reasonably be seen as a detriment. It allowed the claimant to press on with her grievances and/or to reserve the right to resubmit them. It set out a clear rationale for the suggestion that she might wish to reconsider. It was open to her simply to refuse to do so. We rejected the contention that anything in this email amounted to an implication that the permanent contract offer would be withdrawn unless she withdrew her concerns. There was simply no basis for that in the text of the email and if that was the claimant's view, it was unjustified.

213. In any event even if this had been a detriment we were satisfied that Mr Bates was not influenced in any way by PD1 made to Mr Palethorpe. There was no evidence that he knew of that protected disclosure.

15 December 2016

214. The second part of this allegation of detriment was that Mr Bates sought verbally in the meeting on 15 December 2016 to bully the claimant into withdrawing her whistleblowing concerns by implying that the permanent job offer was contingent on those concerns being withdrawn.

215. It was necessary at this point for the Tribunal to consider the claimant's case that the offer of a permanent contract had been accepted by her on the afternoon of 9 December. We noted that in her email to Mr Bates that morning at pages 351-352 the claimant expressed in very strong terms her disapproval of the offer. She asked whether she was really perceived as "daft enough" to accept a permanent contract. She described it as "reprehensible" and an offer she could not even begin to consider as sincere. Those sentiments were reiterated in her email to her line manager, Karen Begley, at shortly before 2.00pm (pages 357-358). Although there was no unequivocal express statement of rejection in that email, it was clearly one which could reasonably be interpreted as amounting to a rejection.

216. Nevertheless the claimant maintained that she told Ms Begley in a meeting at some point after 14.22pm that she would "go with it" on the basis that the details of the role would be confirmed when they were clearer.

217. The claimant initially maintained that this acceptance of the permanent offer was formalised by Karen Begley when she completed the Oracle form at page 348A. Ms Owen gave evidence to the effect that she would only compete Oracle once there had been formal acceptance. However, on closer examination it became apparent that could not have been correct because the entry was made at 12.30pm, about two hours before the claimant maintained she had accepted it. We concluded that the entry on Oracle simply reflected the expectation of Ms Begley that the claimant would accept the permanent contract. The entry was made before she received the claimant's email at shortly before 2.00pm.

218. Importantly there was no evidence that Karen Begley conveyed to any other manager the verbal acceptance by the claimant. It may well have been that this would be formalised only once a letter had been issued and the claimant had accepted it. That process may have been delayed by the fact that Ms Begley went on sick leave and wanted to delay issuing those letters until she returned (email 19 December at page 400A). We concluded that the endorsement made by Sara Barker on 12 December 2016 was simply to improve the offer of a permanent contract with a temporary variation to hours of work. Accordingly, even if the claimant had told Ms Begley that she would accept the offer, we found as a fact that had not been formalised and conveyed to any other managers.

219. For reasons set out above in broad terms we accepted Mr Bates' account of the meeting on 15 December 2016 as recorded in his note of the following day, rather than the claimant's recollection unsupported by any note. It was significant that in cross examination of Mr Bates the claimant put to him that he was seeking "through his tone and body language" to persuade her to withdraw her concerns if the permanent contract was to be pursued. This implied that no words to that effect had actually been spoken. We concluded that the claimant's perception of this meeting was distorted. We were satisfied that Mr Bates took the same position with the grievances as he had in his emails: it was for the claimant to decide whether they were to be pursued or not. Although he knew the claimant had been offered a permanent contract he did not know that she had conveyed verbally to Karen Begley that she would accept it, and indeed understandably thought exactly the opposite from her email to him of the morning of 9 December. We rejected the factual basis on which this allegation was founded.

220. In any event we were satisfied that Mr Bates did not know anything of PD1 about sleep-ins/NMW and therefore this allegation would have failed on causation in any event.

D5: By email of 6 December 2016 Sara Barker offered the claimant permanent status in order to discourage her from continuing with her whistleblowing complaint.

221. This detriment was the offer of a permanent contract made by Mrs Barker in her email of 6 December 2016 at page 344. The email explained that feedback from the consultation process indicated that further review of the HR structure was likely to provide additional opportunities and diminish the risk of permanent staff being at

risk of redundancy as a consequence. As a result the review of the claimant's contractual arrangements ceased and permanent status was offered.

222. It was apparent to us that the claimant was labouring under two significant misconceptions at this point. Firstly, her impression was that her employment was likely to continue after 31 December as things stood even though she had been told otherwise by Karen Begley on 25 November. She believed that the need for HR support for the Care4CE restructuring would be ongoing in the New Year, and from her past experience fixed term contracts would sometimes roll over without the documentation being issued in advance. The second misconception was that under the FTR the respondent would not be able to allow her fixed term contract to terminate without an extension or renewal unless it had objective justification. She was wrong about this, as demonstrated by the decision of the Court of Appeal in **Webley v Department for Work and Pensions [2005] ICR 577**. The requirement for objective justification under regulation 3 of the FTR arises where there is less favourable treatment than a permanent employee during the contract, not at its termination.

223. The email from Mrs Barker of 6 December pausing the restructuring no doubt added to the uncertainty and confusion affecting the claimant and her colleagues in the HR department. It was swiftly followed by the offer of a permanent contract. We recognised that the claimant had a number of reasons for treating this offer with suspicion. It did not identify any permanent post. She was right to think that the offer, if accepted, could potentially simply lead to a redundancy in the New Year. Secondly, the claimant had understandable concerns about the procedure by which this offer was made to her, and the practice of offering fixed term employees permanent status in the middle of a restructuring was one about which she had professional concerns. Thirdly, she may have thought that as a permanent employee she would lose the protection of the requirement (as she saw it) for the respondent to have objective justification for not renewing her fixed term contract.

224. Although the claimant articulated these concerns clearly, we concluded they were unjustified and unfounded. The legal and factual reality was that without either an extension of the fixed term or the acquisition of permanent status, her employment was going to end on 31 December 2016. The offer of permanent status changed nothing save that she would remain in employment from 1 January 2017 onwards, subject of course to events in the restructuring. That could only reasonably be seen as a better position than the one she was in, despite her reservations.

225. Accordingly, we concluded that the claimant had failed to show that this offer of permanent employment amounted to a detriment. It was an offer she was entitled to refuse if she wished.

226. Even if we had found that it amounted to a detriment, there was no causal connection of any kind with PD1. It was simply a consequence of the restructuring process and the realisation by Mrs Barker that there would be a greater need for Grade 11 senior HR officer input in the New Year than had previously been thought. It was a positive move made for the benefit of the claimant and her other fixed term colleagues, and could not be said to be because of any protected disclosure. This allegation failed.

D8: Between 16 December and his report of 22 December 2016 Frank Jordan failed properly to investigate the whistleblowing grievance, and attempted to collate all the grievances together.

227. Detriment 8 concerned the steps Mr Jordan took after the meeting with the claimant on 16 December. On 22 December he prepared his Note at pages 433-436. He recorded what the claimant told him about the whistleblowing disclosure sent to Mr Suarez on 30 November, and then recommended to the monitoring officer, Mr Norman, that matters fell under the grievance procedure rather than the whistleblowing procedure. He made it clear that he had not interviewed the nine individuals identified by the claimant before reaching that view.

228. We were satisfied the claimant could reasonably see this as a detriment. She was aware of the differences between the whistleblowing procedure and the grievance procedure. The former would require the involvement of the respondent's Monitoring Officer. She took pains to label her report to Mr Suarez as a "whistleblowing disclosure". She referred to a breach of legal obligations and unethical conduct. In those circumstances it was reasonable to see it as detrimental that Mr Jordan did not agree, and that he had not interviewed the people she wanted to be interviewed before he reached his view.

229. However, we were unanimously satisfied that had nothing to do with PD1 about sleep-ins/NMW made to Mr Palethorpe on 28 November 2016. Mr Jordan was unaware of that issue. For reasons set out above we found it was not raised with him on 16 December. This report represented his view of the issues raised in the email to Mr Suarez of 30 November 2016 about Sara Barker and the restructuring process. He was entitled to take the view that these were matters better handled under the grievance procedure rather than the whistleblowing procedure. This allegation failed on causation.

D9: By letter of 18 January 2017 Bill Norman informed the claimant that the matters raised with Mr Jordan fell within the grievance procedure not the whistleblowing policy.

230. This detriment was said to have taken place in the letter from Mr Norman, the Director of Legal Services and Monitoring Officer, of 18 January 2017 at page 480. In the letter he accepted the recommendation of Mr Jordan and decided that the concerns raised to Mr Suarez fell under the grievance procedure. His letter ended by providing a copy of the whistleblowing policy and drawing attention to the claimant's right to contact the relevant bodies if not satisfied with his decision.

231. Mr Norman was not called to give evidence. However, we concluded that the respondent had still shown the ground for this decision. It was an acceptance of the report of Mr Jordan, and therefore the reason for the decision was that Mr Jordan had recommended that matters be regarded as falling under the grievance procedure. There was no evidence from which we could properly infer that Mr Norman was influenced by PD1 to Mr Palethorpe of 28 November 2016 about sleep-ins/NMW, not least because that email did not feature in Mr Jordan's report or in the email to Mr Suarez of 30 November. This allegation failed on causation too.

D11: In a telephone call on 21 December 2016 Peter Bates notified the claimant that she was dismissed and then put the claimant on garden leave.

232. This detriment concerned the telephone call made by Mr Bates to the claimant on 21 December 2016 in which he informed her that her employment would be ending on 31 December, and his subsequent letter which confirmed that she would be on garden leave until then. In so far as this was a complaint about the decision to dismiss the claimant, that fell to be considered under the unfair dismissal complaint (see below). However, there were two matters that the Tribunal could deal with as complaints of detriment under section 47B: the fact this was conveyed in a telephone call rather than following the dismissal procedure, and the garden leave point.

233. Dealing with the manner of communication of the decision, the dismissal procedure at page 770 made clear that it applied to fixed term employees. The procedure entitled the employee to be notified in writing of the circumstances that may result in their dismissal, to be invited to a meeting at which the right to be accompanied would apply, and to have an open discussion before a decision is given with reasons. There would then be the right to appeal. Mr Bates accepted in cross examination that none of these procedural steps were followed on this occasion and that telephoning the claimant to confirm that she would be leaving employment was a breach of that procedure. The claimant could reasonably see that as a detriment. The question was whether that breach of procedure was influenced to any material extent by her protected disclosure to Mr Palethorpe about sleep-ins/NMW.

234. Unusually, we had insight into the legal advice that Mr Bates received before making this telephone call. It came from Mrs Lingard and appeared at pages 403A and 403B. The former email was particularly revealing. It showed the awareness that the claimant had less than two years' service and therefore did not have the right to complain to an Employment Tribunal about unfair dismissal. It also recorded that the claimant had rejected the offer of a permanent contract in her email of 9 December and verbally at the meeting on 15 December. Mrs Lingard advised Mr Bates that there was no legal basis to offer a permanent position or an extension to her contract, and he was within his rights to treat the end of her contract as normal by means of notice of termination. That was one week's notice, and the matter was urgent not only because the claimant's contract was ending on 31 December, but because Mr Bates was not going to be in the office after the next day or so. Importantly, Mrs Lingard accepted in cross examination that having started with the respondent only the previous day, she had not had time to read the relevant procedures and was therefore not aware that the dismissal procedure entitled the claimant to a different procedure upon termination. It was for these reasons that Mr Bates chose to telephone the claimant to convey the news to her rather than follow the procedure which should have applied. We were satisfied that he did not know about the protected disclosure regarding sleep-ins/NMW and that this played no part at all in either his or Mrs Lingard's thinking. This part of the complaint failed on causation.

235. The second part of the complaint related to garden leave. The letter from Mr Bates of 21 December 2016 at page 404 noted that the claimant was currently absent on sick leave, having received a fit note to 31 December, and said that for the avoidance of doubt he would consider that the claimant was on garden leave and was no longer required to attend work unless specifically requested to do so for the

duration of her contract. Although the claimant felt aggrieved at this, because her perception of the phrase "garden leave" was that it was almost tantamount to a suspension, we concluded that this was an unjustified sense of grievance on her part. She was on sick leave for the remaining ten days of the contract. She was not warned in the letter not to contact any colleagues. She retained access to her work emails. The fact she was on garden leave was not being publicised in any way. In those limited circumstances the fact she was relieved of any obligation to attend work could not reasonably be seen as a detriment, whatever the pejorative connotations in her mind.

236. In any event, putting her on garden leave was a sensible pragmatic step which had nothing to do with her protected disclosure about sleep-ins/NMW. This part of the complaint would have failed on causation in any event.

D13: By email of 22 December 2016 Mike Suarez dismissed the claimant's concerns and did not respond to an email asking for clarification.

237. Having been informed on the afternoon of 21 December by Mr Bates that her employment would be ending on 31 December, the claimant emailed Mr Suarez on the evening of 21 December at pages 407-408. The subject of her email was:

"Whistleblowing = dismissal!!!"

238. In the email she expanded on that. She said she had not received a response to her grievances within the timescale prescribed. She said she had raised whistleblowing concerns with Mr Suarez "around the practice, culture and bullying management style demonstrated by senior management of the HR function". She said she met Frank Jordan on 16 December, and three days later was sacked by Mr Bates. She made clear her view that the whistleblowing concern she raised was linked to the decision to dismiss her. She asked Mr Suarez what he was going to do about it.

239. The following afternoon the claimant received the dismissal letter from Mr Bates of 21 December and emailed Mr Suarez again at 4.13pm (pages 428-429). She used the same subject heading in her email and said that the dismissal letter was further evidence of bullying, if any was needed.

240. The detrimental treatment was said to be found in Mr Suarez's response ten minutes later (page 428). It was a brief reply informing the claimant that the matter had been assigned to Mr Jordan, and that the outcome would be communicated by Bill Norman. He then assured her that the council did not tolerate bullying or harassment and protected whistleblowers as per policy. The claimant responded within two minutes asking him to explain why she was dismissed within three days of talking to someone about her whistleblowing, and then clarified that she meant three working days. Mr Suarez did not respond.

241. We were satisfied the claimant could reasonably see this as a detriment. Mr Jordan was not aware that she had now been dismissed by Mr Bates, and therefore the suggestion by Mr Suarez that Mr Jordan would consider that matter appeared difficult to understand. Indeed, it was not until the New Year that Mrs Lingard asked Mr Jordan to review the emails (page 463). Further, she was entitled to regard Mr

Suarez's response as a brief response not engaging with the fundamental points she made.

242. However, we were satisfied that this had nothing to do with PD1 about sleep-ins/NMW to Mr Palethorpe. Mr Suarez did not know of it. The claimant was not even making that point herself: her email at page 407 made it clear that she regarded her "whistleblowing" as being about HR management style. She made no mention of sleep-ins in this exchange of emails. The response from Mr Suarez had nothing to do with her protected disclosure and this allegation failed on causation.

> **D14: By letter of 23 December 2016 Peter Bates dismissed the claimant's concerns when he said he would consider the claimant's email of 22 December 2016 when he returned from the Christmas and New Year break.**

243. Following the claimant's emails to Mr Suarez on 21 and 22 December (pages 428-429) alleging that her whistleblowing had resulted in dismissal, Mr Suarez spoke to Mr Bates and asked him to deal with it urgently. He was aware that Mr Bates and the other members of the executive team would not be in work after 23 December.

244. Mr Bates dealt with the matter in his grievance outcome letter of that date at pages 438-439. In the final paragraph he said he had been advised that day of the email of 22 December and that he would consider it as part of the grievance in early January when he returned from the Christmas and New Year break. The claimant alleged that this was a detriment because of her protected disclosure.

245. We rejected the contention that this could reasonably be viewed as a detriment. The claimant had raised a serious allegation about the link between whistle-blowing and dismissal on 21 December and it had been passed to Mr Bates on the last working day before the respondent's offices closed down. The claimant could not reasonably expect the substance of her complaint to be addressed in that time. Even though her employment was going to end on 31 December, the matter could properly be addressed in the New Year. It was wrong to regard this as a dismissive response by Mr Bates. It was a sensible pragmatic response given the timing.

246. However, even if we had found this to be a detriment, there was no evidence to suggest that Mr Bates was aware of the sleep-in protected disclosure to Mr Palethorpe. This allegation would have failed on causation in any event.

> **D15: By email of 24 January 2017 Paul Bayley dismissed the claimant's concerns and inaccurately recorded their meeting of the previous day, thereby failing properly to investigate her grievances.**

247. This allegation related to the way in which Mr Bayley dealt with the aftermath of his meeting with the claimant on 23 January 2017. It focussed on his email of 24 January at pages 499-500. In that email he summarised the "key exam questions" by reference to the desired outcomes from each of the grievances. For Grievance 4 he omitted an outcome he had identified in his preparation table at page 490, namely that the claimant wanted an equal opportunity to obtain suitable permanent employment. In cross examination he said he had removed this because during the discussion with the claimant it became apparent the restructure had been paused.

We were satisfied the claimant was still entitled to see this as a detriment, as it was a point of some importance to her.

248. More broadly, the claimant was also plainly dissatisfied with the limited amount of detail in the email of 24 January. Her response was very detailed and set out a range of matters which she said had been discussed. Again we were satisfied the claimant could reasonably see this summary of the meeting by Mr Bayley as a detriment: he did not provide her with a detailed note of the meeting for her to agree. There were concerns she had which were raised which he had not recorded.

249. However, there was no basis on which we could find that the approach of Mr Bayley was affected by PD1 on 28 November 2016 to Mr Palethorpe about sleep-ins and the NMW. Although we accepted the claimant's evidence that this matter was raised in her meeting with Mr Bayley, not least because he could not be certain it was not raised, we were satisfied it played no part at all in his mental processes. He was focussing on the grievances, which had nothing to do with sleep-ins/NMW. He confirmed in response to a question from the Tribunal that he had not seen the sleep-in paper supplied to Mr Palethorpe in later November.

250. We unanimously concluded that the way in which he dealt with the meeting of 23 January when summarising it the following day had nothing to do with the protected disclosure, and nor did the approach he subsequently took in his investigation of the five grievances. This allegation failed on causation.

> **D16: By email of 3 March 2017 Bill Norman refused to allow Peter Marren to participate in a meeting about the claimant's whistleblowing concerns.**

251. This allegation concerned the response by Mr Norman, the monitoring officer, to the request of the claimant to be accompanied by Councillor Marren at her meeting with Mr Norman about her whistleblowing.

252. The claimant mentioned the NMW issues to Mr Norman in her email of 26 January responding to his letter of 18 January in which he informed her that he regarded her whistleblowing matters as grievances.

253. There was a further exchange of emails in which he asked her for some more detail (9 February page 516) and she supplied him with some more information about sleep-ins and the fact she had been raising matters since November (16 February pages 524-525). The claimant was in contact with Councillor Marren by this stage and copied that email to him.

254. Her request to be accompanied was met by an email from Mr Norman of 3 March 2017 at page 597. In that email he made the point that section 8 of the whistleblowing policy adopted a tiered approach. The concern was to be raised in the first instance with the Chief Executive, the Monitoring Officer or the Corporate Manager for Governance and Audit. Only "in exceptional circumstances" where the employee did not feel able to contact any of those officers could the employee approach a member of the Audit and Governance Committee. As he was in contact with the claimant, and indeed arranging to meet her, he did not consider it appropriate for Councillor Marren to be involved at that stage.

255. His email made plain that if after that meeting the claimant felt unable to contact him further, she could involve Councillor Marren then.

256. His email was confusing in that the extracts from the procedure he then quoted did not include the relevant paragraph. It appears that he quoted paragraph 8.3 from the previous policy: it was not the relevant part. However, its meaning was plain.

257. We were satisfied that the claimant could reasonably see this as a detriment. She had been in touch with Councillor Marren and wanted to bring him with her to her meeting with Mr Norman.

258. However, we were also satisfied that Mr Norman was not influenced to any extent by awareness that the claimant had made PD1 about the NMW. His response was that of an officer insisting that the claimant comply with the relevant policy. Even though Mr Norman was not called as a witness, the ground for his decision had been shown by the text of his email at the time. The policy provided for the claimant to contact Councillor Marren only in exceptional circumstances where she felt unable to meet Mr Norman, and yet she was willing to attend a meeting with him.

259. Accordingly this allegation failed on causation, and all the complaints of detriment in employment failed and were dismissed.

Discussion and Conclusions – Unfair Dismissal

260. The legal test under section 103A was different: because she did not have two years' employment, the claimant had to show that the reason or principal reason for her dismissal was that she made a protected disclosure.

261. That required consideration of the mind of the decision maker. In this case it was clear that the decision to dismiss was taken by Mr Bates on the advice of Mrs Lingard.

262. We dealt with this in relation to detriment 11 above. The principal reason in the mind of Mr Bates for the dismissal communicated on 21 December 2016 was his belief that the claimant had rejected a permanent contract and that she did not want an extension. He took that from what she had put in her email to him of 9 December 2016 and from their discussion on 15 December.

263. That belief left him with nowhere to go: her fixed term contract was coming to an end on 31 December, and she was entitled to at least one week's notice. Time was short because he and the executive team would not be working after 23 December.

264. The email from Mrs Lingard of 20 December 2016 at page 403A set out her analysis of the situation, an analysis which Mr Bates plainly accepted.

265. As set out above, we found that he was not aware of PD1 regarding sleep-ins made to Mr Palethorpe at the end of November. We were satisfied that his reason for terminating the claimant's employment was that he believed she did not want to stay after the end date of her contract, and that this was a belief which had nothing to do with any protected disclosure.

266. As a result the complaint under section 103A failed and the unfair dismissal claim was dismissed.

Remedy

267. Because all the complaints were dismissed it was not necessary to consider remedy.

Employment Judge Franey

4 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 July 2018

FOR THE TRIBUNAL OFFICE