EMPLOYMENT TRIBUNALS

Claimant: Mr A Khan

Respondent: Govia Thameslink Railway Limited

Heard at: London Central

On: 11, 12, 13, 14, 15, 18, (19 & 20 in chambers) and 25 November 2019

Before: Employment Judge Khan
Ms S Samek
Mr I McLaughlin

Representation
Claimant: Mr J Singh, Paralegal
Respondent: Mr P Livingston, Counsel

JUDGMENT having been sent to the parties on 26 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By an ET1 presented on 8 March 2018, the claimant brought complaints of automatically unfair dismissal by reason of making a protected disclosure, detriment on the ground of making a protected disclosure ("whistleblowing detriment"), direct race discrimination and wrongful dismissal.

2. The claimant brought additional complaints of whistleblowing detriment and direct race discrimination by a second ET1 presented on 13 November 2018. These covered some of the same allegations in the first ET1. The complaints in this second ET1 were brought out of time.

3. At a preliminary hearing on 3 April 2019 Employment Judge Goodman allowed the claimant to amend the first claim and agreed, in the alternative, that it would be just and equitable for the second claim to proceed.

4. The respondent resisted these complaints.

The issues

5. The issues that we were required to determine which were set out in EJ Goodman's Order dated 5 April 2019 were amended during the hearing following discussion with the parties, and are as follows:

Protected disclosures (sections 43A – H & 47B of the Employment Rights Act ("ERA"))

1.1 Did the claimant make any or all of the protected disclosures within the meaning of section 43B ERA, upon which he relies? The claimant relies on the following disclosures:

1.1.1 Complaint about Ms Barber's text of 8 January 2017 as a danger to the claimant's health and breach of a legal obligation, made by text on 8 January 2017 ("PD 1.1") and by email on 9 January 2017 ("PD 1.2"), 21 May 2017 ("PD 1.3") and 15 September 2017 ("PD 1.4).

1.1.2 Complaint that Ms Barber had left her shift early, as a danger to the claimant's health and breach of a legal obligation, in emails on 16 & 17 September 2017 (PDs 2.1 & 2.2).

1.1.3 Complaint that Ms Barber had docked his wages for late arrival on 15 September 2017 as a breach of a legal obligation, in an email on 18 September 2017 ("PD 3").

1.2 The respondent accepts that these were disclosures of information. Although this was not a concession that the information which was disclosed by the claimant tended to show that there had been a relevant failure under section 43B(1) (a) – (f) ERA, with the exception of PDs 1.3 & 1.4, insofar as they related to the claimant's health and safety.

1.3 In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

1.3.1 Ms Barber had failed to comply with a legal obligation to which she was subject.

a. In respect of PDs 1.1 – 1.4 the claimant contends that his complaint was that Ms Barber had failed to comply with the following HR policies: Rules of Conduct; Mobile Device User Policy; and the Bullying and Harassment Policy.
b. The claimant did not state what the legal obligation was in respect of PDs 2.1 & 2.2.
c. In respect of PD3 the claimant contends that his complaint was that there was a breach of his right not to suffer unauthorised deductions.

1.3.2 The health and safety of the claimant had been put at risk by Ms Barber's abusive communication (text of 8 January 2017)

when she left work early (on 16 & 17 September 2017) and her vindictive action (steps taken on 15 & 16 September 2017 to dock his wages). The respondent accepts that the claimant had a reasonable belief that PDs 1.3 & 1.4 conveyed information that Ms Barber's text had endangered his health.

1.4 If so, did the claimant reasonably believe that the disclosure was made in the public interest?

1.5 If the protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that:

1.5.1 He was criticised for complaining about Ms Barber's text and dissuaded from pursuing it under the grievance policy on 26 January 2017.

1.5.2 He was told at a mediation meeting that his complaint did not merit a formal grievance under the procedure on 24 March 2017.

1.5.3 He was cautioned not to pursue the complaint about Ms Barber on 17 May 2017.

1.5.4 Ms Barber docked his wages for late arrival and the Area Manager upheld her decision on 17 September 2017.

1.5.5 He was demoted and given a more severe reprimand than Ms Barber on 2 November 2017.

<u>Direct discrimination on grounds of race (section 13 of the Equality Act 2010 ("EQA"))</u>

1.6 Has the respondent subjected the claimant to the following treatment falling with section 39 EQA?

1.6.1 He was given a severe reprimand.

1.6.2 This severe reprimand was for 4 years.

1.6.3 These sanctions were only reduced to a reprimand for 12 months on appeal.

1.7 The respondent accepts that this amounts to less favourable treatment when compared with Ms Barber who is White and British.

1.8 Has the claimant proved primary facts from which the tribunal could properly and fairly conclude i.e. on the balance of probabilities that the difference in treatment was because of the protected characteristic of race i.e. his Indian origin and ethnicity?

1.9 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven discrimination?

Unfair dismissal (sections 95, 98 & 103A ERA)

1.10 Was the claimant dismissed?

1.11 If so, has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

1.12 Has the respondent proved its reason for the dismissal, namely that the claimant's conduct with regard to the dispute with Ms Barber breached the Code of Conduct and was detrimental to the efficient operation of the station?

1.13 The respondent concedes that if the claimant was dismissed then this dismissal was unfair for the purposes of section 98(4) ERA.

Wrongful dismissal

1.14 Did the respondent breach the claimant's contract in that it:

1.14.1 Dismissed him without notice?
1.14.2 Failed to follow the Disciplinary Policy when it dismissed him?

1.15 The respondent also concedes that if the claimant was dismissed then this was a wrongful dismissal as it was without notice.

Jurisdiction (time limits / limitation)

1.16 The claimant commenced early conciliation on 11 January 2018 and the early conciliation certificate is dated 8 February 2018. Accordingly, any complaint about an act or omission which took place before 12 October 2017 is potentially out of time so that the tribunal may not have jurisdiction to consider it. This affects the claimant's complaints of whistleblowing detriment that are alleged to have taken place between 26 January – 17 September 2017.

1.17 Does the claimant prove that any of these detriments formed part of a series of acts or failures?

1.18 If so, is the last date of that series in time?

The Evidence

6. For the claimant, we heard evidence from the claimant himself and John Hatcher, union representative.

7. For the respondent, we heard from: Emma Newman, Station Manager; Joan Fairbrass, Station Assistant (formerly Station Manager); Joe Healy,

Station Manager; Mo Uddin, Acting Area Manager; and Jerome Pacatte, Head of Customer Relations.

8. There was a hearing bundle which exceeded 700 pages. We read the pages in this bundle to which we were referred.

9. We also heard two audio recordings. We did not agree to admit into evidence audio-visual recording of interactions involving the claimant as we found that they were not relevant to the issues we were required to determine.

10. We considered the written and oral submissions made by both parties and the authorities they relied on.

The Facts

11. Having considered all the evidence, we made the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

12. The respondent is a train operating company which operates the Thameslink, Southern and Great Northern rail franchise in England.

13. The claimant who is of Indian origin and ethnicity has been employed by the respondent since 6 April 2009. He was employed initially as a Station Supervisor before his promotion in 2012 to Station Team Leader when he was based at St Pancras Station which is the flagship station on the Thameslink service. The claimant was one of five team leaders at this station, all of whom were line managed by Emma Newman, Station Manager.

14. As a team leader, save for the 12-hour Sunday shift, the claimant worked rotating shifts of 8.5 hours including a 30-minute handover period at the end of each shift. During each handover the incoming team leader completed a safe count in the ticket office together with the outgoing team leader and they were both required to verify the count. This handover process did not apply at the end of the 12-hour Sunday shift when there was no overlap between team leaders.

15. The team leader on duty was responsible for supervising customer service assistants ("CSAs"). There were 21 CSAs based at St Pancras and up to 7 CSAs were deployed on each shift.

16. The claimant was the team leader in charge of the shift on Sunday 8 January 2017 from 0700 – 1900. Vicky Barber, had been the team leader on the night shift. There was no handover between the claimant and Ms Barber between 0700 – 0730 as there should have been. The claimant therefore completed a safe count without Ms Barber. He found that the safe was down by approximately £17. He reconciled the monies. As the supervising team leader, the claimant was supplied with a work mobile telephone. He sent a text from this phone to Ms Barber's personal mobile phone to confirm that he had reconciled the safe monies. They then exchanged a short series of texts in which Ms Barber replied "Fuck Off!!

You just woke me up with that bullshit…" It was notable that in her evidence to the tribunal, Ms Newman described Ms Barber as being fiery and vocal about her feelings. The text she sent to Mr Khan was indicative of this.

17. Ms Barber forwarded the claimant's text to another team leader, Ciara Fraser. From Ms Barber's accompanying text it was clear to us that she treated the claimant's text as an accusation of theft. She told Ms Fraser that she would "dock" the claimant's wages when he was late for a shift. This was a reference to the fact that the claimant was often late into work, especially on Sundays because the time when his local underground station opened.

18. Ms Fraser and the claimant subsequently forwarded Ms Barber's texts to each other. The claimant also discussed Ms Barber's text with another team leader, Param Vivehanadha.

19. The claimant and Ms Barber made no attempt to resolve this between themselves.

PD1.1

20. The claimant forwarded his text exchange with Ms Barber, including Ms Barber's offensive text, to Ms Newman by text in which he made no reference to health and safety nor to any legal obligation. He relies on this as being a protected disclosure. The claimant also discussed this text with Ms Barber over the telephone. He does not rely on this telephone discussion as being a protected disclosure.

PD1.2

21. The next day, the claimant emailed Ms Newman when he complained that Ms Barber's text "was extremely unacceptable and I will not tolerate it…a colleague swearing the way she did is not acceptable". He asked for a written apology and noted "I will otherwise take this further". He did not refer to health and safety nor any legal obligation in this email which he relies on as being a protected disclosure.

22. In his evidence to the tribunal, the claimant said that he was not entirely aware that Ms Barber's text was in breach of any legal obligation and he agreed that at this stage his complaint was not made in the public interest.

23. The claimant says that Ms Barber's text breached the following HR policies:

    23.1 Rules of Conduct ("the Code of Conduct"): The purpose of these provisions "is to provide, without ambiguity, clear guidelines of the standards/conduct/performance/behaviour that all staff must adhere to during the course of employment with Govia Thameslink Railway (GTR)". Their scope "applies to all employees of GTR who undertake work on its behalf or represent it in any capacity". Section 4.1 requires employees, in the context of "personal conduct" to "Discharge the responsibilities of the position they have been employed for consistently and satisfactorily" (4.1.1) and "Relate

to/treat colleagues….with respect, dignity and professional courtesy…" (4.1.2). Section 4.11.7 requires that "Discretion is exercised in the type of messages…sent or circulated to other GTR employees, at work or outside of it; whether through the use of company or private mobile phones".

23.2 Mobile Device User Policy: This policy sets out the conditions applicable to the use of mobile devices and associated equipment allocated by the respondent to its staff.

23.3 Bullying and Harassment Policy: This policy "applies to all FCC employees…while they are at work…"

We found that the Code of Conduct applied to Ms Barber's text, particularly in light of section 4.11.7 read together with section 4.1. We found that the Mobile Devise User Policy was not applicable as it applied only to work mobile phones. Nor did we find that the Bullying and Harassment Policy applied because Ms Barber was not at work when she sent her text.

24. Although Ms Newman agreed that Ms Barber's text was unacceptable no formal action was taken. This is because she sought advice from Ody Nwankwo, HR Advisor, on 9 January 2017, who told her that no action could be taken because Ms Barber had sent her text using her own phone whilst she was off duty. In her evidence, Ms Newman accepted that it might have been different if the response had been explicitly discriminatory. Notably, when Jerome Pacatte, Head of Customer Relations, gave evidence, he said that it was likely that the offensive language in Ms Barber's text warranted a formal investigation and he was puzzled that no action had been taken. We agreed. The Code of Conduct instructed colleagues to treat each other with respect, dignity and professional courtesy. Ms Barber had objectively failed to do this when she sent her text to the claimant.

25. Ms Newman agreed that relationship between the claimant and Ms Barber deteriorated from the date of the offensive text. We found that had the respondent taken appropriate action to intervene, it is highly likely that the subsequent events which are the subject of these proceedings would have been avoided. However, the respondent's failure to take such action did not discharge the claimant from responsibility for his own conduct and in this regard his position as a team leader was highly relevant.

Meeting on 26 January 2017

26. Having relayed Ms Nwanko's advice to the claimant and Ms Barber, Ms Newman arranged a meeting between herself, the claimant and Ms Nwankwo on 26 January 2017 because the claimant was remained unable to accept the respondent's decision not to intervene. The claimant covertly recorded this meeting. We found that he took this step because he had lost trust in his managers by this date. The claimant was told that whilst Ms Barber's text was unacceptable it was not deemed to be work-related because she had responded using her personal phone in her own time. In what we found to be an ill-judged comment, Ms Newman emphasised this

view when she noted "she was in her home and so she can say whatever the hell she wants".

27. We found that it was likely that an apology would have resolved this issue at this stage. Notably, during this meeting the claimant had warned "She has said F-off to me and I'll be happy to see her whenever she comes into work?" It should have been clear from this animosity would persist unless the respondent intervened. The claimant was warned that if this issue escalated into a dispute it could lead to disciplinary action. This is precisely what happened. He was also told to ensure that a manager was present if he needed to speak to Ms Barber during handover. This was not dealing with the root cause of the animosity.

28. The claimant complains that he was criticised at this meeting for complaining about Ms Barber's text. We found that none of the comments recorded in the transcript or audio recording amounted to criticism of the claimant for complaining about this text.

29. The claimant also complains that he was dissuaded at this meeting from pursuing a grievance. This is not what the record of this meeting shows. There was no reference to a grievance or the grievance procedure at this meeting. The claimant relies on the tonal quality and body language which he says left him feeling that he should not pursue this complaint. This was not evidenced by the audio recording we heard. The claimant was told that formal action could not be taken *by the respondent* against Ms Barber. Whilst the claimant was likely to have felt discouraged by this we did not find that he was dissuaded from pursing a grievance.

30. We accept Ms Newman's evidence that after this meeting on 26 January 2017 the claimant's attitude hardened. He ignored Ms Barber and they both acted in an unprofessional manner in relation to each other.

31. On the same date i.e. 26 January 2017 Ms Newman emailed the team to reintroduce and reinforce the requirement for team leaders to complete the safe count during the handover period. This exacerbated the conflict between the claimant and Ms Barber as it meant that they were required to conduct a safe count together at handover. The claimant estimated that they would handover to each other at least ten times each month.

32. Ms Barber emailed Ms Newman on 17 February 2017 to complain that the claimant had not completed a safe count or handover with her for the second consecutive day. She emailed Ms Newman again on 1 March 2017 to complain about the same conduct when she also noted that the claimant had ignored her in front of colleagues. She asked Ms Newman to take action to stop him humiliating and undermining her.

33. Ms Newman did not witness this behaviour. She accepted Ms Barber's complaints at face value. She trusted her team leaders. We found that she also treated the claimant's verbal complaints about Ms Barber in the same way. It was clear that the hostility between the claimant and Ms Barber was escalating. We have already noted Ms Newman's evidence that Ms Barber was fiery and vocal. She also said that the claimant was placid. However, it was evident that the claimant was also proud and stubborn, and he was adamant that Ms Barber should apologise to him, even she

had to be made to do so. Ms Newman tried to placate two very different but equally strong-minded individuals. Her instinct was to resolve this conflict by informal means. She discussed this with another colleague, Joan Fairbrass, then Station Manager, and they agreed to set up a mediation meeting.

Mediation meeting on 24 March 2017

34. The claimant and Ms Barber were instructed to attend an informal mediation meeting with Ms Newman and Ms Fairbrass on 24 March 2017. The claimant covertly recorded this meeting.

35. This meeting failed to address the source of conflict between the claimant and Ms Barber. The claimant said he wanted a written apology or he would take matters further. Ms Barber refused to apologise. In her evidence to the tribunal, Ms Fairbrass said that Ms Barber had a smirk on her face when she was asked if she was prepared to apologise. Echoing Ms Newman's evidence, Ms Fairbrass described Ms Barber as a strong and forceful woman. Because of this no further attempt was made to explore whether she was prepared to apologise. Ms Barber said that it was too late for an apology because of the way that the claimant had reacted to her text i.e. he had not tried to discuss this with her but had reported her to Ms Newman and because of his subsequent conduct towards her. The claimant was again told that the respondent could not take any action because Ms Barber had sent her text whilst off duty. The claimant explained that the impact of the text on him related to his cultural upbringing although he did not explain what this meant.

36. Although Ms Barber said very little during this meeting, both managers agreed that she was prepared to move on whereas the claimant was not. Notably, Ms Barber said that she wanted to be professional, whereas, the claimant, was adamant that an apology was required when it was clear that one would not be forthcoming and he remained unwilling to accept that the respondent would not take any action about the offensive text.

37. The claimant complains that he was told at this meeting that his complaint did not merit a formal grievance. We did not find this to be the case. The claimant made no direct reference to a grievance or the grievance procedure. He did refer to taking matters further twice and on neither occasion did his managers tell him he could not proceed with a grievance. The claimant relies again on tone and body language. He notes that Ms Barber agreed that this was an intimidating meeting for him and she felt sorry for him. From the audio recording it was clear that this was a difficult meeting. But we did not find that the claimant was told in words or tone that his complaint did not warrant a formal grievance.

38. Following this meeting Ms Nwankwo wrote to the claimant and Ms Barber when she confirmed that no action would be taken in relation to Ms Barber's text because the Code of Conduct did not apply. She reminded both that it was:

> "essential that you maintain a professional working relationship with each other and treat each other with both dignity and professional courtesy…going forward any demonstration of a fractured working

> relationship between you would not be tolerated. This is due to the fact that any such behaviour interferes with the workplace dynamic and as Team Leaders you should be setting an example to the rest of the Team."

Ms Nwankwo also cited section 4.1.2 of the Code of Conduct and emphasised:

> "Whilst in the workplace you are therefore requested to adhere to this policy, and are also reminded that failure to do so may result in disciplinary action being taken".

This made it clear that any further conflict between them was likely to result in disciplinary action.

39. We found that it was likely that by this date colleagues were aware of this conflict. There had been several occasions when the claimant and Ms Barber had failed to complete the safe count together which meant that other colleagues were required to complete and countersign the safe count during these handovers. It was also likely that these colleagues had witnessed other poor communication between these team leaders, including when the claimant had ignored Ms Barber. It was also likely that the claimant and Ms Barber continued to discuss this ongoing conflict with colleagues.

40. The day after this mediation meeting Ms Barber complained that the claimant refused to complete a safe count with her. She suggested a three-way meeting with James Gillett, Area Manager. Mr Gillett instead met with the claimant on 28 March 2017. The claimant was told that he was required to communicate and maintain a professional relationship with Ms Barber. Mr Gillett suggested that the claimant took a holiday.

41. The claimant took four weeks' annual leave in April 2017.

42. Ms Barber emailed Ms Newman on 11 May 2017 to complain that the claimant had ignored her during a safe count. She complained that this was victimisation and a breach of the Code of Conduct. She also referred to a comment that the claimant had made that he was not prepared to "let it drop and was prepared to lose his job if necessary".

Discussion on 17 May 2017

43. Ms Newman spoke to the claimant about this on 17 May 2017. The claimant stood by his statement that he was prepared to lose his job over this issue. The claimant complains that Ms Newman warned him against pursuing a complaint against Ms Barber when she told him "Don't give her [Ms Barber] ammunition. I don't want you to lose your job". The claimant accepted that he was not explicitly cautioned by Ms Newman against pursuing a complaint. He said that this was the gist of what she said. He felt that he was being threatened. We did not find that this was a threat.

PD 1.3 – Grievance

44. The claimant was not in fact discouraged to proceed with a complaint and he submitted a grievance four days later in an email to Mr Gillett. He

referred to Ms Barber's refusal to apologise for her offensive text and the respondent's decision that the Code of Conduct did not apply. He also complained that Ms Barber had tried to turn colleagues against him. He referred to his recent discussion with Ms Newman. The claimant relies on this as being a protected disclosure in respect of his complaint about the offensive text. He did not refer to any legal obligation in his email. He did refer to the impact this issue was having on his health. Mr Gillett acknowledged this grievance on 23 May 2017 when he told the claimant that he was awaiting guidance on how to proceed.

45. In the meantime, Ms Barber emailed Ms Newman on 12 June 2017 to submit a grievance against the claimant with reference to the Code of Conduct. She complained about the claimant's refusal to communicate during handovers. She referred to "ongoing unprofessional behaviour" although she did not specify what this was. The claimant says that this was a sham grievance. We did not agree. We found that Ms Barber's grievance was entirely consistent with the complaints she had made repeatedly since February 2017. Ms Newman replied the next day to acknowledge this grievance.

46. The claimant emailed Mr Gillett for an update and they arranged to meet on 28 June 2017 when the claimant was told about Ms Barber's grievance. We accepted the claimant's evidence that Mr Gillett referred to this as a "defensive" grievance but found that in doing so Mr Gillett was explaining Ms Barber's motivation for bringing this grievance and not suggesting that Ms Barber's grievance was vexatious or misconceived.

47. Mr Gillett emailed Ms Newman and John Hatcher, the claimant's union representative, the next day to confirm that he had invoked the formal stage of the Grievance Procedure.

48. Overall, we found that the respondent dealt consistently with these respective complaints. The claimant had complained about Ms Barber since January 2017 and submitted his grievance on 21 May 2017. Ms Barber had complained about the claimant since February 2017 and submitted her grievance on 12 June 2017. Both grievances were acknowledged without delay. The delay between the date of the claimant's grievance and when Mr Gillett invoked the formal stage of the Grievance Policy was explained by the delay in arranging a meeting with the claimant.

49. On the same date, 29 June 2017, the claimant wrote to Mr Gillett to say that he was not comfortable working with Ms Barber. He said that his main concern was to protect himself from vexatious allegations from her. He also referred to advice from Mr Hatcher that the Grievance Procedure required this. It did not. The claimant and Ms Barber were required to continue to work together whenever their respective shifts crossed over.

50. The claimant emailed Mr Gillett on 2 July 2017 to complain that Ms Barber had not completed the safe count with him.

51. Bill Hamilton, Station Manager, was assigned to investigate both grievances. He wrote to the claimant and Ms Barber on 4 July 2017 to invite them to separate grievance hearings on 6 July 2017.

52. The claimant's evidence was that he did not read the respondent's HR policies until he was taken through them by Mr Hatcher. He said this is when Mr Hatcher told him that Ms Barber's text was in breach of the Code of Conduct. Although Mr Hatcher was unable to recall when he discussed these policies with the claimant, we accepted his evidence that it was likely to have been when they met to prepare for the hearing on 6 July 2017. The claimant was not therefore aware of the contents of these HR policies before this date.

Grievance investigation

53. The claimant was interviewed by Mr Hamilton on 6 July 2017 when he was accompanied by Mr Hatcher. The claimant made several comments at this hearing which confirmed that there was ongoing antagonism between himself and Ms Barber, and which also showed that this was impacting on colleagues at the station. He complained that he had been expected to move on in relation to Ms Barber's offensive text. He also complained about her text to Ms Fraser on 8 January 2017 in which he felt she was trying to bully and gang up on him. He told Mr Hamilton that he would have punched Ms Barber had she been a man. He said that he had kept his interaction with Ms Barber to the "bare minimum". He also noted that the "whole atmosphere has become disruptive". We found that this was connected to the breakdown in his working relationship with Ms Barber. The claimant remained hostile and uncommunicative towards Ms Barber. Both had complained that the other was not completing safe counts with them. Ms Barber had also complained that the claimant ignored her. Notably, when Ms Newman was interviewed by Mr Hamilton she said that they had ignored each other.

54. When asked about the impact on his health he said that he was "a bit better now but the first few months he was very upset" and "alright" now.

55. The claimant accepted in his evidence to the tribunal that the basis of Ms Barber's grievance was put to him during this interview. The record shows that Mr Hamilton referred to section 4.1.2 of the Code of Conduct and specifically "employees must treat each other with respect".

56. Mr Hamilton interviewed Ms Barber on the same date. She then forwarded several emails to Mr Hamilton in which she had complained about the claimant.

57. The grievance investigation was delayed. On 24 August 2017 Mr Hamilton wrote to Ms Nwankwo when he referred to his workload. He also summarised his view to date as follows:

> "I am seeing two rather spiteful individuals making no effort to resolve the situation or work together. I get the impression that the booking office is in two 'camps' and depending on who may be asked they will probably show allegiance to the one they get on with".

He also went on to note:

> "I agreed to do it [the investigation] thinking it would be straightforward, it turns out to be a long standing situation that has not been managed and allowed to deteriorate to the point it's at now".

58. Mr Hamilton interviewed Ms Newman on 4 September 2017. Ms Newman said that the claimant was often late and she had spoken to him about this. She said that this did not become an issue until safe counts were reintroduced. She felt that the claimant's response to Ms Barber's text was connected with his pride. Mr Hamilton agreed that Ms Newman's hands were tied. He therefore accepted the erroneous view that the Code of Conduct did not apply to Ms Barber's text.

59. Mr Hamilton wrote to the claimant and Ms Barber on 12 September 2017 to ask for examples of when the conduct of the other during shift handovers had impacted on their work or colleagues.

PD 1.4

60. The claimant replied on 15 September 2017 to ask "how can a Team Leader say F…* Off to a colleague (Team Leader) on an official phone about an issue regarding work & the company does not reprimand her what sort of a precedence is it setting". He referred to the impact on his health but made no reference to any legal obligation in this email. In his evidence, he said that he was raising a wider employee welfare and safety issue although this was not patent from his email.

Docking the claimant's wages

61. The claimant arrived 20 minutes for late for work on 15 September 2017. There had been a terrorist incident seven hours earlier at 0820 at Parsons Green tube station which was the claimant's local station. The entire area had been on lock down and this incident had caused chaos to the transport infrastructure. Ms Barber was working the early shift. She was unhappy because the claimant was late and he had ignored her when he started his shift. She was very insistent that Ms Newman docked his pay by 20 minutes. Ms Newman agreed to do this.

62. Pay alterations were usually completed by the team leader on the night shift and reviewed by Ms Newman before they were processed by payroll. When Ms Barber came in to work the next day she saw that an alteration had not been completed overnight for the claimant's pay. She therefore completed the paperwork herself to dock his pay by 20 minutes. We found that Ms Barber took this action because of the claimant's ongoing conduct i.e. he had been late again – she had already threatened to dock his pay for this reason, on 8 January 2017 – and because he had ignored her when he came on shift.

63. Ms Newman sanctioned this decision. In her evidence, she said that the claimant had a history of poor timekeeping and there had been adequate time for him to have made alternative travel arrangements. She agreed that relations between the claimant and Ms Barber had become inflamed and Ms Barber was angry. She also acknowledged that there were

sensitivities around the reasons for the claimant's delay i.e. the terrorist incident. Ms Newman felt that she had to sanction this alteration once Ms Barber had intervened. This episode demonstrated the escalating animosity between the claimant and Ms Barber as well as the failure of Ms Newman to intervene.

PDs 2.1 & 2.2

64. The claimant wrote to Mr Gillett, Ms Newman and Mr Hamilton on 16 & 17 September 2017 to complain that Ms Barber had left her shift early without completing the handover with him. He complained that he was the only one that was expected to behave professionally. The claimant relies on these complaints as protected disclosures. Neither email referred to his health nor any legal obligation. In his evidence, the claimant agreed that in making this complaint he wanted the respondent to take action against Ms Barber.

PD3

65. The next day i.e. 18 September 2017 Ms Vivehanadha told the claimant about the alteration to his pay. He felt humiliated and victimised. He wrote to Mr Gillett to complain that Ms Barber had docked his wages without authority. He also complained that Ms Barber had not been treated in the same way when she had repeatedly left work early. He said that he felt that this was a personal vendetta. He referred to the impact on his health. He did not refer to a legal obligation. The claimant relies on this email as a protected disclosure.

Upholding the decision to dock the claimant's wages

66. Mr Gillett replied when he upheld the decision to dock the claimant's wages. We found that Mr Gillett took this decision because he concluded that with over six hours between the time of the terrorist incident and the start of his shift, the claimant had had enough time to get to work on time. He also felt that as a team leader the claimant was required to demonstrate resilience.

67. The claimant responded to complain about the unfairness of this deduction and the lack of clarity around Ms Barber's authority to dock his pay. He does not rely on this as a further protected disclosure. The claimant's wages were not in fact docked for reasons which were not explained to us.

Grievance outcome

68. Mr Hamilton wrote to the claimant on 1 October 2017 to confirm that his grievance complaints were "somewhat founded" due to "Your attempts to communicate with" Ms Barber. He recommended formal action be taken against Ms Barber. He also recommended that the claimant face misconduct charges under the Disciplinary Policy on the ground of "Failure to fulfil your duties as a Team Leader". No further details were given. The claimant was told that there would not be a grievance outcome hearing because of the ensuing delay and the case would now proceed to the "next stage of formal action" i.e. under the Disciplinary Policy. This letter

did not refer to any right of appeal. It was clear from this letter that the respondent had concluded the grievance process and initiated the disciplinary process.

69. Mr Hamilton also wrote to Ms Barber in similar terms. He confirmed that her grievance had been "established to a degree" although in her case he found there were three grounds for this: "Your effort to work together"; "your attempts to communicate" with the claimant; and the claimant's "overall behaviour towards you and his failure to communicate effectively". He also confirmed that he had recommended formal action against both team leaders under the Disciplinary Policy.

70. Both letters noted that this formal action would be processed by Joe Healy, Station Manager. Mr Hamilton's recommendations had therefore been accepted by HR and Mr Healy had been assigned by Ms Nwankwo as disciplinary officer for both the claimant and Ms Barber.

Grievance report

71. In his combined report which dealt with both grievances, Mr Hamilton found:

> "during the investigatory interviews both parties raised many complaints and concerns about each other and demonstrated a lack of desire to resolve the situation. Various pieces of evidence were submitted by both parties however most of it can be deemed to stem from ill feelings towards each other rather than any substantive material supporting a grievance, the rest can be attributed to them both failing to work together in a professional manner".

72. Mr Hamilton concluded that "without intervention the situation is likely to deteriorate further". He also concluded that the claimant and Ms Barber were unable to complete handovers in a "professional and courteous manner" in breach of the Code of Conduct although he did not specify in what way this had been breached; and that their working relationship was having a detrimental impact on the station and the "efficient operation of the station", again, he did not specify how. Having found that the text incident on 8 January 2017 was the "catalyst" for the ensuing conflict he concluded that this incident stemmed from a failure to follow Ms Newman's instruction on safe counts. However, Ms Newman had issued her instruction after this incident on 26 January 2017. We found that this confusion in relation to a crucial element in the timeline is illustrative of the broad-brush approach of Mr Hamilton's report. Nevertheless, we also found that there was sufficient evidence to conclude that the working relationship between the claimant and Ms Barber had broken down and this had impacted on the safe counts, their communication and team dynamics more widely.

73. Mr Hamilton also found that the issues between the claimant and Ms Barber had not been brought to management at the relevant time. This finding was contradicted by the texts and emails sent from the claimant and Ms Barber to Ms Newman included as appendices to the report. It was also contradicted by Ms Newman's evidence to us that both Ms Barber and the claimant had raised these issues when they had

happened. It is notable that in concluding this, Mr Hamilton omitted to make any findings about the respondent's failure to intervene. Given his comments on 24 August 2017 i.e. that this was "a long standing situation that has not been managed and allowed to deteriorate to the point it's at now", with which we agreed, we concluded that this was a deliberate omission which had the effect of placing the blame squarely on the claimant and Ms Barber and ignored the critical failure of management and HR to intervene and manage this issue, and their culpability, to some extent, for the ensuing conflict. The mediation meeting in March 2017 was the only intervention made by the respondent to manage this conflict which had been allowed to persist for more than eight months.

74. In addition to charging both team leaders with misconduct, Mr Hamilton recommended that they were separated either by changing their shift patterns or by relocation. These recommendations were made on the basis of his finding that the claimant and Ms Barber were "incapable of working together". We find that Mr Hamilton recommended that such action was taken in addition to any disciplinary sanction that was applied. These recommendations were not included in the individual reports which Ms Nwankwo instructed Mr Healy to send to the claimant and Ms Barber.

Disciplinary process

75. The respondent's Disciplinary Policy provides for a three-stage formal process.

    75.1 Under stage 1, the formal process begins when a supervisor / line manager appoints an investigating officer; where it is found that there is a case to answer the investigating officer issues a Form 1, also known as a "charge sheet" containing a brief summary of the misconduct alleged or the disciplinary offence committed; the employee is required to acknowledge this by signing a Form 1 Receipt. These standard form documents are set out in the Disciplinary Policy.

    75.2 Stage 2 centres on the disciplinary hearing and outcome: a disciplinary hearing is chaired by the employee's supervisor / line manager or another manager; the outcome of this hearing confirmed in a Form 2 issued to the claimant.

    75.3 The appeal hearing takes place under stage 3.

76. The Disciplinary Policy sets out the following examples of "penalties for disciplinary offences…

> Reprimand [i.e. a first written warning]
> Severe reprimand [i.e. a final written warning]
> Suspension from duty/work (with loss of pay)
> Downgrading (i.e. demotion from grade/position)
> Transfer of position to another site
> Curtailment/withdrawal of travel facilities
> Dismissal"

77. The claimant's contract also provided:

> "FCC reserves the right to suspend you at any time, with pay, whilst investigating any disciplinary matter or for a health and safety reason and/or to suspend you without pay and or to demote you with reduced remuneration as a disciplinary measure".

78. Mr Healy treated Mr Hamilton's report as the disciplinary investigation report.

79. He wrote to the claimant on 11 October 2017 to set out the following disciplinary charge on Form 1: "Failure to fulfil your duties as a team leader in the workplace". No other detail was provided. The claimant signed a Form 1 receipt in the presence of Ms Newman on the same date.

80. The claimant was invited to a "Form One Hearing" i.e. a disciplinary hearing on 2 November 2017. This letter did not refer to any of the potential outcomes for this hearing. Nor did it provide any further details of the disciplinary charge, although the claimant had by this date received Mr Hamilton's report.

Disciplinary hearing on 2 November 2017

81. The claimant attended the disciplinary hearing accompanied by Mr Hatcher. The record of this hearing was headed "Grievance hearing". We accepted that this was an administrative error. The claimant says that he understood that this was a grievance hearing. We did not find this to be credible. As we have found, by 1 October 2017 it was clear that the grievance process had ended and the disciplinary process initiated. The claimant had then received a Form 1, signed a Form 1 receipt and he had been invited to a Form 1 hearing, all of which made clear that the disciplinary procedure was being applied to him.

82. Although the claimant denied at this hearing that his conflict with Ms Barber impacted on colleagues, his own evidence contradicted this. The claimant complained that everyone knew that Ms Barber had sworn at him and he felt humiliated and that he was a laughing stock because no action had been taken. He said it was a matter of respect. In his evidence to the tribunal, the claimant said that colleagues were aware that he had taken a grievance against Ms Barber and there were at least two colleagues who supported the action he had taken. We found that this demonstrated that this had become a potentially divisive issue within the team. The claimant had already written to Mr Gillett to say he was uncomfortable working with Ms Barber. He had already told Mr Hamilton that the whole atmosphere in the station was disrupted. He had also told Mr Hamilton that he would have punched Ms Barber if she had been a man and when he was taken to this comment by Mr Healy, he reaffirmed this sentiment.

83. Mr Healy concluded that there was a poor working relationship between the claimant and Ms Barber and "this can have an effect on other colleagues". He relied on the claimant's admission / complaint that colleagues were laughing at him. Mr Healy therefore concluded that the claimant had not been completing his duties as a team leader. He did not specify what these were at the time but we accepted his evidence that he

concluded that the claimant had failed to discharge his duties in relation to the safe count, communication and creating the "right atmosphere". We found that these were the reasons for the disciplinary sanctions he applied to the claimant. We did not find that in doing so Mr Healy was influenced by the claimant's complaints about Ms Barber's text, her leaving work early or about the steps she had taken to dock his wages. His focus was on the claimant's conduct towards Ms Barber and the impact on their work environment.

84. Mr Healy only considered the sanctions of a severe reprimand and demotion. We accepted his evidence that he treated the disciplinary charge under consideration as a misconduct issue and not as serious or gross misconduct. He agreed that the allegations did not warrant the sanction of dismissal. He therefore felt that the sanction of dismissal was both distinct from a demotion and not warranted in the claimant's case.

85. Mr Healy decided that the claimant should be demoted. Mr Hamilton considered recommendations of rearranging shift patterns or relocation we found albeit cursorily. He concluded that rearranging shift patterns would have impacted on the rosters for other team leaders although the degree to which he scrutinised this was not clear to us. In any event, he did not canvass Ms Newman about its feasibility. In respect of relocation, Mr Hamilton's evidence was that there was only one other station which had team leaders i.e. Farringdon and it would have been unfair to relocate either the claimant or Ms Barber. He therefore disregarded this option.

86. Mr Healy also decided on a severe reprimand because he felt that a final warning was required to put an end to this issue. He felt that the claimant had taken a stand and a reprimand would not have been an effective sanction.

87. He discussed his decision with Ms Nwankwo during an adjournment by phone. A demotion by one grade meant that the claimant would move into the role of a CSA on RSA – GPR (i.e. general purpose relief) grade. This was one of the two CSA grades, the difference being that the higher RSA – GPR grade CSA could be deployed to other stations as and when required. Mr Healy and Ms Nwankwo looked at CSA vacancies at Farringdon and London Blackfriars stations.

Disciplinary outcome

88. Following the resumption of this hearing, Mr Healy told the claimant that he had decided to downgrade him to a CSA on RSA – GPR grade at Farringdon station. This was a permanent change. The claimant was told that this would take immediate effect.

89. The claimant was also told that he was being given a severe reprimand to remain on his file for four years. We accepted Mr Healy's evidence that in applying this sanction, he understood that this four-year duration was fixed so that he had no discretion to vary it. Although the Disciplinary Policy was silent on this, Mr Healy's view was consistent with the discipline module training materials we were taken to.

90. When questioned by Mr Hatcher, Mr Healy was unable to explain in what way the claimant had been found to have breached the Code of Conduct. Mr Hatcher referred to section 4.16.8 and Mr Healy then referred to section 4.1.2. This was the same section of the Code of Conduct which Ms Nwankwo had cited in her letter to the claimant and Ms Barber following the mediation meeting in March 2017. However, the fact was that Mr Healy had concluded that the claimant had failed to discharge his duties as a team leader which was how the disciplinary charge had been put on Form 1.

91. Although the claimant says that Mr Healy was acting on instructions and this decision was taken by Samantha Bowler, Acting Route Manager, and Mr Pacatte together with HR, we find that Mr Healy made this decision himself. We found Mr Healy was able to fully explain the rationale for the disciplinary sanctions that were applied to the claimant.

92. An outcome letter and Form 2 which were sent to the claimant the next day confirmed that the respondent had invoked the "penalty" of a downgrade to a RSA – GPR position at Farringdon station.

93. The respondent completed a change of employment form to this effect. A new statement of terms and conditions was issued to the claimant on 10 November 2017, effective from 3 November 2017. The claimant's continuous employment and related rights to annual leave, and occupational sick pay remained unaffected. The foot of this document contained the following signature clause "I accept the offer of employment with Govia Thameslink Railways Ltd and agree to the above contract terms". The claimant did not sign it.

94. The claimant was demoted from an autonomous team leader role which was a supervisory and leadership role and on the first rung of the management ladder to a CSA post without this status and with none of these responsibilities. He was also relocated from the flagship station on the Thameslink service to a smaller station with fewer staff. We accepted that working at St Pancras was a source of prestige and pride for the claimant.

95. Ms Barber attended her disciplinary hearing on 8 November 2017 when she was also downgraded to the role of CSA on RSA – GPR grade and transferred to Blackfriars station. She was given the lesser sanction of a reprimand to remain on her file for two years. The same training materials we were taken to also referred to a two-year duration for this level of warning. We find that Mr Healy understood that this was an automatic rule when he applied this sanction.

96. Mr Healy agreed that Ms Barber and the claimant were equally culpable for the breakdown in their relationship. However, he concluded that Ms Barber had made an effort and was willing to draw a line under the issue with the claimant and move on, whereas the claimant was not. We found that this was the reason why he applied a lesser reprimand to Ms Barber. When asked to substantiate this view, Mr Healy relied on the comments made by Ms Barber during her disciplinary hearing that "There is no ill feeling on her part" and "I wanted it resolved". This was fundamentally

different from the claimant's position as he remained unwilling to accept that no action would be taken against Ms Barber and he had stood by his comment that he would have punched Ms Barber had she been a man. We did not therefore find that the reason why the claimant was given a severe reprimand of four years' duration was because of his race. Nor do we find that Mr Healy was influenced by the claimant's complaints about Ms Barber's text, her leaving work early or about the steps she had taken to dock his wages.

Appeal

97. The claimant submitted an appeal in which he made no reference to protected disclosures. Nor did he assert that the disciplinary sanctions he was now appealing arose from his complaints about Ms Barber's text, her leaving work early or about the steps she had taken to dock his wages.

98. The claimant's appeal was heard by Mo Uddin, Acting Area Manager, on 29 November 2017 when the claimant was again accompanied by Mr Hatcher. Mr Uddin considered Mr Hamilton's report together with the records of both disciplinary hearings and the mediation outcome letters. He did not revert to Mr Healy. It is notable that when Mr Uddin asked the claimant if he had tried to resolve the issue with Ms Barber the claimant did not say that he had. He instead stated that he had acted professionally. He said that he could not accept the language in Ms Barber's text as he "cannot compromise his dignity as everyone has got certain standards in life and certain upbringing".

99. When Mr Uddin told him that it was permissible for one team leader to dock the wages of another team leader the claimant accepted this.

100. Mr Uddin confirmed that section 4.1.1 of the Code of Conduct applied to his misconduct charge. This provided that employees must "Discharge the responsibilities of the position they have been employed for consistently and satisfactorily".

101. Mr Uddin upheld Mr Healy's decision to downgrade the claimant. He concluded that the claimant had not fulfilled his duties as a team leader because he had not communicated with Ms Barber or competed the handover process with her. Mr Uddin found that the claimant had greater culpability for not following the handover process than Ms Barber. He also concluded that the claimant had not made any attempts to resolve the issue with Ms Barber. Like Mr Healy before him, Mr Uddin accepted Mr Hamilton's erroneous conclusion that when the claimant and Ms Barber had failed to complete the safe count on 8 January 2017 Ms Newman had already issued her handover instructions.

102. Because of the delay in the grievance process, Mr Uddin downgraded the claimant's severe reprimand to a reprimand and cognisant that the standard duration for a reprimand was two years he exercised his discretion to decide that this sanction would stand for a shorter 12-month period. It is notable that in his evidence to the tribunal, Mr Uddin said that he had only seen a two-prong sanction i.e. demotion and reprimand in more serious disciplinary cases and none in any other appeal hearing he

had chaired. This was therefore unusual in his experience although it was not impermissible.

103. The claimant says that this appeal decision was made collectively by Ms Bowler and Mr Pacatte, although he accepted that Mr Uddin had some input. We find that Mr Uddin made the decision himself. This is because Mr Uddin was able to explain in clear terms why he made his decision and there was no evidence of any involvement by these senior managers in this decision.

104. Ms Barber also appealed Mr Healy's decision and her appeal was heard by Mr Uddin on 7 December 2017. The outcome was that the demotion was upheld and the reprimand removed. Mr Uddin upheld the demotion as he concluded that Ms Barber had shown no remorse for her text which he found was wholly inappropriate and that, like the claimant, she had been indifferent about the impact of her poor working relationships on colleagues.

105. In one sense, Mr Uddin treated the claimant and Ms Barber in the same way: he upheld both demotions and he downgraded the reprimands by one level which had the effect in Ms Barber's case of removing the reprimand altogether. However, insofar that these appeal outcomes maintained the disparity between the claimant and Ms Barber, as the claimant was now the only one with a reprimand on his file in addition to a demotion, we found that Mr Uddin decided to remove Ms Barber's reprimand because he accepted that she, unlike the claimant, had made some small effort to resolve the conflict. Although this is not what his outcome letter stated – Mr Uddin had in fact written "There is clear evidence that you made no attempts to resolve the issues between yourself and Ameen" – we found that this was an oversight and error. We found that Mr Uddin accepted the representations made by Ms Barber's union representative at appeal that she had tried to communicate with the claimant and he had ignored her. He also felt that there were emails in the investigation report which demonstrated this. In contrast, Mr Uddin concluded that the claimant had not made any efforts to resolve this issue. As noted already, the claimant made no attempt to explain how he had tried to resolve this conflict at his appeal hearing. We do not therefore find that the difference in appeal outcomes was because of the claimant's race.

Claimant's return to work

106. The claimant returned to work until 4 May 2018 having been on sick leave in the intervening period. On 2 May 2018, the claimant's solicitors wrote to the respondent, on his behalf, to assert that he had been dismissed and to protest against what they viewed to be an imposition of a new contract. Although the claimant did not sign this new statement of terms and conditions he agreed that he accepted this new role by his conduct. He had continued to receive occupational sick pay since November 2017 with reference to the new CSA terms until his return to work whereupon he discharged the duties he was required to perform in this new role.

107. The salary set out in the new statement of terms and conditions was £21,946, which appeared to us to be a transcription error and was in fact £21,496, with reference to the relevant payslips. The claimant's basic salary in the team leader role was £23,327. This represented a 7.85% reduction to basic pay. We did not find that this was a significant difference. However, comparing the claimant's net salary in his final month as a team leader of £2,158.92 with his first full month's net salary as a CSA of £1,745.58 we calculated that there was a 19% reduction to his net earnings i.e. £413.34 which we found to be a significant variance. We accepted the claimant's unchallenged evidence that this variance arose from two factors: firstly, the shift patterns applicable to each role, with a greater requirement for night and weekend working in the team leader role and corresponding unsocial hours premia payments; and secondly, the greater availability of overtime at St Pancras than Farringdon which is a smaller station and operation with fewer staff and shifts. We also accepted the claimant's unchallenged evidence that because of the limited overtime available at Farringdon Station he was unable to offset the reduction in pay which meant that overall he was working more hours for less pay.

Relevant Legal Principles

Protected disclosure

108. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H ERA, where relevant.

109. Section 43B(1) ERA provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following six prescribed categories of failure:

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred is occurring or is likely to occur,
>
> (d) that the health and safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

110. Section 43L(3) ERA provides that where the information is already known to the recipient, the reference to the disclosure of information shall be

treated as a reference to bringing the information to the attention of the recipient.

111. A qualifying disclosure must accordingly have the following elements:

(1) It is a disclosure (taking account of section 43L(3), if relevant).

(2) It conveys information. This requires the communication of sufficient factual content or specificity to be capable of tending to show a relevant failure (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA). It may be possible to aggregate separate communications, but the scope is not unlimited and whether there has been a composite disclosure will be a question of fact for the tribunal (see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT). Where the failure is said to relate to a legal obligation, save in cases where the breach is patent (see Bolton School v Evans [2006] IRLR 500, EAT), the worker is required to have disclosed sufficient information to enable the employer to understand the complaint at the time the disclosure is made (see Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06).

(3) The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must have a subjective belief and this belief must be reasonable (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT). In making an assessment as to the reasonableness of the worker's belief that a legal obligation has not been complied with a tribunal must firstly identify the source of the legal obligation that the worker believes has been breached (see Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT).

(4) The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see Chesterton).

112. Whether the information amounts to a disclosure and whether the worker had a reasonable belief that this information tended to show a relevant failure must be considered separately by a tribunal but these issues are likely to be closely aligned (see Kilraine). If a statement has sufficient factual content and specificity such that it is capable of tending to show a relevant failure then it is likely that the worker's subjective belief in the same will be reasonable.

113. A qualifying disclosure is protected if it is made to the employer (section 43C ERA).

Protected disclosure – Detriment

114. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker made a protected disclosure.

115. Once it is has been established that a worker has made a protected disclosure and that he was subjected to a detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA).

116. The correct approach on causation is for the tribunal to consider whether the making of the detriment materially influenced, in the sense of being a more than trivial influence, the employer's treatment of the worker (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

Protected disclosure – Dismissal

117. Section 103A provides that a dismissal will be automatically unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure.

118. The employee must produce some evidence that the reason for the dismissal was that he had made a protected disclosure but once this evidential burden has been discharged the employer must prove the contrary (see Kuzel v Roche Products Ltd [2008] IRLR 530, CA).

Direct discrimination

119. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

120. The but for test "is not a rule of law but a rule of convenience depending on the circumstances of the case" (Nagarajan v London Regional Transport 1999 ICR 877, HL).

121. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

Discrimination – Burden of proof

122. Section 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

123. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination (see Madarassy v Nomura International plc [2007] ICR 867, CA).

124. Whilst a two-stage approach is envisaged by section 136 this is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

125. In exercising its discretion to draw inferences a tribunal must do so on the basis of proper findings of fact (see Anya v University of Oxford [2001] IRLR 377, [2001] ICR 847, CA).

126. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see Igen Ltd v Wong [2005] IRLR 258, para 51).

Dismissal

127. Section 95 ERA sets out the circumstances in which an employee is dismissed, this includes at section 95(1)(a):

> If the contract under which he is employed is terminated by the employer (whether with or without notice).

128. Where an employer refuses to employ an employee on the same terms and instead imposes new terms of a wholly different kind this may amount to a dismissal. This is a question of degree and fact for the tribunal (see Hogg v Dover College [1990] ICR 39; Alcan Extrusions v Yates [1996] IRLR 327).

129. The question is whether the new terms are so fundamentally different as to constitute a termination of the contract and offer of re-engagement under a new contract, as opposed to a variation of the same continuing contract. In Alcan Extrusions the EAT held that there will be a dismissal where the departure from the terms of an existing contract are “so substantial as to amount to a withdrawal of the whole contract”.

ACAS Code on Disciplinary and Grievance Procedures

130. In reaching their decision, tribunals must also take into account of the ACAS Code on Disciplinary and Grievance Procedures if relevant. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRA”), the Code is admissible in evidence

and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

Conclusions

Protected Disclosures

Issues 1.1, 1.3 & 1.4: Did the claimant make any protected disclosures?

131. The respondent conceded that each of the claimant's alleged disclosures amounted to a disclosure of information. Although this was not a concession that the information disclosed by the claimant tended to show that there had been a relevant failure under section 43B(1) (a) – (f) ERA, save for PDs 1.3 & 1.4, insofar as they related to the claimant's health and safety.

132. We found that none of the disclosures made by the claimant amounted to protected disclosures for the reasons set out below.

PDs 1.1 – 1.4

Legal obligation

132.1 The claimant says that in making these disclosures he was complaining that Ms Barber was in a breach of a legal obligation by reference to the following HR policies: Code of Conduct, Mobile Device User Policy and Bullying and Harassment Policy. We found that the information disclosed lacked sufficient factual content or specificity to enable the respondent to understand this complaint. This is because the disclosures did not refer to these policies nor was this patent.

132.2 We have found that the claimant did not read these policies before 4 July 2017 and he was not therefore aware of their contents before this date. We did not therefore find that the claimant had a reasonable belief that the disclosures he made before 4 July 2017 i.e. PDs 1.1 – 1.3 conveyed information that Ms Barber was in breach of a legal obligation to which she was subject.

132.3 By the date of his fourth iteration of this complaint (PD 1.4) on 15 September 2017, the claimant had read these policies and been advised by Mr Hatcher that they applied to Ms Barber's text. We have already found that the Code of Conduct was apt to apply. We accept that by this date the claimant understood that the Code of Conduct gave rise to legal obligations to which Ms Barber was subject. We found that he had a reasonable belief that this disclosure conveyed information that Ms Barber was in breach of a legal obligation to comply with the Code of Conduct.

Health and safety

132.4 PDs 1.1 & 1.2 make no reference to health and safety and we found that the information disclosed by them lacked the content capable of tending to show that Ms Barber's text had put the claimant's health and safety at risk. For the same reason we also found that the claimant lacked the subjective belief that they did; and had we found that the claimant had a subjective belief we would have found that this was not reasonable.

132.5 The respondent accepted that the claimant had a reasonable belief that PDs 1.3 & 1.4 conveyed information that Ms Barber's text had endangered his health and safety. Although the claimant says that PD 1.4 also raised a wider employee welfare and safety issue, we do not find that it did. There was no reference to any wider welfare and safety issues in the information disclosed by the claimant.

Public interest

132.6 Reminding ourselves that PDs 1.1 – 1.4 were about Ms Barber's text we found that they amounted to a complaint of a private nature between two work colleagues and did not have any of the public interest indicia set out in Chesterton. For this reason, we found that whilst the claimant had a subjective belief that PDs 1.3 & 1.4 were made in the public interest insofar as they related to his health and safety – unlike PDs 1.1 & 1.2 which he agreed were not in the public interest – this belief was not reasonably held.

PDs 2.1 & 2.2

Legal obligation

132.7 In both of these disclosures the claimant complained that Ms Barber had left work early. Neither disclosure referred to a legal obligation. Nor was any breach patent. We therefore found that the information disclosed by the claimant was not sufficient to enable the respondent to understand which legal obligation he was complaining Ms Barber had breached, at the time when he made this disclosure. It is notable that in his witness statement the claimant referred to a "breach of rules by an employee" but he did not identify the specific legal obligation that he says Ms Barber breached. Nor was he able to clarify this during the hearing. We therefore found that the claimant lacked a subjective belief that these disclosures conveyed that Ms Barber was in breach of a legal obligation to which she was subject; and had we found that the claimant had such a subjective belief we would have found it was reasonably held.

Health and safety

132.8 Neither disclosure referred to health and safety. Nor was this patent. We therefore found that these disclosures did not tend to show that by leaving work early, Ms Barber had put the claimant's health and safety at risk. Nor did we find that the claimant had a subjective belief that it did; and had we found such a subjective belief we would have not found that this was reasonable.

Public interest

132.9 For completeness, had we been required to make findings on this, we would have found that the claimant's subjective belief that these disclosures were made in the public interest was not reasonably held. In both of these disclosures the claimant was complaining about inconsistency of treatment between himself and Ms Barber. His complaints were of a private nature concerning an ongoing dispute between two employees.

132.10 The claimant agreed that in making this complaint he hoped that the respondent would be prompted to take action against Ms Barber. Whilst this related more directly to the claimant's motivation than his belief, these two factors are not automatically mutually exclusive and we would have found that the claimant's motivation emphasised the private nature of his complaint and of the information he disclosed.

PD3

Legal obligation

132.11 The claimant says that in making this disclosure he was complaining that the respondent, through Ms Barber, was breaching his right not to suffer unauthorised deductions from his wages. We found that the information disclosed was capable of showing this and the claimant's subjective belief that it did was reasonable. Whilst the claimant accepted that he had been late for work on 15 September 2017, his complaint was that Ms Barber was not authorised to deduct his wages in the circumstances. Although the claimant subsequently accepted Mr Uddin's clarification on 29 November 2017 that this was a permissible deduction we accepted that this was not his belief when he made his disclosure on 18 September 2017.

Public interest

132.12 Although we found that the claimant had a subjective belief that this disclosure was made in the public interest we did not find that was reasonably held. The claimant was again complaining about inconsistency of treatment. He also alleged that this was a personal vendetta. This was a further complaint concerning

his ongoing dispute with Ms Barber which patently did not raise any public interest issues.

133. The complaints of whistleblowing detriment and automatically unfair dismissal by reason of making a protected disclosure therefore failed.

Race Discrimination

Issue 1.8: Has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of race?

134. The respondent conceded that the initial sanction of a severe reprimand for four years and the reduction of this at appeal to a reprimand for 12 months amounted to less favourable treatment when compared to Ms Barber.

135. We have found that race played no part whatsoever in this treatment.

135.1 We found that the reason why Mr Healy applied these different sanctions was because he concluded that Ms Barber was willing to repair the working relationship with the claimant whereas he was not. He felt that a severe reprimand was necessary because of the length of time the claimant had been complaining about the text and he felt that a final written warning was more likely to have the desired effect of bringing this issue to a close. We accepted that these were his reasons to applying this sanction. Mr Healy understood that he did not have discretion to apply this sanction for anything other than four years so that this flowed automatically from his decision to apply a severe reprimand.

135.2 We found that Mr Uddin downgraded the claimant's sanction to a reprimand for 12 months whereas he removed Ms Barber's reprimand because he concluded that Ms Barber had made some small effort to resolve this dispute whereas the claimant had made none at all. We accepted that this was his view notwithstanding his letter to Ms Barber to the contrary.

135.3 For completeness, applying the burden of proof provisions, we found that the claimant had not provided facts from which we were able to conclude, on a balance of probabilities, that the reason for the less favourable treatment was because of his race.

136. The race discrimination complaint therefore failed.

Unfair Dismissal

Issue 1.10: Was the claimant dismissed?

137. For the respondent, Mr Livingston submitted, citing Roberts v West Coast Trains [2014] IRLR 788, CA, that where an employee's contract permits an

employer to impose a demotion as a disciplinary sanction this does not amount to a termination of the existing contract (and formation of a new one) but the continuation of the same contract. We did not agree. The logic of this proposition is that any demotion sanctioned under an employee's contract can never amount to a dismissal. We also found that Roberts in which the central issue was one of jurisdiction to bring an unfair dismissal complaint was distinguishable from the present case. It was also notable that Roberts did not refer to Hogg and we did not find that it impacted on the general rule of application arising from Hogg.

138. For the claimant, Mr Singh relied on Hogg to submit that the effect of a substantive change of contract would amount to a dismissal. Whilst we agreed that we were bound by Hogg we did not agree that *any* substantive change amounted automatically to a dismissal. Whether a demotion produces this result in law must depend on the relevant facts in each case and particularly the extent of the demotion and its duration. The central question was whether the new terms which the employer purported to impose upon the employee entailed a sufficient departure from the original terms to constitute a dismissal. Whether those terms were imposed pursuant to the contract or in breach of it was not relevant to our analysis at this stage, although that would be a highly relevant consideration to whether the dismissal was unfair or wrongful.

139. We found that the claimant was dismissed by the respondent within the meaning of section 95(1)(a) ERA when through Mr Healy, it imposed the disciplinary penalty of a demotion / downgrade by giving him notice that he would be removed forthwith as a team leader and placed on the CSA role. This amounted to a dismissal from the claimant's old contract and the offer of re-engagement on a new contract. This offer was accepted by the claimant by his subsequent conduct in attending for work, on 4 May 2018, and thereafter discharging his duties in this new role. The dismissal took effect on 3 November 2017.

140. We found that this was a fundamental and substantial change which had the effect of withdrawing the whole contract for the following reasons:

    140.1 There was a substantial reduction in status and responsibilities. Although inevitable on demotion, we found that there was a two-fold and significant reduction in status. The claimant was demoted from an autonomous team leader role which was a supervisory and leadership role and on the first rung of the management ladder to a CSA post without this status and with none of these responsibilities. A second factor relating to status was his relocation away from the flagship station on the Thameslink service to a smaller station with fewer staff. As we have found, working at St Pancras had been a source of pride to the claimant.

    140.2 There was a significant reduction in pay. Whilst the difference in basic pay was not significant, we found that the difference in the claimant's overall pay, taking account of unsocial hours premia was. As we have explained above we found that there was a 19% reduction in net loss of earnings. This was also likely that this would have impacted on the pension contributions made by the

respondent. The claimant had to work overtime to offset some of the loss. The fact that he was required to work more hours of work for less pay is illustrative of this substantive deficit in his pay. We have found that the differences in overall pay and in earning potential related to the shift patterns applying to each role and the greater availability of overtime at St Pancras than Farringdon. This reduction in pay was therefore related to both the claimant's demotion into the CSA role and his relocation.

140.3 The demotion was permanent.

141. The respondent quite properly conceded that if we found that it dismissed the claimant then this dismissal was unfair. This was because of Mr Healy's evidence that he did not consider the claimant's alleged misconduct to warrant the sanction of dismissal.

142. The unfair dismissal complaint therefore succeeded.

Wrongful Dismissal

143. The respondent also conceded that we found that there was a dismissal then this was a wrongful dismissal on the basis that the claimant was dismissed without notice.

144. For completeness, we did not find that the claimant's second ground for asserting that he was wrongfully dismissed i.e. that the respondent failed to apply the Disciplinary Policy when it dismissed him was well-founded. This is because we found that the respondent applied the Disciplinary Policy when it dismissed him.

145. The wrongful dismissal complaint therefore succeeded.

REMEDY

<u>Unfair dismissal</u>

Reinstatement

146. We accepted the respondent's evidence that there were currently no vacancies for the position of Team Leader. The two team leader roles vacated by the claimant and Ms Barber were filled in Spring 2018 and in September 2018. Although the claimant relied on section 116(5) ERA, we agreed with the respondent that this provision was superseded by section 115(6) ERA which applied in these circumstances. This was because:

146.1 We accepted that it was not practicable for the respondent to arrange cover for the team leader roles vacated by the claimant and Ms Barber on an ongoing temporary basis. The nature of these supervisory roles meant that there was an operational need for the respondent to find permanent replacements.

146.2 We have found that the claimant was dismissed on 3 November 2017. We found that in engaging permanent replacements for the

Team Leader roles in Spring 2018 and August / September 2018 there was a lapse of a reasonable period.

146.3 The claimant did not apply for either vacancy.

146.4 Given the length of time which elapsed between the date of the claimant's dismissal and the dates when the respondent engaged replacements into both team leader roles we found that it was no longer reasonable for the respondent to have arranged for these supervisory roles to be done except by a permanent replacement.

147. We therefore made no order for reinstatement.

Re-engagement

148. We made no order for re-engagement because the claimant did not identify any alternative roles that were currently available.

Contributory conduct

149. We reminded ourselves that to make a finding of contributory conduct such as to reduce the basic and / or compensatory award(s) we must be satisfied that the claimant's conduct was culpable or blameworthy and that this conduct caused or contributed to his dismissal. We must also find that it would be just and equitable to reduce the claimant's compensation.

150. The respondent submitted that if the claimant was dismissed he had contributed to his dismissal to the extent that we should make a finding of a level of contribution between 50 – 100%. The claimant contended for no reduction to be made.

151. We found that the claimant was culpable to some degree for his dismissal. He was insistent on an apology from Ms Barber. When one was not forthcoming and the respondent refused to take any action, his position hardened from 26 January 2017. We found the claimant was culpable because of the way in which his frustration and hurt pride became manifested. He ignored Ms Barber and refused to cooperate with her. This impacted on the safe count and on team dynamics. The claimant was a team leader and he was required to set an example as well as supervising his shift and managing a seamless and incident-free handover. The claimant felt he was being professional but failed to understand that he was required to treat Ms Barber with courtesy and respect. We have found that he did not meet these obligations. We found that this conduct was a contributing factor for his dismissal.

152. In assessing the degree to which this conduct contributed to the dismissal we have taken account of the following two factors:

152.1 Both the claimant and Ms Barber were equally culpable for the breakdown in their working relationship and the impact this had on their colleagues. This is what Mr Healy concluded and it is also notable that Mr Uddin found that both were indifferent to the impact of their working relationship on others in their team.

152.2 We have found that there was an abject failure by the respondent to manage the conflict between the claimant and Ms Barber. Ms Barber's text was objectively offensive. It was caught by the Code of Conduct. Mr Pacatte was puzzled that the respondent failed to investigate this issue. The claimant was justified in feeling aggrieved that this conduct was not being dealt with. Instead of addressing Ms Barber's text the respondent's focus was to insist that the claimant move on. When he was unable to do so and the conflict between them escalated the respondent failed to act. Apart from one unsatisfactory meeting in March 2017, no other steps were taken by the respondent to manage this issue in over eight months. It then took the respondent over four months to conclude the claimant's grievance. In the meantime, the open hostility between the claimant and Ms Barber was allowed to persist and become more entrenched. We found that the most significant culpatory factor was the respondent's failure to address Ms Barber's text and to manage the conflict thereafter. An apology would have resolved this matter at an early stage before the conflict became entrenched. We found that had the respondent managed this conflict as it ought to have done it is likely that the ensuing events would have been avoided. In this way, given the characters involved, an issue which could have been readily resolved became a driving force for this ongoing antagonism between the parties. However, as we have also found, this did not discharge the claimant's responsibility for his own conduct.

153. We found that justice to the case is met by finding that the claimant contributed to his dismissal to the extent of 25% and to apply this level of contribution to both the basic and compensatory awards.

Compensation

Basic award

154. The parties agreed that the claimant was entitled to a basic award of £4,064, subject to any reduction for contributory conduct.

Compensatory award

155. We reminded ourselves that in order to make an award for compensation in accordance with section 123 ERA we must find that the claimant suffered loss which was attributable to his dismissal and that it would be just and equitable to make such an award.

155.1 Loss of earnings: We found that it was just and equitable to award the claimant compensation for lost earnings for the period from 3 November 2017 until September 2018. We found that in failing to apply for the Team Leader post which was filled by the respondent in September 2018, the claimant failed to mitigate his loss and any lost earnings from this date ceased to be attributable to his dismissal. The parties agreed that the claimant was entitled on this basis to compensation for lost earnings in the amount of £10,350.38, subject to any adjustments. This sum was calculated

on the basis that the claimant's pre-dismissal average net monthly earnings were £2,284.32.

155.2 Bank charges: We found that it was just and equitable to award the claimant compensation for 50% of the bank charges he claimed were attributable to his dismissal in the amount of £641, subject to any adjustments. This was because the claimant failed to adduce evidence which showed that the entire loss was occasioned by his dismissal. His evidence on the bank charges he had incurred was also unclear. However, we found that because of the significant variance between his pre- and post-dismissal earnings it was likely that the claimant would not have incurred at least 50% of these charges had he not been dismissed.

155.3 Loss of performance fees: The claimant is a classical musician and has performed quite regularly in the past. We made no award for any lost performance fees suffered by the claimant because we found that there was no evidence that any loss suffered by him was attributable to his dismissal.

Wrongful dismissal

156. The claimant was entitled under his contract to eight weeks' notice. We made no order for damages for wrongful dismissal on the basis that this overlapped with and was extinguished by the compensatory award for unfair dismissal.

ACAS adjustment

157. Under section 207A(2) TULRA a tribunal has the power to increase by up to 25% any compensatory award it makes in relation to relevant proceedings where it finds that an employer has failed unreasonably to comply with a relevant ACAS Code of Practice and it considers it just and equitable to do so.

158. The claimant contended for a 25% adjustment of any compensatory award on the basis that the respondent failed to comply with paragraphs 4, 9, 12, 19 and 21 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code"). The respondent conceded that it had failed to forewarn the claimant about the possible disciplinary sanctions under consideration in advance of the disciplinary hearing for which a maximum adjustment of 5% should be made.

159. We found that there was a failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and that it was just and equitable to increase the compensatory award by 10%. We made the following findings in respect of the provisions of the Code with which the claimant contended the respondent had failed to comply.

159.1 We found that the respondent complied with paragraphs 4 and 12 of the Code because there was an investigation by Mr Hamilton with further investigation of the facts by Mr Healy and Mr Uddin.

159.2 We found that the respondent failed to comply with paragraph 9 of the Code because it failed to put the claimant on notice of the potential consequences of the disciplinary hearing on 2 November 2017 nor did it provide the claimant with sufficient information about the disciplinary charge he faced. This failure was all the more culpable because the outcome of the hearing was dismissal. We therefore found that this was an unreasonable failure to comply with the Code.

159.3 We found that paragraphs 19 and 21 of the Code did not apply because these provisions relate to written warnings which were outside of the scope of the complaints which we upheld.

Order for compensation

160. We therefore made an order for the respondent to pay the claimant compensation in the total amount of £12,116. This consisted of the following elements:

160.1 A basic award of £3,048 i.e. £4,064 which was reduced by 25% in accordance with section 122(2) ERA.

160.2 A compensatory award of £9,068 calculated as follows:

(1) Compensation for lost earnings of £10,350.38.
(2) Compensation for bank charges of £641.
(3) An adjustment of a 10% uplift in accordance with section 207A TULRA.
(4) A reduction of these sums by 25% in accordance with section 123(6) ERA.

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Employment Judge Khan

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Date 29 April 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 May 2020

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FOR EMPLOYMENT TRIBUNALS