Case Number: 3331338/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Wyrtrzyszczewksi	v	British Airways plc

Heard at: Watford

On: 4-6, 9 and (in private) 10 and 13 March 2020

Before: Employment Judge Hyams

Members: Ms J Smith
Ms I Sood

Appearances:

For the claimant: In person
For the respondent: Ms B Venkata, of counsel

UNANIMOUS RESERVED JUDGMENT

The claimant's claims

(1) of automatically unfair dismissal within the meaning of section 103A of the Employment Rights Act 1996 ("ERA 1996"),

(2) that he had been treated detrimentally, contrary to section 47B of the ERA 1996, for having made public interest disclosures within the meaning of section 43B of that Act,

(3) of direct sex discrimination within the meaning of sections 11 and 13 of the Equality Act 2010 ("EqA 2010") contrary to section 39 of that Act,

(4) of harassment within the meaning of section 26 of the EqA 2010 contrary to section 39 of that Act, and

(5) of direct race discrimination the meaning of sections 9 and 13 of the EqA 2010 contrary to section 39 of that Act,

do not succeed and are therefore dismissed.

REASONS

The claim

1 In these proceedings, the claimant claimed originally simply this: "Multiple health and safety issues reported where no action had been taken which forced me to resign / xenophobic comments / prolonged bullying and harassment." He had, however, appended his resignation letter to the ET1 claim form. In that letter, he had listed 22 reasons for resigning. The claimant had less than a year's continuous employment by the time of his resignation. He was employed by the respondent as a new member of cabin crew staff, and was employed subject to a probation period of, initially, 6 months. The claimant's resignation and the claims that he made to the tribunal were triggered by the fact that his probation period was extended by 3 months.

2 Employment Judge Lewis conducted a preliminary hearing on 13 February 2019, and after it issued a case management record which listed the issues to be determined by the tribunal which heard the claim. Subsequently, one of the claims (of a breach of the Working Time Regulations 1998) was withdrawn. By the time of the hearing before us, there were the following claims which required determination.

2.1 The claimant claimed that his resignation gave rise to a well-founded claim of automatically unfair dismissal within the meaning of section 103A of the Employment Rights Act 1996 ("ERA 1996") and/or (see further below) a discriminatory constructive dismissal, that is to say, a dismissal within the meaning of section 39(7)(b) of the Equality Act 2010 ("EqA 2010") on the basis that one or more of the sequence of events on which the claimant relied as an accumulation which, together, amounted to a breach of the implied term of trust and confidence, constituted unlawfully discriminatory conduct within the meaning of the EqA 2010.

2.2 The claimant claimed that he had been treated detrimentally, contrary to section 47B of the ERA 1996, for having made public interest disclosures within the meaning of section 43B of that Act. The claimed public interest disclosures and claimed detriments were listed in the annex to the case management record of Employment Judge R Lewis and that annex was at pages 62-64 (i.e. pages 62-64 of the hearing bundle; any reference below to a page is, unless otherwise stated, a reference to a page of that bundle). There were 5 claimed disclosures and 13 claimed detriments. The claimed

protected disclosures and detriments were set out in tables, in the following form:

Protected disclosures

No	Date	Subject of disclosure	To whom it was made	Verbal or in writing
1	14/09/2017	H & S concerns (blocking emergency exit doors by service trolleys; inexperienced cabin crew performing door safety checks; inexperienced cabin crew in Economy)	Ms J Hale and Mr Whipp	Email at 15.43
2	Nov 2017	H & S concerns (instructor encouraging cheating during cabin crew exams)	Ms E Porter	Online Survey (No 1)
3	Nov 2017	H & S onboard issues	Mr Whipp	Online Survey (No 2)
4	07/12/2017	H & S concerns (multiple hot drinks on tray during in-flight service delivery)	Mr Whipp and Ms J Hale	Email at 19.11
5	04/01/2018	H & S concerns (dimming cabin lights during boarding and safety demonstration; switching cabin lights off in back galley for take-off and landing at night)	Ms J Hale and Ms S Butler	Email at 18:58

Detriments

No	Detriment	Date of act/failure to act	Who was involved
1	Failure to investigate a subsequent concern	07/12/2017	Mr Whipp and Ms J Hale
2	Denial of training (business class training)	19/01/2018	Ms J Hale
3	Extension of probationary period	23/01/2018	Ms J Hale
4	Contact from Mr M Smith	23/01/2018	Mr M Smith
5	C sent 3 probation extension letters	February 2018 (dates to be confirmed by C)	Ms J Hale
6	Extension of probationary period	09/02/2018	Ms Butler
7	Closer monitoring of C's performance by Ms J Hale	February 2018	Ms J Hale
8	Denial of training (work shadowing)	22/02/2018	Ms Butler and Ms Hale
9	Changes to dates of Probation Review Meeting and conflicting information	23/02/2018	Ms Butler
10	BAHS meeting postponed	28/02/2018 to 05/03/2018	Ms Butler & BAHS
11	Comments made at BAHS meeting	05/03/2018	Ms M Davidson (nurse)
12	Feedback for flight of 20/01/2018	05/03/2018	Ms Butler
13	Contents of Ms Pilgrim's email	24/03/2018	Ms Pilgrim

2.3 We pause to record that

2.3.1 the references in those tables to Ms Hale were to Ms Joanna Hale, who is employed by the respondent as a Customer Service Manager ("CSM"), and was the claimant's line manager for the majority of his time as an employee of the respondent, and

2.3.2 the references in those tables to Ms Butler were to Ms Stephanie Butler, who was Ms Hale's line manager.

2.4 The respondent accepted that the first and the fifth of the claimed protected disclosures were in fact protected disclosures within the meaning of section 43B, but it did not accept that the claimant had made the second and third ones, and it claimed that the fourth claimed disclosure was no more than a request for information. The respondent in any event denied that the claimant had been treated detrimentally to any extent because he had made those claimed public interest disclosures (or any of them).

2.5 The claimant (who is Polish in origin) also claimed that he had been discriminated against because of his national origins or nationality, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"). That was said to have occurred when, at a meeting with the claimant on 5 March 2018, Ms Butler referred (it was the claimant's case) to the fact that the claimant was of Eastern European origin. Ms Butler had conducted that meeting instead of Ms Hale, who had been reassigned during her pregnancy because of issues arising in relation to the pregnancy. Ms Butler had taken over Ms Hale's line management responsibilities temporarily before another person at Ms Hale's level took over such responsibilities.

2.6 The claimant (who is gay) also claimed that he had been discriminated against because of his sex when a man who was on the same grade as Ms Hale and to whom we refer as "Mr X" (because the revealing of his identity is not required for the purposes of these reasons and because we judged it to be appropriate, in order to respect his right to a private life, to conceal his identity) communicated with the claimant via Grindr (the among other things gay dating app), subsequently looked at him, and then said the thing that we describe in paragraph 30 below. That claim was, however, best regarded as a claim of harassment related to sex, contrary to sections 26 and 39 of the EqA 2010, and the claimant had also made a claim that the conduct to which we refer in the first part of this paragraph was such harassment. Section 26 provides:

> "(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

3 As an issue of jurisdiction, the application of time limits was paramount, except for the claim of constructive dismissal. That was because the claim was made after the expiry of the primary time limit of 3 months from the date of each claimed unlawful act (extended by any period of early conciliation) except in regard to the termination of the claimant's contract of employment. The claim form was received by the tribunal on 13 July 2018. As Employment Judge R Lewis indicated in his case management summary (at pages 56 and 57), (1) it was agreed that the effective date of the termination of the claimant's employment with the respondent was 2 April 2018, (2) Day A for the purposes of the extension of time by reason of the running of the early conciliation period was 29 June 2018, and (3) Day B for that purpose was 12 July 2018. Thus, as Employment Judge R Lewis wrote in paragraph 10.4 of that summary (at page 57):

> "Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29 March 2019 is potentially out of time, so that the tribunal may not have jurisdiction to rule on it."

The relevant case law

4 We took into account in determining the claims and in arriving at our factual conclusions the principles in the now considerable body of case law concerning proving unlawful discrimination. We did so not only in determining the claims of contraventions of the EqA 2010, when we took into account also section 136(2) of that Act, but also when considering the claimant's claims of detrimental treatment for the making of protected disclosures. Thus, in determining the claims of discrimination and detrimental treatment for whistleblowing, we took into account the lines of cases including (1) *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, and (2) *Igen Ltd v Wong* [2005] ICR 931.

5 In determining the claim of automatically unfair dismissal within the meaning of section 103A of the ERA 1996, we took into account the need for the claimant to satisfy us that the reason, or principal reason, for his resignation was a breach of the implied term of trust and confidence which resulted from the making of one or more protected disclosures. As it was put by the Employment Appeal Tribunal (Carnwath LJ presiding) in *Price v Surrey County Council* (UKEAT/0450/10; 27 October 2011, unreported), in paragraph 52 of the judgment:

> '[T]he statutory scheme ... is about the protection of "whistle-blowers". The purpose is to ensure that employees do not suffer simply because they have had the courage to speak up about problems affecting their workplace. Thus it is the "making" of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal, or for the other detrimental action or inaction.'

6 There is a helpful discussion in volume 14 of the IDS Employment Law Handbooks about a claim of constructive dismissal contrary to section 103A of the ERA 1996. It is as follows:

> "6.38 As discussed above, a dismissal will only be automatically unfair under S.103A if the sole or principal reason for dismissal was that the employee had made a protected disclosure. However, where an employee claims that he or she was constructively dismissed contrary to S.103A, it is not strictly possible for a tribunal to examine the employer's reason for dismissal, because the decision that triggers the dismissal is the employee's resignation. Instead, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the

employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

6.39 It is not surprising that many protected disclosure cases brought under S.103A are constructive dismissal cases, given the strained relations that often result when an employee 'blows the whistle'. If the employer reacts in a hostile, provocative or insensitive manner towards an employee who makes a protected disclosure, it is easy to see how this can lead to claims that the employer has breached the fundamental term of trust and confidence that is implied into every contract of employment. Two examples:

- *Clinton v After Care (North West) Ltd* ET Case No.2100739/11: C was employed as a residential childcare worker from May 2010. In July 2010 she informed AC Ltd that she had seen two colleagues taking money out of petty cash and that taxi receipts were being fabricated. Shortly afterwards, C became aware that one of her colleagues knew of the allegations and this led to some difficulties, although C made no complaint. In November, without any prior warning, her supervisor accused her of 'grooming and colluding' with young people and told her that this 'could be construed that you are a paedophile'. She was also banned from working any overtime and was told that she would never achieve a promotion. A page from her supervision record was put under her door a few days later, recording concerns about her colluding with young people and raising concerns about her mental health. She went on sick leave and raised a grievance. When she became aware that her grievance was not being taken seriously, and she was still expected to work for the same supervisor, she resigned. Shortly afterwards she was informed that her grievance had been dismissed. An employment tribunal found that AC Ltd's lack of support for C, its failure to ensure that confidential information relating to C did not fall into the hands of other employees, its prevarication over C's grievances and the baseless accusations by her supervisor amounted to fundamental breaches of contract. C had resigned in response to those breaches and was therefore constructively dismissed. All of the breaches were causally linked to the disclosure about petty cash and taxi receipts, which the tribunal found to be a protected disclosure. It followed that her dismissal was automatically unfair under S.103A

- *Gozzard v St Andrews Healthcare* ET Case No.2600149/15: G was Deputy Ward Manager on a mental health ward in a hospital run by SAH, an independent charity. On 14 August 2014, at an inspection carried out by the Care Quality Commission Compliance Inspection Team (CIT), G made several

disclosures, including concerns about lack of rest breaks, a patient creating a health and safety risk by buying food outside the ward and storing it in his room, poor record-keeping in relation to leave in the community granted to patients, and the targeting of G by patients (an upsetting incident had taken place just before the inspection in which G was threatened by patients and had to lock herself in an office). G made several similar disclosures to manager colleagues but was unsupported by them. Subsequently, a patient, MR, raised a complaint against G, asserting that she had refused to allow him to leave the ward to use a toilet in his room, despite the fact that he was a Muslim with particular washing requirements after toileting, and that this had resulted in him soiling himself. This was seen by two managers to raise safeguarding issues and so HR was involved. This step was usually only taken when dismissal was being contemplated. On 27 August, G was called to a meeting with a manager and HR officer with no warning. She was told of the allegations by MR and was dismissed with immediate effect on the basis that, as she was in her probationary period, no procedure or warning was required. G wrote to the Care Quality Commission asserting that her employment had been terminated due to whistleblowing. G was then reinstated and her appeal was heard. However, no further investigations of MR's complaint or the whistleblowing allegations were undertaken and, in consequence, G resigned. The employment tribunal upheld G's claim of unfair constructive dismissal by reason of making a protected disclosure. SAH had given G no support and its main concern had been to find out what she had said to the CIT. It was clear that managers were angry at the disclosures G had made to the CIT and this led to the decision to dismiss, relying on MR's complaint as a pretext.

6.40 However, in some circumstances, it may be legitimate to draw a distinction between the protected disclosure and the employer's response to that protected disclosure when considering the reason for a constructive dismissal. In *Price v Surrey County Council and anor* EAT 0450/10, for example, P raised a grievance about bullying by the headteacher, H. Her grievance was not dealt with for several months and was eventually rejected. Although an independent investigation found that nine members of staff had been reduced to tears by H, six members of staff had experienced or witnessed bullying by H, and that P was not a 'lone voice' in complaining about H, P was told by the governors that there was no evidence to support her allegations and her appeal was rejected. When P brought a claim of constructive dismissal under S.103A, the employment tribunal concluded that the statement that there was no evidence of bullying was untrue and breached the implied term of trust and confidence. This therefore

established the constructive dismissal. However, the tribunal went on to find that the reason for this dismissal was not P's protected disclosure (i.e. the bullying complaint). The EAT upheld that decision on appeal. It noted that S.103A requires the reason for dismissal to be the making of a protected disclosure. On the present facts, in contrast, P's resignation came about not because of the making of her complaint as such but because of the Council's inadequate response to it.

'Last straw' cases.

6.41 Constructive dismissal claims are often brought on the basis of an accumulation of minor grievances which, cumulatively, amount to a breach of the implied term of trust and confidence. The individual grievances do not need to breach the contract of employment on their own for the claim to be established: the employee can resign in response to a 'last straw' and base his or her claim on the totality of the employer's conduct — *Kaur v Leeds Teaching Hospitals NHS Trust* 2019 ICR 1, CA. The problem for a claimant seeking to establish a constructive dismissal claim under S.103A is that, where the claim is based on multiple minor incidents, each of which is different in nature, it will be difficult to establish that the protected disclosure motivated enough of them such that the disclosure can be deemed to be the reason or principal reason for dismissal. In *Pye v Community Integrated Care* ET Case No.2401872/16, for example, P claimed to have been constructively dismissed by reason of a protected disclosure after she raised her concern that CIC was delaying making payments to her pension provider, leading to a shortfall. The employment tribunal found that P was constructively dismissed because of the manner in which CIC dealt with the pension disclosure — its response to her grievance, the manner in which it conducted an internal audit investigation and its handling of P's subsequent sickness absence collectively amounted to a fundamental breach of contract, and the last straw was a failure to communicate with P over the timing of her grievance appeal against a background of delays in procedure. However, the tribunal went on to find that the reason or principal reason for the cumulative breach was not P's protected disclosure in relation to the pension payments. On its findings, only two of CIC's failings that contributed to the constructive dismissal were arguably motivated by the protected disclosure and the final straw was not one of them." (Emphasis by underlining added.)

7 A decision of an employment tribunal binds no other tribunal, of course, so much of that passage is about interesting cases which illustrate the difficulties for claimants in this area rather than cases which require a particular approach. Nevertheless, we agreed with the words which we have underlined in paragraph 6.41 of the extract set out in the passage. In our view, the key consideration here

was whether the principal reason for the claimant's resignation was detrimental treatment of him for making one or more protected disclosures.

8 As for the law of constructive dismissal, we applied the principles stated in the decisions of the Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481 and *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1.

The evidence which we heard and the procedure which we followed

9 We agreed with the parties that we would determine liability only initially, but in doing so, we would consider the question of whether the claimant's employment with the respondent would have continued if he had not resigned, and, if so, for how long. We then, during the course of the hearing, agreed with the parties that we would reserve our judgment.

10 We were referred to relevant documents in a bundle that had over 2000 pages. We heard oral evidence from the claimant and, on behalf of the respondent, from

10.1 Mr Dennis Van Gelderen, who is employed by the respondent as an Inflight Business Manager ("IBM");

10.2 Ms Ann Pilgrim, who is employed by the respondent as Area Manager Mixed Fleet; and

10.3 Ms Hale.

11 Having heard that evidence and read those documents, we made the following findings of fact.

Our findings of fact

The manner in which the claimant came to be an employee of the respondent

12 On 29 December 2016, the claimant accepted an offer, which was subject to pre-employment screening (including for the purposes of the Aviation Security Act 1982), of a position as a member of the cabin crew (Mixed Fleet) for the respondent. The respondent contracts with third party providers to carry out that screening, and while that screening started on 4 January 2017, it had not been completed by 19 April 2017. The respondent's guidance given to applicants for employment included that pre-employment screening takes approximately 6 weeks from the date of acceptance of an offer of the sort that the claimant had accepted.

13 The claimant complained to the respondent on 24 April 2017 about the fact that his pre-employment screening had not been completed by then. The complaint was at pages 406-448. On the next day (apparently co-incidentally), he was

informed by the respondent (page 449) that he had "cleared the first stage of [his] personal history check for Cabin Crew London Heathrow – Mixed Fleet", and offered the role conditionally on a number of things, including the respondent receiving "satisfactory references" and "satisfactory results to all pre-employment checks". The start date for the claimant's employment with the respondent was stated to be 7 June 2017, but as a result of further delays in the obtaining of references, the claimant's first day of employment with the respondent was 24 July 2017. (It was the claimant's own evidence that his experience in this regard was, he later learnt, not atypical, and we mention it only for the sake of completeness).

14 The claimant's initial period of employment with the respondent was spent receiving training for the role of cabin crew. That training was predominantly about procedures which needed to be followed in order to ensure so far as possible that passengers of the respondent were kept safe. Ms Hale told us, and we accepted, that the difference between being a member of the cabin crew of a public service airline such as the respondent and being a member of the cabin crew of a privately-owned aeroplane (she referred to it as "private aviation") is that the latter is in reality only a waiter or waitress whereas the members of the cabin crew of an airline such as the respondent all have major responsibilities concerning health and safety.

15 Ms Hale was the claimant's line manager in that she was his "Owning Line Manager" ("OLM"). Her role as CSM was predominantly as a member of cabin crew, managing the cabin crew in any flight when she worked as a member of the crew, but she also had responsibility as the person to whom a limited number of cabin crew members reported as their OLM for their welfare. As the OLM of members of cabin crew of the respondent's Mixed Fleet, she was responsible for assisting them to complete their probation periods and determining whether or not they had passed those periods successfully. Thus, she also had responsibility for deciding whether their probation periods should be extended and, if they did not complete those periods successfully, whether they should be dismissed.

16 In addition to the claimant, Ms Hale had as members of her team (i.e. those members of the respondent's cabin crew for whom she was their OLM) 2 other probationers. They were Ms Ellie May Parker and Mr Angelo Gidding.

The claimant's first claimed public interest disclosure (which the respondent accepted was such a disclosure)

17 On 14 September 2017, the claimant sent the email at pages 556-557 to the respondent's email address "IFCE Safety", but starting it with the words "Hi Matt". That email (which was the first of the claimant's five claimed public interest disclosure) was sent in direct response to an email dated 11 September 2017 from Mr Matt Whipp (pages 557-558), the respondent's "Manager - Cabin Safety", who had sent his email from the "IFCE Safety" email address. Mr

Whipp's email was written after he had been in post for 6 months and was, as he put it, a "high level list" of the findings of the latest audit report of the respondent's Corporate Safety team. That list consisted of 11 items. The fifth was this:

> "Seat Allocation - We have had a couple of reports of where crew have not checked those sat in self-help exits are suitable. A reminder is that if a customer falls under the categories listed in the Operations Manual and is not suitable to be sat in that seat they must be moved for take-off and landing."

18 Mr Whipp's email concluded with the following two paragraphs:

> "Already from your feedback and discussions, either written or in person, we have been identifying some of those areas which causes [sic] you frustrations. One was for instance Cabin Secure. The information in the manual has been put into one place and some of those more 'grey' areas have been clarified. I am sure there will be more but it is certainly a move in the right direction and within the team we are always keen to hear from you. Someone recently wrote that it was good to hear that those at the top are listening to those at the bottom. I am going to have to disagree and rather say 'we in the back will listen to you in the front!'. To make changes does take time and certainly with an organisation of our size, we don't want to make quick decisions, so please bear with us.
>
> As ever, please continue to report any safety concerns or issues, but I would ask that when completing reports do think if a 'Cabin Safety Report' or 'Occupational Safety Report' is relevant to what you are informing us of? Some reports come through that are not Safety or Occupational related but still have been recorded as a CSR/OSR. We will do a bit more of a focus on what and how to report in the coming months."

19 The claimant's email of 14 September 2017 was accurately summarised by him in paragraph 20 of his witness statement as having been about

19.1 the blocking of emergency exit doors adjacent to galleys by service trolleys;

19.2 the failure by inexperienced cabin crew like the claimant to carry out safety checks on exit doors properly; and

19.3 the level of experience of cabin crew in the Economy class section of aircraft, i.e. all of them being still on probation.

20 Mr Whipp's reply was sent on 30 October 2017. It was at pages 555-556. The claimant's email had taken time to be forwarded to Mr Whipp (although it started: "Hi Matt") and then responded to by him. Mr Whipp's response to the claimant's email was that

20.1 it was "pretty much an industry standard to have trolleys out, but certainly nothing should be out unnecessarily", and

20.2 "Experience levels is something that is being looked into by fleet management. Unsure as to what they are going to do but I know it is on the radar. When it comes to knowledge on the flight, interesting to hear what is occurring out there, and for me you were correct to highlight to the CSM. Not to get into trouble, but more to allow the CSM to identify what would be a correct course of action."

21 Certainly, there was nothing in the email from Mr Whipp which suggested that he or anyone else from the respondent had taken, or might have taken, offence at the content of the claimant's email of 14 September 2017 at pages 556-557.

22 The claimant claimed that he had forwarded that email of his to Ms Hale, but she said that she had not seen it before she decided that his probation period should be extended by 3 months (in the manner we describe below). There was in the bundle no copy of an email from the claimant to Ms Hale, forwarding his email of 14 September 2017 to her, and she told us (and we accepted) that she had found in her email inbox no copy of such an email. There was, however, a copy in the bundle (at page 583, to which we return below) of an email from the claimant forwarding claimed disclosure number 4 to Ms Hale. There was in addition, at pages 786 and 584, an email (the email was at page 786) and its appendices (starting at page 584), to Ms Hale dated 25 February 2018, which included (at pages 590-591) the email of 14 September 2017 to IFCE Safety and starting: "Hi Matt". We found Ms Hale to be an honest witness, doing her best to tell us the truth, and we concluded on the balance of probabilities that she did not see the claimant's email of 14 September 2017 at pages 556-557 (and 590-591) until after she had decided that the claimant's probation period should be extended. We concluded that the first time that she saw it was when the claimant sent it to her on 25 February 2018, as one of a number of documents.

The claimant's claimed public interest disclosures numbers 2 and 3

23 The claimant alleged that he had sent responses to 2 online surveys in November 2017. In the first one, he said that he had alleged that an instructor had encouraged cheating by cabin crew during their examinations. The second response had, he said, raised "onboard" health and safety issues. The first was said to have been sent to Ms E Porter, and the second to Mr Whipp. The respondent's evidence was that its online surveys of that nature were completed anonymously, but the claimant said that he had given his name and email address when completing the surveys. The claimant had not, however, retained a copy of what he had said when completing the surveys.

24 The claimant pointed to an email of his at pages 665-666 (to which we return below) to Mr Ian Romanis, who was the respondent's Head of Mixed Fleet (which had in it about 6,500 cabin crew members) as showing that he had indeed

responded to those online surveys. In the email, at the top of page 666, the claimant had referring to himself "filling in the New Entrant survey for Emma Porter (where I elaborated on what I think is lacking in safety culture at BA) as well as the more recent IFCE Cabin Safety survey (where, again, I provided detailed comments on what I think should be improved)". We accepted, given those references, that the claimant had filled in those surveys. However, we also accepted the respondent's witnesses' evidence that they had not seen what the claimant had written in response to those surveys. Accordingly, we did not need to decide whether or not the responses to those surveys consisted of public interest disclosures within the meaning of section 43B of the ERA 1996.

Claimed protected disclosure number 4

25 Claimed public interest disclosure number 4 concerned the manner in which cabin crew were to serve hot drinks and was about what the respondent called "deli cups". There was extensive email correspondence about that issue at pages 580-583 (the first being the claimant's email to Mr Whipp of 7 December 2017 at page 583, which the claimant a minute later forwarded to Ms Hale). The claimant's email of 7 December 2017 to Mr Whipp was in these terms:

> 'Hi Matt
>
> How have you been?
>
> I've heard so many different versions on this that I thought I would go directly to the source as we had an opportunity to meet each other during training.
>
> Can we put the deli cups on the tray? During the NE Training, the on line modules (Short Haul Masterclass etc) explicitly said we can't deliver deli cups with hot drinks on a tray and should do it by hand. It also said we should only fill it up to 2/3 of the cup's volume. On my recent flight, I pointed it out when my colleague would hand six drinks at a time to customers and referred him to our long-haul standards guide but I was then subsequently told by FTC that "it's okay". Would you be able to clarify, please?'

26 Ms Hale had responded at length to that email the following day, in her email at pages 582-583. That email was informative and in no way suggested that Ms Hale had taken it amiss that the claimant had sent his email at the bottom of page 583. The claimant responded on the same day (8 December 2017) in his email at the top of page 582. Ms Hale then responded to that email 36 minutes later, and the claimant responded to her email on 10 December 2017 by embedding his responses to what she was saying (pages 581-582). Mr Whipp then sent a response to all of the emails in the chain (his response was on page 580), and in doing so he (like both Ms Hale and the claimant) recognised that when considering how best to serve hot drinks, issues of both health and safety and service standards arose. We accepted that the claimant had in sending his

emails in that chain raised issues of health and safety and that the emails were protected disclosures within the meaning of section 43B(1)(d) in that if a hot drink was served in such a way that there was a risk that it would, during turbulence or otherwise, be spilt onto a passenger, then there was the possibility of the health or safety of an individual being endangered.

Claimed protected disclosure number 5 (which the respondent accepted was a protected disclosure within the meaning of section 43B of the ERA 1996)

27 The fifth claimed protected disclosure was made by the claimant after he had been given what the respondent calls "instant feedback" for doing what Mr Whipp described in the passage of his email set out at the end of paragraph 17 above. That instant feedback was given by Mr X on 2 January 2018. The disclosure (which, as we say above, it was accepted by the respondent was a protected disclosure) concerned the manner in which the cabin had been lit during take-off and landing on flights when Mr X was the CSM for the flight. The disclosure was at page 603, in the first three bullet points under the heading "Security Concerns", namely:

> "• During boarding, the cabin on all our aircraft was entirely dimmed with only blue lights on, despite the fact that our flights took place over the course of the evening. Some passengers queried why this was the case as they had problems with finding their way around the aircraft. This applies to our first four flights only.
> • Similarly, on one of the flights, the cabin was entirely dimmed during the safety demo.
> • During take-off and final approach, [Mr X] would switch the lights off in our back galley, leaving it entirely dark. This resulted with problems such as fastening the seatbelt on the jumpseat and was a potential risk in an emergency situation. This applies to our first four flights and the sixth (last) light for landing. I clarified this with two crew members I was working with. They confirmed that this had never happened to them and one of them stated that this was not right."

The circumstances in which that instant feedback was given

28 The claimant and Mr X were both part of the cabin crew during a 4-day "trip" (that is to say, a working trip) which took place between 31 December 2017 and 3 January 2018. Mr X was the manager of the cabin crew, as its CSM. During the first 2 days of the tour, the claimant and Mr X got on well. We did not (as indicated above) hear from Mr X, but we did read a document that he had written in response to the allegations which the claimant had made about him. That document was at pages 682-689.

29 The claimant claimed (in his email to Ms Hale of 4 January 2018 at pages 601-605 and in evidence to us) that Mr X had acted inappropriately to him during those 2 days. The first claimed inappropriate act was when Mr X "tapped" the

claimant on Grindr, to indicate that he thought that the claimant was "hot". Grindr shows whether or not other persons in the vicinity are currently logged onto it, and who they are. The claimant had copied the sequence of messages and enclosed them with the email at pages 601-605. The Grindr messages were at pages 606-619. The claimant was "tapped" when he and Mr X were sitting at a table after the first flight on the tour. That was on New Year's Eve. They exchanged one message on Grindr at that time, from 1.45am to 1.59. After they had both gone to bed, Mr X continued the conversation with 5 short messages sent at 2.15 to 2.16, after which the claimant responded in a friendly way, including with a message (at the top of page 609) sent at 2.20am consisting solely of two grinning face "emojis". The claimant's final message to Mr X was at page 616 and was in these terms: "Speak tomorrow x". Mr X had immediately responded: "Lol I'm 5m away" and then in a further message: "Haha". He had then sent a message in the form simply of "X". The next message was sent at 8.27 in the morning, asking whether the claimant was "doing breakfast".

30 During his oral evidence, the claimant said that he did not mean anything by sending the grinning emojis at page 609 and that by using "x" he was not sending a kiss and was instead simply signing off. The claimant is a well-educated man (with a first class degree from York University) who speaks very good English and, we concluded, did know that an "x" in a message (whether in text form, in an email, on Whatsapp or on Grindr) either means a kiss or is a term of endearment. Similarly, we concluded that the claimant knew full well that the two grinning emojis at page 609 were used to convey laughter at what Mr X had just written (about "cruising on here"). We return below to the impact of those conclusions when it came to assessing whom to believe on the one direct conflict of evidence which we had to resolve. In the meantime we record that we concluded that the claimant in no way stated or otherwise made it clear to Mr X that his attentions were unwelcome until after Mr X had given him the instant feedback to which we refer in paragraph 34 below. The conduct of Mr X about which the claimant complained, other than the sending of the Grindr messages, was described by the claimant in the email at pages 602-603 and included Mr X saying that "he was not going to go to the gym but he was going to have sex instead." However, it was clear from the documents before us, and the claimant accepted, that that was said in the presence also of a female member of the cabin crew, when the claimant, Mr X and that female member of the cabin crew were all standing on an escalator.

31 Before turning to the instant feedback which Mr X gave the claimant on 2 January 2018, we record that Ms Hale said in cross-examination that she was aware that "a lot of relationships happen between flight crew, engineers and cabin crew". When Ms Hale said that, the claimant accepted it, i.e. he expressly acknowledged that she was telling the truth. We also record, however, that while we accepted that the claimant did not feel comfortable about the attentions of Mr X we concluded that, before he received the instant feedback to which we are about to refer, he gave Mr X no reason to believe that those attentions were unwelcome. We ourselves questioned the claimant closely on this issue, and he

accepted that the most that he could say in this regard was that while he did not positively encourage Mr X's attentions, he did not discourage them. The claimant said that he would not have done that (i.e. discourage them) because Mr X was his line manager for the trip.

The instant feedback given to the claimant on 2 January 2018

32 On a flight which took place on 2 January 2018 during the European trip of 31 December 2017 to 3 January 2018, a child aged about 7 was, during the descent and therefore in the period just before landing, seated in the row next to the self-help (sometimes referred to by the respondent's staff as the "over-wing") exit door (in fact, the child was seated immediately next to the door). As stated in the passage at the end of paragraph 17 above, when an aeroplane is either taking off or landing that row needs for safety reasons to be occupied only by able persons who are not children. A member of the child's family was sat in that row also.

33 The claimant's evidence was that he had previously (apparently before take-off) seen that the child was sat next to the exit door and spoken to the family member about the situation, with a view to moving them to another row. The family member had said that the ground staff had allocated the seats. The claimant had then insisted on the moving of the child from the seat next to the door, but had permitted the family member and the child to remain seated on the row.

34 That was later (during the aeroplane's descent) seen by another member of the cabin crew, Ms Falcon, who then organised the removal of the child and the family member. Ms Falcon was later interviewed about the matter, and she described the situation thus (page 850):

> "Basically before landing I was securing and hadn't been up to that section. I secured the over-wing saw a child sitting there and couldn't tell how old the child was. I asked [Mr X] did he know anything about it. He said could I find out how old the child was. I went and investigated, found out the child was 7, had to move the child out of the seat and a family member with them. I needed to make sure there was cover for the door so moved a few people around so the child was not sat there anymore. I had to let [Mr X] know that the child had been missed in the first secure by [the claimant] and I believe he gave him instant feedback on that. I remember [the claimant] mentioning it as he was quite upset about the feedback as the child was in the middle seat and not right next to the door."

35 The "instant feedback" evidently upset the claimant greatly. He sent a WhatsApp message to Ms Hale about it (page 871). The claimant was due to have a meeting with Ms Hale on 4 January 2018 to discuss his probation period. That meeting was going to take place after he had returned from the European trip, and he sent two WhatsApp messages to her before she replied. The three messages (in the order in which they were sent) were these:

> "Hi Jo. Any chance I could talk to you briefly at some point before our meeting? I got developmental feedback and I'm quite concerned about that. Clearing after 11pm tonight and free afterwards until 5pm tomorrow."
>
> "Hi Jo. Just to let you know, I've spoken to crewcare about my instant feedback and will also speak to lead CSM after I land if they're still around after 8pm. Hope you have a good trip."
>
> "Thanks, Bartek, the lead CSM's finish at 5.30. We can discuss tomorrow, glad you're feeling better about it. Jo"

36 Ms Hale also sent the claimant the email dated 2 January 2018 at pages 869-870, saying that if he had concerns about "a specific bit of feedback" then he should think about what was concerning him, such as the way it was written down or delivered, and they could discuss it on 4 January. The claimant responded in the email in the middle of page 869, at 01:26 on 3 January 2018, saying that his concerns "were not about feedback delivery but more about why it had been given." Ms Hale then contacted Mr X by email to ask him to telephone her to discuss the matter (see page 599). He did so and told her why the instant feedback had been given, namely about the fact that the claimant had permitted a child to remain in the row next to an over-wing exit door before (and therefore during) take-off.

Ms Hale's meetings of 2 January 2018 with the two other members of her team who were on probation

37 Ms Hale had meetings with Ms Parker and Mr Giddings on 2 January 2018 to assist her to decide what to do in relation to their probation periods: i.e. whether to decide that the periods had been completed successfully, whether the periods should be extended, or whether the employees should be dismissed.

The meeting between the claimant and Ms Hale to discuss the claimant's progress and his probation period

38 The claimant then attended the planned meeting with Ms Hale on 4 January 2018. During it, they discussed the instant feedback given by Mr X. Ms Hale said that the instant feedback was justified and said words to the effect that even if another department of the respondent (such as the ground crew) had said that something was acceptable, it was not for the other departments of the respondent to dictate to cabin crew how to act, and that it was the respondent's operating procedures and flight safety requirements that were paramount. Thus, she said, it was for the cabin crew to ensure adherence to the respondent's policies and procedures and to tell customers why they were being required to act in such a way as adhered to those policies and procedures.

39 However, during that meeting, the claimant complained that Mr X had acted inappropriately towards him. He complained about the Grindr conversation to which we refer in paragraphs 29 and 30 above and the conduct of Mr X which followed that conversation.

40 The claimant claimed that during the meeting, Ms Hale said to him that he did not need to worry about completing his probation period and that he would complete it satisfactorily unless he ran naked through Heathrow Terminal 5. Ms Hale accepted that she had said something of that nature. However, at the time, she had not seen the wording of the instant feedback given by Mr X to the claimant. She told us (and we accepted) that she did not make a decision during that meeting about the continuation or otherwise of the claimant's probation period, and that the claimant's complaint about Mr X's behaviour became the focus of her attention. Later on that day, i.e. after the meeting, the claimant sent her the text of an email that he had been drafting and planning to send to Mr X's line manager and the line manager's line manager about that behaviour. That was in the email at pages 601-605, to which were attached the Grindr messages at pages 606-619 described in paragraph 29 above.

41 Ms Hale then, later on that day (at 21:22: see pages 600-601) forwarded that email and its enclosures to Mr X's line manager, Ms Sarah Ferguson. Ms Ferguson replied with alacrity early the next morning (see the top of page 600), taking the allegation of inappropriate behaviour by Mr X very seriously.

Ms Pilgrim's evidence about the importance of complying with the respondent's safety requirements

42 Ms Pilgrim told us (and we accepted) that the Civil Aviation Authority ("CAA") carries out unannounced inspections of flights to see whether they satisfy the CAA's safety requirements. Ms Pilgrim said (and we accepted) that

42.1 extending a person's probation period for permitting a child to remain seated in an over-wing or self-help exit row during take-off or landing was not only a reasonable thing to do, but also the right thing to do; and

42.2 if the CAA had carried out an unannounced inspection and found a child seated in that row during ascent or descent then that would have led to a determination that the airline in question had failed the inspection, which could have had a "massive effect" on the airline.

Documentary evidence in the bundle about the importance to the respondent of compliance with its safety requirements

43 We saw that there was in the bundle, at page 638, an email from Mr Christopher Peters to the claimant. It had been disclosed to the claimant under a subject access request and had the date blanked out. We could not understand why that date had been blanked out, but fortunately nothing turned on the date. The

claimant had written by hand on it that it had been sent on a date in January, but with a question mark for the year. We concluded that it was sent to the claimant during January 2018. It contained this passage:

> "Anything can extend your probation and I am afraid that instant feedback can result in you being extended for up to 6 months. In probation, it is up to your OLM [Owning Line Manager; in this instance Ms Hale] alone on passing you through or extending for [a] period of time. This times [sic] allows you as an individual to show you are willing and to be given support. This is the fairest way of running the system and is used by every company in the EU, to protect the business and the employee."

Ms Hale's monitoring requests of January 2018 and the reason why she extended the claimant's probation period

44 Ms Hale's witness statement contained the following passage:

> "25. As explained above at paragraphs 3 and 5, part of my role as CSM is to regularly monitor and review the performance of colleagues in my team. As part of this process, I occasionally request feedback from other CSM's when a member of my team is rostered on a flight with them. This is common practice amongst CSM's.
>
> 26. As the Claimant's probation period was due to be reviewed, I wanted to get some feedback from another CSM in relation to the Claimant's performance, so I contacted Josias Mondajar Puig, who was rostered on a flight with the Claimant on 18 January 2018 (see email at page 622). This was something that I would do for all my reports during their probation period to make sure I had a broad range of feedback on their performance from different people. I explained to Josias that the Claimant's probation period was coming up for review and that I was hoping to get some feedback on the Claimant's performance after the flight.
>
> 27. Josias replied to say that he was happy to help and that it was not the first time another CSM had asked him to provide feedback for one of their team members (see page 622). He asked whether there was anything in particular he should pay attention to and I said no, it was simply to ensure that everyone was happy.
>
> 28. On 17 January 2018 I wrote to the Claimant to confirm that his probation period would be extended by a further three months due to safety standards not being met on BA837 on 2 January 2018, setting out my expectations that he will not receive any further development "*did not meet standards*" feedback (see page 632). I made this decision because I considered that the Instant Feedback from the 2 January 2018 flight was correct and showed he had not met safety

> standards. The decision to extend his probation period had absolutely no connection to the fact that he had raised any health and safety concerns. Where any member of my team received Instant Feedback that identified that safety standards had not been met (or another key indicator had not been achieved) I would treat them in exactly the same way and extend the probation period to allow more time to show they can meet the required standards. The Claimant himself pointed this out (at page 884) where he refers to another of my team, Ellie May Parker, who had her probation period extended at about the same time as the Claimant because she had received Instant Feedback too."

45 Copies of the letters informing Ms Parker and Mr Giddings of the extension of the probation periods were put before us (pages 2015 and 2016). Like the letter to the claimant at page 632, they were dated 17 January 2018. Mr Giddings had his probation period extended by one month because he had not obtained sufficient in-flight assessments. Ms Parker's probation period was extended by 3 months "due to a Safety Standards not met on flight BA490 on 1st October 2017 and two occasions of lateness".

46 Copies of requests made to other CSMs for feedback on Mr Giddings and Ms Parker's performance were also put before us (pages 2017 and 2018; we return to them below, in paragraph 67). While they were dated 24 January 2018, Ms Hale told us (and we accepted) that she had sent other (similar) requests, on earlier dates, for feedback on Ms Parker and Mr Giddings.

47 The claimant asserted to us that Ms Hale had only sent emails asking other CSMs to give feedback on Ms Parker and Mr Giddings and extended their probation periods in order to take attention away from the fact that she had done those things to the claimant because she was in reality treating him detrimentally because he had made a protected disclosure within the meaning of section 43B. We found that proposition to be unlikely in the circumstances, but in any event, we came to the conclusion that it was not well-founded. That was because we accepted Ms Hale's evidence in paragraphs 25-28 of her witness statement in its entirety. For the avoidance of doubt, that included her evidence that "the decision to extend [the claimant's] probation period had absolutely no connection to the fact that he had raised any health and safety concerns". We accepted that evidence

47.1 having heard and seen Ms Hale give evidence;

47.2 having taken into account the fact that she had (as we concluded, as stated in paragraph 22 above) not at the time of doing those things known about the fact that the claimant had sent his email of 14 September 2017 at pages 556-557 to which we refer in paragraph 17 above;

47.3 having had regard to the manner in which Ms Hale treated Ms Parker and Mr Giddings, as we describe in paragraphs 45 and 46 above;

47.4 in the light of the content of the email from Mr Peters set out in paragraph 43 above; and

47.5 in the light of the evidence of Ms Pilgrim to which we refer in paragraph 42 above.

The claimant's reaction to receiving Ms Hale's letter of 17 January 2018 at page 632

48 It was the claimant's evidence (which we accepted) that he first saw Ms Hale's letter of 17 January 2018 at page 632 when she sent it to him under cover of the email of 23 January 2018 at page 643. The claimant then sent a series of emails to Ms Karen Slinger (the respondent's "(Head of Inflight Customer Experience Department") and Mr Ian Romanis. It was, we found, an extraordinary series of emails. The first one in chronological terms was sent at 18:44 on 23 January 2018 and was sent to Ms Hale and copied to Ms Slinger and Mr Romanis. It was at pages 642-643. Mr Romanis wrote to Ms Butler the email on page 640 sent at 21:46 on 23 January 2018, commenting that the claimant had "sent Karen and [him] about 8 emails this evening!" The clear purpose of the series of emails sent by the claimant was to overturn the decision that his probation period was extended by 3 months. The claimant's clear belief was that it was "unfair" for that to have happened.

49 Mr Romanis' first response to the claimant's emails was to say, in the email at page 650 sent at 19:05 on 23 January 2018:

> "Bartek
>
> With respect, I am going to ask that you stop sending these emails until I have had a chance to follow up with my management team. If at that point we require anything from you, we will certainly be in contact."

50 Four minutes later (i.e. at 19:09), the claimant wrote (pages 649-650) to Mr Romanis and Ms Slinger in response to that email of Mr Romanis:

> "Dear Ian
>
> Thank you for your email.
>
> My main reason of sending these emails is to point out to you why I think the decision to extend my probation was unfair and, more likely than not, dictated by personal reasons.

> Taking into account the gravity of the situation, I hope that you don't mind it and that any replies and information on next steps would be coming directly from either you and Karen.
>
> Kind regards
> Bartek"

51 Ms Slinger then, at 19:20, i.e. 11 minutes later, wrote to the claimant (page 649):

> "Bartek - following on from Ian's email below, to manage your expectations, I am not personally planning to get involved in reviewing any of these emails at this stage. If there is any requirement for escalation, that would sit within the Mixed Fleet management team at this stage rather to me as the Head of IFCE and Ian has already confirmed to you what he wants to do as a first step.
>
> Brgds, Karen"

52 The claimant (despite being given strong hints from both Mr Romanis and Ms Slinger to cease sending them emails) then (at 21:08 on 23 January 2018) sent the email at the top of page 649, which was in these terms:

> "Dear Karen and Ian
>
> Thank you for your replies.
>
> Having further reflected upon this situation, I wanted to add that I cannot overstate how important it is for me to re-consider the decision of extending my probation as soon as possible.
>
> I hope you understand that any unnecessary delays will only deepen the perception of unfairness and intimidation. I would hope that we will be able to reach a solution to this most immediate concern by the end of this week. I would like to think that this was just an unfortunate incident which will be immediately tackled by the management.
>
> In the meantime, I wish you a good rest of the week and I will do my best to enjoy my longest Singapore-Sydney trip.
>
> Kind regards
> Bartek"

53 The claimant then, at 23:06 on that day, 23 January 2018, sent the email at page 657 to Ms Slinger and Mr Romanis, enclosing the WhatsApp screenshots at pages 658-659 and the Facebook messages at pages 660-662. The email was in these terms:

> "Please be advised that the CSM on my current (SIN/SYD) flight has just messaged me to say that he knows my line manager and that she posted something on Facebook to let him know so. Please find the screenshots attached.
>
> I also need to let you know that this CSM had tried to add me on Facebook before the flight (without even knowing anything about me) and messaged me on there, too.
>
> All I am thinking about now is whether I will receive another instant feedback to enable people to kick me out of British Airways.
>
> Ideally, I want to be taken off this flight but - if I am - I will lose £500 in allowances and I won't even be able to afford a train back to York (home). What is the best course of action, please?"

54 Mr Romanis replied at 09:52 the following morning, i.e. of 24 January 2018 (pages 663-664):

> "Hi Bartek, and thanks for your email.
>
> I know the CSM on your flight, and while I appreciate that you could interpret the Facebook exchange in a number of ways, I have absolutely no reason to question either their professionalism or their objectivity in managing and supporting all of the team operating your SIN-SYD.
>
> I don't believe there is any reason for you to come off the trip at this stage, but if you believe that the CRM and relationship between you and your CSM has been strained to the degree that you don't feel able to operate, you should contact the DOMs in London, who in turn will connect you with one of the Mixed Fleet Duty IBMs.
>
> In terms of the other points you have raised to Karen and I, one of the management team will come back to you next week, after you have returned from SIN-SYD."

55 In paragraph 34 of her witness statement, Ms Hale said this about that matter:

> "At 23.06 on 23 January 2018 the Claimant emailed Karen and Ian to say that a CSM on his forthcoming flight had messaged to say he knew me and in light of this the Claimant requested to be taken off the flight. I can absolutely say that I did not send a Facebook message to Matt Smith or comment on Facebook about the Claimant."

56 We looked carefully at the WhatsApp and Facebook exchanges at pages 658-662 and we saw that Mr Smith had first contacted the claimant on Facebook on 6 January 2018, inviting the claimant to be a Facebook friend. The claimant had

(we saw from page 660) declined that request on the basis that he was "only adding people whom [he knew] well in real life" but that he was "sure that we will all get to know each other during the nine days in January!"

57 Mr Smith had replied: "That's cool of course!! It was really just so u know why [i.e. what] I looked like hah". The exchange on Facebook ended on 20 January 2018. The exchange was, we concluded, completely innocuous.

58 The WhatsApp message exchange at page 659 showed that Mr Smith had written that Ms Hale was "a friend of [his]", and that when the claimant asked him how Mr Smith knew who his manager was, Mr Smith had written: "Joanna commented on a post on fb and said yr with one of my team".

59 Given that exchange, we concluded that Ms Hale had said something on a Facebook page which tangentially referred to the claimant and which had enabled Mr Smith to work out that the claimant's OLM was Ms Hale. We nevertheless concluded that what Ms Hale had done in that regard was completely innocuous and that she had in doing so in no way treated the claimant detrimentally because he had sent the emails about deli cups to which we refer in paragraphs 25 and 26 above (disclosure 4) or the email about the actions of Mr X dimming the cabin lights set out in paragraph 27 above (disclosure 5). For the avoidance of doubt, we concluded that Ms Hale had not contacted Mr Smith about the claimant except in order to procure feedback of the sort that she sought from other CSMs about the claimant (and, as we record above, Ms Parker and Mr Giddings).

60 Indeed, we accepted Ms Hale's oral evidence that she had been in no way concerned about the fact that the claimant had sent his emails on the topic of deli cups and about the dimming of cabin lights by Mr X, and that the fact that he had sent those emails had played no part at all in the making by her of any decision of any nature concerning the claimant or his future as an employee of the respondent.

The claimant's requests to be permitted to do work shadowing in order to assist him, after his probation had ended, to seek to be promoted to CSM, and to receive business class training

61 The claimant was, as he claimed, denied requests to be permitted to do work shadowing and receive business class training (referred to by the respondent as Club World Training). Those were claimed detriments numbers 2 and 8 (see the table set out at the end of paragraph 2.2 above). Ms Hale's evidence on the former was that in her and Ms Butler's view, the claimant in effect needed (although she did not put it as high as that in paragraph 47 of her witness statement) to complete his probation period satisfactorily before starting to gain experience which would assist him in seeking promotion. As for Club World Training, that was (said Ms Hale in paragraph 30 of her witness statement) "only available to colleagues who had passed their probation". Ms Hale's evidence was

to the effect that the denial of work shadowing and Club World Training was to no extent a result of the fact that the claimant had made a protected disclosure about safety. Given that she knew at that time only of the deli cup issue and the claimant's concern about cabin lighting when Mr X was in charge of it, that was highly likely to be the case. In any event, on the basis of (1) Ms Hale's oral evidence on this, (2) the fact that we found her at all times (as stated above) to be an honest witness doing her best to tell the truth, (3) the balance of probabilities and (4) the plausibility and common sense of the reason given by Ms Hale, we accepted that the denial of business class training and work shadowing by Ms Hale and Ms Butler had nothing to do with the fact that the claimant had made protected disclosures.

The manner in which Ms Hale dealt with the claimant's probation period, including by continuing to monitor his progress in February 2018

62 Ms Hale sent 2 further letters (i.e. in addition to the one dated 17 January 2018 at page 632) about the claimant's probation period. They were both about a further meeting to discuss the claimant's performance during his probation period. Ms Hale's evidence on this was in paragraph 35 of her witness statement, which was in these terms:

> 'On 29 January 2018, I wrote to the Claimant to advise him that I had scheduled a probation outcome meeting on 9 February 2018 in which I re-confirmed that his probation period had been extended until 24 April 2018 (page 669). Unfortunately, due to a mistake, this letter did not contain the "standard" template letter information for such a meeting. I noticed this on 6 February 2018 when preparing for the meeting and so I sent a further letter (page 693) which contained the correct content from the template letter inviting an employee to a probation review meeting, which should always be included in an invitation to a probation review meeting. This is confirmed in Our Colleague Guide (OCG) - Managing Colleagues during probation (see third sentence from bottom - page 126). I omitted to include this sentence in the letter dated 29 January 2018, because I used a template from an older letter, which I rectified in the updated letter, so that the Claimant was aware that I would be considering his continued employment. I confirmed this to the Claimant, when he questioned the second letter at the Probation Review meeting on 9 February 2018 (page 821, near top of page). The fact that it is standard wording was also confirmed by Robert Tyrrell of PCS (BA HR) - see page 789.'

63 We looked at all of the documents to which Ms Hale referred in that paragraph, and they bore out what she said in it. We asked ourselves whether it was likely that the respondent would enable persons such as Ms Hale to decide at any probation review meeting that an employee in his or her probation period should cease to be employed by the respondent, and we concluded that it was, if only because if such an employee were acting in an unsafe manner mid-air and there was no realistic prospect of the employee ceasing to do so, then the respondent

would in practice be obliged to cease to employ that person as a member of its cabin crew. In any event, we accepted Ms Hale's evidence in paragraph 35 of her witness statement and concluded that the reason why she sent the first letter (at page 669) was to require the claimant to attend a further probation meeting. The meeting was called in that letter a "probation outcome meeting", but in the letter Ms Hale wrote that its purpose was to "discuss [the claimant's] probation extension and an improvement plan for the future". That was innocuous. The change in the terms of the letter was, we accepted, because Ms Hale had used the wrong template and was also innocuous. We concluded too that there was nothing detrimental to the claimant in or arising from the fact that Ms Hale sent him 3 letters concerning the extension of his probation, or, if there was anything detrimental to him arising from those letters, it had nothing to do with the fact that he had made any protected disclosure.

64 The meeting of 9 February 2018 was conducted by Ms Hale and Ms Butler in an entirely positive way. The claimant recorded it covertly, and the recording was transcribed. The transcript was in the bundle at pages 791-823. It showed, as Ms Hale said in paragraph 41 of her witness statement (which we accepted), that both she and Ms Butler "were keen to support the Claimant to make improvements and pass his extended probation meeting." As Ms Hale there said:

> "At page 797 I made the point to the Claimant that the extended probation period was about us being able to help him reach the required standards and continue his career with BA."

65 It was clear that the claimant's probation period was not extended at that meeting: it had already been extended, and the meeting was held with a view to helping the claimant to achieve the necessary standards to complete his probation period.

66 As for monitoring the claimant's progress Ms Hale's evidence on this was in paragraph 46 of her witness statement:

> 'I understand that one of the allegations made by the Claimant is that I undertook closer monitoring of him because he made alleged protected disclosures. This is simply not true. As with any member of my team, my management duties include that I monitor their progress and performance. I do not know what "closer monitoring" the Claimant is referring to - as explained above, regular scheduled 1: 1's were suggested to help and support the Claimant pass his probation period but this was entirely unconnected to any health and safety concerns he may have raised and in any event he declined this suggestion so they did not take place.'

67 We accepted that evidence, not only because it made sense in itself and was consistent with our experience of situations in which employees are on probation, but also because, as recorded in paragraphs 46 and 47 above, we concluded that Ms Hale had asked for feedback on her other 2 current probationer members

of cabin crew, i.e. Ms Parker and Mr Giddings, and had not done so with a view to covering up detrimental treatment of the claimant for making a protected disclosure.

The circumstances in which the claimant was suspended and the manner in which his health was considered by the respondent's health services team

68 In paragraphs 48-53 of her witness statement, Ms Hale described the circumstances and manner in which the claimant came to be suspended and what happened in relation to his referral to the respondent's health services team (referred to by the parties and from now on here as "BAHS"). Those paragraphs were as follows:

> '48. On 23 February 2018, I received an email from Sarah Jane Gates (p889) in relation to the Claimant's performance on flights to/from Las Vegas on 22 February 2018 (p890). In discussions with Stephanie Butler I was told that the Claimant had informed her on 22 February 2018 that his mental wellbeing had deteriorated. In view of this it was decided to deroster him and arrange a further probation review meeting with him to discuss. Stephanie's email to the Claimant is at page 898 and you can see that the title says the meeting is Monday 26 February but she mistakenly said 25 February in the body of the email. The Claimant queried the correct date and this was confirmed as 26 February 2018 (see page 900).
>
> 49. Stephanie held the meeting on 26 February 2018 and while I was not present Stephanie updated me on the meeting after and the notes are at page 904. In the meeting it can be seen from the notes that the Claimant acknowledged that, on reflection, it was wrong for him to go to the bunks and shine a torch around (page 905). The meeting was adjourned to enable Stephanie to refer the Claimant to British Airways Health Services (BAHS) to assess the Claimant's health and how best the company can support him.
>
> 50. As I reported in to Stephanie, we worked closely together and had regular discussions about the team and she kept me informed of the steps she was taking in relation to the Claimant. At around this time (ie. End February/early March 2018) I provided Stephanie with a document setting out the issues I had experience[d] over the past eight months during which time I was the Claimant's his OLM. This can be seen at pages 1014-1018 of the bundle.
>
> 51. Stephanie's referral to BAHS is at page 916 and the report is at page 918. I am aware that there was an issue with BAHS contacting the Claimant (see the emails on pages 919-921) and then, due to the Beast from the East weather disruption, there was a slight delay in arranging a BAHS appointment. The BAHS appointment was not

"postponed" but, as explained above, it took a few days to arrange an appointment. This had absolutely nothing to do with any health and safety concerns that the Claimant may have previously raised.

52. I understand that the Claimant now makes allegations about what the BAHS adviser said to him at the appointment. I was not aware of these at the time. As I was not present during the appointment I cannot comment on this other than to say that in all my dealings with BAHS I have always found them to be professional health care workers and would be very surprised if they said anything inappropriate. I also note that in his email to Stephanie immediately following the BAHS appointment, the Claimant does not make any complaints about the appointment (see page 924) and he then met with Stephanie and referred to the BAHS appointment going well and being productive (see page 937).

53. While I was not present at the meeting, the notes of the Claimant's meeting with Stephanie on 5 March 2018 are at pages 937-939. I have reviewed these and consider that the points raised by Stephanie were appropriate and reflected the feedback provided about the Claimant operating on two flights. It is clear that Stephanie was relaying this information to the Claimant as part of the ongoing support to help him to try and pass his probation period.'

69 Among other things, the claimant asserted that the document at pages 1014-1018 had not been sent by Ms Hale. She was cross-examined on it. She said that it was an email and that she was sure that she had sent it, and that she had enclosed with it a (digital) bundle of documents, as she referred to that bundle in the body of the document. The top of the document had been cut off, and the attachment had not been located by the respondent in preparation for the hearing. That was, we were told, because Ms Hale had been required by the respondent's data protection policy to send the email and its attachment to a central digital storage facility, administered by the respondent's HR team. As Employment Judge Hyams said during the hearing, that was in our view highly unlikely to be required by the GDPR, and in any event it was likely to hinder an employer's response to a claim such as this one, for which there could in our view be no justification. Having said that, we accepted Ms Hale's evidence that she had sent, as an email to Ms Butler, the document at pages 1014-1018 (not truncated), enclosing the attachment to which it referred. We also accepted Ms Hale's evidence that the content of the email was entirely genuine. It clearly took a lot of time to put it together. It started with these paragraphs:

"Over my time of having Bartek in my team there have been several issues, I have tried to work with Bartek over the last eight months, however when trying to provide Bartek with assistance I have been faced with challenges from him.

> Bartek does not respond well to managers who do not agree with everything he is saying or suggest different ways for him to work, progress and develop. He will manipulate situations to reflect the outcome of his choice.
>
> Despite Bartek being told verbally and in written communication from his OLM and IBM not to do something, Bartek ignores this and chooses to continue to do what he wants.
>
> I feel British Airways have a duty of care not only to its external customers but also internal customers, colleagues and aircraft. I have concerns about Bartek and his ability perform the safety aspects of the role of cabin crew, his customer service levels, his disregard for policies and procedures which he feels do not benefit him and lack of respect for management. Bartek does not respond well to situations which are not in his favour or control."

70 We read with care all of the other documents to which Ms Hale referred in paragraphs 48-53 of her witness statement and they all bore out what Ms Hale said in those paragraphs. What was not apparent until we asked a question about it of Ms Hale was that the email from Ms Gates at pages 889-892 was unsolicited: it was not sent by Ms Gates in response to a request from Ms Hale for feedback but was instead sent because Ms Gates was highly concerned about what had happened on the flights to and from Las Vegas to which she referred in the email. Given the fact that the documents to which Ms Hale referred in those paragraphs bore out what she said in them, and given that we found her evidence on this (as it was, we found, on all other aspects of the case) to have been given honestly, carefully and with a strong desire to tell the truth, we accepted Ms Hale's factual evidence in paragraphs 48-53 of her witness statement. The final parts of paragraphs 48, 52 and 53 were comments, which we disregarded, except to the extent that Ms Hale was proving the documents to which she referred. To the extent that some of what Ms Hale said in paragraphs 48-51 was about what she was told by Ms Butler, we accepted it as a genuine recollection of what Ms Hale was told by Ms Butler at the time.

The comments made about the claimant's European origins, the manner in which Ms Butler acted towards the claimant during the meeting of 5 March 2018 and the other things said at that meeting

71 Ms Butler's meeting with the claimant of 5 March 2018 was, as Ms Hale said in paragraph 53 of her witness statement, minuted. It was minuted by Mr Van Gelderen (pages 937-939). As we say above, he gave oral evidence to us. The claimant's evidence in paragraph 102 of his witness statement was that Ms Butler had said at the end of the meeting:

> "I appreciate your European heritage but this is British Airways"

and that he had "at no point ... mentioned [his] national origins to anyone."

72 The claimant continued:

> "At this point, I wish to elaborate on two things. The first is the question of minutes from the meetings. No minutes from any meeting had been shared with me at all (despite my requests) until the disclosure in May 2019. When they were shared, some of the content was quite inaccurate. Furthermore, Ms Butler's above comment was not included in the minutes. It is true that her other comment about my Eastern European directness and that I should be mindful of that when interacting with customers had been included. However, that comment was made in the middle of the meeting; it was just a completely different comment. As a side-note, I wish to highlight that the comment about the Eastern European directness was quite odd as well, because there had never been any customer complaints about me either [78 Grounds of Resistance, Paragraph 27]. Contrary, the IFAs showed that I was able to welcome customers in a British way [112]. However, the comment that I was really offended with (that was made right at the end of the meeting) was not included in the minutes at all."

73 There was in the minutes, at page 937, this passage:

> "SB [i.e. Ms Butler]: I know that within your Eastern European culture there can be some directness in how you communicate (SB quoting the exact words as written down by CSM in the feedback BW received) so you may want to be a bit more aware of this.
>
> DJ [i.e. Mr Van Gelderen]: Explaining to BW that I am Dutch myself and can be direct in my approach. Gave ideas and suggestions to BW on what has helped me and on how to balance and adjust my approach when working with people from the BA and many other cultures to make working together smooth."

74 Mr Van Gelderen's oral evidence on whether or not Ms Butler said "I appreciate your European heritage but this is British Airways" was clear, firm and insistent. It was that she had not said that, and that she had simply referred to, and read out, the words used by Mr Puig in the email at page 621. Those words were, we noted, not about the claimant's interactions with the public, but with his colleagues. What Mr Puig had written there, was this:

> "He can come across a bit direct when talking to his colleagues however this is part of his European culture and he is working in coming across more polite."

75 That comment was in line with what Ms Gates had written (in her email at pages 889-892) about something the claimant had done during the flights to and from Las Vegas. What Ms Gates said in that regard was this (it was at the bottom of page 890):

> 'From the time that Bartek done the duty free for the customer breaks had then just started and Bartek had not had any dinner at this time. Bartek then said this to the galley lead in WT and she replied with "if someone wants to swap breaks then that's fine but I have a 3 hour drive so staying on 2nd break". Bartek then went to ask the other 2 crew if they would swap breaks with him. The other 2 crew also said no they wanted to keep there own break. Once I spoke with the crew about the whole situation they said that Bartek was very aggressive and confrontational about this. They said he stood over them quite aggressively and said "swap breaks as this is unfair" and said this quite a few times to them, making them feel very uncomfortable.'

76 We concluded that the claimant (who had not recorded the meeting of 5 March 2018) had mis-remembered what had been said, and had convinced himself that Ms Butler had said the words of which he complained. We did so not only because we found Mr Van Gelderen to be an honest witness, doing his best to tell the truth, but also because we saw from our own exchange with the claimant described in paragraph 30 above that the claimant was capable of self-deception. We accepted that the only thing that Ms Butler had said to the claimant in her meeting with him of 5 March 2018 about his national origins stemmed from, or was, what Mr Puig had written in his email at page 621. Thus, we concluded on the balance of probabilities that Ms Butler had paraphrased what Mr Puig had written before then reading it out, but that that was all that had happened by way of a reference by her to the claimant's nationality.

77 In addition, we saw from Mr Van Gelderen's notes at pages 937-939 that the claimant had started the meeting by being positive about his experience of BAHS. The notes started:

> "SB: How are you? I know the last week has been difficult but we are following guidelines and how was your BAHS appointment?
> BW: I [sic] went well, it was productive."

78 Further, we could see from the passage in the middle of the same page (937) that Ms Butler had read back the feedback of Mr Puig in his email at page 621 relating to a failure by the claimant to give an extension seatbelt to a mother whose child was on her lap. Mr Puig's email had been sent on 20 January 2018. We could see nothing wrong with Ms Butler raising that safety issue at that time. Indeed, it was clearly intended to be helpful to the claimant, to enable him to avoid making that mistake in the future, so that he would have a better chance of completing his probation period.

The manner in which the claimant responded to Ms Pilgrim's communications and her email to him of 24 March 2018

79 The claimant sent the email dated 11 March 2018 at pages 957-959 to Ms Butler. It was treated by the respondent as a grievance. Ms Pilgrim was appointed to

consider the content of the email on the basis that it was so treated. On 14 March 2018, she emailed the claimant, inviting him to a face-to-face meeting with her, to discuss his concerns. Ms Pilgrim described what happened next in paragraphs 5-8 of her witness statement, which were in these terms:

> '5. The Claimant replied on the same day to say that he would normally be happy to meet me, but that none of his issues raised in a further email he had sent to Karen Slinger had been dealt with and that he would like to know the answers to his points raised (he attached a copy of the email to Karen at the bottom of this email to me- see page 971). He said that he would be happy to have a conversation with me about that email trail, but would prefer a telephone conversation.
>
> 6. On 16 March 2018, I replied to say that, based on the content of his original email (at page 960) I felt a face to face meeting would be more appropriate. I said that I would contact the scheduling team to add a UKM day in his roster which is a rostered ground duty day so that we could meet and discuss the points in his email to Karen.
>
> 7. The Claimant replied the same day to say that this was fine and gave a deadline by which he expected to receive answers to his questions about interim steps, by 26 March 2018 (top of page 970).
>
> 8. The interim steps the Claimant was seeking were outlined in his email to Karen Slinger and included a written apology from Stephanie Butler to "acknowledge her wrongdoing'', succinct answers to all of his questions and paid leave from April onwards until his queries were dealt with. He said that a break of paid leave would enable the company to thoroughly investigate his concerns (bottom of 972/ top of 973). He also referred to needing to submit his resignation on 26 March 2018. I did not understand why he was referring to resigning when we were trying to arrange a meeting to discuss the issues he had raised and, as far as I was concerned, I was hopeful that we could resolve these issues in some way.'

80 There was then further correspondence in the same vein. Among other things, Ms Pilgrim said (in her email sent at 17:10 on 21 March 2018 at page 968) that it would be appropriate to meet face-to-face before she made a decision "as to whether or not to hear [the claimant's] complaint as a grievance". She also indicated (without saying it in clear terms) in that email that the claimant should, if he wanted paid leave, book it in the usual way, i.e. and take it from his annual holiday entitlement. Ms Pilgrim described the events which followed that email in paragraphs 14-19 of her witness statement. After those events, she sent the email of 24 March 2018 which the claimant claimed was both a detriment for whistleblowing and the final straw which led to his resignation. Those paragraphs were in these terms:

‘14. Later on 21 March 2018 at 22.19 I was copied in to an email from the Claimant to Paul McGowan (see page 986) [Mr McGowan was Ms Hale’s intended replacement as the claimant’s OLM]. In this email the Claimant confirmed that he had secured an alternative job starting on 3 April 2018 and again referred to the possibility of submitting his resignation the following week. The Claimant was required to give a week’[s] notice if he resigned and so I realised that he would have to submit his resignation by 26 March 2018 to be able to start this new job on 3 April 2018.

15. On 22 March 2018 the Claimant emailed to say that he had tried to call me on a few occasions and said that he did not know what I meant when I said “using channels” - he said that as this was not a usual situation and he would like me, or someone else, to book it on his behalf. He also said that the period of leave would enable me to investigate his concerns thoroughly and he then set out a further reminder by listing his concerns again (page 967). He asked again for a period of additional leave and said that if it was not granted he would “have no choice but to resign from my prospective employment with the company ... “ (see page 968).

16. I called the Claimant to discuss his email. During the call the Claimant made it clear that unless BA agreed to a period of additional paid leave he would resign. I felt that the way he said this was framed as a threat and told him calmly and politely that I would not be threatened to agree to this. There is no obligation on BA to allow additional paid leave where concerns have been raised and in my experience this is highly unusual.

17. Following our telephone conversation, the Claimant emailed Karen Slinger (copying in Alex Cruz [the respondent’s Chief Executive Officer]) to give her a “quick update” (page 966). He again asked Karen for a period of additional paid leave and reiterated that if this was not granted he would have no choice but to resign.

18. Karen replied to the Claimant and copied me in (which is how I was aware of the Claimant’s email to her). Karen stated that she was not sure of the purpose of the continued emails and that I had already outlined the proposals for when and how his concerns can be discussed. She said that I was the manager who was responsible for overseeing the process now, no[t] her or Alex Cruz. She said that she did not see the company changing the proposal on how we will hear his concerns, as a result of him continually stating that he will resign unless we grant him additional leave (page 966)

19. The Claimant replied again to Karen, copying in myself [and] Alex Cruz, setting out his reasons for the leave request again (965).”

81 The email of Ms Pilgrim of 24 March 2018 was at page 964. It was in these terms:

> "Hello Bartek
>
> I believe the manner and way in which you are approaching this situation is now completely inappropriate and I need this constant contact and harassment towards Karen and Alex to now stop.
>
> In all of my communications I have been very clear with you, this is a complaint which you are choosing to pursue and I will not be granting you additional leave. I have advised you a few times that you can book leave the usual way which is available to all cabin crew colleagues.
>
> I have been very clear with you and have explained to you a few times, that I have met with Stephanie and have her side of the story and have put time in your roster to hear your side on the 11 April.
>
> If you require more than an hour to do so on the 11 April, I am more than happy to amend this time and extend your duty day. Further to my communication yesterday, the date of the 11 April will remains [sic] in place, as it is more appropriate to meet face to face.
>
> I would also like to remind you that whilst in an extended period of probation I have a high expectation of a colleague's behaviour and conduct. It is not appropriate to continually harass Karen and Alex, I need you to end further communication to Karen and Alex as I am dealing with this matter.
>
> I look forward to meeting you on the 11 April."

82 We found that email to be completely unobjectionable and to the extent that it was critical of the claimant, completely justified. Ms Pilgrim's reasons for sending her email of 24 March 2018 at page 964 were stated in paragraphs 20-22 of her witness statement. Paragraphs 20 and 21 in large part repeated the content of the email, except that in paragraph 20, Ms Pilgrim said that she did not intend her email to be "threatening". Paragraph 22 was in these terms:

> "I sent the email on page 964 because it was not appropriate for an employee to be contacting senior managers in circumstances where someone (ie. me) had been appointed to deal with these issues and where we had arranged a meeting to discuss them. At the time I sent the email I was not aware that the Claimant had raised various concerns previously which he now claims are whistle blowing disclosures. I can categorically say that the fact that the Claimant had raised previous issues (which I understand he now claims amount to whistleblowing) played no part whatsoever in my decision to email the Claimant and I would have sent

> such an email to anyone who was inappropriately escalating matters to senior managers."

83 We accepted that evidence of Ms Pilgrim. We did so not only because we found Ms Pilgrim to be an honest witness, doing her best to tell the truth, but also because in our view it accorded with reality.

The claimant's resignation

84 The claimant resigned in a letter dated 26 March 2018 sent to Ms Maria da Cunha, the respondent's "Director: People & Legal". As we say in paragraph 1 above, the letter set out 22 reasons for the resignation. It was at pages 993-996. In it, among other things, for the first time, the claimant complained about what had happened when he was seen by BAHS: In paragraph 17, he said this (and only this) in that regard:

> "inappropriate conduct of the BAHS meeting which was against the NHS and British Airways values of compassion, integrity, respect and dignity".

85 The first time that the claimant stated what he meant by that was in response to a request made by Employment Judge R Lewis in a letter of 4 December 2018, in which the claimant was asked to "name each legal claim, and for each claim give a summary of not more than 1000 words, in which he says what happened that is the basis of that claim". The response was sent on 17 December 2018 and was at page 50 of the bundle. It was in these terms:

> '05/03/2018. I attend the BAHS meeting. The BAHS Nurse Maddie Davidson begins the meeting by saying that it was not supposed to take place on 05 March but 06 March (despite the fact that Ms Butler copied her into our email exchange advising of the meeting being booked on 05 March for 10:30am). She says: "You are lucky that I am even here". Without asking me any questions, she then states "You're not the right person for this job, sweetheart". Finally, she alludes to the protected disclosures that I had made by saying "You should not be the moral compass for the Company","(...) mind your own business", "life is unfair" and"(...) you will have no life here". After me making my case as to why I consider myself fit to fly, she signs me off and lets me know that Ms Butler will be in touch to continue with the meeting from 26 February 2018.'

The claimant's knowledge of the possibility of making a claim to an employment tribunal

86 The claimant told us that he was aware at the latest on 14 March 2018 of the possibility of making a claim to an employment tribunal about treatment which he believed contravened the EqA 2010. His only reason for not making the claim before he did in fact make it was the government guidance which he had set out

in the witness statement which he had appended to his witness statement for the hearing before us. That guidance was in these terms:

> "You must usually make a claim to the tribunal within 3 months of the problem at work happening.
>
> - if you think you've lost your job unfairly the 3 month period begins from the date your employment ended
>
> - if your claim is about discrimination or a dispute over pay, the 3 month period begins when the incident or dispute happened".

Conclusions

87 We have already stated (in paragraphs 24 and 26 above respectively) our conclusions that (1) the relevant employees of the respondent did not know that the claimant had made the claimed second and third protected disclosures and (2) the claimed fourth protected disclosure was indeed such a disclosure. Our conclusions on the claims of unlawful conduct on the part of the respondent were these.

Claimed detrimental treatment on the ground that the claimant had made a protected disclosure

88 Detriment 1 We saw no failure whatsoever on the part of the respondent to investigate the claimant's concern about the manner in which hot drinks were served. Thus, the claim to have been subjected to alleged detriment 1 was not well-founded on the facts.

89 Detriment 2 For the reasons stated in paragraph 61 above, the claim to have been subjected to alleged detriment 2 was not well-founded on the facts.

90 Detriment 3 For the reasons stated in paragraph 47 above, the claim to have been subjected to alleged detriment 3 was not well-founded on the facts.

91 Detriment 4 In the circumstances described in paragraphs 53-59 above, we concluded that the contacting by Mr Smith of the claimant as described in paragraphs 56-58 above was not a detriment within the meaning of section 47B of the ERA 1996: it was not the result to any extent of the claimant making protected disclosures within the meaning of section 43B of that Act.

92 Detriment 5 For the reasons stated in paragraph 63 above, the letters referred to in paragraphs 44 (i.e. as referred to in paragraph 28 of Ms Hale's witness statement, which is set out in paragraph 44 above) and 62 above were not sent in any way because the claimant had made one or more protected disclosures within the meaning of section 43B of the ERA 1996.

93 Detriment 6 As we state in paragraph 66 above, Ms Butler did not extend the claimant's probation period on 9 February 2018.

94 Detriment 7 For the reasons stated in paragraphs 45-48 and 67-68 above, we determined that the claim to have been subjected to detriment 7 was not well-founded on the facts.

95 Detriment 8 For the reasons stated in paragraph 61 above, we determined that the claim to have been subjected to detriment 8 was not well-founded on the facts.

96 Detriment 9 Given our factual findings in paragraphs 68-70 above, we came to the conclusion on the balance of probabilities that the change in the stated date of the probation review meeting that was intended by Ms Butler to take place on 26 February 2018 as described in paragraph 48 of Ms Hale's witness statement and evidenced by the documents referred to in that paragraph was entirely innocent and had nothing whatsoever to do with the fact that the claimant had made one or more protected disclosures.

97 Detriment 10 Given our factual findings in paragraphs 68-70 above, we came to the conclusion on the balance of probabilities that the BAHS meeting that occurred eventually on 5 March 2018 was delayed as shown by what Ms Hale said in paragraph 51 of her witness statement (which is set out in paragraph 68 above) and the documents to which she referred in that paragraph, and that such delays as occurred had nothing whatsoever to do with the fact that the claimant had made one or more protected disclosures.

98 Detriment 11 We found it difficult to believe that the claimant was offended by whatever it was that Ms Davidson said on 5 March 2018, as he did not complain to Ms Butler immediately after that meeting about what Davidson had said at it. Rather (see (1) the first part of paragraph 52 of Ms Hale's witness statement, set out in paragraph 68 above, and (2) what we say in paragraph 77 above), he spoke positively about it. He was certainly happy with its outcome. The first time that the claimant told the respondent precisely what (he alleged) Ms Davidson said at the consultation of 5 March 2018 was in the document at page 50, which (as stated in paragraph 85 above) was sent to the respondent and the tribunal on 17 December 2018. There was no contemporaneous note of what Ms Davidson had said at that consultation (except, that is, for her short report at page 918). Given the way in which the claimant was quick to complain, we concluded that it was more likely than not that if he had had any real concerns about what Ms Davidson had said to him on 5 March 2018 then he would have complained to the respondent about those concerns shortly afterwards.

99 In any event, we found it extremely hard to believe that Ms Davidson said the things set out in paragraph 85 above as a detrimental response to whatever the claimant had written by way of assertion about the lack of safety of any aspect of the respondent's operations. However, we did not hear from her, so we

determined the matter on the balance of probabilities. Assuming that the things set out in paragraph 85 above were said, we did not know in what context they were said, or in what tone. In addition, the outcome of the meeting during which they were allegedly said was entirely positive as far as the claimant was concerned. We therefore concluded on the balance of probabilities that if Ms Davidson said what was reported by the claimant for the first time some 9 months after she allegedly said it, it was (1) not in the circumstances as we found them to be meant to be offensive and (2) not detrimental conduct in response to any protected disclosure made by the claimant.

100 Detriment 12 Given our factual conclusion stated in paragraph 78 above, we concluded that the claim to have been subjected to alleged detriment 12 was not well-founded on the facts. What Ms Butler did by going back to the email of Mr Puig at page 621 was not detrimental treatment of the claimant for having made one or more protected disclosures.

101 Detriment 13 Given our factual conclusions stated in paragraphs 82 and 83 above, we concluded that the claim to have been subjected to detrimental treatment to any extent on the ground that the claimant had made one or more protected disclosures by being sent Ms Pilgrim's email at page 964, was not well-founded on the facts.

The claim of automatically unfair dismissal within the meaning of section 103A of the ERA 1996

102 Given our findings on the claimed detriments for the making of one or more protected disclosures, i.e. that the claimant was subjected to no detrimental treatment for the making of one or more protected disclosures, the claim of automatically unfair dismissal within the meaning of section 103A of the ERA 1996 had to fail.

The claim of direct sex discrimination as a result of the acts of Mr X

103 As a result of a discussion which we had with him, even the claimant could not see how his claim of discrimination because of sex through the acts of Mr X could succeed. We certainly could not. We did, however, recognise that the claimant had added that claim as he had understood Employment Judge R Lewis to have thought that it was capable of being pursued.

The claim of sexual harassment on the part of Mr X

104 As we indicate in paragraphs 28-31 above, we concluded that at no time did the claimant say or indicate in any way to Mr X that Mr X's attentions were unwanted before Mr X gave the claimant the instant feedback to which we refer in paragraph 34 above. After that feedback was given, the claimant became hostile to Mr X and Mr X kept his distance in all ways from the claimant.

105 As recorded in paragraph 31 above, the most that the claimant could say about his response to Mr X's initially friendly attentions was that they were not positively encouraged. In our view, that meant that the claim of conduct within the meaning of section 26(2) of the EqA 2010 could not succeed. That was because we concluded that

105.1 Mr X's attentions towards the claimant did not have the purpose of either violating the claimant's dignity or creating for him an intimidating, hostile, degrading, humiliating or offensive environment, and

105.2 having, as required by section 26(4), taken into account (a) the claimant's perception, (b) the other circumstances of the case, and (c) whether it was reasonable for the attentions of Mr X to have had the effect of violating the claimant's dignity or creating for him an intimidating, hostile, degrading, humiliating or offensive environment, we concluded that Mr X's attentions did not have that effect.

106 As for what Mr X said on the escalator, as recorded at the end of paragraph 30 above, it was in our view a stupid thing to say, but

106.1 in the circumstances that (1) it was not obviously directed at the claimant, (2) it was said in the presence also of a female member of the cabin crew, and (3) the claimant did not at any time indicate to Mr X that he had no sexual interest in him, it was not said with the purpose of either violating the claimant's dignity or creating for him an intimidating, hostile, degrading, humiliating or offensive environment, and

106.2 having taken into account (a) the claimant's perception, (b) the other circumstances of the case, and (c) whether it was reasonable for the attentions of Mr X to have had the effect of violating the claimant's dignity or creating for him an intimidating, hostile, degrading, humiliating or offensive environment, what Mr X said on the escalator as recorded at the end of paragraph 30 above did not have that effect.

107 Thus, the claim of sexual harassment within the meaning of section 26 of the EqA 2010 did not succeed on the facts. In any event, if we had found that it could have succeeded on the facts, we would have been forced to conclude that it was outside the jurisdiction of the tribunal, because it was made outside the primary limitation period of three months (extended if applicable by the early conciliation period) and that the claimant had put before us no evidence to justify the conclusion that it was just and equitable to extend time.

The claim of race discrimination

108 Given our conclusion stated in paragraph 76 above, namely that the only thing that Ms Butler said to the claimant at their meeting of 5 March 2018 about his national origins was what Mr Puig had written in his email at page 621 (which we have set out in paragraph 74 above) and a paraphrase of that, we concluded that the claimant's claim of direct race discrimination had to fail. That was because we concluded that what was said about the claimant by Mr Puig was not less favourable treatment of him because of his Polish nationality, so that reading it out or referring to it was not such treatment. We say that because in our view the reference to the claimant's "European culture" (or his "Eastern European culture") was in itself inoffensive, and because in our view it was intended to soften the impact of the criticism that the claimant was "a bit direct when talking to his colleagues".

109 In any event, if we had found that that claim could have succeeded on the facts, we would have been forced to conclude that it was outside the jurisdiction of the tribunal, because it was made outside the primary limitation period of three months (extended if applicable by the early conciliation period) and that the claimant had put before us no evidence to justify the conclusion that it was just and equitable to extend time.

Outcome

110 Accordingly, the claims could not succeed. If they had succeeded, however, then we would have concluded that the claimant's employment would not have ended any later than the end of his probation period, as, we concluded, whoever made the decision about the completion of the claimant's probation period would have decided that his employment with the respondent should cease.

_____
Employment Judge Hyams
Date: 30 March 2020

JUDGMENT SENT TO THE PARTIES ON

20 April 2020

.....

FOR THE TRIBUNAL OFFICE