EMPLOYMENT TRIBUNALS

Claimant: Mr M Heywood

Respondent: Otter Controls Limited

HELD AT: Manchester **ON:** 19-28 February 2018
13 April 2018
(in Chambers)

BEFORE: Employment Judge Feeney
Mr A G Barker
Mr C Clissold

REPRESENTATION:

Claimant: Mr T Kenward, Counsel
Respondent: Mr S Jones, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal under Section 98 and 103A of the Employment Rights Act 1996 succeed.

2. The claimant's other claims are dismissed.

REASONS

1. The claimant brings claims under Section 98 of the Employment Rights Act 1996.

2. A claim of automatically unfair dismissal by reason of a protected disclosure Section 103A of the 1996 Act.

3. Detriments due to making a public interest disclosure, Section 47B of the 1996 Act.

4. Disability Discrimination under Sections 13, 15, 19 and 20 of the Equality Act 2010.

List of Issues

Unfair Dismissal

5. What was the reason or principal reason for the claimant's dismissal, did the respondent act fairly or unfairly within the meaning of Section 98(4) of the Employment Rights Act 1996 ("the 1996 Act") in dismissing the claimant.

Automatically Unfair Dismissal by reason of protected disclosures

6. Did the claimant make qualifying protected disclosures of information and

7. If so, was the principal reason for the claimant's dismissal that he made such protected disclosures.

Public Interest Disclosure Detriment

8. Did the claimant make qualified protected disclosures of information?

9. If so, was the claimant subjected to detriments.

10. Having regard to the burden of proof was the claimant subjected to detriment on the ground that he had made any such protected disclosures.

Disability Discrimination

11. Was the claimant a disabled person within the meaning of the Equality Act Section 6 at the relevant time.

Direct Discrimination

12. Has the claimant proved facts from which the Tribunal could conclude in the absence of any other explanation that the claimant was treated less favourably because of disability than an appropriate comparator, if so is the respondent able to provide a non-discriminatory explanation for the treatment.

Discrimination arising from disability

13. Did the respondent treat less favourably because of something arising in consequence of his disability?

14. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim.

Indirect Discrimination

15. Did the respondent apply provision, criteria or practice "PCP" to the claimant which it also applied to persons without the claimant's disability?

16. Did the PCP put the persons with the claimant's disability at a disadvantage when compared with persons without the disability?

17. If so, did it put the claimant at that disadvantage.

18. If so, can the respondent show that it was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

19. Was the PCP applied to the claimant, if so what was the PCP.

20. Did it put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with such persons who were not disabled?

21. Did the respondents know or should they have known that the claimant was disabled and was put at that substantial disadvantage?

22. Did the respondents take such steps as is reasonable to take to avoid the disadvantage?

Witnesses

23. The Tribunal heard from for the claimant the claimant himself, for the respondent Dr David Smith, Chief Executive and Chairman of the respondent. Miss Sally Lowles, Personnel Services Officer, Mike Colling, Finance Director, Julie Woolley, Pension Scheme Co-Ordinator, Paul Boundy, Engineering Director.

24. We had an agreed bundle to which an additional document minutes of meeting between the claimant and Jerry Southan were added during the course of the hearing.

Tribunal's Findings of Fact

25. The claimant had begun working for the respondent on 4 June 1979 when he was 20. He had always wanted to work for the respondent and had family members working there but was unable to undertake his apprenticeship with the respondents. He completed his apprenticeship with an alternative Engineering firm and began working for the respondent from 4 June 1978 until his employment was terminated on 31 October 2016. He was employed from 1979 until 1987 as a Production Fitter, from 1987 to 1989 as a Tool Maker and Shift Supervisor, between 1989 and 2015 he held various roles, Production Line Manager, Development Technician, Process Manager, Technical Buyer, Production Engineer Buyer and finally Group Technical Tooling Manager. The claimant's job took him all over the world including Europe, Asia and United Kingdom.

26. In March 1982 on the claimant's 23rd birthday he became eligible to join the respondent retirement benefit scheme and his service commenced on 1 April 1982. It was a defined benefits pension scheme, it was extremely generous, pensionable service up to 40 years could be accrued and at that point an employee would be entitled to draw an annual pension of 40/60th i.e. two thirds of the final salary (most schemes are 40/80 i.e. providing half of the final salary as a pension). His expected retirement date was 11 March 2022, the date of his 63rd birthday.

27. In line with their many defined benefit schemes particularly in the private sector, the respondent in 2007 sought to limit the liabilities of their pension scheme.

28. The respondent held a series of presentations regarding changing the pension scheme in 2007/2008. The main proposal was to limit increases in future pensionable salary to 2.5% per annum from 1 November 2008. This would be applied with effect from 31 October 2008. By that stage the claimant already had 26 years of pensionable service though he had not at this point addressed his mind to what the changes might mean for him.

29. The purpose of the changes to the 2007/2008 scheme in the mind of the respondents was to achieve a situation where pensionable salary was capped at 2 ½% of the pensionable salary for the previous year or less if no salary rise was incurred. It therefore meant that if you received a higher salary rise than 2.5% not all of this would be counted for your pensionable pay figure. Accordingly, you could receive a higher salary than the notional salary which would be used for the calculation of the pension. However, it is not clear what the respondents thought the effect this would have on already accrued service pre- 2008 compared to post 2008. From an employer's point of view it would be beneficial if the cap on pension salary applied to pre 2008 service, but to be clear in this case it was not for the financial benefit of any individual member of the respondent firm but in order to ensure that the pension scheme could continue functioning within a proper limit of liabilities.

30. The claimant received various salary increases, in some years he did not receive any but for example in 2010 he received a 3% rise, in 2012 a 3.47% rise, in 2013 he received a 13.80% salary rise and after receiving no rise in 2014 received a 25% salary rise in 2015. Clearly this last rise was very substantial.

31. In 2015 the claimant started thinking about retirement planning and he consulted his brother who is a Financial Advisor (Andrew Heywood ("AH")). He suggested the first step was to obtain a transfer value of his benefits. It was never clear what the purpose of this was, certainly legislation had been introduced so that individuals could extract capital from pension scheme, subject to in some circumstances tax, but the claimant in cross examination did not think this was the purpose. Nevertheless, he asked one of the member nominated trustees of the pension scheme for a transfer value on 21 May 2015 and he was advised to contact Julie Woolley the company's Pension Scheme Co-Ordinator.

32. On 21 May he wrote to her asking for a quotation for the transfer value of his pension and posing the following questions: -

(1) From the date received how long is the quote valid?

(2) What penalties are incurred re transferring out of the system early?

(3) Where can I obtain a copy of the latest accounts of the pension scheme?

33. The claimant received a quotation of preserved benefits and transfer values from Friends Life on 16 June. He also received a letter from the respondent advising him of the pitfalls of transferring out his pension or capitalising any part of it. The claimant sent this information to his brother who assisting him in preparing more questions for Miss Woolley and he sent a further letter to the respondent. The first question in that letter was: -

"(1) is the transfer correct value correct as it would indicate a lower pensionable salary than my current position. My Financial Adviser using my latest wage slip calculated this and came up with a completely different figure.

(2) what is the commutation factor for the conversion of pensions to tax free cash.

(3) do the Trustees allow Inland Revenue maximum tax-free cash to be taken i.e. 25% of the fund value, not the final salary scheme calculation.

(4) what is the definition of pensionable pay for my position and pay grade.

(5) is the calculation for service based on employment service or just membership of the scheme?

(6) transfer values – you stated they are good for three months. In the future should I request them can you advise if they roll into the year after being requested prior so as to take them on the anniversary date.

34. Julie Woolley replied on 3 July explaining that "pensionable salaries are different to present salaries as they have had capped increases at 2.5% since 2008, your present capped salary on which your transfer value is calculated is £35,057.00". The claimant's actual salary at that point in time was £50,000.

35. The claimant continued to correspond with Ms Woolley under instruction from his brother and obtained copies of the latest trust deeds which he sent to his brother. AH was working with a pension solicitor at the time who agreed to have a look at the Trust's deeds for him in September 2015.

36. The claimant travelled to China from 13 September to 18 September 2015, during this time the claimant's brother started to prepare a letter for him which was eventually sent on 25 September to the CEO Dr David Smith and a company nominated trustee of the scheme. This letter, which the claimant would later rely on as making a protected disclosure, said:

"I write in reference to the above scheme and a financial review that I am currently undertaking with my independent financial advisor to evaluate my

pension provision now and at retirement. As you are aware over the past few years I have enjoyed a number of pay rises that have increased my annual income. Having recently requested and received an up to date transfer value it was noted by my advisor that the pensionable salary used in the transfer calculation was different to that of my actual salary. This gave rise to further questions that resulted in an email being received by me from Julie Woolley on 3 July 2015. The email from Julie identified that: -

- "Yes your transfer value is correct or we would not have issued it as previously advised to your financial advisor pension salaries are different to present salaries as they have had capped increases at 2.5% since 2008. Your present capped salary on which your transfer value is calculated is £35,057.

- "Pensionable pay is calculated by your pensionable pay as of November 2008 plus maximum increases as outlined above capped at 2.5% per annum with a 60th increment on service per year".

Having reviewed the deeds of amendment dated 30 October 2008 I do not consider that a 2.5% cap applies to my pensionable salary increases since 1 November 2008.

Rather the scheme rules (as amended by the 2008 deeds of amendment) provide that pensionable salary is: a member's full annual salary (including any salary increases during the previous twelve months uncapped) (see clause 1.2.2 (a) of the deed of amendment); or …. "such other amount" (which could be higher or lower than the member's actual salary) as notified by the company to the Trustees for any scheme year (see clause 1.2.2(b)) of the Deed of Amendment.

However where the pensionable salary notified the company to the Trustees (under Clause 1.2.2(b)) would for any particular scheme year be less than 102.5% of the member's pensionable salary for the previous scheme year the Trustees must agree in writing. Therefore I would be grateful if the Trustees could provide please:

(1) Copies of the written notices provided by the company to the Trustee for each scheme year where it was intended that my pensionable salary would be different from my actual annual salary and

(2) Copies of the Trustee's written agreement in respect of any years where my pensionable salary was to be less than 102.5% of my pensionable salary for the previous scheme year.

Please also confirm that in the absence of the company having provided written notice to the Trustees that my pensionable salary was to be different from my actual remunerations for any particular scheme my pensionable salary for that year would indeed be full annual salary (uncapped). In line with

the guidance I have received from my advisor please note I will be sending a further letter to the scheme's trustees to record my request.

37. On 2 October Dr Smith emailed the claimant stating that there was a solicitor's letter in reply to his queries in preparation and asking him if he had any further queries and he confirmed that at present he did not. There was another issue about the percentage of contribution from the employee which was higher than the claimant's brother thought it should be but this never developed into an issue as it appeared to arise from a misunderstanding.

38. On 2 October an incident took place with the claimant and the Respondent's Technical Director Paul Boundy, one of the claimant's best friend's, who asked him if he had a few moments to spare. As far as any difference in accounts of events between the claimant and Mr Boundy we prefer the claimant's version of events as we found him a credible witness He went into Mr Boundy's office who then began to discuss his pension request and the letters he had sent in. The claimant found his attitude intimidatory, accusing him of potentially damaging other people's pension by putting the scheme at risk, telling him to back off and drop the matter. The claimant said that he specifically said "as a director I strongly recommend that you go and see Dave and in doing that you retract your letter as you are jeopardising other members' pensions". He also said that "Andy" was wrong in his calculations (which may well have been correct), however we accept that this is what he said to the claimant as the claimant's recollection was specific. Mr Boundy said that he was speaking to him as a friend and was simply stating he would be better talking to Dr Smith face to face. The claimant said he was shocked Mr Boundy even knew about the letters as they were private and the matter should only have been dealt with by the Trustees.

39. The same evening the claimant went out as usual with Mr Boundy and another friend Michael Hooley for their Friday night drink and game of snooker and Mr Boundy again raised the subject acting he says as a friend, he said "Mark you don't know what you are doing things are so bad Mark I have actually written my notice out this afternoon you are jeopardising other people's pensions, your action will bring down the pension scheme", he left by saying "I know you are on holiday next week but I strongly recommend you go in and see David and in doing so retract your letter". We found the claimant's version of events plausible and accurate and very specific in terms of for example using the word "retract". The claimant said that Mr Hooley came over to say what was going on as he could tell from the body language that the matters were pretty intense. The claimant explained everything to Mr Hooley who advised him that he was an ex trustee of the pension scheme and he asked why was Mr Boundy getting involved in a private matter. He advised the claimant to go home, keep a record of what had happened and send it to somebody he trusted as evidence which the claimant then did sending it to Robin Moore with the heading "Oh crap what have I done". Again we believe the claimant's version of events because it was recorded in this email.

40. There was also a note to Dr David Smith (DAS) from Mr Boundy the next day stating: "Dave as we discussed yesterday afternoon I followed up with Mark last night, I explained very clearly about how to check out his figures, I used my payslip to check things over on my side to make sure I fully understood then explained to Mark how to do it (not showing any figures on my side of course). He was obviously

unclear as to what he was paying because he was still talking in terms of 7% and not 10%. I told him he was wrong and his adviser was wrong, I went on to outline what the potential outcome might be for the scheme should he pursue this in a legal way, he says he feels it is his right to do so a scheme member and he is doing nothing wrong in asking these question., I pointed out to him that his focus should be the benefits he will receive personally from the scheme and not a focus on attacking the scheme itself. I explained that if there is a mistake in his level of pension payments (which I strongly doubt) then this can be corrected by sitting down with Julie and looking at the figures in detail. I further explained that everyone in the scheme (including DAS) are subject to the same rules/restrictions with no exceptions and that I believe personally that the introduction of capping was carried out after due process. I strongly advised him to recall this letter and to talk to you and the trustees face to face. I got no feel at the time (it was a very difficult discussion) as to how he will now react but he knows very clearly my view. I fully expect he will talk to his advisor over the weekend, I don't believe I can do any more (Mark is on holiday next week then in China with me). Regards PB.

41. This clearly shows that Mr Boundy had chosen to speak to the claimant with the full knowledge of Dr David Smith. The claimant was very upset about the conversation with Mr Boundy and on reflection he now says that that marked the point when their friendship actually came to an end.

42. The claimant complained to Dr David Smith about Mr Boundy speaking to him about the pensions issue and Dr Smith directed Mr Boundy not to talk to the claimant about this any further on 5 October.

43. On 5 October the claimant contacted Mr Southan (the member's representative on the pension scheme) requesting a meeting. A meeting then took place on Tuesday 6 October with the claimant, Mr Southan and Mr Beard, the other member nominated trustee. He recorded that Mr Boundy had told him "do you know what this means you will bring down the scheme etc" and that he had given him 'another going over 'on Friday night and that even Mr Hooley could tell something was going on. The claimant said he was only passing on a query about a clause in the Trust deed, basically "why is his pension contribution based on his full wage not on the capped version not a problem" (this is what the note says but is more likely he said that is his pension contribution not based on his full wage but on a capped version). Mr Southan said the trustees would not respond now as they needed their solicitor's input first. He asked him what his end game was and whether he thought anyone had been treated outside the clauses. Mr Southan said he did not think that anything had been done wrongly and that they knew about the letters the claimant had sent to the respondent and a response was not far off.

44. The claimant also sent an email to Paul Boundy recording that Dr David Smith had said he was sorry if he felt under pressure after the conversations on Friday and that he could take up a grievance, he recorded that he had got no grievances with Mr Boundy and he was sorry if he had put him in an uncomfortable position, he was just very shocked that he was involved as he thought his questions were directed at the trustees. He said, "you are a good friend and I hope and pray this matter will not damage that".

45. The claimant's brother felt when he recounted what had happened with Mr Boundy that the company must be aware of something which it was trying to cover up and would ask his solicitor friend to have another look at the Trust deed to see if anything had been missed. AH came back and told the claimant about a legal case called Gleeds which concerned an identical Trust deed to that of the claimant's scheme. The solicitor friend had told him that it was significant that whilst it was lawful to put a cap on pensionable salary to apply in respect of pensionable service accrued after the date of the implementation of the cap it would not be lawful for a cap to apply in respect of pensionable service which the member had already accrued as at the date of the implementation of the cap. Therefore he said that in respect of his 26 years pensionable service already accrued his pension should be calculated by a reference to his actual salary at his retirement date rather than by reference to a capped salary.

46. However, since 2008 his pension could be calculated by reference to a capped salary if the administrative requirements had been complied with.

47. The claimant was then in China again from 12 October to 23 October. Whilst the claimant was in China in October a letter arrived which the claimant's wife read to him over the telephone. The letter said:

> "(1) You have said that having reviewed the deeds of the amendment dated 30 October 2008 which amended the scheme's rules to introduce the current definition of "pensionable salary" you consider that a 2.5% cap on pensionable salary increases (the "2.5% cap") does not apply in respect of your salary increases since 2008. You have not given any reason why you think this".

This is correct as the claimant had not yet linked the issues to pre 2008 service.

The letter then went through the procedure whereby the scheme had been amended. It concluded that a 2.5% cap had been properly applied in respect of pensionable salary increases under the scheme since 2008.

> "(2) You have asked for copies of the written notice provided by the company to the trustees for each scheme year in relation to which your pensionable salary is different from your actual salary. It was stated that such a notification to the trustees did not have to being writing or in any specific form but in any event every year until 2014 the pensionable salary of each active member was provided by the company to Richard Hough in his capacity as the Trustee and on behalf of the Trustee in the form of an Excel spreadsheet. Since 2014 the data has been provided to Julie Woolley who was authorised to receive such information. Each year this data was then forwarded to Friends Life who were authorised to receive the information on behalf of the Trustees and they used this to produce an annual statement of benefits and contributions showing the members pensionable salary for that scheme year".

It was then explained that these were then sent back to the company for distribution to members. Each year the Trustees had been informed by the company of the annual percentage increase in employee's salary and wages and this has been considered by the Trustees at the Trustee's meeting and that was sufficient to provide the notification required.

48. They then categorised the fourth question:-

> "You have asked for confirmation that in the absence of the company having provided written notice to the Trustees that your pensionable salary was different from your actual salary for any particular scheme year your pensionable salary will be your full actual salary for that year uncapped. As stated above notification has been given"

49. The letter continued to say that the company was surprised that the claimant now appeared to be questioning the validity of the 2.5% cap as he had been provided with an annual statement of benefits and contributions showing his pensionable salary for that scheme year for a number of years. It confirmed that his current actual salary was £50,000 and his pensionable salary was £35,344.17. They stated that all company promotions and related pay increases are made on the basis that the 2.5% cap applies with the full knowledge and acceptance of the employees concerned and it went on to say "if you are now alleging that you do not accept this basis this fundamentally alters the premise on which your salary increases were awarded to you and the company may therefore need to revisit its decision with regard to this", it also went on to say "in view of the contents of your letter the company needs to be absolutely clear that you understand and accept the basis on which your pensionable salary is calculated and specifically that all increases in your pensionable salary are capped at 2.5%, you are therefore requested to sign and return to me the enclosed copy of this letter to confirm that you understand and accept that your pensionable salary will be calculated as set out in the letter".

50. It was then added that "until the current situation is resolved the company will notify the Trustees in line with the Deed that your pensionable salary will be held as at 1st November 2014 level". The claimant felt this was an attempt to intimidate him by threatening to take away his salary rises and by freezing his pensionable salary even as calculated by the respondent. He also felt that the response should not have been sent whilst he was away in China. The claimant started to feel ill whilst he was in China with stomach cramps, loose bowel movements, nausea and headaches and lack of sleep although at first he felt this was travel sickness or food related.

51. When he returned home he emailed Dr Smith saying that he had seen the letter and said he would need to get advice from his Independent Financial Advisor. The claimant visited his GP who arranged for various tests to be carried out, meanwhile the claimant consulted his brother who advised him not to sign the 16 October letter because he did not believe that the description of how his pension would be calculated was correct and also he had been advised by the solicitor that he would be risking giving up his historical rights by doing so.

52. The company then asked each employee to sign a document stating that they were notified and consulted in October 2007 about the 2.5% cap on pensionable salary increases and they understand how that their pensionable salary under the scheme as of 1 November 2014 was calculated i.e. that the cap applied to already accrued pension service. They had one to one meetings with Mike Colling, the Group Financial Director or Graham Brown the Company Secretary to take them through the document.

53. The document also said "recently however following receipt of a transfer value request the company and trustees received letters from an active member questioning the amount of his pensionable salary and alleging that a 2.5% does not apply in respect of his pensionable scheme under the scheme. The member has not given any reason for why he thinks this, the company remains of the view that the 2.5% cap on increases applies in respect of this individual's pensionable salary and has written to him refuting his allegation".

54. The claimant felt it was obvious because he was not taken to have a one to one that he was the member in question. However, we do not accept this would be a reasonable presumption at this point in time. The claimant said he started to feel ostracised at work and felt that the atmosphere was much less friendly, he had had close working relationship with the Company Director and senior managers and he no longer felt this was the case. We accept his evidence that this is how he felt at the time and the emails from Dr Smith do show that management were becoming wary of the claimant. He understood that everybody signed that document and returned it to the company apart from himself.

55. The claimant sent an email to Dr Smith on 4 November "re pensionable salary cap". He stated that he was very stressed and he knew they needed to sit down and discuss it but he was not able to discuss it with Dr Smith presently. He needed time to gather his thoughts and speak to his IFA and Pension Advisor. He stated that after 37 years of working for and caring about the company that "I am shocked by the response I have had, I keep questioning myself have I done anything wrong and keep coming up with the answer No". He said that the correspondence and situation had been taken a big toll on his friendship with somebody he cared about, his wife, his family and his health. He stated, "to be perfectly honest with you I am not interested in anyone else, I was only trying to provide the information requested by my IFA so that he could carry out a financial review on my behalf". The respondent would rely on this and the claimant's answers in cross examination that he was really only concerned about his own position to establish lack of public interest.

56. Dr David Smith replied that he wasn't sure if he understood him "are you stating the salary cap should not apply to you but everybody else", he stated "I believe the salary cap is fair and reasonable and is the only way to keep the pension scheme open to accrual for all members otherwise it would have to close. I care deeply about the company, the people that work for it, both now and in the future, many companies have also introduced a pension cap, the BBC, British Airways at a much lower level than we do. I fail to see how anyone can object that it was a fair and reasonable way to proceed at the time, seven years ago and now. Whether

you proceed further with trying to get more than was agreed and understood by everybody is entirely in your hands Mark".

57. The claimant said he found this reply aggressive and antagonistic. It was certainly personally critical of the claimant and therefore it was understandable that he viewed it in this way.

58. The claimant continued to attend medical appointments and kept the company appraised of the situation, he raised with Wendy Turner, the company's Occupational Health Nurse Adviser what was being undertaken and she reported this to his manager Mr Hans Derksen.

59. In November 2015 the claimant was promoted to the role of Group Technical Tooling Manager. He described is as a promotion himself although in cross examination he said it was just a re-naming. The respondents were anxious to show it was a promotion to show that there was no victimisation of the claimant. However we find that it was simply a restructure and re-naming and no salary increase was involved.

60. The claimant again was in China from 22 November to 5 December and continued to experience the same stomach problems.

61. On 24 November he received an email from Mr Colling, Finance Director, querying his expenses in relation to a hotel stay in Zhuhiai. This queried credit card expenses for a hotel stay in Zhuhiai which appeared not to be a business trip and was not booked through "Eileen". The claimant replied on 25 November. He said that "re Zhuhiai this was for a Saturday night as such not a business trip – I prefer to check out of the Holiday Inn here and go over to Zhuhiai and visit Chinese friends in my free time. This I have done for many years on the odd occasions I do visit this area re business I will try to align so as to minimise expenditure and maximise my use of time. Re hotel bookings Eileen or Wendy arrange all hotel bookings as such, I do not get involved with this aspect. Please note that they have negotiated a best deal for accommodation, it is cheaper to stay there than it is to stay in the Holiday Inn in Shenzhen, re local VAT as stated above I do not get involved. Please advise what it is you need me to do so that I can ask them for their help, especially if this will help save even more money".

62. Mr Colling replied "there are many issues re this, both from the company's viewpoint and especially HMRC's as this fails the 'wholly exclusively necessary incurred in the performance of my duties'. You do not charge any holidays to your company credit card in future, please see me when you return to go through the wider issues involved". Mr Colling's point was that he had been alerted to this as it came to him to approve and he queried it as a business trip as this had not been booked by the local travel co-ordinator at one of the approved hotels in China as they were required to do and also that no action had been completed as required by their proforma. Mr Colling also noticed the check in time from the invoice appeared to be 2.15am". Mr Colling stated "that when working overseas employees are expected to stay at approved hotels booked by the local travel co-ordinator in order to ensure that the proper standards are met by the hotel booked, that discounted rates are taken advantage of in relation to the hotel breakfast, laundry, wi-fi etc. It is

paid for by the local group company to recover local taxes which would not happen if booked on a UK company credit card", therefore he believed that these actions were losing the company money.

63. The claimant had also signed to say the hotel stay was wholly for the necessary incurred in performance of his duties as required by HMRC however it was not. Neither had he told his boss Mr Derksen that he was taking this trip which Mr Derksen needed to know in order to ensure the claimant's safety in a foreign company, Mr Colling had attended to re-charge the expenses to the claimant but Dr Smith subsequently advised him not to do this.

64. The claimant believes that he was being targeted here because of his pension queries as he had never been queried on a similar matter before. In cross examination Mr Colling was asked why Mr Derksen had been copied into these emails. He replied it was to keep him informed of the situation but the claimant believed this was to embarrass him further. We accept Mr Colling's evidence as, as the claimant's line manager, it would be appropriate to make sure Mr Derksen was aware of the issue. Further we had no conclusive comparative evidence in the bundle that the claimant had done the same thing in the past in the same way and it had not been queried.

65. On 5 December the claimant spoke to Mr Southan again asking if they could have a catch up as little progress seemed to have been made as whilst he had had a letter back from the company solicitors he had not received a response separately from the Trustees regarding his letter of 25 September, or the issues he had raised at the meeting on 6 October.

66. A further meeting therefore took place with Mr Southan on 7 December 2015 with Mr Moore present who took a somewhat succinct note of the meeting, there was a respondent note of the meeting which was disclosed during the proceedings. Mr Moore's note said "we referred to the fact that the claimant had reiterated his brother's offer to talk to the Trustees about the issue with the Trust deed, Mr Southan said this could not happen and they needed to know what information the claimant needed and suggested he had a conversation with Dr David Smith. However the claimant suggested that Jerry talk to TPAS and his brother.

67. Mr Moore noted that "Jerry is now aware of there being an identified issue" but he was pushing for the claimant to have a meeting with Dr Smith but the claimant said he needed to have a third party there and stated, "if anything happened with his career his brother will go to TPAS". He commented that this seemed like a fight and not a simple pension enquiry. He said that a third party believes there is an issue with the Trust deed, he does not want more than he is entitled to and feels that he has made to feel that everything he is doing in his job is no longer ok. He said he couldn't carry on and that his brother was willing to sit down with them and talk to them about it and in the last line Mr Moore noted that the claimant mentioned Gleeson. The claimant stated that he has had enough of the situation and it was causing him to feel unwell and he wished he had never started it, that he was advised by a pension lawyer through his brother that there were still issues with the Trust deed. When he was asked what the issues were he said he didn't really understand the detail and asked whether they would be prepared to meet his brother

unofficially. Mr Southan refused. The claimant advised he had been told not to sign the letter of acceptance relating to 2½ % cap.

68. Mr Southan's note in respect of the meeting stated that the claimant said, "he has been advised that recently a company with Trust deeds identical to ours was challenged on the way pensionable salary had been capped and lost the case. He was unclear on the name of the case but thought it was something like Gleeson. I have asked him to confirm that he also stated that he thought it was our pension scheme solicitors that were involved with the deeds in this case". Mark has stated he has a duty of care to the members of the scheme to notify us of what he has been told by his advisors, he stated "I only want what I am entitled to". He feels he is being under pressure in his normal job of work due to the fact he is asking questions about the pension scheme". He did not want to sit down with Dr Smith by himself, he wanted his brother to be present so his brother could explain all the points. Mr Southan later said to him he needed to say specifically what the problem was with the trust deed.

69. The minutes of the Trustee meeting record that Mr Heywood was asked to put the matter in writing so that the trustees had a clear understanding of what exactly the issues are and could make a decision as to whether legal advice should be sought. The claimant believed that the trustees were fully aware of the issues raised by Gleeds and was seeking to down play them. We find this is the first time at this meeting that the claimant came near to articulating what the issue was but in an extremely vague way , however he did not get the name of the case correct.

70. Dr Smith emailed him again on 9 December asking him to sign the 2½% confirmation letter.

71. On 29 December 2015 Dr Smith called him and Mr Moore to his office, opening the meeting by saying he had something to get off his chest. The claimant said Dr Smith said at this meeting that the claimant's idea might be right and if he challenged the matter he could win, he acknowledged that there was a legal challenge going through the courts on the issue and that the companies cap on pensionable pay may not have been implemented properly. If challenged in the court it could be found not to be legally enforceable, the future viability of the scheme would then be put in jeopardy. The claimant felt he was putting pressure on him to drop the issues so that the fact that pension benefits were being calculated incorrectly would not become known to members of the pension scheme. He went on to say that as a consequence of the claimant's actions the company had no other option but to shut the scheme to future accrual and that all members would be advised of this on the return to work following the New Year.

72. Dr Smith said to the Tribunal he was not being aggressive and that the company had genuinely believed that the cap would ensure the survival of the pension scheme and without the cap the pension scheme would be too expensive. Therefore it was entirely reasonable to consider closing the scheme to future accrual and he was making the claimant aware before anybody else that this was a likely result. He agreed that he had said that he might be right in his claims but it would take years to resolve and the company would defend their position, he mentioned this in the context that this could be a long legal fight for the claimant. This reflects

that the company were aware there was an issue following Gleeds from their own knowledge or from legal advice.

73. The claimant responded by a letter dated 31 December. In this letter the claimant says

> "I feel you have left me in no other position than to issue you with this letter to protect my interests and future employment with the company". He referred to not being able to sign the document sent on 16 October as he did not agree with its contents and veiled threats. He stated "I would also like to state for the record that at no time since this process started have I been in touch with or discussed my pension arrangement with a solicitor or legal representative despite being recommended to do so by my IFA. If I had I would not now be using TPAS for guidance, I contacted TPAS at my advisor's request to obtain an independent review of the scheme rules and for them to review the information the company provided. I can also confirm that I have not put in a legal challenge as has been implied previously and re-iterate in the meeting by you on 29 December 2015, so there is no misunderstanding and to rule out the theory or should I say the accusation that I have been planning the pension claim for a good number of years, please note the following. To ensure fairness and to enable all members of the scheme to obtain information that I believe should be shared and as a duty of care on my behalf I did not hold back information, rather I brought the matter identified to me by my advisors immediately to the trustees and your attention for your resolution. Also, when I first contacted the company it was to establish my retirement benefits now and at retirement, the reason behind this was that I had recently been in discussion with a family friend about retirement planning and he has stated how complicated the whole issues of pension was. Because of my total lack of knowledge in this area it was suggested by my friend I obtain a transfer value of my benefits as a starting point … following numerous meetings with my advisor I was advised that to correctly identify my current and future entitlements under the scheme the trustees would need to provide additional information as the Trust deeds they held from a previous case that they had worked on offered two methods to determine an individual's pension entitlement and it was important to ascertain that the calculations provided by Julie Woolley on 3 July (i.e. the transfer value) were calculated correctly and in accordance with the trustees. In accordance with my advisor's procedures I was given two letters that had been prepared for me that simply required my signature and I was advised to send these letters to both you, my employer, for common courtesy and the scheme's trustees for their action. Accordingly, I signed the letters dated 25 September and forwarded them on to the respective parties.
>
> Following the receipt of both by the company and the trustees it is fair to say I have been shocked and distressed by the company's stance in this matter and the trustees lack of impartiality. As such I do not believe that the company or the trustees have acted appropriately or proportionately in relation to what I believe is a simple request for information and neither do my advisors.

My advisors have also stated that the highlighted issues in my letter have clearly caused the company to review the way in which the scheme was capped in 2008 and the impact that this will have on all members of the scheme, both active and deferred moving forward. Clearly from the comments you made on 29 December 2015 shows that my advisors concerns have been justified by the company's proposed future actions.

In addition to this I am disturbed by the way in which the company have employed what I believe to be strong arm tactics i.e. having one to one meetings with individual scheme members and getting them to sign documents purporting their agreement to the cap when clearly the vast majority of those who sign the documents would have little or no knowledge of the implications of such action.

So how do you think I felt when each of them was taken out of the office for one to one discussions with the Finance Director and I was the excluded, it did not take long for some of them to put the pieces together approaching me for answers which I could not give as far as I was concerned discussions over pension issues with the trustees were private and confidential and not for general discussion. Having to deflect questions and lying to people is not something I am at all comfortable with especially when doing this to people I care for, I am also not happy regarding some of the feedback I received, I will not name names but I have to say I was shocked all of which clearly indicates to me that I have been singled and discriminated against. For your information and to aid you when making discussions on the future of the scheme I have been advised by my advisors that since this action they have already been approached by other deferred members of the scheme requesting pension advice …. My disclosure of the potential inconsistencies in the way the scheme was purported to be capped, together with inconclusive paperwork to support the claim resulted in unfounded insinuations being made about you in your letter of 16 October 2015 that could not just be ignored. It was also your response not just to my letter but my actions to that of other scheme members had made my advisor question what they have missed to warrant such a response and dig deeper so as to make the position clear I am concerned that the company has breached the provisions of the Trust deed, my contract of employment and more generally broken pension law, since my disclosure to the trustees and as a consequence I have been subject to unacceptable pressure to sign the letter you sent me. Since sending in my letter dated 25 September 2015 raising my concerns regarding pension issues I have also becoming increasingly aware of the way in which I am being treated my senior managers, I feel shunned and in some cases micro managed, i.e. where once I was an active member of what I believe was a very strong management team I now feel as if I have been isolated, this on top of only ever having positive appraisals for the entirety of my 37 years with the company, hurts. This has had a massive impact on my wife, family and friends, please refer to my letter to you dated 4 November and in turn also has had significant and detrimental impact on my health, both mentally and physically as testified by Wendy Turner's email to Hans Derksen and Sally Lowles on 10 November. As you are aware health issues have never been a problem, my service records will bear testament to this, that is until I started

> my pensions review, since then I have suffered and am still suffering sleepless nights, constant headaches, chronic bowel disorders and palpations which I believe are all stress related and due to the inordinate amount of pressure I have been put under since bringing my disclosure to the trustees and yourselves in capacity as my employer. As a consequence, my doctor has now put me under a Consultant to investigate my conditions further …. In the circumstances I reiterate I do not intend to sign the letter nor am I prepared to accept the continuing detrimental treatment or pressure I am facing on a daily basis as a result of the issues I have raised. I am being advised that my correspondence and previous discussions with you constitute qualified protected disclosures pursuant to the whistle blowing procedures, I remind you that any detrimental treatment as a result is unlawful. Any threats to my continued employment as a result will also be unlawful detrimental treatment. In any event I am increasingly concerned that your actions are calculated to fundamentally undermine your duties of trust and confidence to me. I did discuss your request with my advisors to see if we could bring this to a conclusion before the start of the Christmas festivities but unfortunately due to time restraints I was advised this was not possible. Clearly in the light of your disclosure today and the companies pending action I will need additional time to seek further guidance on how best to proceed from both my advisors and TPAS.
>
> On a final note I have to state I am appalled that I am being used as a scapegoat for the company for basically bringing to the trustees and your attention pension related issues identified by my advisors that should have been picked up by your legal advisors following the Gleeds ruling. I would also have to question the role of member nominated trustees in this process as their role is to act at all times in the best interests of the members, should you proceed in the manner you have prescribed on 29 December this action would almost certainly result in me being shunned by my peers and fellow workers as you clearly identified within that meeting. I would be grateful therefore if the company could be minded of the contents of this letter before making further unsubstantiated claims against my good character and any further correspondence or discussions that take place, with both active and deferred members of the scheme. When I started with my request for information I was only trying to establish my pension entitlement and as yet I still do not have the correct answer to the request, I will re-iterate as I have from the start of this journey I am only looking to determine my correct pension benefits, nothing more nothing less. I would hope moving forward the trustees will act in the best interests of all members of the scheme in determining everybody's true entitlement."

74. Dr Smith emailed Russ Jollliffe, Hans Derksen, Brian Smith, Mike Colling, Paul Boundy and Simon Whitely with the claimant's letter and stated, "as you can see from the letter we are left with little option but to close the scheme to future accrual…also treat Mark completely normally as he is also going for constructive dismissal".

75. On 6 January after reading the letter Dr Smith queried from the claimant whether he was fit enough to travel to China for two weeks. The claimant replied on

9 January stating that he had discussed this with his doctor and his doctor was satisfied that there was no difficulty with his travel. He advised he had spoken to his doctor and had arranged a letter from the doctor to state that he was ok and that his brother in law would be picking it up and delivering it to the respondents. He stated that the stress, anxiety, panic attacks and other stomach related issues only appeared to manifest themselves when he was drawn into discussions around the pension scheme and grievance procedures.

76. Also in his email of 6 January Dr Smith had said that the claimant's complaint against the company as detailed in his letter as an employment law matter and as such will be dealt with under the company's internal complaint resolution procedure and he sought to arrange a meeting to be chaired by Mr Brian Smith, independent non-executive director. He advised that any complaint against the scheme's trustees would need to be made in accordance with the scheme's internal dispute resolution procedure.

77. On 10 January the claimant travelled to China and stayed there until 22 January. He recalled incidents that occurred whilst he was in China, he said that Mr Jolley and Mr Derksen both approached him and stated they were happy with the work he was doing and any issues in the UK regarding his pension had no bearing on what he did for them in "Otter Asia". He was surprised that Chinese directors would be aware of the issues back in the UK and upset as he thought the issues were confidential.

78. When he returned he saw the doctor immediately as he was not well and his doctor advised him that he thought it was not a physical problem but a mental one and she advised that he was suffering from stress. He was signed off work from 27 January to 10 February. He was prescribed sleeping tablets. The claimant did not return to work again.

79. On 2 February Sally Lowles, the Company's HR Manager called and left a voicemail for the claimant. We accept that Ms Lowles rang the claimant to find out about his welfare although the claimant's frame of mind meant that he did not really want any contact with anybody from the respondent, he did want to speak to Wendy Turner however and asked Sally Lowles to send him her number. He also asked his brother to tell Ms Lowles that nobody should contact him by phone which he did do although probably more aggressively than Ms Lowles contact merited. Ms Lowles said she was just following normal procedure by contacting the claimant and we accept her evidence.

80. The respondent's sickness absence management policy in respect of monthly paid employees such as the claimant was set out in a table whereby actions were referenced by numbers:

1 – Personal services review
2 – OHS consultation
3 – Medical report request
4 - Contract review

5 – Notice period
5* - Notice period served on countback from final week listed
6 – Contract termination
- - meant that the individual received standard pay

81. It appeared from this chart that a monthly paid employee would receive full pay for 52 weeks. At week 3, 1 would apply; at week 6, 2 would apply; at week 11, 2 or 3 would apply; at week 18, 2 would apply; at week 25, 2 or 3 would apply; at week 32, 2 would apply; at week 36, 2 or 4 would apply; at week 40, 5* would apply; at week 52, 6 would apply, i.e. termination. Therefore notice would generally be given at the 40th week of absence, and there would be several references to Occupational Health. It is clear that this did not occur in this case. Notice would not have been given as the 40th week coincided with the end of October and therefore that part of the procedure was superseded by the events relating to the contractual change.

82. The claimant replied that he was really struggling with what had happened, he had lost his confidence, he was now being asked to attend a grievance which he wasn't ready to do and would prefer to be left alone until he was feeling better and in receipt of information from TPAS. He did not want Mr Smith dealing with any grievance matters. Mr Smith contacted the claimant on 3 February and 8 February.

83. The claimant emailed his brother and asked him if they could have a discussion and whether he had heard from TPAS. Mr Smith wrote to the claimant again on 10 February. The claimant saw his GP again and said he was still anxious and not ready to return to work and he was signed off sick until 8 March when he was diagnosed with anxiety with depression and prescribed Sertraline 50mg tablets. He was advised to contact the counsellor which he did. He saw Wendy Turner on 12 February and she recorded that his investigation showed he had diverticulitis and he now needed to understand how to manage this but he was also being treated for anxiety and depression. Wendy Turner said to Dr Smith "he was aware he needs at some point to begin negotiations with yourself and his managers to discuss how to assist him back to work but I would advise this is left for another three to four weeks until his treatment brings his anxiety levels under control and the counselling has taken place".

84. At this point the claimant could not open mail or take phone calls or answer the door, he felt he was close to having a nervous breakdown.

85. On 1 March 2016 he received a letter from the trustees dated 29 February requesting him to detail his queries about the pension scheme. It is true to say he had not yet fully articulated these although in his witness statement he has identified that his brother had fully explained the Gleeds issue to him however we find that this had not been fully explained in any of the correspondence with the company. The claimant felt he had told the company they needed to consider the applications of the Gleeds ruling and that Dr Smith himself on 29 December had recognised what the issues were. He felt that they had the information they needed to tell him what their position was regarding the legality of the 2.5% cap, the implications for the calculation of members pension and whether they accepted that he had been

provided with an incorrect transfer value however the claimant did not ask any of these questions of the respondent.

86. The claimant was again signed off until 8 April as he was still feeling anxious and was experiencing side effects from his medication. He saw Sister Turner on 15 March 2016 and said he was still feeling anxious but he was trying to do more activities and to get out of the house and build his confidence. He was still waiting for counselling sessions and she said that she would give him the details of a private counsellor in Buxton. She reported back to Ms Lowles saying on 30 March "I saw Mark at home on 15 March, he is still experiencing low moods, bouts of deep depression and anxiety attacks but he is trying to do more activities, getting out of the house and trying to rebuild his confidence which he states is at an all time low. Until recently he was finding it extremely hard to be in the company of anyone other than close family and friends but this is now improving. He advised me he is willing to see the Counsellor I have recommended and he also advises he has an appointment with his Consultant Dr Koss at Macclesfield Hospital on Friday regarding the results of all the tests he has undergone which I will review with him next time we speak, one thing which has become very clear to him whilst he has been off work is how much he misses his job and the people he works with. He does want to return to work but is uncertain how well received he will be on his return and if Otter even want him to. From Mark's point of view he would like to be able to continue to serve Otter as passionately and professionally as he has done over the years, if we can give Mark some reassurance about his welcome back to work then I can start to put together a rehabilitation plan to enable this to happen. Sally, I am not sure who the best person to speak to would be but if you could liaise between Mark and the relevant managers then perhaps we can get something moving here.

87. The claimant spoke to Ms Marshall, his recommended counsellor, on 30 March and Ms Lowles rang him on 31 March to discuss arrangements for his return to work. She emailed Dr Smith on 31 March to say that she had spoken to the claimant who wanted to return to work but the following points needed to be considered:-

- His GP needs to agree he is fit to return;
- Wendy feels that Mark needs reassurance he is wanted back;
- If this reassurance could be provided we would develop a phased part time return to work;
- Mark has a two week holiday week commencing 25 April and would like to return before this;
- Mark has made an appointment with a Counsellor that Wendy proposed for Friday 1 April.

88. She also added, "As mentioned to you Mark advised he has not work email access, he wants to have a read through and start to bring himself back into work mode" and so she was asking for this to be resolved.

89. There was no reply in the bundle from Dr Smith but Ms Lowles replied on 5 April stating that "before a return to work they wanted him to see a Consultant Psychiatrist". The claimant felt this was a way of delaying his return whilst the consultation over the closure of the scheme was taking place and prevent him from talking to other members of the scheme however it seems unlikely that the respondent could have prevented him from speaking to other people whether he was at work or not.

90. The claimant saw his GP on 7 April and explained the situation regarding the psychiatric assessment. The GP advised he should continue with his holiday plans and prescribed more medication, signing him off work until 29 March so that he could see the psychiatrist and have his return to work arranged.

91. The claimant then emailed Ms Lowles about whether she had chance to speak to Dr Smith about Wendy Turner's report of 8 April, that her email had "knocked the wind out of his sails" as he thought he was doing everything to satisfy the criteria for his return and he asked her if she had chance to talk to David (Dr Smith) regarding the points contained in Wendy's note i.e. about discussing the pension matter, reassurance about his return and she replied that she was waiting to have the appointment with the psychiatrist confirmed.

92. On 14 April the company wrote to all members of the scheme to inform them they were proposing to close the scheme, the claimant also received this letter on 15 April and it said the consultation about the proposal would be taking place. The letter stated the company had decided to go ahead with the proposals and members would be invited to voluntarily opt out of active membership of the scheme, it went on to say "if any active members failed to opt out of active membership the company would consider serving notice to terminate the individual's contract of employment, this would have the effect of stopping their pension accrual under the scheme. At the same time the individual would be offered a new contract of employment which would be the same as their existing contract except that it would reflect the proposed new pension terms at the standard rate of contributions rather than at the enhanced contributions as shown at FAQ 17, i.e. it would record that the member was no longer an active member of the scheme but would be automatically enrolled in the new scheme for future pensions benefit."

93. The claimant would argue later that this letter did not say that the active member who failed to opt out of active membership would lose their job, only that it would stop their pensions accrual under the scheme and they would be automatically enrolled in the new scheme. The claimant was sent a copy of the presentation organised for staff on the 18 April. The FAQ sheet did mention that "since the 1 November 2008 the scheme has been operated and funded so as to give effect to this 2.5% cap however developments in pension case law since the means that the changes that were made to the scheme in 2008 to introduce the 2.5% cap may not have been effective in respect of benefits that members had accrued under the scheme prior to 1 November 2008". This succinctly expresses the legal point at issue.

94. On 20 April the claimant emailed Julie Woolley and Richard Beard with some further questions. The claimant then mentioned an issue with a colleague from

China Mr Ken Zuo who told him that he had been told by Mr Jolley the claimant would not be returning to work and he had double checked he had heard correctly and Mr Jolley confirmed this was correct. He confirmed this in an email to the claimant dated 21 April.

95. The respondents stated that this was weak evidence, Mr Zou and Mr Jolley were communicating in second languages and it may simply have been that Mr Jolley had said that the claimant was off sick and it didn't look like he was going to return or he might not be returning. We accept the respondent's argument on this as this is far too second-hand information to read anything into it.

96. An appointment was made for the claimant to see Dr Vincenzi in Leeds on 31 May and again he had to have his sick note extended to ensure he could see the Psychiatrist.

97. The claimant then began to be concerned that he was not being kept in touch with the consultation process and discovered that some documents had been sent to his work email address which he was not checking because he was signed off sick from work, it was not that he couldn't check it but he chose not to. We therefore do not agree with the claimant that the company was deliberately attempting to exclude him from the consultation process. Mr Moore in any event forwarded the documentation to the claimant.

98. The claimant's replied to Robin Moore saying that he was not convinced the trustees were aware of all the issues. The claimant sent also information to Ken Hall and other member representatives recommending that they say sought independent pensions advice. He also sent Mr Moore the comments of the pension lawyer advising his brother on 20 May who said "two things pop out to me they have clearly accepted that there is an issue in relation to the attempt to cap pensionable salary increases in 2008 by virtue of the Gleeds judgment however" and "I find this quite interesting they are giving a clear impression that there is some uncertainty as to the application of Gleeds to the scheme on the basis that Gleeds has been appealed (to be heard by the Court of Appeal in July). I find that an interesting approach because my counter would be that irrespective of the fact that Gleeds is being appealed and could therefore be overturned current law should be viewed on the basis of the judgment of the High Court, under current law there is clearly a problem with the purported capping of pensionable salary increases, the problem with waiting until the Court of Appeal judgment is that in the meantime members who retire or take transfer values may be receiving incorrect levels of benefit (you have confirmed that you have seen the transfer value and they have calculated it as if the capped pensionable salary increases was effective)". He was also offering to give advice to the employee representatives.

99. A course was also held at the respondent's premises on grievance and whistle blowing issues which Mr Moore sent the claimant the details of in May. The claimant felt the training was being held as a result of the issues he had raised.

100. On 25 May the claimant emailed Ken Hall, one of the employee representatives and stated that his concerns were "as an active member of the Otter pension scheme and from an employment law perspective I believe I should be

consulted or informed about any changes that may impact on my terms and conditions of employment which I believe these issues do, the fact that I haven't been consulted could mean I have potential claims against Otter under the relevant employment law provisions, my problem is I do not know where I stand as such, can you please advise:-

(1) As an active member of the scheme should Otter be keeping me abreast by letter or email;

(2) As an active member while I am off sick can I respond and advise to the team set up to act as a conduit between the company and the pension scheme members on issues I would like bringing up;

(3) I have been advised by Robin that all the questions asked are to be sent to him by email to the members representatives for processing, this means that there is a paper trail back to me, should this not have been kept private and confidential, can you advise if it is the normal practice.

101. The claimant also advised he was using his personal email and therefore all the documents were sent to his personal email.

102. Mr Hall replied to the claimant on 26 March stating that he would try and answer his queries as he would anybody else's queries.

103. The claimant attended the appointment with Dr Vincenzi in Leeds on 31 May, the claimant received a further email with details of two presentations made to members on 2 June. On 9 June the claimant emailed Mr Hall advising him of the solicitors details urging him to get his advice. Mr Hall said he would discuss this with the other representatives.

104. On 9 June the claimant received an email from Julie Woolley with allocated slots for an IFA to advise on the pension changes, the respondent had organised this for each member of staff before they decided to opt out of the pension or not. The claimant received the last time slot on 21 June.

105. The claimant received a draft report from Dr Vincenzi in early June, Dr Vincenzi stated his symptoms were consistent with an adjustment disorder or reactive depression and the resolution of his medical condition depended upon him receiving satisfactory resolution to the dispute with the company. There needed to be a resolution or agreement and a phased return to work thereafter. Dr Vincenzi stated that the claimant did have a mental impairment in the form of an adjustment disorder which was "having an adverse effect on his ability to carry out day-to-day activities, in that he was having difficulty with sleep and has had problems with normal social activities. He has avoided answering the mail at times". In the doctor's view this effect was substantial. He also stated that the claimant's condition could be worsened if he prematurely returned to work.

106. The claimant had his sick note extended to 10 July as he felt the situation was stressful with the scheme being closed and he felt he was being blamed for this, this had been related by his brother Philip Heywood who also worked at the company.

107. On 14 June Mrs Lowles called the claimant and he advised her he had been feeling more anxious since he had heard the scheme would be closing. He told her he was concerned about confidentiality as everybody seemed to know he had raised the issues with the firm. Again he said that he needed reassurance regarding how the directors felt about him. She asked him whether he was going to respond to the letter from the trustees dated 29 February and the claimant said he thought his brother had already responded on his behalf. She did not think that was correct. The claimant emailed Julie Woolley on 16 June saying that he believed that he was waiting for the trustees to come back to him, not the other way around.

108. Meanwhile the claimant declined the IFA appointment as obviously he had his own IFA. The claimant believed that the IFA's involved were not IFA but were Welfare Managers however we were satisfied with the evidence given at the Tribunal by the respondent that they were Independent Financial Advisors.

109. Brian Smith contacted the claimant on 21 June with a view to commencing the company's grievance procedure.

110. On 22 June the claimant received a further company presentation, the claimant advised that he could not attend any meetings and asked for copies of any further presentations. In reply to Dr David Smith the claimant advised that he needed advice from his GP as to whether he was well enough to engage in the formal grievance process. The claimant believed on two occasions Wendy Turner was supposed to see him and on one Mrs Lowles but neither attended but although in the first case when he rang Mrs Turner she said she had been ill. The respondent's witnesses gave evidence that they had never had to deal with an employee absent for so long with a mental health condition and so were unsure how to handle it.

111. On 1 July 2016 the claimant sent an email to Mr Hall. He raised some questions regarding the pension scheme changes.

(1) there was no mention of why the existing final salary scheme could not be kept, what was wrong with it, what is the legal challenge, the trustees of the Otter scheme are waiting a judgment on, does the challenge relate fully or partly to the Otter scheme, if upheld how does it affect scheme members, how will the trustees address this if the scheme is closed to further accrual.

(2)He did not see how the consultation could be closed as not all questions had been answered so that could not happen until after 17 July and he said this because TPAS said they could not advise him until the legal challenge had been heard in court.

(3)Was a query about the fact that the rate of accrual was different depending on what salary band you were in.

(4)That they had not replied to him regarding the employee representatives seeking legal advice.

112. In an email that the claimant was not privy to at the time Sally Lowles queried with Dr Smith the situation, as she believed the company had not answered all his questions namely

(1) The company had:

a. breached the provisions of the Trust deed;

b. breached his contract of employment; and

c. broken pensions law (letter of 31/12/15) and

She went on to say, "The email reply of 6 January does not address any of these points directly or refute any of its validity, it offers the option to raise a grievance and to raise a complaint against the trustees, it could be argued that we have not corrected his misunderstanding of the first two points".

113. On 6 July the claimant made a subject access request under the Data Protection Act 1998. He also spoke with his GP on 7 July and reported that his mood was worse and he had had his Sertraline dose increased to 150mg a day. He was signed off work until 7 August.

114. Mr Hall the Employee Representative then emailed the claimant on 7 July, the answer to the claimant's questions were as follows:

1(a) The reasons for the closure of the scheme have been explained in the presentation "summary of the financial history of the Otter retirement pension scheme". It clearly states that the threats to the scheme in the conclusion I am unsure what more information you require.

(b) The Gleeds case is undergoing legal process and as such I am not qualified to comment however the company has clearly stated that they may have to set aside monies to pay stakeholders if necessary, this is dependent upon the legal process

(2) My understanding is that it has taken legal advice and can close the consultation process after the period specified, if you can advise me this is somehow illegal because of the outstanding Gleeds issue please do so ASAP, however my understanding is that Otter are following legal protocols correctly.

(3) I am not sure of the question you are asking in the consultation process has been explained in correspondence sent to you.

(4) You can read points made from the presentation in May 2016 recently circulated that the question of independent legal advice has been raised with staff and the company. The representatives noticed the trustees have taken that advice and the outcome has been that it

> complies. I ask if you have a legal objection to put it to me clearly in writing and I will follow it up.

The respondent relies on this email as establishing that the claimant had been advised that the company would fund any liabilities arising from Gleeds.

115. The claimant received a letter from the trustees sent on 7 July 2016. It detailed the previous correspondence and stated that they understood the letter of 25 September 2015 had been sent to them for information only, the company had responded to that letter and therefore the trustees were not going to take that any further. Further the trustees had written to the claimant on 29 February inviting him to set out his queries and concerns and he was invited again to put forward any further concerns or information that he wanted.

116. The company wrote to the claimant on 15 July advising him that the consultation had closed and that the decision had been made to close the scheme to future accrual. The meeting was then arranged for 18 July to discuss the decision and he would be asked at that meeting if he wished to voluntarily withdraw from pensionable employment and agree to a variation of his contract of employment. This could be done by signing an opt out form which was enclosed with the letter. It explained if he chose to sign this form he would cease active membership of the scheme. This will be discussed in further detail in the meeting. He was allowed to take a companion to the meeting.

117. The opt out form had a "do not agree" section which says "I understand that as a result of this I will not be eligible for temporarily enhanced employer contribution rates. I also understand that as a result of this decision and having followed a suitable consultation process my employer will take steps to terminate my employment contract in accordance with its terms which will have the effect of ending my active membership of the scheme. In that event I will be offered re-engagement on the same pension terms as would apply to a new employee, there will be no other changes to my terms and conditions of employment". This was a reference to the fact that the respondent was offering a "sweetener" for voluntary opting out of the scheme in the form of an enhanced employer contribution rate.

118. The claimant stated that he had no idea from this that his entire employment with the company could potentially come to an end. He believed the new contract would happen automatically.

119. On 15 July after receiving this letter the claimant emailed Ken Hall stating he was not happy that scheme members had been given sufficient time or that the legal advice needed before they sign into anything new. He continued "this is a complicated issue way past my understanding, please see email below and links to a similar case in hand. Can you please review with other reps and make all scheme members aware of this. This email is meant with sincerity I am not becrying you or the other reps for your help and understanding as this is much appreciated. I, like other scheme members, need to understand fully the implications associated with the closure of the scheme for further accrual and to my knowledge these questions have as yet not been covered or answered satisfactorily". The claimant attached an article headed "law firm to challenge pension scheme re-structuring".

120. Mr Hall replied on 18 July. He said that they had concluded that "this case (Gleeds) does raise the issue of being wary of closing schemes, its details do not mirror our circumstances however we have been informed by the company that it has and continues to take legal advice to ensure its follows due process and that it has taken all necessary steps to keep you fully informed. Furthermore, we are reminded that the trustees have taken independent advice which concluded that Otter could legally close the current scheme as many companies have. It is the view of the reps that there will be no benefit to present this attachment to members, I repeat if you have knowledge that the company has not followed due process then please inform me in writing of the specifics, I point out a further consultation officially closed last Friday and as such I am unsure whether I have the ability to take any of your points you raised further but I will try".

121. The company then made efforts to arrange a meeting with the claimant but he said he did not feel well enough to attend an individual consultation meeting. His letter of 20 July stated:

> "In the first instance please note that I have not received any official documentation relating to the company's announcement dated 15 July in which it confirmed the decision to close the scheme to future accrual, can you please supply me with a copy … by way of background as you know I am currently signed off work due to anxiety as a direct result of the grievance which I raised about the company's pension scheme. I recently visited a Consultant Psychiatrist at the company's request who have confirmed that all discussions regarding issues relating to the pension scheme exacerbate my condition. Recent events regarding the announcement to close the scheme, the associated consultation process and the implication that it was a decision taken due to the issues which I had raised have led me to experience even more stress and anxiety, the situation has got so bad that my doctor has prescribed an increase in my medication to help me cope, she has also informed me that I should avoid further unnecessary stress at this time. As a result I am currently not in a position to attend an individual consultation meeting at this time, nor am I able to respond to the notification which requires me to confirm whether or not I will be voluntarily opting out of the scheme. Further, I do not consider that less than three working days is a reasonable time period in which to make a decision for any employee, but particularly my case given my medical conditions. As you will appreciate the letter was dated 15 July 2016 and a response has been required by 21 July 2016. This is not reasonable, not least because of the potential for dismissal and re-engagement should I refuse to voluntarily opt out of the scheme. I note that in general terms ACAS guidance suggests that a minimum of ten days should be allowed for an employee to consider discussions that might result in the termination of their employment.
>
> More generally I am concerned that decisions which are being taken regarding the pension scheme and the associated consultation process and the financial implications for me amount to further acts of detrimental treatment as a result of my protected disclosure and disability discrimination against me. Specifically, I believe it would constitute a reasonable adjustment

> to give me a longer period of time in which to consider my position given my medical conditions. For the avoidance of doubt any attempt to pressurise me into a response tomorrow will be treated as acts of further detriment, bullying and harassment and in the event that my employment is terminated as a result of a failure to respond I believe this could constitute an automatically unfair and discriminatory dismissal.
>
> I appreciate the need for the company to move forward on these issues and as such I will obviously respond as soon as my health permits but to reiterate I will not be able to do so by 5pm tomorrow as required. I trust this will be acceptable in the circumstances."

122. Mr Colling replied to the claimant on 22 July. He explained that the company had to close the pension scheme because of the increased risks against the existing pension scheme. He went on to say that "while I appreciate that the letter specified the deadline of 21 July was sent to you on 15 July 2016, the initial announcement letter and FAQs in April stated the choices available to the members should the company's proposal go ahead and these were also raised in 18 April presentation, a copy of which you have also received. Members have therefore had over three months' notice under the consultation process of the decision they would need to make if the proposal did go ahead. The company has made all affected members aware that there is a possibility of a dismissal and re-engagement exercise being applied if members choose not to opt out of the scheme, the company has followed the required consultation process and will be offering any members that do not consent and are dismissed under this process re-employment on the same terms and conditions save for pension rights. We therefore do not believe that any such dismissal including yours will be automatically unfair or discriminatory". He explained the company was working to a tight timeframe but they extended time to 29 July and invited him to make arrangements for an individual consultation meeting.

123. On 28 July TPAS informed the claimant's brother by email that the appeal in the Gleeds case which had been scheduled for 11 and 12 July did not take place as the case had settled. Mr Davies of TPAS stated "therefore it is our view that your brother's case should be considered on the basis of the Otter scheme document and the relevant case law which would, in our view, include the judgment of 15 April 2014 in the Gleeds case". He went on to say, "it is our opinion that your brother's benefits may not have been correctly calculated when providing the transfer information in 2015, your brother's pension benefits in respect of pensionable service up to 31 October 2008 should be based on an uncapped pensionable salary i.e. taking account of actual pay rises on or after 1 November 2018".

124. TPAS advised that the next step was for the claimant to ask the company what they intended to do about the calculation of benefits pre 1 November 2008 benefits and what the expected time frame was for making the decision and confirming it to members. There would ofcourse be a live issue regarding members of the scheme who had already retired whose pre 2008 benefits had potentially been wrongly calculated.

125. The claimant emailed Ken Hall on 29 January with the information he had received from TPAS. He advised that he would be contacting the trustees when he knew more, in the meantime he set out his questions:

(1) What do the companies intend to do about the calculation of benefits for pre-November 2008 benefits;

(2) What is the expected timeframe for making decisions and confirming this to members;

(3) Who or what third party is to oversee this activity so as to protect the best interests of the scheme members;

(4) Active and deferred. May I suggest you re-visit my original proposal to seek and make contact with an Independent Financial Pensions Lawyer;

126. Mr Hall said he would take up his questions with Dr Smith when he was back in the office.

127. On 29 July the claimant also emailed Mr Colling and Miss Woolley to inform them of the information he had received from TPAS and stating he felt it was not reasonable or appropriate for him to respond to the letter by the end of today (the opt out letter) as "I wish to give the company a chance to respond to points which TPAS make and I also require an opportunity to properly consider my position before confirming my position regarding the closure of the scheme". We find this is an example of the claimant setting out information and requesting a response in respect of an issue of alleged imperfect implementation of the pension scheme rules.

128. Mr Colling replied saying he was not a trustee but would ensure the email was passed on to the trustees however he went on to say that "you will appreciate that the question regarding the validity of the cap on pension salary is an issue that exists notwithstanding the status of the scheme (i.e. whether open or closed to future accrual) as such it is the company's decision to close the scheme to future accrual is unaffected by this information but as previously mentioned I will pass this letter to the trustees for their consideration". Mr Colling was quite right with his analysis there, the respondent had closed the scheme; as to the benefits accrued and available under the closed scheme, that was a separate matter.

129. On 29 July the claimant was sent notice of termination. The letter was headed "termination of your current contract and re-engagement on new terms". The letter said "the scheme is due to be closed to future accrual with effect from 31 October 2016. Please therefore accept this letter as formal notice of the termination of your contract of employment dated 9 May 1990, such termination to take effect on the close of business on 31 October 2016. This letter is also a formal offer of re-employment under the terms of the new contract incorporating the same terms as your current contract, save in respect of pensions. In particular the new contract will contain the following pension clause to reflect the new pension arrangements which will be available to you for service after the termination date …If you accept this offer your employment under the new contract will commence immediately on the day following the termination date i.e. 1 November 2016. If you accept the new contract

you will be treated as having been continuously employed by the company since the date on which you originally joined the company. If you wish to enter into the new contract please sign the attached copy of this letter and return it to me before the 31 October 2016, if you do not wish to enter into the new contract your employment with the company will regrettably terminate on the termination date. You have the right to appeal against termination of your current contract, if you wish to appeal please submit your appeal in writing for my attention by Friday 5 August 2016 stating the reasons for your appeal in full. Given your current ill health we will be prepared to extend this time period if you do not feel well enough to manage the appeal process at this time".

130. At the bottom of the letter the claimant was asked to sign to acknowledge that he would be re-engaged under a new contract with effect from 1 November and that he hereby accepted the new contract and the change to the pension clause within it. The claimant stated he had no idea this was a dismissal letter, he thought his contract was going to be terminated not his job and no one from the company called or came out to see him to make sure he understood what the letter of 29 July meant. We state our findings on this in our conclusions.

131. The claimant saw Dr Phillips on 4 August, he said he was feeling a bit better now he had got the TPAS letter but he was still anxious and was signed off work sick until 3 November 2016.

132. The trustees replied to the claimant on 12 August stating that they believed he had directed his enquiries to the company however they confined themselves to addressing two points which appeared relevant to the trustees.

(1) They considered the scheme has been run and administered in accordance with the scheme's formal governing documents and that his email did not give specific details to how he felt the scheme had not been.

(2) That they were unable to provide any comment as to whether the High Court decision in Briggs and Others -v- Gleeds and Others 2014 Chancery will be appealed to the Court of Appeal, the trustees have taken advice in relation to this matter and so far as the trustees and their advisors are aware there is currently no publicly available information which would confirm or allow the trustees properly to conclude that the Gleeds case will not be considered by the Court of Appeal and they invited if he had any further specific concerns or queries that they should be set out in writing.

133. This was a strange letter as it must have bene clear by 12 August that the Gleeds case had not been heard by the Court of Appeal on the date specified.

134. On 19 September 2016 the claimant's counsellor HM emailed Wendy Turner to say that the claimant had completed six counselling courses and in her opinion was in need of more. She said, "he is still experiencing a high level of stress relating to the ongoing unresolved situation re his work place and as a result is feeling very low and she asked if he could have more sessions" (presumably the company was paying for these) and on 20 September 2016 the claimant asked Wendy Turner if they could meet up to discuss his health.

135. On 5 October 2016 Mr Colling wrote to the trustees regarding the Gleeds case and he summarised that the effect of the High Court decision in Gleeds was that the changes to the pension scheme on 1 November 2008 did not affect benefits already accrued up to that point, but he also pointed out that it was possible for a member of a pension scheme to agree to become contractually bound to accept benefits less than those to which they would be entitled to under the rules of the pension scheme. The Gleeds case had confirmed that the 103 members who had agreed amended contractual terms of employment in relation to their pension were bound by those terms. He also said "to date the company and the trustees have kept themselves abreast of the development in Gleeds however given the ongoing legal uncertainty pending the outcome of the appeal in Gleeds no action has so far been taken in relation to Gleeds in respect of the scheme. Therefore members transfer values continue to be calculated in accordance with existing methods and assumptions approved by the scheme actuary … further the company has recently learnt that the Gleeds case has been vacated for the court list and is awaiting a re-listed hearing date. We understand although this has not been formally verified that settlement negotiations are ongoing and that the case may be settled shortly, as such it is possible that the hearing has been vacated to allow for further time to conclude settlement negotiations in which case the High Court decision will remain unchanged. In light of the above the company believe that that it is sensible to enter into further dialogue with trustees about this matter, as detailed below it is the companies view that if Gleeds does settle and the High Court decision remains good law it is unnecessary to take any further action in respect of this matter, the companies rationale for this conclusion is as follows.

(1) The High Court's consideration of the meaning and wording of the power of the amendment in Gleeds was an ancillary answer and it did not form part of the main discussion in the case, this weakens its authority and means the decision provided judicial guidance but no more.

(2) The legal arguments surrounding Gleeds are complex and have been heavily debated. There are several different schools of thought amongst pension professionals and the significant number of pension lawyers thinks that the courts in Courage and Gleeds are wrong in their interpretation of the powers of amendment in those cases. As such this area of law remains uncertain and could change again in future, if this proved the case then had any transfer payments or enhanced benefits been paid the trustees would have to attempt to recoup these monies which could prove difficult however the most compelling argument from the company's perspective is that a legally binding contract was formed between the company and the relevant members in relation to this matter. If so, it means that any development associated with Gleeds are largely irrelevant, the company's rationale behind this conclusion is as follows and they then recited the procedure used to make the changes in 2008.

We noted that an objection has now been raised from one member seven years after the amendment was put in place and that current active members have confirmed our understanding of how the cap operates and do not dispute the company's position, people have received annual

benefits statements based on the company's interpretation, they were still of the view that the pensionable salary cap was legal.

136. However, the claimant was unaware of this, he said he was shocked when he read that the trustees had not taken their own legal advice as of course their duty was to their members whereas the company's duty was to protect the financial viability of the company.

137. Meanwhile the claimant's therapist was still trying to obtain further sessions and Miss Turner stated on the 14 October that the company had agreed two further counselling sessions.

138. Wendy Turner visited the claimant at his home on 14 October and she reported back to Sally Lowles, copied to the claimant which stated "I saw Mark at his request on 14 October for an update on his medical status, in his opinion his health is not getting any better, he still experiences low mood, poor sleep patterns, loss of confidence and generalised anxiety. Mark tells me that the reason he contacted me was he has no contact with Otter HR for some considerable time, he feels alone, vulnerable and isolated and that this is only fuelling his health issues, he is aware that some of this may be inadvertently of his own making but in truth he was hoping that with time and the correct medication help he could prepare himself to take things further, this unfortunately hasn't or is not happening and because of this he feels no further forward regarding his position with the company than he did back in June. From our conversation and from conversations with the counsellor he is seeing Mark is fully aware that this situation cannot go on indefinitely and as such feels that there is now need for further dialogue with the company regarding his occupational status so as to gain answers to the ongoing questions he has asked regarding the pension scheme. Mark is also conscious that the above if not resolved may compromise his entitlement to company sick and needs clarification of what happens should the situation extend past twelve months, this uncertainty is also fuelling his health issues. Mark advises that he has an appointment to see his doctor again next week, this is for a medical review and to extend his sick note, nothing that his doctor will not sign him back to work until the issues at work have been resolved. As you may have gathered from the above Mark doesn't appear to be personally well enough at the moment to attend any meeting or to go through any grievance type process with the company but I understand from what he said he is looking into appointing a person of legal status to act on his behalf to resolve the position he finds himself in and to prevent further health related issues".

139. On 22 October the claimant appointed HRC LAW LLP to act for him in respect of the grievance process.

140. On 24 October a meeting took place between Wendy Turner, Sally Lowles, Mr Colling and Julie Woolley, there was a minute of this meeting which had the comments made in the email followed by the company comments as follows:-

(1) Contact Issue

Company Comment: He spoke to JW the week before the visit on 10 October re SSP and there is also an email exchange that day, following the subject

access request from Mark on 6 April he received the data on 12 August and there was a course of correspondence between Mark and MC between 17 August and 19 September. In October there was also an email exchange with Lindsey Mycock re pay slips.

(2) Mark has requested a further dialogue.

The company comment, MC asked if Wendy could confirm that Mark was medically fit enough to handle further dialogue via letter as he was happy to write to Mark summarising where we were up to in the correspondence and he could give the grievance issue to his legal adviser.

(3) Go through visit

Wendy confirmed she did not perform any physical tests on Mark, she had just chatted. She had just listened to Mark and jotted down what he said after preparing a summary of those notes she had sent it to Mark whereupon he had amended them in places including additions and sent them back to Wendy. She had then made minor changes to Mark's amendments as she considered the comments too aggressive before submitting the report to Sally.

(4) Actions

Wendy to confirm her medical opinion that ok to write to Mark. MC to send letter.

141. Miss Turner then actually wrote out a note confirming that he was medically fit enough to be able to enter into dialogue.

142. On 25 October Mr Colling sent a letter to the claimant referring to the visit from Wendy Turner stating that "you now feel ready for further dialogue and that you are awaiting replies to ongoing questions raised by yourself with the company and the trustees". He confirmed:-

(1) Grievance

As you are aware Brian Smith sent you a letter regarding the grievance dated 21 June, Brian has still not received a reply to this letter following your appointment of 7 July. However Wendy Turner has informed me that you are in the process of appointment a legal adviser to resolve the issues raised by you.

(2) Subject Access Request

You submitted a data subject access request on 6 July, following this request the data was delivered to you on 12 August. There was an exchange of several letters and emails between us, the last correspondence being my email of 19 September in which I supplied additional requested information and asked you to clarify your comment in your email of 15 September. To

> date I have not received a reply to this email but I am happy to respond following clarification of the comment.
>
> (3) New Contract with amended pension rights
>
> Following completion of the consultation on the closure of Otter Controls Limited retirement benefit scheme to future accrual on 31 October 2016 in my letter of 29 July I offered you a new employment contract commencing 1 November 2016 with all the rights the same apart from the amended pension rights. If you wish to accept this offer you need to return the signed copy of that letter to me by 31 October 2016.
>
> I also believe you wished to clarify your sick pay entitlement, please find attached relevant sections of the companies rule book which explains your rights and if you have any further questions please do not hesitate to write to me.
>
> We look forward to receiving your response to these letters and emails so we can resolve the issues and hope you are able to return in the near future. I am informed by Julie that the Trustees are also awaiting reply from you regarding a letter sent 12 August and you should reply to her on their behalf and not to me."

143. The claimant advised his solicitor that he had been asked to agree to changes to his employment contract on 31 October 2016 and that he was going to be in Ireland between 27 and 31 October attending a family wedding. He did not tell her he was under notice of termination as he says he did not know that he was.

144. The claimant then responded to the company by email on 26 October explaining that he would not be able to respond by 31 October but would reply as quickly as possible after that date. He said that to confirm "I am in the process of appointing legal advisors who will be in touch with you on these issues on my behalf." He had in fact already but only recently appointed them by this stage. This rang alarm bells with the company who then delivered an urgent letter to the claimant on 27 October stating that "following my letter of 29 July you have had three months to decide if you will accept the new employment contract offered with all terms the same apart from pension benefits i.e. if you accept this new contract you will be a member of the company defined contribution scheme from 1 November 2016 in line with all other members who opted out. We are therefore unable to extend the deadline and if you wish to accept the new contract you need to return the signed copy of that letter to me before 31 October 2016".

145. The claimant advised that he returned back from Ireland at 1 o'clock on 31 October and arrived home some time around 5 o'clock but he did not open the post until later. The claimant could not obtain any legal advice as it was after the close of business.

146. The claimant then emailed Mr Colling at 14:11 the next day, 1 November. The email was drafted by his lawyer. It said:-

> "Dear Michael
>
> I am responding to your letter dated 29 October. I mentioned in my previous response to you that I would not be able to respond by 31 October. I was out of the country over the weekend at a family wedding and have only just received and opened your letters, one copy of which by post and the other by recorded delivery, I was not here, the latter I have just picked up from the post office. In the circumstances having considered you proposals I am reluctantly prepared to accept the variation to my contract on the terms proposed in your letter given that the alternative is that my employment is terminated. However, my agreement is on the basis that all my rights are reserved in relation to this matter, in particular my agreement is without prejudice to my historic accrued pension rights whether as against the company or the trustees of the scheme and my ability to pursue those rights to the fullest extent permitted by law. I also reserve my rights in respect of my complaints that the company's actions in this regard amount to further acts of detrimental treatment as a result of my protected disclosures is unlawful discrimination and is further evidence of a breakdown in relationship between the parties. I note that your suggested variation does not set out the definition of pensionable pay, I trust that this definition is based on my actual take home pay as set out on my P60 however I would appreciate if you would confirm this is correct. Finally after talking to another member of staff regarding the new scheme it appears my understanding regarding what I can pay in to the scheme may not be right and that if I pay in a larger percentage of my wage some of this will be offset as I was not present at the presentation and/or the information provided to date does not appear to tally with what I am being told. Could you please send me the relevant information so I can make an informed decision.

147. Mr Colling replied to the claimant around half past three referring him to a hand delivered letter, the claimant said he had not received this at that stage. He received it around 4 o'clock on 1 November. This said:

> "Dear Mark
>
> Further to my letters of 29 July, 25 October and 27 October I note you have not returned the letter accepting the new contract offered by us commencing on 1 November and I therefore write to confirm that regrettably your last day of employment with Otter was 31 October 2016."
>
> He said he was disappointed that:
>
> "you have chosen not to continue your career with the company".

148. The claimant then emailed Mr Colling again at 4:47 stating "I am extremely concerned and distressed to have received your letter dated 1 November, to clarify I have no intention of not continuing my career with the company and indeed have made it entirely clear today that I would accept the changes to my contract. By way of background I explained to you in advance I was not going to be able to respond to your letter dated 25 October by the deadline which you gave me of 31 October. As I

explained to you in my email today I was out of the country and only received your follow up letter dated 27 October late yesterday afternoon. In the circumstances I then emailed you to accept the variation of my contract as soon as I was able to in my email timed at 14.11. At that time I had received no correspondence from the company regarding the continuation of my employment or otherwise, in fact I only received the hand delivered letter terminating my employment late this afternoon at about 4pm after I had accepted the variation to my terms. With all this in mind as far as I am concerned I have accepted the variation and my employment continues under the new agreed terms, can you please confirm the company's position regarding my continued employment by return as a matter of urgency".

149. Mr Colling replied confirming that as he did not return the signed copy of the new contract before 31 October 2016 his employment ended a minute before midnight on 31 October 2016 pursuant to the letter of 29 July. His letter of 1 November 2016 simply confirmed this. He went on to say "in any event your attempt to accept the terms in the form delivered would not have been acceptable even if received before 31 October 2016, this is because you did not purport to accept the terms offered, rather you raised the possibility of different terms being applicable".

150. On 2 November the claimant also received further correspondence from Mr Davies of TPAS which stated inter alia "I feel you should now pass the above information on to the company trustees and see what they now intend to do regarding the calculation of benefits earned before 1 November 2008".

151. On 7 November the claimant's solicitors wrote at length to the respondent setting out an appeal against his dismissal on the grounds that his dismissal was unfair, automatically unfair and discriminatory, that he had suffered detrimental treatment by the employer on the grounds that he had made protected disclosures and that he had been subject to unlawful disability discrimination including a failure to make reasonable adjustments and victimisation. They proposed that a reasonable adjustment would be for the company to agree to a variation to its normal procedures to allow contact in relation to the appeal process to go through themselves to avoid the claimant's medical condition being exacerbated.

152. The appeal then stated that he made a protected disclosure on 25 September 2015 which resulted from an independent financial advisor believed the transfer value he had received was incorrect. They asserted that in his letter of 20 September he informed the company he did not believe that the cap on pensionable salaries applied to him and queried whether provisions of the trust deed had been followed to implement the cap and asked for copies of documentation to verify this was the case. The detrimental treatment on the grounds of that protected disclosure was that Mr Boundy took him aside and subjected him to some pressure regarding the issue. It was also asserted that by sending a letter out to all scheme members stating that a member had queried the 2.5 cap but had not given any reasons that this was also a detriment and that it was common knowledge it was the claimant who had done this. The letter went on to state that no further pay increases would be awarded to any employees until all active members had signed a copy of the letter to confirm, amongst other things, that they had been consulted and agreed to the 2.5% cap, this

was also an attempt to pressurise the claimant into dropping the matter and agreeing to the cap and the situation was very stressful, was in a difficult position regarding his colleagues and understood that all employees signed the letter and returned it to the company apart from himself. This affected his health which he advised the company of on 4 November, and that he had received an email from Dr Smith stating "whether you proceed further with trying to get more than was agreed and understood by everybody is entirely in your hands" which was an aggressive and antagonistic response causing him further stress exacerbating his health conditions.

153. They also mentioned that his expenses had been queried even though he had been filling out and submitting expense forms in the same manner for many years and had never been questioned before that. He was also concerned that the expenses matter had been copied to his manager Mr Derksen, returning from China he felt that he had been ostracised by colleagues and the directors. It recorded that on 29 December Dr David Smith had told the claimant that because of the issues he had raised the company had no choice but to shut the scheme to future accruals and that all scheme members would be advised of this in the new year and that he was probably correct regarding his allegations about the scheme, and that reference was made to a legal challenge going through the courts and it could be found that the cap was not legally enforceable. If the cap was challenged the viability of the scheme would be put into jeopardy and the solicitors interpreted this as trying to place pressure on Mr Heywood to drop the issue which he had raised.

154. It described the claimant's second protected disclosure as at 30 December where he alleged the company had breached the provisions of the trust deed and complained about detrimental treatment he had been suffering since raising these issues since September and the pressure he had been put under to drop the issue, the atmosphere at work, he alleged he had made a protected disclosure and been subject to detrimental treatment as a result. He set out how his health was being affected. The letter went on to say discrimination, detrimental treatment on the grounds of the protected disclosure then occurred.

155. The solicitors had had via the Subject Access Request a copy of the Chief Executive's email by that stage about closing the scheme but also suggesting the claimant was "going for constructive dismissal" which the solicitors denied and they interpreted this as the respondent's making decision the claimant would not be returning to work. They were also concerned that confidentiality had been breached when he was spoken to by Mr Joliffe and Mr Derksen about the issue and where they were anxious to confirm they were happy with his work. They were then contacted several times about taking the grievance process forward even though he had made it clear he was not well enough. In fact he was signed off work from 27 January. It then referred to the process of closing the scheme and the fact the claimant was not receiving information because he was not checking his work email address, this was said to be a deliberate attempt to exclude him from the consultation process and he had also heard from colleagues in China that the company was saying the claimant was not coming back. Further, the Consultant Psychiatrist's report which established that he had a disability for the purposes of the Equality Act. There was then a reference to the grievance process which again it was reiterated he was not well enough to take part in and that again he felt he was not being properly included in the consultation process.

156. It then referred to 15 July options letter and said Mr Heywood was deeply distressed by this letter and the threat of dismissal if he refused to agree to the changes, it complained about the deadline which was then extended by a few days. Further, the claimant had complained he had not seen the notice closing the scheme as it was put up in work and he was not in work. It recorded that he was given notice of termination on 29 July as he had not voluntary withdrawn from the scheme and it stated that the termination of his employment would take place on 31 October 2016, a formal offer of re-employment under the terms of a new contract was made, he was asked to accept the offer and send it back to Mr Colling by 31 October.

157. The solicitors quoted "he was informed that if he did not wish to enter into the new contract his employment will regrettably terminate on the termination date". The failure to contact him about this issue or consult him over the new terms or the termination of his employment was also detrimental treatment due to making a protected disclosure and further acts of disability discrimination".

158. There was then a section regarding the Subject Access Request and an allegation that the company had failed to comply with this properly. Regarding the termination of his employment, it was stated by the solicitors it was self evident from the discussions with Wendy Turner on 14 October the claimant was operating under the assumption his employment with the company would continue and he had no intention his employment would terminate on 31 October. It acknowledged that the company wrote to the claimant on 25 October reiterating that he needed to return the letter by 31 October giving him only three working days in which to respond and he advised them he would not be able to but would do so as quickly as possibly after that date. He was then out of the country until 31 October when he saw the second letter from the company saying they could not extend the deadline. He then emailed Mr Colling on 1 November as we have already seen accepting the proposals. It then continued that he received the handwritten letter terminating his employment.

159. The company then stated they were unable to extend the 31 October deadline but gave no explanation why not and also referring to the fact that in their opinion the terms on which he had accepted the variation were in any event unacceptable. The claimant disputed that he had attempted to agree different terms and suggested that he should have been consulted prior to the decision to issue him notice or afterwards and that they made no steps to ensure that he understood the importance of meeting the deadline of 31 October 2016. It said there appears to be no reason whatsoever why the company was not willing to accept this acceptance of the new terms albeit it came some fourteen hours later than they had requested it, the company has given no explanation as to why this deadline could not be extended, the company suffered no loss or inconvenience in this late reply. They further stated that given Mr Heywood's considerable length of service, his unblemished disciplinary record and all the factual circumstances outlined above the company has not acted reasonably in all the circumstances in treating this reason as sufficient for dismissal. They also said it would have been a reasonable adjustment to extend the deadline and asserted that the company's decision to dismiss the claimant was entirely pre-conceived and pre-judged.

160. The letter also went on to say, "From the company's response dated 2 November it is clear the real reason for his dismissal was the protected disclosure he had raised, his disability and the complaints he had raised, they were not willing to continue employing him unless he dropped all the issues he had raised. It ended, "Mr Heywood is of the view the company would not have treated any other employee in this way, an employee did not have a disability or did not raise protected disclosures" and then his solicitors made suggestions for dealing with the appeal.

161. The letter was replied to by the respondent's solicitors Eversheds LLP at the time, it simply stated "we note the contents of your letter and do not agree with a number of the statements contained therein, we do not propose to enter into protracted legal correspondence in respect of this matter. In summary, you have requested an appeal on behalf of your client however our client is not prepared to offer any such appeal nor is it obliged to do so, we are also aware your client emailed Mike Colling on 10 November regarding the return of his property and collection of his belongings …".

162. On 9 November the claimant emailed the trustees reiterating the comments TPAS had made and stated that he has still not had an answer from the trustees, and TPAS were taking on his case, he stated he was still receiving medication for anxiety.

163. It is not strictly relevant to the case, but after a considerable time TPAS received an outcome to the complaint it put forward on the claimant's behalf to the trustees. They stated that they had obtained different legal advice from the company which suggested that 2.5% pensionable salary cap did not apply to pre 1 November 2008 service. It was also explained that it was possible for the members to enter into compromise agreements to sign away this right. It was indicated that a proposal to compromise was sent to the claimant regarding dealing with his pre 1 November 2008 pensionable service and if he did not accept it the company would confirm that his pre 1 November 2008 benefits would be re-calculated without the 2.5% earnings cap being applied. This was sent to all employees.

164. There were three options then regarding entering into a compromise agreement with the payment of £1,000 in cash if the employee agreed that the 2.5% cap applied to pre 2008 service. The letter also said "please note that in offering these options the company is doing so without prejudice to its position that the cap is already legally binding on members who signed the October 2015 confirmation forms". The schedules attached to this options letter showed that the difference between his pension if he accepted the cap would be £35,638 and if he didn't accept the cap would be £43,333 so a difference of £6,000.

165. In respect of other matters arising at Tribunal we received evidence about the respondent company's financial situation in relation to the group of companies and we accept that the respondent had a real financial need to close the pension scheme. The respondent had existing liabilities on their different pension schemes and had the prospect of litigation regarding potentially defective manufactured goods that could seriously affect their financial situation. In addition the evidence of the respondent's senior managers was that the reason for refusing the claimant's appeal was managerial consistency and integrity.

The Law

Disability

166. Under the Equality Act 2010 section 6(1) disability is defined as:

> "A person (P) has a disability if –
>
> (a) P has a physical or mental impairment; and
>
> (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

167. In respect of determining this, the Tribunal should look at guidance on matters to be taken into account in determining questions relating to the definition of disability issued by the Secretary of State under section 6(5) of the 2010 Act.

168. A substantial effect is one that is "more than minor or trivial" (section 212(1) Equality Act 2010). In addition the Tribunal should look at the substantial adverse effect disregarding the effect of any treatment such as counselling and medication, such as Sertraline.

169. Examples of day-to-day activities are shopping, reading, writing, socialising, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling.

170. The claimant drew our attention to the illustrations given in the guidance of matters which suggest that there is a substantial adverse effect on normal day-to-day activities. These were:

- Persistent general low motivation or loss of interest in everyday activities.
- Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships for example because of a mental health condition or disorder.
- Persistent distractibility or difficulty concentrating.

171. In respect of "long-term" the view is that it must have lasted for 12 months or be likely to last for 12 months. "Likely" means "could well happen" as established in **SCA Packaging Limited v Boyle [2009]** House of Lords.

172. The time at which to assess the disability is the date of the alleged discriminatory act.

<u>Direct Discrimination</u>

173. Direct discrimination is defined in section 13 of the Equality Act 2010, which states that:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

174. In respect of disability it is obviously a protected characteristic and there can be no justification for direct discrimination.

175. This is often described as the claimant having to establish a prima facie case of discrimination following which the respondent has to provide an explanation, the bear fact of a difference in status and treatment is not sufficient; there must be something more, and as established in **Zafar v Glasgow City Council [1998] ICR 120** unreasonable treatment by itself is not sufficient to establish a prima facie case: the circumstances surrounding the respondent's action need further scrutiny.

176. The burden of proof is considered in a number of cases, including **Igen v Wong [2005]** Court of Appeal and **Madarassy v Nomura International PLC [2007]** Court of Appeal.

177. In **Martin v Devonshire Solicitors [2011]** the EAT stressed that:

> "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation…They have no bearing on whether a Tribunal is in a position to make positive findings on the evidence one way or another, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law."

178. In **Laing v Manchester City Council [2006]** the EAT also said it was not improper for the Tribunal to move directly to the respondent's explanation for the action and accept it if it was fully adequate, and it was not necessary to go through a stage of establishing whether or not there was a prima facie case.

<u>Section 15 – discrimination arising out of disability</u>

179. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states that:

> "A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability; and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

180. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant's disability (section 15(2)) or that they could not be reasonably expected to know the claimant was disabled. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer's agent or

employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

181. In **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said, in respect of justification:

> "It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate…A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer's attempts at justification."

Section 20 – Reasonable Adjustments

182. The claimant also makes a reasonable adjustment claim. Section 20 says:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person this section, sections 21 and 22 and the applicable schedule apply, and for those purposes a person on whom the duty is imposed is referred to as A.

The duty comprises the following three requirements (1) a provision, criterion or practice of A's puts a disabled person at (2) a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and (3) the employer is required then to take such steps as it is reasonable to have to take to avoid the disadvantage.

183. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled, and by comparing to non disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

184. In **Environment Agency v Rowan EAT [2007]** the EAT said:

> "A Tribunal must go through the following steps:
>
> (2) Identifying the PCP applied by or on behalf of the employer;
>
> (3) The identity of non disabled comparators where appropriate;
>
> (4) The nature and extent of the substantial disadvantage suffered by the claimant."

185. Serota J stated:

> "In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments…without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

186. Paragraph 21 of schedule 8 to the Equality Act provides that:

> "A person is not subject to the duty if he does not know and could not reasonable be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid."

187. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it. This is also referred to above in respect of section 15 claims.

188. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

> "(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.
>
> (2) The extent to which it was practical for the employer to take the step.
>
> (3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.
>
> (4) The extent of the employer's financial and other resources.
>
> (5) The availability to the employer of financial or other assistance with respect to taking the step.
>
> (6) The nature of the employer's activities and size of its undertaking and matters relevant to a private household."

Indirect Disability Discrimination

189. Indirect discrimination is defined in section 19(1) of the Equality Act 2010 which states that:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

190. Section 19(2) goes on to provide that:

"For the purpose of subsection (1) a provision, criterion or practice is discriminatory in relevant protected characteristic of B if –

(a) A applies or would apply it to persons with whom B does not share the characteristic;

(b) It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) It puts or would put B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Protected Disclosure

Meaning of Protected Disclosure

191. Section 43A of the Employment Rights Act 1996 states that "in this act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H, 43B

(i) in this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure (is made in the public interest) and tends to show one or more of the following:

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

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

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

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

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

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

43C Disclosure to employer or other responsible person

(1) a qualifying disclosure is made in accordance with this section if the worker makes a disclosure -

(a) to his employer or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to

(i) the conduct of a person other than his employer or

(ii) any other matter for which the person other than his employer has legal responsibility, to that other person.

(2) a worker who in accordance with the procedure whose use by him is authorised by his employer makes a qualifying disclosure to a person other than his employer is to be treated for the purposes of this part as making the qualifying disclosure to his employer.

192. It has to be established that the claimant has provided information to the respondent, whilst the information may contain allegations within it it must be sufficiently particularised to constitute information. A harsh dividing line between information (as established in **Cavendish Munro PRM v Geldud [2010] EAT**) and mere allegations is no longer required, in **Kilraine -v- London Borough of Wandsworth EAT 2015** Langstaff J said "I will caution some care in the application of the principle arising out of Cavendish Munroe that the difference between information and allegation is not one that is made by the statute itself, it would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggests that very often information allegation are intertwined, the decision is not decided by whether a given phrase or paragraph is one or rather than the other but is to be determined in the light of the statute itself, the question is simply whether it is a disclosure of information, if it is also an allegation that is nothing to the point".

193. Separate disclosures can be aggregated to establish information, in **Norbrook Laboratories -v- Shaw 2014 EAT** quite trivial matters were involved in a series of emails which taken together constitute a disclosure about Sales Representatives driving in snow. In addition a protected disclosure can be made after the termination of employment (**Onyango v Belvedere [2013] EAT**).

194. In **Babula -v- Waltham Forest 2007** Court of Appeal it was established that the information must tend to show a breach not that it is accurate. However, a claimant does have to establish a reasonable belief even if their belief is wrong. In **Babula** it was said that the word belief in Section 43B(1) is plainly subjective, "it is the particular belief held by the particular worker, equally however it must be reasonable which is an objective test. Furthermore like in **Darnton** I find it difficult to see how a worker can reasonably believe that an allegation tends to show there has

been a relevant failure if he knows or believes that the factual basis for the belief is false".

195. A claimant also has to establish public interest following the Enterprise and Regulatory Reform Act 2013 (although the requirement of good faith has been removed). In **Chesterton Global -v- Nurmohamed 2015 EAT** it was made clear the test of the Tribunal is not an objective one for public interest but rather whether the claimant had a reasonable belief that the disclosure was in the public interest.

196. Further, in **Black Bay Ventures Limited -v- Gaheer 2014** the **EAT** set out the steps the Tribunal should take in its reasoning in a whistle blowing case. It should:-

(1) separately identify each alleged disclosure by reference to date and contact;

(2) identify each alleged failure to comply with a legal obligation or health and safety matter;

(3) identify the basis on which it is alleged each disclosure is qualifying and protected and

(4) identify the source of the legal obligation relied upon by reference to the statute or regulation.

197. The Tribunal should then go on to consider whether the claimant held a reasonable belief as required by Section 43B(1) of the 1996 Act then the enquiry should move onto whether the disclosure was made in the public interest, following which these obstacles are surmounted a Tribunal must identify the alleged detriment, the date thereof as part of its findings and then ultimately decide whether the detriments arose because of the protected disclosures.

198. The burden of proof is on the claimant to establish a protected disclosure has been made (**Goulding -v- Lands Securities Trillion Limited UKEAT 2006**).

<u>Automatically unfair dismissal – section 103 Employment Rights Act 1996</u>

199. Section 103A of the Employment Rights Act 1996 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."

200. A "principal reason" is the reason that operated in the employer's mind at the time of dismissal as set out in **Abernethy v Mott, Hay and Anderson [1974]** Court of Appeal. The burden of proof in a section 103A claim is the same as that which applies in other automatically unfair reasons for dismissal. Technically the burden is on the employer to show the reason for the dismissal. Generally the employer seeks to discharge this by showing that where dismissal is admitted the reason for it was one of the potentially fair reasons under section 98(1) and (2) of the Employment Rights Act 1996. It is said that the employee thereby acquires an evidential burden to show, without having to prove that there is an issue which warrants investigation and

which is capable of establishing the competing automatically unfair reason advanced. However once the employee has satisfied the Tribunal that there is such an issue the burden reverts to the employer, which must prove on the balance of probabilities which of the competing reasons was the principal reason for dismissal.

201. In **Kuzel v Roche Products Ltd [2008]** where the reason for the dismissal was not accepted to be a fair reason under section 98 of the 1996 Act, that did not mean that the Tribunal found that it was the protected disclosures that led to dismissal. At the Court of Appeal Lord Justice Mummery rejected a contention that the burden of proof was on K to prove that that her making of the protected disclosures was the reason for her dismissal, but he agreed with the EAT that once a Tribunal has rejected the reason for dismissal advanced by the employer it is not bound to accept the reason put forward by the claimant. The Tribunal could conclude the true reason for dismissal is one which has not been advanced by either party.

Detriment

202. Section 47B of the 1996 Act states that:

(i) a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure;

(ii) this section does not apply where:

(a) the worker is an employee and

(b) the detriment in question amounts to dismissal.

203. In **Shamoon -v- Chief Constable of Royal Ulster Constabulary (Northern Ireland) 2003** House of Lords it was said that "a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment. In order to establish detriment is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of and the detriment can arise after the end of the employment relationship.

Causation (detriment)

204. In respect of the test for whether the protected disclosure was the reason for the treatment in a detriment claim. the Tribunal must be satisfied that the claimant was subjected to a detriment on the ground of the protected disclosure. In this regard the Tribunal must be satisfied the disclosure was a material factor behind the alleged detriment. This is set out in **Feckitt -v- NHS Manchester 2012** Court of Appeal where Elias LJ held "I agree with the submissions that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act, the reason which has informed the European union analysis is that unlawful discriminatory consideration should not be tolerated and ought not to have any influence on the employers decision, in my judgment that principle is equally applicable where the objective is to protect whistle blowers particularly given the public interest in ensuring they are not discouraged from coming forward to highlight potential wrongdoing. In my judgment the better view is that Sections 47B will be

infringed if the protected disclosure materially influences (in any sense of being more than a trivial influence) the employer's treatment of the whistle blower. If Parliament had wanted the test for standard of proof in Section 47B to be the same as for unfair dismissal it could have used precisely the same language but it did not do so".

205. This raised the issue of whether the individual was responsible for the detriment but was innocent of the whistle blowing disclosures could be responsible for a whistle blowing detriment. In the **Royal Mail -v- Jhuti [2006] EAT** this situation was addressed where Mitton J states, "I am satisfied that as a matter of law a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee who is in possession of the true facts can be attributed to the employer or both of them". However, **Jhuti** has now been overturned on this point at the Court of Appeal.

206. There is also provision for vicarious liability set out by the Enterprise and Regulatory format 2013 where a worker has been subjected to a detriment by another worker of their employer stating that that should be treated as also down by the worker's employer, whether it was done with the employee's knowledge or approval.

Causation Generally

207. In respect of establishing causation more generally this would be decided in many cases by inferences as in a discrimination claim and it is unlikely to be positively acknowledged that whistle blowing caused the detriment or dismissal.

208. For inferences a claimant can rely on natural justice, a defective investigation, bias, breach of protocol or procedure or policies, inferences can be drawn from totality of the primary facts and the context of the case.

Unfair Dismissal

209. The respondents relied on some other substantial reasons for the claimant's dismissal.

210. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). "Some other substantial reason" is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

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

211. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

212. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

213. The Tribunal must not substitute its own view for the range of reasonable responses test.

214. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure.

215. In **Sainsbury's PLC v Hitt [2003]** Court of Appeal the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

216. In this case the respondent relies on "some other substantial reason" which is a potentially fair reason under section 94, which they describe as the claimant's failure to agree new terms and conditions, and rely on the guidance given in **Garside and Laycock Ltd v Booth [2011] EAT**. This states that:

> "SOSR can be established as long as the employer has a sound business reason for imposing changes potentially in fundamental breach of contract but that Tribunals should in assessing unfairness consider both whether the employer acted reasonably and whether the dismissal was equitable."

217. In **Garside and Laycock v Booth [2011]** EAT, the EAT accepted that SOSR was established when an employee was dismissed for refusing to accept a pay cut that the employer had proposed as an alternative to compulsory redundancies. However, when remitting the case to the Tribunal to consider reasonableness the EAT emphasised that the Tribunal should consider the equity of a dismissal for this reason. The EAT indicated that equitable considerations might include whether management was to be subjected to the proposed pay cut as well as the workforce and whether the implied equitable concept of fair dealing was observed in the manner in which the pay cut was negotiated."

218. The Tribunal will look at whether the respondent had a valid and substantial business reason for the contractual change in question; whether the process was carefully thought out and implemented over a reasonable period. Therefore even if

for example there is a sound business reason for a reorganisation the reasonableness of the employer's conduct must be judged in context of the range of reasonable responses text. The Tribunal must consider balancing the needs of the employer and employee. There are many other factors which can be relevant in a SOSR case. Perhaps in this case the most relevant is whether the employer explored all alternatives to dismissal and of course whether a fair procedure was followed.

Parties' Submissions

219. The parties' submissions were lengthy and very helpful and accordingly the Tribunal has incorporated those submissions in its conclusions below.

Conclusions

Disability Discrimination

(a) Disability status

220. Is the claimant disabled for the purposes of the Equality Act 2010? The respondent does not concede disability. The claimant relies on an adjustment disorder, depression/anxiety attacks and stress related illness.

221. The claimant's illness began on or about 16 October 2015, which we accept from his evidence and his visits to his doctor. Further, his email of 4 November and his letter of 31 December referenced his symptoms. His symptoms were severe at this stage although he was continuing to function at work, and indeed when the respondent wanted confirmation that he was fit enough to travel to China and work on 6 January he provided a doctor's note to say he was fit to work. We find at this stage therefore he was not suffering from substantial adverse effects on day-to-day activities. Whilst his work and travelling to China are not day-to-day activities, the fact that he could do these things is symptomatic of him being able to function in respect of normal day-to-day activities. He was also fit enough to correspond rationally.

222. However, once he went off sick on 27 January the respondent should have been on notice that the claimant was seriously affected by his illness as he had never had any absence before in his employment. Nevertheless, the claimant clearly thought at the end of March he was recovering and wanted to return to work and from his witness statement and in cross examination he asserted that he believed that the respondents seeking a Consultant Psychiatrist report was simply delaying tactics. This suggests that the claimant did not think at that point that his illness was having a substantial adverse effect on his day to day activities as if so why would he believe he was in a position to return to work. **?**

223. That position changes on 3 June when the Consultant Psychiatrist gives his view that the claimant will continue to be ill until the disagreement can be resolved which is what sparked the respondent's trying to resolve the matter through the grievance procedure. It might have been possible to resolve the matter by the company making a statement to the claimant that if Gleeds was determined in a

manner adverse to the scheme then the money would be put into the scheme to ensure that legal obligations were met and then the claimant would have been in a position to return to work then as the matter would have been resolved in his favour. However, that is not what actually happened, the company never made that statement to the claimant, and the claimant's illness continued.

224. We find the first time that is suggested to the claimant is in an email from Mr Hall of 7th July, however the company's other actions suggest that this was not going to be the case as they were seeking to obtain binding statements from employees that they agreed to forego any advantage Gleeds gave to them and agreed to the company's view that the 2.5% cap did apply.

225. The respondent contended that later in the year the prospects of dealing with the matter faded and therefore at some point the "long term" provision of the test to establish disability would have been fulfilled however it is not possible to say when as it was still possible on 31 October and that by accepting the new terms and conditions matters would have been resolved in which case the claimant could have recovered. However we do not accept that position as the accepting of the new contract excluding the old pension scheme from his terms and conditions would not have resolved the claimant's issue which was whether the company were going to honour the implication of Gleeds in relation to his and others transfer values and pension benefits.

226. Therefore we find that it was clear from Dr Vincenzi's report that this matter was likely to last for twelve months, that was 3 June and there was no indication that the matter could be resolved until the claimant indicated to Wendy Turner that he was going to appoint solicitors to help with a grievance process, that suggests that that process might have started to resolve the issue however, its highly unlikely that an internal grievance would have resolved this matter, it needed outside intervention and pressure as is shown by the TPAS situation. The claimant did not get the 'comfort' he needed until January 2018 and that might have been the start of a recovery however of course he had been dismissed by this juncture which self evidently would not have assisted a recovery.

227. Accordingly we find it was clear by 3 June the claimant's condition was likely to be long term and therefore that the company should have known he was disabled from this point.

Disability Discrimination Claims

Email of 21 October concerning Mr Jolliffe

228. We have found in our findings above that the information the claimant knew in respect of this was insufficient to establish any less favourable treatment. It is not clear exactly what was being said, it was at third hand, it does not establish any actual event took place to the claimant's detriment.

Letter of 5 April from Miss Lowles re Consultant Psychiatrist

229. We do not accept the claimant's characterisation of this as trying to prevent him returning to work. We accepted the respondent's position that they had never

had anybody off with stress before and they did not want to exacerbate his condition or have him back at work when he was not fit to work. We find it was entirely reasonable of them to obtain a Consultant Psychiatrist report, they could not have prior knowledge of what that Psychiatrist would say, neither was it detrimental to the claimant, it was a benefit to him therefore there is no direct discrimination.

230. In respect of Section 15 the respondents accepted that the risk of exacerbation of an impairment is something arising from a disability, however it was not accepted that it was unfavourable treatment as it was intended to and did protect his health and welfare. We accept the respondent's submissions on this point and also that it was justifiable as the protection of his health and safety and welfare was a legitimate aim and the referral was a proportionate means of achieving it.

Failure to send an email informing the claimant of 18 April 2016 consultation meeting to his personal email address and failure to meaningfully consult

231. There was no direct discrimination or section 15 claim here. The respondents were unaware that he had chosen not to check his work email address and it is clear that the respondents did not want to avoid the claimant obtaining any of the information on the contrary, they were anxious to ensure no doubt under legal advice that given that he was absent from work, he was able to take part in the consultation as far as was reasonably possible, it was not in the respondent's interests to curtail the consultation and leave themselves open to legal challenge.

232. The second part of this complaint refers to no meaningful consultation with the claimant. We do not accept this. There was considerable consultation with the elected members, the claimant was not treated any differently and the fact that he was absent was attempted to be bridged. In fact the claimant did correspond with Ken Hall so that he was able to feed into the collective consultation.

The consultation came to an end on 15 July without there having been adequate consultation.

233. The respondents undertook collective consultation with the elected representatives who did not complain about inadequate consultation. Any information requested was provided, independent financial advice was paid for by the respondent and the period of consultation was extended to allow the representatives to explore and pursue any proposals put forward and the improved benefits were in fact negotiated following this extended period.

234. The claimant also complained about the inadequacy of explanation for proceeding with the proposal then ended the process. The employee's representative stated they understood the reasoning and it had been set out in detail in presentations. There was no differential treatment of the claimant because he was disabled and he has not pointed to anything to establishes that. All the information was available to him the same as any other employee.

235. In respect of the section 15 claim, i.e. something arising his disability, i.e. his absence from the workplace, this did not result in him receiving any less information than his colleagues and therefore he was treated in exactly the same way.

Failure to properly individually consult with him including extension of time

236. It was arranged for the claimant to receive individual consultation, it was his decision that he was not fit to attend. The respondent continued to invite him, therefore there was no less favourable treatment of the claimant. In respect of the extension of the time limit the respondent did offer an extension of the time limit which was more favourable therefore there was no direct discrimination.

237. In respect of Section 15 the extension request was because of something arising in consequence of his disability i.e. that he was too ill to decide this. However, the limitation on the extension was justified as the respondents had a strict timetable to adhere to and ensuring the closure of the scheme in an orderly fashion was a legitimate aim and it was proportionate to only make a limited extension as far as was reasonably possible, which is what the respondent did.

Letter of 29 July giving notice of termination of contract

238. The only reason the claimant was issued with notice of termination on 29 July is because he was the only employee who did not opt out therefore the reason for the treatment was unconnected to his disability. It was identified from the outset that this would be the sequence of events for anyone who did not opt out and that was decided before the respondents knew the claimant was going to be the only one to opt out. In any event this sequence of events was necessary legally for the respondents to close the scheme and ensure they had no further legal liabilities.

239. Neither was this a matter arising because of something in consequence of the claimant's disability, the giving of the notice of termination was entirely because the claimant did not opt out, it could equally have applied to anyone else who did not opt out and there was no reason arising out of his disability which meant that he was the only one who opted out, on the contrary the reason he didn't opt out was because he did not wish to accept the 2.5% cap on his pre-1 November 2008 service which is an entirely legitimate course of action for the claimant but totally unconnected with any disability or something arising from the disability.

240. We also accept that it was justified – closing the scheme was a legitimate aim and following this procedure which is a well-known pathway in these circumstances and other similar circumstances was a proportionate means of achieving the legitimate aim.

Inadequate contact during illness from 29 July until termination

241. The claimant has not specified what contact he expected the respondents to have and we have no comparator to look at somebody else and see that they were having regular discussions about their absence and discussions about their potential return to work. The respondent's sickness policy suggests that there should be a contract review and/or OH referral at 25 weeks which did not happen in this case, this is potentially an indication that there was something about the claimant's situation which meant the respondents did not follow their usual pattern, however we

have no evidence that the respondent did actually follow this pattern in practice, they advised that they had never dealt with a situation like this before and we accept that.
242. Further an OH referral would have been otiose as the respondent had only just got Dr Vincenzi's report and a contract review is with a view to termination for absence so the failure to do that cannot be a detriment/unfavourable treatment.

243. In respect of the Section 15 claim there was nothing to establish that if there was a failure to provide sufficient contact this was because of something arising in consequence of the claimant's disability. It arose out of Dr Vincenzi's report which stated that until the pensions dispute was resolved the claimant would not get any better, whilst the claimant was not well enough to pursue a grievance procedure there was no prospect of this being resolved and there was contact about that.

Letter from Mr Colling of 25 October 2015

244. We do not accept this was less favourable treatment, we actually find this was more favourable treatment as the claimant received an additional letter reminding him that he needed to return the form by 31 October and this was sent in good faith by the company who wished to ensure that the matter was crystal clear. There was no evidence that anybody else would have been treated differently, there was no evidence that this was because the claimant had a disability that this letter was sent, it was sent in order to ensure given that the respondents have not heard from the claimant and following Wendy Turner's visit that the claimant was fully aware of the situation, neither was it sent because of something arising from the claimant's disability.

27 October Refusal to extend the deadline for accepting new terms

245. The claimant had simply said he would not be able to meet the deadline implying that this was because he was seeking to instruct solicitors however we know that he had already instructed them on 22 October.

246. Nevertheless, if there was less favourable treatment in not giving him an extension this was not because of anything arising from his disability, we do not accept that in the three month period the claimant was not well enough to have instructed solicitors and to have taken advice on the position regarding the 31 October. The claimant had been well enough to correspond with the employee representative during the consultation process.

247. Further we find that the company's decision not to extend the deadline was justifiable, they had to close the pension scheme in an orderly fashion and there was the risk that the claimant would then have a different closure date to his colleagues. We do not know but that suggests to us practical difficulties and possibly it would not have been legally possible to close his scheme on a different date to everybody else, it certainly would not have been good for industrial relations, it is likely that it would have held up the closure of the scheme therefore we find that not extending the deadline was a proportionate means of achieving a legitimate aim namely closing the pension scheme in the manner which was operationally consistent.

1 November letter confirming employment is terminated

248. We accept the respondent's argument that this was not unfavourable treatment, it was simply confirming the implications of the claimant's failure to reply to the respondents offer of a new contract before 31 October and this would have applied to anybody else, with or without a disability who didn't reply in that time. If it was unfavourable treatment it was not because of something in consequence of the alleged disability but because of the need to change the pension scheme which resulted in the need to change the claimant's terms and conditions which had not connection whatsoever with the claimant's disability. Again, we find it was justified as it was a proportionate means of achieving a legitimate aim dealing with the formalities necessitated by termination of employment.

Letter from Mr Colling of 2 November declining to accept late indication of acceptance from the claimant

249. We find there was no less favourable treatment, anyone purporting to accept the situation late and also proposing potentially new terms and conditions i.e. an equivocal acceptance would have been treated in the same way. We do not accept that the respondents took the opportunity to get rid of the claimant because of his disability, they could have dismissed the claimant because of his disability following their sickness absence scheme.

250. Further, we do not find there was a Section 15 claim as there was nothing arising out of his disability which meant he could not have responded in time. The delay was throughout the three month period inexplicable whilst the claimant was ill he was not so ill that he could not engage in instructing a solicitor earlier. As far as he argues that he did not reply on time because he did not understand he would be dismissed we have indicated in the narrative we do not accept this, the language was clear. It has not been suggested that his illness meant he could not understand correspondence or that he was unable to instruct solicitors earlier to explain the situation to him. In fact the failure to accept by 31 October appears to result from the claimant being absent in Ireland on holiday attending a family wedding which of course has no connection with his disability.

14 November Letter from Mr Colling not offering an appeal

251. We do not accept that someone in the same situation as the claimant would have been treated identically. However, the reason for the treatment was unconnected with his disability, the reason the claimant was not offered an appeal was not because of his disability but because of the respondent's exasperation with the claimant as a result of the way in which he had conducted his enquiries and the enquiries themselves, which we have found was public interest disclosure discrimination.

Failure to make reasonable adjustments/Indirect discrimination

252. We followed the respondents practice of dealing with these together as the same PCPs relate to each one.

Provision, Criteria or Practice

(1) Requirement that an employee should be attending work and/or not signed off sick in order to be the recipient of consultation and/or staff presentations in particular that on 18 April 2016 as to the proposal on which the consultation was due to take place and/or communications for such purposes or making arrangements for such purposes or asked to his employment situation.

The respondents submitted that no such PCP was applied, the consultation with undertaken with representatives which made no difference as the claimant was asked to work or not and it was clear the claimant was able to communicate with his representatives via email as much as any other worker could do. We accept the respondent's submissions on this point.

He was provided with copies of all the presentations and could ask whatever questions he wanted therefore he was consulted and although the claimant has not strictly argued this, if his issue is that it was not effective consultation we do not accept that either. The claimant was not put at a substantial disadvantage by consultation occurring through the claimant being provided with paper copies and having to email his representatives about any issues. If he was it was clearly justified given his absence from work and the legitimate aim of closing down the pension scheme in an orderly and consistent fashion.

(2) The requirement of any individual one to one meetings referred to in the communications dated 15, 19, 22 July could take place no later than 29 July.

This was applied to the claimant. Did it place the claimant at a substantial disadvantage when compared to non-disabled scheme members. ? In respect of indirect discrimination this was not a PCP that was applied to anyone else and therefore it cannot fit within the definition of indirect discrimination. For the purposes of reasonable adjustments did it place the claimant at a substantial disadvantage when compared to non-disabled scheme members, this cannot be the case as they had an earlier deadline. The claimant was arguing for no deadline at all – this was clearly not a reasonable adjustment as the respondents needed to progress the appropriate steps to close the scheme, notice had to be given in order to ensure expiry before the end of the pension year.

(3) The requirement that the offer of a new contract must be or must have been accepted by the 31 October 2016

This was applied to the claimant and it would have been applied to anybody else who had not voluntarily opted out. Would this have put the claimant at a particular disadvantage for indirect discrimination or a substantial disadvantage when compared with those who were not disabled for a reasonable adjustment? We find that it did not, the claimant had a full three months in which to decide what to do to take legal advice, to obtain advice from his brother.

Further, in respect of indirect discrimination it was justified, there was a legitimate aim closing the scheme to future accrual and it was necessary to do this by the end of October in order to ensure consistency between all the employees.

It is not a reasonable adjustment either because there was no substantial disadvantage, again there was no reason that his disability stopped him within a three month period obtaining legal advice if that is what was a pre-requisite to him deciding whether to accept the new contract or not, he stated he was awaiting reassurance from his existing rights but that was not the reasonable adjustment he was contending for, the reasonable adjustment was an extension to the time limit.

Accordingly, all the claimant's disability claims fail and are dismissed.

Protected Interest Disclosure Detriments claims

A. Was there a protected disclosure?

(4) Did the claimant make a disclosure on 25 September 2015? The letter of 25 September states that "having reviewed the deeds of amendment dated 30 October 2008 I do not consider that a 2.5% cap applies to my pensionable salary increases since 1 November 2008". He goes on to say then rather the scheme rules provide that the pensionable salary is:

- A member's full annual salary including any salary increases during the previous twelve months uncapped or

- Such other amount (which could be higher or lower than the member's actual salary) (as notified by the company to the trustees for any scheme year) but where the pensionable salary notified by the company to the trustees would for any particular scheme year be less than 102.5% of the member's pensionable salary for the previous scheme years the trustees must agree in writing and then he requested copies of the notification.

Accordingly here the claimant is asking for information to confirm that the written protocols have been complied with therefore the trustees should have notified the such other amount and notified again and agreed if this was less than 2.5% obviously this would apply where an individual has received a salary rise lower than 2.5% in which case that lower amount would be the pensionable increase for that year rather than 2.5, 2.5 being a cap rather than a standard amount to be applied year on year. So although the claimant asserts that the 2.5 cap does not apply he suggests the reason could be because these notices have not been complied with because he goes on to say "please confirm that in the absence of the company having provided written notices to the trustees that my pensionable salary was to be different from my actual remuneration for any particular scheme, my pensionable salary for that year would indeed be my full salary (uncapped).

Accordingly this was the issue that the claimant was raising at this stage but it was a mere allegation at this stage as he did not have the written evidence that in fact those notices had not been complied with, neither do we consider the protected disclosure to be "I do not consider that the 2.5 cap applies to my pensionable salary increases since 1 November 2008" as this is undermined by reference to the "rather" on the next sentence, there was no reference whatsoever to the fact that there is a legal case in progress that might mean the cap does not apply to service accrued before 1 November 2008, there is no mention of this whatsoever".

Neither did the claimant have a reasonable belief that this was the case as it could not be reasonable to conclude this when he had no evidence whatsoever that the written formalities had not been complied with at the stage he wrote this letter.

Was it made in the public interest?

(5) It is possible that something that only affects a reasonably small number of employees can be in the public interest. As around 200 plus employees were potentially affected here, the issue raised was sufficient to be in the public interest, even if it arises because a person is concerned about the effect on them. However at this stage the claimant is anxious that his colleague should not know that he had raised any concerns and he did not share with his colleagues any of these issues nor wished the respondent to advise his colleagues of these issues. On balance, however, we find it is in the public interest as this comes within a similar situation to **Nurmohamed** where the claimant raised his own commission issues. However, they applied to other people and therefore it was found to be in the public interest.

Second protected disclosure 4 November 2015

(6) This relates to the comments that "I am stressed at the moment, I am finding it difficult to concentrate on anything and that numerous persons approached him saying "what have you done"". We find this is not a protected disclosure because it was not in the public interest, it was about his own position and he says in the email itself "I am not interested in anyone else" which he confirmed in cross examination. Neither could he have a reasonable belief that there had been a breach of confidence on the part of the respondent as the information he provided does not establish who spoke to him, how this arose - it could have been one of his own friends Hooley or Moore – who had told other people.

29 December meeting

(7) There was no disclosure made at this meeting, Dr Smith was talking to the claimant about the fact that there may be a problem with applying the law although it may well be because of a completely different reason to that suggested by the claimant i.e. the Gleeds case which was not mentioned in the meeting. The claimant made no disclosure of information and no

allegations at all regarding any particular breach of anything at this meeting.

31 December 2017 letter

(8) The letter of 31 December was deliberately written in order to establish the ground for a protected disclosures claim, so it is surprising how obtuse this letter is. The claimant provided some information in this letter, he said that the trust deeds, his IFA understood from a previous case he had worked on that there were two methods to determine an individual's pension entitlement and it was important to ascertain that the calculation provided by Julie Woolley on 3 July were calculated correctly and in accordance with the trustees. Again, the claimant provided nothing specific here to suggest that the respondent had done anything wrong or there was a breach of anything, simply that he needed more information to ascertain how the transfer value was being calculated. He says later "my disclosure of potential inconsistencies in the way in which the scheme was purported to be capped together with inconclusive paperwork … resulted in unfounded insinuations" … This was inaccurate, the claimant had not stated there were potential inconsistencies in the way the scheme was reported to be capped, just there may be insufficient paperwork and having received that paperwork he is now saying it is inconclusive.

(9) He then goes on to say "so as to make the position clear I am concerned that the company has breached the provisions of the trust deeds, my contract of employment and more generally broken the pensions law" however he provides no information to explain how this has occurred, he does not even say that having received the paperwork he believes that the company has failed to comply with the written protocols required to ensure that the 2.5% cap applies which appears to be what he was initially intending to rely on, nor does he say at all in this letter that there are legal problems with implementing the 2.5% cap in relation to service already accrued at the time the cap is agreed. He states that he feels shunned and micro managed but he provides no detail regarding this and the allegation that he was being used as a "scapegoat". However there is insufficient detail here for this to meet the Cavendish Munro test. Again, this is an issue regarding himself and therefore it is not in the public interest in any event. Whilst the respondent may have been alerted to the Gleeds issue or indeed, although this was denied in Tribunal were already aware of it and the claimant's queries were the catalyst for deciding to take the road of least resistance and close down the pension scheme is a separate matter to the claimant actually raising that as an issue. Nowhere does the claimant raise that as an issue. He does not raise the Gleeds issue directly until the meeting on 7 December with Mr Southan which is not included in his list of matters raising a protected disclosure. In any event it was to a trustee and not to the company, who are the respondent in this case.

29 July 2016

(10) This was the claimant communicating the view of TPAS the respondent should calculate benefits for pre 2008 service in accordance with the Gleeds first instance ruling. We find that this was a protected disclosure because it was information that a regulatory body had formed a view based on its legal and technical knowledge that this was the way in which the company should administer its pension scheme and it was not doing so. Accordingly there was a potential breach of the law in relation to individuals who had already retired. This was accordingly the disclosure of information and the making of an allegation of the breach of the law. It was in the public interest as it applied to the respondent's employees who had already retired and on the basis of **Nurmohamed** we find that is sufficient.

7 November 2016

(11) We find taking this letter altogether it does spell out the issue at the heart of this case in relation to the Gleeds case and therefore was a protected disclosure for the reasons given above. It was post termination but that is not a bar to it being a protected disclosure.

B. Detriments

Was the claimant subjected to detriments because of making protected disclosures? We have considered the detriments arising after 29 July 2016 on the basis that this is the first protected disclosure we have found:

Email from Mike Collings of 29 July

(12) There is no detriment here, Mr Collings was simply setting out the position that TPAS issues did not affect the decision to close the scheme, this is entirely accurate. Further the decision to close the scheme was also not because the claimant had made a protected disclosure but was made to protect the financial viability of the scheme if Gleeds was correct ,and was put in train before the first protected disclosure we have been able to identify .

The letter of 29 July giving notice of termination of contract

(13) This was given to the claimant because the scheme was closing and not because of any protected disclosure made on 29 July. It was a necessary adjunct to closing the scheme.

27 October 2016 refusing to extend the deadline for accepting new terms

(14) The claimant did not ask for the deadline to be extended, he simply said he could not comply with it however putting this to one side the claimant has had three months in order to make a decision regarding this and therefore it was completely unreasonable of the claimant to simply send off a short email to say he would not be able to comply and then leaving for Ireland. In fact given that he instructed solicitors on 22 October it could be said that one of the reasons he could not comply with the

deadline was because he was going to the family wedding in Ireland and did not have enough time to spend instructing his solicitors.

(15) In any event ultimately the deadline was not extended because the request was unreasonable and it was important to the respondent to stick to the timetable in order that they could close the scheme on time and to ensure they treated all employees consistently.

1 November 2016 Letter confirming employment is terminated

(16) This was simply confirming the operation of the letter of 29 July and therefore is not a further detriment.

2 November Letter from Mr Colling declining to accept late indication of acceptance from the claimant

(17) Again the respondent declined to accept the late indication because of the reasons given for not extending the deadline but also because the claimant did not unequivocally accept the new contract, not because he had made a protected disclosure.

14 November – Refusal to offer appeal

(18) The respondents case here was that the claimant had been offered an appeal against the decision to dismiss on 29 July and there was an offer to extend this time limit if necessary. However, we find here that the respondents actions were unreasonable as the situation on 29 July was different from the situation post 29 October.

(19) We accept that unreasonableness by itself is insufficient to establish that the reason for the claimant's treatment was his protected disclosures, however we have borne in mind the fact that the claimant had 37 years' service and had never been off sick until this dispute arose. The respondents did not argue it was the way in which the claimant raised his alleged protected disclosures which had caused them difficulty, nor did they put forward convincing reasons why they could not have given the claimant an appeal at this stage, after all they had achieved their object of ending his contract and would have been able to ensure that a condition of the appeal was that he signed the new contract. In any event he conceded he would sign it without conditions to keep his job. Therefore, we have drawn an inference that the reason for the decision was because the claimant had made protected disclosures.

(20) We do not accept that the respondent would have behaved the same in respect of any other employee who had got in a tangle over their dates, procrastinated, albeit unreasonably, and been disorganised, given another employee with the claimant's length of service who had not raised any of these issues but simply not signed the voluntary opt out we do not believe they would have refused to offer an appeal.

Unfair Dismissal

Automatic Unfair Dismissal

253. The claimant's dismissal on 31 October was not due to making protected disclosures however the respondent's failure to offer him an appeal was and accordingly because we have found that that was due to the making of a protected disclosure that makes the claimant's dismissal automatically unfair.

Section 98 Unfair Dismissal

254. Firstly we do not accept that the claimant did not know his employment was at risk during the closing the pension scheme process. The respondent's communications were clear . The claimant argued that the respondent should have realised from Wendy Turner's report of their last meeting that he was unaware his employment could be terminated but we find that was not an obvious conclusion. It could be equally the case the claimant for his own reasons was waiting until the last minute to confirm his position.

255. In respect of the reasons for dismissing the claimant for SOSR the respondent submitted that it was reasonable to terminate the claimant for the following reasons:

- The pension fund required substantial additional funding;
- There was a sound business base for the proposal to close the scheme;
- Collective consultation process was carried out in good faith and to the satisfaction of the representatives;
- Representatives had access to legal advice and all affected employees had access to independent financial advice;
- The members elected overwhelmingly to opt out of the scheme;
- The claimant was the only person who did not;
- Dismissal and re-engagement was the only practicable course in the face of failure to agree to vary terms;
- That course of action had been spelt out as early as April and was re-iterated on several occasions thereafter;
- The claimant had three months within which to accept re-engagement;
- The claimant had accessed the special advice to assist him;
- The claimant had been offered an appeal which he did not take up;
- As far as the claimant required clarification or assurance these matters should have been dealt with before termination were not;

- The claimant's attempt to accept an offer which had lapsed was not in any event unequivocal and made reference amongst other things to a supposed breakdown in relations; and

- The claimant's length of service was not a license to ignore deadlines set for good reason and in good faith.

256. We accept those were all reasons why the respondent terminated employment on 31 October however we do not find they are good reasons why the respondent did not allow the claimant an appeal.

257. As we have said above in relation to the protected disclosure the respondent had obtained their objective of terminating the claimant's membership of the previous scheme and therefore limiting their liability in relation to his pension.

258. The only reason they put forward for not offering an appeal in the witness statements was management consistency and integrity**.** We do not see how this applies at all in this situation as the claimant was the only person subject to the termination situation. We also find that it was not reasonable to expect him to rely on an appeal flagged up on 29 July, three months before the actual termination date as the claimant's information and views changed throughout this period, particularly as he corresponded with TPAS, and the questions he would have asked were different.

259. However it would not have made any difference ultimately because the claimant could not have challenged the termination of his employment at that stage for all the same reasons which ultimately would have been relevant to a post October appeal.

260. His appeal would have had to consider is the fact that he may have been at fault in not accepting the new contract by the due date but given his length of service and the lack of detriment to the respondent there was no reasonable reason why they could not offer him an appeal. The chances of success of an appeal are matters relevant to remedy.

261. Accordingly we find the dismissal was unfair for the failure to offer an appeal.

262. Any issue of **Polkey** and contributory conduct will be considered at the remedy hearing on 10 September.

Employment Judge Feeney

Date: 30th July 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 July 2018

.....

FOR THE TRIBUNAL OFFICE