RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms Svetlana Sinelnikova**

Respondent: **ActivTrades PLC**

Heard at: **East London Hearing Centre**

On: **26 – 28 February 2019**
1 – 6 March 2019
(In Chambers) 24 June 2019

Before: **Employment Judge Ross**

Members: **Ms L Conwell-Tillotson**
Mr M Rowe

Representation

Claimant: In person

Respondent: Ms A Mayhew (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant was unfairly dismissed under sections 94 and 98 Employment Rights Act 1996.**

2. **The complaint of automatic unfair dismissal under section 103A Employment Rights Act 1996 is not upheld.**

3. **There shall be no deduction from the Basic and Compensatory awards under sections 122, 123(1) and 123(6) Employment Rights Act 1996.**

4. **The Respondent has subjected the Claimant to detriments in contravention of section 47B Employment Rights Act 1996 as follows:**

4.1. By failing to thoroughly investigate the grievance and the protected disclosures made on 15 December 2017;

4.2. On 20 December 2017, by misleading the Financial Conduct Authority about the reason for the Claimant's absence from work;

4.3. On 6 February 2018, by falsely alleging to the Financial Conduct Authority that the Claimant had misled the FCA by completion of a Form A;

4.4. From 6 March 2018, by falsely accusing the Claimant of running an ebay account and downloading illegal files on her work computer;

4.5. By mishandling the Claimant's subject access request;

4.6. On 13 April 2018, without justification, threatening legal action against the Claimant in the High Court for: (1) an injunction for starting employment with an alleged competitor, and (2) for damages in excess of £384,000;

4.7. From 2 February 2018, by the Respondent failing to comply with its obligations under Data Protection Act 1998 and (from May 2018) the GDPR, to delete the Claimant's personal data, including sensitive and highly personal data and about her private and family life.

4.8. The complaints of direct sex discrimination under section 13 Equality Act 2010 are not upheld.

5. The complaints of victimisation under section 27 Equality Act 2010 are upheld in respect of the detriments listed at Paragraph 4.2 to 4.7 of this Judgment.

REASONS

Complaints and Issues

1. The Claimant was continuously employed by the Respondent from October 2011 until her resignation without notice on 2 February 2018. After a period of Early Conciliation, by a Claim presented on 18 May 2018, the Claimant complained of:

1.1. Detrimental treatment contrary to section 47B Employment Rights Act 1996 ("ERA");

1.2. Direct sex discrimination including the treatment of dismissal (section 13 Equality Act 2010, "EA 2010");

1.3. Victimisation including the detriment of dismissal (section 27 EA 2010);

1.4. Automatic unfair dismissal under section 103A ERA;

1.5. Constructive unfair dismissal under section 98 ERA.

2. The parties produced separate lists of issues and chronologies. At the outset of the hearing, the lists of issues were considered. A final list of issues was agreed on 1 March 2019, which is annexed to this set of Reasons. It is important to recognise that the List of Issues is a road-map for the parties and the Tribunal; we directed ourselves in accordance with the law as set out below when determining the issues.

3. The parties did not manage to agree a chronology; we considered both versions.

The Evidence

4. The Tribunal read witness statements for and heard oral evidence from the following witnesses (save that there was no written statement for Ms. Patel):

For the Claimant:

4.1. The Claimant;

4.2. Bhavisha Patel, former Compliance Manager at the Respondent firm, whose line manager was the Claimant (who appeared pursuant to a witness order);

4.3. Jon Friend, former Compliance Director at the Respondent;

For the Respondent:

4.4. Stuart Gee, Head of Human Resources;

4.5. Juan Scarabino, Finance Director;

4.6. Arthur Boissiere, Head of Sales;

4.7. Steve Clowes, Chief Finance Officer.

5. There was a bundle of documents, to which documents were added in the course of the hearing by both parties. Page references in this set of Reasons refer to pages in that bundle. On the morning of 27 February 2019, the Claimant produced a bundle of emails passing between herself and the Information Commissioner's Office ("ICO") and between the Respondent and the ICO. This was marked "C1"; the Respondent did not dispute that it had seen this correspondence.

6. The main bundle spanned seven lever arch files and was in the region of 3,000 pages. In addition, there were about 150 pages of witness statement evidence and the substantial list of issues. In that context, it was regrettable that the parties had not informed the Tribunal in advance that 6 days was likely to be too short as a time estimate. The Tribunal, unusually, were able to extend the hearing by 1 day and sit on 7 March

2019. Having reserved judgment, the Tribunal sat in Chambers on 8 April 2019 and, from necessity, on 24 June 2019.

7. The Tribunal found the Claimant and Mr. Friend to be honest and generally reliable witnesses on professional and business matters. They demonstrated that they were very knowledgeable in Compliance matters. We accepted the Claimant's evidence about how she came to accompany Mr. Friend to Dubai, for the inspection in December 2017, her evidence about where she stayed and the work that she did there, including that she worked on the report and that work emails were sent by her from Dubai.

8. In contrast, the Tribunal found the Respondent's witnesses to give unreliable evidence in many areas, some of which was not credible. Part of the reason for this was the Respondent's retrospective attempt to justify its acts or omissions towards the Claimant. In addition, from all the evidence we heard, we inferred that the Respondent's unreliable witness evidence was coloured by its witnesses' desire to follow the company line. Its CEO, Alex Pusco, was described by one Respondent witness as "*temperamental*" and, from both oral and documentary evidence, appeared to lose his patience when his desire for his company was not fulfilled.

9. The Tribunal heard and read a considerable amount of evidence. The following are the relevant findings of fact. It is important for any other Court or Tribunal considering this set of Reasons to recognise that we did not accept much of the Respondent's evidence on key points nor certain aspects of the Respondent's submissions. This set of Reasons is not required to be a checklist; not every dispute nor every argument needs to be examined separately. A good example is the set of arguments by the Respondent about the alleged disciplinary process. We found as a fact that a decision to dismiss had been pre-determined, before any reasonable or proper investigation or hearing took place; the alleged process was a sham. Given those findings, there is no need for this Tribunal to pick through the submissions on this issue.

The Facts

10. The Respondent is a foreign exchange broker, which enables its customers to trade online via electronic trading platforms. It is a market maker, meaning that when the client places a trade, the counter-party to the trade is the Respondent. In summary, the Respondent profits when the client loses, and vice-versa. The Respondent's founder and CEO is Alex Pusco. Mr. Pusco is more than "hands on". He is very involved in all its activities. From the evidence we heard, he has a tendency to direct staff in their roles, or takes control of roles, where he perceives this appropriate.

11. The Claimant was Head of Compliance from April 2016 until her resignation. Her promotions, bonuses and salary at various times can be seen on the document at p140. The Claimant had never been subject to any performance management up the point of her dismissal. The Claimant was not subject to any disciplinary proceedings or conduct investigations, up to December 2017. There was no evidence of any negative formal appraisal; indeed, the pay rises and bonuses pointed the other way. For example, at p.129, an email from Mr. Gee states that Mr. Pusco and Mr. Friend recognised her positive performance and contribution to the Respondent, in recognition of which her salary was to rise from £65,000 to £80,000 from 1 April 2016.

12. The Respondent is subject to regulation by the Financial Conduct Authority ("FCA"). The FCA requires companies such as the Respondent to have both controlled functions including CF10 and CF11. The Respondent's CF11 controlled function (Money Laundering Reporting) was held by the Claimant. This function is described in the FCA Handbook (pp2114A-B), relevant extracts of which are at paragraph 7 of the Claimant's witness statement. Mr. Friend was Compliance Director, part of the Board, and performed the CF10 function (Compliance Oversight). The holders of controlled functions are registered with the FCA. Mr. Pusco has no FCA Controlled Function and no qualifications in Compliance.

13. It is a requirement of the FCA that businesses such as the Respondent have adequate Risk Management of the Respondent's liquidity (which in part requires the Respondent to have adequate capital) and that they mitigate conflicts of interest. We found as facts those matters set out in paragraph 24 Claimant's statement.

The Employment Contract

14. The Claimant's contract of employment (p.99ff) was a standard form contract used for, at least, all its Compliance staff. The Respondent relied on various clauses including 2.1, 2.4, 4.1.5, 4.3, 4.4, and 16.3.

15. The Respondent alleged that the Claimant breached Clause 2.1, and was not a fit and proper person within the Financial Services Authority's approved regime. We found that this was an attempt to attack her credibility, which lacked substance. Throughout her employment, the Claimant did not breach that condition, and that, as a matter of fact, she was accepted as a fit and proper person within the FCA's approved regime.

16. The Claimant became the Respondent's CF11 function holder and MLRO from 14 November 2013.

17. The Respondent relied on the Form A at p. 72-94 (also a Form A is at p.970ff), which was an application to the FCA for the Claimant to hold the CF11 function of Money Laundering Reporting Officer ("MLRO"). Part of the Respondent's evidence was directed to showing that this was incorrectly completed.

18. The FCA, which makes its own background checks following receipt of an application, determined for itself that the Claimant was a fit and proper person. We considered that it was not for the Tribunal to carry out these checks, some 5.5 years later.

19. In any event, we found that the Form A was completed accurately. We accepted the evidence of the Claimant (at paragraphs 6-7 of her witness statement) and Mr. Friend about this. We preferred the evidence of Mr. Friend over that of Mr. Clowes in the matters of the completion of the Form A and the Respondent's internal annual attestation. We noted that Mr. Friend was an experienced Compliance Director, and that his knowledge and experience made his evidence persuasive. On the other hand, Mr. Clowes was an accountant, and expressing a view outside his professional training.

20. The Claimant completed the Form A using the FCA Guidance Notes. The FCA was provided with information about the companies that she had held directorships of.

21. Moreover, the Form A was signed off by the Respondent's own Compliance Director, Mr. Friend. The FCA requires the Respondent to sign Form A to certify that it believes after due diligence that the Claimant is a fit and proper person (see p.92). It was wholly inconsistent for the Respondent, after the Claimant's employment for 4 years in the MLRO role, and some years after the approval by one of its own directors (Mr. Friend), to allege that the Claimant was not a fit and proper person. Further, on 29 May 2018, the Claimant was again found to be a fit and proper person to hold the CF11 and CF10 functions after recruitment by her current employer, Alpha Trades.

22. Mr. Clowes, insisted that the answer to question (a) on p.88 was wrong, because companies that were dissolved were liquidated. We did not consider that the question extended to whether companies were dissolved; but in any event, the Claimant did not mislead the FCA, because her Form A listed all the companies in which she had previously held directorships, and gave the status of those companies (including "dissolved"): see p.91.

23. We noted that Mr. Clowes put the most negative interpretation possible on this document, which was a feature of the Respondent's witness evidence in other areas. This habit of interpreting any document or piece of evidence in such a negative way caused the Tribunal to doubt the reliability of the Respondent's evidence in relation to the Claimant's conduct and alleged failings. For example, we note that this form was counter-signed by Mr. Friend, in his professional role as Compliance Director and years before the Respondent alleged the Claimant and Mr. Friend were in a relationship.

24. The Claimant completed a Respondent's annual attestation form in 2013 (p.94), and yearly thereafter. It was alleged that the Claimant did not continue to meet the conditions as to fitness and propriety from 2013 onwards because she was not financially sound. The Respondent relied on evidence obtained from files left by the Claimant on her computer which demonstrated the degree of debt that she held at that time.

25. We accepted the Claimant's evidence that she remained financially sound and that the attestation form was completed correctly. This question can only be considered after the assets of the Claimant are taken into account. She had equity in her property exceeding her personal debts. In any event, she honestly believed that she remained financially sound when she completed the attestation forms.

26. Moreover, in respect of the Fit to Work Declaration form (p.133), we found that the Claimant did not have "impending financial claims". Read in context ("*I do not have any CCJs or impending financial claims being made against me*"), this phrase means either a legal claim or a claim arising from a legal obligation to repay debts immediately which would give rise to a County Court Judgment or some other form of legal enforcement. If this statement is given a wider construction, it would include debts such as a mortgage in arrears of any amount (which is a loan secured on a property, but where the full sum usually becomes payable where arrears arise), a credit card debt (as a result of the balance not being cleared each month), or even outstanding Council Tax charges.

The Respondent's Policies

27. The Respondent's employment policies were referred to in an Employee Handbook. These policies were not available on an intranet. We heard no evidence that staff were briefed about them. We found that the Claimant and Mr. Friend did not receive

a briefing or a copy of the Personal Relationship at Work Policy within the Handbook (p2108H).

28. In any event, we found that breaches of this policy were tolerated, rather than enforced, by the Respondent. We heard of various relationships between staff. As a further example, Mr. Gee alleged that he had a meeting with Ms. Xi and Mr. Trott due to their relationship; but we found that Ms Xi approached Mr. Gee because of her visa difficulties (she was a Chinese national), and this was the trigger for the raising of the policy by Mr. Gee.

29. There was a rumour amongst the staff in the London office that there was a romantic relationship between the Claimant and Mr. Friend. In the experience of this Tribunal, such rumours are common within a workplace, often with no substance. There was no allegation by the Respondent of such a relationship at the time that the Claimant was awarded pay-rises and promotion, so the suggestion in the Respondent's evidence that these may have been tainted by the relationship is a weak, retrospective, and not credible attempt to undermine the Claimant's performance and ability.

30. Mr. Pusco's email text statement at p.647 (alleged sent on 28 December but received by the Claimant on 8 January 2018) was inconsistent with that of the Respondent witness evidence on this issue. This text stated that there was a relationship between Mr. Friend and the Claimant which was known by many staff, but the witnesses for the Respondent referred only to rumours of a relationship until December 2017. Mr. Gee stated that prior to the events of December 2017, the knowledge of their relationship was no more than a suspicion and the subject of office gossip (paragraph 14 Witness Statement).

31. Despite Mr. Pusco's allegation that this was not hidden, no attempt was made to investigate whether one did exist nor to enforce the alleged Relationship at Work Policy if it did.

32. In respect of the Personal Relationship at Work Policy, in the case of one couple, Mr. Gee was aware of their relationship for two years before the male employee formally told him about it; there was no evidence of anything happening to stop the relationship in that period. In addition, Mr. Boissiere also had a sexual relationship with someone within his line management; the Policy was not raised in that instance either.

33. The Tribunal concluded that it was likely that Mr. Friend and the Claimant had a close working relationship, which developed into a sexual relationship during the latter part of 2017.

34. The Respondent also relied upon its Authorised Absence Policy, and specifically the "Tied Posts" part: see p.2074. Mr. Gee's evidence (paragraph 19 witness statement) stated that the Policy made clear that individuals in tied posts should not be absent from the "UK office". The Claimant and Mr. Friend were cross-examined on the basis that the Policy prevented them being away from the London office at the same time.

35. We rejected the Respondent's case on this point as not credible and unrealistic. Both had been on several business trips together, with the approval of the Respondent. Moreover, the Respondent knew and accepted that the Claimant and Mr. Friend would need to travel on Compliance-related business trips together, demonstrated by the

Compliance Calendar adduced by the Claimant, which was signed off in advance by the Board. The Claimant was, after all, managing the Compliance function across all the offices (that is, both within and outside the UK).

36. We accepted Mr. Friend's evidence about the need for them both to travel on such trips. We noted that the Tied Posts Policy is directed to absence away from work (such as holidays); it does not apply to the situation where the Compliance Director and/or the Claimant are working in another office of the Respondent.

37. Mr. Gee's oral evidence shifted the Respondent's case on this issue, which made it less, not more, credible. He said the words meant out of an office, not the London office.

38. The Respondent failed to establish any breach of the Authorised Absence policy, nor that, by Mr. Friend and the Claimant (the CF10 and CF11 Compliance function officers) going on a business trip to Dubai for Compliance purposes, the Tied Posts Policy would be breached.

39. The Handbook also provided that staff should not abuse the internet whilst working for the Respondent: p705.

40. We accepted the Claimant's evidence that she was not running an eBay account from her computer. There was no direct evidence that she was running such an account from her computer; we understand this allegation to be one that she was using her computer to buy and sell items, but the Claimant's evidence contradicted this. It was an allegation without reasonable grounds. Moreover, the absence of any direct evidence that she was running such an account led us to infer that the Respondent held no genuine belief in this alleged misconduct.

41. In respect of the music files found on her computer, it was alleged in the Grounds of Response (paragraph 67) that these were downloaded in breach of the Respondent's policies. The natural reading of this is that the downloading was done by the Claimant. However, we found that the Respondent's case shifted during evidence; in cross-examination, Mr. Gee did not state that these were downloaded by the Claimant, but that they were transferred onto the Respondent's system. Indeed, we found that his email at p.1360 tended to show that he had no reasonable grounds for his allegation that the music files were illegally downloaded; he tried to reverse the burden of proof by asking the Claimant to prove that they were not illegal downloads.

42. There was no documentary or expert evidence, whether in the form of a report from the IT department of the Respondent or otherwise, to show that these were "illegal" downloads, nor when they were added or accessed; nor was it explained why it was suspected that the Claimant had transferred these onto her computer, nor when they were accessed, nor was it explained why or how the Claimant might be criminally liable. We found this allegation so vague and unparticularised as to demonstrate that the Respondent had no honest belief in the allegation and no reasonable grounds for the belief. This allegation was also inconsistent with the Respondent's own case, which was that documents on its IT systems belonged to the Respondent. In any event, we accepted the Claimant's evidence that she could not have downloaded such files because she did not have the system administrator's password.

Treatment of women by the Respondent

43. In 2013, whilst intoxicated at a Christmas party, the Director of Risk, Mr. Draghi, had referred to women as "*meat*" in a statement made to the Claimant. He was General Manager for the Bulgarian operations.

44. Mr. Pusco, whilst at the Bulgarian office, stated, on an occasion when the Claimant was present, that "*women should stay at home and cook*", in the context of complaining about the length of maternity leave in Bulgaria.

45. The Claimant alleged that in 2017, Mr. Pusco displayed an image of an advertisement by Aston Martin for pre-owned cars. The advert (p.63) contains a woman wearing limited clothing in a particular pose. On a fair reading of this advert, the Tribunal found that it was insulting, offensive, and degrading to women. On showing this advert to the Claimant and others at the London Office, Mr. Pusco stated that the Respondent's marketing needed to be "*sexy*" and that sex sells.

46. We preferred the evidence of the Claimant and Mr. Friend to that of Ms. Patel about this image and when and whom it was shown to. At first, Ms. Patel stated that she had seen the image before, but could not say if this was inside or outside the Respondent's office. The final position in her evidence was that she was not sure if the advert at p.63 was familiar. We found that her evidence was inconsistent with the offensive nature of the advert. We doubted that, from 2017 until now, a woman would forget the image or the offensive nature of it, nor where they had seen it. We formed the view that Ms. Patel was anxious not to upset one or both parties by her evidence and tailored it accordingly.

47. In about February 2017, the Respondent signed the "Women in Finance Charter", which had been proposed by its marketing team (p.155). Given that it was signed, it is not correct, as Mr. Gee asserted, that only initial inquiries had been made. We accepted that the Respondent withdrew from it because it was not prepared to implement the pledge that linked salary and bonuses to gender diversity targets (p.187A). The Tribunal inferred that the Charter had been signed to for publicity purposes, to market the Respondent, because after the marketing article at p.187, the initiative was withdrawn from. The Respondent had withdrawn because Human Resources, specifically Mr. Gee, had decided that it was not feasible to meet the pledge made. We inferred that this was because it was likely to cost money which the Respondent was not prepared to commit to.

Events 1-2 June 2017

48. We accepted the Claimant's evidence about events on 1 – 2 June 2017 at paragraphs 25-30 of her witness statement.

49. On 1 June 2017, the Claimant was contacted on a Skype call by Mr. Pusco. He asked the Claimant to open a real money professional account in his name, and stated that she must keep the request confidential. He said he wanted to test the customer experience of account opening. The Claimant proposed a "demo" or "Virtual" account, because this was the usual method of testing, but was told that it must be a real money account which will be funded. The Claimant believed that this request made no sense, because in order to test the customer experience of account opening, one needed to go through all the stages that the client goes through. By requesting the Claimant to open an account for him, the Claimant believed that Mr. Pusco was trying to bypass all these stages.

50. The Claimant's role included upholding the policies within the Respondent's own Compliance Manual. The request for a real account was outside the Personal Dealing Policy. To open an account, the Claimant would have to breach permissions and systems controls, because accounts are not opened by the MLRO alone.

51. The Claimant informed Mr. Friend of her conversation with Mr. Pusco, stating that the request was clearly not for testing the "customer experience", and that it was likely to be a breach of the Respondent's Personal Dealing policy and create a severe conflict of interest.

52. The Claimant was informed that this was not the first attempt by Mr. Pusco to open such an account.

53. The Claimant's account of events was corroborated by the evidence of Mr. Friend and, to some extent, Mr. Scarabino. In addition, her account was corroborated by the contemporaneous documents including a Skype conversation between Mr. Friend and Mr. Scarabino which included (p.182-183): a discussion of the fact that Mr. Pusco had tried to open a professional client account with a paper application because his email was already registered; that this would be their only professional client account; if he succeeded, Mr. Scarabino recognised that this would mean that the firm could then use Mr. Pusco's funds for hedging; and Mr. Friend considered that Mr. Clowes would find the proposed application laughable.

54. The Skype conversation is particularly revealing. It demonstrates that Mr. Pusco's request was very inappropriate, being contrary to the Respondent's own Compliance policy and FCA obligations. The Skype conversation shows that there would be a conflict of interest if Mr. Pusco had an account and traded. He could use his knowledge of the Respondent's position to make a profit, which could in turn be leveraged up to circumvent capital adequacy rules. In evidence, Mr. Friend explained that were he to do this, it could be fraud.

55. Mr. Friend and Mr. Scarabino took care to construct an email designed to stop Mr. Pusco opening an account: see the conversation at p.184. The email itself is at p. 187.

56. Mr. Pusco responded by email at p.186, accusing the Claimant, Mr. Friend and Mr. Scarabino of misinterpreting his clear messages. He stated that his reason for opening the account was to test the customer journey in person. This email describes the Claimant, Mr Friend and Mr. Scarabino as "*panicking about …insider dealing!*"

57. The Tribunal inferred from the email response that Mr. Pusco was angry at the Claimant, Mr. Friend and Mr. Scarabino, a point confirmed by Mr. Scarabino. We found it was likely that his anger was because his request to open a real account had been blocked. The Tribunal also inferred that he knew that the Claimant had not kept his request confidential, but that she had disclosed the conversation to Mr. Friend.

58. The Respondent's evidence before us on this issue was not credible. Mr. Scarabino stated that he had misunderstood, and did not fully appreciate that Mr. Pusco wanted an account purely to test the customer experience. We rejected this for several reasons:

58.1. There was no evidence that Mr. Pusco had tried any other method to test the customer experience. As Mr. Scarabino noted in the Skype conversation on 1 June 2017, a Virtual account and test environment would have been sufficient for Mr. Pusco's purposes; and in his statement, he noted that he did not see any benefit in a real account being opened.

58.2. Had the request from Mr. Pusco been made in good faith, we would have expected him to open an account with the controls proposed by Mr. Friend in the email referred to (at p.107). Instead, he considered the matter "*closed*".

58.3. Mr. Scarabino's witness statement evidence (paragraph 5) had a markedly different tone to the Skype conversation. In his statement, he stated that there was a "*possibility that it could be perceived as a conflict of interest*". The Skype conversation shows that both Mr. Friend and Mr. Scarabino well knew that it would have created an actual conflict of interest.

58.4. The documentary evidence does not suggest the "misunderstanding" claimed by Mr. Scarabino. The Skype conversation shows that both Mr. Friend and Mr. Scarabino were concerned about Mr. Pusco trading with the account.

59. Mr. Scarabino stated that there were controls in place so that the other departments, like Finance, would have become aware that Mr. Pusco was opening an account. But Mr. Pusco was asking the Claimant to open the account confidentially, which would likely circumvent the controls.

60. We have considered how this matter is dealt with by Mr. Gordon in his report at p.1454ff, adduced by Mr. Gee. The Tribunal found this report lacked input from the Claimant or Mr. Friend (who had resigned and who was not approached by Mr. Gordon). The report was self-serving for the Respondent in several respects. For example, at p.1456, Mr. Gordon concluded:

> "*I cannot find any reason to conclude that Mr. Pusco's request was, as Lana states, "unacceptable". Mr. Pusco's request seems to me to be perfectly reasonable. It seems to have been made with the best and the most honest of intentions; he wanted to test the customer's experience*."

61. We found this conclusion wholly inconsistent with Mr. Gordon's experience in Compliance, the FCA rules as to Capital Adequacy (as explained by Mr Friend in evidence), and the Respondent's policy, in the Compliance Manual, against self-dealing. It must have been as obvious to Mr. Gordon as it was to this Tribunal that by opening a real trading account Mr. Pusco would create a conflict of interest. Moreover, the account that Mr. Pusco wanted to open would have been the only account that the Respondent had of this nature; the Respondent did not have a single "professional" client, so the Claimant and Mr. Friend found Mr. Pusco's explanation for wanting the account to be implausible. He had sought a professional account; the process for such a new client would have been similar but different to the process for the rest of the customers (with an extra application to complete if shown to be professional). These are amongst the reasons why we found Mr. Gordon's report not to be reliable, and that certain conclusions, such as this one, were

not credible. The conclusion that the Claimant was responsible for a badly drafted Compliance Manual (see below) is another which we found not to be credible.

62. Mr. Gordon concluded (p.1457) that Mr. Pusco could have opened an account with "*some simple control mechanisms*". The Claimant's duties included ensuring the Respondent complied with its own Compliance Manual and was FCA compliant. In that context, we did not accept that she could allow the breach that would have occurred by opening a real account for the CEO which could be funded.

63. Mr. Gordon proceeded to conclude that the Compliance Manual was badly written, and that a badly-written Compliance Manual was worse than none at all. Mr. Gordon continued by concluding that the Claimant was one of the owners of the Compliance Manual (in her CF11 role) and therefore to blame for not correcting the Compliance Manual's "*weaknesses*". He ignored that (or failed to investigate whether) the Claimant had inherited the Manual which we understood to mean that it was in place when she joined. We heard no evidence that she had written it, nor that she had been instructed to review or amend it at any time.

64. These conclusions are inconsistent with the purpose of Mr. Gordon's role, which was as a grievance investigator at this point, not someone investigating the Claimant's conduct or performance. It contains an argument that had never been made to the Claimant, yet proceeds to blame the Claimant (and Mr. Friend). The Tribunal found these conclusions very unconvincing. We found that the Compliance function would advise on Compliance matters if any aspect of the Compliance Manual were unclear.

65. Overall, we found the above conclusions of Mr. Gordon to be a retrospective attempt to attack the credibility of the Claimant as a Compliance professional. We rejected these criticisms of the Claimant, finding them not justified on the facts. We inferred from this that the report of Mr. Gordon was prepared as a tool to attack the Claimant's credibility in part because of the protected disclosures contained within the grievance and in part because of anticipated litigation from the Claimant given that the decision to dismiss her had already been made.

66. In any event, we found that Mr. Pusco, given his role as CEO of this type of company, did not need a Compliance Manual to know that he could not open a real trading account; this would have been clear to him from the outset and from the refusal of his earlier request, which is probably why he had asked the Claimant to do this confidentially.

Summer 2017

67. The Claimant was ignored for several weeks after the events of 1-2 June 2017 by Alex Pusco, who went straight to Mr. Friend, Compliance Director, rather than raising matters with the Claimant.

68. In August 2017, the Claimant worked during her annual leave. This was to complete an FCA request for information on Anti-Money Laundering ("AML") systems and controls that arrived just before her leave began. The request followed a "Dear CEO" letter sent by the FCA in 2016, "*Client take-on review in firms offering contracts for difference products*" (p.2464 ff). The Claimant submitted the response on the last day of her leave. The submission was accepted by the FCA.

7 September 2017 meeting

69. Mr. Pusco wanted his Sales Team to bring in more clients, to maximise profits.

70. Mr. Boissiere was Head of Sales and a director. From or about September 2017, he had to account to Mr. Pusco, CEO, as to why sales did not meet expectations.

71. Mr. Boissiere raised with Mr. Pusco the issue of delayed withdrawals, which he alleged was bad publicity because clients were complaining publicly (such as on forums). Mr. Boissiere was not targeting the Claimant in doing so, but he was pointing out to his CEO that Compliance was getting in the way of maximising sales. In short, Mr. Boissiere was blaming Compliance for delayed withdrawals.

72. Delayed withdrawals occurred when AML analysts and the Claimant believed that suspicious activity was taking place with deposits or withdrawals. Compliance would then conduct an assessment, and, subject to the conclusions, may report the client and transaction to the National Crime Agency ("NCA") by a Suspicious Activity Report ("SAR"). The NCA then had 7 working days to object or provide authorisation.

73. A Compliance officer in the CF11 role has a duty to disclose whether they know or suspect, or have reasonable grounds for doing so, that a person is engaged in money laundering. Breach of this duty is a criminal offence.

74. Details of delays due to SARs could not be explained by Compliance to other teams due to the risk of tipping off the client, which would breach FCA regulations.

75. We found that there was a gap between the expectations and understanding of the duties and responsibilities of the Compliance officers by Mr. Boissiere in Sales, and the proper role of the Compliance function and Compliance officers working in the business. For example, Mr. Boissiere criticised the Claimant's response on 6 September (p205) as unhelpful, in respect of a delay of one month in one case. We found that the response was the result of the Claimant performing her role properly.

76. The issue of delayed withdrawals was raised with Mr. Friend, rather than being raised directly with the Claimant, who was the MLRO. Mr. Friend raised them with the Claimant, who asked for examples, explaining that most delayed withdrawals were due to SARs. This is set out in a Skype conversation at p.207, in which the Claimant explains that there was a good reason why Compliance could not be more specific about delayed withdrawals. She explained to Mr. Friend:

> "*you can mention that serious retraining will be completed as no one in the front office reports properly or seems to grasp what needs to be reported even when clients ask them specifically how to launder*"

77. On about 7 September, Mr. Boissiere requested staff to provide examples of delayed withdrawals. These were forwarded to Mr. Pusco, to demonstrate alleged delay by Compliance and to explain clients' complaints (emails at p.208-209). These emails were then forwarded to Mr. Friend, by Mr. Pusco (p.210). Mr. Pusco blamed the delays on the Claimant for being off work (see p.207), when the majority of the delays were actually caused by SARs being raised.

78. This was the first time that delayed withdrawals were raised as a problem created by Compliance. This was despite the fact that the Respondent did not challenge before us evidence that the Compliance department did not have adequate resources to work any quicker. We accepted the evidence of Mr. Friend that the number of clients was increasing and that the type of client mean that they were higher risk clients in AML terms, and that they raised more "*red flags*" (as he put it).

79. A meeting took place on 7 September 2017, with Mr. Friend, the Claimant, Alex Pusco and Mr. Boissiere. The Claimant gave as much detail as she could disclose, such as the majority of delays were due to external reports, but also where a delay was caused by Finance. The Claimant was questioned in an irritable way by Mr. Pusco, causing the Claimant to respond with her concerns that the detail should not be shared with parties outside Compliance. Mr. Pusco ignored these concerns and directed the Claimant to involve Mr. Boissiere in every SAR.

80. Mr. Pusco did not act in the manner described because of the Claimant's gender, nor because of the protected disclosure on 1 June 2017. This is evidenced by the fact that his challenge extended to Mr. Friend and across Compliance. Mr. Pusco's actions were driven wholly by a desire for greater profitability, because he had formed the view that Compliance steps were putting sales at risk.

81. After the meeting, the Claimant disclosed to Mr. Friend that she was anxious about unrelated staff, such as the Head of Sales, being involved in the SAR process and the possibility of tipping off, and breach of the SAR regime in general. She stated that she would not be sharing the SAR or any suspicious activity datas with the Head of Sales or any unrelated party because this was a breach of the FCA rules and regulations.

82. The Claimant believed that this disclosure tended to show a breach of the obligations under section 333 POCA and section 21D of TACT against tipping off persons unrelated to the Compliance decision to send a SAR (These obligations are referred to by the Claimant in the response to the FCA request completed in August 2017, p.2476). We accepted her evidence about this, preferring it to the relevant passage of the report by Mr. Gordon, who was not present for cross-examination and whose approach to the matters above of 1 June was unreliable.

83. The Tribunal found that Mr. Boissiere's witness statement introduced a shift in the Respondent's case. He contended that the delays appeared to be the product of inefficiency or inaction by Compliance, and that this could tip off the client. This is not mentioned in the ET3; the Grounds of Response made various allegations including that Mr. Pusco and Mr. Boissiere were concerned that the Claimant's decision-making was "*becoming increasingly arbitrary and may have become a tool that the Claimant was using to exert unfair power over her colleagues."*. We found that Mr. Boissiere's evidence that delays could tip off the client was not reliable; this allegation was never raised in the ET3 and experienced investors would understand the regulatory regime and may well not be surprised by delays which could be caused by usual checks on transactions done by the Respondent (or its competitors) in-house.

84. There was no evidence to support the allegation of exertion of "*unfair power*" (whatever that was intended to mean) referred to in the ET3, which led the Tribunal to question why it was made. In the absence of explanation or evidence, the Tribunal

inferred that this was an attempt to damage the credibility of the Claimant made without any factual basis.

85. Moreover, the Claimant and Mr. Friend understood the need for training to make the Sales Team better at understanding Compliance requirements. This finding is contrary to the Respondent's pleaded case; the Claimant was making attempts to increase understanding, not to exert any power held by her.

86. We accepted Mr. Friend's evidence about the number and type of clients that the Respondent was attracting: the number of clients had increased substantially and the clients were of higher risk. The Respondent had not prepared for this.

87. The Tribunal considered the Claimant's evidence that she had complained to Mr. Friend on 7 September 2017 that, if she was a male MLRO, she would not have been treated in this way by being forced to disclose SAR information. We found that the Claimant was mistaken about this, even though she believed that she made such a statement. Mr. Friend suspected at the time that the Respondent's approach to this matter was due to ingrained sexism; but we found that he formed this view himself, and that there was no evidence from him of such a statement made by the Claimant on 7 September 2017. The Claimant's own evidence (paragraph 43 witness statement) is not clear about what was said to Mr. Friend, although we fully accept that the Claimant did raise with him her concern about unrelated staff, such as the Head of Sales, being involved in the SAR process.

MFID and MFIR

88. Between March and December 2017, the Claimant provided guidance and advice on the implementation of Markets in Financial Investments Regulation ("MIFIR"), which arose from the Markets in Financial Instruments Directive II ("MIFID II"). All teams, and their directors, were informed that MFIR reporting was due to come into force in January 2018: see email 2 March 2017 (p316), which attached a description of the information now required to be collected in the personal data collection area.

89. The Claimant and the Compliance department provided advice on Compliance matters, but were not involved in operational matters. The Claimant was not the project manager for the implementation of MIFIR or MIFID II at any time.

90. Moreover, as demonstrated by the email from Mr. Nikolov, Risk Manager, of 2 March 2017, the Risk Team was managing the project of implementation in March 2017. The Risk Manager did not expect Compliance to collect the data now required, nor did he expect the Claimant to be responsible for this task: see p317. This email asks Compliance for guidance in defining the new fields, for clients to populate with required identification codes. The Claimant replied: see her email 21 March (p315).

91. Subsequently, a project manager, Georgi Stoev, appeared from the correspondence to have taken over the project: see his email 17 May 2017, p.309.

92. The quarterly AML/TCF (Anti-Money Laundering/Treating Customers Fairly) Meeting Minutes, from 6 July 2017, were sent to the Board of the Respondent, including Mr. Draghi. By these minutes, the Board were expressly informed that the new regulatory

rules of MIFID II and MIFIR needed to be implemented by 3 January 2018. These minutes stated that the number of data fields was increasing to 81 (from 23).

93. At the subsequent AML/TCF meeting on 13 October 2017 (minutes p.265-267), the Claimant and Ms. Patel repeated that the implementation date for MFIR and MFID II was 3 January 2018. The Claimant warned that the Sales Team had not obtained the information required for Compliance, and warned that clients who did not provide the information now required would have to have their accounts suspended until the information was provided. Mr. Boissiere disagreed with the comments that the Sales team was responsible. We found that there was a robust exchange of views at this meeting.

94. On 26 October 2017, Ms. Patel was invited into a meeting with Mr. Draghi, Mr. Boissiere and Mr. Gho. Subsequently, the Claimant was invited into the meeting. Mr. Draghi asked what the "LEI issue" was. This related to MIFIR or EMIR (which have the same practical effects because LEI refers to the Legal Entity Identifier required for reporting trades for corporate clients). The Claimant stated that the Risk Team was dealing with implementation of this, and that she was assisting. Subsequently, Mr. Draghi lost his temper and shouted at the Claimant, the gist of his words being that she was meant to be calling clients to collect the data. On responding that it was not part of her Job Description, Mr. Draghi shouted at her again.

95. We accepted the evidence of the Claimant that she was shouted at, which we find corroborated by the interview given by Ms. Patel to Mr. Gordon, and by Mr. Draghi's own interview which stated that the meeting was "*a kind of verbal warning meeting*", despite the fact that the Claimant had no notice of any disciplinary hearing, no written allegation, and despite the fact that Ms. Patel denied this was the case.

96. We found that the Claimant was shouted at because Mr. Draghi was frustrated because of the realisation that the Respondent had not up to that date collected necessary data, and that the project manager for it lay in his team, making it Mr. Draghi's responsibility. The cause of the Claimant's treatment was not the protected disclosures made on 1 June or 7 September 2017, nor her gender. The cause was a knee-jerk reaction from Mr. Draghi, shifting the blame onto the Claimant. This meeting also showed that Mr. Draghi was siding with the Head of Sales, Mr. Boissiere, against the Claimant.

97. The Claimant was very upset and embarrassed by this treatment. On 26 October, she reported what had happened in the meeting to Mr. Friend. We find that she did not state to him that her treatment was because of her gender, because Mr. Friend addresses only the MFIR data collection complaint in his subsequent email response. In any event, there is no evidence that Mr. Friend communicated such a comment to any other member of the Respondent management.

98. The Claimant's call led to Mr. Friend's email in her defence of 27 October 2017, with the relevant email train from p.294ff.

99. Contrary to Ms. Patel's evidence, the Tribunal found that Mr. Draghi wanted to enlist Ms. Patel to do a project manager role in data collection and GDPR implementation work. Mr. Friend blocked this, which is apparent from the reply from Mr. Pusco (p294). We found Ms. Patel's evidence to be unreliable in other respects; there was no detail provided of the alleged failings of the Claimant and Mr. Friend, alleged to cause extra work after they left. It was inconsistent with this evidence that neither Mr. Friend nor the

Claimant had been subject to any form of performance management or performance warning.

100. This email from Alex Pusco is revealing. He does not claim that the Claimant was the project manager at any time. He blamed the Claimant for not having "*raised a flag a while ago when she noticed the project wasn't going anywhere with Georgi.*"

101. Mr. Draghi blamed the Claimant for not instructing the Account representatives to request the data. After the meeting, he told Mr. Friend that the Claimant was a problem and needed to leave.

102. We concluded that there was a failure in communication within the Respondent business as to who was responsible for collecting the data for the MFIR implementation.

103. Mr. Pusco blamed the Claimant specifically for the failure to communicate (not simply the Compliance team): see his email of 29 October (p.307-308). We find that this criticism was unfair and unjustified on the evidence. We found that the fault in the implementation of the MFIR implementation project lay with the Risk Team, which was in reality responsible for operational matters. Ultimately, the responsibility was that of Mr. Draghi.

104. We rejected the findings of Mr. Gordon in his report at p.1457-1460. Once again, he treated the grievance process as an opportunity to target the Claimant's performance. He also alleged serious misconduct. We found his approach to be inconsistent with the purpose of a grievance investigation, where the grievance had been raised by the Claimant, and inconsistent with the absence of any disciplinary proceedings or performance management steps (in contrast to a string of bonuses and pay-rises). Also, we found that certain findings by Mr. Gordon were made on a limited view of the evidence, owing to a lack of proper investigation. For example, he stated that the Claimant made "*excuses*" based on a "*historic and inconsequential email*". This is an inaccurate compression of a number of facts, which when viewed in full justified the Claimant's position. Moreover, certain findings were made without any evidential basis; Mr. Gordon found that the it was "*likely*" that the Respondent had suffered reputational damage by leaving the collection of data so late; but he gathered no evidence to support this finding.

105. Further, Mr. Gordon missed out reference to certain evidence that supported the Claimant's case, such as emails demonstrating that she had explained the requirement of MIFIR and EMIR in March 2017, evidence that the Head of Sales and the CEO were questioning SARs as early as September 2017, and that the Respondent did not take into account of evidence from certain witnesses, such as Tommy Power, AML analyst, and Bhav Patel.

November 2017

106. On 20 November, following a complaint from a client about a delayed withdrawal, Mr. Evangelista, the International Desk Manager, complained to the Head of Sales, Compliance, and the CEO about the delay.

107. The delay was caused by a SAR being submitted to the NCA. On 21 November, Mr. Friend pursued the matter with the Claimant. Subsequently, he gave a response,

explaining that Compliance could do nothing to resolve the case, and by law had to wait (p396).

108. On 21 November, we found that the Claimant did not complain to Mr. Friend that her judgment had been questioned because she was a woman. This is not referred to in her witness statement (where events on this date are covered in paragraph 58), even though we accept that she honestly believed that she had raised this complaint. We note that she felt under a high degree of pressure at the time and had to attend Accident and Emergency ("A and E").

109. After her discussion with Mr. Friend, the Claimant started to have chest pains. The Claimant went to A and E, where she was advised to see her GP and rest. After leaving A and E, the Claimant returned to the office, where she had a further panic attack. Mr. Friend called an ambulance.

110. On the following day, the Claimant had abdominal pains, and went to A and E again. She was advised to see her GP about stress and anxiety at work.

111. On 22 November, there was a Skype conversation between Mr. Friend and Mr. Pusco. We accepted Mr. Friend's evidence and the rationale for the submission of the SAR to the NCA. Mr. Pusco requested to know why a SAR was made. He accused Compliance of "*blocking*" the withdrawal. We found the response of Mr. Pusco in that conversation to be an over-reaction. There was no evidence that there had been anything other than the proper performance of their duties by the Claimant and the Compliance team, who had received an internal suspicious activity report from the Italian desk.

112. Given the complaints that the Claimant had received as MLRO, the Director of Compliance and the Claimant decided to engage an external training provider to conduct training for the CEO and other staff. They met a training company, who prepared a schedule addressing the main issues raised by the Claimant, specifically her concern about unrelated parties requesting information about SARs, and delayed withdrawals and the tipping off risk. This is evidenced by the email at p.421A-B.

113. The Management Engagement exercise with the Respondent's staff included a consensus that the Claimant and Mr. Friend applied regulatory requirements "*too strictly*" in comparison with competitors, putting the Respondent at a competitive disadvantage. (425-426). There was no evidence that the comments elicited in this exercise were ever raised with the Claimant or Mr. Friend, nor evidence of how the contributors would be able to make such a value judgment given the differing nature of clients across competitors.

114. On 27 November, the Claimant saw her GP. She was provided with a sick certificate for two weeks, the stated reasons being stress and anxiety. The Claimant was also referred to a gastroenterologist. However, the Claimant attended work on 28 and 29 November.

Dubai Financial Services Authority scheduled meeting, December 2017

115. In September 2017, the DFSA scheduled a risk assessment of the Respondent's Dubai office for November 2017 (subsequently revised to December 2017).

116. Each such risk assessment in Dubai was handled by the Compliance Director and sometimes the Claimant, together with branch staff. The Claimant had previously drafted regulatory documents and attended meetings with the DFSA. Upon successful completion of the licensing of the Dubai office, and dealing with the regulator, the Claimant was awarded a bonus of £7,500, instead of the usual £5,000.

117. There was a lot of work to do in preparation for the visit in December 2017. The oral evidence of Mr. Friend was corroborated by the contemporaneous documentary evidence (at p.216 and 221).

118. The trip, which was from 30 November to 10 December 2017, was approved by Mr. Pusco for both Mr. Friend and the Claimant in July 2017: see p.189. In September 2017, the Claimant and Mr. Friend were issued with an Event number for accounting purposes by Mr. Pusco's PA. Flights were booked and meetings arranged. The Claimant began preparatory work including ensuring paperwork would be ready.

119. It was apparent from the documents that up to at least 26 September, it was understood by the Respondent that both the Claimant and Mr. Friend were permitted to attend Dubai for the DFSA visit: see Skype conversation at p.221, showing the plan was for them to stay in the Respondent's flat, and the email to Alex Pusco's PA.

120. The Tribunal accepted Mr. Friend's evidence that Alex Pusco changed his mind about whether the Claimant should attend on the work trip to Dubai.

121. We find that Alex Pusco did indicate to Mr. Friend that the Claimant should not attend the assessment in Dubai, but there was no specific instruction to him that she must not attend in any circumstances. Had there been, we find that it is likely that this would have been in writing, because Alex Pusco was reversing an earlier decision.

122. There appears to be no good business reason for Alex Pusco's preference that the Claimant should not attend; the "Tied posts" Policy is no such reason, given that it does not mean what the Respondent contended before us that it meant. We find that Alex Pusco changed his mind because of the complaints about Compliance that had been made about delayed withdrawals (particularly the recent examples alleged to involve the Claimant) and by Mr. Draghi about the Claimant (due to the MIFIR matters set out above). In essence, Mr. Pusco's change of mind was due to targeting of the Claimant for matters which we find that she was not responsible for.

123. The Claimant did not know that Alex Pusco had stated his preference that she should not go on the Dubai visit. Up to 30 November 2017, she knew only that it was still to be decided whether only Mr. Friend would go. We preferred the evidence of Mr. Friend and the Claimant over that of Ms. Patel, because their evidence was more reliable and they impressed us more as witnesses than Ms. Patel. She claimed to have overheard a conversation that they were discussing who would go, because Mr. Pusco had said only one could go, but this was unparticularised and had no corroboration to support it; and, in any event, Mr. Friend accepted in evidence that he decided at short notice that he needed the Claimant to attend and requested the Claimant go with him. Also, we preferred the Claimant and Mr. Friend's evidence over the hearsay evidence of Ms. Gavrilescu in her email of 8 January 2018. We noted that she was the PA to Alex Pusco and would be unlikely, given the evidence of his personality and strength of feeling about the Claimant, to state anything other than the company's line.

124. On 30 November, we found that the demands of his Compliance role meant that it was too much for Mr. Friend to manage the DFSA visit without assistance from Compliance. He had just had a meeting with the Bank of England and a Board meeting. We found that he invited the Claimant to go to Dubai with him because he needed help, despite the fact that she was absent sick. We found that Mr. Friend relied on the Claimant's assistance in respect of Compliance work.

125. Mr. Friend decided, as Compliance Director, that he required the assistance of the Claimant. He asked the Claimant to accompany him on the trip because he had a close working relationship and personal relationship with her. We found that no other employee could do the work required for him.

126. Mr. Friend believed that he had the authority to make this decision. Also, he knew of the Claimant's health and was concerned about it.

127. The Absence Policy provided that an employee could be disciplined if absent sick, but not in fact sick: p701. It does not state that an employee could be disciplined for working when absent sick.

128. We accepted the Claimant's evidence that she took medical advice on whether she could travel. After scans, she was informed that it was safe to do so. The Claimant travelled to Dubai with Mr. Friend.

129. The Respondent's flat was occupied when they arrived. The Claimant went to stay in a friend's flat, and Mr. Friend booked a hotel room.

130. The Claimant worked during the visit as set out in her witness statement, including by preparing the visit report. This is corroborated by the emails that she sent during the period of this visit. We found that she worked from the hotel, using the business centre. She did not attend the office in Dubai, due to her state of health, and there was no need for her to do so, because the DFSA assessment went well.

131. Mr. Gee had produced a document on the morning that he began his evidence, and stated that he had carried out a search on the server, which showed that the Claimant had sent no emails after 30 November 2017, so the Claimant could not have been working on the visit in Dubai. The Tribunal found this evidence to be unreliable. We had difficulty in understanding how Mr. Gee could believe that this evidence was accurate when, on the following day of the hearing, the Claimant produced work-related emails that she had sent over that period: see p.318Nff.

132. Subsequently, the following morning, Mr. Gee alleged that he had spoken to someone in the Information Technology department of the Respondent during the overnight adjournment. He gave hearsay evidence from the unspecified IT worker that the only way that his search of the server could not have found these emails was if the Claimant had deleted them. We found that evidence of Mr. Gee to be unreliable (at best) for the following reasons:

132.1. This evidence was obtained despite the fact that Mr. Gee was giving evidence when he had made the alleged enquiry, and had been warned not to discuss his evidence; when this was raised with him by the Employment

Judge, he said that he was not discussing his evidence because he did not state the purpose for which he wanted the advice from IT. But we found that it was likely that the IT worker would have known that the reason related to this litigation, given that the Claimant had left the Respondent's employment over 12 months earlier. In any event, aside from that, this information was allegedly obtained from a worker or employee within the Respondent, with a view to adducing it in evidence and that this was done in breach of the direction of the Tribunal not to discuss his evidence.

132.2. This was an attempt to give hearsay expert opinion evidence, produced without written evidence of the instructions provided, without the identity or qualifications or experience of the maker of the opinion being identified, and without any warning or notice.

132.3. From the experience of the Tribunal, a reasonable search for emails would have included a record of any that were actually sent, and later deleted.

132.4. In any event, there was no evidence of fact that the Claimant had deleted these emails (and this was never put to the Claimant). We found it unlikely that she had deleted them, because there appeared no reason why she would have done so.

133. We heard that the Respondent suspected that the Claimant had travelled to Dubai with Mr. Friend. Mr. Gee engaged in surreptitious attempts to find out if the Claimant was in Dubai and made surreptitious enquiries of the GP surgery to establish whether the sick certificate was genuine. In effect, this was a covert disciplinary investigation. We were surprised that, as a HR officer, Mr. Gee did not try the most obvious route: by asking the Claimant or Mr. Friend directly.

134. The reason for this failure appeared to be the Respondent's belief that the Claimant had used her sickness as a ruse to travel to Dubai, because, so it believed, she knew that the CEO had not wanted her to attend. We found that this suspicion arose because the Respondent was looking to force the Claimant from the business at this time, due to the perception of the directors in the areas of the business other than Compliance that she was largely responsible for delayed withdrawals and the MFIR implementation issues. As a result, the Respondent was looking for a reason why the Claimant should leave the business. It jumped to the conclusion that she had committed gross misconduct.

135. Mr. Clowes alleged that the Claimant had misled the Respondent by her silence. We find that she did not do this. The Claimant had a close relationship to Mr. Friend at the time of his request that she accompany him on the business trip to Dubai. From the evidence that we have heard – such as evidence that she worked on holiday – the Claimant was conscientious and it is likely that she wanted to help him make the DFSA visit a success when he asked her to accompany him.

136. There were no reasonable grounds for the suspicion that the Claimant had committed gross misconduct. After all, the Claimant did work for the Respondent whilst in Dubai, having been requested to attend by her line manager, Mr. Friend, who had the authority to make such a request.

137. The Tribunal found that the Claimant had committed no breach of contract or misconduct by travelling and working for at least part of the time in Dubai.

138. We accepted the Claimant's evidence that she was prevented from accessing her company email account from about 8-9 December 2017 onwards. In order to access the account, the Claimant had to receive a verification code sent to her mobile phone; she was unable to obtain such a code. It is consistent with the Respondent's misplaced suspicion about the Claimant that steps were taken to stop her from accessing her account on 8 December, which was a date that Mr. Gee called the hotel in Dubai and found that the Claimant was staying there by that time.

139. We found Mr. Gee's evidence to be disingenuous on this issue of email account access. He was asked whether the account was suspended on 8 December 2017. He answered that, as far as he was aware, it was "*available*" from 8 December until 15 December 2017, and blamed local connectivity in Dubai. In one sense, the account was "*available*" since it remained open; but this does not answer the point that the Claimant could not access her account because she was not sent verification codes.

Events after the Claimant's return to the UK

140. On 11 December 2017, the Claimant returned to the UK. The Claimant requested that her absence that day be treated as annual leave. This was refused. This meant that her pay was reduced to Statutory Sick Pay (around £17 per day).

141. The Claimant considered that this was unfair, stating that she had been allowed to do this in other years. The Claimant referred to various alleged comparators, such as one manager who was arrested and kept in custody, during which time his absence was classed as annual leave.

142. As to whether the Claimant was treated less favourably than those other employees, we found that she was treated less favourably than a hypothetical comparator. The Respondent treated each of the cases mentioned by the Claimant of alleged comparators on a case by case basis, such as the manager arrested abroad, but that these were evidential comparators as to how a hypothetical comparator was likely to have been treated.

143. We found, however, that the reason for the refusal to convert the Claimant's sickness absence to holiday was for reasons unconnected to the disclosures relied upon. This treatment was the result of a combination of factors including the Clamant being absent sick and the allegations made against her arising from the MIFID/MIFIR changes.

144. Also, on 11 December 2017, Mr. Pusco instructed the Compliance Team to run internal SARs by him and the Finance Director, Mr. Scarabino, prior to submission to the NCA. This is apparent from the emails at p.508-509. The reasons for this new system were that: the Claimant was absent sick; the Respondent had a misplaced belief that she was guilty of gross misconduct; Mr. Pusco had decided that Sales department concerns were to carry more weight than Compliance concerns, building upon earlier discussions after Compliance were alleged by Sales management to be blocking withdrawals without cause; and Mr. Pusco had formed the view that Mr. Friend and the Claimant would probably be leaving the Respondent.

145. On 12 December, the Claimant attended her GP, was signed off for 2.5 weeks, and was prescribed anti-depressants.

146. On 15 December, the Claimant was invited to a disciplinary hearing. Her email and IT access were disabled by the Respondent.

147. On 19 December 2017, the Respondent completed a Form C informing the FCA that the Claimant had been suspended: see p136.

Recruitment of Mr. Gordon

148. We found that Mr. Gee's evidence was inconsistent with the evidence produced by Mr. Gordon in the introduction to his grievance investigation report. Mr. Gordon stated that he was employed by the Respondent from 13 December 2017. We find that this was correct, because he was likely to know both the start date and the status of his employment. Moreover, Mr. Gee had stated in evidence that he had been through the report and corrected factual errors; this part of the report was not amended.

149. This inconsistency further undermined the reliability of Mr. Gee's evidence as a whole. The Tribunal asked itself why Mr. Gee had sought to conceal the true nature of Mr. Gordon's engagement. Given the above findings of fact, the Tribunal inferred that Mr. Gee had sought to paint Mr. Gordon as an independent grievance officer when in truth Mr. Gordon's view of the Claimant was coloured by the known belief, and probably the instructions, of his employer, Mr. Pusco, that the Claimant was guilty of gross misconduct. We reminded ourselves of the evidence of Mr. Gee that Mr. Pusco was very "*hands on*". From the documents that we saw, we found it unlikely that Mr. Pusco had not raised his beliefs about the Claimant with Mr. Gordon.

150. We found that, by 13 December 2017 at the latest, Mr. Pusco's view had crystallised to a decision that both the Claimant and Mr. Friend would be dismissed. Our reasons are set out below. The form of secret investigation referred to above had been carried out on both by Mr. Gee. We inferred from all the circumstances that the Respondent had concluded that they were both guilty of gross misconduct.

151. The Claimant learned of the appointment of Mr. Gordon and was concerned, because she had been unable to access her emails from about 8 December, and was anxious that an employee not known to her was now performing the CF11 function, whilst she remained under the duty in law as CF11, requiring her to ensure that the Respondent complied with the regulatory framework.

152. We found that, at this point in time, the fact that Mr. Gordon was covering the CF11 function was a detriment to the Claimant, partly for the above reason. In addition, it was a detriment to the Claimant because the Respondent had not told her that she was not returning; and he had been appointed before she was dismissed.

153. Moreover, the Claimant was subsequently informed on 15 December 2017 by text by Ms. Garilescu, office manager, that the staff had been told that neither the Claimant nor Mr. Friend would be returning to work (evidenced by the text at p560D). Other staff contacted the Claimant shortly after this and expressed their commiserations.

154. Mr. Friend had agreed that recruitment of a Compliance Manager was required, in the absence of the Claimant through sickness. But we found it surprising that a Compliance professional was recruited without the input of the Compliance Director, even if Mr. Gordon had a previous working relationship with a non-executive director.

155. Most significantly, perhaps, on 13 or 14 December, Mr. Scarabino rang Tusker, the company that provided company cars to the Claimant and Mr. Friend. This was followed by an email (p318D), sent at 0918 on 14 December 2017, which asked for information for the early termination of their company cars. Mr. Scarabino asked in bold: "**Please keep this information confidential and only communicate it with myself**". This sentence points to the inquiry being a secret one, the inference being that the fact of the inquiry was to be hidden from the Claimant and Mr. Friend.

156. This was followed by a further email correspondence on 15 December. This included from the Tusker employee (at p.318A) at 0947 an email which stated that the exact mileage of Mr. Friend's TESLA had to be obtained to assess the Early Termination charge. The second, to Tusker, stated:

> "*Can't believe these two are getting the boot!x*"

157. A third email from Mr. Scarabino to Mr Gee, copied to Mr. Pusco and Mr. Clowes (at 1247) included the early termination costs. This included the following, with our emphasis added:

> "*Once we **confirm** the early termination to Tusker, they will receive a letter to arrange collection from Tusker to their home address*."

158. The evidence of Mr. Clowes was that no decision to dismiss the Claimant and Mr. Friend had been made at the time of these emails. It was contended by him that the Respondent was making an enquiry so it knew the costs involved if the decision to dismiss was made. We did not accept this evidence, finding it so implausible as to cast doubt on the veracity of other parts of his evidence where it conflicted with that of the Claimant.

159. We inferred from several primary facts that a decision had been taken by the Respondent's Board to dismiss the Claimant and Mr. Friend on or about 12 or 13 December 2017, probably prior to Mr. Gordon's employment commencing. These findings included the following:

159.1. The above facts concerning the early termination of the leased company car contracts. The Respondent's explanation for the emails at p318A-C was implausible; there would be no need to know the exact mileage of Mr. Friend's car if dismissal was only a possibility, and no reason for someone within the Respondent to have stated to Tusker that "*these two are getting the boot*" unless that decision had already been made.

159.2. The inconsistency within Mr. Gee's evidence and the evidence from Mr. Gordon in the first paragraph of the grievance report, referred to above at paragraph 148. We found this was designed to paint Mr. Gordon as independent and to suggest that his appointment did not commence on the date that the decision to dismiss was made.

159.3. On the afternoon of 15 December 2017, the Claimant received the message from the PA of Mr. Pusco, Ms. Gavrilescu, to say that the office had been told that neither the Claimant nor Mr. Friend were coming back to the office (see p.560D) and a message from Mr. Power (Compliance analyst) wishing her all the best in the future (p558A). We did not accept Ms. Patel's evidence that suggested that when speaking to the Compliance Team, she was equivocal about whether they would be returning; we find that she had been told (probably by AG) that they were not returning and that she communicated this to Compliance staff, which is the express point made in the text messages to the Claimant at p.560D and 588A.

159.4. We found that there was no need to employ Mr. Gordon unless Mr. Friend and the Claimant were not going to continue in post; the documents show that the CF11 post can be vacant for up to three months, which would allow for periods of temporary sickness absence.

159.5. Certain findings of Mr. Gordon's report, particularly those which alleged that the Claimant was guilty of serious misconduct or poor performance, lacked credibility. These pointed to Mr. Gordon not being independent, but an employee who was following a direction or, at least, a steer, by his employer to make findings attacking the Claimant's credibility and performance.

159.6. The email from Mr. Pusco to FCA on 19 December 2017, stating that there was a significant prospect that the Claimant and Mr. Friend would not be reinstated to their "former roles", despite the fact that no disciplinary interview or hearing had taken place with the Claimant into her conduct at this point (p.562).

159.7. The fact that Mr. Friend had not been consulted about the appointment of Mr. Gordon.

159.8. The fact that the Respondent had decided that Mr. Friend would no longer be Company Secretary: see email from Mr. Clowes of 14 December 2017, p.524.

Claimant's Grievance 15 December 2017

160. The Claimant lodged a grievance by email at 1044 on 15 December 2017 (p.555-558). This included disclosures of information that she had made breaches of legal obligations or criminal offences, and that she was subjected to direct sex discrimination, together with other women. In respect of the former, the relevant passage is at p.543:

"*SAR Regime and POCA 2002*

On several occasions now my staff and I were asked to disclose external SAR information including the details of suspicions and their existence to unrelated staff such as Head of Sales. I was called into the meeting room with the CEO, Compliance Director and Head of Sales and questioned on the list of the "delayed withdrawals" majority of which were withdrawals awaiting consent at some point.

Furthermore my team has now been informed that they are to send the assessments for potential SARs to the NCA, which would normally be decided upon by me or Compliance director as the DMLRO in my absence, to Director of Finance and the CEO. The requests were to provide the information prior to submission for the CEO and Director of Finance to decide whether the SAR should actually be submitted or not. …

Such requests are not only against the regulations and internal policies but are also in breach of Section 333 POCA 2002 which clearly defines the offence of tipping off. …"

In respect of sex discrimination, the grievance stated that her opinion as MLRO was not sought or respected because she was a woman (p544):

"*Discrimination*

Lastly, numerous times many colleagues and I were witnesses to discrimination towards women. It was mentioned that "women should stay at home and cook" and that women should not be recruited as they fall pregnant. One of the directors even said that "women are meat" whilst drunk at a Christmas party. I am the only female senior manager in the company since the company was formed. Any initiatives from the women in the office are dismissed and the same goes for the initiative Women in Finance.

…

I am therefore sure that the way I am treated now and disrespect of my decisions as an MLRO and as a manager is based on the fact that I am a woman."

161. The Tribunal found that the Claimant reasonably believed that her grievance tended to show breach of legal obligations and/or criminal offences. Specifically, she believed that the disclosures tended to show breach of the obligation not to tip off investors, defined in section 333 Proceeds of Crime Act 2012. We found that belief reasonable in view of her expertise in Compliance matters. Further, she believed that her grievance tended to show breach of the legal obligation not to discriminate against employees because of sex. We found that belief to be reasonable given her experiences and facts described in the grievance, the sexual objectification of women admired by Mr. Pusco in the advert referred to above, and the tendency for Mr. Pusco to go over her head and consult Mr. Friend.

162. In respect of whether the Claimant had a reasonable belief that these disclosures were made in the public interest:

162.1. We found that the Claimant had a reasonable belief that the disclosures tending to show a breach of the anti-money laundering provisions and section 333 Proceeds of Crime Act 2012 were made in the public interest, not merely to set out her case in a grievance. In particular:

162.1.1. The Claimant found that, on 13 December 2017, a new employee (Mr. Gordon) had been placed in her seat and given access to all the Compliance records. This concerned the Claimant because she reasonably believed that no one should have access to certain information, including CF11 materials, without authorisation and relevant checks. In addition to this, she could no longer access her

emails nor take Compliance decisions, yet she knew that parties not within the Compliance team may be involved in the decision-making process that fell within the remit of the Compliance function, such as whether SARs were made. Because of these factors, and because she remained responsible in law to ensure that those responsibilities were discharged as MLRO, the Claimant reasonably believed that the Respondent was likely to breach the legal obligations upon it to report suspected money laundering both in terms of regulatory provision and the criminal law. As a result, the Claimant had a reasonable belief that the disclosure about the breach of the "tipping off" provisions in section 333 POCA 2002 was made in the public interest.

162.1.2. We accepted the Claimant's evidence to the Tribunal's questions in which she explained that compliance, whether by the Respondent or another firm obliged to follow FCA rules, was in the interest of the Public; it was to protect clients. She explained that wrongdoing would impact on clients and the sector in general; and although Compliance was her Job Description, it was not in her personal interest.

162.2. We found that the Claimant had a reasonable belief that the disclosures tending to show discrimination against women were made in the public interest, not merely to set out her case in a grievance. In particular:

162.2.1. The Claimant was setting out that women were treated with less respect by the Respondent – being treated as if a second, lesser, class of person;

162.2.2. The Claimant was pointing out that, on a basic analysis, women appeared to have less opportunities for appointment or promotion to senior positions within the Respondent;

162.2.3. The Claimant was setting out that the sexist culture went so far as to affect the Compliance function of the company. This was because her decisions as MLRO were not respected. We inferred that she believed that this had a potentially negative impact on clients and the effectiveness of enforcement of the anti-money laundering provisions.

163. We accepted the evidence of Mr. Friend about the context in which the Claimant was working by November 2017. Delays within Compliance were the product of the tools and systems that he had assisted in developing, coupled with the fact that the Sales arm of the business had pushed for newer, riskier, business which triggered more SARs.

164. The Respondent's case was that the grievance was made in bad faith, to detract from the fact that the Claimant had been "*caught in Dubai*" as alleged in the Respondent's submissions. The Tribunal found as a fact, taking all the evidence into account, that the grievance, and the disclosures within it, had been made in good faith, without ulterior motive.

165. The grievance also included a disclosure of information that she had repeatedly asked for her sick leave to be recorded as annual leave, which she believed to be her legal right. These requests had been refused. The Tribunal found that the Claimant's belief was mistaken, but the belief was reasonably held because the Respondent had permitted this before, both for the Claimant, when she had been sick, and for both the Claimant and other employees in circumstances where they were absent for reasons other than sickness.

166. The grievance also contained a disclosure that the Respondent had contacted her GP surgery without her consent.

167. We found that the above two disclosures (about recording of sick leave and the Respondent's contact with the GP surgery) were made in the Claimant's personal interest, not the public interest, because the first was related purely to the belief that she had a personal right to convert sick pay to holiday pay; and the second complained that the Respondent's request had aggravated her stress and anxiety.

168. As explained above, on 15 December and subsequent days, the Claimant received messages from colleagues at the Respondent which indicated that it was common knowledge that she would not be returning to work there.

169. The Respondent alleged that the grievance had only been filed after the Respondent had invited the Claimant to a disciplinary hearing. We rejected that argument. We found that the grievance and the invitation basically crossed over; neither prompted the other. Mr. Gee said in evidence that he was drafting the letters between 13 and 15 December 2017. We found the letters were a retrospective attempt from the Respondent to create evidence which would suggest use of a disciplinary procedure, when, in reality, the decision to dismiss had already been made. In any event, the Claimant sent her grievance independently of this charge letter.

170. Mr. Gee forwarded the grievance to Mr. Pusco and Mr. Clowes. The email, headed "Strictly Confidential", states:

> "*Gentlemen, Please see the email below and let me know who else you wish it to be shared with/what action you wish to take from this point…*"

171. This is an unusual response to a whistleblowing grievance, from a HR professional, because the grievance procedure or the whistleblowing procedure of the employer prescribes what action is required after such a grievance is made; whistleblowing complaints would (in the Tribunal's experience) normally be expected to be confidential, and, in any event, what action should be taken is not at the whim of the CEO and Chief Finance Officer. We found that this response from Mr. Gee was evidence which tended to confirm our inference that there was a plan concerning the fate of the Claimant and that the decision to dismiss had already been made.

172. Despite the Claimant's sickness absence, the Respondent did refuse to delay dealing with the Claimant's grievance and the disciplinary process. We found the reason for this, consistent with other evidence, was that the Respondent had already made up its mind that the Claimant would be dismissed.

Submission of Form C to the FCA by the Respondent

173. A Form C (p.136) was signed on 20 December 2017 and sent to the FCA. This contained a statement that the Claimant had been suspended; and contained a declaration that knowingly or recklessly giving the FCA information which was false in a material particular may be a criminal offence (p.139). In fact, from the evidence of the Claimant and Mr. Gee, the statement in the Form C was incorrect. The Claimant was not suspended when this Form was submitted; indeed, the Claimant was sent a letter dated 15 December 2017 stating that she would be suspended when she returned from sickness absence (see p.527). Moreover, this letter did not state that she was suspended from her CF11 role and this was never communicated to her in any form. For example, the email of 9 January 2018 from Mr. Gordon to the Claimant (p.656) states that he is "*temporary cover for [her] CF11*" role, not that she is suspended from her role. We found that she was never suspended from her CF11 role; the Respondent did not do so, and had no need to do so, because it had already decided to dismiss her when Mr. Gordon was appointed. We found the submission that she was suspended from this role was not supported by the evidence. The email of 19 December 2017 from Mr. Pusco to the CFA (p.562) was designed to inform them that Mr. Gordon was to carry out the CF11 MLRO functions (and CF10 functions of Mr. Friend, who was suspended) even though Mr. Gordon did not have Approved Person status.

174. The Tribunal found that Form C did contain information which was, as a matter of fact, false. We found the completion of this form was an act aimed at damaging the Claimant's career prospects, by an attempt to get the FCA to declare that she was not a fit and proper person to hold a Compliance officer/MLRO role. Thus, the completion of the Form C was very much to the Claimant's detriment; and it came after the Claimant's ability to communicate by using her email account with the Respondent was cut off, after Mr. Gordon was placed in her seat carrying out her functions (without reference to her), and after she had learned that staff were told that she was not returning to work.

175. We inferred from the primary facts that the reason that the Form C was completed in this way was because of the contents of the Claimant's grievance. The Form C was completed as it was because of the protected disclosures and the complaint of sex discrimination within the grievance. In particular, the Respondent well knew that the Claimant was not suspended when the Form C was submitted to the FCA; there could be no question of any mistake by the Respondent and none was suggested in evidence. Moreover, the Form C was signed by the Respondent only after the grievance was received, when it could have been signed and sent at some point between 13 and 15 December when the Respondent had already decided to charge the Claimant with gross misconduct.

176. The detriment alleged at issue 7(12) is really further evidence relevant in this set of events, rather than a free-standing detriment on its own. The Claimant contends that the Respondent was paying her SSP, yet alleging that she was suspended (in which case she would have received full pay). This is a further illustration that the Form C was completed in a misleading way.

Failing to provide documents requested as part of the disciplinary process

177. We accepted the Claimant's evidence as to the documents requested and not provided. We noted that Mr. Gee sent some, but not all, of the documents requested. We

found that the delays in disclosing the documents to the Claimant were not connected to the disclosures made by her. We found that the reason that the Respondent delayed was because it did not want the Claimant to have evidence that could be used against it either in the disciplinary process or in Employment Tribunal proceedings.

Alleged breaching of the Claimant's privacy and data protection rights

178. Mr. Gee accepted in evidence that, at various times, he had contacted the Claimant's GP surgery. These contacts were because he was carrying out surreptitious investigation into the Claimant's conduct, as part of the Respondent's theory that she was not in fact ill but was enjoying a trip to Dubai, as the partner of Mr. Friend, at the company's expense. The information obtained was to be used in a case against the Claimant.

179. On about 6 December, Mr. Gee rang the surgery and posed as a potential new patient. It can be seen from the email recording this sent to Mr. Pusco (p453) that suspicion had fallen on the medical certificate provided by the Claimant, and whether it was genuine. What is noticeable from this email trail is that the Respondent were building a case against the Claimant at this time, evidenced by the response from Mr. Pusco (p.453).

180. At p.510, there is correspondence between Mr. Gee and the secretary to the Claimant's GP. The email from Mr. Gee contains a false statement; he claimed to want to know whether the medical certificate produced by the Claimant is genuine, so that the Claimant was not "*financially disadvantaged*", but we find that he was carrying out a surreptitious investigation for a different purpose. To this extent, we find that this enquiry of the GP surgery was a detriment; it would have been unsettling for the Claimant, with her stress-related mental impairment, when she subsequently found out about this enquiry when her GP surgery informed her of it, which was on about 11 December 2017. There were no reasonable grounds, with a factual basis, for Mr. Gee to believe that the private medical certificate was fabricated.

181. We did not find that these actions of the Respondent were the result of disclosures made by the Claimant. Mr. Gee's actions, and the response of Alex Pusco at p.453 ("*Let's add it to the case*") demonstrate how the Respondent had lost its ability to be objective by this stage because of its belief that the Claimant had committed gross misconduct by travelling to Dubai.

182. We have considered the allegation of the misuse of highly sensitive personal data and confidential information, including accessing her personal data on the Respondent's computer.

183. We found that the Respondent was entitled to retain any data (personal or otherwise) held on its computers or drives during the Claimant's employment: see the Claimant's contract at paragraph 4.4 (p.101). Moreover, we heard no evidence that the Claimant's personal files were marked as "confidential" or "private". We accepted the Claimant's evidence as to the nature of the personal data held on her work PC, including highly sensitive personal data.

184. The contract of employment came to an end on 2 February 2018, when the Claimant resigned. The Respondent had no contractual right to retain the Claimant's

personal data after that point. We note that none of the Claimant's sensitive and highly personal data found on her PC has been relevant in these proceedings, and we understand that none is in the Bundle, nor has any been used in other proceedings (the threatened High Court proceedings have not materialised).

Claimant's disclosure to FCA, 19 January 2018

185. On 19 January 2018, the Claimant made a disclosure by email to the FCA (p840-842). This attached her grievance of 15 December 2017 and alleged victimisation by her employer.

186. In this disclosure to the FCA, the Claimant was going beyond merely explaining her position, but included the alleged regulatory breaches referred to in her grievance. Part of the complaint was in essence that she had been victimised for the disclosures made: see, especially, p.841 (top paragraph).

187. We have no doubt that the Claimant reasonably believed that the information and allegations contained within her protected disclosures made within her grievance, and to the FCA, were true. We found, however, that the Respondent did not know at the material times of the Claimant's disclosure to the FCA; in the Tribunal's experience, we would have expected the FCA to keep a whistleblowing complaint, and the identity of the whistleblower, confidential.

Resignation

188. We found that a decision to dismiss the Claimant had been made before her resignation and before any disciplinary proceedings were instigated. In particular:

188.1. On 13 December 2017, the Claimant learned that Mr. Gordon was placed in her seat, and given access to all Compliance records, despite the fact that the Claimant was still the CF11 Officer. This concerned her, because she was responsible for this function, yet the person in her seat was performing it without authorisation from the FCA and making decisions for which she could be liable as MLRO. Moreover, the Claimant had no access to her work email account to access any information or requests sent to her.

188.2. The Claimant learned from colleagues whilst off sick (on 15 December 2017) that she would not be returning to work.

188.3. Ms. Patel's evidence was that, on about 15 December 2017, she was told that the Claimant was not returning.

188.4. The email of 31 January 2018, from Mr. Gee to Mr. Pusco (p.1006) demonstrates that the recruitment exercise was in progress, and Mr. Gee's concern was that recruiting to the Claimant's post would demonstrate that the decision to dismiss had been made already.

189. On 20 December 2017, the Claimant received the letter at p874-875. This alleged that the Claimant had committed gross misconduct. It informed the Claimant that she would be suspended when she returned from sickness, despite the fact that the

Respondent lacked reasonable grounds for the gross misconduct alleged. In response, the Claimant denied the allegation and requested evidence for the alleged misconduct.

190. On 27 December 2017, at Mr. Friend's disciplinary hearing, he stated that he had known that the Claimant was off sick when he asked her to go on the Dubai visit, but he had done so, because, as with earlier visits, he needed her help to prepare, and a specialist had said that she could fly. His evidence was that he acted to protect the Respondent.

191. On about 9 January 2018, the Claimant realised that her job was advertised with at least five recruitment agencies, from end December 2017. She asked the Respondent why her job was being advertised.

192. Further, in the Claimant's absence whilst sick, the Respondent searched through her documents in and on her desk, and on her computer. Thereafter, on 29 January 2018, the Respondent's solicitor sent further accusations that the Claimant had provided false information when completing the Form A and her annual attestations for the company (pp897-991). The letter alleged that "*our client is concerned that [the Claimant] may have committed a criminal offence under section 398 of the Financial Services and Markets Act 2000*". It is significant that the sole reason given for relying on these documents was because of the alleged false information in Form A. On 6 February 2018, Mr. Gordon wrote to the FCA and stated that he had had to access the Claimant's work PC for the purposes of his work, and alleged that he found documents on it showing that her Form A was completed in a false or misleading way (p1106-107). Again, he gave no other reason for the use or retention of the Claimant's personal documents.

193. The Tribunal concluded that the false allegation made on 29 January 2018 that the Claimant had provided false information when completing the FCA Form A caused the Claimant to resign on 2 February 2018. This false allegation was seriously detrimental treatment capable of amounting to a last straw in this case. Moreover, we found that this treatment was capable of amounting to a breach of the implied term of trust and confidence in itself.

194. The Claimant's decision to resign was caused by this treatment. There is no evidence that she had secured a new role when she made the decision to resign; the Respondent invites us to draw this inference, but, on the evidence of the Claimant and the evident hurt that she felt from this false allegation, coming after the treatment that preceded it (including learning that colleagues had been told that she would not be returning) we concluded that the new role had not been secured at the date of, and could not be a cause of, the resignation.

195. Moreover, the Tribunal inferred from the Claimant's subsequent appointment in her new role, and the fact that she now holds CF10 and CF11 functions, demonstrated that the FCA concluded that she had done nothing wrong when she completed her Form A after appointment by the Respondent and that she was a fit and proper person to hold those roles.

Post-termination disclosures

196. By a letter from her solicitors, dated 2 February 2018, the Claimant stated that the Respondent had retained her highly personal data in breach of the Data Protection Act 1998: see for example p.1012:

> "*Furthermore the Company and/or its employee and/or its agents has/have, inter alia, committed very serious breaches of the Data Protection Act 1998, Article 8 of the Human Rights Act 1998, the terms of our Client's (implied and express) contract of employment and the ACAS Code of Conduct*."

197. The letter contains disclosures of information in respect of the alleged data protection breaches: see the first full paragraph on p.1014.

198. This letter contained disclosures of information which in the Claimant's reasonable belief tended to show that the Respondent had breached her rights to have her data protected under Data Protection Act 1998 and her right to a private life under Article 8 ECHR.

199. However, seen in context, the letter of 2 February 2018 is responding to correspondence from the Respondent's solicitors, in which allegations against the Claimant are made. This correspondence is part of the anticipated litigation between the parties. The information disclosed is not made in the public interest, but in the private interest of the Claimant, setting out her position ahead of litigation.

200. The Claimant made a further disclosure of information in writing to the Information Commissioner's Office on 6 February 2018 (p.1104 and p1561), in which she complained of breaches of her data protection rights which she alleged amounted to victimisation for making protected disclosures.

201. We found that the Claimant had a reasonable belief that the Respondent's obligation under DPA 1998 not to retain sensitive personal data, save in circumstances specified in the statute, had been breached. This formed part of an exchange of correspondence between the Claimant and the ICO.

202. We found that this disclosure was made because the Claimant wanted her highly personal data returned or destroyed, in order to protect her privacy (a point made by the Claimant at p.1309) and in order to stop her feeling "*absolutely violated*" (p1309). We found that the Claimant did not have a reasonable belief at the time that this disclosure was made in the public interest; she was making the disclosure in her personal interest.

203. On 26 February 2018, the Claimant made a Subject Access Request (p.1452-1453).

204. The Respondent did not send a substantive response to the Claimant's personal email address, but to her former work email address. This was found by the ICO to be a breach of the data protection principle that personal data held must be accurate and up to date: see p.1737. The Tribunal found that sending this information to the wrong email address was a deliberate tactic by the Respondent because she had made protected disclosures in her grievance, because it was patently obvious the Claimant could not

access this account (Mr. Gee having made sure that she could not access it from early December 2017).

205. On 8 April 2018, the Claimant made a further disclosure of information in writing to the ICO, stating:

> "*The Firm also failed to meet the deadline of the SAR. To date, I have no communication on the matter whatsoever*."

206. We found that when making this disclosure, the Claimant had a reasonable belief that the Respondent had not complied with its obligations under the Data Protection Act 1998 to provide copies of data held by it. Moreover, the Claimant believed that the information provided was true.

207. The Tribunal concluded that the Claimant reasonably believed that this disclosure was made in the public interest, in that it pointed out alleged breaches of the law (part of which complaint was upheld). Also, it was made in an attempt to force the Respondent to comply with its Data Protection Act obligations in respect of her personal data. Moreover, by this stage:

207.1. the Claimant had already put the Respondent on notice of where to get advice about data retention (that is, from the ICO – see her Subject Access Request of 26 February 2018, p.1453);

207.2. the ICO had given guidance to the Respondent about its obligations in respect of data retention (see 26 March 2018 p.1565-1566);

207.3. the Claimant was complaining that the Respondent was acting contrary to that ICO advice.

208. On 13 April 2018, the Claimant disclosed the following to the ICO:

> "*Unfortunately, the only conclusion drawn from this is the same as what I attempted to deliver to the attention of the ICO in all my correspondence. The Firm is acting with no integrity and, as far as I am concerned, is committing serious offences. The named individuals knowingly and deliberately send the emails to the wrong email address and are in breach of the DPA 1998 again*."

209. The content of this email is one of allegation; there is no disclosure of information, such as who sent the emails, when, nor why they did so deliberately.

210. Within the list of issues, the Claimant also sought to rely upon a disclosure in writing to the Respondent's solicitors, made on 8 April 2018. This disclosure was not part of the Claim. In the absence of any application to amend, we treated this disclosure as background evidence only. The substance of this disclosure is set out in the list of issues. It is apparent that it is following up the SAR and alleges breach of the SAR by the Respondent; but this is not made in the public interest, but in the Claimant's personal interest of obtaining documents for use in anticipated litigation.

211. On 6 March 2018, the Respondent provided a copy of the grievance report by Mr. Gordon. We have explained above why we rejected the relevant parts of that report

above as being unreliable, or not credible. Generally, having seen the Claimant in cross-examination and viewed all the documents, we preferred the Claimant's oral evidence of fact to the contents of the report.

Continued holding of personal data after termination of employment

212. We recognise that a data processor may lawfully retain or supply data to a third party where it is necessary to obtain legal advice. The Respondent gave all the Claimant's personal data to its solicitors. The Tribunal found that there was never any factual basis that made it necessary to obtain legal advice about the highly personal matters within the data collected from the Claimant's computer. For example, the data about her former marriage and divorce, her mother, or previous police involvement with her former husband, would not be necessary to obtain legal advice. We noted that on 19 January 2019, the ICO overturned its previous assessment, and concluded that the Respondent had not complied with data protection legislation, by retaining the Claimant personal data (see p.2511). The ICO required the Respondent to delete all information that was "*not being relied upon in order to defend legal claims*". This requirement was repeated on 30 January 2019. However, the Respondent still to this day retains all the Claimant's personal data on a memory stick, held by its data protection officer. The blanket retention of all the Claimant's personal data led the Tribunal to infer that the Respondent had made this wholesale retention for another reason.

213. Whether or not the Respondent had a potential legal right to retain any personal data of the Claimant after the termination of her employment, we inferred that the Respondent retained the Claimant's highly personal data because she had made the protected disclosures, which included the complaints of direct sex discrimination, within her grievance, not because of any potential legal right. Because of those disclosures, and in part because of that complaint of sex discrimination, the Respondent sought to use the retention of such sensitive personal data as a tool against the Claimant, as leverage to try to push her into not pursuing any form of claim against it – whether brought by herself or not. It was not retained for the reasons suggested by the Respondent.

214. The Tribunal could not understand why, in any event, the Respondent decided to keep the type of highly personal data referred to for any legal advice purpose (nor why the Respondent had subsequently failed to obey the ICO's ruling to delete such data) unless its intention was to use it as leverage against the Claimant in the future. We found that this retention would not have happened unless the protected disclosures, and the complaint of direct sex discrimination, in the grievance were made.

215. In summary, we found that the Respondent refused to delete the Claimant's sensitive personal data, including data about her private and family life, after her employment ended, and instead to use it as the tool referred to, because the Claimant had made protected disclosures, and complained of sex discrimination, within her grievance.

Threats of legal action against the Claimant

216. The Respondent instructed solicitors. By a solicitor's letter of 6 March 2018 (p1470), the Respondent accused the Claimant of "*spending a significant amount of time running her eBay account from her work computer during working hours*" and had stored several music files on the system, alleging that 70 were "*downloaded from three illegal download sites*".

217. By a further solicitor's letter dated 13 April 2018, the Respondent threatened to bring a claim in the High Court against the Claimant, in which damages and an injunction would be claimed. The Tribunal found that several allegations within that letter were factually incorrect, and would be known by the Respondent to be factually incorrect. (We emphasise that we attach no blame to the solicitor whom we infer was acting on instructions). These included the following:

217.1. The allegation that the Claimant had no permission to go to Dubai on the trip referred to. We have found that she was invited to go.

217.2. Form A did not contain misleading information, for the reasons that we have set out above.

217.3. The time taken to implement MIFID II and EMIR was not the responsibility nor the fault of the Claimant or the Compliance department.

217.4. The Tribunal found that the Claimant and Mr. Friend did not "*manipulate their travel plans*" to be together.

217.5. The Claimant ran her ebay account from her work computer and spent over 15 weeks looking at internet sites.

218. In contrast to these allegations, we found that: the Claimant and Mr. Friend were required to go on Compliance visits together for the benefit of the business, such as the one to Dubai in November/December 2017; there was no evidence before us to support the allegation that they had travelled together due to their relationship, rather than the needs of the business; and the Claimant was requested to attend by her manager. In respect of the alleged computer misuse, we accepted the Claimant's evidence; our reasons are set out above. Further, a Subject Access Request to eBay was responded to (at p2008), demonstrating no sales recorded on this account. We found that the Claimant was not running an eBay account. Accessing eBay pages was not in breach of the IT Acceptable Use Policy at pp 2084C-E; if there was any such breach, we find that it was relatively trivial, and we heard no evidence to suggest that this Policy was enforced rigorously or at all. We found that the allegation about 15 weeks was a construct; the Respondent had carried out no real investigation nor obtained any report to support its allegation.

219. The Claimant commenced employment with TradeTech Alpha Limited on 26 February 2018. This was not a competitor firm, for the reasons explained by her in evidence; it had only a handful of retail clients and specialised in business to business transactions. We found it likely that the Respondent knew that, and that it would have applied for an injunction immediately if it honestly held the belief that it was a competitor. Moreover, Ms. Patel's contractual terms were the same; when she resigned to move to a competitor, no threat was made to her. We found that there was another reason behind the threat to obtain an injunction against the Claimant.

220. The Tribunal found that this letter, and the threat of an injunction application within it, was created because the Claimant had made protected disclosures in her grievance, because of the complaint of direct sex discrimination within the grievance, and because, by this stage, she had engaged in the ACAS Early Conciliation process (certificate dated

23 February 2018), which suggested to the Respondent that a legal claim was likely to be made. By sending this letter of 13 April 2018, the Respondent hoped to use it as leverage against the Claimant, to stop her pursuing any legal proceedings.

221. Following the Claimant's recruitment by TradeTech Alpha, she needed to submit a further Form A to the FCA, in respect of both CF10 AND CF11 functions. On 29 May 2018, the FCA determined that the Claimant was a fit and proper person to hold these functions. We inferred that, by that date, the FCA had considered all the allegations from Respondent and the information from the Claimant. The inference from its favourable determination is that the FCA rejected the Respondent's arguments on this issue.

222. The Respondent has been told on three occasions that the Claimant's sensitive personal data should be deleted. The Respondent continues to hold onto it; it was admitted that it is still being held by its data protection officer. We accepted Mr. Gee's evidence that it was removed from the Respondent's system on 6 September 2018, and that it is now on a memory stick.

Submissions

223. The Tribunal received detailed written submissions from both parties. Counsel and the Claimant added to their written submissions orally. It would not do justice to either set of submissions to attempt to summarise them here, not least because of their length. It suffices to say that the Tribunal took into account each and every submission, even if we do not address every submission below; to address every submission in a case of this nature would be disproportionate and not assist in providing a clear decision on all the issues.

The Law

Employment Rights Act 1996 Part IVA

Protected disclosures: statutory definition:

224. We directed ourselves to the relevant statutory provisions of the ERA 1996, and considered the statutory wording. We were conscious of the importance of not adding any form of gloss to the statutory wording. We also considered guidance from the appellate courts in a number of cases.

225. For a qualifying disclosure to be protected, it must be made in accordance with any of Sections 43C – 43H: Section.43A ERA. These subsections set out various categories of person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

226. Section 43B(1) includes, where relevant:

> "*In this Part, a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed;*

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) …"

227. We recognised that "disclosure" for the purpose of Section 43B means more than mere communication. It requires a revelation or disclosure of facts: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325 at paragraph 27

228. Section 43B(1) does recognise a distinction between "information" and "an allegation": see *Geduld* at paragraph 20. But we were cautious about approaching *Geduld* as if there was a clear dichotomy between information and allegations. As explained by Mr. Justice Langstaff in *Kilraine v Wandsworth LBC* [2016] IRLR 422 at paragraph 30:

> *"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are 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 it is also an allegation, that is nothing to the point."*

229. Whether the words used amount to a disclosure of information will depend on the context and the circumstances in which they are used: *International Petroleum v Osipov* UKEAT 0229/16.

230. The "wrongdoing" provisions of s.43B(1) were subject to some examination in *Babula v Waltham Forest College [2007] EWCA Civ. 174, [2007] ICR 1026*. As the EAT explained in *Soh v Imperial College* UKEAT 0350/14, the following propositions are well-established:

230.1. The Tribunal should follow the words of the statute. No gloss upon them is required. The key question is whether the disclosure of information, in the reasonable belief of the worker making the disclosure, tends to show a state of affairs identified in section 43B: in this case, that a person had failed to comply with a legal obligation to which he was subject.

230.2. Breaking this down further, the first question for the Tribunal to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second question for the Tribunal to consider is whether, objectively, that belief was reasonable (see *Babula* at paragraph 81). The third question for the Tribunal is whether the disclosure was made in good faith.

230.3. If the first two tests are satisfied, it does not matter whether the worker was right in his belief. A mistaken belief can still be a reasonable belief.

230.4. Whether the worker himself believes that the state of affairs existed may be an important tool for the Tribunal in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure.

Whether and to what extent this is the case will depend on the circumstances.

231. More recently, in *Chesterton Global v Nurmohamed* 2017 IRLR 837, the Court of Appeal held that (with our emphasis added):

231.1. In applying s.43B, the tribunal had to ask whether the worker believed, at the time of making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The tribunal had to recognise that there could be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest; the particular reasons why the worker believed that to be so were not of the essence. While the worker had to have a genuine belief that the disclosure was in the public interest, that did not have to be the predominant motive in making it. There was not much value in providing a general gloss on the phrase "in the public interest": Parliament had chosen not to define it and the intention must have been to leave it to tribunals to apply it as a matter of educated impression (see paras 26-31).

231.2. An approach to public interest which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions. Whether disclosure was in the public interest depended on the character of the interest served by it rather than simply on the number of people sharing that interest. However, it could not be said that mere multiplicity of persons whose interests were served by disclosure could never convert a personal interest into a public interest. The statutory criterion of "in the public interest" did not lend itself to absolute rules, still less when the decisive question was what could reasonably be believed to be in the public interest (paras 35-36). The correct approach was that in a whistleblower case where the disclosure related to a breach of the worker's own contract of employment, or some other matter under s.43B(1) where the interest was personal in character, there might nevertheless be features of the case that made it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question was to be answered by the tribunal considering all the circumstances of the particular case, but it could be useful to consider: the numbers whose interests the disclosure served; the nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (paras 34, 37).

232. The Respondent's submissions cite *Korashi v Abertawe Bro Morgannwg University* [2012] IRLR 4. It is helpful to consider the relevant paragraphs of the judgment, 61-62 (with our emphasis added):

"61. There seems to be no dispute in this case that the material for the purposes of s43B(1)(a)-(e) would as a matter of content satisfy the section. In our view it is a fairly low threshold. The words "tend to show" and the absence of a requirement as to naming the person against whom a matter is alleged put it in a more general

context. What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable".

62. This filter appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. Bringing it into our own case, it requires consideration of what a staff grade O&G doctor knows and ought to know about the circumstances of the matters disclosed. To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistleblower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further information he or she knows about what happened at the table. So in our judgment what is reasonable in s43B involves of course an objective standard — that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."

Detriment complaints under section 47B ERA and the test of causation

233. Section 47B(1) ERA provides:

"*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*."

234. Under section 48(2) ERA 1996 where a claim under section 47B is made, "*it is for the employer to show the ground on which the act or deliberate failure to act was done*".

235. It was common ground that section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: see *Fecitt v NHS Manchester [2012] IRLR 64*. The Court noted this mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.

236. In a detriment claim under section 47B, the test of detriment is that set out in *Shamoon*, explained below.

237. Section 47B(2) ERA precludes a claim of detriment where it amounts to dismissal.

238. The protection conferred by section 47B(2) ERA extends to former employees. The context and purpose of the amendment of the ERA by the Public Interest Disclosure Act 1998 was the protection of workers who made certain disclosures of information in the public interest and the provision of an action if they suffered detriment as a result; it would be palpably absurd and capricious for Parliament to have afforded protection only in respect of acts done by the employer in retaliation while the contract of employment subsisted and not to protect those whose employment had terminated: see *Woodward v Abbey National (no.1)* [2006] ICR 1436.

239. There was no limitation in the statutory wording to protected disclosures made during the relevant employment. Worker and employer were defined in section 230 ERA 1996 as those who were, or had ceased to be, in a contractual relationship of service. Since the detriment had to occur and be causatively linked to the protected disclosure, it followed that it had to come later in time, and, since the detriment could arise post-termination (see *Woodward,* above), there was no warrant for limiting the disclosure to the duration of the employment. It followed that, as a matter of pure construction of the statute, post-termination disclosures might be relied on if they led to detrimental treatment. This is in line with the legislative purpose of protection for whistleblowers and entirely consistent with *Woodward*. See *Onyango v Berkeley* UKEAT 0407/12.

Automatic unfair dismissal: section 103A ERA

240. On a claim of unfair dismissal for making a protected disclosure under section 103A ERA, a tribunal must identify whether the making of the disclosure had been the reason, or principal reason, for the dismissal: *Kuzel v Roche Products ltd* [2008] IRLR 530. What was the set of facts or beliefs operating on the mind of the employer causing it to dismiss is a question of direct evidence or inference from the primary facts.

241. In contrast, whether the disclosure in question was a protected disclosure is a matter for objective determination by the tribunal, to which the beliefs of the decision-maker were irrelevant: *Croydon Health Services NHS Trust v Beatt* [2017] ICR 1240 (post, paras 74–76, 80, 93, 115, 116).

Jurisdictional points

242. Section 48 (3) ERA provides that an employment tribunal shall not consider a complaint under section 48 unless it is presented-

> "*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*."

243. Section 48(4) provides that –

"For the purposes of subsection (3) –

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated a done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

244. In *Arthur v London Eastern Railway* [2007] ICR 193, the following guidance was provided on the application of section 48(3) ERA:

244.1. The aim of s.48(3) was to exclude from the jurisdiction of tribunals any complaints that were not made timeously. In general, a complaint to a tribunal had to be made within three months of the act complained of. However, Parliament considered it necessary to make exceptions to the general rule where an act or failure in the three-month period was not an isolated incident. An act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. The provisions in s.48(3) regarding the complaint of an act that was part of a series of similar acts was also aimed at allowing employees to complain about acts of detriment that were outside the three-month period. However, there had to be a necessary connection between the acts in the three-month period and the acts outside it. The acts had to be part of a series and had to be similar to one another. The last act or failure within the three months might be treated as part of a series of similar acts or failures occurring outside the period and, if it was, a complaint about the whole series of similar acts or failures would be treated as being in time.

244.2. It was not a particularly enlightening exercise to ask what made acts part of a series, or what made one act similar to another. It was preferable to find the facts before attempting to apply the law. In order to determine whether the acts were part of a series, some evidence was needed to determine what link, if any, there was between the acts in the three-month period and the acts outside the three-month period. Even if it was decided that there was no continuing act or series of similar acts, that would not prevent the complainant from relying evidentially on the pre-limitation period acts to prove the acts or failures that established liability. It would in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions.

244.3. It is possible that a series of apparently unconnected acts could be shown to be part of a series or to be similar in a relevant way by reason of them all being done to the claimant on the ground that he had made a protected disclosure (post, paras 39, 41).

245. The burden is on the Claimant to show that it was not reasonably practicable to present the complaints in time. Reasonably practicable does not mean "reasonable" nor "physically possible". It means "reasonably feasible": *Palmer v Southend on Sea BC* [1984] ICR 372.

246. In *Palmer*, May LJ explained that the test was an issue of fact for the Tribunal and gave examples of facts that may be relevant in certain cases: see p.385B-F. This concludes:

> "*Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account*."
> *The Equality Act 2010*

Direct Discrimination

247. Section 13 EA 2010 provides:

> "*A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

248. In *Shamoon*, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

Less favourable treatment and "detriment"

249. The proper test as to whether a detriment has been suffered is set out in *Shamoon* at paragraphs 34-35. It was not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of. In short:

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".*"

Causation

250. If the tribunal is satisfied that the protected characteristic is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong,* paragraph 37.

Discrimination by Victimisation

251. Section 27 provides, where relevant:
"*A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(c) giving evidence or information in connection with proceedings under this Act;

(d) doing any other thing for the purposes of or in connection with this Act;

(e) making an allegation (whether or not express) that A or another person has contravened this Act."

252. The detriment must be "because of" the protected act, but this is not a "but for" test: see *Bailey v Chief Constable of Greater Manchester* [2017] EWCA Civ. 425. Although motivation is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see *R (E) v Governing Body of MR. FRIENDS* [2009] 1 AER 319, approving *Nagarajan v London Regional Transport* [1999] IRLR 572 on this point.

Burden of proof in discrimination cases

253. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

254. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that she has a protected characteristic or has done a protected act: *Madarassy*; *Bailey v Chief Constable of Greater Manchester* [2017] EWCA Civ. 425. In Madarassy, Mummery LJ explained (referring to the predecessor statutory provisions):

> *"57 "Could … conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at*

all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58 The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

255. It is important, however, not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

Constructive Dismissal

256. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

257. The burden was on the employee to prove the following:

(i) That there was a fundamental breach of contract on the part of the employer;

(ii) That the employer's breach caused the employee to resign;

(iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

258. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

258.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

258.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

258.3. Accordingly, a breach of the duty of trust and confidence has two limbs:

258.3.1 the employer must have conducted itself in a manner

calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

258.3.2 that there be no reasonable or proper cause for the conduct.

258.4 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9.

258.5 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

258.6 A breach occurs when the proscribed conduct takes place: see *Malik*.

258.7 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

258.8 In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation: *Wright v North Ayrshire Council* [2014] IRLR 4.

258.9 The facts have a considerable part to play in assessing compensation where there is more than one reason for dismissal. The Tribunal may need to evaluate whether a Claimant would have left employment in any event: see *Wright* at paragraph 32.

259 In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

259.1 The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

259.2 In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F)

259.3 Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

259.4 The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. It's essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

259.5 The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

259.6 The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

259.7 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

259.8 If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

259.9 The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

259.10 Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists

in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

259.11 The affirmation point discussed in *Omilaju* will not arise in every cumulative breach case:

> "*There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).*" (per Underhill LJ).

Unfair dismissal

260 Where there is found to be a constructive dismissal, the Tribunal must go on to consider whether the dismissal is unfair within section 98 Employment Rights Act 1996, as explained in the Respondent's submissions.

261 The burden is on the employer to prove the reason or principal reason for dismissal is a potentially fair reason within section 98(2) ERA 1996.

262 If the employer has shown a potentially fair reason for dismissal, the Tribunal must consider the test of fairness within section 98(4) ERA 1996. The Tribunal must not substitute its view for what is reasonable in the circumstances. The question is whether the decision to dismiss is within the range of reasonable responses open to this employer in the circumstances.

263 The burden of proof on the test within section 98(4) ERA is neutral.

<u>Data Protection</u>

Data Protection Act 1998

264 Personal data means data which relate to a living individual who can be identified from those data: s.1(1) DPA.

265 Sensitive data is defined in section 2 DPA as information including an individual's physical or mental health or condition, sexual life, and alleged commission of any offence.

266 For the purposes of the DPA, the term 'processing' applies to a comprehensive range of activities. It includes the initial obtaining of personal information, the retention and use of it, access and disclosure and final disposal.

267 Under section 1(1) DPA 1998, 'processing' in relation to information, means an operation or set of operations which is performed on information, or on sets of information, such as:

- collection, recording, organisation, structuring or storage;
- adaptation or alteration;
- retrieval, consultation or use;
- disclosure by transmission, dissemination or otherwise making available;
- alignment or combination; or
- restriction, erasure or destruction.

268 The data protection principles are set out in Schedule 1, which begins follows:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4 Personal data shall be accurate and, where necessary, kept up to date.

5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6 Personal data shall be processed in accordance with the rights of data subjects under this Act.

7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

269 The Conditions relevant for the purposes of the First Principle, so far as they apply to personal data, are within Schedule 2; the relevant Conditions in respect of sensitive personal data are within Schedule 3.

270 Schedule 2 DPA 1998 includes:

"The data subject has given his consent to the processing.

2 The processing is necessary –

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary -

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

Data Protection Act 2018 and GDPR

271 The DPA 2018 extends the definition of "processing" to include that within the GDPR. Section 2 incorporates the provisions of the GDPR as to the protection of personal data. It includes at section 2(1):

"(1) The GDPR, the applied GDPR and this Act protect individuals with regard to the processing of personal data, in particular by—

(a) requiring personal data to be processed lawfully and fairly, on the basis of the data subject's consent or another specified basis,"

272 The GDPR prohibits the processing of personal data unless the controller is able to identify an appropriate legal basis for that processing. Article 6(1) of the GDPR sets out six lawful bases for processing. At least one of these lawful bases must apply whenever personal data is processed:

(a) Consent: the individual has given clear consent for the data controller to process their personal data for a specific purpose;

(b) Contract: the processing is necessary for a contract between the data controller and the individual;

(c) Legal obligation: the processing is necessary for the data controller to comply with the law (not including contractual obligations);

…

…

(f) Legitimate interests: the processing is necessary for the legitimate interests of the data controller or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data which overrides those legitimate interests.

273 As explained in the ICO's Guide to the GDPR:

"*Many of the lawful bases for processing depend on the processing being "necessary". This does not mean that processing always has to be essential. However, it must be a targeted and proportionate way of achieving the purpose. The lawful basis will not apply if you can reasonably achieve the purpose by some other less intrusive means.*

It is not enough to argue that processing is necessary because you have chosen to operate your business in a particular way. The question is whether the processing is necessary for the stated purpose, not whether it is a necessary part of your chosen method of pursuing that purpose."

Conclusions

274 A first reserved judgment day was listed for 8 April 2019. Given the voluminous evidence and the number of issues, a further reserved judgment day was required (24 June 2019) to enable the Tribunal to determine all the issues. This could have been avoided by the parties informing the Tribunal after exchange of witness statements that the time estimate was likely to be inadequate, explaining why. The parties failed to allow any time for the Tribunal's deliberation and the formulation of the decision.

275 In any event, applying the above law and the findings of fact to the issues identified by the parties, the Tribunal reached the following conclusions.

Jurisdiction: Issues 18 - 20

276 The Respondent's argument (paragraph 116 written submissions) that all detriments occurring before 31 January 2018 were presented out of time ignores the benevolent effect of section 48(3)(a) ERA – which provides that an act forming part of a series of similar acts will be in time if the last act (or omission) of the series is in time. The Respondent's submissions deal with the jurisdictional questions in a truncated way, failing to cite *Arthur* at all.

277 We noted the guidance in *Arthur* as to the meaning and effect of section 48(3)(a) ERA in contrast to the effect of section 48(4) ERA. At paragraph 31 in *Arthur*, Mummery LJ explained:

"*The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must*

be some relevant connection between the acts in the three-month period and those outside it. The necessary connections were correctly identified by Judge Reid QC as (a) being part of a "series" and (b) being acts which are "similar" to one another."

278 The majority in *Arthur* explained that whether there was a series of similar acts would depend on the circumstances of the case. Put another way, it is a question for the Tribunal.

279 At paragraph 35 of *Arthur*, the Court gave some limited guidance on relevant facts, such as whether there was a connection between perpetrators, and whether they had acted in concert. The majority held that it was possible for a series of disparate acts to form part of a series of similar acts if they were all done on the grounds of a protected disclosure or disclosures.

280 Directing ourselves in law correctly, we reached the following conclusions on whether the Tribunal had jurisdiction to consider the detriments that we found had flowed from protected disclosures:

280.1 The detriment complaint at issue 7(1) was presented outside the time limit within section 48(3)(a) ERA. On the findings of fact at paragraph 94-96, it did not form part of a series of similar acts. There was no evidence that it was not reasonably practicable to present this complaint in time. The Tribunal has no jurisdiction to consider this complaint.

280.2 The detriment complaint at issue 7(2) was not part of the Claim. The Tribunal has no jurisdiction to determine it. In any event, this complaint was not part of a series of similar acts, and was brought out of time.

280.3 The detriment complaint at issue 7(3) was presented outside the time limit within section 48(3)(a) ERA. On the findings of fact (paragraphs 94-105), it did not form part of a series of acts. There was no evidence that it was not reasonably practicable to present this complaint in time. The Tribunal has no jurisdiction to consider this complaint.

280.4 The detriment complaints at issues 7(4) – 7(5) were presented outside the three month time limit within section 48(3)(a) ERA. On the findings of fact, arguably, these formed part of a series of similar acts, but the last of these was in December 2017. Although the Claimant was absent sick by week commencing 11 December 2017, it was reasonably practicable to present these complaints in time, taking into account other steps taken by the Claimant during the primary limitation period. The Tribunal has no jurisdiction to consider these complaints.

280.5 The detriment complaints at issues 7(6) – 7(8) were presented out of time. We accepted that they formed part of series of similar acts of detriment, arising from the Respondent's beliefs about misconduct by the Claimant particularly in travelling to Dubai to assist the Compliance Director. Although the Claimant was absent sick in the weeks leading up to her resignation, it was reasonably practicable to present these

complaints in time, taking into account other steps taken by the Claimant during the primary limitation period.

280.6 Issue 7(9) alleges a failure to genuinely investigate the Claimant's grievance and the protected disclosures within it. We found that the failure to act in this case was probably determined shortly after the receipt of the grievance on or about 15 December 2017. However, we found that it formed part of a series of similar acts. We found that this was part of a series of similar acts, specifically that this failure to act was part of a series of acts and omissions done on the ground of the Claimant's protected disclosures in her grievance. Moreover, it formed part of a series of acts, along with the detriments at issues 8(1) to 8(3), aimed at potentially damaging her earning capacity and discouraging her from pursuing claims against the Respondent. Accordingly, we found that the Tribunal had jurisdiction to consider this complaint, because the detriment complaints at 8(1) and 8(3) were brought in time.

280.7 The detriment complaints at issues 7(10) – 7(11), 7(15)(iii) and 7(15)(vi) were presented out of time. We accepted that they formed part of series of similar acts of detriment, arising from the Respondent's beliefs about misconduct by the Claimant and the decision to dismiss but the last of the series was not in time. Although the Claimant was absent sick in the weeks leading up to her resignation, it was reasonably practicable to present these complaints in time, taking into account other steps taken by the Claimant during the primary limitation period.

280.8 The complaints at issue 7(12) and 7(15)(ii) were presented in time. The detriment would arise each time a deduction of wages is made in the form of SSP, and the last in the series of deductions would be made in time (see paragraph 29 in *Arthur*).

280.9 The detriment complaints at issues 7(15)(iv-v) are in time insofar as they relate to the Respondent's misuse of the Claimant's personal data (and by refusing to delete it) after the termination of her employment. We repeat our conclusions on jurisdiction in respect of issue 8(3) below.

280.10 The detriments at issues 7(15)(vii and ix) formed part of a series of similar acts. This series included those at issue 7(9), 8(1) and 8(3). For the reasons given in respect of jurisdiction for issue 7(9) above, we find that these complaints were made in time and the Tribunal has jurisdiction to consider them.

280.11 The detriment at issue 7(15)(viii) occurred on or about 28 February 2018. It was clearly brought in time. The Tribunal has jurisdiction to determine this complaint. Moreover, this formed part of the series of similar acts referred to in our conclusions on issues 7(9) and 8(1) to 8(3).

280.12 The Respondent's allegations underpinning the detriment at issue 7(15)(x) were not made to the FCA until 5 February 2018 (p1106). This

complaint is therefore presented in time**.** In any event, we found that this formed part of a series of similar acts, which was the same series referred to our conclusions at 7(9) above.

280.13 The post-termination detriments at issues 7(15)(xi)-(xii) and 8(1) (i and ii) are clearly in time, evidenced by the letter from the Respondent's solicitor dated 13 April 2018.

280.14 The detriment of misleading the FCA (issue 7(15)(x) and 8(2) occurred when the Form C was received by the FCA. This would probably have been on or about 20 December 2017 (we found that it was probably sent electronically). Applying section 48(3)(a) and the guidance in *Arthur*, we found that this was part of a series of similar acts, and that this act was done on the ground of the Claimant's protected disclosures in her grievance, and the detriments at issues 8(1) and 8(3), which were designed to give the Respondent leverage against the Claimant, by potentially damaging her earning capacity, and to discourage her from pursuing claims against the Respondent. Further, and in any event, the last in the series of letters from the Respondent to the FCA was dated 5 February 2018. Accordingly, we found that the Tribunal had jurisdiction to consider this complaint.

280.15 The post-termination detriment at issue 8(3) is in time. We concluded that this failure to act was probably decided upon by the date of the relevant correspondence from the ICO, by or about 26 March 2018 (p.1566).

Issue 1: Constructive Dismissal

281 From all the circumstances, the Tribunal concluded that the Respondent, including the CEO, Mr. Pusco, formed the belief, supported by the complaint about Compliance by the Head of Sales, Mr. Boissiere, that the Claimant was, through her performance in her role of Compliance Director, obstructing the completion of deals. This was viewed as misconduct by the Respondent. We refer to the facts at paragraphs 69-86 above, particularly paragraphs 83-84 (noting that the Claimant's decision-making was alleged in the Grounds of Response to be "*becoming increasingly arbitrary and may have become a tool that the Claimant was using to exert unfair power over her colleagues.",* which was an allegation that we found to be untrue)*,* and paragraph 144.

282 We found that the Respondent lacked any or any reasonable grounds for its belief in misconduct: producing examples of delayed withdrawals did not, without more, show any failing by the Compliance Team or the Claimant. Indeed, it was just as consistent with the Compliance Team making proper investigations and reports.

283 There was no real or adequate investigation into the Claimant's conduct or performance (and, certainly, no reasonable investigation) before the Respondent and its CEO formed this belief in misconduct by the Claimant.

284 We accepted Mr. Friend's evidence about the number and type of clients that the Respondent was attracting. These developments were not appreciated by Sales or Mr. Pusco, and consequently no forward planning had been made by the Respondent.

Instead, the Claimant was treated to be at fault due to the fact that she was manager of the Compliance function. This resulted in the Respondent's CEO and Board requiring the Claimant to give information about SARs to employees not related to Compliance, despite the risk that this could lead to clients being tipped-off about the referral, thus potentially frustrating the framework to prevent money-laundering.

285 This matter culminated on or about 22 November 2017, with Mr. Pusco believing that the Claimant was "blocking" the withdrawal without any reasonable grounds.

286 Given that the Claimant held statutory responsibility for ensuring anti-money-laundering procedures were respected (in her MLRO role and as CF11), her treatment in this matter was detrimental. She held a legal responsibility to ensure that the Respondent complied with anti-money laundering regulatory provisions. We found that requiring the Claimant to give information about SARs to persons (such as in Sales) not related to Compliance, was capable of being part of a sequence of events entitling her to resign, if it did not amount to a breach of the implied term of trust and confidence in itself.

287 Further, the Respondent blamed the Claimant for the delay in implementing MFID and MFIR despite the fact that the operational side of the implementation was supposed to be dealt with by a project manager in the Risk Department. We refer to our findings at paragraphs 88 to 105 above.

288 Although the Claimant was shouted at by Mr. Draghi in the meeting on 26 October 2017 by way of a form of disciplinary sanction ("*a kind of verbal warning*"), there were no reasonable grounds for blaming or warning the Claimant. This treatment was capable of forming part of a sequence which destroyed the relationship of trust and confidence, not least because the Claimant was Head of Compliance across the business and had been shouted out in front of her subordinate and directors, without any reasonable cause.

289 In respect of the Compliance visit to Dubai in December 2017, on learning that the Claimant was in Dubai, the Respondent jumped to the belief that the Claimant was guilty of gross misconduct by travelling to Dubai with the Compliance Director, when she was supposed to be absent sick, without any proper or adequate investigation.

290 As we have explained, the Respondent's belief was that the Claimant had used her sickness as a ruse to travel to Dubai, because, so it believed, she knew that the CEO had not wanted her to attend. We found as a fact that this suspicion arose because the Respondent was looking to force the Claimant from the business by this time, due to the perception of the CEO and the directors in the areas of the business other than Compliance that she was largely responsible for delayed withdrawals and the MFIR/MFID implementation issues. As a result, it jumped to the conclusion that was most convenient for it - namely that she had committed gross misconduct.

291 This conclusion was reached before any proper or adequate investigation was made, demonstrated by Mr. Gee making surreptitious inquiries of the Claimant's GP Surgery, but not seeking to interview the Claimant or Mr. Friend directly. This was not a professional approach to an investigation, nor was it fair. Any investigation should have been looking for exculpatory evidence as well as evidence of misconduct.

292 There were no reasonable grounds for the belief that the Claimant was guilty of gross misconduct or breach of contract by travelling to Dubai. We have found, as facts,

that that she did not know that Mr. Pusco had stated that she should not go on the visit, that she went on the visit at the request of the Compliance Director in order to assist him (despite the fact that he knew she was due to be absent from work due to ill-health), and that she worked for the Respondent whilst she was there. We refer to our findings at paragraph 117 to 139 above.

293 The Tribunal repeats the detriments to the Claimant set out in its findings of fact at paragraphs 138 – 139 (prevented from access to her email account), 144, 151 – 152 (her replacement by the employment of Mr. Gordon), 153 (staff members indicating that they had been informed that the Claimant had been dismissed), 190 (the letter charging her with gross misconduct), and 192 (her job being advertised whilst she was still in post).

294 The Tribunal concluded that the false allegation made on 29 January 2018 that the Claimant had provided false information when completing the FCA Form A was detrimental treatment capable of amounting to a last straw in this case and also capable of amounting to a breach of the implied term of trust and confidence in itself – and thus an entirely new bale of straw, applying the analogy used by the Court in *Kaur*. We found that this action was calculated to, or (at least) very likely to, destroy the relationship of trust and confidence necessary for any employment relationship. In reaching this conclusion, we noted that this was a serious allegation, which potentially had consequences for the career (or career progression) of the Claimant, particularly for any role sought in which she may have had dealings with the FCA.

295 Given all the above points, the Tribunal concluded that the Respondent breached the implied term of trust and confidence on 29 January 2018.

296 In all the circumstances, the breach of the implied term of trust and confidence caused the Claimant to resign on 2 February 2018, thereby causing the dismissal in law.

297 In these circumstances, we found that there was no waiver of the breach of the implied term nor affirmation of the contract of employment.

298 Given our conclusion that the repudiatory conduct of the employer was the sole cause of the dismissal, we did not need to consider the effect of *Wright v North Ayrshire Council* [2014] IRLR 4. We found that the Claimant's case as to why she resigned was consistent throughout, which was that it was due to the conduct of the employer; and this case was corroborated by the words of her complaint to the FCA. In contrast, the Respondent put forward two bases to explain why the Claimant resigned (a new job and to avoid a finding of gross misconduct); and the Tribunal rejected both that the Claimant was guilty of any misconduct and that she resigned because of a new role.

299 The Respondent relied upon *Atkinson v Community Gateway Association* [2014] IRLR 834, at paragraph 34. But given the above conclusions and the findings of fact, demonstrating that the Claimant did not breach the implied term of trust and confidence, the passage relied upon was not relevant.

Issue 2: What was the reason for dismissal? Was there an automatically Unfair Dismissal pursuant to section 103A ERA 1996?

300 As we have explained above, we found that the Claimant was blamed without reasonable (or any) grounds due the difficulties experienced with clients by the Sales

team over delayed withdrawals and due to difficulties over the implementation of MFID and MFIR.

301 We have concluded, however, for the reasons set out in our findings of fact and within our conclusions at Issue 1 above, that the reason or principal reason for the breach of the implied term of trust and confidence (leading to the constructive dismissal) was not one or more protected disclosures. Accordingly, the complaint of automatic unfair dismissal under section 103A ERA is not upheld.

302 We have also concluded that the dismissal was not because of the Claimant's sex. The breaches of her contract of employment, including the repudiatory breach or last straw of 29 January 2018, were not influenced by her sex.

303 As we have explained in our findings of fact, and our above conclusions, the repudiatory breach entitling the Claimant to resign was not made by the Respondent because of a protected disclosure by the Claimant.

Issue 3: Section 98(4) ERA: Was the constructive dismissal fair or unfair?

304 Although the Respondent believed that the Claimant was guilty of gross misconduct, in respect of the trip to Dubai, this was a belief which was not based on reasonable grounds, nor any reasonable or proper investigation. It was a reaction fed by the CEO's desire to see the Claimant removed from the business given the complaints made against her.

305 Further, we concluded that there was no genuine belief that the Form A had been falsely completed.

306 A decision to dismiss the Claimant had been made by the Respondent well before the resignation: see our findings at paragraph 159 above. There was no procedure of any sort applied prior to this decision to dismiss being made.

307 We concluded that the constructive dismissal was not within the band of reasonableness. We find that the Respondent had acted in such a way as to destroy the relationship of trust and confidence.

308 The Respondent had made no attempt to comply with the ACAS Code of Practice on Disciplinary matters before reaching its decision to dismiss. It acted so as to destroy the relationship of trust and confidence without any reference to basic procedural safeguards such as a fair investigation or a fair hearing before reaching its conclusions.

Issues 4-6: Protected Disclosures

309 We concluded that the Claimant did make certain protected disclosures both prior to her constructive dismissal and after her dismissal.

310 We agree with Ms. Mayhew's submission that the Claimant was an "insider", as a Compliance professional and FCA Approved Person. Also, we accept and apply the EAT guidance in *Korashi*. As an "insider", the Claimant's insight entitled her views to respect. The test is what was her reasonable belief, and that belief must be subject to what a person in her position (Head of Compliance and CF11) would reasonably believe to be

wrongdoing. We found that, in respect of each disclosure that we found was made, the Claimant held a reasonable belief of one of the matters within section 43B(1) and that many of her disclosures were made in the public interest, as set out in the findings of fact.

311 Despite our conclusions in respect of jurisdiction, by which several complaints must fail, we have decided to set out our conclusions on each of the issues to assist the parties to fully understand our reasons.

312 Our conclusions on issue 4 are as follows.

Issue 4.1: 1 June 2017

313 The Respondent admitted that, if this conversation took place as alleged, it was accepted that the information disclosed was information which fell within section 43B(1) ERA. But the Respondent contended that the Claimant lacked the requisite reasonable belief.

314 From the Claimant's evidence, and the reaction of Mr. Friend and Mr. Scarabino to Mr. Pusco's request, the Claimant believed that her disclosure to Mr. Friend on 1 June 2017 tended to show breach of a legal obligation in the form of the Capital Adequacy rules set by the FCA in the IFPRU part of the handbook, and potentially, attempted fraud (in that this account could be used by Mr. Pusco to balance the risk of exposure, amounting to a deliberate misrepresentation of the actual financial state of the Respondent), or that such matters were likely to be deliberately concealed by the act of her opening a personal account for Mr. Pusco in a confidential way.

315 We inferred from the facts that her belief was reasonable. The fact that her belief was reasonable is corroborated by the conversation that followed between Mr. Friend and Mr. Scarabino described at paragraphs 53 to 55 above. We rely, in particular, on our findings of fact at paragraphs 58 to 66 above.

316 We have considered *Korashi*. In the present case, the fact that the Claimant was a Compliance professional did not mean that she did not hold the requisite reasonable belief. It is clear from the evidence, including the discussion between Mr. Friend and Mr. Scarabino after the request was made, that any competent employee in the Claimant's CF11 role would have seen this request as inappropriate and suspicious. Set in its proper context, and not the Respondent's implausible version of events, such a belief was entirely reasonable.

317 We do not accept the Respondent's submission that the disclosure was not in the public interest, nor that the Claimant was approached about how to carry out an action within the parameters of the Respondent's policies or the FCA rules.

318 We concluded that the Claimant had a reasonable belief that the disclosure was in the public interest. The disclosure went far beyond her interest as a Compliance Manager. There was potentially client money at risk if the provisions concerning the capital adequacy of the Respondent were avoided. Further, there was a public interest in upholding the FCA regulatory framework, in part to maintain a credible financial system.

Issue 4.2(a) – 7 September 2017

319 The Tribunal repeats its findings of fact set out above at paragraphs 79-87.

320 The Tribunal considered whether the disclosure made was a disclosure of information, or an allegation. We concluded that it was a disclosure of information, albeit wrapped within an allegation. The Claimant disclosed that the Respondent was breaching the FCA regulation against tipping off.

321 We concluded that the Claimant reasonably believed that this disclosure tended to show a breach of a legal obligation.

322 The Tribunal considered the guidance in *Chesterton Global*. We concluded that the Claimant made this disclosure in the public interest. It was in the public interest for her to comply with the duties imposed on her by the FCA and POCA to avoid the risk of tipping off, to further the prevention of the risk of money laundering of funds illegally raised. The disclosure was not made simply because it was in her interest not to be criminally liable.

323 The Tribunal reminded itself that the requirement that disclosures must be reasonably believed to be made in the public interest in order to be protected should not be converted into a trump card for financial firms when public interest disclosure complaints are brought by Compliance professionals. The facts of cases will vary. We noted that when the Employment Rights Act 1996 was amended to include Part IVA, and which was amended in 2013, Parliament did not decide to distinguish classes of professional who did not qualify for protection.

Issue 4.2(b) – 21 November 2017

324 The Claimant did not lead any evidence about a protected disclosure on this date. We found this allegation was probably included in error.

Issue 4.2(c) – 11 December 2017

325 The Claimant did not lead any evidence about a protected disclosure on this date. We found that no protected disclosure was made on this date.

Issue 4.2(d) – 15 December 2017 (allegation within grievance of being asked to disclose SAR information to others)

326 The grievance included disclosures of information. Our reasons are set out in the findings of fact at paragraphs 160 – 164 above.

327 We also found as a fact that the Claimant reasonably believed that the disclosures in respect of breach of the anti-money laundering provisions, by being required to disclose SAR information to staff unrelated to Compliance, including the Head of Sales, were made in the public interest for the reasons set out in paragraph 162.

328 We accepted the Claimant's evidence on this point. We concluded that the adherence to Compliance rules by the Respondent firm was in effect to comply with FCA rules which were made in the public interest to protect clients and uphold laws. It was

reasonable for the Claimant to form the belief that any wrongdoing could impact on clients of the Respondent but, more particularly, have an adverse impact on confidence in the financial sector as a whole and enable criminals to launder money which was from illegitimate sources, which would be likely to affect the interest of the wider public.

Issue 4.3(a) – 7 September 2017 (allegation of disclosure of sex discrimination)

329 The Tribunal repeats the findings of fact at paragraph 87 above. We find that no such disclosure of information was made on this date.

Issue 4.3(b) - 26 October 2017 (allegation of disclosure of sex discrimination by being shouted at)

330 The telephone call made by the Claimant to Mr. Friend contained a disclosure of information, specifically that she had been shouted at by Mr. Draghi in a meeting, in front of Ms. Patel, a subordinate.

331 This disclosure, however, did not tend to show one of the matters within section 43B(1).

332 Moreover, this disclosure was not made in the public interest. It was made in the interest of the Claimant, who was personally targeted for criticism within the meeting of 26 October.

Issue 4.3(c) – 15 December 2017 (allegation of disclosure of sex discrimination within grievance)

333 The grievance included disclosures of information. Our reasons are set out in the findings of fact at paragraphs 160 – 164 above.

334 We also found as a fact that the Claimant reasonably believed that the disclosures in respect of sex discrimination were made in the public interest for the reasons set out in paragraph 162.2 above.

335 The Respondent did not dispute that the grievance contained protected disclosures, limited to the disclosure about sex discrimination, but that this disclosure or disclosures were made in bad faith. We rejected this argument, for the reasons set out in paragraphs 164 and 169 above.

Issue 4.4 – Grievance in relation to not being able to convert sickness absence to holiday and the Respondent allegedly contacting the Claimant's GP without her permission

336 We repeat our findings of fact at paragraph 165 – 167 above.

337 The Claimant did make the two disclosures of information alleged.

338 However, we found that these disclosures were made in her personal interest, rather than the public interest, for the reasons explained in paragraph 167.

Issue 5

339 It was not contended by the Respondent that it could not be found liable for detriments arising from post-termination protected disclosures; and the Tribunal has directed itself in law by applying the principles in *Onyango v Berkeley*. We concluded that the facts in this illustrated why the law was required to be wide enough to protect former employees such as the Claimant in this case. In this case, the Claimant was forced to make further protected disclosures (such as to the ICO) because of detriments suffered as a result of protected disclosures made during her employment.

340 We found that although the Claimant did make post-termination protected disclosures, but these did not have a material influence on the detriments relied upon.

Issue 5.1: to the FCA on 19 January 2018 (attaching her grievance of 15 December 2017)

341 Despite its categorisation in the list of issues, this was not a post-termination protected disclosure.

342 We have explained at paragraphs 160-162 that certain disclosures of information contained within the grievance were made in the public interest and were protected disclosures. These were disclosures which the Claimant believed tended to show breach of the obligation not to tip off investors, defined in section 333 POCA 2012 and breach of the obligation not to discriminate against employees because of sex, within section 13 EA 2010. We found that the Claimant's beliefs were reasonable in the circumstances, given her knowledge and experience as Head of Compliance.

343 We concluded that they were protected disclosures made in the public interest when repeated to the FCA by the Claimant on 19 January 2018. (findings of fact at paragraphs 185-187 above).

344 In this disclosure to the FCA, the Claimant was going beyond merely explaining her position, but included the alleged regulatory breaches referred to in her grievance. Part of the complaint was in essence that she had been victimised for the disclosures made: see, especially, p.841 (top paragraph).

345 The Claimant reasonably believed that the disclosures made within her grievance, and to the FCA, were true. Further, we concluded that they were made in good faith.

346 We concluded that the disclosures to the FCA were qualifying disclosures made to a prescribed person within section 43F ERA. We do not accept that these disclosures to the FCA were "*general employment related grievances*" as the Respondent submitted.

347 The Claimant reasonably believed that the subject matter of these disclosures fell within the remit of the FCA, and reasonably believed that the information and allegations made relevant to regulatory breaches were substantially true.

348 As we have noted, the Claimant was a Compliance professional. The Claimant was able to explain in evidence why the information disclosed concerning regulatory breaches relevant to the FCA's remit and powers was substantially true and demonstrated that her belief that her disclosures fell within the FCA's remit was reasonable.

349 As we have explained in paragraph 187, however, the Respondent did not know of the protected disclosure to the FCA at the date of the detriments relied upon.

Issue 5.2: to the Information Commissioner's Office on 6 February 2018

350 Part of the substance of this disclosure (or disclosures) is set out in the List of Issues. The Claimant's complaint to the ICO is at pp.1104 and 1561 in which she complained of breaches of her data protection rights which she alleged amounted to victimisation for protected disclosures.

351 We concluded that all the disclosures to the ICO (including those considered under issue 5.3) were qualifying disclosures made to a prescribed person within section 43F ERA.

352 The Claimant reasonably believed that that the information disclosed to the ICO was true.

353 However, in our findings of fact (at paragraphs 200-202), we found that this disclosure was made in the Claimant's personal interest, even though we accept that she believed that it was made in the public interest. It was not made in the public interest, but in the Claimant's personal interest. We noted that the four factors set out in *Chesterton Global* at paragraphs 36 and 37 were not present. If such a disclosure were held to be in the public interest, we found that most disclosures to public bodies would also be in the public interest, which we decided was inconsistent with the careful wording and structure of this part of the ERA 1996. Accordingly, we concluded that this disclosure was not a protected disclosure.

Issue 5.3: through her solicitor and by herself to Respondent's solicitor, Respondent and the ICO

354 As we have explained in our findings of fact at paragraphs 198-199, the disclosures made by the Claimant and her solicitor in correspondence to the Respondent and its solicitor is part of anticipated litigation. The information disclosed is not made in the public interest, but in the private interest of the Claimant, setting out her position ahead of litigation.

355 As we have explained at paragraphs 205-207, we found that the Claimant made a disclosure of information to the ICO on 8 April 2018, which tended to show that the Respondent had breached its obligations to comply with the Data Protection Act 1998. This relevant disclosure ("*The Firm also failed to meet the deadline of the SAR. To date, I have no communication on the matter whatsoever")* was not merely an allegation. Taking account of *Kilraine*, the disclosure had sufficient factual content and specificity to amount to a disclosure of information.

356 We concluded that, by this disclosure of 8 April 2018, the Claimant was not raising purely personal matters, but bringing to the attention of a relevant Regulator that there was a breach of the system of regulation, by the Respondent's failure to obey the regime applying to those holding personal data.

357 We found that this was made in the public interest. We concluded that this was a protected disclosure.

358 We concluded that the other disclosures relied upon by the Claimant under this issue were not protected disclosures, as explained in the findings of fact.

Issue 6

359 The conclusions dealing with issues 4 and 5 incorporate our conclusions in respect of issue 6, where necessary.

Issues 7-9: Detriments under section 43B ERA 1996

360 For completeness, we have provided our conclusions on each alleged detriment.

361 As we have explained in our findings of fact, the Respondent did subject the Claimant to various detriments. We have considered each alleged detriment in turn and considered whether the reason that the Claimant was subjected to it was materially influenced by the fact that the Claimant had made a protected disclosure. In other words, we have combined our conclusions on issues 7 and 9, and issues 8 and 9.

Issue 7(1)

362 The treatment set out at issue 7.1 was a detriment to the Claimant. Our findings of fact are at paragraphs 94-96 above. There was no reason at all to justify why the Claimant should have been subjected to the "*kind of verbal warning*" made by Mr. Draghi shouting at her, in front of her subordinate and other directors. Any employee in the Claimant's position would have considered this action to be a detriment.

363 However, we concluded that this detriment was not materially influenced by the protected disclosures made on 1 June or 7 September 2017. We repeat the findings of fact at paragraph 96 above: Mr. Draghi shouted at the Claimant because he was frustrated, because of the realisation that the Respondent had not up to that date collected necessary data, and that the project manager for it lay in his team, making it his own responsibility.

Issue 7(2)

364 The treatment set out at issues 7.2 was not pleaded in the Claim.

Issue 7(3)

365 The treatment set out at issues 7.3, accusing the Claimant of non-existent wrongdoing in relation to MFIR reporting, was a detriment to the Claimant. She reasonably believed that her treatment was to her detriment. Our findings of fact are at paragraphs 94 - 105 above.

366 However, we concluded that this detriment was not materially influenced by the protected disclosures made on 1 June or 7 September 2017.

Issue 7(4)

367 The treatment set out at issue 7.4 was a detriment to the Claimant. Our findings of fact are mainly at paragraphs 69-87, 99-103, 111 and 144 above.

368 Applying the definition of detriment within *Shamoon*, we consider that a reasonable worker in the Claimant's position as MLRO and CF11, would view the questioning of the Claimant and/or her team in respect of SARs, and requiring the disclosure of SAR information to unrelated staff, the Head of Sales and Finance Director, as a detriment. In particular, a Compliance officer in the CF11 role has a legal duty to disclose whether they know or suspect, or have reasonable grounds for doing so, that a person is engaged in money laundering; moreover, the Compliance team and the CF11 role-holder must not act so as to tip-off clients about investigations or SARs.

369 We concluded that the Head of Sales and the Finance Director were staff who were not part of the Compliance function. They were not directly related to it. The effectiveness of the Compliance function, and the duty not to tip-off clients, would potentially be compromised if those with customer relationships to maintain knew of SARs.

370 However, we concluded that this detriment was not materially influenced by the protected disclosures made up to the grievance of 15 December 2017.

Issue 7(5)

371 The treatment set out at issues 7.5 was a detriment to the Claimant. Our relevant findings of fact are at paragraph 144 above. Even though the Claimant was absent sick on the 11 December 2017, we concluded that, applying *Shamoon*, this was to her detriment. The Claimant was the head of the Compliance team; she had a deputy in place (Ms. Patel) and a Compliance director above her. A reasonable worker in her position would take the view that in these circumstances, there was no reason to depart from the usual procedure where the Compliance team made an independent decision on whether to investigate or refer. After all, as the CF11 Officer, the Claimant remained responsible in law for such decisions made in the Compliance area.

372 As we explain in our findings of fact, however, the reasons for the actions of the Respondent in respect of this issue were not influenced by the protected disclosures made earlier in the year. On 11 December 2017, Mr. Pusco instructed the Compliance Team to run SARs by him and the Finance Director, prior to submission to the NCA for the following reasons: the Claimant was absent sick; the Respondent had a misplaced belief that she was guilty of gross misconduct; and Mr. Pusco had decided that the Sales department concerns were to carry more weight than Compliance concerns, building upon earlier discussions after Compliance were alleged by Sales management to be blocking withdrawals without cause.

Issue 7(6)

373 The Tribunal found as a fact that the Claimant's access to her work e-mails was prevented from about 8-9 December 2017. We rejected the Respondent's case that this did not happen until 15 December 2017 for reasons given in paragraph 138-139 above.

374 We found that this treatment set out at issue 7.6 was a detriment to the Claimant. A reasonable worker in her position, who was responsible for ensuring anti-money laundering provisions were complied with, would view such treatment as detrimental, even if she was absent sick at the time.

375 We concluded, however, that the reason for this treatment was the Respondent's belief that the Claimant was guilty of gross misconduct; it had nothing to do with the protected disclosures alleged up to 8 December 2017. Moreover, any protected disclosures made on 11 December 2017 or within the grievance of 15 December could not have had any effect on this decision (which was taken before these dates).

Issue 7(7)

376 A reasonable worker would or might take the view that failing to provide documents that the Claimant had requested as part of the disciplinary process was a detriment to the Claimant.

377 We concluded, however, that the reason for this treatment had nothing to do with the protected disclosures alleged up to that time. We repeat our findings of fact at paragraph 177 above.

Issue 7(8)

378 The treatment set out at issue 7(8), allowing access to the information within the Claimant's remit as holder of the CF11 function, and without the Claimant's knowledge, would or might be viewed as a detriment by a reasonable worker.

379 Our findings of fact include, at paragraphs 151, 152 and 188.1, that this concerned the Claimant because she remained legally responsible for this controlled function, and a person unknown to her was making decisions for which she could be criminally liable as MLRO.

380 The submissions at paragraph 99 of the Respondent's closing submissions do not reflect the evidence heard by this Tribunal; no witness suggested that junior employees in Compliance requested that Mr. Pusco, Mr. Scarabino or Mr. Boissiere stepped into a Compliance role.

381 In terms of causation, however, we concluded that this treatment was not materially influenced by any protected disclosure made prior to 13 December 2017.

Issue 7(9)

382 We concluded that there was a failure to genuinely investigate the Claimant's grievance and the protected disclosures within it. We repeat our relevant findings of fact, particularly at paragraphs 60-65, 148 – 149, 170 - 171 and 104-105. Such treatment would be viewed by a reasonable worker as a detriment.

383 We concluded that this treatment of the Claimant by the Respondent was materially influenced by the fact that she had made the protected disclosures and complaints of sex discrimination set out in her grievance, albeit that those matters were

not the only cause of the treatment. An additional cause of this particular detrimental treatment was the Respondent's belief that the Claimant was guilty of gross misconduct.

Issue 7(10)

384 The list of issues refers to a refusal to delay the Claimant's disciplinary process (although the Respondent believes that the list is inaccurate and should refer to the grievance of 15 December 2017). In fact, as shown by paragraph 48.1 of the Claim (p.23), the Claimant complained that the Respondent refused to delay both the disciplinary process and the grievance process despite her illness.

385 A reasonable worker would or might view this treatment set out as a detriment to the Claimant.

386 However, we found that this decision (or decisions) was not materially influenced by the protected disclosures made by the Claimant up to this point. Our findings of fact are at paragraph 172 above. In short, the reason for the refusal to delay both processes was that the decision to dismiss had already been made.

Issue 7(11)

387 We concluded that a reasonable worker would or might find that initiating a recruitment process for a replacement for the Claimant, prior to informing her that the decision to dismiss had been made and giving her notice of dismissal, was a detriment.

388 We concluded that this treatment was not influenced in any way by any protected disclosure up to the time of the employment of Mr. Gordon. We concluded that the recruitment process was initiated because at that time the Respondent believed, unreasonably, that the Claimant was guilty of gross misconduct.

Issues 7(12) and 7(15)(ii)

389 The treatment set out at issue 7(12) (paying SSP yet claiming suspension) was not a detriment to the Claimant. It was in reality further evidence relevant to issue 7(14) and the facts found at paragraphs 173 to 175 above.

Issues 7 (13) and 7(15)(i)

390 We concluded that a reasonable worker would be unlikely to view the refusal to treat sickness absence as annual leave as a detriment.

391 In any event, we concluded that, at the time of this treatment, the Respondent was not materially influenced by any protected disclosure. We repeat the findings of fact at paragraph 143.

Issues 7(14) and 8(3)

392 We found that the Respondent did misinform the FCA by stating that the Claimant was suspended when this was not the case. Our findings of fact are at paragraphs 173 to 175 above.

393 We concluded that this treatment would be viewed by a reasonable worker as a detriment.

394 We concluded that the decision to complete the Form C with a false statement was entirely caused by the protected disclosures and the allegation of sex discrimination within the Claimant's grievance. We repeat the findings of fact at paragraph 175. We find that this act by the Respondent was retaliation for the Claimant making the protected disclosures within her grievance.

Issue 7(15)(iii):

395 We find that a reasonable worker would not or might not view the treatment set out at issue 7(15)(iii) as detrimental.

396 In any event, we concluded that, at the time of this treatment, the Respondent was not materially influenced by any protected disclosure. We repeat the findings of fact at paragraphs 178-181.

Issues 7(15)(iv)-(v) and 8(3)

397 The Tribunal concluded that the Claimant did not use the term "sensitive personal data" to mean only personal data which met the definition of "sensitive" in section 2 DPA. The Claimant meant this term to apply to personal data which was highly personal data involving family and private life matters. The agreed list of issues demonstrates that the Respondent understood this. We heard no argument that the Claimant was somehow restricted to the definition at section 2 DPA.

398 We have found that, when the Claimant was employed, the Respondent was entitled to access the Claimant's personal data and information that she alleged to be confidential which was held on the Respondent's computer. We have explained why in paragraph 183 above. We concluded that the Respondent had a contractual right to do so: see Claimant's contract at paragraph 4.4 (p.101).

399 In contrast, however, we found that the Respondent did misuse the Claimant's sensitive, highly personal, data, involving her family and private life, by refusing to delete it after the termination of her employment, which occurred on 2 February 2018. There was no contractual right to retain her personal data after her employment ended.

400 In this regard, we found paragraph 65 of the ET3 misleading, by stating that the Claimant had been told to collect a memory stick on 26 February 2018, which was only collected in May 2018. We found that this was misleading because the Respondent continued to retain the Claimant's personal data (irrespective of what was copied onto the memory stick). We found that this allegation in the ET3 was an attempt to conceal the true position.

401 We repeat our findings of fact (at paragraphs 212-215) in respect of the continued holding of personal data after termination of the Claimant's employment. There was no factual basis that made it necessary to obtain legal advice about the sensitive personal data found on the work PC. As we explain above, we inferred that the Respondent retained all the Claimant's personal data because of the protected disclosures in her

grievance as explained in the findings of fact. The Respondent retained it as a tool, in an attempt to make the Claimant back away from legal action.

402 We concluded that this treatment, the retention of sensitive personal data, including data referring to a sexual assault, would be viewed by a reasonable worker as a detriment. The Claimant strongly believed that it was a detriment, leaving her feeling "*absolutely violated*" (see p.1309).

403 In the Respondent's written submissions, it is stated that the Respondent had placed all the Claimant's data on a memory stick held by the data protection officer, and that it will only be used in relation to legal claims and regulatory requirements. This does not explain what legal claims or requirements were, as a matter of fact, justification for this approach and nor did the Tribunal hear evidence about this.

404 Further, the data was not placed on a memory stick and held in this way until about 6 September 2018 (see witness statement of Mr. Gee at paragraph 79). We heard no evidence or argument to justify the delay in removing the personal data from its system between 2 February and 6 September 2018.

405 In any event, we concluded that the Respondent had no legal basis to retain the Claimant's personal data up to the point of the hearing in this case.

406 We considered the Respondent's purported justification for retention of the data. It advanced various reasons, set out in its letter to the ICO which is at C1. This letter was sent in response to the ICO's letter of 21 January 2019.

407 We accepted that the Respondent may have had a legal ground for retaining part of the personal data under Schedule 2 DPA 1988, if it believed that the FCA might investigate following its completion of the Form C.

408 One difficulty for this part of the Respondent's argument is that we found that the Respondent had no genuine belief in its allegation that the Claimant had falsely completed the Form A at the outset of her employment.

409 In any event, it must have been obvious to the Respondent from about the end of May 2018 that the FCA were not going to investigate the Claimant further. The letter from the Respondent's solicitor of 23 July 2018 (p.1784) states that on 29 May 2018 the Claimant was registered as CF10 and CF11 at Alpha Trades. We concluded that, by inference, by about the end of May 2018, the Respondent must have known that the FCA had decided that the Claimant was a fit and proper person. After this time, the Respondent could not have had any justification for holding onto any data for FCA regulatory reasons.

410 In any event, given the issue for the FCA was whether the Claimant was a fit and proper person, this did not permit the Respondent to retain highly personal data about her family life and personal affairs at any stage. This should have been even clearer to the Respondent after the implementation of GDPR, which strengthened the protection of personal data.

411 A second reason raised by the Respondent in justification was the Employment Tribunal claim and other potential claims that it might bring against the Claimant.

412 The Tribunal concluded that the Employment Tribunal claim did mean that the Respondent had an obligation to retain certain relevant documents – such as those potentially relevant to the allegation that the Claimant was not a fit and proper person for the purpose of holding an FCA role (even though we found that the allegation that the Form A had been completely incorrectly lacked credibility).

413 In any event, this did not permit the Respondent from retaining highly personal data about her family life and personal affairs at any stage. This was not necessary under either the DPA 1988 nor under the GDPR.

414 Further, we reminded ourselves of the ICO Guidance on the GDPR set out above. This demonstrated that even the existence of Tribunal proceedings did not give the Respondent a blanket defence to the retention of the Claimant's personal data.

415 By its solicitor's letter to the ICO in "C1", the Respondent alleged that there was an ongoing possibility that it would pursue a contractual claim against the Claimant. We found this to be a weak attempt to justify the Respondent's actions in retaining the personal data of the Claimant. The Tribunal found that the Respondent had no basis in fact for any of these potential claims, for the reasons that we explain above in the findings of fact. For example, the Claimant was not responsible for MIFID implementation, because this was the responsibility of a project manager in a different team.

416 Moreover, in respect of the alleged right to enforce a restraint of trade covenant, there was nil prospect of such enforcement action being taken by the Respondent. This was because any such claim would inevitably fail because no injunction was necessary. The Claimant's new employer was not a competitor; we accepted the Claimant's evidence about this. In any event, the Respondent took no action against Ms. Patel, whose contract contained the same term, even though she did move to work for a competitor. Moreover, any Court would be unlikely to grant injunctive relief based on such a covenant unless the application was made promptly on evidence. We heard no evidence to justify the making of an injunction; and no such claim has been made in any event.

417 Further, given the manner in which this Claim has been anticipated and resisted (such as by the making of false allegations and certain aspects of the Respondent's evidence being found to be untrue), we were satisfied that any credible claim that the Respondent had would have been issued some time ago.

418 In any event, the personal data dealing with the Claimant's private life and family matters that has been withheld has no relevance to the alleged potential contractual or tortious claims. Accordingly, it is not necessary for the Respondent to retain this data.

419 The Respondent admitted the fact that the Claimant's data was still held on a memory stick, held by its data protection officer. This was despite the fact that the Respondent had been told to delete all data relating to her family life by email from the ICO dated 30 January 2019 (confirmed by email to the Claimant on 26 February 2019).

420 Accordingly, the unjustified retention of sensitive data about the Claimant is continuing.

421 We have found that this detriment was caused by the protected disclosures and the allegation of sex discrimination within the grievance.

Issue 7(15)(vi)

422 We have found that, on or about 15 December 2017, the Respondent did announce that the Claimant would be leaving the office. Bhav Patel made the announcement, having been told this by a more senior manager.

423 A reasonable worker would or might view this as a detriment, particularly because no notice of dismissal had been provided nor any justification for such action.

424 We concluded, however, that this treatment was not materially influenced by any of the protected disclosures made up to that time.

Issue 7(15)(vii) and (ix)

425 We have found that there were no reasonable grounds for a belief, nor was any genuine belief held by the Respondent, that the Claimant was running an e-Bay account from her work computer.

426 Further, for the reasons set out at paragraphs 41-42, we concluded that the alleged illegal downloading of music files was an example of alleged misconduct by the Claimant for which the Respondent had neither evidential basis, nor any genuine belief.

427 A reasonable worker would find such unfounded allegations of misconduct to be a detriment.

428 We concluded that the substantial reason that these allegations were made was because the Claimant's grievance contained each of the protected disclosures identified as contained within it.

429 We have addressed above the misrepresentation made to the FCA by the Respondent, which was clearly a detriment.

Issue 7(15)(viii):

430 We found that Mr. Gee deliberately sent information in response to the Claimant's Subject Access Request to her old email address, knowing full well that she could not access this. The ICO considered that in doing so, the Respondent had breached data protection law (by not having retained up to date contact details). Our findings of fact are at paragraph 204.

431 We concluded that a reasonable worker would or might view the sending of emails in response to an SAR to an email address that she could not access as a detriment, not least because the worker could not know whether any response at all had been made to the SAR and so could not know if her legal right to receive her data had been upheld.

432 We concluded that, because this was a failure to comply with data protection law, and given Mr. Gee knew that the Claimant could not receive the emails sent to her work email address, it must have been deliberate, designed to upset or annoy the Claimant.

This treatment called for an explanation; and we rejected Mr. Gee's evidence of innocent mistake as being implausible (given that he was the one who had ensured her email account had been disabled in December 2017). We inferred that, given our findings of fact, the Respondent had subjected the Claimant to this detriment substantially because of the protected disclosures within her grievance and also because of the complaints of sex discrimination within the grievance.

433 Moreover, we concluded that the Respondent had not complied with the statutory 40 day time-limit within the DPA 1988 in responding to the SAR.

Issue 7(15)(x):

434 We found that the Respondent wrongly accused the Claimant of providing false or misleading information in her FCA Form A. We explain why in the findings of fact at paragraphs 17-23. (Although not relevant to this detriment, we found, also, that she did not include false or misleading information in her yearly attestations).

435 We concluded that a reasonable worker would consider the negative and unjustified interpretation put on the Form A document by Mr. Clowes, which had been signed off by the Compliance Director some four years earlier, as a detriment.

436 We concluded that this attack on the Claimant's credibility was an attempt to damage her career prospects and earning capacity, and an attempt to prevent her pursuing legal action against the Respondent.

437 We looked for an explanation for this. We concluded that this treatment was substantially because of the protected disclosures within the Claimant's grievance. We noted that, at the time that the disciplinary procedure letter is dated (15 December 2018), there is no mention of referring the Claimant to the FCA on the basis of these allegations, which suggested to us that this alleged concern about the Form A arose after the filing of the grievance and was caused by the protected disclosures within it.

Issues 7(15)(xi)-(xii) and 8(i)-(ii)

438 We found that, by a solicitor's letter of 13 April 2018, the Respondent did threaten legal action in the High Court for alleged breaches of contract, claiming an injunction and damages of over £384,000. Our relevant findings of fact are at paragraphs 216-218.

439 We concluded that a reasonable worker would consider receiving such a letter to be detrimental, both because of the sums claimed and the anxiety that it would cause.

440 We found that the Respondent knew that several of the key alleged facts in its solicitor's letter were incorrect and it had no genuine belief that the Claimant was working for a competitor (We attach no blame to the solicitor for this, concluding that the firm was likely to have acted on instructions). This begged an explanation.

441 The Tribunal concluded that this solicitor's letter, and the threat of an injunction application within it, was created substantially because the Claimant had made protected disclosures and complained of direct sex discrimination in her grievance. By sending this letter, the Respondent hoped to dissuade the Claimant from pursuing any legal claim against the Respondent, or to make it more difficult for her to do so.

442 Although the Claimant did make post-termination protected disclosures to the ICO on 8 and 13 April 2018, we concluded that these were not a cause of this detriment.

Issues 10 - 15: Victimisation within section 27

443 As set out in our findings of fact at paragraphs 87, 97, and 108 above, we found that the Claimant did not do a protected act on 7 September, 26 October or 21 November 2017.

444 We concluded that the part of the grievance of 15 December 2017 set out at issue 4(3)(c) was a protected act. This is because it amounts to a complaint of direct sex discrimination, which comes within section 27(2)(d) EA 2010.

445 We concluded that this protected act was a further cause of the detriments that we found proved at issues 14(7)(iv), 14(7)(v), 14(7)(vii) – (xii).

446 We made a positive findings of fact that the Respondent was motivated to subject the Claimant to those detriments in part because of the complaints of direct sex discrimination within the grievance of 15 December 2017.

447 In the alternative, if it is alleged that we are wrong to make such findings, we concluded that the Claimant had shown facts from which she could succeed in proving discrimination by victimisation; the burden of proof had shifted; and the Respondent had failed to discharge the burden of proof within section 136 EA 2010.

448 In this case, there was a protected act followed by the detriments identified. Applying *Madarassy*, this is not sufficient to show that the Claimant could succeed in proving discrimination. In this case, however, we have found facts which point to a working environment in which, put simply, women were valued less than men, demonstrated by the advertisement for Aston Martin cars. As we have explained, there was good evidence that pointed to the culture of the Respondent as valuing women less than men.

449 Therefore, we concluded that these factors were the "something more" required for the burden of proof to shift onto the Respondent. Given that we had rejected the Respondent's explanations for the detriments (such as the alleged reasons for retention of sensitive personal data), we concluded that the Respondent had failed to prove that the detriments at paragraph 447 above were not caused in any way by the protected act in the grievance.

450 The detriments listed at issues 14(1) - 14(6), 14(7)(i) to (iii), 14(7)(vi), and 14(9), were caused by the Respondent wanting to make life as difficult and as costly as possible for the Claimant after it had formed a belief that she was guilty of gross misconduct.

451 We found that the Claimant was not constructively dismissed because of the protected act of filing her grievance. The reasons for her constructive dismissal are set out in our conclusions under Issue 1 above.

Issues 21-23: Remedy

452 The Claimant is entitled to declarations that she was unfairly dismissed and that she was subjected to post-termination detriments due to making protected disclosures.

453 Further, the Claimant is entitled to a declaration that she was victimised contrary to section 27 Equality Act 2010.

454 Given our findings of fact, and the conclusions set out above in respect of Issues 1 and 2, we concluded that the Claimant had not committed any misconduct which caused her dismissal.

455 Moreover, we concluded that it was 100% likely that a reasonable and fair investigation would have demonstrated that she was not guilty of any misconduct.

456 Accordingly, there can be no reduction to the Claimant's compensation under either section 123(1) or section 123(6) ERA 1996.

457 The Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in several ways. We consider that adequate reasons have been given already to explain this conclusion. For the avoidance of doubt:

457.1 In breach of paragraph 2 and 18 of the Code, the disciplinary procedure used, such as it was, was not a fair one. The unfairness included that:

457.1.1 The decision to dismiss had been pre-determined, evidenced by the announcement to other staff on 15 December 2017 and by the advertising of her post prior to the outcome of the disciplinary proceedings;

457.1.2 The decision to charge the Claimant with the alleged false completion of the Form A was not based on a genuine belief that the Claimant had committed such misconduct.

457.2 In breach of paragraph 5 of the Code, the Respondent failed to carry out any adequate or necessary investigation before jumping to the conclusion that the Claimant was guilty of gross misconduct.

458 Given our findings and conclusions, the Tribunal was in no doubt that there were multiple breaches of the Code, for which there was no mitigation. The appropriate uplift to the compensatory award for unfair dismissal was 25%.

459 The Tribunal has also considered section 12A Employment Tribunals Act 1996, and whether any penalty award should be made. In fairness to the parties, given that this is not in the List of Issues and given that this is a discretionary power, we concluded that this issue should be addressed at the remedies hearing.

Summary

460 A provisional remedies hearing listed at 10am on 23 September 2019 will now proceed. Despite the many differences that the parties have had in respect of liability, we

would now encourage them to work to narrow the issues on remedy, with a view to avoiding the time and costs that a remedies hearing will involve.

461 Case management directions will be made by the Tribunal of its own motion ahead of the remedies hearing.

Employment Judge Ross
Date: 5 September 2019

APPENDIX

AGREED LIST OF ISSUES

Constructive Unfair Dismissal/Automatic Unfair Dismissal (s.103A Employment Rights Act, 1996)

1. Did the Claimant resign and/or was she dismissed? In particular:

    1) Was there a breach of contract?

    2) Was that breach of contract a fundamental breach of contract?

    3) Did the Claimant waive the aforesaid breach of contract?

    4) Did the Claimant resign as a consequence of the aforesaid fundamental breach of contract?

2. If the Claimant was dismissed was that dismissal unfair as defined in s.94 of the Employment Rights Act 1996 ("ERA, 1996")? In particular what was the reason for the dismissal?

    2.1. The Respondent's position is that the Claimant was dismissed by reason of conduct.

    2.2. Was the reason or the principal reason for C's dismissal that C made protected disclosure(s)?

    2.3. Was the dismissal discriminatory contrary to sections 13 and/or victimisation contrary to 27 of the Equality Act, 2010?

3. Was the dismissal reasonable pursuant to section 98(4) ERA, 1996?

Protected Disclosures

4. Did C make the following disclosures whilst in the Respondent's employment?

    1) The Claimant informed the Director of Compliance about Alex Pusco's 'confidential' request to open a real money trading account in his personal name in June 2017 against the Personal Account Dealing Policy (para 27 of the Claimant's witness statement);

    2) The Claimant was asked to disclose SAR information to the Head of Sales, Finance Director and Chief Executive Officer and the Claimant informed the Director of Compliance that this was an unacceptable and potentially criminal situation to put her in on as follows:

a) To the Director of Compliance after a meeting on 7 September 2017 (para 43 of Claimant's witness statement);

b) To the Director of Compliance on 21 November 2017;

c) To the Director of Compliance the week commencing 11 December 2017;

d) In her grievance dated 15 December 2017 as follows (at [556-7]):

> "Such requests are not only against the regulations and internal policies but are also in breach of Section 333 of POCA 2002 which clearly defines the offence of tipping off. I have never personally disclosed any information requested; however, feel immense pressure on my team and me not to submit the reports when these are needed. I remind you that should the suspicious report not be made when needed the person in question will be committing an offence of Failure to Disclose under section 331 of POCA 2002".

3) The Claimant's concerns and grievance in relation to treatment of the female staff as follows:

a) On 7 September 2017 the Claimant informed the Director of Compliance that if she had been a male MLRO she would not have been forced to disclose the SAR information;

b) On 26 October 2017 the Claimant informed the Director of Compliance that she was shouted at by Andrea Draghi in a meeting and she would not have been if she was a male;

c) On 15 December 2017 in her grievance the Claimant stated:

> "Lastly, numerous times many colleagues of mine and I were witnesses to discrimination towards women. It was mentioned that 'women should stay at home and cook' and that women should not be recruited as they fall pregnant. One of the directors even said that 'women are meat' whilst drunk at a Christmas party. I am the only female senior manager in the company since the company was formed. Any initiatives from the women in the office are dismissed and the same goes for the initiative Women in Finance.
>
> A lot of the times the work load for some of my subordinates is decided without my input whatsoever and more importantly the employee in question is then asked to keep the request confidential. I am therefore sure that the way I am treated now and disrespect of my decisions as an MLRO and as a manager is based on the fact that I am a woman."

4) The Claimant's grievance, in relation to not being able to convert her sickness absence to holiday and the Respondent allegedly contacting her GP without her permission as follows:

> "I have repeatedly requested to have my absence recorded as annual leave which is my legal right, in order not to be anxious about being paid SSP and my requests were rejected, which is only adding to my stress levels. I was told to get another sickness certificate. I had to go and see the doctor again and was signed off for another 2.5 weeks now as am feeling worse.
>
> It would appear that the Firm is deliberately putting me under pressure with, I suspect, the objective of forcing me to leave as I am resisting the breach of policies and laws".

5. Did C make the following post-termination disclosures as follows:

   1) to the FCA on 19 January 2018 (para 55.1 of the ET1) in which the Claimant attached her grievance of 15 December 2017 in which she made a set of disclosures on MIFI, SAR Regime on POCA and Discrimination [840-842 and 846];

   2) to the Information Commissioner's Office on 6 February 2018 (the email is at [1104] read with the form at [1561]) as follows:

      > "My employer, ActivTrades PLC, registration number Z9210067, accessed my password protected work PC and a folder marked personal whilst I am on sickness leave due to the Company inflicted stress and anxiety. The Company and its employees and/or agents have opened the folder marked personal and read through documents concerning and detailing the domestic abuse I suffered, my divorce proceedings, correspondence with my then solicitor, my mental health, communications with the police concerning criminal conduct of my ex-husband, matters relating to my son (minor), my bank statements, credit cards statements, mortgage information, ID documents for my family, photographs, and many other documents. Some of the documents were copied and forwarded to third parties including but not limited to Prettys Solicitors LLP.
      >
      > The Company acted in revenge due to protected disclosure submitted by me internally and this act is one of many in the series of the case of discrimination, victimisation and harassment. This caused immense issues with my health".

   3) through her solicitor and herself to the Respondent's solicitor, Respondent and the ICO?

      1) Respondent's noncompliance with the Subject Access Request reported to the ICO on 8 April 2018:

         > "The Firm also failed to meet the deadline of the SAR. To date I have no communication on the matter whatsoever."

13.04.2018 Claimant disclosed the below to the ICO (disclosed by C, not in the bundle):

> "Unfortunately, the only conclusion drawn from this is the same as what I attempted to deliver to the attention of the ICO in all my correspondence. The Firm is acting with no integrity and, as far as I am concerned, is committing serious offences. The named individuals knowingly and deliberately send the emails to the wrong email address and are in breach of the DPA 1998 again."

Reported by Claimant to the Respondent 8 April 2018:

> "I do not have any of the above including any response to number 2 and 3. I require the data asap for further legal action. The Firm again is in breach of the DPA 1998 which sets the deadline of 40 days for the response to SAR an I informed the Firm of the deadline." [R notes that this is not specifically pleaded in the Particulars of Claim].

2) Retention of the Claimant's highly sensitive data by the Respondent in breach of the DPA 1998 and/or GDPR reported by C's solicitor to R's solicitor 2 February 2018 (page 1020 and 1014):

> "Furthermore the Company and/or its employees and/or its agents has/have, inter alia, committed very serious breaches of the Data Protection Act 1998, the terms of our Client's (implied and express) contract of employment and the ACAS Code of Conduct. The conduct shall be reported to the Information Commissioner, the Financial Conduct Authority and shall form part of our Client's clam to the Employment Tribunal."

6. Did each disclosure alleged to have been made by C:

1) convey information;

2) tend to show one or more of the matters within section 43B(1)(a) – (f) of the ERA.

3) was in the 'public interest';

4) were such that C held a reasonable belief in the subject matter of the protected disclosures?

Detriments under s.43B of ERA, 1996

7. Did the Respondent subject the Claimant to the following detriments contrary to section 43B of the ERA as follows?

1) The Claimant's treatment at a meeting on 26 October 2017 by Andrea Draghi;

2) The Claimant's treatment at AML/TCF meeting 13th October 2017; [R's position is that this is not pleaded];

3) Accusing the Claimant of non existent wrong doing in relation to MiFIR reporting around October 2017;

4) In or around August to December 2017 questioning the Claimant and/or her team on the SAR(s) and/or requiring the disclosure of external Suspicious Activity Report information to the unrelated staff [R's position is that this was to the Head of Sales, Finance Director and CEO and not unrelated staff]?

5) By the CEO instructing the Claimant's team to run SAR reports by him and not the Deputy MLRO during the week commencing 11 December 2011R's position is that this was when C was off sick yet (the Claimant asserts) contactable.

6) Restricting C's access to work emails in (the Claimant asserts) early December 2017 (R's position is that it did not restrict the Claimant's access until 15th December).

7) Failing to provide documents the C had requested as part of the disciplinary process despite requests for such.

8) Allowing access to the information within the C's legal remit of the FCA Controlled function to another individual and without the C's knowledge.

9) Failing to thoroughly investigate the Grievance and Protected disclosures 15th December 2017.

10) Refusing to delay the Claimant's disciplinary process and grievance investigation process despite the Claimant's ill health?

11) Initiating a recruitment process for a replacement for the Claimant prior to Claimant's acceptance of the (alleged) repudiatory breach [R's position is that this should be prior to the resignation]?

12) By paying SSP yet claiming suspension.

13) Not allowing the Claimant to have annual leave booked instead of sickness;

14) Misinforming the FCA in the Form C?

15) Subjecting the Claimant to negative and harassing treatment as follows:

    i) Not allowing the Claimant to have annual leave booked instead of sickness;

    ii) Claiming that the Claimant was suspended yet paying SSP;

    iii) Breaching the Claimant's data protection rights and privacy rights by making contact with the Claimant's GP;

iv) Misusing highly sensitive personal data and confidential information including accessing her personal data on the Respondent's computer;

v) Refusing to delete C's highly sensitive personal records;

vi) Announcing the Claimant's permanent departure from the office on the 15th December 2017.

vii) Accusing the Claimant of non-existent wrongdoing such as 'running an Ebay account' and downloading malicious files;

viii) Mishandling the C's Subject Access Request;

ix) Misleading the FCA about the Claimant's absence from work and/or accusing the Claimant of non-existent wrongdoing;

x) Accusing the Claimant of providing misleading or false information in her FCA Form A.

xi) By threatening legal action against the Claimant in High Court for breaches of contract requesting a payment of over 384,000 thousand pounds;

xii) By threatening injunction action against the Claimant in High Court for starting employment with a competitor Firm;

8. Did the Respondent subject the Claimant to the following post-termination detriments contrary to section 43B of the ERA as follows?

1) By issuing threats to the Claimant as set out below:

i) Threatening legal action against the Claimant in High Court for breaches of contract requesting a payment of over £384,000;

ii) Threatening injunction action against the Claimant in High Court for starting employment with a competitor Firm;

(at paragraph 56.1 of the Particulars of Claim)?

2) By misleading the FCA regarding the Claimant's suspension?

3) By failing to comply with the Data Protection Act, 1998 and General Data Protection Regulation in relation to deletion of Claimant's highly sensitive personal data?

9. Was the reason that C was subjected to the above detriments materially influenced by the fact that C had made protected disclosures?

Victimisation contrary to section 27 of the Equality Act, 2010

10. Did the Claimant do a protected act by way of her grievance dated 7th September 2017 by stating to the Director of Compliance orally after the meeting that if she was a male MLRO she would not have been treated this way? [R's position is that this is not pleaded]

11. Did the Claimant do a protected act by way of her grievance dated 26th October 2017 by informing the Director of Compliance orally that she was only being treated this way because she was female?

12. Did the Claimant do a protected act by way of her grievance dated 21st November 2017 by raising with the Director of Compliance that she was only being questioned because she was a female MLRO?

13. Did the Claimant do a protected act by way of her grievance dated 15 December 2017 as set out at paragraph 4(c) above?

14. Did the Respondent subject the Claimant to the following detriments as follows:

    1) Initiating a disciplinary procedure;

    2) Refusing to delay the Claimant's disciplinary despite the Claimant's ill health.

    3) Initiating a recruitment process for a replacement for the Claimant.

    4) Failing to provide documents the C had requested as part of the disciplinary process despite requests for such.

    5) Allowing access to the information within the C's legal remit of the FCA Controlled function to another individual and without the C's knowledge.

    6) Restricting C's access to work emails from the beginning of December 2017.

    7) Subjecting the Claimant to negative and harassing treatment as follows:

        i) Not allowing the Claimant to have annual leave booked instead of sickness;

        ii) Claiming that the Claimant was suspended yet paying SSP;

        iii) Breaching the Claimant's data protection rights and privacy rights by making contact with the Claimant's GP;

        iv) Misusing highly sensitive personal data and confidential information including accessing her personal data on the Respondent's computer;

        v) Refusing to delete C's highly sensitive personal records;

        vi) Announcing the Claimant's permanent departure from the office on the 15th December 2017.

vii) Accusing the Claimant of non-existent wrongdoing such as 'running an Ebay account' and downloading malicious files;

viii) Mishandling the C's Subject Access Request;

ix) Misleading the FCA about the Claimant's absence from work and/or accusing the Claimant of non-existent wrongdoing;

x) Accusing the Claimant of providing misleading or false information in her FCA Form A.

xi) By threatening legal action against the Claimant in High Court for breaches of contract requesting a payment of over 384,000 thousand pounds;

xii) By threatening injunction action against the Claimant in High Court for starting employment with a competitor Firm;

8) Dismissing the Claimant.

9) Announcing the Claimant's permanent departure from the office on the 15th December 2017.

15. If so, were the above detriments carried out because the Claimant did a protected act(s)?

Direct Discrimination on grounds of sex

16. Was the Claimant subjected to less favourable treatment on the grounds of her sex contrary to s.13 of the Equality Act 2010 as follows:

1) The Claimant's treatment at a meeting on 26 October 2017 by Andrea Draghi;

2) Accusing the Claimant of non-existent wrongdoing in and around October 2017 in relation to MiFIR?

3) In or around August to December 2017 requiring the disclosure of external SAR information to the Head of Sales, Finance Director and the CEO?

4) By the CEO instructing her team to run SAR reports by him rather than the Deputy MLRO during the week commencing 11 December 2017. [R's position is that this was when C was off sick]

5) During a visit to Bulgarian Branch Mr Alex Pusco said that "women should stay at home and cook" [2014].

6) During a Christmas Party in December 2013 in Bulgaria Mr Andrea Draghi said that "women are meat".

7) In Autumn 2017 displaying a sexualised image of a woman to indicate what the marketing of the Respondent should learn from as 'sex sells'.

8) Dismissing initiatives from women in the office and Women in Finance and/or using the initiative for marketing purpose;

9) Failing to involve the Claimant into the decisions on allocation of duties to her staff by deciding on direct report staff work load and tasks.

10) Claiming that the Claimant was suspended yet paying SSP;

11) Dismissing the Claimant.

17. Who is the appropriate comparator relied on by C, if any?

Jurisdiction

18. Are any of C's detriment claims out of time?

19. If so are they capable of being part of a series of continuing acts?

20. If not, should time be extended?

Remedy

21. If successful what remedy is the Claimant entitled to?

22. Should any award be reduced on the basis that the Claimant contributed to her dismissal and/or she would have been dismissed in any event according to the principles set out in Polkey?

23. Did the Respondent fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as follows?

1) Announcing the Claimant's departure on the 15th December 2017?

2) Advertising the Claimant's position prior to the outcome of the Disciplinary process?

3) Failing to provide evidence of the disciplinary allegations requested by the Claimant?

4) The appointment of the grievance investigator?

4) Refusing to delay the disciplinary and/or grievance processes?