EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr S Njoku	**v**	L Rowland & Company (Retail) Ltd

Heard at: Reading **On:** 19, 20, 21 and 22 November 2018

Before: Employment Judge George (sitting alone)

Appearances
For the Claimant: Mr P Summerfield (lay representative)
For the Respondent: Mr G Lomas (consultant)

JUDGMENT having been sent to the parties on **5 December 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The procedural history of this case is that the Claimant presented his ET1 on 15 December 2016 by which he claimed unfair dismissal and automatically unfair dismissal on grounds of protected disclosure. That followed a period of early conciliation which lasted from 26 October 2016 to 10 November 2016. The Respondent company run a number of pharmacies and these claims arose out of the Claimant's dismissal from his job as a pharmacy manager at the Farnham branch of the various different pharmacies that are operated by the Respondent company. They defended the proceedings and entered an ET3, following which the case came before Employment Judge Vowles on 10 April 2017. AT that preliminary hearing the issues were defined as in the agreed list of issues that appears in the Respondent's bundle at page 32.

2. When the case came before me for the hearing, I had the benefit of hearing the evidence of three witnesses called by the Respondent and of the Claimant himself. Each of the witnesses had signed a witness statement, which they adopted in evidence, and they were cross examined upon it. The Respondent's witnesses were:

    - Mr Hemel Chudasama (who was the line manager of the Claimant and area manager for the area in which the Farnham branch is located);
    - Mr Perveen Bhardwaj (who was another area manager for a

different area, and he was charged with the disciplinary hearing and made the decision to dismiss);

- Mrs Deborah Crockford (who was at the time employed by the Respondent as the commission services development manager and she conducted the appeal against dismissal. She no longer works for the Respondent.

3. The Claimant relied on a number of documents which he appended to his witness statement and those documents have been paginated. For ease of reference in these reasons, I refer to page numbers in that statement and its appendix as CB page #.

4. The Respondent had been charged with the production of the joint bundle and has produced a paginated bundle which runs to more than 900 pages. Page numbers in that bundle are referred to in these reasons as RB page #.

5. For a variety of administrative and logistical reasons outside the control of the parties, the hearing of this matter was unable to start until after 12.00 noon on the first day of the hearing and the Employment Judge was unable to sit in the afternoon of day 2. However, the case was timetabled and the representatives have made succinct and focused submissions which means that we have been able to conclude this hearing in the available time and for that I am grateful.

6. Where it has been necessary to refer in these reasons to other members of the staff employed by the Respondent who have not been called to give evidence, they are referred to by the initials of their first and last name as it has appeared in the documentation.

The Issues

7. The issues to be determined at the full hearing were set out in the agreed list of issues. They are,

7.1 Was the Claimant dismissed for an automatically unfair reason? This involves asking first whether the Claimant made a protected act? He relies upon his email dated 6 June 2016 to Hemel Chudasama in which he outlined concerns, (1) that the workload and working conditions were presenting a risk to patient care and safety and (2) that the Respondent needed to address staffing issues because the health and safety of staff was at risk. When considering whether that email was a protected act the following questions arise,

7.1.1 Did that email amount to a disclosure of information?

7.1.2 Did the Claimant have a reasonable belief that the disclosure of information was made in the public interest?

7.1.3 Did the Claimant disclose information that in his actual belief showed or tended to show (1) that the Respondent had failed or was failing to comply with legal obligations to which it was subject and which related to the provision of pharmaceutical services which fall within the remit of the

National Health Service, Pharmaceutical and Local Pharmaceutical Services Regulations 2013 namely schedule 4 of those regulations (hereafter referred to as the 2013 Regulations) and/or (2) that the health and safety of an individual had been, was being or was likely to be endangered?

7.1.4 If so, viewed objectively, was that belief a reasonable one for the Claimant to hold?

7.2 If I conclude that the Claimant did make a protected act then was it the reason or principal reason for the dismissal? If so then the dismissal is automatically unfair.

7.3 If not then the issue would be whether the Claimant was dismissed for a potentially fair reason? The Respondent relies upon misconduct or some other substantial reason, namely a breach of the implied term of trust and confidence.

7.4 If the Respondent shows that the reason for the dismissal was such a potentially fair reason then did the Respondent,

7.4.1 Have a genuine belief that the Claimant had committed to the alleged misconduct,

7.4.2 If so, did the Respondent have reasonable grounds for believing that the Claimant had committed the misconduct alleged

7.4.3 At the time that the Respondent formed that belief, had it carried out as much investigation as was reasonable in the circumstances, and

7.4.4 Did it follow a fair procedure having regard to its disciplinary policies?

7.5 There is also the overall question under section 98(4) of the ERA of whether the dismissal is fair or unfair in all the circumstances – in other words, was it within the range of reasonable responses?

8. If either of those two claims succeeded, then I would need to go on to consider remedy. I was asked at this initial stage, if I find that the Claimant was unfairly dismissed, to rule on whether a deduction from compensation should be made to take account of the likelihood that the Claimant would have been fairly dismissed in any event or because of contributory conduct pursuant to ss.122(2) and 123(6) of the Employment Rights Act 1996 (hereafter the ERA). However, in the light of the conclusions that I made at the liability stage, I have not found it necessary to go on and decide those issues which are more properly relevant to what remedy the Claimant is entitled to, if he has been successful.

The Law applicable to the Issues

9. By section 43A of ERA, a protected disclosure is a qualifying disclosure under section 43B(1) that has been made to an appropriate person in accordance with any of sections 43C to 43H. Here there is no issue but that the alleged protected disclosure was made to the Claimant's area

manager and therefore to his employer. If the communication was a qualifying disclosure, it falls within section 43C.

10. Section 43B(1), as amended with effect from 25 June 2013, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

11. The list of issues states at number 4A that the Claimant relies on the argument that the disclosure of information tended to show that an individual was or was likely to breach a legal obligation, namely schedule 4 of the 2013 Regulations. However, in the event I have not been taken to any such regulations and they do not appear to be in the bundle. I conclude that that particular allegation has not been pursued particularly vigorously. However, the Claimant also relies upon the health and safety provision of section 43B(1)(d). That provides that it is a qualifying disclosure if it is information which tends to show that the health and safety of any individual has been or is being or is likely to be endangered.

12. The Respondent does not dispute that the email of 6 June was sent by the Claimant. I therefore need to ask myself whether the Claimant actually believed that it was a disclosure of information that tended to show that the health and safety of any individual has been or is being or is likely to be endangered and whether that belief was reasonable. I also need to ask myself whether the Claimant believed the disclosure was in the public interest and was that belief reasonable? Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA is the authority which explains that that is the structure of the questions which the employment tribunal needs to ask. See in particular paragraphs 27 to 31 of the judgment where it held that:

    12.1 The tribunal has to ask (a) whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
    12.2 Element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly

so given that that question is of its nature so broad-textured.

12.3 The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

12.4 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time that he or she made it. Of course, if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or she really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief, but nevertheless find it to have been reasonable for different reasons which he or she had not articulated to herself at the time: all that matters is that his/her (subjective) belief was (objectively) reasonable.

12.5 While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it. Lord Justice Underhill stated that he was inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase '*in* the belief' is not the same as 'motivated by the belief'; but that it was hard to see that the point would arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

13. On the Respondent's case, it is challenged whether the email was sufficiently specific to be a disclosure of information rather than an allegation. The Respondent has made no specific challenge to the Claimant's belief that the health and safety of an individual was in danger or that it was in the public interest to disclose this information.

14. In support of their argument that it was not a disclosure of information, Mr Lomas has referred to the case of Kilraine v The London Borough of Wandsworth [2018] EWCA Civ 1436. In that case, the Court of Appeal considered the well-known principles set out in the case of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 .

15. In paragraph 21 of Kilraine, the Court of Appeal cited the judgment of Mr Justice Langstaff, giving the decision of the EAT in the same case where he disapproved of applying "a rigid dichotomy between information and allegations and […] said this:

> "30. … I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure that the Appeal

Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point.

…

32. [The passage in the letter of 10 December 2009 highlighted above] is that upon which Mr Robison focused his submissions. It provides information, he submitted. There had been incidents of inappropriate behaviour. Though the Tribunal thought that this was not information, it is not difficult to see how difficult it would be to bring that within the scope of the protected disclosure provisions. If one takes away the word "inappropriate" from the highlighted section, it says nothing that is at all specific. It does not sensibly convey any information at all. On this basis, I consider the Employment Tribunal was justified in concluding as it did, but even if I were wrong on that, it is difficult to see how what is said alleges a criminal offence, a failure to comply with legal obligations or any of the other matters to which section 43B(1) makes reference. It is simply far too vague. "Inappropriate" may cover a multitude of sins. It has to show or tend to show something that comes within the section.""

16. The Court of Appeal in Kilraine declined to say that Cavendish Munro had been wrongly decided holding,

"31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1) , not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.

32. In my view, [Counsel for the Appellant] is not correct when he suggests that the EAT in Cavendish Munro […] was seeking to introduce a rigid dichotomy of the kind which he criticises. I think, in fact, that all that the EAT was seeking to say was that a statement which merely took the form, "You are not complying with Health and Safety requirements", would be so general and devoid of specific factual content that it could not be said to fall within the language of section 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was seeking to do is borne out by the fact that it itself referred to section 43F , which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement "The wards have not been cleaned [etc]" could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning […] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between "information" and "allegations".

33. I also reject [Counsel's] submission that Cavendish Munro is wrongly

> decided on this point, in relation to the solicitors' letter […]. In my view, in agreement with Langstaff J below, the statements made in that letter were devoid of any or any sufficiently specific factual content by reference to which they could be said to come within section 43B(1) . I think that the EAT in Cavendish Munro was right so to hold.
>
> 34. However, with the benefit of hindsight, I think that it can be said that para. [24] in Cavendish Munro was expressed in a way which has given rise to confusion. The decision of the ET in the present case illustrates this, because the ET seems to have thought that Cavendish Munro supported the proposition that a statement was either "information" (and hence within section 43B(1)) or "an allegation" (and hence outside that provision). It accordingly went wrong in law, and Langstaff J in his judgment had to correct this error. The judgment in Cavendish Munro also tends to lead to such confusion by speaking in [20]-[26] about "information" and "an allegation" as abstract concepts, without tying its decision more closely to the language used in section 43B(1) .
>
> 35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1) , namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

17. Although I take account of this passage as a whole, I particularly note the comment that the alleged protected disclosure in Chesterton Global was so devoid of specific factual content that it could not be said to fall within s.43B(1) and also the passage from paragraph 36 of Kilraine which says that the question of whether an identified statement or disclosure in any particular case does meet that standard will be a matter for an evaluative judgment by a Tribunal in the light of all the facts of the case.

18. If I conclude that the Claimant did make a protected disclosure, I need to go on to consider section 103A of the ERA which, so far as is relevant, provides that:

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

19. This involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

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

The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

20. The legal burden of proving the principle reason for the dismissal is on the employer although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

"… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …

57

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58

Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59

The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

21. When considering the so called "ordinary" unfair dismissal claim under section 98 of the ERA, it is agreed between the parties and indeed has been set out in the list of issues that the principles set out in the well-known case of British Home Stores v Burchell [1980] ICR 303 EAT and other subsequent cases which built upon the test which has become known as the "Burchall test". I need to be satisfied that before deciding to dismiss the employer had formed a genuine belief in the employee's guilt. However, in order for it to be reasonable for the employer to treat the conduct as sufficient reason to dismiss the employer must have had in mind reasonable grounds for that belief and at the stage that the belief was formed the employer must have carried out as much investigation as was reasonable in the circumstances.

22. I must ask myself whether the conduct of the respondent fell within what has been described as the "range of reasonable responses". It is not whether I would have reached the same conclusion as the employers in question, but whether their conclusion or decision was one within the range of reasonable responses to the employee's conduct. The same is true of the employer's conduct of their investigation into the claimant's alleged misconduct. The question for me is whether the investigation was within the range of reasonable responses which a reasonable employment might have adopted: J Sainsbury plc v Hitt [2003] ICR 111, CA.

Preliminary and interlocutory matters

23. On the first day of the hearing, I dismissed an application made by the Claimant to strike out the response on the basis of three allegations of breach of Tribunal orders. Those allegations were set out in the letter from the Claimant's representative of 22 December 2017. I gave my reasons for dismissing that application at the time and I do not repeat them here except to say that I had concluded there was no persistent unreasonable conduct on the part of the Respondent and that a fair trial was still possible. It was also the case that the Respondent had had no notice of the application.

24. On the third day of the hearing, I rejected an application by the Claimant to admit late disclosed documents. Again, full reasons were given at the time and I do not repeat those. To put matters succinctly, I accepted that the documents had some relevance to the claim and therefore they should have been disclosed at the relevant time. However, a decision had been taken apparently by the Claimant in consultation with his representatives or then representatives not to rely upon the document. Had I admitted it, it would in my estimation have inevitably led to the adjournment of the hearing part heard in order to allow the Respondent to call an additional witness and therefore I considered that there was more prejudice to the Respondent than to the Claimant were the documents to be admitted and applying the overriding objective, I declined to do so.

Findings of Fact

25. I make my findings of fact applying the standard of proof of the balance of probabilities. Where it has been necessary for me to make a judgment between two competing accounts, I have taken into account the overall credibility of the witnesses in their oral evidence compared with the witness statements that I have been provided with and contemporaneous documentation where that exists.

26. The Claimant commenced employment with the Respondent on 12 May 2014 as a pharmacist manager. His contract is at RB page 36 and, I note that at point 10 of the contract it provides:

"The company has specified policies and procedures in place to protect the health and safety of all employees and customers as well as to ensure lofty standards of conduct, performance and service. You are required to read the company policies and procedures and take all necessary steps to ensure that they are properly observed. Failure to adhere to company policies and procedures will result in disciplinary action which may include dismissal in line with the company's disciplinary procedures."

27. The Claimant was manager of the Farnham branch. He had only one appraisal during the course of his employment. That took place on 16 March 2016. It appears at the CB page 24. Mr Chudasama carried out the appraisal. He had been appointed the area manager in approximately January of the same year.

28. I have considered what both men said about this appraisal and in my conclusion, it is a satisfactory appraisal. The focus of the Claimant's efforts of the next year is directed to be towards operational excellence and workflow and work pattern but it is certainly true that the appraisal does not set out any performance concerns on the part of the area manager. On the other hand, it seems to me that when the Claimant describes this appraisal as having been represented to him as outstanding by Mr Chudasama, this is an exaggeration.

29. Mr Chudasama agreed that there were staffing problems at the Farnham branch. His oral evidence included statements that he thought there was sufficient staff, that there were enough staff legally to be open, and that the budgeted hours for the branch were sufficient. He stressed that there were no plans on the part of the Respondent to reduce the budgeted hours but he accepted that there were some vacant posts. He set out in paragraph 3 of his witness statement some types of support that he said that he had provided to the Claimant. In particular, he said that he had provided internal relief staff and that was accepted by the Claimant. He had provided locum dispensers. That was also accepted by the Claimant and he had put an apprenticeship scheme in place to give a permanent member of staff. However, in my view, it is overstating things to say that MB was put in as support as such. Her and JW's arrival at the branch postdates the letter of 20 June 2016 and the Claimant clearly did not regard it as support and I shall return to that for later in these reasons.

30. On Mr Chudasama's account, he had a meeting with the Claimant on 31 May and it is referred to in his statement to the disciplinary investigation RB page 524 at page 526. The Claimant did not provide a detailed

account of his meeting with his area manager in his statement but he denied that any concern had been raised about his conduct or capability prior to the 8 June.

31. The heart of the issue seems to me to be that the Claimant regarded that the branch difficulties and the stress of working there were due to inadequate staff both in terms of numbers and in terms of ability. If one looks at Mr Chudasama's account at page 526, he says there that he coached the Claimant on SMART objectives (Short-term, Measurable, Achievable, Realistic Targets) and that the Claimant blamed his team. He also records at page 526 that he had counselled the Claimant that he as manager could influence branch morale and he observed that work practices in the branch were inefficient.

32. I accept that the Claimant did not hear Mr Chudasama to say that he could change his own performance to get more out of his team; however my conclusion is that that was not because Mr Chudasama did not say it. The Claimant did not believe that it was his performance as manager which contributed to the lack of performance of the team even setting aside the vacant positions. It is clear from his evidence to the Employment Tribunal that he still does not understand how that could have been the case.

33. The Claimant's response to the meeting of 31 May was his email at CB page 32 dated 6 June. In it he says:

"Just a few lines to raise my concerns about how we are constantly putting patient safety at risk. Our working conditions is constantly deteriorating. The team morale at now a minimum level. There is no more joy in coming to work. The customers are no more satisfied with the service. Some of them have gone to other pharmacy. The workload and working conditions are now presenting a risk to patient care and to public safety. We need to act now to sort out the staffing issue. I partly understand that we are trying to cut down but we should always put the public safety first. This is not an issue of time and staff management. During our last meeting on Tuesday 31 May you promised that you would have sent two locum dispensers but today Tom was taken away from us making the condition more critical."

34. It is telling in my view that the Claimant says in that email this is not an issue of time and staff management and I conclude that he does so in response to orally expressed concerns by Mr Chudasama that the Claimant's management of time and staff was indeed the problem. I have reached the conclusion that Mr Chudasama did raise the performance matters with the Claimant before his email of 6 June as he alleges. Furthermore, that meeting of 31 May led to a letter of 20 June that is at RB page 169. It includes a passage which says that the following areas of concern were discussed: *"lack of concern and management of your staff; CD balance checks not completed by you or your staff; failure by you and your staff of not following the company cashing up procedure; SOPs not being followed by you or your staff."*.

35. My conclusion is that the meeting of 31 May was held as a consequence of the concerns that Mr Chudasama had about the Claimant's performance. Although he stressed in the 20 June letter that he was not

instigating the formal stage of a performance process, he referred to the 31 May meeting as having been a structured one. I consider that this was essentially an informal performance improvement programme that was being put in place. When, among other things, Mr Chudasama sent MB and JW to the branch this was in order to improve the practices which he had identified as being deficient. That is why I say they were not support as such, they were sent there in order to sort out the branch so that their input, together with the performance improvement plan, might enable the Claimant to have a fresh start and move on and succeed as the pharmacy manager. It seems to me that the Claimant should have been open to their experience and advice but on their account, he regarded them with hostility.

36. It was accepted later both by Mr Bhardwaj and by Mrs Crockford that there were personality clashes, in particular with MB, but in my view, this stemmed from the Claimant's lack of humility in seeing where he needed to accept her contribution which could have set him on a path to improve his performance as required by his manager.

37. Mr Chudasama replied to the email of 6 June (see RB page 162) explaining his decision about the allocation of resource. The Claimant then emailed him with a specific request (at RB page 164) including a request for someone to assist in the destruction of expired controlled drugs referred to in the papers by the abbreviation 'CD'. The Claimant says in paragraph 11 of his witness statement and I accept that he received the letter of 20 June on 22 June. On the previous day, there had been an incident where the Claimant was late for work. Contrary to the Claimant's evidence in paragraph 10 of this statement, Mr Chudasama did not instigate formal disciplinary action. I accept Mr Chudasama's evidence that there were two aspects to his concern recorded in the record of conversation at RB page 179. Firstly, that there was no apology for the lateness; and secondly, that the Claimant had argued with reasonably expressed concerns of a visiting manager and when given the opportunity to do so, the Claimant did not try to clear up certain dispensed stock.

38. The Claimant emailed Mr Chudasama on 23 June (RB page 177). That email is about certain staffing matters and does not refer to the informal PIP or respond to Mr Chudasama's account of the conversation of 31 May. The Claimant seeks to explain that lack by saying that he might not have chosen that email to record any dissatisfaction that he had with the letter of 20 June and I accept that up to a point. However, it is clear that the email of 23 June was sent after he received the letter from Mr Chudasama informing him about the informal PIP. Had the Claimant thought, as he now professes, that the 20 June letter did not reflect the conversation that he had had with Mr Chudasama on 31 May, in the sense that he had not in fact been put on an informal PIP, then surely, he would have emailed his area manager to say so. If he did not do so in the same email as that at RB page 178, then in another one around the same time. Similarly, if the Claimant had thought that the letter of 20 June and the imposition of the informal PIP was motivated by his disclosure on 6 June he would have said so. I infer from the absence of that response, as well as from that passage in the email of 6 June (see paragraph 34 above) that Mr Chudasama's 20 June letter did reflect the true position and the Claimant

did not at that time believe that his line manager was motivated by any alleged protected disclosure.

39. The visits by MB and JW started on 4 July and they stayed for two weeks. MB's account of the visit is at RB page 195. It seems that the visit by Mr Chudasama and KB on 21 June was an assessment visit referred to by Mr Chudasama at RB page 525 as an operational review. However, it seems to be the case that the Claimant thought that MB should be his resource. However, she actually was there and introduced by the Respondent to introduce better practices to the branch. She sets out in her witness statement what she said she discovered and the Claimant refutes much of what she said.

40. Mr Chudasama visited the branch on 13 July during the period of time that MB and JW were there. According to the Claimant, he was merely told that he was suspended. Mr Chudasama's makes reference to the 13 July in his account at RB page 524 but the more detailed account is at RB page 182, a record of conversation made by Mr Chudasama.

41. He had attended at 15.20. In that record at RB page 182, he recorded that over 20 NOMAD trays remained to be dispended, 6 for the following day. NOMAD trays are plastic trays into which medication for vulnerable people are dispensed and, for the ease of the patient, the medication is divided up into compartments that are identified by days of the week and times of day. Mr Chudasama also recorded in his record of conversation of 13 July matters which can be perhaps summarised as indicating a lack of rigour in administration which increased the risk of dispensing errors and a potential risk to patients as a consequence. The matters he recorded also might be said to indicate a lack of planning for staff absences and a failure to follow standard operating practices or procedures: something that the 20 June letter stipulated that that would be one of the SMART objectives. The record of the conversation also noted that a cash discrepancy had not been reported. An additional SMART objective was that the cashing up procedure will be followed and daily logs maintained. "Any discrepancies found by the team must be reported to the manager and sincere efforts made to identify the cause."

42. The Claimant's defence to the failure to report the cash discrepancy to Mr Chudasama was that he had not finished investigating it. However, some nine days had passed since the discrepancy had come to light and therefore the Respondent was understandably concerned about the reporting failure.

43. Mr Chudasama was asked in evidence why he had sent the matter to follow a disciplinary route rather than continue down the performance route. His evidence was that the breaches of SOPs could lead to the disciplinary procedure being imposed if a clear intention not to follow them was evidenced. He also said that whether or not dismissal resulted depended upon whether it was an intentional failure to follow. He also gave evidence that although it was possible that in an individual case it might be appropriate to deviate from an SOP, before doing so, a pharmacy manager should notify the superintendent and apply for a sanction for support in that action.

44. He said that initially he had tried to go down the coaching approach but when he had received a phone call on 13 July which had led to the visit that is recorded at RB page 182, he had seen that the basics were not being followed; he was concerned that patients were going to be harmed as a result of the Claimant's management of the branch. In particular, he was concerned that there were six patients who were expecting their medication the next day and there was no planning for how to fill those trays, let alone fill the trays that were needed for the rest of the week when one of the other members of staff, TF, was due to be on annual leave. There may be some dispute about whether she was due to be on annual leave or whether she was simply on her regular day off but in any event, this was the individual who was most skilled in filling the NOMAD boxes and she was not going to be present in the pharmacy the following day.

45. This was the reason he said that he had concluded that the Respondent should move to going down the disciplinary route and he had suspended the Claimant. The letter of suspension is at RB page 186 and sets out in considerable detail those particular concerns that had been discovered on 13 July.

46. The Claimant gave an account about the NOMAD trays in the investigation meeting with JC at RB page 502. That is a page in the version of the minutes of the investigation interview that have been approved by the Claimant and indeed bear the hallmarks of some amendment by him. Essentially, he blamed changes made to the NOMAD procedure by MB. This was one of the matters that he asked witnesses to be interviewed about and at TF provided a statement which is at CB page 12. She confirmed in that that she had been upset by the system having completely changed following her sickness absence. However, she expressly states that she was not complaining that the change had to be done, rather she complained that it had been done without her input when she was absent. It also appears from that statement that TF was called in on her day off at short notice on 14 July to assist and this in fact supports Mr Chudasama's conclusion that the Claimant had no reasonably effective plan for clearing the NOMAD trays in time for the medication to be dispensed to the patients.

47. There then followed an investigation. The Respondent's disciplinary procedure in this case is somewhat confusing. There is a disciplinary procedure at RB page 53 but there is a second disciplinary procedure at RB page 58. That which starts at page 53 includes, at page 55, the following:

"You will be allowed to set out your case and answer any allegations that have been made. You will be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. You will also be given an opportunity to raise points about any information provided by witnesses. If any witnesses are to be called, then advance notice needs to be given before the meeting."

It also includes at page 56 a non-exhaustive list of offences which are normally regarded as gross misconduct and those include:

"serious negligence which causes unacceptable loss, damage or injury; serious acts of insubordination; deliberate refusal or wilful failure to carry out reasonable and lawful direct instruction given by a supervisor/manager in working hours; breach of trust and confidence."

48. That non-exhaustive list also appears in the other disciplinary policy but the provision for the hearing is slightly different and if one reads through the subsections in section 7 for the disciplinary hearing, there is no express provision for for the accused employee to call witnesses.

49. The ACAS Code of Conduct 2015 covers this point at paragraph 12 which includes:

"The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses."

50. That is strikingly similar to the first version of the disciplinary policy and that is the version that is relied upon by the Claimant.

51. JC carried out the investigation and obtained statements from NV, JW, AL and EQ. The Claimant accepts that he was provided with all of the documents relied upon by the Respondent and the witness statements relied upon as well.

52. If one looks at RB page 548, this is a letter from the business integrity administrator to the Claimant where she records that at that stage he had said that he wanted to call four witnesses and she says:

"I advised you that this does not fall in line with our process and we do not call witnesses into any meeting or hearing. I advised you that we as a company could obtain any additional evidence from the people that you had mentioned to help assist your case."

I suspect, although not having heard from the business integrity administrator cannot be certain, that there may have been some confusion on the part of the Respondent about what was in their policy. I therefore cannot conclude that there was a deliberate breach of the policy in this respect.

53. The original hearing was postponed to 13 September. The Claimant then drafted templates setting out the questions that he wished to be asked and the witnesses were approached. They were completed, the witnesses completed their answers and CB pages 10 – 22 set out the statements by a total of eight individuals, the ninth person who he wished to approach was on maternity leave. It is accepted that these went to Mr Bhardwaj before the disciplinary hearing and the Claimant was also sent them in advance.

54. In general terms, the evidence in those statements attest to the individuals having a good working relationship with the Claimant; that they regarded

him as being an honest individual. It also provides evidence to support the Claimant's assertion that there were issues with staffing levels at the Farnham branch.

55. After the investigation meeting, further statements were obtained – one from Mr Chudasama that is at RB page 524, one from SM that is at RB page 528, and one from TF that is at RB page 529. These all went to Mr Bhardwaj at the hearing, he being another area manager who was not previously known to the Claimant.

56. I need to consider what knowledge Mr Bhardwaj had about the email of 6 June 2016. There is no record in the summary of the investigation meeting that had been approved by the Claimant of a reference being made to that email specifically. If one looks at RB page 673, this was initially described to me as a transcript of the meeting of 13 September and then it was explained that it was in fact a summary of that meeting. I am not sure that that is quite right. If one reads through the document that starts at RB page 673, it includes statements about Mr Bhardwaj's conclusions and it has not been the evidence of anybody before me that he gave the outcome then and there. But in any event, it is said to be a summary of what was said rather than a verbatim account. If one looks at page 729 within that summary, it is recorded that the Claimant had handed over five emails at the investigation meeting which he said had been sent to Mr Chudasama to prove that he, the Claimant, had requested his manager's support in the situation that there were staffing difficulties. The Claimant does not give any positive evidence in his witness statement and did not in oral evidence give positive evidence that he gave the email of 6 June to Mr Bhardwaj. Mr Chudasama denies having forwarded it and I think it is fair to say that despite the importance that is put upon it now, at the time it was part of an exchange connected with Mr Chudasama's management of his performance concerns about the Claimant and the Claimant's assertion that there was a staffing level issue. I accept Mr Bhardwaj was an honest witness who was doing his best to answer questions honestly and assist the Tribunal and he says he was not aware of having seen it.

57. I think it is possible that it was among those forwarded to Mr Bhardwaj but at the time it was not alleged to have been a protected disclosure and it was not alleged that Mr Chudasama had acted because of it in suspending the Claimant or in referring him for disciplinary action. I accept that Mr Bhardwaj was not consciously aware of that email as opposed to emails generally supporting the claimant's assertion that there were low staffing levels, a matter which he considered in his outcome, as I shall come to.

58. I then have to consider what Mr Bhardwaj concluded and why. In his statement, he refers to the outcome letter that is at RB page 745. He was asked in oral evidence about the refusal to allow the Claimant to call witnesses and he agreed that he could potentially have spoken to them himself but he had the information that they said in response to questions that had been drafted by the Claimant. He said that he thought that the Claimant had accepted that there had been some breaches of SOP and he had evaluated it by asking himself the following questions:

- Was there a breach of an SOP? Yes or No.
- Does the person admit it? Yes or No.
- If he said that he had prioritised some SOPs, that led to a risk to the business.

59. This last bullet point is a reference to the defence put forward by the Claimant to the allegations against him, which he has continued to rely upon heavily before this tribunal, that he had an independence as a pharmacist which meant that he had a professional obligation to exercise independent judgment. This meant, argued the Claimant, that, if it was in the patient's interest to do so, he might deviate from the SOP.

60. In my view, that argument is not sufficient to excuse the number and seriousness of the breaches that were evidenced before the Respondent. It was certainly the conclusion of Mr Bhardwaj and Ms Crockford that the argument that one sometimes needed to prioritise a patient's interests even if that meant deviating from an SOP was not sufficient to excuse the defaults with which they were concerned. It is a point of view that may have some relevance in relation to those SOPs that are closer to technicalities. However, as an illustration I pick one the allegations which the Claimant faced; an alleged breach of SOP 6.4 - that of maintaining a CD balance. In relation to that, it is clear from the agreed notes that the Claimant accepted that there had been a partial breach of that and said that that had been due to human error. He also accepted that patients were at least potentially put at risk by a failure to maintain a CD balance. It therefore seems to me that he cannot plausibly argue that he chose to prioritise something in the interests of the patients despite his assertion that the General Pharmaceutical Council would not view the omissions from the CD balance as being critical. The Respondent has a clear process for adapting SOPs to individual circumstances and that is sensible in my view (see paragraph 43 above). They could not permit individual branch managers to deviate from their SOPs at will.

61. It is suggested that I should place less reliance on the statement of Mr Bhardwaj on the basis that it was apparently drafted after the Respondent had had sight of the Claimant's statement. There may be some truth in that allegation but in any event it had been redrafted for the purposes of this hearing. I judge his credibility with reference to the contemporaneous documents. The statements provided by all of the Respondent's witnesses were very sparse. More informative about the reasons for dismissal is the summary (RB page 673 and following) and the outcome letter. I asked Mr Bhardwaj how he decided whether to prefer one version of events over another because there are a number of instances in which MB's account is flatly denied by the Claimant. He said that he had taken into account photographic evidence and documentary evidence (for example, of the CD register which included unexplained omissions). He took into account the chronology and the fact that the events alleged covered a period of time and not merely the time during which MB and JW were in the branch. Mr Bhardwaj's evidence, which I accept, was that this led him to prefer their accounts and that of Mr Chudasama over the account of the Claimant.

62. Mr Bhardwaj's evidence was that he was not dealing with individual breaches of SOPs and that the amount of the non-compliance meant that

it was right to escalate it to a disciplinary case. He considered the Claimant's allegation that he had had a lack of support and concluded that there had been support put in place and it was at an appropriate level, therefore his view was that the Claimant's complaint of low staffing did not adequately explain the problems that had been uncovered.

63. The outcome letter backs up this oral evidence. For example at RB page 749 it is said: *"However, the evidence provided indicates that additional support staff were regularly provided and on the balance of probability it seems more likely that the ultimate responsibility for the multiple failures in Farnham lies with your management of the branch."* He also comes back to the point about the extent of non-compliance in the outcome letter where he says that the eight witness statements obtained that give some positive information about the Claimant's character and provide balance in supporting his account of a clash of personalities with MB. However they did not "*provide sufficient mitigation to explain the level of non-compliance displayed relating to the SOPs and the General Pharmaceutical Council Standards of Conduct Ethics and Performance or your subsequent total refusal to accept any responsibility for the failures found in the branch*".

64. That highlights three matters: a level of non-compliance of SOPs; a level of non-compliance of the standards of conduct; and a refusal to accept responsibility which I accept genuinely operated in the mind of Mr Bhardwaj when he decided that it was appropriate for this matter to be dealt with by way of disciplinary proceedings and not by performance proceedings.

65. As I say, the summary that starts at RB page 673 includes conclusions about the individual categories of allegations. For example, at page 699 the allegations of breaches of SOPs are gone into in detail by rehearsing the evidence against the Claimant, comparing the evidence put forward in explanation before setting out a conclusion. At page 699 the conclusion is stated as being that "*the evidence bundle for this case contains a large amount of photographic evidence to support the allegations that SOPs have not been followed in Farnham branch. Furthermore, you have also admitted that there have been partial failings regarding SOPs, you have prioritised SOPs and you sometimes overlook things as long as the customers are happy*".

66. Without reading exhaustively from each section, I can see that the conclusion to uphold each of the main headline allegations is found in relation to failure to follow lawful instructions (at RB page 702); serious negligence causing loss (at RB page 705); conduct that brings the company into disrepute (at RB page 723). I have considered the individual matters relied upon and whether they are apt as examples of the headline allegation and accept that there is evidence there from which it could be concluded that the allegation had been made out. The conclusion that there is evidence to support the allegation of the breach of the General Pharmaceutical Council's standards is at RB page 726, and then the conclusions in relation to undermining trust and confidence are at RB pages 731-732.

67. It is fair to say when considering that summary that, in places, the

conclusion that there is sufficient evidence to uphold the allegation is stated without a rationale being provided. In other words, one has the Respondent's evidence, the Claimant's evidence, and then a conclusion that the allegation is upheld without a rationale being provided. I have therefore tried to understand how Mr Bhardwaj went about evaluating the strength of the case and evaluating whether the Claimant's answers were true, particularly where he denied the evidence put against him by an individual. One of the Claimant's assertions on appeal was that, to some extent, it was just one person's word against another and therefore I have considered what is the evidence about how Mr Bhardwaj went about deciding who to believe.

68. If one looks at the outcome letter, he includes the following comments and this is also in the rationale provided at pages 731-732 within the summary of the proceedings:

"Your answers to the questions you have been asked throughout the disciplinary process had been frequently and consistently evasive and it is often been necessary to repeat the question several times in order to obtain a direct answer. When you have eventually provided a direct answer you have more often than not stated that the evidence is incorrect. You have refused to accept responsibility for any of the allegations against you and you do not believe that you are fully responsible for any breaches of the company policies and procedures."

69. I am satisfied taking into account the rationale that is set out there and in 731-732 that Mr Bhardwaj genuinely applied his mind to the question about whom he should believe and for rational reasons decided to reject the Claimant's account where it differed from that of the Respondent's staff who had brought these matters to management's attention. This is important because I need to consider whether the Respondent has conscientiously considered the Claimant's defence. He had defended on the basis that some of the facts he denied; he blamed a lack of support and lack of staff; and he also blamed the manner in which MB and JW had behaved. I am satisfied that those matters were effectively and reasonably considered and rejected by Mr Bhardwaj.

70. To take one example, I focus on the 450 prescriptions said to have been uncollected and unclaimed for. This was first raised in MB's statement as an allegation and then evidenced in MB's statement (RB page 196) where she said that there were up to 650. The Claimant said in evidence at the Tribunal in effect that the practice was to file prescriptions that had not been claimed after two months and returned the items to the shelves. He therefore said that it was wrong to have claimed for those items because the drug in question would still have been on the shelf and could have been sold. He alleged that MB had taken the scripts from the file and included them in the prescriptions which it was alleged had not been claimed when they should have been claimed but they did not equate to prescriptions where there was a loss to the company. That is because the item may subsequently have been sold to someone else.

71. The allegation that was put against him finally in the disciplinary proceedings was that there were 450 such prescriptions and it was said to

be an example of serious negligence that caused loss to the company. See RB page 214-216 and photographs of prescriptions were apparently provided. This led to the Respondent going back to Mr Chudasama to see what his evidence was about this to check the Claimant's story as we see from RB page 733.

72. The gist of what was said there is that even if the Claimant was correct about some of the prescriptions, the Respondent had found evidence that there were many expired prescriptions which should have been claimed and had not been. Also, he had been warned about this and if one looks at RB page 703, there is evidence that there had been a note in the register to that effect. In other words, this is a matter where the Respondent looked into the Claimant's defence and reasonably concluded that it was not a sufficient answer to the allegation.

73. I also considered the seriousness of some of the matters that are alleged against the Claimant. In particular, the CD register. He appeared to accept that the CD register was not complete at the time of his suspension and that is a totally different matter from asking for help with the disposal of expired controlled drugs. As we see from RB page 695, there appear to have been accepted by the Claimant to have been errors in the register dating from June which is before MB and JW's visit after the date when, according to the protocol, the balances should have been checked. The Claimant said it was human error but maintaining the register was one of his SMART targets. Similarly, in relation to the cash discrepancy, the Claimant provided what the Respondent reasonably thought was an inadequate response for the delay in reporting when the cash procedures had been one of his smart targets.

74. Mr Bhardwaj had that evidence before him and that led to his conclusion that the level of non-compliance and total refusal to accept responsibility merited dismissal for gross misconduct.

75. The Claimant appealed as I see from RB page 751 and that led to a hearing on 6 October 2016 before Ms Crockford which for which the notes are at RB page 776. The Claimant raised the allegation that the email of 6 June had been a protected disclosure in his letter of appeal and so Ms Crockford was clearly aware of that email. To judge by the appeal letter, he argued first that the matter should have been dealt with non-formally. Secondly, he argued that SOPs were not followed elsewhere and as I say he also said before me and before the appeal that, as a pharmacist, he could deviate from SOPs if, in his professional independent judgment, that was necessary. I have already dealt with that particular argument (see, in particular, paragraph 60 above).

76. The Claimant also argued on appeal that his evidence was not sufficiently taken into account. He said that his previous good record meant that it should have been dealt with by training and performance. He said that he had been dismissed because of one person's word against another and he referred to the protected disclosure which he said had led to victimisation by sending an ACT who conducted an undercover audit to initiate a malicious disciplinary procedure and then said he had been discriminated, bullied and victimised. However, I can see from what is said to be an

accepted summary of the events of the appeal hearing (RB page 777 and following) that he refused to give further details of these allegations, see RB page 783, despite Ms Crockford's attempts to get him to open up about it.

77. I accept that the reasons that she sets out in her outcome letter were genuinely the reasons for her dismissing the appeal. That letter starts at RB page 786. To summarise, they were that the Claimant had been deliberately obstructive and a later visit to the pharmacy had uncovered serious concerns which caused it to become a disciplinary matter. Ms Crockford was satisfied that the evidence supported this judgment and it seems to me that this is a reasonable judgment for her to make.

78. In relation to the second ground of appeal, she said that any action against other individuals for breaches of SOPs would be confidential and he would not know if action had been taken. In relation to the third point, she looked at the evidence of the prescriptions and found those that had been collected and should have been claimed for, so she examined the sample herself. Having done so, she agreed that his explanations did not fully explain the level of the failings in respect of the evidence against him.

79. She considered that the evidence pointed to significant failings and that the length of his employment - and therefore experience - together with the element of choice on his part not to follow procedures meant that it was a conduct matter rather than a training matter. Her view, having reviewed the evidence, was that she rejected the allegation that it was one person's word against another. She was also satisfied that the decision was made because of the evidence of such serious failings that he could not have been allowed to remain in post putting patients, staff and company at significant risk and she said the following at page 789:

"Throughout the appeal you suggest that a number of your failings were as a result of lack of staff. However, there was sufficient evidence that there had been support available to you. This included numerous locum staff moved from other branches and the fact that [Mr Chudasama sent JW and MB] *for a two week period to clean up and clear the backlog of work. This would have allowed you to have a fresh start but instead you were deliberately obstructive. I also believe that it was your lack of management of the staff that you did have that led to what I consider to be a chaotic failing branch."*.

80. I consider that there was ample evidence from which Ms Crockford could reach that conclusion.

Conclusions on the Issues

81. I now set out my conclusions on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment but I have them all in mind in reaching these conclusions.

82. In my view, the email from the Claimant to Mr Chudasama of 6 June 2016 was a protected disclosure within the meaning of section 43B(1)(d) of the

Employment Rights Act.

83. The context of the email was that Mr Chudasama had visited on 31 May and told the Claimant that he was to be put on an informal PIP. The Claimant has said that he was short of competent staff. In the email he stated the following:

"The workload and working conditions are now presenting a risk to patient care and to public safety and this is not an issue of time and staff management and today Tom was taken away … making the conditions more critical."

84. I take account of the dicta of Sales LJ in Kilrayne and although this comment could be regarded as a mixture of allegation and information, my evaluation is that by this email, the Claimant was telling Mr Chudasama that there are too few staff in the branch so the staff are working in difficult and deteriorating working conditions which puts patient care and public safety at risk. In the context that the workplace is a pharmacy dispensing sometimes time-critical medication to ill and vulnerable patients, that seems to me to satisfy the test in section 43B(1)(d) of ERA. The Claimant clearly believed that the information he provided tended to show that patient care was being put at risk and therefore that it was in the public interest for him to mention it. There might have been reason to doubt, in the light of the informal performance procedure that had been initiated against him whether his belief that the *lack of staff* (rather than the Claimant's own practices) caused the risk was a reasonable belief. However, that is not the case that has been advanced by the Respondent and I find that the email was a protected disclosure.

85. I do not find the claim under section 43B(1)(b) ERA that the Claimant had a reasonable belief that there was a failure on the part of the Respondent to comply with the 2013 Regulations to be made out. That has not been addressed in evidence or submissions before me nor has it been seriously pursued in any way.

86. I have concluded that it is possible that the email of 6 June was among those forwarded to Mr Bhardwaj but he did not have his attention drawn to it. The Claimant did not allege at the time of his disciplinary hearing that the email was a protected disclosure or that Mr Chudasama had been motivated by it. The allegation of lack of staff was specifically considered and rejected on reasonable grounds but I am satisfied that Mr Bhardwaj did not have the email of 6 June in mind when deciding whether to dismiss the Claimant or not.

87. Therefore, the Claimant has not satisfied the evidential burden of showing that the protected disclosure was a principal ground for the dismissal. Even were I persuaded that he had, I consider the Respondent to have shown that the reason for dismissal was gross misconduct. The details are set out in the outcome letter of Mr Bhardwaj and the passages of the summary of 13 September meeting to which I have already referred (see paragraphs 58 to 69 above).

88. The Claimant was not dismissed on grounds of protected disclosure. In the

circumstances, the timing of the email of 6 June and the letter of 20 June and the suspension are unremarkable. To suggest otherwise ignores the other events that were going on at the same time which caused the 20 June PIP and the suspension. The claim of automatically unfair dismissal contrary to s.103A of ERA is dismissed.

89. In relation to the unfair dismissal claim, I have concluded that both Mr Bhardwaj and Ms Crockford had the genuine belief that the Claimant had committed the various breaches of the SOPs, the standard of conduct and instances of gross misconduct alleged against him and I refer to but do not repeat my earlier findings.

90. The question is whether that belief was based on reasonable grounds after sufficient investigation and in relation to that I consider the allegation that the Claimant was denied the opportunity to question witnesses that appears to be provided in the disciplinary policy.

91. A breach of the ACAS Code of Conduct does not inevitably lead to a finding of unfair dismissal. Here, there may have been confusion caused by there apparently being two disciplinary policies, but the Respondent does appear to have failed applied their own policy when stating that the Claimant was not permitted to call witnesses. I do not take that fact lightly although I have concluded that it was not deliberate. I have applied the dicta in J Sainsbury v Hitt which says that the range of reasonable responses test applies to the procedure applied by a Respondent as well as to the outcome. When weighing all the circumstances outlined in my findings in the balance, I cannot say that no reasonable employer would have followed the procedure followed by this Respondent. It is true that I should take into account the resources of the Respondent when considering whether the decision was fair or unfair and that, contrary to what appears to be the written policy, the Claimant was told that he could not call witnesses. However other relevant circumstances are that what then happened was that the Claimant was given the opportunity through the Respondent to contact all of the individuals that he wished to ask to support him. He drafted the questions; they responded to them, and what they said was taken into account by the Respondent. When he gave evidence, he was not able to say that there was any additional question that he would have asked of his witnesses had they come to the disciplinary hearing. It is quite common for employers not to permit other employees to have to undergo the stress of coming to a disciplinary hearing and be cross examined by a fellow employee who is facing disciplinary charges. My conclusion is that, in all those circumstances, it was not outside the range of reasonable responses for the Respondent to follow the process that it did notwithstanding the fact that their own policy does appear to suggest that it is permitted to call witnesses.

92. I therefore conclude for the reasons explained previously that there were reasonable grounds for the belief and the investigation was sufficient, that being the only criticism of substance of it.

93. I go on to consider whether the sanction within the range of reasonable responses. I have considered carefully that the Respondent started down the performance route and then changed to the disciplinary route. Would

no reasonable employer have failed to give the Claimant the opportunity to improve his performance? Not only was the disciplinary route started but the Claimant faced allegations of gross misconduct.

94. However, it is clear that there was evidence before Mr Chudasama that the Claimant's attitude was defensive and that he was defensive and resistant to the attempts being made to put in place procedures that would have improved the workflow in branch. He clearly believes still that only more staff would have solved the problem when there was significant evidence that workflow issues and processes in the branch meant that the existing staff were being used inefficiently. The evidence from the Claimant's witnesses suggests that MB's attitude may have contributed to the failure of her and JW's visit to lead to the transformation of the branch. However the problems that they uncovered were separately evidenced by Mr Chudasama and some other staff members and objectively evidenced in the form of the registers and the photographs. These problems disclosed a situation which was more serious than the area manager had realised at the end of May when he put in place the informal stage of the performance improvement plan. I conclude that the additional information led him reasonably to conclude that the Claimant was resistant to coaching. The Claimant's attitude through the disciplinary process was consistent with that and Mr Bhardwaj reasonably concluded that the Claimant's approach meant that it was appropriate not only to go down the disciplinary route but that the sanction should be dismissal.

95. For those reasons I therefore conclude that dismissal was within the range of reasonable responses, in particular for the reasons articulated by Ms Crockford. I disagree that this could reasonably be described as taking a sledgehammer to crack a nut. The dismissal for the potentially fair reason of misconduct was within the range of reasonable responses and the Claimant's unfair dismissal claim is dismissed.

_____

Employment Judge George

Date: ……25 March 2019 …….

Reasons sent to the parties on

.....

.....

For the Tribunal office