COMBINED PROCEEDINGS **Case No. 2500154/2018**
2500155/2018
2500156/2018

EMPLOYMENT TRIBUNALS

Claimant 1: Mrs D Harrington
Claimant 2: Mr M Harrington
Claimant 3: Miss S Casson

Respondent: Hilco Capital Ltd

CERTIFICATE OF CORRECTION
Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69 of the 2013 Rules of Procedure, the written reasons sent to the parties on 19 September 2018 are corrected in order to deal with clerical errors and accidental slips and omissions as appears below in bold type in the corrected reasons.

Corrected REASONS

EMPLOYMENT TRIBUNALS

Claimant 1: Mrs D Harrington

Claimant 2: Mr M Harrington

Claimant 3: Miss S Casson

Respondent: Hilco Capital Ltd

Heard at: Teesside Justice Centre on: 7th, 10th,12th,13th,14th September 2018, 23rd October 2018

Deliberations: 3rd December 2018

COMBINED PROCEEDINGS **Case No. 2500154/2018**
2500155/2018
2500156/2018

Before: Employment Judge AE Pitt
Mrs S Don
Mr E Euer

Representation:

Claimants: Mr S Goldberg
Respondent: Ms S Garner

RESERVED JUDGMENT

1. Claimant 1 was subject to the following detriments as result of her disclosure to Mr Smiley and Mr Kaup:

i. her treatment as part of a pool of employees who were based in the Middlesbrough **office**;
ii. the failure to consult with her in any meaningful sense.

2. Claimant 1 was not subject to victimisation as a result of any protected acts

3. Claimant 1 was unfairly dismissed due to her disclosure to Mr Smiley and Mr Kaup

4. All **the claimants** were unfairly dismissed

5. The respondent was in breach of all three claimants' contract of employment by its failure to pay bonuses for the year end April 2017.

REASONS

1.1 Mrs Harrington, who was born on 16th October 1957 was employed by the respondent or its predecessors from 1979. **A**t the effective date of termination, 25th September 2017 she was 59 years of age. She was latterly employed as the Human Resource Manager. She brings claims of Unfair Dismissal; Automatically Unfair Dismissal pursuant to **section 103A** Employment Rights Act **1996**; and **P**ublic **I**nterest **D**isclosure claims under section 43B Employment Rights Act **1996 ("the 1996 Act").**

1.2 Mr Harrington, date of birth 25th June 1988, was employed by the respondent from 1st April 2008 until 13th October 2017; at this time, he was 29 years of age and had 9 years complete service. At the time of the termination of his employment he was an Assistant Financial Controller. He brings a claim for unfair dismissal **pursuant to sections 94/98 of the 1996 Act.**

1.3 Miss Casson was employed by the respondent or its predecessors from 1979. From 2009 she asserts she was the Financial Controller. She brings a claim for unfair dismissal **pursuant to sections 94/98 of the 1996 Act.**

1.4. The Tribunal read witness statements and heard evidence from each of the claimants; it also read witness statements and heard evidence from Henry Foster, the CEO **of the respondent** from 1st January 2017, **previously** the Investment Director, **and from** John Turner who was employed by the respondent from 1st April 2017 as European Chief Finance officer. The Tribunal also had before it bundles of documents which included emails and transcripts of conversations made by Mrs Harrington.

Findings of Fact

2. Having considered the written and oral evidence from the witnesses and the documents to which we were referred and having assessed that evidence and the manner in which it was given, the Tribunal makes the following findings of fact on the balance of probabilities:

2.1 The respondent is a company which deals with distressed **companies and provides** investment and advisory services. At the time of these event the respondent had 35 employees. However sometimes its workforce expanded to include up to 60 retail staff and consultants. **T**he nature of the respondent's business is to intervene in companies undergoing difficulties. It may purchase the business, or it may assist by offering financial support. Some of the companies in which it intervenes go into administration and insolvency and in such circumstances the respondent may also offer human resource assistance. The respondent was originally established by Paul McGowan in a joint venture with an American company. On 1st January 2017 he became Chairman of Hilco Capital. Mrs Harrington and Miss Casson were originally employed by '**Uptons** PLC' based in Stockton on Tees in the north east of England. This company was bought by the respondent in 2000 and placed into administration by it in 2001. Mrs Harrington and Ms Casson became employees of the respondent: there is a dispute as to whether they became employees of the respondent as a result of a transfer of an undertaking at this time. Neither were given written contracts of employment by the respondent. The Tribunal has not been asked to make a determination **on the** issue **of whether this fell within the TUPE Regulations** and save for some brief evidence from the claimants no specific evidence was heard on the point. All three claimants were based at an office in Middlesbrough which at the time of these events was the respondent's registered office: the respondent's head office was based on **B**ond Street in London.

2.2 Mrs Harrington worked as the HR Director; Mr Harrington as assistant financial controller and Miss Casson as financial controller. There is dispute as to the exact nature of their roles within the company structure.

The nature of the work carried out by the claimants

2.3 The role of Mrs Harrington. It is agreed that Mrs Harrington was the Human Resource Director for the respondent., The claimant asserts that whilst she dealt with HR issues for the respondent much of her work was carried out by assisting companies which were being supported by the respondent. She would deal with issues such as implementing redundancies and transfers of undertakings as were required. As a result of this she states that, whilst nominally based in Middlesbrough, she was rarely **there travelling instead** to any location where she

was required. The Tribunal was shown a document which gave a breakdown of the time spent by Mrs Harrington on the respondent's business and other work. This document, which was produced by the respondent for the purposes of these proceedings from records they hold, shows that, although the claimant had in some years spent substantial amounts of time away from her parent company, Hilco, in later years this had decreased. It was agreed that the claimant's salary was clawed back from the relevant companies and in fact she was 'cost neutral' in effect her salary **was** paid by companies to whom she was outsourced.

2.4 Miss Casson describes herself as **a** Financial Controller **with certificates from the Association of Accounting Technicians**. The respondent not only denies this but claims that she was not qualified to carry out the **work it required. However**, it was unable to produce a job description or indeed, following its review of her role, a list of tasks she carried out. Ms Casson told us that her role was to carry out all accountancy tasks up to and including preparing audits. She was responsible for preparation of management accounts and the movement of monies between associated companies by way of intercompany loans. The issue as to the exact nature of her work is important as it goes to the issue of the fairness of **her** dismissal and is dealt with below.

2.5 Mr Harrington was employed as Assistant Financial Controller.

2.6 On 30/04/16 Mrs Harrington emailed Paul McGowan, who was at this time **was** the CEO, about a lack of pay rises and bonus increases. The bonuses having been announced Mrs Harrington's was less than she had anticipated. She sent a further email to Mr **McGowan** on 16 May **2016** (page 185). In this email Mrs Harrington raised the issue of her bonus saying, "I did not expect to get less bonus than last year expected to get much more the contribution that I gave running **two** departments". **L**ater she says, "I want to know why I have not personally received pay rises over the years and bonuses in line with my position within Hilco". The claimant received a reply to this the same day from Mr McGowan **who** was firmly of the view that the claimant was not receiving a lesser salary in relation to the bonuses; he said that all bonuses were discretionary. He states in the email "as you know, all bonuses have been paid on a fully discretionary basis and are paid for a calendar year with payment being made in the April following the year end." He also indicated that if the claimant wasn't satisfied, she should raise a grievance.

2.7 The claimant was not satisfied with responses she was receiving and at the instigation of Mr McGowan in this email raised a grievance.

2.8 In around June or July 2016 the claimant had a telephone call with Mr McGowan in which she spoke of her bonus and her salary **and** it was during the course of this conversation **that** the claimant also raised an issue concerning consultants having cash in the boot of their cars. This is in contrast to her understanding of the correct banking procedure which is **that** cash should have been accounted for before it left any store and properly banked. It is the Tribunal's understanding that the respondent **accepts** that this practice was going on: the reason proffered by the respondent for this was that the administrator or insolvency practitioner for whom it was working was not paying its bills either in a timely matter or at all. This is the first protected disclosure for the purposes of the claim under section 43B Employment Rights Act 1996 and a protected act the purposes of the victimisation claim under section 27 Equality Act 2010.

2.9 The claimant alleges during that phone call that Mr McGowan was shouting and bawling at her and offered her £10,000. It is unclear whether the £10,000 was offered as part of a bonus or her salary negotiations, or indeed whether it was intended to be a payment to ensure she did not speak of the banking irregularities. The claimant asks the Tribunal to infer that it was the **latter. On the other hand,** the respondent asks the Tribunal to conclude that there was no offer of £10,000 **or, if there was, that** it was to do with pay and not **any other** reason. Indeed, the respondent's case is that Mr McGowan never acted in the way alleged. Mr Foster told us he did not believe Mr McGowan shouted in the way described or at all towards the claimant. The Tribunal did not have the benefit of hearing from Mr McGowan and despite Mr **Foster's** assertions the Tribunal concluded that Mr McGowan did so speak to the claimant, in particular that he did speak to her in this way because **she had raised** the issue of cash in the boots of cars belonging to consultants working on behalf of the **respondent. However, the** Tribunal is not certain that the £10,000 was offered in order to ensure the claimant spoke to no one of this.

2.10 It took some time for the respondent to respond to the grievance but when it did**,** it indicated that an external HR consultant would be appointed to deal with the grievance. Mrs Harrington was not satisfied with this; her view was that it should be kept within the company. As a result of further emails, the claimant indicate**d** she **would** raise the matter with Mark Smiley, a former employee, at that time working as a consultant at Hilco **Global. It was** Mrs Harrington's understanding **that** he was a superior officer to Mr McGowan. Mrs Harrington spoke to Mr Smiley in August 2016 via telephone **and** she spoke to him with regards to her bonus and her salary. In her witness statement the claimant states she spoke of her **claim to** equal pay **but** the Tribunal is not satisfied that she did make reference to equal pay rather than simply to the level of her salary. **The Tribunal** concluded this by **reference** to the email of 18 April 2017 sent to Mr Smiley and Mr Kaur which reads: "further to our conversation last year regarding my salary when you informed me that Paul McGowan would speak to me regarding the subject I was not contacted by Paul so left the matter until after Christmas and then raised a formal grievance." The email goes on but makes no further reference to salaries, equal pay or indeed a bonus. The Tribunal is satisfied that if the claimant had mentioned equal pay to Mr Smiley in August the preceding year **then this would have been** reflected in her email. Following the conversation with Mr Smiley, the grievance was not progressed by the respondent.

2.11 The respondent held a strategic review meeting in September 2016. The Tribunal has seen a document which it understands was compiled by Mr McGowan for that meeting but **notes** again we have not heard from him nor had a witness statement from him. There were a number of issues to be dealt with including the core model of the business and a review of the work **the business conducted**. As part of that review there is a section in the paper which reads "noninvestment team/operations resources" under which it is **reads** "outsourced payroll and HR, Middlesbrough overhead, six people in the finance team, Sharon, Michael, Denise, Rolf in Middlesbrough, Middlesbrough circa 50 K per year excluding salaries." Further on it reads "HR and payroll outsource, closedown Middlesbrough" **Reading on** there is a review of employees giving an indication as to their role in the company going forward, if they were to remain employed this is quite clearly indicated by the word stay: in reference to Mrs Harrington Mr McGowan has written

'restructure to different model, outsourced HR exit end of October'. The Tribunal were also shown a document headed "**structure" and** it is clear from this document that there was no role available for either Mrs Harrington, **Mr Harrington or Miss Casson** in the company going forward. **In particular under the heading 'At Risk' it reads; '*number two Middlesbrough payroll/admin number three HR***.'' None of the claimants were aware of the strategic review and the proposal to close the Middlesbrough **office** until August of the following year. **The** Tribunal has been referred to and seen a document relating to the lease for the Middlesbrough premises. **This is headed as 'Notice to Quit'** and **this notice was served on the landlord of the building on 20th September 2017 and gave notice that the lease would terminate with effect from 24th December 2017. At** the meeting **in September 2016 it** was also agreed Mr McGowan would step down from his role as CEO and Mr Foster would take up that position as from 1st January 2017.

2.12 Upon taking up his new role on 1st January 2017, Mr Foster began a review of the business based upon the strategic review meeting the preceding September.

2.13 Mrs Harrington raised a formal grievance on 16 January 2017. **The Tribunal concluded that** this is not another grievance rather an expression of her first grievance which was unresolved. Grievance 1 was never addressed by the respondent, although the reason why is unclear.

2.14 The grievance was heard by Mr Foster on Friday 3rd February 2017. **The** meeting was recorded, and the Tribunal has seen a transcript of that recording. During the recording it is clear that the bulk of the discussion was Mrs Harrington's concerns with salary. However, towards the end of the meeting **she** refers to banking irregularities specifically she says, **"the stores banked the cash themselves it shouldn't be given to anybody else to count/bank, they should be banking it themselves."** She indicates that before she is prepared to say more, she wishes to take legal advice. This is the third disclosure.

2.15 On 14 February **2017** Mr Foster sent an email to the claimant asking the outcome of **the** advice that she **sought. Mr Foster** is keen to obtain the precise details of the allegation in particular he says, "I am investigating all matters raised by you at our meeting and will respond to all matters **at** same time." Mrs Harrington responded by saying that she went into detail about the cash banking irregularities. Further she said, "consultants are openly speaking about **vast amounts** of money being counted in hotel room/car boots and transported into different countries." This is the fourth disclosure.

2.16 By letter dated 28th of February **2017** Mr Foster replied to the claimant's grievance in relation to equal **pay. This** does not concern this Tribunal; he rejected the argument in relation to banking irregularities responding as follows "I've now had the opportunity of speaking to a number of staff/consultants who are involved in this investment to understand why cash will be handled in this manner. Following this investigation, I'm happy that there has been no wrongdoing, the instruction to change the banking process by Paul McGowan was the correct one and there is no evidence of any **monies being misappropriated**. Advice was sought **at the** time from our advisers and an investment analyst is dedicated to reconciling sales to cash receipts. In addition, **a third**-party security firm were used to manage collections."

2.17 Mrs Harrington was unhappy with the decision and wrote to Mr McGowan to appeal the decision in relation to her pay. He replied by letter of 22 March dismissing the appeal.

2.18 Mr Turner was appointed European Chief Finance Officer as of 1 April 2017, following the termination of the employment of Kate Jenkins due to ill health. He visited the Middlesbrough office as part of his duties in April **2017**. **He wished** to understand the role of Miss Casson and Mr Harrington as they reported into him, but also the Tribunal is satisfied **he wished** to commence his review. He says in his witness statement:' 'I wanted to understand the respective roles of Michael and Sharon and the systems and processes that were being employed.' At that time there were two accountancy systems being run by the staff; Mr Turner it seems was anxious that the legacy system cease, and that the new accountancy system should be fully operational as in his view this system increased efficiency and reduced the need for manual payment on the online banking system. **N**either Mr Harrington nor Miss Casson agree**d** with that **assessment,** saying ***that even with the implementation of the new system there would still be a substantial amount of work required to be done.*** Mr Turner did not produce any notes of or a final review of the roles of Mr Harrington and Miss Casson

2.19 On 18 April **2017** Mrs Harrington emailed Mark Smiley and Eric Kaup the Senior General Counsel for Hilco Global both based in USA; in this email Mrs Harrington having made reference to conversations regarding her salary indicates that she wants to write formally under the **'C**ode of **E**thics **W**histleblowing **P**olicy'. **S**he goes on to tell both gentlemen that she had been aware that cash was taken from stores and not banked at store level, it was collected by individual consultants **and** taken to their hotel **rooms.** Money was taken across borders into different countries. **O**ne consultant had told her he had €1.2 million in his car and another had €2 million in his hotel room. She went on to indicate that money was taken to Pochins concrete pumping facility. **T**he money was picked up by Mercury security and taken to Ireland. **T**his was happening in Ireland and in the UK. This is the fourth disclosure.

2.20 Mrs Harrington had a telephone conversation with Mr Kaup on 20 April **2017 and** again she recorded this conversation and the Tribunal has seen a transcript; during the course of this conversation the claimant repeated her concerns in relation to stores in Belgium and Holland. Mr Kaup indicated he would think about it and get back to her. This is the fifth disclosure.

2.21 Whilst these conversations were ongoing Mr Turner and Mr Foster were continuing their review of the Middlesbrough office. Further on 10 July 2017 Harpreet Banwait was employed by the respondent as Group Financial Controller, the respondent's case is that Ms Banwait was employed to cover the maternity leave of Yulia Gapetchenko, who was the Group Financial Controller. Both were qualified accountants. However, Ms Banwa**it's** role was more senior with a wider remit that Ms Gapetchenko, she was also to be involved with strategic input.

2.22 Mr Foster makes reference in his witness statement (paragraph 24) to a number of issues which he says diminished the need for somebody in an HR role including; company payrolls previously managed by Hilco were reduced from 88 **to** 31 transactions. **O**ther efficiencies **were** introduced by Mr Turner which **improved the efficiency of the payroll system**. None of this information was

reduced into writing and shown to the claimants. Nor was any empirical evaluation of the roles of Mr Harrington and Miss Casson shared with the claimants. Indeed, the Tribunal has not seen any such document.

2.23 On 14 August **2017** Mr Foster visited the Middlesbrough office and addressed the claimants about the proposed closure which would result in roles being redundant. He then conducted individual meetings with each of them. Mrs Harrington makes a very specific allegation that during an informal break she was speaking to Mr Foster and asked what the rationale was behind the restructure **and** she alleges Mr Foster told her that she should not have blown the whistle to America. Mr Foster denies that was said. The Tribunal did not consider either Mr Foster **or** Mrs Harrington **to** be particularly credible **on this matter. Clearly** Mrs Harrington has a motive for saying this: **however**, it is satisfied that on the balance of probabilities this conversation did take place. One of the issues raised by Mrs Harrington and thereafter the other claimants was the issue of the review of the Middlesbrough office and a proposed new structure. All three claimants complain that they were never made aware of the contents of a **review. In** her submissions Ms Garner tells us on behalf of the respondent **that** there was no formal review or plan **as** this was a relatively simple decision-making process.

2.24 All three claimants were invited to challenge and raise queries as to the proposal and following the meetings received letters to confirm the position. Mrs Harrington requested a copy of the review carried out by Mr Foster to include the proposed restructure **and** she repeated this request in a further email on 29th August **2017**.

2.25 A further meeting was held with Mrs Harrington and Ms Casson on 30th August **2017.** Mr Foster sets out his account of the meeting at paragraph 32 of his witness statement.

2.26 Mr Harrington met with Mr Foster on 18th September **2017. He** told the Tribunal he felt disadvantaged as he knew both Mrs Harrington and Ms Casson had had their second meetings. In this meeting Mr Harrington was open to alternative employment opportunities, dependent upon the package, including moving from his present location.

2.27 Following the meetings the outcomes were summarised in letters; all **of the letters** stated that the respondent had provisionally decided to close the Middlesbrough office which could result in redundancies. Mrs Harrington's letter also indicated that the requirements for HR has materially reduced and Mr Foster **would assume that** function; **the letter also referenced that** Mrs Harrington thought she could perform **other** roles and that her preference was to work within Hilco Limited.

2.28 Mr Harrington's letter continued with the fact that the Middlesbrough office was going to close; the switch to one accounting system would reduce the requirements of the finance team; one proposal is for John Turner to take on payroll; Mr Harrington **indicated** he was bested suited to finance roles both in Hilco and its portfolio companies. A further consultation meeting was proposed for 27th September **2017**, but Mr Harrington declined to attend.

2.29 Ms Casson's letter continued that the requirements of the finance team will reduce as one accounting system is rolled out. She indicated she was best suited to finance and was willing to move subject to the package offered.

2.30 Mrs Harrington and Ms Casson were informed of their redundancy by letter of 25th September 2017 **and their respective dismissals were** effective on 13th October **2017**. Mr Harrington was informed of his redundancy on 3rd October **2017** effective from 13th October **2017.**

2.31 All three claimants lodged a combined grievance/appeal regarding the dismissal and other issues. The appeals/grievances were to be heard by Mr Turner in London. All three requested they be held elsewhere **but the requests were** refused. All three queried why Mr Turner, a subordinate to Mr Foster, was handling the **appeals.** The claimants did not attend any hearings and the grievances/appeals were all dismissed.

The Bonus

2.32 None of the claimants have a written contract. Each year they received a bonus. Mrs Harrington's, she tells us, was in the region of £30,000 - £40,000 per annum. Mr Harrington's was £7,200; Ms Casson's was about £10.000 per annuum. They have always received a bonus which is paid at the end of the financial year. None of them received a bonus **at the year-end** April 2018. They all adduced oral evidence that former employees were always paid their bonus even if they were not still employed at the end of the financial year.

3*. The issues*

Protected Disclosure ***(relevant to the first claimant only)***

1. *has the claimant made a disclosure of information?*
2. *if so did the claimant's communication at the time amount to information tending to show that:*

   a) the respondent had committed or was committing ***or*** *was likely to commit a criminal offence and/or*
   b) the respondent had ***f****ailed or was failing* ***or*** *was likely to fail to comply with a legal obligation to* ***which it was*** *subject*
   c) any matter falling within one or more of the two preceding categories was being ***or was*** *likely to be deliberately concealed*
3. *did the claimant have* ***a*** *reasonable belief about the alleged wrongdoing*
4. ***did the claimant have a reasonable belief that*** *any such disclosure was in the public interest*
5. *were the alleged disclosures made to Messers Smiley and Kaup made under a procedure authorised by the respondent*
6. *were the alleged* ***disclosures*** *made in good faith*
7. *were the disclosures protected disclosure within the meaning of* ***Part IVA of the*** *Employment Rights Act 1996*
8. *was the reason or the principal reason for the claimant's dismissal* ***one or more*** *of the protected disclosure*

Victimisation

1. *did the claimant perform **a** protected act under the Equality Act 2010 (or did the respondents believe that the claimant had done such an act)?*
2. *if so, was the reason or principal reason for the claimant's dismissal because of the protected acts*

Unfair Dismissal

1. *was the reason **or** principal reason for the claimant's dismissal on the grounds of redundancy*
2. *If **not, was the reason** or principal reason on the grounds of some other substantial reason, namely business reorganisation*
3. *did the respondents carry out genuine meaningful consultation?*
4. ***was the decision to include the claimant in the pool fair and or mostly constitution of the pool fair***
5. *did the respondent **reasonably** investigate the possibility of alternative employment?*
6. *did the respondent act reasonably in treating the above reasons **as sufficient** reason for dismissal?*
7. *if the dismissal was procedurally unfair **would** the claimant have been dismissed in any event (Polkey)*

Detriment

1. *Was the claimant **subjected** to the conduct alleged?*
2. *if so did the conduct amount to a detriment*

Breach of Contract

1. *what were the express or implied terms in relation to the claimant's entitlement to a bonus?*
2. *did the respondent breach those terms?*
3. *if so what compensation is due to the claimant*

Alleged** Disclosures **by the first claimant

1. ***In** June 2016 the claimant met Paul McGowan to discuss her concerns about her bonus and her perception that male employees were being paid more than her. This is a protected act the purposes of the Equality Act section 27*
2. ***In** June 2016 the claimant reported to Mr McGowan that money was being moved across borders. **This is** a protected act for the purposes section 43A Employment Rights Act 1996*
3. ***In** August 2016 claimant spoke to Mark **S**miley with regards to her bonus pay practices. This is a protected disclosure for the purposes section 43A Employment Rights Act 1996 and section 27 Equality Act 2010.*
4. *On 3 February 2017 the claimant told Mr Foster that money was being taken involving millions of euros in boots of cars. This was a protected disclosure*

*for the purposes of section 43**A** of the Employment Rights Act 1996 **and** section 27 Equality Act 2010.*

5. ***On** 13 March **2017** the claimant appealed raising concerns about her removal from a mailing list; their exclusion from the redundancy process or to employees in Middlesbrough; her exclusion from corporate entertaining; the use of staff agencies and consultants. This letter was a protected act **for** the purposes of section 43A Employment Rights Act and section 27 of the Equality Act*
6. ***On** 18th of April **2017** in an email to Mark **S**miley and Eric Kaup the claimant disclosed the same issues as regard consultants. She specifically said she was doing this under the respondent's code of ethics whistleblowing policy. This was a protected act the purposes of section 43**A** of the 1996 **A**ct.*
7. ***On** 20 April 2017 the claimant disclosed to Mr Kaup that it was Mr Magowan's security firm which had taken the money across country borders. This was a protected act for the purposes of section 43 of the1996 Act.*

*Detriments **alleged to have been suffered by the first claimant***

1. *The instigation of a review into the operation of the Middlesbrough office which was a decision taken by Mr Foster*
2. *The decision to close the Middlesbrough office which was a decision taken by Mr Foster*
3. *Her treatment as **part of** a pool of employees who were based in the Middlesbrough office despite her role being a mobile role with no fixed base which was a decision taken by Mr Foster*
4. *The failure to consult with her in any meaningful sense in relation to her proposed redundancy **and/or** the proposed closure of the Middlesbrough office*
5. *The failure to pay her bonus in April 2017 which considered her work on the 99p stores deal **(as** Mr McGowan had promised) which was a decision taken by Mr Foster*
6. *The failure to pay her bonus or a **pro rota** bonus in respect of the work she carried out in 2017 up to the date of her dismissal which was a decision taken by Mr Foster.*

Dismissal

Mrs Harrington

1. *Was the **dismissal unfair** pursuant to section 103A **of the 1996 Act** because the reason or principal reason for dismissal was that she had made protected disclosures*
2. *Further or in the alternative the claimant's dismissal was an act of victimisation contrary to section 39(4)(c) of Equality Act 2010 because the reason for her dismissal was a protected act*

All Claimants

1. *the dismissals were unfair pursuant to section 98(4) of the Employment Rights Act:*
2. *there was no genuine redundancy situation*
3. ***claimant 1** ought not to be in the pool of potential redundancies because her role was not based in the Middlesbrough office in any meaningful sense*
4. *there was no proper consultation with the claimant**s** prior to the decision to make **them** redundant*
5. ***did** the respondent **fail to** considered suitable alternative employment for the claimant*

Breach of Contract

1. *the claimant was entitled to a bonus in respect of her work during 2017 prior to her dismissal. In breach of contract the respondent has not paid any bonus to Mrs Harrington's*

The Law

4.1 The Tribunal had regard to the following statutory provisions: In relation to Protected Disclosures Part **IV**A **of the** Employment Rights Act 1996 which sets out the provisions in relation to public interest disclosures. In particular section 43B which defines disclosures as

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.
>
> Section 47B gives an employee protection when a disclosure is made
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

Section 94 Employment Rights Act **1996** gives an employee the right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98 Employment Rights Act **1996** sets out how a Tribunal shall determine the fairness of a dismissal as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Section 139 **Employment Rights Act 1996** Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

Section 103(A) Employment Rights Act 19**96** gives an employee further protection from dismissal where a protected disclosure has been made;

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

4.2 The following cases were referred to by Counsel

Williams v Compair Maxim [1082] IRLR 83 which gives guidance on how a Tribunal should approach a redundancy dismissal. The factors a Tribunal should consider are; the employer should give an employee warning of impending redundancies and look to alternative solutions including alternative employment; look to the means for selection; consider the criteria, in particular that they are not dependent upon the opinion of a decisionmaker; the criteria should be fairly applied; consider alternative employment.

Capita Hartshead **Ltd** v Boyd [2010]ICR 1256 which deals with the situation where there is a pool of one, the employer must show **he** has 'genuinely applied his mind' to the question of who should be included in the pool.

Harrow London Borough v Knight [2003] IRLR 140

When considering a protected disclosure claim the Tribunal should not just look at the issue of causation but also the motivation of the employer.

This is expanded upon in Fecitt v NHS Manchester [2012] IRLR 372 the Tribunal must find that the disclosure materially caused or influence the employer to act as he did'

Submissions

5.1 The Tribunal is grateful to both Counsel who submitted full written submissions. The case for all 3 claimants in relation to the unfair dismissal claim is that the respondent failed to follow a proper procedure, in particular there was no consideration **of** the correct pool, it was simply a question that the Middlesbrough office was to close therefore the **claimants'** jobs went to**o**. In addition, the consultation was meaningless, the claimants were not provided with any kind of written documentation setting out the reviews conducted in relation to the closure of Middlesbrough and why they had been selected.

5.2 In relation to Mrs Harrington, her claims in relation to the disclosures are that she was dismissed for making the disclosures to Mr **Smiley and Mr Kaup in the** USA, and/or the procedure was flawed because of the disclosures.

5.3 Turning to the breach of contract **claims**, all three claimants had usually received a bonus, which although discretionary was always paid, there is no term within their contracts which gives the respondent the option to not pay if the claimants were not employed at the end of the financial year.

5.4 The respondent's case in relation to the unfair dismissal claim is that this was a true redundancy situation, a proper review and consultation was carried out. If it is not a redundancy then the dismissals fall under 'some other substantial reason'.

5.5 Turning to the breach of contract, the **claimants** do not have written contracts, the bonuses are entirely discretionary, there is precedent within the company for not paying someone who is no longer employed.

5.6 Mrs Harrington and the detriments, the respondent accepts that some of the disclosures are disclosures capable of protection, whilst other are not. There is insufficient causal link between the disclosures and the detriments.

Discussion and conclusions

The Disclosures

6.1 The Tribunal first considered whether each of the 'disclosures' were disclosures for the purposes of Employment Rights Act **1996** and capable of protection.

6.2 The telephone call with Paul McGowan in June or July 2016; the Tribunal asked itself what was said during the conversation and concluded that the claimant made reference to receiving a lesser salary than colleagues and also reference to her bonus. Further she **alleged that she made** complaints to Mr McGowan in relation

to banking **irregularities. The** Tribunal is satisfied that Mrs Harrington did make reference to irregularities and provided some further information. The Tribunal concluded this because, it accepted the evidence of **Mrs Harrington** in relation to Mr McGowan's response that is to say he started shouting and bawling at **her and** became very angry and repeatedly asked who had given her that information. During this conversation the claimant did not make reference to equal pay nor to her salary being less than her male colleagues.

6.3 Having concluded that there was no reference to equal pay or disparity in pay because of sex the Tribunal concluded that this disclosure did not amount to a protected act the purposes of section 27(2) Equality Act 2010 in particular that the claimant was **not** making an allegation (whether or not express) that the respondent had contravened the Equality Act. **F**urther that she was **not** doing any other thing for the purposes **of** or in connection with **this Act**. The reason why the Tribunal does not consider it falls within this **Act is** that whilst the claimant raised her pay, she did not make reference to disparity in pay.

6.4 In relation to the banking irregularities the Tribunal is satisfied that this was information for the purposes of section 43B Employment Rights Act 1996 in that there was information imparted which in the reasonable belief of the claimant tended to show that a criminal offence was being committed or likely to be committed or that the respondent was failing or likely to fail to comply with a legal obligation. Again, the Tribunal is satisfied of this because of the reaction of Mr McGowan to the claimant's comments. We are asked to consider that it is not made in the public interest and the claimant's motive for raising this**. The** Tribunal do not consider that the claimant was raising this **as** leverage for her other complaints but rather she had a genuine concern, in which she might be implicated if she failed to raise the matters that were ongoing in Holland and Belgium. Miss Garner asked **us** to consider that the claimant has not identified in what way this information qualifies for disclosure however it is clear which sections it would fall within namely, that a criminal offence has been committed, is being committed or is likely to be committed, or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

6.5 The conversation with Mark Smiley August 2016; the Tribunal has not heard from Mr Smiley and the claimant tells us that she spoke to him about her bonus and equal pay. The Tribunal is not satisfied that the claimant referred to equal pay as in her email to Mr Smiley the following year she refers only in the simplest of terms to "our conversation last year regarding my salary when you **informed** me that Paul McGowan would speak to me regarding the subject". It is clear to the Tribunal that if she had made reference to either equal pay or disparity in pay because of her sex this would have been in this email **and it is not. Therefore,** we conclude it was not referred to in those terms and is not a protected **act** for the purpose of Section 27 Equality Act 2010.

6.6 The grievance dated 16 January 2017; the **respondent admits** that this is a protected act for the purposes of section 27 Equality Act and a protected disclosure for the purposes of section 43B Employment Rights Act.

6.7 The conversation with Mr Foster on 3 February **2017**. This was the grievance meeting during the course of that meeting the claimant spoke at length with Mr

Foster as to the inequalities in relation to her pay and bonus. As to the issue of the deals in Belgium and Holland she referred to cash bankings not getting banked. She went on "I know a lot more, but I'm not saying a lot more I want the company to tell me what happened on that deal." She is asked more than once by Mr Foster to expand but she refuses simply saying "I have grave concerns that I am losing sleep over and I am stressed to hell….' At the conclusion of the meeting the claimant indicates she will get advice on whether she should speak as to the banking irregularities.

6.8 The Tribunal is satisfied this is a protected act for the purposes **section** of 27 Equality Act 2010. Turning to the issue of a protected disclosure, the Tribunal is not satisfied that the claimant imparted 'information' for the purposes of section 47B Employment Rights Act **1996** as she only made a very general observation more akin to an allegation rather than specific information.

6.9 **In** his submissions Mr Goldberg, it seems to the Tribunal has conflated the conversation with the email of 16th February **2017.** The Tribunal concluded that it is not permissible to so to do. Each 'disclosure' must be looked at on its own merits

6.10 The email of 16th February **2017** This is the email referred to above addressed to Mr Smiley; in it the claimant, in response to an enquiry from Mr Foster stated "I went into great details about the cash banking irregularities on the music deal. Consultants are openly speaking about vast sums of money being counted in hotel rooms/car boots and transported into different countries"

6.11 Although the Tribunal could conclude that this was a protected act it is disregarding this for the following reasons: it was not referred to in the ET 1 as such, nor was it set out in the list of issues the Tribunal had before it or understood by the respondent as a public interest disclosure, as can be seen from Ms Garner's revised list of issues.

6.12 As noted above, it is not permissible to conflate 2 disclosures into 1; therefore, the Tribunal will disregard this alleged disclosure for the reasons stated above.

6.13 The Appeal letter to Mr McGowan dated 13th March **2017** from the decision of Mr Foster; the main thrust of this appeal is Mrs Harrington's assertion as to her Equal Pay. This would be a protected act for the purposes of section 27 Equality Act 2010

6.14 It is alleged also to be a protected disclosure under the Employment Rights Act in the chronology and list of issues but is not referred to as such by Counsel in his submissions. Having considered its contents, it makes no reference to the banking irregularities, the other issues raised in the appeal have never been relied on as protected disclosures as it is difficult to see how they might be construed as such.

6.15 The email to Mark Smiley and Eric Kaup on 18th April **2017**, the chronology indicates this is an admitted protected disclosure however in her submissions Ms Garner invites this Tribunal to conclude although amounting to protected disclosure for the purposes of remedy it was not made in good faith. The Tribunal consider it was made in good faith, Mrs Harrington was clearly, the Tribunal concluded, concerned about the situation in particular that she may be drawn into

it and be seen to be colluding in it.

6.16 In summary; the following were disclosures for the purpose of section 47 Employment Rights Act **1996**: *Th**e telephone call to Mr McGowan in May 2017**;* grievance in January 2017; the email to **Messers** Smiley and Kaup on 18th April 2017

6.17 The following were **protected acts** for the purposes of section 27 Equality Act 2010: the grievance lodged January 2017; the 3rd February 2017 conversation with Mr **F**oster; the appeal letter to Mr McGowan dated 13th **2017.**

The detriments:

6.18 The instigation of a review into Middlesbrough office; the decision to close the Middlesbrough office; The Tribunal concluded these could **both** amount to detriments. However, it was not satisfied that there was a causal link between the disclosures and these acts. The decision to close the Middlesbrough office was first aired by the board on 26th **September 2016** at a Strategic Review Meeting when Mr McGowan produced the paper referred to above**. Despite** the fact that Mrs Harrington was named as exiting the business the Tribunal is not satisfied that this was because of the disclosure, in particular because of the length of time between the disclosure and the fact **the** claimant was employed for another 11 months before she was dismissed. As to the 'pool' **of** the staff at Middlesbrough, there was too much delay between the disclosure and the action for there to be a causal link.

6.19 Mrs Harrington's treatment as part of a pool of employees based in Middlesbrough, and the failure to consult**. The** Tribunal concluded both were detrimental acts because of Mrs Harrington's disclosure to officials in US office. The Tribunal concluded this because of the timing of the process in **A**ugust 2017 and the manner in which it was carried out.

6.20 The failure to pay the bonuses; again, these could amount to detriments. Is the failure to pay the first bonus at a higher level a detriment? On the basis that the bonuses were discretionary **we conclude** that this not a detriment.

6.21 Is there a causal link? The failure to pay the bonus due because of the 99p deal was already determined prior to the disclosure made on 16th May **2017 as** it is clear in her email of 16th May **2017** that the claimant was complaining about this. ***Further the Tribunal is satisfied in respect of the bonus, that Mr Foster was clear in his evidence that he would have paid this bonus if the claimant had still been employed by the respondent at the time the bonus was due i.e. April 2018.***

Automatically Unfair Dismissal

7.1 The question here is what the principal reason for Mrs Harrington's dismissal was; Whilst part of the reason was the apparent reduction in the workload for Mrs Harrington, the Tribunal was not satisfied this was the principal reason for her dismissal. The Tribunal having considered the evidence and in particular the

chronology it is satisfied that the reason for the dismissal of Mrs Harrington was her whistleblowing to America. The Tribunal concluded this for the following reasons: although the documentation for the strategic review clearly shows that the respondent was intending to dispense with the services of Mrs Harrington, as it was intending to undergo a rationalisation. The principal reason was the disclosure to USA, as evidenced by the conversation between Mr Foster and Mrs Harrington. **T**he 'consultation' for the redundancy follows quickly upon the disclosure and as will be seen below was not a properly carried out redundancy process. **The Tribunal is satisfied that this disclosure 'materially caused or influenced the employer to act as he did', in fact the principal reason was the disclosure to USA, as evidenced by the conversation between Mr Foster and Mrs Harrington.**

Victimisation

8.1 What part did Mrs Harrington's protected acts under the Equality Act play in her dismissal. The Tribunal is satisfied that they did not play a part, the concern for the respondent in particular Mr McGowan was the disclosure to the US office with regards to the movement of cash.

Unfair Dismissal

9.1 Ms Garner asks the Tribunal to accept that **this** is a redundancy under Section 139(1)(a)(ii) Employment Rights Act **1996**, that it was the fact that the Middlesbrough office was closing was the reason for the redundancy, whilst Mr Goldberg argues that the Middlesbrough office was closed because the claimants were made redundant. The evidence in relation to this comes in a number of forms in the strategic review in September 2016 the closure of the Middlesbrough office was under consideration although it is clear it was partly because of the expense of the staff there. The Tribunal is not entirely satisfied with this explanation.

9.2 The Tribunal examined the process with care and noted the following facts; the strategic review undertaken in September **2016** had as an aim the closure of the Middlesbrough office, notification of termination of the lease being given on 20th September 2017 if the decision was based solely on the closure of the office the Respondents would have been able to put that into effect much earlier.

9.3 Although a review was undertaken by Mr Foster and Mr Turner of the roles undertaken by the three claimants, there was no empirical evidence of this, for example, the job roles; the nature of the job roles was not written down and examined, in particular in relation to Ms Casson the Tribunal was forced to look at the job description of Ms Banwait to try and identify the role she undertook.
The review was never reduced to writing so the claimants, in particular Ms Casson in relation to her role. were never able to properly challenge it.

9.4 Was **the** redundancy process fair?

9.4.1 Whilst it may be that Mrs Harrington was in a pool by herself, there is no

evidence as to why that is or how Mr **Foster** would be able to assimilate the HR function into his own role the same cannot be said of Mr Harrington and Ms Casson. Their duties have been distributed amongst a number of other **staff**. Clearly the pool should have included these people.

9.4.2 With regard to Mrs Harrington, it is suggested that Mr **Foster** undertake the HR function, again this was without a review of the role carried out by Mrs Harrington**. If** as the respondent alleges that in the last two years of her employment she spent most of her time on Hilco work, there is no proper explanation as to how Mr Turner would achieve this save for vague statements.

Selection Criteria

9.4.3 On the evidence before it the Tribunal could find no evidence of any selection criteria being applied to the claiman**ts** and or others to ascertain who should be in a pool. In particular there is no evidence that the criteria were objective and fairly applied.

Consultation

9.4.4 The Tribunal concluded that without the proper information that any consultation process is meaningless, none of the claimants had the information upon which they could challenge their redundancy.

Alternative employment.

9.4.5 Although Mr Foster's evidence was **that**, he was actively seeking alternative employment the one alternative he did not consider was home working. If the intention of the respondent was to economise by saving money on the Middlesbrough office this could easily be achieved by the claimants working from home.

The Appeal

9.4.6 All three claimants complain that Mr Turner was subordinate to Mr Foster. There is merit in this argument; there is no reference in his witness statement to cover this point and having reviewed the notes of evidence it does not appear he was asked about this, the general principle in industrial relation is an appeal should be handled by a superior officer.

9.4.7 Further the claimants complain that the respondent refused to hold the hearings outside of London **even though** it was suggested they be held out with Hilco at service**d** offices and that reasonable travel be paid. The Tribunal considered this carefully against the background of the case as a whole. Whilst Mrs Harrington was used to travelling as part of her role, neither Ms Casson nor Mr Harrington did. All previous meetings had been held in the north east, it is difficult to see a justification for this refusal.

9.4.8 Overall therefore the Tribunal considered the appeal process was flawed.

Polkey

9.4.9 **W**ould the claimants have been dismissed if a fair procedure had been followed? It is impossible to say on the evidence we have before us that they would have been dismissed. A proper procedure would have included written documentation setting out first why it was uneconomic to keep Middlesbrough open; secondly setting out why the claimants were selected for redundancy. That is to say, identifying which part or parts of their roles were no longer required, who else was in the pool, the selection criteria used, how they were applied, alternative roles that were considered including home working.

Breach of contract; The Bonus.

10.1 There are no written contracts and therefore the Tribunal has to consider what the terms in relation to the bonus were. The Tribunal found the following facts; the bonuses were always described as discretionary and that Mr McGowan could withhold them if he so wished. The claimants had always received a bonus; all employees had always received a bonus; one employee had left and not been paid a bonus; other employees had received a bonus post termination of their employment.

10.2 The Tribunal concluded that although the bonus was described as 'discretionary' it was always paid and in particular the claimants had always received a bonus. The Tribunal therefore concluded that the 'understanding' that bonuses were discretionary was **superceded** by the custom **and** practice of them being paid. Turning to the question of employment, the Tribunal cannot speculate why a former employee who did not get a bonus did not pursue it, but there is evidence that employees have received bonuses post termination. The Tribunal therefore concluded that it was custom and practice for all employees to receive their bonus despite their employment status **at** the conclusion of the financial year. Indeed, Mr Foster accepted the bonuses would have been paid if the claimants were still employed.

Conclusions

The Tribunal concluded as follows:

11.1 Mrs Harrington was subject to the following detriments **pursuant to section 47B of the Employment Rights Act 1996** as result of her disclosure to Mr Smiley and Mr Kaup **on 18 April 2017:**

11.1.1 her treatment as part of a pool of employees who were based in the Middlesbrough **office;**

11.1.2 the failure to consult with her in any meaningful sense

11.2 Mrs Harrington was not subject to victimisation **under section 27 of the Equality Act 2010** as a result of any protected acts.

11.3 Mrs Harrington was **automatically** unfairly dismissed pursuant to section 103A of the Employment Rights Act 1996 due to her disclosure to Mr Smiley and Mr Kaup.

11.4 **The claimants Mr Harrington and Ms Casson were unfairly dismissed pursuant to sections 94/98 of the Employment Rights Act 1996. If the**

decision in respect of the automatic unfair dismissal of Mrs Harrington is wrong, then we conclude that Mrs Harrington was also unfairly dismissed pursuant to sections 94/98 of the Employment Rights Act 1996.

11.5 The respondent breached all three **claimants' contracts** of employment by its failure to pay bonuses for the year end**ed** April 2017.

Employment Judge **Pitt**

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Date 7th August 2019

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.