EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms K Hopkins	**Secretary of State for Justice**

Heard at: London Central

On: 10 – 14, 17 – 18 June 2019
In chambers: 19 – 21 and 26 June 2019.

Before: Employment Judge Lewis
Ms C Ihnatowicz
Mr I McLaughlin

Representation

For the Claimant: In person

For the Respondent: Mr P Skinner, Counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. On 1 December 2014, the claimant was given a mid-year performance rating of 'must improve' on the ground that she had made protected disclosures. However, the claim in respect of this detriment was brought out of time. For that reason, it is therefore not upheld.

2. The claims in respect of the other alleged whistleblowing detriments are not upheld.

3. The provisional date for a remedy hearing is therefore vacated.

REASONS

Claims and issues

1. The claimant originally brought claims for discrimination under the Equality Act 2010, breach of contract and whistleblowing detriment. The claims for discrimination and breach of contract were struck out. The remaining claim which was before us was for whistleblowing detriments.

2. The issues are attached to the end of these Reasons.

Procedure

3. The tribunal heard oral evidence from the claimant and, for the respondent, from Paul Allen, Jo Peacock, Sarah Morton, Elliot Shaw, John Marais, Rebecca Endean, Patricia Lloyd, Osama Rahman, Cressida Macdonald, Aidan Mews and Christina Golton. Caroline Logue had been approached by both sides to give evidence and had given a very similar witness statement to each. The respondent had agreed that Ms Logue could appear as the claimant's witness. We also read a signed witness statement on the claimant's behalf from Professor Conar Duggan.

4. There was an agreed trial bundle of 1999 pages. The claimant had also brought additional documents, continuing the numbering up to 3353. Although the respondent did not agree they were necessary, it did not in the event object to them being before the tribunal. Both the claimant and the respondent had provided a written skeleton argument at the outset and the respondent had provided a note on housekeeping. The respondent also provided a written closing submission and bundle of case-law authorities.

5. Some time was taken on the first morning in finalising a list of issues. The respondent had collated the issues identified in the preliminary hearings before EJ Elliot and EJ Glennie. The tribunal went through that list, ensuring it was clear and then asking the claimant whether she disagreed with any issue or wished to add anything. This was a simpler approach than going through her own lists and schedules. The respondent's list did not record as any steps in the definition of protected disclosure which they conceded. In some instances, the omitted and therefore conceded steps were explicitly clarified as we talked.

6. The claimant wished to add one further protected disclosure, ie that she disclosed information to her employers during a meeting with CSAAP on 25 June 2012 to the effect that the SOTP did not reduce the sexual reoffending of prisoners after release and in fact was associated with an increase in sexual re-offending and could therefore be harmful to the public. The claimant said her managers were in attendance. She says the information confirmed what she had said verbally in her disclosure 1 in February 2012. The respondent objected on the basis that EJ Glennie

had refused to allow that issue to be added and it had therefore already been decided. They pointed out that the claimant had not appealed the decision. They added that they had prepared the case on the basis that this was not to be taken as a disclosure.

7. The claimant said that the issue before EJ Glennie was whether she had made a disclosure to CSAAP (as is indicated by the schedule at page 120.17a of the trial bundle). However, her employers were also present and she was referring to them. She also cited cases which state that the employment tribunal must not stick rigidly to the list of issues. She said the respondent was well aware of the relevance of the CSAAP meeting from her claim form and her detailed further particulars.

8. The claimant says this disclosure was pleaded at paragraph 3 of the particulars of claim. We consider the pleading is not as clear as it could be, but this would largely apply to all the disclosures and detriments. The meeting is referred to at paragraph 3 and the claimant does say she raised her concerns. We also noted that EJ Glennie had believed the disclosure to CSAAP was pleaded.

9. The tribunal decided to allow the claimant to claim that this was a further protected disclosure (since named disclosure 1A). The CSAAP meeting followed on from the claimant's initial discussions including the alleged earlier disclosure in February 2012. It is a natural part of the story. The minutes of the meeting were already in the trial bundle. We cannot see how adding this as a disclosure would affect the case preparation as it would in any event be part of the evidence. It would not affect the need to prepare the case on consequent detriments because there was an alleged prior disclosure to the same managers. Now that it is clear the alleged disclosure is to the claimant's employer and not to CSAAP, it would be artificial to omit it. The respondent was told that if it wished, it would be permitted to ask any supplementary questions of witnesses or indeed call any new witnesses, and it would also be entitled to produce any further disclosure. The respondent was given a short break to discuss any immediate consequences. However, it was difficult to see why any notable extra preparation should be needed.

10. The tribunal then gave each party a final list of issues to reflect the conversation. Later in the first week, both parties confirmed they were happy with the list as now attached to the end of these Reasons.

11. The other matter arising on the issues concerned detriments in 2012. The claimant initially indicated that she would like to amend the list of issues to add further detriments in 2013, for example, being shouted at in meetings. After discussion, it transpired that her concern was to be able to refer to her treatment by way of evidence which would tend to show why the respondent went on to treat her badly in the later detriments. The tribunal told the claimant that she was entitled to apply for permission to add the extra detriments. If she wished to do so, she should type out a clear self-contained list. As we stopped to read witness statements at

lunchtime on day 1, the claimant was given the rest of the afternoon to decide whether she wanted to make such an application. If she did, she should send a copy of her list to Mr Skinner by 5pm. The claimant said she was happy to leave the matters as evidence. The tribunal explained this meant they would be looked at with a lesser spotlight and specific findings on them might not be made. At the start of day 2, the claimant confirmed again that she was happy to leave those matters as supporting evidence.

12. During the course of the hearing, the claimant started to make references to 'tainted information'. The tribunal asked the claimant if she would like to apply to reframe or add some actions or omissions by, for example, Ms Endean which led to the pleaded detriments. Mr Skinner indicated the respondent would oppose any amendment of the issues on grounds that this had come up first during the hearing and moreover was not in the claim form. In the event, the claimant said she did not wish to pursue this avenue.

13. The claimant identified the criminal offences, legal obligations and miscarriage of justice on which she relied as follows. The respondent did not accept that the MOJ actually had the identified legal obligations, although that of course is not the legal test.

13.1. The criminal offence was future criminal offences likely to be committed by released sex offenders who had been through the SOTP.

13.2. The legal obligation was to protect the public and to rehabilitate offenders: The Constitutional Reform Act 2005 created the MOJ in 2007, bringing together responsibility for criminal justice, prisons and penal policy (basically sentencing policy). Section 142(1) of the Criminal Justice Act 2003 states that 'Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences.'

13.3. There are three alleged aspects of the miscarriage of justice. (1) For victims of any additional crimes, because they had been told the released offender is safer; (2) For the prisoners. The prisoners were told the course would help them and in fact it did not; (3) The prisoners were generally released earlier; but prisoners who did not get onto the course because of not enough spaces were often not given parole or released early because they were said not to have addressed their offending behaviour.

14. At the outset, the tribunal estimated the total time for cross-examination, given the late start because of the various matters which had taken up the first morning of the hearing and after setting aside time for reading witness statements, swearing in each witness, supplementary questions,

tribunal questions, re-examination, closing, contingencies, and the tribunal reaching its decision, would be roughly 17 hours. The parties were happy to agree that Mr Skinner would have up to 5 hours to cross-examine the claimant. He did not plan to cross-examine Ms Logue. The claimant would have a total of 12 hours to cross-examine the respondent's witnesses. The respondent said Ms Golton might need additional time to read and digest documents as she is dyslexic. The tribunal said this was no problem at all and any additional time would not come out of the claimant's allocation for cross-examination. In the event, both Mr Skinner and the claimant kept admirably to their time allocations and only went slightly over.

Fact findings

15. The claimant started work for the MOJ's Analytical Services department in 2006. In 2008, she was promoted to senior research officer at the MOJ. In February 2009, she was promoted to Grade 7. Her line manager at that time was a Grade 6, Nisha de Silva. Ms de Silva reported to Cressy MacDonald, who in turn reported to Rebecca Endean, the Director of Analytical Services. Ms MacDonald was one of five Deputy Directors of Analytical Services who reported to Ms Endean.

16. The Sex Offender Treatment Programme ('SOTP') began in 1991 as part of a national strategy for treating sex offenders in prison. At its core was a cognitive behaviour programme delivered to small groups of sex offenders. Only a limited number of offenders were put on the programme because it was not available in all prisons and places were limited. The SOTP was accredited by The Correctional Services Accreditation Panel (now 'CSAAP')

17. The basis for the SOTP was a theoretical paper written by a Canadian psychologist, Karl Hanson. There was an 'invoking deviant scheme' within the SOTP whereby offenders had to role-play the offence. The theory was that by invoking the situation where they wanted to commit the offence, they would learn how to control it. There was no empirical evidence as to whether such a programme would work or not.

18. In 2010/11, the National Offender Management Service ('NOMS') commissioned research into the efficacy of the SOTP as this had not been done before. NOMS is now called Her Majesty's Prison and Probation Service. The research was initially to assess the feasibility of using propensity score matching ('PSM') as a method to measure the efficacy of SOTP, and then, if it was feasible, to go ahead and measure it.

19. A randomised control trial ('RCT') is the gold standard for any research on the efficacy of medical and other interventions. It involves randomly allocating participants to a treatment and control group. The advantage is that unknown confounding factors tend to be equally distributed across both groups. However, such a trial takes a long time. It can also be

unsuitable for ethical reasons. The next best method is usually considered to be PSM. This statistically measures outcomes of two sets of individuals, one which received the intervention and one which did not. As far as possible, the relevant characteristics of each group are matched. The main advantage is that the study can be done on existing data where interventions have already taken place. The disadvantage is that comparison groups can only be matched on characteristics which researchers have information about. Researchers try to minimise unknown variables, but they cannot be completely eliminated. Within the PSM methodology, there are two alternative designs, ie Per-Protocol ('PP') and Intention to Treat ('ITT').

20. The respondent says that the MOJ and NOMS genuinely wanted to know whether SOTP worked or not as it was an expensive and important programme. The claimant tells us that they were fully expecting the outcome of the research to prove that it did work; they had been delivering the programme for many years and had consistently told anyone who asked that it did work. She said evidence that it did not work would have been career-destroying for the large number of professionals employed to deliver the programme. We will consider these suggestions in our conclusions.

21. The claimant was appointed the lead on the research because of her relevant expertise, particularly in PSM research which she and her team had just completed on the Enhanced Thinking Skills programme.

22. Initially London Economics was contracted to do the feasibility study and the claimant managed Mr Sadler from there. The respondent then took the project in-house in 2011. The claimant worked with various team members over time. She also worked on a number of other publications for the MOJ. In 2011- 2012 she was spending approximately 2 days/week on the SOTP.

<u>The initial research findings</u>

23. At some point in Spring 2012, the claimant told Ms de Silva and the other managers the initial results. It was decided to tell Ruth Mann at NOMS immediately as NOMS were the primary customer. Ms Mann was Head of Evidence and Offence Specialism, Commissioning Strategies Group at NOMS. There was then a meeting was attended by the claimant, Ms de Silva, Ms MacDonald and Ms Mann. There are no minutes of the meeting. The claimant used presentation slides, but these were not in the trial bundle. We find that such a meeting took place. It is suggested by the subsequent chain of events. There was no real dispute that it took place although no one could remember the dates or details.

24. At the meeting, the claimant said that the findings not only showed no benefit from the SOTP, but indicated that prisoners who attended the SOTP were more likely to sexually reoffend on release than those who

had not attended the course. This is the alleged first disclosure. We are unable to make any further findings as to what was said in the meeting or the reactions. The meeting took place 7 years before the tribunal hearing and memories were unclear even as to the date.

25. The claimant wrote up her research findings into a report which was called 'Impact Evaluation of the Prison-Based Sex Offender Treatment Programme (SOTP) using management information and Propensity Score Marking'. It was decided that a specially convened meeting of CSAAP should be held.

26. On 22 May 2012, Ms Mann emailed the claimant to say she would ensure the CSAAP members had a copy of the report, but she would like them also to have a technical report with a full technical description of the decisions made during the course of the analysis. She went on:

> 'As I've said before, the findings from this analysis, if they hold up, have serious consequences for NOMS. I am not sure I have fully got across to you how difficult this could be to handle and how many people we will need to prepare. I understand from Nisha this morning that the aim is to publish the report in July – from NOMS point of view, this simply does not give us enough time to manage the internal handling issues. I have discussed this with Gill who agrees. I was hoping and expecting that we could proceed slowly and carefully through the various stages of scrutiny (NOMS review, peer review, discussion with CSAP) and that any or all of these stages may lead to reconsideration of parts of the analysis.'

In another email, Adam Carter, Head of Prison SOTP at NOMS, echoed the concerns about a July publication date.

27. Ms de Silva responded to Ms Mann, saying that Ms Endean's steer was to publish with caveats where relevant, with the proposal that a RCT be conducted as the next step.

28. On 29 May 2012, Mark Read (Head of Group at NOMS) added his voice to the NOMS' concerns. He said that regardless of the final findings, he wanted to ensure all processes had been followed and that a rigorous analysis of the methodology had been undertaken. Given these technical questions 'and the need for careful handling of results into the public domain whatever the final analysis, I would suggest caution in setting a publication timetable at this stage'. Ms Endean replied in an email dated 31 May 2012. She answered the specific technical queries in Mr Read's emails and concluded:

> ' My professional view is that we can continue to scrutinise and test these results but it is highly unlikely that it will change the key findings (although there is a need to write them up very carefully) and we risk data ming to such an extent that would cause any positive results to be considered dubious by evaluation experts. There is still the possibility that the results are generated by some form of 'negative' selection bias ie that the unobserved characteristics of those on the programme are worse than those who do not go on the

programme in a way that we cannot control for. But to settle this question my view is that we would require a RCT and we ought to give this serious thought.'

29. In accordance with normal procedure, the report was sent in June for external peer review to two reviewers. The reviewers in this case were Karl Hanson and Gerry Gaes. The peer review forms have three categories: (i) publishable (as it is or with minor amendments); (ii) possibly publishable (but only with major changes) and (iii) not publishable. Mr Hanson ticked category (ii). He recommended additional analyses, given the difficulty of identifying unknown variables in PSM studies. He was particularly concerned regarding how to match offenders in both groups who had committed multiple offences, and also as to whether the decision to put an offender on a program or not incorporated any unidentified factor. He said the report was not publishable in its current form but with attention to the noted issues (and much copy editing) it could eventually be publishable. Mr Gaes ticked category (i). He said the authors of the research did need to address the questions he had raised prior to publication. He suggested adding further matching variables, which should be identified by consulting with CSAAP and looking at the literature.

30. The claimant says it is normal and to be expected that external peer reviewers make a number of observations on the first report which need addressing. The respondent did not disagree. However, the claimant says that usually the comments are addressed, the report is internally quality assured and then it goes out, without going back to external peer reviewers. She says the continual requests to add to and rerun tests following this stage were not usual and were indicative of the respondent stalling. The respondent says that with such difficult and sensitive research, it was perfectly normal and proper to check it was robust.

31. Mr Hanson's peer review was provided on 19 June 2012. He said the study had certain strengths but he would push for additional analyses to justify the conclusions. On 20 June 2012, Ms Endean emailed the claimant and her managers to say 'I think these comments are largely cosmetic (and slightly rude!) with the exception of (a) an issue about repeat observations which she needed to think about and (b) a point about understanding the selection criteria for going onto the SOTP. 'We need to see whether we can find the source of any negative selection bias that may be acting as an unobserved latent variable. This is I think the only hope that it works'.

32. On 25 June 2012, a specially arranged meeting of CSAAP was held for the claimant to present her analysis and discuss the initial results, so as to explore whether any contextualising caveats were necessary and a forward research strategy eg for an RCT. CSAAP was initially established in 1996 to accredit the SOTP programme and at that time was a non-departmental public body. In 2007, it was brought within the MOJ. It advises the MOJ in relation to using an evidence based approach to

accredit programmes to reduce reoffending. CSAAP had accredited the SOTP at 5 yearly intervals.

33. Ms Attrill from NOMS chaired the meeting. Also from NOMS were Ruth Mann, Adam Carter and two others. Ms Endean, Ms de Silva, Ms MacDonald, Mr Sadler and the claimant attended from the MOJ. Five CSAAP members attended ie Professor Losel, Professor Banse, Professor Grubin, Professor Murphy, Mr McGrath and Mr Seto provided written comments.

34. The claimant and Mr Sadler presented the CSAAP meeting with a report dated June 2012 ('the 2012 report') written jointly by the claimant and Mr Sadler. The research measured two and five year reconviction outcomes on sex offenders released from prison. The key points listed were that at the two-year follow up there were no differences in reconviction rates; at the five-year follow up, more treatment offenders were reconvicted of at least one sexual offence than the comparison group and had committed more sexual offences. This difference was statistically significant but there were limitations to the study based mostly on limitations to the data available for analysis. The report said the study could be repeated in 2- 3 years' time when a larger sample would be available to support the longer follow-up. Alternatively a RCT could be considered. The report said that its results should be treated with some caution as the study had a number of limitations. However, it was the most robust evaluation of the SOTP to date. What the claimant told the meeting, including her managers who were attending, is said to be protected disclosure 1A.

35. The minutes note the panel's feeling that the finding of raised reconviction rates was not expected and challenged a strongly held paradigm of correctional treatment. This was said to be a very surprising finding for a programme of this type and there were considerable implications for MOJ/NOMS and international correctional practice. The study was likely to be scrutinised very closely. It was therefore very important to make sure the results were reliable. There was a list of further recommended work including that the comparison group should only include those with an index sex offence and that CSAAP should be consulted regarding further relevant variables including those representing sexual deviance as well as criminality.

36. During 2012 and 2013, the claimant carried out extra work on the report, running tests on additional data.

37. At one point during 2013, the claimant was asked by a senior psychologist in NOMS whether the research had yet produced any results. The claimant said the results indicated it was harmful. Ms Endean found out and was very angry with the claimant. She told her she should be keeping the research confidential until an outcome was agreed. The claimant said, 'You are asking me to lie'. Ms Endean disagreed that was the correct viewpoint.

38. In autumn 2013, NOMS wrote to Ms Endean, asking her to stop the project on the basis that PSM was the wrong methodology. According to Ms Endean, she did not at that point agree the basic methodology was wrong, but there were a range of minor queries which she thought needed to be addressed. She discussed the matter with senior members NOMS. Ms Endean says they were happy for the research to continue, but they wanted it to be fully robust. We

39. Ms Skodbo took over briefly as line manager of the claimant in December 2013. In the claimant's later grievance, Ms Skodbo described a meeting with Ms Endean, Ms MacDonald and the claimant fairly soon after she took over, when the claimant was presenting an aspect of the SOTP project. Ms Skodbo said Ms Endean interrupted the claimant, told her she had not done what she had been asked and was intimidating to a degree which shocked Ms Skodbo. There were other meetings where Ms Endean was 'assertive' towards the claimant, though to a less overwhelming extent.

40. At a pre-meeting of the SOTP steering group on 13 January 2014, Ms Endean told the claimant to 'wipe that smile off your face' or something very similar. Ms MacDonald and Ms Skabo were present. Ms Skabo told the later grievance investigation that it was a throw away comment that made her feel 'deeply anxious'.

41. Given the passage of time, we cannot say when Ms Endean started shouting at the claimant during meetings. It is clear from Ms Skodbo's evidence to the grievance that the occasion she witnessed was not the first time and that the relationship was already problematic. The claimant repeated complained to her that she wanted the bullying to stop.

42. On 21 January 2014, the claimant emailed Ms Macdonald and her outgoing line manager, Ms Skodbo, saying:

> 'I want to object to the bullying I received at last Friday's SOTP update meeting. I really don't find it acceptable. It has happened a number of times previously, mostly with other colleagues present. I've raised the issue several times, and made it very clear how I feel about it, and the effect it is having on me. I'll keep doing so until it stops.'

43. Ms MacDonald emailed the next day to suggest that she discuss it with her incoming line manager, Sarah Morton, and then, depending on the claimant's preferences, have a meeting with Ms MacDonald. Ms MacDonald added 'If you'd prefer another approach, please let me know'. The claimant replied that she had spoken briefly to Ms Morton about the matter and asked whether Ms MacDonald thought Friday's meeting was OK or not. The claimant was referring to being shouted at in meetings by Ms Endean. She had told Ms MacDonald prior to this meeting that she did not want it to happen again, but it had.

44. Ms Morton had started as the claimant's new line manager on 21 January 2014. Her role was to oversee the claimant's work and ensure quality standards. At this point, the claimant was spending roughly 50% of her time on the SOTP project.

45. Ms Morton took direction from Ms Endean via Ms MacDonald on what was wanted for the presentation which the claimant was preparing for the steering group meeting on 24 January 2014. The project steering group comprised members of MOJ Policy and Analytic teams and NOMS practitioner and evidence specialists. The claimant was told that 'at tomorrow's presentation we do not draw firm implications on the impact of the programme'. Changes were also required to the claimant's slide pack, removing the claimant's conclusions. In particular, whereas one of the claimant's slides stated 'There are two possible implications of these results: (-) The core SOTP does not work/makes things worse OR (-) The methods used have been unable to attribute cause and effect to the findings.', it was replaced with a slide stating 'Discussion. Q. What do the findings mean? Q. What are the next steps?'

46. The claimant emailed on 24 January 2014 in response to these instructions:

> 'We can certainly NOT draw the conclusion that the SOTP works from these results. We haven't drawn firm implications that it makes offenders worse. However, it is entirely possible. I'm not sure I'll be able to attend a meeting if my research is hijacked by vested interests in the results being the other way round. The robustness of the methodology and the validity of the conclusions MUST be the decision of independent peer reviewers, not those with vested interests. I would also like my professional opinion respected above all other analysts, as I am the person who has been working on the data, mostly on my own, using extremely sophisticated techniques, for more than two years.'

47. Regarding the bullying complaint, after an initial conversation with the claimant, Ms Morton spoke to Ms MacDonald. She also discussed it with Ms Skodbo on hand over. She did not take any notes. They said meetings between the claimant and Ms Endean were often tense as both were frustrated over how the SOTP was progressing. Ms Skodbo said that the claimant would need a lot of support in meetings with Ms Endean because she was nervous about meeting with her. Ms MacDonald confirmed to Ms Morton that Ms Endean had said in a meeting words to the effect of 'Take that your smile off your face'. Ms MacDonald said she was not sure who the comment was aimed at. She told Ms Morton that there were tensions on both sides but Ms Endean was the director and she would speak to Ms Endean.

48. Ms Morton met the claimant again on 29 January 2014 to discuss the matter further. The claimant brought the MOJ's Bullying and Harassment Policy with her. The Policy says the MOJ has zero tolerance of bullying which means that managers will always 'treat allegations seriously, always investigate allegations and take proportionate action'. The Policy says that if an employee feels comfortable enough, they can speak

informally to their line manager. If they would prefer not to do so, they can speak to their line manager's manager / countersigner or to another senior manager. The Policy says that the line manager should be willing to have a relaxed and open conversation.

49. Ms Morton says they talked through the various options including raising a formal grievance against Ms Endean, but it was agreed as a first step that Ms MacDonald would speak to Ms Endean and ask her to be more sensitive in the future. The claimant says Ms Morton asked her, 'Are you sure you want to do this? Are you really sure you want to make a complaint about the Director of Analytical Services?' Ms Morton denies saying this. The claimant emailed Ms Morton later that day to say 'Thanks for today's chat I feel a lot better now'.

50. This meeting took place is a long time ago, which makes it difficult for the parties to remember exactly what was said. We find on the balance of probabilities that the options were talked through including that of taking a formal grievance. It is possible that Ms Morton suggested that a formal grievance might not at this point be a good idea and that they should first try Ms MacDonald raising it with Ms Endean. The claimant's email indicates she agreed and was happy with this approach.

51. Ms MacDonald did speak to Ms Endean mid-February 2014, although her evidence in the tribunal gave us the impression that the emphasis was more on the claimant's feelings rather than asking Ms Endean to change her behaviour. After all, Ms Endean was Ms MacDonald's own line manager and a very senior manager at that. The evidence of a number of witnesses was that Ms Endean was a forceful character. Ms Morton subsequently told the claimant during a meeting that this had been done.

52. By this time, the stress of the project and what she felt was bullying was affecting the claimant's mental health.

<u>The Technical Report and the second protected disclosure</u>

53. On 4 February 2014, Ms Attrill and Ms Ashcroft at NOMS emailed Ms MacDonald asking for a

> 'full technical Method and Results report that (in addition to the information presented verbally)
> - Gives an account of each analytical decision taken at each stage of the process and its rationale
> - Lists the 62 matching variables
> - Explains the original and final treatment samples and gives more information about each stage of loss. An analysis of differences between the original and final samples as there was considerable loss from sample size.
> - Gives absolute number of recidivists as well as percentage rates.'

They also asked for a copy of the dataset for the treatment sample, identifying both those removed from the sample and those retained in it, with conviction information.

54. The next day, the claimant emailed Ms Morton to say she should have a write-up available for NOMS by the end of the week. She pointed out that NOMS had already been provided with a copy of the treatment dataset in July 2013 and the 62 matching variables at the Steering Group meeting. She said it would not be possible to justify every decision made through 3 years of analysis to non-specialists. There were for example 70,000 words of computer code to explain. The QA process was supposed to cover this type of query. She added, 'I don't think it's appropriate for this research to be further delayed. The MOJ research process should be followed appropriately here – decisions on validity and reliability of the research are in the hands of the independent peer reviewers'.

55. The claimant and Ms Morton discussed what was feasible and NOMS were informed. The claimant then worked on expanding her 2012 report to include the additional technical information. The respondent now says that a separate technical report was required, but the claimant was not informed of this at the time. The emails in the trial bundle show Ms Morton was working with the claimant on her expanded 2012 report. Ms Morton, and later Ms MacDonald, came back with comments as they worked through several iterations of the report. No criticism was made of the claimant's performance and she was not told the report was not what was wanted. Ms Morton was unable to specify to the tribunal what was missing other than referring generally to the comments on the working drafts. She acknowledged it was difficult to understand what NOMS wanted.

56. On 27 February 2014, the claimant sent Ms Morton an email regarding certain suggestions she had made. She attached her most recent version of her report. She said she did not want to remove the line about the robustness of the research from the key points section. She also said this:

> 'I'm not prepared to remove the sentence that the research casts doubt on the efficacy of the SOTP, because it very clearly does. Anyone can see it from the results, and not mentioning it is disingenuous and unprofessional. Same goes for suggesting that the SOTP may cause harm – the research very clearly suggests that it does, and I've hardly mentioned it. The words I've used has already pushed me to my ethical and moral limits and I'm not going to be bullied or pushed any further.'

This is said to be the second protected disclosure.

57. On 7 March 2014, Aidan Mews signed off the claimant's expanded research report ('the 2014 report') for quality assurance ('QA') purposes. On the same date, Miguel Gonçalves signed off 'the final QA of this project'. Mr Mews and Mr Gonçalves were top analysts in the department. The respondent witnesses tried to suggest to the tribunal that this was only a partial QA, but that is not what the document states and it is not what Mr Mews suggested in his evidence. The report was not sent to NOMS at this point.

58. On 19 March 2014, Georgia Barnett at NOMS emailed the claimant thanking her for clarifying certain ongoing queries. She said she appreciated the work the claimant had done to clean and merge the datasets. She added, 'We're excited about the result, and just want to emphasise that our questions aren't in any way questioning the quality or integrity of work that you or your team have done, rather they are a reflection of some of the complexities of SOTP and the system used to record offenders' journeys through this suite of programmes'.

The third protected disclosure

59. On 19 March 2014, the claimant emailed Ms Morton. She said she had been feeling stress at work for two reasons. One reason was that she felt bullied at work and had made a specific complaint about this. The complaint included specific incidents and more general issues including oversupervision and reluctance to acknowledge her expertise. The other reason related to the evaluation of the SOTP. She said her report had been positively peer reviewed in July 2012 but not published. For the next two years, she had undertaken an enormous amount of extra work, basically on the same dataset, coming up with the same results over and over again. She said she had not been provided with the extra resources she had asked for. At the same time, concerted efforts had been made to stop the research by those with a vested interest in the results being the other way round. She added 'There are still no concrete plans for the finalisation of the project – and for me, this is quite unbearable. As far as I am concerned, there is potentially a serious public protection issue involved, and I am beginning to feel like I am part of a cover up, which for me is morally and ethically completely unacceptable. I also feel that asking me to do more and more analysis is both unscientific and possibly abusive.' She went on to say that she would like more time working from home and she would like to work towards a concrete, realistic and achievable plan for SOTP in line with the procedures for any other piece of research. The statement that 'there is potentially a serious public protection issue involved' is said to be the third protected disclosure.

60. Ms Morton responded by email the next day, saying they must have a discussion when the claimant returned from leave to discuss how she was feeling, her request to work at home and the helpful suggestion to agree a plan for the SOTP. She suggested using their regular catch up on 7 April 2014. The email does not refer to the bullying complaint. The claimant emailed back on 21 March to say she would also like to discuss her bullying complaint at the meeting as she was not satisfied with the response she had received.

61. Ms Morton met the claimant on 7 April 2014. The claimant asked for a guarantee that Ms Endean would not speak to her again as she had in the January meeting. Ms Morton said 'I can't do that'. She repeated that Ms MacDonald had spoken to Ms Endean regarding the need for sensitivity.

62. On 28 April 2014, Ms Morton met the claimant to discuss her year-end review for 2013/4. Ultimately this was assessed as a good.

Freedom of Information request; protected disclosures 4 and 5

63. On 17 March 2014, the MOJ had received a FOI request from Dr Ross of Broadmoor Hospital. The claimant drafted a response which refused disclosure citing section 22 and said 'you may be interested to know we plan to publish in 2014/5'. Ms Morton asked for that sentence to be removed if it was not needed. Dr Ross then required an internal review. Ms Peacock responded, stating the original refusal was compliant. She said the analysis was still ongoing, that MOJ research undergoes robust QA before findings are made publicly available and it would be premature to release ahead of the quality checks.

64. On 14 May 2014, Ms Endean required additional QA on the 2014 report. An extra QA report was provided by Mr Mews on 20 June 2014. The general tenor of Mr Mews' report was that major errors in the research were unlikely.

65. Meanwhile, Dr Ross complained to the Information Commissioner ('ICO'). The respondent's Data, Access and Compliance Unit ('DACU') warned Analytical Services that the section 22 arguments were weak. On 24 June 2014, Ms Morton sent the 2014 report to NOMS, saying 'Attached is the latest version of the report we have been preparing on the SOTP results which is the report we may be required to release via FOI.' She says the report is currently with Ms Endean who may suggest revisions to the analysis and it should not be circulated any further at this stage.

66. On 25 June 2014, Ms Morton met the claimant to update her. The claimant felt Ms Endean should not use the NOMS and CSAAP emails as evidence of intention to publish because they had vested interests in extending the project. The claimant became very upset. She asked Ms Morton how she could sleep at night with children being harmed as a result of decisions she was taking, and what if it was her daughter being molested. Ms Morton ended the meeting at that point because she found these questions personal and upsetting. The claimant was also upset and went home in tears. She was off sick with stress on 26 June 2014.

67. On 27 June 2014, the claimant emailed Ms Morton with a copy to Ms MacDonald. She started by saying she hoped they understood her frustrations with the way the SOTP was being managed and the effects it was having on her mental health. She said the recent FOI request was a very good example. She reminded Ms Morton that at their meeting a few months previously, she had pleaded with her to put the SOTP paper on the usual publication track and to agree a date to work towards like any other paper. That request was ignored. However, now in the context of the FOI request, when they were asked to provide evidence of a settled intention to publish, 'suddenly it appears we always had concrete plans to publish'.' The claimant said that her main concern, however, was as

always the public protection implications of the research. Since 2012, they had been aware that treated offenders went on to offend more than the comparators. For two years she had been asked to refine and recalculate and add more variables. The claimant repeated that 'attendance on the SOTP is associated with higher levels of re-offending' and 'the public protection implications are quite alarming'. She said the suggestion that the methodology was potentially inadequate was a red herring as nothing could be done about it – PSM had its limitations but there was no evidence that the limitations were any greater or lesser with these offenders. The claimant does not in terms say that the research findings are being covered up, though that is the clear implication of the email.

68. The claimant said 'I feel like I've been pushed beyond my ethical, moral, and professional limits with this research (and I've explained this to you before). I also feel that my professional expertise is being ignored (and this is a form of bullying) ….. This project has been affecting my mental health for a long time.'

69. On 29 June 2014, Ms Endean emailed Ms MacDonald and Ms Morton to say 'I would massively prefer if we could ask someone else to do the analysis rather than Kathryn as the more I look at it the more I am concerned hat she is either deliberately trying not to check whether the negative result is spurious or she doesn't really understand what the analytical issues are. However happy to give her one more chance.'

70. On 30 June 2014, Ms Morton met the claimant to discuss her well-being. The claimant said that she wanted to work at home when necessary and, rather than attend meetings with Ms Endean herself, she suggested an advocate (Jenny Cann) to represent her views. This was agreed with Ms Cann on 2 July 2014. The claimant did not attend any further meetings where Ms Endean was present.

71. On 2 July 2014, the claimant emailed Ms Morton and Ms MacDonald regarding the reply to the ICO which DACU had drafted and approved. She said the response was based on NOMS/CSAAP objections to the research, and the 2012 independent peer reviewers' comments had not been acknowledged. She said the peer reviewers' concerns had been addressed immediately in 2012. She added,:

> 'My concern is that the views of those with a vested interest in the research are being given a higher priority than the analysts' and the independent peer reviewers'. I'm worried that this could be viewed as corruption.'

72. This prompted an email from Ms Endean to Ms MacDonald and Ms Morton on 4 July 2014 as follows:

> 'I have just read this. I am sorry but it is really ridiculous to call this corruption. The problem is competence on Kathryn's part in that she doesn't appear to understand or be able to act on my concerns and/or a refusal to consider any other point of view except her own. This has led me to have major concerns

> about the quality of the analysis and frankly what peer reviewers said in 2012 is irrelevant until my concerns are addressed. Publishing something that I still have major concerns about is going to damage the reputation of the department and may have unwarranted negative impact on operational practice.'

73. On 4 July 2014, Ms MacDonald met the claimant to discuss her complaint of corruption. Ms MacDonald said there were no grounds for the complaint and no vested interests.

74. Also on 4 July 2014, the claimant provided her managers with a further research paper 'Sex Offender Characteristics Report'. This was designed to accompany her 2014 report and to provide extra analysis. The report said that, contrary to what NOMS believed, the literature indicated there was limited empirical evidence associating sexual deviancy or any of its proxies with sexual reoffending.

75. Meanwhile Ms Morton had met HR to discuss the claimant's wellbeing and also 'performance/behaviour'. HR noted 'We discussed using the Action plan / Managers template in the first instance with addressing her quality of work then potentially moving Kathryn off the project if there are no improvements made.'

76. On 7 July 2014, DACU replied to the ICO regarding Dr Ross's complaint. It said that the MOJ intended to publish the research in December 2014 subject to the quality assurance steps outlined in the letter. The publications grid was enclosed as part of the evidence of intention to publish. (The publications grid lists all publications which are planned to be published fairly soon and goes to the Cabinet Office every 3 – 6 months.) Minutes of the CSAAP panel meeting in June July 2012 and NOMS comments in September 2013 were provided as evidence that it was reasonable to withhold information until the point of publication. A list of steps taken to date was set out.

77. On 13 July 2014, Ms Endean emailed Ms MacDonald and Ms Morton. She said

> 'I remain concerned that our approach so far is unlikely to withstand a challenge that it has not met accepted government standards or that we have responded appropriately to previous peer review comments. In addition the write up of the results is in my view wholly unacceptable both in terms of its quality and also willingness to accept competing explanations as to why we are observing the results that we observe. As such publication now would be hugely detrimental to the very high reputation of AS.'

78. On 13 July 2014, Ms Endean provided a detailed plan for what she considered needed to be done: then 'Analysis Plan for SOTP'. In the claimant's view, most of this work had already been done.

79. Ms MacDonald met with the claimant in an attempt to reassure her that the MOJ had no vested interests. On 18 July 2014, the claimant emailed

Ms MacDonald Morton to thank her for a helpful discussion, but she added:

'I'm still concerned however that we could be considered in breach of the Civil Service Code, both with the ICO response, and the treatment of the research in general'.

Ms MacDonald spoke to the claimant and forwarded the email to Ms Endean. Ms Endean emailed Ms MacDonald and Ms Morton in response, saying:

'Can you tell Kathryn that I would welcome her putting in a formal complaint that we have not followed the CSC. However this would expose the poor quality of her work (I would need to be very clear why the work is way below what I would expect from a band A) and therefore she might want to think twice. I am really getting to the point where I am going to insist that we start formal poor performance proceedings as this behaviour is not acceptable and we should not accommodate it. If we are failing the CSC then it is in this regard rather than anything else '

Ms MacDonald told the claimant that she was welcome to put in a formal complaint, but she should think carefully before she did so. The claimant took it as a threat and decided not to put in such a complaint.

80. On 28 July 2014 after time off with stress, the claimant returned to work and once again suggested she was being bullied. Ms Morton suggested independent mediation and completed the referral to OH.

81. On 1 August 2014, the claimant emailed Ms MacDonald and Ms Morton to apologise for any recent tension she had caused. She said she felt totally exhausted and overwhelmed by the list of things Ms Endean wanted doing and she knew Ms Morton was doing the best she could in a difficult situation.

82. In early October 2014, Michael Cohen (two grades below the claimant) was put onto the claimant's team to help with the project until its conclusion.

83. Throughout this period, more work was being done on the project and Ms Endean was taking a very detailed hands-on approach. On 21 October 2014, Ms Endean emailed Ms MacDonald, Ms Morton, Ms Cann and Osama Rahman (who was taking over from her as Director), stating she was firmly convinced the approach they had been using was wrong.

<u>The Mid-Year Performance Review</u>

84. The respondent operated a mid-year review process at that time. Under the process, the job holder drafts a self-assessment by 10 October. The job holder and line manager must then hold a meeting by 17 October, or in any event, before the relevant consistency checking meeting, to discuss performance. By 31 October, there must be light-touch

consistency checks in a meeting within the unit. Line managers must not inform the job holder of their indicative performance mark until after this meeting. By 7 November, indicative performance marks will be confirmed to job holders. Under the Performance Management Policy and Procedure, it is stated that there should be regular performance discussions throughout the year.

85. On 20 October 2014, Ms Morton met the claimant with the intention of discussing her performance under the mid-year review process. The claimant had drafted her self-assessment. After some general discussion, the claimant told Ms Morton that she had felt bullied by her all year. This was the first time the claimant had clearly told Ms Morton this. Until this point, Ms Morton had understood all the claimant's references to bullying to refer to Ms Endean.

86. As a result of this allegation, Ms Morton left the room and did not discuss all the matters she had planned to raise with the claimant. The claimant sent an email to Patricia Lloyd immediately after the meeting saying she had felt quite comfortable in the meeting up until the point when she raised bullying and also that she had received no indication whether she was considered effective or not. This email leads us to accept the claimant's evidence that Ms Morton did not criticise her performance during this meeting and certainly did not say anything which might support a 'must improve' marking.

87. Ms Morton told Ms MacDonald that the claimant had accused her of bullying when she tried to raise areas of concern. Ms Morton also discussed the matter with HR. HR advised that Ms Morton work with the claimant to establish the root of the perceived bullying. If the claimant did not wish to discuss this with her, she could advise her that she could speak to Ms MacDonald, another manager of Ms Morton's grade or workplace support/Employee Assistance Programme. Alternatively if the claimant would like to make her allegation formal, she could submit a grievance. Ms MacDonald could also say she was willing to accept mediation.

88. Ms Morton then emailed the claimant to suggest they meet so she could explore what concerned the claimant and what she could do differently. She asked if the claimant would feel comfortable to meet her to discuss this. She added' 'Alternatively if you would prefer you could instead speak to Cressy, another G6 manager or approach workplace support'. She said they could discuss how they could work together with the help of mediation. She did not mention the option of a formal grievance.

89. Ms Morton met the claimant to discuss the bullying allegation at their regular catch-up on 27 October 2014. The claimant said her complaints related to not being trusted to do her job, being micro-managed, her work not being considered useful and being asked to make unnecessary changes in it. She was also concerned that Ms Morton had not appropriately followed up the complaint she made in January 2014 about

bullying by Ms Endean. She said she was happy for Ms Morton to put in a request for mediation although she might not go through with it because she was considering putting in a more formal complaint about Ms Morton.

90. The claimant subsequently emailed to say she had not intended the meeting to go so badly but she was having trouble with stress and tension leading up to meetings with Ms Morton as well as general mental health issues. The claimant asked if they could have a rest from face-to-face catch-ups for a few weeks to get on with the work, and then catch-up by email or in meetings with other people present.

91. Ms Morton asked HR for advice. She agreed to a pause on catch-ups for the next couple of weeks and she suggested subsequently having Ms Cann join them in SOTP related meetings. She also suggested the claimant complete an individual stress assessment when she felt able to do so.

92. On 3 November 2014, Ms Morton attended the consistency check meeting with Ms MacDonald and other Grade 6s. There were three classifications for the mid-year reviews: 'outstanding', 'good' and 'must improve'. They decided that the claimant should be given 'must improve'.

93. The claimant was told of her mid-year review marking on 1 December 2014. This was when she felt able to restart the one-to-ones. It had been arranged that Jo Peacock, Head of the Transforming Rehabilitation Analysis Programme, come along to the meetings as an independent person for the next month. The claimant had not been expecting to be given her mid-year appraisal at this point or that she would be getting a 'must improve' rating. The claimant became extremely distressed and angry. She had never been marked below 'good' before. She said she had complained of bullying for some time and nothing had been done. She said she felt she had no choice now but to raise a formal grievance against Ms Morton. She also complained that her stress arising from the unresolved bullying had not been taken into account. She said it was unfair that she was being given feedback about areas needing improvement so long after the consistency checking meeting. Ms Morton ended the meeting early when the claimant started crying.

94. Following the meeting, the claimant emailed Ms MacDonald asking to appeal. She said it was unfair that performance issues had not been mentioned to her at the mid-year review meeting in October. She said she had been suffering from poor mental health since January. Further, she did not believe her work merited such a low rating.

Notifying the whistleblowing officer

95. Meanwhile, the claimant had emailed Patricia Lloyd on 18 July 2014 as she had discovered she was one of the MOJ's whistleblowing officers. The claimant met her. She told her about the SOTP research and that it indicated the treatment might have a negative effect on those

participating, leading to a likely increase in sexual offences by released prisoners. This meant the public was at increased risk. The claimant said the research should be published in a timely manner so that action could be taken to halt the programme, and not continue to be subject to unnecessary delays. She said that the research had been peer reviewed in 2012 which was largely positive but suggested some further minor work. She said she had been asked to carry out unnecessary further analysis and that FOI requests were not being answered correctly. These are the alleged protected disclosures 6a – 6d.

96. At the first meeting, the claimant did not want Ms Lloyd to proceed with a formal investigation, but to keep the matter under review. The claimant had several more meetings with Ms Lloyd where she expressed her full range of concerns including that she was being bullied and that the research was being covered up. The respondent accepts the claimant told Ms Lloyd that the NOMS representatives were highly invested in the SOTP and so did not want to acknowledge that it may not be meeting its objectives. The respondent accepts the claimant also said she did not consider that her managers were supportive, that Rebecca Endean had shouted her and/or that she was upset at being asked to re-run the research or try different approaches when she considered that this was unnecessary. These are the alleged protected disclosures 6e and 6f.

97. The respondent does not accept that the claimant said the following to Ms Lloyd, which comprise the protected disclosures 6g-6l:

97.1. That there had never been any robust evidence that the SOPT worked and that oft-repeated claims of efficacy had been made based on little or no evidence. [PID 6g]

97.2. That the research should have been published immediately after the peer review in 2012. [PID 6h]

97.3. That sexual offences committed since February 2012 may have been prevented if the SOTP had been halted in February 2012. [PID 6i]

97.4. That NOMS and CSAAP were covering up the research by subjecting it to continuing and invalid criticism. [PID 6j]

97.5. That the claimant was being bullied in order to stop her from pursuing the publication of the research. [PID 6k]

97.6. That there was a serious breach of research ethics by reason of the endless running and re-running of the research results which was done in order to try and reverse or minimise the findings which was part of the cover-up. [PID l]

Nevertheless, we find on the balance of probabilities that the claimant did make these extra observations to Ms Lloyd. They are consistent with what she was repeatedly saying to everyone. Although Ms Lloyd does not specifically remember the claimant saying those things, the claimant does remember. Given the overwhelming amount of detail with which the claimant was more familiar than Ms Lloyd, we think on balance the claimant's memory is more likely to be reliable on this point.

98. In an email dated 23 October 2014, the claimant emailed Ms Lloyd to say:

> 'Its just not appropriate to keep running and re-running the same analysis on the same data, hoping that the results will change because they won't. I need to know there is an end to this piece of research and also that fair and independent processes are being followed (which they currently aren't).

Meeting with Mr Rahman and Protected Disclosure 7

99. On 1 November 2014 the claimant with Ms Lloyd met Mr Rahman. He had taken over from Ms Endean, initially overlapping with her from 1 October 2014 and Ms Endean had briefed him on the SOTP issues. This was his first day in sole charge. Ms Lloyd had previously informed Mr Rahman that the claimant had approached her in her capacity as whistleblowing officer.

100. At the meeting, the claimant reiterated her concerns about the SOTP research. She also said that she had been bullied by Ms Endean and unsupported by Ms Morton. This was alleged disclosure 7i.

101. The respondent accepts that the claimant told Mr Rahman that NOMS and CSAAP were covering up the research by subjecting it to continuing and invalid criticism. This was alleged disclosure 7h.

102. It is accepted by the respondent that the claimant told Mr Rahman the information itemised as disclosures 6a – 6f (above). The respondent also accepts that the claimant told Mr Rahman the information itemised as disclosure 6g. This may be an error as it is denied that disclosure 6g was made to Ms Lloyd, but Ms Lloyd was at the meeting. However, on the balance of probabilities, as we found disclosure 6g was made to Ms Lloyd, we also find it was made to Mr Rahman at this meeting. These disclosures in respect of Mr Rahman are numbered 7a – 7g.

103. Mr Rahman decided the way to resolve the difference of opinion between who he considered to be two good analysts (the claimant and Ms Endean) was to bring in an Expert Advisory Group. He spoke to the Chief Executive for NOMS, Michael Spurr, who was content with the approach. He consulted the claimant and other members of the Directorate regarding who should be on the group. He appointed Professor Losel, Professor Dorset, Dr Hanson, Professor Dearden and from the DWP, Paul Ainsworth (sometimes covered in his absence by Mike Daly). Professor Duggan was on the group at the claimant's request. The group involved experts on sex offender treatment and on the methodology and application of PSM. Mr Rahman decided his approach would be to present the work done on the SOTP to date and to do further work as advised by them.

104. The claimant was content with this approach. Mr Rahman decided that, as she was happy with the approach, it was not necessary to take formal steps under the whistleblowing policy. The claimant did not request a formal whistleblowing investigation either.

105. Regarding the bullying claim against Ms Endean, Mr Rahman decided there should be an informal fact-finding exercise. He had not appreciated that the bullying claim was against Ms Morton too, He thought she was simply accused of not being supportive. After speaking to Ms MacDonald and Ms Morton, he decided a formal investigation against Ms Endean was unnecessary. He was unsure whether Ms Endean's 'robust challenges' of the claimant constituted bullying or not and in any event, she had left.

Challenging the mid-year review and the claimant's move

106. The claimant emailed Ms MacDonald after she discovered her mid-year performance rating on 1 December 2014. She said she was devastated and wised to appeal the decision. She referred to her poor relationship with Ms Morton and that she had felt bullied by her for a very long time. She said she had told Ms MacDonald this and had been considering taking a formal grievance for a long time, but was hoping to settle things informally. She said she had already made a number of other bullying complaints this year which had not been addressed in accordance with MOJ guidance.

107. The claimant also telephoned Mr Rahman in distress to inform him of her mid-year performance rating. She was very distressed and Mr Rahman was worried about her state of mind. He told the claimant that he would instruct the line management chain to leave her mid-year review performance box mark as blank for now.

108. Mr Rahman discussed with Ms MacDonald and Paul Allen (another Deputy Director) the possibility of moving the claimant to a different line management chain. Mr Rahman told the tribunal that his reason was that he worried about the claimant's health and her relationship with her management chain. They agreed the claimant could be moved to Christina ('Tina') Golton's line management. Ms Golton reported to Mr Allen. The claimant would continue to have 50% of her time allocated to the SOTP work.

109. As a result of the claimant's email of 1 December 2014, Ms MacDonald took HR advice and they again suggested doing an informal fact-finding exercise into the bullying. On 5 December 2014, Ms MacDonald met the claimant to discuss the bullying issues. The claimant said she had a documented body of evidence but highlit the key issues. In terms of what the claimant wanted, she said she wanted the bullying to stop. She felt hugely relieved when Mr Rahman had said she could move to a new line manager and she felt that would address the issue. In the meantime she asked if she could come to Ms MacDonald direct over matters rather than meeting with Ms Morton. That was agreed. Ms MacDonald steered the conversation away from the mid-year appraisal marking because it had in any event been left blank while the respondent tried to resolve the bullying concerns and issues of stress.

110. On 15 December 2014, Ms MacDonald met Ms Morton to discuss the bullying allegations. Ms MacDonald heard Ms Morton's response to the key points. She didn't look at the claimant's 'detailed body of evidence'. She did not talk to anyone else. On 22 December 2014, she told HR 'No case to answer in regard to bullying'.

111. On 19 December 2014, Ms MacDonald emailed Mr Rahman, Mr Allen and Ms Morton to say she had discussed future work and line management arrangements with the claimant, who was very happy with the approach. The claimant would move to Ms Golton's team on 13 January 2015 and would continue to work on the SOTP, which took around 50% of her time. The email said that 'in all comms, the reason for the move is SPCR coming to an end so around half Kathryn's time is coming free. The other half is needed for SOTP. We have an urgent need in SRFFAS for 50% of someone with Kathryn's skills so we are moving her to that role'.

112. On 22 January 2015, Ms MacDonald met the claimant to see how she was settling into her new role. She told her the outcome of her informal fact-finding exercise and said she had decided not to investigate formally under the grievance policy. She felt there were two different perceptions of events. Ms MacDonald said if the claimant was not satisfied, she could take out a formal grievance herself. The claimant replied by email dated 26 January 2015 asking for a new investigation into her formal complaint about bullying and a separate formal complaint about the performance management process and her mid-year review meeting.

113. On 29 January 2015, Ms MacDonald responded that the formal grievance should be made by completing an attached form and submitting it to her current line manager, ie Ms Golton. This was the first time the respondent had given the claimant a form and told her the precise mechanism for a formal grievance.

114. Ms Golton discussed the claimant's complaint, hoping it was possible to resolve the issues through management action rather than a formal grievance. Mr Allen, Ms Golton and Ms MacDonald then met to put together a management plan. However, after a further meeting with the claimant, the claimant said she felt the suggested approach did not resolve the issues and she would like to make a formal complaint.

<u>The formal grievance</u>

115. Ms Golton emailed Mr Rahman, Ms MacDonald and Mr Allen on 5 March 2015 to say that, in order to get closure, the claimant 'wants answers to what action was taken; whether it was/was not in accordance with the guidance, why the issue was not addressed quicker and a validation of whether what occurred was or was not bullying'.

116. Mr Rahman therefore commissioned Elliot Shaw on 24 March 2015 to be the investigating officer. Mr Shaw had recently joined the MOJ at Director level and was outside the management chain. Mr Rahman filled in the Grievance Investigation Notification Form which stated, 'The employee has raised a grievance around performance management processes not being followed and has been subject to bullying and other investigation. I believe a grievance investigation on the issues raised is merited.'

117. There is some lack of clarity as to whether the claimant wanted Mr Shaw to investigate the bullying itself as well as the lack of proper investigation into it (which the claimant asserted was a further act of bullying). However it does seem that although Mr Shaw pressed the claimant into including an investigation of Ms Endean's behaviour, the claimant felt it was all too long ago and pointless now she had left. Mr Shaw therefore focused on whether her complaints of bullying had been appropriately dealt with. The mid-year appraisal was also part of the grievance.

118. Initially it was envisaged that the investigation would be completed by 20 April 2015. In the event, Mr Shaw had to request two extensions. Mr Shaw said this was because of the amount of work involved and also the Easter holidays. He took statements from the claimant. Ms MacDonald, Ms Morton, Mr Rahman, Ms Endean, Ms Lloyd, Ms Skodbo and Ms Golton.

119. We were not given much detail of Ms Shaw's alleged lateness to his meetings with the claimant. He did not recall, but said it was possible he may have been running 5 or 10 minutes late because previous meetings had overrun. The claimant suggested that possibly one meeting had been 20 minutes late. She accepted the reason may have been a previous meeting overrunning. We can make no more specific findings. The claimant accepted in cross-examination that she did not think Mr Shaw was late because of her disclosures.

120. Mr Shaw knew what the claimant was saying about the SOTP project, both from what she told him and from subjects discussed with the other witnesses. The notes of the grievance interview with the claimant note her saying, 'The results say that the sex offender's programme may be harmful. Some people were upset by this and I felt their pressure on me to drop those research results and have them quashed. All of these incidents have been in context of this work'; 'It has also gone before NOMS but they are dead against the research. I feel it lulls everyone into a false sense of security. The research shows that by completing the programme they are more likely to reoffend.' Regarding Ms Endean, the claimant said, 'She shouts, mocks me in meetings and is sarcastic. I haven't been to a meeting with her in 13 months. She refuses to acknowledge the results.'

121. Mr Shaw completed his investigation report on 9 July 2015 and sent it to Mr Rahman. He recommended that the grievance be rejected. The report was set out in detail with evidence for and against, followed by findings. Mr Shaw had some criticisms. He said that better project governance could have helped to ensure the project did not run on. More external input and oversight would have helped address internal fears of a cover-up. He also recommended a more open environment, which Mr Rahman was seeking to create, should be encouraged 'as it is not difficult to see how the prior environment could discourage people from raising formal complaints'. However, on balance, Mr Shaw did not uphold the grievance because he felt that Ms MacDonald and Ms Morton had made reasonable efforts to deal with the bullying complaints and stress, and he felt that the mid-year review was in line with MOJ policies and processes. On the bullying complaints, he said there was a difference in view as to what was expected but Ms Skodbo had said the claimant did not want to formalise her complaints. There was also the claimant's email of 1 August 2014 where she said she knew Ms Morton was doing the best she could. If the claimant had not been satisfied with the responses, she could have gone to HR, the Employee Assistance Programme or one of the Bullying and Harassment advisers. On the mid-year review, even though tensions had prevented conversations being as open as they could be, overall the process had been followed. Regarding stress at work, multiple adjustments had been made.

122. The claimant was given the report and then invited to a meeting on 31 July 2015 to discuss it. Mr Allen accompanied her by way of support. The claimant said there were certain inaccuracies and that her bullying complaints had not been investigated properly.

123. On 16 September 2015, Mr Rahman met Ms Golton and Mr Allen to discuss the outstanding issue on the mid-year review. They decided, due to the passage of time, to record no mark. Ms Golton gave the claimant an overall performance mark of 'good' for the year. Mr Allen countersigned this.

124. The effect of this was partially to uphold the claimant's grievance on the mid-year review marking since what she had wanted was a good marking. On the bullying part of the grievance, Mr Rahman confirmed that it was not upheld because there were two sides to the story and HR processes had been upheld.

<u>The ongoing project and the restructure</u>

125. Meanwhile, the first meeting of the Expert Advisory Group had been on 31 March 2015 when an overview of the methodology and findings to date was presented. The claimant attended as did Ms Morton, Ms MacDonald and Mr Rahman who chaired. Mr Cohen did the presentation. Panel members were invited to submit written comments. The group had met again on 15 June 2015 and there was further discussion. The members of the panel had divergent views but at some point they came

to a joint decision that the analysis would need to be rerun with a different design ie on an ITT basis. This would essentially involve starting again from first principles.

126. On 19 August 2015, Mr Rahman was notified that Mr Cohen had been offered a promotion elsewhere. Mr Rahman said it was a priority to have someone on the project who understood PSM and the best option was to move Aidan Mews across. Mr Mews was the Directorate's lead on statistical methodology.

127. In Autumn 2015, there were structural changes such that Ms Golton moved to be line managed by Ms MacDonald. Mr Rahman thought it would be bad for the claimant's health to come back into Ms MacDonald's section. The respondent created a new role for the claimant in Mr Whitehouse's team who in turn reported to Mr Allen. Ms Golton told the tribunal that the claimant's work for her had been good throughout, and that she seemed to be relieved not to have to move back into Ms MacDonald's team. The claimant did not express any significant concerns about the role or ask to remain in Ms Golton's team in these circumstances. In the event, Mr Rahman says the claimant proved to be a good performer in this new role.

128. Mr Rahman appointed John Marais to take over from Ms Morton as the SOTP lead from November 2015. Mr Marais reported directly to Mr Rahman. By this time, the decision to rerun the project had been taken and Mr Marais's role was to oversee the next phase of the project. Mr Rahman felt that as the analysis was to be rerun from the beginning, it made sense to have different people looking at it. He told Mr Marais that the claimant would only be available one day/week to provide input on compiling the new dataset. Mr Marais made Mr Mews the lead analyst on the project. Mr Mews led a team with Mark Purver and Laura Di Bella.

129. The key difference between the new design and the original methodology were the change from per protocol to ITT. In the claimant's research, an individual was allocated to the treatment group if they had received core SOTP either on the first or on a later prison spell over the period covered by the project. In the final study, an individual was allocated to the treatment group if they had received core SOTP during their first prison spell. The other key change was the addition of more variables. The claimant had started with 13 variables and increased these over time to 62. The eventual study matched 87 variables.

130. In an email dated 18 November 2015, the new lead arrangements were set out. Mr Ejaz was to provide support on data matching. It then states:

> 'We will continue to make use of Kathryn Hopkins' expertise in this area in providing expert advisory support in compiling the dataset. Given the importance of the income forecasting work that Kathryn is working on … I can only afford to allocate one day per week of her time on compiling the data set.'

131. Mr Mews says the claimant's most valuable on-going contribution was the 'handover' information from the considerable expertise she had built up having led the project previously. He says he was therefore particularly keen for her to remain involved and that she had the option of joining the weekly team meetings which they held up to 4 February 2016. He says that in practice she rarely attended after the first few weeks though she occasionally sent an email with some thoughts. We accept Mr Mews evidence both as regards the claimant's contribution and as to her invitation to the meetings. The fact that he later supported her name being added as an author of the final report suggests to us that he was not hostile towards her involvement.

132. In September 2016, the claimant moved to another government department on promotion.

Publication of the final report

133. The final report was completed in March 2017. It found that 'More treated sex offenders committed at least one sexual reoffence (excluding breach) during the follow-up period when compared with the matched comparison offenders (10% compared with 8%)'. Although this was a slightly smaller differential than the claimant had found, it was still statistically significant. Essentially it confirmed what the claimant had been saying all along.

134. Once the report was completed and signed off, Mr Spurr decided to stop the SOTP programme.

135. Mr Rahman asked one of the analysts who was still in touch with the claimant, Ms Logue, to tell the claimant about the results and that the claimant was 'vindicated'. Ms Logue did so.

136. The Report was submitted to Ministers on 29 March 2017. Mr Marais was on leave from 6 March – 21 April 2017. Due to the calling of a General Election, purdah placed an embargo on publication from midnight 21 April 2017 until the new polling stations closed on 26 June 2017/ The Report was published on 30 June 2017.

Listing authors on the Final Report

137. The final report lists as co-authors on the front page 'Aidan Mews, Laura Di Bella and Mark Purver, Ministry of Justice'.

> 'Acknowledgements
> From the Ministry of Justice the authors would like to than Imran Ejaz, Kathryn Hopkins and Michael Cohen for their significant contributions to this project, and John Marais and Osama Rahman.
> The authors would also like to thank an external advisory panel comprising of Conor Duggan, Friedrich Losel, Karl Hanson, Lorraine Dearden, Mike Daly,

> Paul Ainsworth and Richard Dorsett. Thanks are also due to Gerald Gaes and Martin Schmucker for their comments on the report.'

138. Mr Mews says he felt from the outset that the claimant should be named on the eventual report because of the very large amount of work that she had done on previous iterations of the study. Having said that, the first draft of the report for the expert advisory group was by Ms Di Bella and she omitted to note the claimant as one of the authors, simply noting herself, Mr Mews and Mr Purver. For the final report, Mr Mews slightly changed the order to reflect the relative amount of work done, so putting himself first, although he thought of them each as equal authors.

139. Mr Marais says he made the initial decision who should be named as co-authors of the report and that he decided it should be the three because they were the ones working on it at the time. Mr Rahman approved the decision. Mr Rahman says he did not give it much thought at that point. Mr Rahman's personal view is that no names should go on government research reports because the whole department needs to be ready to deal with follow up enquiries.

140. When she saw the report, the claimant contacted Mr Mews and said she wanted to be named as lead author. Mr Mews said he was happy for the claimant to pass on this request to Mr Rahman, which she did. At Mr Rahman's instigation, Mr Ellerd-Elliot, the Chief Statistician and Deputy Director of JSAS, asked Mr Marais and Mr Mews for their views. He asked how much of the final text was a direct lift from the claimant's work.

141. Mr Mews emailed back to say:

> 'You are correct that she is presently acknowledged rather than a main author. When essentially taking over from her I suggested back then that her name should be on the report as she has done a massive amount of work on the study over the years, even if 'her' iterations turned out to not be the final one. So it's probably my fault that this issue has arisen.
> I personally would be happy to add Kathryn's name and think this could be justified as much of the background section (in particular the 'Efficacy of treatment for sex offenders – UK and international evidence' section) was copied from her previous report. This is not a high proportion of the overall report, less than 5%, though.'

142. However, Mr Marais was vehement that the claimant should not be cited because the evaluation had started again from scratch. Mr Rahman therefore decided not to add the claimant as an author.

143. Mr Marais says in his witness statement that he was 'unaware of any of the claimant's claims about the SOTP project'. We will address what we feel Mr Marais knew about the project and his reasons in the conclusions.

144. In his evidence to the tribunal, Mr Mews said he had been aware of the project before taking it over but not any detail. He said he was aware

of the 'urgent and sensitive nature of the SOTP evaluation'. He said he knew there was a 2012 and 2014 report and that the claimant was involved in those, but not how much she had done. He said he did not want to be influenced by what work had been done previously when he took over as the point was to start again. He said he had heard very little about the claimant's role on the previous research. He had been briefed by Ms Morton when he took over, but she had not mentioned that the claimant was upset. He had not spoken to Ms Endean about the project.

Non-promotion

145. In July 2016, there was a general opening for anyone interested in promotion from Grade 7 to Grade 6 of Analytical Services. The claimant claimed that she was not shortlisted by Mr Rahman or Ms MacDonald because of her protected disclosures. Unfortunately the claimant had no details about this. She did not know who had made the decision. Ms MacDonald and Mr Rahman said they were not involved. Although the claimant knew other Grade 7s had applied, she did not know whether any of them had been shortlisted. She had not herself been given a reason why she was not shortlisted and she had not asked.

146. Ms MacDonald was not involved in any part of this recruitment exercise. It appears to have been carried out by other Deputy Directors in Analytical Services.

Law

147. Under Employment Rights Act 1996, s47B a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure. A 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Under s43B(1), 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, inter alia, 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, or

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

148. It is necessary for 'information' to be disclosed and for the worker's statement not to be simply an allegation. However, there is no rigid divide between information and allegation. In order for a statement or disclosure to be a qualifying disclosure, 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. A statement also derives force from the context in which it is made. (Kilraine v LB Wandsworth [2018] IRLR 846, CA.)

149. The public interest requirement applies to disclosures on or after 25 June 2013. Guidance was given by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] IRLR 837, CA. The question is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest. Where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

150. Once it is established that the claimant made a protected disclosure and that she was subjected to a detriment, it is for the employer to show the ground on which any act or deliberate failure to act was done. (ERA 1996 s48(2) .) With regard to the causal link between making a protected disclosure and suffering detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. (Fecitt v NHS Manchester [2012] IRLR 64, CA)

151. Under s48(3), a claim that a worker has been subjected to a detriment for whistleblowing must be made within 3 months of the act or failure to act complained of or, where that act or failure is part of a series of similar acts or failures, the last of them. A claim can be made within such further period as the tribunal thinks reasonable where it is satisfied it was not reasonably practicable for the complaint to be presented within 3 months.

Conclusions

152. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

153. We have at all times borne in mind the passage of time since many of the events concerned and that memory is not always reliable.

Protected disclosure 1

154. The first alleged disclosure is that the claimant told Ms MacDonald, Ms de Silva and Ms Mann in a meeting in Spring 2012 that the SOTP did not reduce the sexual re-offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public.

155. The respondent accepts this was, if made, a disclosure of information.

156. We find the claimant did make this disclosure. As well as the claimant's own recollection, it is clear that it must have taken place from subsequent events including Ms Mann's email of 22 May 2012 and the calling of the specially convened CSAAP meeting.

157. We find that the claimant believed that the information she disclosed showed criminal offences were likely to be committed and that such belief was reasonable. The criminal offences in question were the increased number of offences likely to be carried out the sexual offenders after release if they had attended the SOTP programme. The claimant believed this was 'likely', ie probable. As her write up of the report for CSAAP shows, she was stating quite specifically that by the time of the five-year follow-up, more sex offenders who had been on the SOTP course had been reconvicted than those who had not been on the course.

158. This belief was reasonable because it was explicitly indicated by the preliminary results. The claimant's managers, NOMS and CSAAP also took the results seriously, albeit they wanted further testing. We are not in a position to make the technical judgment ourselves, but we note the reaction. Although it does not automatically follow, the fact that later expanded and rerun tests continually showed the same adverse results also suggests that the claimant's first interpretation and analysis was likely to have been reasonable.

159. If it was reasonable for the claimant to believe that more criminal offences were likely to be committed, for the same reason, it would be reasonable for her to have believed the health and safety of individuals ie potential victims would be likely to be endangered.

160. It is not necessary for the claimant's reasonable belief to relate to more than one of the factors in section 43B(1). We have already identified two factors. However, we will make observations on the other two factors put forward by the claimant.

161. Regarding whether it was reasonable to believe the respondent has a legal obligation, we think that it was. Although we doubt that the respondent did in fact have a legal obligation to protect the public and rehabilitate offenders, we can see how the claimant could have reasonably believed that it did. As she explained to the tribunal, the MOJ has overall responsibility for criminal justice including sentencing policy. Section 142(1) of the Criminal Justice Act 2003 then sets out criteria for

sentencing which include protecting the public and rehabilitating offenders.

162. In regard to 'miscarriage of justice', we do not think it reasonable to believe that concept covers the victims of future crimes or offenders being misled to believe the SOTP would help them. We think potentially it could be reasonable to believe there would be a miscarriage of justice if prisoners were less likely to be granted parole or released early because they had not been on the course.

163. This alleged disclosure took place prior to the change in the law introducing the public interest requirement and moving the good faith requirement to compensation. The respondent accepted that the disclosure, if made, was made in good faith. We therefore find disclosure 1 was a protected disclosure.

Protected disclosure 1A

164. The alleged disclosure is that the claimant told her managers who were attending the CSAAP meeting on 25 June 2012 that the SOTP did not reduce the sexual re-offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public.

165. The claimant did make this disclosure to her employers who were at the CSAAP meeting. The respondent accepts it was a disclosure of information.

166. For the same reasons as set out in relation to PID 1, we find this was a protected disclosure.

Protected disclosure 2

167. The alleged disclosure is that by her email of 27 February 2014, the claimant disclosed that the SOTP did not reduce the sexual re-offending of prisoners after release, and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public.

168. The claimant made this disclosure in an email to Ms Morton dated 27 February 2014 which attached her latest version of the 2012 report and pointed out in the covering email that the research very clearly suggested that the SOTP did cause harm. The respondent accepts this was a disclosure of information.

169. For reasons already stated, this disclosure did in the claimant's reasonable belief tend to show that a criminal offence was likely to be committed and/or that health and safety of an individual was likely to be endangered and/or breach of a legal obligation and/or a miscarriage of justice.

170. The respondent accepts the disclosure was made in the public interest.

171. This was therefore a protected disclosure.

Protected disclosure 3

172. The alleged disclosure is that by her email of 19 March 2014 to Ms Morton, the claimant disclosed that "there were serious public protection issues associated with the SOTP"

173. In her email to Ms Morton of 19 March 2014, the claimant says that 'As far as I am concerned, there is potentially a serious public protection issue involved'. This statement is made in the context of other statements in the email that she had undertaken an 'enormous amount of extra work, basically on the same dataset, coming up with the same results over and over again' and 'There are still no concrete plans for the finalisation of the project'. The claimant had repeatedly stated on other occasions that the increased likelihood of sex offenders reoffending after being put on the SOTP programme was a serious public protection issue. We find the disclosure that there were serious public protection issues therefore to be more than a mere allegation but also to contain information to that effect.

174. We find that this disclosure was made in the public interest. Although the claimant was talking about the effect on herself of the extra work and being asked to rerun the results, her clear intention was to further the public interest in getting the results published.

175. As already stated, we find the disclosure in her reasonable belief tended to show a criminal offence was likely to be committed and/or that health and safety of an individual was likely to be endangered and/or breach of a legal obligation and/or a miscarriage of justice.

176. This was therefore a protected disclosure.

Protected disclosure 4

177. The alleged disclosure is that, by her email of 27 June 2014 to Ms Morton, the claimant disclosed that 'the SOTP is potentially dangerous and is being covered up'

178. In her email to Ms Morton of 27 June 2014, which was copied to Ms MacDonald, the claimant said amongst other things 'attendance on the SOTP is associated with higher levels of re-offending' and 'the public protection implications are quite alarming. The research suggests that those treated on the SOTP sexually reoffend more than those not treated.' She says 'My main concern, as always, however, is about the

public protection implications of the research'. Although the claimant did not use the word 'dangerous', she said as much in different words.

179. We therefore find that the claimant disclosed information, ie that the SOTP was associated with higher levels of offending, which had alarming implications for the public. This information in the claimant's reasonable belief tended to show a 'relevant failure', ie that a criminal offence was likely to be committed and/or that health and safety of an individual was likely to be endangered and/or breach of a legal obligation and/or a miscarriage of justice.

180. The disclosure was made in the public interest. Although the claimant expresses her frustration and the effect on her mental health, she states that her main concern is the public protection implications. Indeed it is clear from her conduct throughout that her main concern was protection of the public.

181. We also find that the claimant disclosed information which in her reasonable belief tended to show the SOTP results were being covered up by not being published. She disclosed the findings, the fact that she had been asked to recalculate and address 'red herrings' for two years and that she had continually advised the results would not change. She said she had been pushed beyond her ethical and moral (as well as professional) limits. She states that the respondent had been asked to provide evidence of a settled intention to publish and was concerned about the legality of this approach. She is effectively saying that the respondent was misleadingly suggesting in response to a FOI request that there had always been concrete plans to publish when in fact there had not because publication had been continually blocked by red herrings. Although the claimant does not use the words 'cover-up' that is clearly implied. The wider context and what the claimant kept repeating about vested interests also indicates that is what the claimant believed and that is how she would have been understood by what she said in this email.

182. Disclosure 4 is therefore a protected disclosure.

Protected disclosure 5

183. The alleged disclosure is that, by her email of 2 July 2014 to Ms Morton and Ms MacDonald, the claimant disclosed that 'the respondent's response to the Information Commissioner's Office is corrupt'.

184. The claimant's email to Ms Morton and Ms MacDonald on 2 July 2014 discloses that DACU's response to the ICO does not refer to the peer reviews in 2012. This element is a disclosure of information. The comment that this could be viewed as corruption is an observation. Strictly speaking, the way the issue is framed, this is not a protected disclosure.

Protected disclosure 6

185. Disclosures 6a – 6l are alleged to have been made by the claimant to Patricia Lloyd, orally or in writing, in the period August – October 2014.

186. The respondent admits that disclosures 6a – 6c were protected disclosures.

187. Regarding alleged disclosure 6d, the respondent claimant told Ms Lloyd the research had been independently peer reviewed and the review was largely positive but suggested some further minor work. Taken alone, this disclosure does not suggest anything. But put in context, ie that the research nevertheless had not been published yet and that it should be published as soon as possible so SOTP could be stopped, this information was a disclosure was made in the public interest and tended to show a relevant failure. We therefore find that 6d was a protected disclosure.

188. Regarding alleged disclosure 6e, the respondent accepts the claimant said that the NOMS representatives were highly invested in the SOTP and so did not want to acknowledge that it may not be meeting its objectives. We find this was an observation which did not in itself contain any information. We therefore find 6e was not a protected disclosure.

189. Regarding alleged disclosure 6f, the respondent accepts the claimant said that she did not consider that her managers were supportive, that Rebecca Endean had shouted her and/or that she was upset at being asked to re-run the research or try different approaches when she considered that this was unnecessary. The respondent also accepts this was a disclosure of information. We find that it was not reasonable to believe that this information tended to show a relevant failure. It does not say anything about why the claimant was being asked to re-run the research or why she was being shouted at and why managers were being unsupportive. We therefore find 6f was not a protected disclosure.

190. The claimant told Ms Lloyd that there had never been any robust evidence that the SOPT worked and that oft-repeated claims of efficacy had been made based on little or no evidence. The respondent accepts that if this was said, it was a protected disclosure. We therefore find that 6g was a protected disclosure.

191. Regarding alleged disclosure 6h, the claimant told Ms Lloyd that the research should have been published immediately after the peer review in 2012. This is not a disclosure of information. It is purely an observation. We therefore find 6h was not a protected disclosure.

192. Regarding alleged disclosure 6i, the claimant told Ms Lloyd that sexual offences committed since February 2012 may have been prevented if the SOTP had been halted in February 2012. This is not a

disclosure of information. It is purely an observation. We therefore find that 6i was not a protected disclosure.

193. Regarding alleged disclosure 6j, the claimant told Ms Lloyd that NOMS and CSAAP were covering up the research by subjecting it to continuing and invalid criticism. The respondent accepts this amounts to a protected disclosure.

194. Regarding alleged disclosure 6k, the claimant told Ms Lloyd that she was being bullied in order to stop her from pursuing the publication of the research. The respondent accepts this was a protected disclosure.

195. Regarding alleged disclosure 6l, the claimant told Ms Lloyd that there was a serious breach of research ethics by reason of the endless running and re-running of the research results which was done in order to try and reverse or minimise the findings which was part of the cover-up. The respondent accepts this was a protected disclosure.

196. In summary, 6a – 6d, 6g, 6j, 6k and 6l were protected disclosures.

Protected disclosure 7

197. The respondent accepts that at a meeting on 1 November 2014, the claimant told Mr Rahman the information at 6a – 6g. These are numbered 7a – 7g in respect of Mr Rahman. Following the reasoning in respect of the counterparts at 6 above, we find that 7a – 7d and 7g were protected disclosures.

198. The respondent also accepts that the claimant told Mr Rahman that NOMS and CSAAP were covering up by subjecting the research to continuing and invalid criticism, and that this was a protected disclosure (7h).

199. The respondent accepts that the claimant also told Mr Rahman at this meeting that he had been subjected to bullying by Ms Endean and had not been supported by Ms Morton. The only issue the respondent raises on this is whether such disclosure of information was made in the public interest. We find she did make the disclosure in the public interest. Primarily what was in the claimant's mind was that she was being shouted at and her judgment as a researcher was being ignored as a reaction to the fact that she was pushing for a report in the public interest to be published.

200. We find further that in the claimant's reasonable belief would tend to show a breach of legal obligation ie an implied right under the contract of employment not to be bullied. This was therefore a further protected disclosure (7i)

Protected disclosure 8

201. The alleged disclosure is that the claimant communicated to Elliot Shaw in February 2015 that SOTP did not reduce the sexual offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public and/or that the results were being covered up. The only disputed issues on this alleged disclosure are whether it was made and whether it was in the claimant's reasonable belief made in the public interest.

202. The claimant disclosed this information to Mr Shaw during her grievance interview. The notes record that she said, 'The results says that the sex offender's programme may be harmful. Some people were upset by this and I felt their pressure on me to drop those research results and have them quashed. All of these incidents have been in context of this work.' She also said, 'It has also gone before NOMS but they are dead against the research. I feel it lulls everyone into a false sense of security. The research shows that by completing the programme they are more likely to reoffend.'

203. The next question is whether this disclosure of information was in the claimant's reasonable belief made in the public interest. We find that it was not. The subject of the grievance was the mid-year marking, the bullying and the claimant's stress. We accept that a disclosure can be made both in a worker's personal interest as well as in the public interest. We also consider, for reasons already discussed, that there was a close relationship between the claimant's complaints of bullying and her complaints about cover-up of the SOTP research. However, we feel this particular grievance was raised to complain about process, the failure to stop the bullying, and in particular, it was prompted by the mid-year review which the claimant wished to be corrected to 'good'. We therefore think this particular alleged disclosure was not made in the public interest.

204. We therefore find disclosure 8 was not a protected disclosure.

Detriment 1

205. The claimant told the tribunal that she had never intended to suggest that Ms Lloyd's failure to formally investigate under the respondent's whistleblowing policy was because of the claimant's protected disclosures. This claim, to the extent it ever existed, was withdrawn.

Detriment 2: Mr Rahman's decision not to carry out a formal whistleblowing investigation

206. At the very least, Mr Rahman was aware of disclosures 7a-d, g, h and i as they were said directly to him on 1 November 2014. He would also have been aware that similar disclosures (6a – d, g, j, k, l) had already been made or were being currently made to Ms Lloyd since she attended the meeting with the claimant. Having worked with Ms Endean for a one month overlap, it is likely he was aware of most of the previous disclosures too, if only in a broad form.

207. Mr Rahman decided not to carry out a formal whistleblowing investigation. This was a deliberate failure to act. We find this was not a detriment. At this stage, the claimant did not want a formal whistleblowing investigation. She had not asked Ms Lloyd, who was after all a designated whistleblowing officer, to carry out a formal investigation.

208. If we are wrong about that, it would mean the respondent must show the basis for Mr Rahman's decision. The respondent satisfied us that Mr Rahman's failure to act was not in any way because of the claimant's protected disclosures. Mr Rahman had just taken over. He had a refreshingly different approach from Ms Endean and he was focused on moving forward constructively. He decided the best way to resolve the impasse between the claimant and Ms Endean, both of whom were respected analysts, was to appoint a panel of independent experts to look at the methodology. Ms Endean had now left. The claimant wanted the project completed and published. This was a constructive way forward and the claimant appeared to be happy with it. The claimant did not ask him to carry out a formal whistleblowing investigation. Also, as we said previously, the claimant had Ms Lloyd with her at the 1 November 2014 meeting with Mr Rahman and she had not asked Ms Lloyd to follow a formal process either.

<u>Detriment 3: Mr Rahman's decision 1 Nov 2014 not to carry out a formal bullying investigation</u>

209. After the discussion with the claimant on 1 November 2014, Mr Rahman said he would look into the bullying complaint. He spoke to Ms MacDonald and Ms Morton. He then decided not to carry out a formal bullying investigation. At this point, Mr Rahman was aware of the protected disclosures as set out above in relation to detriment 2.

210. The claimant did want her bullying complaints looked into properly. The decision not to do so at this point was a detriment. The respondent must therefore show the ground on which this decision was made.

211. Mr Rahman says the reason he decided not to pursue a formal bullying investigation at this stage was because he was unsure whether Ms Endean's 'robust challenges' of the claimant constituted bullying or not, and in any event, she had left, so it seemed unnecessary to resolve that issue. Regarding Ms Morton, he (wrongly) thought that the complaint about Ms Morton was only of lack of support.

212. We accept this evidence. We do not find Mr Rahman's reason was in any way because of the claimant's protected disclosures. It was his first day in the role, Ms Endean had left, and as we have already noted, he wanted to look forward. His focus was on resolving the different views on the SOTP and moving the project on. He took a pragmatic approach. Later when the claimant did put in a formal grievance, he appointed Mr Shaw and correctly arranged for it to be dealt with.

Detriment 4: 'Must improve' rating at the mid-year review

213. It is alleged that the mid-year review rating of 'must improve' given by Ms Morton and which the claimant was told about on 1 December 2014 was because of the claimant's protected disclosures.

214. Ms Morton and Ms MacDonald decided upon the mid-year review rating at the consistency check meeting on 3 November 2014. It is possible that Ms Morton had already formed a provisional intention to give such a rating at or shortly before her meeting with the claimant on 20 October 2014. At this point, Ms Morton was aware of several protected disclosures. She is bound to have known about the initial CSAAP meeting on 25 June 2012 and that the claimant had presented her findings at that point. She therefore must have been aware of disclosure 1a. Ms Morton was directly aware of disclosures 2, 3 and 4 in February, March and June 2014 respectively as these were contained in emails to her. She may not have known at the point of her decision that the claimant had approached Ms Lloyd and therefore about disclosures 6.

215. The respondent argues that as the mid-year rating was only indicative and not included in the claimant's end of year review at which she was marked 'good', it was not a 'detriment'. We disagree. The mark was plainly a detriment. It indicated to the claimant that her managers did not have a good view of her performance. It caused her enormous distress. It was one of the matters which prompted her to bring a formal grievance. She had to fight to get the mark withdrawn. She felt terrible that other managers had heard her performance described as 'must improve'.

216. The claimant had made protected disclosures of which Ms Morton was aware and Ms Morton had by this marking subjected the claimant to a detriment. It is therefore for the respondent to show the ground on which the mark was given.

217. We find that Ms Morton gave the 'must improve' rating on the ground that the claimant had made all or any of the disclosures which she knew about. We find that she did for the following reasons.

218. We appreciate that matters were 5 years ago, but we found Ms Morton's evidence regarding the reasons for the 'must improve' rating to be vague and imprecise. We would have expected clearer and more definite evidence on such a key point. We heard much evidence about what was and was not said in the 20 October 2014 and 1 December 2014 meetings before they were abandoned. We also saw Ms Morton's note to herself of 19 October 2014 regarding matters which she wanted to raise with the claimant. But identifying matters which were discussed or intended to be discussed is not the same thing as identifying the basis for the decision to give 'must improve'. At an appraisal meeting, many positive and negative points are discussed. It does not mean that small

points for improvement which are noted are going to lead to a negative rating. Ms Morton variously mentioned some errors in the figures on the Young Adults paper, a defensive attitude, Ms Morton's desire for a more collaborative approach, and more information required on the Technical Report.

219. None of these matters had been raised prior to (or indeed at) the 20 October 2014 meeting, despite the respondent's policy that there should be ongoing performance discussions. Ongoing dialogue about the content of iterations of the Technical Report is normal process, and not the same as telling an employee that there is a performance failing.

220. We also note that the claimant's ratings had always been 'good' and indeed continued to be 'good' in the future after she changed line management. Ms Morton admits she knew the project was challenging and stressful. She knew it had involved an enormous amount of work. She knew the claimant had been suffering from stress. In all those circumstances, it appears to us to be disproportionate and therefore very surprising that the claimant was marked 'must improve'.

221. We also have concerns about the suggestion that the claimant ought to be more 'collaborative' and less 'defensive' together with the hints at 'behavioural issues' which included the claimant's reference to Ms Morton's children. The claimant did the work. But she argued passionately about the reliability of her research, what it showed and the dangers of delaying publication. We find this criticism of her behaviour suggestive of a criticism of her for making the protected disclosures.

222. We add that in any event we regard Ms Morton's19 October note with some caution because the respondent had just decided to re-run the data set and may have been self-justifying.

<u>Detriment 5: Ms MacDonald's refusal to discuss the mid-year review marking at her meeting with the claimant on 5 December 2014.</u>

223. It is alleged that Ms MacDonald refused, or at least deliberately failed, to discuss the mid-year review marking at her meeting with the claimant on 5 December 2014.

224. At this point, Ms MacDonald was directly aware of disclosure 4 as she had been copied into the email in which it was contained. She therefore knew the claimant was saying the SOTP was potentially dangerous. Ms MacDonald would not have been surprised by this, since she knew the claimant had been repeating that message for some time. She would also have known from disclosure 4 that the claimant was implying a cover-up. Although the claimant did not copy in Ms MacDonald to disclosures 2 and 3, we find that Ms MacDonald must also have been aware of their content. She managed Ms Morton and it is clear they regularly discussed the project and the claimant's perspective. Ms MacDonald was also present during disclosures 1 and 1A. In addition, Ms

MacDonald would have been aware of the disclosures to Mr Rahman on 1 November 2014, since he followed up by talking to her.

225. The meeting on 5 December 2014 was to discuss the claimant's bullying concerns. Ms MacDonald did not refuse to discuss the mid-year appraisal, but she did steer the conversation away from it. She wanted to focus on the claimant's concerns about bullying and stress. The appraisal marking was not a current concern because Mr Rahman had told the claimant it would be left blank for the time-being.

226. We find that a logical reason for not discussing the mid-year appraisal in the particular meeting. It would have involved a wider enquiry. We find that it was not in any way because the claimant had made protected disclosures.

Detriment 6: Ms MacDonald's decision on 19 December 2014 not to instigate a formal investigation into bullying

227. This decision was made on or shortly before 22 December 2014. On 1 December 2014, the claimant had emailed Ms MacDonald saying that she had felt bullied by Ms Morton for a long time. Ms MacDonald took HR advice and they suggested an informal fact-finding exercise. Ms MacDonald met the claimant on 5 December and Ms Morton on 15 December to talk about the allegations. Without having spoken to anyone else, without looking into the body of evidence which the claimant said she had, and before talking to the claimant again, Ms MacDonald told HR on 22 December 2014 that there was no case to answer. She told the claimant on 22 January 2015 that she had decided not to carry out a formal investigation under the grievance policy because there were two different perceptions of events.

228. We find it very poor practice that Ms MacDonald should have reached a concluded view that there was no case to answer and told that to HR without having carried out a proper investigation. She should have more proactively suggested a formal process.

229. However, we do not find that the reason for not carrying out a formal investigation was in any way because of the claimant's protected disclosures. HR had repeatedly advised an informal approach and the written Policy emphasises informality. For a long time the claimant, though repeatedly complaining of bullying, had wanted to keep matters informal. She had simply wanted the bullying to stop. By now, it had been decided to move the claimant out of Ms Morton's team. Ms MacDonald did tell the claimant that she could take out a formal grievance if she was unsatisfied and when the claimant pressed the point, in her email of 26 January 2015, Ms MacDonald told her she could take out a grievance and sent her the forms.

Detriment 7: Moving the claimant to Ms Golton's team

230. The claimant moved to Ms Golton's team on 13 January 2015. This was not a detriment. The claimant at this stage continued to spend 50% of her time working on the SOTP project. She did not want to report to Ms Morton any more. She had previously asked for a period without any one-to-ones with Ms Morton and in December 2015, she had asked Ms MacDonald to report to her pending her transfer. The claimant was given a line manager who she preferred and who treated her well.

231. We further find that the reason for moving the claimant was that her relationship with Ms Morton had broken down and her health was suffering. She had accused Ms Morton repeatedly of bullying. She was not moved because she had made protected disclosures.

Detriment 12: Moving the claimant to a new team reporting to Mr Allen

232. This further move was the consequences of a wider restructuring. It had already been decided on her previous move to Ms Golton and Mr Allen's team that the claimant should have a change of line management as a result of her complaints of bullying and her stress. The move had been successful and the claimant had been happy. The reason for the further move was because Ms Golton's team was moving under Ms MacDonalds's line management. It was thought that the claimant would not wish to have Ms MacDonald in the line management chain once again. The reason was not in any way because the claimant had made protected disclosures.

Detriment 8: Decision to hand over the SOTP project to Mr Mews

233. The decision to hand over the SOTP project to Mr Mews was made by Mr Rahman. Mr Rahman was aware of the claimant's protected disclosures as set out in paragraph 206 above. Handing over the project to Mr Mews was a detriment. It is therefore for the respondents to show the ground on which that decision was made.

234. We find that the claimant's protected disclosures in no way influenced the decision to hand the SOTP project over to Mr Mews. Mr Rahman did what he thought was best in the difficult circumstances he inherited. He wanted to move things on. He was happy to publish controversial reports. The claimant had agreed to let an expert panel decide how to move forward. The panel had come up with a different design which meant starting again from scratch. If starting out from scratch, it made sense to bring in someone fresh to look at the data. Mr Mews was already working on the project, because he had been brought in to replace Mr Cohen. Mr Marais had been brought in to replace Ms Morton as the SOTP lead from November 2015. The claimant had been moved into Mr Whitehouse's team on the restructure, to save her having to move back into Ms MacDonald's line management chain. Most of her time in her new role was working on important income forecasting work.

235. We also note that, when the results of the new design were known, Mr Rahman sought the claimant out (via Ms Logue) to tell her she had been vindicated. That does not suggest to us that he had been unhappy or concerned about her protected disclosures.

Detriment 9: The claimant being side-lined

236. This appears to refer to the claimant's role being reduced to one day/week on the SOTP and not being invited to meetings after the first few.

237. We find that this was not in any way influenced by the fact she had made protected disclosures. The reason for her role being reduced to one day / week we have addressed in relation to detriment 8. Mr Mews had taken over the project because there was to be a fresh start on a new design. He had already been moved across to replace Mr Cohen. Mr Marais was replacing Ms Morton. The claimant had been found a new job, to avoid Ms MacDonald's team, which took up most of her time.

238. Regarding meetings, we believe te claimant was consulted by Mr Mews and was invited to meetings. We have explained our reasons for this in our fact-findings.

239. We therefore find that the claimant was not side-lined in any way because of her protected disclosures.

Detriment 10: Mr Shaw failing to investigate the claimant's grievance as to whether HR processes had been followed

240. The claimant did not make any protected disclosure direct to Mr Shaw. The claimant told Mr Shaw that the SOTP did not reduce the sexual offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public and/or that the results were being covered up. However, for reasons already explained, this was not a protected disclosure.

241. Even if Mr Shaw was aware of any of the protected disclosures, we would find that he did not deliberately fail to investigate the grievance properly. He spoke to eight witnesses including the claimant and recorded their evidence in writing. He then wrote an analytic report with his findings. Any shortcomings would be due to lack of experience. This was his first grievance investigation.

242. We do find it somewhat puzzling that the grievance considered process rather than substance in relation to the bullying. In other words, Mr Shaw looked at whether the claimant's bullying complaints had been properly investigated, as opposed to whether the claimant was in fact bullied by Ms Endean or Ms Morton. However, as discussed in our fact-findings, that focus seems to have come from the claimant herself. It

does not entirely lack any logic since by now the claimant had moved away from the managers who she felt were bullying her, and perhaps her remaining feeling of real grievance was that the matter had been unresolved for so long.

Detriment 11: Mr Shaw turning up late to meetings, taking too long to respond and failing to uphold the claimant's concerns

243. The claimant accepted during the tribunal hearing that Mr Elliott did not turn up late for meetings because of her protected disclosures.

244. Regarding the time Mr Shaw took to do the investigation, Mr Shaw did ask for a couple of extensions. This was because of the amount of work involved. He had to speak to eight witnesses and Easter holidays also intervened. He was commissioned at the end of March 2015 and finished on 9 July 2015. In our experience, this is not an unusual amount of time in the public sector, even if undesirable. There is nothing to suggest the length of time was deliberate stalling or because the claimant had made protected disclosures.

245. Mr Shaw explained the reasons for his findings. He felt that Ms MacDonald and Ms Morton had made reasonable efforts to deal with the bullying complaints and stress. The claimant may not agree with them. We might not agree with them. But Mr Shaw gave his reasons and it is credible that he might have taken that view. There were a large number of meetings between the claimant and her line managers regarding the allegations of bullying and HR advice had repeatedly been sought and followed. Ms Skodbo, a relatively independent witness and sympathetic to the claimant, had told him that in her experience the claimant did not want to formalise her complaints. There was also the claimant's 1 August 2014 email which supported the idea that the claimant may have been indecisive and inconsistent regarding how far she wished to take things.

246. Moreover, Mr Shaw made some criticisms of the respondent and made recommendations. There is no reason to think he was influenced in any way at all by the fact that the claimant had made protected disclosures.

Detriment 13: Mr Rahman and/or Ms MacDonald not shortlisting the claimant for promotion

247. The claimant produced virtually no evidence on this allegation and asked virtually no questions. There simply was not enough to go on. We do not know who made the decision and whether they were aware of protected disclosures. It was not in any event Mr Rahman or Ms MacDonald. We do not know why the respondent says the claimant was not shortlisted. We have no information about how colleagues got on so that we can make a comparison and draw inferences. This claim is therefore not upheld.

Detriment 14/15: Acknowledging the claimant on the SOTP report but not listing her as an author

248. This decision was made by Mr Marais, the senior person on the project. Mr Rahman followed his advice.

249. Mr Marais said in his witness statement that until he was made aware of the tribunal claim, he was unaware the claimant had made a whistleblowing complaint. He said he knew about the involvement of the claimant in the 2012 and 2014 reports, but he did not know how much she had done. He said he did not know that the claimant had been upset about the work.

250. We do not find that entirely credible. We can see that he may not have wished to become distracted by the history of the project and past arguments, when his remit was to see through the new design. We are also conscious that it had been decided to keep the reason for the claimant's move away from the project confidential – it was decided to describe her move generally as due to an urgent need in SRFFAS for someone with the claimant's skills. But it seems highly unlikely that he never found out anything about the claimant's long involvement and that there had been some upsets. However, there is insufficient evidence for us to find that he knew about the protected disclosures and what she was saying. For this reason alone, this claim fails. However, knowing how important this particular allegation is to the claimant, we will go on to consider what we would have concluded if we had thought Mr Marais did know of her protected disclosures.

251. On the one hand, we can see Mr Marais was confronted with a strong argument for naming the claimant as one of the authors. Indeed it is possible we might have made that decision ourselves or at least given her a far more fulsome acknowledgement. However, what our decision would have been is irrelevant. The argument in her favour which confronted Mr Marais and indeed Mr Rahman was that the claimant had done a large amount of work on earlier iterations of the report; that the conclusion on the re-run was essentially the same; and that Mr Mews was willing – and indeed positively supportive – of adding her name. It is also seemingly unfair that others with smaller overall roles such as Mr Cohen were given the same level of acknowledgement that she was.

252. The arguments confronting Mr Marais and Mr Rahman on the other hand were these. There was a written document which in practice, apart from a few paragraphs, had been written from scratch by three other people. Those three people, while benefiting a great deal from the claimant's knowledge and advice at early stages, had done all the new work afresh. The claimant was not strictly speaking one of the authors. The fact of the claimant's 'significant contribution' was covered by the acknowledgement. Mr Marais and Mr Rahman did not ignore the claimant completely. It was also notable that Ms Di Bella had not put the claimant down as author in her first draft report for the Expert Advisory Group and

when Mr Mews corrected the order of names for the final report, he had not added in the claimant either.

253. We therefore find there was room for different opinions on whether the claimant should have been noted as an additional author. Both Mr Marais and Mr Rahman tended to think no one's name should go down as author of MOJ reports anyway. For all these reasons, we do not believe their decision was in any way because of the claimant's protected disclosures.

254. We add that, although Mr Rahman – unlike Mr Marais – was definitely aware of the claimant's protected disclosures, we do not find that his decision was in any way because of the protected disclosures. He went along with Mr Marais's view. Mr Marais was the person in charge of the rerun design. For reasons we have explained, the argument against including the claimant as an author was not illogical. Moreover, Mr Rahman's approach generally indicates a lack of hostility. Indeed he was the person who had told the claimant she was 'vindicated'. When the claimant asked for her name to be added, Mr Rahman did not brush away her request. He asked Mr Ellerd-Elliot to find out the views of Mr Marais and Mr Mews. Mr Marais was the more senior of the two and he was adamant.

Jurisdiction / time-limits

255. The claimant notified ACAS under the EC procedure on 15 September 2017. The certificate was issued 27 October 2017. The claim was presented on 27 November 2017.

256. The claimant was given her mid-year review rating on 1 December 2014. It was decided upon on 3 November 2014. By this time, the claimant's mental health was already suffering and this did continue. However, the claimant would have started to recover when she moved into Ms Golton's team in about December 2014. Even if we were to assume that it was not reasonably practicable for the claimant to have presented her claim within 3 months of 1 December 2014, or even before she moved out of the department in September 2016, there was a further year before she did so. There simply is not the evidence to prove it was not reasonably practicable for the claimant to present a tribunal claim about the mid-year review marking in or shortly after September 2016. This claim is therefore out of time.

Final observations

257. We can understand the claimant's frustration that it took five years to publish a report on such an important matter of public policy. The final report confirmed what the claimant had been saying all along, ie that there was a higher rate of reoffending by prisoners who had undertaken the SOTP programme. We also understand the claimant's disappointment that the final report did not sufficiently acknowledge her extensive

contribution. However, it is necessary to focus on the issues before the tribunal. Ultimately the question is why the respondent treated the claimant in the ways she has identified. Apart from the mid-year review marking, we find the reasons, while sometimes unfair, were not in any way because of her protected disclosures.

_____
Employment Judge Lewis

Dated: 08th July 2019

Judgment and Reasons sent to the parties on:

10th July 2019

…….....
For the Tribunal Office

APPENDIX: AGREED LIST OF ISSUES

Jurisdiction

1. Does the Claimant succeed on Detriments 14/15 below? If not, there are no acts of detriment that are in time and the Tribunal has, subject to an extension of time being granted, no jurisdiction in respect of the claim.

2. If the Claimant is successful on Detriments 14/15, was the decision to publish the Report acknowledging the Claimant's contribution but not listing her as an author or lead author the last of a series of similar acts or failures of which the acts or deliberate failures to act of which the Claimant complains (or some of them) also part?

3. If the answer to either of the above is "no", was it not reasonably practicable for the complaint to be presented before the period of 3 months from any relevant act or deliberate failure to act of which the Claimant claims? If so, what was the period that was reasonable for the Claimant to bring her claim after the relevant act or deliberate failure to act complained of?

Merits

Disclosure 1 (Meeting in February 2012)

4. Did the Claimant tell those present that "the SOTP did not reduce the sexual re-offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public" (as pleaded at **1/120.17a,** line 1)?

5. Was any such information such that in the Claimant's reasonable belief it tended to show:
   5.1. that a criminal offence has been committed, is being committed or is likely to be committed?
   5.2. That a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?
   5.3. That a miscarriage of justice has occurred, is occurring or is likely to occur?
   5.4. That the health and safety of any individual has been, is being, or is likely to be endangered?

6. If the answer to both is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure. Because of the date of this disclosure, it is not necessary to show that it was made, in the Claimant's reasonable

belief, in the public interest. The respondent accepts the disclosure, if made, was in good faith.

Disclosure 1(a) (Meeting with CSAAP on 25 June 2012)

7. Did the Claimant disclose that "the SOTP did not reduce the sexual re-offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public" (as pleaded at **1/120.17a,** line 2)?

8. Was any such information such that in the Claimant's reasonable belief it tended to show:
   8.1. that a criminal offence has been committed, is being committed or is likely to be committed?
   8.2. That a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?
   8.3. That a miscarriage of justice has occurred, is occurring or is likely to occur?
   8.4. That the health and safety of any individual has been, is being, or is likely to be endangered?

9. If the answer to both is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure. Because of the date of this disclosure, it is not necessary to show that it was made, in the Claimant's reasonable belief, in the public interest. The respondent accepts the disclosure, if made, was in good faith..

Disclosure 2 (email of 27 February 2014 to Sarah Morton)

10. By her email of 27 February 2014 (**1/212-213**), did the Claimant disclose that "the SOTP did not reduce the sexual re-offending of prisoners after release, and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public" (as pleaded at **1/120/17a**, line 6)?

11. If so, was any such information such that in the Claimant's reasonable belief it tended to show:
    11.1. that a criminal offence has been committed, is being committed or is likely to be committed?
    11.2. that a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?
    11.3. that a miscarriage of justice has occurred, is occurring or is likely to occur?

11.4. That the health and safety of any individual has been, is being, or is likely to be endangered?

12. If the answer to both is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure. The Respondent accepts the disclosure was made, in the Claimant's reasonable belief, in the public interest.

Disclosure 3 (email of 19 March 2014 to Sarah Morton)

13. By her email of 19 March 2014 to Sarah Morton (**1/274-5**), did the Claimant disclose (as pleaded at **1/120.17a**, line 7) that "there were serious public protection issues associated with the SOTP"?

14. If so, is that the disclosure of 'information'?

15. If so, was the disclosure made, in the Claimant's reasonable belief, in the public interest?

16. If so, was any such information such that in the Claimant's reasonable belief it tended to show:
    16.1. that a criminal offence has been committed, is being committed or is likely to be committed?
    16.2. That a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?
    16.3. That a miscarriage of justice has occurred, is occurring or is likely to occur?
    16.4. That the health and safety of any individual has been, is being, or is likely to be endangered?

17. If the answer to all of these questions is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure.

Disclosure 4 (email of 27 June 2014)

18. By her email of 27 June 2014 to Sarah Morton (**1/439-440**), did the Claimant disclose (as pleaded at **1/120.17a**, line 9) that "the SOTP is potentially dangerous and is being covered up"?

19. If so, is that the disclosure of 'information'?

20. If so, is this disclosure in the reasonable belief of the Claimant made in the public interest?

21. If so, does the information disclosed tend to show, in the Claimant's reasonable belief:
    21.1. that a criminal offence has been committed, is being committed or is likely to be committed?
    21.2. That a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?
    21.3. That a miscarriage of justice has occurred, is occurring or is likely to occur?
    21.4. That the health and safety of any individual has been, is being, or is likely to be endangered?
    21.5. That information tending to show any of the above is being or is likely to be deliberately concealed?

22. If the answer to all of these questions is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure.

Disclosure 5 (email of 2 July 2014)

23. By her email of 2 July 2014 to Sarah Morton and Cressy MacDonald (**1/460-461**), did the Claimant disclose (as pleaded at **1/120.17a**, line 8) that "the Respondent's response to the Information Commissioner's Office is corrupt"?

24. If so, was that the disclosure of 'information'?

25. If so, was the disclosure, in the reasonable belief of the Claimant, made in the public interest?

26. If so, was any such information such that in the Claimant's reasonable belief it tended to show:
    26.1. that a criminal offence has been committed, is being committed or is likely to be committed?
    26.2. That a person has failed is failing or is likely to fail to comply with any legal obligation? If so, what is that legal obligation?

27. If the answer to all of these questions is yes, the Respondent's position is that this is a protected disclosure, otherwise it is not a protected disclosure. NB the Claimant has not pleaded that the information tends to show any of the other matters falling within s.43B(1) (see **1/120.17a**, line 8).

Disclosure 6 (August to October 2014 to Pat Lloyd)

28. The Tribunal will note that the Respondent admits that the Claimant disclosed the following information to Ms Lloyd and that these were qualifying protected disclosures:

28.1. That the research which was being undertaken was producing evidence that the SOTP programme may be leading to increased offences by released prisoners (**Disclosure 6(a)**);

28.2. That the Claimant had concluded that these research findings showed that the public was at an increased risk from sexual offending as a result of the SOTP (**Disclosure 6(b)**)

28.3. That the Claimant had concluded that the research should be published as soon as possible so that action could be taken to stop of change the delivery of the SOTP (**Disclosure 6(c)**).

29. In communicating to Ms Lloyd that the research had been independently peer reviewed in 2012 and that the review was largely positive but suggested some further minor work to do (**Disclosure 6(d)**), did the Claimant reasonably believe that that information was in the public interest and tended to show a relevant failure (ie as paragraph 5 above)? If yes, the Respondent accepts this was a protected disclosure.

30. *Disclosure 6(e):*

30.1. In communicating to Ms Lloyd that the Claimant considered that the NOMS representatives were highly invested in the SOTP and so did not want to acknowledge that it may not be meeting its objectives (**Disclosure 6(e)**), was that the disclosure of 'information'?

30.2. In making Disclosure 6(e), did the Claimant reasonably believe that such information as was disclosed tended to show that either a person had failed, was failing or was likely to fail to comply with any legal obligation and/or that any matter falling within s.43B(1)(a)-(e) had been deliberately concealed?

30.3. If the answers to the preceding 2 questions are both yes, the Respondent accepts that Disclosure 6(e) was a protected disclosure. The Respondent accepts the disclosure was made, in the Claimant's reasonable belief, in the public interest.

31. *Disclosure 6(f):*

31.1. In communicating to Ms Lloyd that the Claimant did not consider that her managers were supportive, that Rebecca Endean had shouted her and/or that she was upset at being asked to re-run the research or try different approaches when she considered that this was unnecessary (**Disclosure 6(f)**), was this a disclosure that in the Claimant's reasonable belief was made in the public interest?

31.2. Was Disclosure 6(f) of information that in the Claimant's reasonable belief tended to show that either a person had failed, was failing or was likely to fail to comply with a legal obligation and/or any matter failing within s.43B(1)(a)-(e) had been, was being or was likely to be deliberately concealed?

31.3. If the answer to both the preceding two questions is yes, the Respondent accepts that this is a protected disclosure. The respondent accepts that this was a disclosure of information.

32. Did the Claimant communicate to Ms Lloyd that "there had never been any robust evidence that the SOPT worked and that oft-repeated claims of efficacy had been made based on little or no evidence" (**Disclosure 6(g)**)? If yes, it is accepted that this is a protected disclosure.

33. *Disclosure 6(h)*:

33.1. Did the Claimant communicate to Ms Lloyd that "the research should have been published immediately after the peer review in 2012" (**Disclosure 6(h)**)?

33.2. If so, is that the disclosure of 'information'?

33.3. If the answer to both the preceding two questions is yes, the Respondent accepts that this is a protected disclosure.

34. *Disclosure 6(i):*

34.1. Did the Claimant communicate to Ms Lloyd that "sexual offences committed since February 2012 may have been prevented if the SOTP had been halted in February 2012" (**Disclosure 6(i)**)?

34.2. If so, is that the disclosure of 'information'?

34.3. If the answer to both the preceding two questions is yes, the Respondent accepts that this is a protected disclosure.

35. Did the Claimant communicate to Ms Lloyd that NOMS and CSAAP were covering up the research by subjecting it to continuing and invalid criticism (**Disclosure 6(j)**)? If so, it is accepted that that is a protected disclosure.

36. Did the Claimant communicate to Ms Lloyd that she was being bullied in order to stop her from pursuing the publication of the research (**Disclosure 6(k)**)? If so, that is accepted as a protected disclosure.

37. Did the Claimant communicate to Ms Lloyd that there was a serious breach of research ethics by reason of the endless running and re-running of the research results which was done in order to try and reverse or minimise the findings which was part of the cover-up (**Disclosure 6(l)**)? If so, it is accepted that this is a protected disclosure.

Detriment 1: Investigation by Pat Lloyd

38. Was the lack of a formal investigation under the Respondent's whistleblowing policy by Ms Lloyd, a 'deliberate failure'?

39. If so, did it subject the Claimant to a detriment?

40. If so, was that failure on the ground of Disclosure 6?

Disclosure 7 (1 November 2014 to Osama Rahman)

41. The Tribunal will note that the Respondent accepts that, at a meeting on 1 November 2014, the Claimant repeated Disclosures 6(a)-6(g) (**Disclosures 7(a)-7(g)**). The issues in relation to Disclosures 6(d)-(g), set out in paragraphs 29-32 above, apply equally to Disclosures 7(a)-7(g).

42. The Tribunal will further note that the Respondent accepts that the Claimant communicated to Mr Rahman that NOMS and CSAAP were covering up the research by subjecting it to continuing and invalid criticism (**Disclosure 7(h)**) and that this constituted a disclosure of information which, in the Claimant's reasonable belief, was made in the public interest and consisted of information which tended to show that any matter falling within s.43B(1)(a)-(e) ERA 1996 had been or was likely to be deliberately concealed, and so that this was a qualifying protected disclosure.

43. In communicating to Mr Rahman that the Claimant had been subjected to bullying by Rebecca Endean and felt that she had not been supported by Sarah Morton (**Disclosure 7(i)**), was this in the Claimant's reasonable belief made in the public interest? If so, the Respondent accepts that it is a protected disclosure.

Detriment 2: Whistleblowing investigation by Osama Rahman

44. Was the lack of formal whistleblowing investigation by Mr Rahman into the Claimant's whistleblowing complaint a deliberate failure to act?

45. If so, did that deliberate failure to act subject the Claimant to a detriment?

46. If so, was that deliberate failure on the ground of Disclosure 6 and/or Disclosure 7?

Detriment 3: Lack of formal bullying investigation by Osama Rahman

47. Was Mr Rahman's decision on 1 November 2014 to undertake an informal fact-finding exercise instead of a formal bullying investigation into the Claimant's allegations of bullying against Rebecca Endean an act or deliberate failure to act which subjected the Claimant to a detriment (**Detriment 3(a)**)?

48. If so, was it on the ground of Disclosure 6 and/or Disclosure 7?

49. Was Mr Rahman's failure to ensure that the Claimant's complaint against Sarah Morton on 1 December 2014 (**Detriment 3(b)**) was investigated formally until he commissioned a formal grievance on 23 March 2015 a deliberate failure to act?

50. If so, did that deliberate failure subject the Claimant to a detriment?

51. If so, that deliberate failure on the grounds of Disclosure 6 and/or Disclosure 7?

Detriment 4: Mid-year review (1 December 2014)

52. Was Sarah Morton's rating of the Claimant as "must improve" for her indicative Mid-year Review done on the ground of the Claimant's admitted or proved protected disclosures of which she was aware?

53. In light of the fact that it is indicative only and was not included in the Claimant's End-Year Review, did this mark subject the Claimant to a detriment?

Detriment 5: Refusal to discuss mid-year review

54. Did Cressy MacDonald fail to discuss the Claimant's mid-year review indicative performance marking during their meeting on 5 December 2014?

55. If so, was that failure deliberate?

56. If so, did that failure to act subject the Claimant to any detriment?

57. If so, was Ms MacDonald's deliberate failure to act on the ground of any of the admitted or proven protected disclosures of which Ms MacDonald was aware?

Detriment 6: 19 December 2014 decision by Cressy MacDonald not to instigate formal investigation into bullying

58. Did Ms MacDonald decide not to instigate a formal investigation into the Claimant's bullying complaints?

59. The Tribunal will note that the Respondent accepts (**1/115**) that Ms MacDonald did make this decision, but on 22 January 2015. In relation to this: was that decision on the grounds of the Claimant's admitted or proved protected disclosures of which Ms MacDonald was aware?

Detriment 7: 19 December 2014 decision to move the Claimant from Ms Morton's team to Ms Golton's team

60. Given that the move was something the Claimant was very happy with, was it an act which subjected the Claimant to a detriment?

61. Was this on the ground of the Claimant's admitted or proved protected disclosures?

Detriment 8: Decision by Osama Rahman and Tina Golton in or around January 2015 to hand over SOTP project to Aidan Mews

62. Was this done on the ground of the Claimant's admitted or proved protected disclosures of which they were aware?

Detriment 9: Claimant being 'side-lined'

63. Was the claimant's role on the project sidelined on the ground of the Claimant's admitted or proved protected disclosures of which the relevant decision maker(s) was/were aware?

Disclosure 8 (orally to Elliot Shaw, February 2015)

64. Did the Claimant communicate to Elliot Shaw in February 2015 that "SOTP did not reduce the sexual offending of prisoners after release and in fact was associated with an increase in sexual re-offending after release and therefore could be harmful to the public and/or that the results were being covered up"?

65. If so, was that disclosure one that was made in the public interest?

66. If the answer to both of these questions is yes, the Respondent accepts that this is a protected disclosure. The Respondent accepts that it was a disclosure of information which in the Claimant's reasonable belief tended to show a relevant failure (ie as set out in paragraph 5 above). The Respondent also accepts the other requirements of section 48G of the Employment Rights Act 1996 are met.

Detriment 10: Elliot Shaw failure to investigate Claimant's grievance as to whether HR processes had been followed

67. Did Mr Shaw deliberately fail to properly investigate the Claimant's grievance?

68. If so, was this on the ground of the Claimant's admitted or proved protected disclosures of which he was aware?

Detriment 11: In March/April to June 2015, Elliot Shaw turned up late to meetings, took too long to respond and failed to uphold the Claimant's concerns

69. Did Mr Shaw turn up late to meetings (**Detriment 11(a)**)?

70. Was this on the ground of the Claimant's admitted or proved protected disclosures of which he was aware?

71. Did Mr Shaw do an act on the ground of the Claimant's admitted or proved protected disclosures of which he was aware in taking the time he did to respond (**Detriment 11(b)**)?

72. If so, did he do so on the ground of the Claimant's admitted or proved protected disclosures of which he was aware?

73. Did Mr Shaw decide not to uphold the Claimant's complaint (**Detriment 11(c)**) on the ground of her admitted or proved protected disclosures of which he was aware?

Detriment 12: October 2015 decision to move to a new team reporting to Paul Allen

74. Was this an act of detriment done on the ground of the Claimant's admitted or proved protected disclosures?

Detriment 13: Not shortlisted for promotion by Osama Rahman or Cressy MacDonald

75. Were Mr Rahman and/or Ms MacDonald involved in the shortlisting exercise for which the Claimant had applied in July 2016?

76. Did the individuals on the sifting panel (Mike Marriott and Louise Skelton) know that the Claimant had made any protected disclosures? If so, was the decision not to shortlist the Claimant on that ground?

Detriments 14/15: Acknowledged on SOTP report, but not listed as an author

77. Did the decision to name Aidan Mews and others as the authors of the report an act that subject the Claimant to a detriment?

78. Was the decision not to include the Claimant as an author on the report taken by someone who knew about the Claimant's protected disclosures and, if so, taken on that ground?

79. Was Mr Rahman's decision refusal to amend the authorship of the already published report done on the basis that ground of the Claimant's protected disclosures?