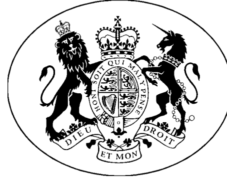


# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Miss J O'Boy** | v | **British Transport Police Authority** |

**Heard at**: London Central **On**: 3, 4, 5, and 6 February 2020

**Before:** Employment Judge A James
Mr M Ferry
Mr D Clay

**Representation**

**For the Claimant:** Ms H Higgins, counsel

**For the Respondent:** Ms A Reindorf, counsel

# JUDGMENT

1) The claims for detriment on the grounds of protected disclosures (ERA 1996, ss43A, 47B) are not well founded and are dismissed.
2) The claims for automatically unfair constructive dismissal by reason of protected disclosures and/or for asserting a statutory right (ERA 1996, ss103A, 104) are not well founded and are dismissed.
3) The claim for ordinary unfair constructive dismissal (ERA 1996, ss 95(1)(c), 98) is not well founded and is dismissed.

# REASONS

## The issues

1 The claims are for unfair constructive dismissal, protected disclosure detriments, dismissal for making a protected disclosure, and dismissal for asserting a statutory right. The agreed issues are set out in Annex A.

## The hearing

2 The hearing took place over four days. Evidence and submissions on liability were dealt with over three days. It was arranged that on the remainder of the third and on the fourth day, the tribunal panel would deliberate. Given the time

available and both the number of and the complexity of the issues, judgment was reserved. Dates were agreed for a remedy hearing, on 3 and 4 September 2020 in case the claimant was successful in any of her claims.

3 The tribunal heard evidence from the claimant and for the respondent the tribunal heard from Detective Inspector (DI) Paul Atwell, Detective Chief Inspector (DCI) Nick Brook, DI Ciaran Dermody, Chief Inspector (CI) Tara Doyle, Detective Sergeant (DS) Antony Samiotis, Colette Osborne, Head of People Delivery, and Alison Williams, Senior Human Resources Adviser. There was an agreed trial bundle consisting of two lever arch files containing over 400 pages each.

## Fact findings

Initial Background

4 The claimant started work for the respondent on 20 September 2010. She was employed initially as an Intelligence Researcher. In July 2014 she was promoted to the role of Field Intelligence Officer. Her work and role involved utilising covert tactics to fill intelligence gaps and support prosecutions. Her employment terminated on 11 June 2018 when she resigned without notice.

5 The respondent, British Transport Police Authority, is a national police force for the railways providing policing services to the rail operators, their staff and passengers throughout England, Scotland and Wales. The respondent employs about 4,800 people.

Application to City of London Police and ‘positive’ drugs test

6 The claimant applied to City of London Police (COLP) for the role of student police officer on 31 August 2017. She underwent a drugs test at Snow Hill police station where two samples of hair were taken, Sample A and Sample B.

7 On 28 September 2017 the respondent received an intelligence report from COLP, informing them that the claimant had tested positive for cocaine after a drugs screening test.

8 On 6 October 2017 the claimant received an email from Mr Clarke in HR at COLP informing her that her application for the role would not progress further. She emailed Mr Clarke on 9 October 2017 asking for feedback on her failed application. She received an email from him the same day informing her that they had received a positive result on her drugs test. The email from Mr Clarke stated: “I’ve queried the results with the lab, as you weren’t the only one, and am awaiting their reply”. The test had been carried out by Alere Toxicology (Alere).

9 A colleague of the claimant who also worked for the respondent failed the COLP drug test around the same time. He tested positive for MDMA and amphetamines. It appears that he accepted the test results and resigned.

10 The claimant was informed by Mr Clarke on 11 October 2017 that she had the right to ask that the second sample of hair, sample B, be sent to an independent lab from the list of laboratories provided to her by COLP. The claimant replied on 12 October 2017 attaching the signed release form and her chosen lab, LGC.

11 The claimant did not raise these matters with the respondent. The respondent only became aware of them from COLP directly. The claimant accepted that, with hindsight, she could have told her employer about the matter earlier. But this omission was not a matter the respondent raised with her at any stage. They were concerned with the results of the test, not with her failure to disclose it earlier. They were aware in any event aware of the issue before she was.

The Alere Toxicology Report

12 On 16 October 2017 the claimant received a text from her line manager DS Samiotis asking her to call him. He asked her to come into the office on 17 October, the following day. DS Samiotis and DCI Kate Forsyth were present at that meeting. The claimant was informed that the respondent had received information about a positive drugs test result from COLP and had opened a disciplinary investigation relating to alleged gross misconduct. She was served with a notice of investigation. The allegation was that: “On 31 August 2017, as part of a City of London Police student officer selection process, you have provided a hair sample for a drugs test which has resulted in a positive result for a class A substance cocaine”. The claimant was asked to stay at home for the rest of the week whilst a decision was made as to whether she should be suspended or placed on restricted duties.

13 The claimant was referred by DS Samiotis to Occupational Health (OH). In the covering email he stated: “As outlined on the form this is a sensitive matter”. The form confirmed that the referral had been prompted by the claimant having been notified that she was being investigated in relation to the use of controlled drugs but that she strongly contested the alleged use.

14 On 18 October 2017 Mr Clarke emailed the original Alere ‘Certificate of Analysis’ to the claimant. The Alere Toxicology report is at page 518, dated 17 August 2017 and states: “Cocaine – POSITIVE”; Under the heading Final Outcome it states: “This specimen was reported POSITIVE and NOT CONSISTENT with ANY PRESCRIBED OR OVER-THE-COUNTER MEDICATION”. The report does not specifically state whether the result arose simply from a screening analysis, or from a confirmation analysis (under which more rigorous tests are carried out using chromatography and spectrometry). It does confirm: “Analytical testing performed in accordance with the Alere Toxicology technical specification(s)”. We find on the balance of probabilities that, when taken in conjunction with the contents of the later Alere report referred to below (dated 4 May 2018), that this Certificate of Analysis resulted both from a screening analysis, and a confirmation analysis.

15 The claimant queried in a text to DS Samiotis on 18 October 2017 whether the fact that she had taken Amoxicillin in February 2017 might have led to a false positive result. DS Samiotis asked her to sign a form allowing the respondent to gain access to all relevant GP records. The claimant was uncomfortable about that, and DS Samiotis did not press her on that point. He simply asked her to ask her GP to provide some form of official documentation affirming the date of the examination, diagnosis and subsequent prescription given. At page 800 in bundle 2 is a reference to false positive tests for cocaine caused by Amoxicillin - but that is a reference to tests on urine samples, not hair samples. The possibility of a false positive

was subsequently followed up by the respondent. They obtained an expert forensic report on 11 December 2017, referred to below.

Restricted duties

16 On 22 October 2017 the claimant started work at Broadway in the Operations and Planning Team. The decision to remove her from her intelligence duties was taken on 13 October 2017 by DCC Hanstock. He decided that because of the allegations, the claimant should no longer have access to force intelligence crime recording or sensitive databases.

17 The claimant states in her witness statement that she did not believe that her removal from her duties in the Divisional Intelligence Bureau was a justified decision as there had been no evaluation of her line of defence that amoxicillin or another contaminant had affected the results. She accepted in cross examination however that the positive drugs test raised a potential disciplinary matter. She accepted that her removal from her duties was reasonable, pending the results of the investigation. Her role involved access to intelligence, amongst other things, about “county lines”, ie the transportation of controlled drugs from London to other counties in England and Wales. The claimant accepted that if she was a cocaine user, it would be inappropriate for her to work in her role for the police.

Occupational health call 23 October 2017

18 The claimant received a call on 23 October 2017 from occupational health in response to DS Samiotis’ referral on 17 October. The OH representative asked her on 23 October what drugs she was taking or whether she had stopped using them. The claimant stated that she had not knowingly taken drugs and requested counselling as she was feeling anxious.

The initial stages of the investigation

19 DI Atwell was the first investigating officer. He had been appointed to that role on 4 October 2017. On 25 October 2017 the claimant emailed DI Atwell for an update. She again emailed him on 9 November.

20 We were taken to the respondent’s *Interim Substance Misuse Testing Policy and Procedures*. In relation to the matter of with cause testing, paragraph 3.2.2 reads: “The residual sample will be split into two samples in order to give the employee the opportunity to have their own independent analysis conducted”. Paragraph 3.4.3 states: “The employee being tested will be advised that a positive screening test is only a provisional indication and further evidential tests will be sent to a laboratory for analysis. A risk assessment will be arranged by the employee’s line manager in relation to the suitability of the individual to perform their current role…”..

21 Consideration was given by the respondent as to whether or not to organise a further test on a fresh hair sample but they decided that since the timescale covered by such a sample would not be the same as that used in the COLP test, it was not appropriate to do so. The claimant accepted in cross examination that given that a second hair sample (Sample B) had been taken at the same time as Sample A, it was appropriate to test Sample B. In any event, the claimant arranged for an independent analysis herself on a new hair sample. We refer to the results of that test in due course.

22 There were some delays in the respondent obtaining a reply from COLP regarding the tests on sample B. Those delays were not caused by the respondent. The sending of the B sample for analysis was complicated by the fact that COLP 'owned' that sample. Therefore, the respondent was beholden to COLP in relation to the claimant's request that it be sent for further analysis. The respondent agreed with COLP that it would pay for the B Sample test. The initial delay occurred because the officer at COLP with responsibility for the test on sample B went on sick leave. Nobody else took responsibility for his work during his absence. We were referred to various emails sent during October and November 2017, showing that DI Atwell kept following the matter up with COLP. At one point he suggested to the claimant that he was thinking of attending the lab himself in order to move matters forward. There was also some delay caused by the invoice being sent to the wrong department within the respondent organisation.

Concerns about the restricted duties role

23 The claimant was not happy in her new role. She did not consider the work to be meaningful. She could not tell her colleagues in Intelligence why she was on restricted duties. Understandably, she felt stressed and anxious about this. On 6 November 2017, the claimant had an anxiety attack on the tube on her way to work and had to take some time out before going into the office. She subsequently had a telephone conversation with Care First to arrange counselling and arranged a meeting with the railway chaplain about her situation.

24 Due to her suffering from stress and losing sleep, the claimant agreed with CI Doyle she would work reduced hours of five per day, from Monday 6 November onwards. It was felt by CI Doyle that was better than her being off altogether which would have led to her feeling even more isolated from colleagues. The claimant argued that the work she was given only took 1.5 to 2 hours per day. CI Doyle did not agree that the time to be spent on those tasks could be completed so quickly. According to CI Doyle there was always enough work to do. Further, the claimant would in due course have been trained to carry out other helpful tasks, had she remained at work. For example, CI Doyle had suggested that the claimant shadow Mel Black in order to get to grips with the DMS system.

25 CI Doyle informed us that the role involved assisting Inspector Richard Mitchell to take a much more structured approach to the day to day demands on the Operational Support Unit teams. It was work of a mainly administrative nature. The claimant would have found the work quite mundane compared to her FIO role. But the work was useful to the organisation; so much so that CI Doyle recruited someone to continue that work after the claimant had left.

The LGC Report

26 The LGC report on sample B was issued on 30 November 2017. It confirms that the analysis was carried out by LC-MSMS i.e. by a mixture of liquid chromatography and spectrometry. It confirms in relation to cocaine that the Society of Hair Testing (SoHT) cut-off is 500 pg/mg. The confirmatory result on the presence of cocaine in the sample was 491 pg/mg, less than 2% short of the cut-off figure. In relation to benzylecgonine (BE), a metabolite of cocaine, the SoHT cut off is 50 pg/mg. The confirmatory result on the presence of BE in the sample was 150 pg/mg. This report was not disclosed

to the claimant, prior to the proceedings being issued.

Statement of Marcus Donohue, Forensic Toxicologist, 11 December 2017

27 DI Atwell sent the Alere report dated 21 September 2017, the LGC report of 30 November, and the patient record regarding the prescription of amoxicillin to a forensic toxicologist, Marcus Donohue. Mr Donohue provided a response to DI Atwell on 11 December 2017. His report referred to the concentrations of cocaine and BE found in the LGC report. It stated that the recommended cut-offs used by the SoHT were "to identify chronic drug use by an individual" (our emphasis).

28 On page 475 he concluded: "The ingestion of amoxicillin by Ms Jenny O'Boy would neither give rise to cocaine (or its metabolite BE) or affect the toxicological findings obtained in this instance. In my opinion, the toxicological findings demonstrate either the repeated use of cocaine by Ms Jenny O'Boy during the investigated period, the frequent exposure to the drug during the investigated period, or a combination of the two".

2 January 2018 meeting

29 On 2 January 2018 there was a meeting between the claimant, DS Samiotis and DI Doyle. The claimant says that she expected this to be a welfare meeting. The emails leading up to this meeting between DS Samiotis and the claimant refer to it being a 'catch up' meeting. We accept DI Atwell's evidence that when the LGC report came back positive, he let DS Samiotis know, as her line manager, so that he could risk assess the situation and look after her welfare. We also accept his evidence that this is standard practice in such disciplinary situations. The intention of the proposed meeting was to explain the situation to the claimant and the possible consequences of the second test coming back positive. The claimant accepted in cross examination that the 2 January 2018 meeting was not part of the formal investigatory process.

30 There was a discussion at the meeting about the disciplinary process that would follow, and the effect that that might have on the claimant. She was told that she had the right to resign. The potential impact of the proceedings on her health was discussed. The claimant says that she asked to be accompanied at that meeting, but that her request was refused by DS Samiotis. We accept that is her honest recollection. However we find, on the balance of probabilities, that such a request was not made. In an email sent by the claimant to DI Dermody and copied to DI Atwell on the same day after the meeting, she referred to the fact that she had been told that the second test had come back positive and asked about her right to representation at the forthcoming investigation meeting which was planned at that stage for 5 January 2018. She did not mention in this email any problem with her not being allowed to be accompanied at the meeting on 2 January. She had been told about that meeting at the end of December by CI Doyle.

The Investigatory Meeting

31 The investigatory meeting is governed by the *Discipline - Police Staff, Policy and Procedure*. This says, amongst other things, paragraph 3.2, that the investigation is to be concluded as soon as reasonably possible, whilst allowing sufficient time to interview relevant parties.

32 Paragraph 4.1 concludes that at an investigatory interview, the employee is entitled to be accompanied. There is nothing in the policy about the documents which should be provided to an employee, prior to the investigatory meeting taking place. DI Dermody told us that had the meeting gone ahead on 5 January 2018, he would have provided any relevant documents to the claimant on the day. The respondent's position was in any event, that all of the relevant documents would be provided, if there was a case to answer, and the case proceeded to a disciplinary hearing.

33 The claimant made enquiries with her TSSA representative Ms McVey, who told us that she was not available on 5 January. The claimant informed DI Dermody of that, and it was agreed that the meeting would be rearranged.

Sickness absence and 10 January 2018 conversation

34 On 9 January 2018 the claimant was signed off work by her GP with stress and anxiety for a month. She remained on sick leave until she resigned five months later. At no point did she indicate that she wished to return to work. Nor did the respondent make any attempt to return the claimant to work, whilst the investigation was ongoing.

35 On 10 January 2018 a conversation took place between DI Dermody and Ms McVey. The claimant says that Ms McVey told her that she had been informed by DI Dermody that she should resign because the respondent had enough evidence to justify dismissing her. Ms McVey did not give evidence before us. The claimant told us and we accept that she emailed Ms McVey and she declined to provide a witness statement or to attend the tribunal.

36 We accept DI Dermody's evidence that the conversation that he had with Ms McVey was no different to the open and honest conversations he would have with any trade union or Police Federation representative in such circumstances. The respondent is different from other Home Office police forces, in that the 2015 Police Conduct (Amendment) Regulations do not apply to them. Those Regulations mean that serving police officers in other forces are not allowed to resign, where there are outstanding gross misconduct allegations against them. That was the context of any reference to resignation. He was simply stating the fact that resignation remained an option, for the claimant, if she wished to go down that route. As the Investigating Officer, it was not his decision whether or not a disciplinary hearing would be instigated. His job was to advise the appropriate authority whether in his view there was a case to answer.

37 Due to her being absent on sick leave, DI Dermody emailed the claimant on 23 January 2018 asking her to submit a disciplinary statement by 6 February. This set out a number of questions for her to answer in her statement. A request for a written statement is common practice, where somebody is off sick during a disciplinary investigation. The claimant asked for an extension until 16 February 2018 to provide her response. DI Dermody refused that but did give her a short extension until 9 February instead. The claimant duly provided a response by that date, in which she referred to the AlphaBiolabs report, which she had been provided with by then, in relation to the tests on sections 1 to 8 of the hair sample she had provided to them, which were negative (see below).

The claimant's grievance dated 1 February 2018

38 The claimant lodged a grievance on 1 February 2018 in which she raised a number of complaints, which were helpfully summarised by Ms Higgins in her oral submissions as: a failure to commission a new sample test; a failure to independently review the Alere Toxicology report; communication issues, including the lack of regular updates and information about the timescales to be taken for conclusion; concerns that she was being pressurised to resign; key documents not being provided for no valid reason; and the ongoing delays in relation to the investigation. She stated that she had lost trust and confidence in BTP as her employer "to manage this situation fairly, reasonably or promptly". She stated that she had been advised that she had grounds to resign and claim constructive unfair dismissal.

39 The claimant was informed by Ms Alison Williams on 27 February 2018 that "the decision has been made that your grievance is not able to be investigated at the present time. This is due to the content of your complaint relating to an ongoing PSD investigation. The concerns you have raised about the handling of the investigation should be presented at any hearing that may be arranged at the conclusion of the investigation".

40 The claimant states in her witness statement at paragraph 64 that she regarded the disclosure of information in her grievance about the alleged unreliability of the drugs tests to the respondent as being in the public interest because she was highlighting unfair practices within the respondent which placed her at risk of being unfairly dismissed without due process being followed and without evidence being available to support the decision to dismiss her. "This would have resulted in the loss of an intelligence officer (and in all likelihood others who may have applied for the role with COLP and/or the respondent and received false positive test results) who was or were committed and effective in helping to combat crime on the nation's railways".

41 She says in paragraph 65 that she was also seeking to expose the unfair recruitment practices of COLP by failing to properly investigate the reason for the "false positive test results when they were challenged by the candidate". She alleges that the respondent "could have sought to address that by reporting the matter to the relevant authorities".

42 When cross-examined on these matters, the claimant accepted that in her grievance, the issues raised were about her being treated fairly. She was not concerned in her grievance with the rights of others. Further, she was not concerned with the wider practice about concealing information in the disciplinary process, which she raised in her grievance. The grievance was about the effect on herself. Similarly, the claimant conceded that her concern about City of London Police and their drugs testing policy, was about herself, not others.

The AlphaBiolabs Report

43 On about 19 January 2018 the claimant had instructed Alpha Biolabs to carry out a further hair strand test (referred to below as sample C) for the same period covered by the sample A and sample B tests. The report was provided on 5 February 2018. This confirmed that the results for segments 1 to 8, for

the approximate period from the start of May 2017 to the start of January 2018 were negative. The test results for segment 9 were still pending at this point.

44 The test results for segments nine were provided to the claimant on 16 February 2018. The results were negative for cocaine, but positive for benzylecgonine (BE) (0.067ng/mg, the cut-off point being 0.05ng/mg). The report states that BE can be formed not only through the metabolic breakdown in the body of cocaine, but also by natural environmental degradation. Therefore “the presence of cocaine and/or [BE] alone may not be conclusive evidence of direct cocaine ingestion” (page 280). The author of the report also noted: “[W]ith the disclosed application of hair dye in combination with the use of thermal hair straighteners, these analytical results could be understated”. In the conclusion section of the report it was stated: “The presence of [BE] alone in hair segment S9 suggest that Jenny O’Boy had either used a small amount of cocaine or had been exposed to an environment laden in cocaine between approximately the start of April 2017 and the start of May 2017” (page 281). In contrast, the claimant states in her witness statement at paragraph 48, that the test result on segment nine “does not amount to evidence that I had taken cocaine and the results for cocaine on segment nine is negative”.

45 The claimant raised further questions with AlphaBiolabs on 16 February 2018. A response was sent to her on 7 March 2018. Amongst other things, this concluded: “[BE] will only be detected above the SoHT cut-off in hair from cocaine users or individuals who are environmentally exposed to substantial quantities of cocaine. Random hair testing of the population at large has not been undertaken”. The report concluded it was unlikely that the contamination of banknotes or any other environmental factors would have caused the test results. As with the further AlphaBiolab’s report on segment 9, this further response from the independent expert instructed by the claimant, was not disclosed to the respondent until these proceedings.

<u>Claimant’s Solicitors Letter to respondent on 15 March 2018</u>

46 The claimant’s solicitors wrote to the respondent on 15 March 2018. Amongst other things, the letter stated: “Our client has undergone a drugs test for cocaine for which the results have come back as negative. Her position is that there is likely to have been contamination of the samples in the lab, that the results are accordingly unreliable and that the case against her should be dropped immediately.”

47 Later on, the letter stated: “Our client has lost trust and confidence in BTP as her employer to manage the situation fairly, reasonably or promptly. Key documents our client has requested have not been provided without any apparently valid reason. The results of CoLP’s tests are evidently unreliable in light of the results of our client’s subsequent drugs tests and the comments made by CoLP about the number of positive results returned for those candidates who applied for the same role as our client did. A campaign is being pursued against our client based on unreliable evidence”.

48 The letter alleged that the claimant was encouraged to resign at the meeting on 2 January 2018. The letter criticised the failure to give the claimant additional time for her own investigations before submitting her disciplinary statement. This was alleged to be “a significant flaw in the process and goes

to its fairness in support of our client's potential claim for constructive unfair dismissal …. In view of the above and now that our client is clear about the situation, she requests the disciplinary proceedings against her be dropped and that an announcement is issued internally clearing her name to those of her colleagues who are aware of her prolonged absence".

Statement of Marcus Donohue 9 April 2018

49 In the light of the comments raised by the claimant in her statement of 7 February 2018, DI Dermody sought further expert evidence from Mr Donohue. Mr Donohue was provided with the same reports from Alere and LGC that were previously sent to him, together with the AlphaBiolabs report of 5 February 2018 and the claimant's statement of 7 February 2018.

50 He responded on 9 April 2018. The delay was partly due to the lab he worked for becoming insolvent and work being put on hold until a buyer was found. Again, there is reference in his report to the SoHT cut-off points. At the bottom of 481 it is noted, in relation to those cut-off levels: "However, less frequent use may result in concentrations lower than these cut-off limits being present". He stated that in order to carry out a thorough review of all three hair strand analyses and provide a comprehensive assessment of the findings, further information would be required from each laboratory. He set out the information which he required. He concluded:

"1) I agree in general with the comments of Ms Rebecca McLernon in her report dated 5 February 2018 [i.e. the AlphaBiolabs report]. Significant drug loss can occur in cosmetically treated (e.g. dyed hair) and thermally treated (e.g. hair straightened) hair. Ms Jenny O'Boy has disclosed both previously dyeing her hair and using thermal hair straighteners and such use could account for the negative findings in this later test undertaken by AlphaBiolabs.

"2) I have no reason to doubt the analytical results reported by Alere Toxicology or LGC … However, in order to provide a more comprehensive assessment of their findings from the first test specimen collected from Ms Jenny O'Boy, additional information would be required. Until this information is sought, the findings from the analysis of the first test specimen collected from Ms Jenny O'Boy on the 31st August 2017 covering an approximate 3 to 4 month period could be due to the following: the prior use of cocaine by Ms Jenny O'Boy, the frequent exposure to cocaine by her, such as being in an environment where cocaine is being used or a combination of two.

"3) In my opinion it is highly unlikely that the detection of cocaine in Ms Jenny O Boy's first test specimen is due to either the ingestion of contaminated food prepared in a restaurant by kitchen staff who have previously taken cocaine or from the handling of banknotes."

Request for further information from Alere, LGC and AlphaBiolabs

51 In response to Mr Donohue's request for further information, DI Dermody wrote to all three laboratories. LGC responded on 12 April 2018 by email (page 551). This email confirmed that the appropriate wash protocol had been applied and that the concentration of cocaine and BE present in the wash compared sample was calculated as below 10%. The response continues: "If the concentration [in the wash test] is below or equal to 10% the presence of the drug is said to be indicative of use". The response also confirmed: "When analysing B samples, as the counter-analysis laboratory, we report our

findings as a presence of drug(s) and level determined (only if the confirmatory criteria is met). We do not report as negative or positive against some recommended guideline cut-offs as we would for an A sample. This approach gives more information and context in interpreting the results of the A sample for a reporting officer or medical reporting officer".

52 DI Dermody wrote to AlphaBioLabs on 12 April 2018, raising the questions which Mr Donohue had asked him to raise with them. There was a delay in the information being provided because AlphaBioLabs was not one of the preferred suppliers of the respondent, and a new account had to be set up. That delayed the process. Their response was still outstanding when the claimant resigned.

53 Relevant questions were also raised with Alere. They provided a response on 4 May 2018 (page 603). This confirmed that the appropriate chain of custody procedures and quality checks had been implemented. It confirmed that the wash solution prepared from the hair section had also been analysed for evidence of cocaine group analytes and opiate group analytes and that neither were detected in the wash solution. On page 608 he states: "After cocaine enters the human body, it breaks down to form metabolites such as [BE]. When a cocaine metabolite is detected in a hair section, the results are consistent with the use of cocaine. [BE] has been detected together with the presence of cocaine in the hair section analysed. The results of the analyses of the wash sample suggests that the source of the cocaine detected in the hair section is from use of cocaine rather than external exposure of the hair to cocaine. In my opinion, when taken in isolation, the results more likely than not indicate the use of cocaine by Jenny O'Boy within the approximate time period covered by the hair section analysed. The hair section represents the approximate time period from the middle of May 2017 to the middle of August 2017".

<u>Response to Lotus Law letter on 11 May 2018</u>

54 The letter sent on 15 March 2018 by the claimant solicitors was eventually responded to on 11 May 2018 by Ms Colette Osborne. The delay occurred in part because Ms Osborne was on sick leave for a period of about six weeks. The letter had not been dealt with in her absence. She accepted that it could and should have been dealt with earlier. She had understood that the letter had been sent to the legal department and she had expected them to respond. She replied on her return from sick leave, on discovering that no one else had done so on the organisation's behalf.

55 In her reply, she confirmed that PSD had told her that they hoped to have the investigation completed by the end of June at the latest. She stated that the claimant had been provided with updates throughout the process. She relied on information from PSD in stating that. She confirmed: "Until we have the outcome of the PSD investigation we will not be proceeding with the grievance as per the email (see attached) sent to Miss [O']Boy in February 2018." She confirmed in her evidence that this was a fresh decision by her on the grievance at that stage.

56 It was put to Ms Osborne that the submission of a grievance by the claimant led the organisation to be antagonistic towards her because she had "dared to complain". Ms Osborne refuted that. She stated that grievances are dealt with

day in day out by HR; issuing a grievance was nothing unusual. We accept her evidence.

57 The Acas Code of Practice on disciplinary and grievance procedures paragraph 46 states: “Where an employee raises a grievance during a disciplinary process the disciplinary procedure may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently”. This was put to Ms Osborne. Her response was that it did not apply because the process was at the investigation stage, not the disciplinary stage. She said that it wasn’t an automatic outcome that the investigation would lead to the instigation of a disciplinary procedure against the claimant. We note at this point that the formal disciplinary procedure includes provision for an investigation, prior to a disciplinary hearing, implying that the investigation is part of the disciplinary procedure as a whole (sections 2 and 3). Ms Osborne also stated that at the time of her email there was approximately a six-week period of time to completion and she thought it would potentially prejudice and/or delay the PSD investigation, if the grievance process was undertaken either independently of or concurrently with the disciplinary investigation.

<u>Lotus Law letter of 23 May 2018</u>

58 A response was sent by the claimant’s solicitors to Ms Osborne on 23 May 2018. This raised concerns about the length of the investigation; the lack of information provided to her; the lack of updates; that the claimant had to continue chasing up PSD; concerns about the lengthy period of sickness absence of the claimant and the effect that could have on any future employment opportunities. It was also stated that the grievance process “should be adhered to and concluded before the PSD investigation continues any further”.

59 A brief reply was sent by Ms Osborne on 1 June 2018 reiterating that they awaited completion of the investigation report from PSD; reiterating that the claimant had received regular correspondence via email with PSD; and that there was an opportunity to make an application for extension of sick pay, although that was discretionary.

<u>Ongoing delays in investigation/Suspension Reviews</u>

60 DI Dermody emailed the claimant on 7 June 2018 to say that he was still waiting for the further report from AlphaBiolabs. He explained that the delay was partly due to the lab not being in the preferred supplier list for the respondent. The report was not received before the claimant’s resignation.

61 Regular suspension reviews were carried out, every 28 days, by DCI Brooks. He was cross-examined at length about the contents of those, which it was stated suggested a lack of even-handedness. We accept his evidence in relation to the contents of those reports - which was that they set out that the claimant had raised a number of lines of defence and that it was necessary for the force to follow those up. He told us and we accept that the DCC who he reported to was keen to ensure that investigations were dealt with by PSD as quickly as possible. What he was trying to do in the suspension/restriction reports was to explain why, in this particular case, the investigation was taking much longer than had originally been anticipated.

Resignation

62 The claimant resigned without notice on 11 June 2018. In her resignation letter, she alleged that there had been fundamental breaches of contract including breaches of the duty of trust and confidence owed to her. The matters which she said amounted to breaches included the disciplinary investigation not being fair, even-handed or thorough. She also referred to the delays in the investigation; the failure to submit her for a further hair test; the issues with the meeting on 2 January 2018; her being pressured to resign; the lengthy sickness which was now on her record; and the failure to deal with her grievance. She states: "I have quite recently undergone a drugs test for cocaine for which the results came back as negative for the relevant period covering CoLP's test window … These results have been supplied to BTP, yet in view of this evidence exonerating me, the investigation continues".

63 Following her resignation, the respondent paid the claimant four weeks' notice pay.

Completed disciplinary investigation

64 Following the claimant's resignation, DI Dermody completed his investigation report. He did not send the responses from LGC or Alere to Mr Donohue for comment before doing so. Nor did he pursue the enquiries with AlphaBiolabs any further. His report concluded that there would be a case to answer.

65 That was sent to the appropriate authority, DCI Gordon Briggs. DCI Briggs noted at paragraphs 14 and 15 that: "At the time of Ms O'Boy's resignation further analysis was being carried out to seek to prove or disprove additional challenges made by her in relation to the reliability of the CoLP laboratory processes. This work will continue and will be added to this file when received. Whatever the outcome of those tests, based on the two positive tests taken by CoLP (the current available evidence) and on the balance of probabilities there would in my view still be a case to answer as there is sufficient evidence upon which a properly directed tribunal could find misconduct". Had Ms O'Boy not resigned, he would have recommended that the case was heard before a misconduct hearing because: "If proven the sanction of immediate dismissal should be available to the panel to deal with the seriousness of the alleged transgression".

Placing of claimant on Police Barred List

66 On 9 July 2018 a Mr Hoque of the respondent wrote to the claimant informing her that the disciplinary investigation was complete, that there was sufficient evidence on which a properly directed disciplinary tribunal could reach a finding of gross misconduct and this would have resulted in her attendance at a gross misconduct hearing. The letter confirmed that police service records would be updated and a flag placed against her name to show that she had resigned whilst being investigated for gross misconduct, which could preclude any future employment in the police service. The claimant objected to this in writing on 18 July 2018 without success.

67 The letter of 27 July 2018 also referred to the *Police Barred List and Police Advisory List Regulations 2017*. It confirmed: "The advisory list includes individuals who leave during investigations, or before an allegation comes out, relating to conduct only". It confirmed that her name would remain on that list.

68 In cross-examination, the claimant accepted that the flagging of the service records was an obligation on the respondent police force under the 2017 Regulations referred to above. She accepted that it was not done because she blew the whistle. Ms Osborne confirmed in cross-examination that the decision to place the claimant on the barred list was not hers to take. But in any event, it had nothing to do with the grievance being submitted, it was part of a formal process which would be followed in any situation where an employee or officer resigned in circumstances in which they were facing gross misconduct allegations. DCI Brook's evidence was to the same effect.

The treatment of the grievance post-dismissal

69 On 27 July 2018 the respondent wrote to the claimant asking her to confirm by 7 August 2018 if she wished to pursue her grievance. The claimant did not respond. She says in her witness statement, para 75, that was because she had already resigned and completed the ACAS early conciliation process with a view to bringing a tribunal claim and she had no trust and confidence in the respondent to deal with the grievance properly.

## The Law

Protected disclosures

70 Section 43B ERA 1996 reads:

***43B Disclosures qualifying for protection***

*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—*

*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*

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

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

*(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

*(e) that the environment has been, is being or is likely to be damaged, or*

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

*(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere,*

*and whether the law applying to it is that of the United Kingdom or of any other country or territory.*

*(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

*(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.*

*(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

71 The tribunal must ask whether the worker (a) believed at the time that they were making it that the disclosure was in the public interest and (b) that belief must be reasonable - *Chesterton Global v Nurmohamed [2018] ICR 731 at #27*. The two-stage test should not be elided. The tribunal must not consider what the worker's predominant motive was; but what their subjective belief was and whether it was objectively reasonable (para 30). See also *Ibrahim v HCA International Ltd [2019] EWCA Civ 2007* at #25 and #26.

72 Section 47B(1) ERA 1996 reads:

***47B Protected disclosures***

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

73 In deciding whether there is a causative link between the protected disclosures and the detrimental act, the tribunal must analyse the mental processes, whether conscious or unconscious, which caused the employer to act in the manner alleged.

74 The burden of proof is on the claimant to establish that there was a legal obligation in each of the circumstances relied on and that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which she is subject - *Boulding v Land Securities Trillium (Media Services) Ltd UKAEAT/0023/06* at #24.

75 S103A ERA 1996 reads:

***103A Protected disclosure***

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

<u>Constructive unfair dismissal</u>

76 S95(1)(c) ERA 1996 reads:

***95  Circumstances in which an employee is dismissed***

*(1)     For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—*

*….*

*(c)     the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*

77 In order to succeed in a constructive unfair dismissal claim a claimant must show that the respondent fundamentally breached her contract of employment, that she resigned in response to the breach and that she did not waive the breach or affirm the contract (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221)*.

78 The following two terms are implied into employment contracts. First, that the employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and its employees (*Baldwin v Brighton and Hove City Council [2007] ICR 680* at #35-36). Second, that the employer will reasonably and promptly afford a reasonable opportunity to its employee to obtain redress of any grievance she may have (*W A Goold (Pearmark) Ltd v McConnell [1995] IR LR 516*).

79 In *Leach v Office of Communications [2012] ICR 1269 653*, Mummery LJ held at #53:
*"… In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the employment tribunal has to examine all the relevant circumstances. That is what the employment tribunal did with regard to the nature of the employer's organisation, the claimant's role in it, the nature and source of the allegations and the efforts made by the employer to obtain clarification and confirmation, the responses of the claimant, and what alternative courses of action were reasonably open to the employer."*

Dismissal for asserting a statutory right

80 Section 104 ERA 1996 reads:.

***104  Assertion of statutory right***

*(1)     An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*

*(a)     brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*

*(b)     alleged that the employer had infringed a right of his which is a relevant statutory right.*

Hair Sample Testing

81 Counsel for the claimant referred us to the case of *In re H (A Child) (Care proceedings: Hair Strand Testing) [2017] EWFC 64.* This case concerned care proceedings, in relation to a mother who was alleged to be an ongoing cocaine user. Evidence was heard over five days, which included evidence from three different experts on hair strand testing. At paragraph 44 and 46 Peter Jackson J concluded:

*"44. These [industry] guidelines appear to state that a test requires at least a concentration of the parent drug at greater than the cut off level and the identification of one of the metabolites. [There then continues a discussion about Dr Rushton's evidence which was rejected]….*
*"46. There was similar disagreement between Dr Rushton and the other witnesses in relation to the significance of findings below the cut-off level. He was not prepared to entertain a positive finding that takes account of any data falling below the cut-off level. The other witnesses considered that all information should be taken into account, but giving due regard to whether or not results pass the cut-off level or not."*

## Conclusions

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

Whistleblowing (ERA 1996, ss.43A, 47B)

83 In many protected disclosure (whistleblowing) cases, the most difficult hurdle a claimant has to get over is the demonstration of a causal link between the protected disclosures made and the alleged detrimental treatment. As will be clear from our conclusions below, we were able to make clear findings as to the lack of any causal link between the alleged detriments and the alleged protected disclosures. For that reason, we deal with the question as to whether or not any protected disclosures were made in a fairly summary fashion. We do not consider that it is proportionate to go into those matters in any great detail, in the light of our clear conclusions on the causation question.

84 It is accepted by the respondent that in her grievance of 1 February 2018 the Claimant complained that:

84.1 the Respondent had failed to address her concerns about the results of the drug tests (PoC §44); and

84.2 the Respondent had failed to address her concerns about the disciplinary investigation process (PoC §44).

*Protected disclosure?*

85 We have to decide whether the Claimant has shown that those complaints or either of them amount to protected disclosure(s) within s.43A ERA 1996. That involves answering the following questions in italics below. Our conclusions are set out in each sub-paragraph.

85.1 *They constituted disclosures of information to the Respondent.* We conclude that they do constitute disclosures of information to the respondent.

85.2 *In the Claimant's reasonable belief they were made in the public interest.* We conclude that the claimant did not reasonably believe that the disclosures of information were made in the public interest at the time that they were made. We accept that the claimant had raised genuine concerns in the grievance, both about the disciplinary process, and CoLP's drug testing regime. We conclude that her concerns were (understandably) being raised because of the impact on her, rather than the potential impact on the wider public. That is of course about the motive for her disclosures, rather than about whether the claimant held such a belief and the reasonableness of it. We did not find the claimant's evidence in that regard convincing. We conclude that the claimant did not believe at the time that the disclosures she was making were in the public interest. Even if she had, we do not consider that such beliefs would have been reasonable, bearing in mind the limited number of people in the group whose interest the disclosures served (2 or 3 at the time).

85.3 *In the Claimant's reasonable belief, and by reference to the legal obligations set out below, did the information disclosed tend to show that the Respondent had failed or was likely to fail to comply with a legal obligation to which it was subject*? We consider that the claimant's belief that the information disclosed tended to show that the respondent was failing to comply with the legal obligations below was reasonable. In coming to that conclusion, we have borne in mind, as set out in the *Boulding* case, paragraph 24, that the burden of proof is on the claimant to establish this.

85.4 The legal obligations relied on by the claimant are:

85.4.1 an obligation on the Respondent to follow a fair process in relation to disciplinary proceedings which could result in dismissal or other sanction (PoC §45); and/or

85.4.2 an obligation on the Respondent to report concerns regarding the reliability of City of London Police's drugs tests to the relevant authorities/regulators (PoC §45); and/or

85.4.3 an obligation on the Respondent not to conceal information which would have enabled the Claimant to exonerate herself and not be

unfairly dismissed and which could have resulted in action against City of London Police by the regulator (PoC §45)?

*Detriments*

86 As can be noted from the above, we have concluded that the claimant did not make any protected disclosures. If we had found that she had done so, our conclusions as to whether or not the claimant was subjected to any detriments, as alleged, as a result, would have been as follows.

87 *The alleged failure to investigate and progress her grievance lodged on 1 February 2018 adequately or at all (PoC §49).* The clear and unambiguous conclusion of the tribunal is that the reason that the grievance was not investigated and progressed, was because Ms Williams and Ms Osborne took the view that to do so would potentially prejudice the PSD investigation; and/or delay it yet further. We have accepted that was the reason for their decisions. That reason had nothing to do with the potential protected disclosures the grievance contained. As a matter of logic, nor did the decisions based on that reasoning.

88 *On or around 30 January 2018, refusing to allow the claimant any, or any adequate, extension of time to submit her disciplinary statement and properly defend herself (PoC §49)*. This allegation was withdrawn by Ms Higgins on the claimant's behalf, because DI Dermody's evidence was that he was not aware that the grievance had been submitted or of the content of it, when he refused to allow the claimant the extension of time she had requested within which to provide her statement. We consider that concession was properly made. DI Dermody's evidence was not contested and we accept his evidence on that matter.

*89 On or before 9 July 2018 the Respondent marking the claimant's records to show that she had resigned whilst under investigation for gross misconduct when there was insufficient evidence to support such action (PoC §54)?* We conclude that the placing of the claimant on the Police Barred List was because the respondent had an obligation to do so, pursuant to the *Police Barred List and Police Advisory List Regulations 2017*. The placing of her on that list therefore had nothing to do with the potential protected disclosures the grievance contained. The claimant quite rightly conceded in cross examination that was the case. Even if she had not done so, we would in any event have concluded, on the basis of the evidence heard and our findings of fact above that the decision to place the claimant on the Police Barred List was not causally linked to the potential protected disclosures in her grievance.

Automatically unfair constructive dismissal (ERA 1996, ss.95(1)(c), 103A, 104)

*S 103A ERA 1996 – Protected disclosure unfair constructive dismissal*

90 In the light of our findings above in relation to the protected disclosure detriments, we conclude that the claim under s103A ERA 1996 is not well-founded. We still need to consider however whether or not the claims for unfair constructive dismissal (s 98 ERA 1996) or dismissal for asserting a

statutory right (s104 ERA 1996) are made out. We shall first come to our conclusions on the alleged repudiatory breaches of contract.

*Repudiatory breaches?*

91 We set out below each of the alleged repudiatory breaches of the Claimant's contract of employment, and our conclusions in relation to each. The term relied on is not set out in the list of issues but it is apparent that the terms relied on are (1) the implied term of trust and confidence and (2) that the employer will reasonably and promptly afford a reasonable opportunity to its employee to obtain redress of any grievance she may have. In the circumstances of this case, we conclude that the latter adds little to the former in this particular case. In our discussion below, references to 'breach of contract' are references to the trust and confidence term, except the alleged breaches in relation to the grievance, in which that expression refers to both potential breaches.

92 We make a number of references below as to whether or not the conduct of the respondent was reasonable. We are of course aware that unreasonable conduct is not necessarily repudiatory conduct. However, conduct by an employer that is reasonable, is unlikely to be repudiatory conduct (since there is likely to be reasonable and proper cause for the conduct in question).

93 *Removing the Claimant from normal duties and her usual workplace on 17 October 2017 for the duration of the disciplinary investigation (PoC §13).* We refer to our findings of fact above in which we found that the claimant was removed from her duties because of the nature of those duties. If the claimant was found to be a class A drug user, there was a potential risk of corruption or compromise of the Respondent's investigations into the illegal supply of Class A drugs around the country. The claimant accepted in cross examination that given the nature of those duties, then if had she been found to be a cocaine user, the respondent would be entitled to be concerned about that. The claimant accepted that in those circumstances, the removal of her from her duties was reasonable. We conclude that her removal from those duties pending the outcome of the disciplinary investigation was indeed reasonable in the circumstances and did not amount to a repudiatory breach of contract.

94 *Allocating the Claimant few duties for the duration of the disciplinary investigation (POC §13).* Again, we refer to our findings of fact above. We have some sympathy with the position the claimant found herself in. She had been working in a role which was interesting, responsible and demanding. The restricted duties role that she was asked to carry out involved duties which were mainly of an administrative nature. Whilst we do not consider that they could be done within just one and a half hours of her five-hour working day, we do accept that her working day was by no means filled by the duties that were offered to her. We conclude however that had the claimant not suffered ill health and gone on sick leave as a result, further training would have been offered to her, and that the amount and complexity of the duties would have increased. Those would still have been duties on the whole of an administrative nature. Nevertheless, they were meaningful and important administrative duties, evidenced by the fact that after the claimant left, CI

Doyle recruited somebody to carry out the same duties. These actions did not in the circumstances amount to a repudiatory breach of contract.

95 *Asking the Claimant (through an Occupational Health representative) on 23 October 2017 what drugs she was taking and whether she had stopped using them (PoC §14).* We have found that the question was asked. In response, the claimant denied any controlled drug use, as she has maintained throughout. That was the end of the matter. We do not find anything sinister in the question being asked. It was asked in the context of an occupational health referral, by the OH representative, and was not connected to the investigation. Had the claimant accepted that she had taken class A drugs, she could have been offered appropriate medical support, if applicable. We conclude that this incident did not amount to a repudiatory breach of contract.

96 *Placing the Claimant under restrictions as set out in a call by DS Samiotis on 30 October 2017 (PoC §19).* We refer to our conclusions above in relation to the duties given to the claimant. We have concluded that the restrictions the claimant was placed under were reasonable in the circumstances. The respondent had potential grounds to suspend the claimant in the circumstances but chose instead to redeploy her into restricted duties. We conclude that such actions were not a repudiatory breach of contract.

97 *Relying solely on the hair test from the laboratory instructed by City of London Police to pursue the disciplinary investigation rather than conducting its own hair test (PoC §20).* We conclude that the decision by the respondent not to carry out a test on a sample taken from the claimant after the allegation came to light, was a reasonable one for them to take. Their rationale was that two samples of hair had been taken by CoLP and that the most sensible course of action was to have tests carried out on the B sample, as well as making further enquiries in relation to the tests on the A sample. Had a further hair sample been taken in October 2017 by CoLP, that would have related to a later timescale, than the B sample which had been taken by COLP at the same time as the A sample. That was a justifiable reason not to take a further sample from the claimant at that stage.

98 We note also that the whole investigation was complicated by the fact that the issue had arisen as a result of a test carried out by a different police force. If it had arisen as a result of a drugs test by the respondent, the matter would have been much more straight-forward. If so, two hair samples would have been taken by the respondent, an A sample and a B sample. If the A sample had tested positive, further tests would have been carried out on the B sample, had the first sample tested positive. That is what happened in the claimant's case; it just had to be organised via another police force. The respondent's actions in these circumstances do not amount to a repudiatory breach of contract.

99 *Failing to independently review the positive drugs test result prior to the commencement of the disciplinary investigation (PoC §22)*. We have found as a fact that the initial certificate of analysis from Alere Toxicology was based on both a screening and a confirmation analysis. When the respondent made the decision to commence a disciplinary investigation, they did not have this certificate; they simply had an intelligence report from CoLP. As we have

already indicated, the situation here was somewhat unusual in that the respondent was relying on a drugs test carried out on behalf of a different police force. We consider that in those particular circumstances at that time, it was reasonable for the respondent to rely on the intelligence report from a separate force, particularly when considered in conjunction with the nature of the duties carried out by the claimant. In particular, her work as a field intelligence officer involved in police work concerning controlled drugs and 'county lines'. The failure of the respondent to independently review the positive drugs test result was not in these circumstances a breach of contract. It had to act fast initially on the basis of the report and did so.

100 *Denying the Claimant the opportunity to be accompanied at the meeting on 2 January 2018 (PoC §28).* We refer to our specific finding of fact in relation to this issue, that such a request was not in fact made. Even if it had been made, it could reasonably have been refused by the respondent since this was not a meeting in any way connected to the disciplinary investigation. This was not therefore a repudiatory breach of contract.

101 *Requesting on 9 November 2018 (through DS Attwell) a copy of the prescription for Amoxicillin in February 2017 from the Claimant's GP, her GP's details and a signed medical disclaimer (PoC §27).* We have found that DI Atwell (at the time, DS Atwell) did ask for those documents. When the claimant objected, he did not press the matter further. He simply asked her to provide confirmation that a prescription for amoxicillin had been provided to her at the relevant time. She did so. Those circumstances did not give rise to a repudiatory breach of contract.

102 *Failing to give the Claimant copies of the laboratory reports obtained by the Respondent, the sample B test results and/or the evidence requested by the Claimant about those results at the meeting on 2 January 2018 (PoC §28)*. It is agreed that none of the reports obtained by the respondent during the investigation, and in particular, the laboratory and expert witness reports, were disclosed to the claimant by the respondent. The claimant did receive, independently, the initial Certificate of Analysis from Alere. She was not forwarded the expert statements from Mr Donohue, the initial LGC report, LGC's response to the request for further information in April 2018, or the detailed report from Alere Toxicology in May 2018. We accept the respondent's evidence that those reports would have been provided, had a disciplinary hearing been organised. Ms Reindorf argued before us that we would not expect an employee to be shown all of the evidence collected in the course of a disciplinary investigation before the conclusion of the investigation. An investigation meeting is a fact-finding exercise she argued, and an employer is usually entitled to conduct it without disclosing all the evidence to the employee.

103 In our view, it always depends on the circumstances. In the claimant's case, we see no good reason why the respondent could not have provided copies of those reports to the claimant during the investigation itself, shortly after they were provided to the respondent. That would have kept the claimant informed of the evidence against her and reassured her that the investigation was being progressed. We consider below whether the respondent's failure in that aspect

amounts to a repudiatory breach of contract, whether on its own or in combination with other matters.

104 *Informing the Claimant at the meeting on 2 January 2018 that the results of the B sample were positive in an attempt to pressurise her into resigning (PoC §28).* We refer to our findings of fact above in relation to the rationale behind the meeting on 2 January 2018, and what happened at it. Informing her of the results of the B sample was not done for the purpose of attempting to pressurise the claimant into resigning. The respondent's actions at the meeting on 2 January 2018 were not a repudiatory breach of contract.

105 *Advising the Claimant to think about her strategy and whether she was prepared for the financial and emotional strain of the disciplinary investigation and any proceedings at the meeting on 2 January 2018; AND failing to discuss welfare issues at the meeting on 2 January 2018 (PoC §28).* We have found that the purpose behind the meeting on 2 January 2018 was to risk assess the situation and to look after the claimant's welfare. Given the claimant's reaction to that meeting, unfortunately it appears that objective was not achieved. It may be that, with the benefit of hindsight, the respondent might have made it clearer what they were trying to achieve at that meeting from the outset, and that it was meant to be centred on the claimant's welfare. Despite that however, we conclude that what happened at the meeting on 2 January 2018 was not a repudiatory breach of contract

*106 Failing to take any, or any adequate, steps to facilitate the Claimant's return to work at any point after the commencement of her sick leave on 9 January 2018 (POC §30).* The claimant was on sick leave because of the stress caused by her facing serious disciplinary allegations. In those circumstances, we conclude that there was no breach of contract by the respondent, by not taking any more active steps to ensure her return to the workplace. It was unlikely that she would have been in a position to do so whilst the allegations were outstanding and she remained on restricted duties. In the absence of any indication from the claimant that she was able and willing to return to work, we conclude that it was not a repudiatory breach of contract to fail to take any steps to facilitate her return.

*107 Informing the Claimant's union representative (through DI Dermody) on 10 January 2018 that the Claimant should resign and that the Respondent had enough evidence to dismiss her (PoC §31)*. We refer to our findings of fact above in relation to this matter. Given those findings, we conclude that there was no breach of contract, as a result of the contents of an open and honest conversation between DI Dermody and Ms McVey which is in our experience typical of such conversations between union officials and managers in the context of disciplinary processes.

*108 Denying the Claimant on 7 February 2018 a sufficient extension of time to submit her disciplinary statement (PoC §35).* We consider that the failure to allow the claimant a further week, on top of the extension of three days to 9 February, indicates a somewhat inflexible attitude by DI Dermody, particularly given how long the process had taken up to that date. However, the short extension did allow the claimant to refer to the results of the AlphaBiolabs report in relation to segments one to eight. There was nothing to prevent the

claimant, under the disciplinary procedure, providing further information following receipt of the report in relation to segment 9. Somewhat inflexible as the approach was,  we conclude that it did not amount to a repudiatory breach of contract.

*109 Informing the Claimant via an email from Alison Williams dated 27 February 2018 and/or an email from Colette Osborne dated 11 May 2018 that her grievance would not be addressed until the disciplinary investigation had been concluded (PoC §33); and/or failing to investigate and progress the Claimant's grievance of 1 February 2018 (PoC §34).* This is an issue which we have had to consider very carefully. We take due notice of the fact that with this particular respondent, the disciplinary procedure was being driven by PSD, which is run by police officers, whereas any grievance procedure would have been run by civilian employees working in the HR Department. We consider that Ms Williams email of 27 February 2018 could have been better worded. She states that the claimant's grievance "is not able to be investigated at the present time". That is not correct. It could have been investigated at that time. The Acas Code, paragraph 46, makes that clear.

*110* Nevertheless, as Ms Williams went on to indicate, the concerns that the claimant was raising about the handling of the investigation could have been presented at any disciplinary hearing that resulted from that investigation, had there been a case to answer and had a disciplinary hearing been organised. This was not a case where the respondent was saying it was never going to look into the grievance matters. Rather, the respondent was saying, first, that issues about process could be raised at any disciplinary hearing, if there was one. Second, that at the conclusion of the disciplinary process, a separate grievance process could have been followed, had that been appropriate and had the claimant wanted to continue to so. We note that the claimant was given the option of continuing with her grievance after her employment ended (although not surprisingly by that stage she was no longer interested in doing so). We consider below whether this and other matters could amount to a repudiatory of breach of contract.

*111 Informing the Claimant (through DI Dermody) on 7 February 2018 that the concerns she had raised in respect of the testing process were an entirely separate issue to the disciplinary process (PoC §36)?* We note the comments made by DI Dermody in his email of 7 February. We confess to being somewhat surprised by them. Clearly, the claimant's concerns in respect of the testing process were central to the claimant's defence. Nevertheless, we note from the defence statement that was produced by the claimant that she did indeed, quite reasonably, raise numerous issues in relation to the testing process. Further, those matters were considered by DI Dermody and he raised them with Mr Donohue, for him to comment on. Mr Donohue dealt in detail with the issues raised in his report of 9 April 2018 and he asked for further enquiries to be made. Those enquiries were followed up. Unfortunately, as already indicated, none of this was communicated back to the claimant, so that she could have been reassured that her concerns were being comprehensively looked into. However, the comment by DI Dermody did not in our view amount to a repudiatory breach of contract.

112 *Other alleged breaches - the decision to commence the investigation; delays in the investigation; failure to follow up lines of inquiry and carry out an even-handed investigation; failure to provide meaningful updates and timeframes.* These were not pleaded as separate breaches in the list of issues but are set out in Ms Higgins skeleton argument. We have heard full argument and evidence in relation to them and it is appropriate to deal with them. Ms Reindorf did not strenuously object to us doing so in these circumstances.

113 The decision to commence the investigation resulted from the intelligence report received from COLP. We conclude that it was reasonable for the respondent to commence an investigation, on the basis of that intelligence reports. The respondent was entitled to assume that the report was based on reliable information.

114 It was central to the claimant's case that she at no point tested positive for cocaine, in that she did not reach the SoHT cut off point, in any of the tests. That is true, on the basis of the contents of paragraph 44 of *In re H*. The claimant did however, in relation to the LGC test on the B sample, come within 2% of that cut-off, which is in any event a cut off point for chronic use of cocaine. Ms Higgins argued that the respondent force should have been aware of the contents of paragraphs 44 to 46 of the *In re H* decision concerning family proceedings in the High Court. That was a bold submission. We respectfully disagree with it. Even if the respondent had been aware of those paragraphs, in all likelihood the investigation would still have been commenced, bearing in mind that paragraph 46 states: "*The other witnesses considered that all information should be taken into account, but giving due regard to whether or not results pass the cut-off level or not".* A positive result within 2% of the SoHT cut off point for chronic cocaine use was bound to be of concern to the respondent, given the nature of the respondent's work, and the particular nature of the claimant's work within it. The expert reports it received concluded on the balance of probabilities that the claimant had either consumed cocaine and/or had been in an environment laden with cocaine. The respondent was clearly in those circumstances entitled to commence and continue an investigation into the potential use of cocaine by the claimant.

115 The investigation did take a lengthy period of time and we understand the claimant's concerns in relation to that. However, there are a number of rational explanations for the various delays that occurred. In the first instance, the allegation arose out of an intelligence report provided by COLP as a result of a drugs test carried out by them. They owned the samples and the reports and the officer dealing with the matter was absent from work for a period. We conclude on the basis of our findings of fact that DI Atwell was doing his best to progress matters. There was reasonable and proper cause for each of the delays. These include, the fact that COLP owned the hair samples; the sickness absence of the officer at COLP who was coordinating the further tests on the samples; and the raising by the claimant of legitimate concerns in relation to the validity of the test results which led to the respondent commissioning an expert report from Mr Donohue, and following up the further questions set out in his report dated 9 April 2018.

116 The claimant, understandably, obtained her own expert report. As found above, that report and her statement of 7 February 2018 was provided to Mr

Donohue, to comment on. There was a delay in him responding, because his employer had gone into liquidation. He responded on 9 April 2018 and within a matter of days, DI Dermody had raised further queries with Alere, LGC and AlphaBiolabs. Responses were received from the first two, but not from AlphaBioLabs due to them not being a preferred supplier. It therefore taking some time to sort out, through the accounts department, the payment of that organisation.

117 As to even-handedness, we refer to our above findings of fact, from which there are no reasonable grounds to conclude that the investigation was not carried out even-handedly. We refer in particular to the expert reports, all of which concluded (even the claimant's own on segment nine, which she did not disclose to the respondent), that the tests carried out indicated on the balance of probabilities that the claimant had either consumed cocaine and/or had been in an environment laden with cocaine.

118 As for the question of updates, it is true that the claimant often chased up the matter herself, and that DI Dermody could have been a bit more proactive in his contact with her. However, when the claimant contacted him, he did let her know what was happening shortly thereafter. At the time of the claimant's resignation, the expectation was that the investigation would be concluded by the end of June. It is possible that the failure of the claimant to disclose her own report in relation to segment nine could have delayed matters beyond that date but if so that would not have been the fault of the respondent. In the light of the responses from LGC and Alere, Mr Donohue's conclusions were not likely to have been any different.

119 In summary, none of the further matters relied on amount to repudiatory breaches of contract.

*Conclusions on repudiatory breaches*

120 As stated above in The Law section, two implied terms are relied on, the implied term of trust and confidence, and that the employer will reasonably and promptly afford a reasonable opportunity to its employee to obtain redress of a grievance. The former depends on whether the employer has reasonable and proper cause for its actions. We consider that the latter contains a similar limitation, given that it is premised on reasonableness. Further, it is always necessary to look at the particular circumstances.

121 The two matters which concern us from the above list of alleged breaches are the failure to disclose the reports to the claimant; and the response to her grievance request. The disciplinary procedure contains surprisingly little detail in relation to the procedure to be adopted in a disciplinary investigation. We understand that the investigating officers would have been adopting a similar process to that used where a serving police officer is being investigated under the Police Conduct Regulations. We were not referred to any specific sections of those Regulations. We conclude that, as a matter of good industrial relations practice, the expert reports could have been disclosed to the claimant, as and when they were received by the respondent. In particular, the LGC report, the various responses from Mr Donohue, and the subsequent responses from both LGC and Alere. The disclosure of those reports would

have gone some way to reassuring the claimant that progressing. However, the disclosure of those reports would not in any way have assisted the claimant in the preparation of her defence. In all likelihood there would still have been a finding that there was a case to answer. After all, her own expert report on segment nine of the later hair sample taken showed a positive finding for a metabolite of cocaine.

122 As for the failure to follow up the grievance, then as stated above, we consider that whilst the wording of Ms Williams email could have been better, it was still clear from her response that the matters which the claimant was complaining about in her grievance, could and would be considered as part of any disciplinary proceedings, were such proceedings to result from an investigation. Even bearing in mind the contents of paragraph 46 of the ACAS Code of Practice on Disciplinary and Grievance Procedures, we do not consider that the respondent's actions amounted to a repudiatory breach. The claimant's case can be distinguished from the *Goold* case in that the respondent was not simply saying to the claimant that it was not going to investigate the matters raised by her grievance at all. Rather, it was saying that those matters could be considered as part of any resulting disciplinary procedure (or if one did not result from the disciplinary investigation, at the conclusion of that investigation).

123 We conclude therefore that the ongoing failure to disclose the expert reports and the response to the grievance did not amount to a repudiatory breach of contract, whether on their own, or in combination. In those circumstances, we conclude that the claimant was not constructively dismissed.

*Resignation in response?*

124 *If so, did the Claimant resign on 11 June 2018 in response to the breaches or any of them (having regard to the 'last straw' doctrine)?* This question does not arise, because we have concluded that the respondent was not in repudiatory breach of contract. It is not possible or necessary for us to answer the 'resignation in response' question in the abstract. We therefore arrive at no conclusions in respect of this issue.

*Waiver/affirmation*

125 *If so, did she waive the breach or affirm the contract of employment?* Similarly, it is not possible or necessary to answer the 'waiver/affirmation' question in the abstract, given our conclusion that there was no repudiatory breach of contract. Again, therefore we arrive at no conclusions in respect of this issue.

Dismissal for asserting a statutory right

126 It is accepted that the Claimant asserted the statutory right not to be unfairly dismissed in her grievance of 1 February 2018 (PoC §53). The claimant's claim in this respect necessarily fails however because we have concluded that there was not a dismissal. In any event, just as we concluded that the matters raised in the claimant's grievance was not causally connected in any way with any of the adverse treatment she alleges, we conclude that the

raising by the claimant of her right not to be unfairly dismissed in her grievance had nothing to do with any subsequent conduct towards her. As Ms Osborne and DCI Brooke stated in their evidence, grievances are regularly raised by those working for the respondent, and neither they nor anyone else working for the respondent react adversely to the claimant as a result of her raising a grievance.

Ordinary unfair constructive dismissal (ERA 1996, ss.95(1)(c), 98)

127 The questions as to the reason for the dismissal, and whether or not the dismissal was fair do not arise, on the basis of our conclusions above.

Limitation

128 Similarly, limitation issues do not arise, as a result of our above conclusions. It is not possible or necessary to consider limitation issues in the abstract in this case, since we have not found any lawful conduct.

## Concluding remarks

129 For the above reasons, the claims do not succeed. In the circumstances however we would like to add the following.

130 We have not been concerned in this case with the question as to whether or not the claimant ever took cocaine and/or was in an environment 'laden with cocaine'. We have simply been concerned with the conduct of the respondent, arising out of an investigation into those questions. The claimant has maintained her innocence throughout the proceedings. The scientific findings would have needed to be considered in due course, at any disciplinary hearing, if one had been arranged, alongside any explanation that the claimant could provide for those findings. What those explanations and findings might have been is not our job to decide.

Employment Judge Andrew James
London Central Region

Dated: 9 March 2020

Sent to the parties on:

11 March 2020

For the Tribunals Office

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

## ANNEX A – AGREED LIST OF ISSUES

### Whistleblowing (ERA 1996, ss.43A, 47B)

1 It is accepted that in her grievance of 1 February 2018 the Claimant complained that:

1.1 the Respondent had failed to address her concerns about the results of the drug tests (PoC §44); and

1.2 the Respondent had failed to address her concerns about the disciplinary investigation process (PoC §44).

2 Has the Claimant shown that those complaints or either of them amount to protected disclosure(s) within s.43A ERA 1996 in that:

2.1 they constituted disclosures of information to the Respondent; and

2.2 in the Claimant's reasonable belief they were made in the public interest; and

2.3 in the Claimant's reasonable belief, the information disclosed tended to show that the Respondent had failed or was likely to fail to comply with a legal obligation to which it was subject?

2.4 In this regard, what was the legal obligation? Was it:

2.4.1 an obligation on the Respondent to follow a fair process in relation to disciplinary proceedings which could result in dismissal or other sanction (PoC §45); and/or

2.4.2 an obligation on the Respondent to report concerns regarding the reliability of City of London Police's drugs tests to the relevant authorities/regulators (PoC §45); and/or

2.4.3 an obligation on the Respondent not to conceal information which would have enabled the Claimant to exonerate herself and not be unfairly dismissed and which could have resulted in action against City of London Police by the regulator (PoC §45)?

3 If so, was the Claimant subjected to a detriment arising from an act or a deliberate failure to act by the Respondent in that:

3.1 the Respondent failed to investigate and progress her grievance lodged on 1 February 2018 adequately or at all (PoC §49); and/or

3.2 on or around 30 January 2018 the Respondent refused to allow her any, or any adequate, extension of time to submit her disciplinary statement and properly defend herself (PoC §49); and/or

3.3 on or before 9 July 2018 the Respondent marked her records to show that she had resigned whilst under investigation for gross misconduct when there was insufficient evidence to support such action (PoC §54)?

4 If so, were those acts or omissions or any of them done on the ground that the Claimant had made the protected disclosure(s)?

**Automatically unfair constructive dismissal (ERA 1996, ss.95(1)(c), 103A, 104)**

5 Did the Respondent commit a repudiatory breach of the Claimant's contract of employment by any of the following acts or omissions, taken individually or collectively:

5.1 removing the Claimant from normal duties and her usual workplace on 17 October 2017 for the duration of the disciplinary investigation (PoC §13); and/or

5.2 allocating the Claimant few duties for the duration of the disciplinary investigation (POC §13); and/or

5.3 asking the Claimant (through an Occupational Health representative) on 23 October 2017 what drugs she was taking and whether she had stopped using them (PoC §14); and/or

5.4 placing the Claimant under restrictions as set out in a call by DS Samiotis on 30 October 2017 (PoC §19); and/or

5.5 relying solely on the hair test from the laboratory instructed by City of London Police to pursue the disciplinary investigation rather than conducting its own hair test (PoC §20); and/or

5.6 failing to independently review the positive drugs test result prior to the commencement of the disciplinary investigation (PoC §22); and/or

5.7 denying the Claimant the opportunity to be accompanied at the meeting on 2 January 2018 (PoC §28); and/or

5.8 requesting on 9 November 2018 (through DS Attwell) a copy of the prescription for Amoxicillin in February 2017 from the Claimant's GP, her GP's details and a signed medical disclaimer (PoC §27); and/or

5.9 failing to give the Claimant copies of the laboratory reports obtained by the Respondent, the B test results and/or the evidence requested by the Claimant about those results at the meeting on 2 January 2018 (PoC §28); and/or

5.10 informing the Claimant at the meeting on 2 January 2018 that the results of the B sample were positive in an attempt to pressurise her into resigning (PoC §28); and/or

5.11 advising the Claimant to think about her strategy and whether she was prepared for the financial and emotional strain of the disciplinary

investigation and any proceedings at the meeting on 2 January 2018 (PoC §28); and/or

5.12 failing to discuss welfare issues at the meeting on 2 January 2018 (PoC §28); and/or

5.13 failing to take any, or any adequate, steps to facilitate the Claimant's return to work at any point after the commencement of her sick leave on 9 January 2018 (POC §30); and/or

5.14 informing the Claimant's union representative (through DI Dermody) on 10 January 2018 that the Claimant should resign and that the Respondent had enough evidence to dismiss her (PoC §31); and/or

5.15 denying the Claimant on 7 February 2018 a sufficient extension of time to submit her disciplinary statement (PoC §35); and/or

5.16 informing the Claimant via an email from Alison Williams dated 27 February 2018 and/or an email from Colette Osborne dated 11 May 2018 that her grievance would not be addressed until the disciplinary investigation had been concluded (PoC §33); and/or

5.17 failing to investigate and progress the Claimant's grievance of 1 February 2018 (PoC §34)?

5.18 informing the Claimant (through DI Dermody) on 7 February 2018 that the concerns she had raised in respect of the testing process were an entirely separate issue to the disciplinary process (PoC §36)?

6 If so, did the Claimant resign on 11 June 2018 in response to the breaches or any of them (having regard to the 'last straw' doctrine)?

7 If so, did she waive the breach or affirm the contract of employment?

8 It is accepted that the Claimant asserted the statutory right not to be unfairly dismissed in her grievance of 1 February 2018 (PoC §53).

9 If so, was the reason or principal reason for the Claimant's dismissal that:

9.1 she had made the protected disclosures in §3 above or any of them (PoC §52); or

9.2 that she had asserted the statutory right not to be unfairly dismissed?

**Ordinary unfair constructive dismissal (ERA 1996, ss.95(1)(c), 98)**

10 If the Claimant was constructively dismissed as per §§5–7 above, was the reason for her dismissal a potentially fair reason within s.98(1)(b) ERA 1996, namely

10.1 misconduct; or

10.2 some other substantial reason?

11 If so, did the Respondent act reasonably in treating the reason as sufficient reason for dismissing the Claimant within s.98(4) ERA 1996?

**Limitation**

12 Which, if any, of the Respondent's acts or deliberate failures to act which constituted detriment to the Claimant contrary to s.47B ERA 1996 were part of a series of similar acts or failures?

13 In respect of each of the Respondent's acts or deliberate failures to act, if any, which constituted detriment to the Claimant contrary to s.47B ERA1996:

13.1 did the Claimant present a complaint to the Tribunal before the end of the period of three months beginning on the date of that act or failure, taking into account the extension of time limits for Early Conciliation provided for in s.207B ERA 1996;

13.2 if not, if any such acts or failures were part of a series of similar acts or failures, did the Claimant present a complaint to the Tribunal before the end of the period of three months beginning on the date of the last of those acts or failures, taking into account the extension of time limits for Early Conciliation provided for in s.207B ERA 1996?

14 If any of the Claimant's complaint were not presented within the relevant time limit:

14.1 has the Claimant shown that it was not reasonably practicable for her to present the complaint within the time limit; and

14.2 if so, did the Claimant present the complaint to the Tribunal within such further period as the Tribunal considers reasonable?

**Remedy**

15 Is the Claimant entitled to:

15.1 a declaration that she suffered a detriment contrary to s.47B ERA 1996; and/or

15.2 a declaration that she was automatically unfairly dismissed contrary to s.103A and/or s.104 ERA 1996; and/or

15.3 a declaration that she was unfairly dismissed contrary to ss.95(1)(c) and 98(4) ERA 1996; and/or

15.4 compensation for detriment suffered during employment; and/or

15.5 compensation for unfair dismissal; and/or

15.6 compensation for injury to feelings; and/or

15.7 an uplift for any failure by the Respondent to comply with §33 of the ACAS Code of Practice on Disciplinary and Grievance Procedures by

failing to arrange the grievance hearing without unreasonable delay (PoC §§32, 34)?

16 Should any compensation be reduced on the basis that the Claimant:

16.1 contributed to her dismissal by her own conduct; and/or

16.2 would have been dismissed in any event notwithstanding any procedural breaches by the Respondent?