EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Kong		Gulf International Bank (UK) Limited

Heard at: London Central

On: 9, 10, 13, 14, 15, and 16 January 2020 and (in Chambers) on 17 and 29 January 2020

Before: Employment Judge Stout
Ms T Breslin
Mr I McLaughlin

Representations
For the claimant: In person
For the respondent: Mr N Siddall QC

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is:

(1) The Claimant's claim that she was subjected to detriments because she made protected disclosures contrary to s 47B Employment Rights Act 1996 (ERA 1996) is outwith the Tribunal's jurisdiction having regard to the time limit in s 48(3) ERA 1996 and is therefore dismissed.

(2) The Claimant's claim that she was unfairly dismissed by the Respondent, contrary to ss 94-98 ERA 1996, is well-founded.

(3) The Claimant did not cause or contribute to her dismissal and no deduction falls to be made to any compensation that she may be awarded by reason of any conduct of hers occurring prior to dismissal.

(4) There should be no *Polkey* deduction to any compensation awarded to the Claimant.

(5) The Respondent unreasonably failed to comply with a relevant Code of Practice and accordingly any award made to the Claimant will be subject to an uplift pursuant to s 207A(2) Trade Union Labour Relations (Consolidation) Act 1992.

(6) The Claimant's claim for wrongful dismissal is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 15 February 2010. The Respondent is the UK branch of an international bank that is headquartered in Bahrain. Its principal business is client-related activities in treasury and asset management.

2. The Claimant was initially employed as Senior Business Auditor, but promoted to Internal Audit Manager in March 2012 and to Head of Financial Audit in March 2016. She was dismissed summarily on 3 December 2018.

3. The Respondent accepts that the Claimant's dismissal was procedurally unfair. The main issue for the Tribunal in this case is therefore what was the reason for the Claimant's dismissal. The Claimant contends that the sole or principal reason for her dismissal was that she had made a number of protected disclosures within the meaning of s 43B of the Employment Rights Act 1996 (ERA 1996). The Respondent accepts that the Claimant made protected disclosures as pleaded, but denies that they were any part of the reason for the Claimant's dismissal. The Respondent contends the reason was the Claimant's conduct or some other substantial reason (breakdown in working relationship). The Claimant also contends that she was subjected to other detriments for making protected disclosures.

4. At this hearing we considered only issues as to liability, and as to certain matters that may go to increasing or decreasing the amount of any award that we make to the Claimant, including whether there should be an uplift to reflect the Respondent's failure to follow the ACAS Code of Practice in the procedure used to dismiss her, and her conduct prior to dismissal.

The issues

5. The issues to be determined at this hearing were agreed at the outset to be as follows:

Unfair Dismissal

(1) Has the Respondent shown that the reason for the Claimant's dismissal was her conduct or some other substantial reason with the meaning of ss 98(1)(b) or 98(2)(b) ERA 1996?

Section 103A Dismissal

(2) Was the sole or principal reason for the Claimant's dismissal that she had made any or all of Protected Disclosures (PDs) 1-10?

Detriment

(3) Was Detriment a. (below) issued out of time? If so:
   a. Is that allegation of detriment part of a series of similar such acts or failures and is the last such act within time? Or
   b. Was it not reasonably practicable for the Claimant to have issued that claim within time and did she issue her claim in this regard in such further period as was reasonable?

(4) Was the Claimant subjected to detriment in the following ways:
   a. The treatment of the Claimant by Ms Harding on 22-23/10/18 ("Detriment a.");
   b. The decision to dismiss the Claimant in the absence of any recognised procedure ("Detriment b.");
   c. The dismissal of the Claimant ("Detriment c.");
   d. The manner of her dismissal ("Detriment d.");
   e. The manner of the appeal procedure ("Detriment e.").

(5) Are Detriments (b)-(e) ones which the Claimant is unable to advance against her employer by virtue of s 47B(2) ERA 1996?

(6) If the Claimant was subjected to detriment in the ways alleged were the Respondent's actions in that regard materially influenced by any or all of PDs1-10?

Wrongful dismissal

(7) Was the Claimant dismissed in breach of contract?

Remedy issues to be determined at the Liability Hearing

(8) If the Claimant was unfairly dismissed, what would have been the outcome of a fair procedure?
(9) Has the Claimant been guilty of culpable or blameworthy conduct and is it just and equitable to reduce the Claimant's basic award in that regard?

(10) Has the Claimant been guilty of culpable or blameworthy conduct which caused or contributed to her dismissal? Is it just and equitable to reduce her compensatory award in that regard?
(11) Has the Claimant been guilty of subsequently discovered misconduct and is it just and equitable that she receive no compensation in that regard?

ACAS Code

(12) Has the Respondent failed to comply with a relevant code of practice?
(13) Was any such failure unreasonable?
(14) Is it just and equitable to increase the Claimant's compensation in that regard and to what extent?

6. The above are the issues that it was agreed at the outset should be determined as part of the Liability Hearing. There may remain other issues to be determined at a separate Remedy Hearing if required as follows:

(15) What is the proper measure of loss as regards any proven claims?
(16) What is the proper level of any injury to feelings claim?
(17) Is this an appropriate case for an award of aggravated damages?

The Evidence and Hearing

7. The parties both produced written opening and closing submissions, which we read. We heard oral evidence from the Claimant (C) and the following witnesses for the Respondent:

a. Rhod Sutton (former Money-Laundering Reporting Officer (MLRO) and Head of Compliance) (RS);
b. Ian Henderson (Senior Portfolio Manager) (IH);
c. Andrew Sykes (Non-Executive Director and Ex-Chair of the Audit and Risk Oversight Committee (AROC)) (AS);
d. David Maskall (Chief Operating Officer (COO)) (DM);
e. Julian Anthony (former Chief Financial Officer and Head of Risk) (JA);
f. Alison Yates (Head of Human Resources (HR));
g. Jenny Harding (former Head of Legal) (JH);
h. Khalid Mohammed (Group Chief Auditor (GCA)) (KM);
i. Katherine Garrett-Cox (Chief Executive Officer, CEO) (KGC);
j. Gary Withers (Non-Executive Director) (GW).

8. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and written submissions and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle during the course of the hearing.

9. In particular, we noted when we read the Claimant's witness statement that she had referred in it to various documents that were not in the bundle, or

which had been redacted by the Respondent. We asked, and the Respondent agreed, to locate those emails and to unredact certain sections of relevant documents.

10. We explained our reasons for various case management decisions carefully as we went along.

Amendment applications

The first amendment application

11. At the start of Day 2 of the hearing, after we had completed our reading of the pleadings, the parties' written opening submissions, the witness statements and the documents referred to therein, we raised with the parties an issue that arises from the decision of the Court of Appeal in *Timis and anor v Osipov (Protect intervening)* [2018] EWCA Civ 2321, [2019] ICR 655.

12. The Claimant in her claim form filed on 3 May 2019 had referred to this case at paragraphs 108 and 109, citing it as authority for the proposition that she could bring a claim for subjection to a detriment for having made a protected disclosure under s 47B ERA 1996 in respect of her dismissal, as well as Detriments a.-e. (see List of Issues above), i.e. (in summary) the manner of her dismissal and the manner of handling her appeal against dismissal. The Respondent in its response at paragraph 6(c) had identified this claim as being *"misconceived and … based on a misapplication of the ratio of the Court of Appeal in* [Timis]*"*, but had not there explained why the Claimant's claim was misconceived. The parties agreed that this had also not been discussed or explained to the Claimant at the Preliminary Hearing (Case Management) before Employment Judge Wade on 12 September 2019. In its Skeleton Argument for this hearing, however, the Respondent cited paragraph 91 of Underhill LJ's judgment in *Osipov* which captures the *ratio* of the Court of Appeal's judgment in that case as follows:

> 91 *SUMMARY ON THE EFFECT OF S 47B(2)* [*sic*]
> The foregoing analysis has been regrettably dense, but I can summarise my essential conclusions as follows:
> (1) It is open to an employee to bring a claim under s 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s 47B(1B). All that s 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.
> (2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply.

13. We pointed out to the Claimant that the effect of this was that in order to bring a claim that a dismissal is a detriment for the purposes of s 47B of the ERA 1996, it is necessary to bring a claim against an individual co-worker under s 47B(1A). Subject to the 'reasonable steps' defence in s 47B(1D), the

employer will be vicariously (jointly) liable with the co-worker for the detriment by virtue of s 47B(1B). In the absence of a claim against an individual co-worker, s 47B(2) precludes a claim being brought against an employer that a dismissal is a detriment.

14. We explained to the Claimant that if she wished to make such a claim she would need to make an application to amend and that if she did we would need to consider whether to allow that amendment, taking into account all the circumstances, including whether the claim was out of time having regard to s 48 of the ERA 1996.

15. We adjourned for 30 minutes to allow the Claimant and Respondent to consider their positions and indicated that they could have more time if required.

16. The Claimant then did make an application to amend. Her application was to amend such that Detriments b., c. and d. in the List of Issues should be claims brought against Alison Yates and Kathryn Garrett-Cox as individual co-workers in addition to the Respondent. In answer to questions from the Tribunal, she confirmed that she had instructed solicitors (Bindmans) shortly after her dismissal and up until 5 days before she filed her claim. She said that she had relied on her solicitors' advice in pleading the claim as she did, and that when she received the Respondent's response she had assumed that her solicitors' advice remained correct and had not sought further advice in the light of the Respondent's indication that her claim was misconceived. She said that she did not know until we explained that the decision in *Osipov* meant that she had to bring a claim against an individual in order to claim that her dismissal was a detriment. She also indicated that she had not wanted to make the claim a personal one against individuals, but if the law was as we said it was, then she was 'forced' to make this application.

17. The Respondent resisted the application. The Respondent argued, in summary, that: (i) we should decide the time point now, that the claim was out of time and that since the Claimant had consulted skilled advisors during the limitation period the *Dedman* principle precluded her from bringing a claim late; (ii) the amendment proposed would significantly widen the scope of the factual enquiry because, although no additional documentary or witness evidence would be required, there would need to be consideration of whether the protected disclosures were a 'material influence' in the dismissal decision rather than whether they were the 'sole or principal' reason for dismissal; (iii) there would be a need for the claim form to be served on the two proposed individual respondents and they would need an opportunity to take legal advice and respond, which would mean that the hearing could not go ahead; (iv) there may be a conflict of interest between the Respondent and the two individuals as the Respondent would need to consider whether or not to run the 'reasonable steps' defence and if it did decide to run that defence there would need to be separate representation; (v) there would be very significant prejudice to the two proposed individual respondents who would face a claim in respect of which they may incur a personal liability of up to £2.6m (that being the value of the Claimant's Schedule of Loss).

18. We adjourned for 45 minutes to deliberate and then announced our decision, giving summary reasons at the hearing. We indicated that written reasons would be given as part of this final judgment. Our written reasons are as follows:-

The law

19. The Tribunal has power to permit amendments to a case under Rule 29 and to permit the addition of a party under Rule 34. In accordance with the principles in *Selkent* [1996] ICR 836 the Tribunal must first consider the nature of the amendment and, in particular, whether it is the addition of factual details to existing legal claims or addition or substitution of other legal labels for facts already pleaded to or whether it amounts to making an entirely new claim.

20. If a new claim is to be added by way of amendment, then the Tribunal must consider whether the complaint is out of time or, at least, whether there is an arguable case that it is in time (*Galilee v Comr of Police of the Metropolis* [2018] ICR 634 and *Reuters Ltd v Cole* Appeal No. UKEAT/0258/17/BA at para 31).

21. In *Reuters v Cole* Soole J specifically considered what is necessary to make something a new claim and concluded that a relabelling of already pleaded facts with a new legal label does not make it a new claim, but if additional facts are pleaded with the new legal label such that the 'new' claim involves a different factual enquiry, then it will be a new claim. It will still be relevant to consider how close the facts are to the old claim so as to consider the significance and likely impact of the amendment (para 30). In that case, it was held that a different reason for treatment and different causation issue, made it a new claim, not a relabelling: see paras 28-30.

22. The Tribunal must consider the timing and manner of the application, although it should not be refused merely because there has been a delay in making it. The Tribunal must consider all the circumstances, in particular the impact on the proceedings and whether there can still be a fair trial.

23. In this respect, the focus will often be on the extent to which the new pleading *"is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely that it will be permitted"* (*Abercrombie and ors v AGA Rangemaster Ltd* [2013] IRLR 952).

24. The underlying merits of the proposed amended claim may be relevant if the Tribunal is in a position to make a fair assessment of those merits, since there is no point in allowing an amendment to add an utterly hopeless case, but normally it should be assumed that the proposed amended claim is arguable: *Woodhouse v Hampshire Hospitals NHS Trust* (UKEAT/0132/12), at para 15.

25. Where the need for an amendment arises because of the 'fault' of the party or a legal adviser that is not necessarily a reason for the amendment to be refused: *"it is not the business of the tribunals to punish parties (or their advisors) for their errors"* (*Evershed v New Star Asset Management* UKEAT/0249/09 at para 33 per Underhill P, as he then was).

26. Finally, the Tribunal must consider the prejudice to the parties of allowing/not allowing the amendment and have regard to the over-riding objective in Rule 2 of dealing with cases fairly and justly including, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues and saving expense.

27. In this case, consideration of whether there is an arguable case that the proposed amended claim is out of time requires the Tribunal to consider s 48 of the ERA 1996. Under s 48(3)(a) ERA 1996 there is a primary time limit of three months beginning with the effective date of termination. By virtue of s 48(3)(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period.

28. This is the same test as applies in unfair dismissal cases. The Tribunal must first consider whether it was reasonably feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. Where an employee has knowledge of the relevant facts and the right to bring a claim there is an onus on them to make enquiries as to the process for enforcing those rights: *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488.

29. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53*,* CA: 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against

them.' The scope of the *Dedman* principle was revisited and confirmed by the EAT in *Northamptonshire County Council v Entwhistle* [2010] IRLR 740.

30. We should add that we have also had regard to the decisions of the Employment Appeal Tribunal in *Gillick v BP Chemicals Ltd* [1993] IRLR 437 and *Drinkwater Sabey Ltd v Burnett* [1995] ICR 328 to the effect that under the Employment Tribunal Rules of Procedure then in force a party could be added or substituted to the proceedings at any time, as a matter of discretion, without reference to the rules of time bar. The Employment Appeal Tribunal in those cases held that the Employment Tribunal has a discretion and should have regard to all the circumstances of the case, including any injustice or hardship which may be caused to any of the parties, including the party proposed to be added, if the proposed amendment were allowed, or as the case may be, refused. These decisions were recently reaffirmed by the EAT (Lavender J) in *Pontoon (Europe) Limited v Shinh* (UKEAT/0094 and 0213/18/LA) at para 39. However, it is notable that Lavender J in *Pontoon v Shinh* does not appear to have been referred to either *Galilee* or *Reuters v Cole*. Likewise, neither *Gillick v BP Chemicals* or *Drinkwater Sabey* were referred to in *Galilee* or *Reuters v Cole*. In the absence of any apparently significant difference between the Tribunal's Rules of Procedure as they were at the time of the *Gillick* and *Drinkwater* cases, or any further guidance from the Employment Appeal Tribunal, the law at present is that a party may (as a matter of judicial discretion) be added or substituted at any time without reference to any otherwise applicable time limit, but an amendment to add a new claim against an existing respondent must take into account the time limit.

Our judgment on the first amendment application

31. We decided that the amendment should not be allowed. This was for the following reasons:-

    a. The proposed amendment constitutes a new claim. Although it is based on the facts already pleaded, it would involve a new claim being made under s 47B(1A) against individual co-workers, for which the respondent would then in principle be vicariously liable under s 47(1B), subject to the 'reasonable steps' defence (if it were taken). That would be a claim which involves the Tribunal considering not 'merely' whether the sole or principal reason for the dismissal was the Claimant's protected disclosures, but whether the protected disclosures were a 'material influence' on that decision. It would, if it succeeded, also open up the possibility of an injury to feelings award in respect of the dismissal element of the Claimant's claim. It is not merely a matter of adding new respondents to the existing pleaded case, but would require an amendment to the current pleading which would change the nature of the case against the existing respondent as well as create new claims against the two proposed individual

respondents. This is accordingly not a situation where the *Gillick* and *Drinkwater Sabey* principle applies.

b. Since it is a new claim, we must consider whether or not the Claimant has an arguable case that the claim was out of time. We did not hear oral evidence on this before making our decision on the amendment application so we have not made any final judgment on this point, but we find based on what the Claimant told us that she would not have an arguable case that the claim was in time. This is because it is a claim that we are (in the light of *Galilee*) to regard as having been made at the time of this amendment application, which is many more than three months after the act complained of. However, the Claimant consulted solicitors during the initial three-month period and told us that she had relied on that advice in pleading the claim in the way she did. Indeed, it is apparent to us that the Claimant had had the benefit of extensive legal advice in the way that she pleaded the claim. Although she ultimately presented the claim to the Tribunal as a litigant in person, we are satisfied that (assuming at the point we made this decision that what the Claimant told us in submissions would be borne out in oral evidence) the *Dedman* principle would apply and we would have to find that it was reasonably practicable for her to make a claim in the form that it is now proposed to make by way of amendment within that initial three-month period.

c. We have considered the potential prejudice to both the current parties and the proposed additional parties of allowing or not allowing the amendment. This is finely balanced. There is clear prejudice to the Claimant of not being able to advance the proposed amended claim because the causation test is as we have noted easier to meet and because the injury to feelings award is unlikely otherwise to be available to her in respect of the dismissal element of her claim. On the other hand, without the amendment, the Claimant is still able to advance the rest of her case, including her central claim that her dismissal was automatically unfair because she made protected disclosures. So far as the Respondent employer is concerned, there is perhaps less prejudice in allowing the amendment since the case that it would have to meet would in reality change very little, although the different causation test will have as significant an impact on the Respondent as on the Claimant. There would, though, be no additional documentary or oral evidence and its potential liability in these proceedings will not significantly change given that an injury to feelings award is currently a relatively small element of the Claimant's £2.6m Schedule of Loss. However, we must also consider the position of the individuals (Alison Yates and Kathryn Garrett-Cox). They would, if we permitted the amendment, find themselves facing a potentially significant personal liability at a late stage in the proceedings. There would be clear prejudice even if as a matter of law they would (subject to any reasonable steps defence) share that liability jointly with the Respondent.

d. Finally, we have borne in mind that it is possible that if the amendment were permitted it may not be possible for the present trial to go ahead within the current listing. This is because the Respondent indicated that time would be required both for the proposed individual respondents to take legal advice and respond formally to the claim, and for the Respondent to take instructions on whether or not to run the 'reasonable steps' defence. We are not convinced that the Respondent would, on reflection, wish to run any such defence, but it is difficult to resist the conclusion that it would be necessary if the amendment were permitted to allow those involved time to take instructions and legal advice and that may well delay the current trial. There would also need to be a formal response from the individuals as required by the Rules, although time for that could be foreshortened.

32. Balancing all those factors together, and in particular the view that we have reached as to the arguability of the Claimant's case on the time point, we decided that the amendment should not be allowed.

The second amendment application

33. After all the evidence was complete, and at the start of closing submissions, the Claimant indicated that she wished to make an amendment to her claim to plead 20 further detriments to which she contended she had been subject because of her protected disclosures. We explained to the Claimant that she could make all these points as evidential arguments in support of her already pleaded case, without making an amendment application, but the Claimant was adamant that she wished to apply to amend her case. She argued that she had not known about these matters prior to oral evidence in these proceedings and/or prior to disclosure (14 October 2019) or witness statements (25 November 2019) and that she accordingly could not have made the application previously. The amendments that the Claimant sought to make were to add the following matters (set out in *italics* below) as alleged detriments to which she was subjected for having made protected disclosures.

34. The Respondent argued that the application should not be allowed. It would mean adding 20 detriments after close of evidence when witnesses did not know these were alleged to be detriments. This was not the 11th hour, but the 11th hour and 59th minute. They would require additional evidence to deal with. It was woefully out of time. Moreover, for most of them they did not come out of disclosure and/or the evidence. There was no good explanation for why they could not have been raised previously.

35. The law that we should apply is the same as for the first amendment application and is set out above. In the context of this second amendment application, a crucial question is whether the Claimant ought reasonably to have known about the matter about which she now seeks to complain at an earlier point. If she did, then it seems to us that she should not be permitted

to amend her claim at this very late stage in proceedings unless we are satisfied that the amendment would in character be a 'relabelling' rather than a new claim to which the time limit must be applied (*Galilee*), and we are satisfied that we have heard all the evidence that we should have heard in order fairly to determine the issue, and that the Respondent has not been unfairly prejudiced by the failure to identify these matters as individual detriments claims before the evidence was heard. If it is in character a new claim to which the time limit applies, then again it is crucial whether it is a matter of which the Claimant was or ought reasonably to have been aware previously, since if it was then that claim will be out of time, applying the time limit in s 48 ERA 1996 in accordance with the legal principles we have identified above.

36. Having considered each of the proposed amendments, we have decided that none of them should be allowed. Our reasons for refusing each proposed amendment are in short as follows (the text in italics in the sub-paragraphs below is quoted from the Claimant's closing submissions):-

PD1 Detriments

a. *2017/2016 (Mr Rhod Sutton) pointed his finger to the Claimant and put 'deceitfully' as a direct discrimination against the Claimant's professional integrity* – This is a reference to what Mr Sutton said about the Claimant in the 2017 Auditee Survey feedback. The Claimant's evidence was that she was shown the 2017 Auditee Survey feedback in early 2018. When cross-examining the Respondent's witnesses, she said that she was very upset about the use of the word 'deceitfully' at the time. Although we did not accept her evidence on that particular point, when giving her own evidence she also said orally that she knew from disclosure that Mr Sutton wrote this. She had a copy of the document from the point at which disclosure took place (14 October 2019). This would be a new claim and one that the Claimant could reasonably have pleaded at the outset of proceedings or, at least, some months ago. This was not dealt with in oral evidence in the way that it would have to have been if it were a separately pleaded detriment. We cannot fairly determine it now.

b. *The Claimant was told off in an email by Rhod Sutton* – As the email was to her, she clearly knew about this when she received it, which was prior to Mr Sutton leaving in July 2018. The same comments apply as for a. above.

c. *The email exchange with Rhod was accused as 'jumping into conclusions', the Claimant was described as 'harassing' and Rhod CCed the Claimant's line manager in that email* – This email is at pp 220-221 and it was sent in December 2017 so the Claimant knew about it at that point. The same comments apply as for a. above.

d. *The accusation of the CEO's witness statement paragraph regarding Rhod's complaint* – This was in Ms Garrett-Cox's witness statement exchanged on 25 November 2019. The same comments apply again as for a. above.

PD2 Detriments

e. *Bundle page 301d and 301e – the key whistleblowing written evidence (the Claimant blown the whistle directly to her line manager regarding)* – This is not a detriment, but documentary evidence forming part of the Claimant's protected disclosures.

f. *Evidence during the cross-examination with Khalid that the Claimant called him regarding her intention to blow the whistle to the Chairman of AROC and the Claimant's view to suspend the GTOP fund* – This is also not a detriment, but documentary evidence forming part of the Claimant's protected disclosures.

g. *Jenny expressed her frustration to David – see David's witness statement paragraph 26/p 7* – This was in the witness statements. The same comments apply as for a. above.

h. *Antipathy from the Claimant's fellow colleagues – Product manager Ms Judith reported the Claimant to the Head of HR* – We have heard no evidence about this at all. The only evidence we received regarding Judith Scattergood was that Ms Harding had spoken to her after the argument on 22 October 2018. This stands no reasonable prospect of success and could not fairly be determined on the evidence we have heard.

i. *Antipathy from the CEO regarding the 'Jose Event' – para 16 of KCG witness statement* – This is in the witness statement. Same comments apply as for a. above.

PD3 detriments

j. *Delay in providing management responses despite three reminders* (p 303a ff) – This relates to what happened in October 2018. The Claimant knew about it at the time and the same comments apply as for a. above.

k. *Her action of altering the reporting and removing the audit findings etc* – This is the conduct of Ms Harding. To the extent that it is not encompassed within the already pleaded Detriment a., the Claimant knew about it at the time and the same comments apply as for a. above.

l. *Alteration of the audit report, deletion, change of ownership of the audit point and reversing* – This is the same point as k.

PD4 detriments

m. *Escalation/express frustration to the Head of HR/CEO/COO – David Maskall's statement para 7* – This was in the witness statements. The same comments apply as for a. above.

n. *Phone calls between Jenny Harding and Head of HR* – This was evident from disclosure and witness statements. Same comments apply as for a. above.

o. *Email of 21 November 2018 from Alison Yates to Kathryn Garrett Cox* (p 397) – This was included in disclosure. Same comments apply as for a. above.

p. *Misplaced grievance expressed by Jenny* – This is already pleaded as Detriment a.

PD10 detriments

q. *Alleged discovery of misconduct emails* – She knew about this from the solicitor-to-solicitor correspondence of 31 January 2019 (p 460). The same comments apply as for a. above.

r. *Bullying and disparaging comments in the witness statements* – These were in the witness statements. The same comments apply as for a. above.

s. *Unfounded criticism of the Claimant's performance/ethics* – This is the basis of the Claimant's existing claim. There is no need for this amendment. Alternatively, if it is something new then the same comments apply as for a. above.

t. *Reputation damage despite after being dismissed* – This potentially goes to remedy and is not a detriment or an issue for the liability hearing.

37. For all these reasons, the second amendment application is refused.

The facts

38. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

The parties

39. The Claimant was employed by the Respondent from 15 February 2010 until her summary dismissal on 3 December 2018.

40. The Respondent is the UK arm of Gulf International Bank. Its parent company Gulf International Bank BSC is based in Bahrain. The Respondent in the UK has approximately 80-85 employees (KGC, para 5). The Respondent does not generally have private individuals as clients. Its principal business profile is providing banking and asset management services to a limited number of customers, most of which are large institutions.

41. Prior to joining the Respondent, the Claimant had worked at Ernst and Young as an auditor and before that she studied International Trade and had four years' experience of processing trade finance in a commercial bank.

42. The Claimant's job at the Respondent was to carry out risk-based audits of all the Respondent's business activities, by reference to the regulatory requirements imposed by the Financial Conduct Authority (FCA) and the Respondent's Audit Manual. She was also responsible for the audit of one of its subsidiaries, GIB (UK) Alternative Investment Management Limited (GIBAIM). She reported to Hassan Al-Mulla between 2011 and 2015. From 2015, she reported directly to the Group Chief Auditor (GCA), Mr Khalid Mohammed, who is based in Bahrain.

43. Although the previous incumbent in the Claimant's role worked full-time, the Claimant worked part-time. It is apparent from the evidence we have seen and heard that she often worked long hours and put in extra time over the weekends to complete work. In closing submissions she said that she had given her 'blood' to the bank and although we would not use this terminology ourselves, we accept that the Claimant was a very dedicated and hard-working employee. We do not understand that to be disputed by the Respondent.

44. The Claimant was initially employed as Senior Business Auditor, but in March 2012 she was promoted to Internal Audit Manager (p 116) and in March 2016 her job title was changed to Head of Financial Audit (p 118). Although this latter change in title was not regarded by Alison Yates as a promotion and was not accompanied by any change in terms and conditions, the Respondent recognised that it would be perceived as a promotion and the correspondence in the bundle indicates that the Respondent did not approve the change in job title (pp 191-198) until it was considered that she had demonstrated improvements in certain aspects of her performance.

45. We were provided at our request with organisation charts for the Respondent (pp 105a-c) which show the Claimant's role as sitting apart from the UK Senior Management, and reporting directly to Mr Mohammed. UK Senior Management, including (so far as relevant to these proceedings), Ms Yates, Ms Harding, Mr Maskall and Mr Anthony reported directly to the CEO, Ms Garrett-Cox.

The Respondent's policies

46. We make the following findings about the Respondent's written policies:-

Disciplinary and Grievance Policy

47. This provides (p 97) that the bank expects a high level of performance and conduct of its employees and all employees are therefore expected to maintain certain standards set by the bank. It states that the line manager is responsible for ensuring that employees observe the policy. The policy also provides that if any individual has an issue with regard to his treatment by the bank then he or she is entitled to raise that issue with human resources and have it resolved reasonably, fairly and in a timely fashion. The policy provides that any issue concerning forms of conduct may lead to disciplinary action. Examples of performance or conduct which may lead to disciplinary action include breach of bank standards rules policies and/or procedures. It further states *"acts of gross misconduct may result in dismissal without notice or any payment in lieu of notice. Examples of acts, which may be considered as gross misconduct, include: a material breach of bank, FCA and PRA standards… Unauthorised possession of bank, client or other employees property … This list is neither all-inclusive nor exhaustive."* The policy provides for the usual procedure (investigation, disciplinary hearing, appeal) to be followed in line with the ACAS Code of Practice in relation to disciplinary matters including disciplinary matters which may result in dismissal.

48. We heard evidence in these proceedings that this policy was not followed in relation to the dismissal of a number of employees including the Claimant, her subordinate, a former CEO, and the former Head of Asset Finance. When we put to Alison Yates that it did not appear the policy was ever followed, she said that was not the case, but gave no examples. She distinguished the situation of the Claimant's subordinate from that of the Claimant on the basis that the subordinate was still in an extended probationary period and had had prior warnings of performance issues during that time. She did not seek to distinguish the situations of the other individuals about whom we have heard evidence.

Information Systems Acceptable Use Policy

49. The Claimant had signed on 15 February 2010 to indicate that she had received and read v1 of this policy dated June 2006 (p 96a), although the Respondent did not put v1 of the policy in evidence. An updated policy was circulated by email on 22 August 2016 (p 96b) and an email from the Claimant of 22 August 2016 confirmed she had read and understood this (p 96c). The version in the bundle was a further iteration, however, dated 15 August 2017 (p 96d). There was no evidence that this further iteration was provided to the

Claimant directly. Ms Yates' evidence was that it was available on the Respondent's intranet, to which the Claimant had access. She also said that normally policy updates were notified to employees, but in the absence of specific evidence of that (when there was evidence of notification of the previous policy), we do not accept that the Claimant was notified individually of the version of the policy ultimately included in the bundle.

50. The version in the bundle provides (para 2.3.2) that *"Any employee … found to have violated this policy may be subject to disciplinary action"*. Paragraph 4.1.1 provides: *"users are only to utilise GIB information resources for business purposes for which they have been authorised. Excessive use of GIB information systems resources for personal use or for use on behalf of a third party (i.e., personal life, family member, political, religious, charitable, school, etc) is prohibited."* The policy also includes (at 4.3.1 and 4.3.2) certain activities that are *"strictly prohibited"*. The Respondent has not suggested that anything in these paragraphs is relevant to these proceedings.

Acceptable Use of Email

51. The Respondent's evidence was that this policy (p 98) was available on its intranet. The Claimant denied having seen it at any point prior to disclosure in these proceedings, and we accept her evidence on this point. This policy provided further guidance supplementing the Information Systems Acceptable Use Policy. It states that: *"email is provided for business purposes only. Please ensure, for example, that you … do not copy, manually forward or auto-forward business-related information to your personal email address"*.

Capability policy

52. Ms Yates confirmed that the Respondent does not have a Capability Policy. Mrs Garrett-Cox told us that she does not consider that performance improvement procedures work with senior individuals.

<u>The Claimant's protected disclosures</u>

53. The Claimant alleges, and the Respondent accepts, that she made the following protected disclosures within the meaning of s 43B of the ERA 1996. What was in her ET1 (paras 15-63 and 97), as further clarified in the course of cross-examination, is as follows (in chronological order). Where relevant, we have added our findings in respect of minor issues that emerged between the parties during the hearing as to the circumstances in which these disclosures were made:

    a. <u>PD1</u> - in the period between 8 December 2017 and 17 December 2017, she raised significant concerns to the GCA (Mr Mohammed) through emails and telephone calls disclosing what the Claimant classified (ET1, paras 35-43) as the AML and Sanctions Concern regarding the Global Trade Finance SPC (GTOP) Fund or 'New

Product' as the Claimant sometimes terms it. During the same period, the Claimant also raised the same concerns to the ex-Head of Compliance and MLRO (Rhod Sutton) in emails. In summary, the Claimant's concern was that in the trades being done by the GTOP fund, full Know Your Client (KYC) due diligence was only done on the Respondent's direct counterparties and not on the underlying borrowers with whom the counterparties (and not the Respondent) were in a direct legal relationship. The Claimant considered that unless the underlying borrowers were treated 'as if' they were customers of the bank there would be a heightened risk of loans being made to persons, or trade being financed through loans, in breach of AML and international sanctions obligations. This was especially because many of the underlying borrowers were based in jurisdictions perceived to be financially high risk, such as Turkey, Ukraine, Tanzania, Brazil, Morocco and elsewhere. We add that in this respect the business being done by the GTOP fund was different to that normally done by the Bank, where counterparties were normally large institutions.

b. PD7 - the 2017 AML Audit Report prepared by the Claimant in January 2018 but not issued by the Respondent until 4 July 2018. This contained in substance the same disclosures as PD1. It was only Mr Mohammed who in the end signed off that Report, but we find that is immaterial. All the Respondent's witnesses were well aware that the source of these protected disclosures was the Claimant.

c. PD2 - Through emails and telephone calls from the Claimant to Mr Mohammed and Julian Anthony from mid July and throughout August and September 2018, concerns regarding GTOP, in particular significant issues concerning the Asset Valuation and NAV (Net asset value), Maturity Extension and Position Consolidation, and also what the Claimant has described in her ET1 as the Risk Framework and Governance Concern, the Opaque Relationship Concern, the MRPA Concern, the Consolidation Concern, the NAV Concern, the Product Governance and Client Suitability Concern, the Investment Prospectus Obligation Compliance Concern and the Early Warning Procedure Concern. In oral evidence to the Tribunal, the principal issue of concern to the Claimant raised in this set of disclosures (collectively termed PD2), was on the practice of the Portfolio Manager in consolidating loans for which the maturity date had passed and which therefore should have been classified as *"overdue/aged"* into new positions. The new positions then misleadingly appeared in reports as 'repaid', when that was not the case. This in turn had a significant impact on the Net Asset Value (NAV) of the Fund which influenced investors' investment decisions. A related issue, dealt with in more detail in the Claimant's witness statement (C, para 26) rather than in the ET1 (where it is referred to, obliquely, as part of the Consolidation and IT Concerns, paras 26-33) was that loans were being extended just before their maturity date so

that it appeared in the statements as if there were *"no past due loans"* when in fact some had been extended as many as 21 times.

Another aspect of PD2 which received some focus in evidence was the Early Warning Procedure Concern. This relates to a shipment of cashew nuts which had been financed by the GTOP fund, but which had been damaged. The Claimant considered that this should have been reported by the Portfolio Manager (Mr Henderson) to his line manager (José Canepa, then Head of Asset Management) in accordance with the Early Warning Procedure. This is because the damage had the potential to justify non-repayment of loans, which would in turn significantly affect investors' capital return.

d. PD8 – the 2017 Compliance Audit Report including the MiFID project review prepared by the claimant in August 2018 which disclosed the Product Governance and Client Suitability Concern and the Non-compliance with the MiFID ii from the product governance perspective. In summary, this concern, as described by the Claimant at ET1, paras 46-49, related to the assessment of risk for the GTOP fund, which was assessed as being 'Low' when in fact, in the Claimant's view, the credit risk for investors was significantly high.

e. PD3 - email dated 26 September 2018 at 18:26 (pp 304-305) from the Claimant to Julian Anthony, the head of legal and seven others, attaching the draft GTOP audit report which disclosed a number of concerns namely the Risk Framework and Governance Concern, the Opaque Relationship and MRPA Concern, the Consolidation Concern, the NAV Concern, the Product Governance and Client Suitability Concern, the Investment Prospectus Obligation Compliance Concern, and the Early Warning Procedure Concern. The focus of these concerns in the course of evidence has been summarised above in relation to PD2 and PD8. In addition, it is important to record that the other issue of substance in the draft GTOP audit report about which we have heard much oral evidence was the MRPA Concern. In summary, the issue in relation to this was that the Claimant considered that the industry-standard MRPA template was designed for bank-to-bank lending and not for use with non-bank institutions. She considered that it had insufficient safeguards in it for the use that the Respondent was making of it with the GTOP fund, in particular in relation to the legal effectiveness and enforceability of the securities on transaction level and the lack of provisions in the MRPA agreement to address the fact that the GTOP fund's counterparties were non-bank corporate entities and to require them to carry out appropriate KYC and due diligence checks and monitoring on underlying borrowers (ET1, paras 23-25).

f. PD4 - at a meeting between the Claimant and Jenny Harding on 22 October 2018 in which the Claimant reiterated concerns regarding the MRPA agreement, particularly the 'bank to bank' issue (i.e. the same issue as PD3).

g. PD9 – The 2017 GIBAIM Fund management Audit Report (the final GTOP report) issued on 26 November 2018, which included the same matters as PD3 and PD4.

h. PD5 – An email chain between the Claimant and the Product Manager, the Head of Strategy and the Interim Operational Risk Manager in the afternoon of 28 November 2018, including a memo written by the Claimant in which she disclosed the Product Governance and Client Suitability Concern, the Regulatory Compliance Risk Concern, the IT Concern, the Internal Audit Exclusion Concern and the Oversight Concerns. This email chain was not in the bundle. It is referred to in the Claimant's solicitors' letter of 18 December 2018 (p 451). It has not otherwise featured in evidence.

i. PD6 – An email on 3 December 2018 to the Interim Operational Risk manager and the Head of Strategy and the Product Manager restating the concerns raised in PD5. This email was not in the bundle either.

j. PD10 – her solicitor's letter of 18 December 2018 (pp 446-455) setting out her case that her dismissal was automatically unfair.

54. In respect of PD1 to PD9 the legal requirements that the Claimant alleged the Respondent had breached, was breaching or was likely to breach were set out at paras 100 to 103 of the ET1. For the avoidance of doubt, the Respondent's admission that all the PDs (including PD10) constituted protected disclosures necessarily entails an acceptance that the Claimant's belief that these breaches had occurred, were occurring or were likely to occur was reasonable. We note that in relation to PD10 that includes an acceptance that the Claimant's belief that the Respondent had automatically unfairly dismissed her was a reasonable one at the time of her solicitor's letter of 18 December 2018.

55. The Claimant in her ET1 (paras 104-105) also argued that some of her PDs constituted disclosures of exceptionally serious failures within s 43H ERA 1996. The Respondent did not admit this part of the Claimant's case and we find it unnecessary to consider s 43H. Section 43H permits an individual to rely on a disclosure to someone other than their employer as a protected disclosure where they reasonably believe it is an exceptionally serious failure. It is not necessary to consider this section in the context of a claim where all the alleged protected disclosures were made to the Claimant's employer.

The Claimant's performance and conduct generally

56. The Claimant was at no time during her employment (or any previous employment) subject to any disciplinary or capability procedure. She was assessed in performance appraisals by the Respondent every year as

"outstanding" or "exceeded expectation". Those appraisals were carried out by her line managers, i.e. Hassan Al-Mulla and latterly Khalid Mohammed.

57. The Claimant was paid her full discretionary bonus every year. Mr Mohammed confirmed in oral evidence that he had been responsible for these decisions and that he had taken into account her performance, and the performance of the bank. Ms Yates confirmed this.

58. The Claimant also received her highest annual pay rises (15%) on 1 March 2017 and 1 March 2018. In this respect, Mr Mohammed said that it was principally the fact that the Claimant's salary was significantly lower than the market benchmark which had led him to determine she should have two 15% pay rises in 2017 and 2018.

59. Many former and current employees of the Respondent, including some of the witnesses who gave evidence to the Tribunal, considered that the Claimant's performance was outstanding from a technical perspective and that her work ethic was extremely good. In particular, Julian Anthony, who was the Respondent's Head of Internal Audit from 2000 to 2010 and thereafter Chief Financial Officer and executive director until his retirement in January 2019, expressed the view in his witness statement (JA, para 9) that *"she was extremely hard working and technically very good. She seemed to have an ability to deep-dive into very detailed legal and regulatory documents, and to come back with many audit points"*. He said that in his experience *"a major challenge is finding people with that technical ability and I thought she certainly had it"*. Similar views were expressed by Hassan Al-Mulla and Khalid Mohammed. Ian Henderson also said (IH, para 20) that he had found her audit of the GTOP Fund to be useful and he was grateful for her recommendations.

60. On the other hand, a number of the individuals who were subject to audit by the Claimant questioned her technical abilities, and all of the Respondent's witnesses expressed to a greater or lesser extent concern about what they perceived to be the way in which the Claimant went about her job.

61. Some of the incidents raised by witnesses in this respect we deal with in the course of the general chronology of events leading up to her dismissal below, but other matters were advanced by witnesses either in general terms or as examples of particular conduct and it is convenient to set out our findings on those sorts of points here as follows. We set out in this section our general findings as to the views of the Respondent's witnesses with regard to the Claimant. The question of why the Claimant was treated as she was by the Respondent in relation to the matters about which she complains in these proceedings, however, we address later in this judgment:-

Rhod Sutton

62. Mr Sutton (former Head of Compliance) asserted (RS, para 8) that *"The Claimant's audit points were often poorly conceived, speculative and*

appeared to have no clear basis. She would refer to regulatory updates she had seen online and then raise audit points, when in reality these bore little or no relevance to our business. It appeared to me that her view was that if she threw enough mud at the wall some of it would stick." He said that *"The Claimant also had a tendency to jump to conclusions."*

63. However, we find that none of these points were substantiated in evidence. We were not shown any evidence of an occasion where the Claimant had raised a poorly conceived or speculative audit point or had wrongly jumped to any conclusions. The set of emails to which Mr Sutton referred in this regard are at pp 200-204 of the bundle. They show the Claimant swiftly reaching a conclusion on 8 December 2017 on what she has called in these proceedings her MRPA Concern. At that stage, her concern was that clause 22 of the MRPA agreement (an industry template) did not deal with an important element (sanction risk) which in turn created risk for the Respondent because the leading lending Bank and L/C parties were based in high risk jurisdictions with lower standards of financial crime controls.

64. The Claimant felt that the concern needed to be addressed rapidly as it was an ongoing risk with around 40 live transactions affected by it each month. In her email at 11.27 on 8 December 2017 she indicated that there was a *"potential gap"* in controls and asked which department was going to take *"ownership to look into these matters"*, but Mr Sutton in his email (11.33) said *"A person will take ownership for each audit point, when and if they are substantiated. Let's not rush to conclusions!"*.

65. The Claimant also notified Mr Mohammed on the same day that it *"appears there is a major gap in controlling the Financial Crime risk for the Trade Finance fund business"*. In evidence she said that she used the word *"potential"* in her email to management at 11.27 because she did not wish to be inflammatory, but she considered the point to be clear and so left it out of her email to her line manager Mr Mohammed, which we consider to be a reasonable approach.

66. The Claimant then in her email later that day (14.40, p 202) explained her initial audit observations in more detail. She subsequently sought to arrange a meeting with Mr Sutton so that she could discuss her initial findings before circulating a pre-draft report. She was keen to do this before going on holiday and emailed Mr Sutton on 12 December, 13 December (p 213) and 14 December (p 221).

67. It is clear from the Claimant's emails that she wished to discuss matters with Mr Sutton so as to *"validate the facts"* before circulating a formal draft report. Mr Sutton for his part was reluctant to meet before seeing a draft report. In his email of 14 December 2017, 17.09 (p 220-221), copied to Mr Mohammed as the Claimant's Line Manager, he said that he was feeling *"harassed"* by her *"relentless insistence that we must meet in order for you to talk about findings"*. He indicated that he felt that he and his team had been available to her and he was now entitled to see a written draft report. It was around this time that Mr Sutton accepts that he became angry with the Claimant in the

office and raised his voice to her (RS, para 20). He acknowledged this was inappropriate conduct and no formal action was taken.

68. The Claimant's email response to Mr Sutton's email of 14 December 2017, 17.37 (p 220) was, we find, conciliatory in tone, accommodating and offered his team until 2 January 2018 to provide management responses to the draft report. Ultimately, the issues that the Claimant had raised were accepted by Khalid Mohammed and included in the final AML Audit Report (pp 285-289). Many of the points were not agreed, or only partially agreed, by management (Gavin Allard and Ian Henderson), but the Audit Comment on Management Response made clear that Audit (Mr Mohammed on this occasion) maintained the concern the Claimant had raised (pp 288-289). Further, we heard oral evidence from Jenny Harding that this particular concern was subsequently addressed by the Respondent instructing external solicitors to add wording to the standard form agreement – a point to which we return below.

69. We do not find that the above emails evidence any shortcomings in the Claimant's approach. It is not 'leaping to a conclusion' to read a document and realise that a point is missing from it which is indeed missing. Moreover, these emails demonstrate that the Claimant was making efforts to liaise with those responsible for the various areas, sharing concerns early, giving them an opportunity to look into matters themselves and trying to meet to discuss. It is Mr Sutton who appears in this exchange unreasonably to have refused to work together with the Claimant and to be obstructive in his approach. He even went so far as to accuse her of harassing him which appears to us in the circumstances to have been unwarranted and unreasonable.

70. We find that Mr Sutton clearly found it difficult working with the Claimant and made his views known widely in the office, as is apparent from our findings (set out further below) as to his taking the lead on the 2016 and 2017 Auditee Surveys and his discussions with colleagues about the Claimant. However, on the evidence we have seen, his view of what he regarded as the Claimant's shortcomings was exaggerated and lacked a proper evidential basis.

71. Mr Sutton left the Respondent on 10 July 2018 and so was not involved at all in the events that immediately preceded the Claimant's dismissal.

David Maskall

72. Mr Maskall (COO) had been told (DM, para 5) by the former Head of Treasury, Mohammed Sbitri, who left the Respondent in 2017, that he had concerns that the Claimant did not sufficiently understand the products and the business. Mr Sbitri told Mr Maskall that he had spoken to Mr Al-Mulla about this, but Mr Maskall does not know whether Mr Al-Mulla passed this feedback onto the Claimant. Mr Maskall for his part had limited direct contact with the Claimant although he had been audited by her occasionally. He said that he found her approach to be challenging as she had a *"pernickety approach"* and *"could be inflexible"*. He contrasted her approach with that of the Bahrain audits where he said that *"the auditors saw reason in any specific points*

raised by senior management, and they were happy to discuss these with due consideration, which is something … the Claimant was not always prepared to do".

73. However, in oral evidence Mr Maskall confirmed that when providing input to the Auditee Survey in 2017 (p 231) he actually compared the Claimant's performance on the Trade Finance Audit in December 2017 favourably to the performance of the Bahrain auditors in January 2017, noting that the Claimant (as the December auditor) had *"a good understanding of the products and process"* but questioning the competence of the broader Bahrain team who had not picked up in January on the issues that the Claimant later identified in December.

74. We accept that insofar as Mr Maskall had concerns about the Claimant's approach, those were genuine concerns and he was balanced and moderate in the way he articulated and dealt with them.

Andrew Sykes

75. Mr Sykes (Non-Executive Director and Ex-Chair of the Audit and Risk Committee (AROC)) had only met the Claimant once prior to Tribunal as her reports were presented to AROC by Mr Al-Mulla and then Mr Mohammed. Mr Sykes was made aware of issues between the Claimant and members of the management team in London (including Mr Anthony, Mr Sutton and Mrs Garrett-Cox). He said that his impression was that business relationships with the Claimant were characterised by *"frequent, at times quite personal, disagreements over proportionality and the presentation of her reports … lengthy delays between the completion of fieldwork and delivery of her Internal Audit reports"* and *"periods in which the Claimant's approach appeared to improve, followed by others where she slipped back into what were seen as her previous 'bad habits'"*. His impressions in this regard were necessarily based on information received from Mr Sutton and others. For his own part, however, his concerns (which we accept were genuine) were that a number of her reports were very lengthy and complicated and he felt that she was sometimes unable to 'see the wood for the trees'. He discussed these matters with Mr Al Mulla and Mr Mohammed, but carefully as he did not wish to undermine the internal audit function.

Ian Henderson

76. Mr Henderson gave evidence in his statement (para 8) on which he elaborated orally that he had been warned when he commenced employment by Sylvia Solomon (Ex-Head of Product Development) to be careful of the Claimant. It was apparent to the Tribunal that he was very diplomatic and professional in his dealings with the Claimant. He accepted that during the GTOP Fund Audit he had told his team not to respond directly to the Claimant but to refer matters to him. He did this in order to avoid her seeking (in his view) to 'play off' members of the team against one another.

77. Like Mr Sutton, Mr Henderson felt that the Claimant would rush to conclusions (para 14), although the evidence that he pointed to in this respect were the same emails as Mr Sutton relied on (see above).

78. Mr Henderson questioned the Claimant's understanding of trade finance (IH, para 19). He said (para 11) that he had spent a *"lot of time trying to explain to the Claimant the distinction between … the trade finance fund* [the GTOP fund – see further below] *on the one hand, where there was no direct relationship with the underlying obligors, and trade finance operations on the other, where the obligor is a client of the bank"*. Mr Henderson also complained that she refused to accept that sufficient 'know your client' (KYC) checks had been made on the underlying borrowers in relation to the GTOP fund (para 13b). Mr Henderson in oral evidence was adamant that the Claimant had misunderstood these issues, and that it was not him misunderstanding her. However, on these points it was the Claimant's view that was ultimately accepted by the Respondent, in particular by Mr Mohammed when he finalised the AML Audit Report (published on 4 July 2018) (p 289). The Claimant's point, with which Mr Mohammed agreed, was that although there was no direct relationship with the underlying obligors in the GTOP fund, the nature of the underlying borrowers (who were based in high risk jurisdictions) was that they should be treated as customers. This point was also accepted (in significant part) by AROC, chaired by Mr Sykes, who confirmed in oral evidence that the Respondent had decided henceforth to treat non-UK/non-UK-equivalent underlying obligors as if they were clients for the purpose of KYC checks.

79. Mr Henderson was also concerned about references in the draft GTOP Audit report to fraud. He considered (para 27) that *"the draft report pointed to fraud or collusion in GIB UK, rather than the possibility of a fraud in the counterparty or obligor. On any view, that was incorrect since even if there had been fraud or collusion (which was unproven at this time), GIB UK was not involved"*. We cannot see that the draft report does point to this (at p 310 it refers to fraudulent activities with the underlying borrowers and alleged collusion between employees of the counterparty and the obligor, not to fraud or collusion in GIB UK), but in any event these are minor drafting points which were appropriately resolved prior to the issue of the final GTOP Audit Report on 26 November 2018.

80. Mr Henderson also complained (IH, para 24) that the Claimant had not taken into account his comments on the draft report. He gave evidence orally that these were also points that he had discussed with the Claimant previously. These were for the most part points where Mr Henderson said that changes had already been made to address the problems identified by audit. While it is correct that the Claimant did not reflect all these points in the final report, this does not seem to us to be a significant issue as the final report includes sections for management responses where this sort of information could (and was: see p 423) included.

81. Ultimately, Mr Henderson concluded (para 31) that when it came to the final audit recommendations, he had no objection to the points that she had raised, and on the trade finance desk all her recommendations were accepted and implemented. He was surprised that she had been dismissed (para 40).

82. We find that Mr Henderson's approach to the Claimant was influenced by the views of Mr Sutton and others in the light of the warning he received when he commenced with the Respondent. We find that he, personally, was balanced in his approach to the Claimant and very professional in his dealings with her. This was also apparent from the way he gave evidence and answered questions from the Claimant in Tribunal.

Julian Anthony

83. Although Mr Anthony was complimentary about the Claimant (as we have set out above), he also said (para 10) that *"she always struggled with softer, interpersonal and listening skills"* and *"because she had this ability to dive into the detail, sometimes … she lost sight of the need to put it all into context, and in particular to recognise that GIB UK is a small bank, with a small number of institutional clients, such that some of the regulations which apply to larger financial institutions or those serving retail clients are not relevant to its business"*. He continued *"There was also a feeling amongst my colleagues that she was reluctant to let points drop and, whilst a degree of tenacity is a good quality in an internal auditor, there was a view that the Claimant went about her work in a way that was overly dogmatic, took an unnecessary amount of management's time and was detrimental to her internal relationships. For those reasons, the Claimant was often a topic of discussion at the management committee meetings"*.

84. In his witness statement he said (para 13d.) that he noticed the working relationship between Mr Sutton and the Claimant was particularly problematic and that *"It seemed to me that Mr Sutton and the Claimant began to see one another as opponents rather than as colleagues"*. When questioned about this by the Tribunal, he said that it was more a case of Mr Sutton feeling that way about the Claimant. He had not heard many complaints from the Claimant about Mr Sutton.

85. We find that Mr Anthony was measured in his approach to the Claimant. He recognised, and was well aware of, Mr Sutton's views of the Claimant, but he himself genuinely rated the Claimant highly.

Jenny Harding

86. Ms Harding (former Head of Legal) gave evidence that her own interactions with the Claimant were generally straightforward from when she first started working with her up until the events preceding the Claimant's dismissal. She was aware that colleagues saw her as difficult to work with, and that she could be indiscrete in discussing audit issues in non-confidential environments.

87. She gave an example in her witness statement (para 13) which she said was an example of the Claimant *"refusing to listen to advice with which she did not agree"*, but in fact it was an example of the Claimant accepting the advice of external lawyers. When questioned, Ms Harding said her point was that the Claimant had refused to listen to others in the business so that it had been necessary to go to external lawyers.

88. She also gave evidence of what other people (Lou Gibson and an external consultant, paras 12 and 14) had said about the difficulties of working with the Claimant.

89. Ms Harding was centrally involved in events leading up to the Claimant's dismissal and we deal with her evidence further below.

90. It is convenient to record here, however, that Ms Garrett-Cox's evidence, and Mr Henderson's was that Ms Harding is not a trade finance lawyer.

Katherine Garrett-Cox

91. Mrs Garrett-Cox (CEO) had little direct involvement with the Claimant other than in relation to events leading up to the dismissal and we deal with her evidence below.

Alison Yates

92. Ms Yates is also central to events leading up to the Claimant's dismissal and for the most part we deal with her evidence as part of our chronology below. There are, however, some more general points of her evidence that it is appropriate to deal with at this stage.

93. Ms Yates (Head of HR) was aware that the Claimant was rated highly by her line managers in all of the Respondent's competencies throughout her employment with the Respondent. She, however, had reservations about that in the light both of her own observations of the Claimant and reports from other employees, in particular Mr Sutton. She said she had raised these concerns with Mr Al-Mulla and Mr Mohammed, but that (para 12) they, being based in Bahrain, *"did not share the same views [of the Claimant] with those who interacted with her daily"*. She did not, though, seek to intervene any further in, or object to, the Claimant's appraisals, bonus determinations or pay rises. Nor did she take up any performance issues with the Claimant directly, although she accepted in answer to questions from the Tribunal that in principle she could have done.

94. She herself had concerns (para 13) about the way in which the Claimant handled the process of dismissing her direct report in the summer of 2015. She considered that the Claimant was *"sharing too much information related to GIB UK's process"* and she *"expressed this concern both to the Claimant*

and to other colleagues". The Claimant for her part said that her concern was that her direct report ought to be given an opportunity to resign rather than be dismissed but that since the Respondent had not given her any notice of the meeting at which she was to be dismissed, she was working in the office right up to her dismissal without any knowledge of what was to come. We have every sympathy with the Claimant's desire for the Respondent to adopt a basic fair dismissal procedure in relation to her direct report and do not accept this to be an example of poor practice by the Claimant as Ms Yates advanced it. We also accept the Claimant's evidence that she had not in the end told her direct report that she was going to be dismissed.

Khalid Mohammed

95. Mr Mohammed as the Claimant's line manager had consistently rated her highly, although he agreed that there were times when he had had to step in to redraft her reports so as to express matters more concisely. In general terms, he was always very supportive of the Claimant, but ultimately (he frankly admitted in oral evidence) he agreed to dismiss the Claimant in the light of her email to Ms Harding of 23 October 2018. We deal with this below.

Events of 2015 and 2016

96. In 2015 issues had arisen as to the relationship between Internal Audit and the management team. The former CEO Mr Watts sought to address this both with the Claimant and with the Respondent's UK leadership team, as is reflected in the emails of 7-10 July 2015 at pp 189-190. Mr Watts in his emails in substance encouraged the team to regard the Claimant and Audit as a 'critical friend' (not a term he used in that email, but a term that the Respondent's witnesses frequently use) and not to be afraid of audit criticism. He also set out a number of action points for the Claimant as to how Audit should approach matters in future. He offered training to *"the audit team in London"* relating to hard and soft skills. At the time that email was sent the audit team in London comprised the Claimant and her subordinate, although the subordinate's employment was terminated 3 days' later.

97. Part of the background to this was that there had been performance issues with the Claimant's subordinate at that time. What those issues were, and how they were managed by the Claimant, is not material to our decision. However, on 10 July 2015 the subordinate was dismissed. We have dealt with the relevant evidence in relation to this at paragraphs 48 and 94 above.

98. The Claimant in her oral evidence was reluctant to accept that the matters set out in Mr Watts' email related directly to her, as in her view the issues that Mr Watts sought to address had really been precipitated by the issue with her direct report. She also disputed that the Respondent had organised training for her following this email, or that training she had subsequently attended in October and November 2015 on Negotiation Mastery and Influencing and Communication Skills (p 117), or, in August 2016, Personal Impact and

Assertiveness Training (p 126) was prompted by this email. We find that the Claimant's reluctance to acknowledge in general terms that a training need had been identified and that she (or the Respondent) had acted on that in arranging training for her was not to her credit. She was overly concerned about the precise mechanism by which training had been arranged.

99. Shortly after this on 15 July 2015 the Claimant's then line manager, Mr Al-Mulla raised the question of the Claimant's job title (p 192), suggesting that the Chartered Institute of Internal Auditors considered that Internal Audit should be of a seniority comparable to senior management whose activities they are responsible for auditing and that the Claimant's job title should therefore be changed to Head of Financial Audit. At that time it was felt, principally by Alison Yates, that it was not appropriate, but that the matter should be revisited in the first quarter of 2016.

100. It was revisited in February 2016 and by then Ms Yates and Mr Anthony supported the proposal on the basis that she was technically excellent, supportive of her staff and had taken steps to address the issues discussed with her by Mr Watts the previous year. As noted above, however, it was agreed that this was a change in job title rather than a promotion and the letter to the Claimant communicating the decision (p 118) reflects this.

The Auditee Surveys

101. It was the practice of the Audit Department to seek feedback from auditees on an annual basis through an Auditee Survey. For the year ending December 2016, because of the perceived problems with the Claimant, the UK management team, including Alison Yates, Rhod Sutton, Dave Maskall and others decided to provide a consolidated response reflecting the group's concerns. Mr Sutton accepted, however, that he had taken the lead on drafting the document and that much of its content was his. We find that other witnesses involved in drafting this document essentially went along with Mr Sutton's comments and ratings and there was not much discussion of the content or the ratings. The key passages from the response are as follows:

> "The Auditor has a tendency to portray audit matters in a very negative manner and, often, context is not provided or proportionality exercised. Though it is sometimes left to the auditee to fully investigate a potential solution to issues identified, there may be instances when the Auditor has not fully explored the potential exposure or issue arising and, in doing so, asks the business to look into the issue further which is very time consuming for the auditee.
>
> Very often, there is no suggestion that sampling has been performed by the Auditor to more objectively assess materiality of deficiencies identified. The implications of audit points are not always clear and, sometimes, vague.
>
> Generally, there are some valid audit points identified and reported, but their impact is diminished by inclusion of other points in the report that do not appear to be adequately considered and/or could easily be noted to management outside of the audit report as observations.

> There appears to be a tendency to raise audit points in reaction to prevailing regulator announcements or publications issued by law firms, or to reference regulatory publications or rules, without taking account of the scope and context of our business.
>
> A structured risk based approach to auditing does not appear to be evident, which leaves questions about whether material issues have been overlooked. Typically, this is apparent where new audit points are raised that are not raised in previous audits of the same subject area and where there has been no material change to the audit area.
>
> A detailed working paper, showing the key risks reviewed, anticipated controls, testing and findings would greatly resolve these matters and support objectivity….
>
> It is essential we have an independent audit function that highlights material matters and situations when effective action is not taken. Reporting to the board of directors should be objective and proportionate as, otherwise, the messages conveyed can be misleading. I do not think this is always achieved."

102. This response was sent to Mr Mohammed who did not share it with the rest of the Audit Team, including the Claimant.

103. The following year, (year ending 2017), the same approach was taken. Mr Sutton was tasked by Mr Maskall with taking the lead again because he *"generally has quite an open view of audit"* (p 222) (which we take to mean that it was well known what Mr Sutton thought of the Claimant, while others had perhaps been more cautious in expressing their concerns). The 2017 response was largely a cut and paste of the previous response, but with some significant additions, including the following:

> "It has also regularly been seen, again in the UK, that areas are played off against each other when gathering audit information. Whilst it is recognised that audit may wish to independently confirm information, the information obtained from one of them is distorted when presented to another, deceitfully, in order to obtain the desired outcome; perhaps agreement to an audit point that is of doubtful validity"

104. Again Mr Mohammed made it clear that he did not agree with the feedback and he informed Mr Maskall, who in turn informed Ms Yates, that he would not share it with his team. In fact, he did show a copy to the Claimant and her subordinate at a subsequent meeting, but he made clear that he did not think much of it, saying that it should be *"binned"* or words to that effect. The Claimant said in evidence that the word *"deceitful"* had leapt out at her when she looked at it, but we are not satisfied that it did. She did not mention this in her own ET1 or witness statement and we find that it was the Tribunal's questions which led her to realise, retrospectively, the potential significance of this word being used.

105. The word *"deceitful"* is strong language to use without any supporting evidence. Mr Mohammed appears to have discounted the allegation altogether as being unevidenced. Ms Yates, when questioned, effectively said that she had not done anything about it as she agreed with it. She said that the Claimant would often ask the same question of different members of staff and she had experienced that herself. We find that this was indeed why Ms Yates took no action in response to the Auditee Survey, but we have not been

provided with any evidence to substantiate the suggestion in this Survey that the Claimant was 'deceitful' at any time, and it was not put to her in cross-examination that she had been 'deceitful' on any occasion.

The New Product

106. During 2017 the Bank developed a new product, known as the GTOP Fund. The Claimant described this in the hearing as the Bank's 'new baby'. Her overarching submission was that in the two audits that she carried out involving this fund between 8 December 2017 and 3 December 2018 (the Anti Money-Laundering or AML Audit and the Trade Finance Fund or GTOP Audit) the problems that she identified with the GTOP fund had a direct impact on the Fund's net asset value (NAV). The Respondent accepted that there had been a diminution in the funds under management during this period. We do not consider that we have heard sufficient evidence on which to make a finding as to the cause of that diminution in value.

AML Audit

107. The Claimant commenced an AML Audit of the GTOP Fund in the latter months of 2017. In December 2017 there was an exchange of emails between the Claimant, Mr Sutton, Mr Henderson and others, which we have dealt with above when analysing Mr Sutton's evidence (see paragraphs 63-69). This correspondence also includes the disclosures relied on by the Claimant as PD1 (see above paragraph 53.a).

108. Following this correspondence, the AML Audit appears to have stalled as a result of disagreements between the Claimant and auditees. A meeting between Mr Maskall and Mr Mohammed in Bahrain in March 2018 led to Mr Mohammed agreeing to issue a revised draft report that would be more concise (p 239).

109. At this meeting, Mr Maskall also mentioned, in connection with the Compliance Audit that was also ongoing, his concern that matters may be getting 'personal' between the Claimant and Compliance (Mr Sutton), but Mr Mohammed dismissed this suggestion, which did not reflect his view of the Claimant.

110. There was some involvement from HR after this as emails in the bundle (p 242) reflect the view of HR that the relationship between the Claimant and Mr Sutton (in particular) was deteriorating. The emails show that HR regarded the problem as being with the Claimant and identifying a need to speak with Mr Mohammed about it. There is no suggestion of similar action being taken regarding Mr Sutton or his line manager. Again, whatever HR said to Mr Mohammed about the Claimant at this time, the feedback was not passed onto the Claimant or (at any rate) not in anything more than the most general, high level terms.

111. During this period Mr Mohammed redrafted the AML Audit report in more concise terms (pp 280-301) (but maintaining the substance of all the Claimant's points). Following this the audit points were still disagreed so in accordance with the Respondent's policies, they were escalated to Ms Garrett-Cox on 25 May 2018 (p 244).

112. On 5 June 2018 a meeting took place between Ms Garrett-Cox, Gavin Allard (Mr Sutton's replacement) and the Claimant. This was Ms Garrett-Cox's first substantial encounter with the Claimant and her impression was that Mr Allard approached the meeting in a conciliatory manner and that the Claimant *"spoke in a rambling and incoherent fashion for large amounts of the meeting"* (KGC, para 14).

113. Ultimately, the AML Audit was finalised on 4 July 2018 (p 280). It was signed off only by Mr Mohammed and not by the Claimant. This was because the Claimant disagreed with Mr Mohammed's assessment that the overall AML rating should be Satisfactory notwithstanding that the Risk Rating for GTOP was High. There were also a number of remaining disagreements between Audit and Management, which are formally recorded in the report, including Audit's final Comment on Management Response (p 289) that *"the underlying borrowers (obligors) are not treated as customers of GIBUK/Fund to trigger AML and sanction requirements"*. Ultimately, we heard from Mr Sykes that Internal Audit's view was largely accepted by AROC, who determined that additional procedures should be put in place where the underlying borrowers were non-UK or non-UK equivalent institutions.

114. On or around 10 July 2018 Mr Sutton left the Respondent. The relationship between the Claimant and Mr Sutton's replacement (Mr Allard) was much better and Mr Sykes said that he had heard no complaints from Mr Allard about the Claimant.

GTOP Audit

115. In mid July 2018, the Claimant started the Trade Finance Fund (GTOP) Audit. Mr Henderson asked the Claimant to provide a clear objective for the Audit (p 301a) and was disappointed when the Claimant responded by providing the standard Audit start letter again. In his witness statement (para 18) he described the Claimant's approach as 'obstructive'. We accept this was his genuine view, but do not find that the Claimant was 'obstructive'. We note that her email response includes an offer to provide *"further detailed audit risks to be covered during the audit … subject to the approval from the GCA"* (p 301a).

116. The Claimant was disturbed by her initial consideration of the GTOP Fund. On 28 July 2018 (p 301d) she emailed Mr Mohammed. She said that she had noted that *"the current GTOP Fund financial statement has not disclosed any past due loans"*, that there were *"loans with excessive number of payment extensions"* and *"loans with chronic past loan histories are reported as current and do not appear on the Fund's problem loan list".* She said that the *"two matters above are considered as indicators of insider loan fraud"* and she

referred to an attached screen shot (p 301e), which was an extract from the ffiec.gov site identifying warning signs of fraudulent trading. This email forms part of the Claimant's PD2 (above paragraph 53.c).

The José incident

117. Around this time the Claimant had also discovered that there had been damage to a shipment of cashew nuts that the GTOP Fund had funded. This was significant because it meant that there was a risk that monies loaned would not be repaid which was particularly problematic because the MRPA did not provide for the GTOP Fund to have any right of ownership over the underlying goods. The Claimant found that the damage had occurred in February 2018 and in accordance with the Respondent's "Early Warning Procedure" should have been reported by the Fund Manager (Mr Henderson) to his line manager (Mr Canepa). The Claimant wanted to speak to Mr Canepa to validate this audit finding but had been unable to do so because he was on vacation (C, para 32).

118. On 30 July 2018 at 09:34, Ms Garrett-Cox (p 302) emailed a large list of employees, including the Claimant, informing them that *"Following recent discussions regarding the future strategy and structure of the Asset Management business"* Mr Canepa *"will be leaving GIB UK with immediate effect"*. The Claimant forwarded this to Mr Mohammed (p 302a).

119. On the evening of the following day, between 7pm and 8pm, Mr Canepa came into the office to collect his personal belongings. The Claimant, who was still in the office, saw him and considered that it was her last opportunity to validate this audit finding with him, so she did ask him (in an area potentially visible and audible to other employees) whether Mr Henderson had told him about the damage to the cashew nut shipment in February time and he said "No".

120. Ms Yates' attention was drawn to this conversation by another colleague and she immediately went over to 'put a stop' to the conversation which she considered to be *"wholly inappropriate, for obvious reasons"*. By the time that she got there the Claimant was walking away and so she suggested that they speak in her office, where she told the Claimant that she thought her actions were wholly inappropriate. The Claimant did not at the time, and still does not, see that there was anything wrong in her speaking to Mr Canepa. She considered the point to be so important that in oral evidence she said that she would have done the same again if the circumstances arose. Ms Yates considered it to be *"remarkable"* (AY, para 46) that the Claimant did not recognise her error of judgment in this regard. Mr Mohammed, when told about this incident, also considered it to be completely inappropriate conduct and he told the Claimant so at the time. He did not think that it was necessary for Audit's purposes for the question to be put to Mr Canepa. He said that it is for Management to show that procedures such as the Early Warning Procedure have been complied with and if that could not be evidenced, then the Audit finding would be that there would have been non-compliance.

121. Ms Yates did recognise when speaking to the Claimant about the José incident that the Claimant was stressed and upset. As Ms Yates recorded in her much later email of 21 November 2018 (p 397, see below), the Claimant mentioned that she was considering 'blowing the whistle' on the issue. Ms Yates offered the Claimant additional support, as is apparent from her email later that evening (p 303). The Claimant said that in this conversation Ms Yates said she was an 'asset' to the Respondent and we accept that something like that was said.

122. The Claimant had a conversation with Mr Mohammed after this incident when she was tearful and said that she was so worried about what she had discovered that she wanted to make a whistleblowing complaint. Mr Mohammed discouraged her from taking this course on the basis that it is the role of Internal Audit to raise concerns and the appropriate way to do that is through an audit report, backed up by evidence, which is then submitted to AROC in the usual way.

123. We find in relation to the José incident that it was inappropriate for the Claimant to approach an ex-employee at a vulnerable time for him when he was collecting his personal belongings. However, the Claimant was at that time very stressed about the matters she had uncovered as part of the audit and genuinely considered that there was a real need for her to approach José to ask him the single question that she did. We find that this was in substance recognised as a mitigating factor by Ms Yates and this is why the Respondent, reasonably at that point in our judgment, took no action against the Claimant following this incident (even though the Claimant had not acknowledged that she should not have spoken to José).

<u>GTOP Audit continued</u>

124. From late July throughout August and September 2018, the Claimant continued to raise concerns with Mr Mohammed and Mr Anthony (in particular) regarding the GTOP Audit concerns, while she worked on drafts of the report. These concerns include the agreed disclosures PD2 (above paragraph 53.a).

125. In early August 2018 the Claimant became aware of the existence of a memo prepared by one counterparty concerning the fraud committed by the borrower (which we have referred to above in the context of Mr Henderson's evidence at paragraph 79). She escalated this to Mr Mohammed. This issue appeared in the final GTOP Audit report (below), which records as a fact that *"Since the launch of the fund in July 2017, there have been two defaulted loans formally reported with fraudulent activities involved with the underlying borrowers"* (p 414, para 1.5.1).

126. In the meantime, in August 2018 the final Compliance Audit Report was issued (PD8). We have not seen this Report, although we have received evidence of its contents (see above paragraph 53.d).

127. At the end of August/beginning of September 2018 the Claimant was expecting Mr Anthony to raise with the GTOP Fund Board the issues that she had identified in the course of her internal audit, but he did not do so. He explained, and we accept, that this was because the GTOP Fund Board is 'external' to the Respondent and the Respondent does not share its internal audit reports with the Fund Board.

The draft GTOP report

128. On 26 September 2018 at 12.35 the Claimant sent to Jenny Harding (copying Mr Henderson) an email setting out some paragraphs which she intended to include in the draft GTOP Audit Report (p 303b), including (highlighted in yellow on our documents) proposed new material. She stated *"If you would like us to change or amend anything, please let us know. Alternative, if you prefer to respond later after the issuance, we have no issue with that"*.

129. Ms Harding responded (p 303a) at 13.00 stating: *"I feel very uncomfortable with the extract of your report you have included in your email. In my view it is full of sweeping statements which I think you should substantiate before they go in a report like this. My comments are below. I am out of the office this afternoon at a seminar but am happy to pick up on this with you tomorrow if need be."* Ms Harding's comments were inserted in red on the documents we have.

130. The Claimant then replied at 17.34 on the same day inserting her comments in blue. She stated: *"Given I am out of office next week, may I suggest you to review the following comments/files and discuss with* [my subordinate] *in my absence. Whilst I have not put all comments in the draft report for now, we can update the draft report once concluded"*.

131. The comments from the Claimant and Ms Harding in the above emails relate to the Claimant's MRPA Concern which forms part of PD3 (above paragraph 53.e). The comments indicate that the Claimant considered that the MRPA signed by the counterparties in relation to the GTOP fund adopted the standardised version used by bank-to-bank trade loans, and that her view in this regard was based on a document which she attached. Ms Harding disputed this, asking *"How do you know this. It is an industry wide document which is used by non-banks as well."* The Claimant responded by explaining, *"There should have been additional provisions tailored to the MRPA template given most of GTOP counterparties are non-banks which requires additional protection to the Fund"*. Ms Harding considered that this had happened because *"The GTOP template was reviewed by external lawyers and they inserted the provisions they felt necessary to protect the fund"*. The Claimant indicated that her concern was that the risk department had not been involved and that accordingly not all potential risks had been covered by the agreement. We add that Ms Harding said in cross-examination that she was willing to go back to external lawyers, but note that is not reflected in her

comments on this email, so could not have been appreciated by the Claimant at the time.

132. We observe that although by the end of the above email exchange the basis for the Claimant's opinions was clear, we have some sympathy with Ms Harding's opinion that the Claimant's initial statements were *"sweeping"*.

133. At 18:26 on 26 September 2018 the Claimant sent an email (her PD3) to Mr Anthony, Ms Harding and seven others. This attached the draft GTOP Audit Report (pp 339b-c), but omitted the passages highlighted in yellow in the preceding emails. She asked for management responses by close of business on 3 October 2018 and made clear *"Please kindly start the management responses with the opening statement of 'agreed, partially agreed or disagreed' as usual"*. She also took the opportunity to thank Mr Henderson and his team for the co-operation they had provided during the audit.

134. At 18:38 (p 304) she sent a further email to Ms Harding and Mr Henderson regarding the passages highlighted in yellow asking them to discuss them with her subordinate in her absence.

135. No response of any sort was received by 3 October 2018 in line with the Claimant's request.

136. By emails of 4 October 2018,15 October 2018 and 17 October 2018 the Claimant sent three *"friendly reminder"* emails requesting management responses (pp 339a-339b).

137. On 19 October 2018 at 17.54 Ms Harding emailed the Claimant a copy of the draft GTOP Audit Report marked up with her comments, Mr Anthony's comments and Mr Henderson's comments (p 304). The email stated *"I think that we should sit down and go through them with you next week. Let me know if you have any questions in the meantime"*. The attached draft included multiple comments and what appeared to be extensive deletions (albeit with changes tracked). It did not include as requested the formal management responses. We find that the reason for most of the deletions and comments were because Ms Harding and (to a lesser extent) Mr Henderson considered that the points that the Claimant had made in the draft audit report (i.e. her PD3) were wrong.

138. On 22 October 2018 at 12.45 (p 376h) the Claimant emailed Mr Mohammed stating that she would like to escalate that management responses had not been received despite reminders and that the comments received had included amendments and deletions to audit points, reassignment of points to other departments and responses which contradicted comments previously received in September.

<u>Jenny Harding incident 22/23 October 2018</u>

139. At 14.56 on Monday 22 October 2018 (p 339d) the Claimant emailed Ms Harding as follows:

> Dear Jenny
>
> May I take this opportunity to understand from your perspective is there any particular reason that legal department would provide comments on behalf of risk department? Is any particular reason that no formal management responses from legal dept provided since 26th Sep other than amending/commenting on the audit report?
>
> This give rise to a concern of audit efficiency and delay in reporting and resolving high risk audit issues in a timely manner.
>
> And I am also a bit concerned to see a number of our audit observations had been amended, removed and some of the audit recommendations had been removed/assigned to different department at the very last stage of this audit. This has detrimental impact to audit independence and the progress on our 2018 audit plan.
>
> Kind regards

140. The Claimant's email makes clear why, quite reasonably in our judgment, the Claimant was unhappy with management's responses to her draft audit report. This prompted Ms Harding to go to the Claimant's office. We find that she went because she felt the Claimant's email was accusatory (as it was, both with regard to the delay and in relation to the amendments and deletions to the audit findings). She entered without knocking. We find that she was agitated from the outset of this meeting. She picked up the draft GTOP report from the Claimant's desk and asked to discuss it. (Ms Harding in evidence was unclear about why she went to the Claimant's office, but we find it was the email we have quoted in full above as otherwise there is no explanation for why she went to the Claimant's office at that time and without the draft GTOP report in hand.)

141. Ms Harding's evidence was that the Claimant immediately raised the issue in the email (p 303b) about why Ms Harding did not realise that the MRPA was a bank-to-bank document. It was clear from the Claimant's evidence to Tribunal that this was still a very important point for her (it is her PD4) and that she considered that this was a point that Ms Harding ought to have known. We therefore accept that the Claimant raised this with Ms Harding and questioned her legal awareness about the matter that constituted her PD4.

142. However, Ms Harding's evidence went further. She said that three or four times the Claimant had said that she (Ms Harding) should not be in the role of Head of Legal *"if [she] was asking questions like that"* and was shocked that she was. She said that the Claimant said that she would escalate her concerns about her holding the title of Head of Legal to the CEO. Ms Harding said that this upset her so much she had to leave the room.

143. Ms Harding's account does not quite accord with that of the Claimant, although there is agreement as to the overall shape of the conversation, including that it was Ms Harding who went without an appointment to the

Claimant's office, that the discussion focused immediately on the email at p 303b and 'the bank-to-bank issue' and that it was Ms Harding who left upset.

144. We do not, however, accept that the Claimant questioned whether Ms Harding should have been in the role of Head of Legal or threatened to escalate that issue to the CEO. The Claimant was concerned about Ms Harding's legal knowledge as is apparent from the email at p 303b, and she did question her legal awareness, but what she threatened to escalate to the CEO was the lack of management responses to the draft GTOP audit report. We so find because it is clear from the Claimant's emails around this time that that was the issue of chief concern to her and she had already asked Mr Mohammed about escalating it to the CEO. What upset Ms Harding and led to Ms Harding walking out, slamming the door, however, was what the Claimant said about her PD4 and her legal awareness of that issue.

145. For the avoidance of doubt, we find that the Claimant did not in this conversation question Ms Harding's professional integrity as she did not question her honesty or her principles. She questioned her legal awareness.

146. We add that a further reason for rejecting Ms Harding's account of the conversation is that the point on which she now places so much weight (the Claimant questioning whether she should be in the role of Head of Legal) does not appear to be something she said to anyone at the time, even though she spoke to a number of people about the incident immediately after te event. Mr Henderson's evidence (IH, para 35) was that after the meeting Ms Harding said that she was being accused of not doing her job properly and of not understanding issues raised in the fund audit. Mr Maskall (DM, para 27) said that Ms Harding told him that the Claimant had questioned her integrity and professional ability. Ms Yates (AY, para 51) said that Ms Harding said that she felt her integrity and ability to do her job had been called into question by the Claimant.

147. Shortly after this conversation the Claimant at 15.57 on 22 October 2018 forwarded to Mr Mohammed the email of 14.56 that had provoked Ms Harding to coming to her room, stating that she was *"very concerned that the high risk audit issues are not being reported/dealt in timely manner due to the management delay. I raised my concern to the Head of legal on the following private email but she got agitated. I am waiting your approval/advice regarding the escalation of the issue (delay in receiving mgt responses)."*

148. For her part, Ms Harding emailed the Claimant at 16.37, copying in Mr Henderson and Mr Anthony, attaching a changed version of the audit report which she sent on Friday *"so that it includes the management responses which are for the head of legal as well as the comments which I feel are within my remit"*. She asked Mr Henderson and Mr Anthony to do the same. The version attached to this did not include the substantial deletions that Ms Harding had previously made in track changes.

149. The Claimant saw this as acceptance by Ms Harding that she had overstepped the mark previously. Ms Harding for her part said that the

deletions had only ever been 'for discussion', she had not meant to indicate that all the text should come out of the report and that she removed the deletions after the discussion with the Claimant because she did not want to argue with the Claimant any further. We do not accept Ms Harding's explanation on this point. We find that she recognised that she had overstepped the mark in the way she had commented on the draft report, the deletions she made and the fact that she (and Mr Henderson and Mr Anthony) failed to put in formal management responses as requested. We find that her original deletions were not put forward as suggestions or in order to highlight sections for comment. As she accepted in oral evidence in answer to our questions, in Word the steps of deleting a section and commenting on it are separate. There was no need to delete whole sections of audit findings in order to comment on the sections and she knew that. This is why she changed it back after her conversation with the Claimant. We further infer that Ms Harding felt a degree of sensitivity about the way she had handled this and did perhaps think that what she had done with the draft report would not reflect well on her. We find that this is part of the reason why she reacted as she did in the conversation with the Claimant.

150. The Claimant thanked Ms Harding for her revised draft and asked Mr Anthony and Mr Henderson for their final management responses by mid-day the next day (p 376aa).

151. At some point during the afternoon, Ms Harding telephoned Ms Yates (who was working from home) and told her what had happened. Ms Yates' impression was that Ms Harding had reached the *"end of her tether"* with the Claimant.

152. At 18.50 that evening (22 October) Ms Harding emailed the Claimant asking to meet for a chat the next day, to which the Claimant agreed for 12 noon (p 379).

153. However, the next morning Ms Harding asked to speak to Ms Yates again (p 376a). They discussed Ms Harding's options, including speaking to the Claimant informally or raising a grievance. Ms Yates said Ms Harding should think carefully before raising a grievance. We find that this was intended to dissuade her from raising a grievance. Ms Yates denied this was the intention, but there is no other reason for saying she should think carefully rather than simply offering a grievance as an option.

154. At 11.51 on 23 October 2018 Ms Harding emailed the Claimant (p 376c) stating *"I'm afraid that I'm going to have to reschedule our catch up until tomorrow and so I'll send out a revised meeting invite. I need more time to think about things because to be honest you have really upset me by calling into question my professional integrity in the way you did yesterday".*

155. The Claimant responded at 12.29 (p 376b), blind copying in Mr Mohammed. Her email is in our judgment conciliatory in tone and careful in the way that it explains why the Claimant had felt it important to raise the bank-to-bank issue

only privately with Ms Harding so as to avoid causing her any embarrassment by including it in the draft audit report circulated more widely:

> "I have no intention to hurt you in anyway and I have no concern on your professional integrity.
>
> Since all MRPA agreements are based on a template designed for Bank to bank, it is important to tailor legal provisions to add further protection to GIB since we are dealing with newly established, less capitalised, even previously dormant corporate entities. Therefore, I was a bit uncomfortable when the legal team questioned why it is 'bank to bank' since it is a reflection of legal awareness. If I had raised this 'bank to bank' issue in the audit report, the reader might have raised a question on the professional awareness (not integrity). Therefore, as I mentioned to you, I do not mind raising it privately with you and deal with it on offline basis to avoid any personal impact to you.
>
> On the other side, when you slammed the door and walk out with anger, honestly I did not feel comfortable as I did feel it was a type of intimidation to auditor. I would like to emphasize that all auditees have full rights to disagree, however we need formal responses as opposed crossing/removing/deleting our audit observations and reassigning the ownership to other departments.
>
> Lastly, I agree with you to discuss these issues again is a good approach since a peaceful professional relationship in the work place is very important. Happy to discuss it further tomorrow when we meet."

156. For the avoidance of doubt, we again find that in this email, the Claimant was, as she made explicitly clear, questioning Ms Harding's legal awareness and not her professional integrity.

<u>The forwarding of emails to the Claimant's Hotmail account</u>

157. The Claimant forwarded this email to her Hotmail account at 12.34 on 23 October 2018, followed one minute later by her email to Mr Mohammed of 22 October 2018 at 12.45 (p 376h: above paragraph 138) The second email included in the ensuing chain the draft GTOP Audit Report. Following her dismissal, the Claimant told Ms Yates that she had forwarded these emails for the purposes of Employment Tribunal proceedings. However, that cannot really explain why the Claimant forwarded the emails to herself on 23 October 2018, over a month before she was dismissed. We find, rather, that the Claimant's action in forwarding these emails was motivated in part by her belief that the issues she had identified with the GTOP Fund were not welcomed by the Respondent and that there may, in general terms, be a need for her to take further action, including possibly whistleblowing to regulators. We so find because the Claimant had previously raised with Mr Mohammed and Ms Yates following the José incident the possibility of blowing the whistle (see above paragraphs 121-122). However, we also find that the Claimant feared for her job after seeing that Ms Harding thought that she had questioned her professional integrity, and that this is also part of the reason why she forwarded the emails at that point, to ensure that she had evidence of what had happened should it be needed.

Jenny Harding incident 22/23 October 2018 (continued)

158. Ms Harding responded to the Claimant's email at 12.29 ten minutes later (p 377): *"I did not walk out with anger, I walked out like I did because I was upset and not surprisingly. You were in effect questioning my ability to do my job and you have done so again in your email below. Let's chat tomorrow and I'm going to have a think about whether or not to ask someone else to come along. Let's chat tomorrow."*

159. Ms Harding forwarded the email chain to Ms Yates.

160. Following receipt of the blind copy of the above email (12.29, p 376b) from the Claimant, Mr Mohammed telephoned the Claimant and spoke to her for over an hour. He told her that the email was totally unacceptable. As he explained in his witness statement (paragraph 43) to the Claimant, contrary to everything he thought he had told the Claimant previously about not allowing interactions to become personal, *"it called Ms Harding's competence into question, suggesting twice that she lacked legal or professional 'awareness'"*. He told the Claimant that he *"could not defend this behaviour"*. He urged her to apologise to Ms Harding. The Claimant mentioned that she had forwarded emails to her Hotmail account because she was afraid that this would end in a Tribunal. Mr Khalid did not remember her mentioning this, but he did not dispute that she had said it and we accept that she did. It was a long telephone call and Mr Mohammed readily accepted that he could not remember it all. (It is also relevant in this respect that it is accepted by Ms Yates that the Claimant did mention these emails again immediately after dismissal, so we accept that the Claimant was being open about what she had done.)

161. Ms Harding and Ms Yates had further discussions about the incident. Ms Harding did not want to raise a formal grievance but did want the matter raised with Mr Mohammed as the Claimant's line manager. Ms Yates felt that doing nothing was no longer an option. She explored with Ms Harding the possibility of mediation with the Claimant, but Ms Harding did not consider that would be helpful. Ms Harding also spoke to Ms Garrett-Cox. Ms Harding forwarded to Ms Garrett-Cox the emails with the Claimant (pp 384-396) saying that at the meeting on 22 October the Claimant *"indicated that she wanted to escalate upwards that I was in effect not capable of doing my job"*. She asked for Ms Garrett-Cox's *"thoughts on next steps"*.

162. Ms Harding and the Claimant met again on 24 October 2018. Ms Harding's evidence, which we accept, was that the meeting was productive and that the Claimant to some extent recognised that she had made a mistake. But Ms Harding also said (para 33) that *"so far as our professional relationship was concerned the damage had been done"*. She said that she had very little contact with the Claimant before her dismissal. She said that she tried to do everything by email to ensure minimal direct interaction with the Claimant and that if they had had to work together again in future it would have been very challenging and that she would have found it difficult to be transparent with her in future. However, she also said (para 38) that she *"was not sure whether*

our exchange on 22 October 2018 was, of itself, sufficient reason for the Claimant's dismissal, there was a history there and it felt like she could not go on getting chance after chance to improve".

163. At the management meeting in early November the Claimant's performance came up and Ms Harding gave evidence (para 36), which we accept, that she informed the meeting of the incident as well.

164. The Claimant for her part considered that matters were resolved and proceeded to finalise the GTOP Audit Report. She messaged Mr Mohammed to this effect, which he understood as indicating that the Claimant had apologised as instructed.

165. In fact, however, the Claimant had not done so and Ms Yates and Ms Garrett-Cox were, we find, inclining to the view that the Claimant should be dismissed. Ms Yates confirmed in oral evidence that the possibility of dismissing the Claimant had not been considered prior to the incident with Ms Harding. With dismissal in mind, Ms Yates and Ms Garrett-Cox both travelled out to Bahrain to meet with Mr Mohammed.

166. On 21 November 2018, in advance of their meeting with Mr Mohammed, Ms Yates drafted an email to Ms Garrett-Cox as follows (p 397):

> Dear Katherine,
>
> In preparation for a meeting with KM at 9 AM this morning, here is a summary of the issues:
>
> Recent situation involving the Head of Legal which was brought to the attention of both HoHR and CEO. A formal grievance was considered.
>
> - In respect of the Trade finance audit – comment made whereby JH felt that her professional integrity was being questioned. Matter was discussed directly with the HoA but was not resolved satisfactorily (attached).
>
> This follows other situations/feedback provided over the past few years
>
> - AML Audit – Rhod Sutton. Perception was that it the audit [*sic*] became very personal
> - Trade Finance Audit – Ian Henderson (discussing that fraud may have occurred without finalising her findings or discussing the situation directly with him)
> - A Whistleblowing comment made to the HoHR who was in a very stressed and emotional state
> - Historical view of the business generally re the approach taken by the HoA
> - Feedback has been given to GHoA historically in writing and verbally; the approach and behaviour does not appear to have modified (attached)
> - Previous conversations wit the Group HoHR and the GIBUK HoHR regarding closer management
> - HoA inappropriately speaking with employees outside of the audit subject on her findings (this has been addressed by KM)
> - Her approach to Jose Canepa on the day he came to collect his personal belongings in front of other staff, who brought it to the attention of the HoHR and the subsequent conversation that took place with HoHR

- Previous GIBUK CEO who met with the HoA to discuss the feedback that he had received

There is a common theme:

- Lack of discretion/confidentiality
- Little emotional intelligence when dealing with colleagues
- So engrossed in the task that the she [*sic*] doesn't consider the people implications
- Dogmatic in her approach
- Despite the constant feedback, no apparent change
- Consistent feedback over many years from managers in the business regarding her approach

Summary

Whilst the HoA's contribution to the function may be perceived to be high, the HoA's ability to listen and build relationships with colleagues is limited. She is very forensic in her approach to the audits and often it is felt that she does not take a proportionate approach in her assessment of the risk given the existing business model. Reports are that the audits can be overly detailed, disruptive and lengthy as issues take longer to resolve than expected. Perception from the auditees is that the HoA plays people off against each other which creates a feeling of mistrust and generates defensive behaviour. The function is not perceived as helping the business.

167. This email is a conspicuously one-sided briefing. In particular, although there is reference in the 'summary' paragraph to the perception that the Claimant's contribution to the audit function *"may be perceived to be high"*, the briefing omitted reference to the Claimant's consistently excellent performance reviews and clean disciplinary record. It attached the 2016 and 2017 Auditee Survey Responses containing Mr Sutton's comments about the Claimant (which we have dealt with above at paragraphs 69-70 and 101-105). It did so without saying that, as Ms Yates' personally knew, the greater part of those Survey Responses had been drafted by a single employee (Mr Sutton) and that the 'feedback' in the Survey Responses had never been provided to the Claimant. Positively misleadingly, given the lack of any formal negative feedback to the Claimant since 2015 (see above in particular paragraphs 96-97 and 102-104), the briefing said: *"Despite the constant feedback, no apparent change"*. It cited the incident with Ms Harding and suggested that the *"Matter was discussed directly with [the Claimant] but was not resolved satisfactorily"* as if to suggest that Ms Yates personally had taken the matter up with the Claimant, which she had not done. There had been no attempt to give the Claimant an opportunity to set out her side of the story in relation to any of the matters that Ms Yates included in the briefing.

168. In the circumstances, we find that Ms Yates drafted the briefing email of 21 November 2018 with a view to engineering the Claimant's dismissal.

The dismissal decision

169. Mr Mohammed, Ms Yates and Ms Garrett-Cox met in Bahrain on 21 November 2018. Mr Mohammed gave evidence orally that in this meeting a collective decision was made that the Claimant should be dismissed. When questioned further, he indicated that it had been for him as the Claimant's line manager to make the initial decision, but we find that Mr Mohammed was placed in a position where it would have been difficult for him to have done otherwise. This is because we consider it would have been plain to him from the fact that Ms Garrett-Cox and Ms Yates had travelled to Bahrain especially, and from their approach (as reflected in Ms Yates' briefing email in advance of the meeting), that dismissal was the outcome they sought. We find that the dominant factor in his agreement to dismissal was that he considered the email to Ms Harding on which he had been blind copied to be unjustifiable and 'career limiting'. He also considered her actions regarding the previous incident with José Canepa to have been deeply inappropriate (see above paragraphs 118-123).

170. Following this meeting, Ms Garrett-Cox determined that the Claimant should be dismissed and she and Ms Yates presented this view to Mr Sykes as Chair of AROC for approval, which he gave.

171. On 26 November 2018 the final (GTOP) Fund Management Audit Report was issued (pp 405-442) (PD9). It was signed off by both the Claimant and Mr Mohammed and rated the internal control processes falling within the scope of the audit as Generally Unsatisfactory. This was the first time that the UK business had received such an audit rating, although the Claimant accepted in evidence that she had given a Generally Unsatisfactory rating in a Bahrain trade finance audit the previous year. She did not consider that previous audit to be of such significance as the GTOP Audit.

172. On 28 November 2018 the Claimant sent PD5 (see above paragraph 53.h).

173. On the morning of 3 December 2018 the Claimant sent PD6 (see above paragraph 53.i).

174. On 3 December 2018 the Claimant was invited to a meeting in the Board Room for what the CEO's secretary called a 'general audit update'. Present at the meeting were Ms Garrett-Cox, Mr Mohammed (by video link) and Ms Yates. Notes were taken of the meeting by Ms Yates (pp 442a-b) which the Claimant accepted (and we find) were broadly accurate.

175. Ms Garrett-Cox began the meeting by referring to the incident with Ms Harding. She said that it was not acceptable behaviour in the workplace and in a small team it will cause serious problems. She said that the Claimant's behaviours, manner and approach had resulted in people not wanting to work with her. She referred also to the José incident. She said that it had been decided that the Claimant's employment should be terminated with immediate effect.

176. The Claimant responded by saying that she disagreed with the reasons given, that she had thought that something would happen as a result of the GTOP Fund Audit either to her or to Mr Henderson (because of her view that what she had uncovered, in particular in relation to the non-transparent reporting of loan extensions, revealed possible misconduct on his part). She said to Mr Mohammed that if she had not followed his advice and had blown the whistle this would not have happened. The Claimant said that she would take the bank to a Tribunal. The Claimant attempted to explain her side of the story regarding Ms Harding, saying that she had been very patient with Ms Harding who raised constant issues. She also said that the meeting with José was tricky because she needed a witness to what she had found.

177. In response to the Claimant, Ms Garrett-Cox emphasised that this was not about the Claimant's professional capability and that all the issues she had raised regarding the GTOP Fund were included in the final report.

178. At the end of the meeting, the Claimant was given a letter terminating her employment, the material parts of which are as follows (pp 443-444):

> Dear Ling,
>
> **Termination of Employment**
>
> I am writing on behalf of Gulf International Bank (UK) Limited (the "Bank") further to our meeting earlier today, 3 December 2018, to confirm that the Bank has decided to terminate your employment as Head of Financial Audit. Please treat this letter as written notice of the termination of your employment in accordance with the Notice Period and Termination Clause of your statement of Individual Employment Particulars …
>
> As discussed at our meeting, on 22 October 2018 your conversation with the Head of Legal in connection with the Trade Finance Audit led to her strong view that you were questioning her professional integrity, followed with a subsequent email on the same day reinforcing this view. The Head of Legal informed both the Head of HR and me of this situation which has led us to discuss the matter with the Group Head of Audit. We are all in agreement that your approach was entirely unacceptable and fell well short of the standards of professional behaviour expected of a Head of Financial Audit, as well as being contrary to the Bank's accepted principles of treating all colleagues with dignity and respect.
>
> This incident has resulted in a more extensive consideration of your behaviour and approach and the Bank has, unfortunately, identified a series of incidents which have contributed to relationships with key internal clients having broken down to the point that key stakeholders no longer wish to work with you and have lost the trust and confidence required to be had in the incumbent of such a business critical role.
>
> Unfortunately, the Bank does not feel that relationship coaching or mediation will be effective as a number of stakeholders have already expressed that matters have reached a point where they do not consider working relationships can be improved and do not wish to participate. As a result, the Bank has concluded that there is no alternative other than to terminate your employment.
>
> … Finally, you are required to return all property, equipment, information and documents of the Bank which are under your control or in your possession (including any copies of such items) by 17.00 on Wednesday, 5 December 2018.

179. Termination of employment was with immediate effect, the Claimant being paid in lieu of 8 weeks' notice, 8 days' TOIL and 8 days' accrued but untaken holiday as permitted by her contract (p 109).

180. The letter had been drafted by Ms Yates, although it was signed by Ms Garrett-Cox. In evidence, Ms Yates said that the *"key stakeholders [who] no longer wish to work with you"* were Ms Harding, Mr Mohammed and Ms Garrett-Cox. We find that this answer by Ms Yates in this regard reveals the lack of substance to this part of the Respondent's purported reasons for dismissal. Although Ms Harding no longer wished to work with the Claimant and had lost confidence in her, that was not the case with anyone else. In particular, it was not the case that Mr Mohammed had said he no longer wished to work with the Claimant, he had simply agreed that dismissal was appropriate because of her conduct towards Ms Harding, which is different. The same in our judgment goes for Ms Garrett-Cox. In this respect, we have considered what Ms Garrett-Cox said in her statement (para 25) about her *"own observations and conversations with other people who knew the Claimant"* leading to a belief that *"she was unlikely to engage in a formal improvement process as she could not accept that she was ever wrong and was not open to self-reflection"* and that she *"viewed the Claimant's presence and ways of working as having created a toxic and destructive environment for the team as had been evidenced by fractured relationships, eg Jenny Harding and previously Rhod Sutton"*. We find that Ms Garrett-Cox's view was (inevitably, given her position and minimal personal interaction with the Claimant) again an expression of her opinion that the Claimant's conduct towards others warranted dismissal, not that Ms Garrett-Cox personally no longer wished to work with the Claimant.

181. The Claimant was asked to sign the letter to confirm she had read and understood its terms and would comply with them. She signed, but amended the statement as follows:

> "I hereby confirm that I have read this letter. However, I don't agree with the reason for my dismissal. There is no property, equipment or documents etc I need to return other than a case (for a tablet) which I am happy to post it back or return in person to the reception (ground floor). I will respect the confidentiality outlined in the employment contract. However, I may not able to send the appeal letter by 11 Dec since it is unreasonably for me to achieve given I am flying out Saturday and haven't been able to find a suitable solicitor to get advice so far."

182. The Claimant also spoke to Ms Yates and said that she had also forwarded some emails to her Hotmail account which she would be keeping as she intended to take the Respondent to Tribunal. Ms Yates made no comment in response to this.

Events immediately following dismissal

183. The Claimant instructed solicitors (Bindmans LLP) who wrote a lengthy letter to the Respondent on 18 December 2018 (PD10, pp 446-445) setting out why the Claimant contended that the real reason for her dismissal was that she had made protected disclosures. The letter was to stand as her grounds of appeal. The letter also included a data subject access request on the Claimant's behalf.

184. In response to queries by Ms Yates, on 10 January 2019 (p 457) the Claimant's solicitor wrote to ask that the appeal be dealt with on the papers. He reported on her emotional state in terms which reflect the evidence that the Claimant gave to the Tribunal, and her emotional state when in Tribunal (in particular during closing submissions). We find that the Claimant was very badly affected by her dismissal, and that the manner in which it was effected (in particular, the misleading label for the meeting, the lack of warning or opportunity to put her side of matters) exacerbated that. We find that the Claimant's cultural background made it particularly difficult for her (and her mother) to come to terms with her dismissal.

Subsequently discovered misconduct

185. By letter of 18 January 2019, Ms Yates responded to the Claimant's solicitor agreeing to deal with the appeal on the papers. She also noted that the terms of the Claimant's data subject access request suggested that the Claimant may have retained some documents following her dismissal. She asked that if the Claimant did have any bank property it should be returned without delay with an explanation.

186. Before any response was received to that, Ms Yates wrote again on 31 January 2019 saying that in carrying out a search for the Claimant's personal data, the Respondent had *"uncovered evidence that your client has sent numerous documents to her Hotmail account, including the confidential details of an audit she was working on during 2018 and internal business email correspondence between her and other employee of Gulf International Bank (UK) Limited. These emails represent a clear breach of the Acceptable Use of Email and Information Systems Acceptable Use policies … [and] the Data Protection Policy"* These were the emails referred to above at paragraph 157).

187. The Claimant's solicitor replied on 1 February 2019 identifying the two email chains in question and stating:

> "We are instructed that on 3 December 2018, shortly after the meeting in which she was unfairly dismissed, my client informed you that she held two email threads that related to the event on 22 October 2018. …

> We are instructed that Ms Kong also conveyed to you at your office on 3 December 2018 that she had retained these emails as they would be material to any Employment Tribunal litigation that would arise from her unfair dismissal. She believed at that time, prior to having taken legal advice, that she was within her rights to do so. Nothing said or done by GIB at that time indicated to her that she was not so entitled.
>
> In the absence of any direct request to her, Ms Kong understood that the requirement placed upon her for the return of documents, was to return hard copy files and non-digital files, and not the two emails whose existence she had voluntarily brought to your attention. …
>
> The second [of the emails] includes a draft GTOP audit report. At the time of her unfair dismissal, Ms Kong could not open the attachment: at that time she only had access to an iPad to read emails, and the attachment would not open on her iPad. She therefore believed that the attachment was corrupted. She did not know what the attachment was and specifically did not know that it was a draft audit report, which in any event she could not open.
>
> Subsequently, while Ms Kong was preparing the appeal letter, she accessed the emails in question through a laptop, on which the attachment could be opened. It was only at this point that she realised that the attachment was not corrupted and the draft GTOP audit report was attached in the email."

188. Arrangements were made for the return or holding of the documents pending litigation.

189. Regarding the forwarded emails, we find that the Claimant was, in general terms, conscious that she should not send work emails to her personal email account, although she was not aware that this was specifically prohibited by any of the Respondent's policies. The Claimant made much in evidence of the fact that previously the Respondent had allowed employees to access their Hotmail accounts at work. That is a different point and irrelevant to the fact of her forwarding emails to her Hotmail account in order to ensure she had evidence should the matter come to litigation. However, we find that it was because she was conscious that it may be wrong that she mentioned it to Mr Mohammed and to Ms Yates whilst still in employment. We further find that the Claimant knew that the GTOP Audit Report was confidential and that she should not have retained a draft, but we accept her evidence (reflected in her solicitor's letter above) that she had at the time not appreciated (or had overlooked) that the draft GTOP Audit Report was attached to the emails that she had forwarded to herself on 23 October 2018.

<u>The appeal</u>

190. Mr Withers was appointed to determine the Claimant's appeal against dismissal. He was new to the Respondent. He interviewed Mr Mohammed, Mr Sykes, Ms Garrett-Cox, Ms Harding, Mr Al-Mulla, Ms Yates and Mr Anthony and reviewed a number of papers. By letter of 19 February 2019 (p 468) the Claimant's solicitors had indicated that Mr Withers could contact the Claimant directly with any specific appeal investigation-related questions. Mr Withers decided that he did not have any questions to put to the Claimant by

email, although on 25 February 2019 he gave her an opportunity to add anything further that she wished, but she said she was content to leave it to him (p 468a).

191. Mr Withers set out his decision in a detailed and carefully reasoned document. It is apparent that he approached his task conscientiously. In summary, Mr Withers found that the personal conduct incidents with Ms Harding and Mr Canepa *"should each have resulted in an appropriate disciplinary process in accordance with the GIB procedure and been followed by appropriate formal disciplinary warnings"*. However, he considered that, in aggregate, the reasons for dismissal set out in the termination letter did constitute a sufficient basis for dismissal. He was satisfied that the Claimant had directly questioned Ms Harding's professional competence and that this was inappropriate. He considered that the Claimant had not made any protected disclosures, essentially because he considered that the nature of her job meant that a 'high threshold' should be applied to her and that all she was doing was raising issues in the normal course of her employment. In his evidence to this Tribunal he accepted this was the wrong approach.

192. Mr Withers also considered as part of the appeal whether the audit points that the Claimant had raised had been accepted and acted upon appropriately by the Respondent and he considered that they had been. As a member of AROC, he was very much aware of the steps being taken in relation to the GTOP Fund.

<u>What has happened since the Claimant's dismissal</u>

193. Mr Withers and Mr Sykes both told us that the GTOP Fund had been the subject of frequent discussion at AROC. The Claimant was convinced that the Respondent's procedures required that there be a three-month follow-up audit to a Generally Unsatisfactory audit, but Mr Anthony, Mr Withers and Mr Sykes all said that the policy was six months, and we accept that. However, in fact in this case there has been no six-month follow-up because management were still working on the actions necessary to address the matters identified by the Claimant and a further GTOP audit is only now about to start.

194. The Claimant has not been replaced since her dismissal. The internal audit function is now run from Bahrain. Ms Garrett-Cox and Mr Withers told us that the business considered this to be sufficient.

Conclusions

Subjection to detriment because of making protected disclosures

The law

195. Under s 47B ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure.

196. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.) The Court of Appeal has recently confirmed that the same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases: *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180 at paragraph 42.

197. Section 43B(1) ERA 1996 defines a protected disclosure as a qualifying disclosure, being *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"* and, (d), *"that the health or safety of any individual has been, is being or is likely to be endangered"*.

198. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

199. In this case the Claimant also sought to rely on s 43H of the ERA 1996 which permits qualifying disclosures to be made to persons other than an individual's employer where (*inter alia*) the *"relevant failure is of an exceptionally serious nature"*. However, this section is not relevant to the Claimant's case because all the disclosures that she relies on in these proceedings were in fact made to her employer.

200. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment *"on the ground that"* she has made a protected disclosure (s 47B(1)). This means that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at paras 43 and 45.

201. Careful consideration needs to be given to cases where the employer's defence is that the detrimental treatment was not because of the protected disclosure but because of the way in which the protected disclosure was

made. The question in such cases is *"whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and, if so, whether those factors were, in fact, the reasons why the employer acted as he did"*: *Panayiotou v Chief Constable Kernaghan* [2014] IRLR 500 *per* Lewis J at para 54. However, the EAT in *Martin v Devonshires* [2011] ICR 352 warned (in a discrimination context) that Tribunals should bear in mind the policy of the anti-victimisation provisions (which policy also underlies the protected disclosures legislation) and *"be slow to recognise a distinction between the complaint and the way it is made save in clear cases"* (per Underhill P, as he then was, at para 22).

202. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he or she was subject to detrimental treatment. However, s 48(2) provides that it is then *"for the employer to show the ground on which any act, or deliberate failure to act, was done"*. It has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as to causation before the employer will be called upon to prove that the protected disclosure was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at para 40 (deciding this point so far as dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

203. We have also had regard to the Supreme Court's judgment in *Royal Mail Ltd v Jhuti* [2019] UKSC 55. That case concerned a claim of automatic unfair dismissal for having made a protected disclosure contrary to s 103A ERA 1996. The situation was one which the Supreme Court described at paragraph 41 as *"extreme"* and *"not … common"*. The dismissal decision had been taken in good faith by a manager on the basis of evidence of poor performance presented by the claimant's line manager. However, the Tribunal found that the line manager had dishonestly constructed the evidence of poor performance in response to a protected disclosure made by the employee. At paragraph 60 the Supreme Court concluded as follows:

> 60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X , courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith

> by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

204. We consider that there is no reason why the principle in *Jhuti* about the circumstances in which the state of mind of one employee can be attributed to the employer should not apply to detriments cases under s 47B as it does to automatic unfair dismissal cases under ss 98(1) and 103A. This is because both causes of action require the employer's 'reason' or 'ground' for acting to be shown. We also accept that the principle in *Jhuti* applies to situations in which the manipulating manager (i.e the manager who is acting because of the employee's protected disclosures) has played a part in the decision-making process, such as by carrying out the investigation stage of that process. This is because the Supreme Court in *Jhuti* at paras 51-53 approved (*obiter*) the (also *obiter*) view expressed by Underhill LJ in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 that *"the motivation of [a] manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation"*. In our view, the Supreme Court's judgment in *Jhuti* is not authority for any wider principle that where an individual has manipulated the actions of other employees in order to retaliate against a claimant for making a protected disclosure, that motivation is to be attributed to the individual who takes the decision to dismiss or subjects the individual to a detriment - save where the manipulation in fact amounts to a situation within the *ratio* of *Jhuti* (i.e. where there has been dishonest presentation of facts to the decision-maker so that the ostensible reason for the decision-maker's action is an 'invention').

205. It is convenient also to note here that, subsequent to the conclusion of the hearing in this case, the EAT has confirmed that what is said in *Jhuti* about the circumstances in which the knowledge or conduct of person other than the person who actually decided to dismiss can be attributed to the employer is equally relevant to the question of the fairness of the dismissal under s 98(4) ERA 1996: *Uddin v London Borough of Ealing* (UKEAT/0165/19/RN) per HHJ Auerbach at para 78.

206. In this case, we also have to consider whether, given that the Claimant's claim is brought solely against her employer and not against individual co-workers, she can bring her claims in relation to Detriments b. to e. against the Respondent at all. This is because of the terms of s 47B(2) ERA 1996 and the judgment in *Timis v Osipov* to which we have referred above (paragraphs 11-14). The statute on its face precludes a detriment claim where *"the detriment in question amounts to dismissal"*. The Respondent argues, in reliance on paragraph 34 of Chadwick LJ's judgment in *Melia v Magna Kansei Ltd* [2006] ICR 410 that this *"excludes detriment which can be compensated*

under the unfair dismissal provisions". The Respondent submits that this approach was approved in *Timis v Osipov* at paragraphs 85 to 90 by Underhill LJ. We disagree. As Underhill LJ explained at paragraph 90, in relation to the employer's submission in that case:

> 89. At paras 35–36 Chadwick LJ considered the reasoning of Burton J (President) in the Employment Appeal Tribunal. This was based on the terms of section 95(1)(c) of the 1996 Act. Burton J held that in such a case what "amounted to" the dismissal was the conduct of the employer which entitled the employee to resign, and thus that it fell within the terms of section 47B(2) . Chadwick LJ's reasons for rejecting that argument were expressed at para 36 as follows:
>
> > "It is the employee's determination of the contract under which he is employed … which amounts to dismissal, under section 95(1)(c) , for the purposes of Part X of the Act. I reject the proposition that the act of termination by the employee (in circumstances where he may have no other realistic option) cannot, of itself, amount to a detriment. Section 47B(2) of the 1996 Act requires that 'dismissal' be given the meaning that it has in Part X . The meaning of 'dismissal' in Part X , as I have sought to explain, is that dismissal occurs when the employment is terminated, which, in the present case, was 9 November 2001; and not at some earlier date."
>
> 90. Mr Stilitz understandably sought to rely on Chadwick LJ's observations to the effect that the policy behind subsection (2) was to prevent a claimant recovering under Part V where he had a right under Part X in respect of the same detriment: see the end of para 15, and his approval at para 34 of the claimant's arguments summarised at para 32. But those observations were made in the context of the particular issue in that case, namely whether the claimant could recover under Part X for an injury suffered prior to the dismissal. That was a wholly different question from the issue before us. Chadwick LJ's analysis and mine of the policy behind subsection (2) are broadly the same, but he refers to the "the same loss or detriment" whereas I refer to "the identical claim". His language was entirely appropriate in the context of the pre-2013 legislation when the two phrases necessarily connoted the same thing: a more refined approach is only necessary now because of the possibility of having claims against different respondents arising out of the dismissal. That issue was not before the court in that case and Chadwick LJ's language cannot be treated as having any bearing on the question which we have to decide.

207. Underhill LJ was there pointing out that what Chadwick LJ had said in *Melia v Magna* was that the meaning of 'dismissal' was to be taken from Part X of the ERA 1996, and that (in the context of that case, and this) dismissal occurs when the employment *"is terminated by the employer (whether with or without notice)"* (s 95(1)(a) ERA 1996). Underhill LJ went on at paragraph 91 to make clear (emphasis added):

> …All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.
>
> (2) **As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal**, though the usual rules about remoteness and the quantification of such losses will apply.

208. In our judgment, therefore, the question that we must ask ourselves in this case, which involves alleged detriments occurring prior to and after dismissal, is whether the claim is in respect of a 'distinct … detrimental act' to the 'act of dismissal'. The act of dismissal in this case is the giving by the employer of notice of termination of the employment contract, which was done orally and in writing on 3 December 2018.

209. Finally, in relation to Detriment a., we must also consider whether the claim is out of time. For detriment claims under s 48(3) ERA 1996, there is a primary three-month time limit for the claim to be presented to the employment tribunal (subject to any extension under the ACAS Early Conciliation provisions). We have set out the law on this above at paragraphs 27-30. In relation to Detriment a., the key question is whether it forms part of a series of similar acts or omissions with the subsequent detriments relied upon so that the three-month time limit runs from the last of them: s 48(3)(a) ERA 1996. This requires that there be some link between the acts which makes it just and reasonable to treat them as having been brought in time: *Arthur v London Eastern Railway* [2007] IRLR 58. An act may also be regarded as extending over a period under s 48(4), in which case time runs from the last day of the period over which the act continues. In discrimination cases it has been held that an in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19/OO) at paras 32-33. We see no reason why the same principle should not apply to protected interest disclosure cases.

210. If the tribunal is satisfied that it was not reasonably practicable for a claimant to present the claim within three months of the acts complained of, it should consider the complaints if they were presented within such further period as the tribunal considers reasonable: s 48(3)(b).

Conclusions

211. The detriments about which the Claimant complains in these proceedings are as follows:-

Detriment a. - The treatment of the Claimant by Ms Harding on 22-23/10/18;
Detriment b. - The decision to dismiss the Claimant in the absence of any recognised procedure;
Detriment c. - The dismissal of the Claimant;
Detriment d. - The manner of her dismissal;
Detriment e. - The manner of the appeal procedure.

212. We have asked ourselves, first, whether or not these are distinct detrimental acts to the act of dismissal such that s 47B(2) ERA 1996 (see above paragraphs 206-208) does not preclude their being advanced against the Claimant's employer in these proceedings. We find that Detriment a. is clearly a distinct prior detrimental act. It is the act of a co-worker (Ms Harding) who is not one of those who took the decision to dismiss. We find that Detriments b. and c. cannot be separated from the act of dismissal. The Claimant was

dismissed in the absence of any recognised procedure and thus that act was the dismissal itself. However, we find that Detriment d. does constitute a distinct detrimental act to the extent that the Claimant's complaint is about something other than the actual dismissal. Here, part of the Claimant's complaint is that she was misled about the reason for the dismissal meeting and given no warning of her dismissal. These are distinct detrimental acts and we have considered them as such. We also find that the manner of the appeal procedure is a distinct detrimental act occurring after the act of dismissal and thus can also in principle be pursued against the Respondent as employer.

213. We consider next whether the three detriments constitute detriments in law. We accept that Detriments a., and d. constitute legal detriments. Detriment a. was, for the reasons we set out below, the incident that led ultimately to the Claimant's dismissal. Detriment d. was clearly distressing to the Claimant. So far as Detriment e. is concerned, we do not accept that the manner in which the appeal was conducted could reasonably be considered by the Claimant to be a detriment. The Claimant was out of the country and chose to have it conducted on the papers. Mr Withers did a thorough and conscientious job in the circumstances, interviewing a large number of witnesses and reaching carefully reasoned conclusions. While the outcome of the appeal might reasonably have been regarded as a detriment, the manner in which it was conducted was not.

214. We then consider whether any of the Claimant's protected disclosures were a material influence on Detriments a. and d.

215. We find that Ms Harding's treatment of the Claimant on 22/23 October 2018 (Detriment a.) was materially influenced by the protected disclosures that the Claimant had made (in particular PD2, PD3 and PD4). We reach that conclusion for the following reasons:-

    a. Ms Harding's treatment of the Claimant on 22/23 October 2018 comprised the following key elements on the facts as we have found them to be:

        i. Ms Harding went to the Claimant's office without making an appointment and in an agitated state in response to the Claimant's email of that same date (paragraph 139 above) in which the Claimant suggested that Ms Harding was delaying dealing with, and had deleted large parts of, the document containing the Claimant's PD3;

        ii. Ms Harding became more agitated when the Claimant made her PD4 and questioned her lack of awareness of PD4. She walked out slamming the door (see paragraphs 140-146 above);

        iii. Ms Harding then told a number of people in the office about the incident, including Ms Yates, Ms Garrett-Cox, Mr Henderson and Mr Maskall, wrongly saying that the Claimant

had questioned her professional integrity. The nature and extent of Ms Harding's complaints to others about the Claimant was a material part of the reason why the Claimant was ultimately dismissed. We return to this point below.

b. We find that the above is sufficient to raise a *prima facie* case that PD3 and PD4 were a material part of Ms Harding's reasons for acting as she did because they are at the least a 'but for' cause in relation to that treatment. In the absence of an explanation from the Respondent we consider we could conclude that they were a material influence on Ms Harding. The burden therefore shifts to the Respondent.

c. We have found that Ms Harding was unable to explain an important aspect of the meeting on 22 October in that she could not recall why she went to the Claimant's room (above paragraph 140). She also exaggerated and/or distorted her evidence about the conversation and we rejected her evidence in favour of the Claimant's (above paragraphs 141-146). We were not, therefore, satisfied as to Ms Harding's explanation of her reasons for treating the Claimant as she did.

d. We further draw the inference that PD3 and PD4 were a material part of her reasons for so acting. The origin of the whole incident is that Ms Harding disagreed with many of the protected disclosures that the Claimant made in PD3. She disagreed to the extent that she deleted many of them in a way that we have found she subsequently recognised overstepped the mark and her sensitivity about which was, we have found, part of the reason why she reacted as she did on 22 October (above paragraphs 137, 148, 149). Further, when the Claimant had originally set out the content of PD4 in her email at p 303b, Ms Harding had stated that it made her *"uncomfortable"* (see above paragraph 129).

e. Yet further, the 'professional awareness' point that the Claimant raised (PD4) was, we find, inseparable in this case from the protected disclosure itself. The making of PD4 by the Claimant in and of itself entailed implicit questioning of Ms Harding's legal awareness because she had overseen the putting in place of the MRPA which the Claimant (reasonably, the Respondent accepts) considered was a bank-to-bank document and thus meant that the Respondent was failing, or likely to fail, to comply with certain legal obligations. We acknowledge that it was not a necessary part of a protected disclosure in law to add to PD4 words such as 'it's a matter of legal awareness', but we find that in this case the Claimant did not raise her concerns about Ms Harding's legal awareness in an unreasonable way.

f. In any event, and perhaps more importantly, we find that Ms Harding's conduct towards the Claimant on 22 and 23 October 2018

was not simply because the Claimant questioned her legal awareness, but also a response to the substance of the protected disclosures that she had made, the content of which she disagreed with.

216. As to Detriment d., the manner of dismissal, and specifically the misleading of the Claimant about the reason for the dismissal meeting and the lack of warning of dismissal, we do not find that these detriments were materially influenced by the Claimant's protected disclosures. This is because we have heard evidence that this manner of dealing with dismissals has been adopted by the Respondent in a number of other cases (see above paragraph 48) and was not a response to the Claimant's protected disclosures.

217. As to Detriment e., we have found that this did not constitute a detriment, but lest we are wrong about that, we record that we do not find that Mr Withers' conduct of the appeal was influenced by any of the Claimants' protected disclosures. We find that he approached his task conscientiously and would not have dealt with it any differently had the Claimant not made protected disclosures.

218. Finally, we have considered whether Detriment a. was issued out of time. The Detriment is pleaded as having occurred on 22 and 23 October 2018. We have found there to be no subsequent unlawful detrimental acts to which Detriment a. could be linked in a series (and dismissal does not count as a detriment for reasons already set out). As such, the primary three-month time limit under s 48(3)(a) for bringing a claim in respect of Detriment a. expired on 22 January 2019. The Claimant did not contact ACAS until 26 February 2019 so she is not entitled to the benefit of any extension of time in respect of this isolated detriments claim. The core facts on which the Claimant relies for this detriments claim were known to the Claimant immediately on 22/23 October 2018. The Claimant instructed solicitors shortly after her dismissal on 3 December 2018 and solicitors were engaged in correspondence on her behalf between at least 18 December 2018 (paragraph 183) above and 19 February 2019 (paragraph 190) above. As such, the *Dedman* principle means that this claim is out of time and cannot form the basis of any remedy in these proceedings.

<u>The reason for the dismissal</u>

The law

219. Under section 98(1) of the ERA 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), eg (in this case) conduct or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so. Facts and matters known to other employees of the

employer, but not to the dismissing officer, may only be taken into account in the circumstances recently identified by the Supreme Court in *Jhuti v Royal Mail Ltd* (set out above at paragraphs 203-205).

220. In this case, the Claimant must raise a *prima facie* case that the sole or principal reason for her dismissal was that she had made protected disclosures (s 103A(1)). If she does, then it is for the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81, the principles of which we have set out at paragraph 202 above.

Conclusions

221. We find that the principal cause of the Claimant's dismissal was the incident with Ms Harding on 22/23 October 2018. We so find because, despite the various concerns expressed by the Respondent's witnesses about the Claimant over preceding months and years, there is nothing to suggest that dismissal had been contemplated prior to this incident, a point which Ms Yates confirmed in evidence (see above paragraph 161). It is also clearly the matter that was foremost in the minds of those who participated in the decision-making process. It was the first matter mentioned by Ms Yates in her briefing email which we found was written with a view to engineering the Claimant's dismissal (above paragraphs 166-168). It was the matter that was dominant in Mr Mohammed's rationale for agreeing to dismissal (above paragraph 0). And it was the first point mentioned by Ms Garrett-Cox in the dismissal meeting and in the termination letter (above paragraphs 175 and 178).

222. In some cases, our finding in the previous paragraph as to the principal cause for dismissal would be a sufficient finding also as to the reason for dismissal. In this case, however, since the Respondent relies on alternative potentially fair reasons for dismissal (conduct or some other substantial reason), and since the Claimant contends that the principal reason for dismissal was her protected disclosures, and because we have found that the incident with Ms Harding on 22/23 October 2018 involved Ms Harding subjecting the Claimant to a detriment for having made protected disclosures, we have considered very carefully what it was about the incident with Ms Harding that constituted the principal reason for dismissal. We have to decide what part or aspect of the Harding incident it was that constituted the principal reason for dismissal and whether that reason is to be categorised in law as being conduct, some other substantial reason or the Claimant's protected disclosures. In the light of our finding that the incident with Ms Harding was an unlawful detriment, we must also first consider how the principles in *Jhuti* (above paragraphs 203-204) apply to this situation.

223. The principles in *Jhuti* require that in most cases we should consider only the decision-maker's reasons for the dismissal. In this case, the relevant decision-makers are (in our judgment), Mr Mohammed and Ms Garrett-Cox. Although we have found (see above paragraph 0) that Mr Mohammed perhaps did not have an entirely free rein in the matter, he regarded himself as a joint decision-maker and we consider that his part in the decision was of such magnitude

as to count as a 'decision-maker' for the purposes of application of the *Jhuti* principles. However, in *Jhuti* the Supreme Court accepted (*obiter*) that the matters in the mind of a manager who participated in the dismissal process (such as an investigating manager) could also be attributed to the employer. In this case there was no formal investigation as no procedure was followed, but in our judgment Ms Yates fulfilled that investigating manager role (and, indeed, on our findings acted with a view to engineering the Claimant's dismissal). Accordingly, we consider that we can take into account the matters in her mind as well in deciding what the employer's reason for dismissal was.

224. The position of Ms Harding, however, is different. There is no evidence that she participated in the decision-making process. However, we find that she does fall within the category identified in *Jhuti* as being a person *"in the hierarchy of responsibility above the employee"* whose reasons for acting may be taken into account if they invent a reason for dismissal on which the decision-maker subsequently acts. We base our finding that Ms Harding sat above the Claimant in the hierarchy on the fact that she was a member of the Senior UK Management Team (when the Claimant was not) and that she reported directly to the CEO (when the Claimant did not): see above paragraph 45.

225. We have next considered what precisely it was about the incident with Ms Harding that led Ms Yates, Ms Garrett-Cox and Mr Mohammed to decide to dismiss the Claimant. What Ms Yates and Ms Garrett-Cox said about that incident was that the Claimant had questioned Ms Harding's professional integrity, both orally in the meeting on 22 October 2018 and again in the email that the Claimant sent on 23 October 2018. This was, of course, how Ms Harding herself had categorised it, and Ms Yates and Ms Garrett-Cox explicitly accepted that categorisation, using the same terminology in the email at p 397 and the termination letter. The categorisation by Ms Harding of the Claimant's conduct as questioning her professional integrity was, we have found, wrong, since the Claimant was not questioning her professional integrity but her legal awareness (above paragraphs 141-146 and 154-155). However, the joint decision-maker, Mr Mohammed, recognised that distinction (see above paragraph 160), but still considered the email to have been *"totally unacceptable"*. While we consider that there is an important distinction between questioning professional awareness and questioning integrity, we do not consider that it would have made any difference to Ms Yates or Ms Garrett-Cox's approach if Ms Harding had used the right terminology. Accordingly, although there was an element of 'invention' in Ms Harding's use of the word 'integrity', we do not consider that it is an invention of the sort that the Supreme Court had in mind in *Jhuti*. To attribute to the dismissal decision-makers here, Ms Harding's motivation, on the strength of an issue as to terminology such as this is not in our judgment the correct legal approach, applying the principles in *Jhuti*.

226. We accordingly find that the Respondent's principal reason for dismissal in this case was that the Claimant had questioned Ms Harding's professional awareness/integrity both orally in the meeting on 22 October 2018 and in the subsequent email of 23 October 2018. That, in our judgment, was a matter of

conduct on the part of the Claimant and we accordingly find that the principal reason for the Claimant's dismissal was her conduct, which is a potentially fair reason under s 98(2).

227. However, there are three further points that we should deal with for completeness:-

228. First, in our judgment what led the Respondent to dismiss the Claimant for that reason on this occasion not just the fact that the Claimant had questioned Ms Harding's legal awareness. This is because it is apparent that similarly robust language/conduct on other occasions (eg Mr Sutton's accusing the Claimant of being 'deceitful' or as harassing him or Mr Sutton's shouting at the Claimant – above paragraphs 67 and 105) had not led to dismissal for either the Claimant or Mr Sutton. What was different on this occasion was the fact that Ms Harding had been apparently so upset by the incident, as reflected in her discussing the matter with so many colleagues (above paragraphs 146, 151, 153, 159, 161), raising it with the management team in a formal meeting (above paragraph 163), and her expressed difficulty in working further with the Claimant thereafter, including her refusal to mediate (above paragraphs 161-162). Ms Harding's actions in this regard were, we find (consistent with our finding in relation to Detriment a. above) motivated by the fact that the Claimant had made protected disclosures. However, again, we are unable to conclude that Ms Harding's degree of upset, or her raising of the incident with colleagues, were an 'invention' of the kind that the Supreme Court had in mind in *Jhuti*. This is because we accept that Ms Harding was genuinely upset by the Claimant. Accordingly, even though part of the reason for that was the fact that the Claimant had made protected disclosures, applying the principles in *Jhuti*, we cannot attribute Ms Harding's motivation to the Respondent.

229. Secondly, we should for the avoidance of doubt make clear that we do not find that Mr Mohammed, Ms Garrett-Cox or Ms Yates were motivated by the Claimant's protected disclosures when taking the decision to dismiss. None of them looked in any way at what had led up to the incident with Ms Harding or at the underlying issues that were of concern to the Claimant in her protected disclosures. Nor do we find, on the evidence we have heard, that we can draw any inference from the facts that the Claimant's role has not been replaced, that audits are now being undertaken by the Bahrain auditors who the Respondent's witnesses perceived (in general terms) as being more easy-going, or that the follow-up to the GTOP Audit has not yet taken place, that the reason for the Claimant's dismissal was that she had made protected disclosures or, more particularly, that she had driven the audit which had led to the first Generally Unsatisfactory rating for the Respondent's UK function. Although these matters could have indicated that an ulterior motive on the part of the Respondent in dismissing the Claimant was to stop her making further protected disclosures about GTOP, in our judgment this was not the motivation of the decision-makers from whom we have heard evidence.

230. Thirdly, we do not accept that the Respondent's principal reason for dismissal was that the Claimant's relationship with *"key stakeholders"* had broken down

to the extent that they no longer wished to work with the Claimant as was asserted in the termination letter. This was not put forward by the Respondent's either in the termination letter or in their oral evidence at the hearing as the primary reason for dismissal and it was (at least in the way expressed in the termination letter) simply not true for the reasons we have set out above at paragraph 180.

Substantive fairness

The law

231. If, as we have found, dismissal is for a potentially fair reason, then the Tribunal must consider whether dismissal was fair in all the circumstances, taking into account in particular whether, given the size and administrative resources of the organization, a fair procedure was followed and whether it was fair to dismiss for that reason. At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

232. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

233. Where a breakdown in working relationships is relied on, the EAT in *Stockman v Phoenix House Ltd* [2017] ICR 84 at paragraph 21, indicated that, as a minimum, an employer is required to: *"fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker … of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair … to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary common sense fairness requires that … [an] employee [should be given] the opportunity to demonstrate that she can fit back into the workplace without undue disruption"*.

Conclusions

234. The Respondent has in this case conceded that the Claimant's dismissal was procedurally unfair, but it remains for us to decide whether, if a fair procedure had been followed, it would have been fair as a matter of substance to dismiss for the conduct that we have found to be the Respondent's reason for dismissal.

235. We find that the Claimant's dismissal was substantively unfair for a number of reasons as follows:-

    a. The Respondent carried out no investigation at all into the incident with Ms Harding. At times the Respondent's witnesses suggested that the matter was 'investigated' by speaking to Ms Harding and the Claimant's line manager. However, it is not 'investigating' a matter simply to talk to the complainant to an incident and the line manager of the person complained about (especially when the line manager had no personal involvement in the incident). A reasonable investigation would at the least have involved speaking to the Claimant and looking into the background to the incident.

    b. If the Respondent had carried out a reasonable investigation, the factual background to the incident would have become apparent to it, in much the same way as it has to us in these proceedings. Whether or not the Respondent concluded (as we have done) that Ms Harding was subjecting the Claimant to a detriment for making protected disclosures, a reasonable employer would, in our judgement, at least have recognised that the Claimant was acting reasonably in raising PD3 and PD4 (a point the Respondent in fact concedes in these proceedings), and that Ms Harding had acted unreasonably in her delay in responding to the draft audit report and then making extensive deletions from the same. A reasonable employer would also, in our judgment, have recognised that the Claimant was at least endeavouring to raise with Ms Harding in what she considered to be a sensitive manner a legal issue which she considered could cause Ms Harding some embarrassment (see our findings at paragraphs 128-156) – although we accept that a reasonable employer could conclude that, despite the Claimant's efforts, the way she actually raised this matter with Ms Harding was not 'sensitive'.

    c. We find that, properly appraised of the facts, no reasonable employer would have dismissed the Claimant for the incident with Ms Harding. This is particularly so in the case of this Respondent, which (as noted above) had not dismissed (or even disciplined) Mr Sutton on previous occasions where he had used similarly robust language/conduct with the Claimant (eg Mr Sutton's accusing the Claimant of being 'deceitful' or as harassing him or Mr Sutton's shouting at the Claimant – above paragraphs 67 and 105).

    d. We do not find that the Claimant's prior conduct regarding the José incident could properly be treated as a reason for fair dismissal six

months later when it was not even dealt with at the time as a disciplinary matter (of any sort).

e. We do not consider that the Respondent could fairly dismiss the Claimant for 'some other substantial reason' in the form of a breakdown in working relationships with other stakeholders in the business when in fact, on analysis:

   i. this was a reference only to a breakdown in working relationship with Ms Harding (see above paragraph 180);
   ii. there had been no proper investigation of the incident which had led to that breakdown in working relationship (investigation of which would have revealed, at the least, a degree of unreasonable conduct on Ms Harding's part and ought in our judgment to have led a reasonable employer to conclude that Ms Harding's refusal to mediate was unreasonable in the circumstances);
   iii. there had been no discussion of the incident with Ms Harding with the Claimant so as to enable any assessment to be made of whether she would be able to mediate or otherwise restore her working relationship with Ms Harding; and,
   iv. the Claimant had not (other than in 2015) previously been given any formal feedback about her conduct of audits and/or towards colleagues generally (see above in particular paragraphs 96-97 and 102-104).

236. For all these reasons, we find that the Claimant's dismissal was wholly unfair substantively as well as procedurally. We do not consider that the Claimant could fairly have been dismissed by the Respondent at any point for any of the matters that have been raised before us in these proceedings.

Contributory fault

The law

237. Section 122(2) ERA 1996 provides that:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

238. Section 123(1) ERA 1996 provides that, subject to the provisions of that section (and sections 124, 124A and 126) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

239. Section 123(6) further provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

240. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to a reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal's 'just and equitable' discretion under s 123(1) as to what compensation, overall, is appropriate.

241. Reductions can, therefore, be made for conduct which did not causally contribute to the dismissal, such as may be the case where misconduct occurring prior to the dismissal is discovered after dismissal: see *W Devis and Sons Ltd v Atkins* [1977] ICR 662 and *Soros v Davison* [1994] ICR 590. In every case, however, it must be established that there has been culpable or blameworthy conduct on the part of the employee in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances: see *Frith Accountants v Law* [2014] ICR 805.

Conclusions

242. In this case the Respondent relies on three matters of conduct prior to termination in contending that the Claimant caused or contributed to her dismissal. In relation to each, we find as follows:

    a. <u>The Claimant's approach to her role</u> – We do not find this to be culpable or blameworthy conduct by the Claimant. The evidence indicates that the Claimant's approach to her role was fairly consistent over at least the three-year period leading to dismissal that we have focused on in these proceedings. She was, her appraisals repeatedly assured her, very good at her job. Issues as to her approach to her role had been raised with her in a semi-formal way by Mr Watts in 2015 (above paragraphs 96-98), and had this sort of management of the Claimant continued, we might possibly have been persuaded that there was a degree of culpability in the Claimant's continued approach to her role. However, this is not what happened. The Claimant received no negative feedback of any substance between the summer of 2015 and her dismissal three-and-a-half years later. Moreover, the specific instances of allegedly unreasonable conduct in her approach to her role that the Respondent has put before us in these proceedings have for the most part not, on analysis and in our judgment, demonstrated any unreasonableness by the Claimant. On the contrary, they have tended to show the Respondent's other employees (in particular Mr Sutton) in a poor light. See above paragraphs 61-95.

b. The incident with José Canepa – Our findings on this are set out at paragraphs 115-123 above. While we agree with the Respondent that the Claimant's conduct on this occasion amounted to an error of judgment, we have found that there were mitigating circumstances, which implicitly the Respondent appeared to recognise at the time. Although as a matter of fact this incident was a factor in the Respondent's reason for dismissal, given that it was not taken up with the Claimant by the Respondent at the time as a formal disciplinary matter, we are not prepared retrospectively to treat this as culpable or blameworthy conduct by the Claimant in relation to her dismissal. That might have been appropriate had the Claimant received some sort of formal warning in respect of the incident, but where it was not treated by the Respondent at the time as a disciplinary matter, we do not consider it to be just and equitable to take it into account now.

c. The incident with Ms Harding – Our findings on this are set out at paragraphs 128-164, 215 and 228 above. We have found that in that incident Ms Harding unlawfully subjected the Claimant to a detriment for having made protected disclosures. Moreover, although we recognise that the Claimant on that occasion expressed herself robustly and inappropriately to Ms Harding (both orally and in her subsequent email), as we have noted above, similar conduct on other occasions both by the Claimant and Mr Sutton was not treated by the Respondent as meriting even disciplinary action. What made the difference on this occasion was the degree of upset apparently caused to Ms Harding, her telling everyone about the incident, and her refusal to mediate. However, as we have also found, Ms Harding's conduct in this respect was also motivated by the protected disclosures that the Claimant had made. In those circumstances, we do not consider that it would be just and equitable for the Claimant to suffer any reduction in compensation as a result of the part she played in this incident.

243. It follows that there should be no reduction for contributory fault in respect of the matters known to the Respondent prior to dismissal.

Subsequently discovered misconduct

The law

244. The law on this is the same as is set out above for contributory fault. The same principles apply. However, the Respondent in this aspect of their case, relies on the emails that the Claimant sent to her Hotmail account containing personal data of other employees and confidential information of the Respondent. In relation to this sort of conduct, there is further guidance in the case law which the Respondent has put before us.

245. In *Chadwick v Brandeaux Advisers* [2010] EWHC 3241 (QB), [2011] IRLR 224 Jack J had to consider an incident where an employee emailed large

quantities of confidential information to herself, described as follows in the judgment:

> 8. On the day before, Sunday 24 January, Ms Chadwick started a process of e-mailing to her private e-mail address at btinternet.com a huge volume of material. The process was taken further on 26 January outside normal working hours. All this company material was of a confidential nature, and some of it was highly confidential. The confidential material has been printed out and occupies 49 box files. Over the following months Ms Chadwick continued to e-mail confidential material to her own e-mail address as it arose. She did not do anything with it. At some later point she copied it to her solicitor.

246. Jack J held this to be a breach of the implied duty on an employee of good faith and fidelity. He made it clear that he was not dealing with a 'whistle-blowing' case and an intention to report to a regulator, but with a case where the employee said that the documents were required for subsequent legal proceedings. He found that this would be unlikely ever to justify removal of confidential information, and certainly not on the scale in that case. He acknowledged that a difference of approach may be required in whistle-blowing cases, although he doubted that even there that would justify removal of information on such a scale. The relevant parts of the judgment are as follows (emphasis added):

> 15. …Brandeaux also relies on the duty of fidelity: 'It is another implied term in a contract of employment that the employee will serve the employer with fidelity and in good faith' – *Chitty on Contract* 30th edition, volume 2, paragraph 39-057, citing first *Robb v Green* [1895] 2QB 315.
>
> 16. Byzantine arguments can be advanced whether or not what Ms Chadwick did in emailing the confidential documents was in breach of the obligations not to 'divulge to any person whatever or otherwise make use of' any confidential information. It is, however perfectly clear that the transfers were not for her employer's purposes but for her own purposes. They were, therefore, in breach of the duty of good faith unless she can justify as she has sought to do and to which I will come shortly. Further, since the transfers were discovered she has refused to 'surrender' the material in breach of clause 21.3.
>
> 17. Ms Chadwick's case set out in paragraph 14 of her amended defence is that there were terms implied into her contract 'as a matter of law and/or as a matter of reasonable necessity' that she was entitled to use confidential information or to disclose it to third parties where the use or disclosure was fairly required for her legitimate interests or to protect her legal rights or to defend herself; that she was so entitled where the use or disclosure was in the public interest including use or disclosure in relation to financial regulators; and that she would not be required to deliver up confidential information relevant to legal or disciplinary proceedings brought or threatened against her by Brandeaux.
>
> 18. … I accept without question that she did not intend to use the material for a nefarious purpose: that allegation has not been made. I think that her purpose was to arm herself for the future in any disputes with Brandeaux or with the regulators which might arise. As to the former she was by then seeing that her further time with the company might well be limited and she was very concerned as to the difficulty she might have in getting another job. She foresaw the possibility of a dispute with the company over compensation. As to the latter, there were not then any problems with the regulators, nor have any arisen since. Nor could Ms Chadwick in her evidence provide any convincing grounds for

> thinking that they might arise. Nonetheless she appears to have become concerned that they might.
>
> 21. The first point to be made here is that Ms Chadwick simply e-mailed to herself a vast quantity of material stored in certain files on her company computer regardless of whether its content might be relevant to any dispute with Brandeaux or any problem between Brandeaux and a regulator. Her explanation is that she had no time to be particular. I accept that to have sorted the material would have been a large task. But that emphasises the further difficulty which she faces. There was no problem with a regulator. Nor was she involved in any whistle blowing exercise: **I am not concerned with a situation where Part IVA of the Employment Rights Act 1996 as inserted by the Public Interest Disclosure Act 1998 has become applicable. In the event of a dispute with her employer or in the event of a dispute between Brandeaux and a regulator a comparatively small number of documents would have been required**. Further, although a substantial number of pages have been copied for the purpose of these proceedings, the number which it has been necessary to refer to has been small. I have not had to look at any financial information of a kind such that disclosure might injure Brandeaux. No attempt has been made to limit the number of documents which Ms Chadwick still seeks to retain.…
>
> 23. In my judgment the two cases relied upon fall a long way short of establishing that Ms Chadwick was entitled to act as she did. I should not get drawn into any wide statements of principle which are unnecessary to my decision. **I am doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention, which might be relevant to such a dispute. If such a dispute arises, in the ordinary course the employee must rely on the court's disclosure processes to provide the relevant documents: even if the employee is distrustful whether the employer will willingly meet its disclosure obligations, he must rely on the court to ensure that the employer does. But on any view there can be no justification for the exercise which Ms Chadwick carried out here**. **Nor, in the absence of a specific issue, was Ms Chadwick entitled to transfer documents to protect her own position in case a regulatory dispute might arise. If she wished to use confidential information to make a report to the regulator, a situation which has not arisen, she would not be prevented from using confidential information for that purpose: but whether that would entitle her to copy documents onto her private computer would be doubtful**.
>
> 24. I conclude that Ms Chadwick was not entitled to do what she did and that her conduct was in breach of her contract.

247. In *Farnan v Sunderland Association Football Club Ltd* [2015] EWHC 3759 (QB), [2016] IRLR 185, Whipple J went further than *Brandeaux Advisers* and held, relying on the judgment of Coulson J in *Tokio Marine Kiln Insurance Services Ltd v Ms Yi Yang* [2013] EWHC 1948 (QB), that it would 'never' be justified to retain documents in order to bolster a case in litigation. However, again, this was a case in which substantial numbers of documents were taken by the employee and it is significant that Whipple J did not hold that taking documents in this way was inevitably a serious, repudiatory breach of contract, but that it was on this occasion on the facts as she had found them to be. The relevant passages from the judgment are as follows (emphasis added):

> 76. I reject Mr Farnan's suggestion that the banking [of documents] was authorised under the SA [the contract]. It was not. The SA prohibits the use of Confidential Information for non-business purposes. The SA reflects the detailed policy in the Handbook, which also prohibits personal use. Nothing said by Mr Quinn lifts that prohibition: first, Mr Quinn left SAFC in February 2012, at the time that the IIA sponsorship deal was being negotiated, and this conversation appears to have related only to that deal: **it was not on any view a blanket authorisation to bank all and any documents on any subject, regardless of when they arose or what they were about**. Secondly, it was, at highest, a piece of advice from a colleague, and Mr Farnan cannot reasonably have understood it to be a "direction" from the Chairman or a co-director of SAFC, as to how Mr Farnan should go about doing his job for the club. Third, and in any event, Mr Quinn was plainly not telling Mr Farnan to breach his contract with SAFC, by compiling a personal databank at home, when this was in clear breach of the SA and the Handbook. At most, Mr Quinn was advising Mr Farnan to have the relevant documents to hand, in his office, in case the question about IIA sponsorship arose. Fourth, and in any event, I fail to see that Mr Quinn's advice, given on an informal basis, by a single director (or even the Chairman, alone) could ever amount to an "authorisation" by the Board: it was not.
>
> 77. The Courts have confirmed that the possibility of future litigation with an employer does not justify an employee in transferring or copying specific confidential documents for his own retention: see *Brandeaux Advisers (UK) Ltd v Chadwick* [2010] All ER 235 per Jack J, and more recently, *Tokio Marine Kiln Insurance Services Ltd v Ms Yi Yang* [2013] EWHC 1948 (QB), per Coulson J:
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> > "As a matter of common sense, it cannot be right for a defendant to retain information in breach of contract simply to bolster its claim in the Employment Appeal Tribunal. If there are documents to be disclosed in that dispute, they will be disclosed in the normal way. This sort of pre-emption is not therefore valid".
>
> 78. I cannot know which emails sent by Mr Farnan to his wife's email address were "banked" documents (as opposed to emails falling in one or other of the "innocent" categories outlined above). But I conclude that there were a sizeable number of "banking" emails. The rate of despatch increased in April and May 2013, after Mr Farnan had sensed that his time was up at SAFC.
>
> 79. Mr Farnan had no authorisation from the Board to build up a private bank of Confidential Information at home or on his or his wife's personal email accounts. Doing so was a breach of the SA. **In my judgement, this was a serious breach.**

248. In response to our request that the Respondent should identify any case law relevant to this point that assisted the Claimant, we were also referred to the following:

    a. *Invista Textiles (UK) Ltd v Botes* [2019] EWHC 58 (Ch), [2019] IRLR 977 where Birss J, without having apparently been referred to any relevant authority, observed at paragraph 235 that *"the employment contract ought not to be construed so as to mean that an employee who is a party to bona fide proceedings relating to his employment, after that employment has ended, is not permitted to hold copies of material reasonably necessary for such a dispute, pending the resolution of the dispute"*; and,

b. *Phoenix House Ltd v Stockman* [2019] IRLR 960 where the EAT (HHJ Richardson), having been referred (paragraph 60) to the *Brandeaux Advisers* line of authority held that where an employee made a covert recording of a meeting that would not necessarily constitute a breach of the implied term of mutual trust and confidence, whether it did would depend on the circumstances (see paragraph 78).

249. We do not find that *Invista Textiles* assists greatly given the lack of reference to the *Brandeaux* line of authority. *Phoenix House* is concerned with a different situation to that which arises in the present case, but it is not in our judgment out of line with *Brandeaux*. As we have observed, *Brandeaux* and *Farnan* are not authority for the proposition that every time an employee takes confidential documents from their employer they commit a repudiatory breach of their employment contract. The question of the seriousness of the breach (and thus whether it was repudiatory and/or a breach of the duty of good faith and fidelity) was in each case a judgment made on the facts of those particular cases. *Phoenix House* is (on proper analysis) to similar effect, though expressed somewhat differently, possibly because it was dealing with an allegation of breach of the implied term of trust and confidence, any breach of which (it is well established) constitutes a repudiatory breach of contract: *Morrow v Safeway Stores* [2002] IRLR 9.

Conclusions

250. In this case, what the Respondent relies on is the Claimant's conduct in forwarding to her Hotmail account two emails, one an email exchange between her and Ms Harding and the other a series of email exchanges about the GTOP Audit which included in the chain a copy of the draft GTOP Audit report which was a clearly confidential document belonging to the Respondent. Both email chains include personal data of both the Claimant and Ms Harding (and some other employees).

251. Our findings regarding the Claimant's conduct in this regard are set out at paragraphs 157, 160, 181, 182 and 186-189 above. We have found that although the Claimant was not aware of any specific policy of the Respondent prohibiting her conduct, she was aware in general terms that it was wrong to send emails to herself, and in particular that it was wrong for her to have retained a copy of the GTOP Audit report. However, we have also found that she had genuinely not appreciated that she had a copy of the GTOP Audit report. We also find that she was open with the Respondent (Mr Mohammed and Ms Yates) about what she had done and that her reasons for doing so at the time were partly as a result of concerns that she considered she might wish to report to regulators as well as concerns about her job and the possibility of employment tribunal proceedings.

252. We have also noted (above paragraphs 47, 49-50) that although what the Claimant did was in breach of the Respondent's policies, it is not conduct that is 'strictly prohibited' under the Respondent's policies. It is in a lesser category of conduct which only 'may' be subject to disciplinary proceedings and 'may'

constitute gross misconduct. Whether or not it amounts to gross misconduct on a particular occasion is a matter for assessment on the facts of each case.

253. In this case, we find the Claimant's conduct was improper and a breach of her contract of employment. However, we do not consider it constitutes a serious breach. In contrast to the authorities to which we have been referred the breach involved a very small number of documents, the Claimant informed two senior employees of the Respondent that she had done it and neither of them said anything to her at the time, and the Claimant was at the time genuinely concerned not only about her own employment and the possibility of legal proceedings, but about whether she needed to take matters to a regulator on issues that the Respondent has in these proceedings accepted constituted protected disclosures.

254. In the circumstances, we do not consider that it would be just and equitable in this case for the Claimant's compensation to be reduced because of her conduct with regard to these two emails. The Respondent dismissed the Claimant in this case both substantively and procedurally unfairly in disregard of its own disciplinary policy. We are not prepared to accept that a minor and inconsequential breach by the Claimant of her own contract means that her compensation for that unfair dismissal should be reduced.

Failure to comply with ACAS Code of Practice – s 207A TULR(C)A 1992

255. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) *"it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"*.

256. In this case, a relevant Code of Practice, namely the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015), does apply because we have found that the reason for the Claimant's dismissal was 'conduct' (see above paragraph 226). We do not therefore need to engage with the question as to what the position would be if this were a dismissal for 'some other substantial reason' in the light of the EAT's judgment in *Stockman v Phoenix House Ltd* [2017] ICR 84.

257. The Respondent failed to comply with most of the Code of Practice. In particular, it failed to comply with paragraphs 5 to 21 of the Code of Practice in that it did not investigate the facts of the Claimant's alleged misconduct, did not give her an opportunity to answer any allegations, did not hold any form of hearing before making a decision and did not give the Claimant an opportunity to be accompanied to any meeting. The only aspects of the Code of Practice that the Respondent did comply with were the notification of dismissal and appeal (paragraphs 22 and 26-29).

258. The Respondent has not advanced any specific reason as to why it failed to comply with the ACAS Code of Practice, although it was asserted in the Respondent's Counsel's closing submissions that the failure was not unreasonable in the circumstances of this case. There was some suggestion from Ms Garrett-Cox (see above paragraph 52) that in her view capability procedures do not work for senior employees, but we do not consider that provides an answer to why no procedure was followed in a conduct case. Nor, for that matter, would we accept that to be a reasonable reason for not following any procedure in a capability case. Basic principles of fairness require that every employee, no matter how senior, should in all but the most exceptional circumstances have a chance to answer allegations made against them (whether they are allegations of misconduct or of poor performance) before they are dismissed. In this case there was no reason not to follow the ACAS Code of Practice. The incident for which the Claimant was dismissed occurred over a month prior to her dismissal, during which time (so far as the Claimant is concerned) work continued as normal. This is not a case where there was an immediate and pressing need to remove the Claimant from the workplace and (indeed) if there was, that could have been dealt with by suspension.

259. We should add, for the avoidance of doubt, that we do not consider that the fact that an appeal procedure was provided in any way renders the prior failure to comply with the ACAS Code of Practice 'reasonable'. Mr Withers did a commendable job in the circumstances, but he was inevitably faced with considering matters 'after the event' and without the benefit of any proper, even-handed investigation of matters prior to dismissal. Moreover, the Respondent's handling of dismissal upset the Claimant to the extent that she left the country and did not participate in person in the appeal. While this was to an extent her choice, it is an understandable one given the Respondent's conduct and her personal circumstances. In short, Mr Withers' handling of the appeal was 'too little, too late'.

260. We therefore conclude that the Respondent unreasonably failed to comply with the ACAS Code of Practice and that this was a serious failure.

261. We do not, however, attempt at this stage to put a % on the uplift that should be awarded because of the caution urged by the Court of Appeal in *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, [2011] ICR 1290 that consideration should be given before doing so to the overall value of the award. While the fact that we have dismissed the Claimant's whistleblowing claim may mean that *Wardle* is no longer relevant, the % uplift will therefore remain an issue for the remedy stage.

<u>Wrongful dismissal</u>

262. The Claimant's dismissal was in accordance with her contract and she was paid in lieu of notice and outstanding accrued holiday pay (see above paragraph 179). Her wrongful dismissal claim therefore fails.

Overall conclusion

263. The unanimous judgment of the Tribunal is:

(1) The Claimant's claim that she was subjected to detriments because she made protected disclosures contrary to s 47B ERA 1996 is outwith the Tribunal's jurisdiction having regard to the time limit in s 48(3) ERA 1996 and is therefore dismissed.

(2) The Claimant's claim that she was unfairly dismissed by the Respondent, contrary to ss 94-98 ERA 1996, is well-founded.

(3) The Claimant did not cause or contribute to her dismissal and no deduction falls to be made to any compensation that she may be awarded by reason of any conduct of hers occurring prior to dismissal.

(4) There should be no *Polkey* deduction to any compensation awarded to the Claimant.

(5) The Respondent unreasonably failed to comply with a relevant Code of Practice and accordingly any award made to the Claimant will be subject to an uplift pursuant to s 207A(2) TULR(C)A 1992.

(6) The Claimant's claim for wrongful dismissal is dismissed.

Employment Judge Stout

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Date2 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/03/2020.....

…….....

FOR THE TRIBUNAL OFFICE