**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4104765/2017**
**Held in Glasgow on 30 April 2018, and**
**1, 2, 3, 8, 9 and 16 May 2018 (Final Hearing); and**
**6 July 2018 (Members' Meeting)**

**Employment Judge: Ian McPherson**
**Members: Robert McPherson**
**Andrew Ross**

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| **Mr David Buchanan** | **Claimant**<br>**Represented by:-**<br>**Mr Tony McGrade – Solicitor** |
| **Student Loans Company Limited** | **Respondents**<br>**Represented by:-**<br>**Ms Kerry Norval – Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The **unanimous** Judgment of the Employment Tribunal is that:

(1) Having heard parties' representatives on the first day of the Final Hearing, on 30 April 2018, in respect of the respondents' opposed application, made orally at that Hearing, for leave of the Tribunal to be allowed to amend the ET3 response form previously lodged on behalf of the respondents, the Tribunal **refused** that application, for the reasons then given orally by the Judge, on

behalf of the Tribunal, as reproduced below at paragraph 31 of the following Reasons for this Judgment of the Tribunal; and

(2) Further, having considered the evidence led at the Final Hearing, and the closing submissions made to the Tribunal by both parties' representatives, and after private deliberation by the Tribunal, the Tribunal has decided as follows :-

(a) None of the 3 communications relied upon by the claimant as part of his claim against the respondents are qualifying protected disclosures made by the claimant to the respondents in terms of **Section 43B of the Employment Rights Act 1996**.

(b) Further, and in any event, the detriment claim, under **Section 47B of the Employment Rights Act 1996**, insofar as based on the first three alleged detriments relied upon by the claimant, is time-barred, and accordingly outwith the jurisdiction of this Tribunal for that reason, having been brought outwith the statutory time limit set out in **Section 48(3) of the Employment Rights Act 1996,** and no argument having been presented to the Tribunal, on behalf of the claimant, that it was not reasonably practicable for a claim based on those alleged detriments to be presented in time, or that it was presented within a further reasonable time.

(c) The claimant was not subjected to any detriment by the respondents, as alleged or at all, and, in particular, he was not subjected to any detriment on the grounds that he had made a qualifying protected disclosure. Accordingly, his complaint against the respondents, under **Section 47B of the Employment Rights Act 1996**, of detriment for having made such a disclosure fails, and that complaint is dismissed by the Tribunal as not well-founded.

(d) The claimant resigned from the employment of the respondents, and he was not dismissed by them, either expressly, or constructively

under **Section 95(1)(c) of the Employment Rights Act 1996**. Accordingly, his complaint of unfair constructive dismissal by the respondents, contrary to **Sections 94 and 98 of the Employment Rights Act 1996,** fails, and that complaint too is dismissed by the Tribunal as not well-founded.

(e) Further, the claimant was not dismissed by the respondent expressly or constructively, on the grounds that he had made a qualifying protected disclosure. Accordingly, his complaint against the respondents, under **Section 103A of the Employment Rights Act 1996**, of automatically unfair dismissal for having made such a disclosure fails, and that complaint too is dismissed by the Tribunal as not well-founded.

(f) In all these circumstances, the claimant's complaints against the respondents are dismissed in their entirety. The claimant is not entitled to any compensation from the respondents, as sought in his Schedule of Loss provided to the Tribunal, as alleged, or at all.

## REASONS

### Introduction

1. This case called before us as a full Tribunal on Monday, 30 April 2018, for an 11 day Final Hearing, on certain assigned dates between that date and 16 May 2018, for full disposal, including remedy, if appropriate, all as previously intimated to parties' representatives by the Tribunal by Notice of Final Hearing dated 1 February 2018.

2. As previously agreed with parties' representatives, 10 days were listed for hearing evidence, and the eleventh day for closing submissions from both parties' representatives. In the event, two days within that original allocated

sitting, being 11 and 14 May 2018, were vacated by the Tribunal, on account of the non-availability of the Judge, and thereafter, evidence from parties' witnesses having concluded in less time than previously estimated by parties' representatives, two further days were vacated on 10 and 15 May 2018.

## Claim and Response

3. Following ACAS early conciliation between 4 and 21 July 2017, by ET1 claim form, presented to the Tribunal by the claimant's representative, Mr Tony McGrade, solicitor with Mc Grade + Co, Glasgow, on 27 September 2017, the claimant complained of being unfairly constructively dismissed, automatically unfairly dismissed for making a protected disclosure, and detriment for having made a protected disclosure, all said to be arising out of the termination of his employment as a Dev Ops Manager on 30 June 2017. In the event of success with his claim, the claimant's preferred remedy was stated to be an award of compensation from the Tribunal.

4. His ET1 claim form was accepted by the Tribunal, on 29 September 2017, and a copy served on the respondents on that date for reply by 27 October 2017. On 27 October 2017, Ms Kerry Norval, Associate, with Burness Paull LLP, Solicitors, Edinburgh, lodged an ET3 response on behalf of the respondents resisting the claim. A preliminary point on time-bar was taken, in relation to the whistleblowing detriment claim, and the respondents defended each of the whistleblowing detriment claim, and both the automatically unfair and constructive unfair dismissal claims, further denying that the claimant was entitled to any compensation from them.

## Initial Consideration and Case Management Preliminary Hearing

5. Following Initial Consideration of the claim and response by the Judge, the case called before him, in private, as an Employment Judge sitting alone, on 20 December 2017, for a Case Management Preliminary Hearing.

6. At that Preliminary Hearing, having noted the completed Preliminary Hearing Agendas returned by the parties' representatives, Mr McGrade and Ms Norval, and having heard from both of them at that Hearing, the Judge made various Case Management Orders, all as more fully detailed and set forth in his written Note and Orders of the Tribunal, dated 22 December 2017, as issued to both parties' representatives under cover of a letter from the Tribunal dated 22 December 2017.

7. In terms of matters discussed at that Preliminary Hearing, and then regulated by formal Orders of the Tribunal, the Judge ordered that the claimant's solicitor should lodge a detailed Schedule of Loss, and mitigation documents, and further ordered that the case be listed for Final Hearing, reserving for consideration at that Hearing the disputed preliminary issue of time-bar in relation to the whistleblowing detriment claim.

8. At that Preliminary Hearing, it was further agreed that the case be listed for this 11 day Final Hearing, although the actual dates for this Hearing were not then assigned, but later intimated when the Notice of Final Hearing was issued by the Tribunal on 1 February 2018, after ascertaining the availability of parties, their representatives and witnesses.

9. In advance of the start of this Final Hearing, and as per the Orders made at that Preliminary Hearing, the Judge further ordered a Joint Bundle of Productions, and an Agreed List of Issues, and a Joint Statement of Agreed Facts, to be prepared, and lodged with the Tribunal, before the start of this Final Hearing.

10. Further, on joint agreement of both parties' representatives, the preparation and mutual exchange of witness statements was ordered by the Tribunal, on the basis that witnesses would be called to give oral evidence, and any witness statement produced would <u>not</u> stand as their evidence in chief, but would require to be read aloud, before cross-examination by the other party's representative, and questions by the Tribunal, in the usual way.

11. On 13 January 2018, Mr McGrade intimated the claimant's provisional Schedule of Loss, seeking a total award of **£80,487.36**, and he also provided further and better particulars of the claim, where he sought to add a further sentence at the end of the existing paragraph 12 of the ET1 paper apart. Thereafter, on 26 January 2018, Ms Norval, the respondents' solicitor, commented on the claimant's provisional Schedule of Loss, and separately she updated her ET3 paper apart in response to the claimant's further and better particulars of the claim.

12. On 16 April 2018, there was a case management application made by the claimant's solicitor, Mr McGrade, to take all witness statements, or at least the claimant's, as read, and not require them to be read aloud, as previously ordered by the Tribunal. While there was no objection taken to that application by the respondents, it was refused by the Judge, on 20 April 2018, for the reasons then set forth in the Tribunal's letter to both parties' representatives of that date.

**Final Hearing before this Tribunal**

13. The Final Hearing called before us, as a full Tribunal, just around 10.20am, on the morning of Monday, 30 April 2018, when the claimant was in attendance, represented by his solicitor, Mr McGrade, while the respondents were represented by their solicitor, Ms Norval.

14. A Joint Bundle of Documents was provided, in a large, A4, ring binder, with a typewritten index of documents, extending to 9 pages, under 5 separate tabs, with documents 1 through to 112, comprising 355 pages in total, including (1) Employment Tribunal documentation; (2) background documents; (3) other documents; (4) medical documents; and (5) mitigation and loss documents.

15. The provisional Schedule of Loss, included in tab 5 of that Bundle, as document 103, at pages 334/335 (seeking a total award then of **£99,327.52**) was superceded, on 30 April 2018, when Mr McGrade lodged a finally revised

Schedule of Loss, seeking **£107,327.52** as the total net award sought for the claimant, and that included sums of £4,000 for each of past and future loss of bonus.

16. In the course of the Final Hearing, the document originally produced as document 88, at pages 294-295, described as a letter of 13 June 2017 from the respondents to the claimant advising of the investigation outcome, was substituted by a copy of the signed, original letter, dated 8 June 2017, issued by Louise Love, to the claimant, which was relabelled as pages 294A and 295A.

17. Further, in the course of the ongoing Final Hearing, clearer / more legible copies were provided of certain productions, at pages 86A/E, 87, 100, 171A/G, and 298. Also, on 3 May 2018, we were presented with a revised version of the Agreed Statement of Facts, where paragraph 19 thereof, relating to Ms Love's outcome letter to the claimant, was suitably revised, to reflect the change of date from 13 to 8 June, and the change of page numbers from 294-295 to 294A-295A.

## Clarification of Issues

18. Further to a letter sent to both parties' representatives on Friday, 27 April 2018, following a reading day allocated to the Judge, who had considered the Joint Bundle of Documents, agreed List of Issues, agreed Statement of Facts, and witness statements, provided by both parties, certain points of clarification were raised by the Judge for addressing by parties' representatives at the start of this Final Hearing.

19. Accordingly, at the start of this Final Hearing, there was discussion between the Judge, on behalf of the Tribunal, and both parties' representatives, about various preliminary matters, including running order of witnesses, and estimated time for evidence, and whether or not a formal Timetabling Order was required from the Tribunal. Mr McGrade stated that, while the claimant's witness statement referred to loss of bonus, and there was detail in the

agreed Statement of Facts, there was no item for loss of bonus included in the claimant's Schedule of Loss, and he would require to attend to providing an updated Schedule of Loss for use by the Tribunal.

20. On the matter of a medical witness, to be called by the claimant, if the medical report was not agreed by the respondents, as discussed at the Case Management Preliminary Hearing, we were advised by Mr McGrade that the claimant's GP's report, by Dr Walker, was agreed by the respondents, and that Mr McGrade would accordingly not be calling any medical witness on behalf of the claimant, although he recognised that this matter should have been addressed in the agreed Statement of Facts adjusted with Ms Norval. He stated that an additional paragraph to that statement of facts would be added to reflect parties' agreement about the medical report.

21. We pause to note and record here that, when a revised version of the agreed Statement of Facts was produced, a new paragraph 27 had been added, stating that the medical evidence produced at pages 310 to 331 of the Joint Bundle is a true and accurate record of the claimant's medical history and the other issues contained therein.

22. There was also discussion, with both parties' representatives, about the terms of Ms Norval's email to the Tribunal of 24 April 2018, concerning evidence from the respondent's witness, Dwayne Pascal, a "***reasonable steps defence"*** for the respondents, and generally about the exchange and sharing with the claimant of the respondent's witness statements exchanged with Mr McGrade on 16 April 2018.

23. As per Mr McGrade's email of 27 April 2018, he had advised the Tribunal that he took issue with any attempt by Ms Norval to introduce a reasonable steps defence in this case. He commented how she had quite properly conceded that there was no reference to this in the ET3, and while she had forwarded him a draft List of Issues on 9 April 2018, which made reference to this matter, he had advised her that he did not consider this could appear on the List of

Issues as it formed no part of the response, and there had been no application to amend the response to include this line of defence.

24. Further, Mr McGrade's email stated, and he confirmed to us, that it was not clear to him what steps the respondents say they took, what formed the basis for the reasonable steps defence, and had he been made aware that the respondents were proposing to defend the claim on this basis, he would have sought to obtain additional information, including any documentation or presentations relating to the reasonable steps defence, and he would have asked his various witnesses to cover this issue in their witness statements. He submitted that there would be very substantial prejudice to the claimant, if this line of defence for the respondents was to be admitted now.

**Respondents' application to amend the ET3 response refused by the Tribunal**

25. There being no formal application to amend the ET3 response before the Tribunal, the Judge invited Ms Norval to address the Tribunal on the respondents' behalf. She stated that the respondents had taken reasonable steps to prevent any detriment that may have occurred, and she sought leave of the Tribunal to be allowed to amend the ET3 response accordingly.

26. The Judge stated that to consider any application to amend, it is fundamental that there is a formal application to amend before the Tribunal, setting forth the proposed amendment sought by the respondents. The Judge referred to the well known guidance on proposed amendments set forth by Lady Smith in the Employment Appeal Tribunal in **Ladbrokes Racing Limited v Traynor EATS/0067/06** and enquired of Ms Norval whether she required a short adjournment to draft a proposed amendment for the respondents, for the consideration of Mr McGrade, solicitor for the claimant, and for the Tribunal's consideration thereafter.

27. In response to the Judge's request for clarification, Ms Norval stated that she did not need to request an adjournment, and she then intimated orally to the Judge, who noted and recorded, her proposed amendment. Under reference

to the copy of the respondents' paper apart to the ET3 response, produced at pages 28 to 34 of the Joint Bundle, Ms Norval stated that she sought leave of the Tribunal to add a new paragraph, after the existing paragraph 5.9 (Detriment Claim), and before the existing paragraph 5.10 (Automatic Unfair Dismissal), and to renumber the existing paragraphs 5.10 to 5.15 accordingly. The proposed new paragraph 5.9 was to read as follows:-

> "***If the Tribunal finds that the claimant was subjected to any detriment on grounds of having made a protected disclosure, which is denied, the respondents took reasonable steps to prevent any such detriment from occurring.***"

28. Having heard Ms Norval's application for leave to amend the ET3 response, as per that proposed new paragraph 5.9, we invited Mr McGrade to reply, on behalf of the claimant. He submitted that Ms Norval's amendment simply came too late, as fair notice to the claimant, and while in discrimination cases, an employer may have a statutory defence, under **Section 109 of the Equality Act 2010**, had this application been made at an earlier stage, he would have been asking the Tribunal for a Documents Order against the respondents, and asking for all company policies, procedures and documents that support that defence, and also all training materials, and details of training, and follow up.

29. In writing up this Judgment, we pause to note and record that while Mr McGrade referred to that **Section 109**, this is not a discrimination claim, but a whistleblowing claim, and we assume he meant to refer us to the equivalent statutory provision found in **Section 47B(1D) of the Employment Rights Act 1996**.

30. In the absence of Ms Norval's proposed amendment specifying the steps taken by the respondents, Mr McGrade submitted it was simply not appropriate to allow her amendment, and he reminded the Tribunal that, in context of drafting the agreed List of Issues, he had advised Ms Norval that

this matter was not pled by the respondents, and he took the view that her application to amend intimated at this Final Hearing came far too late.

31. Having heard Mr McGrade's objection, Ms Norval replied, stating that she accepted the points made by Mr McGrade, but she had explained her position as best she could. In the circumstances, the application being opposed, the Tribunal decided to adjourn for private deliberation, to consider the respondents' opposed application for amendment. The Tribunal adjourned for that reason at 11.05am. When proceedings resumed, at around 11.15am, the Judge read *verbatim* from a note written in chambers, and agreed with both lay members of the Tribunal, as follows:-

> ***"Having carefully considered Ms Norval's oral application to amend the ET3 response, as intimated at this morning's Hearing, and having heard Mr McGrade in reply, the Tribunal refuses to allow the respondents' amendment.***
>
> ***It comes far too late, at the start of the Hearing, that has been fixed since 1 February 2018 and when, even if it had been intimated earlier than today, e.g. when she and Mr McGrade discussed the List of Issues, no application was made at that stage seeking leave to amend.***
>
> ***Further, and more fundamentally, the proposed amendment is wholly lacking in any meaningful specification of the "reasonable steps" taken by the respondents, on which they seek to rely, and Kipling's six honest men of who, what, why, where, when, and how, have not been specified, meaning the claimant has not had fair notice of the proposed defence, which strikes the Tribunal as odd because we would have assumed that this is information that must be within the respondents' knowledge.***
>
> ***To allow the amendment, and call for additional information, will stop this listed Final Hearing proceeding and that is not***

***appropriate, and so the amendment must be refused, and we will proceed to hear the case at this diet of Final Hearing.***"

**Evidence to be heard by the Tribunal**

32. The respondents' amendment application having been refused by the Tribunal, the Judge then raised with both parties' representatives their proposals about witness running order, and time estimates, and whether or not a formal Timetabling Order by the Tribunal was required. He intimated that the Tribunal would not be sitting on Friday 11, and Monday 14 May 2018, as he was on annual leave, and so not available.

33. Mr McGrade confirmed that evidence would be led from the claimant, and two witnesses, Craig Docherty, and Stephen Murchie. For the respondents, Ms Norval, confirmed that evidence would be led from Dwayne Pascal, Louise Love, and Lynda Hainan, as also Jonathan Mitchell, but Steven Kennedy, identified as a potential witness for the respondents, in her date listing stencil of 19 January 2018, would not be being led on the respondents' behalf.

34. Just prior to the start of the claimant's evidence in chief, at around 11.30am, Ms Norval handed up to the Tribunal a three page, typewritten Cast List, identifying 33 separate persons, and clarifying their position with the respondents, and their involvement in the claimant's case, including the claimant and his two witnesses, and the respondents' four witnesses.

**Witness Statements**

35. In determining this case, we had before us signed witness statements, spoken to in evidence at this Final Hearing, as follows:-

(1) Mr David Buchanan: Claimant (formerly Dev. Ops. Manager);

(2) Mr Stephen Murchie: formerly Respondents' ICT Commercial Manager;

(3) Mrs Lynda Hainan: Respondents' HR Business Partner (Technology Group);

(4) Mr Craig Docherty: formerly self employed contractor with the Respondents;

(5) Mr Dwayne Pascal: Respondents' former Head of Digital Delivery & Customer Solutions;

(6) Mrs Louise Love: Respondents' Head of Internal Audit and Whistleblowing Officer; and

(7) Mr Jonathan Mitchell: Respondent's then Senior Database & Applications Analyst, and now Dev. Ops. Engineer.

36. With each witness statement before the Tribunal, after the witness had been sworn in by the Judge, the witness was asked to confirm their identity, and that the document in front of them on the witness table was their own signed witness statement for use at this Final Hearing, and that they had recently read it.

37. Further, each witness was asked if they had any alterations to make and, in some instances, while none were then intimated, during the course of the witnesses' evidence, some minor manuscript alterations were required, usually to dates, and other typographical/spelling errors in relation to names of persons.

38. After the witness statement was read aloud, by the relevant witness, cross referring the Tribunal to any cited productions included in the Joint Bundle, that witness was then subject to cross examination by the other party's solicitor, in the usual way, and questions from the Tribunal, before any re-examination of the witness.

39. Mr McGrade, the claimant's solicitor, confirmed, on 2 May 2018, that he had no objection to Ms Norval, solicitor for the respondents, putting supplementary questions in chief to her witnesses, in light of the claimant's own witness statement.

**Evidence concluded before the Tribunal**

40. With the close of Mr Mitchell's evidence to the Tribunal on the late afternoon of Tuesday, 9 May 2018, that concluded evidence from the respondents, and evidence in the whole case. Accordingly, the Tribunal discharged the two remaining sitting days, previously allocated for evidence, on Thursday 10 and Tuesday 15 May 2018.

**Agreed List of Issues**

41. The Tribunal was presented with the undernoted List of Issues agreed between parties' representatives, as follows:-

***Detriment Claims***

1. *Did any of the following acts constitute a qualifying protected disclosure in terms of section 43B of the Employment Rights Act 1996 (**ERA**)?*

    a. *The communication by the Claimant to Dwayne Pascal on or around 6 May 2016 regarding Leslie I' Anson.*

    b. *The email dated 16 May 2016 sent by Craig Docherty to the Claimant, Dwayne Pascal and David Milligan.*

    c. *The grievance submitted by the Claimant under the Respondent's whistleblowing procedure on 21 December 2016.*

2. *Did any of the following take place and constitute a detriment that the Claimant was subjected to by the Respondent:*

    a. *The decision to withdraw from the Claimant the power to determine whether Leslie I' Anson should be removed from the Respondent's premises on or around 12 May 2016.*

b. *The decision to remove the Claimant from the place where he carried out his duties and to insist that he work elsewhere on or around 16 May 2016.*

c. *Requiring the Claimant to submit an email in deliberately misleading terms requesting that he be moved on or around 18 May 2016.*

d. *The delay in dealing with his grievance (the outcome in respect of which was issued by letter dated 13 June 2017).*

e. *The decision to refuse to reinstate full pay to the Claimant following the upholding of significant elements of his grievance (which was communicated to the Claimant on 22 June 2017).*

3. *Was any such detriment(s) on the ground of the Claimant having made a qualifying protected disclosure(s)?*

***Unfair Dismissal Claim***

4. *Did the Respondent's actions, as identified in paragraph 38 of the ET1 Claim form, cumulatively amount to a breach of contract?*

5. *Had any earlier breach(es) by the Respondent previously been affirmed by the Claimant?*

6. *If the Respondent breached any term of the Claimant's contract of employment as noted above, was any such breach repudiatory?*

7. *If so, did the Claimant resign in response to that repudiatory breach?*

8. *Did the Claimant delay too long in resigning in response to any repudiatory breach?*

9. *What was the reason for the employer's conduct?*

10. *Was the Claimant unfairly dismissed contrary to section 98 of the Employment Rights Act 1996?*

11. *Was the Claimant automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996?*

***Remedy***

12. *If the Claimant was subjected to a detriment by the Respondent as a result of making a protected disclosure, or constructively dismissed by the Respondent (as a result of making a protected disclosure or otherwise), what compensation (if any) is due to the Claimant as a result?*

13. *In the event that the Tribunal finds that the Claimant was unfairly dismissed (automatically or otherwise) and that it is appropriate to make any award of compensation, should any award of compensation be reduced on one or more of the following grounds:*

    a. *The Claimant's contribution towards his dismissal;*

    b. *Section 123 of the ERA;*

    c. *The Claimant's failure to comply with the Acas Code by not appealing the Respondent's decision in respect of the Complaint under the Respondent's Whistleblowing Policy;*

    d. *Whether any relevant disclosure made by the Claimant was not made in good faith;*

*e. Any sums received by the Claimant in alternative employment elsewhere or through social security benefits since his dismissal; or*

*f. Any failure by the Claimant to mitigate his loss.*

***Preliminary Issues***

*14. Did the Claimant raise his detriment claim within the statutory time limit set out in section 48(3) of ERA?*

*15. Were the detriments relied on by the Claimant part of a series of similar acts or failures under section 47B of ERA?*

*16. If the Claimant's detriment claim was not raised within the statutory limit, was it reasonably practicable for the claim to be presented in time?*

*17. Did the Claimant raise the detriment claim within such further period as the tribunal considers reasonable?*

**Agreed Statement of Facts**

42. Further, the Tribunal also had before it a finally revised version of the agreed Statement of Facts adjusted between parties' representatives, and added to, by way of a new paragraph 27, relating to medical evidence on 30 April 2018, and amended, at paragraph 19, as regards the claimant's outcome letter from Ms Love, as detailed earlier in these Reasons. The finally revised agreed Statement of Facts reads as follows:-

*1. The Claimant commenced employment with the Respondent on 30 June 2003.*

2. *The Respondent administers government funded loans and grants to students in higher and further education in England, Wales, Scotland and Northern Ireland. As at 31 December 2017, the Respondent employed 2,998 employees. In addition, there were a number of staff working for the Respondent but employed by third-party companies.*

3. *The Claimant was first appointed to the role of Print Design Technician with effect from 30 June 2003. He worked initially at the Respondent's premises in Hillington. He moved to work at the Respondent's headquarters in Bothwell Street, Glasgow in 2007, when the Print and Design Team transferred to the Respondent's ICT Directorate. Around September 2011, the Claimant was appointed as an Analyst Programmer (Java). In September 2013, he was appointed to the role of Senior Analyst Programmer. He moved to the Cerium Building, Douglas Street, Glasgow after taking up this post.*

4. *During the period the Claimant was employed as a Senior Analyst Programmer, he worked alongside a number of employees of ThoughtWorks, an independent IT consultancy appointed by the Respondent to carry out work on their behalf. Leslie I'Anson was employed by ThoughtWorks. Leslie I' Anson's line manager at ThoughtWorks was Simon Jenkinson.*

5. *While the Claimant was employed as a Senior Analyst Programmer, he reported to a number of people. Dwayne Pascal was appointed by the Respondent to the role of Head of Digital Development around January 2015. He became the Claimant's line manager when he was appointed to this role.*

6. *Around November 2015, Dwayne Pascal approached the Claimant and advised him that an internal advert was about to be published for the role of Digital Delivery Manager – DevOps*

*(DevOps Manager). He encouraged the Claimant to apply. The Claimant did so and was appointed to the role. He took up the role on 21 March 2016. Following his appointment to this role, he became line manager for Jonathan Mitchell (Senior Applications and Database Analyst), who was based in the Cerium Building in Glasgow and Colm Tolan (Digital Developer), who was based in the Respondent's Darlington office. The Claimant had no line management responsibilities in any of the roles held by him prior to his appointment as DevOps Manager.*

7. *The Respondent used software called Forescout to ensure only authorised machines had access to the Respondent's computer network.*

8. *The Claimant and Craig Docherty met with Dwayne Pascal in May 2016 to discuss concerns regarding the actions of Leslie I'Anson. As a result of the concerns raised at that meeting, Dwayne Pascal agreed to speak with Simon Jenkinson, Leslie I' Anson's line manager.*

9. *On Sunday 15 May 2016, Dwayne Pascal sent the Claimant an email which appears at page 66 of the bundle. The Claimant read this email on his return to work the following day. After reading this email, the Claimant sent an email to Dwayne Pascal advising him that he was sick and had to go home. This email appears as page 67 of the bundle.*

10. *At 11:51 on Monday 16 May 2016, Craig Docherty sent an email to Dwayne Pascal, David Milligan (Post Graduate Programmer Manager) and the Claimant setting out a number of concerns regarding the conduct of Leslie I'Anson. This email appears on pages 68-70 of the bundle.*

11. *Around 16 May 2016, Dwayne Pascal met with the Claimant and Jonathan Mitchell to discuss matters.*

12. *Following this meeting, the Claimant worked from the Respondent's Bothwell Street office until around July 2016. He then returned to the Cerium Building on Douglas Street.*

13. *The Claimant was then absent from employment due to ill-health. He did not return to work at SLC prior to his resignation.*

14. *During the period of his absence, the Claimant received full salary, in accordance with his contractual sick pay entitlement, until 13 December 2016. Thereafter, he received half pay until 28 February 2017. The Claimant elected to convert his sickness absence to annual leave from 1 to 31 March 2017. The Claimant then received half pay again from 1 to 16 April 2017.*

15. *During the period of the Claimant's absence, he had various meetings with members of staff from the Respondent's Human Resources Department. He met with Laura Curtis and Craig Allison (Digital Manager) at Costa Coffee in Sauchiehall Street on 20 October 2016. He had a further meeting with Laura Curtis, Lynda Hainan and Stephen Murchie (Commercial Manager) at Scaramouche in Glasgow on 24 November 2016.*

16. *The Claimant submitted a grievance in terms of the Respondent's whistleblowing procedure on 21 December 2016. This matter was passed to Louise Love, the Respondent's then Whistleblowing Officer, on 10 January 2017. She met with the Claimant for the first time on 6 February 2017. Jonathan Gouck (Senior Auditor) attended the meeting and took minutes. Lynda Hainan (HR Business Partner) also attended. The Claimant was accompanied by Kevin O'Connor (Head of Repayments).*

17. *During the course of the meeting on 6 February 2017, the Claimant and Kevin O'Connor both raised the issue of whether the Claimant would be placed back on full pay.*

18. *Following the meeting, Kevin O'Connor emailed the Claimant advising him of the position being taken by the Respondent. A copy of that email appears as page 167 of the bundle.*

19. *The Claimant was advised of the outcome of the whistleblowing complaint by letter dated 8 June 2017. A copy of that letter appears at pages 294a-295a of the bundle.*

20. *Following the conclusion of the whistleblowing investigation, the Claimant met with Louise Love and Lynda Hainan at the Mercure Hotel in Glasgow on 14 June 2017. He was accompanied by Kevin O'Connor. At that meeting the Claimant's return to work was discussed. The Respondent also undertook to confirm its decision in respect of the Claimant's pay.*

21. *Lynda Hainan emailed the Claimant on 20 June 2017 at 09:39. A copy of that email appears on page 299 of the bundle. The Claimant replied to this email on 20 June 2017 at 10:57. A copy of that email appears on page 299 of the bundle.*

22. *Lynda Hainan emailed the Claimant again on 22 June 2017 at 17:41. A copy of that email appears on pages 301-302 of the bundle. The Claimant replied to this email on 23 June 2017 at 11:50. A copy of that email appears on pages 304-305 of the bundle.*

23. *Gillian Walker emailed the Claimant on 23 June 2017 at 14:29. A copy of that email appears on page 306 of the bundle.*

24. *The Claimant resigned from employment by undated letter, which was hand delivered to the Respondent. A copy of that letter appears on page 308 of the bundle.*

25. *As at the date of dismissal, the Claimant's annual income was £48,240. His normal monthly gross salary was £4,020. His normal monthly net salary was £3,015. He was eligible to receive a discretionary bonus. He had received a bonus in the following years in the following amounts (the Respondent's records do not go back before 05/06):*

| | |
|---|---|
| *05/06* | *£1,350* |
| *06/07* | *£1,397* |
| *07/08* | *£1,582.03* |
| *08/09* | *£1,377* |
| *09/10* | *£610* |
| *10/11* | *£300* |
| *11/12* | *£400* |
| *12/13* | *£400* |
| *13/14* | *£560* |
| *15/16* | *£1,650* |

*26. The Claimant was a member of the Respondent's NOW: pension scheme Both the Respondent and the Claimant respectively contributed 1% of the Claimant's salary to this scheme.*

*27. The medical evidence produced at pages 310 to 331 of the Joint Bundle is a true and accurate record of the Claimant's medical history and the other issues contained therein.*

**Findings in Fact**

43. We have not sought to set out every detail of the evidence which we heard, nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before us.

44. Ms Norval, the respondents' solicitor, in her written closing submissions, at section 3, provided us with 40 suggested findings in fact, from paragraphs 3.1.1 through to 3.1.40. Mr McGrade, for the claimant, has also made reference, in his written closing submissions, to findings in fact suggested from the claimant. We have had regard to both of their written submissions in that regard, but we have not considered ourselves bound by only them. We have had regard to the whole evidence before us. Our own findings in fact, running to 127 sub-paragraphs at paragraph 45 below, are more extensive in scope and extent, and often more detailed, than their respective suggested draft findings. In our findings in fact below, relevant documents from the Joint Bundle are referenced, in bold**,** by page number from that Bundle, for ease of reference.

45. On the basis of the sworn evidence heard from the various witnesses led before us over the course of the Final Hearing, and the various documents included in the Joint Bundle of Documents provided to us, and the facts as

agreed in the final version of the agreed Statement of Facts, the Tribunal has found the following essential facts established:-

## Introduction

1. The respondents are a non-profit making, government-owned, organisation with their head office in Glasgow, and offices in Scotland and England. They administer government funded loans and grants to students in higher and further education in England, Wales, Scotland and Northern Ireland.

2. The claimant's employment with the respondents commenced on 30 June 2003, that date being agreed by both parties, when he joined the respondents' employment as a Print Design Technician, and we find that his employment with the respondents continued until his resignation, with immediate effect, on 29 June 2017.

3. While the claimant's effective date of termination of employment is stated to be 30 June 2017, in the ET1 claim form, and in his revised Schedule of Loss provided to the Tribunal, the Tribunal finds it to be 29 June 2017, as stated by the respondents at paragraphs 2.2 and 4.10 of their ET3 response paper apart, being the date when the claimant wrote his letter of resignation to the respondents, copy produced to the Tribunal at **page 308** of the Joint Bundle, with immediate effect.

## Claimant's Terms & Conditions of Employment, Earnings and Benefits

4. A copy of the claimant's written terms and conditions of employment with the respondents, signed by him on 26 June 2003, was produced to the Tribunal at **pages 35 to 45** of the Joint Bundle.

5. The claimant, as an employee of the respondents, was eligible to receive a discretionary bonus, and in many years, he did receive a bonus from the respondents, most recently in 2015/16, as detailed at paragraph 25 of the jointly agreed Statement of Facts produced to the Tribunal.

6. In his July 2015 pay slip, copy produced to the Tribunal at **pages 336 and 337** of the Joint Bundle, it is vouched that the claimant received **£1,650** gross bonus from the respondents.

7. He was also a member of the respondent's NOW pension scheme, to which both employer and employee each contributed 1% of the claimant's gross salary to that pension scheme.

8. The claimant was paid monthly by the respondents. In paragraph 25 of the jointly agreed Statement of Facts, the Tribunal was advised that the claimant's annual income was £48,240, and his normal monthly gross salary was £4,020, with his normal monthly net salary being £3,015.

9. These figures are at odds with the figures provided on the claimant's behalf in his revised Schedule of Loss, where it is stated that, as at the effective date of termination of employment, stated to be 30 June 2017, his gross annual wages from the respondents was £47,760, producing gross weekly wage of £918.46, and net weekly wage of £672.10.

10. They are also at odds with the claimant's earnings details provided in the ET1 claim form, at section 6.2, where his earnings were stated to be £3,980 per month (gross) pay before tax, and £2,912 normal take home pay (net), as vouched by his copy payslip from the respondents, issued in April 2016, as produced to the Tribunal at **page 332** of the Joint Bundle.

**BCF Team and working with Leslie l'Anson**

11. From around July 2013 until 21 March 2016, the claimant worked as a Senior Java Developer in the respondents' Business Capability Foundation (BCF) Team.

12. From around October 2015 until 21 March 2016, the claimant worked alongside a third party consultant, Mr Leslie l'Anson, whom the respondents had engaged through an independent IT consultancy, known as ThoughtWorks.

13. Mr l'Anson's line manager at ThoughtWorks was Simon Jenkinson. The claimant did not raise any concerns in relation to Mr l'Anson during that time, when he was working on a particular project known as the PGL project.

**Claimant's Promotion to DevOps Manager**

14. The claimant was promoted by the respondents to the role of Digital Delivery Manager – DevOps with effect from 21 March 2016, after being encouraged to apply by his line manager, Dwayne Pascal (Head of Digital Delivery and Customer Solutions).

15. The claimant worked from the respondents' Douglas Street office, known as the Cerium Building, but he was not contractually aligned to any particular respondents' premises in Glasgow.

16. A copy of his internal promotion letter from the respondents, dated 10 March 2016, was produced to the Tribunal at **page 46** of the Joint Bundle.

17. When in the DevOps Manager role, the claimant was responsible for line managing Jonathan Mitchell (Senior Applications and Database Analyst, Glasgow) and Colm Tolan (Digital Developer, Darlington) only. The claimant had no line management responsibility over Mr l'Anson.

18. The DevOps role required the claimant to liaise with all teams across the Digital Delivery Department, not just the BCF Team. The claimant was only required to spend 5-10% of his time with the BCF Team.

19. Mr Pascal had regular meetings with the claimant during the claimant's time in the DevOps role, and he regularly encouraged the claimant to take on less work and utilise the respondents' Strategic Resource & Planning Team, as he was concerned about the amount of work the claimant was taking on board personally.

**Claimant's Concerns about Mr l'Anson**

20. In or around April 2016, the claimant first raised with Mr Pascal concerns about the difficulties he had working with Mr l'Anson. At first, the concerns raised related to Mr l' Anson's personality or their working relationship. The claimant told Mr Pascal that he found it difficult to get information from Mr Pascal. Mr Pascal coached the claimant on how he could resolve such issues.

21. Around early May 2016, the claimant's allegations escalated with him then claiming to Mr Pascal that Mr l'Anson was critical of the respondents, SLC. The claimant and Craig Docherty met with Mr Pascal in May 2016 to discuss concerns regarding the actions of Mr l'Anson. However, the claimant never disclosed to Mr Pascal what Mr l'Anson was purported to have actually said that was critical of the respondents. The claimant alleged that Mr l'Anson may have acted inappropriately and that he should be removed from SLC.

22. However, at no point did the claimant provide any details to Mr Pascal of what he thought Mr l'Anson had done. Rather the claimant said he thought there might be something going on, but it was only vague allegations and he was unable to provide any specific details to Mr Pascal when asked to elaborate.

23. On Thursday, 12 May 2016, at 19:31, the claimant sent Dwayne Pascal a text to tell him that Craig Docherty and he had secured two machines being used by Mr l'Anson. A copy of the claimant's text to Mr Pascal was produced to the Tribunal at **page 58** of the Joint Bundle.

24. As a result of the concerns raised by the claimant, there were open and ongoing discussions between the claimant and Mr Pascal about when Mr l'Anson should leave SLC. However, at no point did Mr Pascal delegate the decision to the claimant. The claimant was not Mr l' Anson's line manager and so the claimant had no line management responsibility for him.

25. While it was initially discussed between the claimant and Mr Pascal that Mr l'Anson should be removed from the respondents' site, after considering matters further, Mr Pascal decided that the better approach would be to retain him on site, and that Mr l'Anson should not be removed prematurely.

26. Mr Pascal was conscious that the successful delivery of the project – which was due to be completed in 2-3 weeks – was reliant on Mr I'Anson and that no evidence of actual wrongdoing had been produced by the claimant. Mr I' Anson's contract was due to end on the conclusion of the project. Mr Pascal decided to monitor the situation closely, and he did not raise it with the respondents' IT Security team, nor did he escalate the matter elsewhere.

**Dwayne Pascal's e-mail to the Claimant: 15 May 2016**

27. Mr Pascal wrote to the claimant and Craig Docherty, by e-mail, on Sunday, 15 May 2016, at 23:31, to explain the rationale for his decision in relation to Mr I'Anson. A copy of this e-mail was produced to the Tribunal at **page 66** of the Joint Bundle.

28. In that e-mail, Mr Pascal wrote as follows:

> "*Hi David / Craig,*
>
> *Thanks again for your time on Friday and I have spent the weekend weighing up the options for Leslie's transition off the team. At this point, I think it would be best for all to have Leslie onsite for the remainder of the week. I understand that this is not the decision you were suggesting and I'll provide some rationale below but I would appreciate your support in managing this transition.*
>
> *Leslie will definitely be in Glasgow anyway for this week so, to a greater degree, I think we would be best managing him within our sights and within the team rather than outside… This was not a decision I took lightly, but I trust the both of you to manage this well….I'll try to call you in the morning to discuss verbally."*

**Claimant's e-mail to Mr Pascal: 16 May 2016**

29. On Monday, 16 May 2016, at 10:14, in response to Mr Pascal's email of the previous evening, the claimant emailed Mr Pascal from work to let him know he intended to go home, as he felt sick, and whilst he knew that the measures Mr Pascal described were "***reasonable",*** the claimant stated that he felt so stressed out he wanted to be sick.

30. A copy of the claimant's email to Mr Pascal was produced to the Tribunal at **page 67** of the Joint Bundle. In it, the claimant confirmed that he had found the recent events stressful, and that he was unable to continue in his current working environment. In his email, the claimant stated that he thought it was best that he ***"appear unwell so as not to disrupt the Team".***

31. Mr Pascal texted the claimant back, that same day, 16 May 2016, as per the copy text produced to the Tribunal at **page 59** of the Joint Bundle. stating:

> ***"Hi David – really sorry if this issue has caused you distress. Please take some time to relax. I have the utmost confidence in you taking the team forward once this situation gets resolved. We will work together to resolve this ASAP. I'll call you later to check in on you. Things are fine – project is good".***

**Craig Docherty's email to Mr Pascal and others: 16 May 2016**

32. On the same day, 16 May 2016, at 11:51, Craig Docherty sent an email to, amongst others, Mr Pascal, documenting his concerns in relation to Mr l'Anson, which were similar to those concerns raised previously by the claimant. A copy of Mr Docherty's email to Mr Pascal was produced to the Tribunal at **pages 68 to 70** of the Joint Bundle.

33. That email of 16 May 2016 from Mr Docherty was sent to David Milligan (DTS Senior Management), Dwayne Pascal, Stuart Skinner (Digital Technical Architect) and the claimant. There is no mention in that email to suggest it had been sent on the claimant's behalf or that the claimant played any part in its drafting.

34. As a result of Mr Docherty's e-mail, Mr Pascal decided to speak to other members of the department (including those who worked on the PGL Project and who had worked closely with Mr I'Anson since he arrived) to see if they had overheard things or if they had any concerns about Mr I' Anson's performance. However, Mr Pascal was not able to find anything to corroborate the concerns raised by the claimant, and Mr Docherty.

35. Mr Pascal also spoke with Mr I'Anson who denied any wrongdoing but acknowledged that he should be more respectful to the claimant. As a result of his investigations, Mr Pascal reached the conclusion that there was mainly relationship issues between Mr I'Anson and the claimant.

**Claimant's Move to Bothwell Street**

36. While Mr Pascal met with the claimant and Jonathan Mitchell, at the Hilton Hotel, Glasgow, on 16 May 2016, to discuss matters, at no point did Mr Pascal require the claimant to relocate from one office location to another.

37. Because the claimant was concerned about how Mr I'Anson would react to the fact that he had wanted Mr I'Anson removed, and the fact that he and Mr Docherty had safely secured two machines that Mr I'Anson had been using, the claimant chose to work from the respondents' Bothwell Street premises, rather than Douglas Street.

38. On or about 17 May 2016, the claimant moved to Bothwell Street with other members of his team – Reda Benjil (external contractor) and shortly afterwards, Ashok Subramanian and Chris Green. Jonathan Mitchell did not move because he was already embedded in, and sat with, the BCF Team, not the DevOps Team, in Douglas Street.

**Claimant's e-mail to Mr Pascal: 18 May 2016**

39. The claimant requested that members of his team also move with him to Bothwell Street. This was confirmed, in writing, by email from the claimant, dated 18 May 2016, and sent at 10:30. A copy of the claimant's email to Mr Pascal was produced to the Tribunal at **page 73** of the Joint Bundle.

40. Mr Pascal agreed to the claimant's request and he was supportive of it, as he felt there were advantages to the move – for example, it would allow the claimant to work more closely with the respondents' Operations Team. He did not ask the claimant to send an email requesting the move, nor did he tell him the terms in which he should write his e-mail to him.

41. The claimant was keen that both he and Mr Pascal be aligned in terms of how the move was communicated to the team. He wanted to provide the BCF Team with a reassurance that he wasn't moving to be away from Mr I'Anson but with a positive perspective about working more effectively with teams in Bothwell Street. Mr Pascal was happy to support this message as he felt it was a valid reason for the move.

42. The claimant's role did not change upon his move to Bothwell Street and he was not prevented from attending management meetings during this time. He returned to Douglas Street on or about 18 July 2016. Mr I'Anson had left the previous month. The claimant continued to work as normal at Douglas Street until 14 September 2016, when we went off on sick leave.

43. During the summer of 2016, the claimant met with the respondents' then Chief Executive Officer, Mr Steve Lamey. The claimant had a discussion with him regarding work and his plans for the DevOps Team. The claimant did not raise any concerns with Mr Lamey regarding work.

**Claimant's Sickness Absence**

44. From 14 September 2016 until his resignation, the claimant was absent from work on the grounds of ill health. The statements of fitness for work, submitted during that time from the claimant's GP, cited anxiety, depression, and stress, as the reasons for the claimant's absence from work.

45. A copy of the claimant's statements of fitness for work from his GP, as submitted to the respondents as his certificated sick lines, were produced to the Tribunal at **pages 75 and 76, 81, 97, 119, 158, 192, 212 and 213, 283 and 307** of the Joint Bundle.

46. The respondents stayed in regular contact with the claimant throughout this period of sick leave absence, and they offered him support through their Employee Assistance Programme, and counselling sessions were also arranged for the claimant, including additional counselling sessions.

**Claimant's Contractual Sick Pay**

47. During his absence from work, the claimant received contractual sick pay totalling 3 months' full pay and 3 months' half pay, rather than statutory sick pay only, before moving to a no pay situation.

48. The claimant's full pay ceased on 13 December 2016, and he went on to half-pay from 14 December 2016. He would have reduced to nil pay from 15 March 2017, but, instead, he applied for and he was granted annual leave, as per e-mails exchanged on 15 March 2017 with Linda Curtis from the respondents' HR. Copy emails were produced to the Tribunal at **pages 200 and 201** of the Joint Bundle.

49. As jointly agreed in parties' Agreed Statement of Facts produced to this Tribunal, at paragraph 14, during the period of his absence, the claimant received full salary, in accordance with his contractual sick pay entitlement, until 13 December 2016.

50. Thereafter, he received half pay until 28 February 2017. The claimant elected to convert his sickness absence to annual leave from 1 to 31 March 2017. The claimant then received half pay again from 1 to 16 April 2017, when his contractual entitlement to half-pay was exhausted, and he was in a no pay situation.

**HR Contact with the Claimant while on Sick Leave**

51. While absent on certificated sick leave, there was frequent contact with the claimant by the respondents' HR, by telephone and email, and copy e-mails exchanged with the claimant, and copy diary entries from HR, recording contact with the claimant, were produced to the Tribunal within many pages of the Joint Bundle, including **pages 100, 120, and 198 and 199**.

52. On 20 October 2016, Laura Curtis (HR Advisor) and Craig Allison (Digital Manager, who acted as deputy to the Head of Digital) met with the claimant at Costa Coffee for a catch up and to discuss his absence. No concerns were raised by the claimant at this meeting.

**Claimant's email to Laura Curtis, HR: 4 November 2016**

53. On 4 November 2016, the claimant emailed Laura Curtis and noted in writing for the first time his concerns. A copy of the claimant's email to Ms Curtis was produced to the Tribunal at **pages 86 to 88** of the Joint Bundle.

54. In this email, the claimant spoke of the challenges in his new role, from February 2016 onwards, and a very difficult set of circumstances, with little to no support from his direct line management, gross under resourcing, and from "***a snowball of events, creating an avalanche***", the claimant stated that it was not until he felt ill that he realised the affect work was having on his health and he had to visit his GP.

55. Further, in that email to Ms Curtis, the claimant spoke of his whole confidence having been shattered which he stated had led him to thoughts of desperation and feeling completely worthless, for which his GP prescribed beta blockers and anti-depressants to treat his symptoms.

**Meeting with Claimant: 24 November 2016**

56. A further meeting was then arrange by HR and held with the claimant. Laura Curtis (HR Advisor), Lynda Hainan (HR Business Partner), and Stephen Murchie (Commercial Manager), met with the claimant on 24 November 2016 at the Scaramouche restaurant to discuss the claimant's issues, and take things forward in a way that the claimant would feel comfortable with.

57. Following the meeting an email was sent to the claimant, on 24 November 2016, by Ms Curtis to confirm HR would investigate the claimant's complaints, and that HR would do the investigation themselves. A copy of the email from Ms Curtis to the claimant was produced to the Tribunal at **page 90** of the Joint Bundle.

**Respondents' Whistleblowing Policy**

58. However, the respondents subsequently decided that, due to the nature of the claimant's concerns, they should best be investigated and dealt with under their Whistleblowing Policy.

59. This position was confirmed to the claimant by email from Lynda Hainan, HR Business Partner, dated 9 December 2016. A copy of her email to the claimant was produced to the Tribunal at **page 99a** of the Joint Bundle.

60. Ms Hainan, in her email, asked the claimant to give more detail of his concerns in writing, and Ms Hainan also, in that email, supplied the claimant with a copy of the respondents' Whistleblowing Policy, version 5.3 dated October 2014, a copy of which policy was produced to the Tribunal at **pages 47 to 55** of the Joint Bundle.

**Claimant's Whistleblowing Complaint: 21 December 2016**

61. Thereafter, on 21 December 2016, after more than 3 months' sickness absence for the claimant, and 6 months after Mr l'Anson had left SLC, the claimant raised a complaint under the respondents' Whistleblowing Policy.

62. A copy of the claimant's email, intimating his whistleblowing complaint on 21 December 2016, was produced to the Tribunal at **pages 101, and 110/115,** of the Joint Bundle.

63. In submitting his complaint, along with certain appended documents, the claimant apologised for the delay in doing so, after his receipt of Ms Hainan's email of 9 December 2016, and he explained that it had been difficult for him to write his complaint.

64. As part of the complaint raised, the claimant requested that his full pay be reinstated on the basis that his reduced sick pay entitlement was causing him stress, and he asked that he be reinstated to full pay until the whistleblowing complaint was concluded.

**Whistleblowing Complaint Investigation**

65. Due to the intervening festive holiday period, the claimant's whistleblowing complaint was passed to Louise Love (Senior Manager, Internal Audit), the respondents' Whistleblowing Officer, on 10 January 2017, having been transmitted through HR, and Legal.

66. A meeting with the claimant was held by Ms Love on 6 February 2017 to discuss the terms of his complaint. There had been a delay in holding the meeting because the claimant was not prepared to come to the respondents' office, so an offsite venue had to be identified and arranged.

67. Further, steps were taken to identify a suitable companion to accompany the claimant. Copy email correspondence from the respondents' HR to the claimant regarding the setting up of this meeting was produced to the Tribunal in the Joint Bundle.

68. In attendance at the meeting, held on 6 February 2017, were the claimant, Ms Love, Kevin O'Connor (Head of Repayment) as the claimant's companion, as well as Lynda Hainan (HR Business Partner) and Laura Curtis (HR Advisor), both in order to provide HR support.

**Claimant's Pay Position**

69. Thereafter, on 9 February 2017, the claimant, though Kevin O'Connor, requested that the respondents confirm what their position was in terms of his pay. The claimant made a similar request direct to Ms Hainan in the respondents' HR.

70. On 9 February 2017, Mr O'Connor emailed the claimant, after a discussion with Ms Hainan. He reported that she had stated that, until the investigation

concluded, there was a reluctance to resubmit full pay, but he believed, to be fair to Ms Hainan, she was sympathetic towards the claimant's plight and she had made a strong case on his behalf, but unfortunately it was unsuccessful.

71. Mr O'Connor further stated to the claimant that Ms Hainan had indicated that, if at the end of the investigation period, it was concluded that the claimant had been unfairly treated, then consideration would be given to backdating any pay / benefits. A copy of Mr. O'Connor's email was produced to the Tribunal at **page 167** of the Joint Bundle.

72. On 10 February 2017, Ms Hainan confirmed to the claimant direct, by email, that the respondents would wait until the whistleblowing investigation was complete before making any decision in respect of the claimant's pay. A copy of her email was produced to the Tribunal at **page 169** of the Joint Bundle.

**Whistleblowing Investigation Outcome Report**

73. The respondents, though Ms Love, conducted an investigation into the claimant's whistleblowing complaint which investigation, due to the nature of the allegations, and it being over and above Ms Love's daytime job, took place over a number of months. The respondents kept the claimant, and / or Mr O'Connor on his behalf, updated as to the investigation's progress.

74. The respondents' investigation comprised of:

(a) A series of interviews with nine current and former employees and consultants, including the claimant and Mr Docherty, as also Mr Pascal, but not Mr l'Anson who had left SLC;

(b) An independent and externally commissioned forensic investigation, carried out by Information Risk Management Limited, ("***IRM***") into the contents of the computers and USB drives which were at the centre of the claimant's allegations; and

(c) A review of the relevant respondents' policies with regard to the set up and configuration of computers and servers, and Information Security protocols for dealing with potential breaches to these policies.

75. The claimant was interviewed by Ms Love on 6 February 2017, and a copy of his witness statement to her was produced to the Tribunal at **pages 161 to 166** of the Joint Bundle. On 16 February 2017, the claimant reviewed those notes, sent to him, as per the copy produced at **pages 171a/171g**.

76. Ms Love's investigation also interviewed Dwayne Pascal on 16 February 2017; Craig Docherty on 17 February 2017; Chris Dickson (Senior Security Analyst) on 27 February 2017; Karen McCrossan (Senior System Tester) on 1 March 2017; Stuart Skinner (Chief Designer) on 1 March 2017; Jonathan Mitchell on 2 March 2017; Alun McGlinchey (Chief IT Security Officer) on 2 March 2017; and Kirsty Jordan (Security Incident Manager) on 6 March 2017. Copies of all their witness statements were also produced to the Tribunal in the Joint Bundle, at **pages 172 to 194**.

77. A copy of Ms Love's full whistleblowing investigation report, and appendices, dated May 2017, was produced to the Tribunal, at **pages 214 to 237** of the Joint Bundle, and also a copy of the IRM report, dated 3 March 2017, at **pages 257 to 273**. By the end of May 2017, Ms Love had drafted an interim report, and discussed it with senior managers within SLC, including John Evans, HR Director.

**Occupational Health referral**

78. Further, by the end of May 2017, the respondents, through HR, had proposed to the claimant that Occupational Health advice be obtained in order to better understand the claimant's health concerns and ascertain whether any adjustments could be made to facilitate his return to work.

79. However, the claimant requested that this be postponed until after his whistleblowing complaint had been dealt with, as the claimant stated, in his emails of 31 May 2017, copy produced at **pages 287 and 292** of the Joint

Bundle, that he found it difficult to discuss return to work until he had heard the findings of Ms Love's investigation, and he was happy for an OH referral to be organised after the investigation findings meeting to be arranged with Ms Love.

**Louise Love's Outcome Letter to the Claimant: 8 June 2017**

80. By letter dated 8 June 2017, the respondents, though Ms Love, issued their outcome letter in relation to the whistleblowing complaint raised by the claimant. A copy of that outcome letter sent to the claimant was produced to the Tribunal at pages **294a/295a** of the Joint Bundle.

81. It upheld, at least in part, all but one of the claimant's concerns. The response made clear that the respondents agreed that the level of management support the claimant had received was insufficient and that internal procedures – in terms of information security and reporting concerns – had not been followed, although no adverse consequences arose as a result.

82. However, as a result of the findings of IRM's independent forensic review, the respondents' investigation concluded that no untoward activities had been undertaken by the third party consultant, Mr I'Anson, whom the claimant suspected of wrongdoing,

83. Ms Love's outcome letter to the claimant also confirmed that she, and the respondents, had taken the claimant's concerns seriously, and that a number of recommendations had been made to Senior Management within the respondents' organisation to address the issues that had been identified.

84. Ms Love's letter to the claimant stated that she hoped that the assurances she had provided to the claimant would allow him to look positively at resuming his duties at the respondents.

85. However, her recommendations to Senior Management were not made known to the claimant, nor was he provided with a copy of Ms Love's full investigation report, the IRM report, or even just her recommendations to the respondents' Senior Management.

86. After issuing the outcome letter to the claimant, on 8 June 2017, so that the claimant would have time to reflect in advance of a meeting to discuss his situation, the respondents, through HR, arranged to meet with the claimant to discuss the findings of Ms Love's investigation.

**Meeting with the Claimant: 14 June 2017**

87. That follow-up meeting took place on 14 June 2017, at the Mercure Glasgow City Hotel. In attendance were the claimant, Ms Love, Mr O'Connor, Ms Curtis and Ms Hainan.

88. At that meeting, discussion ensued as to the composition of the DevOps Team and the changes to the department (including the fact that Mr I'Anson and Mr Pascal had since left), as well as what steps could be put in place to help facilitate the claimant's return to work with the respondents. HR stated that they would be happy to welcome the claimant back to work whenever he was fit to return.

89. The claimant did not thereafter contact Ms Love, nor did he appeal the respondents' decision about his whistleblowing complaint, despite having the right to do so, under the respondents' Whistleblowing Policy, although Ms Love's outcome letter, communicating her decision to him, did not itself advise him that he had any right of appeal in that regard.

**Post-Meeting e-mail correspondence with the Claimant**

90. After the meeting on 14 June 2017, Ms Hainan emailed the claimant, on 19 June 2017, copy produced to the Tribunal at **page 297** of the Joint Bundle, advising the claimant that, in his absence, a Stephen Docherty was temporarily looking after the DevOps team, and she provided the claimant with an organisational chart of the department as requested by him, at their meeting, clarifying the current members of the team.

91. Further, Ms Hainan also emailed the claimant, on 20 June 2017, at 09:39, stating: ***"Further to the meeting last week, the company will look to re-imburse your sick pay on your return to work."*** A copy of her email to the claimant was produced to the Tribunal at **page 299** of the Joint Bundle.

92. In reply, the claimant emailed Ms Hainan, on 20 June 2017, at 10:57, as per the copy email produced to the Tribunal at **page 299** of the Joint Bundle, stating his understanding was that he would be paid full pay during the entire period of his sickness absence, once he had returned to work, and he asked for confirmation that his understanding was correct.

93. Ms Hainan discussed with her line manager, Gillian Walker (HR Business Manager) and Steven Kennedy (Senior Manager: Legal & Compliance) whether the claimant's pay should be reimbursed for the period of his sickness absence.

94. They concluded that the claimant should receive nothing further, on the basis that he had already reached his maximum contractual sick pay entitlement, and he had already received the amounts due under that entitlement.

95. This decision was confirmed to the claimant by email from Ms Hainan, copied to him and Ms Walker, on 22 June 2017, at 17:41, copy produced to the Tribunal at **pages 301 and 302** of the Joint Bundle.

96. In her email of 22 June 2017, Ms Hainan advised the claimant as follows:

> "*Hi David*
>
> *Apologies for the delay in getting back to you. I am writing to clarify that what I said was that SLC would consider re-imbursing your sick pay on your return to work. I must however highlight that in accordance with your Contract of Employment which states: "All Grades - Over 2 years' service - 3 months full pay and 3 months half pay" and SLC's Sickness Absence Policy, I have to advise you that your maximum entitlement to sick pay has been reached and that you have already received this amount.*

*Hopefully the meeting you attended helped to alleviate your concerns as regards to the workplace, your role and your return to work. If there is anything else that we can do to help facilitate a return to work, please call me to discuss."*

97. By email dated 23 June 2017, sent at 11:50, copy produced to the Tribunal at **pages 304 and 305** of the Joint Bundle, the claimant sent Ms Hainan the following reply:

*"Lynda,*

*I have received your email of 22 June 2017. I do not expect the Student Loan Company to pay me more than I would have received had I not been absent due to ill-health. I consider that I am entitled to be paid any shortfall in salary due to my absence as I am clear my ill-health is directly related to my whistleblowing complaint and the way this was handled by the Student Loan Company. I hope this clears up any confusion on this point.*

*You have not addressed the second point raised by me, namely that I do not understand why I have to wait until I return to work before any payment is made. Kevin O'Connor told me that he had spoken with you and that if the investigation concluded that I had been unfairly treated then consideration would be given to backdating any pay or benefits. The investigation has concluded that I have been badly let down by my employer. I have been and remain very seriously ill. I believe this has happened because of the way in which I have been treated. I cannot therefore understand why I cannot simply be put back on full pay now and paid for the loss of salary that I have suffered. This would help to relieve the financial pressure that I am under and assist my recovery."*

98. Thereafter, by email dated 23 June 2017, sent at 14;29, copy produced to the Tribunal at **page 306** of the Joint Bundle, Gillian Walker, HR Business Manager, set out the position taken by the respondents, as follows:

> *"Hi David*
>
> *I have been contacted by Kevin O'Connor as you have received Lynda's out of office.*
>
> *Lynda emailed you yesterday to confirm that you had been paid for your absence in accordance with the terms of your contract of employment. You are not entitled to any additional pay for the period in question.*
>
> *I am aware that you recently attended a meeting where return to work was discussed and I can confirm that Lynda would be happy to engage with you regarding this when she returns to work on Monday."*

99. The claimant did not thereafter contact Ms Hainan, nor did he appeal the respondents' decision about his pay for the period of his sickness absence, but Ms Hainan's e-mail, communicating that decision, and Ms Walker's email, confirming it, did not advise him that he had any right of appeal in that regard.

**Claimant's Letter of Resignation: 29 June 2017**

100. On 29 June 2017, the claimant intimated his resignation, by undated letter, addressed to the respondents' HR Director, Mr John Evans, "***with immediate effect".*** The claimant did not deliver it personally, but he had it couriered to the respondents' offices the following day, Friday, 30 June 2017, where it was signed for by a receptionist at the respondents' Bothwell Street offices.

101. His letter of resignation, copy produced to the Tribunal, at **page 308** of the Joint Bundle, was written in the following terms :

"*Dear John Evans,*

*RESIGNATION FROM EMPLOYMENT*

*As you are aware, I have been absent from employment since September 2016. My absence has been caused by the issues that I outlined at some length in the whistleblowing complaint that I submitted on 21 December 2016. It took five and a half months for my grievance to be investigated and for me to be given a decision on this, despite being told that the investigation would be expedited because of my financial position. During that period, I exhausted my contractual sick pay entitlement and was therefore left with no income. I repeatedly raised the issue of whether I should be paid during the period of my absence, given the circumstances of that absence. I was told you were likely to look favourably on paying the lost salary, in the event that my grievance was upheld. A number of significant aspects of my grievance were upheld. I was then in contact with human resources in an effort to obtain the pay that I lost. Initially Linda Hainan suggested to me that I would be paid any lost pay once I returned to work. When I asked for clarification on this issue and requested that my pay be restored now, I was told by Gillian Walker that I will receive no additional pay for the period of my absence.*

*My health has suffered enormously because of the difficulties that I have experienced at work. I believe I have been exceptionally badly treated since I took up the role of DevOpps Manager in February 2016 and am now left with no alternative but to resign from employment with immediate effect because of your treatment of me.*

*I would be grateful of you would acknowledge receipt."*

102. While, in his evidence to the Tribunal, the claimant stated that he had received some acknowledgement of his resignation from somebody at the respondents, no copy of any formal letter of acknowledgement of the

claimant's resignation was produced to the Tribunal by either party as part of the Joint Bundle.

103. Further, while the Tribunal was advised in evidence that the respondents have a set Leaver's Procedure, and an Exit Interview Process, no evidence was led by either party before the Tribunal that the claimant had been offered, or that he had completed, any exit interview.

104. At the time of his resignation, the claimant had been absent from work for 9 ½ months, since 14 September 2016, and he was not in receipt of any pay from the respondents at that point, his contractual entitlement to sick pay having been exhausted, when he went on to no pay, as from 17 April 2017.

**Claimant's Schedule of Loss, with Medical and Mitigation Evidence**

105. As per paragraph 111 of his witness statement, in his evidence in chief to the Tribunal, the claimant, at this Final Hearing, spoke of not being in work for 18 months, and therefore being "***deskilled to some extent."*** He believed that it was necessary for him to undertake various courses to refresh his skills and to acquaint himself with advances in technology.

106. He listed 7 courses and exams that he considered would be necessary for him to undertake, with a total cost of £11,762,70, all to take place in London, and so he would need to find accommodation and travel costs, at a further estimated £2,500. As per paragraph 20 of his witness statement, in his evidence in chief to the Tribunal, the claimant, at this Final Hearing, spoke of a reasonable estimate of 3 months to complete the necessary courses, following which it would take him at lease 3 months to find employment.

107. On the matter of bonus, the claimant spoke to paragraph 116 of his witness statement, stating that he had previously received bonuses from the respondents, most recently £1,650 in 2015, but he did not receive any bonus in 2016, as he had only very recently been appointed to the post of DevOps Manager, and therefore it was extremely unlikely that he would be given a bonus.

108. Had he not resigned from employment, based on Jonathan Mitchell's bonus in 2016, which he quantified at £4,000, the claimant anticipated that he would have received a bonus of between £3,000 and £4,500, in future years.

109. As regards injury to feelings, the claimant spoke to paragraphs 117 and 118 of his witness statement, stating that, in addition to direct financial loss that he had suffered, he was also seeking compensation for the "***distress and ill-health caused to him as a result of his whistleblowing***", stating that the treatment to which he was subjected had had "***a very significant impact on his mental health".***

110. Further, in the course of his evidence in chief, the claimant cross-referred the Tribunal to the medical reports produced in the Joint Bundle, and agreed between the parties in the finally revised version of the agreed Statement of Facts, at paragraph 27.

111. In his evidence in chief, the claimant referred to having made no claim for State benefits, after his employment with the respondents ended, but to having received some insurance pay out, of a sum undisclosed.

112. He also spoke to the circumstances of two job applications made by him, as referenced in the vouching documents at **pages 349/352**, and **353/354**, of the Joint Bundle, with City Facilities Management and Everis UK respectively, in February 2018, where he had been interviewed, but his applications were both unsuccessful.

113. In his cross-examination, the claimant spoke of doing certain, unpaid, freelance creative art work to help out a friend, and to build up his own confidence. His Schedule of Loss disclosed no sums received in mitigation of his losses.

114. On 30 January 2018, the claimant's solicitor, Mr McGrade, wrote to the claimant's GP, Dr Walker, seeking a medical report that might be used in connection with these Tribunal proceedings. A copy of this letter of instruction was produced to the Tribunal at **pages 326a/c** of the Joint Bundle.

115. Dr Walker's medical report, dated 13 March 2018, was thereafter provided to Mr McGrade, with copy to Ms Norval for the respondents, and a copy was produced to the Tribunal at **pages 327 to 331** of the Joint Bundle.

116. In his report, Dr Walker reported that the only identifiable underlying cause for the claimant's absence from work with the respondents was work related stress.

117. The medical evidence lodged with the Tribunal in this case (at **pages 310 to 331** of the Joint Bundle) discloses that the claimant had been suffering from anxiety and depression, and that he was certified as unfit to work for a period of more than 18 months, from September 2016 to April 2018. He was referred by his GP for both psychiatric and psychological treatment. While he did not receive any treatment from the consultant psychiatrist, the claimant had a number of sessions with clinical psychologists.

118. On 5 April 2018, Dr Walker issued a further statement of fitness for work to the claimant, stating that he was fit to work, as his anxiety, stress and depression, had improved, and the claimant was certified as now fit to work from 2 April 2018. A copy of that fit note was produced to the Tribunal at **page 331a** of the Joint Bundle.

119. No evidence was provided to the Tribunal by the claimant to show that he had made any efforts, post 2 April 2018, to try and secure alternative employment with a new employer.

120. In those circumstances, the Tribunal is not satisfied that he had made reasonable efforts, <u>after that date</u>, to mitigate his losses post termination of employment with the respondents.

121. When intimating the claimant's provisional Schedule of Loss, on 13 January 2018, his solicitor, Mr McGrade, in emailing the Tribunal, with copy to Ms Norval for the respondents, stated that the claimant had received no income since his resignation, and he had received no State benefits, nor had he applied for employment since his resignation, as the claimant then remained unfit to return to employment.

122. Other than the two unsuccessful job applications, in February 2018, spoken of in evidence, and vouched by documents lodged, by the claimant, as detailed above, the claimant did not provide any evidence to the Tribunal that he had taken steps to secure alternative employment, or obtain State benefits.

123. While the claimant made oblique reference in his oral evidence before the Tribunal to some insurance pay out, no specification was provided by him in his evidence to the Tribunal, and no vouching documents were lodged by him.

124. The only information provided to the Tribunal in this regard was the terms of paragraph 103 of the claimant's witness statement, where he stated: "***I have received some income as a result of an insurance policy that I took out some time ago entitling me to payment in the event that I am absent from work due to illness or unemployment."***

125. The claimant's finally revised Schedule of Loss, as lodged with the Tribunal on 30 April 2018, was for a total net award of **£107,327.52**, comprising the following items:

(a) Basic Award: **£6,846.00**

(b) Compensatory Award - Past Loss to 16 May 2018: **£45,727.18**

(c) Future Loss: **£44,800.34** (including Retraining and other costs)

(d) Sums obtained though Mitigation: **£nil**

(e) Whistleblowing Detriment Claim - Injury to Feelings (mid-point middle ***Vento***): **£16,800**

(f) Loss of salary between December 2016 (when moved to ½ pay) and 30 June 2017 (date of resignation): **£10,166.46**

126. It was stated on the claimant's behalf, in that Schedule of Loss, that, as at the effective date of termination of employment, on 30 June 2017, the claimant

was then aged 39, and he had 14 complete years of continuous service with the respondents.

127. His date of birth being 27 February 1978, as per section 1.4 of the ET1 claim form, and it being agreed between the parties that his employment with the respondents commenced on 30 June 2003, the Tribunal finds that, as at 29 June 2017, being the effective date of termination of his employment, the claimant was aged 39, and he had exactly 14 years' continuous service, including that end date.

**Tribunal's Assessment of the Evidence heard at the Final Hearing**

128. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Joint Bundle of Documents lodged and used at this Final Hearing, insofar as we were referred to them, and to the finally revised Agreed Statement of Facts, which evidence and our assessment we now set out in the following sub paragraphs:-

**(1) Mr David Buchanan: Claimant (formerly Dev. Ops. Manager)**

(a) The claimant was the first witness to be heard by the Tribunal. Aged 40, we heard his evidence on Monday 30 April 2018, and continued on Tuesday and Wednesday, 1 and 2 May 2018.

(b) In giving his evidence in chief to the Tribunal, Mr Buchanan read from his 22 page, 119 paragraphed, witness statement, signed by him on 16 April 2018, and a further copy signed by him on 30 April 2018, just prior to giving his evidence to the Tribunal.

(c) Before reading his witness statement, the claimant advised us that an amendment was required, on page 7,

at paragraph 42, where his reference to "***Thursday, 12 June 2016"*** should have said "***12 May***".

(d) In giving his evidence in chief, the claimant did so in a straight-forward, matter of fact way, reading from his pre-prepared witness statement, and referring us, from time to time, to contemporary documents from the relevant time included in the Bundle of Documents lodged with the Tribunal for use at this Final Hearing.

(e) He came across, in giving his evidence in chief, by reading from his pre-prepared witness statement, as comfortable in recalling events related to his claim before the Tribunal, but when cross-examined by the respondents' solicitor, his demeanour changed, and his replies often became confused and confusing.

(f) Given a significant number of basic facts relating to the claimant`s employment, and its termination, were the subject of the finally agreed Statement of Facts lodged with the Tribunal for use at this Final Hearing, there was some, but not much, dispute between the parties as to the relevant events, as detailed in that Agreed Statement of Facts, and as detailed in our own findings in fact.

(g) Despite the passage of time since some of the material events, going back to February 2016 onwards to June 2017, those events, meetings, etc were usually recorded in some contemporary record or other, taken at or about the time of the relevant event. That fact reduced significantly the room for disputed factual matters between the parties in giving their evidence at this Final Hearing.

(h) Where meetings / discussions were not minuted, or otherwise documented, there was more scope for

disagreement / dispute about what actually happened, or what actually was said, or done.

(i) In her written closing submission, at section 4, with her "***Observations on Evidence***", at paragraph 4.2, Ms Norval, solicitor for the respondents, submitted that there were a number of errors, misrepresentations, omissions, and points that were contrary to documentation, within the claimant's evidence, which, in her submission, undermined both his credibility and reliability, as more fully detailed by her at paragraphs 4.2.1 to 4.2.12.

(j) By contrast, at paragraphs 4.5 and 4.6, she submitted, on the respondents' behalf, that the evidence of the respondents' witnesses was credible, reliable and supported by relevant documentation, and we accept that as an accurate reflection of the evidence she led from her witnesses for the respondents.

(k) While, in particular, Ms Norval noted, at paragraph 4.6, that Mr Pascal's evidence was not detailed, we understand and accept as sound her argument that that was to be expected, given that meetings with the claimant were not formal, but part of ongoing dialogue, which took place 2 years ago, and even the claimant was not clear about certain things, given the passage of time.

(l) We also agree with Ms Norval that Mr Pascal came across as an honest witness, willing to make concessions and reacted well to the criticism leveled to him by the claimant's solicitor, during cross-examination. Further, he no longer being an employee of the respondents, we also agree that Mr Pascal had no vested interest in the outcome of these proceedings, and so there was therefore nothing to be gained by him lying, or misrepresenting, matters in his evidence to the Tribunal.

(m) If anything, we felt that Mr Pascal's lack of detail enhanced the credibility of his evidence, as it was clear he was doing his best to truthfully recount what he remembered of relevant events. Where there was a conflict between his recollection, and the claimant's, we preferred Mr Pascal's account.

(n) On the contrary, we did not find the claimant to be a persuasive or convincing witness. His evidence was often confused, and confusing. We considered that the claimant's evidence, and his recall of events, was to some extent distorted by him reviewing and reflecting on events retrospectively.

(o) While the claimant may have been genuinely convinced that events happened in the way, and for the reasons, that he recalled and described them to us in evidence, it seemed to us, on reviewing the whole evidence before the Tribunal, that the claimant's description and memory of events was not always accurate.

(p) He was unclear as to when he alleged that he had made disclosures to Dwayne Pascal. He referred to his first meeting with Dwayne Pascal having been on or around 6 May 2016, but the precise terms of that discussion, at paragraph 46 of his witness statement, included points not referred to in his ET1 claim form, or his further and better particulars, and points that had been included in his Tribunal pleadings were omitted from his evidence to us at the Final Hearing before this Tribunal.

(q) His witness statement referred to the second meeting with Mr Pascal as having been on Thursday, 12 June 2016, which he corrected to 12 May 2016, but that was at odds with the date of Friday, 13 May 2016 given in his whistleblowing complaint, at page 112, and what he said

to Ms Love at his investigation meeting, at page 117d, and also at odds with Dwayne Pascal's email to the claimant on Sunday, 15 May 2016, at page 66, where he refers to time with the claimant on the Friday.

(r) While the claimant insisted that Mr Pascal had, in effect, instructed him to write an e-mail, on 18 May 2017, about the change of office location, we found the claimant's evidence in that regard bizarre, and not at all believable. Similarly, we felt it was not credible for him to say that, in effect, he could not function properly, when the Bothwell Street and Douglas Street offices were so close and nearby to each other.

(s) Further, we did not regard it as credible for the claimant to insist that Mr Docherty's e-mail of 16 May 2016 was a disclosure by him, when the whole email is written in the first person by Mr Docherty, and while copied to the claimant, it does not say, as it so easily could have, that this was a message being sent by Mr Docherty on behalf of both himself and the claimant. Indeed, the claimant at no stage advised that he adopted that message as his own position,

(t) Generally, the claimant's unsatisfactory evidence to the Tribunal stood in marked contrast to the respondents' witnesses who we were satisfied were all doing their best to give us an accurate and objective account of events as they recalled them, some of which had taken place up to 2 years ago.

(u) Where there was a conflict between the claimant's evidence, and that given by witnesses for the respondents, we preferred the respondents' evidence as being more likely on the balance of probabilities, and generally having the ring of truth attached to it.

(v) While, in his resignation letter, produced at page 308 of the Joint Bundle, the claimant referred to having been ***"exceptionally badly treated"*** from February 2016 onwards, and there being "***no alternative but to resign"***, that part of his evidence leaves out of account that he continued to be at his work, until he went off on sick leave from September 2016, and that the respondents had made efforts to refer him to Occupational Health, and arranged counselling for him, with a view to him resuming his work with the respondents.

(w) It seemed to us that the real prompt to his resignation was that the respondents had done nothing to address the claimant's concern about not being on full pay throughout the period of his sick leave absence. Had he returned to work, and had he been fit to do so, his full pay would have resumed, and he could then have entered into dialogue with the respondents about whether or not any financial recognition could have been given to the period when he was on ½ pay, or no pay.

**(2) <u>Mr Stephen Murchie: formerly Respondent's ICT Commercial Manager</u>**

(a) Mr Murchie was the first of two witnesses led on the claimant's behalf. Aged 50, we heard from Mr Murchie on Wednesday, 2 May 2018, when, in giving his evidence in chief, he spoke to the terms of his 3 page, 15 paragraphed witness statement, signed on 13 April 2018, with a further copy signed on 2 May 2018, just prior to him giving his evidence to the Tribunal.

(b) In giving his evidence to the Tribunal, Mr Murchie spoke to only a small part of the background to the claimant's case, and that centred around him attending a meeting with the claimant and the respondents' HR on 24 November 2016.

From his evidence, we gleaned that this witness took what the claimant had told him at face value, and his witness statement, particularly at paragraph 14, was highly emotive, with him speaking of the claimant's treatment by the respondents being "***appalling***."

(c) Overall, we found this witness to be a peripheral witness, more akin to a character witness for the claimant, albeit recounting his involvement in the meeting with the respondents held on 24 November 2016. He had attended that meeting, to support the claimant, and his evidence to the Tribunal was generally supportive of the claimant's case against the respondents.

(d) That said, we felt Mr Murchie added nothing of any real significance to the evidence of what happened, as laid before the Tribunal, as we had the claimant's own evidence of that meeting, and events leading up to it, and in its aftermath, and likewise we had the respondents' evidence, particularly from Ms Hainan from HR who was also present at that meeting, and involved with the claimant's case before and after that meeting.

(e) To that extent, we agree with Ms Norval's summation, in her written closing submissions for the respondents, at paragraph 4.4 that : ***"The evidence of Stephen Murchie was of limited use to the points in dispute between the parties, given the limited role he played."***

**(3) <u>Mrs Lynda Hainan: Respondents' HR Business Partner (Technology Group)</u>**

(a) Mrs Hainan was the first witness to be led on the respondents' behalf, but her evidence was interposed, during ongoing evidence being led on behalf of the claimant. Aged 60, in giving her evidence in chief to the

Tribunal, she read from her undated, but signed, witness statement, running to 8 (unnumbered) pages, and paragraphs 1.1 to 10.9.

(b) After Mr Murchie's evidence concluded, at around 11.15am on Wednesday, 2 May 2018, there was an adjournment of proceedings, at Mr McGrade's request, as he had a difficulty with attendance of his next proposed witness, Mr Craig Docherty. After discussion between parties' representatives, and the Tribunal, and so as to make best use of the available judicial sitting, when proceedings resumed, just after 12.35pm, on the afternoon of 2 May 2018, the respondents interposed Mrs Hainan as the next witness to be heard by the Tribunal.

(c) Her evidence in chief was taken, and thereafter some cross examination by Mr McGrade, until proceedings adjourned for the day at 4.00pm. On Wednesday, 3 May 2018, the Tribunal continued with Mrs Hainan's further cross examination, and conclusion of her evidence to the Tribunal, before then hearing from the claimant's next witness, Mr Docherty. The Tribunal did not consider it appropriate, when Mrs Hainan had been interposed, to interrupt her evidence by interposing Mr Docherty.

(d) In giving her evidence, Mrs Hainan spoke to her own personal involvement in the claimant`s case, including attendance at meetings, keeping in contact with him, and the circumstances of the claimant`s resignation, and its aftermath, and, in doing so, she did so under reference to the relevant contemporary documents included in the Joint Bundle lodged with the Tribunal for use at this Final Hearing.

(e) Given her role as HR Business Partner, we were somewhat surprised when Ms Hainan stated that she did

not know fully about the respondents' Sickness Absence Procedure and what, if anything, it might say about extending full, or ½ pay, in any particular set of circumstances. No copy of that Procedure was provided to us by either party.

(f) She explained that such matters were dealt with by HR administrators, rather than HR advisors, but nonetheless she was confident in telling us that the respondents had never, to her knowledge, granted an extension of sick pay to any employee. That said, Ms Hainan told us that Kerry Kirk, Head of HR, thought there was discretion, as did Mr Kennedy, Head of Legal.

(g) She recalled it being Mr Kennedy, the SLC lawyer, who insisted that the claimant come back to work, but she denied Mr McGrade's suggestion that some people at SLC regarded the claimant as a ***"chancer***", who was using his whistleblowing complaint to get paid what otherwise he would not be entitled to as sick pay, and she further disputed that the SLC lawyer had, in effect, decided to call the claimant's bluff, and see if he came back to work.

(h) We were not assisted at the Final Hearing by the fact that neither party had produced to us, as part of the Joint Bundle, whatever constitutes the full terms of the respondents' Sickness Absence Procedure.

(i) Further, in the course of giving her evidence to the Tribunal, when cross examined by Mr McGrade, the claimant's solicitor, Mrs Hainan made a significant number of concessions to Mr McGrade, including an admission that, in her view, the respondents had "***moved the goalposts***" a number of times, and she accepted that the claimant was entitled, in her view, to feel "***betrayed***" by the respondents as his employer, when dealing with his

request to have full pay reinstated for the period of his sickness absence.

(j) With hindsight, Ms Hainan accepted that it would have been better if she had not introduced a new element of a return to work, when considering the claimant's pay situation, and just dealt with it after the outcome of Ms Love's whistleblowing complaint investigation. She further accepted that the respondents could probably have told the claimant far earlier than they did, that he was entitled to no additional pay, and she also accepted that probably the claimant's case was a unique situation.

(k) She denied that she had misled the claimant over payment, and she clarified that she personally had no authority to make such payments. She advised us, and we believed her, that she was personally sympathetic to his request about pay, and while she had made a case for it being considered in February 2017, when the claimant first raised the matter with her, she had been unsuccessful in that regard.

(l) Generally, we found Ms Hainan to be credible and reliable witness, and she stood up well to cross-examination by Mr McGrade, the claimant's solicitor.

(m) Overall, we had no issues about the general credibility or reliability of this witness, and we were satisfied that she was doing her best to recount her involvement in the claimant`s case to the best of her recollection, and she did so in a clear and confident manner, making concessions where she felt it appropriate to do so.

(n) There was one issue, however, arising from evidence we heard later on, from Louise Love, that related to Ms Hainan's evidence, so it is appropriate to mention that

here, as it formed part of Mr McGrade's closing submissions to the Tribunal, at paragraphs 68 to 70, regarding the decision by Lynda Hainan and others to refuse to reinstate full pay to the claimant, following the upholding of significant elements of his whistleblowing complaint, and, at paragraphs 71 to 76, regarding the actions of John Evans, the respondents' HR Director.

(o) While it is clear from the evidence before us that there was consultation by Ms Hainan with Gillian Walker (HR) and Steven Kennedy (Legal), neither if them was led as a witness before us, although, at an earlier stage, it had been indicated that Mr Kennedy was to be led as a witness. Ms Norval confirmed, however, at the start of this Final Hearing, that he was not being led on the respondents' behalf. Similarly, Mr Evans, whose name was several times mentioned in evidence, was not led as a witness for the respondents, nor was Ms Walker.

(p) In her evidence to us, Ms Hainan stated that she was not provided with a copy of Ms Love's whistleblowing investigation report, yet when we heard from Ms Love, she suggested that Ms Hainan had been provided with it. In his closing submissions, Mr McGrade suggests that if we prefer Ms Love's evidence on this point, then that would suggest that Ms Hainan had given an inaccurate account of events, either deliberately or otherwise.

(q) In considering that submission, we are not able to say that Ms Hainan deliberately misled the Tribunal. We accept that Ms Love's recollection is different, and we know from her evidence that she reported to, and met with Mr Evans, but equally, it could be that Ms Love's recollection is incorrect. What is clear is that Ms Love's report recommended that the Executive Director of Corporate

Services was to decide whether the claimant should be paid the salary he had lost during his sickness absence, and that Mr Evans, acting in that role, had meetings with Ms Love, where she recalled that he didn't have a firm view either way.

(r) What is also clear is that we have no direct evidence from Mr Evans, and we do not know whether or not he made any specific decision, on Ms Love's recommendation, or whether, as appears from the evidence before us, and in Ms Hainan's and Ms Walker's emails, they were pro-active, with or without any express delegated power from Mr Evans, and they dealt with the claimant's request to reinstate full pay only after consultation with the lawyer, Mr Kennedy.

(s) Mr McGrade submitted, at paragraph 75 of his closing submissions, that the Tribunal can draw an inference that the criticisms of the claimant in Ms Love's report (that the claimant had not acted in good faith) had a material influence on the refusal to pay the claimant, or Mr Evans' failure to act on the recommendation from Ms Love to decide whether the claimant should be paid the salary he had lost during his sickness absence.

(t) We do not consider it appropriate for the Tribunal to draw any such inference from the limited information available to us. Ms Hainan told us that Mr Evans was not aware of the undertaking given to the claimant in February 2017 regarding pay, and that Gillian Walker, Head of HR, did not consider it necessary to escalate the matter to Mr Evans. They discussed it with Mr Kennedy, the lawyer. There is no evidence that Mr Evans had any knowledge of, or involvement in, the decision that Ms Hainan and Ms Walker communicated to the claimant in June 2017. We

have made our findings on the basis of the direct evidence before us as per the emails from Ms Hainan and Ms Walker to the claimant.

**(4) <u>Mr Craig Docherty: formerly self-employed contractor with the Respondents</u>**

(a) The Tribunal heard evidence from Mr Docherty, aged 48, on the afternoon of Thursday, 3 May 2018. He was called as a witness for the claimant, and, in giving his evidence in chief to the Tribunal, he spoke to the terms of his 5 page, 31 paragraphed witness statement.

(b) At the start of his evidence, Mr Docherty volunteered that there was a mistake in paragraph 19 of his witness statement, where "***Friday, 12 May 2016***" should have stated "***Thursday, 12 May 2016***."

(c) He advised us that he had not seen that error earlier, despite having read the witness statement before previously signing it twice, once on 16 April 2018, and then again on 3 May 2018, just prior to giving his evidence to the Tribunal.

(d) In giving his evidence to the Tribunal, it was not put to him, in cross-examination by Ms Norval, solicitor for the respondents, that he had colluded with the claimant as to certain facts of the case.

(e) We note and record that here because, in her written closing submissions for the respondents, at paragraph 4.3, Ms Norval included a submission that "***it appears that there has been some collusion between Mr Docherty and the Claimant as to the facts of the case."***

(f) Specifically, Ms Norval highlights that both the claimant and this witness now suggest the second meeting (with Mr

Pascal) took place on Thursday, 12 May 2016, and that both were similarly wrong in thinking that the respondents' offices were closed on Friday, 13 May 2016, and so this must call into question the credibility of their evidence.

(g) On the basis of Mr Pascal's e-mail of 15 May 2016, at page 66, referring to "***Friday***", we have found, on balance of probability, that Friday, 13 May 2016 is the correct date for the second meeting.

(h) As we see things, the difference in date affects the reliability of their respective evidence, rather than their credibility, but the fact remains that Ms Norval did not put collusion directly to either the claimant, or Mr Docherty, when she had the opportunity to do so, during their respective cross-examinations.

(i) As such, there was no evidence before us that Mr Docherty had colluded with the claimant to give evidence on the basis set forth in his witness statement, but the Tribunal did consider that Mr Docherty's witness statement was written in a partisan way, in support of the claimant, and so lacked objectivity.

(j) Mr Docherty was clear, in answer to a question from the Judge, that in sending off the email to Mr Pascal and others, on 16 May 2017, it was drafted as ***"I"*** and <u>not</u> ***"we",*** and he explained that as the claimant was so upset that day, ***"I pulled the trigger",*** and he then added that it was his mistake that he had not made it clear that his email was a "***joined up***" joint view of him and the claimant, as they were both not happy with the situation around Mr l'Anson at that time.

**(5) <u>Mr Dwayne Pascal: Respondents' former Head of Digital Delivery & Customer Solutions</u>**

(a) The respondents' second witness was Mr Pascal, aged 49, whose evidence we heard on Tuesday, 8 May 2018. In giving his evidence in chief to the Tribunal, Mr Pascal did so reading from his undated, but signed, witness statement, running to 19 (unnumbered) pages, and paragraphs 1.1 to 13.4.

(b) In giving his evidence to the Tribunal, Mr Pascal spoke to his role as the claimant`s line manager, and he also spoke of the personal support which he had provided to the claimant. He came across as a senior manager doing his best in his own job, and genuinely wanting to help the claimant, both personally, and professionally.

(c) Further, Mr Pascal gave evidence by referring us to various of the documents included in the Joint Bundle and, overall, we had no issues about the general credibility and reliability of this witness. We were satisfied that he was doing his best to give his evidence of matters as he recalled them, from the relevant time, and that he was doing so truthfully, and without any evident malice aforethought towards the claimant, notwithstanding the various criticisms that the claimant had made of him, as his line manager, in terms of his claim before the Tribunal.

(d) Earlier in these Reasons, when assessing the claimant's evidence before this Tribunal, we referred to Ms Norval's written closing submission, at section 4, with her "***Observations on Evidence***", at paragraphs 4.5 and 4.6, as regards Mr Pascal's evidence. We refer back to what we said above, earlier in this paragraph of our Reasons, at (1) (i) to (m).

(e) We had no issues about Mr Pascal's credibility or reliability, as we felt that he was open and honest in his witness statement, and in answering questions at the

Tribunal, and he readily acknowledged where he had no recollection of any particular matter. In our view, that added to his general credibility, as did the fact that he was no longer an employee of the respondents, and so he had no reason to tailor his evidence any particular way.

(f) At this Final Hearing, Mr Pascal was a key witness for the respondents, and while, as regards certain matters, he had no knowledge, or no clear recall of detail, his evidence generally came across to us as honest and straight-talking, having the ring of truth to it, and so we believed his evidence, particularly when his account was in clear conflict with the account spoken to in evidence by the claimant.

(g) Mr Pascal accepted, in the course of his evidence before us, that he had been interviewed as part of Ms Love's whistleblowing complaint investigation, and he also accepted that she had reported to Senior Management her view that he did not fulfil his management responsibilities towards the claimant.

(h) However, Mr Pascal was clear to us that while he accepted Ms Love had made that specific finding, he was happy with what he did in the claimant's case, and he advised us that he did not accept her investigation report's findings that were critical of him.

**(6) <u>Mrs Louise Love: Respondents' Head of Internal Audit Whistleblowing Officer</u>**

(a) The penultimate witness heard by the Tribunal was Mrs Love, aged 54, whose evidence, called by the respondents, we heard on the late afternoon of Tuesday, 8 May 2018, and continued to and concluded on the following day.

(b) In giving her evidence in chief to the Tribunal, Mrs Love did so under reference to her signed witness statement, running to 15 (unnumbered) pages, and paragraphs 1.1 to 12.1, dated 17 April 2018.

(c) Before reading from her witness statement, she advised us that she did not carry out all of the investigation interviews, and that paragraphs 6.4.5 and 6.4.6 required to be revised to refer to her internal audit colleagues who had conducted some of the interviews.

(d) In giving her evidence to the Tribunal, this witness did so under reference to some of the many documents in the Joint Bundle. Her evidence was given in a straight-forward, matter of fact way, and generally we had no issues about the credibility or reliability of this witness, whom we were satisfied was doing her best to recount her limited involvement in the claimant`s case to the best of her recollection.

(e) Of all the respondents' witnesses led before us, Ms Love was the most self-assured, and she spoke confidently and clearly to her role as the respondents' whistleblowing officer, and her conduct of the whistleblowing investigation, its recommendations and outcome for the claimant, and her attendance at the meeting with the claimant on 14 June 2017 to discuss her outcome letter issued to him the previous week.

(f) Given all the whistleblowing investigation interviews had been fully minuted, and minutes given to interviewees to confirm, as a true record, we were surprised that Ms Love did not speak of arranging for the outcome meeting with the claimant on 14 June 2017 to be minuted. She advised us that she was there just to feed back from her outcome

letter, and she stated that no notes were taken by her, but they may have been taken by HR.

(g) In her cross-examination by Mr McGrade, the respondents' earlier witness, Ms Hainan, had advised us that Jonathan Goukes, senior auditor, had noted this outcome meeting, but both parties' representatives told us that they were unaware of any such notes, and so they were not included in the Joint Bundle. It may be Ms Hainan was confused in this regard, as Mr Goukes had noted some of the earlier investigation meetings.

(h) In her evidence to us, Ms Love was adamant in her witness statement, at paragraphs 9.27 and 9.28, that the claimant's principal concern was that his pay should be reinstated for the period during which he had been on half-pay, and that it seemed as if he had his heart set on that issue.

(i) Somewhat surprisingly, we thought, given her role as Head of Internal Audit, she added that, not being an HR person or a lawyer, she did not know if the claimant was entitled to have his pay reimbursed in the circumstances. Again, in her witness statement, at paragraph 11.4, she was clear that, at the meeting on 14 June 2017, the claimant was really only concerned about money, his ***"sole concern"*** being around pay.

(j) While, in her witness statement, and in her evidence, Ms Love spoke of escalating the matter of a conclusion in terms of the claimant's pay for decision to an Executive Director, and of her having shared her interim report with Mr John Evans, HR Director, and also Chris O'Connor, Chief Information Officer, and David Wallace, Deputy Chief Executive, no evidence was led before us from any of these senior officers of the respondents.

(k) Further, while there was some general reference made in evidence by some witnesses to the respondents' Sickness Absence Policy and Procedure, no copy of that specific employer's policy and procedure was provided to the Tribunal, by either party, and so we were not advised as to what flexibility, if any, there was to extend sick pay provision in any given circumstances, whether defined circumstances, or in exceptional circumstances.

(l) While the copy of the claimant's written terms and conditions of employment, issued on 26 June 2003, and copy produced to us at pages 35 to 45 of the Joint Bundle, contained some information, at section 6 thereof, about sickness absence, and referred to the respondents' Sickness Absence Procedure, we were alert to the fact that those written terms and conditions were of some antiquity, and the relevant procedure document in force in 2016/17 was not made available to us by either party at this Final Hearing.

(m) In answer to a question from the Judge, Ms Love stated that normal practice within the respondents is for a Leaver's form to be completed, and sent to HR support by an employee's line manager, and it will be normal to issue an acknowledgement of a resignation. While the claimant spoke in his evidence of having received some acknowledgement, no copy of any document from the respondents' HR function was lodged by either party for our perusal at this Final Hearing.

(n) Further, Ms Love advised us that the respondents have now, and they had at the relevant time, an Exit Interview process, but she did not know if it was utilised in this case. No evidence was presented to us, by the claimant, or any of the respondents' other witnesses, including Ms Hainan

from HR, about there having been an exit interview offered, or carried out, for the claimant.

(o) That seems to us, having heard the whole evidence led before the Tribunal, and our own collective experience of the workplace, and what is generally regarded as good industrial relations practice, to have been a missed opportunity for the respondents, and we trust that the respondents, on receipt of this Judgment and in reading our Reasons, will wish to internally review their employment leavers' practices and procedures in light of the circumstances shown by the facts of the present case.

(p) We say that because we regard offering exit interviews as being good industrial relations practice, and while Ms Hainan, in paragraph 9.5 of her witness statement, referred to having had some internal discussions, after the 14 June 2017 meeting with the claimant, about perhaps offering him a lesser role but ring-fenced to his existing salary, the respondents never had a chance to discuss that option with him, as he resigned shortly after that meeting, and without returning to work. We pause to suggest that an Exit Interview might have allowed for such an opportunity.

(q) It may be, of course, as Ms Hainan, from HR, advised us that at the meeting with the claimant, on 14 June 2017, her ***"impression***" was that he did not want to come back, and that he had already made his mind up at that point, but we also take into account that she also told us that they were prepared to put in place a phased return to work, after an OH appointment, as they were "***keen to have him back as a valued employee".***

(r) On the basis of nothing ventured, nothing gained, it is difficult for us to understand why an Exit interview process

could not have been used by the respondents to see if the claimant could return to work, but the fact of the matter is that the claimant's resignation letter was taken as the final word, without any apparent attempt, post 29 June 2017, by the employer to have some manager, or HR representative, meet with the claimant and see if there was another solution acceptable to them, and to the claimant.

**(7) <u>Mr Jonathan Mitchell: Respondents' then Senior Database & Applications Analyst, now Dev. Ops Engineer</u>**

(a) The final witness heard by the Tribunal, and led on behalf of the respondents, was Mr Mitchell, aged 41. He gave his evidence in chief to the Tribunal under reference to his undated, but signed, witness statement, extending to 5 unnumbered pages, and running from paragraphs 1 to 6.3.

(b) We heard, and concluded his evidence, on the afternoon of Tuesday, 9 May 2018. In giving his evidence to the Tribunal, Mr Mitchell did so in a straight-forward, matter of fact way, and generally we had no issues about the credibility or reliability of this witness, whom we were satisfied was doing his best to recall matters relating to the claimant, and their respective working relationships with Leslie l'Anson, several years before.

(c) We felt that his evidence about his working relationship with Mr l'Anson, and the claimant, was helpful in us getting a full picture of the working environment within the respondents' business at the material time. He painted a different picture of Mr l'Anson than that given to the Tribunal by the claimant, but, of course, the Tribunal did not hear directly from Mr l'Anson, as he was not led as a witness by either party.

(d) Generally, Mr Mitchell's evidence was consistent with that given to the Tribunal by Mr Pascal. We felt that he made credible and reliable statements in evidence, having regard to the passage of time between the date of him giving evidence at the Tribunal, and the relevant dates of Mr I'Anson's engagement with the respondents.

(e) On one particular matter there was a clear conflict between the claimant's evidence, and that given by Mr Mitchell, and that related to Mr Mitchell's bonus payments from the respondents in 2016. We found it surprising that, as parties had agreed the dates and amounts of the claimant's bonus payments from the respondents, over many years, they had been unable to agree the amount of Mr Mitchell's bonus for a specific year.

(f) No relevant vouching documentation was provided to the Tribunal by the respondents, as to the precise amount of Mr Mitchell's bonus in 2016, and the claimant's solicitor had not sought to ascertain that amount by seeking any formal Documents Order / Additional Information Order against the respondents from the Tribunal.

(g) The claimant insisted that it was around **£4,000**. In her cross-examination of the claimant, Ms Norval put it to the claimant that, in 2016.17, the maximum bonus was **£2,100**, but the claimant challenged that figure, although he did accept that bonus was restricted to the top 25% of performers.

(h) In the event, Mr Mitchell's evidence to the Tribunal on this matter was vague and unhelpful. As such, we have been unable to make any specific finding in fact on that point, as quite simply we do not have any reliable evidence before us on that specific matter.

(i) Ms Norval repeated the **£2,100** figure in her written closing submissions to the Tribunal, but with no clear documentary evidence before us to vouch the matter, one way or the other, we have unsurprisingly not been able to make a specific finding in fact about what bonus was actually paid to Mr Mitchell in 2016.

**Hearing on Submissions**

47. In the Tribunal's letter of 3 May 2018 to both parties' representatives, concerning the Hearing on Submissions, assigned for Wednesday, 16 May 2018, specific case management directions were given by the Judge as to the conduct of the Hearing on Submissions, including a Timetabling Order, under **Rule 45,** ordering that each party's representative would be allocated **one hour** to deliver their submissions to the Tribunal.

48. It was further ordered that each party's representative was to prepare and lodge an outline written submission, and they were to be exchanged between parties' solicitors on the morning of the Hearing of Submissions, so that they could each address the Tribunal on their own submission, but also reply, as appropriate, to the outline written submission prepared by the other party's solicitor.

49. Thereafter, on 15 May 2018, there was an application by Ms Norval, the respondents' solicitor, to vary our Case Management Order of 3 May 2018, so as to allow both parties' representative **90 minutes** rather than one hour as set out in our Timetabling Order. There being no objection intimated by Mr McGrade, the solicitor for the claimant, the Judge allowed that variation of the earlier directions of the Tribunal, and that further direction, by way of variation, was confirmed in a letter from the Tribunal to both parties' representatives on 15 May 2018.

50. In accordance with our Case Management Orders of 3 May 2018, we received timeously outline written submissions from each of Mr McGrade, for the claimant, and Ms Norval, for the respondents, on the afternoon of 15 May 2018.

51. We wish to place on record here that we are much obliged to both Mr McGrade, and Ms Norval, for their respective written closing submissions, which we have found most helpful in addressing the competing arguments presented to us for determination by this Tribunal.

52. While, in terms of the revised Timetabling Order, the Hearing on Submissions was timetabled, with 1.5 hours per party, so that the Tribunal could hear closing submissions in the morning session, and proceed to private deliberation in the afternoon, in the event, that situation did not transpire, as closing submissions, including clarifications raised by the Tribunal, lasted for almost the whole allocated sitting day on 16 May 2018.

53. Accordingly, due to the lateness of the hour, and the closing submissions taking almost a full sitting day, rather than the half day anticipated, the Tribunal did not have any time for private deliberation on the evidence led over 6 days, and closing submissions made on day 7, and as such, the Tribunal agreed that it required to meet again for that private deliberation.

54. Both parties' representatives were advised, by letter from the Tribunal dated 17 May 2018, that the earliest, mutually convenient date that the full Tribunal could meet again in regards to this case was Friday, 6 July 2018, and that date was subsequently assigned for that purpose and for the full Tribunal to reassemble for a Members' Meeting on that date for private deliberation.

55. Further, in the Tribunal's letter of 17 May 2018, clarification was sought from Ms Norval, the respondents' solicitor, about the alternative argument, advanced in the ET3 response, at paragraph 5.14 of the revised paper apart, that in respect of the constructive unfair dismissal claim, where they denied that the claimant was constructively dismissed, as alleged, or at all, but if the Tribunal found that he was dismissed, the reason for dismissal was some other substantial reason ("***SOSR"***), and it was not unfair in all the circumstances.

56. As that alternative argument was not included in Ms Norval's written closing submissions for the respondents, the Tribunal assumed that it was an argument not now being pursued by the respondents in the same way as, at

the Hearing on Submissions, in answer to the Judge's request for other clarifications, Ms Norval confirmed that the remedy arguments, at paragraph 5.15 of that paper apart, and followed through to the agreed List of Issues, at paragraph 13, were not now being pursued by the respondents in respect of the earlier arguments that (a) the claimant contributed towards his dismissal, and, at (b) and (f), that the claimant failed to mitigate his losses.

57. It is appropriate to note and record here that, by email to the Tribunal, later on 17 May 2018, Ms Norval confirmed that the respondents were no longer pursuing the alternative ***SOSR*** argument in respect of the constructive unfair dismissal claim.

**Written Closing Submissions for the Claimant**

58. In accordance with the Tribunal's Case Management Order, made on 3 May 2018, that the claimant's solicitor should prepare an outline written submission, and email it to the respondents' solicitor, and the Tribunal, prior to the start of the Hearing on Submissions, Mr McGrade, the claimant's solicitor, duly did so, by email sent to the Glasgow Tribunal Office, and copied at the same time to Ms Norval, for the respondents, on the afternoon of 15 May 2018.

59. Mr McGrade forwarded a typewritten, 24 (numbered) page, written submission for the claimant, extending to 97 paragraphs, dated 15 May 2018, including, as ordered by the Tribunal, an **executive summary** of the claimant's written submissions, at pages 1 and 2, reading as follows:-

> *1. The tribunal is asked to make findings in fact in relation to the events that caused the claimant to resign in accordance with the terms of the agreed statement of facts and the evidence of the claimant, Craig Docherty and Stephen Murchie.*
>
> *2. Most of the disputed factual issues in this case relate to the events prior to the claimant's absence from work in September 2016. The tribunal is asked to prefer the evidence of the claimant and Craig*

*Docherty to that of Dwayne Pascal, where there is any dispute in relation to what took place.*

3. *It is submitted that the evidence of the claimant and Craig Docherty is to be preferred to that of Dwayne Pascal as there is a substantial degree of consistency between the evidence of the claimant and Craig Docherty. In addition the claimant is able to provide very detailed information in relation to the events that took place. The evidence of Dwayne Pascal lacked detail and he had great difficulty recounting very basic issues such as where meetings took place, what issues were discussed and who attended those meetings.*

4. *The Claimant asks the tribunal to hold that he made the following protected disclosures to his employer:-*

   a. *the disclosures made to Dwayne Pascal on or around 6 May 2016*

   b. *the email submitted by Craig Docherty on 16 May 2016*

   c. *the whistleblowing complaint dated 21 December 2016*

*It is accepted that the claimant did not submit the email of 16 May 2016. However, it is submitted that on the evidence of Dwayne Pascal, the email of 16 May 2016 can be viewed as a protected disclosure by the claimant.*

5. *The Claimant seeks a declaration that he was subject to the following detriments on the grounds of making a protected disclosure, contrary to section 47B of ERA.*

   a. *the decision to withdraw from the Claimant the power to determine whether Leslie l'Anson should be removed from the Respondent's premises. The disclosures made to Dwayne Pascal on or around 6 May 2016*

b. *the decision to remove the Claimant from the place where he carried out his duties and to insist that he work elsewhere*

c. *requiring the Claimant to submit an email in deliberately misleading terms requesting that he be moved.*

d. *the delay in dealing with his grievance*

e. *the decision to refuse to reinstate full pay to the Claimant following the upholding of significant elements of his grievance.*

6. *In order to succeed in the whistleblowing detriment claim, the claimant need only prove that the protected disclosure was a material factor in the detriment.* ***(Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372).*** *It need not be the sole or even the principal reason for the treatment of which the claimant complains.*

7. *The claimant seeks compensation for the detriments to which he was subjected by the Respondent as set out in the schedule of loss, which includes an award for injury to feelings and lost pay.*

8. *The Claimant seeks a finding of unfair dismissal contrary to section 94 of ERA on the basis that the claimant resigned in response to a fundamental breach of the contract of employment, consisting of the treatment outlined in the ET1. I would submit the tribunal should have no difficulty in holding that the claimant was entitled to resign in response to the treatment he received, particularly in light of the admissions made by Lynda Hainan as to how the claimant had been treated in relation to the issue of pay.*

9. *The Claimant seeks a finding of automatically unfair dismissal contrary to section 103A of ERA on the basis that the claimant resigned in response to fundamental breach of the contract of*

*employment and the reason or principal reason for the conduct that caused the claimant to resign was that he had made a protected disclosure. It is accepted that in determining the issue of the automatically unfair dismissal claim, it is not sufficient for the claimant to demonstrate that the whistleblowing was a material factor in the treatment that caused him to resign. What the claimant has to prove is that the reason or principal reason for the treatment that caused him to resign was the whistleblowing.*

*10. The claimant seeks compensation for the unfair dismissal as set out in the schedule of loss, which includes a basic award, past loss of salary, future loss of salary, loss of pension, loss of bonus and retraining costs.*

60. Thereafter, after that executive summary, Mr McGrade included a narration of the relevant statutory framework, at pages 3, 4 and 5, together with a List of Authorities for the claimant, at page 5, before proceeding to give a detailed commentary, and narrative, from pages 6 through to 24, at paragraphs 1 through to 97, dealing with evidence led before the Tribunal; general credibility issues; specific proposed findings in fact; alleged disclosures, and alleged detriments; and submissions on the dismissal claims, both **Section 95**, and **Section 103A**.

61. While, at various points, in the course of his written closing submissions for the claimant, Mr McGrade had referred to "***grievance"***, he agreed, as did Ms Norval for the respondents, that the claimant had not invoked the respondents' formal grievance procedure, and that reference to the word "***grievance***" should be read, in context of the facts of this case, as being a reference to the claimant's "***whistleblowing complaint".*** We also noted, after explanation from Mr McGrade, that the second sentence of paragraph 83 of his text ("***Did the claimant delay too long in resigning***") was wrongly positioned, and it should have been placed at the end of his paragraph 92 ("***Tax position***").

**Written Closing Submissions for the Respondents**

62. Again, in accordance with the Tribunal's Case Management Order, made on 3 May 2018, that the respondents' solicitor should prepare an outline written submission, and email it to the claimant's solicitor, and the Tribunal, prior to the start of the Hearing on Submissions, Ms Norval, the respondents' solicitor, duly did so, by email sent to the Glasgow Tribunal Office, and copied at the same time to Mr McGrade, for the claimant, on the afternoon of 15 May 2018.

63. Ms Norval forwarded a typewritten, written submission for the respondents, extending to some 46 numbered pages, running from section 1.1 to 10.2, but dated 16 May 2018, being the date assigned for the Hearing on Submissions. Again, as ordered by the Tribunal, her written closing submissions included an **executive summary** of the respondents' closing argument, included at section 2, on pages 1 and 2 of her submission, reading as follows:-

> *2.1. The Respondent's position can be summarised as follows:*
>
> *2.1.1. The three communications the Claimant relies upon as part of his whistleblowing claim are not qualifying protected disclosures, on the basis that they do not satisfy the legislative requirements set out in Section 43B of the Employment Rights Act 1996 (**"ERA"**).*
>
> *2.1.2 The Claimant was not subjected to any detriment by or on behalf of the Respondent.*
>
> *2.1.3 If the Tribunal finds that the Claimant was subjected to a detriment by or on behalf of the Respondent, it is denied that any such detriment was on the grounds of the Claimant having made a qualifying protected disclosure.*
>
> *2.1.4 If the Tribunal finds that the Claimant was subjected to a detriment on the grounds of having made a protected qualifying disclosure(s), then the Tribunal will be required to consider the issue of time bar. The Respondent submits that the whistleblowing detriment claim in respect of the first three alleged detriments has been brought outwith the statutory time limit set out in Section*

*48(3) of the ERA and should, accordingly, be dismissed as the Tribunal has no jurisdiction to hear them.*

*2.1.5 It is denied that the Claimant was constructively dismissal* **(sic)** *because of having made a qualifying protected disclosure. At no point were the steps taken by the Respondent motivated by the fact that the Claimant had raised his concerns.*

*2.1.6 It is denied that the Respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Claimant. At all times the Respondent had reasonable and proper cause for its actions.*

64. Otherwise, Ms Norval's written closing submissions for the respondents included an introduction, at section 1, on page 1, submitting that the claimant's claims should be dismissed, followed, after the executive summary, by suggested findings in fact, at section 3, then observations on the evidence, at section 4, followed by the relevant law on whistleblowing at section 5; and, at section 6, her application of the law in relation to whistleblowing to the facts of the case.

65. Further, at section 7, Ms Norval provided the key elements of the law on constructive dismissal, followed, at section 8, by her application of the law in relation to constructive dismissal to the facts of the case. While denying that the claimant was entitled to any compensation, as sought or at all, her section 9 dealt with various remedy points, if the Tribunal should decide to uphold one or more of the claimant's claims. She submitted that the claimant's quantification of the value of his claim was excessive, and the quantification in his Schedule of Loss was challenged on a number of specific, and detailed, grounds at paragraphs 9.3 to 9.29.

66. Ms Norval's final section, at section 10, comprised her conclusions, inviting the Tribunal to dismiss the claims, the respondents contending that they were not in fundamental breach of their obligations entitling the claimant to resign; they did not subject the claimant to any detriment on the grounds of him

having made a protected disclosure; and the claimant was not automatically unfairly dismissed by them.

**Authorities referred to / relied upon by the Parties**

67. As part of Mr McGrade's outline closing written submissions for the claimant, he produced, at page 5, his list of 8 case law authorities on which he intended to refer or rely upon at the Hearing on Submissions. These were the cases cited at numbers 17, 21, 26, 27, 29, 30, 33 and 36, in the list reproduced below at paragraph 70 of these Reasons. For ease of reference, we have marked them with an asterisk.

68. While Ms Norval's written closing submissions for the respondent cited, and referred to various case law authorities on which she was relying, on behalf of the respondents, her written outline did not include a specific list of authorities, but, in terms of the Tribunal's earlier case management directions, there was produced to us, at the Hearing on Submissions, a two page, typewritten Joint List of Authorities, citing 35 case law authorities referred to / relied upon by parties' representatives.

69. These included the case law authorities referred to, and cited by, Mr McGrade in his outline written submission although, when the Bundle of authorities was produced to the Tribunal, at the start of the Hearing on Submissions, it did not include what is now item number 36, being the **Kuzel** judgment referred to by Mr McGrade. Copies of that Judgment were delivered to the Tribunal, and added to the Bundle of Authorities, during the course of Mr McGrade's oral submissions to the Tribunal on 16 May 2018.

70. In coming to our final decision in this case, we have had regard to the following case law authorities referred to / relied upon by parties, as follows:-

1 Western Excavation Limited v Sharp [1978] QB 761

2 Photo Production Ltd v Securicor Transport Ltd [1980] AC 827

3 Lewis v Motorworld Garages Ltd [1985] IRLR 465

4 Malik & anor v Bank of Credit & Commerce International SA [1997] IRLR 606

5 Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493

6 Brown v Merchant Ferries Ltd [1998] IRLR 682

7 Weathersfield Ltd v Sargent 1999 IRLR 94

8 Chattenton v City of Sunderland City Council ET Case No. 6402938/99 (referenced in IDS Employment Law Whistleblowing Handbook, Chapter 5, para 5.10)

9 Morrow v Safeway Stores [2002] IRLR 9

10 London Borough of Harrow v Knight [2003] IRLR 140

11 Dunnachie v Kingston upon Hull City Council [2004] UKHL 36

12 Kraus v Penna plc and anor 2004 IRLR 260

13 Street v Derbyshire Unemployed Workers' Centre [2004] IRLR 687 (CA)

14 London Borough of Waltham Forest v Omilaju 2005 IRLR 35

15 Arthur v London Eastern Railway [2006] EWCA Civ 1358

16 Melia v Magna Kansei Ltd [2006] IRLR 117 (CA)

17 Babula v Waltham Forest College [2007] ICR 1026 *

18 GAB Robins (UK) Ltd v Triggs [2008] EWCA Civ 17

19 Goode v Marks and Spencer plc EAT UKEAT/0442/09

20 Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38

21 Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 *

22 Buckland v Bournemouth University [2010] IRLR 445

23 Wells v Governing Body of Princecroft Primary School ET Case no. 1400787/11 (referenced in IDS Employment Law Whistleblowing Handbook, Chapter 5, para 5.21)

24 Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12

25 Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4

26 Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2012] IRLR 64 *

27 Abertawe v Ferguson 2013 ICR 1108 *

28 Oxfordshire County Council v Meade UKEAT/0410/14

29 Deer v University of Oxford [2015] IRLR 481 *

30 Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15/JOJ *

31 Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979

32 Parsons v Airplus International Limited UKEAT/0111/17

33 Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 *

34 Harvey on Industrial Relations and Employment Law/Division CIII Whistleblowing; para 7(1)

35 Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06

36 Kuzel v Roche Products Ltd [2008] EWCA Civ 380 *

**Oral Submissions from Parties' Representatives**

71. At the Hearing on Submissions, on 16 May 2018, each of Mr McGrade, the claimant's solicitor, and Ms Norval, solicitor for the respondents, spoke to their respective written closing submissions, provided to the Tribunal, so we do not record here ***verbatim*** the oral submissions made to us on that date, for they were, in the main, an oral delivery of the written closing submissions already produced to us, together with an oral reply to the other party's written submission. Neither party's written outline submission was materially added to, or augmented, orally in the course of the Hearing on Submissions.

72. We heard oral submissions from Mr McGrade, from just after 10.25am, until the Tribunal adjourned, at around 12.25pm, for lunch, and thereafter resumed, just after 1.10pm, hearing oral submissions from Ms Norval until the Tribunal adjourned, just after 3.05pm, to consider whether we had any questions to ask of either, or both, parties' representatives.

73. Mr McGrade, in replying orally to Ms Norval's written closing submissions, did not dispute that the relevant law was as described by her. Further, Mr McGrade made some concessions that calculations in the claimant's Schedule of Loss required to be reworked, as there appeared to have been double counting of the claimed head of loss for lost pay, between December 2016 (when the claimant moved to ½ pay) and his resignation in June 2017, and he also agreed that his calculation and workings for pension loss required reworking too, as it should have been based on 2% total contributions, from employer and employee, and not just 1% from the claimant.

74. When the public Hearing resumed, just before 3.15pm, the Judge asked a number of questions of clarification, on behalf of the Tribunal, and he sought to clarify certain matters arising from their written outline submissions, and the agreed Statement of Facts, and agreed List of Issues, before the Tribunal. We have taken those oral clarifications into account when coming to our final decision on this case.

75. In the course of clarifications raised by the Judge, both parties' representatives agreed that, in construing the word "***detriment"***, the Tribunal was entitled to refer to the House of Lords' well-known judgment in **Shamoon**

**v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**, **[2003] IRLR 285, HL**, albeit neither party's solicitor had referred us to that familiar case law authority in their respective lists of authorities provided to the Tribunal. That said, we did note, at tab 8 of the joint list of authorities, the excerpt from the **IDS Employment Law Handbook on Whistleblowing**, chapter 5, at para 5.9, does refer to **Shamoon.** We had, however, been referred to paragraph 5.10, about an unreported first instance Tribunal decision from **Chattenton v City of Sunderland City Council 6402938/99**

76. In concluding proceedings, on the afternoon of Wednesday, 16 May 2018, at around 3.35pm the Judge, on behalf of the full Tribunal panel, thanked both parties' representatives for their helpful written submissions, and further oral replies, and advised that Judgment was reserved, and a Members' Meeting would be arranged, and parties advised accordingly.

77. Thereafter, as more fully detailed earlier in these Reasons, at paragraphs 54 and 55 above, by letter to both parties' representatives from the Tribunal, dated 17 May 2018, they were updated as to our progress, a clarification was sought from Ms Norval regarding the respondents' ***SOSR*** argument, and they were advised of the arrangements made for a Members' Meeting on Friday, 6 July 2018 following which they were advised that a further update would then be provided by the Tribunal.

78. By update letter from the Tribunal, sent to both parties' representatives, on 24 July 2018, they were advised that good progress was made, and the Tribunal had concluded their private deliberations. While the Judge would ordinarily try and have a final draft Judgment and Reasons completed within the following 4 weeks, both parties were advised that that timescale would be impacted by the Judge being away from the office on 2 weeks' annual leave, but he would hope to have the draft issued to the lay members for comments as soon as possible, following his return, week commencing Monday, 6 August 2018.

79. On account of other judicial business, it took longer than anticipated for the Judge to complete the draft. This written Judgment and Reasons represents the final product from our private deliberation, on 6 July 2018, on the evidence

led, and closing submissions made to us, at the Final Hearing, and us then applying the relevant law to the facts as we have found them to be in our findings in fact, as set forth earlier in these Reasons. It represents our unanimous view, as a specialist Tribunal acting as an industrial jury, with our membership coming from disparate employment backgrounds and experience.

**Issues for the Tribunal**

80. We had before us the agreed List of Issues, adjusted between parties' representatives, and extending to 17 discreet issues, covering detriment claims, unfair dismissal claim, remedy, and preliminary issues, as reproduced earlier in these Reasons at paragraph 41 above.

81. Unfortunately, in preparing their written outline submissions for the Tribunal, parties' representatives, while providing their respective executive summaries, and otherwise a fulsome narrative covering all of the issues before the Tribunal, did not do so in the form of producing to us an easy to read, numbered issue by issue, set of proposed responses by each party to the 17 issues identified in that agreed List of Issues.

82. Coming to this our final, and unanimous, decision, on this case, we have had regard to that agreed List of Issues, as well as to the written outline submissions lodged by both parties' representatives, their oral submissions at the Hearing on Submissions, and Ms Norval's post Hearing clarification on 17 May 2018 that the respondents are no longer pursuing any alternative ***SOSR*** argument.

83. In doing so, we have however departed from their proposed sequencing of issues in that agreed List, and dealt with the preliminary issues of protected disclosures, and time-bar, before addressing parties' competing arguments on liability and remedy.

**Relevant Law**

84. The relevant law was addressed by both parties' representatives in their respective written closing submissions provided to the Tribunal, and in the

case law authorities produced to us. As such, it is not necessary, or proportionate, that we should refer here to their respective written submissions on the relevant law in any detail, as those submissions are on the casefile, and we have referred to them in preparing this our Judgment and Reasons.

85. Accordingly, and as per **Rule 62(5) of the Employment Tribunals Rules of Procedure 2013**, it will suffice to identify here concisely the relevant statutory provisions, as set forth in the **Employment Rights Act 1996**, in particular at **Part IVA** (Protected Disclosures, specifically **Sections 43A to 43L**); **Part V** (Protection from Suffering Detriment in Employment, specifically **Sections 47B, 48 and 49**) ; **Part IX, chapter I** (Unfair Dismissal, specifically **Sections 94 to 98,** and **Section 103A**), as well as **Part IX, chapter II** (Remedies for Unfair Dismissal, at **Sections 111 to 126.)**

## Discussion and Deliberation

86. In coming to our final decision on the various aspects of the present case, we have taken as our starting point, the claimant's stated position as set forth in the ET1 claim form, at paragraphs 32 to 38, as follows:

> *32. The disclosures made by the Claimant to Dwayne Pascal on 6 May 2016 regarding the activities of Leslie I'Anson, the email submitted by Craig Docherty on 16 May 2016, which had been drafted by him and the claimant, and the whistleblowing complaint submitted by the claimant on 21 December 2016 were protected disclosures as they contained information, which in the reasonable belief of the Claimant tended to show that:*
>
> *(a) A criminal offence had been committed or was being committed or was likely to be committed, that offence being*

*theft, fraud or unauthorised use or interference with data held by the Respondent.*

*(b) That Leslie I'Anson had failed or was likely to fail to comply with the legal obligation to which he was subject, namely the requirement to comply with the Respondents IT security policies and not to cause or permit the unauthorised use or access to the data held by the Respondent.*

*(c) That the Respondent had failed or was likely to fail to comply with a legal obligation to which it was subject, namely the requirement to properly safeguard the data held on its system and to prevent unauthorised access to or use of that data.*

*(d) Information tending to show a breach of subparagraphs (a), (b) or (c) had been or was likely to be deliberately concealed.*

*33. The disclosure was in the public interest as the Respondent performs an important public function, namely the administration of government funded loans and grants to students in higher and further education in England, Wales, Scotland and Northern Ireland and disclosure or unauthorised use of the information held by the Respondent could have significant adverse consequences for a significant section of the population.*

*34. The Claimant contends he was subject to a series of acts or failures to act by the Respondent or employees of the Respondent following disclosure of this information contrary to section 47B of the Employment Rights Act 1996 (the 1996 Act). Those acts constitute detriments on the ground that the Claimant made a protected disclosure. Those detriments include the following acts: –*

(a) *the decision to withdraw from the Claimant the power to determine whether Leslie I'Anson should be removed from the Respondent's premises.*

(b) *the decision to remove the Claimant from the place where he carried out his duties and to insist that he work elsewhere.*

(c) *requiring the Claimant to submit an email in deliberately misleading terms requesting that he be moved.*

(d) *The delay in dealing with his grievance*

(e) *the decision to refuse to reinstate full pay to the Claimant following the upholding of significant elements of his grievance.*

35. *The actions of the Respondent in response to the disclosures made on 6 and 16 May 2016, and in particular removing the Claimant from the place where he carried out his duties and insisting that he work elsewhere undermined his position as a manager and caused his health to suffer. This resulted in him being absent from employment from September 2016 onwards. The Claimant seeks recovery of the salary lost during his period of absence and an award for injury to feelings and psychiatric damage.*

36. *The Claimant resigned in response to the treatment that he received from the Respondent. That treatment constituted a fundamental breach of the contract of employment. The reason or principal reason for the treatment was because the Claimant made a protected disclosure. Accordingly, the Claimant was*

*automatically unfairly dismissed contrary to section 103A of the 1996 Act.*

*37. Esto the Claimant was not automatically unfairly dismissed contrary to section 103A of the 1996 Act, which is denied, the actions of the Respondent in refusing to pay the salary lost by the Claimant during his absence, given the undertaking provided by Kevin O'Connor, constitute a fundamental breach of the implied duty of trust and confidence. The Claimant resigned in response to that fundamental breach. Accordingly, he was constructively dismissed.*

*38. Esto the actions of the Respondent in refusing to pay the salary lost by the Claimant during his absence does not of itself constitute a fundamental breach of the implied duty of trust and confidence, which is denied, the following actions of the Respondent considered cumulatively constitute a fundamental breach of the implied duty of trust and confidence which entitled the claimant to resign and claim constructive dismissal*

*a. Failing to provide sufficient support to the Claimant when he was first appointed to the role of DevOps Manager.*

*b. Failing to follow information security procedures when the Claimant raised his concerns in relation to the actions of Leslie I'Anson.*

*c. Removing from him the authority to determine whether Leslie I'Anson should continue to work at the respondent's premises.*

*d. Insisting he move away from the team that he was managing*

*e. Insisting he submit a request in deliberately misleading terms as to why he wished to do so*

*f. The delay in investigating the whistleblowing complaint submitted by the Claimant.*

*g. The refusal to pay the salary lost by the Claimant during his absence,*

*The Claimant resigned in response to that fundamental breach. Accordingly, he was constructively dismissed.*

**Qualifying Protected Disclosures**

87. Given there are a number of discreet matters for our judicial determination, we have decided to start with parties' competing submissions on whether or not there have been any qualifying protected disclosures in this case. This is dealt with at paragraphs 1(a) to 1(c) of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above.

88. In their ET3 response, paper apart, at section 5, the respondents put forward the following arguments:

**Qualifying Disclosure**

*5.1 It is denied that the Claimant made a qualifying disclosure as alleged or at all.*

*5.2 The Claimant seeks to rely on three communications:*

*5.2.1 A conversation between the Claimant to Dwayne Pascal on 6 May 2016 regarding Leslie I'Anson (the **"Oral Disclosure"**);*

*5.2.2 The email submitted by Craig Docherty to David Milligan (Postgraduate Loans Programme Manager), Stuart Skinner (Chief Designer - Digital ) and the Claimant on 16 May 2016 (the **"Third Party Disclosure"**); and*

*5.2.3 The complaint raised by the Claimant under the Respondent's Whistleblowing Policy dated 21 December 2016 (the **"Complaint"**).*

*Oral Disclosure*

*5.3 The Respondent does not accept the Claimant's position in relation to the content of the Oral Disclosure. To the extent that the Oral Disclosure was made in the terms relied upon, the Respondent denies that the Oral Disclosure constituted a qualifying disclosure., The Oral Disclosure did not involve information which could reasonably be believed to tend to show a breach of an obligation set out at Sections 43B(1)(a) - (f) of the ERA. Rather, at most, they were merely allegations or statements of position; no facts were conveyed in the Claimant's communication.*

*Third Party Disclosure*

*5.4 Section 47B of the ERA states that "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".*

*5.5 Section 103A of the ERA states 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".*

*5.6 Accordingly, any qualifying protected disclosure must have been made by the Claimant in order for him to benefit from the protection afforded by the ERA. The Third Party Disclosure which the Claimant seeks to rely on was sent by another external consultant, Craig Doherty, and not the Claimant. The Third Party Disclosure was written in the first person and does not identify the Claimant*

*as having been involved in drafting its terms. Rather, the Claimant was one of the recipients of the email. Therefore this alleged disclosure does not amount to a qualifying disclosure by the Claimant.*

*Complaint*

*5.7 The Complaint did not involve information which could reasonably be believed to tend to show a breach of an obligation set out at Sections 43B(1)(a) - (f) of the ERA. Rather, at most, they were merely allegations or statements of position; no facts were conveyed in the Claimant's communication.*

*5.8 It is further denied, in the alternative, that the Claimant had a reasonable belief that any information disclosed: i) tended to show that a malpractice had occurred, was occurring* ***or*** *was likely to occur; or ii) was in the public interest. Rather the timing and context of the alleged disclosure – i.e. made one week after the Claimant's contractual entitlement to sick pay reduced to half pay and seven months after he was aware of the issues forming the subject matter of the complaint – demonstrate that the Claimant was not motivated by the public interest but rather with a view to receiving full pay.*

89. For the claimant, Mr McGrade dealt with the matter of protected disclosures at paragraphs 40 to 53 of his written submissions, and he submitted that these were disclosures of information, not simply allegations; that the claimant had outlined in his concerns to Dwayne Pascal, and while he was not specific as to the legal obligations that he considered were being breached, the claimant did have a reasonable belief at the relevant times, and that the information provided was provided in the public interest. In coming to our Judgment, we have referred to his detailed submissions, but, for the sake of brevity, we do not repeat them here at length.

90. For the respondents, Ms Norval, at section 6 of her written submissions, at paragraphs 6.16 to 6.36, argued the contrary position. Again, in coming to our Judgment, we have referred to her detailed submissions, but, for the sake of brevity, we do not repeat them here at length.

91. Further, we note that Mr McGrade submitted, in paragraph 4 of the executive summary to his closing submissions, that the claimant had made 3 protected disclosures to his employer, being (1) to Dwayne Pascal on or about 6 May 2016; (2) e-mail by Craig Docherty on 16 May 2016; and (3) his whistleblowing complaint on 21 December 2016. Mr McGrade further stated that:-

> *"It is accepted that the claimant did not submit the email of 16 May 2016. However, it is submitted that on the evidence of Dwayne Pascal, the email of 16 May 2016 can be viewed as a protected disclosure by the claimant."*

92. Further, at paragraph 52 of his written submissions to the Tribunal, Mr McGrade stated that:-

> *"When questioned by the tribunal regarding this email (EJ McPherson), Dwayne Pascal indicated that "it sounded like a collaborative view of things." He also described the issues identified as being "very much in line" with the previous discussions and "very, very similar." This is strongly indicative of Mr Pascal recognising the issues raised were being raised on behalf of both Craig Docherty and the claimant."*

93. While it is true that, in his evidence to the Tribunal, Mr Pascal expressed such a view, as we have recorded in our assessment of his evidence at this Final Hearing, it is important to note that that was his personal view, and not the view of the respondents, as per their ET3 response, and Ms Norval's written closing submissions on their behalf.

94. For present purposes, it is for us to come to a view, based on the evidence before us, and applying the relevant law, and we are in no doubt that that 16 May 2016 disclosure by Craig Docherty was a third party disclosure, and not a disclosure by the claimant.

95. The claimant's evidence was confused and confusing as regards the first alleged oral disclosure, both as to its date, and its terms, and we did not find it established what exactly had been said, or when.

96. As regards the whistleblowing complaint, being the third alleged disclosure, it was raised more than 7 months after the alleged acts took place, and more than 6 months after Mr I'Anson had left the respondents. As such, we could not see how, at the time of that communication, the claimant had a reasonable belief, nor, more significantly how, at that time, he reasonably believed that it was a disclosure in the public interest, when it appears from that complaint, and its timing, that he was motivated by personal reasons, namely financial concerns arising from his pay situation, where he had been on sick leave, and thus outwith the workplace, for over 3 months by that date.

97. Having carefully considered both parties' competing submissions on the qualifying protected disclosure point, we prefer the arguments advanced by Ms Norval for the respondents, which we regard as well-founded. Accordingly, as per paragraph (2) (a) of our Judgment above, we have found that none of the 3 communications relied upon by the claimant as part of his claim against the respondents are qualifying protected disclosures made by the claimant to the respondents in terms of **Section 43B of the Employment Rights Act 1996**.

**Time Bar**

98. Next, we have dealt with the respondents' preliminary point about time-bar. This is dealt with at paragraphs 14 to 17 of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above.

99. In their ET3 response, paper apart, the respondents submitted as follows:

> *1.1 A number of the alleged detriments which the Claimant seeks to rely upon occurred more than three months before the presentation of the Claim Form (notwithstanding the extension of time as a result of the interplay with the Early Conciliation regime). The Respondent denies that the alleged detriments constituted part of a series of similar acts or failures.*
>
> *1.2 Accordingly, the Respondent submits that these claims have been brought outwith the statutory time limit set out in Section 48(3) of Employment Rights Act 1996 (the "ERA") and should, accordingly, be dismissed as the Tribunal has no jurisdiction to hear them. The Respondent contends that it was reasonably practicable for the Claimant to have submitted his claims in time and that the Claimant did not, in any event, present the claims within a further reasonable period.*

100. We note and record that Mr McGrade, in his written closing submissions for the claimant, did not specifically address this preliminary matter, although it was reserved for determination as part of this Final Hearing. Moreover, no evidence was led by the claimant, and so no closing submission was made by Mr McGrade, that it was not reasonably practicable for the claimant to have submitted such a claim in time, nor that it was presented within a further reasonable period.

101. For the respondents, Ms Norval made detailed submissions on this matter, at paragraphs 6.85 to 6.93 of her written submissions, further to paragraph 2.1.4 of her executive summary. In coming to our Judgment, we have referred to her detailed submissions, but, for the sake of brevity, we do not repeat them here at length. Suffice it to say that she argued that the 3 "***out of time detriments***", as she labelled them, should be dismissed as the Tribunal has no jurisdiction to hear them.

102. Having carefully considered both parties' competing submissions on the time-bar point, we prefer the arguments advanced by Ms Norval for the respondents, which we regard as well-founded. Accordingly, as per paragraph (2) (b) of our Judgment above, we have found that the detriment claim, under **Section 47B of the Employment Rights Act 1996**, insofar as based on the first three alleged detriments relied upon by the claimant, is time-barred, and accordingly outwith the jurisdiction of this Tribunal for that reason, having been brought outwith the statutory time limit set out in **Section 48(3) of the Employment Rights Act 1996,** and no argument having been presented to the Tribunal, on behalf of the claimant, that it was not reasonably practicable for a claim based on those alleged detriments to be presented in time, or that it was presented within a further reasonable time.

**Detriment Claims**

103. Next, while we have upheld the respondents' time-bar point, in respect of the first 3 alleged detriments, we have gone on to consider all the detriments cited by the claimant, and we have carefully considered parties' competing submissions on the detriment claims. This is dealt with at paragraphs 2(a) to 2(e, and paragraph 3, of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above.

104. As per Mr McGrade's written submissions for the claimant, at paragraph 54, reproducing the 5 distinct detriments being relied upon by the claimant (as originally set out at paragraph 34 of the paper apart to the ET1 claim form, these alleged detriments were as follows:-

***a. the decision to withdraw from the Claimant the power to determine whether Leslie I'Anson should be removed from the Respondent's premises.***

***b. the decision to remove the Claimant from the place where he carried out his duties and to insist that he work elsewhere.***

***c. requiring the Claimant to submit an email in deliberately misleading terms requesting that he be moved.***

***d. The delay in dealing with his grievance***

***e. the decision to refuse to reinstate full pay to the Claimant following the upholding of significant elements of his grievance.***

105. In their ET3 response, paper apart, at section 5, the respondents put forward the following arguments:

***Detriment Claim***

*5.9 To the extent that the Claimant seeks to rely on a detriment other than dismissal, it is denied that:*

*5.9.1 The alleged acts constituted a detriment; and*

*5.9.2 The Claimant suffered any such detriment, as alleged or at all, because of any qualifying protected disclosure.*

106. For the claimant, Mr McGrade stated, at paragraph 55 of his written submissions, in answer to his question, ***Did the detriments alleged by the claimant take place and are they to be regarded as detriments?,*** that the Tribunal :

"… *should have no difficulty in holding that each act constitutes a detriment. I would refer to the tribunal to the words of Elias LJ in* ***Deer v University of Oxford {2015} IRLR 481****, where he stated at paragraph 25: –*

*"the concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all*

*the circumstances been to her detriment; but an unjustified sense of grievance cannot amount to a detriment.*

107. We would put emphasis on the words : ***"… but an unjustified sense of grievance cannot amount to a detriment."*** From the evidence we heard at this Final Hearing, it is clear that then, and indeed still now, the claimant is suffering from an unjustified sense of grievance at what he sees as unfair and unreasonable treatment of him by the respondents as his former employer.

108. For the respondents, Ms Norval stated, as per paragraph 2.1.2 in her executive summary, that the claimant was not subjected to any detriments by or on behalf of the respondents. Further, she set forth her detailed arguments about detriment at paragraphs 6.37 to 6.84 of her written submissions. In coming to our Judgment, we have referred to her detailed submissions, but, for the sake of brevity, we do not repeat them here at length.

109. Having carefully reflected on the alleged detriments, and the evidence led before us at the Final Hearing, these are our findings:

**a. the decision to withdraw from the Claimant the power to determine whether Leslie l'Anson should be removed from the Respondent's premises.**

- We do not accept that the claimant has established the factual basis for this alleged detriment. Further, we do not accept that there ever was a delegated power given to, and then removed from, the claimant, who had no line management responsibility for Mr l'Anson, an external consultant engaged by the respondents.

- Mr Pascal's email of 15 May 2016 (page 66 of the Joint Bundle) makes it clear that while the claimant had ***"suggested"*** Mr l'Anson be moved off site, it was Mr Pascal who had weighed up options, and decided it would be best to keep Mr l'Anson onsite, for

essentially business continuity reasons related to completion of the project.

- The claimant himself, in his email reply on 16 May 2016 (page 67 of the Joint Bundle), described Mr Pascal's decision as "***reasonable".***

- We see that as an acceptance, at the time, by the claimant that Mr Pascal had made a rational business decision, as the Head of Digital Delivery, and while we can understand that the claimant says now, and may indeed have felt then, that he personally did not like that decision, it was clearly within Mr Pascal's operational discretion, and we cannot see how it was detrimental to the claimant.

**b. the decision to remove the Claimant from the place where he carried out his duties and to insist that he work elsewhere.**

- We do not accept that the claimant has established the factual basis for this alleged detriment. There was no forced relocation imposed on the claimant against his will.

- Further, we do not accept that the claimant has established his belief that he was being moved as a punishment for raising genuine concerns about Mr I'Anson.

**c. requiring the Claimant to submit an email in deliberately misleading terms requesting that he be moved.**

- Again, we do not accept that the claimant has established the factual basis for this alleged detriment.

- There is no dispute that he sent the email, on 18 May 2016 (page 73 of the Joint Bundle) to Mr Pascal, but no evidence whatsoever

that its specific terms were dictated by, let alone, influenced by Mr Pascal.

- While Mr Pascal and the claimant had had a discussion, the claimant wrote the email on his own terms, and without any direction or control, directly or indirectly, by Mr Pascal.

**d. The delay in dealing with his grievance**

- Yet again, we do not accept that the claimant has established the factual basis for this alleged detriment.

- Mr McGrade criticised the delay in dealing with the whistleblowing complaint (for there was no "grievance") as taking too long to come to a conclusion, and that being strong *prima facie* evidence of a detriment. We disagree.

- The respondents' investigation was thorough, and such an investigation takes time. Having regard to Ms Love's other duties, we cannot describe the delay as inordinate, or unreasonable, and the claimant was kept advised of progress, either directly, or though Mr Kevin O'Connor.

- It cannot have been to the claimant's detriment that his complaint was investigated, whereas a failure to have investigated would clearly have been a detriment.

**e the decision to refuse to reinstate full pay to the Claimant following the upholding of significant elements of his grievance**.

- Again, we do not accept that the claimant has established the factual basis for this alleged detriment.

- At paragraph 60 of his written submissions for the claimant, Mr McGrade stated:

"*This is the decision which prompts the claimant to resign. There is no factual dispute that this took place and most of the communications between the parties took place in writing, so there can be very little dispute as to what happened. I would submit there can be no dispute that the refusal to make good the lost pay constitutes a detriment."*

- In our view, Mr McGrade's submissions on this point are not well-founded. On the evidence before us, there was no contractual obligation on the respondents to pay the claimant anything more than he had received, and no binding promise or undertaking that he would be paid anything, or any particular sum. Paying an employee what they are contractually due cannot amount to a detriment.

- Contrary to Mr McGrade's submission, at paragraph 69, that,***: "… it is open to the tribunal to hold that there was an element of ill will towards the claimant as he was pursuing a whistleblowing complaint.",*** we have to say that there is no cogent evidence before us that would entitle us to make such a serious finding against the respondents.

110. Having carefully considered both parties' competing submissions on the detriment claims, we prefer the arguments advanced by Ms Norval for the respondents, which we regard as well-founded. As per paragraph (2) (c) of our Judgment above, we have found that the claimant was not subjected to any detriment by the respondents, as alleged or at all, and, in particular, he was not subjected to any detriment on the grounds that he had made a qualifying protected disclosure. Accordingly, his complaint against the respondents, under **Section 47B of the Employment Rights Act 1996**, of detriment for having made such a disclosure fails, and that complaint is dismissed by the Tribunal as not well-founded.

**Unfair Constructive Dismissal Claim**

111. Next, we have carefully considered parties' competing submissions on the complaint of unfair constructive dismissal. This is dealt with at paragraphs 4 to 10 of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above. We deal separately, in the following section of these Reasons, with the automatic unfair dismissal claim, at paragraph 11 of that agreed List of Issues.

112. In the ET1 claim form, at paragraph 37, it was argued by Mr McGrade, on the claimant's behalf, that:-

> *37. Esto the Claimant was not automatically unfairly dismissed contrary to section 103A of the 1996 Act, which is denied, the actions of the Respondent in refusing to pay the salary lost by the Claimant during his absence, given the undertaking provided by Kevin O'Connor, constitute a fundamental breach of the implied duty of trust and confidence. The Claimant resigned in response to that fundamental breach. Accordingly, he was constructively dismissed.*

113. We pause to note that automatic unfair dismissal, under **Section 103A**, was the primary claim brought by the claimant. The **Section 95** claim, for "ordinary" unfair constructive dismissal, is a fall-back position. We also note that while that paragraph 37 refers to "***the undertaking provided by Kevin O'Connor",*** he was simply relaying a message to the claimant, as his go-between with the respondents' HR, and it was Ms Hainan who, on the respondents' behalf, communicated direct with the claimant in February 2017, as per her email of 10 February 2017, at page 169 of the Joint Bundle.

114. We further note that In the ET1 claim form, at paragraph 38, it was then argued by Mr McGrade, on the claimant's behalf, that:-

> *38. Esto the actions of the Respondent in refusing to pay the salary lost by the Claimant during his absence does not of itself constitute*

*a fundamental breach of the implied duty of trust and confidence, which is denied, the following actions of the Respondent considered cumulatively constitute a fundamental breach of the implied duty of trust and confidence which entitled the claimant to resign and claim constructive dismissal*

*a. Failing to provide sufficient support to the Claimant when he was first appointed to the role of DevOps Manager.*

*b. Failing to follow information security procedures when the Claimant raised his concerns in relation to the actions of Leslie l'Anson.*

*c. Removing from him the authority to determine whether Leslie l'Anson should continue to work at the respondent's premises.*

*d. Insisting he move away from the team that he was managing*

*e. Insisting he submit a request in deliberately misleading terms as to why he wished to do so*

*f. The delay in investigating the whistleblowing complaint submitted by the Claimant.*

*g. The refusal to pay the salary lost by the Claimant during his absence,*

*The Claimant resigned in response to that fundamental breach. Accordingly, he was constructively dismissed.*

115. As can be seen, from comparison with the claimant's alleged 5 detriments, at paragraph 34 of the ET1, paragraphs (c) to (g) above reflect, in terms, but not precise drafting, paragraphs (a) to (e) in paragraph 34, but (a) and (b) in paragraph 38 are additional items. As such, it can be seen that there is

considerable overlap between the substance of the claimant's whistleblowing complaints, and his constructive unfair dismissal complaint.

116. In their ET3 response, paper apart, at section 5, the respondents put forward the following arguments:

***Constructive Unfair Dismissal***

*5.11 The Claimant claims that he was constructively dismissed by the Respondent. This is not accepted by the Respondent.*

*5.12 The Respondent denies that it conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Claimant. At all times the Respondent had reasonable and proper cause for its actions. The Respondent's position is as follows:*

*5.12.1 It is denied that there was any repudiatory breach of any express or implied term of the Claimant's contract of employment;*

*5.12.2 The Respondent's actions did not cumulatively amount to a breach of the implied duty of trust and confidence and there was no action capable of amounting to a 'final straw';*

*5.12.3 If, which is denied, the Tribunal finds that there was such a breach, the Respondent contends that the breach was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated.*

*5.13 It is accordingly denied that the Claimant was constructively dismissed, as alleged, or at all.*

*5.14 Alternatively, if, which is denied, the Claimant was dismissed, the dismissal was for some other substantial reason justifying dismissal and was not unfair in all the circumstances.*

117. We pause to note and record that, as recorded at paragraph 57 above earlier in these Reasons, per Ms Norval's email of 17 May 2018, the respondents are no longer pursuing the alternative ***SOSR*** argument in respect of the constructive unfair dismissal claim, as per paragraph 5.14 of their ET3 response.

118. For the claimant, Mr McGrade submitted, at paragraph 8 of his executive summary, that:-

*"The Claimant seeks a finding of unfair dismissal contrary to section 94 of ERA on the basis that the claimant resigned in response to a fundamental breach of the contract of employment, consisting of the treatment outlined in the ET1. I would submit the tribunal should have no difficulty in holding that the claimant was entitled to resign in response to the treatment he received, particularly in light of the admissions made by Lynda Hainan as to how the claimant had been treated in relation to the issue of pay."*

119. Further, we note that Mr McGrade submitted, at paragraph 82 of his written submissions, that:

*"… In my submission, the handling of the issue of pay alone is sufficiently serious to constitute a fundamental breach. I say that for 8 reasons: –*

*a. The issue in dispute was pay. This is a fundamental element of any contract of employment.*

*b. The respondent was aware that this was an issue of the very considerable concern to the claimant as he had repeatedly raised it.*

*c. Having given a very clear undertaking to consider the issue of lost pay once the whistleblowing investigation was concluded, the respondent introduced a clear link between the outcome of the whistleblowing complaint and the issue of lost pay. However, having created that link, they completely ignored that issue when making the decision. The emails of 21, 22 and 23 June 2017 make no attempt to address the issue of whether in light of the outcome of the whistleblowing investigation, it is appropriate for the claimant to receive payment for lost salary. This was what the respondent had undertaken to do.*

*d. The email of 21 June 2017 from Lynda Hainan to the claimant indicates "the company will look to reimburse your sick pay upon your return to work." This causes two difficulties. Firstly, it appears to suggest that the claimant will be paid his lost pay. Secondly, it introduces a new condition which was never previously mentioned, namely that payment would be conditional upon the claimant's return to work, when the medical evidence indicated that the claimant was not fit to return to work at this stage.*

*e. When the claimant sought clarification of the position, it was then made clear that he would not receive further payment as he had received his full contractual sick pay. However, the respondent had known from the point of time that the claimant had first raised this issue that he had exhausted his contractual entitlement. Otherwise, there would have been no point in raising this issue.*

*f. I accept that the whistleblowing report contains a criticism of the claimant that he delayed raising the issues which formed the basis for the whistleblowing investigation and this caused the investigator to question whether he was doing this simply to*

*recover lost salary. This causes two very significant difficulties for the respondent.*

g. *Firstly, there is nothing in any of the documentation that has been provided to the tribunal to indicate that the claimant was asked why he did not raise these issues earlier. There is however very clear evidence from the claimant and Stephen Murchie that the claimant did not raise the issues earlier as he was unaware of the whistleblowing procedure. Before reaching this conclusion, it was incumbent upon the respondent to put the question to the claimant in order to given the opportunity to respond.*

h. *Secondly, the refusal of sick pay was clearly linked to the whistleblowing. I submit the respondent chose not to pay the claimant lost salary as it concluded the claimant had submitted a whistleblowing complaint in order to get paid lost salary. I will cover this issue in more detail in the context of the detriment/automatically unfair constructive dismissal claim.*

120 While, in his executive summary, Mr McGrade prayed in aid there, "***particularly in light of the admissions made by Lynda Hainan as to how the claimant had been treated in relation to the issue of pay.****",* it has to be remembered that that is his narrative, for the purpose of his closing submissions.

121 Based on Ms Hainan's evidence to us at the Final Hearing, we ourselves record earlier in these Reasons, in our own assessment of the evidence heard, Ms Hainan did indeed make some concessions, in response to cross-examination questions from Mr McGrade, but we took her responses in that regard to be answers by her, from her personal point of view, rather than she was expressing a corporate view on behalf of the respondents. Their corporate view was, as per their ET3 response, as reinforced in Ms Norval's closing submissions for the respondents.

122 Mr McGrade made detailed submissions on the unfair constructive dismissal claim, at paragraphs 81 to 85 of his written submissions. In coming to our

Judgment, we have referred to his detailed submissions, but, for the sake of brevity, we do not repeat them here at length. In brief, he argued that the claimant was entitled to succeed on her **Section 95** claim.

123 For the respondents, Ms Norval submitted that, as per paragraph 2.1.6 of her executive summary, it was denied that the respondents conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant. At all times, she submitted, the respondents had reasonable and proper cause for their actions. In coming to our Judgment, we have referred to her detailed submissions, at section 8 of her written submissions, paragraphs 8.1 to 8.22, but, for the sake of brevity, we do not repeat them here at length.

124 We have also had specific and careful regard to the reasons for the claimant's resignation, as set forth in his letter of resignation of 29 June 2017 to the respondents' HR Director, Mr Evans, as produced to us at page 308 of the Joint Bundle, and reproduced in full in our Reasons, at paragraph 45 (99) above, as also to what the claimant told us, in evidence in chief, at paragraphs 94 to 97 of his witness statement about his reasons for resignation.

125 The claimant referred to "***the two most important issues***" being (1) the treatment he received in the week beginning 15 May 2016 from Dwayne Pascal, which he says left him isolated and undermined his position as a manager, and (2) the respondents' refusal to follow through on an undertaking he says they gave to him in February 2017 to consider making good the pay he had lost, once the whistleblowing investigation was complete.

126 On the facts as we have established them, on the evidence led at this Final Hearing, his first issue did not, as a matter of fact, occur, as the claimant alleges, and, as to his second issue, we are satisfied that the claimant was never given any guarantee, or promise, by anybody at the respondents, that the respondents would reimburse him for any salary lost while he was on ½ or no pay, on account of his sickness absence.

127 While, as per paragraph 94 of his witness statement, the claimant says he felt he had "***no alternative but to resign***", as he had been ***"extremely badly***

***treated***" by his employers, we cannot accept either of those propositions as being established by the claimant.

128. We consider that he did have an alternative, in that he could have discussed a return to work. We find it difficult to accept that if things were as extremely difficult as his evidence suggested, he worked through from February to September 2016, before going off on the sick. If anything, he delayed too long in resigning for that reason, and by continuing to work, without submitting any grievance about his working conditions, we consider that he affirmed his contract.

129. While, of course, the respondents could, with the benefit of reflective hindsight, perhaps have done things differently, and perhaps acted a little sooner than they did, as regards clarifying his pay situation, there is no proper basis for the claimant asserting that they fundamentally breached the contract of employment with him, entitling him to resign, and establish an unfair constructive dismissal.

130. We have carefully reflected on the alleged fundamental breaches of contract relied upon by the claimant, and in light of the evidence led before us at this Final Hearing, we adopt here, for the sake of brevity, and to avoid unnecessary duplication, our findings, and reasoning, as set forth earlier in these Reasons, at paragraph 109 above, when addressing the alleged detriments.

131. As regards the two additional matters, pled as fundamental breaches of contract, we set out below our findings and reasoning, as follows:-

***a. Failing to provide sufficient support to the Claimant when he was first appointed to the role of DevOps Manager.***

- The respondents denied this allegation and it was clear to us, from the evidence given by Mr Pascal, that he did his best, as a busy senior manager, in a dynamic and challenging working

environment, to support the claimant, throughout his employment, and not just at the time of his promotion into the new manager's job.

- This was further evidenced in his emails to the claimant of 15 and 16 May 2016, as produced at pages 66 and 59 of the Joint Bundle, where Mr Pascal referred to him having "***full confidence***" in the claimant's leadership and professionalism, and that he had the "***utmost confidence***" in the claimant taking the team forward.

- Had Mr Pascal had any real concerns about the claimant's performance, or ability to carry out his new managerial role, we would have expected him to have taken some performance management action, but there was no evidence before us that that had happened.

- Further, the fact that the claimant worked in that new role, from March to September 2016, before going off on sick leave, is an indicator that the respondents were providing sufficient support, otherwise we would have expected the claimant to have raised matters far earlier, or gone off sick much sooner than he did.

- We do not see how this can be said to be a breach of the implied term of trust and confidence.

***b. Failing to follow information security procedures when the Claimant raised his concerns in relation to the actions of Leslie l'Anson.***

- On this matter, on the evidence led before us, it was not clear exactly what information security procedures the claimant was alleging had been breached, but once his whistleblowing complaint was brought, it was investigated by Ms Love, and he was fed back the outcome from that investigation.

- Further, from Mr Pascal's evidence, he felt there was no need to escalate the claimant's concerns about Mr I'Anson to involve the respondents' IT security team, and the claimant himself never raised his concerns with that team either.

- We do not see how this can be said to be a breach of the implied term of trust and confidence.

132. Having carefully considered both parties' competing submissions on the constructive unfair dismissal complaint, we prefer the arguments advanced by Ms Norval for the respondents, which we regard as well-founded. As per paragraph (2) (d) of our Judgment above, we have found that the claimant resigned from the employment of the respondents, and he was not dismissed by them, either expressly, or constructively under **Section 95(1) (c) of the Employment Rights Act 1996**. Accordingly, his complaint of unfair constructive dismissal by the respondents, contrary to **Sections 94 and 98 of the Employment Rights Act 1996,** fails, and that complaint too is dismissed by the Tribunal as not well-founded.

**Automatic Unfair Dismissal**

133. Finally, we have carefully considered parties' competing submissions on the complaint of automatic unfair dismissal. This is dealt with at paragraph 11 of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above.

134. In their ET3 response, paper apart, at section 5, the respondents put forward the following arguments:

**Automatic Unfair Dismissal**

*5.10 If the Tribunal holds that the Claimant's alleged disclosures were qualifying disclosure(s), it is denied that the Claimant was dismissed (constructively or otherwise) because of them. At no point were*

> *the Respondent's actions motivated by any disclosure made by the Claimant. In particular, the reason for the Claimant receiving reduced pay from 14 December 2016 onwards was not because of him having made any protected qualifying disclosure. Rather, the reduction in pay was due to the Claimant being on sick leave at that time, and the Claimant having exhausted his contractual entitlement to full pay.*

135. For the claimant, Mr McGrade made detailed submissions, at paragraphs 86 to 90 of his written submissions. In coming to our Judgment, we have referred to his detailed submissions, but, for the sake of brevity, we do not repeat them here at length.

136. In particular, in his written submissions to the Tribunal, at paragraph 88, Mr McGrade, when addressing the claimant's complaint of automatically unfair constructive dismissal claim, stated that:

> *"Perhaps the best starting point for a legal analysis of the section 103A constructive dismissal claim is* ***Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15.*** *This case bears a number of factual similarities to the case before the tribunal as it is a case of both ordinary constructive dismissal and automatically unfair constructive dismissal arising from the treatment of a member of staff over a period of time after he made a protected disclosure".*

137. For the respondents, as per paragraph 2.1.6 of her executive summary, Ms Norval submitted that it was denied that the claimant was constructively dismissed because of having made a qualifying protected disclosure, and, at no point were the steps taken by the respondents motivated by the fact that the claimant had raised his concerns. She made more detailed submissions, at section 6, paragraphs 6.94 to 6.98, and, in coming to our Judgment, we have referred to her detailed submissions, but, for the sake of brevity, we do not repeat them here at length. Like Mr McGrade, she took referred us to the EAT's judgment in **Wyeth.**

138. We have carefully read the EAT's judgment in **Wyeth**. Having done so, we cannot agree with Mr McGrade's assessment of it as a case bearing a number of factual similarities to the present case. We agree that in both cases, the claimant / employee complained of both ordinary constructive dismissal and automatically unfair constructive dismissal arising from their treatment by the respondents, their employer, over a period of time, but in **Wyeth** the Tribunal accepted there had been a protected disclosure, and that the employee had been unfairly, constructively dismissed by the employer, but here, we have not accepted either of those matters as having been established on the claimant's part.

139. As is clear from Her Honour Judge Eady's summary of the EAT judgment in **Wyeth**:

> *Having found that the Claimant had been constructively dismissed and that the Respondent had not put forward any reason that was capable of being fair for the purposes of section 98 ERA; the Claimant's dismissal was unfair. The issue was whether the reason or principal reason for that dismissal was a protected disclosure, thus rendering the dismissal automatically unfair for the purposes of section 103A ERA. The ET had found that it was.*
>
> *The Respondent contended that in so doing, the ET had (1) erred in law in applying a "but for" test rather than determining what was the reason or principal reason for the dismissal; alternatively (2) failed to properly identify the reason or principal reason for the dismissal and/or reached a conclusion that was perverse.*
>
> *Held:*
>
> *Although the Claimant had put his case on a "but for" basis, the ET had not fallen into the error of applying that approach but had kept in mind the need to determine what was the reason or principal reason for the dismissal. Where an error did arise, however, was in the ET's failure to engage with the potential explanations put forward by the*

> *Respondent and/or arguably apparent from its own findings of fact. The ET thereby failed to conduct the necessary critical analysis of the Respondent's reason for its conduct and failed to properly explain its findings and reasoning in that regard. In the circumstances, the appeal on this ground would be allowed and this matter - the section 103A aspect of the claim - remitted to a freshly constituted ET for re-hearing.*

140. In considering her summary, we have also had particular regard to paragraph 44 of her judgment, part of her discussion and conclusions, where the learned EAT Judge states that:

> *"On the automatically unfair - protected disclosure - dismissal claim, the starting point was provided by the ET's conclusion on the question of dismissal (see paragraphs 72 and 76 to 78). The Claimant was constructively dismissed because he left as a result of the Respondent having conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence essential to the employment contract. It did that (on the ET's findings) by: (1) moving him, without consultation, from the night to the day shift; (2) ignoring the difficulties that had arisen from this sudden move; (3) continuing not to investigate and resolve his complaint of bullying; (4) leaving him "temporarily" working on the day shift; (5) not including the Claimant in the investigation into ODP1; and (6) sending the letter of 21 March 2013 (to the Claimant and other staff) with what might be seen as a veiled warning to him."*

141. It is clear to us, from that description, that the facts and circumstances of the **Wyeth** case are significantly different and distinct from the facts and circumstances of the present case, as we have found them to be in our findings in fact earlier in these Reasons. In particular, we have made no finding that the claimant here was constructively dismissed because he left as a result of the respondents having conducted themselves in a manner

likely to destroy or seriously damage the relationship of trust and confidence essential to the employment contract.

142. Further, we have not made any finding that the claimant here was moved without consultation, or that the respondents failed to investigate his whistleblowing complaint, excluded him from that investigation, or in any way subjected him to any form of detriment. On the contrary, we are satisfied that the claimant's move was voluntary, rather then forced, or imposed by the respondents, and the respondents interviewed him, along with many others, as part of Ms Love's investigation into his whistleblowing complaint, and, in our findings, we have not upheld any of his complaints that he was subject to any form of detriment by the respondents.

143. **Wyeth,** and the present case, are not like by like comparisons, as not only are the facts and circumstances in one not alike to those in the other, they are not even broadly similar.

144. Having carefully considered both parties' competing submissions on the automatic unfair dismissal complaint, we prefer the arguments advanced by Ms Norval for the respondents, which we regard as well-founded. As per paragraph (2) (e) of our Judgment above, we have found that the claimant was not dismissed by the respondents, expressly or constructively, on the grounds that he had made a qualifying protected disclosure. Accordingly, his complaint against the respondents, under **Section 103A of the Employment Rights Act 1996**, of automatically unfair dismissal for having made such a disclosure fails, and that complaint too is dismissed by the Tribunal as not well-founded.

**Closing Remarks**

145. Having dismissed all of the claimant's complaints before the Tribunal, the matter of remedy does not strictly speaking arise for the Tribunal's consideration. As per paragraph (2) (f) of our Judgment above, we have found that, in all these circumstances, the claimant's complaints against the

respondents are dismissed in their entirety, and the claimant is not entitled to any compensation from the respondents, as sought in his Schedule of Loss provided to the Tribunal, as alleged, or at all.

146. However, as we were addressed by both Mr McGrade, and Ms Norval, in their respective written closing submissions, on the matter of remedy, as per paragraphs 12 and 13 of the agreed List of Issues, reproduced earlier in these Reasons at paragraph 41 above, we think it is appropriate that we say something about their respective submissions to us.

147. The claimant's position, in Mr McGrade's written closing submission to the Tribunal, was that he sought compensation for the claimant, while Ms Norval's position, for the respondents, was that no compensation was due, and if the Tribunal found for the claimant, the amounts of compensation sought were excessive.

148. In their ET3 response, paper apart, at section 5, the respondents put forward the following arguments about Remedy:

***Remedy***

*5.15 It is denied that the Claimant is entitled to any compensation as pleaded or at all. If the Tribunal finds that the Claimant was unfairly dismissed, the Respondent contends that any compensation should be reduced to reflect:*

*5.15.1 The Claimant's contribution towards his dismissal;*

*5.15.2 Section 123 of the ERA;*

*5.15.3 The Claimant's failure to comply with the Acas Code by not appealing the Respondent's decision in respect of the Complaint under the Respondent's Whistleblowing Policy;*

*5.15.4 The fact that any relevant disclosure made by the Claimant was not made in good faith;*

*5.15.5 Any sums received by the Claimant in alternative employment elsewhere or through social security benefits since his dismissal; and*

*5.15.6 Any failure by the Claimant to mitigate his loss.*

149. At the Hearing on Submissions before us, on 16 May 2018, Ms Norval clarified the respondents' position, in answer to a request for clarification from the Judge, about which parts of that paragraph 5.15 of the ET3 response, paper apart, as reproduced in paragraph 13 of the agreed List of Issues, the respondents were now relying upon.

150. She stated that her earlier arguments that (a) the claimant contributed towards his dismissal, and at (b) and (f) that the claimant had failed to mitigate his losses, were not now being pursued by the respondents. We accept, as well advised on the respondents' part, her withdrawal of an argument that the claimant had some how contributed to his own dismissal. On the facts of this case, such an argument, if maintained, would have been untenable.

151. While we noted her position, as regards the claimant's failure to mitigate his losses, we do not accept that her declared position on this matter was well-founded, as we have found in our findings in fact above, at paragraph 45(109) to (120) of these Reasons, as we are not satisfied that the claimant has made reasonable efforts, after being certified fit to work again, from 2 April 2018, to mitigate his losses post termination of employment with the respondents.

152. Further, the fact that, in February 2018, he made two applications for new employment, although unsuccessful, suggests to us that the claimant must have considered himself fit at that point to return to employment, albeit he was still in receipt of medical certification stating he was unfit to work.

153. In looking at compensation, had we required to make an award in the claimant's favour, our starting point would have been the calculations in the claimant's final, revised Schedule of Loss, subject to the caveat, explained by Mr McGrade, that some of those calculations needed re-working, as detailed earlier in these Reasons at paragraph 73 above.

154. However, in that event, had we found in the claimant's favour, and gone on to consider awarding him compensation for loss of earnings, we would have required to seek further information and clarification from both parties' representatives about the proper calculation of a week's net pay in the claimant's employment with the respondents, having regard to the EAT's guidance, by Mrs Justice Slade, in **University of Sunderland v Drossou [2017] UKEAT 0341/16; [2017] ICR D23,** about calculating a week's pay, to include pension contributions pad by the employer.

155. Otherwise, looking at the sums sought by the claimant, and the many points advanced by Ms Norval in her written closing submissions, at section 9, paragraphs 9.1 to 9.29, giving the respondents' counter arguments, we have to say that we would not have awarded the claimant anything like the sums he was seeking, which we regard as excessive, even if we had upheld any of his complaints. His claim for training costs was of particular note given it would have amounted to the equivalent of over 30% of his gross annual salary whilst working for the respondents.

156. By way of a further example, at paragraph 78 of his written submissions, Mr McGrade, solicitor for the claimant, stated as follows:-

> *"I have valued the claim for injuries to feelings in the middle of the middle Vento band. The claimant was absent from work for a period of almost 10 months. He remained unfit to return to work until April 2018. The reports before you, the terms of which have been agreed, indicate the treatment to which he was subjected had a very significant impact upon him. He required a number of sessions with a clinical psychologist".*

157. From the medical evidence submitted to us, in the agreed medical reports, it is clear, as we have found, at paragraph 45(117) of our Findings in Fact, that the claimant had been suffering from anxiety and depression, and that he was certified as unfit to work for a period of more than 18 months, from September 2016 to April 2018. He was referred by his GP for both psychiatric and psychological treatment. While he did not receive any treatment from the consultant psychiatrist, the claimant had a number of sessions with clinical psychologists.

158. Mr McGrade valued injury to feelings at **£16,800** in the revised Schedule of Loss provided to the Tribunal on 30 April 2018. At this Final Hearing, the claimant gave some limited evidence in chief, as per his witness statement, but we would not have assessed that his injured feelings were so significant as to merit an award, if otherwise due, at that level.

159. That is so when, unlike other cases we hear at the Tribunal, where supporting evidence is often led, from independent witnesses, clinical connected to a claimant, there has only been the claimant's evidence, and no supporting evidence from a friend, family member, or work colleague, about the effect of treatment at work on a claimant, and / or a medical witness to speak to matters, and be cross-examined, and asked questions of clarification, by the Tribunal, The fact Mr Murchie felt the claimant's treatment by the respondents had been "***appalling"*** is not sufficient.

160. Finally, we close by stating that we recognise that our Judgment will not be well received by the claimant, because, even during the course of the Final Hearing, it was clear to us that he still bears a sense of grievance and injustice at the way he was treated by the respondents.

161. We appreciate that that is his perception, and so his reality, but, as the independent and objective fact finding Tribunal, applying the relevant law to the facts of this case as we have found them to be, based on the evidence led before us from both parties, we hope that in reading our Judgment, and

these Reasons, the claimant will come to understand our reasons for dismissing all of his complaints.

162. We also hope that the claimant will note and act upon our suggestion that, being certified fit to work again, he should now turn his efforts towards seeking new employment, and trying to rebuild his employment experience for the benefit of a prospective new employer, and his own self-confidence and personal esteem.

Employment Judge: Ian McPherson
Date of Judgment: 07 September 2018
Entered in register 12 September 2018
and copied to parties