EMPLOYMENT TRIBUNALS

Claimant: Mr J P Brannan

Respondent: Martin McColl Limited

Heard at: Manchester **On:** 7 May 2019
10 May 2019
17 May 2019
(in Chambers)

Before: Employment Judge Aspden

REPRESENTATION:

Claimant: In person
Respondent: Mr N Singer, Counsel

JUDGMENT

1. The claimant was unfairly dismissed. His claim is upheld.

REASONS

Claims and Issues

1. Mr Brannan was employed by the respondent from August 2016 until his dismissal on 2 November 2017. Mr Brannan's case is that he was unfairly dismissed on the basis that the reason (or, if there was more than one reason, the principal reason) for his dismissal was that he had made one or more protected disclosures.

2. The respondent accepts that Mr Brannan made the following disclosures during his employment and that, in each case, the disclosure was a ‘protected disclosure’ within the meaning of that term set out in the Employment Rights Act 1996:

a. On 31 July 2017 Mr Brannan sent a document to Tony Hoey, one of the respondent’s Area Managers, in which Mr Brannan alleged, among other things, that the company had failed to pay the National Minimum Wage. I refer to this below as the first protected disclosure.

b. On 29 August 2017 Mr Brannan had a conversation with Mark Jones, one of the respondent’s Regional Managers, in a grievance appeal meeting in which Mr Brannan alleged again that the company had failed to pay the National Minimum Wage and also raised a health and safety issue. I refer to these below as the second and third protected disclosures.

c. On 30 August 2017 Mr Brannan made a disclosure to the Health and Safety Executive. This concerned what Mr Brannan described as ‘the endangerment of staff in the workplace’. I refer to this below as the fourth protected disclosure.

d. On 30 August Mr Brannan made a disclosure to HMRC about alleged failures to pay the National Minimum Wage. I refer to this below as the fifth protected disclosure.

3. A separate complaint that Mr Brannan had been subjected to detriment on the ground that he had made protected disclosures was dismissed by Employment Judge Ryan at an earlier hearing because it had been brought outside the time limit set out in the Employment Rights Act 1996 and, therefore, the Tribunal did not have jurisdiction to consider the claim.

4. Therefore, the only issue for determination at this hearing is whether the reason, (or, if there was more than one reason, the principal reason) for Mr Brannan’s dismissal was that he any of the disclosures outlined above.

The Law

5. The Employment Rights Act 1996 provides, at Section 94, that an employee has the right not to be unfairly dismissed by his employer.

6. Section 103A of the Act 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.

7. As Mr Brannan lacks the requisite continuous service to bring a claim of ‘ordinary’ unfair dismissal, the burden is on him to prove, on the balance of probabilities, that the reason for dismissal (or the principal reason) was that he made one or more protected disclosures: Smith v Hayle Town Council [1978] ICR 996, CA.

8. Determining the reason for dismissal involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. In Abernethy v Mott Hay and Anderson [1974] ICR 323, approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] ICR 662. Cairns LJ said: "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."

9. As it was put in Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748: ' …the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so (see also Hazel v Manchester College [2014] EWCA Civ 72, [2014] ICR 989 and The Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658).'

10. A Tribunal assessing the reason for dismissal can draw reasonable inferences from primary facts established by the evidence or not contested in the evidence: Kuzel v Roche Products Ltd [2008] EWCA Civ 380, [2008] ICR 799, [2008] IRLR 530.

11. In Orr v Milton Keynes Council [2011] EWCA Civ 62, [2011] ICR 704 Moore-Bick LJ, giving the majority judgment of the Court of Appeal, held that in cases of 'ordinary' unfair dismissal under section 98 of the 1996 Act, when determining the reason for the dismissal the Tribunal must consider only the mental processes of the person or persons who were or had been authorised to, and had, taken the decision to dismiss. In the case of Royal Mail Group Limited v Jhuti [2017] EWCA Civ 1632; [2018] ICR 982, the Court of Appeal held that the same principle applies in cases of automatically unfair dismissal under section 103A. Underhill LJ, giving the judgment of the court, went on to address the approach to be taken in cases where the facts known to the decision-maker or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation (referred to in Baddeley as an Iago situation.' On that issue, Underhill LJ said this:

> *'59…The correct analysis of a "manipulation" case seems to me require some care. It is best to take it in stages, by reference to the status of the manipulator.*
>
> *60. I take first the case where a colleague with no relevant managerial responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled. In such a case the dismissal is plainly not unfair within the meaning of the 1996 Act, whether by way of the manipulator's motivation being attributed to the employer for the purpose of section 98 (1) (or sections 98B-104G), or by his knowledge being used to impugn the reasonableness of the decision to dismiss under section 98 (4). The employee has no doubt suffered an injustice at the hands of the Iago figure and may have other remedies …; but the employer has not acted unfairly.*
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> *61. I take next the position where the manipulator is the victim's line manager but does not himself have responsibility for the dismissal. If the matter were free from authority I could see the force of the argument for attributing the manipulator's motivation to the employer, because it has delegated authority to him or her to manage the employee in question. However, that is precisely the argument that appealed to Sedley LJ in Orr and which the majority rejected, for cogent reasons: see paras. 49-50 above. It is accordingly not open to us to accept it.*
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> *62. Neither of those situations is covered by what I said in Baddeley, which referred specifically to the situation where the manipulator is "a manager with some responsibility for the investigation", albeit ex hypothesi not the actual*

> *decision-taker. That phrase was chosen, I think, to refer generally to the possible role of Mr Berne, and it was imprecise because no findings had been made about what that role was. But it does in fact have a possible application in cases where someone other than the ultimate decision-taker has a formal role in the decision-making process. For example, in the more elaborate forms of disciplinary procedure manager A is sometimes given responsibility for investigating allegations of misconduct which are then presented to manager B as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. This is a refinement of a kind which did not fall for consideration in Orr; and there would in my view be in such a case a strong case for attributing to the employer both the motivation and the knowledge of A even if they are not shared by B. I do not see anything in that view inconsistent with the ratio in Orr: in such a case the conduct of the investigation is part of the deputed "functions under section 98". ...*
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> *63. There was, finally, some discussion before us of the case where someone at or near the top of the management hierarchy – say, to take the most extreme case, the CEO – procures a worker's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker. Such a case falls outside Moore-Bick LJ's formulation quoted at para. 47(4) above, because the CEO, despite his or her seniority, would not have formal responsibility for making the dismissal decision. But the facts in Orr did not raise this issue, and it rather sticks in the throat that even in a case of this particular kind the manipulator's motivation should not be attributed to the employer for the purpose of section of 98 (1). There may well be an argument for distinguishing the case of a manager in such a senior position from those considered in the preceding paragraphs; but the issue does not arise on the facts before us and I prefer not to express a definitive view.'*

12. I was referred to the cases of Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] ICR 372; The Trustees of Manor East African Women's Group v Dobson UKEAT/0219/05 [2005] (unreported); and Timis, Sage v Osipov [2018] EWCA Civ 2321, [2019] ICR 655. Given my conclusions below there is no need for me to say anything further about those cases.

Evidence and primary facts

13. I heard evidence from Mr Brannan himself. For the respondent I heard evidence from Mr Jason Chapman, one of the respondent's Area Managers, and Mr Andrew Thomas, one of the respondent's Regional Managers. Mr Chapman dismissed Mr Brannan. Mr Thomas dealt with Mr Brannan's appeal against dismissal.

14. I was also referred to a number of documents in a bundle prepared by the respondent, although by no means all of the documents in that bundle.

15. The respondent operates a number of convenience and newsagent stores in the UK.

16. The respondent has a written disciplinary procedure. It sets out the procedure to be followed in matters of misconduct. It gives a non-exhaustive list of the types of serious breaches of rules and standards that are likely to constitute gross

misconduct. Examples of such breaches include 'threatening behaviour or rudeness to customers', 'discrimination, bullying or harassment' and 'actions that bring the image of the company into disrepute'.

17. The respondent employed Mr Brannan as Retail Sales Assistant from August 2016 until his dismissal on 2 November 2017. In January 2017, at a time when Mr Brannan was working at the respondent's store in Anchorsholme, Mr Brannan was summarily dismissed by his then Area Manager, Mr Gerald Currey. He appealed against his dismissal, following which his dismissal was overturned and he was re-employed, working at the respondent's Fleetwood store from March 2017. Shortly after 11 July 2017 Mr Brannan moved from the Fleetwood store to the respondent's Thornton Cleveleys store, where he remained until his dismissal.

18. At some point in his time at the Fleetwood branch, Mr Brannan spoke to the manager about comments she wrote in a handover diary, accusing her of illegal workplace bullying.

19. On 15 June 2017 Mr Brannan sent an email to the respondent's employee relations department with the subject line 'I need to speak to somebody urgently about a problem I am having at work'. In that email Mr Brannan said he had made several attempts to send an email to that email address detailing a problem he was having at work. He also said he had made two phone calls but had not been able to speak to anybody in Employee Relations. He asked, 'Is there really only **one person** working in the Employee Relations Department for an organisation of this size????'. He ended the email saying, 'I need somebody to phone me back asap' and gave his phone number. On that same day Mr Brannan sent another email to the employee relations email address marking it for the attention of 'Carly' (an HR Officer, Carly Ramsey). He referred to McColl's as being 'incompetent…when it comes to resolving staffing issues'. He asked, presumably rhetorically, 'shouldn't there be a minimum legal requirement for large employing organisations to have more than one member of staff in their (supposed) Employee Relations Department?' In that email Mr Brannan complained about various matters, including the way the manager of the Fleetwood branch had completed the handover diary.

20. Ms Ramsay forwarded these emails to Mr Chapman, copying in Mr Thomas. Mr Thomas replied saying, 'Carly, I think this should go to Mark?' That was a reference to Mr Mark Jones who was at that time Mr Brannan's Regional Manager. Mr Chapman's evidence was that he does not recall receiving the email of 15 June from Mr Brannan and he did not look at it at the time. I accept that he did not recall receiving the email and did not recall the email at the time of conducting Mr Brannan's disciplinary hearing. I also accept Mr Thomas' evidence that he had no recollection of the emails from 15 June 2017 at the time he was dealing with this appeal.

21. Mr Brannan's move from the Fleetwood store to the Thornton Cleveleys branch following an incident that occurred on 11 July 2017. Shortly before that date Mr Brannan had asked to see some signing in sheets as he thought he had been underpaid. Mr Brannan's line manager at the time, Mr Mike Bottomley, told Mr Brannan the documents would be available for him to see in the branch on 11 July when Mr Brannan was due to work. On 11 July Mr Brannan went into work but the signing in sheets were not there. Mr Brannan was annoyed. He texted Mr Bottomley asking why they were not there. Soon after he sent that text the Branch Manager

telephoned Mr Brannan. Mr Brannan's evidence was that she shouted at him and he 'firmly' told her to stop shouting at him. Later that day a man came to the shop and said to Mr Brannan, 'I've just had to explain to my daughter why you made her auntie cry'. After a few moments of initial confusion, it occurred to Mr Brannan that the man could be referring to the manager. The man confirmed this was the case. Mr Brannan felt the man was behaving aggressively and threatening violence so he asked him to leave. When the man refused to do so Mr Brannan dialled 999 and asked for the police. The police arrived and the man left. After explaining what had happened to the police, Mr Brannan decided to go home early as he was shaken up. That day he had been working alongside a colleague, Ms Julie Machell. It is the only time Mr Brannan ever worked alongside Ms Machell during his time with the respondent. Mr Brannan waited until an ex member of staff who lived locally arrived before leaving to go home. Mr Brannan said that this individual came so that Ms Machell would not be left on her own to close the shop at the end of the shift. I infer that it was Mr Brannan who arranged for this individual to come to the shop. Mr Brannan texted Mr Bottomley to say he was leaving early. He also reported the incident to Mr Tony Hoey, one of the respondent's Area Managers.

22. On the day after that incident Mr Brannan spoke to Mr Hoey. They agreed that Mr Brannan should be found a job elsewhere in light of the events of the previous day. Consequently, he was moved to the Thornton Cleveleys branch. This was where the Regional Manager, Mark Jones, was based.

23. Almost immediately upon joining the Thornton Cleveleys branch, Mr Brannan formed the view that morale amongst staff there was low. His colleagues at that branch were Ms Joanne Proctor, the manager; Mr Nathan Cooper, a new starter who was working as a Sales Assistant; and Mr Martin Grundy-Chalmers, another new starter who was also a Sales Assistant.

24. On 31 July 2017 Mr Brannan sent a document to Mr Hoey in which Mr Brannan alleged, among other things, that the company had failed to pay the National Minimum Wage. This was the first protected disclosure.

25. The complaints raised by Mr Brannan were treated as a formal grievance and dealt with by Mr Hoey. I infer that Mr Brannan was not satisfied with the company's response to his grievance as he later submitted an appeal. On 29 August 2017 a meeting took place between Mr Brannan and Mr Jones. The meeting was described as an appeal against the grievance. Mr Brannan was accompanied by a union representative. Also present was a Mr Tom Halsall who took notes. Mr Brannan recorded that meeting covertly.

26. At that meeting Mr Brannan referred to the fact that he had been underpaid. Managers of the respondent company had agreed he had been underpaid by £315 and he had, by then, been paid what had been owing to him. However, Mr Brannan said, at this meeting, that the issue that had led to him being underpaid (working without pay in what he described as 'cashing-up time') was common practice throughout the organisation, and he felt that others in the company would also have been underpaid. Mr Brannan said that the company had not resolved the issues by paying him the money it owed him because, in his words, 'the issue I've put forward is not just for me, it's for all my colleagues that have been underpaid'. This was the second protected disclosure. Mr Brannan's union representative at that meeting referred to the company having 20,000 staff, implying that a very large number of

employees could have been underpaid. Mr Brannan made the point to Mr Jones that he was unhappy with the fact that he had been told that the grievance discussions he had had and the outcome of his grievance were confidential and should not be discussed. He referred to a different, household-name company in the retail sector having been 'fined' £1.5 million in respect of underpayments of the minimum wage and another large, well-known retailer having 'set aside £36 million to backpay the staff.' In relation to the respondent company he said he had worked out 'it's about £1.5 million every year' and said 'I'm not happy with all my colleagues being underpaid and I'm not happy with being told that I can't discuss my outcome with them so that they can put their own claim in.'

27. Mr Brannan and his union representative repeatedly pressed Mr Jones to say why Mr Brannan was not permitted to talk to colleagues about the fact that he had raised a grievance with the company about non-payment of the minimum wage and that the company had acknowledged that he had been underpaid. Mr Jones' response was to ask why he would want to talk about it. At one point Mr Jones said, 'This kind of stuff that you talk about, it sounds like wherever we go with it and the several times that we've had communications from you, it always escalated and continues to escalate and I can't see an end to all this. The end I see is that you're just continuously going to see misery with McColl's as a whole'.

28. Mr Brannan said during the course of the meeting, 'By the time I'm finished, HMRC will be making you pay back all those people'. Mr Jones responded, 'Jeff, I think you need to carry on with it'. He then added, 'I think it's time for you to show your hand…I think maybe that's what you need to do'. Mr Brannan replied, 'So, you're telling me you want me to go to HMRC? Are you telling me that's what you want me to do?' Mr Jones replied, 'I think for the last 12 months, you know everything we've talked about, it seems like we're building up to a position where you're now at the point where, you're threatening to do it, I think you're at the point, Jeff, where this is where you want to go anyway. Maybe that's what you need to do, Jeff'.

29. There was then an exchange about whether the staff were happy, with Mr Jones saying he thought they were a 'happy bunch.' He added, however, that Joanne (the Branch Manager) was 'desperately upset' and had been in tears a few times and said that this was 'as a result of you, I'm talking about'.

30. Mr Brannan also referred in this meeting to McColl's having been fined £150,000 18 months previously for, in Mr Brannan's words, 'endangering the lives of their staff'. Mr Jones responded, 'I know, Jeff'. Mr Brannan then went on to refer to people having to work alone in the store without a panic alarm and the company having failed to 'learn their lesson' and 'change their protocols'. This was the third protected disclosure.

31. On 30 August 2017 Mr Brannan also made a disclosure to the Health and Safety Executive. This concerned what Mr Brannan described at the time as 'the endangerment of staff in the workplace'. This was the fourth protected disclosure. Mr Brannan sent a copy of the document containing that disclosure to a number of people by email. Amongst the recipients of that email were Mr Jones, the CEO of the respondent company and various MPs, including the Prime Minister and Mr Corbyn. The subject line of that email read 'Will one of my colleagues need to be killed before anything is done to stop these dangerous working practices?' In the email Mr

Brannan said, ‘Amongst other issues (which I will be reporting separately), I raised two points with regard to the endangerment of staff in the workplace, as detailed in the attached Word document…’.

32. On 30 August 2017 Mr Brannan also contacted HMRC, alleging that the respondent had failed to pay the National Minimum Wage. This was the fifth protected disclosure. Subsequently, HMRC launched an investigation into whether the company had been paying the minimum wage to staff.

33. On 11 September 2017 four members of the respondent’s staff each wrote and signed statements making complaints about Mr Brannan. Three of the statements were from those who worked with Mr Brannan at Thornton Cleveleys: Mr Grundy-Chalmers, Mr Cooper and Ms Proctor. The fourth statement came from Ms Machell, with whom Mr Brannan had worked on 11 July in the Fleetwood store.

34. The statement that was signed by Mr Grundy-Chalmers included the following allegations:

a. That he had seen and heard Mr Brannan give out Head Office contact details to customers and that Mr Brannan hade told them to ‘shop elsewhere as McColl’s is shit.’

b. That on one (unspecified) occasion Mr Brannan had barred a customer ‘as he said she was rude as she put her money on counter and never said anything.’

c. That he found it difficult to work a shift after Mr Brannan as Mr Brannan had ‘quite often said that he is employed as a shop assistant not to put stock out.’

d. That he felt Mr Brannan bullies some of the other staff and ‘can be quite aggressive with his shouting and swearing.’ He said he had seen Mr Brannan shout at Mr Cooper for being late.

e. That Mr Brannan ‘refuses to come into work unless it is dead on time and threatens to shut the shop and go home if people are not in for their shift on time.’

f. That ‘a few customers’ had complained that Mr Brannan was ‘rude and arrogant.’ Mr Grundy-Chalmers said ‘One lady said he called her stupid as she paid with a £10 when she could have used the £5 but she wanted if for a birthday card.’

35. That statement also said ‘On my last shift Jeff told me he had a meeting with Mark and that Jeff has now made himself a whistle-blower officially and if McColl’s try anything he will sue them.’

36. The statement that was signed by Mr Cooper alleged that Mr Brannan made him and customers uncomfortable when he was at work. The statement included the following allegations:

a. That Mr Brannan had been ‘aggressive/hostile’ to Mr Cooper ‘several times’. Mr Cooper said this ‘can be backed with CCTV evidence.’

b. That around 28-31 August, Mr Brannan swore at Mr Cooper and was 'very hostile' to him 'to the point where I felt he was going to be physically violent to me' because traffic had made him unavoidably late for work.

c. That Mr Brannan had threatened that he would lock up the shop and leave if anyone was late, yet he had been late several times himself.

d. That Mr Brannan had said he was going make 'waivers' with the CEO's number on so customers can make complaints directly to him.

e. That 'multiple customers' had complained about Mr Brannan's language and behaviour towards them and that many had asked what time Mr Brannan worked so then they could avoid him.

f. That Mr Brannan constantly complained to customers about the treatment of staff and how he was going to change it.

g. That whenever Mr Cooper gives notice that he would be late, Mr Brannan 'swears and insults me, which is classed at bullying at least that is how I feel.'

h. That Mr Brannan tampered with the sign-in book by changing other people's sign-in times if late by a few minutes.

i. That Mr Brannan 'comments on notes that I leave for others in the handover book saying that I am being aggressive etc.'

37. Ms Proctor made the following allegations in her statement:

a. That during Mr Brannan's first shift at the Thornton Cleveleys branch he had complained to every customer that he had served about the way he had been treated by Mr Bottomley and about the company as a whole.

b. That less than a week later Mr Brannan had 'yelled' to her in an 'angry tone' that was a customer waiting to be dealt with. She alleged that Mr Brannan had shouted at her again saying that he had a queue and that a customer had been waiting for a while to be dealt with.

c. That on other (unspecified) occasions she had heard Mr Brannan complain 'to anyone who listens' about how bad the company treats its staff.

d. That Mr Brannan refused to 'upsell' as he sees it as 'a useless tool for selling something the customer doesn't want'.

e. That Mr Brannan had complained that he should not be putting stock out.

f. That Mr Brannan had, on two separate (though unspecified) occasions, shouted at two members of her staff for being late and had 'threatened them'.

g. That Mr Brannan made it very difficult for her to do her job to the standard she likes to achieve.

38. Ms Machell's statement began 'Dear Mike'. She continued:

> 'I would like to let you know the reasons I would never work with Jeff Brannan again. The night I worked with him he came in and did no work at all, his first 'job' was to send an email – then phone you. I was disgusted by the way he spoke to Joanne during a phone call. He also made it quite clear I would be locking up on my own – also stating his money wasn't sorted out. Hope this is ok – thank you.'

39. None of the four individuals who complained about Mr Brannan gave evidence at this hearing; so I have not heard direct evidence from them as to why they wrote these statements and how they all came to write statements on the same day.

40. During the course of the Tribunal proceedings, on 19 October 2018 Mr Grundy-Chalmers sent an email to Mr Brannan and to Ms Ramsay of McColl's in response to a phone-call Mr Grundy-Chalmers had received from Ms Ramsey that day. He said:

> 'With reference to your telephone call to myself this morning, the information contained in this email must be shared with both parties' barristers and you are legally obliged to forward this information on to them. I take it the former employee is Jeff? Yes, I was asked my opinion on Jeff and although he is an arrogant self-centred person I was asked to give a statement against him by the Area Manager, Mike, and Store Manager, Joanne. I was promised a £100 bonus in lieu of all the times I used my own car and time without pay to complete banking and safe checks, as I was aware that they had reimbursed Jeff for his time in doing so, and they wanted to 'get rid of the nuisance'. However, I never obtained this bonus but did write the statement with the things included as requested. After giving the statement Mike said he would send me the money but I never received it. He gave another employee a promotion to supervisor for writing a statement and the store was shut down shortly afterwards.'

41. Mr Brannan exchanged Facebook messages with Mr Grundy-Chalmers about the statement in which Mr Grundy-Chalmers said: 'The thing is, I didn't write it!!...I'm at work 9-5 tomorrow but can call after if need to?' Mr Brannan replied, 'who wrote it?' and Mr Grundy-Chalmers replied, 'Mark'. He added, 'yes I signed it…he promised me the £100 and at time I really needed the money'.

42. Mr Brannan said he and Mr Grundy-Chalmers subsequently spoke on the telephone, and that during the course of that conversation Mr Grundy-Chalmers said to Mr Brannan that he had told 'Carly' from McColl's that he had not written the statement. Although Mr Brannan referred to these conversations in his witness statement, it was only during questioning that he elaborated on this evidence. Mr Brannan said that Mr Grundy-Chalmers had told him on the phone that on 11 September he and Mr Cooper and Ms Proctor were all present when Mr Mark Jones called him upstairs to his office; Mr Jones had a folder and took out a pre-written statement from the folder and said to Mr Grundy-Chalmers 'copy that out and sign it

and I'll make sure you get your £100' and said after he had done that, when he was going downstairs Mr Jones asked him to send Nathan Cooper up. I must treat this evidence from Mr Brannan as to what he says Mr Grundy-Chalmers told him in a phone call with a degree of circumspection. I accept that a phone-call did take place between the two men following the facebook messages: there is evidence of that in the form of a partial transcript of a recording of the call. However, the fact that Mr Brannan omitted to refer to the detail of what was said in his witness statement, only mentioning it under cross-examination, causes me to question whether this part of his evidence is reliable. That said, I recognise that the claimant has not had legal representation and the form of his witness statement suggests to me that he may not have fully understood the need to set out all the evidence he wished to give. I also note that the account the claimant says Mr Grundy-Chalmers gave over the phone is broadly consistent with his earlier message in which he said that 'Mark' had written the statement. On balance, therefore, think it more likely than not that Mr Grundy-Chalmers did tell Mr Brannan that Mr Jones had asked him to copy out and sign a pre-prepared statement.

43. Under questioning, Mr Brannan acknowledged that he had challenged Mr Cooper one day when he had arrived late as he was annoyed. He denied being angry, however, and said Mr Grundy-Chalmers had not been present as they were never on a shift with all three of them together. Mr Brannan also acknowledged that he didn't agree with upselling, although he denied he had refused to do it as alleged by Ms Proctor (and also denied he had refused to put stock out). Mr Brannan also confirmed that there had been an occasion when he shouted to (but not, he said, at) Ms Proctor that there was a queue and that a customer was waiting to be dealt with. Mr Brannan accepted that he may have been frustrated, at the time, by the queue.

44. On 12 September 2017, although unaware of the statements signed by colleagues, Mr Brannan covertly recorded himself having conversations and interactions with customers and with Mr Cooper whilst at work. He had also recorded himself working with Ms Proctor. On being questioned about his reasons for these covert recordings Mr Brannan said 'I felt I had to watch my back' Mr Brannan said he thought Mr Cooper was a 'compulsive liar' and felt he needed to 'cover [his] back with him'. Mr Brannan said that he was 'suspicious that some kind of complaint might have been made' because he had made disclosures and 'it had gone quiet'. He also referred to 'jockeying' between Mr Cooper and others and said he wanted it to be clear he wasn't involved and was covering his back. Mr Brannan disagreed with Mr Singer's suggestion to him that his covert recordings were indicative of the relationship between himself and staff having broken down. Mr Singer put to Mr Brannan that there was an on-going problem between him and the other staff; Mr Brannan denied this was the case, saying he had no idea of any problems at all except for the altercation with Mr Cooper when he was late.

45. An Area Manager, Ms Kerrie Patience, conducted was what described as an 'investigatory meeting' on 27 September 2017. I did not hear any evidence as to how Ms Patience came to be involved in this matter. Present at the meeting were Ms Patience, somebody called Gina who took notes, Ms Proctor, the Acting Branch Manager, and Mr Brannan. In that meeting Ms Patience referred to the complaints made by staff. Mr Brannan described this meeting as 'unexpected'. I infer from this that he was given no prior warning of it. Ms Patience opened the meeting by saying she was there to investigate a couple of allegations that had been made. She said,

'A few members of staff that have put kinda complaints in about you'. She said, 'I just want to tell you what they've said and basically you can just tell me your response to it'. She said, 'I won't read them all out' and she then proceeded to read an extract from Mr Cooper's statement. Ms Patience then read out extracts from Mr Grundy-Chalmers' statement and then Ms Machell's statement and finally Ms Proctor's statement. Mr Brannan was not provided with copies of these statements during the meeting and had not seen them in advance. During the course of the meeting Mr Brannan said to Ms Patience, 'I am a whistle-blower. I have reported McColl's to the Health and Safety Executive…'. Ms Patience responded, 'I'm not getting into that…it's got nothing to do with me'. Mr Brannan then referred to the investigation as a witch-hunt.

46. Mr Jones asked Mr Chapman to conduct a disciplinary hearing into the matters raised by Mr Brannan's colleagues. I infer that at some point, therefore, Mr Jones must have received the statements made by the four individuals who had complained about Mr Brannan. Mr Chapman described himself as being experienced in implementing the respondent's policies and procedures, which includes the disciplinary procedure. He said he has heard a number of disciplinary cases involving many different issues including misconduct. Mr Chapman kept Mr Jones apprised of the progress of the disciplinary matter. He said this was because Mr Jones was the Regional Manager responsible for Mr Brannan's store.

47. Mr Chapman wrote to Mr Brannan on 3 October 2017 asking him to attend a disciplinary hearing on 6 October 2017. He said in that letter that the purpose of the hearing was to consider allegations of gross misconduct for 'inappropriate conduct towards customers, staff members and inappropriate comments regarding the company reputation.' The letter did not contain any further detail of the specific allegations, although Ms Patience had told Mr Brannan some of what colleagues had said about him during the earlier meeting. Mr Brannan received that letter at home on 5 October (the day before the disciplinary meeting was scheduled to take place). It was delivered to him by hand to his home address.

48. Upon receipt of the letter, Mr Brannan emailed Mr Chapman to say that the short notice of the meeting was not acceptable as it did not allow him reasonable time to prepare his case or to discuss the hearing with his union. He asked Mr Chapman to advise him of an alternative arrangement. Mr Brannan's email is shown as timed at 14:38.

49. Mr Chapman forwarded that email to Mr Jones in an email (timed at 14:43) which read:

> 'Hi Mark, as predicted! Can you send me a copy of the 'invite to disciplinary letter' when you get a moment and I will set another date…I may set it for next week with him being on his hols! Will copy you into correspondence etc.'

50. In his evidence, Mr Chapman sought to explain the comment 'as predicted' by saying that Mr Jones had informed him that Mr Brannan had some leave coming up and so may not be able to make the meeting. I am not convinced by that explanation, however, given that Mr Brannan did not say the reason he was unable to make the meeting was because he was on annual leave (it is clear from a subsequent email referred to below that the claimant was not in fact on annual leave): he said it was because he had not been given sufficient notice. I find it more

likely that Mr Chapman and Mr Jones were aware that the claimant was unlikely to be able to prepare properly for a disciplinary hearing or arrange for union representation and anticipated he would object. Mr Chapman also said that his reference to setting the meeting for the next week with Mr Brannan being on holiday was an error (he described it as a typo when giving evidence) and that he had meant to type 'I won't set it for next week', as he was aware at this stage that Mr Brannan was on annual leave. I find that explanation to be implausible: the words 'may' and 'won't' are entirely different – it is extremely difficult to see how using one rather than the other can sensibly be interpreted as a typing error. I find that Mr Chapman said exactly what he meant to say in that email.

51. On the same day Mr Brannan sent another email to Mr Chapman, this one timed at 15:36, saying, 'Further to my email earlier, I require you to provide me with copies of the witness statements that are to be used against me at the disciplinary hearing'. He referred to 'ACAS guidelines' which say that an employer should provide an employee with all the evidence in advance of the disciplinary hearing. He finished that email saying, 'I also request that you note that I will be on annual leave for one week, with effect from 9 October 2017, and as such will be able to attend a reconvened hearing no sooner than 16 October 2017'. It is clear from this email that Mr Chapman's letter asking Mr Brannan to attend a disciplinary hearing had not enclosed the statements containing the allegations against him.

52. On 9 October 2017 Mr Brannan sent another email to Mr Chapman (which he also sent to Mr Jones). He said: 'It is now over a week since payday and once again I find myself without a payslip. You should have put it through the door on Thursday afternoon along with the short notice invite to the disciplinary hearing. I have received no reply to my Thursday email, and am yet again in limbo with regard to my livelihood. My solicitor needs copies of the libellous witness statements made against me as a matter of urgency.'

53. Mr Chapman forwarded Mr Brannan's email of 9 October to Mr Jones with the comment, 'How to win friends and influence people!' In his witness statement, which stood as his evidence in chief, he said he considered Mr Brannan's attitude in the email to be unnecessarily argumentative, and in the heat of the moment he forwarded it to Mr Jones with that comment. He acknowledged that the contents of the email were unprofessional and he should not have sent it, adding 'unfortunately it was a result of how frustrating I found Mr Brannan to deal with'. When giving evidence Mr Chapman was asked about his reference to finding Mr Brannan frustrating to deal with and was asked what dealings he had had with Mr Brannan by that time. He confirmed that the only dealings he had had with Mr Brannan were in connection with the disciplinary proceedings, and acknowledged that those dealings consisted of Mr Brannan's emails of 5 October and 9 October. He acknowledged that there had not been any other emails and said he thought it was the tone of Mr Brannan's emails that he found frustrating. On re-examination Mr Singer asked Mr Chapman whether there was anything in particular in the tone of the email. Mr Chapman's reply was that 'it was just the overall…it's now over a week…I felt it was aggressive…the overall tone'. Mr Singer invited Mr Chapman to read the email from Mr Brannan that had prompted Mr Chapman's response and asked if there was anything else he wanted to comment on. Mr Chapman's response was 'no'. I note that Mr Chapman did not refer to Mr Brannan having referred to 'libellous witness statements'.

54. Mr Chapman wrote to Mr Brannan to say he had rescheduled the disciplinary meeting for 18 October 2017. He enclosed copies of the statements signed by Mr Brannan's four colleagues. Upon receipt of that letter Mr Brannan emailed Mr Chapman to say the hearing was at a date and time that he claimed to have told Mr Chapman he would be attending a hospital appointment. He said he had an appointment at Blackpool Victoria Hospital at 11.00am. and that he would therefore be unable to attend the 10.00am hearing. I accept Mr Chapman's evidence that he had not previously been aware of the hospital appointment. Mr Chapman forwarded Mr Brannan's email about the hospital appointment to Mr Jones, saying: 'Hi Mark, literally just had this email through from him. So looks yet again like it is off and he seems to expect me to fall in line with what he wants?'

55. Later that day Mr Brannan sent another email to Mr Chapman asking for a copy of the sign-in book that Mr Cooper had referred to in his witness statement (alleging that Mr Brannan had tampered with it), and saying that he believed CCTV footage would help determine the validity of some of the allegations raised in Mr Cooper's statement. Mr Chapman forwarded that email to Mr Jones to keep him updated. He asked Mr Jones seek some input from the HR department. He said he was unsure how to deal with the request and that he did not consider that the information requested by Mr Brannan was relevant to the disciplinary hearing.

56. In another email that day Mr Brannan said to Mr Chapman, 'I require you to supply me with proof of my link deal sales for my period of employment at Thornton. Mr Chapman forwarded that email to Mr Jones saying, 'this sounds like a fair bit of work for IT to do, if at all possible. Can you ask Dawn if we are at liberty to provide this information prior to his disciplinary?'

57. Later that day Mr Brannan emailed Mr Chapman, copying in his union representative and Mr Jones. He said he had heard back from his union and that he would be able to attend a disciplinary meeting on wither 24 October or 26 October. In response to that email Mr Jones emailed Mr Chapman saying, 'I'll speak to Dawn in the morning, mate. Could you just reply to Jeff saying 'all received'? Cheers'.

58. Two days later Mr Chapman emailed to Mr Brannan a revised disciplinary invite letter. He said, 'I confirm I will send a copy of signing-in sheet entries with the disciplinary letter'. He also said he was unable to provide details of link deal sales but that that would not be forming part of the disciplinary hearing. Mr Chapman copied Mr Jones into that email.

59. Mr Jones emailed Mr Chapman on 18 October attaching a document and saying, 'Hi Jason, you can print this off and send with the letter. Only one example that can be found'.

60. On 19 October 2017 Mr Brannan emailed Mr Chapman, copying in Mr Jones, asking him for the dates on which each of the four witness statements were supplied to McColl's and asking for permission to be able to contact his Area Manager, Mr Tony Hoey. He also asked for an explanation as to why Mr Chapman was unable to supply him with proof of his link deal sales. He said in that letter, 'Failure to supply this information will be deemed to be obstructive'. He had made similar comments in previous emails. Mr Chapman emailed Mr Jones upon receipt of that email, saying:

> 'Hi Mark, can I get some HR clarification on how we handle the ongoing requests that are coming through on this. Do we need to keep responding to the requests when he isn't aware what I'm going to ask? Surely the information he is asking for would form part of an appeal. The witness statements were on 11 September 2017. Not sure why he would want to speak to Tony Hoey, do we permit this? Would Tony Hoey welcome this? Link deal sales part is fine. This will not form part of the disciplinary so as such I won't be providing. Please advise before I respond on this one if you could…much appreciated. My own view is that any evidence (if there is any) he is looking for should be provided after the disciplinary!'

61. There was a further exchange between Mr Chapman and Mr Brannan by email regarding the additional information he had requested. Mr Chapman forwarded that exchange to Mr Jones and then subsequently sent a further email saying to Mr Jones, 'Any chance you get some guidance from HR on how I respond to this one'.

62. The disciplinary meeting took place on 26 October 2017. Mr Brannan had a union representative with him. During the course of that meeting Mr Brannan's union representative made the point that the statements seemed 'a little lacking in detail'. Mr Brannan told Mr Chapman that he felt that people were telling lies about him. Mr Chapman asked Mr Brannan, about the statements, 'why would they say these things?' Mr Brannan replied, 'I feel they've been coerced into saying these things'.

63. During the meeting Mr Brannan told Mr Chapman that he had recorded conversations with colleagues. Mr Chapman said in evidence that he found it curious that Mr Brannan would covertly record conversations with colleagues unless he had anticipated that they might complaint about him, which suggested to him that Mr Brannan's relationship with his colleagues was not as good as he had suggested.

64. Mr Brannan suggested in his evidence that he had told Mr Chapman during this meeting that he had made whistleblowing complaints. This is not reflected in the notes of the meeting and Mr Brannan candidly acknowledged under questioning that he could not be sure that he had referred to whistleblowing but he thought he would have done. I accept Mr Chapman's evidence that Mr Brannan did not mention being a whistle-blower during the disciplinary meeting.

65. Mr Chapman arranged to meet with Mr Brannan again on 2 November 2017 to tell him the outcome of the disciplinary proceedings.

66. Mr Chapman's evidence was that following the disciplinary hearing he spoke to both Mr Grundy-Chalmers and Mr Cooper and asked both of them if they had been coerced into giving their statements. He said both denied there had been any coercion. Mr Chapman produced a typed note, which purported to be a record of those conversations. However, that note recorded the conversations as having taken place on 30 November and 31 November respectively. Quite apart from the fact that 31 November does not exist as a date, had these conversations taken place at the end of November then that would have been after Mr Brannan's dismissal. When Mr Chapman's attention was drawn, during cross examination, to this apparent discrepancy, he said he thought 'November' must have been an error and that these conversations in fact took place on 30 and 31 October respectively. In his witness statement Mr Chapman said that when he spoke with Mr Cooper, Mr Cooper 'described to me that he had raised complaints previously to Mr Jones regarding Mr

Brannan'. He said that Mr Cooper described Mr Brannan's attitude as 'inconsistent' as sometimes he would be chatty and other times he would be aggressive. He also said Mr Cooper described how Mr Brannan would badmouth the respondent to customers. He said that Mr Grundy-Chalmers maintained that Mr Brannan had made inappropriate, brand damaging comments to customers regarding the respondent. He said that Mr Grundy-Chalmers 'confirmed that his statement had been sent by his own free will and he maintained that he stood by its contents completely'. I accept Mr Chapman's evidence that he did speak with Mr Grundy-Chalmers and Mr Cooper before dismissing Mr Brannan but after he had arranged to meet with Mr Brannan again to notify him of his decision. I find that Mr Chapman asked each of them, over the telephone, if they had been coerced into producing those statements and both of them denied that there had been any coercion. They both told Mr Chapman that they stood by their statements. Mr Chapman did not, however, ask either of them what prompted them to write their statements. In response to questions, Mr Chapman confirmed, when he spoke to Mr Grundy-Chalmers and Mr Cooper, he did not try to get them to be more precise about the allegations they were making by, for example, identifying what had been said by Mr Brannan to colleagues or customers and when. Mr Chapman said that what Mr Grundy-Chalmers and Mr Cooper had said was 'pretty much what is in the record at page 230 of the bundle'. The record of those conversations at page 230 of the bundle states:

> 'Martin confirmed that the statement was sent by his own free will and stands by the contents completely. Martin felt compelled to submit a statement following seeing colleague, Nathan Cooper, being bullied and picked on consistently. Martin confirmed that Jeff consistently made comments to customers that were brand damaging, in particular that 'McColl's shit'.
>
> …
>
> Nathan advised that he had informed Mark Jones historically of issues that he was saying with Jeff's attitude towards him in branch. Mark advised Nathan to keep a log which is why Nathan ultimately submitted a statement. Nathan advised that Jeff consistently created an uncomfortable attitude with customers and even before working for the company would often walk past the store saying 'McColl's is a good company to work for, not'. Jeff was aggressive and hostile towards Nathan on a number of occasions, though his attitude was inconsistent in that sometimes he would be chatty and at other times aggressive. Customers are apparently still coming into store complaining about the way Jeff spoke to them, also that some customers ask whether Jeff is on shift before deciding whether to come in. Jeff consistently slagged off McColl's to customers, which was the main reason customers stopped coming in. Nathan felt at one stage he was genuinely going to be assaulted due to being ten minutes late. Although Nathan had rung in advance, Jeff had a meeting in Preston and was verbally abusive to Nathan as the lateness impacted on his travel arrangements. Jeff shouted and was very aggressive.'

67. Mr Chapman did not speak to Ms Machell or Ms Proctor. He said the reason he did not speak to Ms Machell about her statement was that she was on annual leave, and the reason he did not speak with Ms Proctor was that she was on sickness absence. During cross examination Mr Brannan pressed Mr Chapman as

to why he had not made more determined efforts to speak to either Ms Proctor or Ms Machell, for example when Ms Machell returned from annual leave. Mr Chapman's response was to say that, 'I formulated my decision on the back of other evidence'. When questioned about the fact that he had not spoken to Ms Proctor he said, 'my reliance was more on telephone interviews'. He said, 'If I was not able to speak to individuals I could not take their evidence into account'. When asked why he did not wait to speak to those two individuals upon their return he said he was 'content with what he got from other interviews'.

68. Mr Chapman's evidence to the Tribunal was that, based on what Mr Brannan's colleagues had said, he concluded that Mr Brannan had made the inappropriate comments to customers as alleged. He said that he was not convinced that Mr Brannan's colleagues had been coerced into submitting statements about him. He said in particular he noted that Mr Cooper had raised complaints previously against Mr Brannan which demonstrated that the 'issue had been on-going for some time'. He noted that Mr Brannan had admitted confronting Mr Cooper about being late despite the fact that that was not Mr Brannan's responsibility as he was not a manager. He said that Mr Cooper's version of events was corroborated by Mr Grundy-Chalmers and that he preferred their evidence to that of Mr Brannan. He said he believed Mr Brannan did not have a productive working relationship with his colleagues, noting that Mr Brannan had admitted to making covert recordings of conversations with his colleagues, which suggested that Mr Brannan was aware that complaints may be raised against him.

69. Mr Chapman said he felt Mr Brannan's conduct amounted to gross misconduct on the basis that he had been rude to customers, and on the basis that his conduct towards Mr Cooper in particular amounted to bullying and was threatening. He said he concluded that dismissal was the appropriate sanction. He said Mr Brannan had created a hostile working environment for colleagues and customers which prejudiced the respondent's core values.

70. Mr Chapman met with Mr Brannan on 2 November. Mr Chapman told Mr Brannan in that meeting that he had spoken to Mr Brannan's colleagues except one who had been on holiday (although in fact he had only spoken to two of them). He said he had been unable to find any evidence of collusion between them and that they stand by their statements. He said he found their statements and allegations against him to be proven. He told Mr Brannan that he considered him to have committed gross misconduct and that his employment was terminated at that point with immediate effect. Mr Brannan responded, 'I feel that Mike Bottomley has had a vendetta against me'.

71. A letter confirming Mr Brannan's dismissal was sent to Mr Brannan on 7 November 2017. That letter was signed on behalf of Mr Chapman by Mr Jones. Mr Chapman was on holiday at this time. The letter itself was drafted by a third party HR provider used by the respondent called Empire. Mr Chapman had spoken to a woman called Heather Hoey at Empire and had explained to her the decision he had reached and the reasons for it. He asked her to draw up a letter. Mr Chapman sent an email to Ms Hoey after he had spoken to her. He explained that he was on annual leave for the next two weeks, but said 'I am happy for you to send any dismissal letter through to Regional Manager, Mark Jones, who I authorise to issue in my absence'. He added, 'If you need to contact me this afternoon to discuss anything that's fine'. He copied in Mark Jones to that email. On 7 November Ms Hoey sent an

email to Mr Chapman and Mr Jones attaching what she described as a 'suggested outcome letter'. The email was sent to Mark Jones. It said:

> 'I would be grateful if you can check the letter carefully to ensure that it accurately reflects the discussion at the disciplinary hearing and the points the company wish to stress. Please also complete the required information in the letter. If you would like any amendments or additions to the letter then please don't hesitate to contact me.'

72. There is no suggestion that Mr Jones asked for any changes to be made to the letter; nor was there any suggestion that Mr Jones told Mr Chapman or Ms Hoey he was not in any position to say whether the letter accurately reflects the discussion at the disciplinary hearing. I infer that Mr Jones knew what had been discussed at the disciplinary hearing and the points the company wished to stress because he and Mr Chapman had spoken about the matter before Mr Chapman's departure on holiday.

73. That letter, dated 7 November 2017, expressed Mr Chapman's decision as follows:

> 'Several colleagues have stated that you had said that you were not employed to fill shelves. You denied the allegation stating that the colleague had previously made a statement about you and that you believe she felt humiliated about a customer incident on 8 August 2017. Reports were also given that you had been rude to customers, including calling one 'stupid', and that on another occasion you referred to the company as being 'shit'…With regard to the allegation that you swore at Nathan when he arrived late for work, you stated that the date was incorrect and that it happened on 31 July rather than between 28 and 31 August 2017. You admitted that you had confronted your colleague but denied swearing.
>
> …
>
> Having investigated your allegations that colleagues were coerced and colluded with their statements, I can confirm that I was unable to identify any evidence to substantiate this claim. The colleagues stand behind their statements and maintain that you have behaved inappropriately to customers and colleagues, and that you have made inappropriate comments about the company. I therefore do not accept your defence that everyone was lying. You have denied the allegations but have been unable to provide any reasonable explanation as to why so many colleagues have raised similar issues about you behaving inappropriately towards them and customers. On the basis of the available evidence I reasonably believe that you have been rude to customers. You have admitted that you have confronted a colleague about their lateness and that you have said that you would close the store if colleagues were late. Whilst you have denied swearing or being aggressive I am satisfied that there is a pattern of behaviour which is unacceptable. You have admitted that you made comments to customers about single manning the branch when there are queues. Having reviewed the evidence I reasonably believe that you have made inappropriate comments to customers. I find there is a pattern with the behaviour which has been raised by your colleagues and I find this wholly unacceptable. I therefore have no

alternative but to consider your actions to be gross misconduct and having considered all the alternatives I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from November 2.'

74. In the letter Mr Chapman said: 'In reaching my decision I have taken into account your conduct record and length of service and have considered whether a lesser sanction would have been appropriate.' On being questioned by Mr Brannan, however, Mr Chapman's evidence to the Tribunal was that he had not in fact taken into account Mr Brannan's conduct record.

75. Mr Chapman said he was unaware that Mr Brannan had made whistleblowing allegations when he dismissed Mr Brannan. Mr Brannan drew Mr Chapman's attention to Mr Cooper's statement, which referred to Mr Brannan being a whistle-blower. Mr Chapman's response was, 'I can see it in black and white. I didn't fixate on it. It wasn't the crux of the disciplinary I was dealing with'.

76. Mr Brannan appealed against his dismissal. The appeal was dealt with by Mr Thomas. Mr Thomas was asked to hear Mr Brannan's appeal by Mr Ian Midgley, the General Manager for the North. Mr Thomas was given an 'appeal pack' containing the four statements made by Mr Brannan's colleagues, the investigation report compiled by Ms Patience and the letter of dismissal. Mr Thomas met with Mr Chapman before hearing Mr Brannan's appeal. He said this was to discuss the reasons for his decision in more detail. Mr Thomas also met with Ms Dawn Clark from HR. Ms Clark told Mr Thomas that Mr Brannan had been calling the office every day and had been verbally abusive over the telephone.

77. On 16 November 2017 Ms Ramsey of HR emailed Mr Thomas saying, 'Please can you let me know when you want to meet with Jeff and I will draft a letter for you?' She followed that up with another email a few minutes later saying: 'Please can you try to do this as soon as possible to avoid any delays in the process. Given the nature of this case and the correspondence generated, before you hear the appeal I would want to hold a conference call so we are all clear on what we are saying and how we respond.' On the same day Ms Clark of HR sent an email to Mr Thomas and Ms Ramsay. She copied in Mr Jones and Mr Midgley. She said: 'I suggest you ask Tine to note take for you at the appeal. It is possible given the complexity of this case that you could meet up and hand over everything if possible. I want to avoid anything getting lost. It may be helpful for you to discuss some background as well. This case will in my view progress to a Tribunal and has been high profile in the business.' Mr Thomas was asked what he understood she meant by 'high profile'. He said that many phone calls had been made to Head Office that were not in the right tone from Mr Brannan to the HR team. Later on 16 November Ms Ramsay sent another email to Mr Thomas, copying in Mr Jones, saying, 'I am sending you everything I have on Jeff'. In response to questions about this email Mr Thomas said he could not remember whether Ms Ramsay did actually send him anything; he said 'I dealt with the appeal documents. I didn't look at everything'. Minutes after Ms Ramsey sent her email, Mr Jones sent an email to Ms Ramsay and Andrew Thomas, saying: 'Andrew…just be mindful the disciplinary/dismissal was purely based on the customer/colleague complaints. Give me a ring when you are free and I can talk through. Regards.' Mr Brannan asked Mr Thomas whether he asked Mr Jones what he meant by that. He replied, 'No, I stuck to the facts. I dealt with what's in front of me'. Mr Thomas said he could not recall whether a phone call

took place between him and Mr Jones in response to Mr Jones' email. Mr Thomas said that it was 'a fair while ago' and that he could not remember if that phone call took place. Mr Thomas denied, however, that Mr Jones informed him of the protected disclosures made by Mr Brannan. Mr Thomas also denied, on being asked by Mr Brannan in cross-examination, that Mr Jones had told him he wanted rid of Mr Brannan. Mr Thomas did recall that a conference call took place (as alluded to in Ms Ramsey's email). He said there were no minutes of that call. On being questioned about what was discussed on that call Mr Thomas said 'the four employees in the branch had raised the issues and we need to follow the process and support the colleagues'.

78. On 28 November 2017 Mr Thomas sent an email to Ms Clark saying, 'Dawn, as discussed earlier, have you got an appeal letter from, Jeff Brannan referencing whistleblowing?' Upon questioning, Mr Thomas said that he did not know the full detail of the whistleblowing disclosures made by Mr Brannan.

79. Mr Thomas met with Mr Brannan on 1 December 2017 to hear his appeal. Mr Brannan was accompanied by a union representative. Mr Brannan said at that meeting that he felt the real reason for his dismissal was due to whistleblowing disclosures he had made to HMRC and the HSE. Mr Thomas told Mr Brannan that he was not aware of the disclosures he was referring to. After the meeting Mr Thomas spoke with Mr Chapman again and asked him whether he had been aware of Mr Brannan's whistleblowing disclosures. He said he had not been. Mr Thomas also spoke with Mr Bottomley and asked him whether he had asked Ms Machell to write a statement; Mr Bottomley replied that he had not. Having reviewed the evidence and Mr Brannan's submissions Mr Thomas decided to uphold Mr Chapman's decision to dismiss Mr Brannan and rejected the appeal.

Conclusions

80. Mr Brannan puts his case on two alternative bases: either Mr Chapman was motivated to dismiss him by the fact that the claimant made protected disclosures and this was the only, or at least the principal, reason for his dismissal; alternatively, Mr Chapman was manipulated into dismissing the claimant by Mr Jones and/or Mr Bottomley, who solicited complaints from the claimant's colleagues so as to engineer disciplinary action and whose manipulation was primarily motivated by the fact that the claimant made protected disclosures. As I understand it, Mr Brannan contends that if I find that Mr Chapman was unwittingly manipulated into dismissing him, then I should hold that the motivation and knowledge of Mr Jones and/or Mr Bottomley should be attributed to Mr Chapman as suggested in paragraph 62 of the Court of Appeal's judgment in Jhuti on the basis that they had a formal role in the decision-making process, or in the alternative that, as posited in paragraph 63 of the Jhuti judgment, their motivation should be attributed to the employer on the basis that Mr Jones was at or near the top of the management hierarchy.

81. In determining this issue it is instructive to consider first of all how the complaints came about that formed the basis of the disciplinary action.

82. I did not hear direct evidence from any of the staff members who complained about the Mr Brannan. Mr Thomas speculated, when he gave evidence, that the individuals could have decided between themselves to complain simultaneously. There is some evidence that could be said to support this hypothesis In particular:

a. It appears to me that the working relationship between Mr Brannan and his colleagues was not particularly good. Mr Grundy-Chalmers said in his email in October 2018 that he thought Mr Brannan was ‘an arrogant self-centred person’. Furthermore, Mr Jones told the claimant during his grievance appeal meeting that he had reduced the Branch Manager to tears. And I accept Mr Singer’s submission that the fact that the claimant had taken to recording his interactions with colleagues indicates that the working relationships between the claimant and his colleagues was not good.

b. The claimant acknowledged that he had challenged Mr Cooper one day when he had arrived late as he was annoyed; that he didn’t agree with upselling; and that there had been an occasion when he shouted to Ms Proctor that there was a queue and that a customer was waiting to be dealt with; and that he had left work early on the day he worked with Ms Machell. It is conceivable that other staff members involved might have nursed a genuine sense of grievance (justified or not) about those matters, which prompted them to complain.

c. Mr Cooper and Mr Grundy-Chalmers told Mr Chapman they had not been coerced into writing statements.

d. Mr Bottomley told Mr Thomas, during the appeal process, that he had not asked Ms Machell to write a statement.

83. On the other hand, there is a significant body evidence pointing towards the complaints from colleagues having been solicited by Mr Jones and/or Mr Bottomley. In particular:

a. All four of Mr Brannan’s colleagues signed their statements on the same day. In the absence of any direct evidence from those individuals as to how this came about, this strongly suggests the making of complaints was co-ordinated by someone.

b. One of the complainants was Ms Machell, with whom the claimant had worked only once. Ms Machell no longer worked with the claimant. Her complaint was about an incident that occurred two months before she made her complaint. No explanation was given for why she had waited two months before deciding to complain and what had prompted her to complain now, notwithstanding that she no longer worked with the claimant.

c. Ms Machell’s statement is in the form of a letter to ‘Mike’, who I take to be Mr Bottomley. Its wording, and in particular the fact that Ms Machell signed off ‘I hope this is ok’, clearly points to the complaint having been written in response to a request by Mr Bottomley, notwithstanding what Mr Bottomley told Mr Thomas.

d. Mr Grundy-Chalmers told Mr Brannan that Mr Jones had asked him to copy out and sign a pre-prepared statement. It does not follow from that finding, however, that I accept that Mr Grundy-Chalmers’ telephone account of how the statement came into being was entirely

accurate. There appear to be inconsistencies between what Mr Grundy-Chalmers said in his email of 19 October and what he subsequently told the claimant. In his email he said he was asked his opinion of the claimant and was asked to give a statement against Mr Brannan by 'the Area Manager Mike', who I take to be Mr Bottomley and made no mention of having been asked to copy out a statement by Mr Jones. When he spoke to the claimant on the phone shortly afterwards, however, he appears to have made no mention of Mr Bottomley and instead said it was Mr Jones who had asked him to give a statement. It is conceivable that Mr Grundy-Chalmers was spoken to initially Mr Bottomley (who asked his opinion of the claimant, in the same way that he appears to have asked Ms Machel) and then subsequently by Mr Jones (who had prepared a statement based on his response to Mr Bottomley) but if Mr Jones had, as Mr Grundy-Chalmers said, asked him to copy out a pre-prepared statement it is surprising he did not mention that in his email of 19 October. Also if Mr Jones had effectively written Mr Grundy-Chalmers' statement for him, it seems unlikely he would have referred to the claimant being a whistle-blower. Notwithstanding those points, however, I regard the evidence of what Mr Grundy-Chalmers said does point to Mr Jones and Mr Bottomley having solicited the statement from Mr Grundy-Chalmers and Mr Jones having solicited a statement from Mr Cooper.

e. Although Mr Jones asked Mr Chapman to take forward the disciplinary matter, Mr Jones remained closely involved in that process throughout, up to and including appeal stage. Although Mr Chapman claimed he simply kept Mr Jones apprised of progress, there was clearly more to it than that. Mr Chapman sought Mr Jones' advice on several occasions throughout the process, rather than seeking advice directly from HR, and Mr Jones was involved in approving the letter setting out the reasons for dismissal. There is nothing in the evidence to suggest Mr Jones discouraged Mr Chapman from involving him in the process. When it came to the appeal, the email evidence strongly suggests that Mr Jones was keen to influence the outcome of the appeal: his request to Mr Thomas to phone him points to that being the case, particularly in the absence of any other explanation for him being involved and wanting to speak to Mr Thomas. I infer that Mr Jones involved himself in the appeal because he wanted to influence its outcome. Consistently with that, I infer that Mr Jones also sought to influence the outcome of the disciplinary process. Had Mr Jones simply been responding to complaints raised independently by one group of employees against another employee it seems to me unlikely that he would seek to influence the outcome of a disciplinary process, rather than allow an independent investigation to take its course.

84. Stepping back and looking at all the evidence in the round, I find it more likely than not the complaints made by the claimant's four colleagues were solicited by Mr Jones, who obtained assistance in his endeavour from Mr Bottomley.

85. As for what motivated Mr Jones, I note that the respondent, or its representatives, chose not to call Mr Jones to give evidence to explain his role in the

disciplinary process. It is conceivable that he was simply responding, in his managerial capacity, to dissatisfaction amongst employees. However, there was no direct evidence from the respondent that that was the case. There is evidence pointing to Mr Jones having been motivated by the fact that the claimant had made protected disclosures, in particular:

a. It is clear from what he said in the grievance appeal meeting in August 2017 that Mr Jones was unhappy with the fact that the claimant was not prepared to let the minimum wage issue drop, having been paid the money that was owing to him.

b. The complaints were obtained by Mr Jones a matter of days after the claimant made the second, third, fourth and fifth protected disclosures and just a few weeks after the first protected disclosure. Mr Jones was aware of at least the first four of those disclosures at the time he solicited complaints from staff.

c. Mr Jones did not simply take statements from the claimant's colleagues and pass them on to Mr Chapman to conduct an independent investigation. As I have recorded above, Mr Jones was closely involved in the disciplinary process throughout and sought to influence its outcome, something he was unlikely to have done had he simply been responding to dissatisfaction amongst employees.

86. Looking at the evidence in the round, I find that it is more likely than not that Mr Jones was motivated to solicit formal complaints from the claimant's colleagues by the fact that the claimant had made protected disclosures, with the ultimate aim of securing the claimant's dismissal.

87. Although Mr Brannan did, at one stage in the hearing, suggest that the decision to dismiss may have been taken by Mr Jones rather than Mr Chapman, he did not press that point and I am satisfied that that it was Mr Chapman who was the person deputed to take the dismissal decision. The next issue I must consider, then, is whether Mr Jones' motivation was shared by Mr Chapman.

88. In this regard I note Mr Chapman's firm and repeated denials when giving evidence that he dismissed the claimant because he had made protected disclosures. However, I did not find Mr Chapman to be a reliable witness. As recorded above, I have rejected Mr Chapman's evidence in certain respects – see in particular his evidence as to comments made in an email to Mr Jones on 5 October. Furthermore, there were other discrepancies in Mr Chapman's evidence. For example, when, during cross-examination, Mr Brannan challenged Mr Chapman's decision not to speak to Ms Matchell and Ms Proctor, Mr Chapman sought to downplay the effect of that decision by claiming that he had effectively disregarded their statements because he had been unable to speak to them. Yet this was not part of Mr Chapman's evidence in chief. Furthermore, there was nothing in the dismissal letter to that effect. Nor did Mr Chapman tell the claimant at the time of his dismissal that he had disregarded this evidence. Mr Chapman also, initially, said in evidence that he was unaware that Mr Brannan had made whistleblowing allegations when he dismissed him; yet when Mr Brannan drew Mr Chapman's attention to Mr Cooper's statement, which referred to Mr Brannan being a whistle-blower, Mr Chapman

shifted his position somewhat, saying I didn't fixate on it. It wasn't the crux of the disciplinary I was dealing with'.

89. Mr Chapman also downplayed Mr Jones' involvement in the disciplinary process. As recorded above, I have found that Mr Jones sought to influence the outcome of the disciplinary process. Looking at the correspondence between Mr Chapman and Mr Jones I am persuaded that Mr Chapman, far from carrying out an independent inquiry into the misconduct allegations, allowed himself to be led by Mr Jones. Evidence of this can in particular be found in the following matters:

a. Mr Chapman sought Mr Jones' advice on a number of matters notwithstanding the fact that he was experienced in dealing with disciplinary matters. Where he felt he needed HR advice, he asked Mr Jones to obtain the advice rather than approaching HR himself.

b. Mr Chapman's investigation of the matters that formed the subject matter of the disciplinary action was perfunctory. Notwithstanding that Mr Brannan's union representative had pointed out the lack of detail in the complaints, Mr Brannon made no effort to probe the complainants about the vaguer aspects of their statements. He also demonstrated a marked lack of curiosity as to how four employees, one of whom had not worked with the claimant for two months, had come to make statements on exactly the same day, notwithstanding the fact that the claimant had raised doubts as to the genuineness of the statements. Although he spoke to two of the complainants he only asked if they had been coerced and avoided asking any further questions about the circumstances in which the statements had been made. He did not speak to the other two complainants at all, giving as a reason that they were both away from work at the time; he could have delayed his decision until they had returned to work but chose not to.

c. Notwithstanding that Mr Chapman had had no prior dealings with Mr Brannan, a number of emails that Mr Chapman sent to Mr Jones demonstrated significant contempt for Mr Brannan. For example, in the email of 5 October Mr Chapman said he may fix the disciplinary hearing for a date when the claimant was on holiday. Whether or not he was serious about that, the email was disparaging. The same can be said of the fact that the disciplinary hearing was originally fixed at such short notice that Mr Chapman and Mr Jones had predicted the claimant would object; Mr Chapman's email of 9 October with the comment, 'How to win friends and influence people!'; his email to Mr Jones in response to the claimant asking to rearrange the disciplinary meeting to accommodate a hospital appointment in which he said 'So looks yet again like it is off and he seems to expect me to fall in line with what he wants?'; his email of 19 October suggesting they should only provide evidence to the claimant after the disciplinary had taken place; and the fact that he only provided copies of the witness statements to the claimant after he asked for them. I acknowledge that the tone of some of Mr Brannan's emails was antagonistic and this may have coloured Mr Chapman's opinion of him to some extent but I do not think that can be a full explanation for the comments made by Mr

Chapman to Mr Jones, the tenor of which suggest an undercurrent of disdain towards Mr Brannan.

90. Stepping back and looking at the evidence as a whole, I am satisfied that it is more likely than not that Mr Chapman was aware that the claimant had made protected disclosures and was motivated to dismiss the claimant by the fact that the claimant had done so.

91. The next issue for me to determine is whether the fact that the claimant had made protected disclosures was the only reason Mr Chapman chose to dismiss the claimant and, if not, whether there were other reasons.

92. In this regard, I note that, on their face, the complaints by the individuals do not appear to be entirely without any substance. I acknowledge that Mr Chapman may genuinely have believed that the claimant had behaved improperly towards staff and customers. However, the perfunctory nature of his investigation, the tone of his emails about the claimant, his willingness to actively involve Mr Jones in the disciplinary process, and his decision not to take into account the claimant's clean disciplinary record when considering the sanction all indicate to me that even if Mr Chapman genuinely believed the claimant had behaved improperly towards staff and customers, the main reason for dismissing the claimant was that he had made protected disclosures.

93. In light of the above, I find that the reason (or the principal) reason for dismissal was that the claimant made protected disclosures.

94. Applying section 103A of the Employment Rights Act 1996, the claimant was unfairly dismissed.

95. I understand that the claimant secured a new job immediately after his dismissal, earning at least as much as he earned with the respondent. Mr Brannan, as I understand it, is not seeking reengagement or reinstatement. Accordingly, I hope the parties will be able to agree compensation between them. If that cannot be done, Mr Brannan must write to the Tribunal within four weeks of this judgment being sent to ask for a date to be fixed for a remedy hearing.

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Employment Judge Aspden

Date 6 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 June 2019

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to Mr Brannan(s) and respondent(s) in a case.