Case Numbers: 3352944/2017
3330786/2018
3334442/2018

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs D Davidsen	**v**	IBM United Kingdom Limited (1) Joanne Czekalowska (2) Samantha McFarland (3) Sandra Oliveira (4) Claire Bryant (5)

Heard at:	Reading	**On:**	4 – 21 February and In chambers: 24 – 28 February, 20 March, 28 May & 4 June 2020

Before: Employment Judge Anstis
Mr A Kapur
Ms HT Edwards

Appearances
For the Claimant: Mr J Heard (counsel)
For the Respondents: Miss D Masters (counsel)

RESERVED JUDGMENT

A. Liability

1. The claimant has been subject to unlawful detriments and victimisation as follows (by reference to the detriments set out in the reasons which follow):

   By the first respondent only (IBM United Kingdom Limited):

   - Detriment 7

   By the first and second respondent (Joanne Czekalowska):

   - Detriment 4

   By the first and third respondent (Samantha McFarland):

   - Detriment 17 (part – as described below)

By the first and fourth respondent (Sandra Oliveira)

- Detriments 5, 6, 8 and 13

By the first and fifth respondent (Claire Bryant)

- Detriments 8 and 13

2. The claimant has been subject to an unlawful detriment by the first respondent as follows:

   - Detriment 11

3. The claimant's claims in respect of detriments 1, 2, 3, 9, 10, 12, 15, 16, 18 and 19 are dismissed.

4. The claimant's claim of victimisation in respect of detriment 11 is dismissed.

5. The claimant's claims in respect of detriment 14 and part of detriment 17 (as described below) are dismissed on withdrawal.

B. Remedy

6. The claimant is entitled to the declarations set out above.

7. The first respondent must pay to the claimant compensation as follows:

   7.1. the difference between what the claimant was paid by the first respondent during the period from 6 February 2018 to six weeks after the date this decision is sent to the parties and what she would have been paid during that period if she had been at work,

   7.2. £20,000 as compensation for injury to feelings, and

   7.3. a further 10% of both awards of compensation as an uplift under the terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

8. The tribunal recommends the following actions be taken within six weeks of this judgment being sent to the parties:

   8.1. The first respondent should stop the performance improvement plan implemented in respect of the claimant and remove it from her personnel records.

   8.2. The first respondent should include an entry in the claimant's end of year review for 2017 referring anyone viewing the end of year review to the terms of this judgment.

REASONS

A. INTRODUCTION

Introduction

1. The claimant is employed by the first respondent. The second to fifth respondents are employed by the first respondent and are the claimant's managers.

2. The claimant brings claims of victimisation and in respect of detriments arising from protected disclosures. These relate to a series of alleged protected acts or protected disclosures that she made or carried out from June to July 2017. She says these resulted in unlawful victimisation and detriments spanning from June 2017 to September 2018. The parties agreed a list of issues which we adopt and is set out in its final form below. There are five alleged protected acts or disclosures and 18 alleged acts of victimisation or detriments. The claimant remains employed by the first respondent although she has been off sick and not at work since 6 February 2018.

3. The claimant has submitted (and we are addressing in this judgment and reasons) three separate claims. However, for the purposes of this decision it is not necessary to distinguish between the three claims except in respect of any question of time limits. They all arise out of the same subject matter. The second and third claims add allegations of further acts of victimisation (or detriments) as and when they are said to arise.

The hearing

Amendment

4. On 17 January 2020 the claimant's solicitors wrote to the tribunal and the respondents setting out what they described as proposed amendments to the list of issues. It was their position that this was not an application to amend as such, but was simply further particulars of matters that were already part of the claim. The respondents replied seeking further particulars in respect of those amendments. No further particulars were provided and the matter fell to be dealt with by us at the start of the hearing.

5. Mr Heard identified these amendments or particulars as being matters which had only become apparent to the claimant following exchange of witness statements, and which she could not previously have been aware of, such as who the decision-maker responsible for a particular detriment was. He said that she had previously proceeded on the basis that the person who had told her something or carried out an action against her was the person who had decided to do this, but it had become apparent only on exchange of witness statements that this may not be the case.

6. Miss Masters said that putting the case in this way gave rise to a large number of potential additional detriments of which the respondents had had no notice or proper understanding of. For instance, if it was now said that another person was responsible for a detriment, how was it that they were responsible for that detriment and what precisely was their action in respect of that detriment? She said that all of this needed to be clearly pleaded.

7. We took some time for consideration before deciding that the claimant should be permitted to add in the additional names as people responsible for the detriments. We felt it was possible that the claimant had not been fully able to identify those responsible before exchange of witness statements, and that there was little if any prejudice caused to the respondents through the claimant saying that someone else (who was present and able to give an account of themselves) had been the person responsible for making a decision on a detriment. This did not seem to us to require any additional evidence or cause any particular difficulty for the respondents. However, this was on the basis that (i) there was no change in the underlying detriment and (ii) for the individual respondents, if their names had been added as responsible for the detriment this was not to be taken as meaning the claim was against them personally in respect of this detriment.

8. Our reason for those two qualifications was that we considered that if there was any change in the underlying detriment that was a point on which the respondents would need to take instructions and which may cause them some difficulties by only being raised at this point. We also took account of the fact that the individual respondents would have prepared their cases and expectations for the case based on the points that had been originally plead against them, and should not now face additional claims.

9. This point came up for further discussion during cross-examination of the respondents' witnesses, when Miss Masters objected to what she said was the extension of the claimant's case in relation to the handling of grievance, where, she said, Mr Heard was now putting the claimant's case on the basis not just of failures by those responsible for hearing the grievance but also on those individuals having been fed misleading information by the people they interviewed (primarily the individual respondents).

10. After discussion between Miss Masters and Mr Heard the problem was identified as being limited to detriments 18 and 19, where Mr Heard wanted to argue that the handling of the appeal or grievance had itself been affected by false information given to those responsible for hearing the appeal or grievance, and where the giving of that false information has allegedly been motivated by protected acts or protected disclosures.

11. After further consideration we told the parties that we considered that any such extension of the case amounted to the addition of new detriments – the detriment of giving false information to an investigator being a distinct detriment to the individual failures previously alleged against the

investigators. We also noted that it may be very common for those responsible for acts of discrimination (if that is what they were) to deny any discrimination or defend their position during grievance hearings, but this was not typically relied upon as being a new act of discrimination. If that denial or provision of (allegedly false) information in support of their position was to be said to be itself an act of discrimination then we would expect that to be very clearly spelt out in the pleadings or list of issues. Going back to our previous ruling, we had not permitted the alleged detriments themselves to be changed, so these allegations in relation to the provision of false information during the appeal or grievance process would not be allowed to proceed.

12. Further argument on this point arose during closing submissions, with Miss Masters pointing to an email that Mr Heard had sent her the previous evening saying "*list of issues: don't we simply need to remove what was added in red by us in respect of the additional names, given the ET's ruling on the amendment*". She had taken it that this (and a brief discussion at the end of evidence on Thursday 20 February) meant that all the additional names were to be deleted, whereas Mr Heard said that he had only meant that in respect of detriments 18 and 19.

13. We decided that we should not accept that elements of the claimant's claim had been withdrawn by virtue of an apparent misunderstanding between counsel, so we considered this point to be limited to detriments 18 & 19, as Mr Heard had intended. Those were the points that had been previously discussed in the tribunal. In case this misunderstanding had disadvantaged her, we offered Miss Masters the opportunity to say if there was anything more she wanted to add in relation to her submissions to address any points were there may have been a misunderstanding, but she was content to rely on them as they were.

The hearing

14. This case was originally listed to be heard across 17 days, starting on Monday 3 February 2020. The tribunal could not sit on Monday 3 February 2020 because of difficulties with availability of the panel, so started on Tuesday 4 February 2020 which was, after initial discussions with the parties, a reading day for the tribunal.

15. We are grateful to both counsel for their work on the timetable and other housekeeping issues during the course of the hearing, along with their helpful and professional approach to any points arising during the course of the hearing.

16. From Wednesday 4 February up to and including Monday 10 February the claimant gave evidence and was cross examined by Miss Masters. On Thursday 5 February 2020 the tribunal only sat in the morning to take account of a chambers hearing that had been listed on that day for the employment judge on a different case. We heard evidence from the

claimant's witness David Webster (formerly the EMEA Managing Director of The Weather Company) on that day, interposing him in the claimant's evidence to take account of his availability.

17. From Tuesday 11 February onwards the tribunal heard from the respondents' witnesses, who were, in sequence:

    - Joanne Czekalowska (Director of Acquisition Integration for Europe, the Middle East and Africa ("EMEA")) – the first respondent,

    - Samantha (Sam) McFarland (Acquisitions Sales and Go To Market Leader for EMEA) – the second respondent,

    - Paul Martin (Head of Technical Consulting, Global Technology Services Division) – who heard the claimant's first grievance,

    - Michelle Andrews (HR Partner, IBM Digital Sales Europe & UKI Global Finance) – who heard the claimant's appeal for her first grievance outcome,

    - Sandra Oliveira (Go To Market Project Manager and Go To Market Operations Team Manager) – the third respondent, and

    - Claire Bryant (UK Acquisitions Integration Manager) – the fourth respondent.

18. Tuesday 18 February 2020 was taken by the tribunal as a reading day to read the next sequence of witness statements, with the following witnesses giving evidence on Wednesday 19 February and Thursday 20 February:

    - Donna Fowler (Leader, EMEA Manager Solutions Centre of Excellence, HR) – who heard the claimant's second grievance,

    - Nick Evans (UKI Acquisitions Integration Manager),

    - Philip Johnson (HR Business Development Mergers, Acquisitions and Divestiture Leader, Europe),

    - Angie Churchill (Senior Manager, Foundation, IBM UK Early Professionals Programmes),

    - Jenny Taylor (UK Foundation Leader, IBM UK Early Professional Programmes),

    - Amanda Brumpton (Vice President Global Vended Services Executive) – who heard the claimant's appeal against the outcome of her second grievance,

    - Vicki Lowe (Strategic HR Partner).

- Caroline Tucker (Care Management and Appeals Partner),
- Alison Webb (HR Partner), and
- Lindsay Williams (Sales Operation Integration Project Manager).

19. By agreement, the parties exchanged written closing submissions (and provided them to the tribunal) at 10:00 on Friday 21 February 2020, with short oral replies to those submissions being heard from 14:00 on Friday 21 February 2020.

20. The hearing had been listed to determine both liability and remedy. The tribunal papers contained a detailed schedule of loss. The claimant gave evidence and was cross-examined on questions of causation of loss but not on the detailed figures contained in the schedule of loss.

21. We had taken it from that that the figures and calculations in the schedule of loss (at least insofar as they related to loss of earnings) were agreed, subject to the question of causation. It transpired at the end of closing submissions that that was not the case. The parties took time to discuss this point between themselves. On their return to the tribunal they said that agreed that the best approach would be for the tribunal to declare a period in respect of which loss of earnings (if any) should be paid, with the parties then carrying out any further calculations themselves with a view to agreeing a figure. They had suggested this because on discussion they considered that any award would be taxable. The schedule of loss had been comprised of net figures but those net figures (even if calculated correctly at the time) may not be reliable when the claimant's tax situation for the current year was considered.

22. Subject to this point and the question of causation there were, in principle, no other disagreements between them on the question of loss of earnings as addressed in the schedule of loss. It is unfortunate that this issue was only identified at the conclusion of the hearing. We agreed to this approach, but have (by a separate order) added the opportunity for a further hearing in the event that the point is not resolved between the parties.

The decision

23. The tribunal took Monday 24 and Tuesday 25 February as chambers days for deliberation, which concluded the original listing of the case.

24. At the conclusion of the hearing we had indicated to the parties that we intended to reconvene for a further chambers hearing on 3 April 2020. Thanks to early settlement of a subsequent case, the tribunal were in fact able to meet for deliberations for part of the day on 26 and 27 February and all day on 28 February 2020. It is an indication of the scope of the case that even that was not sufficient to conclude our decision. By mid-March, restrictions in connection with the Covid-19 pandemic were starting to come into force. We were able to hold a further chambers meeting (by telephone)

on 20 March. Disruption to the usual running of the tribunal during the Covid-19 pandemic meant we were not able to make further progress with the decision until further chambers meetings were held (by remote working and telephone) on 28 May 2020 and 4 June 2020.

B. THE ISSUES

25. The list of issues in its final form is set out below. Names in italics were the names added by the claimant in her application referred to above.

First GOC = Grounds of Claim lodged on 22.12.17 ("First Claim")
Second GOC = Grounds of Claim lodged on 19.06.18 ("Second Claim")
Third GOC = Grounds of Claim lodged on 30.10.18 ("Third Claim")
ERA 1996 = Employment Rights Act 1996
EA 2010 = Equality Act 2010

S47B ERA 1996

1. Did the claimant disclose information within the meaning of s43B(1) ERA 1996 as particularised in the table below:

No.	Date	Recipient within IBM	Content	Witnesses to disclosure
1.	20.06.17	Samantha McFarland	The Claimant disclosed to Samantha McFarland her concerns of the management team within The Weather Company ("TWC") (as set out at number 2 of this table). The Claimant also explained to Samantha McFarland, when asked how 8am calls on a Saturday break the law, that as women predominantly had responsibility for childcare the calls would have a disproportionate effect on women, and therefore could amount to indirect sex discrimination. To support this, the Claimant referenced [named individual], who had been the Security Systems Brand Executive for Software Group. [She] had shared with the Claimant at a Diversity meeting, that as a single parent, with two preschool age children, she had struggled to keep her children quiet for the 8am Saturday calls that [named individual] used to hold. The Claimant informed Samantha McFarland that she believed that the said behaviour could amount to a breach of legal obligation, including the Equality Act, and could result in grievances and/or legal action taken against IBM United Kingdom Limited. (First GOC, para 6 & Second POC 9 & Third POC, para 11)	Lindsay Williams (Sales Operations Integration manager)

2.	29.06.17	Claire Bryant	The Claimant sent a summary detailing her concerns to Claire Bryant and provided examples of discrimination on the grounds of sex, breaches of contract, bullying and harassment and that were being reported against [named individual] within TWC, including: - The part time employee within the TWC team was required to attend work and training sessions on her non-working days, including regularly scheduled team calls, despite management having ample opportunity to rearrange these events to the employee's working days; - Threats from TWC management that if sales performance was not satisfactory employees would be expected to attend weekly calls on 8am on Saturday mornings; - Employees being requested to attend calls at 5pm daily whilst on annual leave; and - Employees having little to no contact or support from their managers and being confused regarding receipt of contradictory instructions between managers. The Claimant attended a meeting of the same day (via telephone) to discuss the concerns. The Claimant explained her concerns during said call, and stated that the behaviour was against the law and could put IBM United Kingdom Limited at risk. (First GOC, para 7-11 & Second GOC, paras 10-14 & Third GOC, paras 12-16)	Claire Bryant (UKI & Europe Integration Manager), Lindsay Williams, John Cooper (Go To Market Manager) and Samantha McFarland
3.	13.07.17	Claire Bryant	The Claimant attended a UKI Integration team meeting and raised her concerns again. The Claimant repeated that IBM United Kingdom Limited was at risk of legal action and she was concerned that nothing was happening in relation to the issues raised by her. (First GOC, para 12, Second GOC, para 15 & Third GOC, para 17)	Nick Evans, Lucy Shepherd, Vicky Brammall and Hugh Wallis
4.	17.07.17	Philip Johnson (HR Acquisitions Leader of the First Respondent)	The Claimant emailed Philip Johnson outlining her concerns with the ongoing issues within TWC and explained that these situations may result in grievances from employees, or potential legal action.	Philip Johnson

			(First GOC, para 14, Second GOC, para 17 & Third GOC, para 19)	
5.	31.07.17	Philip Johnson	The Claimant attended a call with Philip Johnson and Nick Evans to discuss her concerns. The Claimant provided additional detail in relation to her concerns during the telephone call. The Claimant stated that the actions taken by TWC management were unlawful and proposed that further training should be provided to the relevant managers to clarify their responsibilities and re-enforce correct management behaviour. (First GOC 15-16, Second GOC 19-20 & Third GOC, paras 21-22)	Philip Johnson / Nick Evans

2. If so, did the claimant reasonably believe that each of the alleged disclosures were in the public interest as per s43B(1) ERA 1996?

   [Note: in their closing submissions the respondents accepted that the claimant "subjectively believed that the alleged disclosures were in the public interest".]

3. Further, did the claimant reasonably believe that each of the alleged disclosures tended to show that the respondent was failing to comply with a legal obligation, namely a breach of the implied term of trust and confidence, and / or a breach of s13 and s26 of the EA 2010 as per s43B(1)(b) ERA 1996?

4. If the tribunal concludes that the disclosures amounted to qualifying disclosures, then the respondent accepts that the alleged disclosures were made to the claimant's employer as per s43C ERA 1996.

5. If the claimant did make one or more protected disclosure(s), was she subject to the following alleged detriments?

No.	Date:	Individual who committed the act/responsible for the omission	Act
1.	From 04.07.17 to 22.12.17	Samantha McFarland	Claimant no longer invited to participate in meetings from 4 July 2017 with the Respondents including Go To Market meetings. (First GOC, para 20.1)
2.	From 28.06.17 to 26.10.17	Sandra Oliveira *Samantha McFarland*	Claimant was obliged to attend Go To Market operational calls. (First GOC para 20.2)
3.	28.06.17	Sandra Oliveira *Samantha McFarland*	Claimant was reprimanded for attending a give back event on 26.06.17 (First GOC, para 20.3)

4.	21.07.17	Claire Bryant and Joanne Czekalowska *Samantha McFarland*	Claimant was removed from the 'Bluewolf' acquisition project. (First GOC, para 20.4)
5.	21.07.17 to 10.08.17	Claire Bryant and Sandra Oliveira *Joanne Czekalowska and Samantha McFarland*	Claimant informed that her line managers were disappointed in her performance. (First GOC, para 20.5)
6.	21.07.17	Sandra Oliveira *Samantha McFarland*	Claimant informed that there would be no funding for the Go To Market part of her role in 2018 and the Claimant was advised to start looking for other projects and roles immediately. (First GOC, para 20.6)
7.	On or before 10.08.18	Philip Johnson *Samantha McFarland and Joanne Czekalowska*	Claimant was described as "militant" (First GOC, para 20.7)
8.	07.09.17	Claire Bryant and Sandra Oliveira *Samantha McFarland and Joanne Czekalowska*	Claimant placed on a PIP and / or the PIP was unrealistic. (First GOC, para 20.8)
9.	28.09.17 to 09.01.18	Paul Martin	Claimant raised a grievance on 28.09.18 but did not receive the outcome until 09.01.18. The Claimant was also informed that the delay was due to the IBM United Kingdom Limited's legal team requesting that Paul Martin made amendments to the report. (First GOC, para 20.10, Second GOC, para 23.1)
10.	18.10.17 - 19.10.17	Joanne Czekalowska and Samantha McFarland *Sandra Oliveira*	Claimant excluded from a two day Design Thinking Workshop (First GOC, para 20.11)
11.	07.11.17 to 09.01.18	IBM United Kingdom Limited, Paul Martin	Failing to conduct the grievance investigation impartially. (Second GOC, para 23.3)
12.	18.01.18-19.6.18	Michelle Andrews	Failing to investigate the Claimant's appeal raised for detriments relating to whistleblowing. (Second GOC, para 23.4)
13.	25.01.18 (verbally) and 07.02.18 (in writing)	Sandra Oliveira and Claire Bryant *Samantha McFarland*	Claimant received a poor 2017 end of year performance review. (Second GOC, para 23.2)
14.	Withdrawn		
15.	09.03.18 onwards	Michelle Andrews and Donna Fowler	Failing to investigate the Claimant's grievance regarding her end of year review. (Second GOC, para 23.6)
16.	11.05.18	Michelle Andrews	Sending an email falsely stating that the Claimant had been emailed previously regarding the scope of the investigation. (Second GOC, para 23.7)
17.	29.06.17 onwards	Samantha McFarland, Leon Butler and Elizabeth Staples (in relation to TWC employees although Leon Butler and Elizabeth Staples were not involved until or after 31 January 2018 when the Claimant restated her	Failure to investigate the Claimant's disclosures regarding the treatment of the TWC employees (as stated at number 2 of the above table and also raised again by the Claimant on 31

		concerns via the 'Confidentially Speaking' process). Bernadette Dugan and Christina Garcia failed to investigate the Claimant's concerns about part time employees	January 2018 via the 'Confidentially Speaking' process). The other concerns raised in January 2018 were in relation to unlawful treatment of part-time employees in respect of job opportunities and sales compensation payments also raised via the 'Confidentially Speaking' process. (Second GOC, para 23.8)
18.	31.07.18	Michelle Andrews	Decision not to uphold the Claimant's appeal against the outcome of her grievance raised on 18 January 2018. (Third GOC, para 25.9)
19.	27.09.18	Donna Fowler	Decision not to uphold the Claimant's grievance regarding her end of year review which she raised on 9 March 2018. (Third GOC, para 25.10)

6. If so, was the Claimant subject to that detrimental treatment by the relevant individual on the grounds that the Claimant made a protected disclosure?

7. If so, are any of the named Respondents liable under s.47B ERA 1996? NB. The First Respondent accepts that it is liable for any breach of s.47B ERA 1996 but there is a live issue as to whether any of the named Respondents are liable for the detriments set out at para 5 above in so far as they are not named in the Third Column.

8. Have any or all of the allegations been lodged 'in time' as per s.48 ERA 1996? This will require consideration of the following issues:

   a. When do the primary time limits expire as per s.48 (3) / (4) ERA 1996?

   b. Are any of the acts of detrimental treatment which appear in the First, Second and Third Claim a series of similar acts or failures as per s.48 (3)?

   c. Is there an extension of time under s.207A (3) ERA 1996?

   d. Is there an extension of time under s.207A (4) ERA 1996?

      NB. These questions will have to be determined by reference to each Respondent and by identifying the correct EC certificate.

   e. Should there be an extension of time to the time limits under s.48 (3) ERA 1996?

s27 EA 2010

9. Do any of the alleged disclosures outlined in the table at paragraph 1 above amount to protected acts within the meaning of s.27(2) EA 2010?

10. Was the Claimant subject to the alleged detrimental treatment set out at paragraph 5 above by the relevant individual?

11. If so, was this because of the alleged protected acts?

12. If so, are any of the named Respondents liable under s. 110 EA 2010? NB. The First Respondent accepts that it is liable for any breach of s.27 EA 2010 by virtue of s. 109 EA 2010 but there is a live issue as to whether any of the named Respondents are liable for the detriments set out at para 5 above in so far as they are not named in the Third Column.

13. Have any or all of the allegations been lodged 'in time' as per s. 123 EA 2010? This will require consideration of the following issues:

    a. When do the primary time limits expire as per s123(3)/(4) EA 2010?

    b. Are any of the acts of detrimental treatment conduct which extends over a period of time as per s123(3) EA 2010?

    c. Is there an extension of time under s140A(3) EA 2010?

    d. Is there an extension of time under s140A(4) EA 2010?

       NB. These questions will have to be determined by reference to each respondent and by identifying the correct EC certificate.

    e. Should there be an extension of time to the time limits under s123(1) EA 2010?

Remedy

14. What compensation is the Claimant entitled to recover for injury to feelings?

    [Note: although this refers to compensation for injury to feelings only, there was clearly in this case also a claim for compensation for loss of earnings which we have to address.]

15. Should there be an uplift of 25% for failure to follow the ACAS Code on Disciplinary and Grievance Procedures?

16. Should any compensation be reduced under s49(6A) ERA 1996 namely that any of the disclosures were made in bad faith?

    [Note: although this point appears in the list of issues it was not argued before us by the respondents that the claimant's disclosures were made in bad faith.]

17. Is a recommendation appropriate pursuant to section 124(2) EA 2010?

18. Should the tribunal make any declarations? If so, what?

[Note: in closing submissions the claimant said that while she was seeking declarations in respect of any discrimination caused by the individual respondents she was not seeking individual awards of compensation against any of them, and that any question of compensation should be dealt with solely against the first respondent. The respondents agreed that approach, which was a pragmatic one and avoided any difficult question arising as to apportionment of an injury to feelings (or other financial) award between the different respondents.]

C. THE FACTS

Introduction and background

The claimant's history and role

26. The claimant has been employed by the first respondent (or predecessor companies) since 22 July 1996. It is a notable feature of this case that all or almost all the individuals involved have had very long service with the first respondent or its predecessors – typically 20 years or more.

27. During that time she had carried out a number of roles, including in respect of technical sales. Before taking on her current role she had worked as a "band 9" employee for ten years. She describes this as being a "*middle-tier, non-executive employee*". Within the first respondent's organisation there were ordinary job bands from 1-10, followed by executive levels from A-D. She describes her job title immediately before her current job as Software Group Graduate and Apprentice Programme Leader. The respondents say it was "Software Early Professionals Programme Manager" in the software division but we do not see any material distinction to be drawn between these titles. They describe the same work. In that role she worked closely with the first respondent's "Foundation" programme which was concerned with the recruitment and development of graduates and those at the earliest stages of their professional careers.

28. Her work in that role was due to come to an end by reason of redundancy but before this occurred she was taken on in her current role: Acquisitions Integration Manager, which started on 5 August 2016. In this role she worked in the European Acquisitions Integration Team.

29. The acquisitions integration team was part of the first respondent's corporate development organisation. As the name suggests its role was to ensure the successful integration of acquired businesses within the respondent's mainstream organisation. For our purposes there were two

different aspects to this. The claimant's role was split equally between the two.

30. The first was dealing with the basic practicalities of integration: that is, dealing with premises and equipment and ensuring that the employees of the acquired businesses were for practical purposes integrated within the first respondent's organisation. This was known as the CIL or "Country Integration Lead" work. In this, the claimant reported to Claire Bryant, who is the fifth respondent. Her job title (at the time) was UK Acquisitions Manager.

31. The second is in making sure that the products offered by the acquired company (known as its "offerings") are known to the first respondent's customers, properly understood and promoted by the first respondent's sales staff and that the most is made of the possibility for adding the acquired company's technology to the first respondent's existing technology. That was known as the GTM or "Go To Market" work. The purpose of this was to ensure that at an early stage (i) the acquired company's technology could be combined with the first respondent's existing technology to present new and more attractive products to its customers and (ii) the acquired company's products could be understood by the first respondent's customers and sold by its sales staff. The purpose of this was for the acquired company to quickly add to the first respondent's overall revenue. In this part of her role she reported to Sandra Oliveira, the fourth respondent. Sandra Oliveira's job title was Go To Market Project Manager and GTM Operations Team Manager.

32. An email dated 25 August 2016 from Sandra Oliveira to Claire Bryant and the claimant is the closest we have to a formal job description for the claimant's role. This sets out the nature of the role across a number of bullet points, three of which (under the heading "responsibilities") were particularly referred to by Mr Heard. They are:

> *"- Act as BluePages host / admin manager for all pre-transfer employees …*
>
> *- Provide on-site presence to give hands on support; identify and address team concerns.*
>
> *- Manage local communications, round tables etc. to foster an open supportive environment to identify and mitigate issues and provide a vision for the future in IBM."*

33. These relate to the CIL side of the claimant's role. The reference to "BluePages" relates to the first respondent's internal administrative system. In the period before the employees transferred over to employment by the first respondent the CIL (while not having formal business or line management responsibility for them) would hold responsibility for them on the first respondent's internal systems. More broadly, we take from this (and it did not seem to be in dispute) that an important part of the CIL role was

not simply dealing with practicalities but also with maintaining morale and reassuring employees during what may be a difficult transition period. Loss of skilled employees from an acquisition (at least in an unplanned way) was regarded by the first respondent as a significant risk to the overall success of the acquisition. As Claire Bryant says in her witness statement "*part of* [the claimant's] *role involved pastoral support for issues related to the integration for the transferring employees.*" Where issues (other than strictly business issues) arose during a transition the CIL was to be the interface between the first respondent and the staff of the acquisition.

The acquisitions team and the individual respondents

34. The process of integrating an acquisition within the first respondent had two stages: transfer of business and transfer of employees. These may or may not coincide in respect of any particular acquisition. We heard that the involvement of the acquisitions team would typically end two quarters after the later of transfer of business and transfer of employees, but in a phased manner rather than with an abrupt end to its involvement.

35. The GTM side of the acquisition team's work is more difficult to describe. While not holding direct business or revenue responsibility, the GTM side of the team was concerned with publicising and promoting the acquisition's offerings within the first respondent and doing whatever was seen as necessary in order to facilitate a swift connection between the acquisition's offerings and the first respondent's customers, salespeople and technical staff.

36. The claimant's role was full time, split 50/50 between the CIL work and the GTM work.

37. For the CIL work she reported to Claire Bryant, who in turn reported to Joanne Czekalowska, the second respondent, who was Director, Europe Acquisitions Integration Team.

38. For the GTM work she reported to Sandra Oliveira who (at the start of the claimant's work) also reported to Joanne Czekalowska. In May 2017 Sam McFarland, the third respondent, took up the role of Acquisition Sales and Go To Market Leader for Europe and Middle East and Africa. This was a newly created role that sat between Sandra Oliveira and Joanne Czekalowska.

39. The claimant's work was thus managed up two separate reporting lines with Joanne Czekalowska at the head of both reporting lines.

40. Her "card holding" manager – that is, the person who had formal responsibility for her on the first respondent's systems was initially Claire Bryant but at some point during 2017 became Sandra Oliveira.

41. The acquisitions team brought in no direct revenue itself, but was funded by other areas of the business, with allowance being made for its costs in the

business plans for the various acquisitions. Part of Ms Czekalowska's role was to seek continued funding internally for the team's work. During times when there were no new acquisitions members of the team may be assigned to assist on other projects which were not related to acquisitions but for which there was funding available.

42. The acquisitions team did not work at any one geographic location. For the CIL work at least part of an individual's time would be spent at the offices of the acquired company. At other times an individual in the team may work at home or at any other suitable office the first respondent had. The claimant's offer letter for the new role says that she will be based at the first respondent's Woking office. No events of any significance for the purposes of the claim took place in Woking. There were meetings at the first respondent's offices at South Bank in central London, Bedfont Lakes in west London and at the Hursley laboratory and client centre near Winchester. Typically, meetings were held by telephone rather than in person, in which case the location of the individual participating would be irrelevant. It appears that team members were encouraged to work from Bedfont Lakes on Tuesdays if they could, and that allowed a certain amount of face-to-face contact. Outside these meetings, team members would communicate with each other by telephone, email and using the first respondent's "Sametime" instant messaging service.

43. There was some dispute about exactly how the claimant came to learn of or be appointed to her current role, but her future managers, and in particular Sandra Oliveira, were keen to secure her for this role. She was originally recommended to Joanne Czekalowska by a Vice President within the first respondent. In various emails we have seen Sandra Oliveira describe the claimant (at a time when she was a candidate for the role) as "*excellent*", "*a known quantity*" and her appointment as "*a no-brainer*". While Claire Bryant is more cautious, at the time of her appointment the claimant was considered to be a strong candidate for this new role. The acquisitions team acted quickly to secure the claimant's appointment before her redundancy took effect.

44. While we were later to hear of concerns about the claimant's performance in her previous role, these concerns do not seem to have been mentioned during the course of the recruitment process, and the claimant came to the acquisitions team with a good track record. The claimant's evidence that for the previous ten years she had been rated as either an "*above average contributor*" or "*among the top contributors*" was not disputed by the respondents.

TWC

45. A CIL or GTM project manager would typically be assigned one or more acquisitions to work with. For the whole of the claimant's time in the role the only acquisition she was given formal responsibility for was The Weather

Company (or "TWC") for which she was UK CIL. Her colleague John Cooper was the GTM project manager for TWC.

46. As its name suggests, The Weather Company was concerned with meteorology: providing weather data to businesses (B2B) or direct to consumers on, for example, their mobile phones (B2C). The first respondent had purchased large parts of the TWC business, in anticipation that it could then add weather data to its other offerings to the benefit of its customers.

47. TWC had its headquarters in North America, but also a staff of around 30 in the UK, across two sites in Birmingham and London, both of which were to be relocated following the acquisition. We heard that the staff employed were a team of meteorologists and a team of salespeople. At the time we are concerned with, TWC had completed transfer of employees but not transfer of business. The effect of having completed transfer of employees was that all its former employees were now employees of the first respondent and were being directly line managed by employees of the first respondent. They were also subject to (and had the benefit of) the first respondent's HR policies and procedures, which may have been quite different to the ones they were used to. Transfer of business had not completed, and despite them having transferred their employment the former TWC employees were considered a distinct unit referred to as "TWC" during the period we are concerned with.

Other priority acquisitions

48. TWC was one of several "priority acquisitions" which included (in the period we were concerned with): Merge (which produced medical devices), Truven (concerned with large-scale medical data), Cleversafe (cloud storage) and Agile 3. Merge and Truven were known as the "Watson healthcare" acquisitions.

HR

49. The first respondent's HR operations were organised so that each business unit had one or more HR Business Partners assigned to work with it. A separate team of HR Business Partners had responsibility for acquisitions (and divestitures) during the transitional period. Managers could have direct contact with these HR Business Partners, who would be their point of contact for difficult or non-standard HR matters. Employees who were not managers did not have direct access to these HR Business Partners.

Appraisal and feedback systems – Checkpoint and ABC

50. For the calendar year 2016 the first respondent introduced a new appraisal system, known as "Checkpoint". This comprises an online system for setting and monitoring achievement of goals. The system is capable of being updated throughout the year by the employee, but in general the goals for the previous year were reviewed, and goals for the next year set, on a yearly

basis in the January following the end of the year in question. There was also typically a mid-year review around July of each year.

51. Checkpoint appears to be a conventional appraisal system such as would be operated by most large employers. For the 2017 scheme (where the claimant's eventual grading in January 2018 is in dispute) the "dimension ratings" are set out as follows:

> *"Business results:*
>
> *Your achievement against agreed goals. In order for the employee to be rated:*
>
> - *Exceeds: Exceeded all objectives and delivered outstanding results on all relevant measures.*
>
> - *Achieves: Accomplished agreed upon goals and outcomes delivering key committed business and financial objectives.*
>
> - *Expects more: Delivered on some but not all key committed business and financial objectives, demonstrated progress towards agreed upon goals.*
>
> *Client success:*
>
> *You are passionate about every client's success, so you put them first, listen for need and find opportunities to bring new ideas and add value. Partnering with all relevant IBM stakeholders, you focus on outcomes – helping every client succeed however they measure success. In order for an employee to be rated:*
>
> - *Exceeds: Exceeded client expectations on all measures while delivering outstanding client outcomes.*
>
> - *Achieves: Consistently put the client first. Delivered successful outcomes experienced by the client.*
>
> - *Expects more: Demonstrated an inconsistent understanding of the client needs. Delivered some successful outcomes as experienced by the client.*
>
> *Responsibility to others:*
>
> *You prioritise collaboration and focus on building trust and earning it anew every day, in every relationship – with IBMers, clients, partners and more. For those of you entrusted with management or executive responsibility, this includes your effective leadership and showing personal interest in IBMers, their careers and their development. In order for the employee to be rated:*

- *Exceeds: Sought out and know for collaboration and helping others to succeed.*

- *Achieves: Built trust and collaborated effectively. For people managers, helped their teams excel through feedback, development, progression and improved engagement.*

- *Expects more: Demonstrated effectiveness collaborating with others varies. For managers, actions to foster engagement yielded inconsistent results.*

Skills:

IBMers are dedicated to growing skills that matter to our business and to being essential now and in the future. You continuously find opportunities to learn and apply new skills strategic to IBM and needed to be successful in your role. You are recognised for your expertise and you share it with other others. In order for the employee to be rated:

- *Exceeds: Learned and applied new, relevant skills to own role, and successfully transferred relevant skills to others.*

- *Achieves: Developed new, relevant skills or deepened existing skills, and applied them consistently in own job role.*

- *Expects more: Demonstrated efforts to build new, relevant skills, but did not translate consistently to own job role."*

52. We were told by the respondents' witnesses, and accept, that a rating of "expects more" would not necessarily constitute criticism or a negative opinion of an employee, and that even high achievers may have one area in which they were graded "expects more".

53. There was a separate feedback system called "ABC", which enabled an employee to post feedback about a colleague. We do not think that this was formally linked to the Checkpoint system but it appears that at the time of a Checkpoint review an individual's manager would often encourage others to post feedback on the individual in the ABC system for the manager subsequently to take into account and use in the Checkpoint review and grading.

Performance improvement plan - PIP

54. The first respondent also had a "performance improvement plan" or "PIP" process. This was operated online and enabled a manager to set particular goals for achievement outside the usual Checkpoint system. While the use of a PIP in the claimant's case was one of the central issues in her claim, we had little if any documentation in the tribunal bundle at the start of the claim as to when a PIP should be used within the first respondent or what

its purpose was. On prompting by the tribunal the respondents produced a one-page document from the online system setting out what a PIP was and when it should be used. This includes the following:

> *"A Performance Improvement Plan (PIP) can be initiated by a manager at any point during the year, in order to address unsatisfactory performance.*
>
> *The performance improvement plan describes areas for improvement and sets objectives which ensure a satisfactory contribution to the business is achieved. We expect employees to engage with this process, discuss objectives actively, participate in reviews during the PIP and use the opportunities for improvement that are made available. Failure to do so my result in disciplinary action.*
>
> *The purpose of the PIP document is to record:*
>
> - *The areas of an employee's performance which need to improve,*
> - *The level of improvement required,*
> - *The relevant timeframes for improvement,*
> - *The employee's progress against the objectives,*
> - *The outcome of the PIP.*
>
> *…*
>
> *End of PIP assessment: At the end of the PIP period, performance will be assessed as either:*
>
> - *Having met the requirements outlined in the PIP and having demonstrated significant and sustained improvement, and therefore having passed the PIP, in which case the PIP process is successfully concluded, or*
> - *Not having met the requirements outlined in the PIP, or having only marginally improved, and therefore having failed the PIP. If the requirements of the PIP are not met, the PIP is failed and disciplinary action for unsatisfactory performance may be taken up to and including dismissal …"*

55. That document and its ostensible purposes are entirely conventional and what the tribunal would expect and has seen many times before in respect of a performance improvement plan.

56. As we shall describe later, there was a difference of views between the witnesses as to whether a PIP was necessarily to be regarded by an employee as negative, and what its purpose was in the claimant's case.

The alleged protected acts, disclosures, victimisation and detriments

57. We will now work through the alleged protected acts and disclosures, and the alleged acts of victimisation or detriments, in as close to chronological order as we can. Where we draw inferences from or attribute causes to what follows we do so in the section on "discussion and conclusions" which follows. We have adopted the terminology used by the claimant in primarily referring to "disclosures" and "detriments", while acknowledging that in each case she says that these are also protected acts and acts of victimisation for the purposes of her claim.

58. For the purposes of giving this section some form of structure we have divided our consideration of the facts into four broad parts:

    Part 1 – The period up to the claimant's first disclosure on 20 June 2017.

    Part 2 – The disclosures and initial detriments – this covers from the first disclosure (20 June 2017) up to the final disclosure (31 July 2017). This period also includes detriments 1-6.

    Part 3 – Further detriments - this covers detriments 5, 7 and 8, 10 and 13. In doing this, detriments 10 and 13 appear out of strict chronological order, but this appears appropriate as it allows part 4 to be solely concerned with the grievance and appeal detriments. We have also included the element of detriment 17 that falls outside the grievances and appeals.

    Part 4 - Grievance and appeal detriments – this covers the period from the claimant's submission of her first grievance onwards (detriments 9 – 19 (excluding 10, 13 and part of 17)) and is concerned with the handling of her grievances and any subsequent appeals.

59. For most of the disclosures there is no dispute that something was said on each occasion. The dispute is what was said (which we will deal with here) and whether it amounted to a protected disclosure or protected act (which we will deal with in our discussion and conclusions).

60. In the case of the detriments, for most other than the grievance and appeal detriments it is not disputed that they occurred. What is disputed is why they occurred and whether there was a causative link in the relevant legal sense with the disclosures. That will be a matter for our discussion and conclusions, but we have set out the detailed circumstances of each detriment in our fact-finding for the purposes of any later inferences or causal links we may have to consider in our discussion and conclusions.

Part 1 - The period prior to any disclosures

Trial period

61. The first month of the claimant's new role was to be a "trial period". On 5 September 2016 Sandra Oliveira wrote to HR to say she was "*happy to confirm successful completion of trial*" – although we note her comment in her evidence that in fact the claimant had been on holiday for two weeks of this time, so would only have been at work for about half of the trial period.

23 November 2016 - the first technical accelerators presentation

62. On 23 November 2016 the claimant attended a meeting with Sandra Olivera and Joanne Czekalowska. This was the first formal contact the claimant had with Joanne Czekalowska. From the respondents' point of view this meeting was significant because they say it was the first time that they came to have doubts about the claimant's abilities in her GTM role.

63. A meeting invitation was sent by Sandra Oliveira for this meeting, describing it as "Acquisition Tech Activation brainstorm".

64. Our understanding is the concept of "tech activation" or as it was later described "technical accelerators" or "technical engagement" was that it was about what could be done to speed up the incorporation and adoption of an acquisition's technology within the rest of the first respondent's products. The addition of the acquisition's technology to the first respondent's existing offerings was one of the ways in which the necessary revenue could be achieved following an acquisition. It appears that the acquisition team's role in this was limited to influencing and persuading existing technology leaders, teams and salespeople (including those who had to have detailed technical knowledge of the product) to pay attention to and incorporate and sell the acquisition's technology, rather than them being in the position of line managers who could give orders to people to do particular things.

65. This work by the claimant on the technical accelerators project was described by various of the witnesses for the respondents as being particularly important for the acquisitions team, but there is no document defining its scope or even an exchange of emails setting out what it is that the claimant is to do and what the objective of the project is. There is nothing in writing from the time that gives any indication about what this project was supposed to be about.

66. The meeting was set up by Sandra Oliveira, who wrote in an email on 16 November 2016 to Joanne Czekalowska to say:

> *"Joanne*
>
> *As you know Dawn has been working on how we can accelerate tech activation on acquisitions and we would like to have a session with you to brainstorm initial findings and suggestions …"*

67. She goes on in that email to suggest various times, and eventually arranges a 90-minute session on 23 November 2016 from 14:00 – 15:30 under the heading "Acquisition Tech Activation brainstorm".

68. As this was to be the first formal contact between the claimant and Joanne Czekalowska it seems to us that Sandra Oliveira would have seen this as an opportunity for her (Sandra Oliveira) to showcase to Joanne Czekalowska the skills of someone she whose recruitment she had championed.

69. As may be expected in those circumstances, Sandra Oliveira had a role in assisting the claimant in preparation of her presentation for the meeting. She says, "*I had, at* [the claimant's] *request, tried to help her to prepare the presentation*".

70. Particularly in view of the respondents account of this presentation as going badly (which have reflected badly on Ms Oliveira), we spent some time with Ms Oliveira trying to understand exactly what she had done with the claimant prior to the presentation in order to help her and to try and make the presentation a success. As with many aspects of supposed informal coaching or advice given to the claimant by her managers we remained unclear what this was or in fact whether any coaching or assistance had been given. Ms Oliveira said that she could coach the claimant on the presentation itself but not on the content, which was not within her expertise. She did not explain what this coaching was nor how it had apparently failed given that Ms Czekalowska's criticisms were as much about the structure and nature of the presentation as its content. There is no suggestion that Ms Oliveira had any doubts about the claimant's abilities or what she was going to say during that meeting.

71. The claimant's position on this presentation was that it had gone well. No-one had suggested otherwise to her except for Ms Czekalowska's suggestion that she read and adopt Barbara Minto's book on structured writing. Ms Czekalowska herself accepted that she had told the claimant this was a "*good start*".

72. In her evidence to us, Ms Czekalowska described herself as being "*disappointed and worried*" with the presentation delivered by the claimant. In her oral evidence she said it was "*agonising*". She says that she only described it as being a "*good start*" to be supportive of the claimant, but she had not in fact believed it to be a good start.

73. The first fault that Ms Czekalowska described to us was that in line with the invitation and description of the meeting from Ms Oliveira she had expected it to be a "brainstorm" not a formal presentation. In other words, from her point of view the claimant had started off on the wrong foot with completely the wrong idea of how the meeting was supposed to be structured.

74. The second fault that Ms Czekalowska described to us was that if it was supposed to be a presentation it was not a very good one. In her witness

statement she describes the claimant's presentation as being lengthy and having no new ideas. She says that she was concerned that despite having been told by Sandra Oliveira that she had coached the claimant in the presentation it was "*still of such a poor standard*". She says she told Sandra Oliveira (but not the claimant) that the presentation was poor. She says Sandra Oliveira agreed it was poor, and it was then for Sandra Oliveira to feed that criticism back to the claimant with a view to there being a follow up presentation. She says "*we did not set a timeline for this but I envisaged it happening early in 2017*", which she later describes as being towards the end of the first quarter of 2017.

75. We do not accept Ms Czekalowska's (or Ms Oliveira's) account of this presentation. Ms Czekalowska tells us that this was an important project where it appeared that the claimant had completely failed (in her first encounter with Ms Czekalowska) to grasp the nature of the task she had been given, either in terms of its form or its substance. This was (on her account) despite coaching by Sandra Oliveira. We can understand her not wanting to be discouraging to the claimant through harsh criticism of the presentation, but even given that we do not see it served any purpose to describe the presentation as a "*good start*". Beyond that, we do not see that in such circumstances such a failure would have had no consequences for Ms Oliveira. Ms Czekalowska appeared to want to leave the matter in her hands despite what she must have seen (on her account of events) as a complete failure by Ms Oliveira to pick up in her coaching on obvious problems such as the claimant misunderstanding the nature of the meeting.

76. We accept that there was criticism of the structure and length of the claimant's presentation, and that at this point the work on the technical accelerators project was far from complete, but that is only what would be expected from something that was set up as a brainstorming session and therefore at a very early stage. Sandra Oliveira accepted in her cross-examination that the presentation contained some good ideas. There was no written follow up at all following that meeting – which we would have expected if it had been as bad as made out by the respondents.

January 2017 - Checkpoint

77. The claimant's Checkpoint review for the calendar year 2016 took place in January 2017. At this point Claire Bryant was the manager with responsibility for completing the review with the claimant.

78. On 19 January 2017 Sandra Oliveira wrote to Claire Bryant as follows:

> *"Dawn is naturally inquisitive and creative which enables her to look at situations from multiple angles and try and identify best parts forward. From a GTM perspective she always has the end clients in mind and is constantly considering how we can improve the buying experience for them either by focusing on social media reach or better engagement through technical advocacy. Dawn has come into*

the team with very person skills (both technical and recruitment/onboarding) and is starting to apply them on the project she is working on as is evidenced by feedback provided by the TWC team.

Dawn has a natural tendency to be drawn to detail and needs to be careful not to lose sight of the bigger picture and to remain concise particularly in interactions with leadership where there is an expectation of executive summaries. She is passionate about her work and likes to demonstrate the level of attention she dedicates to various tasks that need to be mindful of verbosity which ultimately hinders her communication style.

It is obvious that all come into contact with Dawn appreciate her helpfulness, attentiveness and drive to problem solve. Dawn has a positive, can-do attitude and is a great team player which are key attributes for a project manager. From a GTM perspective, Dawn has derived great insights from our various 2017 planning meetings and made meaningful improvement suggestions which have now been incorporated into our project plans.

Dawn has only been in the team since August but has made a promising start, I think she will be very successful in 2017 if she can still use to hone her project management skills and focus on succinctness."

79. The second paragraph can be taken to be a reference to the November presentation, but we note that the criticism there is the one we have found to have been made: the need to be concise, using the Barbara Minto method, rather than any question of fundamental flaws in the presentation.

80. The email from Sandra Oliveira also included feedback from a number of colleagues about the claimant. In her evidence Sandra Oliveira described this feedback as "*largely positive*", but noted criticism from Jenny Taylor, who the claimant had worked with in her previous role. Ms Taylor also gave evidence at our hearing.

81. Ms Taylor praises the claimant's passion, visibility, accessibility, thoroughness and attention to detail, but says that this attention to detail "*can lead her to deflect from strategic thinking … and hampers the impact of her management style*" and "*her propensity to talk rather than listen can also have a negative impact*". She goes on to describe a particular problem that arose in the early professionals program whereby the first respondent's compensation and benefits team had stopped a previous practice that could result in some graduates "leapfrogging" others and obtaining jobs at a higher banding than those with more experience. She says that she was on a phone call with the claimant where despite having achieved the desired outcome of this practice being reinstated the claimant "*pressed on for more*".

82. This was explored in more detail in Ms Taylor's evidence, where it became apparent that the claimant and Ms Taylor had different objectives for this call. While both wanted to reinstate the practice, the claimant wanted to press for the opportunity to have higher pay differentials, which Ms Taylor thought was not necessary or appropriate. We do not see this as anything more than a simple difference of views between two colleagues who had different perspectives and goals for the different parts of the organisation that they represented.

83. Following further discussions between Sandra Oliveira and Claire Bryant they held a joint meeting with the claimant on 31 January 2017.

84. The final version of the 2016 Checkpoint assessment gives the claimant the following ratings:

Business results:	Achieves
Client success:	Exceeds
Innovation:	Achieves
Responsibility for others:	Achieves
Skills:	Expects more

85. We set out below in full the "summary" contained in the Checkpoint document (prepared by Claire Bryant), much of which derives from the earlier email from Sandra Oliveira:

> *"Dawn joined the team in Q3 as a shared resource for UK integration and GTM, both roles are complex & wide ranging. Dawn learnt fast and was quickly able to take on large elements of the UK TWC role. She built relationships with TWC well and her technical & people management background enabled her to add value quickly. The feedback from the TWC team is excellent; they view her as a reliable go-to person for issue resolution and advice.*
>
> *Dawn has excellent attention to detail which helped her to learn fast and begin to contribute to process improvements. As she takes on more projects, brevity and speed will become important. I have observed a tendency for Dawn to talk rather than listen, she knows a lot and can share her experience to good effect but this is not always pertinent or appropriate in a busy environment. She should focus on the impact she has on her audience, she could try opening discussions with a question to encourage others to talk, listening actively and playing back to clarify what she hears.*
>
> *Dawn's responsibility to others was demonstrated by her investigation into the TWC OOH and its alignment to UK regulations. She investigated meticulously and engaged SMEs as needed, driven by care for the individuals and the business need to comply. Dawn my need to take care to retain the balance in her thinking between employee rights and business needs.*

Dawn is an excellent addition to the UK team and will continue to learn, develop and question how we can improve. Specifically, Dawn can use her knowledge of the Labs to educate others in the team and drive greater value from the tech community for acquisitions.

Dawn is naturally inquisitive and creative which enables her to look at situations from multiple angles and identify best paths forward. From a GTM perspective she always has the end-clients in mind and is constantly considering how we can improve the buying experience by focusing on social media reach or better engagement through technical advocacy. Dawn has come into the team with very pertinent skills (technical and recruitment/on boarding) and is starting to apply them on the projects she is working on as is evidenced by feedback provided by the TWC team.

Dawn tends to be drawn to detail and needs to be careful not to lose sight of the bigger picture and to remain concise particularly with leaders where executive summaries are expected. She is passionate about her work and likes to demonstrate the attention she dedicates to her tasks but should be mindful of verbosity which hinders her communication.

All who come into contact with Dawn appreciate her helpfulness, attentiveness and drive to problem solve. Dawn has a positive, can-do attitude and is a great team-player which are the key attributes for a project manager. From a GTM perspective, Dawn has derived great insights from our various 2017 planning meetings and made meaningful improvement suggestions which have now been incorporated into our project plans. On the second project that Dawn was working on around Tech Engagement on Acquisitions, it is key that innovation and skills are based on evidenced outcomes so I would encourage Dawn to accelerate her deliverable so that she can start to apply, demonstrate capabilities and measure the effectiveness of the initiative.

Dawn has only been in the team since August but has made a promising start, I think she will be very successful in 2017 if she continues to hone her project management skills and focus on succinctness.

The feedback provided about her previous role is consistent with the feedback on her current job. She demonstrated exemplary responsibility to others and very good attention to detail to deliver results but could benefit from more audience awareness and concise com"

86. The reference to "*investigation into the TWC OOH and its alignment to UK regulations*" is to an issue that the claimant raised in November 2016 about whether the current working practices at TWC (which required

meteorologists to work on shifts around the clock) were compliant with the Working Time Regulations in respect of night work and health assessments.

87. The reference to "*retain the balance in her thinking between employee rights and business needs*" foreshadows what was to come. Given that employee rights arise from legislation we do not see how there is any "*balance*" to be struck against business needs.

88. Joanne Czekalowska comments on the review as her "upline manager" (at p5107) as follows:

> *"Thank you for all your hard work and welcome to the team. I appreciate you jumping into projects, always more tricky than being in at the beginning and learning with the rest of the team. It is great to see you so quickly building trusted relationships with the TWC team. I encourage you to keep learning – acquisitions cover so many aspects of IBM we are all still learning every day – and to focus on the good guidance from Claire on big picture and clear options/recommendations in how you analyse challenges, build consensus and drive actions."*

89. One of the claimant's goals arising from this was described as "*review technical aspects of acquisition integration processes and make recommendations*". The claimant's comments against that (as at 18 January 2017) are:

> *"Researched current involvement of technical community in the acquisitions process, and drew up a presentation identify areas of possible interest. Presented findings to Sandra and Joanne. Additional work required to fine tune thoughts and assess the business value of any proposals."*

February to May 2017

90. During this period there are far more documented examples of good performance by the claimant than of poor performance. These are referred to in detail in the claimant's witness statement and include the following:

- A comment from a colleague on 10 February 2017 about an event the claimant was involved in, describing it as "*IBM at its best*".

- Sandra Oliveira saying on 2 March 2017 to the claimant: "*Well done, this is super encouraging and exactly the type of 'connecting of dots' that is so key on the GTM side, this is particularly exciting however due to the new technology angle!*" in relation to a talk that a TWC member of staff had given at one of the first respondent's laboratories.

- Claire Bryant saying on 26 April 2017 to the claimant: "*Wow, this is really impressive and it communicates a lot about the business*"

in relation to her work on getting a weather forecast from TWC onto displays at client centres in Europe.

91. On 16 March 2017 Sandra Oliveira writes to the claimant saying:

> *"Hi Dawn*
>
> *Before 1Q gets closed and I set off on hols, can we please spend some time together on Monday/Tuesday next week to review status on:*
>
> - *Your checkpoint goals,*
> - *Your tech engagement project,*
> - *Offerings roadmap template"*

92. On 20 March 2017 the claimant sent a single slide to Sandra Oliveira saying:

> *"Attached is the offering roadmap template – is this the sort of thing you were thinking of? I am not sure that I have got the items in the right order, or if I have identified too many, but thought it would be good at least get them down and we can always consolidate them and/or move them around."*

93. On 22 March 2017 under cover of an email simply headed "presentation", the claimant sends 37 slides with the title "Acquisitions – technical accelerators".

94. It appears that these two documents were the claimant's attempt to address the final two bullet points of the email of 16 March 2017.

95. On 23 March 2017 Sandra Oliveira sent an email to her team with brief points ahead of her departure on holiday, including (to the claimant): "*Great job re the ppt* [PowerPoint slide(s)]".

96. When questioned on this she could not say whether this was intended to refer to the single slide or the 37-slide presentation. She said that she thought it was about the single slide, but also that she could not be sure.

97. Whichever of the documents she was commenting on, we do not see anything from this from which the claimant could have concluded that Ms Oliveira was disappointed or not happy with either of these documents. Although it was not fully explored in evidence before us, it also appears from these emails that the claimant had a follow-up presentation on the technical accelerators project available much earlier than suggested by Sandra Oliveira and within the expectations of Joanne Czekalowska – that is, by the end of the first quarter of 2017.

98. Claire Bryant said in her witness statement that her next one to one meeting with the claimant following this review was on 19 April 2017. She refers in

that statement to notes that she took at that meeting, which include the word "disappointing" or "disappointed", which she said was a reference to feedback she had given to the claimant on Sandra Oliveira's views on her performance in the GTM role.

99. However, in cross-examination, she accepted that these notes must come from a much later date, because of a reference to "BW" in the notes, which she accepted was a reference to the "Bluewolf" project which was not an issue until much later on.

100. In response to this, Miss Masters later produced Ms Bryant's original notebook containing these notes, which appeared to date from April 2017. However, as she accepted she was in some difficulty with this given that Ms Bryant's own evidence was that these notes were not from April.

101. We do not to resolve the question of when this document dates from. Its only significance is the one-word reference to "disappointed", but this so limited in this note we can have no confidence as to what it refers to – whether it is the claimant's performance or something else - nor can we rely on Claire Bryant's recollection of its significance, when she told us that what were originally presented as the notes of the meeting were in fact from a later date.

102. On 8 May 2017 the claimant wrote to Sandra Oliveira saying, amongst other things:

> *"… could we schedule some time to go through the technical accelerators? … I would also like some more things to get involved with …"*

103. Sandra Oliveira replies saying "*Great … lets discuss. Feel free to reach out to Lee on GDPR to see if any support is needed there but I agree that we need to have a broader strategic discussion*".

104. The GDPR project was not an acquisition but was a wider project which some acquisitions staff ended up helping with as a result of a shortage of work within acquisitions.

105. We were referred to a series of emails relating to an event that the claimant had been involved with at the end of May 2017 called the "Hursley Summit". It appears that this was a wider event for IBM clients but that the claimant had arranged for acquisition staff to be present at the event and to present to the clients. Everyone, including Sandra Oliveira, appeared to be delighted with the event and the presence of the acquisitions at the event. There are a series of emails praising her involvement and Sandra Oliveira reported to Claire Bryant that "*Dawn has been doing some very good work on the GTM side*", with Joanne Czekalowska also being aware of this. Sandra Oliveira awarded the claimant 250 "BluePoints" for this work. This appears to be a special award, of nominal monetary value, by which managers can recognise good work by their staff.

106. In her witness statement Sandra Oliveira says that during this period,

> "*the main concern that started to emerge was that Dawn appeared to be less autonomous and self-driven than I initially thought and too reliant on being directed to activity. I was concerned by what I perceived as a lack of creativity … equally I was concerned that Dawn was slow to produce her work …*"

107. She did not express these concerns at this stage in writing, and we do not see anything in the papers before us to suggest that what she is now saying is how she felt at the time. On the contrary, the message that comes across from the documentation was that the claimant was continuing to do well.

2 June 2017 - the start of the Bluewolf handover

108. There is in the tribunal bundle an email dated 2 June 2017 in which Claire Bryant asks Nick Evans (another country integration lead) to note down the work he has been doing with a new acquisition: Bluewolf. The plan was that the claimant would take on the role of Bluewolf CIL from Nick Evans, and that she would be introduced to the relevant business leader as the new CIL the following week.

15 June 2017 - the second technical accelerators presentation

109. The claimant emailed Sandra Oliveira to set up a meeting to discuss the technical accelerators project on 5 June 2017 saying, "*does this time work for you to look at Technical Accelerators*". This suggests to us that the claimant was the one who was making the running with progress on the technical accelerators project. We have seen nothing to suggest that Joanne Czekalowska was chasing for progress on this.

110. On the evening of 5 June 2017, presumably following this meeting, Sandra Oliveira sends an email to Joanne Czekalowska and Sam McFarlane (who had joined the previous month) saying:

> *"As you are aware Dawn has been driving a successful series of activities with Hursley and progressing her recommendations on Technical Acceleration.*
>
> *In addition to that work and as per our recent discussions, I have asked Dawn to define an approach for earlier Geo engagement around offerings so that we can better assess market suitability, localisation plans, release schedules and of course linkages into Q2C, GTM and functions. To ensure alignment to the current 10 integration ideas initiative you are driving, I suggested to Dawn it would be good to setup a review and feedback session next week – invite to follow."*

111. At this point it is clear that the questions of the technical acceleration project and the offerings were going to be dealt with together, albeit that it was

understood that the offerings section was at a much earlier stage of progress.

112. In her witness statement, Sandra Oliveira says:

> "*by early June 2017, I had become frustrated by the delay in the second part of the technical accelerators presentation and so I pushed the matter by emailing Joanne and Sam on 5 June 2017 to say we would sent them an invite to a review and feedback session the following week*"

She continues,

> "*I met Dawn on 5 June 2017 to help her prepare … I saw that the draft presentation was still unstructured, in other words not summarised enough, with clear recommendation of next steps and actions*".

113. This is not the picture that emerges from the documents. From the documents, it appears that the claimant initiated the discussion on 5 June 2017, following which Sandra Oliveira was keen to set up the meeting with Joanne and Sam, describing the claimant in glowing terms. There is no suggestion that she may have reservations about the quality of the presentation, or delays in producing it.

114. The date of the presentation was set for 15 June 2017.

115. On 12 June 2017 Sandra Oliveira emails the claimant asking that we (presumably her and the claimant) should look at her "revised slides" the next day and passing on some recommendations from Joanne in respect of offerings.

116. It was not possible for the claimant and Ms Oliveira to meet on 13 June 2017, so the claimant sent her an email instead setting out her thoughts, attaching the draft presentation and also a link to her work on the offerings blueprint.

117. The night before the presentation (14 June 2017) the claimant sent an email to all the attendees at the meeting saying:

> *"… this is what I'm planning to cover:*
>
> *Technical accelerators*
>
> - *How and why we should use these to aid a fast start and 'prepare the market' for the acquisition offerings.*
>
> - *Recommendations and next steps.*
>
> *Offering engagement*

- *I could like this as a brainstorming session to get your input into the initial ideas and areas that I have identified.*

- *If you have 5 minutes to take a quick look before the meeting that would be great* [link to document attached]*."*

118. In her witness statement Sandra Oliveira says:

> *"I did not receive the final version until the morning of the meeting and had limited ability to make last minute suggestions, and in any case by this stage I genuinely felt I had given enough input and feedback to Dawn given the prior reviews she and I had."*

119. This ignores the fact that the claimant sent a draft of the presentation to her on 13 June 2017. When asked about what she had done with that, Sandra Oliveira said she had been very busy at the time and "*may have browsed*" the slides. She noted that they had next steps and recommendations, and that the recommendations were not "*off the wall*". She said that they had not gone through the previous slides in detail on 5 June 2017.

120. We find this extraordinary given the account that the respondents' witnesses had given of the difficulties with the previous presentation. If it was as bad as they had said then it would have been highly embarrassing for Sandra Oliveira, yet she seemed to see no need to fully review this second presentation. One reason she says this for is that she felt she had already given the claimant "*enough input and feedback*" yet there was little if any in her evidence as to what that might have amounted to – it certainly did not amount to a full review on either 5 June or 13 June or at any point prior to the presentation, which was to both her direct and one step removed line managers.

121. What is much more likely, and what we find to have occurred, is that Sandra Oliveira did not pay much attention to this presentation because the previous presentation had (apart from points in relation to style) gone well and she had no reason to suspect that this second one would not go well also.

122. While Sandra Oliveira also attempted to criticise the claimant for not having contacted her colleague Louis (in connection with the offerings project) Ms Czekalowska in her oral evidence said that this was not a point the claimant should be criticised for.

123. It was not clear during the hearing whether we had the final set of slides that went with the presentation in the tribunal bundle, but the parties agreed we could treat the slides that began at p1383b as being the final set. These are titled "*Accelerating acquisition growth through earlier engagement with the technical community*". These comprise four slides under the headings "*what problem are we trying to solve*", "*prepare the market*", "*core accelerators*" and "*next steps*". These are followed by a further 42 slides in a separate section headed "*backup slides*", which the claimant said she intended to refer to if the topics mentioned in them came up in the discussion. These

included such things as social media use and work with client engagement centres, typically under headings of "what", "why", "when" and "who". Many of these options would have an estimate of relative cost signified by a £-£££ rating in one corner.

124. Sandra Oliveira describes the presentation as involving a "*lively discussion*" with many questions being asked by the attendees. While that may sometimes be a positive description of a presentation this is not what was intended in Ms Oliveira's description, as she felt that these questions should have been anticipated and dealt with in the presentation by the claimant.

125. Joanne Czekalowska says she was "*underwhelmed*" and that while it was less wordy than before "*there was again limited new insight*". She emphasised that having understood the claimant to have good connections with the first respondent's laboratories she would have expected her to use those to explain what it was that the technical staff wanted. She says, "*I was very concerned*" and "*for a band 9 employee this was not a good presentation*".

126. Sam McFarland describes the presentation as being "*of very poor quality*" and "*far below the standard I was expecting*" with "*very little technical sales information*" and "*no recommendations as to how we should move forward to achieve our aims*". Both she and Ms Czekalowska said they thought that the claimant had not put much effort into the work.

127. In cross-examination Ms McFarland accepted that the presentation had contained some good ideas, which is consistent with how the claimant describes her reaction below. She also accepted that there was nothing wrong with the claimant putting forward as suggestions existing ideas that were already in use by the first respondent.

128. The claimant saw nothing amiss in the presentation. She took questions and discussion as being a good sign and says that she was told at the end that she had some good ideas and to keep up the good work by Sam McFarland.

129. We were keen to learn from the respondents' witnesses what exactly was wrong with the presentation. Both Joanne Czekalowska and Sam McFarland focussed on a lack of recommendations and insight into what might work to enable quick success for the acquisitions.

130. The lack of recommendations had also (on the respondents' case) been a criticism in the earlier presentation, and therefore something we would have thought Sandra Oliveira would be particularly alert to ahead of this presentation. There was a section in the presentation headed "*next steps*" which could be taken as recommendations. We asked Sandra Oliveira whether this was something she had discussed with her when giving "*input and feedback*" for the purposes of the development of the presentation. She said that the claimant had told her that there were recommendations in the presentation but she (Sandra Oliveira) had not asked what they were. This

is surprising given that (on the respondents' case) that was likely to a key point of the presentation.

131. No-one explained to us or gave examples of what these recommendations or insights should have been.

132. The respondents' witnesses said that there had been a discussion between them after the presentation at which they were critical of the claimant's presentation. It was, however, common ground that any follow up on this was to be dealt with by Ms Oliveira in and following the mid-year review that was due the following month.

133. As with the question of Sandra Oliveira's involvement in the preparation of the presentation we have real difficulties with the respondents' evidence as to whether this presentation was a bad one or not. Sam McFarland in particular was very critical of the presentation yet did not raise anything directly with the claimant at the presentation. Everyone seemed content for Sandra Oliveira to deal with this at the mid-year review. No one addressed any problems with the claimant at the time.

134. In a somewhat surprising piece of evidence, Sandra Oliveira says that after the presentation she had asked the claimant how she thought it had gone, and that claimant said, "*really well*". Rather than correct her, Ms Oliveira said she referred her on to Joanne Czekalowska and Sam McFarland to get feedback from them. This is surprising in two respects: first, Sandra Oliveira did not immediately correct that misapprehension, and second, according to Joanne Czekalowska and Sam McFarland it was Ms Oliveira who was delegated by them to give feedback to the claimant.

135. To the extent that there was any feedback given at the time, it was praise. This suggests either that any difficulties with the presentation were not as great as were subsequently made out (when it became the foundation of the respondents' case that the claimant's underperformance was so great as to require a PIP) or did not exist.

136. As with the previous presentation, there are no contemporaneous documents raising any concerns about the presentation – not even private messages exchanged between the relevant managers.

137. To the extent that there were any problems with this presentation we find that they have been exaggerated by the respondents' witnesses and did not exist in that form at the time. No doubt the presentation could be improved – any presentation could be improved - but we find that there were no substantial concerns about the claimant's abilities during this presentation. If there were the respondents would have raised them at the time and not left it to the mid-year review.

20 June 2017 – Give-back notification

138. At the start of her evidence Sam McFarland changed the date in her witness statement at paragraph 56 so that it now reads:

> *"On 20 June 2017, a graduate told me that he was going to attend a 'give back' event … 'Give back' events are voluntary activities that IBM involves itself in to play a positive role in society. This event involved IBM employees attending a school, to help students sharpen their interview skills. I am pleased that we are able to support 'give back' events … the graduate then told me that four people in the GTM team were going …"*

139. Ms McFarlane said in her oral evidence that the graduate named the claimant, Lindsay Williams and two other graduates or interns as those attending. It also appears she was told of the date of the event: 26 June 2017. She said she was surprised that so many people would be attending so close to the quarter end and she contacted Sandra Oliveira to check on this. Ms Oliveira said that she knew nothing of it but, it appears she did nothing to stop it taking place or limit the numbers attending. Ms McFarland did not intervene either, considering it something to be dealt with by Ms Oliveira.

140. Ms Oliveira says that she was not told about this event beforehand by Ms McFarland. She says that she thinks it was mentioned beforehand by the claimant (who also mentioned that a graduate would attend) but not when it was or who else would be attending. Ms Oliveira said that she had been off for an operation on Wednesday 21 June and then recuperating for the next two days, so that the first she learned that so many people had attended the give-back event on 26 June was the day after it had occurred: 27 June.

Part 2 – disclosures and initial detriments

The first disclosure – 20 June 2017

141. On 20 June 2017 the claimant was working in a meeting room at the first respondent's Bedfont Lakes office alongside her colleague Lindsay Williams.

142. The claimant says she was discussing problems with management at TWC when Sam McFarland entered the room, and asked either her or them how things were going.

143. The claimant describes what followed in these terms:

> *"I replied that we had been discussing TWC, that I was concerned about the toxic environment, and that whilst it was clear that* [name given] *was under some pressure, this didn't excuse his volatile behaviour, which was having a negative impact on the employees and in turn their ability to meet revenue targets. I provided some examples:*

- *that employees were being shouted at in meetings and on team calls,*

- *that* [names given] *in the Business to Consumer (B2C) team were ignored and excluded from team events, and that when* [name given] *did talk to them, he contradicted what they had been told by their US management,*

- *that* [name given] *was concerned that she would be sacked as a result of threats being made on team calls,*

- *that* [name given] *was under considerable stress due to a challenging time in his personal life and I was concerned about whether he was getting any support,*

- *that* [name given] *had fallen out with* [name given] *…, following a disagreement about an opportunity with Marks & Spencer,*

- *the scheduling of the sales enablement course on* [name given's] *non-working day, that she felt harassed by* [name given] *for updates on her days off, and that team calls were held on her non-working day meaning that she missed out on information important for her role, and*

- *that regular 8 am Saturday calls were being scheduled.*

I explained that this behaviour was against the law, with [name given's] *treatment and the Saturday calls being sex discrimination, and the bullying and harassment also against the law, any of which could result in grievances or legal action against IBM.*

Sam queried how the Saturday calls could be sex discrimination as the whole team was affected. I explained that as women predominantly had responsibility for childcare, calls out of normal working hours have a disproportionate effect on them, which would be indirect sex discrimination."

144. In cross-examination she conceded that she may not have used the word toxic, but if not had used something similar. She said she had used the word 'volatile'. She accepted that she had not at this stage spoken to the management at TWC (saying this was not her role) and that her source for what she was saying was the employees at TWC. She said that she thought that someone should have a word with the individual said to be responsible and she said she did not want to inflame the situation.

145. Three of the respondent's witnesses said that they were present and gave evidence about what had happened and had been said. While we would not expect them to be in complete agreement about what occurred there was a stark difference in their recollections.

146. The most extensive evidence came from Sam McFarland. She said she had come into the room to speak to Lindsay. She accepted that she had asked how things were going. In her witness statement she says:

> *"Dawn started telling me about issues she was aware of regarding the behaviour of the IBM management team who were managing the TWC acquisition:*
>
> - *A female employee of TWC had been asked to attend a telephone meeting (or some telephone meetings) on a Saturday morning and that this was bad if the woman had children,*
> - *The same female employee had to attend a meeting and/or training at work on her day off and that this was also unfair,*
> - *A member of the sales team had been told to ring in to work during his holiday.*
>
> *Dawn also said that IBM would end up in court over this.*
>
> *Regarding the second issue, I remember suggesting to Dawn that a man could have the same issue if he were a single parent and so it was not necessarily a matter of discrimination but about unreasonable requests.*
>
> *Regarding the second issue, I remember suggesting that generally a manager would discuss this with an employee and if the meeting/training could not be moved another date, and the employee was required to attend, then a manager would normally agree to an alternative day off for the employee.*
>
> *Regarding the last issue, I said that hopefully the sales employee and his manager had reached some sort of agreement in advance, for example that the employee would check in with his manager from holiday if it coincided with a deal. I was sympathetic about all of the issues. I asked Dawn if the issues had been taken to the employees' manager(s), or to HR if the employees did not feel able to discuss the issue with their manager(s). I then said that we would investigate the issues and we should obtain feedback from others who were working on the TWC acquisitions so that we could understand the situation better."*

147. She then goes on to say that she would not have asked how Saturday morning calls breached the law, accepts that the claimant mentioned that Saturday morning calls could be sex discrimination and that IBM could be sued for this behaviour, but not that there could be grievances.

148. A somewhat different picture emerged during her cross-examination. She said that Lindsay and the claimant were in the room along with one other person – possibly the intern. She said that the claimant had had "*an*

emotional outburst" about the situation at TWC. She said she (Sam McFarland) was "*taken aback*" by this "*outburst*" and the "*torrents of words*" coming towards her "*as if hit by an emotional tide*" which had "*physically hit me like a force*". "*There was a lot she had said and I received it as an outburst*". She said that the claimant had related these to her own experiences when a single parent. She said that the claimant was "*overly on the employees' side*" as "*the way she was saying things the default position was that IBM was at fault*". She said, "*as a CIL to be so passionate – to mention personal experience and it could end in court and that IBM was wrong that was what shocked and surprised me most.*" She said that her comments about it not necessarily being discrimination were an attempt to "*take the heat out of the situation*". She accepted Mr Heard's suggestion that "*that feeling that she was saying everything IBM was doing was wrong is a feeling you maintained going forwards from this meeting*".

149. Sam McFarland had previously given her own reasons for being particularly alert to allegations of bullying and harassment.

150. While Ms McFarland and the respondents generally criticised the claimant for too closely identifying herself with the TWC employees, and not having investigated these points with management before raising them, we are concerned that the first reaction of Ms McFarland to hearing of these matters was to seek to explain them away and come up with reasons why they may not be matters of discrimination or concern, and we are also concerned by Ms McFarland's apparent lack of understanding of what might amount to indirect discrimination.

151. The strength of feeling with which the claimant expressed herself on this occasion became a theme throughout Sam McFarland's evidence, with her twice saying that this was one of the things she had in mind when later talking about the claimant underperforming, although also when being given the opportunity correcting herself and saying that this was not underperformance as such but simply a matter of communication style, and she accepted that the claimant did not at any later stage express herself in the same way.

152. Lindsay Williams says, "*it is entirely possible that this topic was discussed on that day, but I cannot recall it*". Everyone agrees that she was present, and her view that nothing particularly memorable occurred on the day is at odds with Sam McFarland's description of the claimant's dramatic demeanour.

153. Joanne Czekalowska says:

> "*I remember Dawn raising some issues with me about TWC as I happened to wander into a meeting room where Dawn was talking to Lindsay Williams and Sam about TWC … I listened to Dawn and told her that she needed to bring this to Philip Johnson's attention and ask for his advice on what should happen next. Philip Johnson is in*

> *HR Business Development for Europe and I was very confident, having worked for him for a number of years, that his breadth of experience meant he was the right advisor for an issue like this.*"

She goes on to deny hearing any of the specific points that the claimant said she raised.

154. That Joanne Czekalowska may have been present was raised for the first time in her witness statement, despite the claimant's three claims each raising the issue of a disclosure during that meeting. No-one had suggested before that she may have been present at the meeting. This led to a strange passage of oral evidence in which Sam McFarland said that she was certain that Ms Czekalowska was not in the meeting at the start or middle of it but could not be sure whether or not she was there at the end. We do not see how Ms McFarland can be so sure about the first two stages of the meeting but so unclear as to the end of the meeting, except that if she had said that Ms Czekalowska was not there at the end she would have been contradicting her manager. We later gave Ms McFarland the opportunity to say who spoke at the meeting, but she did not identify Ms Czekalowska as having spoken at the meeting. The claimant says that Ms Czekalowska was not there and Ms Williams had no recollection of the meeting. We find that Ms Czekalowska was not present at the meeting and did not tell the claimant to contact Philip Johnson. If she had been she would have mentioned it much earlier and the others who were present would also have identified her as being there.

155. It is plain that the claimant raised a number of concerns with Sam McFarland at this meeting about what was going on at TWC, and that (i) IBM could get sued as a result and (ii) some of the events amounted to sex discrimination.

156. Much was made by the respondents of any problems arising from this meeting as being to do with the way in which the claimant had expressed herself rather than what she had said. Given this, Mr Heard asked Ms McFarland whether she had told the claimant that she had expressed herself the wrong way at the time. Ms McFarland responded that the claimant had been emotional at the time and that that was not the right time to correct her. She had not done anything later because she did not know the claimant well and felt that this was something for Claire Bryant to do as her manager. She said she told Claire about the "*concerns about the employees and their environment*" and that she was concerned "*with the level of passion* [she] *had heard* [the claimant] *express around these matters.*"

Subsequent events

157. Although Joanne Czekalowska was not at this meeting she was in Bedfont Lakes that day and (although not mentioned in her witness statement) in her oral evidence Sam McFarland said that she had reported the conversation she had had with the claimant to her the same day. As she put it in her answers to cross-examination "[I] *don't remember the level of specifics*

[discussed] *but remember telling her* [Joanne Czekalowska] *how I felt about the emotional outburst*". She also told us that "*the employee side of employee welfare was owned through the CIL side.*" The claimant was the TWC CIL but in that role she was managed by Claire Bryant, rather than Ms Oliveira and Ms McFarland. Ms McFarland said that she had weekly one to one meetings with Ms Oliveira but had not brought up the claimant's comments and behaviour at those meetings.

158. Joanne Czekalowska says:

> *"My thoughts on the issue being raised by Dawn were that, with the support of HR, it was something that could be dealt with. It is not uncommon for sales teams to have to attend calls on Saturday … I felt that Dawn was possibly over-reacting to passing comments, showing inexperience in dealing with things like this … I hoped with appropriate HR guidance and support, Dawn would be able to clearly understand what her role should be in helping to resolve the situation … It needed to be directed through the appropriate HR channels … I believed this to be a sales management issue which HR were well placed to resolve through coaching."*

159. Ms Czekalowska herself did not take any steps to refer the matter to HR until she learnt on 18 July 2017 that the claimant was going to take the matter up with Philip Johnson. We will deal with this in more detail later.

160. Although she had no formal responsibility for investigation or for the welfare of the employees within TWC Ms McFarland tells us that "*I took several steps to investigate the situation and to escalate the matter through the correct channels*". We do not understand why she took it upon herself to carry out an investigation, when this was not part of her role and Ms Czekalowska thought it was a matter for HR. The information should have been passed directly on by her to HR for further investigation, but was not.

161. She says that this started the following day when she sent an email dated 21 June 2017 (page 1420) to Claire Bryant, the claimant, John Cooper (who was the GTM PM for TWC) and Lindsay Williams with the heading "TWC – review, reflections and recommendations". In this she sends out a meeting invitation, saying:

> *"Hi all*
>
> *I am getting feedback about TWC from many sources and given the YTD health of their business, it is important that we quickly come together and reflect on what we are observing/experiencing and also the extended feedback you may be getting across all business dimensions/functions.*
>
> *We should focus on what works (do more of?), what is missing (best practice recommendations), what needs improvement/should change.*

I want to ensure we do this before qtr end, as there will be business reviews post blackout and our insight will be critical.

It is proving difficult to find a slot where everyone can attend – the proposed time looks to get us all together for most of the hour."

162. In her statement, she says that this email is sent because "*I wanted to understand the context of the issues and how they were being handled in order to ascertain if there was any substance to them*".

163. While the email does concern TWC it is difficult to read into it anything that could be said to have been particularly prompted by the claimant's comments or be by way of investigation into management behaviour. It appears simply that Ms McFarland was anticipating poor financial performance from TWC at the end of the quarter (which would be the end that month) and wanted to have some sort of response available when questions were asked about that poor financial performance. There is nothing in this that suggests it is an invitation to people to comment on misbehaviour by the relevant managers.

164. The same day she sent the "cadence – rules of engagement" to the same recipients. "Cadence" refers to the sales calls which the claimant said were taking place on Saturday. There is nothing in that document about what time or day of the week such calls should or should not be held on. She said she did this because either the claimant or Lindsay Williams had said the previous day that there were too many cadence calls within TWC.

26 June 2017 - Give-back

165. On 26 June 2017 the claimant and others (including Lindsay Williams) attended the school give-back event.

27 June 2017 - Sam McFarland and Sandra Oliveira meeting

166. Sam McFarland and Sandra Oliveira had a one to one meeting on 27 June 2017 between 14:00 – 15:00. Sam McFarland says that she did not mention the claimant's previous disclosures at that meeting, but "*I may have asked whether* [the claimant] *was ok because I had an emotional discussion with her.*" We find it to be unlikely that Sam McFarland would have mentioned an emotional discussion without going on to describe what the discussion was about. She also said that they discussed the claimant's underperformance in the second presentation. Sandra Oliveira said there was no discussion of this at the meeting on 27 June 2017 because "*the feedback had been given on the day for that*".

167. Shortly after that meeting Sandra Oliveira sent a Sametime message to Claire Bryant saying, "*I need to talk to you re: Dawn – will look at a free slot in your diary tomorrow/Thursday.*"

28 June 2017 - detriment 3 – "the claimant was reprimanded for attending a give-back event"

168. On 28 June 2017 the claimant received a text message from Lindsay Williams saying:

> *"Hi Dawn – heads up that Sandra not happy ref Monday. I was taken aback by her reaction. However, Patrick* [the graduate] *also mentioned it to Sam and she's not happy either …"*

169. While the respondents accepted that there was nothing wrong with attending a give-back event in itself (and they supported such attendance) Sandra Oliveira describes herself as being disappointed that "*Dawn has also arranged, unbeknownst to me, for three or four other members of the UK team to go with her*". This was particularly so as there were two other team members on holiday at that time so she was left short-staffed for part of a day in the run up to the end of the quarter. The only staff who may have been particularly required in the run up to the end of the quarter were Lindsay Williams and a graduate who helped to run some reports. Thus the claimant's attendance was itself not a problem, but Sandra Oliveira's objection was to not being told in advance that so many people would be away at a potentially busy time when she was already short-staffed. Both the claimant and Lindsay Williams were told off by her for this. We were not told that this had given rise to any actual problems, and Lindsay Williams said that she had been contactable throughout the time of the event, which took 3-4 hours including travel time.

170. It is not in dispute that this occurred (or at least that the claimant was reprimanded for attending with so many people). We will deal with why it occurred later.

28 June 2017 - detriment 2 – "claimant was obliged to attend GTM operational calls"

171. The claimant says in her witness statement:

> *"On 28 June 2017 at the end a call about the GiveBack event, Sandra said that I was to work at the Bedfont office every Tuesday going forwards, and that I must attend the weekly GTM Ops team meeting with the rest of the European team via web conference. She did not give a reason."*

172. The claimant says that she was not in an operations role, and John Cooper, who was also a GTM PM, did not have to attend the calls or come into the office. She also says that this meant working in a meeting room with others, which she found to be unproductive and meant she had to work on evenings and weekends at home, which was a better environment for her to work in.

173. It is common ground that the claimant was only shown as an "optional" attendee on the weekly invitation for the GTM ops calls – but the claimant

says that this was because it had been set up as a recurring appointment earlier, at a time when her attendance was not compulsory.

174. We do not accept that the claimant was told that she had to attend these calls. Her attendance remained optional as described on the meeting invitation. Sandra Oliveira had nothing to gain by requiring the claimant to attend these calls.

175. As for the question of attendance at Bedfont, it is our understanding that throughout the period of the claimant's work members of the team were encouraged to work at the Bedfont office on Tuesdays. We have previously seen examples of meetings taking place on Tuesdays in Bedfont. For instance, the first disclosures took place on a Tuesday in Bedfont when the claimant and Lindsay Williams were in a meeting room together, as did the notification from Patrick to Sam McFarland of his intention to attend the Give-back event and the one to one meeting between Sam McFarland and Sandra Oliveira on 27 June.

29 June 2017 - the second disclosure

176. The call had been set for 29 June 2017 from 12:00 – 13:00. On 21 June 2017 the claimant sent an email to Sam McFarland saying that she had an appointment then but may be able to move it. Ms McFarland says that there was no need to move the appointment and the claimant should be able to join part of the meeting. On 29 June the appointment was then changed to 12:30 – 13:00 on account of Ms McFarland having other urgent business. This clashed completely with the claimant's appointment, so that morning she sent two emails.

177. The first was to Claire Bryant setting out the individual issues she had been told by the TWC employees. The claimant told us that she was circumspect in this and other written communications, thinking that they may be shared with the TWC management. This email broadly repeats the points she had raised previously but without explicitly mentioning discrimination, a toxic environment, harassment and bullying or any suggestion that this may result in grievances or legal action.

178. Shortly after that she sent an email to Sam McFarland saying:

> *"Hi Sam*
>
> *Just to let you know that I can't make the new time, as 12:30 is the time of my orthodontist appointment, although if it is delayed I will dial in. I think Claire, John and Lindsay are between them aware of the issues I've seen, as have shared information with them, but let me know if you have any specific questions."*

179. Later in that chain of emails exchanged with Claire Bryant the claimant says (to Ms Bryant) "*I did let Sam know I couldn't join, unless my appointment is delayed. Perhaps have an initial discussion and then we could have a call*

with Philip [Johnson] *to discuss further, and I could join that?*" Ms Bryant replies, "*I do not think you should lead the call with Philip and invite me …*". She said in her witness statement that this was a typographical error and that it should read "*I do think you should lead the call with Philip and invite me …*". This was because "*I thought Dawn should take more of a lead*".

180. The claimant was able to attend the beginning of the phone call, as her appointment was delayed. She says that in this call she added that the points she was raising in the email were (in the case of one individual) sex discrimination and that the other points "*breached employment law*". Claire Bryant's brief notes of the call include the words "*climate of fear*" but nothing directly relating to sex discrimination or breaches of legislation. Claire Bryant says that she cannot remember whether the claimant mentioned TWC issues in the call (although according to Sam McFarland "TWC issues" were the entire point of the call). Sam McFarland says that the claimant did not raise any "*new or material issues … nor anything that specifically tied back to the initial issues raised by Dawn*".

181. In a Sametime chat following the meeting, Claire Bryant says to the claimant "*I do think a call with Philip would be useful. I really don't know how we address the* [named individual] *bullying perception*". It is clear, therefore, that the question of that individual's approach as being bullying had been raised in the call, and that must have been by the claimant. When asked specifically where the word "*bullying*" had come from she had no explanation.

182. Lindsay Williams says: "*I do not remember anything particular that was discussed on this call …*"

183. We accept that the claimant was circumspect in writing but was more likely to be open when speaking. It also appears (consistent with this) from the reference to a "*climate of fear*" that she went further on the call than she did in writing. Sam McFarland saying that the claimant did not raise anything new is broadly consistent with the idea that these disclosures were the same as the ones she had made previously (where she specifically referenced sex discrimination and the possibility that the actions breached employment law). We find that she did say in the phone call that the points she was raising were points of sex discrimination and breach of employment law. This is the way she had previously put them to Sam McFarland, and would be consistent with the "climate of fear" and "bullying" comments and notes later made by Claire Bryant.

29 June 2017 - Claire Bryant and Sandra Oliveira meeting

184. Claire Bryant's notes of a meeting on 29 June 2019 with Sandra Oliveira are at page 5401 of the tribunal bundle. This was the meeting that Sandra Oliveira had asked for following her meeting with Sam McFarland on 27 June 2019. The notes read:

> *"Checkpoint*
> *Dawn – lots of conversations around team set-up.*

Band + seniority + deliverable.
Now getting bit between teeth.
Challenge distilling.
GTM PM
Level of [indistinct]
Value ??
Band 9
Inquisitive … so what.

185. Ms Bryant said that the final comments "[relate] *to the fact that both Sandra and I were querying whether Dawn was really doing a Band 9 role*". Although Ms Bryant has occasionally suggested that there were problems with the claimant's work as a CIL PM, on further questioning about that she has always reverted to there being no material performance problems with the claimant's work as a CIL PM so we do not see how it was that she would be querying whether the claimant was really doing a band 9 role. On the respondents' case any questions of underperformance were only in the GTM role.

29 June 2017 - "Lessons learned"

186. By way of follow-up to the phone meeting on 29 June 2019 John Cooper was asked by Sam McFarland to compile a document headed "*TWC – lessons learned*". In an email he described the task as being to enter in that document "*your lessons learned and any recommendations*" in relation to TWC. This was to be done by 5 July 2017.

187. In a Sametime conversation on 3 July 2017 Claire Bryant says to the claimant "*Hi Dawn, shall we consolidate our thinking for the input to John re TWC? I think we need to be cautious about how we communicate the issues with the sellers.*" She continues "*we … need to include examples – but anon*".

188. In a further exchange on 6 July 2017 Claire Bryant prompts the claimant again on the question of a response. The claimant says, "*struggling with it a bit, as am not sure we have learned the lessons … was thinking that we could say something along the lines of 'provide greater clarity of direction, as employees became demotivated due to ongoing uncertainty' as one thing … need to say something about the level of cadence (including on non-working days) but that's difficult.*" Claire Bryant replies, suggesting "*maybe refer to cultural change and respect personal time*". There is further discussion about "*coaching leadership team on change management*".

189. The "lessons learned" document eventually comprised 36 points, of which the claimant contributed seven, three of which could be said to be related to the concerns she had previously expressed. There is no mention of any of these points being matters of discrimination or being any breach of legal obligation.

4 July 2017 - detriment 1 – "claimant no longer invited to participate in meetings from 4 July …"

190. In her witness statement the claimant described the relevant meetings as being GTM strategy meetings, which she had attended from 23 May – 19 June 2017 but not after that. The meetings she did not attend started with a meeting with Paul Price, an executive from the US, which was scheduled for 4 July 2017. We have also heard of "KPI meetings" which would appear to fall under this detriment, including one on 16 November 2017. It is said that Sam McFarland is responsible for this detriment.

191. It is apparent from emails disclosed that there was a meeting scheduled for 4 July 2017 at South Bank between Joanne Czekalowska, John Cooper, Mark Butterworth, Sam McFarland, Sandra Oliveira and Paul Price, a US executive. This was titled as "*Red Devil, Blue Devil discussion*". We were told that Red Devil and Blue Devil were the names of projects to investigate the reasons why an acquisition may succeed or fail. The meeting did not ultimately take place because Mr Price had to attend another meeting instead.

192. Neither party particularly focussed on these meetings in their evidence and submissions. The claimant accepted in respect of the KPI meetings that there were two phases to this work – the first phase of which she was invited to and the second she was not. The claimant appears to have taken the view that she should be attending these meetings because her colleague, John Cooper, who was also a GTM PM, was attending them. Sam McFarland in her evidence said that his position was different because he was actively working as a PM on particular acquisitions, which the claimant was not.

193. It is apparent that there were meetings that took place in connection with the GTM work which the claimant was not invited to attend. We will consider the reason for this in our discussion and conclusions.

10 July 2017 – the TWC relocation presentation

194. One thing the claimant was working on as part of her CIL PM role was looking at the TWC site in Birmingham, and whether it should be relocated to an existing IBM site in Warwick. A presentation concerning this was due to take place on 10 July 2017. The claimant and Ms Bryant met to discuss this and other matters on 7 July 2017. Claire Bryant says in her statement that the claimant was unprepared for this and:

> "*had not gathered the information needed in order to make recommendations … Dawn later told me that she worked over the weekend to get input from stakeholders, including TWC employees, complete the preparation and that the meeting went well. However, this lack of preparedness and determination to get essential answers was an example of Dawn's lack of proactivity. It created unnecessary*

> *pressure and weekend work for TWC team members Dawn was there to support and this was of real concern to me*".

195. In cross-examination, it was pointed out to Ms Bryant that she had replied at the time "*it looks good*", and also replied "*brill*" in response to the claimant saying who she had contacted about the draft presentation. As with each of the other criticisms she made of her performance as a CIL PM, the criticism faded away under cross-examination and we repeat what we have said before – she accepted that there was no material underperformance in the claimant's role as CIL PM.

12 July 2017 – Joanne Czekalowska email to Alison Webb

196. On 12 July 2017 Joanne Czekalowska sent an email to Alison Webb, with a copy to Sam McFarland, saying:

> *"Alison*
>
> *I hope you are well. Sam and I would really appreciate some time with you re an underperforming employee."*

197. It is not in dispute that the "underperforming employee" in question is the claimant. Alison Webb was at the time the HR Partner with responsibility for the acquisitions team.

198. This is the first document suggesting that the claimant was underperforming (or containing any criticism of her performance) in her current role.

199. This approach followed discussions Ms Czekalowska had with Sam McFarland in which, she said, "*Sam and I discussed putting Dawn on a PIP as this would signal to her that things were not moving in the right direction but would also show a commitment from us to ensure that she got back on track*".

200. She said that she thought the idea that the claimant needed to be on a PIP had come originally from Sam McFarland rather than her.

201. When cross-examined about this email, she said:

> *"This email to Alison Webb was because I was concerned* [that we should] *follow the right procedure after the 15 June presentation meeting.*

202. When challenged that it had taken her a month to make this approach, she said that she had wanted to ensure they were following the proper procedures going into the forthcoming mid-year reviews. She said that she rarely had underperforming employees in her team, and wanted to check the latest procedure particularly as the Checkpoint system was by then relatively new. She said the poor performance she had in mind was the claimant's work on the two presentations. She denied this approach had

anything to do with the concerns the claimant had raised. She said that she also intended on any call with Alison Webb to raise the concerns about TWC – to see who the correct HR Partner to deal with this would be – but that this would be a secondary purpose of the call.

203. We were somewhat surprised that such a senior manager should have thought that it was necessary to contact HR for advice about underperformance that amounted, to her understanding, to two poor presentations over a period of more than six months.

204. We were equally surprised that Ms Czekalowska came to the view that the step of approaching HR was something she and Ms McFarland should take without reference to Claire Bryant or Sandra Oliveira. Ms Czekalowska said that she had not formed a view that the claimant actually was underperforming, as that would have to await the outcome of the mid-year review to be conducted by Ms Bryant or Ms Oliveira. She also said that she was not aware of what the outcome of that mid-year review was or what eventually was included in the claimant's PIP.

205. We asked what informal steps had been taken with the claimant before making this approach. Ms Czekalowska had taken no such steps herself, saying that this was a matter for Ms McFarland and Ms Oliveira. She was not able to give us any specific examples of informal steps that they had taken, nor why, if such steps had been taken, they had not been successful and formal advice was required from HR. When we asked the same questions of Ms McFarland and Ms Oliveira they were equally unable to give specific examples of what informal steps had been taken or coaching they had given before Ms Czekalowska contacted HR and before adopting the eventual PIP. In respect of the June presentation Ms Oliveira went out of her way not to give the claimant feedback on it, preferring to leave the claimant to approach Joanne Czekalowska and Sam McFarland to correct her impression that the presentation had gone well.

206. On her own evidence Ms Czekalowska had formed a view that the claimant had underperformed based on two poor presentations, then taken the initiative to enquire with HR about implementing a PIP without actually having decided for herself whether there was underperformance and without having checked what had been done about this by the claimant's managers. Having had HR advice how a PIP was to be implemented, she then took no further steps to establish whether it was actually warranted or what the claimant's managers were doing about it. We find this to be highly unlikely, and will consider the significance of that in our discussion and conclusions.

207. Alison Webb was away until 18 July and the conversation with her eventually took place on 24 July 2017.

13 July 2017 - the third disclosure

208. The claimant says in her witness statement:

> *"… on 13 July 2017 at the end of the UK I integration team meeting I asked Claire what steps Sam had taken regarding the disclosures. She replied that the only outcome that she was aware of from the meeting was the "TWC lessons learned" presentation.*
>
> *For the benefit of the rest of the team … I quickly restated the disclosures I'd made and said that I thought we were particularly exposed on the treatment of* [named individual] *from a sex discrimination perspective, and that the bullying and harassment meant that we might see a grievance being raised by one of the team at some point soon.*
>
> *As Nick had an employee in the Merge acquisition who had also raised a grievance, Claire said that a call with the three of us and Philip would be helpful to get some advice. I agreed to contact Philip to set that up.*
>
> *On 14 July 2017 I sent an email to Philip Johnson entitled "Advice re TWC and Merge""*

209. Claire Bryant says she has no recollection of the claimant raising these issues again then and there is nothing in the team meeting notes about such a comment. She does, however, go on to say, "*I advised* [the claimant] *to contact Philip to set up a meeting with Philip, me and Nick for advice about TWC and other acquisition issues*". She does not explain when this occurred or what prompted it. If this is intended to relate back to the mis-typed email of 29 June 2017, there is no explanation of how Nick Evans came to be involved when he is not mentioned in that email.

210. Nick Evans (who was present at that meeting) says "*Dawn may have mentioned TWC to me in June 2017, but I cannot recall any particular conversation we had about it*". He does not address in his witness statement the question of any conversation on 13 July 2017. In his cross-examination he said there were many team meetings held and he did not remember this particular one.

211. The claimant did send an email the following day (14 July 2017) to Philip Johnson, saying: "*Claire Bryant, Nick Evans and I would like to seek your advice on a couple of the acquisitions we are currently working on – TWC and Merge*". He replies, "*Hi Dawn, nice to hear from you … as TWC and merge well past ToB we have moved off these project …*". "ToB" is a reference to "transfer of business", following which the involvement of the HR integration team would be at an end and the employees would be dealt with through standard HR reporting lines. While transfer of employees had taken place for TWC, transfer of business had not.

212. We find that the claimant did make this third disclosure in the terms she says she did. It is the only explanation for her contact the following day with Mr Johnson, in which she says that she, Claire and Nick want to speak to him. Her explanation that she had made this third disclosure completely explains

this attempt to contact him, and there is nothing from the respondents' side to explain what could have prompted this. While Claire Bryant says that she told the claimant to do this, that is consistent with the claimant's version of events and Claire Bryant has not suggested anything other than the discussion the claimant refers to that could have prompted this.

213. We also note that on 19 July 2017 Claire Bryant wrote to the claimant saying "*did you manage to get some time with Philip about the TWC HR issues we discussed*" – which suggests that there was discussion about TWC HR issues on 13 July and this was what had prompted the approach to Philip Johnson.

17 July 2017 - the fourth disclosure

214. The claimant replies on 17 July saying:

> "*we have a couple of situations that either have, or could result in grievances, and then following on from that the possibility of legal action. Nick has already made you aware of the one in Merge, and I have a couple of situations brewing in TWC. We would like to bring you up-to-date on the merge situation, and discuss those in TWC to see if there are actions we could or should put in place in to reduce the likelihood of this happening, either in TWC or in other acquisitions …*"

215. Mr Johnson replies saying he is aware of the problem in Merge but not in TWC, and that in both cases the problems are ones for the usual HR reporting lines in IBM, not him.

216. This disclosure is in written form and there is no dispute that it was made (although the extent to which it can amount to a protected disclosure is something we will consider in our discussion and conclusions).

18 July 2017 - meeting between Joanne Czekalowska and Sam McFarland

217. Joanne Czekalowska and Sam McFarland had what Ms Czekalowska described as "*one of our regular 'catch-up' meetings*" on 18 July 2017. Ms Czekalowska prepared some notes of what had been discussed and sent them to Ms McFarland for her comments – some of which we have set out below.

218. In her witness statement Ms Czekalowska says:

> *"Sam had mentioned to me during one of our regular 'catch-up' meetings, on 18 July 2017, that Dawn was indeed going to refer her concerns to Philip Johnson and I also felt it was important to notify Alison* [Webb] *of the issues because she is my HR Partner and is very experienced. I wanted to ensure that she was aware of the situation so she could advise whether there was anything she should be doing. I raised the issue to Alison, and she agreed she would in*

> *turn pass it on to the relevant HR Partner, I think at that time this was Nyree Murrell."*

219. We were not told how Ms McFarland came to know that the claimant was going to speak to Philip Johnson. She denied in her cross-examination that she had heard about this from Mr Johnson so it seems most likely that she heard about it from Claire Bryant, following the conversation that comprises the third disclosure.

220. It is not obvious to us why learning that the claimant was to speak to Philip Johnson would itself have prompted Ms Czekalowska to contact HR. She says that it was because:

> *"Given some of the comments Dawn had shared in an open forum (including to Sam but not to me) of her own personal experiences … I was concerned that Dawn might be getting too personally involved and Philip was the right person to guide and advise her. (I did not hear these comments by Dawn, but Sam relayed them to me). It is easy to become personally involved as we get to know the acquired company employees as individuals. However, it is our job to guide them when they ask for help, proactively support them wherever we can and to link them to the relevant IBM subject matter experts … If there was substance to the concerns, then I wanted it to be dealt with quickly and following the correct processes so I did, therefore, escalate Dawn's concerns."*

221. There are several problems with this explanation.

222. First, the statement that "*I was concerned that Dawn might be getting too personally involved*" arises entirely from personal references that had been raised at most only once by the claimant, in her initial disclosure. Those personal references had (on the respondents' case) been relayed to Ms Czekalowska by Sam McFarland on the day of the disclosures – 20 June 2017. There had been no repetition of those personal references. Given that so far as Ms Czekalowska was concerned the claimant had still not spoken to Mr Johnson (but was intending to do so) almost a month later hardly suggests that the claimant was taking an intense personal interest in the problems.

223. Second, taking it up with Philip Johnson was the thing that Ms Czekalowska had said was the right thing to do in her account of her involvement in the original meeting (and also what Claire Bryant had suggested following the second disclosure) so it is unclear why she would then have any difficulty with the claimant doing that.

224. Third, any concept that Ms Czekalowska wanted things to be dealt with "quickly" cannot be correct since she had waited almost a month to raise the point with HR. In her initial approach to Alison Webb on 12 July 2017 Ms Czekalowska had only mentioned problems with "an underperforming employee", and not anything to do with TWC concerns.

225. We do not accept the reason Ms Czekalowska gives for contacting Alison Webb about the claimant's concerns.

226. The eventual phone call with Alison Webb took place on 24 July 2017 and is dealt with below.

19 July 2017 - detriment 4 – removal from Bluewolf

227. We have previously set out that plans were in progress for the claimant to take over work as the CIL PM on Bluewolf from Nick Evans.

228. On 19 July 2017 Sam McFarland replied to some notes she had been sent by Joanne Czekalowska following a meeting they had had the previous day. Extracts are set out below, with Ms McFarland's comments shown as bullet points after Ms Czekalowska's notes:

> *"People and do we have the right skills in our team … Would be good to get Sandra's feedback to you today. Will add in thoughts to the table on skills enhancement …*
>
> - *Sandra meets Dawn Friday for her review – we agreed 1H performance issue to be addressed and 2H funding issue – be good if we can talk to Alison Webb prior to then and get clear direction on options …*
>
> [a colleague] *shared that Bluewolf now not expanding in Europe so will remove that from our possibilities list*
>
> - *Bluewolf – just a heads up that Dawn currently covers this … supposedly Nick handed over to her but not sure what status that handover is at."*

229. The fact that the claimant was in the process of taking over as project manager for Bluewolf was not news to Ms Czekalowska, as she accepted in her oral evidence that she had known of it since an email from Nick Evans to her on 7 June 2017 which said "*I am in the process of handing Bluewolf over to Dawn*". Ms Czekalowska did not intervene at that point to stop the handover.

230. On 19 July 2017 Claire Bryant wrote to Sam McFarland saying, "*Dawn is just taking over BW* [Bluewolf] *from Nick*". It is not clear what prompted this but it appears to be a continuation via email of a Sametime chat which we do not have a copy of. The email chain below continues throughout the same day.

231. Sam McFarland replies, copying in Ms Czekalowska and Ms Oliveira:

> *"Thanks Claire*

Given the current funding discussions and also Dawn's 1H individual performance/contribution issues and need for improvement, is it still the right thing to do the handover? I'm not familiar with the bandwidth of your team."

232. Claire Bryant says to this:

"Hi Sam

I think as the handover is in progress and Dawn needs to have projects to allow her to increase contribution, it is the right approach."

233. At that point, Joanne Czekalowska intervenes, saying:

"Claire,

I honestly don't think this handover should continue. I understand your concern to give Dawn a project she can own however, the next steps on Bluewolf are to focus on NA [North America] *and not expand more into Europe … With that in mind, I would prefer Nick stay engaged and work more handover, so if he has bandwidth issues, Dawn can pick up specific areas she can support him on."*

234. Ms Bryant replies:

"Joanne

I will make it happen but will give you a buzz tomorrow if you have time to chat through."

235. In her statement Joanne Czekalowska said about this decision:

"… after the June presentation, I did not think it would be helpful for Dawn to be distracted by another integration project as I wanted to ensure that she had the best chance to show she could perform on the GTM side … I felt that Dawn needed to manage her time to focus on the core GTM actions, prioritise the country integration actions and not let other 'nice to' actions take so much of her time.

Furthermore, I came to the conclusion that the Bluewolf project needed an experienced project manager …

Another contributing factor to my decision was that there had been some speculation that Bluewolf was going to expand in Europe and if it did, it would take up much more of Nick Evans's time. However, by mid July 2017, I knew that the expansion into Europe was not going to happen. The project would not, therefore, be too onerous for Nick and I thought it best to keep him in place …

In short, I did not think Dawn was the right person to manage the Bluewolf project as the Bluewolf project leader needed someone with

broader integration experience to give them guidance, and in any event, she needed concentrate on improving her performance on the GTM side."

236. In cross-examination she said there were two reasons for her to remove the claimant from Bluewolf. The first was that the internal client for this acquisition was inexperienced and did not seem to fully understand the role of the acquisitions team. She said that his meant that it was better to retain an experienced project manager on the work. The second was that she did not want the claimant to be taking on additional work at a time when there was a question mark over her performance in the GTM role.

237. We questioned Ms Czekalowska about this, given that it had not been suggested by anyone that any lack of performance in the GTM role was about a lack of time. Indeed, in an earlier email to Sandra Oliveira the claimant had explicitly asked for more work on the GTM side. The second technical accelerators presentation had been on 15 June 2017 yet Ms Czekalowska had not taken any steps then to remove the Bluewolf role from her then, despite having known about her involvement at that time and considering it to be a large project at the time.

238. This also did not seem consistent with her email which said that the claimant's removal had come about following her learning that Bluewolf's expansion was to be very limited in Europe, thus suggesting that it was a less onerous and time consuming role than she may have previously thought.

239. The CIL PM role for Bluewolf was a funded role in the acquisitions team – that is, one for which there was internal funding allocated.

240. There is no dispute that this detriment occurred. The question is why it occurred, and we will address this in our discussion and conclusions.

21 July 2017 - detriment 5 – claimant informed that her line managers were disappointed in her performance – mid-year review with Sandra Oliveira & detriment 6 - told that there was not a job

241. Two alleged detriments arise from the claimant's mid-year review with Sandra Oliveira: that she was told that her line managers were disappointed in her performance, and that she was told that there would be no funding available for the GTM part of her role in 2018 and that she should immediately start to look for other projects and roles.

242. The claimant was due to have a mid-year review with her managers under the Checkpoint system. This was originally scheduled by Sandra Oliveira (who by then had taken over as the claimant's "Bluepages" manager and so had primary responsibility for her under the Checkpoint system) to be a joint meeting between her, Ms Oliveira and Ms Bryant at 15:00 on Tuesday 18 July 2017. However, Claire Bryant told Ms Oliveira that she was busy then and on 12 July 2017 Ms Oliveira replied saying "*Understood so for efficiency*

I suggest we do separate sessions with Dawn next week as I know she is also out on Wed/Thursday and then you are on hols." She copied this reply to the claimant.

243. On 17 July 2017 around 16:30 Sandra Oliveira rescheduled the appointment from Tuesday 18 July 2017 (when it had originally been intended that all three would attend – but which was kept for the purposes of a meeting with Sandra Oliveira only) to Friday 21 July 2017. She includes in the invitation to the rescheduled meeting "*I am very sorry but need to reschedule this to Friday.*"

244. The claimant says, "*I believe this* [rescheduling] *was at Sam's request, to enable her to provide direction to Sandra at their regular Tuesday meeting, on what was to be said at my review.*" She goes on to quote from the exchange on 18/19 July between Joanne Czekalowska and Sam McFarland that we have referred to above.

245. Sandra Oliveira does not say why the meeting was rescheduled in her witness statement and it remained unclear why it was rescheduled following her oral evidence. It is, however, clear from the email exchange that whatever the reason for the rescheduling it was considered by Sam McFarland to be an advantage as it gave the opportunity for them to discuss the claimant's situation and to consult HR before the meeting (with Alison Webb being away until 18 July 2017).

246. The claimant says in her witness statement:

> *"On 21 July 2017 I had my mid-year review with Sandra. At the review Sandra told me she was disappointed in my performance, that I had not demonstrated technical leadership and was not performing at the level expected for a band nine. She seemed very uncomfortable and emphasised that this view was shared by Sam and Joanne. She added that she did not know what Claire's view of my performance was and asked when my review with her was scheduled for.*
>
> *I asked for more information but only got a very vague response that they had expected more technical leadership. She changed the subject saying there was another problem which was that there was no longer a role for me in the team.*
>
> *I was very shocked. Sandra had not raised any concerns about my performance with me prior to this point. Feedback had primarily been given in front of others during team meetings and we'd had just a couple of one-to-ones for her to provide input on the technical accelerators that I was working on."*

247. Sandra Oliveira says:

> *"I took a blunter approach with Dawn at this meeting. I told her I was disappointed with her performance. She asked why and I said I was*

disappointed with the delay on the technical acceleration presentation and the standard of the end product. Dawn said that she had not thought that Joanne was very interested in it, which surprised me. Joanne is always receptive to new ideas and to innovation. In any event I had asked to do the work so she should not have simply disconnected from it on the basis that she thought her upline management was not interested in it. I expressed surprise that she thought this and that she let such a long period of time to lapse without speaking to me about it.

I recognised her for some things which are done well, for example, the Summit event but I also told her she was focusing too much on TWC as her role was broader than that … The work I needed her to do on the GTM side was less tangible and required an influence model rather than a direct relationship model and I felt Dawn struggled with that …

We then spoke about work for the second half of 2017. Dawn was concerned there were no new projects coming up. I advised Dawn, as I had my entire team repeatedly, that there was no funded work in the pipeline and said it was incumbent on everyone in the team to look for new opportunities, be it bringing in new projects for the team; being assigned to other projects whilst remaining in the team; or even seeking redeployment …

I was clear with the whole team about the fact that there could be a funding gap due to a lack of new projects coming in. I tried to help new the team members to look for other work internally in the summer of 2017 …"

248. We do not have any notes of that meeting, but we do have a Sametime chat between Sam McFarland and Sandra Oliveira from 24 July 2017 (the Monday following the mid-year review on Friday). This says:

"SM How did the feedback mtg go on Friday?

SO You mean Dawn's mid-year review?

SM Yes

SO As well as could be expected, would rather we discuss in person tomorrow but basically told her there isn't a role for her going forwards."

249. According to Ms Oliveira's account of matters, with no pipeline there was no ongoing role for anyone in the acquisitions team, so it is surprising that she singled out saying "*there isn't a role for her going forwards*" in her one sentence report to Ms McFarland – particularly when she would have had the more difficult task with the claimant of identifying her individual underperformance.

250. We asked Ms Oliveira why she had singled this out as being the most notable part of the meeting. She said that she had been rushed when writing this, and that this question of lack of a pipeline of work was more of a concern with GTM PMs than with other members of GTM operations because they had fewer transferable skills.

251. There is, ultimately, no dispute that both of these detriments occurred at the mid-year review with Sandra Oliveira. The more significant question is why they happened, which we will deal with in our discussion and conclusions.

24 July 2017 - the telephone call with Alison Webb

252. The telephone call that Joanne Czekalowska had sought on 12 July 2017 between her, Sam McFarland and Alison Webb took place on 24 July 2017 at 13:30. The meeting invitation had the heading: "*Catch up re Acquisitions: Dawn Davidsen and TWC HR situation*".

253. Joanne Czekalowska does not mention in her witness statement what was said on this call except that she was told that there was a new online tool for managing underperformance and that it would not be Alison Webb who was responsible for advising on this.

254. Alison Webb says:

> *"I do not recall precisely the exact words spoken on the call but I remember they were asking for some advice about managing poor performance in relation to Dawn … I cannot now remember if I … gave general advice to Joanne and Sam, but if I did, it would likely have included telling them to have a discussion with Dawn, as a first step, to inform her that she was underperforming. Following such discussion, I usually advise the manager to consider whether a Performance Improvement Plan ("PIP") might help the employee to improve … I cannot remember if I went into this detail with Sam and Joanne, but this would have been my general advice if I gave it.*
>
> *I also remember that during our call on 24 July 2017, Joanne passed on to me some concerns that Dawn had raised. I recall a conversation with Joanne about the management style of* [named individual] *who was the business lead for TWC. I did not discuss this at length as* [the individual] *was not in a Business Unit I supported, and I did not have any background or history of the situation and was not aware of any action already being undertaken. I did not get the impression from this call that Joanne was in any way annoyed that Dawn had raised these issues. I think Joanne raised it with me as she was concerned that the matters were properly dealt with and HR was aware of them.*
>
> *After the call … I sent an email to Joanne in which I advised that Nyree Murrell (HR Partner) would connect with* [the individual] *and the Global HR partner. In this email I also sent Joanne a link to*

> *HR@IBM so she could access the support she may need in tackling Dawn's poor performance."*

255. There are no notes of this call, but as Alison Webb says, immediately after it she sent an email to Joanne Czekalowska saying:

> "*Thank you for the call, Nyree … is going to connect with* [the named individual] *and the Global HRP to understand the bigger picture within TWC.*"

The email also includes a copy of a note setting out the latest HR structure and contact information.

256. This is the first time that any of the individual respondents raised possible issues within TWC with HR.

24 & 25 July 2017 - the claimant's response to her mid-year review

257. No doubt stung by Ms Oliveira's criticism in the mid-year review meeting, the claimant on Monday 24 July sent to her what she describes as "*what I've done so far on the offering dashboard for Merge*" and also including a draft presentation she had prepared on "social media discovery". The following day, Tuesday 25 July, she sent Ms Oliveira "*an update on some of the technical acceleration activities I have been working on over the last few months*". This is an email that extends across five pages and includes extracts from emails from people she has been working with. Plainly her intention in both these communications was to reply to the criticism she had received from Ms Oliveira by demonstrating that she had, in fact, been active in the GTM work.

31 July 2017 – the fifth disclosure - the claimant's call with Philip Johnson

258. Joanne Czekalowska had raised her points about TWC with Alison Webb in anticipation that the claimant was contacting Philip Johnson.

259. As we have seen, the claimant first contacted Philip Johnson on 14 July 2017, but he was on holiday and the telephone call she wanted to have with him did not occur until 31 July 2017. The call was a joint call with both the claimant and Nick Evans raising HR issues - arising from the Merge acquisition (in the case of Nick Evans) and TWC (in the case of the claimant).

260. The call with Philip Johnson took place on 31 July 2017 at 16:15 and is the fifth and final disclosure relied upon by the claimant.

261. The claimant says:

> *"I restated to Philip the disclosures I had made to Sam on 20 June 2017, and that in particular I felt the treatment of* [named individual] *was sex discrimination, that calls on Saturdays were indirect sex*

discrimination and that the harassment and bullying of the employees was also illegal as it breached the mutual trust and confidence expected in employment contracts …

I said a 'quiet word' with [another named individual] *was required …*

Philip asked if I would be comfortable raising the issue with [that named individual] *myself. I replied that I wouldn't but that I could look for an opportunity to have a quiet word with* [a third named individual] *instead as I knew* [that named individual] *a little better …*

Philip said that by letting the employees confide in me that I had created a difficult situation and that by telling him about it, I had also put him in an awkward situation. He said that I should be advising the employees to raise their concerns directly with their managers, and that if they didn't wish to do that, or it had no effect, that they could raise grievances through the usual process."

262. Nick Evans says he has:

"*no recollection at all of the issues that Dawn raised on this call … but I am sure I would have remembered anything major, for example, breaches by IBM of legal obligations.*"

263. Philip Johnson says:

"During the call, Dawn raised concerns over the management style in TWC saying that managers were not acting appropriately or correctly. I do not recall Dawn saying that TWC management were acting 'unlawfully'. She stated that the employees were not happy with the culture and management style at TWC. I do not recall Dawn raising the issue of employees having to work on non-working days or having to attend calls at 8 am on Saturday mornings … I do recall that we talked about the challenge that newly acquired managers have adjusting to being a manager in IBM … [albeit that it is common ground that the managers in question at TWC are what Mr Johnson referred to as "heritage IBM" managers, rather than coming from TWC]

I told Dawn that she should advise the employees to discuss any of their concerns with their manager directly and / or their manager's manager and / or the HR Partner and if that was not working to their satisfaction to raise their concerns through the formal IBM processes …

Drawing on my experience, it is my view that in this instance, the employees had gone straight to Dawn with their issues so I was concerned that she might not have the full story and that she might want to speak to managers or HR to see what was happening as they may have been struggling with the change and they possibly needed

> *more coaching … My impression of Dawn during the call was that she was attempting to be more of a 'champion' of the TWC employees and their alleged problems and I wondered if she had misunderstood her role … Her role was not to manage personnel and handle grievances. She should have helped the employees to report on any issues and encouraged them not to sit on their issues but to pursue them through the correct processes so they could be properly resolved.*
>
> *I was also aware that as Dawn had not spoken to the managers who were being complained about, she may not be presenting a balanced account of events. In my experience I often find that there are 'two sides to the story' so it was important to speak to the manager to understand their position."*

264. In cross-examination Mr Johnson played down even further the significance of the call and the issues raised. From his account in cross-examination this was the kind of conversation he had had dozens of times before in relation to acquisitions who were finding it difficult to adapt on joining a much larger organisation. He gave some general advice about how difficult change can be, and the employee's ability to raise grievances if they wanted to.

265. Mr Johnson said TWC was not even within his remit at the time as he thought it had already been through transfer of business (or transfer of employment, which was the same for his purposes). In his oral evidence he recalled little to no specifics about the call and said that it was a short one. He says that despite the claimant having described the purpose of the call as being to discuss things that could lead to grievances and legal action, grievances and legal action were not mentioned on the call. On the whole, the impression he created in his oral evidence was that he had lent 10-15 minutes of his time to give generic advice to the claimant about what was at most the usual teething problems to be expected on an acquisition coming under IBM management. He says he did not know whether the claimant was raising serious issues as "*no specifics were given by her*".

266. Given his oral evidence the tribunal suggested to him that, from his point of view, he had "*just given standard HR advice on a situation he took no further steps on*". He agreed with this.

267. Despite what he says in his witness statement about the claimant possibly misunderstanding her role he denied having formed a negative view of the claimant in the call. He did, however, say that he considered her approach to him to be "one-sided" as she had the employees' side of the story but not the managers'.

268. He denied having subsequently called her "militant" or referred to her as being a "shop steward" – terms which we will discuss in more detail later.

269. There are no notes of this call.

270. What happened after that call is described by Sam McFarland in this way in her witness statement:

> *"After a call between Dawn and Philip, Joanne rang me and said that she had just finished a call with Philip and that she was concerned that Dawn's call with him had not been particularly helpful. I understand from Joanne that Philip felt Dawn had been quite extreme in pursuing her concerns and that she was acting like a 'shop steward'. I subsequently followed up with Philip to clarify the facts. Joanne said we might have a problem in terms of how Dawn was engaging with the issues and this lead to my Sametime conversation with Philip …"*

271. Before we turn to that Sametime conversation, there is an exchange of emails starting on 2 August 2017 between Sam McFarland and Claire Bryant. We were told that at that time Claire Bryant was supposed to be on holiday but had had to break that holiday to attend an urgent business meeting in New York.

272. On 2 August 2017 at 19:12 Sam McFarland sends an email to Claire Bryant with only the subject heading "*are you back*".

273. Claire Bryant replies the following day (3 August 2017):

> *"I was not due back from holiday until next week but changed my plan to come to a … meeting in NY. So I am working … but was travelling yesterday and tomorrow in the US.*
>
> *Is there something urgent you need?"*

274. Sam McFarland replies on 3 August 2017 at 11:26 (with a copy to Ms Oliveira):

> *"Think we need to quickly get 15 mins to talk with Sandra, re: Dawn as we might have a problem in the making."*

275. This document was only disclosed in full after the individual respondents had completed their evidence. We understand from Mr Heard that it had previously been disclosed only in a redacted form, omitting the final email referring to "*a problem in the making*". It was not explained to us why this had previously been redacted.

276. Claire Bryant had previously accepted in her oral evidence that she had had a phone call with Sam McFarland early in the morning while in New York, and that her phone call had concerned the claimant's call with Philip Johnson.

277. She said that Sam McFarland had said that Philip Johnson had been "*concerned about* [the claimant's] *tone*". She accepted that it was unusual

to have a call like that in New York from Sam McFarland, particularly as Sam McFarland was not her manager.

278. She accepted that Sam McFarland had used words to the effect of "*mother hen*" or "*shop steward*" in reference to the claimant's behaviour (we will see how those terms arose below).

279. Claire Bryant said she was "*nonplussed*" after that call, and that it was left that she would speak to Nick Evans and Philip Johnson. She said she thought Sam McFarland was "*alerting me to a concern within the team*".

280. From 13:15 on 3 August 2017 a Sametime conversation apparently initiated by Mr Johnson with Sam McFarland proceeds as follows:

> *"SM re TWC – Joanne told me bout the Dawn/Nick call – I am quite worried she is creating more problems than help, we do have performance issues with Dawn – I just pulled Sandra and Claire together – explained about the call and Claire will talk to you and Nick.*
>
> *PJ Ok*
>
> *SM I strongly believe she is in the wrong job.*
>
> *PJ I don't really know her and I do not think I have met her but based on my conversation with her and Nick I wonder is her view on what her job role is matches what the integration team expect from the role.*
>
> *SM Exactly. We didn't advertise for a mother hen who needed to go native."*

281. The references to "*creating more problems than help"* and "*mother hen who needed to go native*" can only be taken as references (in critical terms) to what the claimant was doing in respect of the concerns that had been brought to her by the TWC employees. No other explanation has been given by the respondents – although as we shall see Ms McFarland denied that this should be taken as a reference to the basic fact of her having raised the concerns. This also appears to be (at least in part) the reasoning behind Ms McFarland's statement that "*I strongly believe she is in the wrong job*".

282. Moving forward a week, on 10 August 2017 the claimant writes to Philip Johnson, with a copy to Clare Bryant, saying:

> *"Hi Philip*
>
> *Just to let you know that I have followed up with 3 of the 4 employees at The Weather Company that we discussed recently.*

As you will recall, each of them had shared worries and concerns with me. One had a couple of major life events to deal with, and the others had work-related concerns. I listened to them, and encouraged them to speak to their manager to discuss these, and ensured they were aware of the Employee Assistance Programme.

At our follow up calls, they all seemed much happier, and had been able to discuss their concerns with their managers, who had been understanding and supportive. Whilst the end of the quarter was a stressful period all round, they have confirmed that they are ok, and are happy with the support that they are getting from their managers now.

I will let you know if anything is different once I have caught up with the 4th employee.

Thank you for your advice – it was very helpful."

283. The passages of evidence we have cited above raise several uncomfortable questions for the respondents, but what we are primarily concerned about at this stage is whether the claimant made the disclosure to Mr Johnson in the terms she said she did.

284. We take as our starting point that the claimant had made the initial approach to Mr Johnson on the basis that she wanted to discuss circumstances which "*could result in grievances* [and] *the possibility of legal action*".

285. We note that despite Mr Johnson's evidence that the claimant had not given specific details of anything, what she spoke about plainly gave rise to consternation within the first respondent sufficient that he reported on what was, on his account, a routine matter of no significance, to Ms Czekalowska. This in turn gave rise to an emergency phone call between Ms McFarland, Ms Oliveira and Ms Bryant at a time when Ms Bryant was engaged in such important business that she had had to break her holiday for it.

286. We do not see how a short, routine call could have had that effect, even if Mr Johnson had formed the view that the claimant had misunderstood her role. If this was simply a question of her misunderstanding her role it was something that could easily have been the subject of a simple correction by him or one of her managers. There must have been more substance to the call for it to have had that effect.

287. As we shall explain later, we consider that what occurred on that call did prompt Mr Johnson to describe the claimant as "militant" or words to that effect.

288. Nick Evans was on the call. Like the claimant held the role of CIL PM, so would have known what was and was not appropriate for a CIL PM. His evidence the claimant said nothing memorable on the call cannot be taken

to be correct when whatever was said on that call seems to have prompted this remarkable chain of events.

289. Finally, we note that on 10 August 2017 in her follow up email the claimant specifically refers to having discussed four employees with Mr Johnson, and she says (without any later contradiction or correction by Mr Johnson) "*as you will recall, each of them had shared worries and concerns with me"*. That is not consistent with the general terms in which Mr Johnson says the claimant spoke to him on the call.

290. Taking all of that into account we find that the claimant's account of the call is much more likely to be correct than that of Mr Evans or Mr Johnson. We prefer her evidence and find that she did on the phone call make the disclosures she says she made.

Part 3 – further detriments

2 August 2017 - Sam McFarland's feedback on the claimant's response to the mid-year review

291. We have mentioned above that on 24 & 25 July 2017 the claimant wrote to Sandra Oliveira detailing her GTM activities, apparently in response to the criticism she had received in the mid-year review.

292. On 1 August Sandra Oliveira forwarded on the longer document – the email of 25 July 2017 to Sam McFarland, commenting only "*as discussed today …*".

293. On the evening of 2 August 2017 Sam McFarland replies to Sandra Oliveira as follows. The initial reference to "*a separate issue bubbling*" must refer to the feedback she was then aware of from Philip Johnson in relation to the claimant's phone call with him on 31 July 2017. The evening of 2 August was the same time she was trying to get in touch with Claire Bryant about what was described the following day as "*a problem in the making*":

> *"Hi Sandra*
>
> *We need to discuss – aside to this, we have a separate issue bubbling.*
>
> *I looked at this last night – lots of verbiage – so set it aside until I have time to properly review and digest.*
>
> *Networking and awareness activities are valuable but should be part of (or complementary to) other activities that focus on delivering the business outcomes, for our strategic priorities and the ultimate goal of revenue. These connections may prove valuable for others and us longer term, but having made them, it is okay for Dawn to let them on the course.*

My net summary of her email is "so what did you personally do during 2Q to drive our business and change the outcomes?".

What does Dawn think her role is? or the projects she was given was supposed to ultimately deliver? I would like to hear from her, what she personally contributed to in 2Q, as I can't find anything of real substance in here.

Throughout FY 17, there have been full strategic priorities set out for Europe – I see TWC in here, but have to wonder how Dawn did not "hear/see" the other acquisitions priorities, or if she did, why did she ignore them, and indeed the other acquisitions?

Given her banding, the more evident that she needs to move – it's not just about square peg for the role (whether GTM or CIL), and low performance/contribution, but there is a level of business competence, expected at her band, and it is clearly not there.

I've added some comments below into her email. We need to carve out time to speak tomorrow."

294. As Ms McFarland says in that email, she has added in comments to the claimant's email generally critical of her lack of progress and demonstrable results.

295. We note that while the claimant's immediate manager did not see the need to make any critical or other comments on the email, apparently being content simply to forward it on, Ms McFarland has then responded with a lengthy critique of the email, pointing out (on her case) its many flaws. If these were so obvious to someone who understood the GTM role, we do not see why Ms McFarland would have gone to such lengths to point them out to Ms Oliveira. We do not understand why it required Ms McFarland to point out these supposed problems to Ms Oliveira.

296. This brings us to a further point. If the claimant's performance in the GTM role was so poor as to demonstrate her complete unsuitability for it, this would not reflect well on Sandra Oliveira, whose appointment and management of the claimant in the role would have been a complete failure. There has, however, been not the slightest criticism of Ms Oliveira or her management of the claimant by her more senior managers.

297. Ms McFarland's point that it was "*more evident that she needs to move"* and her being "*square peg for this role (whether GTM or CIL)*" (presumably with the role being a round hole) make it clear that by this point she had formed the view that this was not simply a question of poor performance such as may be corrected by a PIP, or misunderstanding of part of the role but was a case of fundamental unsuitability for both parts of the role. We also take it from her reference to it being "*more evident …*" that she had previously expressed to Ms Oliveira her view that the claimant either did or may need to move to a different role. She cannot practically have done that without

also at some point having explained to Ms Oliveira how she (Ms McFarland) had come to that view.

298. Ms McFarland was, of course, qualified to comment on the claimant's performance in the GTM role, but we are concerned to see at this point that she considers the claimant also to be completely unsuitable for the CIL role which was not part of her (Ms McFarland's) remit and where there had up to this point been no criticism of her CIL work. As we have previously recorded, her immediate manager Claire Bryant had no criticism of her work as a CIL PM even to the date of the tribunal hearing. The views Ms McFarland expresses in this email on 2 August are, of course, consistent with those we have referred to in her Sametime chat with Philip Johnson the following day, when she said, "*I strongly believe she is in the wrong job."*

299. We were keen to understand what it was that had led Ms McFarland to this conclusion at such an early stage, particularly in relation to the CIL role. In her oral evidence, she accepted that the email contained some good ideas, but said that they were too long-term, and that the claimant needed to focus much more on short-term outcomes, meaning results in the next 1-2 years. She said that, "*given the feedback from Philip Johnson and my concern about how she had raised TWC issues to me* [it was] *difficult to understand how she could continue in the CIL role*". She said that this was the only area of concern in the CIL role. She also accepted that the claimant had good ideas on the GTM work but that these were long term rather than short term.

300. We explored further how it was that Ms McFarland had come to the conclusion that the claimant's performance was irredeemable on the GTM side. She said that she had understood that the claimant had indicated "*some acceptance that she let herself down and had not done her best*" in the mid-year review with Sandra Oliveira. She also accepted that she did not know how the claimant had responded to the criticism in the mid-year review, but said that what was contained in the email she had been commenting on made it clear that the claimant had not taken on board the criticism she had received in her mid-year review. She accepted, however, that it was common for employees to be defensive on receipt of such criticism.

301. In concluding on this point, we asked Ms McFarland why she considered that the claimant needed to move rather than being given further coaching. She said that it was evident from this email that the claimant had not understood the feedback she had been given by Sandra Oliveira in her mid-year review.

302. Throughout the hearing of the case we have been conscious that the GTM role is concerned with intangibles and is one in which there are no direct measurements of success or failure. That is particularly so where, as in this case, the claimant was never the GTM project manager in respect of any specific acquisition.

303. The GTM role is a sophisticated one within a sophisticated and complex organisation. Given that, we have been at pains with each relevant witness for the respondents to try to understand what the claimant's underperformance in this role amounted to, and what steps they took to address it.

304. Despite our best efforts, we have not found it possible to understand what the underperformance was from the accounts given by the respondents' witnesses. General assertions as to the claimant's delay or lack of focus in her presentations have not stood up to scrutiny.

305. This case is, however, not about us making an assessment of the claimant's abilities. It is what her managers thought of her performance, and why they thought that, that matters.

306. Joanne Czekalowska, Sam McFarland and Sandra Oliveira have all given evidence on their perceptions of the claimant's performance in the GTM role. Whether we accept that evidence is a matter for our discussion and conclusions, but for now we note that if managers (and particularly such senior and experienced managers) believed that an employee is underperforming we would expect them to take informal coaching or other remedial action (and ensure the employee had been made fully aware of the problems) before moving on to formal procedures such as a PIP.

307. Despite continued protestations by the relevant witnesses that they did undertake coaching of the claimant as we have previously noted we heard nothing specific concerning this (at least ahead of the mid-year review) – what was done and when.

308. The more senior managers – Joanne Czekalowska and Sam McFarland – had come to the decision that the claimant was underperforming without themselves understanding what coaching or other steps had been taken by Sandra Oliveira to remedy any underperformance.

309. The passage we have outlined above in Ms McFarland's evidence is an instance of this.

310. On 12 July Ms McFarland made an approach together with Joanne Czekalowska (apparently instigated by Ms McFarland) to HR about "*an underperforming employee*", with a view to a PIP, and without knowing at that stage whether there really was any underperformance. We now see that by the start of August 2017 Ms McFarland had moved on, without any discussion at all with the claimant, and with the only criticism of the claimant having been made in mid-year review a couple of weeks previously, to concluding that the claimant was completely unsuitable for both the GTM and the CIL role. Despite having spent considerable time with her on this point we do not see how she could properly have formed that view.

311. As we have seen, the claimant's immediate manager for the CIL role was happy with her work, and the only criticism Ms McFarland had of this part of

the role was "*how she had raised the TWC concerns*" with her and Mr Johnson.

312. We will come later to the significance of this, but we record that despite our best efforts to understand the respondents' position on the claimant's underperformance we do not accept that there was any meaningful underperformance in the GTM role, and the respondents accept that there was in fact no underperformance in the CIL role.

10 August 2017 – detriment 5 and 7 - mid-year review with Claire Bryant – "militant"

313. The claimant had her mid-year review with Claire Bryant on 10 August 2017.

314. Claire Bryant says this about the mid-year review:

> *"At my review meeting with Dawn, I talked about her performance overall. I acknowledge that she was doing a good job on the work she was doing, but I would expect her to be able to deliver high standards, even with a larger volume of projects. I told that she was not performing to the level of a band 9 employee. I mention the poor preparation for the TWC relocation meeting and the level of guidance I had had to give her to help her prepare for the meeting … I also mentioned that she sometimes asked questions to which she ought to have known the answers and I warned her not to transgress into operational tasks the TWC that they ought to have been doing for themselves, such as sourcing weather forecasts for client centres across Europe. In an attempt to coach Dawn on her communication style, I did mention that I've been told that Dawn had come across as militant in the meeting with Philip. I was using this specific example to build on previous guidance that Dawn should retain her stance as a business representative and she accepted this comment as it was intended.*
>
> *Dawn was emotional in this meeting and said she was sorry she had not been able to do better. This was the first time I had formally spoken to her about the areas that she could do better, although I had spoken to her about such issues as and when they had arisen."*

315. She refers in her witness statement to notes she made in preparation for the meeting. The clearest account of this is in the typed version at page 3203. It is difficult to read into these preparatory notes the criticism that Ms Bryant described in her witness statement. The claimant agrees that during this meeting she was criticised about the TWC relocation presentation but points out that Ms Bryant had never raised this as a problem before. She also accepts that she was given the feedback that Philip Johnson had described her as being "militant" on the call. She also points to notes made by Ms Bryant saying, "*careful not to be shop steward*".

316. In an email exchange on 8 November 2017 with Paul Martin (who was at the time investigating grievance raised by the claimant) Claire Bryant says

that the areas of improvement or focus that she had suggested to the claimant in the midyear review were the same as had been raised in the January 2017 checkpoint review and that she had "*overall good performance on CIL*". This is not consistent with the criticism Ms Bryant identified in her witness statement – in particular her statement that she told the claimant that she was not performing at the level of a band 9 employee. We find that that criticism that she was not performing at the level of a band 9 employee was not made in the meeting by Claire Bryant. There was no substantial criticism of the claimant's performance by Claire Bryant during that meeting. At most a few coaching points were raised.

317. The claimant says, "*the mid-year review with Claire is included as a detriment as, despite it being positive, I believe she negatively modified her opinion and comments to align more with the views of Sandra, Sam and Joanne … I had performed well, and deserved a mid-year review that reflected that.*"

318. We understand this to be an argument that she had a positive mid-year review with Claire Bryant, but that it was not as positive as it should have been.

319. Detriment 6 on the list of issues itself relates back to para 20.5 of the claimant's first claim, which refers only to what she was told by Sandra Oliveira in the meeting that Sandra Oliveira carried out (and which we have found above to be established). Para 20.7 of the first claim deals with the claimant's mid-year meeting with Claire Bryant and raises no allegation of detriment in relation to Claire Bryant's assessment of her performance. We therefore find that the claimant has not plead any detriment in relation to this, and it is not something that we can find as being a detriment for the purposes of her claim.

320. One detriment which is, however, clearly set out, is Philip Johnson's description of her in a phone call as being "*militant*". She first learned of this from Claire Bryant at the meeting. Mr Johnson denies having said this, but is clearly in some difficulty given that Claire Bryant accepts that she relayed this description – attributing it to him – to the claimant. She had not been spoken to directly by Philip Johnson about the phone call. It seems that it was only Joanne Czekalowska who spoke directly to Philip Johnson about the call. She denied having passed on the description "*militant*" to Claire Bryant, as did Sam McFarland. In cross-examination Ms Bryant said she had thought she had heard that word from Sam McFarland. Sandra Oliveira accepted that she had heard that description of the claimant in relation to the call but could not recall who she had heard it from.

321. We do know, however, that "*militant*" is broadly consistent with Mr Johnson's own negative view of the approach the claimant took during this phone call, which prompted the emergency phone call between Sam McFarland, Claire Bryant and Sandra Oliveira when Ms Bryant was in New York. It seems to us highly likely that it was relayed by Sam McFarland in that telephone call.

Whether Mr Johnson himself had used that word is not essential for the purposes of this detriment. Even if he had used that word, "*militant*" must have been the impression he passed on to Joanne Czekalowska and via her to Sam McFarland.

322. We do not see that Ms Bryant relaying this information is itself relied upon by the claimant as being the detriment in question. It must relate to the original description by Mr Johnson, rather than her being informed of this description.

323. "Militant" is not necessarily a pejorative description, but we find it would have been seen as negative by the first respondent's employees. Claire Bryant was relaying it to the claimant as an undesirable quality and attempting to make sure that the claimant did not give this impression again.

324. We find that Mr Johnson did use this description – or if not those precise words, something very similar and equally negative – in relation to the claimant in his feedback to Joanne Czekalowska on the call. That detriment is made out.

325. It does not appear that there are any formal records of the mid-year review with either Claire Bryant or Sandra Oliveira.

326. The mid-year review with Claire Bryant took place on Thursday 10 August 2017. The following Monday (14 August) the claimant started her holiday and was away until 1 September 2017.

August – September 2017 – detriment 8 - PIP

327. Sandra Oliveira says:

> *"In August 2017 I had conversations with Joanne, Sam and Claire to discuss what we could do to improve Dawn's performance on the GTM side …*
>
> *There are formal and informal ways of addressing performance concerns and I thought that perhaps a coaching programme would be the appropriate way forward. This would be less formal than a performance improvement plan and would not be recorded formally through the online tool. I had concerns that Dawn would not respond positively to being put on a PIP because by then I had the view that she was quite litigious. This was based on conversation she had with me about challenging decisions made by external bodies, such as her local council and also her daughter student accommodation body …*
>
> *I discussed this with Joanne and Sam during a meeting we had about the wider team. Joanne and Sam thought that if we were going to instigate performance management, it should be done sooner rather than later. We were in the summer heading into quarter four and it*

would have been good to see some performance improvement before the New Year so that we could have a positive annual appraisal in January 2018.

I suggested seeking advice from HR, particularly as I wanted to know if a PIP could be done informally. Claire and I had a telephone discussion with Elizabeth Staples, HR partner … on Friday, 18 August 2017. Elizabeth brought a different perspective. She advised us to implement a formal PIP as a show of investment to Dawn that as her managers, we were committed to working together to improve her performance. It would give Dawn the opportunity to turn around her performance and to have that improvement formally documented. Elizabeth advised that the PIP should be articulated, not as a negative thing, but as a show of investment …

I met Claire on 25 August 2017 to discuss the PIP. It was difficult as we had to manage the implementation of the PIP around various holidays. Dawn was away on holiday at the time and I was going away on holiday from 4 to 19 September 2017. Claire and I agreed that I would prepare the PIP in the online tool before I went on holiday. Claire would then notify Dawn of the PIP face-to-face during the week commencing 4 September 2017, after her return from holiday."

328. Claire Bryant says:

"*Following the mid-year reviews, Sandra told me that she felt she needed to take some action to improve Dawn's performance and she queried with me whether a performance improvement plan was warranted. Sandra raised some specific examples of poor performance on the GTM side, particularly a poor piece of research and presentation on technical acceleration and a lack of productivity. I did not think a PIP was warranted on Dawn's CIL work alone but I certainly found that Dawn had some challenging behaviours which are inconsistent with the way a band 9 should work, including a lack of proactivity. As these issues were consistent on both sides of Dawn's role and as Sandra had some serious issues with the standard of Dawn's work, I conceded that perhaps a PIP was warranted. Sandra and I agreed to seek advice from HR.*

Sandra and I spoke to Elizabeth Staples … on 18 August 2017 about how best to work with Dawn to improve her performance. We explained to her Dawn's performance issues with the GTM role but also told her that there was an overall good performance on her CIL role and that if the latter role was representative of both parts of her job there would not be considering performance management. However, some of the improvements required in the GTM role were also required in the country integration role and had been pointed out

to her by me in her performance reviews in January 2017 and August 2017.

Elizabeth's advice was that as both roles had areas for improvement we should implement a PIP. Sandra emailed Elizabeth on 23 August 2017 to advise that we would establish a formal PIP to support Dawn's performance improvement …"

329. While Joanne Czekalowska and Sam McFarland had sought advice on how to implement a formal PIP as early as 12 July 2017, in August 2017 following the mid-year reviews the claimant's immediate managers either saw no substantial performance problems in their area of work (Ms Bryant) or were seeking advice on informal performance management (Ms Oliveira). On Ms Oliveira's case the formal PIP only came about because Elizabeth Staples had told her that this was the best way of handling things.

330. Ms Oliveira's description of the PIP as being "*a show of investment*", and Ms Bryant's as "*support*[ing] … *improvement*" echoed other evidence from the respondents' witnesses suggesting that the use of a PIP was unremarkable within the first respondent, not something for an employee to be alarmed about and almost a positive step, with a considerable amount of management time and energy devoted to enabling the employee to reach their full potential.

331. Both Ms Oliveira and Ms Bryant were, however, rather more candid in expressing their understanding of a PIP in a Sametime conversation between them on 25 August 2017. After criticising the online tool used to create the PIP, and discussing how to prepare the PIP, they continue as follows:

"CB … I wonder if [the claimant] *will resign? I think I would look for another job.*

SO I think I would too … but she may want to hold on for a package … if it comes to that."

332. Later, in a Sametime conversation on 20 September 2017 (the day the PIP was to be presented to the claimant) there is the following exchange between them:

"*CB* [the claimant] *will want to know what the next step is if PIP not successful.*

SO I know and that is a redundancy scenario.

CB No … it is not

SO Sorry – lack of performance is dismissal

CB Redundancy is quite different from PIP. Failure of PIP could mean dismissal. However first steps is annual appraisal … redundancy she would be ranked with the others.

SO Which would be a negative one …"

333. Claire Bryant goes on to say:

"We really must take care about redundancy … I think she may be going constructive dismissal route"

334. Thus Claire Bryant and Sandra Oliveira – who were preparing the PIP - saw it as such a humiliation or burden that they themselves would resign rather than be subject to a PIP, and they contemplated that the claimant may do the same thing. If she did not resign, and she did not meet the PIP, then they contemplated that the next step was the claimant's dismissal – either in a redundancy selection exercise or for poor performance.

335. In these frank conversations there is nothing about supporting the claimant, or which contemplates that she may succeed or thrive under the PIP. They are all about the PIP leading to the end of the claimant's employment, whether through her resignation or dismissal.

336. On 7 September 2017 Claire Bryant called the claimant to tell her that she was going to be put on a PIP. This was the first time a PIP had been mentioned to her.

337. By way of follow up after this call, on 7 September 2017 Claire Bryant forwarded to the claimant an email saying:

"Dawn

As discussed, this is the note from Sandra, to which I have added UK specific items for you to focus on. Do take the time before Sandra's return to decide what you need to be successful and where you need more clarity on the GTM projects. I will give you every support I can and I am sure Sandra will do the same when she returns."

338. The note from Sandra Oliveira (which was included in that email) said:

"Dawn

Hope you had a great holiday … and welcome back.

Ideally I would have liked to have spoken to you rather than send an email but alas, not possible as holidays overlapped.

Claire and I have discussed our separate input from the midyear reviews we each had with you and sought guidance from HR. We have been advised to work with you on a formal performance

improvement plan to give you every possible support to address the performance issues we raised with you.

I will initiate a 60 day PIP in the system starting September 11th. Claire and I will set specific improvement objectives and set up weekly progress calls/meetings with you.

You have already started to document your activities via email to me so we will roll those into the formal process, with a focus on quantifiable outcomes and brevity.

1. *By end of September publish International Offerings Roadmaps for priority Acquisitions … including readiness and localisation status per offering per market:*

    - *identify gaps or/and risks to GTM plan and provide recommendations to GTM PM's on potential mitigation actions*

    - *identify launch activities needed in support of upcoming new offerings so we capitalise on new product releases*

    - *define and document the process for driving awareness, adoption and early technical assessment of new offerings by the technical community or subset of technical champions.*

2. *By end of October create executable plan for consistent and repeatable inclusion of Acquisitions in Europe Client Centres/Exec Briefing Centres:*

    - *identify repeatable steps required, investment needed and stakeholder map*

    - *develop metrics for assessing ROI from Client Centres/Exec Briefing Centres and how activities will contribute to Acq performance improvement*

    - *secure stakeholder support and pilot in three centres for a minimum of three priority acquisitions*

3. *By the end of October deliver a recommendation for a structured template approach for engagement with Foundation on our acquisitions, including:*

    - *document pick list of recommended Foundation offerings, tailored to acquisitions if appropriate, with benefits, engagement requirements for the acquisition and budget implications*

- *work with stakeholders, including HR TM, Foundation and the UK integration to recommend how we should assess need and potential value for each acquisition, engage with Foundation, secure appropriate funding, measure success*

- *define deliverables and resources needed for success*

4. *Continue to support the UK operational aspects of the TWC acquisition, focusing on pro-actively supporting the Birmingham Office resolution and ensuring the TWC team in UK are self-sufficient*

    - *ensure that where you are engaging in GTM -related activity for the UK, John Cooper is fully engaged and agrees that this is an appropriate use of the integration resource budget"*

339. The claimant appears to have immediately taken steps in response to this, emailing John Cooper the same day asking for a copy of "the latest GTM plan for TWC" as "*I'm starting work on pulling together an offering dashboard for TWC to show availability per offering per market, and then to identify gaps and/or risks to the GTM plan and provide recommendations on actions to be taken*".

340. The next day Claire Bryant sent a Sametime message to the claimant and there is the following exchange:

    "CB Hi Dawn, are you ok?

    DD Hi Claire – yes – thanks for checking.

    CB I have been thinking about you. Let's really make this work.

    DD Yes keen to do that …"

341. The meeting to formally present the PIP to the claimant took place on 20 September 2017. It had been expected that both Sandra Oliveira and Claire Bryant would be at that meeting, but at the last-minute Claire Bryant could not attend in person and attended by phone instead.

342. As the claimant points out, Sandra Oliveira and Claire Bryant had a call with Joanne Czekalowska and Sam McFarland under the subject "*catch-up re: Dawn Davidson*" from 16:00 – 16:30 directly before their meeting with the claimant, which was scheduled for 16:30 – 17:30. None of the respondents' witnesses explained to us what the purpose of that meeting was, particularly given that Joanne Czekalowska told us that the PIP was a matter for the claimant's line managers, Ms Bryant and Ms Oliveira.

343. There is no substantial dispute about what occurred at the PIP meeting. Upon the PIP being introduced the claimant read a prepared note (a copy of which was produced to us) saying that she refused to sign the PIP "*as I*

believe it to be unwarranted and unreasonable". Amongst other things, she says:

> *"Usually when a manager is concerned about their employee's performance they schedule time to specifically discuss that performance with the employee … neither of you scheduled any time with me to discuss your concerns or to make those enquiries."*

344. She goes on to say that she has taken legal advice and said that the managers' actions were detriments for whistleblowing disclosures the claimant had made, which could attract personal liability. She says she will be submitting a grievance and expected to be working mostly from home in the future.

345. The meeting broke up, in some disarray. Sandra Oliveira reported back to Joanne Czekalowska and set up a call with HR the following day. According to a Sametime chat that Sandra Oliveira had with Sam McFarland on 22 September 2017 the advice received from HR was "*to continue as normal*" to which Sam McFarland replies "*good*".

346. Despite that HR advice, no further steps were ever taken in respect of the PIP. At the tribunal hearing the witnesses were somewhat unsure of its status. It had never actually been implemented but neither had it been removed from the online tool that was used to record it. On 21 September 2017 Sandra Oliveira, presumably after consulting with HR, sent a follow up email to the claimant essentially saying that she would await the claimant's grievance.

347. The claimant's detriment claim in respect of the PIP was put in two different ways – first, the fact of the PIP itself, which is not in dispute, and second, that "*some of the targets which were set were wholly unattainable in the prescribed time frame*". Argument on that latter point focussed on the first objective, which was: "*By end of September publish International Offerings Roadmaps for priority Acquisitions … including readiness and localisation status per offering per market"*, and which includes, *"identify gaps and/or risks to GTM plan and provide recommendations to GTM PMs on potential mitigation actions"* and *"define and document the process for driving awareness, adoption and early technical assessment of new offerings by the technical community or subset of technical champions"* – which appears to be the technical accelerators work.

348. The claimant drew attention to the apparent breadth of the task, saying there were 48 separate countries to be covered in Europe. She pointed out that amongst the "priority acquisitions" were medical devices and medical data offerings that would be likely to be highly regulated, and that it would be impossible for her to address the scope of this in a time period that would have been not much more than a working week between 20 September and the end of September and explain, say, why a particular medical device could not be marketed in Italy or Poland.

349. The respondents' witnesses said they would have explained this task to the claimant if they had been given the chance, and described it as being simply the collation of existing information that was readily obtainable.

350. The claimant's witness, David Webster, said that there was no go to market (or GTM) plan in existence for TWC at the time, and there still was not one in place at the time he left the business in January 2019. In his cross-examination he accepted that in saying this he was only referring to the business-to-consumer (or "B2C") part of TWC, as he had no knowledge of or responsibility for the business-to-business (or "B2B") part of TWC. The PIP makes no distinction between these two parts of the business and does not say that the claimant was to look at one but not the other.

351. We find that this task was unachievable. Given the delays there had been in setting up the meeting, the claimant now had little more than a working week in which to achieve this goal. Taken at face value it does require an assessment of the readiness for sale of each offering across each European market – a substantial task in its own right – along with what appears to be completion of the technical accelerators work which according to the respondents witnesses had already been substantially delayed by the claimant and was far from ready. We do not see how the claimant could have achieved this in the time allowed. That detriment is made out.

352. For the remainder of this part we are departing from strict chronological order. The next two detriments overlap with the period during which the claimant brought her grievances and subsequent appeals, but it seems appropriate for us to deal with them and the remainder of this part at this stage, as the grievance and appeal detriments which then remain concern entirely different processes and individuals.

18-19 October 2017 – detriment 10 – claimant excluded from "design thinking" workshop

353. On 18-19 October 2017 the first respondent held a "design thinking" workshop for members of the acquisition team at its Hursley site.

354. We were not told what "design thinking" is, but it is clear from the evidence we heard that it was a new way of working which was coming into fashion within the first respondent.

355. The origins of this appear in an email exchange on 14 August 2017 between Mark Butterworth and Doug Hall, another IBM employee who was an expert in "design thinking". In this Mark Butterworth thanks the colleague for his work in delivering a "design thinking overview" and proposes setting up a further workshop. This was eventually arranged over two days on 18/19 October.

356. On 27 September the claimant requested (and appears to have been granted) an afternoon's holiday for 19 October 2017 (having the following day – 20 October 2017 – as holiday as well).

357. On 28 September Mark Butterworth emailed Sandra Oliveira with his suggestion of attendees (including Joanne Czekalowska, Samantha McFarland, Claire Bryant and others but not including the claimant). He also says that it will have a limit of 15 people and that travel restrictions mean it can only be for people in the UK and attendees should be "*ideally people who would commit to the 2 days*".

358. Sandra Oliveira says in reply:

> *"This is great, thanks Mark, I suggest:*
>
> - *Lindsay …*
>
> - *John Cooper as he can apply straight into* [particular acquisitions]*"*

359. In her witness statement Sandra Oliveira says:

> *"Mark provided me with ten names (and I noted many missing UK names) and I added* [Ms Oliveira at this point gives three names, but only two names appear in her email] *to the list but not Dawn as it was fresh in my mind that she would be away, from the previous day's vacation request … at no point did Dawn approach me about the workshop. I openly commended about it in my weekly team calls but Dawn did not ask to be included and did not ask for any information about it."*

360. On 4 October 2017 Sandra Oliveira asked Mark Butterworth's assistant to send invitations to the event to 13 people, including all those mentioned above, but not the claimant, whose name had not been mentioned as a possible attendee in the documents we have seen.

361. On 6 October 2017 (after the invitations for the event had been sent) the claimant wrote to Claire Bryant and Sandra Oliveira to ask for the whole of 19 October 2017 as holiday.

362. On 16 October 2017 Doug Hall sent out a welcome email to all attendees, which prompted Sandra Oliveira to notice that a particular colleague had not been invited. She picked up on this with Mark Butterworth, who told her that he had not invited that colleague. Sandra Oliveira replied, "*why not … did Joanne not support doing so?*". We do not have a reply to that. The claimant relies on this comment as showing that Joanne Czekalowska had a role in or was responsible for the invitees to the workshop. The colleague in question is not a name who appears either in Mr Butterworth's original suggested invitees, Ms Oliveira's suggested additions or the list of people who Ms Oliveira asked Mr Butterworth's assistant to send invitations to.

363. Ms Czekalowska says that the workshop was specifically in reference to the Truven acquisition (which the claimant had never been involved with) and that she did not choose the invitees. She says that Sandra Oliveira and Mark Butterworth chose the invitees.

364. Ultimately it is not in dispute that this detriment occurred. The claimant was not invited to the workshop. The question is why this was, and whether it was because of her disclosures. We will address this in our discussion and conclusions.

30 October 2017 - reduced working hours

365. On 30 October 2017 the claimant sent an email to Sandra Oliveira and Claire Bryant attaching a note from her GP and saying:

> *"I … cannot continue to work 5 days a week in the short term, so I hope a way can be found to accommodate my working 3 days a week for the next month from home."*

In the same email she told them that she had made an early conciliation notification to ACAS covering her employer and all of those who are individual respondents to this claim.

366. Her request for reduced hours was granted, and no issues arise in this case in relation to this request or the fact of reduced hours.

27 November 2017 – further reduced working hours

367. On 27 November 2017 the claimant submitted a further doctor's note recommending that she reduce her hours to two days a week. These further reduced hours appear to have been granted without difficulty and no point arises in this case from that. It appears that early in 2018 she returned to working five days a week.

Detriment 17 – investigations at TWC

368. Detriment 17 is concerned with "*failure to investigate the claimant's disclosures*" (para 23.8 of the second claim). In the list of issues, this is broken down into two parts. The first (which we shall deal with here) is the failure to investigate the disclosures in relation to alleged bullying and harassment, and sex discrimination, at TWC. The person said to be responsible for that failure (at least insofar as concerns matters before 31 January 2018) is Sam McFarland.

369. The claimant says that this failure took place from 29 June 2017 onwards, but the detriment was only raised in her second claim and so falls towards the end of her numbered detriments. It is somewhat difficult to know at what stage to address this, but it seems to fall best at this point since it is not a matter in relation to the grievances or appeals and much of the relevant material dates from around October and November 2017.

370. In her witness statement, Ms McFarland gives a lengthy account of the steps she took to investigate the claimant's allegation in relation to TWC. Both her account and the claimant's allegation of a detriment start from the somewhat difficult position that Ms McFarland had no responsibility for carrying out any

investigation. If there was to be an investigation, it ought to have been done by HR or at least by someone with line management responsibility for TWC. Ms McFarland had no formal responsibility for TWC at all.

371. The first steps Ms McFarland says she took to investigate are in the feedback she sought on the 29 June call and subsequent "lessons learned" document. As we have previously set out, we have very great difficulty in accepting that this was directed at investigation of the concerns the claimant had raised. This process had a different purpose.

372. She goes on to say:

> "*I met with the* [TWC] *business leaders* [against whom the allegations were made] *for reviews at least once a quarter … I had a discussion with one or both of them in which I told them that I was hearing complaints about the team working out of hours and on days off. They responded that they had daily progress calls with the team towards month end and quarter end.*"

and

> "*Nevertheless I continued to escalate the matter, raising it with Philip Johnson … Philip said that the matter should be raised with the IBM HR Partner for the business.*"

373. Ms McFarland gives no dates for either of these contacts, but they appear in her statement before the call she had with Joanne Czekalowska and Alison Webb on 24 July 2017. There is no documentation in respect of either of these two discussions she mentions.

374. As well as there being no documentation in relation to these contacts there are two further points of difficulty with what Ms McFarland says about this.

375. First, raising one of the points directly with the managers concerned cannot really be said to be an investigation of the matter. If she was taking on the role of investigator Ms McFarland ought at least to have also sought out the views of the employees.

376. Second, the idea that she raised the problems with Mr Johnson cannot be accepted given all the evidence we heard about Mr Johnson's involvement. If she raised this with Mr Johnson before the claimant's call with him there was no point in her and Ms Czekalowska's intervention with Ms Webb, which was specifically designed to make sure that Ms Webb heard of the problems before Mr Johnson did. If she raised it after the claimant's call with Mr Johnson there was no point in doing so because he was already aware of the problem.

377. She goes on to say:

> "*Alison* [Webb] *agreed to speak to the HR person in her team who was the IBM HR Partner for TWC and was already working with* [TWC] *…*
>
> *I also took the issues to the leadership team of TWC … and specifically to Durjoy Mazumdar, Sales Worldwide Leader for TWC. I had several discussions … with* [him] *when he was in the London offices and I also met with his boss, Carrie Seifer, who said that she would also investigate ...*
>
> *I also spoke to Richard Petley … about the issues.* [He] *was shortly to take over responsibility for the TWC business … he agreed to investigate … He asked me to put in writing the TWC concerns and I emailed him on 20 October 2017 … to summarise the issues that had been raised …*
>
> *I do not know the outcome of the investigation that ensued …*"

378. The Alison Webb call is documented and we have set out our findings on that call. Except as set out below there is no documentary evidence of contact between Ms McFarland or any of the other managers she mentions.

379. The question of Ms McFarland raising the problems with more senior line management within the business is problematic. There is in the tribunal bundle an email dated 9 November 2017 from Ms Czekalowska to Ms Seifer (apparently also sent to Ms McFarland) under the heading "*TWC follow up from our meeting today*". This refers to "*linking with HR*" and "*potential risks you would need to carefully mitigate*" but there is a lot more to this email and it does not seem to have any focus or specific mention of the allegations the claimant raised. Ms Seifer replies with some comments, copying in Mr Mazumdar, but there is again no particular focus on employee issues or the points the claimant raises.

380. There is an email dated 20 October 2017 in which Ms McFarland writes to Mr Petley saying:

> *"As discussed.*
>
> *There is one grievance … that* [HR] *know about.*
>
> *Durjoy commented on bullying behaviour and sellers crying in cadence …*
>
> *Dawn Davidsen (through her 'country integration' role with TWC employees), suggested disengaged leadership, bullying and … discrimination. She followed up her comments with a summary by employee …"*

She goes on to quote from the claimant's email of 29 June 2017. What prompted this email is not clear, but if would appear that Ms McFarland

waited for more than three months before passing on that information, which does not match with the eagerness to investigate that she portrays in her witness statement. Vicki Lowe (the HR partner who took over from Nyree Murrell as responsible for TWC) told us that in September 2017 an unnamed employee of TWC had raised their own grievance which was being investigated. We find that this grievance was more likely to be the reason for any particular interest being taken in employee welfare at TWC by senior management, rather than any steps Ms McFarland took towards investigation or raising the issue herself.

381. There was no proper investigation of the claimant's complaints.

382. The manager who the complaints were primarily against was moved to a new role in 15 January 2018.

25 January 2018, 7 February 2018 – detriment 13 – "claimant received a poor 2017 end of year performance review"

383. The claimant was due to have her Checkpoint review for the calendar year 2017 in January 2018.

384. On 11 January 2018 Sandra Oliveira sent an email to Claire Bryant under the heading "*Confidential: DD ACE feedback so far – for our discussion later*". This attached extracts of feedback given by the claimant's colleagues under the ACE system, dating from either late 2017 or early 2018. It is uniformly positive, with some speaking of the claimant in glowing terms. The same day, Sandra Oliveira asks the claimant to complete her self-assessment for the purposes of the Checkpoint process. She replied with the required information the following day.

385. Notes prepared by Claire Bryant either ahead of or during a meeting on 12 January 2017 with Sandra Oliveira record the following grades for the claimant:

Business Results:	E	
Client Success:	A	
Innovation:	A/E	E
Responsibility to others:	A	
Skills:	E	

386. Not surprisingly, the claimant has taken "E" in those notes to be "Exceeds". However, Ms Bryant said in her evidence that "E" stood for "Expects More". With E as "Expects More" (and with Innovation graded as "Expects More"), Claire Bryant sent the draft gradings to Joanne Czekalowska on 16 January 2018 with the note "*Draft assessment table for the team for our discussion tomorrow. The assessment for Dawn is agreed with Sandra*".

387. In comparison with the January 2017 final grades, these draft grades represented a step down for each of the first three criteria with the final two remaining the same.

388. On 18 January 2018 Claire Bryant prepared a draft narrative for her part of the Checkpoint review. This reads:

> *"Dawn has recently returned to full-time hours after a period of working three then two days, for medical reasons. We are glad that Dawn now feels able to return full-time and is feeling better. The expectation for Dawn's performance has been carefully considered and adjusted to in the preparation of this evaluation.*
>
> *Client success and responsibility to others – for the UKI operations portion of her role, Dawn acted as UKI country integration lead for The Weather Company acquisition all year. The support that she delivered to the TWC team in Birmingham to the whole year was professional and much appreciated. She provided manager training and one-to-one guidance, which was invaluable to an inexperienced manager. Dawn should be careful however to ensure that she is familiar with latest processes before giving advice (HR partner is not available for FLMs, which Dawn was not aware of in Q2).*
>
> *Dawn was able to continue to offer effective support to the manager who needed compassionate leave even through her period of reduced hours working in Q4 and was able to guide the upline manager regarding appropriate course of action.*
>
> *The TWC project has been challenging due to the unusually long integration period. As discussed earlier in the year the TWC managers in Birmingham have had a much longer period of transition support to self-sufficiency than most newly acquired managers and they have appreciated this. For future acquisitions this time commitment will not be possible and coaching managers to independence more quickly will be important. To some extent Dawn continued to offer this service as you felt she felt she had the bandwidth to do it.*
>
> *In Q2 Dawn highlighted some concerns regarding some management practices in TWC and demonstrated her responsibility to others by ensuring these were raised to senior managers and HR for investigation.*
>
> *Client success. Dawn was a very active and appreciated member of the #3 Red Devil Work group. She was able to pilot the succession planning approach with TWC which contributed real business value in helping formally to highlight staffing risks.*
>
> *Some of Dawn's work for TWC aligned more to GTM objectives was innovative and demonstrated fresh thinking … and was recognised by David Stokes, who requested something similar for Madrid. This project whilst impressive, is really something that should have been owned and driven by the BU not the integration budget.*

Business results

Dawn's intelligent enquiring mind means that she has the ability to learn fast, however does not always investigate and chase down detail thoroughly. While working on the RESO strategy, as discussed in the review in August, although the end result was well received by [TWC management] *the advance preparation was not thorough and readily available data had not been tracked down initially. Although this was the first time Dawn had done a RESO strategy, I would have expected greater productivity, independence and determination from a band nine person to get necessary input.*

Skills

Dawn has been prompt to complete all required training and is also work to extend her skills and maintain her business relevance. However, I have not seen skills development in the areas previously suggested.

In her 2017 review Dawn's tendency to talk rather than listen was highlighted and this is again an area for improvement. Dawn's communication would be improved if she were to better focus on the objective of the discussion rather than leading the conversation to an area of personal interest. For example asking detailed personal interest questions when Lee was briefing the UK team regarding GDPR and then not hearing the cues to move on.

Dawn creates written communication fast but still needs to work on her ability to communicate concisely, to make her message clear…"

389. The same day, in a Sametime chat, Claire Bryant and Sandra Oliveira had the following exchange:

"CB I talked with Joanne yesterday and she felt our assessments were a bit harsh on DD.

SO Really?

CB Well, wonders never cease."

390. Shortly after this they met with Joanne Czekalowska and Sam McFarland. The subject for the meeting appointment was "*Discussion re: DD Checkpoint*", and a note on the appointment reads "*Discussion re: Dawn's Checkpoint feedback, we will also review with the case manager*".

391. In a Sametime discussion concerning the claimant's grades with Sandra Oliveira on 19 January 2018 Claire Bryant describes the claimant as "*an awkward git*" and "*very irritating*". Sandra Oliveira agrees with the latter assessment, which she explained in her evidence as relating to the claimant having falsely accused them of retaliating against her in the PIP meeting on

20 September 2017. There is discussion that "*we will have to up one of the EMs* [Expects Mores]".

392. The claimant's January 2018 review took place on 25 January 2018 with Claire Bryant and Sandra Oliveira. Apparently in an attempt to assist them in this meeting (or in the review more generally) Joanne Czekalowska sent them that day an email with a series of prompts for the review, including:

> *"Don't mention finding another role.*
>
> *Tactically need to restart the PIP.*
>
> *Does she want to do GDPR?*
>
> *NHS and GDPR sound good places to work in."*

393. As the claimant points out in her witness statement, the note "*tactically need to restart the PIP*" contrasts with what Amanda Brumpton was later told by Sandra Oliveira and Claire Bryant when she heard the claimant's appeal against her second grievance outcome, where she records "*both manager confirmed to Donna* [Foster] *that as an outcome of the end of year Checkpoint they were not considering placing Dawn on a further PIP in 2018*".

394. The ratings remained as originally drafted by Claire Bryant:

Business Results:	Expects More
Client Success:	Achieved
Innovation:	Expects More
Responsibility to others:	Achieved
Skills:	Expects More

395. As the claimant points out, these results were the worst amongst her colleagues.

396. The claimant does not seem to have taken this well. She cited it as another example of a detriment against her and walked out of the meeting.

397. The outcome was eventually formalised in writing on 7 February 2018. The narrative to support the grading reads:

> *"This assessment reflects adapted expectations of Dawn's FY performance, due to her reduced hours …*
>
> *Business results: Dawn met some but not all key committed goals in 1H17. In 2H a similar assessment was reached based on lower expectations of Dawn's performance. Strong contributions to TWC but lack of consistent focus elsewhere per goals and mid-year feedback. As a band 9 there is an expectation of greater proactivity,*

independence and determination to collaborate with stakeholders and escalate quickly.

- *technical accelerators definition not concluded by end of April or piloted by end of Q2*

- *her activities with client centres were not linked to requested definition of business outcomes, i.e. link to lead generation process*

- *did not drive engagement with IBM BU tech teams so they could assist in solutions, Geo readiness assessments and be proactively engaged in new acqs*

- *engagement with Merge was good but it required considerable nudging to initiate*

- *lack of preparation work for the RESO strategy review for TWC Birmingham in June and July*

Client Success and Responsibility to Others: Dawn met her objectives in 17 and demonstrated application of these dimensions

- *highly valued ops/mentoring support to TWC. The team value her presence and trust her advice but Dawn needs to be careful that she is fully up-to-date on latest policies*

- *active member of the #4 Red Devil work group. Piloted succession planning with TWC which helped them mitigate risks.*

- *JRD for Truven in Q4*

- *partnership with the WW Merge Offerings team to develop a dashboard to provide a valuable accessible view of offerings, availability to the field*

- *good leverage of her Hursley networks to promote visibility of TWC within the Client Centres in the UK and liaison with colleagues to extend to Madrid, Paris and Vienna centres too*

- *creative work on the Daily Weather Forecast was recognised by David Stokes, who requested something similar for Madrid. This project whist impressive should have been owned by the BU not the integration team.*

Innovation: Dawn demonstrated creativity by identifying potential growth areas for TWC and in her work with the Client Centres and the Emerging Technology Team. Dawn does, however, need to focus her creativity to driving business results aligned to her goals – other albeit valuable projects need to be passed to the BU for progression.

Dawns innovation was centred on TWC which particularly drove her interest. There were many opportunities to add value through new activities beyond TWC and as a Band 9 with varied sales, technical and client experience in IBM there was an expectation of thought leadership to promote new ways for IBM to engage with acquired companies. In 1H, Dawn could have applied her considerable creativity to promote acquisitions engagement and enablement with the BUs as well as influence Geo offerings roadmaps which was the focus of Tech Acceleration and Offerings Blueprint. Dawn's capacity for innovative initiatives in 2H was more limited due to her sickness and reduced working hours.

Skills: Despite her Q4 illness, Dawn completed all required training and has worked to extend her skills/business relevance. We have not, however, seen skills development in the areas previously suggested around clarity of comms. In Q416 it was suggested that she should learn the Minto principles re concise and structured logic in comms and presentations. Dawn's tendency to talk rather than listen was highlighted as this is again an area of improvement. Dawn's communication would be improved if she were to focus on the objective of the discussion rather than leading the conversation to areas of personal interest (e.g. GDPR UK briefing). The development of consultancy and questioning techniques may be helpful for the future. We appreciate skills development would have been difficult in 2H."

398. The claimant has expressed this detriment as being "*receiving a poor performance review*". We accept that this is a poor performance review. That is demonstrated by the fact that she has only "achieved" two of her goals, suggesting that overall she is not performing to the standard expected of her role. It was also the worst in the acquisitions team. The question that follows for consideration later is why this performance review was poor.

399. This will require us again to consider what documentary evidence there is of poor performance by the claimant. We have previously expressed our findings on this up to the point of the mid-year review and PIP, and see nothing in the full year review to change our assessment of this. For much of the period after the PIP she was either on holiday or working at much reduced hours, which may make assessment of her work difficult. We note, however, that even during this period there remains little if any documentary evidence of poor performance or of attempts by her managers to correct that poor performance.

Long-term sick leave

400. The Checkpoint review meeting was the last significant event that occurred while the claimant was still at work. On 6 February 2018 the claimant started a period of long-term sickness absence from which she has not yet returned.

401. The remaining detriments all relate to or arise out of two grievances that the claimant raised, and her appeal against the decision in the first grievance.

Part 4 – grievance and appeal detriments

28 September 2017 – 9 January 2018 – detriment 9 – "claimant raised a grievance on 28 September 2018 but did not receive the outcome until 9 January 2018" – detriment 11 – "failing to conduct the grievance investigation impartially"

402. On 28 September 2017 the claimant sent an email to the first respondent's "Grievance Co-ordinator", Caroline Tucker, saying:

> *"I am writing to bring to your attention a matter that is causing me concern. I should like you to deal with this as a formal grievance in accordance with applicable IBM procedures and the ACAS Code of Practice on Disciplinary and Grievance Procedures.*
>
> *Breach of statutory duty*
>
> *Protected act*
>
> *You have subjected me to detriment as a result of my having taken a "protected act" as set out below:*
>
> *I made protected disclosures under the Public Information Disclosure Act 1998, also known as whistleblowing legislation. The disclosures related to bullying, harassment and sexual discrimination against employees who have recently transferred into IBM from, and who are working for, an acquisition company – The Weather Company. I made the disclosures on the following dates to the following managers in the acquisition team:*
>
> *20th June – to Sam McFarland*
>
> *29th June – to Sam McFarland and Claire Bryant*
>
> *17th July – to Philip Johnson*
>
> *31st July – to Philip Johnson*
>
> *Victimisation*
>
> *Whilst Claire Bryant supported me in sharing my concerns with Philip Johnson, neither Philip nor Sam McFarland took any action to investigate and resolve my concerns. After making the disclosures I suffered the following detriments:*
>
> - *sudden removal from working on the Bluewolf acquisition with no notice or clear reasons given other than "business reasons"*

- *an unexpected poor mid-year performance review – with no prior indication that there were concerns about my performance*

- *informed that there would definitely not be a role for me in the GTM team in 2018 due to a lack of funding and advised to look for other projects, or roles outside the team*

- *no longer invited to participate in Go To Market meetings to discuss strategy and KPIs*

- *mandated to join team calls and meetings focused on the operations side of the business, even though the other GTM PM's attendance was optional*

- *informed that I was to be put on a formal performance improvement plan, two working days (due to holiday) after the second mid-year review*

this situation has caused me considerable distress, and I would be grateful if you would arrange a formal grievance meeting for this matter to be discussed as soon as possible. I have supporting information and documentation that I will share at this meeting."

403. The grievance thus broadly covered the matters that the claimant later complained of in her first tribunal claim.

404. Caroline Tucker acknowledged the email almost immediately, then notifying her on 5 October 2017 that she had appointed Paul Martin, Head of GTS Consulting and Mainframe Services Development, to investigate the grievance. Mr Martin told us that he had worked on around 20 grievance investigations, and this was a voluntary role he undertook for the first respondent in addition to his other duties. Caroline Tucker forwarded the grievance to him for investigation.

405. The first respondent has a 20-page document titled "Open Door [Grievance] Procedure – Guidance for Investigators". Mr Heard placed particular emphasis on one point at para 2.4.6(iii) of the document, where under the heading "Fact Finding" it says:

"Don't accept rumour as fact … validate all information where possible e.g. from personnel records, management documentation etc."

406. At para 2.5, under the heading "Drafting the report and recommendations" it says:

"Upon completion of the investigation you will need to draft the Grievance Report … and send it to the CM&A [Case Management and Appeals] *partner for review. They will test the logic and rationale supporting the conclusions and determine if any further investigation*

> *is needed. It also affords an opportunity to review the consistency of report, conclusion and recommendations in line with precedent.*
>
> *Note: Outcome and Recommendations will need to be approved by your CM&A Partner and they may need to be reviewed and approved by HR and/or the Business."*

407. Except for the formalising of this final review stage, there is, on the whole, nothing unexpected or unusual in that document. The process is one that would be familiar to anyone conducting a grievance investigation in a large company.

408. On the day of his appointment as investigator, Paul Martin got in touch with the claimant to arrange a meeting. They eventually met on 18 October 2017. Following this the claimant sent an email to Mr Martin saying, "*thank you for your time today and for listening so patiently*" and forwarded some further documents to him. Mr Martin subsequently arranges to meet the claimant's managers, including Ms Czekalowska and Ms McFarland.

409. Mr Martin's investigation continued largely in the manner that might be expected of such an investigation. We have copies of various emails provided to Mr Martin by the claimant's managers during his investigation, including one from Claire Bryant saying:

> "*I have not been able to find any evidence of performance discussions with Sandra from earlier* [than the mid-year review]"

410. That is, of course, consistent with our findings, and it remained the case at this hearing that there was no documentary evidence of performance discussions earlier than the mid-year review.

411. Much, although not all, of the emails and Sametime chats which were produced to us at the hearing were also provided by the managers to Paul Martin.

412. A key exchange from the claimant's point of view, and in particular her detriment 11 is on 7 November 2017 where Mr Martin sends emails to Joanne Czekalowska, Sam McFarland, Claire Bryant and Sandra Oliveira in the following terms:

> *"I am compiling the conclusions of my investigations …*
>
> *Although I have no doubt that concerns about Dawn's performance were clearly being raised during both Q4 2016, and YTD 2017, I don't as yet have any clear communication between the management team 'proving' this. Could you please work through your notes and sametimes again to find something that supports this chronology."*

This is specifically referenced by the claimant at para 23.3 as demonstrating that Mr Martin was not conducting his investigation impartially.

413. The only specific responses we have to that email are from Sam McFarland and Claire Bryant.

414. Sam McFarland says first that she only joined the team in May 2017 and then that any feedback to the claimant would have been directly from Sandra Oliveira and Claire Bryant. She later says (in an email which seems to follow on from this discussion):

> "*Sandra and I meet weekly to talk about all aspects of the business – the team is covered as part of that, though we don't document our weekly meetings.*
>
> *My specific feedback to Claire was by phone on two occasions: 1) after the interaction with Dawn where she raised the TWC leadership issues; and 2) after the call from Philip Johnson in HR where he had been alarmed about her 'shop steward' approach.*"

415. We note therefore that the two points at which Sam McFarland says she provided specific feedback to Claire Bryant about the claimant was in relation to two of the claimant's disclosures (although we also note Ms McFarland's position that this was about the manner of the disclosures, not the fact of the disclosures).

416. We will later have to decide what, if anything, Sandra Oliveira knew of the disclosures, but we record here that it seems to us very unlikely that Sam McFarland would have raised these two points specifically with Ms Bryant (who did not report to her and for whom she had no managerial responsibility) but not Ms Oliveira (who did report to her and for whom she had managerial responsibility). We also note that the second point would be consistent with the urgent phone call on 3 August 2017 which both Ms Bryant and Ms Oliveira participated in.

417. Claire Bryant says:

> *"Paul*
>
> *I am checking my notebooks at home. I also have a printout of her Checkpoint goals with my notes on from our meetings. But one of the specific examples I raised with Dawn as part of her checkpoint review was sadly on the 29th June shortly after the call with Sam. I can guarantee there is no link and I think the tone of the ST transcript I sent you support that but it does not really prove no link."*

418. Later she forwards the January 2017 Checkpoint feedback to Mr Martin, who comments in response:

> *"I know this is only for a quarter but I think this reads as a fairly positive outcome – you certainly wouldn't read this and think performance improvement plan would you?"*

419. On 8 November 2017 Ms Bryant replies:

> *"No, however the improvement areas that were called out in January are consistent with the examples I highlighted to Dawn in her mid-year. The areas of improvement/focus I called out to Dawn in the 2017 mid year were just that and if the Country Integration Lead role was representative of both parts of her job there would not be a PIP. When Sandra and I discussed with Elizabeth, we explained to her the issues with the GTM roles and the overall good performance on CIL. The improvement we required in the CIL role was consistent with the examples from Sandra. Elizabeth's advice was that as we both had areas for improvement we should do a PIP."*

420. Also 8 November 2017 Ms Oliveira writes to Mr Martin attaching a Sametime conversation she had had with the claimant (it is unclear when this dates from) saying: "*I share this one as it struck me as odd that she* [the claimant] *would raise the issue of discrimination when all I wanted to know was if the candidate could work full time or not. My answer was somewhat terse because I actually felt a little offended that* [the claimant] *would even mention discrimination, I distinctly remember thinking at the time that it as an odd association to make but then dismissed it.*"

421. In the Sametime chat which was attached, the claimant cautions Ms Oliveira to be careful about specifying full-time work in the context of a job candidate who may have a disability. Plainly this is a legitimate concern to raise when considering disability discrimination.

422. As with the initial reaction of Sam McFarland to the claimant's first disclosure, we consider that this demonstrates both a total lack of understanding by a senior employee of the first respondent as to how discrimination can arise outside the most obvious cases of direct discrimination, and undue sensitivity and defensiveness to a suggestion that the first respondent may have discriminatory practices or working arrangements.

423. On 15 November 2017 Mr Martin writes to Sandra Oliveira saying:

> *"… just a really quick additional ask … please could you forward me any note, to anyone of your other team members, discussing job opportunities outside M&A … like the one you sent Dawn…"*

There does not seem to be any reply to that email.

424. On 17 November 2017 Mr Martin sent his conclusions to Caroline Tucker under cover of the following email:

> *"Caroline, I have written this in extended form as there is a lot to cover. We can discuss how much we share with Dawn but in principle I am happy with all of it. Could you read and pass to legal if you need …"*

425. At this point Mr Martin's conclusion was that the grievance was not upheld, but he had made some critical comments about how the claimant's managers had conducted themselves in their management of her.

426. Mr Martin had moved from his first meeting with the claimant to producing a full draft of his report in about a month. We do not think that he can be properly criticised for taking too long in doing so.

427. On 6 December 2017 the claimant chased Mr Martin for his conclusions. He replied the same day:

> *"I concluded my investigation some weeks ago. This has gone into the normal review process which has taken far longer than normal. I will chase in the morning …"*

428. A couple of days after that, Claire Bryant wrote to Caroline Tucker to ask what progress had been made with the grievance, saying, "*the ACAS timing* [presumably the early conciliation period] *has expired and it is really hard to manage Dawn with all these different threads ongoing*". Caroline Tucker says that the grievance report is in HR review, and invites Ms Bryant to call her.

429. The claimant sent a further chasing email to Paul Martin on 14 December 2017. Mr Martin replies:

> *"Dawn, I appreciate the delay is frustrating. I assure you I am frustrated as well. I have escalated the cause of the delay this morning and hopefully this will enable me to schedule something with you next week …"*

430. Mr Martin and Caroline Tucker meet to discuss his report on 18 December. On 19 December 2017 he has the following exchange with the claimant:

> *"Hi Dawn*
>
> *Nearly there! I apparently need to change some words from English to Legal Speak, and cycle round the loop again (albeit promised to be quicker than 4 weeks this time!!! All real content is finalised. I will try and update and resubmit today and will push for an immediate turn around, but unless there are miracles, it's looking unlikely for this week."*

and

> *"Hi Paul*
>
> *I'm very disappointed and frustrated to hear of a further delay on top of the 12 weeks this process has taken to date … I am in the process of submitting my ET1 form to the employment tribunal … and will send you a copy for your information."*

431. On 20 December 2017 Mr Martin submitted an amended report to Caroline Tucker, copied into the correct report format, saying, "*Caroline, I am not going to cut down the length but hopefully this is cleaner as requested.*"

432. On 22 December 2017 the claimant submitted her first employment tribunal claim, sending a copy to Mr Martin.

433. On 5 January 2018 Caroline Tucker writes to Mr Martin suggesting further changes to his report. Her comments on the covering email were:

> *"In line with the grievance procedure your report should respond to the specific issues raised by Dawn and my suggested changes therefore, in the main, remove what I believe are the points that go outside the specifics of Dawn's concerns.*
>
> *Therefore, please can I ask that you carefully go through the HR review with this point in mind and consider the suggestions or you may also feel that there is further text that should be removed. I'll leave you to review.*
>
> *The wider observations that your investigation has highlighted can then be fed-back and discussed separately with the relevant managers."*

434. Large parts of the report have been removed by Ms Tucker – particularly those critical of management actions. Her point seems to be that with Mr Martin having found that the claimant's grievances are not made out that should be sufficient for the report with any criticisms of the managers then left for private feedback to the managers.

435. On 12 January 2018 Mr Martin sent the claimant the final version of his report.

436. The two detriments that are alleged in relation to this are (taking the wording from the claimant's second claim) first:

> Detriment 9 – "*The investigating officer … advised the claimant on 6 December 2017 that he had reached his conclusions and completed his report several weeks previously. On 18 December, the claimant was informed that there was a delay in her receiving the report as it has been sent to the first respondent's legal team who had requested that Paul Martin make amendments. On 9 January the claimant received the report.*"

437. While it does not seem to be in dispute that grievance outcomes would routinely be reviewed in this manner, as Mr Heard points out in his submissions, Mr Martin himself identified this delay in this case as being abnormal.

438. There is a difficulty with the claimant's case in that she has identified Mr Martin as being the person responsible for this detriment. As Miss Masters points out, the claimant accepted in cross-examination that Mr Martin had not delayed the report. If there was a delay, it was in the legal review process, and that was not Mr Martin's doing. Miss Masters says that if it is now alleged that others were responsible for this delay this is not the detriment that the claimant had pleaded and cannot be considered by the tribunal.

439. With some reluctance we conclude that Miss Masters is correct. Whatever delay there was was not Mr Martin's fault. A delay caused by the investigating officer is a different matter to a delay caused by legal review. The detriment alleged by the claimant is a detriment committed by Mr Martin, and no such detriment occurred.

440. The second relevant detriment is:

> Detriment 11 – "*… on 7 November 2017 an email was sent from Paul Martin in response to the claimant's grievance stating 'although I have no doubt that concerns about Dawn's performance were clearly being raised during both Q4 2016 and YTD 2017. I don't yet have any clear communication between management 'proving' this. Could you please work through your notes and sametimes again to find something that supports this chronology." It is alleged that the first respondent failed to conduct the grievance investigation impartially."*

441. This appears to be a criticism that Mr Martin took the claimant's managers at their word that there had been performance concerns despite there being no documentary evidence to back that up, and did not regard the lack of documentary evidence as something that added weight to the claimant's contention that there had been no performance concerns prior to her disclosures. Taken in that way it is made out, although it is another question whether that demonstrates that Mr Martin was not "impartial" or what his reasons may have been for taking this approach.

18 January 2018 – appeal against decision in first grievance lodged

442. On 18 January 2018 the claimant submitted her appeal against Paul Martin's decision on her grievance. This included, as an "*additional detriment since I raised my grievance*" the allegation of exclusion from the design thinking workshop (what is now detriment 10). On 31 October 2018 Caroline Tucker appointed Michelle Andrews (HR Partner) to hear the appeal.

18 January 2018 – 19 June 2018 – detriment 12 – "failing to investigate the claimant's appeal raised for detriments relating to whistleblowing"

443. The detail of this detriment is contained at para 23.4 of the claimant's second claim:

> *"On 18 January 2018, the claimant submitted an appeal against the findings to her grievance. However, to date the first respondent has failed to investigate the appeal against the grievance raised for detriments relating to whistleblowing".*

444. The second claim was submitted on 19 June 2018, so "to date" means 19 June 2018.

445. On 6 February 2018 (the same day the claimant left work on long-term sick leave) Michelle Andrews contacted the claimant with a view to meeting her to discuss her appeal. This discussion eventually took place by phone on 26 February 2018. Ms Andrew's notes of the meeting show the "next steps" as including "*email to DD confirming scope of investigation*".

9 March 2018 – detriment 15 – "failing to investigate the claimant's grievance regarding her end of year review"

446. This is described in the claimant's second claim as "*the first respondent has to date* [i.e. to 19 June 2018] *failed to investigate the grievance regarding the claimant's end of year review*". In her third claim this point has become: "*did not investigate the grievance regarding the claimant's end of year review in a timely manner*". It is the second claim that is specifically referenced in the list of issues, and we take the way it is put in the third claim to be simply another way of putting the same point – that it was not investigated before 19 June 2018. We note the focus of this detriment is on the timeliness of the investigation, with detriment 19 relating to its outcome.

447. On 9 March 2018 the claimant wrote to Caroline Tucker saying:

> *"I would like to raise a grievance in respect of my 2017 Checkpoint Review, which was unfairly negative and forms part of a series of events victimising me following whistleblowing disclosures I made in June and July 2017 which were not investigated nor appropriate action taken."*

448. On 14 March 2018 Caroline Tucker appointed Michelle Andrews to investigate this grievance, apparently hoping for her to do this together with the appeal against the findings on the claimant's first grievance.

449. As we shall see below, there was (to put it for now in a neutral fashion) a failure in communication between Michelle Andrews and the claimant, as a result of which the claimant wrote on 16 May 2018 requesting that another investigator be appointed. On 7 June 2018 Donna Fowler was appointed to hear this grievance.

450. On 15 June 2018 Donna Fowler emailed the claimant with a view to arranging a meeting with her. The meeting took place on 26 June 2018

451. It is therefore clear that the first respondent had not, as a matter of fact, investigated the claimant's grievance regarding her end of year review by

the time her second claim was submitted on 19 June 2018. That detriment is made out. What eventually became of this grievance will be discussed under the heading relating to detriment 19.

11 May 2018 – detriment 16 – "sending an email falsely stating that the claimant had been emailed previously regarding the scope of the investigation"

452. On 19 March 2018, 30 March 2018 and 3 May 2018 the claimant wrote to Michelle Andrews to chase for that email. On 11 May 2018 Michelle Andrews wrote to the claimant saying:

> *"Dawn I can only apologise that you haven't received a mail from me. I did sent you a note some weeks ago confirming the scope of the investigation and asking for some time to speak to you regarding some additional questions I have related to the original grievance appeal and about your subsequent grievance relating to your performance assessment.*
>
> *I cannot find the mail so I don't know if there has been some problem with my Lotus Notes."*

453. In her witness statement Michelle Andrews says:

> *"I believe there was a technical problems at the time which meant the original email did not send. I had a problem with my computer as a number of my emails were not sending, which I was not immediately aware of. I was also not receiving all emails sent to me. I deny that I falsely represented that Dawn had been emailed previously as alleged. Moreover, I deny that I was in any way influenced by the alleged protected disclosures …"*

454. Detriment 16 is "*the Appeal Grievance Investigator falsely stated via email dated 11 May 2018 that she had emailed the claimant previously regarding the scope of the investigation*".

455. It is clear from the extract from her witness statement that Ms Andrews now accepts (as she had to, given that there was no trace at all of any earlier email) that there was no earlier email sent. The detriment is therefore made out – she had not sent an email to the claimant at any earlier stage. Whether this was because of the claimant's protected acts or disclosures remains to be considered.

456. Michelle Andrews proceeded to carry out investigation meetings with Sandra Oliveira, Claire Bryant, Sam McFarland, Vicki Lowe, Paul Martin, Philip Johnson and Elizabeth Staples. There are full notes of these meetings. Although they are not dated it appears from some of the surrounding correspondence that she obtained some relevant documentation in March 2018 and was arranging meetings in April 2018. Although it then took a long time for the eventual decision to be produced (in July 2018), the specific detriment alleged by the claimant ("*to* [19 June

2018] *the claimant has failed to investigate the appeal*") is not made out as steps were being taken in this period by Ms Andrews to investigate the appeal.

29 June 2017 onwards – detriment 17 – failure to investigate the claimant's disclosures regarding the treatment of TWC employees – 31 January 2018 disclosures in relation to part-time workers

457. We have dealt with the first aspects of disclosure 17 above. There remains the question of the further points raised by the claimant. Although the list of issues refers to this as being made on 31 January 2018, they are noted as having been received on 1 February 2018.

458. The claimant submitted these through the first respondent's "Confidentially Speaking" process, which appears to be a mechanism by which concerns can be raised by employees.

459. She says in her submission to the process:

> *"I would like to raise the following concerns, all of which I believe put IBM in breach of laws, including the Equality Act, the Data Protection Act, and breaching the duty of mutual trust and confidence implied in employment law ….*
>
> [the claimant then raises matters in line with her previous concerns, which we have previously dealt with, and]
>
> *2. Inequality of opportunity in changing roles for those working part-time, due to a disproportionate number of roles being posted up as "full time" only, as opposed to "full time or part time" or "part time". Of 189 UK roles currently posted on GOM, there is not a single role where a part-time employee would be considered.*
>
> *3. Incentive payments for sellers – part-time workers are treated less favourably than their full time colleagues in the way payments are calculated.*
>
> *4. Data Subject Access Requests – IBM tells requesters that they need to complete IBM's own form, and that the statutory time limit for responding will not start until a completed form is received, both of which are contrary to the DPA."*

460. The claimant received a response to this by email on 28 February 2018 from Christina Garcia. Whatever the rights and wrongs of this response the claimant during the hearing withdrew any allegation that the response from Christina Garcia was influenced by the claimant having made protected disclosures and protected acts. As referred to in Miss Masters's submissions, she also did not suggest that Elizabeth Staples, Leon Butler or Bernadette Duggan had acted as they did because of her disclosures or

protected acts, so there is nothing more to say about this aspect of detriment 17

31 July 2018 – detriment 18 – "decision not to uphold the claimant's appeal against the outcome of her grievance raised on 18 January 2018"

461. Ms Andrews accurately describes her conclusions as follows:

> *"I concluded that all the appeal points raised by Dawn in her grievance appeal were invalid. I did, however, find that improvements could be made for the future and made several recommendations in my investigation report. These included ensuring that, in relation to the communication of the PIP, both manager's document their feedback to ensure there is a record of the expectations of the employee. I also recommended scheduling more formal 1:1 feedback sessions, to ensure feedback is well communicated."*

462. This detriment plainly occurred, and we will consider later the extent to which (if at all) it was because of the claimant's protected disclosures or protected acts.

27 September 2018 – detriment 19 – "decision not to uphold the claimant's grievance regarding her end of year review which she raised on 9 March 2018"

463. As Donna Foster put it in her witness statement, in investigating the claimant's grievance in respect of her year-end Checkpoint review, "*my focus was solely to examine whether the 2017 Checkpoint review was fair*".

464. An obvious problem with this statement is that the claimant was not complaining that her Checkpoint review was not fair. She was complaining that it was "*unfairly negative and forms part of a series of events victimising me following whistleblowing disclosures"*.

465. Donna Fowler was frank in her cross-examination in accepting:

(i) that she had not seen the claimant's original grievance, and

(ii) did not consider whether there was any link between the claimant's disclosures and the outcome of the Checkpoint review.

466. Even though she had not seen the claimant's original grievance she accepted that the claimant had at her original meeting with her made a link between the disclosures and the Checkpoint review. Despite this, she maintained her position that she was only there to determine whether or not the Checkpoint review was fair, not whether there was any link with disclosures. She said that the decision to ignore the possible effect of the disclosures was hers alone, but we were left completely unclear as to why she had taken this decision.

467. After her meeting with the claimant she went on to have meetings with Sandra Oliveira and Claire Bryant (and them only) to discuss the grievance.

468. She sets out her conclusion in her witness statement as follows:

> *"In relation to the issue of whether Dawn's end of year review was unfair, I concluded that this issue was invalid. Dawn had been recognised as someone with a caring, can do attitude and was good at one to one relationships … Claire and Sandra had moderated their expectations of Dawn over the second half of the year due to her sickness absence …*
>
> *… Dawn was not delivering to the level expected in certain areas and was needing more guidance than expected for an employee at her level ...*
>
> *I was comfortable that Dawn had been fairly assessed ... I saw the ratings as fair in the circumstances and an attempt to help Dawn improve."*

469. Plainly the investigation did not uphold the grievance and this detriment is made out.

Summary of findings on disclosures

470. The claimant has established that all five of her disclosures occurred in the manner she says they did.

Summary of findings on detriments

471. The claimant has established that the following detriments occurred and are detriments:

> (1), (3), (4), (5), (6), (7), (8), (10), (11), (13), (15), (16), (17) (part) (18) and (19)

472. The following alleged detriments did not occur:

> (2), (9) and (12)

473. The following alleged detriments were withdrawn during the hearing:

> (14) and (17) (part)

Facts relevant to time and remedy points

474. We will address points in relation to the time the claims were lodged to the extent that they arise as a result of our conclusions.

475. The claimant remains employed by the first respondent. She has been off sick continuously since 6 February 2018. She received full sick pay until 6 August 2018 and since then has been on 75% of her full pay.

476. We have set out above the issue which arose between during the hearing as to how any financial losses during this period should be calculated.

477. The claimant attributes her sickness absence to her alleged discriminatory or detrimental treatment by the respondents. The primary medical evidence relied upon in support of this is an occupational health report commissioned by the first respondent dated 17 July 2018. This says, amongst other things:

> "[the claimant] *has been absent from work since February 2018 as a result of work related stress …*
>
> *… the underlying cause for this sickness absence is work-related stress …*
>
> *It does appear* [that her] *condition is work-related as she feels she is being victimised following raising concerns about colleagues.*
>
> *… as the employment tribunal remains ongoing I do anticipate her symptoms may continue."*

The report goes on to conclude that the claimant is unfit for work, even with adjustments, and will be unfit for work for an indefinite period of time.

478. The occupational health report thus entirely supports the claimant's case that she is off sick because of the actions she complains of. There was no suggestion from the respondents that "work-related stress" could refer to anything else. Resolution of the employment tribunal proceedings is the only thing suggested by the occupational health advisor that would enable the claimant to return to work.

479. The claimant describes in her witness statement the effects of what occurred on her. We will deal with this in more detail in reaching conclusions on what remedy is appropriate.

D. THE LAW

Protected disclosures

480. A "qualifying disclosure" is (s43B(1) of the Employment Rights Act 1996):

> *"any disclosure of information which, in the reasonable relief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …"*

481. There is no dispute that the claimant's disclosures were made in line with s43C(1)(a) – to her employer.

482. Under s27B(1), "*a worker has the right not to be subjected to any detriment … by his employer done on the ground that the worker has made any protected disclosure*".

Victimisation

483. Section 27 of the Equality Act 2010 provides:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:*
>
> *(a) B does a protected act,*
>
> *(b) A believes that B has done, or may do, a protected act*
>
> *(2) Each of the following is a protected act:*
>
> *(a) Bringing proceedings under this Act,*
>
> *(b) Giving evidence or information in connection with proceedings under this Act,*
>
> *(c) Doing any other thing for the purposes of or in connection with this Act,*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

Detriments

484. We do not understand it to be argued by the respondent that there is any material distinction between the concept of "detriment" for the purposes of a whistleblowing or protected disclosure claim, nor do we understand it to be argued that any of the matters complained of by the claimant are not (if they occurred) detriments.

Causation

485. In the case of protected disclosures, the test is whether the employer's actions were "*on the ground that the worker has made any protected disclosure*". In the case of victimisation the test is whether the employer's actions were "*because* [the person] *does a protected act*". We do not understand there to be a material distinction between the two different forms of wording (see, e.g. Amnesty International v Ahmed 2009 ICR 1450).

486. In whistleblowing detriment claims, "*s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial*

influence) the employer's treatment of the whistleblower" Fecitt v NHS Manchester [2011] EWCA Civ 1190 (para 45). The position is similar in victimisation claims, where the requirement is of a "significant" influence on the treatment of the employee, which is "*an influence which is more than trivial*" (Igen v Wong [2005] EWCA Civ 142).

487. An important part of the respondents' case relied upon distinguishing between the contents of any disclosure or protected act and "*a feature which is related to but properly separable from it*", such as the manner in which it was made. Miss Masters relies upon the following passage from Martin v Devonshire Solicitors [2011] ICR 352, together with the more recent case of Jesudason v Alder Hey [2020] EWCA Civ 73:

> *"In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act … but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not that complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 am. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say 'I am taking action against you not because you have complained of discrimination but because of the way in which you did it'. Indeed, it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint."*

488. This approach applies equally to the whistleblowing and victimisation claims.

The burden of proof in detriment claims

489. Section 48(2) of the Employment Rights Act 1996 provides that:

> "*On* [a complaint of detriment due to protected disclosures] *it is for the employer to show the ground on which any act … was done.*"

The burden of proof in discrimination claims

490. Under section 136 of the Equality Act 2010:

> *"(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

491. This applies in respect of the claimant's victimisation claim but has no application to her claim of whistleblowing detriments.

492. We note from Hewage v Grampian Health Board [2012] UKSC 37 (para 32) that: "*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*"

Summary of distinctions between whistleblowing and victimisation claims

493. The provisions in relation to detriments for having undertaken protected disclosures and victimisation for having undertaken protected acts operate under different statutory regimes and have some differences in their wording. They do, however, operate along similar lines, with the material distinctions being in the original definitions of protected disclosures and protected acts, and the question of the burden of proof. In a claim of whistleblowing detriments, the onus is on the employer to show the reason for its treatment of the claimant. In a claim of victimisation, the claimant first has to show "*facts from which the court could decide*" that there had been discrimination. However, the shifting burden of proof makes no difference "*where the tribunal is in a position to make positive findings on the evidence one way or the other*".

494. We will discuss the law in relation to remedy when addressing questions in relation to remedy.

E. DISCUSSION AND CONCLUSIONS

Were the disclosures protected disclosures?

495. Section 43A of the Employment Rights Act provides that:

> "*A protected disclosure means a qualifying disclosure … which is made by a worker in accordance with any of sections 43C to 43H*" (section 43A Employment Rights Act 1996).
>
> (It is not in dispute that if these were qualifying disclosures they were made by a worker in accordance with section 43C.)

496. Under section 43B(1):

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

497. In her submissions, Miss Masters concentrated on the "reasonable belief" aspect of this definition, saying that while the claimant may have subjectively believed that the disclosures were in the public interest and tended to show particular things, this was not an objectively reasonable belief. She makes six specific arguments in support of this point. We set out below the first two, in italics, followed by our response to them.

498. *"Sex discrimination: The Claimant's view that sex discrimination had taken place does not appear to be based on an objective and balanced assessment which would suggest that her views were not reasonably held. This is a requirement of any reasonable belief as per Darnton v University of Surrey [2003] IRLR 133 ("There must be more than unsubstantiated rumours in order for there to be a qualifying disclosure. The whistle- blower must exercise some judgment on his own part consistent with the evidence and the resources available to him" – paras 31 and 32 as confirmed in Babula v Waltham Forest College [2007] IRLR 260). Instead, she had become personally embroiled in the team at TWC and had stopped taking a dispassionate view of events. She does not appear to have applied her mind to whether there was a legitimate business reason for management practices such as to objectively justify any prima facie indirect sex discrimination even though she confirmed in cross-examination that she knew that this part of the legal test and she admitted to not having made enquiries of this matter of those accused."*

499. We accept that simply relaying a rumour, or gossip, may not amount to a protected disclosure, but there was more to what the claimant did than that. While we do not understand that she personally witnessed any bullying behaviour or acts that may amount to indirect sex discrimination, she was basing her disclosure on complaints that she had received from the TWC employees. She was, in effect, passing on complaints that she herself had received, even if those employees did not express those matters in quite the same way that the claimant did. We have some difficulties with the idea that in order to have a reasonable belief the person must consider whether there is some potentially lawful reason or excuse for the behaviour complained of. There is no requirement for an individual to have satisfied themselves that the information they provide is in fact true before providing it to their employer, nor do we think there should be such a requirement. What the claimant was passing on was information that she felt required further investigation. That seems to us to be the essence of any whistleblowing disclosure. We do not think there is any requirement for a whistleblower to

maintain a "dispassionate view of events", but in any event we have found that the claimant did not in this case over-identify with the TWC employees in the way described by Miss Masters.

500. *"Bullying and harassment by [named individual]: … He has a direct and demanding style, but it is going too far to represent him as a bully. Indeed, the Claimant explained in cross- examination that she had heard him raise his voice rather than shout. It is also important to bear in mind that [he] was operating in a difficult and pressured sales environment where the sales team would have been subject to incentive plans, where targets were not being met and there was a management expectation of delivery."*

501. There may well have been explanations for the individual's behaviour, and it is no part of our role to determine whether there was actually bullying at TWC, but all that is required for a protected disclosure is information which "tends to show" something – not information which conclusively proves a point one way or another. What the claimant did was to give information that she felt required further investigation. It is not the task of a whistleblower themselves to have carry out a detailed investigation into what they have been told. We have no doubt based on the events that occurred that the claimant herself would have been subject to greater criticism by the respondents if she had taken it upon herself to investigate and form a concluded view on the allegations.

502. The remaining four points concern matters where it is said that the information did not show any breach of a legal obligation or was at best speculation as to what may happen in the future, rather than relating to anything that had actually occurred.

503. We do not understand the claimant to be saying that everything she said in the course of these conversations amounted to protected acts. The matters referred to by Miss Masters in her final four points either do not appear at all in the claimed disclosures set out in the list of issues (exclusion/being ignored and an issue in relation to the possible consequences of a business deal) or appear only as a single element of the second disclosure (lack of support and contradictory instructions). We accept that information in respect of a lack of support or being given contradictory instructions cannot of themselves be said to tend to show a breach of a legal obligation, but those only appear once in the list of disclosures and appear to be an example of bullying and harassment (which can amount to a breach of a legal obligation), rather than being disclosures in their own right.

504. Miss Masters sets out in the Appendix to her submissions elements of the disclosures where the respondent accepts that the claimant has provided information, which are said to be limited in contrast to the remainder of the disclosures simply being allegations, comment or opinion.

505. Looking at the disclosures set out in the list of issues (which we have found are the disclosures the claimant made), apart from the fourth disclosure we are satisfied that these involve the disclosure of information, rather than simply being allegations or assertions by the claimant. The claimant was relaying information, and explaining why she thought this information should be followed up on and the possible consequences that could arise for the first respondent. The claimant had a reasonable belief that they were made in the public interest and tended to show that legal obligations were being breached.

506. The fourth disclosure amounts simply to the claimant saying to Mr Johnston that she wishes to discuss with him some unidentified problems that may give rise to grievances or legal action. There is no "information" in that disclosure that would qualify for protection. An assertion that there may have been a breach of a legal obligation is not a protected disclosure, since what is required is "information". There is no information in the fourth disclosure, and it is not a qualifying or protected disclosure.

507. Apart from the fourth disclosure, the claimant's disclosures as set out in the list of issues appear to us to be classic whistleblowing disclosures in which an employee relays their concerns about how other employees are being (or may be being) treated to their employer. We cannot see any reason why they should not be considered to be protected disclosures. Apart from the fourth disclosure they all are protected disclosures.

Were the disclosures protected acts?

508. Under section 27 of the Equality Act 2010, a "protected act" includes "*making an allegation … that* [someone] *has contravened this Act*".

509. The respondents accept that the part of the first disclosure that referenced sex discrimination is a protected act. On our findings of fact, the claimant referenced sex discrimination in the course of the first, second, third and fifth disclosure, and these are protected acts. While the fourth disclosure mentions "legal action" there is nothing in the disclosure to suggest that this is legal action on account of a breach of the Equality Act. The first, second, third and fifth disclosures were protected acts but the fourth disclosure was not.

Was there a link between the disclosures/protected acts and the detriments?

Introduction

510. The question of what (if anything) the link was between the disclosures or protected acts and the detriments requires us to draw inferences from our findings of fact.

511. For the purposes of this section we will split our consideration of the link into two parts – the first in relation to the substantive detriments alleged (largely)

against the individual respondents, and the second in relation to the subsequent grievance and appeal proceedings.

Part 1 – the substantive detriments

Introduction, context and the burden of proof

512. In the case of the whistleblowing detriments, it is for the respondents to show that the detriments are not on the ground of the claimant having made any protected disclosures.

513. In the case of the victimisation claim it is for the claimant to show facts from which we could decide that the respondents had unlawfully victimised the claimant. If she does this, it is for the respondents to show that there was no unlawful victimisation. This is, however, only of practical significance in cases where we are not able to make "positive findings on the evidence". In what follows, we are making positive findings on the evidence except in those cases where we specifically discuss the burden of proof.

514. We have found:

(a) That except for a need to be more concise, there were no material criticisms of the claimant's work as a CIL or GTM PM prior to her first disclosure.

(b) To the extent that there was any documented feedback on the claimant's work as a CIL or GTM PM prior to the first disclosure, it was almost entirely positive.

(c) The claimant was never told at the time of any problems with her second technical accelerators presentation.

(d) That Sam McFarland took an adverse view of the claimant's first disclosure.

(e) That Sam McFarland communicated that adverse view to Joanne Czekalowska shortly after the first disclosure. She also told Claire Bryant of her adverse view, despite not having any managerial responsibility for Claire Bryant.

(f) That Sam McFarland communicated that view in such a strong manner that Joanne Czekalowska subsequently contacted HR to discuss "*an underperforming employee*" and the implementation of a PIP, without taking any informal steps towards performance improvement and without any reference to the claimant's direct line managers.

(g) That the matters the claimant raised in relation to TWC were not properly investigated.

(h) That the claimant was taken off a funded project (Bluewolf) by Joanne Czekalowska and was told by Sandra Oliveira that "*there isn't a role* [for you] *going forwards*".

(i) That Philip Johnson took an adverse view of the claimant's fifth disclosure, and relayed this adverse view to Joanne Czekalowska. This view was seen as so significant that it was shared by Sam McFarland with Sandra Oliveira and Claire Bryant on an urgent basis "*as we might have a problem in the making*".

(j) Sam McFarland said at that time to Philip Johnson (in relation to the claimant) "*I strongly believe she is in the wrong job*" and "*we didn't advertise for a mother hen who needed to go native*".

(k) In preparing the claimant's PIP, both Claire Bryant and Sandra Oliveira both contemplated that the consequence of the claimant's failure to complete the PIP would be her dismissal.

515. We have also rejected the respondents' criticism of the claimant's performance in the technical accelerators presentations and (on the whole) the other matters which were said by them to have given rise to performance concerns.

516. From this we find that it was the claimant's disclosures (or something about them) that lead the respondents (or some of them) to take action against her with the intention of removing her from (or getting her to voluntarily give up) her role in the acquisitions team. This is, at the very least, material from which we can conclude that the respondents' actions, insofar as they were directed at the removal of the claimant from the acquisitions team, were unlawful victimisation.

517. In part this is not disputed by the respondents. Sam McFarland was clear that her assessment of the claimant's performance was based at least in part on what occurred during the first disclosure. In other parts, it is the only conclusion that is properly open to us. There has, for instance, been no satisfactory explanation as to how the call with Philip Johnson could have been considered to be a problem or lead to such an urgent phone call. Starting with the initial reaction of Sam McFarland, the view propagated out by her to Joanne Czekalowska and then to Claire Bryant and Sandra Oliveira, was that the claimant's disclosures had shown that she was unsuitable for her role, or, as Ms McFarland put it to Philip Johnson "*I strongly believe that she is in the wrong job*" as "*we didn't advertise for a mother hen who needed to go native*".

518. Faced with the obviously negative reaction to the disclosures, Sam McFarland in her evidence and Miss Masters in her submissions sought to draw a distinction between the fact of the disclosures and the way the disclosures were made. It is the respondents' position that to the extent that the respondents formed a negative view of the claimant it was in relation to

the manner of the disclosures rather than the fact of the disclosures or the material contained in the disclosures.

519. Martin shows that such a distinction can be made. The fact of making a disclosure or undertaking a protected act is protected, but this protection does not necessarily extend to the way it was made.

520. Typically the way in which such points arise is when the manner of the disclosure (or other matters connected with the disclosure) amount to misconduct. Those are the examples given in Martin. It is more difficult to see the distinction in a case such as this where the argument is that the manner of the disclosure amounts to poor performance rather than misconduct. Nevertheless, we accept that such a distinction can still in principle be made. However, tribunals should be careful of such arguments to avoid routinely undermining the protection properly given to those who raise such allegations.

521. Miss Masters describes in her written submissions what it is that the respondents objected to (we have kept her emphasis but omitted her footnotes referencing the relevant witness statements):

> *"The Respondents (and others) were concerned about the way in which the Claimant articulated the problems which she perceived. Rather than undertaking the CIL role in an objective way, she appeared at times to behave as follows:*
>
> *(a) "Over-identify" and "personalise" perceived concerns which detracted from her ability to be objective.*
>
> *(b) Act more like a "champion" of the employees or a "spokesperson" or an "employee rights representative" or a "shop steward" who was advising and acting on behalf of the TWC employees rather than a neutral "Swiss" ambassador.*
>
> *(c) Act like she was one of the TWC team rather than sit objectively outside it as a neutral bridge.*
>
> *(d) Fail to present an objective, balanced, 360-degree examination of concerns and look at whether there may be sound management reasons for certain decisions even if they were unpopular.*
>
> *In short, she was not simply raising allegations or concerns for further investigation. She was positively, passionately, and in an entirely one-sided way, asserting that there were (as opposed to may be) problems at TWC which she further personalised. She was doing this in the absence of an investigation … She was doing this in the context of a role which required her to act as the neutral interface between the acquisitions and IBM … she had become embroiled*

within TWC rather than communicating appropriately, constructively and with balance."

Miss Masters continues, having noted some of the questions from the panel during the hearing:

"… the Respondents' concerns centred on the mismatch between the Claimant's communication style and her CIL role …"

522. We do not accept this, for the following reasons:

(a) If this was the problem, it could and should have been dealt with by someone raising the point informally with the claimant. This was not done. Despite having every opportunity, no-one ever suggested to the claimant that she was raising her complaints in the wrong way or with the wrong tone. To the extent that problems relating to the claimant's raising of these issues was raised, they were raised in private conversations between the respondents (and Philip Johnson). If the respondents had (as they said they had) welcomed the disclosures but with reservations about how the claimant was expressing herself this could simply have been dealt with by any of the individuals involved taking up the point with the claimant. This was not done.

(b) As we refer to elsewhere in this judgment, those to whom the claimant made her complaints were either very slow to take any steps to investigate the claimant's disclosures (or pass them on to others for investigation) or did not do so at all. If the problem was only with the manner of disclosure that does not explain the reluctance to investigate what the claimant was disclosing.

(c) To the extent that the disclosures were raised in writing, the manner in which they are raised appears to be cautious and measured, and to be a long way from the over-emotional or personal way described in Miss Masters's submissions. The theme of the claimant's written disclosures is that these are matters which ought to be investigated, not matters on which she has already reached a firm conclusion or where she considers one side or the other to be definitively in the wrong.

(d) The question of the claimant over-identifying with the TWC employees or having improperly jumped to conclusions could only relate to the oral disclosures to Sam McFarland and Philip Johnson. Both of those disclosures were witnessed by others (Lindsay Williams and Nick Evans) who were experienced employees of the first respondent who apparently saw nothing wrong or remarkable in what the claimant was doing. Indeed, the way in which Mr Johnson himself described the phone call with him in his evidence to us suggested that nothing remarkable or objectionable had occurred during that telephone call. The only evidence we have of the claimant being over-

exercised by the TWC complaints comes from Sam McFarland in relation to the initial disclosure, but even that is not supported by Lindsay Williams's evidence.

(e) We do not accept that the claimant should have taken the initiative to look at what explanations there may be for the behaviour that the TWC employees were complaining of. It is common ground that it was not part of her role to investigate these concerns – that would be a task for HR or those with managerial responsibility for TWC. For the claimant to have undertaken her own investigation or enquiry into the rights and wrongs of the situation would have taken her outside the proper confines of her role.

(f) To "*identify and address team concerns*" was a specific part of the claimant's job description. There is nothing to say that this had to be done only in one way, nor that the claimant should not get too involved in such matters. Far from under-performing, in raising these concerns the claimant was specifically carrying out part of her role.

523. We therefore reject the respondents' contentions that the way the claimant was treated was a result of the way in which she had made her disclosures, rather than the fact that she had made those disclosures.

524. We can add a further point. The argument put by the respondents suggests that there is only a very narrow way in which the claimant could properly raise these concerns without the way they were raised being held against her. In finding fault with the way in which the claimant raised her concerns Miss Masters leaves only a very narrow gap or set of circumstances in which these concerns could have been raised without the claimant being in some way criticised for how she had done so. The examples given in Martin are clear examples where the manner of raising the concerns would amount to misconduct. We would be very reluctant to extend that so that an individual may be properly subjected to sanctions (disciplinary or otherwise) by an employer for simply over-identifying with a complaint or raising it in breach of some unspoken etiquette required by the employer's culture.

525. The claimant's disclosures were unwelcome and not well received by either Sam McFarland or Philip Johnson, both of whom were critical of the claimant for having made the disclosures (as opposed to being critical of the claimant for the way in which she made those disclosures). Both formed the view that the disclosures demonstrated that the claimant was not suitable for her role in the acquisitions team. Arising out of this, as we will discuss in detail below, the individual respondents took steps to remove the claimant from or persuade her to leave the acquisitions team, as well as not taking any substantial or meaningful steps to follow up on the disclosures that the claimant had made.

526. We will now consider the individual detriments against that background. In doing so we will also have to consider which (if any) of the individual

respondents are liable for the detriment. To avoid repetition we will take it as read that in any such case, where the detriment arises from the protected act or disclosure, the first respondent is liable.

Detriment 1 – 4 July 2017 onwards - claimant no longer invited to participate in meetings – Sam McFarland

527. As we have mentioned in our findings of fact, there was little focus from the parties on this detriment or the reasons for it.

528. We have found that there were GTM meetings that another GTM PM was attending but which the claimant was not invited to. Mr Heard says in his written submissions that "*the pivotal reason* [for the claimant not being invited] *was her* [first] *disclosure*", but he gives no reason or basis for saying this. We have found that the respondents (or some of them) wished to remove the claimant from her role, but it is not clear to us what difference her participation in these meetings may have made to the performance of her role or her job security. On balance we prefer and accept the respondents' explanation that these were not meetings that were relevant to her. This was not a detriment because of her protected acts or disclosures.

Detriment 2 – claimant was obliged to attend Go To Market operational calls

529. This detriment did not occur.

Detriment 3 – 28 June 2017 - claimant was reprimanded for attending a give back event – Sandra Oliveira

530. The claimant was reprimanded for attending the give back event (or at least attending it with so many others so close to quarter-end). However, in the case of this detriment we also have the example of Lindsay Williams who also attended and was reprimanded in the same way by Sandra Oliveira. There is no suggestion that Lindsay Williams had made any protected acts or disclosures. The example of Lindsay Williams being treated in the same way in the same circumstances demonstrates to us that this detriment was not caused by the claimant's protected acts or disclosures.

Detriment 4 – 21 July 2017 – claimant was removed from the 'Bluewolf' acquisition – Claire Bryant and Joanne Czekalowska

531. In our findings of fact we have raised some of the difficulties with Joanne Czekalowska's decision to intervene and prevent the claimant from taking over as Bluewolf CIL.

532. Ms Czekalowska had known of this since 7 June 2017 but had taken no action to prevent it at that stage. Her rationale was supposedly to allow the claimant more time to focus on her GTM work following her poor performance at the second technical accelerators presentation and the need for a more experienced CIL to undertake the work.

533. As noted in our findings of fact, we have found that there were no such problems, and in any event no-one had suggested that lack of time caused any issues with the presentation. Also by that time the Bluewolf project was known to be more limited in Europe than had previously been thought at the time the claimant was originally appointed to it. We do not accept the explanation given by Joanne Czekalowska for her decision. We find it more likely that in pursuit of the removal of the claimant from her role she did not want the claimant to take up more funded work such as the Bluewolf project. If the claimant did not have funded work, it would be easier to remove her through any eventual redundancy process within the team or to persuade her to find other roles and projects elsewhere. This detriment was caused by the claimant's protected acts and disclosures and the second respondent is liable for it.

534. While Claire Bryant implemented Joanna Czekalowska's instruction to remove the claimant from the project it is apparent from the exchanges about this that she was personally supportive of the claimant remaining on the project and was only removing her under direct instruction from Ms Czekalowska. In such a situation we do not consider that she can be held to be liable for the detriment of removing her from the project – the decision was Ms Czekalowska's, against the wishes of Ms Bryant.

Detriment 5 – 21 July 2017 & 10 August 2017 – claimant was informed that her line managers were disappointed in her performance – Claire Bryant and Sandra Oliveira

535. Sandra Oliveira accepts that she told the claimant during the mid-year review that she was disappointed with her performance and that she particularly mentioned "*the delay on the technical acceleration presentation and the standard of the end product*".

536. This stands in contrast to our findings that:

(a) It was the claimant who sought time with Ms Oliveira to go through the technical accelerators work, not the other way around.

(b) Ms Oliveira did not pay much attention to the second presentation because there had been no significant issues with the first one.

(c) The problems with the second presentation did not exist in the form described by the respondents.

(d) Ms Oliveira specifically refusing to give feedback to the claimant immediately after the presentation.

537. It follows from that that Ms Oliveira was not genuinely concerned by problems with the technical accelerators presentation and there must be some other explanation for her raising this with the claimant.

538. It is clear to us that the initial impetus and subsequent drive to remove the claimant from the acquisitions team following her disclosures came from Sam McFarland, with the subsequent endorsement of Joanne Czekalowska. We also know that shortly after the claimant's first disclosure, on 27 June 2017, Sam McFarland and Sandra Oliveira had had a meeting at which Sam McFarland had referred to having an emotional discussion with the claimant and that following this meeting Sandra Oliveira sent a message to Claire Bryant with a view to talking about the claimant. Sandra Oliveira had also delayed the mid-year review from 18 to 21 July 2017 without any explanation.

539. On 18 July 2017 Sam McFarland had told Joanne Czekalowska that the claimant was going to take her concerns to Philip Johnson and on 19 July 2017 Sam McFarland had mentioned to Joanne Czekalowska of contacting Alison Webb prior to the mid-year review to "*get clear direction on options*".

540. On 19 July 2017 Joanne Czekalowska had given the instruction that the claimant was to be removed from the Bluewolf work.

541. It is plain from the subsequent Sametime conversation that Sam McFarland and Sandra Oliveira had discussed the mid-year review in advance.

542. We conclude from this that the most likely explanation for Sandra Oliveira raising performance concerns with the claimant at the mid-year review was that she had been told by Sam McFarland to do so and that Sam McFarland had shared with Sandra Oliveira her concerns about the claimant's disclosures and her conclusion that the claimant was not suitable for a role in the acquisitions team.

543. Sandra Oliveira knew by this point that the disclosures had been made and that these were the reason why Sam McFarland wanted her to raise performance issues which did not really exist. Sandra Oliveira did this in the mid-year review, knowing that it was because of the protected acts and disclosures. The claimant succeeds in her claim against Sandra Oliveira on this point.

544. The list of issues suggests that this is a claim made against Claire Bryant as well as Sandra Oliveira. However, para 20.5 of the first claim (from which this issue derives) refers only to Sandra Oliveira, and in her witness statement the claimant says she was told that this opinion was shared by Sandra Oliveira, Sam McFarland and Joanne Czekalowska, not Claire Bryant. To the extent that the claimant intended this detriment to be a claim against Claire Bryant, it does not succeed.

Detriment 6 – 21 July 2017 – claimant was informed that there would be no funding for the Go To Market part of her role …. – Sandra Oliveira

545. The claimant was told in her mid-year review with Sandra Oliveira that there was no funding for the Go To Market part of her role and that she should look for other projects and roles immediately.

546. We accept in principle that the acquisitions team was dependent on internal funding from other parts of the business, and that if there were no acquisitions and no funded work members of the team would have to be redeployed to other work or made redundant. We accept that maintaining funding for the work of the acquisitions team was a significant challenge for Joanne Czekalowska and that at the time of the mid-year review there was not a large pipeline of new acquisitions or funded work. The acquisitions team was more likely to contract than to expand.

547. On the respondents' evidence, there being no funding and the need to find other work was something that applied across the board within the acquisitions team. However, we also understand from the respondents' evidence that in fact all members of the team who wished to remain in the team had remained in the team and been redeployed to other projects such as GDPR or NHS work. There were no compulsory redundancies within the acquisitions team in the relevant time.

548. What we have found most striking about that is that when Sam McFarland checked in with Sandra Oliveira about the mid-year review the one point that Sandra Oliveira mentions is telling the claimant that "*there wasn't a role for her going forwards*". We have explained in our fact-finding section the difficulties we have with this. We also note that saying to the claimant "*there isn't a role going forwards*" is substantially different from the explanation given to others in relation to the need for members of the acquisition team to seek redeployment or other funded work.

549. We find that it is most likely that the reference to "*there isn't a role going forwards*" was prompted by the claimant's disclosures and the subsequent desire of Sam McFarland, as communicated to Sandra Oliveira, to remove the claimant from the acquisitions team. For the same reason given in detriment 5, Sandra Oliveira is liable for this.

Detriment 7 – on or before 10 August 2018 – claimant was described as 'militant'

550. We have found that this detriment did occur, leaving only the question of why the detriment occurred.

551. Mr Johnson (who was responsible for the comment) denies having made it. Having denied making the comment, he did not and could not give any explanation for why he had made it. No explanation for it is put forward in the respondents' submissions.

552. The only reason we can see for such a comment having been made is the most obvious explanation – that Mr Johnson objected to the claimant raising these matters on behalf of the TWC employees. As such it was both a detriment because of her protected disclosures and victimisation on account of her having carried out a protected act.

Detriment 8 – claimant placed on a PIP and/or the PIP was unrealistic

553. This detriment is at the heart of the claimant's claim, as such was the subject of the most evidence and argument before us. It is the culmination of the parties' respective positions that:

    (a) (from the claimant's side) she was being pushed out through (amongst other things) unfair criticism of her work and

    (b) (from the respondents' side) that the claimant was significantly failing in respect of part of her work but could not accept that and mistakenly sought to attribute it to any disclosures she had made.

554. It must have been clear from the start of this litigation that this was a difficult area for the respondents. A move to a formal PIP, as a first resort, without any previous documentation of performance issues or any apparent attempt to address performance informally (whether documented or not) is unusual in the tribunal's experience, and certainly not in line with the practice we would have expected from such a large employer. However, as previously set out, the claimant held an unusual role requiring a very particular set of skills. Because of this we have been at pains throughout to try to understand the respondents' perspective and how questions of performance might have been dealt with in the context of the acquisitions team.

555. We have discussed at length in our findings of fact the question of whether there were performance issues with the claimant's work, concluding that there were no performance issues that required addressing through a PIP and that the PIP, if taken literally, was unachievable. The question is why this was.

556. On the question of why the PIP was imposed, the respondents' explanation is that the claimant was underperforming. We do not accept that explanation, and find that the more likely explanation, in the context of our findings of fact, was that they wished to remove the claimant from the acquisitions team and saw the PIP as an expedient way of doing so. A clear example demonstrating that is the Sametime chat between Sandra Oliveira and Claire Bryant showing that, while the respondents sought to present the PIP as being a supportive measure, in practice they saw it as likely to end with the claimant leaving the acquisitions team. This continued through to the later mention by Joanne Czekalowska of needing to "*tactically*" continue with the PIP.

557. On the question of whether the PIP was achievable, the explanation put forward on behalf of the respondents was that if the claimant had remained in the PIP meeting the way in which the PIP would have been explained to her would have shown that it was achievable.

558. This needs to be considered in the context of our findings that (i) the purpose of the PIP was to remove the claimant from the team, (ii) read literally, the PIP was unachievable, and (iii) those compiling the PIP saw it as leading to the end of the claimant's work within the acquisitions team.

559. Against that background we do not accept the respondents' explanation that the PIP, although apparently unachievable, would have been explained to the claimant in a way that meant that was achievable. That would not have happened when the objective was to remove the claimant from the team.

560. This detriment was on account of the claimant having made protected acts and protected disclosures.

561. This claim is brought against Claire Bryant and Sandra Oliveira. It has been part of the respondents' case (to various degrees) that they could not have been motivated by the claimant's disclosures since they knew nothing of them.

562. We do not accept this. We have set out in considering detriment 5 how it was that Sandra Oliveira came to know of the initial disclosure. Claire Bryant was told by Sam McFarland of the initial disclosure almost immediately, and was herself the recipient of the claimant's second and third disclosure. By the time of this detriment there had also been the emergency telephone call in early August at which Philip Johnson's concerns about the claimant's disclosures had been discussed. Both Claire Bryant and Sandra Oliveira knew of the claimant's disclosures. They contemplated that the PIP would lead to the claimant losing her job, and were constructing it based on supposed performance failings that did not exist. They are both liable for this detriment and act of victimisation.

Detriment 10 – claimant excluded from a two day design thinking workshop

563. The claimant was excluded from (or at least not invited to) the design thinking workshop. We have described the circumstances in which that came about. The difficulty for the claimant is that the respondents have a ready explanation for why that was. The claimant was not available for the workshop as she had booked holiday during that time.

564. While we have expressed our general view that the respondents wished to remove the claimant from the acquisitions team, we find that in respect of this detriment the reason for the claimant not being invited to the workshop was far more likely to be her lack of availability rather than in aid of the attempt to remove her from the team. This detriment was not because of the claimant's protected acts or protected disclosures.

Detriment 13 – claimant received a poor 2017 end of year performance review

565. This is essentially an extension of the claimant's case in relation to the PIP, and succeeds on the same basis. There is nothing that the respondents rely on for this that they did not also rely on in support of the PIP.

Detriment 17 – failure to investigate the claimant's (original) disclosures

566. We have found that Sam McFarland failed to investigate the claimant's original disclosures. The question is whether this was on the ground of (or

because of) the fact that those disclosures were protected acts and protected disclosures.

567. Sam McFarland did not give any explanation of not investigating the disclosures, because it was her case that she did investigate the disclosures. We have found that it was not part of her role to investigate the disclosures, but that has not been suggested by the respondents as a reason why she did not investigate them, or properly refer them on to HR.

568. As there is no explanation of her failure to investigate the disclosures it must follow that the respondents have not met their duty to under section 48(2) of the Employment Rights Act 1996 to show (for the purposes of the whistleblowing detriment claim) the ground on which this act was done.

569. The failure to investigate does not, in our view, form part of any attempt to remove the claimant from the acquisitions team. It does, however, appear to us to stem from Ms McFarland's aversion to the claimant's apparent criticism of the first respondent. Even if she was not to investigate it herself, she ought to have immediately referred the issues on to HR. She did not do so. The fact that these included an allegation of discrimination but it was not properly referred on to HR appears to us to be sufficient to transfer the burden of proof in respect of the discrimination claim on to the respondents. There has been no explanation why she did not either investigate it or properly refer it on. We conclude that this was an act of victimisation of the claimant as well as a detriment on the basis of a protected disclosure.

Part 2 – the grievance and appeal detriments

Introduction and context

570. The grievance and appeal detriments are of a very different nature to the substantive detriments. They require very different consideration of the motivations of the individuals concerned.

571. During the course of the amendment application we rejected a submission by the claimant that we should consider the some grievance detriments as being plead in respect of the provision of "tainted" information by the individual respondents – that is, that the grievance process was corrupted by the accounts given by the individual respondents of their actions. That was not the way in which the grievance and appeal detriments had been put. The way in which they were put is that those responsible for the grievance and appeals process were themselves individual motivated (consciously or unconsciously) in their treatment of the claimant by the fact that she had made protected acts or protected disclosures.

572. That raises the question as to how such motivation may arise. None of those responsible had any direct connection with the acquisitions team. It was not suggested by the claimant that they were participants in the plan to remove the claimant from the acquisitions team, nor (except for her "*tainted information*" argument) that the acquisitions team had improperly interfered

with the processes. Those responsible for the grievance and appeal process had no particular desire for the claimant to be removed from the acquisitions team.

573. The claimant's case in relation to the grievance and appeal detriments thus has a much weaker starting point than that in relation to the substantive detriments. Insofar as those dealing with the grievances and appeals did have a motivation related to the claimant's protected acts or detriments, it is unclear what the might have been, except for a squeamishness of investigating potentially embarrassing matters, or a desire to protect the first respondent from embarrassing findings.

574. Perhaps because of this, the way in which the grievance and appeal detriments are described in the claimant's claim also tend to be much broader and less specific than with the substantive detriments. Detriments which are summarised simply as "*failure to uphold the grievance*" require careful consideration as to how this is actually put in the claimant's claim along with how it is that this could be said to be due to the claimant's protected disclosures or protected acts, rather than for some other cause.

The shifting burden of proof

575. While in respect of the substantive detriments there was ample evidence to shift the burden of proof (in the case of victimisation) to the respondents, this is not the case in relation to the grievance and appeal detriments. They were dealt with by different people, unconnected with the substantive detriments or the plan to remove the claimant from the acquisitions team. There is not the "something more" that would be required to suggest that the detriments were motivated by the claimant's protected acts.

576. For the purpose of the claims of whistleblowing detriments, the onus remains on the employer to show that the detriments were not on the ground that the claimant had made any protected disclosure.

Detriment 9 – delay in receiving the outcome of her first grievance

577. This detriment did not occur.

Detriment 11 – failing to conduct the grievance investigation impartially

578. The detriment alleged here is that Mr Martin was not impartial in his investigation. As plead, it is that in the absence of documentary evidence of underperformance he accepted the word of the managers in relation to performance issues, rather than finding that there was no underperformance. This case on impartiality was somewhat extended by Mr Heard in his submissions but we are confining ourselves to the claim plead by the claimant.

579. It is plainly the case that Mr Martin (in the absence of documentary evidence of underperformance) accepted the word of the managers rather than what

the claimant said. The question is why he did that. In answer to our questions he said that he believed the individual respondents because what they said was "*consistent without being artificial*". We have two difficulties with that. First, this does not necessarily mean that their evidence should be preferred when not backed up by documentary evidence. Second, if that was Mr Martin's view it does not explain why he went back to the managers to ask them for material to bolster their evidence, but not to the claimant. Bearing that in mind, we do not accept his explanation.

580. The consequence of that is that for the purposes of the claim of whistleblowing detriments the respondents have not shown the reason why Mr Martin accepted the word of the managers. It is not in dispute that he knew that the claimant had made protected disclosures. In those circumstances we are bound to find that this was a detriment on account of the claimant's protected disclosures. However, this does not apply to the victimisation claim, where we see nothing that would shift the burden of proof to the respondent on this point. For the purposes of the claim of whistleblowing detriment the respondents have not shown that the disclosures had no material effect on Mr Martin's actions. For the purposes of the victimisation claim, the claimant has not shown that Mr Martin's actions were because of her protected acts.

Detriment 12 – failing to investigate the claimant's appeal …

581. This detriment did not occur.

Detriment 15 – failing to investigate the claimant's grievance regarding her end of year review

582. As we have found, there was no investigation of the grievance regarding the claimant's end of year review by the time of her second claim.

583. This appears to have occurred because of the delays caused by the miscommunication referred to in detriment 16, so we will consider it together with detriment 16.

Detriment 16 – sending an email falsely stating that the claimant had been emailed previously

584. Michelle Andrews did not send an email to the claimant outlining the scope of the investigation between 26 February 2018 and 11 May 2018. She told the claimant that she had done so. The question is why she told the claimant that.

585. Ms Andrews explanation is that she made a mistake or genuinely believed that she had sent the email. There is nothing to suggest that she was motivated by the fact that the claimant had raised protected disclosures or carried out protected acts.

586. We note that during this period Ms Andrews had been making efforts to investigate the claimant's appeal (although not her second grievance). There is nothing to suggest that she was particularly shy of getting involved with questions around the claimant's disclosures and the behaviour of the respondents.

587. From this we conclude both that the reason why the second grievance was not investigated earlier and the reason why Ms Andrews told the claimant that she had sent her email earlier were not anything to do with the claimant's protected disclosures or protected acts, and the claimant's claims in respect of thess detriments does not succeed.

Detriment 18 – decision not to uphold the claimant's appeal against the outcome of her grievance

588. This is described in para 25.9 of the claimant's third claim in the following way:

> *"Decision not to uphold the claimant's appeal against the outcome of her grievance raised on 18 January 2018."*

589. Ms Andrews has given in her witness statement a detailed account of her conclusions. While not upholding the grievance she did make criticisims of the respondents' handling of matters. While we have disagreed with her decisions, she had fully explained them and we do not consider that her failure to uphold the grievance appeal is a matter of unlawful detriment or victimisation.

Detriment 19 – decision not to uphold the claimant's grievance regarding her end of year review

590. This is described in para 25.10 of the claimant's third claim in the following way:

> *"Decision not to uphold the claimant's grievance regarding her end of year review which she raised on 9 March 2018."*

591. This detriment is said to be the responsibility of Donna Fowler.

592. We have identified two problems with Donna Fowler's handling of the claimant's grievance in respect of her end of year review. First, she never saw the written grievance she was supposed to be investigating, and second, she chose to completely disregard the claimant's point that there was a link between her grading and her disclosures or protected acts. The real issue is on the second point. She ignored any possibility of a link between the claimant's disclosures or protected acts and the end of year review.

593. It is not surprising that Donna Fowler was questioned at some length about why she had made the decision to ignore the possible effect of the claimant's

disclosures or protected acts on her end of year review. Her response was to the effect that she considered the central point to be whether the review was fair or not, and that that should be dealt with without reference to the possible reasons for it being unfair. We are surprised at this approach and do not consider it to be a good reason for ignoring the central element of the claimant's grievance.

594. However, the claimant's claimed detriment in respect of this is not that part of her grievance was ignored, but simply that the grievance was not upheld. We cannot see any substantial material on which we could concluded that the grievance was not upheld because of the protected acts or protected disclosures, and this aspect of the claimant's claim is not made out.

Time points

595. Except for detriment 17, we do not see that on these findings any issue arise in relation to any of the points we have found to be detriments (on the basis of protected acts or protected disclosures) being claims brought by the claimant outside the appropriate time limit.

596. Her first claim was lodged on 22 December 2017. Taking into account her early conciliation period from 17 October 2017 to 1 December 2017 this means that her complaints in relation to the imposition of the PIP in September 2017 are within time. On our findings the imposition of the PIP was a continuing act with all the earlier detriments which we have found to be imposed on the basis of her protected acts and protected disclosures. All were in support of the same goal by the same people: the removal of the claimant from her role within the acquisitions team.

597. Her second claim was lodged on 19 June 2018 following a period of early conciliation from 4 May to 4 June 2018. This means that the written end of 2017 review (on 7 February 2018) – detriment 13 – is within time. If necessary we would have found that this was itself a continuing act with the previous actions by the individual respondents, but this is not necessary because the first claim deals with earlier matters.

598. The position is different in relation to the part of detriment 17 which relates to the inaction of Ms McFarland. This is alleged as a failure to act, so, s123(3) and (4) of the Equality Act 2010 apply. We take it that Ms McFarland should have either started investigating or referred the matter on to HR around a week after the disclosure was made, meaning that time runs from the end of June 2017 in respect of this detriment.

599. This detriment is not referred to in the first claim, but arises for the first time in the second claim, which was submitted in June 2018. Although this is of a different nature to the detriments aimed at the removal of the claimant from we consider that it can be considered to be a "continuing act" for the purposes of the discrimination law time limits when taken together with the detriments that relate to the removal of the claimant from the acquisitions

team. They all stem from Ms McFarland's adverse reaction to the claimant's disclosures.

600. No time point arises in respect of matters which only appear in the third claim (detriments 18 and 19), as we have not found those to be detriments arising from the protected acts or protected disclosures

F. REMEDY

Introduction

601. Having found there to be unlawful discrimination (s124 Equality Act 2010):

> *"(2) The tribunal may:*
>
> *(a) Make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) Order the respondent to pay compensation to the complainant;*
>
> *(c) Make an appropriate recommendation.*
>
> *(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate …*
>
> *(6) The amount of compensation which may be awarded … correspondents to the amount which could be awarded … under section 119* [that is, the amount that could be recovered in proceedings for tort]."

602. In respect of whistleblowing detriments, the provisions of section 49 of the Employment Rights Act 1996 apply:

> *"(1) the tribunal:*
>
> *(a) Shall make a declaration … and*
>
> *(b) May make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates"*

603. Further detail on the way in which compensation is to be calculated follows in section 49, but it was not argued before us that the compensation for whistleblowing detriments was substantially different to compensation for unlawful discrimination. We will not make two awards of compensation in respect of one act of discrimination or whistleblowing detriment.

Declarations

604. The claimant is entitled to the declarations set out in the judgment.

Compensation

Financial loss

605. The claimant's claim for financial loss arises (if at all) from her period of sickness absence that commenced on 6 February 2018 and is ongoing.

606. As set out above, the claimant's occupational health report attributes her absence from work to "*work related stress*", "*as she feels she is being victimised following raising concerns about colleagues*", with her symptoms continuing for so long as the tribunal claim remains ongoing.

607. In her closing submissions, Miss Masters suggests that the claimant's absence is more properly attributed to the decisions made on her grievances rather than the underlying complaints or actions of the individual respondents. We do not accept this. The occupational health report says "[the claimant] *has raised grievances and tells me there was a failure to investigate these in a timely manner which again has contributed towards her symptoms".* Any failures in relation to the grievances have at most "contributed to" her symptoms. We consider that the claimant's sickness absence due to work related stress is properly attributable to the underlying unlawful victimisation and detriments the claimant has been subject to by the actions of the individual respondents.

608. We make an award of loss of earnings (attributable to what we have found to be unlawful victimisation and detriments) from 6 February 2018. We also find that this resolution of the case, substantially in the claimant's favour, will put her in a position where she is medically able to return to work. Arrangements for her return to work will take some time, particularly during the current restrictions arising from the Covid-19 pandemic. We consider that she will be fit for work and in a position to return to her role six weeks after this judgment is sent to the parties, so that will be the end of her loss period for the purposes of compensation.

609. For reasons we have set out at the start of these reasons we are not able to calculate this amount or make a specific financial award of compensation. At the conclusion of the hearing it was expected that the parties would be able to agree any amount between themselves if we were to set out the loss period. In case this is not possible we have issued a separate order requiring the claimant to make a further application within eight weeks of this judgment being sent to the parties if it is necessary for the tribunal to make a specific award.

Injury to feelings

610. The claimant has presented three claims at different times. Any substantial injury to feelings arises from the matters referred to in her first claim, presented on 22 December 2017. We therefore apply the Joint Presidential Guidance on Vento bands applicable in December 2017, which is the original version. The relevant bands are described as follows:

> *"Vento bands shall be as follows: a lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000."*

611. There is no doubt in this case that the claimant has suffered substantial injury to feelings as a result of the matters which we have found to be unlawful discrimination. That much is shown by her own evidence and by the occupational health report. There has been substantial discrimination in this case.

612. In Vento v Chief Constable Of West Yorkshire Police (No.2) [2002] EWCA Civ 1871 the relevant "bands" were described in the following way (using the figures that then applied):

> *"Employment tribunals and those who practise in them might find it helpful if this court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury:*
>
> *(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race ...*
>
> *(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.*
>
> *(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."*

613. While the discrimination in this case (and resulting injury to feelings) has been "serious", we do not regard it as being in the "most serious cases" so as to mean that compensation for injury to feelings falls within the top band. In our judgment it falls within the middle band, but towards the upper end of the middle band as it has been maintained over a period and is far from

being a "one off" event. We consider the appropriate amount for compensation for injury to feelings to be £20,000.

614. The claimant has sought an award of aggravated damages. We have found there to be discrimination and unlawful detriments in this case, and have been critical of the conduct of the respondents. However, we do not consider that this is a case which meets the criteria for an award of aggravated damages. The respondents have not, as a matter of fact, acted in the "*high-handed, malicious, insulting or oppressive manner*" relied upon by Mr Heard in support of the claimant's claim for aggravated damages.

Uplift or other variation

615. The claimant seeks an uplift in any award of compensation under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides:

> *"(2) If, in the case of proceedings* [including discrimination and whistleblowing detriment proceedings] *it appears to the employment tribunal that:*
>
> *(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) The employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) That failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."*

616. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant code for these purposes, and applies where grievances are raised in writing by an employee. The claimant raised the substance of her complaints by way of grievances (and appeals). Accordingly, the relevant Code of Practice applies to the handling of those grievances under s207A(2)(a).

617. The failure identified by Mr Heard in his written submissions is delay, contrary to paras 40, 42 and 45 of the code, and a failure to conduct an appeal impartially (para 43). We do not see any point arises in relation to impartiality on appeal. To the extent that there is any allegation of impartiality it is in relation to Mr Martin's original decision on the grievance.

618. An obvious problem with the first respondent's handling of the grievance and appeals is the decision by Donna Fowler to ignore the element of the claimant's second grievance that related to the reason why her review had been unfair. This was a wrong approach by her to the grievance, but we do

not see anything in the code that requires an employer to investigate every point raised by the employee, and this is not relied upon by Mr Heard as a breach of the code.

619. Grievances will often take a considerable time to investigate and produce an outcome. Whether there has been "unreasonable delay" requires consideration in the context of what the grievance (or subsequent appeal) is and what actions were taken by the employer.

620. The claimant's first grievance was raised at the end of September 2017. Mr Martin concluded his investigation by mid-November, but due to the subsequent reviews the claimant did not receive the outcome until mid-January 2018. The appeal against this was submitted in mid-January 2018 but not completed until July 2018.

621. The claimant's second grievance was raised on 9 March 2018, with the outcome being received by her on 27 September 2018.

622. The first grievance thus took 3-4 months for an outcome to be given to the claimant, with the appeal and second grievance each taking over six months to come to a conclusion.

623. The claimant's grievance (and subsequent appeals) were not matters that we would expect to have been dealt with in a couple of weeks. An appropriate timescale is, in our view, indicated by the time taken by Mr Martin for his investigation – 6-8 weeks. Each took substantially longer. In the case of the first grievance that was because of the various reviews, but we were not told why those took particularly long, or anything much beyond that they were required and caused the delay. The appeal was delayed by around three months because of Ms Andrews's mistaken belief that she had sent an email to the claimant. We are at a loss to understand the delay in respect of the second grievance as it was never explained to us in the respondents' evidence, except to the extent that it flowed from a late replacement for Ms Andrews as the grievance investigator, which itself arose from Ms Andrew's error in respect of the email.

624. We find that there has been unreasonable delay in the handling of the two grievances and the first appeal. In the first grievance, this was in the final reviews, which took a long time for unexplained reasons. In the appeal this was because of Ms Andrews's mistake (which she did not at any point follow up on) and in the second appeal it is simply unexplained. There was therefore a breach of the Code of Practice.

625. Having found that there was "unreasonable delay" it must follow in these circumstances that the failure to comply with the code of practice was also itself unreasonable. We therefore "*may, if* [we] *consider it just and equitable in all the circumstances to do so, increase any award … by no more than 25%"*.

626. We do consider it just and equitable to make an increase in the claimant's financial award for the failure to comply with the code of practice. The first respondent should have dealt with these matters more promptly. This is a case in which we should increase the award. We consider 10% to be an appropriate amount to reflect the first respondent's failings in dealing with the grievances (and appeal).

Recommendations

627. "Appropriate recommendations" are "*recommendations that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant"*. In many cases this definition means that recommendations cannot be made, since the claimant has left the respondent's employment and there is nothing that the respondent can then do to reduce the effect of the discrimination on to claimant. In this case, the claimant remains employed and recommendations can be made.

628. We set out below the recommendations sought and our findings on them:

628.1. *"Cessation of the PIP and its removal from the claimant's records"*

We consider this recommendation can and should be made. We have found that the reason for the PIP was because of the claimant's protected disclosures and protected acts. It should have no further effect in relation to her employment.

628.2. *"For the claimant's EOY 2017 review to be amended to reflect that it was negatively influenced because she made disclosures"*

We have also found that the end of year review was as negative as it was because of the claimant's protected disclosures. It cannot stand as an authoritative record of the claimant's performance during that year. The recommendation sought does not say in what way it should be amended. We consider that the most satisfactory way in which this can be done is by a reference to that judgment so that anyone who wants to understand the claimant's end of year review can also consider this judgment.

628.3. *"Training on discrimination/victimisation for all named individuals …"*

We have been concerned during this hearing that a number of the individual respondents, all senior managers within the first respondent's organisation, did not have any proper understanding of how discrimination could arise outside the most obvious situations of direct discrimination.

The first respondent will need to consider carefully this judgment and what steps, whether by way of training or otherwise, it takes in

consequence of this. However, we do not see that it is necessary for us to make a formal recommendation as to exactly how this is done.

628.4. *"Communication to the following people about why the claimant has been absent from work …"*

See below.

628.5. "Appointment of a Vice-President Level Mentor …"

See below.

628.6. *"Appointment of* [named individual] *to assist the claimant with her return to work …"*

The claimant's return to work will be a matter to be dealt with between the claimant and the first respondent. We are reluctant to say exactly how that should be done, since this will ultimately have to be worked out between the claimant and the first respondent.

As we have set out in our discussion regarding financial compensation, we anticipate that within six weeks of this judgment being sent to the parties the claimant will be medically fit to resume her role. By that point this judgment will be likely to be publicly accessible on the tribunal's website, as with any other judgment. Those who wish to find out why the claimant has been absent from work will be able to read these reasons. Those who did not want to find out why she has been absent from work will not want or need to do so. We are reluctant to impose requirements as to who should be instructed to say (or not say) particular things. The claimant's return to work may not be easy, but we do not wish to bind either party by recommendations which unnecessarily inhibit how that might be achieved.

The same goes for the question of mentorship or having a named contact responsible for her return. Those may be good ideas and may serve a useful purpose, but as Miss Masters's says, it is unlikely to be fruitful to make mentoring a compulsory rather than voluntary relationship, and as identified in the terms of the recommendation sought, it is hardly appropriate to recommend that a particular person undertakes a particular task when it is not known whether they will be willing to do so.

The claimant's return to work will require careful management, but we do not think that is assisted by the tribunal making the recommendations sought.

629. While we have only made two recommendations, we hope that the first respondent will reflect on this judgment and take steps to ensure that

someone in the position of the claimant is not subject to such detriments or victimisation in the future.

_____

Employment Judge Anstis

Date: 5 June 2020

Sent to the parties on: .11/08/2020

Jon Marlowe
For the Tribunals Office

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