Case Number**: 1300079/2017**

EMPLOYMENT TRIBUNALS

Claimant Respondent

Ms C Johal v Sandwell Metropolitan Borough Council

FINAL MERITS HEARING

Heard at: **Birmingham** On: **4, 5 & 6 December 2018 and 2 to 6 & 9 to 11 September 2019 and in chambers 12, 13 & 16 September 2019**

Before: **Employment Judge Perry** **Members:** **Mr MJ Bell**
Mr D Faulconbridge

Appearances

For the Claimant: **In person (assisted by Mr Howells, a friend of the claimant during the hearing in December 2018)**

For the Respondent: **Mr T Sadiq (counsel)**

JUDGMENT

It is our unanimous judgment that:-

1. The claimant's complaints that she was unfairly dismissed pursuant to sections 98(4) and 103A Employment Rights Act 1996 and that she was subjected to detriments having made protected disclosures are not well founded and are dismissed.

2. The claimant was not discriminated against by the respondent by it failing to comply with the duty to make reasonable adjustments pursuant to sections 20-22 and part 5 Equality Act 2010. That complaint is also dismissed.

3. The claimant's complaint that she was dismissed in breach of contract (wrongfully dismissed) is also dismissed.

REASONS

Unless the context suggests otherwise references in square brackets are to the page of the bundle or if they follow a case reference or a document reference or a witness' initials, the paragraph number of that document (e.g. [initials/36], [ET1/8.2]). References in curved brackets are to the paragraph of these reasons.

INTRODUCTION

1 This is a claim for wrongful dismissal, 'ordinary' unfair dismissal (s.98(4) Employment Rights Act 1996 (ERA)) and that Ms Johal was unfairly dismissed having made protected disclosures (s.103A ERA) and that the respondent failed to make reasonable adjustments (s.20-22 Equality Act 2010 (EqA)).

2 It was presented on 9 December 2016 following early conciliation between 29 September and 12 November 2016, her dismissal thus appeared to be in time but any complaints that occurred before 28 July 2016 may be out of time unless they formed part of a course of conduct and/or the Tribunal exercised its discretion to extend time.

3 Given the claim includes both s.103A and s.98(4) complaints we should make plain from the outset that there was no dispute Ms Johal had qualifying service to bring the claim.

Context

4 At the core of this claim is a disciplinary investigation and procedure that the respondent asserts arose out of a fraud/audit investigation that stemmed from disclosures made by a whistleblower.

5 Ms Johal suggests that, at least insofar as that disciplinary investigation and procedure related to her, that was because she had also raised protected disclosures and that the respondent's detrimental treatment of her, including its failure to make adjustments for her medical conditions and her dismissal, were part of a conspiracy by a number of the respondent's staff linked to her disclosures and three earlier Tribunal claims she had brought against the respondent.

6 Ms Johal asserts the main culprits in that conspiracy to be Mr Oliver Knight, Mr Peter Farrow, Mrs Louise Knight, Mrs Baldish Bains, Mr Charlie Davey, Mr Stuart Lackenby, Mr Satinder Sahota, Mr Lee Bentley, Mrs Maria Price and Mr Chris Ward [CJ/383] alleging amongst other matters that her dismissal was pre-designed and evidence fabricated to achieve it. When asked about these matters she did not include Mr Lee Bentley whom she repeatedly referred to in her witness statement and throughout the trial as being one of the main instigators of this.

The issues

7 The claim has been the subject of considerable case management to identify the claims being pursued. The issues were identified across several case management hearings. At a hearing on 10 March 2017 I indicated that Ms Johal had confirmed that save for a failure to make reasonable adjustments complaint all other disability discrimination complaints were argued as background only and were dismissed on withdrawal.

8 As to the unfair dismissal claim I identified in my order that I made following the hearing on 10 March 2017 the issues were as follows:-

8.1 *Has respondent shown that the reason for the dismissal was one of the potentially fair reasons for dismissal s.98(1)&(2) Employment Rights Act 1996. To do so the respondent must prove that it had a genuine belief in the misconduct.*

8.2 *Did the respondent hold that belief in the claimant's misconduct on reasonable grounds following a reasonable investigation? In coming to that belief did the respondent act in the way a reasonable employer could have done? The burden of proof is neutral. The claimant's challenges to the fairness of the dismissal are set above.*

8.3 *Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?*

8.4 *If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.*

8.5 *Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?*

9 As to the breach of contract wrongful dismissal claim I recorded that she accepted she had already been paid her full notice pay and the respondent has not sought to recover the same. No award is thus pursued for wrongful dismissal but a declaration she was wrongfully dismissed is pursued.

10 Ms Johal's representative at that hearing was unable to clarify for me the nature of her protected disclosure and failure to make reasonable adjustments complaints. These were provided at a hearing before Employment Judge Cocks on 6 July 2007 by counsel instructed by Ms Johal. They were set out at [201-207] and are attached. As they relay the detail of the protected disclosures relied upon, the detriments that are alleged to have ensued, the provision, criterion or practices (PCPs) , substantial disadvantages and adjustment contended we do not repeat them here.

11 By the time of the hearing before us two impairments only were relied upon:-

11.1 Sacroiliac Joint Dysfunction, and

11.2 Anxiety & Depression

12 The respondent accepted that Ms Johal satisfied the definition of disability within s. 6 EqA in relation to those impairments but did not accept it had knowledge of the same.

Adjustments and the way the hearing proceeded

13 Following considerable case management, the claim was listed for a final hearing in February 2018 before a panel chaired by Employment Judge Michael Butler. That was postponed.

14 We should record that Ms Johal was given limited permission to amend her already lengthy (74 page) witness statement by Judge Butler following the hearing in February 2018 to allow her to comment on any documents that it was anticipated would be added to the bundle and to cross reference her witness statement to the bundle.

15 That relisted hearing came before this panel in December 2018. An application made by Ms Johal at the start of the relisted hearing in December 2018 for her to record the hearing was refused on the basis that cogent medical evidence identifying why that recording was required and why alternatives such as her companion at that hearing, Mr Howells, making a note for her, were not proportionate alternatives were not addressed.

16 The hearing in December 2018 again had to be adjourned part way through her evidence, Ms Johal having fallen ill and having had to attend hospital.

17 It was only after the panel sought assurances that Ms Johal was fit and able to represent herself at a hearing scheduled to last 2 weeks and them having been provided that the Employment Judge determined the hearing could proceed and only then after a number of adjustments to accommodate Ms Johal having been made, including the provision of an assistant to help her (including whist she was giving evidence) locating pages, that that page references be given first to her and questions be delayed until her assistant located pages for her, extra time, regular and extended breaks.

18 In addition to regular breaks, any breaks sought by Ms Johal were granted and the Tribunal also offered breaks when we felt Ms Johal, the witnesses, counsel or tribunal generally, needed one.

19 At the conclusion of this hearing Ms Johal thanked the Tribunal for the way it had conducted matters (as did Mr Sadiq). We are grateful to the respondent and Mr Sadiq for the flexible approach they adopted in relation to the adjustments that were required.

These went so far as the respondent providing to Ms Johal a copy of its note of evidence from December 2018 when the hearing had to be postponed.

THE EVIDENCE AND SUBMISSIONS

20 We heard from Ms Johal, Mrs Bains, the investigating officer, Mr Davey the dismissing officer and Mr Lackenby, the officer who heard Ms Johal's appeal. Ms Johal also sought to rely upon a signed witness statement from Mr Matthew Foster a physiotherapist dated 18 January 2018 (25 paragraphs at pages 75-78 of the witness statement bundle), a signed witness statement from Mrs Howells dated 30 November 2016 (13 paragraphs at pages 79 & 80 of the witness statement bundle) and Mrs Howell's witness statement in her own claim (1302511/2016) signed and dated 8 December 2016 (61 pages and 298 paragraphs).

21 We indicated that as Mrs Howells and Mr Foster had not attended we would have to give such weight to their statements as we deemed appropriate based on the evidence we heard and were taken to. The respondent reminded us that in the light of the request regarding Mrs Howell's witness statement for her own claim that the Tribunal should consider the determinations made by the Tribunal in relation to Mrs Howell's Tribunal claim [1957ci to 1957avii].

22 We had before us a bundle spread over 1964 pages and 7 files the index to which identified when these documents had first been referred to, (incorporating a revised list of issues, cast list and chronology) plus a separate medical bundle [M/etc.] from Ms Johal of notionally 91 pages that was not numbered in its entirety (documents at the start were not numbered). Various documents were added with the agreement of both parties as the hearing progressed.

23 Both parties provided written skeleton arguments at the outset and made oral closing submissions.

24 The matters we highlight at (199.4), (206) and (397) are examples of one of the difficulties we faced in this case; identifying what matters Ms Johal had raised at given points in time (and if she had provided the detail of those matters rather than merely making assertions) and the contrast to the matters she now raises.

25 That task has been made more difficult by Ms Johal's failure to address either at the time or subsequently, in her witness statement, her account concerning core issues. We return to these in our general findings at (266) following.

26 Whilst Ms Johal complained that was because she had been restricted in her witness statement by Employment Judge Butler's order firstly was not so – that order was made at the date scheduled for hearing and related to additional documents that were to be included in the bundle – by that stage she had already prepared a 74 page witness statement which set out the basis of her claim – and that I had reminded her that irrespective of whether she had been told what she needed to set out in her witness statement by other judges I had explained what was required and had set that out in my case management order and given she knew what the core of her case was and it should have been set out in the body of the witness statement prior to that hearing.

27 That aside large parts of Ms Johal's cross examination of witnesses appeared to relate to new points. Notwithstanding we allowed Ms Johal to cross examine the respondent's witnesses on points that she disputed notwithstanding that appeared to be new and/or had not been led in evidence. However, we explained to her we had to balance that against the prejudice that could cause to the respondent by it having been deprived of the opportunity to cross-examine her and thus allowed her to pursue those points with witnesses on the basis she cross referenced where those issues were raised in the bundle or statements (not least so we could identify if the point had been raised and

thus if the respondent should have already been on notice of the point and thus should have addressed this). Ms Johal was only stopped from pursuing points that appeared to

be new and that she had not led in evidence when she could not identify where that had previously been addressed or the documents identified that was not so.

OUR FINDINGS

28 We make the following primary findings of fact on the balance of probabilities and from the evidence before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.

29 It was agreed that Ms Johal commenced her continuous employment on 8 April 2002 [ET1/§5.1]. At the time of its response (28 February 2017) the respondent told us it employed 8,000 staff across its various directorates [ET3/1 [15]] and had its own human resources and legal teams.

30 At the time of the events that concern us Ms Johal was a senior manager within the respondent, Sandwell MBC's Adult and Family Learning Service (SAFL) and was also a justice of the peace from 2004 until she was suspended in 2015 as a result of the matters that gave rise to this claim.

Internal audit/fraud investigation

31 The respondent asserts that in late 2014 it received, via an anonymous whistle-blower in SAFL, allegations of irregularities relating to the procurement of goods and external services.

32 Two of the whistle-blower's disclosures were before us in a redacted form.

33 The first was dated 13 October 2014 [1950a-d] and made no direct reference to Ms Johal. The second, was undated [1691] but did make direct mention to Ms Johal. Whilst that was undated, we find it had come into the respondent's possession no later than the date of her subsequent suspension on 25 June 2015 because when she was suspended she was told she had been named by the whistle-blower.

34 Ms Johal asserts that during the disciplinary process that followed she was only provided with a copy of the second of those disclosures [1691] and that was not sent to her until 9 December 2016 [1689] , that is after her dismissal but before her appeal was heard.

35 An internal audit/fraud investigation followed ensued that the respondent asserts was as a result of those disclosures. The respondent also asserts that as a result a subsequent disciplinary investigation followed against a number of individuals, including Ms Johal.
Of those individuals:-

35.1 Mrs Howells was dismissed,

35.2 disciplinary sanctions short of dismissal resulted following a disciplinary process against Mrs Kerry Davison and

35.3 no formal disciplinary process was undertaken against Ms Samantha Allen, a finance assistant.

36 Mrs Bains, the disciplinary investigating officer, told us she had not seen the second disclosure before [1691] and could not recall if she had seen the first [1950a-d] although she accepted it was familiar. What is not in dispute and we find on balance

she was aware of them from the outset of her investigation because they were basis of an internal audit/fraud investigation which predated her disciplinary investigation.

37 Both the internal audit/fraud investigation and disciplinary investigations in part concerned Ms Johal's connection to an entity called Learning Exchange. It appears to have been set up as a means of providing materials that were either not available to SAFL through other means or to offer a cheaper alternative.

38 It is the respondent's case, and this was not disputed by Ms Johal, that if she had been connected to Learning Exchange the Council's Financial Regulations [981—1070] specifically regulation 4.55 [1045] required that she should have declared her interest in it. It was common ground she did not declare that interest. The respondent asserts that she was connected to Learning Exchange, that was evidenced by her signing various cheques and Internal Supplier Forms relating to it. Ms Johal argues that she was connected to it prior to 2007/08 but ceased to be so after that time.

39 It was not in dispute that Learning Exchange was set up by Mrs Christine Howells, who at the time was an Adult and Community Learning Manager in the respondent's Adult Education Service and a work colleague of Ms Johal.

40 At interviews Mrs Howells subsequently attended on 30 December 2015 and 3 February 2016 [594-643] she stated Learning Exchange was set up in 2005/06 [603 Q58] whereas in the witness statement she provided for her own claim against the respondent [12] she dated her involvement with Learning Exchange to 2004. Mrs Howells also stated that Ms Johal was removed as an official signatory for Learning exchange in December 2007 when she moved to a different directorate within the respondent [603 Q58].

41 Ms Johal told us orally that Learning Exchange was set up in around 2005 and that she recalled going to a bank and signing something. Ms Johal stated that she did not know what she signed and did not take a copy of the same – that was based on her trust in Mrs Howells as her manager. She stated that she thought it was a voucher. She told us she did not know if she was a signatory on Learning Exchange's account or not. She did however accept that she was connected to Learning Exchange prior to 2007/08 (but did not say what that connection was) but that she ceased to be so when she moved to a different department. That is at odds with the view she gave in her pre-prepared statement that she gave at the PACE interview where she stated she went along to the bank to be a signatory [692].

42 To place that into context at the time Learning Exchange was set up Ms Johal was working in the respondent's education directorate as a learning co-ordinator. Ms Johal moved from the respondent's education directorate in December 2007. It was not until 2012/13 that Ms Johal next worked with Mrs Howells. They continued to do so for the remainder of the time they both remained employed by the respondent.

43 Ms Johal later stated at a disciplinary investigation interview on 2 February 2016 that when she returned to SAFL in September 2012 she discovered Learning Exchange was still being used as a source of materials by SAFL [708]. She stated she had only known from November 2015 of her alleged link to Learning Exchange [714 – Q117].

44 It is the respondent's case that the extent of and longevity of Ms Johal's involvement with Learning Exchange is at the heart of the disciplinary process that ensued and by implication the credibility of her account.

45 We find that Ms Johal's account of her involvement in Learning Exchange was vague, unconvincing and that she gave a number of inconsistent accounts about her involvement with it over time. For reasons that we will expand upon (266) the nature of

those inconsistencies on core issues such as whether she was a signatory or not led us to conclude her account about her involvement in and with Learning Exchange was not credible.

Ms Johal's Road Traffic Incident & absence

46 On 7 July 2014 Ms Johal was involved in a road incident. She told us she attended work after this despite encountering high levels of pain. She made a number of visits to her local hospital and told us her insurance company referred her for private physiotherapy. It appears from the documents before us that she continued to attend work each day until around 14 August [811] when she submitted a MED3 sick note. She was subsequently diagnosed with sacroiliac joint dysfunction.

47 It is unclear precisely how long her absence lasted but on 10 October 2014 a MED3 fit note suggested that if adjustments were made, she was fit to return to work [M/8]. The evidence before us from both parties suggests that she was referred to occupational health and various adjustments were thereafter made for her, such as specialist chair and physiotherapy.

48 Whilst she was on sick leave the respondent underwent a restructure.

49 From the documents we were taken to it is clear there was at least one further period of sick leave from 24 June to 15 July 2015 by reference to back pain [M/17]. We should say there may have been others (and we do not exclude that possibility) but that absence and her ongoing physiotherapy sessions show there remained a medical issue.

First Alleged Protected Disclosure

50 Before the events that directly concern us in an email of 5 November 2014 to John Garrett (Deputy CEO) [1438-1439] that formed part of a longer email chain Ms Johal referred to concerns that ***"… regarded allegations relating to children …***." given SAFL had ***"…. close links to children and safeguarding"***. That was subsequently forwarded to Peter Farrow (Internal Audit) by an email of 6 November 2014 [1437]. Thus, what Ms Johal asserts to have formed the basis for those concerns was only set out in very general terms. We thus went to considerable lengths to try to identify what formed the basis of those safeguarding concerns from the various documents before us. We were unable to do so.

51 A copy of an earlier email that Ms Johal's email referred to was not before us. In her statement Ms Johal referred to a discussion she had with Mr Garratt in which she passed to Mr Garratt an exchange of emails she had with a former council employee, Dan Reeve, between 28 & 30 October 2014 [1435-36] [CKJ/67, 69, 71-75]. She did not however set out the facts that the disclosure related to.

52 Whilst Ms Johal stated that she told Mrs Howells about the email from Mr Reeve she did not assert that Mrs Howells attended the meeting with Mr Garratt or that Mr Garratt knew that Mrs Howells was aware of Mr Reeve's email (or its contents).

53 Thus, whilst an allegation was made concerning safeguarding concerns Ms Johal did not set out the details of facts underlying those concerns.

54 Whilst she refers to this email in her witness statement she makes no reference to how this has any bearing on subsequent events nor did she put that to the any of the witnesses in cross examination despite repeated reminders from us to ask questions of witnesses about matters and the documents that support them that were in dispute.

Ms Johal's suspension & subsequent Subject access requests, FOI complaints and grievances

55 In June 2015 Ms Johal's father died and she took some time off work. She told us she attended work to submit a medical certificate (for the period 24 June to 15 July 2015 for back pain) [Medical Bundle/17] on 25 June 2015 when she and two others, Mrs Howells, the senior strategy manager for SAFL and a finance assistant, Samantha Allen were suspended on full pay by Mr Steve Lawrence [CKJ/101-107].

56 Mr Lawrence was described repeatedly before us as Ms Johal's line manager. Ms Johal suggested before us that prior to her own suspension Mrs Howell's was her line manager and Mrs Howells was line managed by Mr Lawrence.

57 Whether Mr Lawrence was Ms Johal's direct or second level manager, was never formally clarified before us, but all the evidence on balance suggests that was so, he having suspended her, confirmed her suspension in writing (see (58)) and Ms Johal having treated him as such in correspondence following her suspension including seeking reasons from him why she had been suspended [CKJ/106]. Ms Johal having sought reasons for her suspension she was told this was as a result of a whistleblowing letter in which she had been named.

58 Ms Johal's suspension was confirmed in writing by Mr Lawrence the following day [831-832]. She was instructed not to ***" … make contact with other council employees or clients or enter her normal place of work without prior authorisation. Any contact with your normal place of work must be made via myself …"*** on a telephone number supplied and was told that the investigation would be conducted by Louise Knight a counter fraud investigator who would arrange an interview to discuss the allegation in due course.

59 By that time a production order had been already been sought and obtained (it is dated 29 April 2015) by the respondent from Wolverhampton Magistrates Court for a number of documents concerning various bank accounts held at Barclays Bank. This was not in the bundle before us and did not appear to have been included in disclosure. We expressed our surprise that was so as that appeared to be a relevant document.

60 The claimant asked the Dismissing Officer, Mr Davey, [CKJ/197-198] how those documents had been provided and asserted that was without permission of the account holder. She referred us to a complaint made by Mrs Howells to Barclays Bank. Whilst we did not have a copy of the complaint, however we find based on the contents of the determination of the complaint which was sent on 9 December 2015 [1522-23] that her complaint related to the bank providing copies of cheques and other information without her authorisation. The determination stated there was no evidence Bank had done so. We address Mrs Howells complaint at (77).

61 We were referred to an explanation how that had come about in Ms Johal's appeal hearing minutes [1779-80]. The Tribunal sought that the production order be provided by the respondent. The respondent did so and provided a letter dated 8 May 2015 from Barclays Bank showing what documents were supplied to the respondent.

62 The copies we had of both documents were redacted and as these were provided on the last day of evidence were not numbered.

Ms Johal's grievances, Subject Access and Freedom of Information requests and extracts from Ms Johal's correspondence with the respondent

63 Various Subject Access and Freedom of Information requests were subsequently submitted by Ms Johal the first of each appear to have been made on 28 June 2015 and 13 July 2015 respectively.

64 On 30 June 2015 Ms Johal raised a number of questions concerning clarification of her suspension and the investigation [1455-56]. By 7 July 2015 Ms Johal asserts she had not received a response to those questions and so repeated them in a grievance [14581460].

65 Ms Johal lodged a subsequent second grievance on 18 December 2016 [1101-1108] that we address at (100) below.

66 On 30 August 2015 Ms Johal complained to Mr Lawrence that the terms of her suspension (which restricted her from making contact with employees or clients of the respondent) as ***"… oppressive and derogatory …"***. That suspension by that time had lasted 2 months and restricted her from contacting her work colleagues outside of work [1071]. We find that the restrictions upon her were standard practice and whilst that could have given rise to difficulties in her defending herself, she was entitled (as she did so) to raise any issues with Mr Lawrence. When she subsequently sought access to her work computer to prepare her defence supervised access was arranged although we were not referred to a copy of Mr Lawrence's response (and can find no trace of it in the bundle).

67 Whilst Ms Johal did not take the witnesses to this Mr Lawrence's instruction appears to have been in contradiction to the respondent's Disciplinary FAQs [CJ52(e)]. Irrespective of that and whether she was permitted to or not, we find that Ms Johal had contact with Mrs Howells before Ms Johal was dismissed on 19 September 2016. We form that view because Ms Johal was aware of the complaint Mrs Howells had made concerning Barclays Bank (see (60), (77) & (78)) and accepted she had signed an ***Appointment of Bankers Form*** [1282-88] that purported to be an instruction to Learning Exchange's bank (Barclay's) to change the authorised signatories on Learning Exchange's bank account. We return to that at various points below including (229-234) and (272.2272.4).

68 On 2 September 2015 in the context of her thanking Mr Lawrence for returning her call, speaking to her and hoping he would pass on her concerns to the appropriate individuals amongst other matters Ms Johal stated that her past experience with dealing with HR was like ***"banging your head against a brick wall. As these individual's [sic] do not understand the meaning of 'HUMAN' within HR. Sandwell MBC leaders simply play lip service to 'effective communication' … it has now been 9 weeks whilst senior leaders sit around drinking tea/coffee"*** [1075]

69 On 15 September 2015 Ms Johal wrote to Mr Lawrence, about the restrictions on her having contact with colleagues, seeking he arrange a meeting between her and the respondent's chief executive and stated amongst other matters ***"I would appreciate it if you please do not (do what HR do) simply undermine and ignore me."*** [1079]

The lead up to Ms Johal's Fraud investigation (PACE) interview and the Second Alleged Protected Disclosure

70 On 18 September 2015 Mrs Knight, the fraud investigator who was investigating the allegations that had led to Ms Johal's suspension, invited Ms Johal to an interview that was to be conducted in accordance with the Police and Criminal Evidence Act 1984.

71 On 25 September 2015 Ms Johal wrote to Ms Knight seeking that her interview be postponed on the basis that she required time to prepare for the same, to include appointing a specialist legal representative and to enable that to be done sought detail of the allegations against her, the specific issues that would be the addressed and documents [1498]. The respondent replied on 9 October 2015 [1505-07] enclosing another letter providing a date plus alternatives for the PACE interview [1502-1504].

Whilst this was not on one of the dates suggested within that letter the PACE interview eventually took place on 29 October 2015. We return to that below (79).

72 In the interim by an email of 29 September 2015 addressed to Neeraj Sharma (Monitoring Officer for public disclosures) and copied to Jan Britton (the respondent's chief executive), Mr Lawrence and to an email address 'casework'. Ms Johal raised what she described as a disclosure made under good faith under the respondent's confidential reporting code. The detail of that was that the respondent was attempting to frustrate her by failing to provide information that she had sought in an attempt to force her resignation and suggesting that the respondents HR service was under the influence of Cathy Dodd and it was deliberately and maliciously abusing its position and power to avoid carrying out their duties. She repeated her earlier request for information and that a full investigation be carried out under the respondent's confidential reporting code [1499-1500].

73 In one of a number of emails sent from Ms Johal to Mr Lawrence on 6 October 2015 in the context of referring to her suspension being in its fourth month (the end of the fourth complete month would have fallen on 25 October 2015) she referred to this as a ***"Knee jerk reaction and not properly processed and managed suspensions and false accusations …"*** [1086].

Third Alleged Protected Disclosure

74 Ms Johal emailed Neeraj Sharma on 15 October 2015 [1513-1514] and copied that to Jan Britton. Ms Johal again raised what she described as a disclosure made in good faith under the respondent's confidential reporting code referring to what she described as beaches in relation to the investigation of fraud allegations against her and others seeking that immediate measures be put in place to prevent the *"spoliation of evidence"* that the investigation was placed on hold until an external investigation was concluded, that the matter was addressed under the respondent confidential reporting code and finally seeking that the original investigation be conducted by an independent third party. That email asserted ***"that the matter is now being investigated by the bank's fraud team".***

75 We find that whilst that purported disclosure did make allegations it did not include information setting out what the alleged breaches referred to were or what the investigation by the bank's fraud team related to.

76 Whilst Ms Johal again refers to this email in her witness statement, she makes no reference to how this had any bearing on subsequent events, nor did she put that to the any of the witnesses in cross examination.

77 Ms Johal referred us to a letter from Barclays Bank relating to the complaint made by Mrs Howells [1522-23] that we address at (60) above. Within the witness statement given by Mrs Howells' in her own Tribunal claim [CH/104) Mrs Howells stated that immediately following her PACE interview she contacted her bank to make a complaint how the respondent gained access to the bank accounts of Learning Exchange. It follows that if Mrs Howells made that complaint to the bank that she was an authorised signatory of Learning Exchange at the time. Mrs Howells's PACE interview was conducted on 30 September 2015 [CH/90].

78 We find that in order for Ms Johal to have raised the alleged protected disclosure on 15 October 2015 she must have been in contact directly or indirectly with Mrs Howells in the intervening period in breach of the restriction imposed by Mr Lawrence.

Fraud investigation (PACE) interview and subsequent events

79 On the 29 October 2015 Ms Johal attended an interview that was purportedly conducted pursuant to PACE 1984. That was recorded and a transcript of the interview was before us [724-792]. The interview was conducted by Mrs Knight and Lee O'Malley who were both counter fraud offices working for the respondent. Ms Johal was accompanied by Mr Evans a solicitor's clerk, as a legal adviser.

80 Ms Johal made a pre-prepared statement [692-696] that was signed and dated by both her, Ms Knight and Mr Evans. That addressed in turn nine allegations that had been passed to her in advance of the interview via her legal representative on 27 October

2015. Ms Johal states [CKJ/166] that she was advised to proceed on the basis of a ***"no comment"*** interview by her legal advisor [728].

81 A number of other individuals were also requested to undertake PACE interviews. In the witness statement Mrs Howells's provided as part of her own tribunal claim against the respondent Mrs Howells stated that her PACE interview took place on 30 September 2015 [CH/90].

82 During her submissions and questioning of Mr Lackenby Ms Johal sought to suggest that the respondent did not have the power at the time to conduct a PACE interview in relation to these matters. Whilst she does appear to have raised questions at various points within the bundle as to the respondent's power to do this (see (100)). She was not able to take us to that issue being raised by her before or at the PACE interview. Nor does she raise that or the legal basis for that assertion within her witness statement. Accordingly, as that was not a matter raised at the time nor has she provided the legal basis for that argument to the Tribunal having been asked to do so, that is not a matter we can address it.

83 On 19 November 2015 Ms Johal emailed Mr Lawrence thus ***"Having read your email I will ask you a straightforward question are you having a laugh and is this some sort of sick joke? … Your current responses left me totally stressed any anxiety to the point that I can confirm I can no longer be held responsible for my actions."*** [1096]. Within that email Ms Johal compared her treatment and suspension with that of all the colleagues and also stated to
Mr Lawrence ***"I'm not sure who is actually putting you up to play mind games, or holding you ransom, however I deem messing about with someone mind [sic] is a form of mental abuse!"***

The initial stages of the Disciplinary Investigation

84 At some time after Ms Johal's PACE interview the papers from the internal audit investigation were passed to the respondent's HR department and Mrs Bains was instructed to carry out an initial fact find to identify if there was a disciplinary case to answer.

85 Mrs Bains did not explain to us when she was first asked to undertake that fact find or precisely what papers she was passed to enable her to do so. We find that must have been in the six week period between Ms Johal's PACE interview on 29 October and 9 December 2015 when Ms Johal was informed that a disciplinary investigation was to follow (see (88) below).

86 Mrs Bains told us orally that having considered the papers she concluded that the allegations should be progressed to a formal disciplinary investigation. She told us orally that she reported her conclusion to her line manager, Ms Louise Lawrence in the form of an Interim fact find report. That was not before us and nor did Mrs Bains mention that in her witness statement.

87 Mrs Bains told us that any papers that she had produced as part of her investigation were within the file she left with the respondent when she left its employ. No explanation was provided why that interim fact find report was not before us.

88 Mrs Bains told us that her recommendation to commence a formal disciplinary investigation against Ms Johal was approved by HR and on 9 December 2015 Mrs Bains wrote to inform Ms Johal [833-835] that in addition to the separate and ongoing internal audit investigation, she was to be subject to a disciplinary investigation to be conducted by Mrs Bains relating to potential misconduct and gross misconduct relating to the abuse of authority, conflict of interest, improper practice and another allegation concerning 'some other substantial reason' namely that trust and confidence may have irretrievably broken down concerning her employment relationship with the respondent.

89 Mrs Bains enclosed with her letter a copy of the respondent's disciplinary policy [836839] and rules [840-843]. The bundle also included the respondent's officer code of conduct [844-855] and guidance on notifications of declarations of interests [856-867] various versions of its procurement and contract rules [868-903, 904-942 & 943-980] and its financial regulations procedures [981-1070]. Ms Johal also referred us and asked the witnesses questions about the respondent's disciplinary procedure guidance [12461263].

90 That internal disciplinary investigation was thus commenced prior to Ms Johal having been told the outcome of the internal/audit fraud investigation against her. We should record that as at the date of her subsequent appeal that was still the case; Ms Johal having referred us to a discussion she had on 9 December 2016 [1794c] with Mr Oliver Knight (who by that stage had taken over conduct of the Counter Fraud investigation from his wife, Louise, who had previously led the same (from October 2014 to November 2015 [1546])).

91 In addition to the stress that an outstanding potential criminal enquiry could have for anyone, Ms Johal was a Justice of the Peace (JP) and that that led to her having to cease sitting as a JP while the investigation was ongoing. We find that her appointment as a JP was something she held dear and was something that her family placed great esteem in.

92 Ms Johal complained that she had not been given the detail of the allegations against her and she did not understand the interplay between the two investigations.

93 Whilst Ms Johal had not been given the detail of the allegations against her, Mrs Bains had informed her of the general allegations against her (see (88)) and an employer is not required to do so until it decides to commence a disciplinary process. At that point all that Mrs Bains had determined was that there was a potential disciplinary case that required investigation.

94 Further prior to the PACE interview in relation to the fraud investigation Ms Johal was made aware via her solicitors, at least in general terms of the potential charges against her and had had an opportunity to take advice. In essence those charges related to was Ms Johal's failure to declare an interest in an entity, Learning Exchange, with which she was involved, in breach of its declaration of interest rules. She had lodged a detailed and lengthy position statement in relation to the PACE interview.

95 We find that Ms Johal should or at least could have been clear on the same. She had instructed a solicitor in relation to the PACE interview and the respondent had in our judgment made plain that the internal disciplinary and internal/audit procedures would run in parallel.

96 In addition to eventually speaking Ms Johal during the investigation Mrs Bains interviewed seven individuals in connection with the allegations against Ms Johal:-

96.1 Mrs Davison, a Senior Manager at SAFL, on 16 December 2015 and 6, 7 and 11 January 2016 [561-592]

96.2 Mrs Christine Howells, Adult Community and Strategy Manager, who line managed three Senior Managers, Mrs Davison, Ms Green and Ms Johal who was also subject to investigation/disciplinary action [594-643] on 30 December 2015 and 3 February 2016

96.3 Mr Steve Lawrence, the Council's Lead Manager for Post-16 Education and Adult
Skills and Mrs Howells' line manager, [511-522] on 18 January 2016

96.4 Ms Samantha Allen, a finance and data officer at SAFL, [538-560] on 15 and 22 December 2015,

96.5 Mr Jim Wells, the Service Leader for Leisure and Culture, he had appointed Mrs Howells in 2004/2005 and managed her up until to April 2014 when the service moved back under the auspices of education and had also managed Ms Johal for a year when she was a Learning co-ordinator [523-537] on 26 January and 9 February 2016

96.6 Mr Oliver Knight, a Senior Fraud Officer within the Council's Audit Services and latterly in charge of the investigation against Ms Johal [648] on 22 February 2016

96.7 Mr Neil Whitehouse, who was a Senior Category Manager at the Council. He explained that his role was to be responsible for managing the Category Managers, the Sourcing Officers and the e-sourcing managers within the Council's Procurement Service [1127-1138] on 26 February 2016

97 Mrs Bains informed Ms Johal that she wished to meet with her to conduct an investigatory interview but to also, give her the option, if she wished, of letting her PACE interview stand as her evidence as part of the investigation. Mrs Bains provided three dates in December 2015 when they could meet.

98 She also informed Ms Johal that she could be accompanied by a trade union representative or work colleague enclosed a copy of the Council's disciplinary procedure rules [836-843].

99 On 17 December 2015 Ms Johal emailed Mr Lawrence to inform him that ***"… all future correspondence should be referred to my solicitor" [1100]***

Ms Johal's second grievance

100 Ms Johal lodged a second grievance on 18 December 2016 [1101-1108]. Amongst other matters she complained about the way the audit enquiry had been addressed and passed to the investigator, that the contents of the PACE fraud/audit interview had been disclosed to the disciplinary investigator, the length of her suspension was causing her to be de-skilled, her work and social relationships with colleagues were being destroyed by preventing her return to work (and by being prevented from having contact with them), the investigatory process was disproportionate and non-transparent and prevented her preparing a proper defence, that she had been forced to attend a PACE interview having declined to attend voluntarily, that the investigator did not have the power to conduct such an interview, that the partiality of witness had been compromised that proceeded without the allegations against her having been clearly set out, that the allegations against her had been amended to increase the

potential sanction and that a whistleblowing allegation had been converted to an allegation of fraud.

101 She also alleged defamation and breach of confidence and data protection requirements by the counter fraud team concerning how they obtained details from the bank (and amongst other matters, the cheques relating to Learning Exchange), bullying, harassment, victimisation, referred to her previous tribunal claims, raising the assertion of a statutory right (although explicitly that was not argued as complaint before us), that she had made protected disclosures, and that the respondent had failed to resolve subject access requests made by her, had failed to follow ACAS guidance as to fairness, its own disciplinary rules and policies, was guilty of delay and that her guilt had been assumed by staff and clients.

102 Further, she also stated ***"… you appear to have taken your eye off the ball to secure your potential personal position in leading and taking forward a combined local authority…"*** and concluded ***"In plain English this appears to be yet another total f… up by HR."***

103 Whilst Ms Johal argues the second grievance [1101-1108] was not addressed adequality or at all having been asked to expressly clarify her position on the same confirmed she did not pursue before us any points concerning the first grievance [1458-1460].

The Disciplinary Investigation (cont.)

104 The subsequent correspondence suggests that the disciplinary meeting did not occur on the dates offered. We find the reason for that was that given by Ms Johal in subsequent correspondence; she wanted further detail of the complaints against her. We say that because Ms Johal told us [CKJ/202] that on 11 January 2016 she received a further identical letter to the one dated 9 December from Mrs Bains inviting her to a disciplinary investigation meeting. She told us she emailed Mrs Bains and informed her that she would be happy to attend once the actual allegations had been set out as the four matters in the letter were not allegations in her view.

105 On 25 January 2016 Ms Johal states [CKJ/204] that a further letter was received inviting her to attend an investigatory interview on 2 February 2018 and that a copy of the letter had been forwarded to her solicitor. She told us she assumed her legal advisor Mr Evans had been invited as she had not appointed or notified the council of another other solicitor. Later in her witness statement she stated she assumed her solicitor was going to be present [CKJ/208].

106 On 28 January 2016 Ms Johal emailed Mr Lawrence to thank him for pursuing Mrs Bains for information. She went on to add that when she had contacted him by telephone that misunderstandings had been reduced and stress avoided. She stated, ***"on reflection it seems that you have had a lack of control over the situation, communication and the relationship suffered, however when I contacted you by phone you've always tried to assist."***

107 In contrast with her description of her relationship with Mr Lawrence she also said this ***"I don't know why colleagues within HR deliberately provoke or choose to ignore me".***

108 Ms Johal in her cross examination of Mrs Bains complained that the invitation had been sent to her solicitor yet she did not have a solicitor. That is in direct contrast to the statements in her witness statement [CKJ/204 & 208] (see (105)).

The disciplinary investigation meeting

109 The disciplinary investigation meeting eventually took place on 2 February 2016.

110 Ms Johal complained before us that Mrs Bains proceeded with the interview when she was off work on sick leave. Whilst she told us [CKJ/206] that at start of meeting she said was not well and was experiencing internal bleeding that was due to stress, Ms Johal having attended the interview would normally suggest that Ms Johal felt she was fit to attend but merely wished to make Mrs Bains aware in case she later felt unwell.

111 When we asked her to point us to where she had raised her fitness to attend in advance of the disciplinary interview or to take us to any sick notes or other evidence that could have shown Mrs Bains should have been aware of that being something that needed to be addressed, Ms Johal could not do so.

112 Notwithstanding that failure to do so we considered the documents before us. Whilst she complained on 12 October to Mr Lawrence [1508-1509] about her pre-existing health condition taking a turn for the worse (see also 19 November [1096] where she complained about being stressed and her second grievance 18 December [1102]) we can find no trace of her any sick notes or other medical evidence dating from that time to suggest she was not fit to attend a disciplinary interview or for that matter work. Those complaints have to be read against the context that Ms Johal had attended a PACE interview had been conducted on 29 October 2015 and having asked her to identify where she had raised her fitness to attend, she could not take us to the same.

113 In the absence of any evidence being led or any documentary evidence to support the same we find that Ms Johal had not told Mrs Bains that she felt that her condition was such that she was not fit to attend the disciplinary interview.

114 Ms Johal asserts [CKJ/209] that the questions all seemed pre-designed to achieve a specific outcome and that Mrs Bains only seemed interested in one matter the cheques and Learning Exchange. She told she felt it did not really make a difference what I said Mrs Bains was not interested.

115 Ms Johal told us that she refused to sign a statement that had been prepared based on her interview [699-723] on the grounds that Mrs Bains had not administered a fair interview.

116 It is common ground that the statement was not signed and when Ms Johal put to Mrs Bains that when she had refused to sign it that Mrs Bains had stated that she wanted to speak to Lee Bentley about this. He was the individual who Ms Johal suggested was driving a hate campaign amongst senior management against her [CKJ/140] and one of the persons she named as p[art of the conspiracy against her at the start of the hearing (see (6)).

117 Mrs Bains told us that she had sent the statement in draft for Ms Johal to sign but that when it had been returned she had noticed that Ms Johal had amended the same specifically to prevent its use other than within the disciplinary process and that Mrs Bains therefore indicated that she would need to take advice from colleagues about that. Mrs Bains told us that she returned with Ms Lawrence and the discussion became heated because Ms Johal made clear that in essence she did not want it used other than as part of the investigation. Mrs Bains told us that their attempts to reassure Ms Johal came to no avail. Neither individual provided a date when that discussion took place although it appears that dates to sometime between the date of Ms Johal's disciplinary investigation meeting on 2 February 2016 and the date of Mrs Bains's disciplinary investigation outcome, 16 March 2016 [473].

118 Irrespective of the reason why that was not signed this Ms Johal did not seek at any point either within her statement or in her questions to any of the witnesses, Mrs Bains in particular, to challenge that the unsigned statement [699-723] was an inaccurate

record. Indeed, in our judgment, that statement appeared to be consistent for the most part with the pre-prepared statement that Ms Johal gave at the PACE interview.

119 That being so we find that reading the draft statement that emanated out of her disciplinary investigation interview [699-723] Ms Johal :-

119.1 Accepted her historic association and link to Learning Exchange [708 Q61]

119.2 Disputed she had signed the cheques with her name on them but accepted her signature was similar to that on the cheques [712 Q97], but

119.3 did not deny approving the orders [714 Q116-117] instead stating if she had any association with Learning exchange she would not have done so, and 119.4 had not declared an interest in Learning Exchange [711 Q90-91].

120 In an investigation meeting Mrs Bains conducted with Mr Knight on 22 February he stated that as part of the counter fraud investigation, enquiries had been made with Barclays Bank who had confirmed Ms Johal was one of two signatories to the Learning exchange account. He repeated that when giving evidence at Ms Johal's disciplinary hearing on 11 August 2016 although he referred (incorrectly) to SAFL not Learning Exchange [1233] (that was corrected in Ms Johal's dismissal letter).

The conclusion of the disciplinary investigation and its outcome

121 On 29 March 2016 Ms Johal was informed of the result of the disciplinary investigation and that she was to be invited to a disciplinary hearing in relation to two allegations against her on 12 April 2016. Namely:-

121.1 Allegation 1 – that she authorised two payments in her capacity as a manager to a registered supplier ... Learning Exchange, with which she had some form of involvement.

121.2 Allegation 2 – that the employment relationship between Ms Johal and the respondent had irretrievably broken down and this was considered to be some other substantial reason (SOSR) .

122 Within her investigation outcome dated 16 March 2016 [473]. Mrs Bains identified the allegations against Ms Johal and the basis for them.

123 Ms Johal was asserted to have approved internal orders sanctioning the purchase from Learning Exchange of materials :-

123.1 Created 30 January 2013 for £99.50 and also actioned on 30 January 2013 [794], and

123.2 Created 5 August 2014 for £98.90 but actually "actioned" [793] on 6 August 2014.

124 A spreadsheet extract (although the creator of that was not identified) stated that both orders had both been approved by Ms Johal and had a total value of £198.40 [797]. That extract also identified the respective order numbers and gave their dates as 1 March 2013 and 7 August 2014.

125 The investigation also identified three cheques signed "C Johal" which the respondent asserted were similar to the signatures of Ms Johal examples of which were included elsewhere in the bundle:-

125.1 One of which dated 15 December 2012 in the sum of £260.00 was made payable to "K Johal", whom Ms Johal accepted was her daughter and who had also worked for SAFL for ***"a while 5 or 6 years ago"*** and solely signed by "C Howells" [668],

125.2 Another for £3,000 for "cash" signed by "C Howells" and a "C Johal" dated 5 September 2014 [676], and

125.3 The third for £1,700 payable to "C Howells" signed by "C Howells" and "C Johal" dated 26 February 2015 [680].

126 Also, within the bundle was another cheque payable to "West Mercia Supplies" for £41.14 dated 17 September 2014 signed by "C Howells" and a "C Johal" [678].

127 We were also taken to one of the respondent's internal documents for [authorised] suppliers dated 19 January 2011 [665] (***the Internal Supplier Form***) where Ms Johal was shown as Learning Exchange's secretary. In her witness statement Ms Johal also refers to Mr Whitehouse's evidence concerning that [C/231] in his witness statement of 26 February 2016 [1127-1138] but does not challenge that document's veracity.

128 In the (non-PACE) interview conducted by Mrs Bains on 2 February 2016 [712-713 Q107] Ms Johal denied having seen the Internal Supplier Form before, stated that she didn't work at SAFL in January 2011, suggested that it did not refer to "Chaz" but "C Johal", there could be other "C Johals" at Sandwell, denied that it was her signature on the Internal Supplier Form, that she had not been the Secretary of Learning Exchange, stated that the Internal Supplier Form it had not been supplied to her as part of Subject Access Requests she had made, suggested it had only recently come into being and stated that she had no involvement with Learning Exchange.

129 Within her investigation outcome Mrs Bains referred to many emails received from Ms Johal over the preceding months with reference to Ms Johal's approach and attitude (2.3 [495]). She went on to document over the following pages [496-509] extracts from the correspondence that Mrs Bains concluded were not trivial or throw away comments and demonstrated Ms Johal's attitude which she felt could be perceived as showing disrespect towards peers and senior colleagues, unreasonableness, frequent use of sweeping unfounded allegations, frequent threats of litigation aimed at the respondent and individuals, frequent misrepresentations of fact, inappropriate use of the grievance procedure to obstruct processes the respondent was attempting to apply, offensive comments, sarcasm and a lack of professional maturity [509].

130 We have not referred to all of them above and below but we have identified those that were later referred to by Mr Davey (see (66, 68, 69, 73, 83, 99, 102, 106/107, 176, 179 & 183/185).

131 We need to add that it was agreed by the respondent that the emails referred to in Mrs Bains's investigation report did not include Ms Johal's emails of 9 or 18 August and we return to them below (187 and 199.2).

132 Mrs Bains concluded that those emails showed that the respondent's ***"employment relationship with Ms Johal may have irretrievably broken down"*** and that ***"breakdown cannot be remedied"*** [510].

133 We find that the reason for Ms Johal's comments in those emails was her frustration at the delays in the investigatory process, the effect this had upon her serving as magistrate (because of the ongoing investigation she was suspended from undertaking that role and we find she placed great weight and status upon that) and the anxiety and worry of not knowing whether a criminal prosecution would ensue. What in our view, were her justified frustrations about that delay and the uncertainty it caused did not excuse the immoderate language she used or its tone, from a person who was a manager with considerable experience, to a variety of individuals within the respondent's organisation at various levels from chief executive down, who for the most part were senior to her.

134 Mrs Bains's disciplinary investigation outcome was dated 16 March 2016 [473].

135 The disciplinary hearing was to be chaired by Mr Davey. Alternative dates were offered as 13 April 2016 or 18 April 2016 [1549]. This letter also confirmed that Ms Johal, could be accompanied by a union representative of colleague and explained how Ms Johal could obtain copies of the disciplinary investigation report. She was advised that if she did not attend it could proceed in her absence and that if wished to submit any documents, she would need to notify the respondent of that at least 3 working days before the hearing.

136 The disciplinary bundle that was before us was that that was used within both the disciplinary and appeal hearings and therefore the index was amended and large numbers of documents added. As we will set out below (218) there was initially some dispute over the contents of the disciplinary and appeal bundles so we confirmed what this included with Ms Johal, Mrs Bains, Mr Davey and Mr Lackenby.

137 Ms Johal accepts that she collected a copy of the disciplinary report and bundle [459 – 1138] on 30 March 2016.

138 Having stepped back having heard all the evidence and considered matters we find that the evidence before Mrs Bains was that Ms Johal had accepted that she had been connected to Learning Exchange , had approved payments to it and had not disclosed an interest (119). The core question Ms Johal accepted before us was whether that connection had remained after 2007/08.

139 The contrary evidence was limited to the assertions of Ms Johal and Mrs Howells.

140 Whilst Ms Johal also asserted [CKJ/217] that if the signature was supposed to be hers, ***"then it had been forged and that she should investigate this. To my knowledge this has never been addressed. I offered to provide Ms. Bains with copies and specimens of my actual signature for comparison. She was not interested and failed to obtain these."*** We find the respondent included various samples of her signature from its own records within the investigation bundle. Further, before us Ms Johal accepted the signatures on the cheques and the Internal Supplier Form appeared similar to her signature on other documents.

141 Before us Ms Johal went a stage further suggesting that the respondent should have obtained the original cheques and sent them to a handwriting expert. That was not something she raised at the time or as part of the disciplinary or appeal processes and neither did she challenge Mr Lackenby about that. We address this further at (397).

142 Whilst Ms Johal denied approving the orders before us, she accepted she had not done so expressly previously in her grounds of appeal or elsewhere (on the basis she had only done so to Mrs Bains based on what had been shown to her at the time and the evidence in the bundle did not prove it) she accepted she had admitted to approving the two orders to Mrs Bains.

143 In any event having accepted her earlier link to Learning Exchange, the cheques and internal supplier document, Mrs Howells had accepted her own signature, were highly persuasive evidence that Ms Johal remained linked and thus in our judgment Mrs Bains entitled to come to the view that she came to.

144 We also find that the protected disclosures had no influence whatsoever on Mrs Bains's investigation outcome. She was not aware of the fourth disclosure as that post-dated her decision. Of the three that existed and there was evidence Mrs Bains was at least aware of them (the second was addressed to Mr Lawrence from whom some of the correspondence she referred to in her outcome had also been addressed) she told us he had not drawn them to her attention. We accept that was so. We find Ms Johal has not shown that Mrs Bains was aware of their contents. Nor has Ms Johal provided an

evidential basis to support the conspiracy allegation she makes. We find her outcome was in no sense influenced by the disclosures.

145 Whilst Mrs Bains's investigation was not perfect as was demonstrated by Mr Knight sitting in on the investigation meeting Mrs Bains held with Mr Wells, it was a reasonable one.

Fourth Alleged Protected Disclosure

146 By an email dated 31 March 2016 to Mr Britton and copied to Mr Sharma & Mr Lawrence [1553-1555] Ms Johal again made what she described as a disclosure in good faith under the respondent's confidential reporting code referring to what she described as abuse of its position and power to avoid carrying out its duties in accordance with its policies, data protection requirements and failing to protect the interest of the public purse. The facts that she appeared to relay concerned being provided with personal details of a known individual including that individual's personal named bank, location of bank, company name, address, where the bank account was registered to, sort code, account number, home address including postcode, email address, full name including middle name, purchase order numbers, and value paid by the respondent. Secondly that

she had received personal details, bank and sort codes the name of the bank where the payments had been made to third-parties. She referred to having an active case open with the Information Commissioner and asserted that that disclosure contravened the Data Protection Act. She sought clarification on how the respondent proposed to redress this further catalogue of errors and assure the public and herself that their data was protected.

147 We find that in addition to raising an allegation that amongst other matters data protection requirements had not been complied with, Ms Johal supplied information relaying how she alleged those requirements had been breached within that email.

148 In her witness statement Ms Johal again refers to this email but made no reference to how this has any bearing on subsequent events nor raised that with any of the witnesses in cross examination.

Ms Johal's sickness absence

149 On 5 April 2016 Ms Johal provided a MED3 certificate stating that in the view of her GP she was not fit for work for the period 5 to 19 April 2016 because of a ***"stress related problem"*** [M/34]. Ms Johal makes no reference in her witness statement to having provided that sick note at the time however on 11 April 2016 Ms Johal emailed Ms Gemma Kisby, another of the respondent's HR Consultants, and informed her that she had not been able to respond to her due to her health and that she was taking ***one day at a time as recommended by her doctor***, stated she had collected the disciplinary pack and bundle on 30 March and raised a number of issues concerning the bundle and the procedure adopted the respondent to date [1563-1564].

150 An invitation to arrange a counselling assessment appointment dated 21 April 2016 [M/36] from Black Country Partnership NHS Foundation Trust was before us. The only two references that we can find within her witness statement to Ms Johal undergoing counselling are in July 2015 [CKJ/122] and August 2016 [CKJ/276].

151 A further sicknote was before us dated 18 April 2016 [M/35] for the period 18 April to 20 May 2016 stating the reason as ***"Depression".*** Again, we can find no trace of Ms Johal stating that that was forwarded to the respondent however on 4 May Ms Johal emailed Mr Lawrence raising a number of issues concerning occupational health and her discharge from physiotherapy. She went on to say that her overall mental health

was not good and her back had gradually started to worsen. She asked that he address the treatment she required [1624].

152 The following day, 5 May 2016, Mr Lawrence responded stating he was sorry to hear of her medical conditions, as she had requested he had referred her to occupational health and attached a copy of the referral form [1623].

153 By an email 24 June 2016 Mr Lawrence wrote to Ms Johal to state that she had not attended the occupational health appointment arranged for the 9 June 2016 [M/40] and that had been re-arranged for 30 June 2016.

154 Further sicknotes dated 15 June for the period 15 June to 31 July 2006 giving a reason ***"depression and stress"*** [M/39], 31 August 2016 for the period 31 August to 30 September 2016 citing ***"depression and back pain"*** [M/54] and 29 September 2016 for the period 29 September to 31 December 2016 citing ***"back pain and depression"*** [M/56] were in the medical bundle before us.

155 Ms Johal attended Occupational Health although it was not entirely clear when because at 11:52 on 8 July Ms Johal was sent a draft Occupational Health report [document CJ61 (bundle 7)] and asked to send any amendments before 12 July when it was to be released to her manger. She forwarded an amended version to Occupational Health on 12:08 on 11 July [document CJ60 (bundle 7)].

156 There were various versions of that report before us all dated 8 July 2016. As well as their contents, their footnotes also differ. The footnote of one [document CJ63a-d (bundle 7)] is marked "MS C JOHAL OH REPORT", two [1157-58 and 1159-63] are marked "Amended OH Report for Charanjit Johal - July 2016" and another [1151-1155] had no marking in the footnote.

157 We find that all four versions of the OH advice that were before us were consistent in including the following:-

157.1 Ms Johal was eager for the disciplinary hearing to come to a close and return to work,

157.2 that because of the volume of documents she had not been able to work through them,

157.3 (either expressly or impliedly) she was not fit to return to work or a disciplinary hearing at that point, and

157.4 that she would be able to attend a disciplinary meeting once she had had an opportunity to read the documents related to the hearing.

158 We find, the documents on balance show that a version of the Occupational Health report had been expressly agreed by Ms Johal and that all four versions before us repeat the four points at (157).

159 On 29 July 2016 Mr Davey wrote to Ms Johal referring to his letter of 29 March 2016 and the scheduling of the disciplinary hearing, acknowledging that she had been unable to attend due to ill-health, had been seen by occupational health and they had provided an advice. He went on to say that three weeks had elapsed since that advice which he hoped it allowed her sufficient time to read and understand the disciplinary hearing packs which were collected at the end of March and went on to say that for the sake of her own health and so the matter could be resolved he sought to rearrange the disciplinary hearing. He therefore invited her to attend a disciplinary hearing on 8 August, offering an alternative date of 11 August.

160 He provided a copy of the disciplinary policy and rules, advised of her right to be accompanied, explained which witnesses would be available, who would conduct the

management case and that if she did not attend without prior notification or good reason the hearing could be conducted in her absence. He reminded her that any documentation that she wanted to refer to needed to be provided to the respondent at least three working days before the hearing [1166A-1167].

161 By an email to Mr Lawrence that was copied to Mr Davey and Ms Kisby on 2 August [1635-36] Ms Johal stated that she had received a disciplinary hearing invitation of 29 July from the respondent and that the respondent's management was again ignoring professional medical advice. She stated she ***"closed up"*** when she received emails from work (followed by letters in hard copy) and attached a letter from her GP of 26 July and a MED3 medical certificate of 29 July.

161.1 The MED3 certificate of 29 July 2016 (to 31 August 2016) [1638] cites the reason for the absence as ***"depression, stress".*** Whilst we can find no assertion in her statement that the sick notes we refer to at [154] were provided by Ms Johal, by reason of the contents of her email of 2 August amongst others, the referral to occupational health and/or the respondent not taking an issue in that regard we find that on balance these had been provided to the respondent.

161.2 Ms Johal's GP's letter of 26 July 2016 [1637] stated Ms Johal suffered from anxiety and depression, was taking anti-depressants and was of unstable mood and which attributed the cause to ***"work place investigations which have been ongoing for around 12 months"***. The GP letter stated she received support from her GP and follow ups but that the writer feared ***"the work place investigations may worsen her mental health problems and cause her depression to get worse"***.

161.3 Her GP letter continued, ***"if you require further information please do not hesitate to contact me".*** The letter was addressed ***"to whom it may concern"*** so it is unclear how Ms Johal could have authorised her GP to contact the recipient to provide that further information without her GP first having to revert to her to obtain consent. Ms Johal put it to Mr Davey that it was open to the respondent to have contacted her GP.

162 As a result the respondent sought Ms Johal's permission to contact her GP on 3 August. As the respondent had not received that by 8 August and a further request was sent to Ms Johal [1195] by Paula Luton of the respondent's HR department.

163 In her response of 9 August [1193] Ms Johal stated that seeking medical consent would not allow the respondent a better understanding of her condition. She continued that the Occupational Health report was to be private and confidential but it had been released to Ms Luton (we return to this at (176)), she referred to her concern that the respondent was unable to keep her (personal) data confidential and a number of other complaints. She went on to say that the Occupational Health report and her GP's letter both stated she was not fit to attend work and that she had told her GP's surgery that they were to inform her if anyone sought access to her data without her consent.

164 We find that within her response Ms Johal she failed to identify the distinction between fitness to attend work and fitness to attend a disciplinary hearing. However it also highlights in our judgment that contrary to the suggestion she put to Mr Davey in crossexamination that he should have contacted her GP that firstly the respondent had sought her consent to do so twice, she had failed to consent and her letter [1193-95] specifically ruled that out.

165 We find that is directly at odds with the suggestion she makes, demonstrates an inconsistency in her account and by attempting to portray matters in a way that they were not, i.e. that the respondent should have taken steps and had failed to do so when

she had given a direct instruction that prohibited that we find that Ms Johal was attempting to mislead the Tribunal.

166 Ms Johal's grounds of appeal, detriment complaints (PCP(1) - adjustment (1) and the Protected Disclosure detriment (6)) all included a complaint that Mr Davey had proceeded with the disciplinary hearing when she had been signed off work ill and should have postponed this. Ms Johal had also raised that with Mr Lawrence (161). On several occasions during the hearing before us Ms Johal also sought to argue her GP's advice had been disregarded concerning the Disciplinary Hearing going ahead.

167 For instance Ms Johal sought to challenge how Mr Davey had come to view to proceed by challenging which version of the Occupational Health report he had relied upon. He told us he had only seen one prior to the disciplinary hearing [CD/18.2] and identified that as [1157-58] and that did not form part of the disciplinary hearing bundle because it had been created after the bundle was finalised.

168 An email chain of 15 July [1165] suggests a marked up version was created by HR prior to the disciplinary hearing showing the amendments made to the Occupational Health report. That was not put to Mr Davey by Ms Johal. What she sought to argue instead was that he had not considered what appeared to be an earlier version of the report [CJ63ad] that was not included within the disciplinary process at any stage (by the time of the

appeal the other versions of the Occupational Health report [1151-1163] were within the bundle along with [1165] but not [CJ63a-d]). Again, that appears to us to be an assertion that he should not have proceeded with the appeal.

169 That being so we indicated if that was so Ms Johal needed to ask Mr Davey about the contents of her subsequent email to Mr Lawrence of 18 August [1640] ***"I am aware ... that the longer the disciplinary hearing hangs over me my road to recover [sic] will be slow. For my own sanity .... I want to get this whole sordid affair over however there are matters and behaviours by SMBC officers that do not add up in my head and which ... are contributing to me current stress levels and overall mental state."***

170 She did not do so instead stating that she was happy for the disciplinary to go ahead but merely wished to be able to put her input into it by making written submissions. That that was her view and she wished the hearing to proceed is reinforced by her not raising her fitness to attend in her appeal (203.4), what she had said to OH (157.1) and to Mr Lawrence (184) but does not explain her failure to respond. That is not the way detriment (6) and adjustment (1) of PCP (1) are put.

171 When she put the stance she relayed at (170) to Mr Davey he told us that he had written to her specifically asked her to put her side of events and answer questions he had raised but that she did not respond.

172 We find the way she sought to suggest she was not fit to attend the disciplinary hearing in her grounds of appeal (203.4) and (adjustment (1) of PCP (1) and detriment (6)) is a further example of where her version of events changed, she sought to adopt contradictory positions and sought to exploit a situation to potentially discredit the way the respondent was behaving.

173 Whilst her GP certified her as not fit to attend work he did not state she was not fit to attend a disciplinary meeting explicitly. Instead he stated the work place investigations might worsen her mental health problems and might cause her depression to get worse. [1637]. When it was put to Ms Johal that he had not explicitly said that she was not fit to attend the disciplinary hearing, she suggested that be put to her GP, that she was merely following his advice and suggested he be called. She did not elect to do so.

174 Nor did her GP letter address the point made in the Occupational Health report; that given the stress was caused by the disciplinary process, the cause of the stress would not go away until the disciplinary process had been addressed and as Ms Johal wished to return to work implicitly that would not occur until the disciplinary process had concluded.

175 Nor did her GP suggest either the adjustments she contends for be made nor any adjustments generally be made to allow the disciplinary hearing to proceed (for instance lodging written submissions) either in his letter or in the MED3 sick note [1638].

176 Whilst Ms Johal had voiced concerns about her medical records being disclosed to Ms Luton (see (162) to (163)) Ms Johal did not at the time set out that complaint in the way she did before us. The first time we can find reference her having done so in that way was when she did so to Mr Lackenby when she allowed him to view but not to copy her medical notes as part of her appeal.

177 We find that was it was only during the course of her subsequent appeal to Mr Lackenby (and not in August 2016) that it became clear to the respondent (or, albeit with hindsight, to us) what Ms Johal's objections were to in the detail such that a work around could be agreed. We find at no point prior to January 2017 did Ms Johal make that clear to the respondent. Her stance at the time appeared to be that the respondent should have called her GP to clarify the position. However, as we state elsewhere she had not provided consent for the report and in correspondence made it clear to the respondent that her GP had been instructed to inform her of any attempt to gain access to her records (her email of 9 August 2016 [1193-95]).

178 In an email of 9 August 2016 to Su Samra (an Assistant Business Partner from Human Resources who assisted Mr Davey with the disciplinary hearing) when responding to a request from Ms Samra seeking Ms Johal's consent to speak to the Ms Johal's GP, Ms Johal in addition to refusing to provide that medical consent stated that in her view that would not allow the respondent to gain a better understanding of her medicine current condition as HR staff are ***"all incapable of understanding how that on behaviours are contributing to my condition. The problem you have is that none of you have the listening skills, or the desire to listen to anyone when senior management have had one pre—set agenda to dismiss me from more than a decade …"*** and went on to ask Miss Samra to stop sending emails to her personal email account, to reinstate her email accounts with the respondent (see (66)), referred to concerns that she had about the occupational health report being disclosed in contravention of its heading 'private and confidential' made an allegation that Lee Bentley was manipulating Paula Luton and other staff to harass her, that Mrs Knight had managed to seek third-party information regarding her personal affairs without Ms Johal's consent and questioned why consent was being sought at that point. She then made the following comment; "***I would greatly appreciate if paid officers would not continue to try and fxxx with my head."*** [1199-1200].

179 In another email to Jan Britton also of 9 August [1198] that was copied to Mr Lawrence, Ms Johal commented "***If officers are at a loose end due to the lack of senior direction …"*** and made this request – ***"… I would greatly appreciate it if they would not continue to practice their skills of bullying intimidation and harassment on me".***

180 The following day, 10 August 2016, Ms Samra informed Ms Johal that based on the previous OH recommendations, Mr Davey had decided to proceed with the disciplinary hearing and if necessary, it would proceed in her absence [1190].

181 Also, on 10 August 2016, Mr Lawrence wrote to Ms Johal [1642-43] to thank her for copying him in on the email that she sent to Ms Samra (the email chain is [1643-1644] but that is a duplicate of the email [1199-1200]). He continued "***As your line manager, I***

am saddened by some of the content of your email, and I'm sorry to hear that you are still unwell." He went on to say ***"(1) While I do not understand the references you've made to HR not listing and their 'behaviours contributing to your condition' I would encourage you please to try and cooperate with HR with a view to resolving any concerns you hold. I am happy to help with this if you wish; (2) I'm sorry you feel you are being harassed by HR. …".*** He went on to indicate amongst other matters that he was unable reinstate use of these email addresses as you are suspended from your employment and sought clarification from her as to what personal details/information she was alleging had been released.

182 We find that those reactions of a genuine and reasonable manager confronted by a frustrated employee using immoderate language.

183 Ms Johal's response of 18 August to that email [1640-41] was to state that Mr Lawrence had ***"… converted and sold your soul to senior leadership / management and no longer serve to protect junior staff."*** She later went on to allege that ***"… their efforts have now gone beyond the call of duty as Mr Britton in an attempt to cover up wrong doings by Directors appears to have handed over bullying, harassment and intimidation rights over to certain officers."*** and "***Instead of sending recorded deliveries send over its best hitman… and shoot me in the head."***

184 Within her response Ms Johal called upon the respondent to conclude the process it was undergoing and suggested that it ***"continue with the disciplinary hearing in my absence but afforded [sic.] me the right book for written submissions, consider my supporting evidence which I need access to print, submit my questions and call my witnesses".***

185 She concluded ***"(5) stop patronising and insulting my intelligence. Leave me alone to repair the damage and before my remaining bright brain cells explode!! (6) just get it over and done with, do whatever you need to put me out of my misery-dismiss me and take pleasure in doing so! I can then take the matter to a private prosecution."***

The Disciplinary hearing – 11 August & 14 September 2016

186 Ms Johal's disciplinary hearing was chaired by Mr Davey. Ms Samra was present as was Ms Kam Kang who took the minutes [1218 – 1243]. Mrs Bains presented the management case and Mr Oliver Knight and Mr Steve Lawrence gave evidence. Ms Johal did not attend the hearing and it went ahead in her absence.

187 At the outset of the disciplinary hearing [1218-19] Mrs Bains asked Mr Davey to take into account some additional documents namely email chains incorporating emails from Ms Johal of 9 August to the respondent's Chief Executive and to Mrs Samra [1198 to 1202]. He agreed to do so [CD/39]. As those documents had been already copied to Ms Johal we find that notwithstanding Ms Johal's absence from that meeting he was entitled to do so.

188 In his evidence Mr Lawrence told the hearing that because of the orders to Learning Exchange he had lost trust and confidence in Ms Johal [1237] and that based upon Ms Johal's correspondence with the respondent she did not appear to be able to move on from the past, and her relationship with the respondent had irretrievably broken down and he did not believe she could return as an employee.

189 We heard [CD/26], [BKB/33] & [1243] that at the end of the meeting, Ms Samra advised Mr Davey that Ms Johal should be given an opportunity to respond in writing and make submissions in respect of the two allegations before making a decision. Mr Davey adjourned the meeting.

190 Mr Davey wrote to Ms Johal on 16 August 2016 by recorded delivery [1184 & 1186] to confirm that the hearing had taken place in her absence and to invite her to provide a

written response to the allegations before he made his decision. He also asked Ms Johal whether she had raised her concerns with Barclays Bank regarding her disputed signature on the Learning Exchange cheques. He asked her to respond by 31 August 2016.

191 It is not in dispute that Ms Johal did not respond to the request. She told us that she had not received the recorded delivery letter. That does not appear to be in dispute as it was marked ***"refused/not called for"*** [1188) but the respondent was not aware of that for three weeks.

192 Her failure to respond was not actioned until the respondent received the email from Ms Johal to Mr Lawrence on 18 August [1640-41]. This was copied by Ms Samra to Mr Davey [1639] on 5 September with a request that he needed to schedule a date for his decision.

193 In the interim, Ms Kisby, had responded to Ms Johal on 24 August 2016 [1639-40] confirmed that the disciplinary hearing had taken place and drawn Ms Johal's attention to a letter from Mr Davey that she stated was attached indicating he was offering her an opportunity to comment.

194 Whilst Ms Johal suggested that the email chain did not identify an attachment was present given what we had before was the latter parts of the chain after it had been forwarded again through various hands that is unsurprising. If that enclosure had not been attached we would have expected Ms Johal to have said so, and there is no evidence she did but in any event the body of the email from Ms Kisby made clear she had an opportunity to comment on the allegations and thus we find she was or should have been aware of that and declined to do so.

195 On 7 September 2016, Mr Davey wrote to Ms Johal [1204], stating that the hearing had been convened, had taken place in her absence, had been adjourned because he had not received a response to his request of 16 August 2016 and he proposed to reconvene the hearing on 14 September 2016 to give his decision in relation to the allegations.

196 If Ms Johal did not receive a copy of the letter of 16 August by then, given that was referred to within his letter of 7 September or Ms Kisby's of 24 August, we would have expected her to request a copy of the same. She did not do so. Nor did she take the opportunity to lodge responses to the allegations.

197 The outcome meeting took place on 14 September 2016 and in attendance were Mr Davey, Mrs Samra (HR) and Mrs Bains (Investigating Officer). It was minuted [1244]. As Ms Johal again did not attend Mr Davey decided to inform her of the outcome in writing.

198 We find that Ms Johal was or should have been aware that she had been given an opportunity by the respondent to lodge written responses to the allegations and thus by 14 September she had chosen not to do so.

199 Mr Davey's outcome letter was dated 19 September 2016 [1208-1212]. He determined that both allegations were substantiated [1209]. His rationale was as follows:-

199.1 As to allegation 1 Ms Johal had made the relevant approvals, ***the Internal Supplier Form*** demonstrated a link to Learning Exchange and Mr Knight had indicated that Barclays Bank had identified Ms Johal as one of two signatories to the Learning Exchange bank account. He identified whilst she had denied signing the cheques, at the [PACE] interview in October 2015 she had made no comment.

199.2 As to allegation 2 he relayed identified from some of Ms Johal's communications with the respondent's officers that Mrs Bains had referred to in her disciplinary outcome. We have summarised the ones he highlighted at (66, 68, 69, 73, 83, 99, 102, 106, 107, 176, 179, 183, 184 and 185). He accepted before us he had mistakenly referred in his outcome to an e-mail from Ms Johal dated 18 August 2016 that had been received after the hearing on 11 August 2016 and was not part of the evidence bundle but that did that did change his view. (A further email that Ms Johal also raised was not in the bundle was one of the documents we refer to at (187) and had thus been included at the start of the hearing having been forwarded to Ms Johal in advance of the same).

199.3 Having referred to Mr Lawrence's evidence (188) Mr Davey formed the view that the content and tone of Ms Johal's correspondence with the respondent was frequently inappropriate and given the comments were directed at a range of officers of the respondent and had lasted almost a year it demonstrated the relationship between Ms Johal and the respondent had broken down and given the comments referenced historic issues the break down was irretrievable.

199.4 Mr Davey concluded Ms Johal's actions in relation to allegation 1 represented an abuse of authority, conflict of interest and improper practice. Whilst the respondent's disciplinary rules identified improper practice as gross misconduct which in the absence of mitigating circumstances would normally result in summary dismissal, he decided that given that the allegation related to two transactions of relatively small value (£99.50 & £98.90) and there being no aggravating circumstances that the sanction for that allegation should be a final written warning rather than summary dismissal.

199.5 As to allegation 2 having concluded the relationship between Ms Johal and the respondent had irretrievably broken down he considered it was not reasonable

for Ms Johal to remain an employee and his overall decision was therefore to dismiss Ms Johal (on notice).

200 We find Mr Davey was entitled to note that Ms Johal had made contrasting responses in relation to the cheques. Whilst she was of course entitled to make no comment at the PACE interview, she had also lodged a lengthy statement at the PACE interview setting out her position and thus he was entitled to take that into account.

Ms Johal's appeal against dismissal

201 Following a request of that day, on 29 September 2016 Ms Johal was sent the minutes of the disciplinary hearings on 11 August and 14 September 2016 along with a copy of the respondent's disciplinary guidance and process.

202 Ms Johal appealed on 30 September 2016 [1268-1270] stating that she was unsure of the appeal process as she had not received a copy of the appeal procedure with the dismissal letter and sought a further copy. She confirmed she had received a copy of the minute of the disciplinary hearing that day. The grounds of appeal were divided into four heads :-

202.1 The disciplinary process was unfair and was not transparent,

202.2 The Investigation process was unfair,

202.3 That she had been subjected to discrimination, victimisation and unfavourable treatment, and

202.4 She had been unfairly and/or wrongfully dismissed. 203 She argued amongst other matters that :-

203.1 she was unsure of the appeal process and had only just received the transcripts of the dismissal hearing (in addition to the dismissal letter),

203.2 the dismissal letter did not make clear the effective date of termination ,

203.3 she had asked for clarification by HR of the contents of the dismissal letter, had not been given it and considered that to be part of a continuous attempt to cause distress and undermine her,

203.4 the disciplinary process was not fair or transparent and breached the ACAS code in that it was conducted in her absence which was contrary to advice from her GP and Occupational Health, her request for the hearing not to proceed in her absence was ignored, and she did not receive the disciplinary officer's invitation of 16 August to provide a written response,

203.5 the dismissing officer had not taken into account the effect her suspension and dismissal had had on her professional standing as a JP (she had been unable to sit in that role as a result),

203.6 in line with the law she should have been afforded the right to legal representation at her disciplinary hearing,

203.7 her grievance (singular) was not investigated and remained unresolved,

203.8 her protected disclosures had not been investigated and remained unresolved,

203.9 the respondent had failed to set out the second offence against her and give particulars of it,

203.10 The investigation was biased, unfair and unreasonable,

203.11 The chair of the disciplinary had a vested interest because of his links to audit who had carried out the counter-fraud investigation ,

203.12 The HR investigation failed to investigate all matters raised, to obtain and secure evidence and allowed unauthorised access to the report which led Ms Johal to conclude there was a conspiracy by HR officers,

203.13 The decision to dismiss was improperly influenced by HR officers in an attempt to cover up another dismissal,

203.14 Allegation 1 was not fully investigated, and the chair did not take into account all the facts in the evidence bundle,

203.15 Allegation 2 was not investigated by the investigation officer at all and the chair based his decision not disclosed in the evidence bundle,

203.16 She had been discriminated in comparison with other managers who were the subject of the allegations,

203.17 Her sickness absence had been mismanaged, referrals not properly made, OH recommendations were not properly carried out, GP advice disregarded, reasonable adjustments not made and welfare visits and risk assessments not undertaken,

203.18 She had been victimised for asserting her legal rights, and

203.19 The respondent had failed to follow its own disciplinary policy in that allegation 2 was categorised as misconduct and could not be 'masked' as SOSR.

204 She went on to say that wished to raise grievances in relation to several aspects of the above indicated that supporting evidence would be provided at the appeal hearing and sought to assert the right to be accompanied by a legal representative because she was a JP, the impact the case had on that and because of her Mental Health issues.

205 As Ms Johal pointed out in the appeal letter it was her intention to set out the facts that underlay the allegations, she was making at the appeal hearing. She did not do so because she left the appeal hearing before it started to address the substance of the complaints against her. Thus, for the vast majority of those complaints she did not identify prior to the appeal outcome the detail of what it was her complaint centred on.

206 Within her witness statement Ms Johal sets out some of the detail that was omitted at the time for instance one of her complaints about Mr Davey was that he had heard the disciplinary hearings concerning Mrs Howells and Mrs Davison in April and May 2016 [CKJ/302] and similarly Mr Lackenby (albeit the point concerning Mr Lackenby's involvement was directly addressed in the appeal he heard) and that amongst other matters and he failed to consider Mrs Howell's statement and failed to ensure one had been obtained from Ms Green [CKJ/303].

The attempts to schedule the appeal hearing

207 On 15 November Mrs Manjit Gill (another of the respondent's HR team) wrote to Ms Johal [1300] indicating when her appeal was to be heard (2 and 5 December 2016), the officer who would chair it, Mr Lackenby, and the arrangements for it, to include how she could collect the appeal bundle which ran to two lever arch files printed on double sided paper.

208 On 20 November [1327] Ms Johal wrote seeking a number of adjustments. Mrs Gill responded on 22 November 2016 [1331-33] in the main agreeing to Ms Johal's requests one of which was that the hearing which was provisionally scheduled for two days would not take place on either side of a weekend. Mrs Gill told Ms Johal that the hearing was relisted for 5 & 6 December 2016 and indicated that the options open to Mr Lackenby were to uphold decision to dismiss or to apply a lesser sanction/reinstatement.

209 There followed yet further exchanges of correspondence from Ms Johal on 27 November [1341-42] and a response of 28 November [1345-47] from Mrs Gill confirming amongst other matters that the hearing was re-listed as an appeal rehearing and that objections raised by Ms Johal to the involvement of Mr Sahota and Mrs Bains in the appeal hearing would be addressed by Mr Lackenby at the outset.

210 Thereafter (30 November [1353-1355]) Ms Johal raised further numbering discrepancies within the bundle. Mr Lakenby replied the same day acknowledging them, indicating that those errors would be corrected, a new bundle provided and that the hearing would be relisted to allow Ms Johal time to prepare [1357].

211 Ms Johal then raised an issue concerning reinstatement of her salary as by the date of the rearranged hearing her notice period would have expired (a payment in lieu had been made). That was peremptory; if Ms Johal's appeal was successful and she was reinstated that would have addressed the issue.

212 On 20 December [1691a-c] Ms Johal was advised of the new dates for her appeal, namely 9 & 10 January 2017.

213 On 3 January 2017 Ms Johal sought to postpone the hearing having identified further irregularities in the bundle, having been provided two copies that were not identical, sought clarification on how the appeal would proceed by way of rehearing, objected to the use of new evidence and sought the appointment of a new impartial chair, other

than Mr Lackenby, on the basis of his previous involvement and that he was not of the required seniority (director level) amongst other matters [1694-95].

214 Mr Lackenby responded on 4 January [1695a] indicating the contents of the bundle would be addressed at the outset, the re-hearing was at her request and directed her to the relevant policies, refused her application for the appointment of a new chair and indicated she could be legally represented if she wished.

215 On 9 January 2017 Ms Johal presented to the Tribunal the claim from which this hearing arises.

The Appeal hearing – 9 January 2017

216 Ms Johal attended the appeal hearing on 9 & 10 January 2017. It was chaired by Mr Lackenby. Mrs Gill attended along with Mr Sahota. The hearing was minuted by Ms Elaine Daley [1753-1789]. Ms Johal told us she disputed the minute. She accepted before us she made no note herself and she relays little detail of what occurred in the hearing in her witness statement.

217 The minute records that at start of appeal hearing Ms Johal confirmed the issue concerning the numbering of bundle had been resolved [SL/34].

218 Ms Johal raised issues before us with regards to what was identified in trial bundle as the disciplinary and appeal bundles. An index was prepared showing how these had been constituted and their makeup changed. It appeared given the contents of the disciplinary and appeal bundles that the first and last items were at [459] and [1364]. Mr Lackenby initially confirmed that was so. Mr Lackenby was also asked during his evidence if had had seen the second whistleblowing letter (see (34)). Following an overnight adjournment, he told us that question had prompted him to review the position having remembered that Ms Johal had provided documents to be added to the appeal bundle and they were set out at [1364a-1693]. That last document was the second whistleblowing letter at [1691-93]. We find the appeal bundle was that set out at [459 to 1693].

219 At the start of the appeal hearing Ms Johal presented a document headed ***'Grounds of Objection'*** [1698-1700]. That included four bases:-

219.1 That Mr Lackenby should not have heard the appeal because the respondent's policies required the appeal should have been impartially heard by a director, he did not hold that post and he could not be impartial because he had previously heard and determined other linked appeals arising out of the same matters,

219.2 An objection to Mrs Bains presenting the management case on the basis the respondent's policies required the dismissing officer (Mr Davey) do this and that she wished to call Mrs Bains as a witness,

219.3 To the involvement of Mr Sahota on the basis there was a conflict of interest and breach of Solicitors Ethics and Code of Conduct because he had provided advice and represented the respondent at Ms Johal's last Employment Tribunal in December 2013 and had prior knowledge of her which might prejudice his ability to provide an impartial opinion, and

219.4 that the respondent's procedures did not set out the procedure to be followed for a re-hearing as opposed to an appeal hearing and that Ms Johal was thus uncertain as to how to proceed (and thus prejudiced) and there were too many discrepancies between the evidence bundles.

220 Have adjourned for 20 minutes [1765] to consider her Grounds of Objection Mr Lackenby rejected the four objections raised by Ms Johal at the appeal hearing. Ms Johal then indicated she was not prepared to stay if Mr Sahota, a solicitor employed by the respondent, and whom objection 3 related, remained. That was declined by Mr Lackenby on the basis Mr Sahota was there to provide impartial advice and having clarified that her objection was not that Ms Johal wanted a solicitor to be present on her behalf but to Mr Sahota's involvement [1767].

221 Mr Lackenby thereafter attempted to dissuade Ms Johal from leaving and stated he would not allow Mr Sahota to refer to any previous tribunal cases [1768]. Ms Johal repeated her view that Mr Sahota was linked to Mr Bentley whom she believed was the instigator of the campaign against her and asked for another of the respondent's solicitors to be present. Despite further requests for her to stay she left but before she referred to the cold calculated decision to get rid of her and ***"Why would I want to return to such a poisonous organisation?"*** [1770] ***.***

222 Before us Ms Johal denied having said those words. Despite the minute of the rehearing having been forwarded to her on 7 March 2017 [1870a] she could not take us to where she had disputed the minutes or having made any reference to denying having used those words in her witness statement. However, we noted she was also specifically asked to comment whether that was her view by Mr Lackenby when he wrote to her on 10 January 2017. She replied stating those were not her words and suggested that she was happy to continue her employment with the council but that would require the full co-operation of the council [1868].

223 The manuscript minutes refer to that phrase being used [1721] although the notes identifying those words appear to be added. It is not possible to say if they were added contemporaneously or not; Ms Johal did not asked the witnesses about the manuscript note. What is clear is the day after she left Mr Lackenby wrote to her stating those words had been used. Given the little weight we give to Ms Johal's evidence generally, that that phrase is consistent with the tone of her correspondence with the respondent generally, the inclusion of the words in his letter of the following day (irrespective of the contents of the note) on balance we find those words used by her on the day.

224 When she was asked before us what her objection to remaining was, the minute of the appeal hearing [1767/8] having recorded she could not stay if Mr Sahota remained on several occasions; she told that was Mr Sahota was not the main reason.

225 The appeal then proceeded in her absence, Mrs Bains presenting the management case and calling Mr Lawrence, Mr Knight and Mr Davey. The meeting was adjourned at 4:00 pm [1789] and the formal minute ends there.

226 Whilst Mrs Bains stated the meeting had not reconvened, the manuscript notes [174345] suggest the meeting reconvened the following day, 10 January. The note records Mrs Bains summed up her case and left the meeting at 10:20 am. Mr Lackenby [SL/86] also confirmed that she read from a document headed "summing up" [1748-52].

227 We were also referred to a document [1746-1747] that Mrs Bains had no recollection of but which Mr Lackenby told us were his notes of the next steps he intended to take. We prefer Mr Lackenby's evidence and the notes to Mrs Bains on that point. Had he decided on the next steps before the meeting we find he would probably have asked Mrs Bains to address him on those matters. He did not. The next steps document also accords with what he did next.

228 We find the next steps document was his personal note how he intended to proceed and that on balance that was made after Mrs Bains had finished her summing up and had left.

229 One of those steps related to making enquiries relating to the completion of the Appointment of Bankers Form [1282-88]. The Appointment of Bankers Form on its face dated the decision to purportedly remove Ms Johal as a signatory of Learning Exchange to 9 January 2008.

230 That would have supported Ms Johal's assertion that she was not involved in Learning Exchange after 2007/08.

231 Ms Johal accepted before us the Appointment of Bankers Form was not completed by the bank and there were no bank stamps on the form.

232 That was a document that had been produced by Mrs Howells as part of her appeal. Ms Johal told us it was produced by Mrs Howells at a hearing on 25 April 2016 [CKJ/266] [1].
Mrs Howells told the Tribunal that heard her claim that her appeal was heard on 13 July 2016 [1957(t) - paragraph 94 of the judgment of the Tribunal chaired by Employment Judge Cocks]. Given Mr Lackenby heard Mrs Howells' appeal we find he was aware of it.

233 The pro forma Appointment of Bankers Form on its face indicated it was not created by Barclays Bank until July 2013 [1288].

234 The Appointment of Bankers Form was thus clearly a relevant document and it having been drawn to Mr Lackenby's attention he needed to investigate how it came about.

Following the appeal hearing

235 Mr Lackenby told us he wrote to Ms Johal on 10 January 2017 [1790-94] and also to Mrs Howells to clarify a number of questions about the Appointment of Bankers Form and other aspects of Ms Johal's appeal including a request to see Ms Johal's medical records; (the latter appeared to stem from Ms Johal having cited her mental state as an objection to her appeal being heard [1791]).

236 Before us Ms Johal initially did not accept, she was fit to attend the appeal hearing (stating she could not say that she was) only to later accept that she was fit and able to attend.

237 Ms Johal responded on 13 January [1794a-d] but did not answer his questions.

238 On 18 January 2017 Ms Johal met with Mr Lackenby at Oldbury Council House. Whilst Ms Johal refused to allow him to take copies of her medical records, she allowed him to view them in her presence.

239 On 19 January [1795-6] Mr Lackenby wrote to thank Ms Johal for meeting him and asked her to respond to his questions seeking that she respond substantively by 23 January.

240 Ms Johal replied on 23 January 2017 [1797-1804] but instead of indicating when the Appointment of Bankers Form was completed, she directed him to speak to Mrs Howells [1803]. However, she stated she believed the Appointment of Bankers Form removed her name as a signatory from the Learning Exchange account [1802].

241 On 9 February 2017 Mr Lackenby wrote to Ms Johal [1806] and Mrs Howells [1960a] asking if he could meet them both.

242 Mrs Howells responded on 12 February [1807a & 1959d] declining to do so as she had an ongoing Employment Tribunal claim against the respondent.

243 Ms Johal declined his invitation on 13 February 2017 [1807b-e].

244 Mr Lackenby wrote to Ms Johal by email of 13 February 2017 (the text of this is set out at [1849-50]) setting out the questions he wished to ask of her.

245 On 14 February he wrote to Mrs Howells setting out the questions he wanted her to reply to [1959b-c].

246 Mrs Howells responded later that day stating the signature on the Appointment of Bankers Form was Ms Johal's and as to the question concerning the date of creation she indicated that the form asked for the date of the decision to remove/change the signatory and that was when the decision was made. She asked him not to ask for further information reminding him he could ask her questions at the forthcoming Employment Tribunal hearing.

247 On 17 February 2017 [1959a] Mr Lackenby sent a further email to Ms Johal requesting a response to his earlier request concerning the Appointment of Bankers Form and enclosing a copy of the responses he had received from Ms Howells. He told us that was to be open and transparent with her.

248 On 20 February 2017, Ms Johal responded [1807f-g] and agreed with what Mrs Howells had said in her response of 14 February concerning the completion of the Appointment of Bankers Form*.*

249 When asked to explain before us how that could have been done if the Appointment of Bankers Form was not created until 2013 Ms Johal told us the Appointment of Bankers Form asked for the decision date, the date given was roughly when the decision was taken and she had not stated that was when the Appointment of Bankers Form was signed. They accord with the responses Mr Lackenby recorded Mrs Howells and Ms Johal gave in his outcome letter [1866].

250 She was then asked why she had not said that when he first asked that question of her on 10 January, she told us ***"I didn't want to answer Mr Lackenby's questions I believed I was being duped into answering stuff … I felt at the time he was trying to dupe me – I didn't want to liaise with him ... I met him and tried to cooperate – he had an agenda – he wasn't interested because I believe he was acting outside of his remit and I said that to him – it was not his duty to ask these questions – he was not the investigating officer – that was not his role"***. When the question was put to her about his obligation to ask her about something that had provided to absolve her, she told us ***"he wasn't interested in what I wanted him to ask – one piece of evidence - I didn't have the answer"***

The appeal outcome letter

251 Mr Lackenby's outcome letter of 1 March 2017 [1808-1869] was not only as its size demonstrates, extensive but in our judgment well structured, thorough and clinical in its analysis and rationale.

252 He firstly gave a summary of his conclusions before proceeding to relay the background to the appeal , the allegations against Ms Johal, her Grounds of Objection, the reasons he had given orally at the appeal hearing for rejecting Ms Johal's Grounds of Objection [1765], why he decided to continue with the appeal in her absence [1835], his deliberations in relation to her health [1851], her four main grounds of appeal [1854] and his conclusions in relation to allegations one [1861] and two [1864].

253 As to the grounds of objection Mr Lackenby stated as had HR in the run up to the hearing that as a Chief Operating Officer, he was a director grade post and of the appropriate seniority level. Further because he, Mrs Bains and Mr Sahota amongst others had been involved in Mrs Howells' disciplinary process did not mean he was not impartial and should not have conducted the appeal nor did Mrs Bains presenting the

appeal and calling Mr Davey mean that that the respondent's procedures were breached.

254 Whilst Ms Johal asserted there was a conspiracy against her and that employees had vested interests because of their links to audit or HR he stated she had been unable to take him to evidence in support of those links or conspiracy.

255 We find he was entitled to form those views.

256 Mr Lackenby assessed her medical position and accepted she had a long-standing back condition and a mental health condition. He identified a number of means by which her approach had protracted matters [1853-54]. He concluded that her approach had not helped matters by producing a confusing contradictory and complicated picture. In our judgment when that is viewed with his findings concerning collusion (see (260)) he had considered those matters in the light of her mental health at the time and formed that view on that basis.

257 In relation to Allegation 1 he concluded that Ms Johal authorised two payments in her capacity as a manager to a registered supplier Learning Exchange in which she had some form of involvement and that allegation was substantiated.

258 He noted that Ms Johal herself had accepted that she had authorised two payments to Learning Exchange [7l4], and whilst she denied signing the cheques and the Internal Supplier Form and asserted that the signatures on the cheques could be forged, she did not give any view on who could have done this or why someone would want to forge her signatures on four separate occasions. He also had difficulty accepting the signatures as forgeries and genuinely believe the signatures looked like hers.

259 Mr Lackenby in his outcome letter [1866] went on to conclude that neither Mrs Howells nor Ms Johal had been able to convince him of the legitimacy of the Appointment of Bankers Form, their answers had been evasive, the cheques, the respondent's Internal Supplier Form, and her evidence in relation to the Internal Supplier Form (there must have been another ***'C Johal'*** working for the respondent and it was not her signature) were not credible, sweeping and vague. He found Ms Johal remained a signatory to Learning Exchange up to 2015 and thus the Appointment of Bankers Form purportedly removing her was retrospective and done because Ms Johal could not seen to be associated with Learning Exchange anymore. He went on to accept the signatures on the cheques and the Internal Supplier Form were hers.

260 Mr Lackenby concluded that there was collusion between Mrs Howells and Ms Johal to attempt to retrospectively show that Ms Johal was not linked to Learning Exchange and

to present improper evidence to influence his decision to support her case. He concluded she was not credible due to the position she had adopted in relation to the Internal Supplier Form and the cheques and her lack of credibility influence his decision as he did not believe that she was being open and transparent with the respondent [1864].

261 The evidence before us was that Ms Johal and Mrs Howells had been in contact notwithstanding the instruction from the respondent to the contrary (67, 77 & 78).

262 As to Allegation 2 Mr Lackenby told us his view of Mr Lawrence's evidence was that the correspondence from Ms Johal was unreasonable, disrespectful and inappropriate and that Mr Lawrence took the view that references to previous employment issues demonstrated Ms Johal was unable to move on from past events [1237], that Mr Davey had taken a similar view and as a result Ms Johal's relationship with the respondent had irretrievably broken down [1867] [SL/101-102].

263 He took the view that Allegation 2 was proven because his determinations in relation to Allegation 1 irreparably undermined the employment relationship between Ms Johal and the respondent. As Ms Johal had been dismissed on notice he concluded there was little he could do about that, but his view would have been that she should have been dismissed without notice. We find he thus did not seek to substitute his own view for Mr Davey's decision

264 We record that in our bundle his outcome letter appeared in the incorrect order (page 59 of the decision letter having appeared before pages 57 and 58 [1864-66]).

265 Ms Johal accepted orally she did not challenge those findings in her witness statement and despite repeated reminders throughout the hearing to challenge witnesses by asking questions in relation to disputed matters relevant to the issues (and to raise unrelated undisputed matters)

The witnesses generally

266 Mrs Bains was vague in relation to matters that she had not set into writing. That may be unsurprising given the period since the events concerned and that she left the respondent's employ some time ago. Her failure to recall if the appeal meeting ran into a second day demonstrates the point. Whilst she made errors in the investigation (269.1) they did not in our judgment call into question its fairness or the conclusions it reached.

267 Whilst Mr Davey's approach to matters was a fair one both he and Mr Lackenby failed to address Ms Johal's grievance or clarify who would be addressing that. the thoroughness of Mr Lackenby's approach, desire to attempt to address the medical issue raised by Ms Johal and preparedness to review his thinking before us in relation to the bundles on a matter that Ms Johal had conceded and which meant that he was aware of critical documents (218) caused us to give very substantial weight to his account. We find that Mr Davey and Mr Lackenby were in our judgment consistent and truthful witnesses.

268 Mrs Howells and Mr Foster were not called and thus we would ordinarily give their evidence little weight save where supported by other evidence or documents. That is reinforced in Mrs Howells' case due to the inconsistency of her account (40) and we give her no weight save where supported elsewhere.

269 Ms Johal raised a number of complaints before us that were either not led in evidence in her statement or had not been raised by her as part of the disciplinary process:-

269.1 Mr Knight had sat in on the first interview by Mrs Bains conducted with Mr Wells on 26 January 2016 [523] but that was before she had taken a statement from Mr Knight on 22 February 2016 and that both were appropriate.

269.2 Whilst that was so Mr Knight was essentially provided a statement to enclose the various cheques and other evidence obtained as part of the fraud investigation that had already been put to Ms Johal at the fraud (PACE) interview. Whilst that was inappropriate, we find that has little impact on his statement.

269.3 That Mrs Bains did not go back and check with Ms Allen what Ms Johal had said about her alleged link to Learning Exchange given Ms Johal's interview was after that of Ms Allen. When we asked Ms Johal why that needed to be checked she was unable to expand and decided to move on.

269.4 That Mrs Bains conducted telephone interviews with some of the individuals she spoke to (e.g. Louise Knight) but not others.

269.5 We find that may have been so but for the most part Mrs Knight again was merely being asked to confirm events that could be verified elsewhere that she had undertaken so a witness statement could be prepared that was unlikely to be contentious statement and which she could check and sign in due course.

269.6 That Mrs Bains did not take advice from HR and remind herself specifically of the respondent's disciplinary rules and procedures. We heard Mrs Bains was a senior HR officer well versed in such matters.

269.7 Mrs Bains did not interview and take a witness statement form Ms Tonia Green despite her being mentioned. Ms Johal did not state what evidence Ms Green could add or why that would have been relevant to the core issues here – her connection to Learning Exchange. We find it was a matter for Mrs Bains who she decided to interview and in the absence of us being told why a witness's evidence was relevant and how that could cast doubt on the investigation the decision not to speak to Ms Green was one Mrs Bains was entitled to come to.

269.8 Ms Johal failed to address the basis for the conspiracy and set up allegations by asking the witnesses about evidence that pointed to the same.

269.9 Her fitness to attend the disciplinary investigation interview with Mrs Bains (110) to (113).

269.10 Her complaints concerning the PACE interview (82).

269.11 That bank statements were not obtained concerning Learning Exchange. Whilst they were not in the bundle the evidence before us on balance suggested that they were. Irrespective of that Ms Johal again did not explain how they were relevant.

270 In addition, she sought to raise matters that appeared to have no direct relevance to the matters at hand only to then withdraw the same or which the evidence did not support:-

270.1 Contrary to Occupational Health advice the respondent sought to stop the ongoing physiotherapy treatment she was having [CKJ/260] [1624-26] (see (151)). Having considered the documents, it appeared at best the authorisation for the ongoing physiotherapy treatment needed to be renewed but, in any event, there was evidence of a break in the treatment or more than a couple of weeks.

270.2 Ms Johal raising the respondent contacting her solicitor (105) & (108).

271 Further Ms Johal raised an issue concerning her access to her emails to assist her defending herself from the charges against her and as a result challenged if others had had access to her log in. We heard and accept that her account was suspended. Her account had to be re-activated to allow her to do so and thus the ability of others to access and interfere with her account was precluded (see (66), (178) & (181)).

272 In addition to those complaints about matters that were not addressed previously Ms Johal sought to give a number of explanations going to core issues that she had not raised at the time of the events :-

272.1 In her witness statement [CKJ/224] Ms Johal purported to give an explanation for having sent the various emails relied upon not given at the time of the disciplinary or appeal namely that at the time she sent the emails she could feel herself getting very angry and upset about how she was being treated. She admitted she lost her temper and her choice of words was not that of a person with a sound mind. She stated they were not sent in an attempt to cause

distress to any other person and she maintained she did not swear at anyone. She argued she was simply driven to sheer frustration by the actions of HR, her pain and lack of sleep.

272.2 Again having relayed no evidence in her witness statement to explain how or why the Appointment of Bankers Form came about Ms Johal was asked before us why she made no reference to the signing of the Appointment of Bankers Form at that either the disciplinary investigation (or PACE) interviews she told us she was not aware of that at the time. She told us that the Appointment of Bankers Form was completed after her investigation interview (2 February 2016) but before December 2016 when she was trying to clear her name.

272.3 She was also asked before us about the creation of the pro forma being at odds with the date of the document (9 January 2008). She told us that the Appointment of Bankers Form was signed until sometime between February and December 2016 (272.2). When asked why the date of it was 8 years before it was signed (and 5½ years before the pro forma was created), she stated that was because the form asked for the decision date and that was the date it was agreed that she be removed.

272.4 Given it was produced at Mrs Howell's appeal irrespective of when that occurred (232) that places its actual completion by Ms Johal to between February and either April or July 2016. When Ms Johal was asked by Mr Lackenby as part of her appeal to give details when the Appointment of Bankers Form was completed [1793 Q4] she expressly failed to provide that having been asked a direct question (240). She later provided an explanation adopting that of Mrs Howell's response to Mr Lackenby.

272.5 Given her account was that she had no involvement with Learning Exchange after 2007/2008 her initial response to Mr Lackenby namely that she believed the Appointment of Bankers Form removed her name as a signatory from the Learning Exchange account (240) combined with the date given on the Appointment of Bankers Form and the absence of the later explanation Ms Johal later gave to him and us (246) we find were intended to give a deliberately misleading impression about when ***that form was completed***. Further, that deliberately misleading impression was given in relation to a question that was core to the respondent's rationale on the appeal.

273 We found her account as to her involvement with and whether she was a signatory of Learning Exchange not only inconsistent but lacking in credibility (45).

274 There were a number of instances over time where before us Ms Johal sought to change her position seeking to dispute matters, she had accepted (or vice versa):-

274.1 Her fitness to attend the appeal hearing (236),

274.2 Whilst at the start of her evidence before us she denied having authorised the payments to Learning Exchange, she accepted in the disciplinary investigatory interview she had had approved the orders and had not expressly denied that previously in her grounds of appeal or otherwise (119). Before us she argued that she had only done so based on what had been shown to her at the time and the evidence in the bundle did not prove it (see (139)),

274.3 In her disciplinary investigation interview [714 - Q116] Ms Johal was asked why it was appropriate for her to approve orders with Learning Exchange when she appeared to have some association with it. She responded stating she had only known of that link from November 2015 and she did not have a direct or indirect

link to Learning Exchange. She went onto accept that if she had any link to Learning Exchange, she would not have approved orders because there would have potentially been a conflict of interest.

274.4 Her objections to Mr Sahota's involvement in the appeal hearing (224).

274.5 During her evidence before us Ms Johal suggested there should have been a check in place to identify if she had approval rights against a budget code. She went on to say that she had previously said to the respondent that she had not approved the orders (although she did not refer us to where this was) and had accepted them without scrutiny. When asked by Mr Sadiq if she accepted that was the first time she had alleged that, having accepted that at the time of her interview, and not having raised that in her statement or in her appeal grounds, she accepted that was so.

274.6 Her account concerning her objection to disclosing her medicals records prior to attending upon Mr Lackenby (176-177).

274.7 In her appeal letter Ms Johal repeatedly referred to the alleged conspiracy and cover up, that she had made protected disclosures and grievances and that they remained unresolved she did not explicitly assert despite the length of that letter that she had been dismissed or badly treated because she had made protected disclosures. The closest she got to doing so was to assert she had been victimised for asserting her legal rights.

274.8 Detriment (6) related to the allegation that Mr Davey conducted Ms Johal's appeal hearing on 11 August 2016 when she was signed off sick. As we state above (367) this was expressly at odds with the position Ms Johal adopted before us and thus she was not subjected to a detriment in relation to head (6).

274.9 This was also inconsistent with the position Ms Johal adopted at the time rightly complaining of the length of time these complaints had been hanging over her head, the effect they had on her and that she wished them to be resolved (see amongst other matters (161.2) following). That merely reaffirms there is an imperative to addressing disciplinary procedures as quickly as reasonably possible. Ms Johal had been referred to Occupational Health and as we say above, the reason Mr Davey gave to us for proceeding was that Occupational Health had advised he could proceed and that given it appeared to be the stress of the process that was the cause of the issue and thus delaying the disciplinary process would not address the same and merely protract rather than resolve the issue we find that was the reason he decided to proceed.

275 Whilst Ms Johal did not swear in the correspondence she did use the phrase "***fxxx"*** or equivalent [1199-1200] [452] in emails and her oral denial that did not have to read as a swear word but instead what the reader intended it to mean and instead it could have meant "flip", which in context it could not, is in our judgment not only implausible, but damages her credibility.

276 In addition, Ms Johal's stance in relation to her involvement with Learning Exchange was not only inconsistent but also bordered on implausibility (41). On the one hand she said she did not know what she had signed when she went to the bank, was not the secretary (as had been stated on the Internal Supplier Form) but in contrast she asserted that having asked Mrs Howells to remove her from ***"Learning Exchange's books***" in 2007 that that had been agreed and that Mrs Howells had told her she had told the bank to take Ms Johal off the account.

277 If Ms Johal's involvement was as limited as her lack of knowledge of the forms she was signing and her positive assertion she was not the secretary suggests she would not

have needed Mrs Howells to remove her from the bank mandate via the Appointment of Bankers Form.

278 In addition to the inconsistent accounts she gave as to whether she could remember the dates and detail when this was done and the piecemeal way she gave her account damages her credibility. That is reinforced by her failure to explicitly assert she was not involved after 2007/08 and instead her repeatedly asserting she had no knowledge of the link after 2007/2008.

279 We remind ourselves that the failure to accept a witness' account in relation to one matter does not mean that witness is lying; witnesses can believe that their evidence contains a correct account of relevant events, but be mistaken because, for example, they misinterpreted the relevant events at the time or because they have over time convinced themselves of the account they now give. Nor does a conclusion that a person is lying or telling the truth about one point mean that he is lying or telling the truth about another.

280 We have set out above examples how Ms Johal attempted to portray the respondent in a negative light. We find given our determinations concerning her account generally that they were a deliberate attempt to mislead the Tribunal :-

280.1 as to the conflicting way she sought to raise her fitness to attend the disciplinary hearing which was at odds with her stated position before us (which she argued was the detriment (6) of the Protected Disclosure complaints and adjustment (1) of PCP (1) (see (161, 166, 167 & 172)), and

280.2 the issues we raise above concerning her suggestion that the respondent should have spoken to her GP concerning her fitness yet refused to allow him to do so and thus was again an attempt (161-164).

281 In this case what we found to be Ms Johal's deliberate attempts to mislead the tribunal, her changes of her account on core issues and the inconsistency and implausibility across a number of matters lead us to conclude that her account across the board should be given no weight save where it is supported by contemporaneous documents or other witnesses.

THE RELEVANT LAW

The duty to make reasonable adjustments

282 Section 39(5) Equality Act 2010 (EqA) imposes a duty to make reasonable adjustments upon employers. Where such a duty applies sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that the duty comprises three requirements. Insofar as is relevant for us, where the absence of an auxiliary aid, or where a physical feature or a PCP applied by the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

283 Section 21 EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments and that in turn constitutes discrimination by the employer.

284 The Statutory Code of Practice on Employment written by the EHRC (the Code) is to be read alongside the Equality Act and sets out, in chapter 6, the principles that underlie and describes the application of the duty to make reasonable adjustments for disabled people in employment. At paragraph 6.2 it describes the duty to make reasonable adjustments as:-

"a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'.

285 As was noted by the House of Lords in its decision in *Archibald v Fife Council [2004] IRLR 651,* (per Baroness Hale [47]), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

286 In *Environment Agency v Rowan [2008] IRLR 20* a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

"27 … In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice ['PCP'] applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.'"

287 The guidance in *Rowan* needs to be adapted to take into account the changes in the EqA and that amongst other matters reference to the additional (third) requirement, auxiliary aids.

288 In *Carranza v General Dynamics [2015] IRLR 43 EAT* HHJ Richardson stated:-

"37. The general approach to the duty to make adjustments under s.20(3) is now very well-known. The employment tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the employment tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the 'step'. Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take.

289 Paragraph 6.10 of the Code suggests that ***'provision, criterion or practice'*** should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions and may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied.

Substantial disadvantage.

290 This is defined in s. 212 EqA as one that is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis. In *Chief Constable of West Midlands Police v Gardner UKEAT/0174/11* Langstaff P at [53] said

> ***"There may be many cases in which it is obvious what the nature of the substantial disadvantage is, and why someone with the disability in question would inevitably suffer it … " and whilst the words of Rowan were clear and correct they may "… insufficiently emphasise the need to show, or to understand, what it is about the disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made."***

The PCP and the comparison exercise.

291 The comparison exercise normally required by the s.23(1) EqA (no material difference [2] between the circumstances relating to each case) applies to section 13 (direct), 14 (combined – although this provision is not in force), and 19 (indirect). Accordingly, it has no application to a reasonable adjustments claim.

292 Accordingly – and unlike direct or indirect discrimination – the duty to make adjustments does not require the identification of a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's. Thus, post Equality Act, the purpose of the comparison with people who are not disabled is as stated in para 6.16 of the Code; to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question.

293 In *Lamb v The Garrard Academy [2018] UKEAT 0042/18* Simler P, as she then was, at [20] reinforced the importance of identifying the relevant PCP and the precise nature of the disadvantage it creates in relation to a disabled individual by comparison with its effect on non-disabled people citing *Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216* (CA). She went on to state :-

> ***"… The nature of the comparison required in a given case will depend on the disadvantage caused by the relevant arrangements. Where the disadvantage is the risk of dismissal for lack of capability, the comparator is likely to be an able-bodied person not at risk of dismissal because capable of performing the job (as for example in Archibald v Fife Council [2004] UKHL 32). In a case where the complaint concerns the requirement to maintain a certain level of attendance at work to avoid disciplinary sanction and possibly dismissal, although both able-bodied and disabled employees will suffer stress and anxiety when ill and unable to attend work, the risk of this is likely to be greater for disabled employees whose disability results in more frequent or longer absences, making it harder for them to comply with the requirement to attend work on a regular basis."***

Knowledge.

294 In *Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283* (EAT) a case that preceded the EqA identified that two questions needed to be determined:-

294.1 Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A(1)?

294.2 Only if the answer to that question is: 'no' then ought the employer to have known both that the employee was disabled and that his/her disability was liable

to affect him/her in the manner set out in section 4A(1)? (We will hereafter refer to this as "constructive" knowledge).

295 If the answer to both questions were also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in *Wilcox v Birmingham CAB Services Ltd [2011] EqLR 810 EAT*).

296 Schedule 8, para 20(1) EqA states a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability ***and*** is likely to be placed at the disadvantage referred to (Schedule 8, para 20(1) EqA). It would seem therefore that the analysis in ***Alam*** remains good law. See also paragraphs 6.19-6.22 of the Code.

297 In *Lamb v The Garrard Academy* UKEAT/0042/18 Simler P [15] said this:-

> ***"Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:***
> ***(i) the impairment (whether mental or physical);***
> ***(ii) that it is of sufficient long-standing or likely to last 12 months at least;***
> ***(iii) that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability.***
> ***However, there is no need for the employer to be aware of the specific diagnosis of the condition that creates the impairment: Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM at [88].***

The adjustment

298 This is an objective test. It is not necessary for there to be a 'real prospect' of an adjustment removing a disadvantage to be reasonable. It is sufficient that there would have been 'a prospect' of it being alleviated and *"although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective".* [3]

Protected Disclosures

299 To qualify for protection as a ***"whistleblower"*** the ***worker*** concerned (this includes employees) is required to make a ***"protected disclosure"*** [4]***.*** In order to be protected firstly the disclosure must be a "***qualifying disclosure***", namely:-

> ***"… any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and*** [5] ***tends to show one or more of …" (our emphasis)***

the circumstances (or as they are sometimes referred to '***states of affairs')*** set out in s.43B(1) ERA are made out [6]. For our purposes the relevant circumstances are those set out in:-

> *"(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, "*

A "Disclosure of information"

300 This requires facts to relayed, as opposed to merely making an allegation [7], an expression of opinion or a state of mind [8] or statement of position for the purpose of

negotiation [9] . Thus, the words, ***"The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around,"*** relay information whereas ***"You are not complying with health and safety requirements"*** is the making of an allegation and is not relaying information [10].

301 The difference between "***information***" and "***allegation***" is not one that is made by the statute itself and an alleged disclosure does not have to be an allegation or information, reality and experience suggest that they are very often intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If is nothing to the point if it is also an allegation [11]. It is also irrelevant if the recipient was already aware of the information [12].

302 Separate communications can be read together to amount to a protected disclosure even if on their own they would not do so [13]. Whether they do is a question of fact [14].

303 If a breach of a legal obligation is asserted, save in obvious cases the source of the obligation the claimant believed the Respondent to be in breach of should be identified and capable of verification by reference for example to statute or regulation [15]. Each of the complaints should be looked at individually rather than collectively to see whether it identifies (not necessarily in strict legal language) the breach of obligation on which the employee relies. [16]

"Public interest"

304 This is not defined but the Court of Appeal [17] has stated that where the disclosure relates to a breach of the worker's own contract of employment (or some other where the interest in question is personal in character) there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The CA cited as an example of this, doctors' hours. The CA stated the question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case but stated a list of relevant factors cited by Mr James Laddie QC as a useful tool.

305 As to any of the alleged failures, the burden is upon the claimant to establish upon the balance of probabilities the employer was in fact and as a matter of law, under a legal (or other relevant) obligation and the information disclosed tends to show that that a person has failed, is failing or is likely to fail to comply with that obligation [18].

The reasonable belief of the worker.

306 It is not necessary that the claimant in a given case believes that the matters relied on definitely show the relevant state of affairs existed, provided the claimant believes that they ***"tend to show"*** that state of affairs existed [19]. However, the factual accuracy of the allegation may be an important tool in determining whether the worker held the necessary reasonable belief. Thus, it will be extremely difficult for a worker to show s/he reasonably the information tended to show a failure where s/he knew or believed the factual basis to be false [20]. An honest mistake could be one such exception [21].

307 While ***"belief"*** alone requires a subjective consideration of what was in the mind of the discloser, ***"reasonable belief"*** involves an objective standard [22], and its application to the personal circumstances of the discloser, which are likely to include his knowledge of the employer's organisation as a well-informed insider and having regard to his/her qualifications, thus the reasonable belief of an experienced surgeon may be entirely different view to that of a layperson [23].

"Detriment"

308 Detriment has been given a wide meaning by the courts [24]. Brandon LJ [25] in a case involving the interpretation of the 1975 Sex Discrimination Act, stated *"… I do not regard the expression* ***'subjecting to any other detriment',*** *as used in s.6(2)(b), as meaning anything more than* ***'putting under a disadvantage'*** *" and went on to say that was a question of fact for the Tribunal [26].*

309 Lord Hope stated [27] the question is one of materiality [28], namely whether the treatment is of such a kind that a reasonable worker would or might reasonably take the view that in all the circumstances he or she had been disadvantaged [29]? An unjustified sense of grievance cannot amount to "detriment" [30] and contrary to the view expressed by the Court of Appeal [31] it is not necessary to demonstrate some physical or economic consequence.

"Protected disclosure"

310 A ***"qualifying disclosure"*** will be a ***"protected disclosure"*** if it falls within one of the various conditions set out in ss.43C to 43H ERA (as amended) [32]. No issue was taken here in this regard. All the alleged disclosures were made to the respondent's officers.

Unfair dismissal.

311 Where the claimant was an employee and had been continuously employed for (here) 2 years, and a brought a claim for unfair dismissal within the relevant time limits s. 94 ERA gives the right to an employee not to be unfairly dismissed. In such cases it is for the employer to show the reason (or, if there was more than one, the principal reason) for dismissal was one of the potentially fair reasons set out in sub-s. 94(1)(b) and (2). The reason relied upon here by the respondent is conduct.

S. 103A ERA.

312 Where the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure s. 103A ERA provides the employee ***"shall be regarded for the purposes of this Part as unfairly dismissed".*** Thus, if the employer does not persuade the tribunal the reason for dismissal was a potentially fair reason or the Tribunal finds the reason was the s. 103A reason the dismissal is automatically unfair and there is no need to assess the reasonableness of the dismissal, as would be required under s. 98(4) ERA.

The reason (or principal reason) for the dismissal

313 The determination of the s. 98(1) ERA question was traditionally considered by looking at the facts or beliefs known or held by the employer which caused it to dismiss the employee [33] and that included information coming to the respondent's knowledge on the hearing of the appeal [34].

314 Where, as here, the claimant has qualifying service to bring a claim of unfair dismissal [35] but advances a different reason to that suggested by the employer such as making protected disclosures [36] the tribunal must consider the evidence of both sides as a whole and from that make findings of primary facts what the reason (or principal reason) for the dismissal was noting the burden is on the employer to do so. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. A mere assertion by the employee will not normally be sufficient to discharge the

evidential burden on the employee; s/he must produce some evidence to support the assertion. It may be open to the tribunal to find that the true reason for dismissal was not that advanced by either side. Thus, the employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employee is dismissed for an automatically unfair reason [37].

Fairness (s. 98(4) ERA)

315 If a potentially fair reason is shown by an employer the Tribunal must then go on to assess the fairness of the dismissal. The burden for s.98(4) is neutral. The starting point is the words of s.98(4) ERA:-

> ***"…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."***

316 The Tribunal must not carry out the assessment of the reasonableness of the employer's conduct using its own subjective views of the right course the employer should have adopted [38]; in many, (though not all) cases there is a "***band*** (or range) ***of reasonable responses***" within which one employer might take one view, and another might quite reasonably take another. The role of the tribunal is to decide in the circumstances of each case if the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair [39].

317 The band of reasonable responses test is also how the Tribunal assesses all parts of the question of fairness in s.98(4) including whether the employer was entitled to form the view it did between competing versions of events [40] and if the sanction was appropriate [41]. As to the extent of the investigation ***"it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary"*** [42] but ***"… more will be expected of a reasonable employer where allegations of misconduct, and the consequence to the employee if they are proven, are particularly serious."*** [43]

Misconduct

318 Where this is argued as the s.98(1)(b) or (2) reason the employer will normally not act reasonably unless ***"… he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation"*** unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been "***utterly useless"*** or ***"futile"*** [44]. Thus, the employer must have reasonable grounds upon which to sustain the belief in the misconduct having carried out in all the circumstances a reasonable investigation [45]. Thus, a sufficiently serious breach of procedure can be sufficient to render the decision to dismiss unreasonable.

319 The Tribunal must also have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 which contains amongst other matters the following provisions:-

"(2) Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used…

(9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

(12) … At the [disciplinary] meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this…

(14) The statutory right s to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. …

(24) Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but include things such as theft or fraud, physical violence, gross negligence or serious insubordination."

SOSR

320 In *Hollister v National Farmers' Union [1979] IRLR 542 at 551 CA* Lord Denning MR approved the Appeal Tribunal's judgment of Arnold J [1978] ICR 713 at 722F:-

"We think it is sufficient if the occasion for it is a sound business reason; and by that we mean not a reason which we think is sound, but a reason which management thinks on reasonable grounds is sound."

321 In another decision of Arnold J, *Banerjee v City & East London Area Health Authority [1979] IRLR 147 (EAT)* he said at 18, ***"The question is, was it a substantial reason? This is, as we think, to a very large extent a matter for the employer."*** In *Harper v National Coal Board [1980] IRLR 260 (EAT)*, Lord McDonald, at [8] expanded on what that meant:-

"It was argued before us that it was not sufficient to bring a case within this category simply to show that the employer for reasons of his own regarded the reason as a substantial one. There must, ... be facts which indicated that the employer was entitled to regard the reason as being substantial. ... an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific

foundation (Saunders v Scottish National Camps Association Ltd [1980] IRLR 174)."

'Polkey'

322 Where an employer argues that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, this is the so called *"Polkey"* reduction [46]. In such cases it is the task of the Tribunal is to assess, using its common sense, experience

and sense of justice how long the employee would have been employed but for the dismissal.

323 Thus, the assessment is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The Tribunal's role is not to answer the question what it would have done if it were the employer or a hypothetical fair employer? It is assessing the chances of what the actual employer would have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand 47.

324 The appellate courts have repeatedly referred to the distinction drawn by Lord Bridge in *Polkey;* the Tribunal is not called upon to decide the question on the balance of probabilities but instead to reduce compensation by a percentage representing the chance of losing employment. It is a hypothetical enquiry that may have to be undertaken, owing more to assessment and judgment than it does to hard fact [48].

325 The tribunal is also entitled to take into account evidence of misconduct which came to light after the dismissal [49] but it is for the employer to bring forward relevant evidence. The Tribunal must however have regard to any material and reliable evidence which might assist when making that assessment, including any evidence from the employee [50].

326 Mr Sadiq referred us to *Perkin v St Georges Healthcare NHS Trust* [51] as authority pertinent on both issues here but specifically the comments therein at [70-73] on the effect the manner of Mr Perkin's actions had on his ability to work for the respondent thereafter.

327 A degree of uncertainty is an inevitable feature of this exercise and the Tribunal must recognise there are limits to the extent to which it can confidently predict what might have been. It is acknowledged by the appellate courts that there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal no sensible prediction based on that evidence can properly be made.

328 The mere fact that an element of speculation is involved however is not a reason for refusing to have regard to the evidence. The tribunal must however take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. It may also be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made. Whether that is so is a matter of impression and judgment for the Tribunal but a finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored [52].

Contribution

329 For both ss. 122(2) and 123(6) the Tribunal also must consider what conduct/action (respectively) of the employee occurred before s/he was dismissed, or notice was given. For the compensatory award (s.123(6)) the conduct must also have been culpable or blameworthy and caused or at least contributed to the decision to dismiss. It follows for s.123(6) that the action had occurred, and the employer must have been aware of it [53].

330 For both ss. 122(2) and 123(6) reductions the function of the Employment Tribunal is to take a broad common-sense view of the situation, and it 'shall' reduce the basic and compensatory awards if it is just and equitable to do so in the light of its assessment [54]. The Tribunal's findings on contribution should be kept separate where possible to findings on liability [55].

331 Whilst the power to reduce for contributory conduct pursuant to s.122(2) (the Basic Award) is wider than s.123(6) and the Tribunal is entitled to take into account any reduction under s.123(1) in assessing what is just and equitable pursuant to s.123(6) normally the reduction will be the same for both ss. 122(2) and 123(6) [56].

332 For both the burden is on the employer and the burden is on the employer.

Wrongful Dismissal

333 In cases where wrongful dismissal is alleged the essential question, is whether the Claimant was in breach to the extent that his or her conduct might be regarded as repudiatory, such that it justified the premature termination of the contract [57].

334 The burden is on the employer and the test is the civil balance of probabilities test; the Respondent must prove the due cause. It is not sufficient for the respondent to have a reasonable belief in the guilt of the claimant (the test in cases of unfair dismissal) and we must be careful to distinguish between the two questions.

335 Unlike in unfair dismissal cases (see (313)) in an claim for wrongful dismissal (which is an action for damages) an employer can rely on information acquired after the dismissal to justify it [58].

Gross Misconduct

336 In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a breach of the contract of employment entitling the employer to repudiate (terminate) it without notice.

337 What amounts to gross misconduct depends upon the facts of the individual case. In a case from the 1950s Lord Evershed in the Court of Appeal said that the question must be whether the conduct complained of shows that the employee has "disregarded the essential conditions of the contract of service", and that a single act of disobedience could amount to gross misconduct if it was "wilful" in the sense that it connoted a deliberate flouting of the essential contractual conditions [59].

338 A finding of gross misconduct does not mean that dismissal is a reasonable response and an employer has to consider the reasonableness of the dismissal in the usual way [60].

OUR CONCLUSIONS

Disability

Knowledge - Generally

339 For the purpose of adjustments complaints knowledge needs to be considered in the light of the PCPs for it is they that give rise to the substantial disadvantage (see [345] and the Code).

Adjustments

PCPs

340 The two PCPs identified in the case management process [206] here were :-

340.1 The requirement that Ms Johal attend a disciplinary meeting on various dates in the period from April 2016 to August 2016, and

340.2 The practice of communicating with Ms Johal by post and e-mail during the course of the disciplinary proceedings from the end of March 2016.

341 We find both were applied. Whilst we address why the former was so in a moment as to the latter Ms Johal appeared to raise no general objection to communicating with the respondent by post and e-mail at the time, indeed she substantially increased the volume of communications as a result of matters she raised.

Knowledge - Anxiety & Depression

342 By time of the first part of the disciplinary hearing 11 August 2016, Ms Johal had been off work since April 2016, 4 months, and by the time of the appeal hearing on 9 January 2017, 9 months. The respondent had taken Occupational Health advice prior to the disciplinary hearing

343 Occupational Health did not expressly identify if Ms Johal was or was likely to be a person within the meaning of the Equality Act. They did however identify an underlying medical condition Stress and Depression.

344 The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances.

345 The EHRC Employment Code states at paragraph 6.19 [61] that is not enough for the employer to show that they did not know that the disabled person had the disability but also requires the respondent has knowledge that the employee ***"... is, or is likely to be, placed at a substantial disadvantage"***. before going on to state

> ***"The employer must, however, do all they can reasonably be expected to do to find out [whether this is the case]. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."***

346 At para. 6.19 it gives the following example:

> ***"A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements"***

347 That being so it is incumbent on the respondent to do all they can reasonably be expected to do to find out whether this is the case. We find the respondent had attempted to make those enquiries, but Ms Johal had refused to cooperate. The distinction she also took

before us (and latterly Mr Lackenby) that it was disclosure of hard copies of her records to the respondent that she objected to and the respondent had enough information (supported by fact she agreed to show these to Lackenby – and his response he had enough information supported her account she had provided this) was not something not said in writing at time or in her witness statement (176, 177 & 274.6).

348 We accept that was her concern at least by the time she met Mr Lackenby to discuss her medical position but the stance she took before us (that the respondent should have contacted her GP) was in our judgment directly at odds with the stance she took at the time (refusing to provide consent for her GP to provide information) and that was a further example of her account changing over time.

Knowledge - Sacroiliac Joint Dysfunction

349 This impairment was suffered in 2014, the respondent had put in place adjustments for Ms Johal including the provision of a specialist chair and she had undergone physiotherapy at the respondent's expense for some time. We find the respondent had or ought to have knowledge of the impairment.

Disadvantages

350 We asked Ms Johal to take us to what disadvantage she states she was put to by the PCPs as a result of her impairments at the material times. She was unable to take us to where she had set this out nor of even greater relevance to be able to tell the Tribunal what that was.

351 We explained to her without that we were unable to identify whether adjustments had a prospect of alleviating the disadvantage. Specifically, as to the Sacroiliac Joint Dysfunction we asked her to relay why communicating with her by post and e-mail during the disciplinary proceedings and holding the disciplinary meeting on those dates was an issue when they were not matters raised by Occupational Health or her GP. She could not do so.

352 As to the anxiety and stress the disadvantage that appeared to be argued was proceeding with a disciplinary hearing at which she was dismissed and communicating with her when she was not fit to attend.

Adjustments

353 We sought to clarify how those matters could be pursued by Ms Johal at some length. She accepted, the panel having explained those matters at length to her, that her argument the respondent had gone against the occupational health advice went against the actual evidence before us and similarly, the reason Mr Davey gave to us for proceeding [366] was that given by Occupational Health namely it appeared to be the stress of the process that was the cause of the issue and thus delaying addressing this would not resolve the issue and whilst Ms Johal's GP had suggested the process should be delayed her GP did not address how delaying matters had a prospect of allaying that disadvantage or suggest adjustment that would do so. We do not say that was not capable of doing so merely that Ms Johal has not identified how that was so.

354 Ms Johal accepted that was an error on her part (we checked that again prior to submissions and she repeated that) and that complaint was withdrawn.

355 Even if that complaint had not been withdrawn for our part we find that Occupational Health had advised she would have been fit to attend the dismissal hearing by the time she had had a reasonable opportunity to read the papers and delaying matters further would not have assisted alleviating the disadvantage in that the delay was protracting the stress and depression. The need to progress matters having been identified we

find that the respondent did not do so until she had had the advised period to consider the papers and had given Ms Johal opportunities to advance her case in writing rather than to attend a hearing. Further she accepted she was fit to attend by the time of the appeal hearing and at no point could address why the provision, criterion or practices led to the disadvantages complained of in relation to the Sacroiliac Joint Dysfunction. For those reasons had we been asked to determine those matters we find the respondent had made reasonable adjustments to accommodate her impairments.

The Protected Disclosure complaints

The Disclosures

356 In our judgment we found above that disclosures one and three were general and unspecific allegations and failed to relay information or facts that underlay them. As to the second and fourth disclosures we find Ms Johal has demonstrated on balance both the legal obligation namely that the respondent respectively failed to comply with its obligation to give access to personal data pursuant to s.6 Data Protection Act 1998 (DPA), as was, having mentioned data protection in the former and the act specifically in the latter and released personal information in contravention of that act as well as in doing relaying information that underlay those disclosures.

357 We find that based on her state of knowledge that she believed the matters she was raising tended to show a breach of the DPA namely the respondent had firstly, failed to disclose personal data to her and then released personal data concerning another. Further given the failure in relation to the second and fourth disclosures we find that her belief was reasonable it not being necessary for her to show there was such a breach notwithstanding her state of knowledge.

358 Whilst at the time of the second disclosure she was concerned about the failure to disclose information to her relating to the ongoing disciplinary process against her and that concerning her personal interests in our judgment it is reasonable to regard those disclosures as being in the public interest in that those matters relate to the duties of a public authority to comply with its obligations pursuant to the DPA, as was. That is reinforced by her complaint in relation to the fourth disclosure when, absent her knowing of the lawful basis by which the respondent had come by the bank information of a third party, she was complaining that that personal data had been obtained and then released to her. That personal aspect in no sense detracts in our judgment from the public interest and the potential breach of the respondent's duty.

Dismissal (and Appeal)

359 Whilst in her witness statement Ms Johal referred to each of the protected disclosures, she made no reference to how these had any bearing on subsequent events nor raised that with any of the witnesses in cross examination. In cross-examination Ms Johal accepted she had not asserted in her witness statement that Mr Davey or Mr Lackenby knew of the protected disclosures.

360 Both Mr Davey and Mrs Bains disputed they were aware of the protected disclosures. Mrs Bains told us Mr Lawrence had not mentioned them to her.

361 Despite Ms Johal not raising them with the witnesses, we asked Ms Johal on that basis how she asserted they knew of them. She referred us to her grievance of 18 December 2015 [1106-1108 & 1101-1102]. She told us that Mr Davey had referred to that in his outcome letter [1209-1210]. We considered its contents and asked her to tell us where that made any direct reference to the content of her protected disclosures. The only section she was able to refer us to was ***"I made a number of protected disclosures***

(whistleblowing) which have not been investigated and remain unresolved" [1269]. Whilst that addresses whether their existence was known to Mr Davey (and it follows Mrs Bains given she referred to that grievance in her investigation outcome [503]) it does not in any sense address if they were aware of the contents of the disclosures. Nor does that address how Ms Johal asserts that her dismissal and/or the alleged detriments were in any sense connected to her having raised those disclosures.

362 We repeatedly asked Ms Johal to explain where in her witness statement she had addressed that. She told us that she had raised the protected disclosures as part of her complaints about the general unfairness concerning her dismissal and the process leading to it. We asked why that had not been raised in detail. She told us she had been restricted to adding one paragraph by Employment Judge Butler.

363 That however does not address why Ms Johal had not included those matters in her original witness statement, the need to provide witness statement(s) incorporating all matters they wished to rely upon having been made clear to the parties in paragraph 3.15 of the Case Management Order of 10 March 2017, and in paragraph 6.6 of which I also drew their attention to the Presidential Guidance on 'General Case Management',

which includes sections on the disclosure of documents and the preparation witness statements.

364 Contrary to Ms Johal's acceptance the protected disclosures were not in disciplinary or appeal bundles Mr Lackenby accepted the disclosures were before him. We note his frankness and honesty. He told us whilst he read them as part of the appeal, he did not understand how they fitted with the appeal. Ms Johal having not explained how they were; nor do we.

365 For the reasons we give below in relation to dismissal in our judgment the evidence does not in any sense whatsoever support that the protected disclosures played any part whatsoever in their decisions. That is yet further supported by our findings relating to the detriments below.

The detriments

366 Save in relation to detriments (6) & (7) Ms Johal does not allege (or provide information from which it can be inferred) whom the various acts of detriment were alleged to have been done by or assert how the perpetrators are alleged to have known of the protected disclosures.

367 As to (6) for the reasons we give above (166) this was expressly at odds with the position Ms Johal adopted before us.

368 As to (7) Mr Lackenby amending the sanction on the misconduct matter, Mr Lackenby's task on appeal was to find if the charge was made out and uphold the decision of Mr Davey or to find it was not made out (in whole or part). We found that whilst he stated his view would have been different to that of Mr Davey and he would have determined that a dismissal without notice was warranted, he not alter the sanction from a dismissal on notice as alleged and substitute for that instant dismissal by recovering or seeking to recover from Ms Johal the notice period which she had been paid by that stage (see (263)).

369 The burden is on her to do show she has been subjected to a detriment and having not discharged that burden in relation to all the detriment complaints those complaints fail.

370 Accordingly, as to the s.47B complaints we conclude that Ms Johal has not shifted the burden to the respondent (s.48(2)) to show the alleged Protected Disclosures had no influence whatsoever on the acts of detriment and they thus fail.

Dismissal

371 Given Ms Johal's complaint relates in part to a conspiracy and cover up we first turn to address the procedural aspects of her complaints to consider if there was evidence to support those assertions.

Ms Johal's complaints about procedure

372 As to the grounds of objection (253-255) we accepted that Mr Lackenby was of the appropriate seniority level (a director grade post) to undertake the appeal and that the involvement of him, Mrs Bains and/or Mr Sahota amongst others in Mrs Howells' disciplinary process did not mean they were not impartial and thus should not have conducted the appeal nor did Mrs Bains presenting the appeal and calling Mr Davey mean that was unfair or that the respondent's procedures were breached.

373 We also found that whilst Ms Johal asserted there was a conspiracy against her and that employees had vested interests because of their links to audit or HR she was unable to take the witnesses to evidence in support of those links or conspiracy and thus on balance he was entitled to form the view there was no such a link.

374 Whilst she asserted matters were not investigated and evidence and documents were not secured as to the former, we accept that not all witnesses were spoken to that some should not have sat in on the interviews of others and certainly not until they were interviewed themselves. Those failures were minor and not related to core key issues in our judgment. Accordingly viewed in the round they did not call into doubt the fairness of the procedure as a whole.

375 As to the securing of evidence that principally appeared based on the questions Ms Johal asked of the witnesses to relate to an assertion colleagues could (and had) gained access to her login/accounts. We accept the respondent's evidence that on her suspension her computer access was suspended, and this was supported by this having to be reactivated when she wished to gain access to emails later (see (66), (178), (181). & (271)).

376 We found that by the time the disciplinary process proper started Ms Johal was aware of the allegations against her, and she had ample time to consider the bundle. Whilst there were defects in the bundle, she did not take to missing documents that should have been in the bundle or point us to the pagination errors. By the time of the appeal she accepted the bundle had been remedied and she had provided for inclusion a substantial tranche of documentation.

377 Whilst Ms Johal also referred to a number of other matters such as the respondent failing to comply with subject access requests and failing to complete medical forms Medex7 correctly) she was unable to explain to us how those matters affected the substantive fairness of the procedure adopted.

378 Whilst Ms Johal asserted medical advice relating to her fitness was ignored, we found it was not - Occupational Health had advised she would be fit to attend once she had had an opportunity to consider the papers and she was given that opportunity. Whilst her GP subsequently stated she was not fit Ms Johal failed to allow the respondent access to her GP records and then sought to portray it as having failed to speak to her GP when it was her that had expressed refused to allow it access. Both Mr Davey and Mr Lackenby considered her medical position and having weighed the various

competing issues decided to proceed. Both essentially gave Ms Johal and opportunity to make representations in writing after the meetings even though by it was accepted by the time of the appeal Ms Johal was fit to attend the appeal re-hearing and did so before leaving. By the time of the appeal she was given the opportunity to be legally represented at the hearing.

379 Despite her complaints to the contrary Ms Johal was informed how the appeal would proceed (namely as a re-hearing) that stemmed essentially from her request and she was referred to the respondent's procedure as to how that would proceed in advance of the hearing.

380 Mr Lackenby's accepted Ms Johal's had a long-standing back condition and a mental health condition. He accepted the latter would have had a negative impact on employees. He considered the respondent had done what it could to mitigate the effects of that on her; he stated that the respondent could not merely arrive at a decision there was no case to answer [1852]. He accepted the procedure had been protracted but that fraud/audit investigation was not something he had any control over and as to the disciplinary process that had been protracted make adjustments for her. He identified a number of means by which her approach had protracted matters [1853-54]. He went on to state that whilst he had no reason to doubt her when she said her mental health had been impacted during the disciplinary process, she had not helped matters by producing a confusing contradictory and complicated picture.

381 We find reading that correspondence as whole that notwithstanding Ms Johal's frustrations at the delay and effects on her both friendships and position as a JP that her suspension had had and the stress and anxiety that had no doubt caused, Ms Johal did not allege her mental health complaints were present at the time of the matters that gave rise to allegation 1 such that they explained her conduct nor, was there any evidence to support this before us. As to allegation 2 Ms Johal did not seek to argue that excused her conduct at the time only asserting that later (272.1). Her physical conditions were not argued as seeking to justify allegation 1 or 2 before us.

382 Whilst Ms Johal raised before us the failure of the respondent to address her grievances when we drilled down into this with her, she did not specifically identify these failures in her witness statement.

383 Whilst she told us she had been told her first grievance would be addressed by Mr Davey and it was not when we asked her to identify which issues had not been addressed. She accepted grievance 1 [1459-1460] had been superseded by grievance 2 and so did not pursue that issue.

384 As to grievance 2 of 18 December 2015 [1101] if she asserted that those matters had not been addressed, we reminded her that those matters would need to be put to the witnesses. When he was asked why he had not directly addressed the grievance Mr Lackenby stated that he felt Mr Lawrence in his response had indicated the areas would be addressed through the disciplinary process, that the themes in each were extremely similar to the grounds her appeal and he addressed them in the appeal outcome letter. Further that the respondent's grievance procedure set out three stages and if Ms Johal had been dissatisfied, she could have appealed the outcome and she had not.

385 Whilst that is so and there was a considerable overlap between the two Mr Lackenby could and should have identified if he was dealing with the grievance, if that was what he intended and if not said so as that formed part of Ms Johal's grounds of appeal. However, neither did Ms Johal appear to take that point at any stage after the grounds

of appeal and Mr Lackenby addressed all of the issues Ms Johal put to him in relation to the grievance in his outcome. Those matters being so substantively those issues were substantively addressed and thus that did not make the process unfair.

386 Finally, whilst Ms Johal complained Mr Lackenby substituted his own view at the appeal hearing and dismissed her without notice when that was not open to him. We found he did not. The options open to Mr Lackenby would be to uphold decision to dismiss or to apply a lesser sanction/reinstatement (208). He personally would have substituted dismissal without notice, but he did not and instead upheld Mr Davey's decision.

387 Whilst Ms Johal argued before us the respondent had failed to properly investigate matters, including failing to obtain expert evidence concerning the signatures she was alleged to have signed (we return to that below (397 following)) we find that it did and viewed in the round the process was thorough and fair.

The conclusions reached in disciplinary and appeal process

388 As to allegation 1 irrespective of the complaints Ms Johal makes about the alleged conspiracy against her and the respondent's procedural failings, in our judgment the initial investigation had identified matters that warranted a disciplinary investigation.

389 We set out the matters we found she accepted at the disciplinary investigation meeting with Mrs Bains at (119).

390 Whilst Ms Johal denies the factual basis for the post 2007/08 link to Learning Exchange (including the cheques and Internal Supplier Form), she accepted that if she had a link to Learning Exchange that she would not have approved orders because that would have potentially been a conflict of interest (266).

391 Whilst at the start of her evidence before us she denied having authorised the payments to Learning Exchange, in the disciplinary investigatory interview she accepted she had (again see (119)).

392 Before us Ms Johal challenged Mrs Bains whether she had authority to approve orders. In her grounds of appeal [1268-70] she did not deny having either the authority to do so or having done so and as we say at (388) in her oral evidence accepted that if she was linked to Learning Exchange that was a misconduct arising out of the conflict of interest. We return to this when dealing with sanction below (426).

393 Ms Johal also accepted she had been historically linked to Learning Exchange but that ceased in 2007/08.

394 Thus, the fundamental question for the investigatory, disciplinary and appeals officers to determine in relation to allegation 1 was whether Ms Johal was linked to Learning Exchange at the time she approved the orders.

395 That has to be viewed against her acceptance she had been linked in the past.

396 Whilst she accepted at interview that the cheques had a striking resemblance to her signature [712 Q97 & 103] she told us it was her belief her various signatures on that document and the cheques were forged. Similarly regarding the Internal Supplier Form [665] she accepted the signature was similar to hers but that there could have been other ***"C Johal" s*** who worked for the respondent and denied that it was not her signature (128).

397 Before us she suggested the respondent should have sent the cheques to a handwriting expert for analysis. We return to that in a moment (406 to 414) but that was not something she raised at the dismissal and/or appeal. During the investigation she had argued that Mrs Bains should have undertaken further checks on the

signatures cheques not that handwriting experts should have been instructed. Nor did she respond when Mr Davey wrote to ask her if she had pursued the signing of the cheques with the bank (190).

398 Given the appeal proceeded as a rehearing and one of the principal factors that he states influenced his rationale, the Appointment of Bankers Form, was not something that was before Mr Davey we will focus hereafter on the conclusions Mr Lackenby reached.

399 Mr Lackenby [1863] concluded the signatures not only looked like Ms Johal's but that he was entitled based on the surrounding evidence to come to the view the signatures were hers [1866] no plausible explanation having been provided why someone else would have forged her signatures or who that might be. The other signatory [1863] Mrs Howells had accepted she had countersigned the documents. It was thus suggested she must have been aware who had forged the signatures if that had been the case.

400 Ms Johal accepted she had not given an explanation who or why someone would have forged her signature on those documents. When she was asked given that Mrs Howells accepted the signatures on them were hers if she was asserting Mrs Howells forged her signatures rather than denying that was the necessary consequence Ms Johal's response was to challenge Mr Sadiq if he was suggesting Mrs Howells forged the signatures.

401 Mrs Howells was at one point was going to give evidence for Ms Johal having provided a statement. She was not however called and thus could not be asked about that having declined not to address that issue in the disciplinary and appeal process on Ms Johal's behalf. Mr Lackenby asked Mrs Howells for her comments on the signatures. She did not comment substantively on the same.

402 By the time of the appeal the Appointment of Bankers Form had been introduced. Whilst Ms Johal objected to its inclusion before us, she argued that it had been ignored in Mrs Howells' appeal [CKJ/266]. Given that was a document that purportedly supported Ms Johal's case it is difficult to see how Mr Lackenby could reasonably have excluded that from consideration (232 to 234).

403 That view is reinforced by both parties including additional documents in the appeal bundle that were not in the original disciplinary bundle (and as a result the appeal was addressed as a re-hearing).

404 Whilst the long-held view that what we have to consider is what in the decision maker's mind at the time of the dismissal or appeal and that includes information coming to light as part of the appeal. The Supreme Court in the last few days has partially reviewed the same stating that whilst in most cases the approach is as it always was namely it is limited to looking at the mental processes of the decision maker, where the real reason is hidden from the decision-maker behind an invented reason, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination [62]

405 Given our positive determination son that point we do not need to seek further representations form the parties on the same.

406 As to Mr Lackenby's decision not to send the cheques for handwriting analysis it has long been decided [63] that the band of reasonable responses test does not require:-

> ***"a quasi-judicial investigation with a confrontation of witnesses, and crossexamination of witnesses. While some employers might consider this to be necessary or desirable, to suggest as the Tribunal did, that an employer who failed to do so in a case such as this was acting unreasonably, or in the words***

of Lord Denning, acting outside '… a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view', is in my view insupportable."

407 In *Turner v East Midlands Trains Limited* [2012] EWCA Civ 1470, Elias LJ made the following observation:

> ***"20 … When determining whether an employer has acted as the hypothetical reasonable employer would do, it will be relevant to have regard to the nature and consequences of the allegations. These are part of all the circumstances of the case. So if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which will harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation."***

408 In *Turner* [22] Elias LJ went on to refer to approve the approach he had taken in the Employment Appeal Tribunal in *A v B [2003] IRLR 405 EAT* and *Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457 CA* stating

> ***"The test ... is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where allegations of misconduct, and the consequence to the employee if they are proven, are particularly serious.".***

409 Elias LJ in *Roldan* at paragraph 13 also cited from his own decision in *A v B*:-

> ***"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*** *410* In *A v B* he went on to say:-
>
> ***"… This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."***

411 Those principles as to the nature and extent of the investigation are thus not limited to whether a quasi-judicial hearing is conducted but to the other aspects of the investigation such as the use of handwriting analysis.

412 Witnesses were called at the hearings before Mr Davey and Mr Lackenby (the latter was strictly a re-hearing). Ms Johal could have attended and challenged the witnesses why a handwriting expert was not used. She did not do so. Nor did she raise that in her appeal or her Grounds of Objection.

413 One of Mr Lackenby's conclusions was that Ms Johal had colluded with Mrs Howells to remove her association to Learning Exchange by backdating the Appointment of Banker's form, that significantly impacted on Ms Johal's credibility and that she had not been open and transparent with the respondent (265).

414 In our judgment Mr Lackenby was entitled to conclude Ms Johal had colluded in relation to creation of the Appointment of Bankers Form and that she had not disclosed to the respondent how it came about when asked for that and only subsequently provided the same. He was thus entitled to conclude she had not been open and transparent with the respondent. Further, he was entitled to take that into account when forming a view whether Ms Johal remained linked to Learning Exchange after 2007/08.

415 Based on the determinations he made that we refer to at (399) he was entitled to conclude that Ms Johal was still linked to Learning Exchange when she authorised the orders. Even had that been argued before him which it was not in our judgment, he was entitled to come to those views with the need to refer the cheques to a handwriting expert.

416 As to allegation 2 Mr Lackenby told us he had viewed the correspondence between Ms Johal and the respondent from 30 August 2015 to 18 August 2016 [1071 on] and had noted that her second level manager, Mr Lawrence had told him that he viewed the correspondence to be unreasonable, disrespectful and inappropriate and that Ms Johal's references to previous employment issues demonstrated an inability to move on from past events [1237]

417 Mr Davey had formed a similar view as to the content. Because the comments were directed at officers across different services and management, its volume and the period over which it was sent led Mr Davey to conclude that Ms Johal's working relationship with the respondent had been irretrievably damaged. Mr Lackenby concurred.

418 Despite them having been raised with her in the dismissal letter [1209-1210] (and these being included the letter of 18 August 2016) within her grounds of appeal [1268] Ms Johal did not dispute that they were inappropriate or demonstrated a breakdown were not disparaging or offensive or undermine trust and confidence. At no point did she make an apology for the contents of them but in her statement [CKJ/224] she purported

to give explanation not given at the time that she was angry and upset, had lost her temper was not of sound mind and was riddled with pain and had been having sleepless nights.

419 In her evidence Ms Johal did not accept the emails she sent to individuals within the respondent were disparaging and undermined their trust in her. We extract those that Mr Davey highlighted at (66, 68, 69, 73, 83, 99, 102, 106, 107, 176, 179, 183, 184 and 185). Whilst she also denied she had said ***"Why would I want to return to such a poisonous organisation?"*** [1770] before she left the appeal meeting. Whilst she had denied that in her reply, Mr Lackenby acknowledged in his outcome [1868] her reply was the first time he had identified an attempt by her to remedy the relationship with the respondent. However, he went on to conclude that the tone of her subsequent correspondence did not give him any confidence that she had moved on. We found on balance she used those words on the day (232).

420 As we state above Ms Johal has not taken us to medical evidence that specifically states the contents of those emails was influenced by her mental health condition nor did she argue it at the time (272.1).

421 We have not been provided her full medical records and thus it is not possible for us to judge how if her mental health condition affected her at the time. It is only in her witness statement that she sought to explain her actions by reference to how she was feeling. Mr Lackenby had sought to and viewed Ms Johal's medical records. In his conclusion about the affects her medical condition had had on her and the impact it had and on the disciplinary process (and vice versa) having accepted she had a long-

standing back condition and a mental health condition he identified a number of means by which her approach had protracted matters [1853-54].

422 We found (256) that he concluded that her approach had not helped matters by producing a confusing contradictory and complicated picture. In our judgment when that is viewed with his findings concerning collusion, he had considered those matters in the light of her mental health at the time and formed that view on that basis.

423 He formed the view the employment relationship had been irreparably damaged such that he would have dismissed without notice for the SOSR head (allegation 2). However, he stated that as she had received her notice that there was little he could do about that. He went on to say he did not uphold her appeal on that or the first allegation.

424 We find that the respondent has shown the burden being on it to do so that is the reason why he dismissed Ms Johal. We find the burden being neutral that based on the evidence before him he had reasonable grounds on which to form that belief.

425 Whilst the investigation was not as extensive as the Ms Johal wished it had been viewed in context the investigation was a reasonable one. Whilst she did not attend the dismissal hearing and left mid-way through the appeal by the time of the appeal she was fit to attend had had the bundle of documents, its numbering having been corrected for some time, the documents she had sought were added and she was or in our view ought to have been clear on the charges against her.

Sanction

Nature of breach

426 Of the three misconduct heads with which she was charged [467] having been reminded what she accepted during her disciplinary interview [714] that if she was associated with Learning Exchange that would have constituted a conflict of interest when giving evidence Ms Johal accepted they respectively constituted :-

426.1 "1.1 – An abuse of authority" was misconduct (defined at [836]),

426.2 "1.2 – A conflict of interest" was misconduct, and

426.3 "1.3 – Improper practice" was gross misconduct (defined at [838])

427 Ms Johal was also charged with some other substantial reason as to allegation 2.

428 At the appeal stage we found Mr Lackenby was entitled to conclude that Ms Johal had colluded with Mrs Howells and in so doing had undermined her employment relationship with the respondent. Mr Davey had already dismissed her on notice for that allegation. Mr Lackenby did not seek to overturn that decision but did state he would have reached a different view (and dismissed without notice). However, as we state he upheld the decision.

429 Based on our findings above Mr Davey and Mr Lackenby were entitled to conclude the employment relationship had broken down and that Ms Johal should be dismissed.

Inconsistency of treatment

430 We were reminded by Mr Sadiq that we have to be satisfied that the circumstances between the various individuals was truly parallel [64].

431 We heard that like Ms Johal, Mrs Howells was dismissed.

432 No action was taken against Ms Allen. We heard little or nothing to compare her circumstances to Ms Johal.

433 Mrs Davison was issued a final written warning. We were told her circumstances differed. She had admitted to the charge and co-operated, only issued one authority (not two like Ms Johal). Nor had she sent allegedly disparaging emails and thus had not been the subject of allegation 2 that was what led to Ms Johal being dismissed on notice at the disciplinary stage. Nor was there evidence of collusion against her.

434 In our judgment the circumstances of the individuals who were not dismissed were for the reasons we relay, very different to Ms Johal and her treatment was not inconsistent.

435 Accordingly, the dismissal was a fair one.

Reductions & breach of contract

436 We approach the issues of conduct, *Polkey* and breach of contract with the warning about conflating the tests for unfair dismissal and wrongful dismissal at the front of our mind. That being so we note that it would also be easy to conflate what conduct had occurred, the matters the respondent was (not) aware of and the causative links at the various times. In consequence we intend to firstly address contribution which requires the conduct to have occurred before the notice dismissal/appeal is concluded, followed by *Polkey* (s.123(1)), and wrongful dismissal.

Contribution

437 In the event we are wrong on any of the above matters we find that the respondent has shown the burden being on it to do so that Ms Johal was guilty of culpable or blameworthy conduct as to both allegations 1 & 2. The evidence pointed to her continued involvement with learning Exchange. Mr Lackenby was entitled to find she had colluded with Mrs Howells and given her comments in the correspondence and the absence of any contrition at the time and we find it was impossible for the respondent to countenance Ms Johal to return to work and furthermore work with the individuals concerned.

438 We find that her conduct caused or contributed to her dismissal.

439 In assessing the just and equitable reduction that flows we have to have regard to the nature of the breach. We found that the respondent was entitled to conclude the employment relationship was at an end by virtue of Ms Johal's conduct.

440 That being so and in the absence of Ms Johal proving the conspiracy or the 'cover-up' in our judgment this is one of those rare cases where nothing other than a reduction of 100% can be viewed as applicable.

Polkey

441 Whilst we have identified minor procedural failures above in our judgment, they did not affect the outcome of the process; the evidence before the respondent was clear in any event. They did not affect the outcome and the respondent was entitled to come to the view it came to in any event by the time it did so.

442 Given those findings we have to consider the chance of Ms Johal losing her employment in any event.

443 The evidence before us was centred around on a rehearing and the additional evidence that was before that hearing. It would be difficult for us to second guess what would happened at the earlier dismissal stage but by the stage of the appeal had a fair procedure been followed in our view we conclude the chance that Ms Johal would have been dismissed was also 100% and any award should be reduced accordingly after that point.

Wrongful Dismissal

444 Mr Davey decided having found both allegations 1 and 2 substantiated that allegation 1 warranted a final written warning for allegation 1 but given as to allegation 2 her relationship with the respondent had irretrievably broken down that she could not remain as an employee and was dismissed on notice. There is no dispute before us she was paid for her notice.

445 Mr Lackenby concluded in relation to allegation 1 repeated collusion by Ms Johal to present improper namely to influence his decision in support of her case and that she had not been open and transparent with the respondent. For those reasons he found she was guilty of gross misconduct in relation to allegation 1 and his findings in relation to allegation 1 irreparably undermine her relationship with the respondent (allegation 2).

446 As to allegation 1 the respondent has shown on balance that Mr Lackenby was entitled to conclude Ms Johal had colluded in relation to creation of the Appointment of Bankers Form a document that on its face purported to say it was created far earlier than it was, that she had not disclosed to the respondent the actuality of how it came about when asked for that and only subsequently provided the same.

447 He was thus entitled to conclude she had not been open and transparent with the respondent.

448 As to allegation 2 irrespective of our finding whether the "***poisonous organisation"*** comment was made (and we found on balance it was) that reflects and is consistent with the comments made by Ms Johal that Mr Davey and Mr Lackenby referred to in their outcome letters. The context in which that phrase was used reinforces that view, it preceded her walking out of a meeting to address her appeal against dismissal.

449 To that end we should add that on 9 August 2016 Ms Johal stated, "***I would greatly appreciate if paid officers would not continue to try and fxxx with my head."*** (176)***.*** Before us she attempted to argue she was not intending to swear. We found her argument implausible. That however was not the only time she used that phrase. She concluded grievance 2 of 18 December 2015 thus ***"In Plain English this appears to be yet another total f... up by HR". [1103].***

450 Neither Mr Davey or Mr Lackenby (or for that matter Mr Lawrence) were of the view she had moved on such that she could return. We can find no evidence that she had other than the brief comments Mr Lackenby referred to in his outcome [1868] (and indeed the views expressed subsequently in her witness statement are also consistent with that - [CKJ/385] where she referred to a conspiracy and cover up in which a number of senior officers were involved, [CKJ/384] where she referred to wide-spread institutionalised bullying and harassment and at [CKJ/383] where she accused a number of individuals of intentionally and covertly turning a blind eye to the link this case had to potential wider fraud and that a criminal case could have huge and damming consequences for both the reputation of the wider council and the trust and confidence of the general public in the senior leadership).

451 The closest she approaches to that is in her witness statement [CKJ/224] where Ms Johal purported to give an explanation for having sent the various emails relied upon that was not given at the time of the disciplinary or appeal hearings namely that she could feel herself getting very angry and upset about how she was being treated. She admitted she lost her temper and her choice of words was not that of a person with a sound mind. She stated they were not sent in an attempt to cause distress to any other person and she maintained she did not swear at anyone. She argued she was simply driven to sheer frustration by the actions of HR, her pain and lack of sleep (see (272.1)).

452 We note those comments are made after the event and thus should treated such.

453 In our judgment the respondent has shown that Ms Johal remained involved in Learning Exchange long after she accepted her involvement had ceased and, the statements Ms Johal made and her actions, including the collusion viewed objectively are the acts of someone who in the words of Lord Evershed (337) has ***"disregarded the essential conditions of the contract of service"*** and who intended to abandon and no longer perform her contract of employment [65].

Employment Judge Perry

09 December 2019

sent to the parties on

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[1] The name of that hearing is of limited importance but whilst Ms Johal refers to this being an appeal hearing, Mrs Howells in her witness statement refers to that being the date of her dismissal and making a later appeal [CH/220 & 225]. Given Ms Johal accepts she was not present we give greater to weight t what Mrs Howells described it as.

[2] *And as to the that term the Code states [3.23] "... However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator."*

[3] See *Lamb* at [21] and *Noor v Foreign and Commonwealth Office [2011] ICR 695* where the EAT (HHJ Richardson) held that observations to this effect were endorsed in Griffiths.

[4] See Underhill LJ in *Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401 at [24] following*

[5] The words underlined inserted by the Enterprise and Regulatory Reform Act 2013 apply in relation to disclosures made as here on or after 25 June 2013

[6] s. 43B(1) ERA – the underlined words relate only to disclosures made with effect from 25 June 2013

[7] *Cavendish Munro v Geduld [2010] IRLR 38 UKEAT/0195/09 [24*]

[8] *Goode v Marks and Spencer UKEAT/442/09 [36*]

[9] see *Cavendish Munro*. This approach was also applied in *Goode, Norbrook Laboratories v Shaw UKEAT/0150/13 and Millbank Financial Services v Crawford [2014] IRLR 18 EAT.*

[10] see Lady Slade in *Cavendish Munro* where she explains the rationale for this and contrasts the statutory words in
Part IVA ERA and the provisions in the Sex Discrimination Act 1975 and Race Relations Act 1976 [11] Per Langstaff P *Kilraine v London Borough of Wandsworth UKEAT/0260/15* [30]

[12] *Cavendish Munro [27]*

[13] *Goode* [37]

[14] *Everett Financial Management v Murrell EAT/552-3/02 and 952/02* [46 & 47]) see also *Norbrook* at [22]

[15] *Blackbay Ventures v Gahir [2014] ICR 747 (EAT)* [98] & *Eiger Securities v Korshunova [2017] IRLR 115 (EAT)*

[16] *Fincham v HM Prison Service UKEAT/0991/01*

[17] *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 314 per Underhill LJ [37]*

[18] *Korashi v Abertawe Bro Morgannwg University Local Health Board* at [24]

[19] *Darnton v University of Surrey [2003] IRLR 133 EAT*

[20] Wall LJ *Babula v Waltham Forest College* [2007] ICR 1026 CA at [82]

[21] see *Darnton* [28-29]. One such instance was *Babula, which* involved a disclosure relating to breach of a non-existent legal obligation but in which the worker claimed that he reasonably believed was such an obligation. The Court of Appeal approved *Darnton* stating the policy of the legislation is to encourage responsible whistle-blowing, and it would work against that policy to require employees to have a detailed knowledge of the criminal law. [22] Again Wall LJ in *Babula* at [82]

[23] *Korashi [2012] IRLR 4 EAT*

[24] Lord Hoffman in Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at [53].

[25] *Ministry of Defence v Jeremiah [1979] IRLR 436 CA*
[26] *adopted and approved by* the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337* which in turn referred often to another HL decision in *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 48*
[27] *Shamoon [34-35]*
[28] Per Lord Brightman in *Ministry of Defence v Jeremiah* [1980] QB 87, 104B
[29] Per May LJ in *De Souza v Automobile Association [1986] ICR 514*, 522G
[30] *Barclays Bank plc v Kapur and others (No 2) [1995] IRLR 87*
[31] relying upon *Lord Chancellor v Coker and Osamor [2001] IRLR 116*
[32] For disclosures made prior to 25 June 2013 it was a requirement of both s. 43C and 43G that the disclosure should have been made in *"good faith"*. That requirement was removed by s. 24(6) Enterprise and Regulatory Reform Act 2013, but the definition of "qualifying disclosure" in s. 43B was amended to include that the disclosure should be made *"in the public interest"*. However, the question of *"good faith"* remains relevant to remedy.
[33] *Abernethy v Mott, Hay & Anderson [1974] ICR 323 CA* per Cairns LJ at 330B-C
[34] Browne-Wilkinson P in *Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 (EAT) at [95]* approved by Lord Bridge in *West Midlands Co-Operative v Tipton [1986] IRLR 112 (HL)*
[35] *Smith v Hayle [1978] IRLR 413 (CA)*
[36] The cap on the compensatory award does not apply if the dismissal was for s.103A reason (s. 124(1A) ERA) [37] *Kuzel v Roche [2008] IRLR 530 (CA) [56-61]*
[38] *Orr v Milton Keynes [2011] ICR 704 CA*
[39] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*
[40] see for instance *Sainsburys Supermarkets v Hitt [2003] IRLR 23 CA*
[41] *Securicor v Smith [1989] IRLR 356 (CA)* applying the older authority of *British Leyland v Swift [1981] IRLR 91*
[42] *Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457 CA* per Elias LJ [13] & *A v B [2003] IRLR 405*
[43] *Turner v East Midlands Trains [2012] EWCA Civ 1470 [22]* referring to the approach taken in *A v B* and *Roldan*
[44] Lord Bridge in *Polkey v AE Dayton Services Ltd [1988] ICR 142 HL*
[45] *British Home Stores v Burchell [1978] IRLR 379* decided before the amendments in s.6 Employment Act 1980 [46] *Polkey*
[47] *Hill v Governing Body of Great Tey Primary School UKEAT 0237/12, [2013] IRLR 274* per Langstaff P
[48] *V. v Hertfordshire County Council UKEAT/0427/14 per Langstaff P at [1 & 21-25]*
[49] Devis v Atkins *[1977] IRLR 314* at [39] HL
[50] *Software 2000 at [54]*
[51] *[2006] ICR 617, [2005] EWCA Civ 1174, [2005] IRLR 934*
[52] *Software 2000 Ltd v Andrews [2007] IRLR 568*
[53] *Nelson v BBC No.2 [1979] IRLR 346 (CA)*
[54] *Hollier v Plysu [1983] IRLR 260 (CA)*

[55] *London Ambulance Service v Small [2009] IRLR 563* (CA) [56] *Rao v CAA [1994] IRLR 240 (CA)*
[57] HHJ Serota QC in *Shaw v B&W Group Ltd UKEAT/0583/11*
[58] *Boston Deep Sea Fishing v Ansell (1888) 39 Ch.D. 339).* Approved by HL in *Devis v Atkins [1977] IRLR 314* at [14]
[59] *Laws v London Chronicle [1959] 1 WLR 698 (CA)* where the employee had disobeyed a direct instruction [60] *Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*
[61] taking a different view from that of the DRC Code as applied by the EAT in *O'Neill v Symm & Co [1998] ICR 481*
[62] And that applies to all forms of dismissal falling within Part X ERA (and not just s.103A) *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 [60]
[63] *Ulsterbus -v- Henderson [1989] IRLR 251 NICA* per O'Donnell LJ [21]
[64] *Paul v East Surrey District Health Authority [1995] IRLR 305 at paragraphs 34 to 35, 38 and 41*
[65] What constitutes a repudiatory breach in the commercial as opposed to employment arena was considered recently by the Court of Appeal in *Eminence Property Developments Ltd. v Heaney* [2010] EWCA Civ 1168 [61], where
Lord Justice Etherton giving the only judgment restated the view of Lord Wilberforce in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd [1980] 1 WLR 277 HL* which in turn approves the view of Lord Denning in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1978] QB 949 (CA), [1979] AC

757 (HL) at CA [979F] as to the legal test for repudiatory conduct. *Tullett Prebon Plc v BGC Brokers LP [2011] IRLR 420* in the words of Langstaff P in *Bethnal Green and Shoreditch Education Trust v Dippenaar UKEAT/0064/15 "[22]*