EMPLOYMENT TRIBUNALS

Claimant
Mrs. G. Leclerc

Respondent
AMTAC Certification Ltd

v

Heard at: Watford

On: 16, 17, 19, 20 and 23-27 July 2018

Before: Employment Judge Heal
Mrs. A. Brosnan
Mr. D. Sutton

Appearances:
For the Claimant: in person
For the Respondent: Mr. K. Charles, counsel.

Judgment with reasons was given orally on 27 July 2018 and judgment was sent to the parties on 8 August 2018. The claimant requested written reasons in writing and in time on 28 July 2018. Accordingly written reasons are provided.

REASONS

1. By a claim form presented on 25 January 2017 the claimant made complaints of public interest disclosure dismissal and detriment, breach of contract and unauthorised deductions from wages.

2. We have heard oral evidence from the witnesses listed below in the order given. Each of these witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called and then the witness was cross examined and re-examined in the usual way.

Gica Leclerc, the claimant;
Elizma Parry, Clinical Manager;
Barry Fitch, Former Head of Notified Body;
James Bradbury, Global Operations Manager (Notified Body);
Victoria Taylor, Interim Head of Notified Body;
Cara Rees, HR Business Partner and
Karen Dunlop, HR Business Partner.

3. The parties have provided us with an agreed bundle running to 4 lever arch files and 1991 pages. We have also been provided with a supplemental bundle of documents by the claimant and the supplemental bundle of documents by the respondent. The respondent's supplemental bundle, produced on the second day of the hearing, contained 6 items. We gave the claimant time to read the new documents. On consideration, she objected to our receiving documents 1 and 2 in evidence. We admitted documents 3-6 with her consent. We put consideration of documents 1 and 2 onto one side until Ms Taylor was available to give instructions about them. We returned to that consideration after having identified the claimant's disclosures. By that time, Mr Charles had reflected on the situation in the light of the disclosures identified and had decided not to rely on documents 1 and 2. We have not referred to them.

4. The claimant's supplementary bundle ran initially to 108 pages. The respondent did not object to our admitting that bundle in evidence. We gave the respondent an opportunity to read those documents. On the second day of the hearing, the claimant produced a further set of documents which were added to her bundle at pages 109-119 by consent.

5. Further documents were produced by the claimant on day 3. After having had time to consider these documents, the respondent agreed that they could be added to the claimant's supplementary bundle by consent at pages. The respondent handed in a two-page technical document review report, however it turned out that this was already in the bundle.

6. On day 4 of the hearing the claimant produced yet further new documents which were added to her supplementary bundle at pages 217 to 219, by consent. She also handed in page 220 which was a table of disclosures. However, it turned out that this too was already in the bundle.

7. On day 5 the claimant produced some manuscript notes which she said were her notes of skype calls with Elizma Parry. Mr Charles was unable to read the claimant's handwriting, so we asked her to transcribe them overnight. The transcript was produced on the morning on day 6 and added to the claimant's bundle by consent at pages 242 to 250. Mr Charles confirmed that he did not need to apply to recall any witness to deal with them.

Issues.

8. There have been three preliminary hearings in this case, on 24 April 2017, on 8 August 2017 and on 11 May 2018. The issues were most recently identified on 11 May 2018 by EJ Skeehan, as set out below.

Public Interest Disclosure

8.1 Did the claimant make a protected disclosure(s) as defined by section 43B ERA 1996?

8.2 If so, was the reason or principal reason for the claimant's dismissal, because she had made a protected disclosure(s) contrary to section 103 (A) ERA 1996?

8.3 The claimant will concentrate on four main areas of the alleged protected disclosures namely 'Suncoast Dental', 'Overtime', 'Active implants' and 'Shoulder Joint replacement'. (The disclosures relied upon are set out in the text of the reasons below. The disclosures are given numbers in bold in the text to enable the analysis for each to be identified).

8.4 Did the respondent subject the claimant to a detriment(s) on the ground that she had made the alleged protected disclosure(s) contrary to section 47(B) ERA 1996. The claimant relies upon the following alleged detriments:

8.5 Two mentors namely Elizma Parry and Victoria Taylor, assigned to the claimant, failed to perform the required mentor duties with regard to the claimant's signoff as a reviewer;

8.6 the respondent failed to sign the claimant off as a reviewer;

8.7 the respondent failed to sign the claimant of as an auditor;

8.8 the respondent failed to give the claimant a performance appraisal for the year end 2015 or 2016 or to provide her with any performance-related feedback. As a result, the respondent failed to consider the claimant for a salary increase for the year 2015 to 2016; (On day 5 of the hearing the claimant told us that the 2015 appraisal had been carried out, so we did not ask questions of Mr Fitch about it.)

8.9 the respondent failed to investigate the claimant's grievance;

8.10 the respondent gradually removed technical reviewer work/duties from the claimant, without justification;

8.11 the respondent gradually removed auditor work/duties from the claimant without justification and fails to recognise the claimant's previous audit experience;

8.12 the respondent failed to provide the claimant with a training programme and therefore she received no training to allow her career progression which was detrimentally affected.

Wrongful dismissal/breach of contract/unauthorised deductions from wages

8.13 Does the employment tribunal have jurisdiction to hear these claims? The respondent contends that these claims were not included and did not form part of the early conciliation and as such the tribunal has no jurisdiction?

8.14 If the employment tribunal has jurisdiction to hear the claims, did the respondent make any unauthorised deduction from the claimant's wages contrary to section 13 ERA 1996 or wrongfully dismissed the claimant by failing to make full payment claimant in respect of payment of wages in lieu?

9. On the first day of this hearing, Mr Charles confirmed that the respondent did not now contest jurisdiction to hear the claims of wrongful dismissal, breach of contract or unauthorised deductions from wages.

10. He pointed out that the claimant's witness statement made reference to the non-payment of national insurance contributions throughout the course of her employment. An analysis of the claim form showed that this claim had not been made in the claim form. Therefore, on the basis of *Chapman v Simon* [1994] IRLR 124, the tribunal had not been given jurisdiction over this matter. Therefore, it seemed to us that the claimant had to make an application to amend if we were to have jurisdiction. Accordingly, we drew the claimant's attention to the factors which would influence our discretion under *Selkent Bus Co Ltd v Moore* [1986] ICR 836 and we heard submissions from both sides accordingly. We decided not to grant the application to amend and gave full reasons orally at the time. Those reasons are as follows.

10.1 We applied the Selkent principles.

10.2 We considered the amendment sought to be a substantial amendment. It gave rise to a new cause of action for breach of contract. We noted that a different breach of contract had already been pleaded but the point now being raised was entirely new. The claimant was not simply adding a new detail to the existing claim.

10.3 The claimant said that she had told her solicitors about the matter and they did not include it in the form. This was the reason for the delay. If it is correct, it is her solicitors' mistake and she might have a remedy against them. We do not consider this to be decisive of the point however.

10.4 We have looked back at the matters discussed at previous preliminary hearings. We did this because we had been told that the matter had been raised before at a preliminary hearing. What had been raised however related only to the final payment and so Cara Rees in her witness statement has interpreted it.

10.5 We consider that the respondent would be prejudiced by the claim being raised at this point. Although we anticipate that the respondent would have records to deal with it, the time available for this hearing was already under pressure and further delays to get additional records would make postponement likely. There would be substantial delay before we could relist this hearing. The alternative is that the respondent would have to continue making enquiries about the new matter and producing evidence while this hearing was going on. That of itself would disadvantage the respondent and cause delay.

10.6 We bear time in mind as well. The claim is now made out of time. We consider that it was reasonably practicable to present this part of the claim earlier because the claimant tells us her solicitor made a mistake. It could with reasonable practicability have been raised at the time of the claim form.

11. On the first day of the hearing, we asked the parties to spend some time identifying the disclosures by reference to page numbers in the bundle. This was necessary because it was by no means clear to us from the list of issues above what were those disclosures. The parties did produce such a list and we read the documents referred to in the course of our pre-reading, however as we worked through it we found it impossible to identify what were the disclosures. This was in part because in some cases we were given page numbers for an email, but the disclosure was in fact made

in an attachment the page number of which we did not have. At other times reference was made, for example, only to the grievance letter at pages 107 – 131 without any page or passage being identified.

12. The problem became acute when we tried to arbitrate upon the relevance of documents when a party objected to the documents submitted in evidence. Therefore, we embarked on an exercise with the claimant working through document by document to make sure that we understood exactly what she said was each disclosure. This proved to be a time-consuming exercise. It took the morning of the third day of the hearing, until 12:42pm.

13. Had we not done this, the claimant would have been at real risk of failing to prove her case from the outset because her witness statement did not identify the disclosures relied upon.

Timetable

14. At the outset of the hearing, we set a timetable with the help of the parties for the hearing of the evidence. We asked the claimant and Mr Charles how long they expected to take in cross examination with each witness on the assumption that witnesses gave direct answers to direct questions. We told them that if they became worried that a witness was not cooperating so that they were not going to be able to finish their cross-examination within the time estimate given then they should tell us as soon as they became worried. Otherwise, we told them we would be likely to hold them to their time estimate. This was necessary so that we would be able to finish hearing in the time listed. Mr Charles did become worried that he was not likely to finish within his time estimate and told us so, however he was indeed able to complete his cross-examination of the claimant within the five-hour estimate he gave.

Concise statement of the law

15. In order to establish that she has made a public interest disclosure, a claimant must first show that there has been a disclosure of information. It is not sufficient that the claimant has simply made allegations about a wrongdoer. The ordinary meaning of giving information is conveying facts. Sometimes there are cases however of mixed primary facts and opinion which on balance can still qualify as disclosures of information. Just because something contains allegations does not mean that it does not also contain information. The question is simply whether it is a disclosure of information.

16. Once a disclosure has taken place we consider whether or not it can be characterised as a *qualifying* disclosure. We have to consider the nature of the information revealed. It is necessary that the claimant had a reasonable belief that the disclosure was in the public interest and tended to show one of the six statutory categories of failure. What is required is only that the claimant has a reasonable belief. It is not necessary for the information itself to be actually true. This statutory test is a subjective one because the Act states that there must be a reasonable belief of the worker making the disclosure.

17. Where there are a large number of disclosures the requirement is that there was a reasonable belief in relation to each one: it is not sufficient that the claimant believed in the general gist of her complaints.

18. It is necessary too that the claimant reasonably believed that the disclosure was in the public interest. Sometimes there will be a mixture of personal and public interest in which case it is a matter of fact for the tribunal as to whether there was sufficient public interest to qualify under the legislation.

19. Where a worker makes a disclosure in the context of a private workplace dispute, whether that will be in the public interest will depend on the features of the situation which will engage the public interest which might include the number of persons whose interests are engaged in the workplace dispute. We would also have to consider the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. We would have to consider the nature of the wrongdoing itself, for example, is it deliberate or inadvertent and also the identity of the alleged wrongdoer. For example, the larger or more prominent the wrongdoer, the more obviously should disclosure about its activities engage the public interest.

20. Section 47B(1) of the Employment Rights Act 1996 provides that a worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by her employer done on the grounds that the worker has made a protected disclosure. No qualifying period of employment is necessary to claim this right. If the claimant has made a protected disclosure, it becomes necessary to consider whether or not she has been subjected to a detriment as a result. Section 48(2) the 1996 Act provides that on a complaint under section 47B it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In a detriment case the test is whether the detriment was on the grounds that the worker has made a protected disclosure so that the disclosure must have been a 'material influence'. The test is that set out by Elias LJ in *NHS Manchester v Fecitt and others* [2012] IRLR 64 at para 45, [2012] ICR 372, "…s47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

21. Section 103A provides that an employee who is dismissed shall be regarded 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. This is a more stringent test than the test for detriment. The burden of proving the reason or principal reason is on the employer unless, as in this case, the claimant lacks the qualifying period of employment and therefore she has to show that the tribunal has jurisdiction to hear her claim. In that case the burden of proof lies on the claimant.

Facts

22. We have made findings of fact on the balance of probability. We have read and listened to the evidence placed before us by the parties and, where there is a dispute of fact, we have decided on the basis of that evidence what is more likely to have happened than not. There have been some very substantial disputes of fact in this case. In resolving those disputes of fact, we have not been able to rely on the claimant's evidence. She has made allegations of fabrication of documents without

any objective basis for doing so. Her evidence has not always been consistent with her own case. Her perceptions – particularly, but not only of her own performance, behaviour and abilities - are at variance with the actual wording of documents, and with the perceptions of clients, of colleagues and of her managers. By contrast we have found the respondent's witnesses' evidence to be consistent with the contemporaneous evidence and with each other. They have been ready to admit mistakes where they have taken place. Mr Bradbury in particular has impressed us as a witness of integrity.

23. In 1993 the European Directive for medical devices came into force. This sets out a loose framework requiring manufacturers of medical devices to conform to harmonised standards. These standards require specific tests, inspection and pass criteria. A manufacturer of medical devices is required to submit evidence of compliance with these standards to the relevant notified body.

24. The respondent is one of 5 medical notified bodies in the UK. The role of a notified body is to assess technical documentation and the quality management systems of manufacturers to ensure compliance with regulations. The manufacturers concerned are those who wish to release their products – medical devices – onto the European market. As a notified body, the respondent is responsible for certifying whether a device is fit for its purpose, safe and effective. If the respondent is satisfied, it issues a certificate to the manufacturer which serves as a licence for the manufacturer to release its products on the market in Europe.

25. A manufacturer of medical devices may choose which notified body it wishes to use, depending on the specific product and the notified body's scope of designation.

26. There is a competent body in the UK ('MHRA') which is the UK designating and competent body for medical devices and pharmaceuticals. It performs assessments of notifying bodies' competence and performance. If satisfied, it designates the notifying body to certificate devices to be marketed in the European Union.

27. The respondent employs technical reviewers whose role involves technically assessing device packages for safety and quality information in order to make recommendations as to whether to approve or reject an application for a certificate that would allow the medical device under review to be released onto the European market.

28. Once a device has been reviewed by a technical reviewer then a review is carried out by an independent reviewer who would also be employed by the respondent.

29. Prior to joining the respondent and until May 2007, the claimant was employed by a different notifying body called BSI. From May 2003 to July 2004 the claimant was a client services coordinator. From August 2004 to March 2005 she was an assistant scheme manager. In October 2006, she became a product manager technical specialist. She brought a claim against that company which resulted in a hearing from 26 October to 6 November 2009.

30. In February 2012 Ms Victoria Taylor joined the respondent as a technical reviewer. She retained that role until June 2017. In 2013, Ms Taylor became a member of the clinical team, ensuring that the respondent was compliant with the changing interpretation of clinical MEDDEV guidance.

31. In March 2013 Ms Elizma Parry began her employment with the respondent as a technical auditor, reviewer and client manager. Ms Taylor became Ms Parry's mentor. They had a good and successful mentoring relationship.

32. On 14 May 2014 Mr Barry Fitch began employment with the respondent initially as a senior technical assessor and auditor and after a few months he was promoted to the role of Head of Notified Body.

33. In 2014, the respondent was facing a very significant backlog of work. It was very short of auditors and technical reviewers. The theme of extreme pressure of work is one which has arisen repeatedly during the course of this hearing. This forms the backdrop to the claimant's employment with the respondent.

34. The claimant was employed by the respondent as an auditor and technical reviewer from 20 October 2014. She reported initially to Barry Fitch who was then Senior Lead Assessor. She was based at her home address but was required to travel nationally and internationally for the purposes of the work. There was a three-month probation period.

35. The letter offering the claimant employment dated 16 September 2014 said expressly, '*you have no contractual right to overtime*.'

36. The respondents staff handbook (8th edition, December 2009) also deals with overtime at clause 11:

'*The company believes that consistent and significant overtime over an extended period in any given department indicates lack of management control, and also points to an opportunity for job creation. Overtime must only be undertaken in those cases where a task cannot be completed within normal working hours, and where specific agreement of the relevant department manager and/or his/her senior manager has been obtained. Casual overtime not properly authorised or resulting from inefficient use of time will not be recognised for reimbursement*.'

37. On 19 September 2014 the claimant signed an agreement to opt out of regulation 4 (1) of the Working Time Regulations 1998 regarding weekly working time. This said,

'*I, Gica Leclerc agree that the limit in Regulation 4 (1) of the Working Time Regulations 1998 shall not apply to me and that my average working time may therefore exceed 48 hours for each seven-day period (as defined by and calculated in accordance with the Working Time Regulations 1998).*

This agreement shall apply from 20/10/2014.

I agree that I will comply with any and all policies of the Company, from time to time in force, which relate to its maintenance of records of my hours of work.

I can terminate this agreement by giving 3 months' notice in writing to the company.'

38. Although the claimant was appointed as a technical reviewer/auditor, before being able to carry out this role the respondent required such employees to undergo training and supervision and to be able to demonstrate their competence. Therefore, the claimant was regarded as a 'Technical Reviewer Under Training,' with a view to becoming a technical reviewer once and only if she had shown a satisfactory level of competence.

39. Even if an employee had had prior experience with another notified body, the respondent took the view that not all notified bodies were the same and regulations changed; therefore, it still required its technical reviewers or auditors to go through its own internal procedures and processes to ensure that they met the standards required by the respondent. It took this view with all members of staff, and not just the claimant.

40. The respondent's processes have been evolving during the course of the claimant's employment. In general, however, a new starter would be appointed a mentor and buddy. The same person could cover both roles. The buddy would help the new starter to settle in and become familiar with the respondent's procedures and practical matters.

41. A mentor was a senior and experienced technical reviewer/assessor who was assigned to the individual employee and who would provide him or her with guidance, feedback and advice on how to produce reports in accordance with the respondent's standards and expectations. Once a report had been reviewed by the mentor, it would then be subject to further assessment by the independent reviewer.

42. When both the mentor and the independent reviewer were satisfied that the employee's technical reports were up to standard then a recommendation would be made to the Head of Notified Body to sign the employee off as a technical reviewer. There was no set time limit as to how long this process would take: much would depend upon the progress of the individual employee and the availability of the mentor and independent reviewer.

43. At the time the claimant was employed, the respondent had a fairly loose training programme with regards to technical assessment. An auditor would need to do a lead auditor training course which was a five-day course.

44. The claimant was subject to the same training process as any other new starter.

45. There has been no suggestion in the evidence that we have heard that the claimant was anything other than a committed and hard-working employee.

46. On 21 October 2014 the claimant underwent the respondent's induction programme which involved an overview of clinical evaluation, design dossier processes, technical support for the design dossier team, unannounced audits, and overview of the centre of excellence and the client information form and approval.

47. Initially, the claimant was buddied and supervised by Samantha Baxter.

48. On 13 November 2014, Elizma Parry agreed to become the claimant's mentor although this arrangement did not take practical effect until early February 2015.

49. On 24 November 2014 at 11:00 the claimant wrote to Karen Breedon about a review of a dental implant, saying:

'*As I have emphasised in our skype conversation, this submission cannot be accepted by any NB as satisfactory, therefore I cannot see how their continuous certification is possible. My view is based on the information that the manufacturer has provided in the file and their response to the 7 (seven) NCs raised previously (in Nov. 2010) by the Intertek reviewer, at the time*.'

('NB' stands for Notified Body'. 'NC' stands for 'non-conformance or non-conformity').

50. The claimant says that that email is a protected disclosure (**1**).

51. By email dated 24 November 2014 at 13:34 the claimant wrote to Karen Breedon saying that she had completed a technical file review concerning a submission by Suncoast Dental. The claimant attached the review. The claimant says that this document constitutes a protected disclosure. The claimant identified for us all the passages set out below as disclosures which she said were protected. We set them all out in full.

52. The attachment contains a template headed technical documentation review report. The product reviewed is said to be a dental implant: uni post Implant System; posts/abutments. The claimant has identified this as product class 'b'. She has crossed a box saying technical documentation not accepted/corrective actions required within 30 calendar days.

53. Under the heading Structure of the Technical Documentation and a further subheading GL General comments she has written:

'*the client's response to Intertek's earlier (November 2010) review of the Technical Documentation consists of a response letter dated 24 October 2014 along with 2 (two) CDs containing 'the original, 2010 Suncoast Dental Technical files*'. (**2.1**)

54. She adds,

'*Note: The response of the manufacturer on the previous 7 (seven) NCs has formed the basis of this submission, current review and review outcome*. (**2.2**)

55. Under a heading NC2 Classification the claimant writes:

'*The NC2 was raised by a previous Intertek reviewer on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested) and as a hardcopy (i.e. not in electronic format as requested) ….(**2.3**)*

*Although the course of the device has been indicated the rationale as to how this is established (based on the manufacturers intended use of the device) was not provided. (**2.4**)*

The manufacturer stated that Posts/Abutments are 'Considered to be an implantable device' classified is it as an 'invasive in the Body Orifice, not surgically, in oral cavity long-term use'. Classification for Posts/Abutments does not seem appropriate and needs clarification.' (**2.5**)

56. Under a heading 3.8 Labelling and Instructions the Use the claimant writes:

'*The NC4 was raised by a previous Intertek reviewer on 06th November 2010 and the manufacturer provided their reply after 4 years, on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested).* (**2.6**)

In response of NC4 the manufacturer provided a copy of a set of updated label and instructions for Use (IFU) for 'Implants' and 'Posts'. These documents have been reviewed and it has been found that they do not provide all the information required by MDD ER 13.3 and 13.6 for example:
- *the address of the manufacturer (on the label and IFU)*.' (**2.7**)

57. Under a heading NC5 Results from Bench Testing the claimant writes:

'*The NC5 was raised by a previous Intertek reviewer on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it is has been requested). And as a hardcopy (i.e. not in electronic format as requested). The manufacturer has indicated in their letter to Amtak Certification Services dated 27th of October 2014 – the University of Alberta conducted the bench testing, 'along with reporting that the last war'. This took them a long time to complete*.' (**2.8**)

58. Under a heading NC 6 Clinical Data the claimant writes:

'*The NC6 was raised by a previous Intertek reviewer on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it is has been requested), and as a hardcopy (i.e. not in electronic format as requested).*' (**2.9**)

59. Karen Breedon replied to the claimant on 8 December 2014 thanking her for the assessment and asking whether the claimant had sent this to the client so that the client could complete its 'non-conformances'.

60. By email dated 8 December 2014 the claimant wrote to Karen Breedon with a copy to Barry Fitch. The claimant says that the contents of this email too are a protected disclosure. We have placed in italics those specific passages which the claimant identifies as a protected disclosure.

61. She said:

'Morning Karen,

Thanks for your message.

As you would realise, I have not sent my review to the client (**3.1**) (but uploaded to our database as soon as I could, as usual, and prior to the certificate expiry date), for the higher level review/approval within AMTAK Internek, as I have been doing this TF reviewing work under supervision (as, to my knowledge, I'm not an approved Technical File reviewer at Intertek yet and, as I understand it, I'm required to go through the applicable stages until I get that NB approval)….

Just to mention again, as shown by the findings of my review (review which I have done carefully and in an objective manner), the subject documentation is obsolete, incomplete and the NCs are significant, therefore I cannot see (based on the evidence) how this submission can be improved and certificate renewed. (**3.2**)

Who has seen by now my review that I emailed you on 24 November 2014, as it was quite urgent given the certificate expiry date was due on 28 November 2014? *Has one of our colleagues or/and Barry seen this review and my findings? Please would you let me know about it?* (**3.3**)

Karen, I have been actually awaiting reply from you, further to my email message and file review that I emailed you on 24 November 2014, the emails chain below), and was thinking that their certificate was going to be suspended (if not cancelled) during the days prior to 28 November 2014 and the client notified about the NB decision. I am honest and say that I did not understand what was happening is no news came from anywhere, including from the information available in the file. (**3.4**)

Karen, I would suggest that Barry should be informed without delay this file/client as he may want to see the review and my findings and site further, as appropriate. (**3.5**)

I would be most grateful if you could please let me know as soon as possible about the outcome of this action (Barry's review of this case and/or his decision) or if I need to do anything else necessary. Many thanks in advance. (**3.6**)

Karen, Just to make things easier and faster, I have reattached my file review and included Barry (FCC) in the recipient of this email message. You could approach as well as this matter is important.' (**3.7**)

62. In making the comments set out above, the claimant was performing the role which she had been employed to perform. She was carrying out her job. We do not consider that she was going above and beyond the normal tasks of her job. We are not, in saying this, considering the quality of her performance although we will turn to that below.

63. On 2 January 2015 Mr James Bradbury joined the respondent's employment initially as a technical assessor/lead auditor.

64. The 3 months of the claimant's probation period expired on 20 January 2015. It appears that the claimant was confirmed in employment by default in that no formal process was undertaken by which the question of whether she passed a probation period was considered.

65. Skype messages between the claimant and Mr Fitch at this point show that Mr Fitch was extremely busy so that he had minimal communication with the claimant. He did arrange for the claimant to meet Mr Fitch in the Milton Keynes office on 26 January 2015 to discuss the list of projects the claimant had worked on and also a training plan. In evidence, the claimant says that on that day Mr Fitch signed her off as a technical reviewer but that he never produced the paperwork to confirm this. If correct, this would mean that the claimant would have no case on issue 8.6.

66. Although there is ample evidence that Mr Fitch was too busy to deal with paperwork, on the balance of probability we find that he did *not* sign the claimant off as a technical reviewer at this point. In subsequent documents the claimant repeatedly refers to not having been signed off as a technical reviewer. We do not think she would have said this had Mr Fitch in fact signed her off; instead, we think she would repeatedly have been stating that she had been signed off.

67. In early 2015, Mr Fitch began to develop concerns about the claimant's performance. Samantha Baxter, who Mr Fitch regarded as very experienced, raised concerns that it was difficult to understand what the claimant was trying to say in her technical reports.

68. At about the same time Elizma Parry and Victoria Taylor raised concerns with Mr Fitch about the claimant's technical writing ability.

69. During the above period, the claimant was being supported by Samantha Baxter. On 6 February 2015 Elizma Parry accepted the role of mentor to the claimant instead.

70. In April 2015 the claimant received a salary increase.

71. Ms Parry accordingly set appointments in her diary to mentor the claimant. She put time aside to review the reports and to give the claimant feedback. Initially Ms Parry and the claimant had Skype calls with each other every 2 weeks. This changed however because of the volume of work. They ended up having Skype calls about every 3 weeks.

72. Both Ms Parry and the claimant worked from home in different parts of the country. The mentoring process involved the claimant carrying out a technical review and then producing a technical report which she sent to Ms Parry. Ms Parry would then give her feedback via a Skype call. Sometimes however Ms Parry would make amendments or make comments and suggestions in the report using track changes.

73. Ms Parry herself had responsibility for one of the respondent's biggest and most demanding clients. Together with the majority of the respondent's staff, she was working under substantial pressure.

74. We find that so far as permitted by the pressure of her work, Ms Parry was a conscientious mentor. She found the role of mentor to the claimant frustrating however and became concerned that the claimant might be exceeding her remit by consulting with the client and telling the client what to do and how to fix the problem. Conversely Ms Parry also became concerned that the claimant was exceeding her remit by being extremely prescriptive. Ms Parry found it difficult to reach a clear conclusion about these concerns however because she found the reports themselves unclear. When she attempted to understand what the claimant had done, by talking with her, she found that the claimant responded with so much detail that it was very difficult for Ms Parry to understand what the claimant was trying to say. Ms Parry found it difficult to reason with the claimant. Ms Parry did her best however to give advice and to make suggestions to the claimant about how to prepare reports and about how to clarify her writing.

75. Ms Parry found herself at a disadvantage to some extent in dealing with the claimant because Ms Parry did not hold the 'NBOG' codes relevant to some of the devices which the claimant was reviewing. (That is, she was not identified as having the expertise necessary to deal with a particular device.) There were limits therefore to what she could say about the technical side of the claimant's work, however she was able to give advice on written style and expression.

76. Independent reviewers themselves found the claimant's reports confusing. Patricia Colin, a technical file reviewer, fed back some very detailed queries and comments to the claimant and Ms Parry direct. The news of this problem also reached Mr Fitch.

77. By email dated 8 May 2015 Ms Parry forwarded a sample assessment by the claimant to Mr Fitch. She did this to illustrate her own concerns about the claimant. On taking a brief look at the assessment Mr Fitch thought that the claimant needed some guidance and 'alignment'.

78. To the claimant, Ms Parry was pleasant and reassuring. She told the claimant that she was happy to help her. In the meantime, she asked the claimant not to submit any further final assessments for independent review. She said that the claimant's technical assessments were in order but, 'it is around the administration etc… but we can iron out a few things.' This was Ms Parry's gentle expression of her concerns about the claimant's written style and tendency to exceed her remit. We do not read this email as an indication that there was nothing wrong with the claimant's reports but on the contrary that there were real concerns. However, Ms Parry plainly did not wish to damage the claimant's morale. We consider this to be good mentoring.

79. By email dated 18 May 2015, Samantha Baxter supported the decision to place the completed reviews by the claimant on hold.

80. Meanwhile, Victoria Taylor had already been sent one of the claimant's completed reviews for independent review. By email to Mr Fitch and Ms Parry dated 16 June 2015 she suggested that the claimant be brought into the office for some additional training on technical report writing. She said, 'I don't think she is quite there yet'. Ms Taylor had to spend a disproportionate amount of time on the independent review on the claimant's assessment. The respondent's policy required her to bill the

client for this time and Ms Taylor was worried that the manufacturer would complain. She too pointed out the need to improve the clarity of the claimant's assessments so as to save time and effort in the future.

81. Ms Parry herself took the view that the assessment referred to by Ms Taylor should not go to the client again until the issues of inappropriate assessment by the claimant had been resolved.

82. In early July 2015 Suncoast Dental wanted very much to have their EC certification on a particular project reinstated. They were chasing Mr Fitch daily and Mr Fitch accordingly chased the claimant for an update of her assessment of the technical documentation.

83. Accordingly, on 10 July 2015 at 13:25 by email the claimant responded to Mr Fitch and attached a specific response about the Suncoast dental file.

84. In the email itself, the claimant identifies the following passages as protected disclosures:

'*The details on the open NCs and the information I further requested from the manufacturer by my (previous) review report dated 07/06/2015 are summarised in the attached Response for you, also shown in the review report dated 07/06/2015.*

As you will see there is a classification issue there that also needs to be addressed. I added Elizma to the recipient of this message as she is my Buddy and as she wanted to discuss this issue with you internally. Class IIb dental devices are actually implants and I believe that the dental abutments are dental implants (and not class IIa devices as claimed by the manufacturer and the regulatory team). If class IIb, then with the same (class IIa device) submission to the NB be sufficient? It's not the same thing.

I just want to make another point here is file: The original findings are dated 2010, classification issue included… And it took about 4 years for the manufacturer to reply (they would not unless we have asked them for a reply last year) and they still did not provide the adequate information, when I reviewed it.' (**4**)

85. The claimant also identifies particular passages in the attached response as protected disclosures. They are as follows:

'*As requested, I sent the report to Elizma Parry (my Buddy) as well and explained about the classification issue (where my view is that the dental abutments are class IIb while the manufacturer had the previous CE certificate issued by Intertek covering the abutment as a class IIa device and where through current submission they continuously claim abutments are class IIa).*(**5.1**)

…

Abutments as Class IIb (dental implant)… new submission in a way… Does it need in House further Clinical assessment as well?

Elizma thought that you, the Head of NB should be informed about it as the classification issue could have an impact on other dental manufacturers (our NB customers). (**5.2**)

…

GL Reviewer's comments:

The NC2 was raised by a previous Intertek review on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested). (**5.3**)

…

The NC3 was raised by a previous Intertek review on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested). (**5.4**)

…

The NC4 was raised by a previous Intertek review on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested).(**5.5**)

…

The NC5 was raised by a previous Intertek review on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested). The manufacturer has indicated in their letter to Amtak Certification Services dated 27 October 2014 at the University of Alberta conducted the bench testing, 'along with reporting that was asked for', and this took them a long time to complete. (**5.6**)

…

The NC6 was raised by a previous Intertek review on 06th November 2010 and the manufacturer provided their reply after 4 years on 13 October 2014 (i.e. much later than it has been requested), and as a hardcopy (i.e. not in electronic format, as requested).' (**5.8**)

86. By email dated 10 July 2015 Excem Limited wrote to the claimant chasing the completion of her review on its product and pointing out that it was unable to sell its product and was suffering from great loss.

87. The claimant responded:

'*Hello,*

There is no need to pressurise me with such messages, as you have just emailed me.

I am doing my work to the best of my abilities and it is unfair that you send me such messages (see below your message dated 10 July 2015 10:54).

Kind regards,

Gica.'

88. Mr Fitch regarded that response as brusque, rude and unprofessional.

89. By email dated 14 July 2015 the claimant wrote to Ms Parry attaching a review report and findings in relation to Suncoast Dental. The claimant says that the attached report contains protected disclosures. The claimant took us precisely to page numbers of those disclosures. They are the same passages as are set out in paragraphs above.

90. By email dated 15 July 2015 the claimant wrote to Mr Fitch complaining about her relationship with Ms Parry. She complained about Ms Parry's insistence that she recheck or redo a report (Suncoast Dental). The claimant found Ms Parry's attitude superior and was upset by it. The claimant for her part found the relationship frustrating. The claimant said that it would be a good idea if Ms Parry was not her buddy any longer.

91. Ms Parry herself had already sent an email to Mr Fitch on the same day and about the same subject. She said that the claimant was very upset and very emotional, was very defensive and kept interrupting her.

92. It became clear to Mr Fitch therefore that the mentor relationship between Ms Parry and the claimant was not working. Indeed, Ms Parry herself confirmed this by email dated 16 July in which she said, 'I may not be the right person to buddy her.'

93. Therefore, Mr Fitch agreed to find another mentor for the claimant, however there was a delay of some months before he succeeded. It appears however that the mentor relationship was not formally ended, and Ms Parry and the claimant continued in at least a nominal mentoring relationship although Ms Parry was too busy to give mentoring her full attention and indeed the relationship was not a productive one because the claimant and Ms Parry did not get on. The reason for the failure of the relationship was because the claimant did not and would not accept feedback from Ms Parry.

94. During this period Mr Fitch was still keen for the claimant to succeed however he continued to receive adverse feedback about her.

95. On 18 August 2015 by Skype message, the claimant told Mr Fitch that she really did not want to do auditing but only file reviews. She said that this was because she was affected in a detrimental way by the way the scheduling system worked. It reached Mr Fitch's attention that the claimant had upset the scheduling team who arranged the audits because of the way she communicated to them her refusal to

conduct further audits. The scheduling team forwarded the claimant's messages to Mr Fitch and Mr Fitch found them brusque and aggressive, we think reasonably.

96. Mr Fitch also received feedback from clients in which they told him that they could not understand what the claimant was trying to say in her reports. They were going around in 'loops' with her which meant the whole process was extended and taking too long.

97. By email in September 2015 the claimant sent to Ms Parry a number of files to be buddy reviewed, including one relating to Suncoast Dental. The claimant says that this included the same concerns as raised above and that it is also a protected disclosure. (We do not number this separately as it is a repeat of the above.)

98. During September there were client complaints about delays, not only in relation to the claimant. These did not form any reason for the claimant's ultimate dismissal, so we do not set them out in detail here.

99. By email dated 25 September 2015 the claimant wrote to Karen Breedon. She says that the entire email is a protected disclosure. (**6**) It says:

'Hi Karen,

Many thanks indeed for your message on Suncoast Dental G101901798. Karen, I still need to know more about this file and its progress, perhaps you could help with some information?

I do understand that Barry had been speaking to Tony at Suncoast, however I am afraid that I do not understand what you mean when saying: I think it is now all sorted out. As the file review been stopped and the application rejected (as there are indeed open major NCs that are outstanding since 2010)… Or what exactly has been discussed and decided/sorted out?? Please can you clarify and provide further details, as appropriate and if available.

1. *Yes, as I have just mentioned, I need to know what has been discussed/what are the stages involved in this file following Barry's discussion with the manufacturer in question.*
2. *I trust that you also have seen Elizma's comments on the file (I have emailed them to you as well) and as a result of the review/the progress seems to become confusing… What has been cancelled and when and why (see Elizma's comments in my previous email message to you). Please can you clarify-see client file for further information.*
3. *Also, has been decided/should this file be stopped now (see Elizma's comments, as already mentioned).*
4. *What about manufacturer being required to provide more/adequate information for a class IIb device, when they only submitted information when they thought that device (abutment) was a class IIa instead of its correct classification (which is class IIb)-what has been decided about it/discussed by Barry and the manufacturer. Has this been discussed/decided it, can you please clarify?*

5. *Also, what about the biocompatibility review that seems that is required (also please see Elizma's comments, as suggested already) has this beed (sic) discussed and decided?*
6. *If so, who and when the biocompatibility review is going to be done (i.e. has it actually been decided to go on the file review instead of just dropping the file and also instead of informing the manufacturer about the outstanding NCs and about the unacceptable huge length in time (years of delay for them, since Oct 2010 until end of 2014 /beginning of 2015 also) they took to provide some device information (still insufficient and not satisfactory).*

Any other clarification would be really very much appreciated. I look forward to receiving your reply and many thanks in advance.'

100. From 9 to 13 November 2015 claimant attended a lead auditors' training course run by QCS. The claimant had wanted to undergo this training. Mr Fitch received feedback from other delegates on the course that they found the claimant difficult to understand. Mr Bradbury passed on to Mr Fitch that the course trainer did not consider the claimant to be auditor material.

101. From 15 to 16 December 2015 the respondent sent the claimant on another training course about performing technical documentation. Mr Ron Nash who was in charge of the course subsequently told Mr Fitch that it was difficult to understand what the claimant was saying. The certification manager, Brian Moan told him that the claimant would not listen at times, was very fixed in her ideas and was difficult to work with. Mr Fitch passed this on to Mr Bradbury.

102. This was consistent with feedback given by Mr Moan to Mr Bradbury at other times, that is that the claimant went from being polite and friendly to aggressive and emotional.

103. At the end of December and the beginning of January 2016 Mr Fitch passed on to Mr Bradbury the role of line manager to the claimant. Mr Bradbury was promoted to Global Operations Manager (Notified Body) and therefore he took over line management responsibility for the assessors. He now reported to Christine Forcier. He gave Mr Bradbury feedback about her performance. Mr Bradbury came to realise that there was a backlog of unresolved issues relating to the claimant.

104. Accordingly, Mr Bradbury involved Cara Rees of Human Resources in his concerns about the claimant's performance. She advised Mr Bradbury to address the matter informally at first.

105. By email dated 12 January 2016 Mr Bradbury wrote to all his staff asking them to complete self -assessment forms in preparation for a one-to-one meeting to complete the performance appraisal form.

106. In preparation for a performance review meeting with the claimant, Mr Bradbury sought feedback from Ms Parry about her. Accordingly, by email dated 19 January 2016 Ms Parry responded praising the claimant's keenness, enthusiasm and commitment. She said however that some of the assessment work had insufficient depth and focused on semantics rather than technical depth. She said that this was

reflected in feedback from independent reviewers. She noted the need for the claimant to be assigned a new buddy and also recommended that the claimant receives some further 'TLC' guidance on doing assessments.

107. By email dated 21 January 2016 the claimant sent a form claiming overtime for 20 January 2016 to Tania Hart with a copy to Mr Bradbury. The claimant says that this is a protected disclosure:

'*Dear Tania,*

please see the attachment-GL overtime 20 Jan 2016, for your review and approval. It is related to an audit (as Observer, as planned by the office) to VacSax company in Plymouth (with Peter Pringle) and to travel back on the final auditing day, after the ordered closure meeting in the afternoon; non-journey (from 5.00pm until night) via London.' (**7**)

108. Mr Bradbury replied saying that he was very surprised to see the claim for overtime for audit. He asked the claimant to explain why she had sent this request because as he said to his knowledge she had some approval many months ago to work some overtime to support technical files, but this was not extended to audit. He said, additionally, that the claimant's contract did not include any entitlement to overtime.

109. By further email on 21 January 2016 the claimant replied to Mr Bradbury with a copy to Mr Fitch. She says that this too is a protected disclosure in its entirety (**8**).

110. She says,

'*I am concerned that you have not understood me (sic) overtime requests, that you are not mentioning anything about those which have not been paid to me for months, despite of the work done; also I must admit that the way you generally look at the overtime work and it's payment it's something I would not have expected.*

However, to explain and clarify your surprise about overtime request, as requested: travelled long hours during the night beginning with 5.00pm, after the audit final day was completed. To me, this is the time which is the end of the daily working time and to it many hours have been added (instead of for example staying longer in Plymouth and not travelling on my own at risky hours during a journey at night several changes), and this is the reason why I have sent this overtime report. If this is not reasonable, then I would consider it in the future. The contract also does not say that I am required to work extra hours/do overtime work and not be paid for, is this correct? There are company documents that are applicable to company employees generally and to overtime as well, and I believe that they should be applicable to me too. Do you think that I am excluded from doing overtime work or if I do overtime work I have to do it without payment, this is what you have just suggested in your message today? Please would you clarify your views and expectations on this matter to me?

I should in the future stay one more night at hotel and not put myself at risk when travelling on my own, long journey, several changes, winter conditions and night.

Would this be acceptable to you/the company? Please would you let me know so I would do my best to comply with it in the future, as necessary.

In your message below, you mentioned that: Additionally, your contract does not include any entitlement to overtime. (AMTAC Technical file reviewers and Auditors) contract? What I actually mean by this question is: According to your message today (see below), do you mean that my colleagues are entitled to overtime work (Technical file and any overtime work) and I am not? If so, why? Please would you clarify? Also, if my contract does not include any overtime entitlement, why I was sent messages about technical file overtime work to be done in order to reduce the backlog why no one stopped me doing extra work/overtime work by now, except you?

It's my first time when I am sending this kind of overtime audit related report (although I have travelled after working hours e.g. for the audit at Medical Gas Solutions, worked outside working hours during audits days as well) but have made no overtime claims about yet).

James, As you would also like to realise, this recent/today submitted audit related overtime request has nothing to do with my previous overtime requests (which would have been paid long time ago and which are still not paid, to my frustration, although Barry confirmed to me that they should be paid months ago). But these would you also let me know whether my overtime technical file related work is going to be paid, and if so, when?

111. Mr Bradbury responded by further email saying that he had approved the claimant's previous overtime submissions for technical file support recently. He said however that auditors could not and did not claim overtime hours worked over their normal hours and travel time did not count as working time. He said that the claimant's contract, like his own and that of other auditors did not allow for overtime claims.

112. By further email on 21 January 2016 the claimant replied and included the following which she says is a protected disclosure:

'*Yes, yet it is not clear to me whether I am required to travel late after working program, travelling long hours after a few days of auditing, in a trip with several changes, on my own as a woman, at risk (believe it you or not) during the night and winter conditions and actually not paid for extra time used or any of these. I look forward to receiving related information from Eugen (as he was copied in/cc in correspondence related to this matter) on auditing and overtime, as necessary. (**9.1**)*

*Concerning the audits which were planned for me to attend in Feb 2016 and that have been cancelled today, you would like to realise that, by cancelling them, the outcome would be that the information I gained through hard work in preparation for that auditor training, the recent 13485 training itself and the audit with Peter Pringle on 19-20 /01/2016 is going to be forgotten (at least some of it), unless used in due time. (**9.2**)*

I will just follow your decisions and do what I am required to do, but in the meantime I am saying what I think it is right to say about matters that concern me, my work in company as well, and I expressed my frustration as necessary, as well.'

113. By further email dated 21 January 2016 the claimant wrote to James Bradbury and Eugene Kotlirov saying that she was still not signed off yet either as a technical file reviewer or as an auditor although others who had joined more recently than her had been signed off. She said that she had not been supervised for months and wondered if he could help with assigning her a new buddy. She accepted that Elizma Parry was very busy.

114. Mr Bradbury was concerned that the claimant was worried about travelling to audits alone and as a woman felt at risk. It was in the nature of the auditors' role that they travelled alone to a considerable degree. Travel could be global and was necessary to carry out surveillance and unannounced inspections at clients' premises. Mr Bradbury discussed this with Ms Rees. They concluded that it would not be possible to make changes to the role and therefore decided that in the interests of the claimant's safety and out of their duty of care to her, it was appropriate to stop her performing any further audits.

115. On 27 January 2016 a meeting took place between Mr Bradbury, Mr Fitch, Cara Rees of human resources and the claimant. The purpose of the meeting was to discuss the claimant's lack of mentor and also the concerns about travelling to audits by herself. There are no minutes of this meeting, but the claimant did complain about the length of time it was taking to approve her as a technical reviewer and that she had not had a mentor for several months. Mr Bradbury set about finding her a mentor as a result of this meeting, with a view to signing the claimant off as a technical reviewer if she could prove that she was up to standard.

116. At the meeting Mr Bradbury told the claimant that he had been worried by her concerns about travelling alone to audit work. It was not possible to provide her with a chaperone. He told her that because of the nature of the work and the requirement to travel, the respondent would not require her to perform any further audit work.

117. The reason the respondent removed the claimant's auditor duties was because she had said that she was at risk as a woman travelling alone. We note that she had made no reference to concerns about other women employed by the respondent and appears also to have been making the point in the context of and to strengthen her claim for overtime. She did not believe that she was making her comments about being a woman travelling alone for the benefit of anyone besides herself.

118. There is a suggestion in Mr Bradbury's statement that the claimant claims to have made a protected disclosure at the meeting, although she has not identified it in her own list. (**10**) In any event the claimant complained at this meeting about the length of time that it was taking to approve her as a technical reviewer and she complained that she had not had a mentor for a few months. We accept Mr Bradbury's evidence about this meeting.

119. In February 2016, Ms Parry was promoted to Global Clinical Manager.

120. An initial date of 17 February 2016 was set for Mr Bradbury to carry out the claimant's appraisal. This date was postponed twice due to Mr Bradbury's pressures of work. Although Mr Bradbury was able to carry out some performance appraisals for some of his staff in 2016 he was not able to carry out an appraisal for the claimant or

for other members of staff. The reason for this was pressure on Mr Bradbury's time and diary.

121. In February or March 2016 Mr Bradbury approached Victoria Taylor. He said that there were some issues with the claimant and her performance and that he was considering terminating her employment, but he wished to give her one last chance to prove herself. Accordingly, he asked Ms Taylor to become the claimant's mentor for a period of 12 weeks. He asked Ms Taylor in particular to help the claimant with quality of her report writing.

122. Ms Taylor agreed and booked 4 hours per week for 12 weeks in her diary to mentor the claimant.

123. On 2 March 2016 Mr Bradbury wrote to Mr Fitch and Ms Rees about challenges that the claimant was presenting on a personal and professional level. He expressed the frank view that the respondent had been negligent in its duties in training, coaching and giving candid feedback to her in a timely manner. He set out his plan for dealing with the situation as follows:

1. '*Assign Vicky Taylor (she has already agreed) as Gica's coach/mentor/technical guide from 1st May for around 4 hours per week. This time may or may not be billable depending on the tasks.*
2. *Set out clear expectations in areas such as NC description, client communication, conduct, etc. relevant to the TD assessor role she is performing*
3. *provide clear and candid feedback about performance of the TD assessor role*
4. *measure the performance against expectations over 3 months*
5. *review performance*.

   He concluded, '*at the end of this, either Gica will have developed into a competent billable assessor and be happy, or she will not we have to talk about letting her go, or she will leave during the process as she is not happy with what is expected (what everyone else is doing).*'

124. At about the same time, Cara Rees advised Mr Bradbury that he could begin a formal performance improvement plan.

125. On the same day, Mr Bradbury sent an email to the claimant informing her about client concerns that a technical review had taken too long and accordingly the client was questioning the invoice.

126. At about the same time, the complaint emerged from a client, Xcem about the claimant's conduct as a reviewer for its product. It said that the fundamental problem was that the claimant failed to communicate over the telephone and she failed to understand issues. The claimant was not approachable, did not answer queries and took an entrenched position that the product was a new product although the client said it had provided her with 'reams' of evidence that it had been making the product for 15 years. It said that the experience was causing it great financial loss.

127. The claimant responded to the complaint on 3 March saying that she did not accept the client's comments and she refused to work any further with the client.

128. By email dated 16 March 2016 Mr Bradbury told Ms Rees that together with Christine Forcier and Barry Fitch he had agreed to start a formal performance improvement plan with the claimant.

129. By email dated 21 March 2016 Mr Bradbury revealed to Victoria Taylor that he found dealing with the claimant and her work something of a burden. Having expressed his feelings however, he set out that what he wanted to do was to define exactly where everything related to the claimant's work was and then define a precise action plan. Therefore, for the next 5 or 6 weeks he was not going to allocate anything new to the claimant. He told Ms Taylor that she was, bar one other person, the only person who he would trust to coach the claimant through and give feedback. He asked her specifically to help the claimant with the complaint from Xcem.

130. On the same day, Mr Bradbury confirmed to Mr Rich and Ms Rees that he had stopped allocating any further work to the claimant until the current issues were cleared and Ms Taylor started as coach from 1 May. He confirmed that the claimant was not signed off as a technical reviewer and although he thought that his course of action was logical and safer for the respondent's business he did not think that the claimant really accepted it.

131. Ms Rees replied immediately sending Mr Bradbury forms for a performance improvement plan, however Mr Bradbury did not use these forms in assessing the claimant's performance.

132. On 21 April 2016 another complaint relating to the claimant's work into Mr Bradbury's attention. The client, Orthocare, had raised the complaint in December 2015 however, perhaps because of a mistake in Mr Fitch's email address it appears that the complaint was not logged or investigated.

133. The claimant alleges that Mr Bradbury fabricated this complaint. We reject this allegation: we do not accept that the respondent would invent an email string showing that a complaint was made in December but that there was an embarrassing failure to log or investigate it until April. Moreover, the complaint includes quotations from the claimant which are consistent with her somewhat abrupt style, e.g. '*Please respond to the NB findings in the review report just the same way as any other medical devices manufacturer does*'.

134. The claimant met with Victoria Taylor in mid-April 2016 and they agreed that Ms Taylor would become the claimant's mentor. Ms Taylor duly became the claimant's mentor on 1 May 2016 although she had already been doing some work with the claimant about client complaints.

135. Ms Taylor sent an email to Mr Bradbury on 4 May having had her first session dealing with the claimant's work. She said that her first item to work on with the claimant was presentation of her NCs and improving her use of definitions. Once she was writing more clearly then it would be easier to determine if the actual technical issue raised was appropriate. She had set the claimant a specific task for the week to look through four sections of a client submission which Ms Taylor had already assessed and to write up the NCs she found from those sections. They could then

compare notes on the following Wednesday. In parallel, Ms Taylor was working through one of the claimant's assessments submitted in 2014. The claimant had completed her own assessment of it in June 2015 that had not gone out to the client. Ms Taylor was adding to it her own notes of what she would do differently next time and what needs to be corrected this time.

136. Pausing there, we consider that Ms Taylor's approach demonstrates the care with which she undertook the mentor's role. We find her approach thoughtful and reasonable.

137. On 5 May 2016 Christine Forcier (Global Program Manager) who was based in Canada, requested a short meeting with Mr Bradbury and Ms Rees about the claimant and her performance. In a frank email, Ms Forcier weighed up the risks of litigation when dismissing an employee with less than two years' service. She pointed out that the claimant had been employed for one year six months and if the respondent could prove that it had given her the opportunity to improve and give feedback then there would be no issue. She said that she would really like to terminate the claimant's employment and not waste any more time and money. She added, '*everyone seems to agree that we should not have employed her in the first place so there seems to be little or no hope*.'

138. In order to prepare for that meeting Mr Bradbury approached Ms Parry for feedback about her work with the claimant under her mentorship. Ms Parry responded that she did not see an improvement during the time she tried to mentor the claimant. She said that because she did not have the same codes as the claimant in most assessments it was too risky for her to be the claimant's buddy as there were technical/clinical issues that she could not help with. Independent reviewers showed that the claimant's assessments were not ready yet and she had missed some critical technical issues. Ms Parry said that mentoring the claimant took a lot of time, energy, patience and exasperation.

139. On 9 May 2016 the short meeting between Ms Forcier, Mr Bradbury and Ms Rees took place. Ms Forcier expressed the view that they were wasting the respondent's time and resources and they needed to make a decision about the claimant. She followed this up with an email dated 13 May to Ms Rees and Mr Bradbury asking them to take the necessary steps to terminate the claimant's employment by the end of the following week.

140. However, Mr Bradbury - who we have found to be a witness of integrity, clarity of thought and strength of mind - refused to act on that strong request by his superior and insisted that because they had started the mentoring with Ms Taylor and improvements were being seen, he could not give the claimant notice the following week.

141. On 31 May 2016 Mr Bradbury wrote to the claimant by email saying that he would like to have a call with her later that week to talk about a few things that should be her focus for June and July. He set out some matters for her to digest before that call:

'*We had discussed some points during our last meeting which focused mainly around following concerns:*

- *Too much detail in the technical assessment report*
- *Lack of clarity in technical report findings*
- *Performing full reviews of sampling Technical Files instead of an abridged assessment*
- *Confusing/frustrating communication with clients*
- *Not taking feedback on board from mentor*

In order to support you achieving an improved standard, Vicky Taylor has offered to provide coaching, guidance and support for May, June and July. Obviously May has passed now and Vicky has provided some useful guidance I believe, which she confirms you are taking on board.

We will take time out to review performance at end of June and July to ensure that:

- *Your technical assessment reports are neither lacking detail or over detailed*
- *The wording of your findings is easily understood, clearly written and fact based*
- *Sampling of technical files is performed in an abridged way*
- *Your communication with clients is clear, unambiguous and appropriate.*
- *Feedback provided by Vicky to help you perform your role correctly has been taken on board*

If, despite this coaching, by the end of July I cannot see that we are in the position where you are in a position to perform lone assessments of technical documentation to the required standard, I will need to carefully consider your future employment within AMTAC.'

142. The claimant's case is that in June 2016 she made protected disclosures in telephone conversations and Skype calls that file reviews were performed by reviewers who were not adequately qualified to do such work. These reviewers were Ms Parry and Ms Taylor. By this, she meant in particular that they did not have the necessary 'codes' to review particular devices. (**11**)

143. She says that she told Ms Taylor on the telephone at the end of May or the beginning or middle of June that she (Ms Taylor) did not hold code for the catheter under review and that she should not be doing the review if she did not have that code.

144. The claimant also says that she told Mr Bradbury in June 2016 that if he did not sign her off, her files were going to be evidence at an employment tribunal because her work was good, and the work of others was not good. She says she repeated '*about catheters and joint replacements'*. (**12**) She said she knew this because she had seen the CVs of others and their work was not adequate.

145. These disclosures were, she says, made orally.

146. Where there is a dispute between the claimant's evidence and that Victoria Taylor, we accept that of Ms Taylor. We have found Ms Taylor be a careful and knowledgeable witness. In particular, she appears to have had the claimant's best

interests at heart and to have set out genuinely to improve the claimant's performance. She has impressed us too with her detailed knowledge of the area of expertise.

147. She selected a review which she had already carried out concerning a particular catheter. She gave this to the claimant as a training exercise, not as a real review for the client. She selected this review because although she and the claimant held different codes, the codes which each held enabled them both to review this particular device. We have heard a great deal of detailed evidence about these specific codes but we do not consider it necessary to rehearse that evidence here. Suffice to say that we accept Ms Taylor's evidence that she did hold a code which enabled her to review this particular device and she explained to us in precise detail why that was the case.

148. More importantly at this stage we find that the claimant did not say to Ms Taylor during May or June that Ms Taylor did not hold the correct code for this review (**13**). We accept Ms Taylor's evidence that had the claimant done so she would have given to the claimant the same careful explanation which she gave to us. We note that the claimant wrote a long and detailed email to Ms Taylor on 2 June 2016 about this very device without making the point she now makes that Ms Taylor did not hold the correct code.

149. On the contrary, the claimant's email of 2 June 2016 is positive about Ms Parry's mentoring of her and is also positive about Ms Taylor's mentoring. The claimant thanked Ms Taylor for all her help and support, saying that she found it useful.

150. On 2 June 2016 in preparation for the Skype call with the claimant, Mr Bradbury told Ms Taylor about his plan for that call and asked for comments. She agreed with his summary of the areas where the claimant needed to improve (as set out in the letter we have quoted above) but declined to comment on the bullet point *'not taking feedback on board from mentor*' because she said she was not sufficiently far into the mentoring process.

151. Although the Skype call had been planned for 6 June, in fact Mr Bradbury had to postpone it until the following week. When the call took place, he explained his concerns to the claimant about her performance and her general attitude, however he found that she would not listen, and she did not accept that she herself might be part of the reason why the respondent had '*all these issues'*.

152. We find that the claimant did not say to Mr Bradbury during that Skype call that Ms Parry and Ms Taylor did not have the correct codes or skills to review the relevant catheter or joint replacements (**14**). Given that, on the claimant's own case, she was looking ahead to possible tribunal proceedings, we think that if she had said this and genuinely had these concerns she would have raised them in writing at the time. She did not do so.

153. By email dated 15 June 2016, Ms Taylor wrote to the claimant about a report which had not been used as a training exercise. She expressed some concern that she did not understand some comments on NCs.

154. By email dated 20 June 2016 Mr Bradbury asked Ms Taylor for a talk about the claimant and his recent discussion with her about her performance, attitude and

communication. He said that he had been very direct with the claimant about the non-technical aspects of the job which needed improvement.

155. On 23 June 2016 Mr Bradbury forwarded to the claimant an email from Orthocare thanking the respondent for a proposed reduction in fees following the earlier complaint and saying, amongst other things, that the respondent had raised nonconformances that were not in any way clear or concise, leaving it rather difficult for Orthocare to understand what the nonconformance was, let alone to be able to provide a response. The review in question had been performed by the claimant.

156. By this point Ms Hind Goreish had been appointed training manager. On 28 June 2016 Mr Bradbury contacted her and Ms Taylor to confirm an arrangement for a communication coach to help train the claimant with listening, written work, and speaking slowly and clearly.

157. On 2 July 2016 Ms Thomas, the communication coach sent Ms Goreish feedback on her session with the claimant. She said that the claimant was pleasant with a good command of English language and appropriate grammar. She seemed motivated to do well in her job and took pride in being thorough. At the beginning of the session the claimant spoke slowly and carefully and did listen, however she did not appear to take in everything that Ms Thomas said. As the conversation moved on, the claimant spoke faster, more quietly, did not breathe much, there were no pauses and the claimant did not give Ms Thomas an opportunity to enter the conversation. Ms Thomas recommended that if the claimant wanted a more positive result from conversations, she should speak more slowly, speaking shorter sentences and take a breath for the next sentence. The claimant should pause to give the other person an opportunity to speak and she needed to make the other person aware and convinced that she had heard what they had said correctly.

158. By email dated 6 July 2016 Ms Goreish sent to Ms Thomas a sample of a written report produced by the claimant, asking for help in improving the claimant's written nonconformities.

159. Ms Taylor and Ms Goreish continued to work with the claimant on her written and oral communication skills during July 2016.

160. By email dated 15 July 2016 Ms Taylor wrote to Mr Bradbury saying that the claimant believed her work was acceptable, that there were no issues and that where complaints have been received, the manufacturers were at fault. Ms Taylor thought that the claimants NCs were getting better but that the process was time-consuming and disheartening/draining for Ms Taylor. Ms Taylor did not think that a one-to-one process was working and hoped that Ms Goreish could take over the burden.

161. At this stage, Mr Bradbury began to feel that '*enough was enough'*. Meanwhile, Ms Taylor continued to try to mentor the claimant.

162. By email dated 26 July 2016 the claimant sent to Ms Taylor a report about 'active implants-meniscus'. This was purely a training assessment. The actual manufacturer's information and report had been dealt with in 2015 and was also known to the respondent's regulators. As a project it had been completed in 2015.

163. The claimant identifies passages in this report as protected disclosures as follows (**15**):

'*The copy of IFU provided in the file is identified as 00060 rev. B and dated 13 October 2013. No clear information provided to indicate whether IFU relates to the device which undertook the changes (e.g. 'four additional sizes 35, 45, 55, 65 are similar to sizes 30, 40, 50, and 60 respectively, with additional thickness of 0.8-1 mm'), as appropriate.'*

'Clarification required about my reference was made to Doc. 000 33 dated 2006 (which refers to mechanical properties characterisation of PU resin, the tensile behaviour before and after gamma sterilisation) and why no justification was provided about its relevance to the device in question. A copy of 000 33 was provided. The subjects devised within this submission is made not from PU resin and it is Ethylene oxide sterilised.'

'No correlation provided between IFU and CER on intended purpose information.
Within CER it is stated for example that: The NUsurface Meniscus Implant is a device developed for painful medial compartment meniscal deficiencies of the knee after having a previous meniscal surgical procedure.

Within IFU it is stated: For patients with (a) painful medial meniscus tear(s) and/or insufficiency, the purpose of the NUsurface meniscus Implant is to help restore the function of the medial meniscus.'

'*Clarification required about the change of IFU (as mentioned on page 21/24 of CER) and details about when and how the NB was informed about it.*
See page 21/24 of CER where it was stated: 'The main purpose of the present clinical evaluation was to substantiate through clinical evidence the proposed change to the definition of the indications as stated in the Instructions for Use (doc. 00066) of the NUsurface meniscus Implant and in the Instructions for Use (doc WI-00019 and WI – 00118) for the NUsurface Trial Meniscus Disposable Instruments and Surgical Instrumentation.'

164. Ms Taylor received and scanned it sufficiently to see that there had been a marked improvement in the area of 'cannot document findings clearly'. Therefore, to the extent that she looked at the document her reaction was fairly positive.

165. However, she had been given a twelve-week period from 2 May to 23 July in which to mentor the claimant. She was now outside that period. On 28 July she had received information from Mr Bradbury suggesting that the claimant's employment may be terminated. Therefore, she did not review this report in detail.

166. On 26 July Mr Bradbury heard from Ms Goreish that some of the claimant's nonconformities still were not clear. Ms Goreish sent the claimant an email to this effect.

167. It was at this point that Mr Bradbury decided that the respondent had tried its best to bring the claimant up to the standards required. He thought that they had

allowed a more than reasonable time for her to demonstrate her competence, but she was still not able to do so. He felt it was unlikely that they would ever get to an acceptable point with the claimant or that the amount of time it would take was justifiable. Therefore, he decided to terminate her employment. He confirmed this in an email to Ms Rees and Ms Forcier on 28 July 2016.

168. By email dated 29 July 2016, which we accept as a genuine email expressing her authentic views, Ms Taylor told Mr Bradbury that mentoring the claimant had been a very draining matter. She had struggled to communicate effectively with the claimant. She had found her final call with the claimant on 14 July very difficult. The main problem as Ms Taylor saw it was that the claimant did not accept that her work was substandard and therefore did not believe that there was a problem to fix. Some improvement came when two assessors both pointed out to the claimant that they did not understand some of nonconformities. When manufacturers complained the claimant was convinced that the fault was that of the manufacturer. The claimant also took too long doing her assessments. She did not take feedback well. On the other hand, there had been a marked improvement on the one area of nonconformity writing.

169. By email dated 31 July 2016 Mr Bradbury confirmed his reasoning about his decision to Ms Forcier and Ms Rees. We accept that this was his authentic reasoning. He said that the main drivers were his own conversation and communication with the claimant as well as feedback from Ms Parry and Ms Taylor. He highlighted that the claimant had shown some improvement in dealing with nonconformities that he remained concerned about her confusing, incorrect and unclear findings for Xcem and Orthocare. He noted that there had been several client issues or complaints about the claimant's communication and work. Verbal communication with the claimant continued to be very difficult and time taken to perform assessment work was too long. The claimant created a challenging work relationship with her mentors. He had no evidence that the respondent could provide files to the claimant to work on in isolation. The claimant did not believe that she was remotely responsible for the problems they were experiencing, and he doubted that she would be able to do her job to the required standard.

170. Mr Bradbury therefore invited the claimant to a meeting on 10 August 2016 at a Premier Inn. In advance of that meeting he sent to Ms Rees a draft script of what he proposed to say. This script includes a statement that the respondent had taken a decision to terminate the contract with immediate effect and that the decision was non-negotiable. It is therefore clear to us that Mr Bradbury had made up his mind to dismiss before anything was said at the meeting on 10 August.

171. Mr Bradbury met with the claimant and Ms Rees as planned on 10 August. Mr Bradbury ran the meeting according to his script. He told the claimant that her work did not meet the standards of a notified body. The respondent felt that it had provided support but in the long term was concerned that the claimant was not going to reach its standard. It is therefore taken the decision to end the claimant's employment with effect from that day. The claimant would be paid three months in lieu of notice.

172. We do not accept that the claimant repeated all of her alleged protected disclosures at this meeting (**16**). We do accept that she complained to Mr Bradbury that other people did not have the correct NBOG code. The claimant did not give

specifics about which code, which device or which person or for what work the people did not have the correct code.

173. By letter dated 15 August 2016 Ms Rees confirmed the outcome of this meeting with the claimant. That is, the claimant's employment was terminated with effect from 10 August 2016 because the claimant's work was not up to the required standard expected within a notified body. The claimant would be paid three months' notice pay and accrued but untaken holiday of 6 days.

174. By letter dated 18 October 2016 the claimant presented a 23-page grievance to the respondent. She says that this letter too contains protected disclosures.

175. The claimant's table of disclosures only identified the grievance letter as a disclosure, without identifying any particular passage within it as a disclosure. When we sought a more precise identification of the disclosure, the claimant identified for us very substantial passages of this grievance as disclosures (**17**). It would make this already long judgment too lengthy to quote them all in full. We append a copy of the grievance to this judgment with the relevant passages marked. Neither party has analysed in submissions whether or not those passages amount to protected disclosures.

176. The claimant alleged simply in the issues that the respondent did not investigate her grievance properly. It was not clear to the tribunal or the respondent until about 4:15pm on day 7 of this hearing in exactly what respects the claimant said the grievance was not properly investigated.

177. She told us that her complaints about it were that the respondent should have investigated:

177.1 the cause of the dismissal;

177.2 why the claimant was not signed off,

177.3 the disclosures about active implants;

177.4 the claimant said 'about the overtime point the respondent only took one side and did not look at all of the claimant's concerns about travelling late after work';

177.5 she said they did not look properly at the NBOG codes. She said she put down a list of the codes in her grievance and they should have looked at the files of reviews done by Vicky Taylor when she did not have the codes;

177.6 she said they did not ask Ms Parry if she had the codes on orthopaedics and dental;

177.7 she said they did not ask Ms Taylor if she had the codes on orthopaedics and dental;

177.8 she said on the Suncoast matter they should have looked at the claimant's file but did not;

177.9 She said the respondent should have looked at her ability to communicate;

177.10 She said the respondent should have looked at all the issues she now relies on as detriments as well as her communication coaching and all the complaints raised against her because there was evidence to show that she was not guilty.

178. Mr. Paul Sayer was appointed as the chair to hear the grievance. He was employed as the Operations Director for Transportation Technologies and is now Managing Director.

179. The claimant elected for the grievance to be dealt with in writing.

180. Mr Sayer read the grievance letter together with all its attachments. He interviewed all of the people listed by the claimant in her grievance. These were Elizma Parry, Hind Goreish, Lucie Janicatova, Victoria Taylor, Barry Fitch, Tanya Hart Denning, Frank Lowe, David Scarr, James Bradbury, Denise Harding, Steve Meakins and Cara Rees.

181. Mr Sayer did investigate the cause for the dismissal, in particular by interviewing Mr Bradbury. He made findings about the cause of the dismissal at page 11 of the grievance outcome letter. He found that the respondent made the decision to dismiss the claimant on the grounds of poor performance, specifically in relation to failing to listen and take on board constructive criticism from peers and mentors, being unable to engage with clients or colleagues, at times being confrontational and unprofessional, being unable to document findings and continuing to be too detailed and critical in assessments.

182. Mr Sayer investigated why the claimant's approval as a technical assessor was delayed. (We think this is what the claimant means by 'not being signed off'.) Mr Sayer dealt with this matter at page 3 of the outcome letter. He found that the respondent was required to put employees through its own qualification process, even if they had experience with other companies. He made detailed findings about the claimant's performance and behaviour. He noted that the claimant had ceased to do audits after she had raised concerns about travelling alone. So, he investigated and made appropriate findings about why 'approval was delayed'.

183. Mr Sayer investigated and then made findings about 'the disclosures about active implants'. This appears at page 12 of the outcome letter.

184. The overtime point was also investigated. Mr Sayer deals with this at page 6 of the outcome letter. The claimant had complained that as a result of her challenging the respondent on overtime matters the respondent unfairly decided to stop her auditor career progression. Mr Sayer examined this and found it to be incorrect, in that the respondent had listened to the claimant's concerns about travelling and had therefore agreed not to send her on audits. It is not the case therefore that the respondent only took one side and did not look all of the claimant's concerns about travelling late after work'.

185. Mr Sayer looked at the issue of the NBOG codes. His findings appear at page 12 of the outcome letter. The claimant in her grievance complained that Ms Taylor and Ms Parry did not have the relevant NBOG codes. The respondent accepted, according to the outcome letter, that Ms Taylor did not have the relevant codes: there was no need therefore to look at the files in relation to her.

186. The claimant said the respondent did not ask Ms Parry if she had the codes on orthopaedics and dental. However, Mr Sayer records that Ms Parry acknowledged that she did not have the same codes as the claimant.

187. The claimant said that the respondent did not ask Ms Taylor if she had the codes on orthopaedics and dental. Again, this is dealt with at page 12 of the outcome letter and also at page 14. Ms Taylor freely accepted that she did not have the relevant codes to assess the claimant's technical ability. However, she was assessing the claimant's structural report writing, not her technical ability.

188. The claimant said that on the Suncoast matter the respondent should have looked at the claimant's file but did not. Paul Sayer had read the claimant's grievance and the numerous attachments that she provided. Her appendix 1 attached the documents she relied on about Suncoast. This was read.

189. The claimant said that the respondent should have looked at her ability to communicate. It did this however: this was a significant part of the reason for the dismissal that Mr Sayer investigated.

190. The claimant said that the respondent should have looked at *all* the issues she now relies on as detriments as well as her communication coaching and all the complaints raised against her because there was evidence to show that she was not guilty.

191. The respondent worked through and investigated the issues actually raised by and the evidence supplied by the claimant and her grievance letter. That was reasonable and appropriate. It is not to be expected that an employer will foresee the way a case will be put at the tribunal in the future. It deals with the grievance as placed before it. The claimant's real complaint appears to be that the grievance investigation did not agree with her and it should have agreed with her. Just because it did not agree with her, does not mean that it did not consider the matters she now says it failed to consider.

192. We consider that the respondent did investigate claimant's grievance properly and carefully.

Analysis.

193. The respondent argued that because many of the various disclosures were carried out as part of the nature of the claimant's work, they were not protected disclosures: she was simply doing her work. We disagree. There is no exception in the 1996 Act for a disclosure carried out as an integral part of a worker's work. We think that it was in the very nature of the claimant's work that she would potentially make protected disclosures. Her job involved, by its very nature, communicating information

about possible issues which would carry a real risk to health and safety or might involves breaches of legal obligations.

194. So, we do not accept that it was not possible for the claimant to be making protected disclosures, just because she was carrying out her work. However, given that she was employed to communicate information relevant to health and safety, we think that may lessen the likelihood that this employer would subject her to detriment or dismiss her because of any disclosures intrinsic to her performance of her work. We think this because we have found this employer to be carrying out its functions with integrity. We think it supports appropriate disclosures about health and safety risks that arise as part of its service to its clients.

195. Nonetheless the claimant says that she has made a significant number of different disclosures. We have numbered them in bold above for (we trust) ease of identification.

1. (paragraphs 49 - 50): is not a disclosure of information. It is an assertion that a client's submission is unsatisfactory and cannot be accepted. Nothing in the disclosure tends to show any of the matters in section 43B(1).

2. (paragraphs 51 to 58). We have broken this down further:

2.1 (paragraph 53) contains no information tending to show any of the matters in section 43B(1). It says what a client's letter contains.

2.2 (paragraph 54) also contains no information tending to show any of the matters in section 43B(1). It is a statement of what forms the basis of the claimant's submission.

2.3 (paragraph 55) is a complaint by the claimant that the manufacturer has been dilatory and has provided information in the wrong format. It contains no information tending to show any of the matters in section 43B(1).

2.4 is a complaint that the manufacturer has not provided information. There is no information tending to show any of the matters in section 43B(1).

2.5 is an analysis of the correct classification of a device. There is no information tending to show any of the matters in section 43B(1).

2.6 is a complaint about delay by a manufacturer and about the format in which information is provided. There is no information tending to show any of the matters in section 43B(1).

2.7 says that labels and instructions for use do not provide the information required by MDD ER 13.3 and 13.6, for example the address of the manufacturer. We understand that the claimant is saying that the proposed label and instructions for use do not comply with a European Directive. We think that is or would be a breach of a legal obligation. So, we think that this statement is a disclosure of information tending to show a likely breach of a legal obligation, if it is not corrected. We think the claimant reasonably believed that. We consider that this would be in the public interest for medical devices and equipment to be properly labelled and the manufacturer clearly

identifiable and so the claimant reasonably believed. The disclosure was made to the claimant's employer. We consider that this is a protected disclosure, albeit it is made as an intrinsic part of the claimant's work.

2.8 is a complaint of delay by a manufacturer and of providing information in the incorrect format. There is no information tending to show any of the matters in section 43B(1).

2.9 This is a repeat of 2.6. It is not a protected disclosure.

3.1 (paragraph 61) The claimant says that she has not sent a review to a client. There is no information tending to show any of the matters in section 43B(1).

3.2 The claimant complains about the subject documentation provided and says that there are significant non-conformities. She does not say what these are. This passage is an allegation with no information.

3.3 is a question, not a disclosure of information.

3.4 is a complaint about a lack of a response, not a disclosure of information.

3.5 discloses no information

3.6 discloses no information

3.7 discloses no information.

4. (paragraph 84) The claimant raises issues about the correct classification of devices or equipment. Then she complains again about the delay by the manufacturer in providing information and about inadequate information being provided. There is here no information tending to show any of the matters in section 43B(1).

5.1 (paragraph 85) The claimant makes points about a classification issue. There is no information tending to show any of the matters in section 43B(1).

5.2 The claimant says that the matter could have an impact on other dental manufacturers but says nothing about a breach of a legal obligation or any risk to health and safety, of indeed any of the matters referred to at section 43B(1).

5.3 to 5.6 These are all repeats of 2.6.

6. (paragraph 99) is a request for information, not a disclosure of information.

7 (paragraph 107) makes a claim for over time. It does not assert a failure to comply with any legal obligation to pay overtime. It is not a disclosure, protected or otherwise.

8. (paragraph 109 - 110) is an email saying that the claimant's overtime requests have not been paid. It gives information about the risks to the claimant of travelling at night. Examining that further:

8.1 The claimant did not have a reasonable belief that she was entitled to overtime. Her contract clearly stated that she was not entitled to overtime (see paragraph 35 above). The working time opt out which she had signed (paragraph 37) plainly had no bearing on overtime. This does not qualify for protection.

8.2 The claimant's complaints that she had not received payment for overtime that had been specifically agreed were information showing a breach of a legal obligation, but she did not have a reasonable belief that they were made in the public interest. She was complaining only about her own private rights.

8.3 Similarly we consider that the disclosure about being a woman at risk when travelling alone at night was not a matter which the claimant believed or reasonably believed was in the public interest. The respondent is a private employer. The claimant made the complaint in fact only in relation to herself and in the context of wanting overtime payments for the time spent travelling. The disclosure was made in self-interest only. The respondent was not deliberately putting women at risk. We have been given no evidence of the numbers of women who might have been affected. So, this disclosure does not qualify for protection.

9.1 (paragraph 112) This is a complaint about being a woman travelling alone at night and does not qualify for protection for the reasons set out above.

9.2 is a complaint about cancelled audits. It points out the waste caused by cancelling the audits but there is no information tending to show any of the matters in section 43B(1).

10. (paragraph 118) The claimant complained about the length of time taken to approve her as a technical reviewer and about not having a mentor for a few months. She disclosed no information tending to show any of the matters in section 43B(1) however.

11. (paragraphs 142 and 146). We have found as a fact that these alleged disclosures were not made.

12. (paragraph 144) The only evidence the claimant gave was that she repeated 'about catheters and joint replacements'. This is too vague to be evidence of a disclosure.

13. (paragraph 148) We have found that this alleged disclosure was not made.

14. (paragraph 152) We have found that this alleged disclosure was not made.

15. (paragraph 163) This is a report identifying lack of information from a client, reporting the claimant's request for clarification and then a statement of the information supplied by the client. The claimant reports what was supplied without comment on what it means. There is no information tending to show any of the matters in section 43B(1).

16. (paragraphs 170-172) we have not accepted that the claimant made any disclosures of information at the meeting of 10 August 2016. At most, she said that

other people did not have the right codes. This is too vague to convey information that tended to show any of the matters in section 43B(1).

17. (paragraphs 174 to 192) We have found as a fact that the respondent did not fail to investigate the claimant's grievance. In the circumstances of the way this case has been presented, we have not therefore embarked on the exercise on analysing all the alleged disclosures contained in that document. The claimant has not proved the detriment alleged.

196. The claimant has made one protected disclosure (2.7 above). However, we have been able to make clear findings about the causes of the dismissal and the alleged detriments. For the reasons given below we do not find that the dismissal or detriments were caused by the protected disclosure proved or indeed any of the alleged disclosures, whether protected or not. Even if we are wrong about any of the above findings rejecting the claimant's other alleged disclosures, we would still find that she was not dismissed or subjected to detriment because of any of the alleged disclosures. [The only *possible* exception to this might be the issue about audits. If we were wrong that the claimant did not reasonably believe the disclosure (about the risks of being a woman travelling alone at night) to be in the public interest and if we were also wrong that removing the claimant from audits did not amount to a detriment (see below) then the respondent did remove the claimant from audit duties because she had disclosed information about being a woman traveling alone at night. There might however be issues about time and possibly about whether the respondent was motivated by the fact of disclosure or by its concerns about the claimant. In the circumstances, we do not consider it proportionate to examine those points.]

Dismissal

197. We have found as a fact that the sole reason for the claimant's dismissal was that put forward by respondent: her poor performance. The reasoning was that set out in Mr Bradbury's email of 31 July 2016 which we have accepted as authentic. (Indeed, the claimant did not even put to Mr Bradbury that he had dismissed her because of any of her alleged disclosures, even though she was prompted to do this by the tribunal.) Therefore, the reason for the dismissal was not any alleged disclosure, whether qualifying or not.

Detriments.

198. We look at the alleged detriments in turn.

Detriment 1. Two mentors namely Elizma Parry and Victoria Taylor, assigned to the claimant, failed to perform the required mentor duties with regard to the claimant's signoff as a reviewer.

199. Ms Parry and Ms Taylor did not fail to perform their mentor duties: both were assiduous, thorough, conscientious and fair. They performed their duties. So, the claimant has not proved that the alleged detriment took place. That being the case, the cause of the detriment is strictly irrelevant. However, in so far as the mentors did not succeed with the claimant, that in both cases was because the claimant did not engage with the feedback and guidance they were giving.

Detriments 2. and 6:

The respondent failed to sign the claimant off as a reviewer;

The respondent gradually removed technical reviewer work/duties from the claimant, without justification;

200. The respondent did not sign the claimant off as a reviewer. It did remove her reviewer duties. We consider that these amount to detriments.

201. The respondent made its own judgments about the claimant's abilities on the basis of what it saw of her performance. The respondent did not refer back to the claimant's performance with previous employers as the claimant has argued that it should. On the basis of what it saw and experienced of her, it both removed her technical reviewer duties and did not sign her off because she was not performing to its standards, despite extensive mentoring, coaching and training. In neither case was either decision influenced at all by any disclosure made.

Detriments 3 and 7

The respondent failed to sign the claimant off as an auditor;

The respondent gradually removed auditor work/duties from the claimant without justification and fails to recognise the claimant's previous audit experience;

202. The respondent did not sign off the claimant as an auditor and it did remove her auditor duties.

203. The claimant had told Mr Fitch that she did not wish to do audits. It was not a detriment to remove from the claimant duties which she had said she did not wish to do. She raised concerns about audits because she said she was unhappy travelling alone as a woman. The respondent acceded to her concerns and removed her auditor duties

Detriment 4: the respondent failed to give the claimant a performance appraisal for the year end 2015 or 2016 or to provide her with any performance-related feedback. As a result, the respondent failed to consider the claimant for a salary increase for the year 2015 to 2016;

204. The claimant herself told us that there *was* an appraisal in 2015.

205. Mr Bradbury did fail to conduct a performance appraisal for the claimant in 2016. This is a detriment. He fully intended to carry out the appraisal and even set a date for a meeting, however this never took place because of his pressing work commitments. The claimant was not the only member of his staff to whom this happened in 2016. The reason was not to do with any disclosure, whether or not it qualified.

Detriment 5. The respondent failed to investigate the claimant's grievance;

206. The respondent did not fail to investigate the claimant's grievance or fail to investigate it properly. It read the claimant's lengthy and detailed grievance letter together with all its appendices. It interviewed 12 witnesses. It did not agree with the claimant, but that does not mean that it did not investigate properly. There was no detriment.

Detriment 8. The respondent failed to provide the claimant with a training programme and therefore she received no training to allow her career progression which was detrimentally affected.

207. We were referred to two training plans dating from January and August 2014 relating to Mr Scarr and Mr Meakin, one of which dates from before Mr Fitch's time with the respondent. The claimant refined her case during the hearing to say that she was not given a training programme comparable to Messrs Scarr and Meakin *in writing*. She acknowledged that she did receive training: and we have set out the training she received in our findings of fact. Mr Fitch did arrange to meet with claimant to discuss training (Skype message 22 January 2015) but no *written* training plan emerged. We accept his evidence that this was because of the continuing pressure of work. The respondent did not therefore fail to train the claimant and did not fail to produce a training programme in writing because of any disclosure, protected or otherwise.

Breach of contract

208. The only money claim remaining before us was the claimant's claim that the respondent deducted too much tax from her pay in lieu of notice. We have been given no evidence about that. Cara Rees was called but the claimant did not cross examine her on this matter. Ms Rees says that the claimant was paid £12,562.50 as her 3 months wages in lieu. That included the 75% which would usually be deducted and paid into the claimant's pension. The respondent could not pay that 75% into the claimant's pension because her contract of employment had come to an end. The result was that she was taxed on the amount actually paid to her.

206. The respondent was in breach of contract in that it dismissed the claimant without notice. There is no suggestion that she was guilty of gross misconduct, so the respondent was not entitled to dismiss without notice. The purpose of compensation for breach of contract is to put the claimant back, as much as money will do it, into the position she would have been in had the contract been performed. Had the contract been performed, the claimant would have been able to pay the 75% into her pension for those three months. Therefore, she would have been subject to tax on a lower amount, so the amount deducted for tax in those three months would have been less.

_____
Employment Judge Heal

Date: …08.11.18……..

Sent to the parties on: ....08.11.18.....

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For the Tribunal Office