EMPLOYMENT TRIBUNALS

Claimant: Ms A Lewington-Hill

Respondent: Chase Search and Selection Limited

Heard at: Manchester **On:** 12 and 13 December 2019

Before: Employment Judge Holmes
Ms F Crane
Mr W K Partington

REPRESENTATION:

Claimant: Mr P Byrne, Solicitor
Respondent: Mr D Gorry, Solicitor

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant's complaints of protected disclosure detriment were presented out of time. It was reasonably practicable for them to have been presented within time, and they are dismissed.

2. The claimant was not unfairly dismissed and this claim is dismissed.

REASONS

1. In this case the claimant brings complaints of unfair dismissal, in the species of constructive dismissal, and protected disclosure detriments arising out of the employment that she had with the respondent between 27 July 2015 and 31 August 2018 when she resigned. The case has been case managed, and a preliminary hearing was held at which the issues were identified and have been included in the hearing bundle, set out in the Annex to the Orders made, in relation to firstly the protected disclosure detriment claims, and secondly the unfair dismissal claims.

2. At the outset of the hearing it was agreed that the Tribunal would deal with liability only, and consequently issues as to remedy have not been determined at this hearing but will be, if necessary, after the Tribunal's judgment.

3. The claimant has given evidence herself and has called Mrs Tracy Halsall as her witness, and the respondent has called one witness, Peter Munro, who was the relevant Project Manager for the claimant.

4. There has been an agreed bundle and during the course of the hearing supplemental documents have also been made available and have been considered by the Tribunal. The parties' representatives made oral submissions, and the Tribunal deliberated. This judgment was given orally on the final day of the hearing. Reasons were requested by the claimant and are now provided. Where these Reasons amend or add to anything said in the oral judgment given on the day, these Reasons are the Tribunal's reasons for its decision.

Findings of Fact

5. Having considered the evidence, the submissions of the parties' representatives and the documents in the bundle, the Tribunal unanimously finds the following relevant facts:

5.1 The claimant was employed by the respondent, with the details of her employment being set out in the offer letters, and indeed a contract of employment which are to be found at pages 49-60 of the bundle. The contract of employment refers to the employer as being the respondent, and in terms of others parties referred to in that document, the first paragraph of the contract refers to the respondent as "the Company" and then goes on to refer to it providing services to "Healthcare Companies" which are then referred to collectively as "the client", which are provided by the respondent, as and when provided by the client.

5.2 In terms of the place of employment, the contract provides, albeit with a slight typographical error one expects, that the claimant would be required to work from the offices of the client to whom she was assigned , and that she could be required to work at such other places that may reasonably be required of her by the respondent or indeed the client.

5.3 In terms of her job title, the contract provides that she would be employed in terms of the position stated in her letter of engagement, and that her designation may change as specifically required by the client from time to time, and her duties would vary accordingly. It was then provided that she would report to her immediate superior within the client and also the company's Project Manager as identified in the letter of engagement.

5.4 Another clause of the contract which has been referred to is clause 7.7, where in terms of the claimant's obligations she was required to comply with the Code of Conduct laid down by the Association of British Pharmaceutical Industry, the ABPI as it is known, and this was one of the express obligations to which she was subject both in terms of her contract of employment, and indeed was generally subject as a professional working in this industry.

5.5 In addition to that, the claimant was an ethics champion within the respondent, so she had that additional role as well.

5.6 Having been appointed by the respondent she initially was assigned to the Pan Merseyside territory , but then in 2018 she moved to a different territory, the Lancashire territory, and was assigned , as she had been before , to the client GSK, (which is GlaxoSmithKline but referred to by those initials throughout), and in terms of her day-to-day management that was carried out by Debbie Edginton of GSK, and others, and her Project Manager, for the respondent, was Peter Munro. In terms of his management of her, that was less intensive. Day-to-day matters were left to GSK, but he would have an overall responsibility for her management and would keep in touch and perhaps have contact on a monthly basis, but that would vary depending upon how the work was going.

5.7 The work in question was that of a representative promoting and selling the pharmaceutical products of GSK. This is obviously a highly specialised, and indeed regulated occupation, and the claimant was very experienced within it. The issues giving rise to this case began in spring 2018, when, having moved physical territory, the claimant was also then given, for her, the new responsibility for marketing a new product that had been introduced by GSK in late 2017 called Trelegy Ellipta. That is a drug treatment, an inhaler type treatment we understand, for the treatment of severe chronic obstructive pulmonary disease ("COPD") and this is one of a range of products available for the treatment and management of that condition. That particular product was licenced, as all such medicines doubtless are, by the European Medicines Agency. In terms of the precise terms of that licence, the Tribunal has not been provided with the original licence, or the precise terms of it, as it appears to have been superseded by a later version, but the Tribunal accepts without seeing the actual licence that the terms of it, as is apparent from a number of other documents that the Tribunal has been provided with, were that it could be utilised, or prescribed to two groups of patients, with COPD. The first group were those who were on a single treatment, a single inhaler or certainly a single drug treatment within that inhaler, and the second group were those who were already receiving treatment, but the medications that they were on were of a double nature, and that this particular treatment (the Trelegy) could then under the terms of the licence be prescribed to them for them to then "step up", as it has been termed, to triple treatment. Consequently, in terms of the difference between what the other medicines or treatments could do and Trelegy, it was not permitted under the terms of the licence for a pharmaceutical professional (although doctors apparently were different) such as the claimant, and anyone else subject to the rules of her profession , under the terms of the licence to promote this treatment as a replacement for an existing triple treatment. The Tribunal has been taken into some detail about that, but in essence it was permissible for it to be a "step up" to triple treatments but it was not permitted for it to replace an existing triple treatment. That, in terms of the licence, was the claimant's understanding of it, and we accept that, on a balance of probabilities, that was indeed the case.

5.8 It would be a serious breach of the claimant's obligations under the ABPI, and indeed, of course her contract of employment, to promote a product in breach of its licence, and it was that issue that gave rise to the events that bring the claimant before us today.

5.9 Those events began to come to a head in spring 2018, when the claimant had not been very long involved in the promotion of Trelegy. The then (and possibly still) person involved from GSK, Mr De Almeida who was the Regional Business Director at that time, sent an email addressed to all (which was all on the relevant sales team, which would include the claimant) in relation to Trelegy. This email, which is at pages 67-68 of the bundle, includes on the first page (page 67) what is called a "call to action", and what he says in this email is that the sales of Trelegy had been, effectively, disappointing. What he was seeking to do in this email was to achieve an increase in those sales, and in particular that each sales representative should in each working day provide at least two new Trelegy patients as the minimum goal to strive for.

5.10 In this email, on page 68 following on from that sentence where he sets out that aim, he then goes on to refer to patients stepping up to triple medication, but then goes on to refer to those who were already on triple medication, for whom many were supplied a competing product called Trimbo from another pharmaceutical company. The proposal from Mr De Almeida was that Trelegy would then be prescribed instead of the Trimbo, in other words it would then be prescribed in place of an existing triple mediation. That, the claimant contends, would be to promote of its use in breach of its licence, certainly as it was at that time.

5.11 This email caused the claimant some concern, and she therefore began to have conversations about this, firstly with Debbie Edginton who was the GSK (effectively) line manager for the claimant, and also with Simon Davies, also of GSK, with whom the claimant was well acquainted and whom she trusted from previous experience. There were some conversations the dates of which are not too precise, but appear to have been around about 27 June, when the claimant spoke to both of those persons and had discussions with them, to put it neutrally, about the licence for Trelegy and how it could be promoted.

5.12 In terms of the disputed content of those conversations, at that point, the claimant has given evidence in her witness statement and her oral evidence to the Tribunal about them, and there is other evidence from other sources in relation to what was happening at the time. One of the things that was happening at the time was that a lady called Shona Mutch who was also working on Trelegy for GSK, albeit not provided to GSK by the respondent company Chase, but by another company , IQVIA ,was dismissed, in circumstances which she contends, and indeed has claimed , or intends to claim (not quite clear which of the two it is yet), but she has brought an Employment Tribunal claim against her employer, in which she alleges (pages 167 to 172 of the bundle are her Grounds of Claim)

that having raised similar concerns to the claimant in relation to the licencing and promotion of Trelegy, she was, on 30 May 2018, dismissed from her post, a dismissal that was confirmed on 1 June. The claimant became aware of that, and indeed there is in the bundle a short text exchange between the claimant and Ms Mutch on 29 June 2018 in which the claimant refers to her concerns and whether it would be a breach of the ABPI rules and Ms Mutch replies to that. We have seen that exchange, but that was happening at the same time and the claimant was concerned, she told us, and we have accepted, about the way in which GSK wished to promote Trelegy.

5.13 In terms of her own Chase Project Manager, Mr Munro, he at this stage had no direct dealings with these matters. It is not suggested that he was party to any of those discussions which were taking place between the claimant and Debbie Edginton and/or Simon Davies, and she does not suggest that he was present, or party to any of those. She has contended that he was, or would have been made aware of them, but there is no evidence that he was, and we find that he was not.

5.14 In terms of what happened thereafter, the claimant became increasingly concerned, and in her witness statement she says effectively that whilst having those concerns she continued to carry out the work for GSK, but was doing so really because she was a single mother with significant outgoings. She was concerned that if she raised anything in too strong a term that might, as she puts it, “tock the boat” and she needed her employment and was most concerned what would happen, particularly in the light of what had happened to Shona Mutch, if she were to raise the matter any more formally. She agrees that she never put any of her concerns in writing.

5.15 The position became more difficult, and having attended a meeting with Debbie Edginton and indeed Mr De Almeida on 27 June 2018, the claimant became rather more concerned and that prompted her call to Simon Davies. In terms of that call , there is an account of the conversation that probably is being referred to there in the papers relating to the Shona Mutch claim, and we have got copies of an interview that Mr Davies gave in connection with that matter, in the context of the grievance raised by Tracy Halsall in 2019 (pages 192 to 196 of the bundle).

5.16 At some point between 27 June and 16 July (when is a little unclear but it is probably the former in that Peter Munro was on holiday for some of that period), but at some point between those two dates there was a telephone call between the claimant and Peter Munro. The accounts of that phone call are set out in both their witness statements, and in terms of the claimant's account she says that in that phone call (paragraph 13 of her witness statement) she had a conversation with Mr Munro regarding the “culture” at GSK , and the unwritten but stated requirement to promote Trelegy outside the licence provisions. She says that she indicated that she was unhappy with this, and could not continue on that basis, and that she wanted to look for work on another contract. She said that Mr Munro

told her that he was happy for her to continue to work for Chase, and that he would arrange for the recruitment team to assist her so that she could be transferred.

5.17 Mr Munro's account of that telephone call is in his witness statement at paragraphs 15-18 and is a rather more detailed account. In terms of what happened in that telephone call, the claimant was asked about that conversation, and indeed agreed with a lot of what was put to her. In relation to the prospect , and indeed the proposal of Peter Munro to assist the claimant to move from the GSK account, the claimant agreed that is correct and a lady called Claire was identified as the person that could assist in that regard, and Mr Munro did indeed agree that he would speak to her, and did so.

5.18 In relation to the conversation that took place, where the two accounts diverge is as to whether or not in that telephone call the claimant told Mr Munro that she was being put under pressure to promote Trelegy outside the terms of its licence, she maintaining that she did tell him that, he maintaining that she did not. Other than that disagreement the claimant largely agreed with the account that Mr Munro gave in his witness statement as put to her in cross examination.

5.19 Soon after that call, however, Debbie Edginton of GSK, in the light of the continuing poor performance, as GSK saw it, of Trelegy, decided that the team promoting Trelegy would be put on a performance plan. This was something that was communicated to the claimant by Debbie Edginton in a meeting into which Mr Munro also appeared by Skype, but was not present throughout; he, as he puts it, "popped into" that meeting, which was on 16 July 2018. That was a decision Debbie Edginton made on the basis of the performance of the team as a whole and most, albeit with one exception, of the people involved in that team were put onto a performance focus plan which was then formalised in a document which is available to us in the bundle at pages 72-75. That was compiled with some input from the claimant in relation to page 72, where she was invited to make some comments which. she agreed in her evidence he had made to Debbie Edginton for her to put into this document. In terms of what is recorded there (on page 72 of the bundle) what is written is:

"Andrea feels that she has support and training for Trelegy, challenging moving to another area, HCP trust taking longer to gain. No home/health issues affecting work."

5.20 The claimant accepts that that was roughly what she said in that meeting with Debbie Edginton, and that she did not at that point raise anything about selling or promoting the product out of licence.

5.21 The plan that was then prepared, of which page 78 is the first page, is on GSK stationery – their logo and moto appears in the top right-hand corner and it is clearly a document that Debbie Edginton prepared with the claimant. What then was produced (pages 79 to 81) was sent to the claimant, and this is a document which has a number of headings., on the

first page, which apply to the ensuing pages. Under the various headings are the actions that are required to achieve the expected standard. Whilst there is much use of abbreviations and other terminology that is peculiar to the industry, it is clear from that document that in relation to Trelegy itself the relevant entry is on page 74 where , in the second column, which is under the heading "Evidence that improvement is needed", what has been recorded is that there is evidence that the uptake for Trelegy after four weeks of the eight week "blitzing" of the Chorley and Ribble commissioning group had declined. Then, in terms of what then was the expected standard that next box has the requirement to prescribe Trelegy in appropriate patients, at least two a day, which rather echoes what was in Mr De Almeida's email, defined by samples given or verbal agreement, with a follow-up appointment. Then in relation to the action for improvement in the next box, it is for the claimant in this case to show on the next four field visits at least a 30% call rate, achieving a good sales outcome, and various other steps that were then to monitor the improvement required. In terms of the support, the next column deals with that, which would be a weekly Skype check-in, but in relation to the next review date what is set out in that box for both this particular heading, focussing in terms of call quality, the next review date is given as 1 and 2 August ("FV" being field visit with Debbie), obviously a reference to Debbie Edginton.

5.22 So in terms of that review, it was to last for eight weeks, and in terms of what the claimant was expected to do under it, it is set out in this document, which was followed up by an email from Mr Munro (page 76 of the bundle) in which he referred to their meeting by Skype the previous day and went through the areas that are referred to in the performance review. The final paragraph of this document says this:

"Andrea, as discussed during our meeting both Debbie and myself have are really looking forward to working with you to see the situation on your patch turn around. I know you are also very keen to see Trelegy achieve the success it deserves within the area, but just as a final reminder it is very important that we work together to achieve these improvements as a continuation of current performance levels could result in more formal action being taken including the possibility of GSK no longer requiring your services on this project."

5.23 That email was then followed up by a telephone call between Mr Munro and the claimant that evening, or certainly later than day, in which the performance plan was again discussed and he wanted to talk her through those matters, and indeed did so as he says in his witness statement because this would be a call that would not involve Debbie Edginton. As he says in his witness statement this may have given the claimant an opportunity to open up a bit more, as he puts it, without her being involved in the call. In terms of what occurred in that call, he says that the claimant understood the reasons and reacted to the plan in a professional manner. He disagrees that in that call, or indeed any other, the claimant said anything about being required to operate outside the licencing provisions applicable to Trelegy.

5.24 The claimant then went on holiday, as indeed was planned and known about, and was always going to be the case. Having returned from holiday on the evening of 31 August 2018, however, she telephoned Mr Munro, or vice versa, but they certainly spoke on the telephone, and she told him that she was going to resign the following day. Indeed she sent Peter Munro an email that night (page 84 of the bundle) at just before 9.00pm, in which she said that she was due to meet Debbie the following day, and would be giving her the attached letter, the attached letter being her resignation letter dated 1 August (page 82 of the bundle). That letter says this:

"I write to ask you to accept this letter of resignation with effect from now and my one month's notice period will commence from today. I am really sad to leave GSK and I wish the region all the best and I really look forward to watching the success from afar.

I have learnt a lot from my time in the company and I take the positive experience with me. I have made some really good friends here, which I will keep for life.

The medicines that GSK brings to fruition is [sic] exemplary and I am privileged to have been a part of it. I know that the future is very bright for the region and given the time they will be number one."

5.25 The claimant in her evidence has explained that in that resignation letter she made no reference to the requirement to promote the Trelegy product outside the terms of its licence, or indeed raise any matter, and that she clearly in that resignation letter sounded positive and gave a good indication of how she viewed the relationship with GSK. She has explained the reasons for doing that as being her desire to (as it were) again "not rock the boat" and to ensure her best prospects for continuing future employment. In those circumstances she considered that that was best achieved by not saying anything in this resignation letter, focussing as she always did, understandably, on looking after her son as a sole parent, and the need that she would soon have for other alternative employment. So in terms of why she did not put anything in that letter, that is the explanation that she has given to the Tribunal.

5.26 The response of Peter Munro to the claimant's resignation letter, he having on 31 July 2018 been told that was what she was going to do, was to attempt to dissuade her from that course. Having then got her resignation letter wrote however, on 1 August 2018, an email accepting her resignation and then setting out the actions that would then be required. The claimant was then to be put, and was put, on garden leaving for the remainder of her notice period, which expired on 31 August 2018.

5.27 Thereafter there were, during August, further email communications in relation to things such as handover, the company car and things of that nature, and in none of those, the claimant accepts, did she make any further reference to licence conditions being broken in the promotion and

sales of Trelegy. She accepts that she did not raise those issues in writing in any form at any time, and only contends that she did so verbally to Peter Munro, in terms of Chase being concerned.

5.28 That remained the position until 22 October 2018. The claimant during this time was actually still receiving, and had received before her resignation, contact from Claire at Chase whose task it was to provide potential other vacancies for the claimant. It is to be recalled that there are two ways in which the respondent's business operates: one is by what is called "headcount" where there is direct employment by the end user, as it were, and the respondent acts effectively as an agency and provides someone who is employed by the end user; or there is the other type, where the respondent employs the individual, in this case the claimant, and then supplies them to relevant clients. Those are two different ways of working, and Claire was in a position to advise the claimant of various roles that she then may be able to apply for. There is a printout at pages 213-214 of the bundle of the contacts that were made, and the Tribunal can see that they were made in September, October and December 2018, where the claimant was being advised of the vacancies she may be interested in applying for.

5.29 So that contact between the claimant and the respondent continued, but on 22 October 2018 the claimant then wrote to the respondent an email (page 103 of the bundle) which she addressed to Judy Phillips at the respondent in which she said this:

"Hi, I'm writing to issue a grievance and explain the reason for my resignation. As my employer at the time this email is to notify you and confirm that I wish you to investigate my post termination grievance. Please understand that the grievance is a result of GSK's actions whilst contracted to them but employed by Chase."

She continues:

"The reason for my resignation from GSK was on ethical grounds. I was asked to promote out of licence by my lead team on numerous occasions. The first time was a few days after conference and training which took place on 25 April. After attempting to seek clarification from a previous manager who agreed that it was inferred but would never be written down on email due to repercussions for GSK. At this point I had no other option but to resign as I felt it impossible to work in an unethical way and felt I had no safe place to voice my concerns. I was afraid to voice my reasons for leaving on my resignation letter as I was worried it would negatively impact on references and as a single mum I needed to secure another role. Having moved away from the situation I can see that I was in an environment of fear and bullying confirmed by witnessing the treatment of other colleagues who had questioned the inferred out of licence strategy."

5.30 That email received by the respondent was then dealt with by Emma Busby, Project Director. She contacted Peter Munro and he, having been provided with a copy of the claimant's email, replied to Ms Busby on 22

October 2018, by email (page 104 of the bundle) in fact the very same day. In that he says that he has read the claimant's email, and says that he can confirm that she never raised anything with him about being asked to promote out of licence or that what she was being asked to do was unethical. He goes on to say:

"It also makes me sad that she says she felt she had no safe place to voice her concerns as I did think that she and I had quite a good and open relationship. I knew she was unhappy and considering leaving her role well before she did, but the reason she cited to me was more about not feeling she was getting on with some people in the team, frustration around the process within GSK and the culture of activity. She was feeling the above increasingly towards the end if you remember: all of Debbie's team were put on performance improvement plans."

5.31 He sent that to Ms Busby, and she on 23 October 2018 (page 105 of the bundle) replied to the claimant thanking her for raising the issues, and that she would investigate her claims internally. She relayed to the claimant what Peter Munro had told her and set that out in this email, and then ended the email by saying:

"Please note I will not be treating your email as a formal grievance given that you have already left our employment."

5.32 Indeed, that is how it was left. The grievance was not investigated nor, Peter Munro confirmed, was there any further internal investigation into the matters that the claimant had raised. The claimant took this step on 22 October 2018, having taken some time before then, precisely when is not clear but it seems around about that time, legal advice. At the same time as she presented her grievance, she also instigated the ACAS early conciliation procedure, as she was required to do before she could bring any Employment Tribunal claim, and she did that the very same day, 22 October 2018. She was given the option, as all claimants in these circumstances or prospective claimants would be, of either having a certificate immediately or of ACAS contacting the respondent and clearly took the second option which would explain why there was not then a certificate until 6 December In the intervening period ACAS contacted the respondent, but ultimately , of course , that did not resolve the matter and ACAS issued a certificate on 6 December 2018. Thereafter, on 19 December 2018, the claimant's ET1 claim form was lodged. It was drafted on her behalf by her solicitors, the implication being that they had prepared it , and indeed it is a legal document with legal terminology and is doubtless prepared on her behalf by them, and it is also I think conceded that it was to this firm that the claimant had first gone before she raised her grievance.

5.33 In terms of the reason why the claimant did not take any action until 22 October 2018 , she has explained to the Tribunal how , having decided to resign and being very anxious to ensure that she could get another job as soon as possible she was expecting that she would get support from the respondent and would get another job fairly soon, but she became

increasingly concerned when that was not happening . She was also fearful that the industry being as it were in her eyes a small one that there may well be some repercussions in relation to any licence issues, and that this may be preventing her from getting other employment, but she was getting increasingly concerned at the length of time that this was taking, concerned about looking after and obviously maintaining her household with her son in it, and so having made some initial enquiries on Google as to what she should be able to do in these circumstances and learning from that that she had to contact ACAS, that those were the reasons why she did not until 22 October take any steps in relation to these matters.

5.34 Once the certificate was issued on 6 December there was then the period of 13 days until the claim form was actually presented, in respect of which all the Tribunal knows is that the claimant was at that time in receipt of legal advice and ultimately that led to the presentation of the claim form. In terms of what was happening during that time the Tribunal has no evidence from the claimant in relation to any reasons for that further delay.

6 That in summary is the findings of the Tribunal on the central issues of fact at this stage. One of the most important issues of fact has been whether or not the claimant did, as she contends, ever inform Peter Munro that she was being required by GSK to promote Trelegy in breach of its licencing conditions. She says she did, he says she did not, and that is obviously the fundamental (and in our eyes crucial) question of fact to be resolved in this case before any other. There are clearly two competing accounts and we have had to choose between the two.

7 In essence it has been put to Mr Munro that because of the enormous importance of GSK to Chase, and the potential upset to that relationship if he was to concede that he did know about these issues that he is in effect, put bluntly, lying about whether the claimant ever raised these issues in these terms with him. It has effectively been put to him that he has not simply forgotten about this, or been mistaken: he is effectively seeking to conceal what the claimant told him in relation to these licencing issues. He says that is not right, that he is (a) recalling things correctly, and (b) telling the truth, and that the claimant did not in any of the conversations that she had with him ever tell him that GSK was asking her to promote this product in breach of licencing conditions. The claimant on the other hand says that she did, and we have had to consider which of these two accounts can be relied upon. In doing so we have had to look at the manner in which this evidence has been given, both in terms of the witness statements, and in cross examination, and to see if there is any corroboration or support for either version.

8 In relation to the witness statement evidence, we have to observe that the claimant's witness statement in a number of respects is somewhat deficient, in that she omits reference to matters which she clearly subsequently conceded as having taken place, particularly in relation to telephone calls with Mr Munro. Her witness statement in relation to the important conversation in which she claims, in paragraph 13 , that she had this conversation in which she told him about the unlawful promotion and breach of licencing conditions , is a very brief paragraph. It became apparent when his account of that conversation was put to her that she accepted much of what he said which is contained in rather more detail in his witness

statement. It was much of the detail from that witness statement the claimant then agreed.

9 That, however, is the only reference the claimant makes in her witness statement to any telephone conversations with Peter Munro, but it became apparent, again from his evidence, that there were two other quite significant ones: one in relation to the performance plan on 17 July 2018, when he spoke to her after that, and the other on 31 July 2018, in which her potential resignation was discussed. Neither of those are even mentioned in the claimant's witness statement, but again she accepted that they took place, despite being absent from her witness statement. In terms of the details of these calls too, Peter Munro has set out them out in his witness statement and the claimant has largely accepted them. That gives us some concern as to how reliable and accurate her recollection of these conversations has in fact been.

10 That is further compounded by the terms of the first document in which she put anything forward after her resignation. We understand the reasons why her resignation letter was written in the terms that it was, and that she made, as she accepts, no reference whatsoever to licencing conditions in that letter, but the very first document that she produces after her resignation is the grievance letter of 22 October 2018, and we find that very instructive. It is instructive because in that letter she makes it clear that the reason for her resignation from GSK was on “ethical grounds”. She says the grievance is a result of GSK’s actions while contracted to them. She makes no reference whatsoever to Peter Munro, she makes no reference whatsoever to having told Peter Munro about the issue, and, if anything she supports the contention that she did not say anything by saying that she felt she had no safe place to voice her concerns. That would lead to her not voicing them. She says she was afraid to voice them in her resignation letter, and she indicates that she felt she had no safe place before then. That is rather consistent with her not doing so, and of course is entirely consistent with Peter Munro saying she never did so. In terms again of instant reaction, when those matters are first put to a witness, in this case Peter Munro, we draw some further support for our findings from his reaction when that grievance letter was put to him by Mr Busby. He immediately reacted in his replying email to say the claimant had not raised such issues with him before her resignation. So, in terms of the two accounts on this crucial issue as to whether the claimant ever raised with Peter Munro the issue of promotion outside the terms of the licence, we do prefer Peter Munro’s evidence. That is not to say that we think that the claimant has been deliberately dishonest, we have to assess her reliability and accuracy. We can well understand how the claimant may well believe that that is the case, and it is certainly understandable that she may have expected that Peter Munro knew because she may have expected that Debbie Edginton or Simon Davies or someone else within GSK may have mentioned these things to him, but his evidence is that they did not , and his evidence is that the claimant did not either. So, whilst it is understandable that the claimant may, certainly by the time that these proceedings have been brought, have come to the view that she did mention these things to him, we consider that on the balance of probabilities she did not, and we are satisfied that Peter Munro did not know , and was not told by the claimant that GSK were putting her in this position. That, as I indicate, is probably the most crucial finding of fact that we have to make, because it will affect what we subsequently do in relation to the various claims.

The claims and the submissions.

11 Turning to those, and taking them from the issues set out in the Annex to the Case Management Orders, the first of them of course are the protected disclosure claims and then the unfair dismissal claim. The parties' representatives , of course have both made submissions and time does not permit a long rehearsal of those submissions which are still fresh in our minds, but in essence to summarise them, hopefully without doing violence to them, Mr Gorry for the respondent submits first of all that the protected disclosure detriment claims are out of time, and further that if they are out of time that they could have been presented , and should have been presented within the relevant time limit . Consequently the Tribunal should not extend time for their presentation, and he has presented his arguments in relation to why it was reasonably practicable for them to have been presented within time. On the merits of whether the claimant actually made protected disclosures, firstly, to GSK , and secondly , to Peter Munro, his alternative argument is that she certainly did not, on facts, do the latter, and , in relation to the former, there was a lack of clarity as to whether the claimant's discussions with GSK did amount to the imparting of information. He does not, however, in the alternative argue that if we were satisfied that they were disclosures of information that they would not satisfy the remaining tests for protected disclosure in terms of what they tended to show, and the claimant's reasonable belief that it was in the public interest to make them.

12 To revert then to the claimant's counter submissions and deal with the matter that way on this topic, for the claimant Mr Byrne submits that the relevant time limit should run not from the date when the performance plan was announced to the claimant and she was put on it, but that effectively it was a continuing detriment; it would have been for the eight weeks of her employment, which of course did end on 31 August, but he says regardless of that , she remained employed until 31 August, she did not resign until 1 August , and so on that basis given that the plan itself would cover the remaining period of her employment and certainly up until her resignation on 1 August, that that is the date from which the relevant time limits should be calculated. Therefore these claims were presented in time. In the alternative, if we were against him on that, he submits that it was not, for the reasons given by the claimant, reasonably practicable for her to have presented her claims within the relevant period, and that for the reasons she gave , in relation particularly to wanting to ensure that she could continue to find alternative employment focussing upon that and the needs of her son as a single parent, these were all matters that we should take into account in finding in the alternative that it was not reasonably practicable for her to have presented the claims in time. She then went to ACAS, acted quite reasonably in doing so; the ACAS process of course did not end until 6 December , and that thereafter the claims were presented within a reasonable time , given the work that would need to be done in preparing them and submitting them to the Tribunal. So, in summary, and again hopefully doing justice to his arguments on that, those were his submissions on that issue.

13 Turning to the constructive dismissal, Mr Gorry's submissions in relation to that were effectively that the claimant has not established that there was any fundamental breach of contract on the part of the respondent. To the extent that the claimant may be able to establish that GSK required her to promote this medicine in breach of the licence conditions, which is not conceded, but if (which is not admitted) they did do that, the respondent, as her employer did not, and Peter Munro certainly

did not. On that basis he says that the respondent is not, and cannot be found to have been in fundamental breach of contract.

14 On the central issue in terms of the constructive unfair dismissal, he submits primarily that if we have found as a fact that Peter Munro was not aware of the alleged breach of licencing conditions, in those circumstances given everything else that Peter Munro did, and he refers us to his evidence in particular and his attempts to assist the claimant, there can be no fundamental breach , and that consequently the claimant cannot succeed in her constructive dismissal claims.

15 For the claimant Mr Byrne's submissions in respect of the unfair dismissal are that there was clearly, on the evidence , pressure by GSK to promote this medication in breach of the licencing conditions. That he says is apparent from the documents , and indeed , of course, the supporting evidence of Ms Halsall from whom we also heard and who was herself a GSK employee and whose evidence sets out very clearly, and indeed was unchallenged, that that was what was occurring within GSK, a matter about which she herself has raised a formal grievance which has led to the investigation that we have got at the back of the bundle. But, submits Mr Byrne, her evidence and the evidence of what happened in terms of Shona Mutch, which is also in the bundle, and predominantly the email of April 2018, show very clearly that that is what GSK were doing. The claimant, as both an ethics champion and as someone would be subject to severe sanctions or indeed potential loss of employment if she breached her ABPI requirements, clearly was being put under an intolerable pressure to act in that way, and that that was something which GSK were doing, and which Chase effectively were also doing by putting her on the performance plan. They were effectively going along with GSK in terms of what they were asking her to do. The claimant in those circumstances understandably resigned, but equally understandably did not make a fuss about why she resigned; she kept matters quiet for sensible reasons, to protect her position, and only when she realised that she had little choice did she then grieve and start the proceedings. But in essence he says the claimant was , first of all, in relation to the protected disclosures , treated this way because of them, if we are satisfied they were made, but secondly , and perhaps more importantly he submits that her treatment amounted to a fundamental breach of contract on the part of the respondent, not only on the part of GSK, for which the claimant was entitled to resign and which in response thereto she did resign. So those, in summary, are the competing submissions.

The Law

16 In terms of the law, several provisions of law apply, obviously within different jurisdictions. The protected disclosure provisions are contained in the Employment Rights Act 1996. The relevant ones given that the respondent does not take issue with whether the claimant's disclosures, if made, would be qualifying disclosures, are in relation predominantly to time limits. The relevant time limit for presentation of a detriment claim as set out in section 48 of the Employment Rights Act 1996, which provides at s.48(3) that an Employment Tribunal shall not consider a complaint (of detriment in this case) before the end of a period of three months beginning with the date of the act or failure to act to which the complaint relates, or whether the act or failure is a part of a series of acts, the last of them; and that is not relied upon.

17 The alternative, the extension clause, is at s.48(4) which says "within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months", and that is the extension clause which would be applicable if the Tribunal was to find that the claims were in fact out of time.

18 In terms of when the relevant time limits run from, subsection 4(b) says this:

> *"A deliberate failure to act should be treated as being done when it was decided upon, and in the absence of evidence establishing the contrary an employer shall be taken to decide on the failure to act when he does an act inconsistent with doing the failed act."*

That relates to failures, but in this case what we consider we are dealing with is not a failure to act but an actual act, and ordinarily and under the provisions of subsection (3)(a) it is when an act is done.

19 The provision in relation to when an act is done is also subject to the potential construction that an act is taken to be done if act extending over a period of time at the end of that period, by analogy, in fact, of course with discrimination law. So in relation to the law on time limits, that is the applicable law.

20 In relation to constructively unfair dismissal, a constructive dismissal, of course, occurs within the definition from the well-worn authority and leading authority from no less a person than the late Lord Denning in ***Western Excavation v Sharp***. A constructive dismissal occurs if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment , or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct he is constructively dismissed. That of course is the classic formulation.

21 In terms of the term, breach of which is alleged, that was identified in the preliminary hearing, and is as one would expect it to be in these circumstances, the implied obligation of trust and confidence. It is worth repeating the definition of what that term means from ***Woods v WM Car Services (Peterborough) Limited [1981] ICR 666***, where that term was expressed to be that the employer would not without reasonable or probable cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. That formulation was endorsed in ***Woods***.

22 There are two ways in which that can be achieved: one can be where the conduct is calculated to destroy the relationship, i.e. it is almost deliberate; the other is where it is likely to, so although the employer does not intend that , if that is the likely consequence of the employer's conduct , then that is sufficient. I do not think it is contended, although it has actually been put, that there was a desire to manage the claimant out, certainly on the part of GSK, but in terms of whether that was so from Chase, it may be said to be calculated. It does not matter, however, if it is not deliberate, if the conduct was such as it was likely to have effect, that is sufficient. It is important to remind ourselves that that is the term breach of which is relied upon.

23 Going back to the issues, there is one, and only one, breach relied upon, and that is that the claimant was placed under a requirement or expectation for her to promote a product outside the relevant licence conditions. I mention that because it might at one point have been thought that the imposition of the performance focus plan itself was part of that, but that is not the pleaded breach, although we appreciate that it may include it , because the claimant's case is , in essence, that in that review she was also effectively being required to promote the product in breach of the licence conditions. It is therefore relevant, we can see from that point of view but it is worth pointing out that that in itself is not relied upon as breach of the implied term.

24 That is the test of constructive dismissal. There is no alternative plea that if there was a constructive dismissal it was for a potentially fair reason. Equally, there is no pursued claim in relation to that being an automatically unfair dismissal for whistle-blowing. So to that extent the protected disclosures are not relevant to the constructive unfair dismissal, which is claimed on the basis of an “ordinary” unfair dismissal.

Conclusions

25 We have already made a central finding of fact, and will revert to that in a moment.

26 Dealing with the claims in order, and the order Mr Gorry submitted about them to us, and in the Annex to the Case Management Orders, we will start off with the protected disclosure detriment claims. The first issue there is whether they were presented in time.

The protected disclosure claims.

27 Mr Byrne’s submissions of course, as I have summarised, are that because of the nature of the performance plan, this is to be treated as not something that was a detriment on 16 or 17 July but was continuing thereafter, certainly to 1 August. On that basis the claims would be in time. It seems to be conceded that if that is not the case, then they are out of time, and if it not conceded it certainly would be our finding , as , by the Tribunal’s calculations if the detriment was imposed on 16 July the referral to ACAS was not until 22 October, the certificate was 6 December and the claim was issued on 19 December 2018, the claims would be out of time; the new limitation date would have been 29 November in those circumstances. That is assuming that 16 July is the appropriate date. Of course if it was 17 July that would just simply make it a day later, but it would not still save the claims.

28 That requires us to consider the detriment in this case, and whether or not Mr Byrne’s submissions are correct in terms of whether we should regard that as a detriment on 16 and 17 July, or whether we can as it were take it to a later date. Whilst not cited to us, Mr Byrne doubtless ad in mind the provisions of s.48(4) which provides:

> *(4) For the purposes of subsection (3)—*

> *(a) where an act extends over a period, the 'date of the act' means the last day of that period, and*
>
> *(b) a deliberate failure to act shall be treated as done when it was decided on;*

29 By analogy with the case law on discrimination, generally speaking when an act takes place, that is the date from which the relevant limitation period runs. The contrary construction in some instances is where the act continues because its effects continue, but there is a distinction between effects and act, and if there is something like a suspension, for example, clearly not only is the decision to suspend the date on which one could consider a detriment, but each day thereafter could also, and would be considered a detriment, and there is case law to that effect which says that a detriment does not end until the suspension does, so in that situation one can see how the detriment continued.

30 In this case Mr Byrne argues that the performance plan continued by analogy, although (it is mine and not his), and he is saying the plan continued and therefore the detriment continued. With respect, we think that is not a valid argument. In terms of the plan, clearly the imposition of the plan on 17 July was an act, and it clearly set out a plan, but in terms of what was to happen thereafter nothing was to actually happen until at the earliest 1 August, not least of all because the claimant was going on holiday and did. She did not work any later than that until she returned and then resigned having decided to do so on 31 August. The meeting that would have taken place with Debbie on 1 August did not take place or did not take place in the normal circumstances (i.e. no review of her performance was carried out), because of the claimant's resignation by that time, and so in terms of the next act under the plan, it never took place. The claimant did not even actually in our view work under it, because she went on holiday, so it seems to us somewhat illusory to say that the act of the detriment continued beyond the imposition of the plan, unless and until something else, in furtherance of it, actually then happened.

31 We accept that had the claimant remained at work and then carried out a review, and particularly if she then was found to be wanting in that review, that that would be a further act of detriment from which then the relevant time limit could run, but that did not occur. It seems to us the act, and the only act, from which the relevant time limit can apply is the imposition of the performance focus plan at the latest on 17 July 2018 , and that is the basis upon which we will consider the relevant time limit , and which does have the result that the detriment claims are therefore out of time.

32 Was it then reasonably practicable for the claimant to have presented those claims within time? Whilst appreciating her reasons and considering the test of want of reasonable practicability, we have to consider whether she satisfies that test, bearing in mind that unlike discrimination claims where we would have a discretion and we can weigh up the prejudice to the parties, we cannot do that in a reasonable practicability case.

33 As to what “reasonable practicability” means, there has been much authority, the lead one being ***Palmer & Another v Southend-on-Sea Borough Council [1984] ICR 72,*** where having considered that phrase which has been observed to be

not the easiest phrase, the Court of Appeal held that this phrase does not just mean "reasonable" because that would be too favourable to employees; but it does not mean "physically possible" which would be too favourable to employers, but it means something like "reasonably feasible". That was commented upon and adopted by Lady Smith in ***Asda Stores Ltd v Kauser EAT/0165/07*** and she said that it was best explained in these terms:

> *"The relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done."*

34 So we have to ask ourselves was it reasonable to expect the claimant in these circumstances to have presented this claim within the relevant three month time limit, or as extended by any early conciliation provisions if she had started those in time. Whilst appreciating her motives, as it were, and her feelings we have to consider whether there was anything, as it is often put in this context, stopping her bringing the claims. Was there any sort of impediment, as it has been put in other cases, physical, mental or otherwise? Frankly, with respect to her we do not consider that there was. Whilst the understandable desire to keep one's head "below the parapet" and not "to rock the boat" until one can get another job is understandable, that is not something that actually prevents one putting in a claim of this nature. Clearly , by 22 October 2018 the claimant had realised that she needed to do something about this and decided that she would put her head above the parapet then; the Tribunal has not heard any evidence as why she could not have done so before then, particularly as she seems to be making some enquiries, if only by Google, before the date that she first grieved. Had she brought the claims shortly before that period she would still have been in time, or if she had at least gone to ACAS within that time.

35 In terms of want of reasonable practicability, with sympathy for the claimant, (and if this was a discretion case the outcome may be different), in terms of want of reasonable practicability we consider that the claimant could have brought the claims within the relevant three month time limit. It therefore does not fall to us to have to consider whether to grant an extension, and if so to what time we would consider reasonable within which then to bring her claims. If we did, then we would have to observe that the further delay of 13 days thereafter has not been adequately explained, and given that the claimant was apparently in receipt of legal advice at that time, that would be a very difficult matter for her to justify in terms of a further delay. But we do not get to that point because we can only do that if it was not reasonably practicable to have presented the claims within time, and we find that it was. We therefore have no jurisdiction, and it is not a matter we have any choice over, in relation to the detriment/protected disclosure claims.

36 That is one of the reasons why, as may be observed, we have not determined as such whether the alleged disclosures to GSK were in fact protected disclosures in terms of whether they conveyed information. We accept the respondent has conceded that if made, they would qualify as protected disclosures, but we have not found it necessary to determine whether or not they would actually did amount to protected disclosures, and so we have not made any findings on that.

The unfair dismissal claim

37 That deals with the protected disclosure claims, but we now come to the unfair dismissal claim, which of course is alleged to be a constructive dismissal. In doing so we have to look at the conduct of the respondent. For that purpose an issue does arise, perhaps rather anticipated by Mr Gorry, as to the extent to which the actions of GSK can be attributed to the respondent. We say that because we do accept, and we do find that in relation to the claimant's case that she was put under pressure by GSK to promote these products in breach of licence, she is right. We find that is indeed the case. We accept her evidence in relation to that. The respondent has called no-one from GSK to counter that, and that evidence is amply supported in our view by the unchallenged evidence of Tracy Halsall and the documents and of course the email in particular of 11 April 2018 from Mr De Almeida. To that extent we do find that as a matter of fact that GSK were pressurising the claimant to promote this product in breach of its licence. So as far as GSK is concerned, that would be the case.

38 That, however, is not the end of the matter, because we have to consider where that leaves the respondent. We have already found that Peter Munro was not aware that that was the case. We have already found that the claimant did not notify him herself, and we have no basis on which to find that anybody else did. Given the performance focus plan and Peter Munro's evidence in relation to it, and his lack of intimate familiarity with this particular drug and the licencing regime, with no evidence of these matters being brought to his attention by GSK or anybody else before the performance plan, there is no reason why he actually did, or would appreciate, the claimant not having told him, that the performance plan was, as she would put it effectively, unachievable without breaking the licencing conditions. She would appreciate that and doubtless did, but he would not necessarily do so unless and until she told him, or anyone else had told him. We find that she had not so told him and no-one else had done so, so in terms of what he knew, and whether participating to the extent he did in the performance focus plan was a breach on the part of the respondent, we find that it was not.

39 We have also considered the degree to which, legally, the acts of GSK in what, we find, it did do prior to that would themselves be acts of the respondent. We consider it would be a bold step to hold that the acts of a client in terms of how that client manages an employee such as the claimant who has been assigned to them could result in liability in contract, and I stress that, on the part of the respondent for the acts of what is at the end of the day a client to whom the claimant has been assigned. We think it important to revert back to the terms of the contract, which Mr Byrne quite rightly identified to us. We note that under the terms of that contract there is not one client: GSK is not defined as "the client" – "the client" is any number of healthcare companies, and the claimant's contract of employment is with the respondent. She can clearly be assigned under that contract to any healthcare company collectively referred to as "the client". So to the extent that there may alleged to be any form of delegation here, this contract does not achieve it, we have not seen any contract between Chase Search and GSK, and we think it going very far to say that the actions of GSK in how it managed, to some extent , the claimant would amount to breaches of contract on the part of the respondent , without more. Clearly if Peter Munro in those circumstances, aware of what GSK were doing, and then effectively adopted that conduct in terms of the imposition of the performance

plan on the claimant in those circumstances, and effectively was then on behalf of the respondent doing the same thing i.e. the respondent itself was making that requirement of the claimant, then the position may be different, but we do not consider that he ever did , and we do not consider the respondent ever did.

40 In any event, we note on the claimant's own case that although she claims, and Peter Munro does not accept, that she did tell him about the problems in relation to the licence (in paragraph 13 of her witness statement), we think it important to look at what then happened. Even on her own case what happens is not Peter Munro saying "you're going to be put on performance" or saying "you must continue to work for GSK, it is very important". No, what he says on her own case and of course as his evidence confirms is that he would arrange for her to be transferred. He was not saying at that point "you've got to stay on GSK come what may", he was accepting that she was not happy in that placement, and was telling her that he would arrange for her to be transferred. Not only did he say it, but he did it, as the claimant accepts. She began to get communications from Claire. So in response to even the claimant's own case, which of course we do not find made out on the facts, his response is not to say "you've got to put up with it" and "we as Chase are going along with it", it is "right, I'll get you off that project , we'll make arrangements to do so". That is one point.

41 The next point is that in relation to the performance focus plan, again its terms are important and indeed instructive, because if one reads again, as I did previously, the final paragraph, what is important to note there is not the threat that the claimant's employment would end if the performance improvement required was not achieved: what was the risk there was that GSK may no longer require her services on that project. Peter Munro is the Project Manager. The claimant, as I have pointed out, under the contract is assigned to "the client". "The client" is healthcare companies, so in terms of the alleged threat in that document , it is not even to dismiss the claimant, it is effectively the same as Peter Munro had said he would try and do for the claimant anyway, which is to redeploy her: she would not be on that project.

42 So, in terms of the implied term of trust and confidence we consider it must the case that , if something has gone wrong, as we accept was the case clearly in terms of the claimant and GSK is concerned, for the employer to fundamentally breach the obligations upon it, the employer must do rather more, for example, by going along with any unreasonable or illegal requirement from GSK, or forcing the claimant to continue to work with that client. The evidence is Peter Munro did not do that. When any problem was put to him in terms of the claimant being unhappy he agreed to move her, and even if the performance plan itself did not go well for the claimant, the worse that was going to happen was that she may not be required to provide her services on that project. We note her contract of employment and we also note that in evidence she seemed to suggest that there was some sort of "30 day period after which your services could be dispensed with". We cannot see that in the contract. The contract seems to us to have no such provisions. We do note, however, in the case of Ms Mutch, in the respondent's response to her claim form Ms Mutch was subject to some 15 day redeployment window and that thereafter she may have been dismissed, but those were her terms. The claimant's contract of employment says nothing about what would happen if there is no project to which the claimant could be deployed. So quite where that comes from we are not quite

sure, but in any event , it does not matter because we are quite satisfied that in all the circumstances the conduct of the respondent, and we emphasise that, not necessarily of GSK, did not amount to a fundamental breach of the implied term of trust and confidence of her contract of employment..

43 So whilst appreciating the claimant's reasons for resignation, which we do indeed find were probably those that she set out in her grievance , which of course is all about GSK and not about Peter Munro, that for reasons we perfectly understand and accept , as to why she felt she could not carry on working with GSK, we cannot find that she was entitled to resign by reason of any fundamental breach on the part of the respondent, and consequently her unfair dismissal claim must fail.

Postscript.

44 By way of postscript, and not mentioned in the oral judgment, we would make these observations. Whilst we made no findings as to whether the claimant's alleged disclosures to GSK personnel did "convey information", had we done so, given the concession that such disclosures would satisfy the test of protected disclosure, we would have to have considered then whether the detriment of being placed on the performance plan (the only one complained of) was on the ground of her having made such a disclosure. Accepting for these purposes as Mr Gorry did, that given our finding that no protected disclosure was made to Peter Munro, the claimant could still rely on s.43C(1)(b)(i) to render disclosure to GSK employees a relevant disclosure, we would then have to consider whether the detriment of being placed on the performance plan was within s.47B.

45 Two issues arise here. The first is the motivation of Peter Munro, and the second is the motivation of GSK. We have accepted that Peter Munro was unaware of any protected disclosure. We have not heard from any GSK personnel, in particular Debbie Edginton or Simon Davies. The former it was who instigated the performance focus plan. Assuming (and this is not free from doubt) that Peter Munro, and the respondent as a whole could be "tainted" by the improper motivation of GSK, and in particular Debbie Edginton, (i.e this is a "Iago case" as referred to in the Court of Appeal in ***Jhuti v Royal Mail Group***) was that her motivation in any event? We accept that the burden of proof would be on the respondent in these circumstances, but the evidence that all bar one other member of the team (whether supplied by Chase or from other sources) were put on the same , or a similar , performance review programme, when no one else had made any similar disclosures, is powerful evidence that the claimant's whistleblowing had nothing to do with the decision. What, in our view, led to the decision is, as can be seen from the terms of the email of 11 April 2018, and the continuing poor performance of Trelegy, despite a "blitz" over an 8 week period, was GSK's disappointment at its sales. If anything, it seems to us that the claimant was put on the performance plan despite, not because of, any disclosure that she had made to GSK.

46 All of that, however, pre-supposes that any whistleblowing motivation on the part of GSK can be imputed to the respondent for the purposes of this detriment claim. The Supreme Court decision in ***Royal Mail Group v Jhuti [2019] UKSC 55*** is authority for the proposition that an employer cannot escape liability for a protected disclosure dismissal by relying upon the lack of knowledge of the whistleblowing on the part of the dismissing manager, where the information upon

which the dismissal has been based has been provided by another person , a line manager, who was indeed motivated by the whistleblowing. A number of points arise. Firstly, ***Jhuti*** is a dismissal, and not a detriment case. Secondly, the Supreme Court was examining the reasons for the dismissal, and for that purpose considered it was free to go beyond just the decision maker, and to look beyond him at the hierarchy involved. The fact that the claimant's line manager provided the information to another manager was highly influential in that case. It would arguably be extending ***Jhuti*** beyond its limits to apply it, firstly to a detriment case, and secondly, to cases where the "tainted" motivation comes not from another member of management above the employee, but from, in this instance, a client.

47 This is, we appreciate, by – the – by, given our findings, but we mention it to highlight the fact that had the claimant's detriment claims not been time barred, the likelihood was that these claims would not, on the facts, have succeeded. Finally, and without wishing to make gratuitous observations, or be in any way critical, it appears that the respondent had no whistleblowing policy in place, which , given the regulatory regimes and the industry in which it operates , is surprising, and may be something upon which it wishes to reflect, so that its employees in future can feel that they have a safe space in which to raise any concerns.

Employment Judge Holmes

Date: 19 December 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 January 2020

FOR THE TRIBUNAL OFFICE