EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Lenton	**v**	Commissioners for Her Majesty's Revenues And Customs

Heard at: Bury St Edmunds

On: 2, 3, 4, 5, 6, 9, 10 and 11 March 2020
12 March 2020 (Discussion Day – no parties in attendance)

Before: Employment Judge Laidler

Members: Mr A Bloomfield and Mr R Eyre

Appearances
For the Claimant: In person.
For the Respondent: Mr S Margo, Counsel.

RESERVED JUDGMENT

1. The claims (save for detriment 27) have been brought out of time. It was reasonably practicable for the claims to have been presented in time but they were not. The tribunal therefore has no jurisdiction to determine the claims which are dismissed.

2. Further, and in the alternative, if the tribunal had found the claims in time, and in relation the detriment 27, the claimant was not treated detrimentally 'on the ground' that she made protected disclosures within the meaning of section 47B Employment Rights Act and all claims fail and are dismissed.

REASONS

1. The claim in this matter was issued on 23 July 2017 after a period of ACAS Early Conciliation from 22 June to 4 July 2017, the claim is one of detriment for making protected disclosures.

2. The claim has been subject to a number of preliminary hearings.

3. At a hearing on 22 September 2017 Employment Judge Ord made an order for further particulars of the alleged disclosures and detriments. The claimant's replies were seen at page 52A of the bundle and have been referred to throughout this hearing. These reasons will deal with each of the alleged detriments in turn.

4. There was a hearing before Employment Judge Spencer on 5-8 November 2018 to determine whether the matters relied on by the claimant did amount to protected and qualifying disclosures within s.43B of the Employment Rights Act 1996. He found the following were:-

   (i) The claimant's email to Hugh Dorey dated 21 June 2013.

   (ii) The claimant's email to Steven Kellett dated 13 January 2014.

   (iii) The claimant's complaint to the Civil Service Commission dated 11 March 2016.

   (iv) The claimant's complaint to the National Audit Office dated 24 November 2016.

   But not the claimant's email to Nikki Stinton of the 4 July 2013.

5. In a Judgment and Reasons sent to the parties on 8 January 2019 Employment Judge Spencer made the following findings about the work the claimant was undertaking leading up to the protected disclosures which are relevant in setting the background:-

> "11 The respondent is the UK's tax, payments and customs authority, with responsibility to collect tax revenue.
>
> 12. The claimant is employed by the respondent as Assurance Officer. She dealt with environmental taxes. The claimant works at an Officer Grade undertaking an operational role in the Environmental Taxes Team, a part of a department named Customs International Trade and Excise (CITEX). Her role includes casework and making decisions within operational guidelines laid down centrally, or by line management. Employees at Officer Grade are not responsible for setting policy or strategic decision-making.
>
> 13. The respondent is a part of the civil service. The civil service follows the Civil Service Code ("the Code"). The Code is significant as it is the "legal obligation" that the claimant relies on for the purposes of section 43B(1)(b) ERA. The Code sets out the standards of behavior expected of the claimant and other civil servants. Civil servants (including the claimant) are required by their contracts of employment to abide by the requirements of the Code. A copy of the Code is contained within the tribunal hearing bundle. The claimant directed me to various requirements of the code including the following:

13.1 the need to comply with the law and uphold the administration of justice;

13.2 the need to set out the facts and relevant issues truthfully, and correct any errors as soon as possible;

13.3 not to deceive or knowingly mislead ministers, Parliament or others;

13.4 to provide information and advice, including advice to ministers, on the basis of the evidence, and accurately represent the options and facts.

14. I was satisfied from the evidence of the claimant, Witness A and Mr. Hooper that the provisions of the Code are significant to those working within the civil service. The claimant was very conscious of the need to comply with the Code in her work. Witness A was also clearly conscious of this. The Code is at the forefront of the minds of those working within the civil service.

15. The main environmental tax that the claimant worked on is the Climate Change Levy (CCL). The CCL is a charge levied by the respondent upon the energy industry. The CCL encourages the generation of "green" (i.e. more environmentally friendly) energy.

16. In late 2010/early 2011 the claimant and Witness A (a Higher Officer) were tasked with developing a project to identify businesses known as Combined Heat and Power Operators (CHP's) who were under declaring CCL.

17. CHP's are companies that use the heat generated by their own businesses to generate power.

18. The claimant and Witness A identified several CHPs that were gaining relief from CCL in circumstances where they were not entitled to that relief. This resulted in underpayment of CCL.

19. The issue involved Levy Exemption Certificates (LECs). LECs are effectively "badges" issued by OFGEM to certify that electricity has been produced in a green way. Such electricity is exempt from the need to pay CCL. Once electricity has been generated and an LEC obtained for that electricity, the electricity concerned could be sold on free of the requirement to pay CCL. LECs can be passed on to the new owner of the electricity so that they too benefit from the CCL exemption.

20. The claimant and Witness A became aware of the existence of a sale and buyback arrangement operated between CHPs and utility companies whereby a CHP sold then bought back electricity at a profit using LECs to maximise that profit by avoiding payment of CCL. The arrangement involved the creation of contracts after the event. For example, in one instance a contract was entered into in June 2010 in respect of the sale of electricity the CHP had generated from January 2009. These contracts were referred to by the claimant as "retrospective contracts".

21. The retrospective contracts scheme left the CHP liable for a potential

penalty under regulation 60(1)(hb) of the Climate Change Levy (General) Regulations 2001. The potential penalty was high. It was £250 per megawatt of self-generated electricity that could not be supported by an LEC. The claimant identified that the penalty to one of the companies concerned would exceed £23 million if raised in full. This penalty was wholly disproportionate to the amount of CCL that had been avoided by the arrangement. I have seen various figures in the documents in the hearing bundle. However, it appears to be common ground that the potential penalties were something in the region of fifty times the amount of CCL revenue avoided by the scheme.

22. As with many tax penalties the legislation provides for the CCL penalty to be reduced for mitigation. The claimant identified that paragraph 104 of Schedule 6 to the Finance Act 2000 provides for mitigation of the penalty. The paragraph expressly states what factors must not be taken into consideration by the respondent when considering mitigation of the penalty. However, it does not state what factors should be taken into account. The Claimant could not identify any guidance to assist her. Guidance is available in other more established areas where penalties are raised. Such guidance set out the mitigating factors that will be considered and gives guidelines for the percentage reduction of penalties for each mitigating factor. For example, there is clear guidance about mitigation of VAT penalties.

23. Large businesses such as the majority of the CHPs that were involved are dealt with by a division of the respondent known as the Large Business Directorate (LBD). Each large business has its own client relationship manager (CRM) at a senior grade as the single point of contact for the business. The CRM has an overview of the tax affairs of that business.

24. By late 2011 the claimant had informed one of the CHPs concerned of the potential for a penalty. She had also informed Mitch Noble, the relevant CRM for the CHP.

25. This was to be the first time that a penalty had been raised under the Climate Change Levy Regulations. The claimant discussed with Witness A how to take this forward. Both were aware that they needed to establish the correct process and follow the correct guidance on mitigation to raise a proper and appropriate penalty. However, guidance did not appear to exist.

26. In February 2012, the claimant approached the respondent's environmental policy team to ask for guidance. The response was that the environmental taxes policy team did not "own" the policy. The claimant was told that it was the central policy team who were responsible for the policy and that she should contact them to seek assistance in determining the correct level of the penalty.

27. On 28 February 2012 the claimant contacted the respondent's central policy team to seek guidance. In her email the claimant stated, "*as you are aware the penalty is harsh - £250 for each failure*" (i.e. for each deficit of an LEC). Each LEC was currently worth £4.85 and so a £250 penalty for each failure to have an LEC worth £4.85 was, in the claimant's words "*harsh*". In addition to asking for guidance the claimant set out some suggestions for appropriate guidelines which she had

composed in discussion with Witness A.

28. The respondent's central policy team responded to the claimant by memo dated 17 April 2012 to provide advice about the civil penalty regime under the Climate Change Levy regulations and also to provide suggested guidelines regarding mitigation of the penalties."

6. Further findings will be referred to within the body of these reasons.

7. This hearing was listed by Employment Judge Foxwell at a preliminary hearing on 19 June 2019 with a 15 day time estimate and to be heard in Cambridge. Due to lack of judicial resources it was transferred to Bury St Edmunds but the Tribunal only had 11 days available to it. This was reduced to 10 days as it was discovered that Judge had another hearing listed before her on 13 March 2020. It was possible to hear the evidence and submissions within that time period but the decision was reserved.

8. The Tribunal heard from the claimant and from the following on behalf of the respondent:-

   8.1 Julia Williams.

   8.2 Katharine Salter.

   8.3 James Harra.

   8.4 James Russell Murphy.

   8.5 Maureen Brownlees.

   8.6 Val Hennelly.

   8.7 Jason Shelley.

   8.8 Nicola Stinton.

   8.9 Lynda Ridgers-Waite.

   8.10 Nicole Stout.

9. The Tribunal has 5 bundles of documents comprising in excess of 2000 pages but it was not necessary to go through all of those documents. The Tribunal read the witness statements and all witnesses were cross examined upon them. From the evidence heard the Tribunal finds the following facts.

The Facts

10. The claimant commenced employment with the respondent in 2001. She was promoted to officer grade in November 2002 and at all material times worked in the Environmental Taxes Team part of Customs, International

Trade and Excise (CITEX) as an assurance officer. The claimant was based at the Peterborough office.

11. On 26 March 2013 the claimant slipped a disc in her back resulting in a month off work. This caused her to be unable to sit down for any length of time. The claimant was offered a phased return to work at an office nearer to her home in Northampton. She was referred to Occupational Health on 4 June 2013 and started physiotherapy on 10 June 2013.

12. Each of the detriments will now be dealt with as identified in the claimant's further information. To preserve the chronology some are dealt with out of order. The underlined text is the incident or email and the italicised text the alleged detriment relied upon by the claimant.

Detriment 1 – 9 July 2013 – Phone call between the claimant and Maureen Brownlees when claimant was allegedly told "not to speak of the matter again".

The "matter" relates to issues later raised in protected disclosures. I felt shocked and threatened. I felt she was trying to bully me. My views were being suppressed.

13. In his decision E J Spencer made findings as to what occurred after the claimant first raised the issue of penalties in February 2012 (paragraphs 29 – 56). In summary the claimant was very concerned as to the magnitude of the penalties that could be several million pounds. She initially expressed her view that they should raise penalties that were 'reasonably proportionate and ones we can defend at tribunal'. It was found specifically at the Preliminary Hearing that she was not at that point advocating the imposition of higher penalties and was looking for guidance to enable the penalties to be mitigated to a more modest level.

14. Advice was sought from the respondent's solicitor's office in January 2013 which was seen by the claimant. The claimant became concerned however at the time it was taking for decisions to be made. The issue of the CCL penalty and the approach to mitigation was a new issue and there was much discussion between the claimant and her colleagues. The claimant took issue with their focus.

15. E J Spencer dealt with the Contentious Issue Panel, at the heart of this matter, in his decision and then what occurred as follows:

> "35 The respondent had two contentious issues panels (CIPs) within its governance framework for decisions in resolving tax disputes. The CIPs were authorised to decide HMRCs strategy for handling major contentious issues and to agree an approach for resolving such issues in accordance with the respondent's litigation and settlement strategy (a part of the respondent's policy for resolving tax disputes through civil appeal procedures). The remit of the CIPs is to ensure that cases with the same major contentious issue are handled in a coordinated and consistent manner. The CIPs take referrals from within the respondent's organisation. The CIPs are composed of senior individuals within the

respondent's organisation. The CIPs decide the strategy for handling the major contentious issues submitted to the CIPs by those "issue owners". The relevant policy defines a major contentious issue as an issue that involves a point of law or practice which might have a significant and far-reaching impact on HMRC policy, strategy or operations, affect multiple cases and different business areas and may result in major litigation.

36 The CCL civil penalty issue was to be referred to the relevant CIP for guidance as it was a major contentious issue. The CIP referral process involves a paper being produced to brief the CIP about the issue and to make recommendations which the CIP are invited to adopt. The paper represents the combined efforts of many individuals who work within the areas concerned. Comments and input are sought from those individuals and the draft paper is circulated for comment. Thus, the final paper represents the work and views of many individuals. However, one or two senior individuals are responsible for coordinating, signing off and submitting the paper to the CIP Secretariat before the paper is presented to the CIP at its next sitting. In this case I understand that it was Juliette Roche (a CRM within the Large Business Directorate) who was responsible for signing off and submitting the paper to the CIP Secretariat.

37 The claimant was involved in drafting the paper to be submitted to the CIP. The paper gives details of the background, the substantive issue, the points for the CIP to consider and the recommended options open to the CIP. A draft copy of the paper was circulated for comment to various individuals including the claimant. The claimant provided comments by email dated 7 March 2013. The claimant's email suggests that she considered the latest version of the paper to be a vast improvement on the previous version. She expressed some concerns and suggested several amendments. Although the claimant's email suggested that she had several issues with the draft paper the amendments that she suggested were relatively modest.

38 The claimant continued to have input into the discussions. For example, she provided information to Juliet Roche on 15 March 2013 about the extent of tax loss to the respondent because of the issue. She was also asked by Mitch Noble to provide him with information. The claimant also participated in a conference call on 21 March 2013 to discuss the issue further The claimant was deeply involved in the discussions. This was hardly surprising given that she and Witness A had discovered the retrospective contracts scheme in the first instance and that the issue arose in a field in which they had considerable expertise and experience.

39 On 3 May 2013 Juliet Roche circulated an amended version of the draft paper to be submitted to the CIP. The draft was circulated to several individuals (including the claimant) giving a deadline for responses. The claimant responded by email on 7 May. The draft report set out options for the CIP to consider regarding establishing a policy for mitigation of the penalty. The claimant's comments included an additional option that she wanted to be added.

40 Juliet Roche submitted the final version of the paper to Hugh Dorey, Secretariat to the CIP on 8 May 2013 to be considered at the next

meeting of the CIP. Ms. Roche circulated a copy of the final version of the paper to various individuals, including the claimant, the same day. The paper included the claimant's suggestion for the additional option for mitigation of the penalty.

41 After the paper had been submitted, the claimant spoke to Steve Kellet, a Grade 6 Manager within CITEX, to express concerns that the CIP were being misled. It was unclear from the claimant's evidence as to exactly how she considered the CIP were being misled. Mr. Kellett suggested that the claimant raise her concerns through her line management. However, the claimant did not act on her concerns as Mr. Kellett put her mind at rest by suggesting that it was not uncommon for the CIP to reject the recommendations in papers put to them.

42 The CIP convened on 13 May 2013. The CIP did not approve the proposed methods of mitigation. Concerns were expressed by the panel as to whether the respondent had the lawful authority to mitigate the relevant penalties. The CIP suggested that clearer legal advice should be obtained. The CIP confirmed that it was, in principle, supportive of the proposal to mitigate the penalties in the way proposed. However, they did not consider that the legal position concerning the respondent's ability to lawfully mitigate these penalties was sufficiently clear. Ms. Roche confirmed the outcome to various individuals, including the claimant, who received a copy of the CIP's written decision.

43 A second paper would need to be prepared for submission to the CIP to address their concerns.

44 The claimant's concerns increased when she was copied into an email from Juliet Roche on 24 May 2013 in which she stated that when she had discussed the matter with solicitors they had suggested that the unmitigated penalty looked unlawful. The claimant took the view that those involved (including Ms. Roche) were becoming increasingly concerned with how they could reduce the penalty to a level that was acceptable to them. The claimant took the view that a "harder line" was required. The claimant was taking a more robust approach than others involved in preparing the second paper for the CIP. The claimant's approach was also much stricter than the more liberal approach to mitigation that she had advocated previously.

45 The claimant and Witness A believed that the CIP was not being provided with the full facts upon which to base their decision. This manifested itself in the claimant and Witness A taking a more robust approach. This is clear from the content of an email that the claimant and Witness A sent to Juliet Roche on 3 June 2013. The email contained an express request for the content of their email to be considered by one of the solicitor members of the CIP. The content of the email contained some forthrightly expressed views about the retrospective contracts scheme. She asserted that the retrospective contracts were not valid contracts, contravened statutory legislation and may amount to tax evasion.

46 The claimant and Witness A considered the activities of the CHPs and the Utility companies involved in the retrospective contracts scheme to have acted fraudulently and illegally and that in the circumstances the

respondent should adopt a more robust approach to the imposition of a civil penalty. They acknowledged that it would be appropriate to put in place policies to enable the penalty to be mitigated. However, the claimant's clear view was that the starting point should be the full amount of the penalty as provided for in the legislation and that the respondent should mitigate down from the full penalty taking into consideration each company's individual mitigating factors on a percentage basis.

47 The claimant considered the retrospective contracting arrangement was fraudulent and that the solicitor members of the CIP would recognise this if they were provided with the full facts.

48 The claimant and Witness A formed the impression from various discussions and emails from those within the Policy and Large Business Directorate that those individuals were seeking to downplay the severity of the issue. For example, the claimant's view was informed by views expressed by Steve Robinson who was responsible for signing off the next paper to be submitted to the CIP. The claimant's perception was that he took the view that the penalty offended the EU doctrine of proportionality and ran contrary to the protection of property provisions of the European Convention on Human Rights. The claimant also considered that Mr. Robinson was placing too much emphasis on the actions of the utility company that had promoted the retrospective contracts scheme to the CHPs thereby implying that the CHPs were less blameworthy and less deserving of a penalty. This was plainly at odds with the view taken by the claimant and Witness A. As the claimant put it in her witness statement "*the whole thing to me wreaked [sic] of evasion on the part of the companies and I was at a loss to understand why others within HMRC were not acknowledging such*".

49 By this stage the claimant and Witness A wanted the second paper that was to be submitted to the CIP to highlight their view that the retrospective contracts scheme was fraudulent and constituted tax evasion and to advocate a more robust approach to the imposition of civil penalties.

50 The claimant discussed her concerns with Witness A and agreed that the claimant would contact Hugh Dorey, the secretariat to the CIP, and raise the matter with him. The claimant did so on 19 June 2013. The claimant agreed with Mr. Dorey that she would send him an email setting out her concerns.

16. This then lead to the claimant's first protected disclosure, her email to Mr Dorey of the 21 June 2013. In it she concluded that the information in the first paper submitted to the CIP did not include the information in her paper and that she would like the 'content of this email to be considered by Andrew Scott and Flora Fraser from the CIP'. The email went on to set out how the claimant believed the CIP should approach the imposition of a civil penalty and the approach that should be taken to mitigation. The following points were made:-

(i) These "retrospective contracts" are not valid contracts.

(ii) These "retrospective contracts" contravene statutory legislation.

(iii) These "retrospective contracts" may be seen to amount to evasion.

(iv) There is a tax loss to the Exchequer.

17. The claimant was particularly concerned with penalties. She stated:-

> "Where there is a deficit in the CHP operators records the law provides for a regulatory penalty (SI2001/838 Reg 60(1)(hb) and schedule 2 regulation 12). We do not agree after taking the above circumstances into consideration that the penalty is disproportionate to the offence. As a matter of principle and for breaching an established rule of law we believe HMRC must be seen to act accordingly and not allow these contracts to be acknowledged as valid."

18. The claimant made the point that these Regulations were enacted post the implementation of the Human Rights Act and therefore "one should be able to assume that Parliament intended that the penalty is compatible with HRA 1998 in accordance with Section 19".

19. The claimant believed that mitigation should always begin with the full penalty and "mitigate down" taking into consideration each company's individual mitigating factors on percentage basis. She stated that Policy's view appeared to be that they did not intend to raise an assessment beyond the value attached to the number of LECs in deficit. She however took the view "we have seen no evidence to support this and it is not reflected in the legislation".

20. The claimant went on that she believed another factor that should be taken into consideration with regard to mitigation was the delay caused by HMRC.

21. Nicola Stinton found out from Tracey Blundell that the claimant felt so strongly about the CIP matter that they had written their own paper for the CIP to be considered as an alternative to the agreed paper. She was informed by Tracey that the claimant was going to send an email to the CIP attaching her paper and that she was not intending to discuss it with anyone else. The Tribunal accepts her evidence that she felt that the claimant was bypassing process. Hugh Dorey was the secretariat for the CIP and worked around the corner from her. Nicola Stinton was concerned about process not being followed for the CIP and he told her that for transparency purposes Judith Knott the Chair of the CIP would want to see the email and she did see it. She was also of the view that the correct processes should be followed.

22. Nikki Stinton was at that time a Grade 7 within the Excise and Environmental Taxes ('EET') team leading on the introduction of the Carbon Price Floor ('CPF') and the Climate Change Levy. She has remained in the EET team and she and Katherine Mansfield jointly led on CPF and CCL. From January 2018 Nikki Stinton has led on energy tax project work. She was tasked with preparing the paper to be presented

to the second CIP and circulated a draft on the 3 July 2013. The claimant responded on the 4 July making it clear that she did not agree with the recommendations at 5.1 and would prefer to mitigate using trader's individual circumstances. This email was relied upon as a protected disclosure but found not to be. The claimant remained concerned that the CIP was not being presented with all the facts and options. She attempted to contact various senior members of staff to raised concerns but without success. This is the context of the first detriment which the claimant relies upon.

23. This allegation relates to a conversation between Maureen Brownlees and the claimant on 9 July 2013. The Tribunal accepts her evidence that she was asked to speak to the claimant by Kelly Adam, PA to Steve Kellett. This followed on from emails seen on 9 July 2013 (page 228). Sarah Harlen (manager to Nikki Stinton) had emailed Steve Timewell (copying in amongst others Nicola Stinton and Maureen Brownlees) stating:-

> "I'm afraid that Nikki is still receiving calls from Sally Lenton who remains unhappy with the agreed position and who appears to be considering trying to re-open this at the CIP panel or before.
>
> I would be grateful if you could do your best to prevent this as it really is not acceptable, particularly when we have gone to such lengths to try and get an agreed position."

24. The Tribunal saw an email that Maureen Brownlees sent to addressed to Sarah Harlen and others (page 227) following this conversation in which she confirmed she had spoken to the claimant "and advised her firmly to refrain from making any further calls or comments in this topic".

25. The claimant in evidence stated that to her knowledge Maureen Brownlees had not seen the protected disclosure but then she would not know if she had. The claimant would never and had not copied her into the disclosure. The claimant explained that Maureen asked her to stop making calls "on the topic which was what went in the paper to the CIP". She knew the content that the claimant and Tracey Blundell were trying to get into the July paper and that was the same information as the claimant disclosed in her email to Hugh Dorey, which has been accepted as a protected disclosure. In the claimant's words "What I wanted in the paper was the protected disclosure".

26. The Tribunal is satisfied from hearing Maureen Brownlees evidence that she had not seen the claimant's email to Hugh Dorey and that all she knew was that the claimant felt information she wanted included in the paper to the CIP had not been included. She did not know any of the technical details.

Detriment 2- 16 July 2013 – Nikki Stinton emailed the claimant allegedly "Instructing me not to send any more correspondence to Policy or to Hugh Dorey.

The email was intended to exclude me and my professional opinions from direct involvement in the CIP paper. By copying in senior leadership it felt intimidating.

27. The CIP Panel and how the papers were put together was covered by Employment Judge Spencer in his Judgment as set out above.

28. The Tribunal heard from Nicola Stinton who leads on energy tax project work. She gave evidence that the presentation of the case to the CIP1 was managed by operational colleagues within large business. The CIP is one of the governance bodies set up by HMRC to consider proposals for dealing with novel, contentious or sensitive issues. The membership is drawn from senior personnel across operational and policy areas of the business plus HMRC's solicitors. There were 15 people present at the first CIP meeting with five apologies for absence, so some meetings could be 20 people. It was not only covering considering one discrete issue but could be considering a number and might have only had up to about 20 minutes on each issue. The idea of the preparation of the papers and delivery to the members beforehand was so they could attend fully appraised of the issues they were being asked to consider. Employment Judge Spencer made findings on the preparation of the documents for the first CIP paper, as set out above.

29. Nikki Stinton became involved with the CIP following its decision at the first meeting in view of the complexity of the case and the need to collate views from across HMRC. Steve Robinson also in EET – (Environmental Taxes) in the Manchester office acted as a link between all the environmental taxes and operational colleagues.

30. Nikki Stinton was tasked with preparing the paper to be presented to CIP2. It had to go through a process where senior managers from all stakeholder areas signed it off. The process was lengthy. She was required to seek consensus across policy and operational areas which required weighing up a number of factors and looking at compelling priorities to develop a solution that could be adopted more widely.

31. Nikki Stinton and Steve Robinson arranged a number of calls between May and 11 July 2013 and some meetings with the claimant, Tracey Blundell, Trina White (co-ordination of operational work for EET at the Environmental Taxes Unit of Expertise in Newcastle) and others within Large Business plus Central Policy and Solicitor's Office. Nikki Stinton's evidence which the Tribunal accepts is that in the run up to the second CIP she spoke to the claimant on numerous occasions.

32. Julia Roche was also involved in co-ordinating the papers to the CIP and sent an email to all concerned including the claimant and Tracey Blundell on 24 May 2013 confirming the questions that the solicitors on the panel

had asked to be addressed. She confirmed that the next step would be a paper to the solicitors to agree the legal position and then that would go to the CIP with a final recommendation. She would share the paper before it went to the solicitors.

33. The second CIP did not meet until the 11 July 2013. By email of 3 July 2013 Nikki Stinton emailed various colleagues including the claimant and Tracey Blundell with the revised draft paper for the CIP requesting comments by the end of Friday 5 July. These were provided to her from various people as seen in the bundle. On 4 July the claimant replied to Nikki Stinton that she should see the technical changes she had made "We would like it made explicit that we do not agree with your recommendations in 5.1 and would prefer to mitigate using traders' individual circumstances as already tested".

34. The Tribunal accepts the evidence of Nikki Stinton that she can remember receiving telephone calls from the claimant throughout this period on a regular basis and that the claimant was becoming increasingly agitated as she thought that her proposals were not being properly considered. She had several difficult conversations with the claimant during this period. She found them repetitive and for her quite frustrating because the claimant was unable to articulate what she thought they should recommend. Sometimes she seemed to think CHIP businesses involved were fraudulent (in which case a civil penalty would be appropriate) and that at other times she wished the penalties to be mitigated to an amount that she could get the CHP businesses to pay (with no supporting legal basis).

35. The email that the claimant relies upon as a detriment was sent by Nikki Stinton on 16 July to the claimant and copied to others more senior. She said that she just wanted to confirm where they were with the CIP. The CIP had asked for further legal advice on penalties and the potential to mitigate them. Steve Robinson and she had been discussing how they should handle that and working on any requests for further advice or papers for the CIP:-

> "I appreciate you have strong views on this and are responsible for a number of cases that are being held pending a decision. However it is important that the correct procedures are followed and that we are consistent in our policy line – whether or not you agree with it. As you know, we represented your views in the previous paper to CIP albeit that the recommended option was not to do as you suggested.
>
> You mentioned that you had or would be writing a further paper on these penalties that you thought would be useful for CIP in moving things forward and agreed that you would not independently send it to the Panel/Secretariat. I said I would consider any additional points you raise but I must ask that you clear this paper through your CITEX line management chain before sending it to me or Steve as it is important that any views or points made are those of the business (CITEX) rather than yours as an individual.

> I will keep you updated but must stress that any papers that are submitted to the CIP on this issue must be from the Policy Team in agreement with CITEX and you should not send any further papers or emails on the issue to either the Secretariat or CIP Panel Members."

36. The claimant in her witness statement accepted that she agreed she would not send a paper direct to the CIP. The claimant argues this email was a detriment as she and Tracey Blundell were being "side-lined and not included". Nikki Stinton was doing this "because of the protected disclosure and she did not want the information included".

37. The Tribunal accepts the evidence of Nikki Stinton that what was important to her was presenting a paper which was the collective view. In asking the claimant to not independently send her paper to the Panel it was so they could ensure that the correct governance procedure was followed. She accepted in cross examination that the claimant was an expert on CCL and how it worked and that some of the managers had less involvement in the technicalities. She did not accept that meant that the claimant could forgo the usual process of having her views passed through her manager who could either support her contentions or not. The claimant should have been able to persuade her line management. Nikki Stinton was not getting that however but views coming direct from the claimant with little evidence that management support had been sought by the claimant or that line managers were providing it.

Detriment 3 – 17 July 2013 – Phone call between the claimant and Julia Williams, when the claimant was allegedly told 'to stop pushing our views forward for inclusion in the draft CIP paper and if I did not stop immediately disciplinary action would be taken against me. She stated her manager, Jason Shelley agreed with this.

I felt threatened by her aggressive manner. I believed my professional opinion was being suppressed and I was threatened into submission.

38. Julia Williams became the claimant's line manager in July 2013. The claimant's position is that she would not know if Julia had seen her protected disclosure, but in her view she would have been aware of it. Julia William's evidence is that she had not seen and was not aware of the disclosure. The tribunal has no reason to doubt that and accepts her evidence.

39. The claimant had suffered a back injury and was on a phased return to work. She was working from the respondent's Northampton office as it was closer to home. She also worked at home. She had increased from 10 hours a week to 25 hours. There had been an Occupational Health Assessment in June before Julia Williams became the claimant's line manager.

40. Julia Williams evidence which the tribunal accepts is that she felt the claimant had a case to put forward to the CIP and that she had had an

opportunity to put that forward. She believed she had supported the claimant in that. This conversation was not around the issues in the case and whether she thought the claimant was technically right or not. It was the behaviours that the claimant was exhibiting at meetings and about others who had approached her and said they found the claimant difficult to work with. She did not threaten the claimant with disciplinary action but that the conduct and discipline route could be used if there were allegations of bullying and harassment

Detriment 5 – 19 July 2013 – a telephone conversation where Julia Williams required an explanation as to why doctors had not increased my hours and she said would send me to Occupational Health.

I felt she was pressuring me to do things which were contrary to my doctor's advice and would be damaging to my back injury. Due to this pressure I re-approached my doctors to increase my hours.

41. This telephone call on the 19 July the claimant says was a planned 'keeping in touch' call. In evidence the claimant said that it was not her case that this call was about her making a protected disclosure. It was however 'an accumulation and I felt she was out to get me'. The claimant went to her doctor after the call and increased her hours.

42. Julia Williams does not recall this specific call. The claimant does not mention it in her Timeline prepared for Val Hennelly in February 2015. Julia Williams evidence which the tribunal accepts was that at this time she was keeping in touch with the claimant as required by HR guidance, which would have including asking about fit notes. Having heard her evidence the tribunal is satisfied she did not put pressure on the claimant to increase her hours in the phased return. If the claimant did that she did it of her own volition.

43. Although not wishing to appear too legalistic to a litigant in person the claimant, who did have all her cross examination prepared did not put to Julia Williams in cross examination that she had been forced by her to increase her hours

Detriment 4 & 6 – 8 August 2013 – Meeting between claimant and Julia Williams where the claimant was allegedly told that she had 'created an awkward relationship with Policy', that the tone of her emails was 'inappropriate' and she may be 'put on a reduced hours contract' or permanently moved to Northampton and away from Environmental Taxes

I was intimidated by her aggressive and patronising manner. Her attitude showed a lack of respect for me, professionally and personally. My professional views were being suppressed. She was accusing me of things that were not true. By referring to Senior Leadership Team she inferred that they agreed with her which made me feel as if they were party to the bullying also.

44. These two detriments are linked. Both the claimant and Julia Williams took notes at this meeting. In hers Julia Williams confirmed that the claimant was currently working reduced hours with a combination of office based in Northampton and working from home, with her return to work having commenced on the 3 May 2013. She was working a total of 25 hours with 12 hours classed as sick leave. Her next fit note was due on 12 August.

45. In a letter of 4 June 2013 ATOS had confirmed that the current arrangement was appropriate and may be required for up to 4 months.

46. Julia Williams noted what was stated in HR policy about a phased return to work, namely that:

> 'Exceptionally, the manager may agree to support and extension past the end of 3 months based on occupational health advice. Under no circumstances should a phased return to work extend beyond 6 months in total.'

47. Julia Williams also noted that she was unclear when the 4 months would run from but that on reflection, she considered it would be from 4 June 2013 the date of ATOS' letter. This gave the expectation that the claimant would return to full time working on or around 4 October 2013 which would be within the HR guidance. She acknowledged in her note however that it was not yet known if the claimant would be fit enough to travel to Peterborough due to her back condition and that one possibility contemplated in the HR guidance was a reduction of hours if full time return to work was not possible. She noted that she had discussed the situation with her manager Jason Shelley and confirmed to the claimant that one option would be for the claimant to permanently move to the Northampton CITEX team as geographically that was her nearest to her home. That would eliminate the additional drive and associated discomfort in travelling to Peterborough. Any such move however would result in a change to the type of work the claimant was undertaking with the Northampton office dealing mainly with Customs and International Trade.

48. The claimant's notes as well as Julia Williams' state that the claimant referred to a letter she had received from a previous manager Steve Pilgrim. In paragraph 27 of her witness statement the claimant referred to this as stating she could 'be based in Peterborough but on occasions work from an office closer to home to ease the hours I was travelling. I said this was more relevant now with a back injury, which was made worse by sitting for long periods of time. I asked if she would honour this letter. Julia Williams said no…I just felt threatened'.

49. Julia Williams note of the meeting records that this letter had been written prior to the current period of sick leave and that she did not consider it to be a long term solution. She also informed the claimant that CITEX's management policy had changed and the focus was very much on face to face management and not remote management. As there was a team in Northampton it made sense, depending on her recovery, for the claimant

to become part of that team. Even the claimant's notes record 'trying to pull away from remote management. Options if not able to travel to P'boro to move to Northampton and leave ET'.

50. At the same meeting Julia Williams conducted the claimant's monthly management meeting to discuss her performance over the last month. Her notes record that they did in particular discuss the CIP paper. She noted:

> 'Sally told me of her concerns regarding the quality of submissions from Policy to the CIP and felt that we should be pushing more for a resolution which was legally sound and for sight of policy's final paper to CIP to see if they had included our submissions.
>
> I explained that I felt that we needed to let policy now take this forward and not contact them but wait until we had the final outcome from CIP. We had raised…about the length of time these particular cases had taken and the concern that the decisions made were not correct. This had been escalated…
>
> On this particular issue we needed to build bridges with Policy to re-establish a good working relationship. Sally felt that they already had a good relationship as they regularly asked for her assistance…'

51. The tribunal accepts that these were Julia Williams genuine concerns at that time.

Detriment 7 – 12 August 2013 – email from Julia Williams confirming discussion at meeting on 8 August 2013 stating she had the support of Jason Shelley.

I felt harassed, bullied and pressured to increase my hours

52. By email of the 12 August 2013 Julia Williams sent the claimant her notes of their meeting that day. She confirmed the points they had discussed. There was nothing threatening in the wording used. Julia Williams accepted that she probably had spoken to Jason Shelley about these issues as he was her line manager.

Detriment 8 – weekly phone calls between 1 August 2013 and a meeting on 24 October 2013 with Julia Williams

Conversation always commenced with question how my back was and then repeat of information as stated on 8 June 2013 – redeployment in Northampton, removed from Environmental Taxes and going onto short hours contract.
I felt constantly pressured to recover quicker than I was able. I was increasingly harassed and bullied. I dreaded the phone calls.

53. The tribunal accepts the evidence of Julia Williams that it was her responsibility as the claimant's manager to have weekly calls with the claimant as she was working remotely.

54. In the complaint the claimant submitted to Steve Kellet on the 2 November 2013 she raised this issue. She said that in every conversation with Julia Williams since the 8 August 2013 she started by asking about her back. She said it felt 'like a threat because the same format is used every time as if she is reading from a script.' The claimant went on in that document to state she had not damaged her back 'on purpose' and 'cannot and should not rush its recovery due to potentially causing more permanent damage'. The claimant felt harassed by the constant reminder that 'I will be moved to Northampton and off the team if I did not return to Peterborough'.

55. In cross examination the claimant again stated that Julia Williams appeared to have a fixed script and that she did eventually tell her these calls were distressing her.

56. The claimant was asked in cross examination to explain why she alleged the above were detriments because she had made a protected disclosure. She said that she believed Julia Williams was 'out to get me'. It was all about the CIP issue. The protected disclosure may have formed an opinion that the claimant needed to 'be controlled or put in my place'. She had expected a manager to be more supportive of her during her phased return to work. The tribunal finds that her manager was being supportive and following HR guidance.

<u>Detriment 9 – 15 October 2013 – meeting with Julia Williams when given a 'must improve award for mid year performance</u>

I felt bullied into accepting this assessment of my performance. This mid-year marking reflected only the issue in hand and did not take into account any of the work I had completed during the half year.

57. The Mid-Year Performance Marking includes a discussion between the team member and their manager. The team member submits a document showing how they have met the performance goals and objectives that they set at the beginning of the year and what they think their marking should be. This includes both operational targets and behaviours. The manager then discusses the document with the team member and then attends a Validation Meeting with other team managers in that business area. The managers discuss their individual team members in grade groups.

58. Julia Williams made notes and provided these to the claimant with her email of the 21 October 2013. The notes were seen at page 300. In cross examination the claimant accepted that these acknowledged positives in the claimant's performance, for example her 'strong understanding and technical knowledge'. With regard to behaviours on the positive side it was noted that the claimant had 'demonstrated some good positive behaviour's as identified above with those in her immediate team sharing knowledge and expertise and with some of the wider team.' However:

> '…there are some areas for improvement in regard to Changing and Improving. Putting aside preconceptions and consider new ideas on the own merits and Leading and Communication listen to, understand, respect and accept the value of different views, ideas and ways of working'

59. Whilst acknowledging that the claimant is 'focused and passionate about her work and getting the task done' Julia Williams considered that:

> 'Challenging ways of working is acceptable but there are ways of doing that in a positive constructive respectful way rather than putting barriers in place and not engaging in those activities'

60. It is the case that the example was then given of the papers put before the CIP when the claimant did not feel that the paper included her conclusions. The claimant's time, it was felt had been spent on:

> 'pushing this matter forward albeit with good intentions when it could have perhaps been better spent on new cases and bringing in yield in a different way whilst waiting for the CIP cases issue to be resolved further up the management chain'

61. In cross examination the claimant's position was that she felt this was 'heavy handed'. She believed that she was working outside her grade and that Julia Williams seemed to ignore everything she was doing. Her case is that she got the mark she did at this review 'because of the CIP' and because 'they didn't agree with the way Tracy and I were trying to get heard. We were trying to get facts forward for senior managers on the CIP to consider'. It was clear throughout the claimant's evidence that everything that occurred after her first protected disclosure, because that was about the papers put to the CIP was also a detriment because she had made that disclosure. It was in fact not about the CIP or the protected disclosure but about her behaviours.

62. The claimant asked Julia Williams for and was provided with examples of emails which she considered were inappropriate in tone. In one (p311) the claimant when writing to various colleagues, copying in Julia Williams refers to her in the third person. She accepted in cross examination that was rude.

63. By email of the 22 November 2013 the claimant indicated to Julia Williams that she did not believe she had provided reasonable evidence, that remarks she had made in support of the 'must improve' grade were untrue and made an official request that her marking be changed to 'good'.

Detriment 10 – 9 December 2013 – Andrew Brooks – email from the Validation Chair – reasons for receiving the 'must improve' for mid-year – not seeing bigger picture, wants to be left alone, the constraints and limitations of colleagues in other areas and not taking a wider view of what else was happening on others.

I felt bullied because what was stated was not true. I believed my personal and professional reputation was being blackened as a result of this issue. I felt I was being forced to pander to Julia Williams for self-preservation and this led to levels of anxiety that caused pains in my chest.

64. By email of the 5 December 2013 Andrew Brooks chair of the Validation Panel provided some information about the panel discussions. He recorded that the notes he took from the meeting concerning the claimant:

> *'were around seeing the bigger picture. The discussion was around working in a silo, appreciation of the constraints and limitations of colleagues in other areas and not taking a wider view of what else was happening and the impact on others.*
>
> *Several people fell into this category and the view was that they should engage more with what was happening both in regards to developments in CITEX as well as HMRC in the wider context'*

65. The claimant requested minutes or notes of the meeting. It is the reply of 9 December 2013 which the claimant states was a detriment. The notes were primarily of a more generic nature and he restated his notes in relation to the claimant as in his earlier email.

Detriment 11 – 2 January 2014 email from Julia Williams confirming she had signed of four action points within my Development Plan for me to work at that would improve her behaviour

I was insulted and bullied into accepting the insubstantial action points which appear to bear no relation to the reasons for my half year marking.

66. The agreed Development Plan was sent by the claimant to Julia Williams by email of the 19 December 2013. The agreed actions were:

    1. To work at improving ones relationship with manager.

    2. To word emails in order that I take into consideration the recipients.

    3. To work with management to ensure they can fulfil their role effectively'.

67. The claimant had set out the support she might need to achieve the last one as follows:

> 'To bear in mind I am dealing with a technically inexperienced manager and to offer my support to help her understand the complexities of the issues that we are dealing with'

68. The claimant restated that in cross examination. This was not very respectful to the manager and rather similar to writing about her to others in the third person.

69. In her witness statement the claimant described the development plan as 'designed to put me in my place, to continue suppressing me'. It was unclear what the claimant's case was on this when she gave evidence. It was put to the claimant that neither disciplinary action or capability proceedings had been started and the claimant accepted that. She also went onto state that she believed that Julia Williams 'wanted to give me a chance'. It is therefore hard to see how it was detrimental treatment.

70. The actual document said to be detrimental was Julia Williams email to the claimant of the 2 January 2014 (page 449). In acknowledging the plan the claimant had sent her she replied:

> 'Thanks Sally, can we use this as a basis for our discussion on behaviours at our monthly PMR chats to provide evidence of improvement for the end of year marking'

71. The claimant in cross examination said that this was an example of bullying since the first PID to Hugh Dorey and 'the CIP issue'. The claimant stated she felt bullied by the 1:1 meetings with Julia Williams as at every one there was discussion as to whether her behaviours were improving but then acknowledged that was exactly what the 1:1's were for.

<u>Detriment 12 – 29 January 2014 – a meeting with Julia Williams when she relayed a complaint that a Grade 6 involved in the CIP paper had felt pressurised by the claimant and her constant challenges. She stated that this complaint would be put in writing</u>

This was evasive information which was more criticism of me which felt relentless.

72. The claimant explained in cross examination that this was 'evasive information' as Julia Williams had not yet spoken the Grade 6, Angela Horton, before mentioning this to her. She was not however alleging that Julia Williams had fabricated the allegation.

73. The tribunal saw Julia Williams note of her discussion with the claimant on the 30 January 2014 (page 532). This noted that she had already had a 1-1 discussion with the claimant the previous day. She had raised then a

discussion with Maureen Brownlees and they had agreed to discuss it again once Julia Williams had spoken to Angela Horton.

74. Angela Horton was a Grade 6 who the claimant was giving technical advice to. In a telephone conversation she advised Julia Williams that she sometimes felt pressurised by the claimant over the case they were working on and that she felt constantly challenged about 'why are we doing what we are doing'. Angela told her she felt it had been a difficult relationship and she had tried to explain the wider picture to the claimant and how the decisions fitted into the wider strategy but the claimant seemed unable to take this on board. She did not want to put this in writing for fear of making the working relationship worse. This matter was relayed to the claimant in a meeting with her on the 30 January. The claimant said she was unaware of Angela's concerns. That had not been what she intended when she had contacted Angela but she knew she could be 'tenacious'. The note went onto record:

> 'We discussed behaviours and although I appreciate that it was her passion about the job, she has to be aware of how her behaviour can be interpreted by others and we need to consider how we can take this forward so it doesn't happen again'

Detriment 13 – 1 May 2014 – notified I was awarded a 'Must Improve' for my 2013/2014 annual performance countersigned by Jason Shelley

My actual performance which was supported by extensive evidence for the year had been ignored. I had absolutely no doubt this was awarded to show me it was unacceptable to challenge decisions of Senior Leaders.

75. Julia Williams notes of the meeting when she informed the claimant of this marking were seen at page 591 of the bundle. She again acknowledged that operationally the claimant had achieved although she had not fully met the expectations of the year. That was due to an extended period of sick leave, a phased return to work and long running cases awaiting policy decisions. The reason the claimant had moved into 'must improve' was noted to be 'due to behaviour'. She acknowledged that the claimant's behaviour 'was moving in the right direction and our relationship has improved' but that then there was the issue raised by Angela Horton. This had lead the validation committee to find that the claimant's marking could not move into achieved and must remain at must improve. They agreed a stress risk assessment due to the claimant's stress concerns.

76. The claimant did then move out of the 'must improve' making the next year during a period when she was still pursuing her whistleblowing complaints.

77. This was the last detriment alleged against Julia Williams.

Detriment 14 – 13 June 2014 – Katherine Salter – email notifying me of the results of appeal – upheld the 'Must Improve' Award on the grounds I seemed unwilling to work in partnership with others when they hold a different view.

The appeal manager failed to consider my actual performance for the year along with the evidence that I had presented to support an 'achieved' award. The explanation for upholding the decision refers to my involvement in the CIP paper. This is now in my record of employment.

78. The claimant lodged an appeal against her end of year marking on the 21 May 2014.

79. Katherine Salter was assigned to deal with this appeal. Before that she had no involvement with the claimant and nor was she involved with the Climate Change Levy or the discussion around the mitigation of penalties. Having heard her evidence the tribunal accepts that she did not at the time know about the matters now relied upon as protected disclosures which she only became aware of when preparing her witness statement for these proceedings.

80. The claimant was advised that Katherine Salter would be conducting her appeal by email of the 3 June 2014. She did not consider it right that her appeal had gone to someone who had been part of the validation panel and this was addressed by Jason Shelley in his email to the claimant of the 10 June 2014. He explained that almost all his managers attended both validation meetings but that the manager appointed to hear the claimant's appeal had no dealings with Environmental Taxes, had not worked with her or had any significant interaction with her. He did not feel the claimant's circumstances to be exceptional such as to necessitate the appointment of another person to hear her appeal. In her cross examination of Katherine Salter, the claimant focused almost entirely on whether the witness considered all the evidence the claimant supplied and whether she was independent having sat on the validation panel rather than whether she acted in the way she did due to the protected disclosure.

81. The appeal outcome was seen at page 660. It made clear that the appeal rested on 'behavioural expectations.' Reference was made to the Civil Service Competency Framework under 'Seeing the Bigger Picture' and that an example of ineffective behaviour was '…people who have a narrow view of their role, without understanding the Department's wider activities'. What was important was reaching decisions by consensus.

82. Referring to the claimant's appeal submissions and her specialism in the area it was felt that the claimant had 'worked outside of the partnership agreement…and seem to be implying that you are better placed to deal with technical issues than your colleagues, irrespective of roles and responsibilities'. Whilst acknowledging that the claimant had demonstrated a wealth of technical expertise Katherine Salter's concern was that the claimant seemed 'unwilling to work in partnership with others

when they hold a view that is different to your own. As a result the Must Improve performance rating should remain'

83. It was quite clear from the claimant's evidence that she equates everything that occurred after her first protected disclosure as being because the respondent and its officers did not approve of it rather than having genuine concerns about her behaviours and interaction with colleagues. She even stated that 'I can't prove that Katherine Salter saw the protected disclosure but I know she would know as the 'behaviour they complaining about starts with my first disclosure'**.** The claimant believed that Katherine Salter would have been told to make her decision by senior managers and as Jason Shelley was her manager believed there would have been some influence from him. That allegation was not put to Jason Shelley by the claimant and having heard his evidence and that of Katherine Salter the tribunal is satisfied it was her decision alone and not influenced by him or any other more senior manager.

Detriment 15 – 11 May 2017 – 'needs development' 2016-17 for the reason I operationally had not completed enough cases

84. It was agreed at the preliminary hearing 19 June 2019 that this detriment was a consequence of the alleged detriments rather than a detriment in itself and is therefore not one for the tribunal to determine

Failing to provide unredacted copies of reports into the allegations made by the claimant and upon which she relies as amounting to protected disclosures/or failing to address the complaints made

85. These detriments are dealt with out of order to preserve the chronology.

Detriment 16 – Russell Murphy – 20 May 2014 – meeting to discuss findings into concerns raised on 13 January 2014. Informed no findings.

No satisfactory explanation as to why there was no findings and therefore the concerns remained unresolved

Detriment 21

Long periods of time where there was no apparent activity, despite me chasing it led to frustration, anger and anxiety. The delay along with never knowing when I was going to hear something resulted in becoming completely distressed.

11 March 2014 and 8 May 2014 when meeting was arranged for 20 May 2014. Day of the meeting and 1 August 2014 - Russell Murphy.
11 March 2014 report signed off by Keith Knight. 8 May 2014 – meeting arranged for 20 May 2014. Attended a meeting on 20 May 2014 to discuss Keith Knights findings. Received an email from Russell Murphy dated 1 August 2014.

86. The second matter held by E J Spencer to amount to a protected disclosure was the claimant's email to Steve Kellett of the 13 January 2014. This is dealt with at paragraphs 76 – 88 and 125 – 135 of his written reasons. Keith Knight was appointed to investigate the claimant's concerns which he did not uphold. The allegation is not made against him but against Russell Murphy who only informed the claimant of Keith Knight's findings and against whom there are also allegations of delay.

87. From April 2013 – January 2014 Russell Murphy was temporarily promoted to Assistant Director for CITEX West with responsibility for approximately 400 people. From February to April 2014 he temporarily performed the role of Assistant Director for CITEX East, with again responsibility for about 400 people. From April 2014 he was covering both roles. He did not know the majority of the 800 people in the East and West regions and did not know the claimant, neither was he involved in Climate Change Levy or any discussions about mitigation of fines. The tribunal accepts his evidence that the first time he was aware of the claimant's concerns was when her received Keith Knight's report sent to him by Kelly Adam on the 10 April 2014.

88. Keith Knight (Portfolio Lead for Environmental Taxes) was tasked with investigating the claimant's concerns and Russell Murphy was not involved at that point. He was responsible for those with technical knowledge of Environmental Taxes and had the technical knowledge and experience to deal with the claimant's complaint.

89. Keith Knight forwarded his 'timeline of events' to Kelly Adam and Steve Kellett on the 11 March 2014 apologising for the delay and explaining that he had received comments from various areas of the business which had taken time and the 'summarising by me has also been delayed due to other priorities'. Kelly Adam up dated the claimant on the 12 March that Keith Knight was finalising his report 'as we speak'.

<u>Keith Knight's 'Timeline'</u>

90. Keith Knight concluded that there was evidence that the claimant's views were represented at the first CIP. He had concluded on the evidence he had seen that the claimant was:

> '…incorrect, to my mind, to say that her option was not presented to the CIP as the options of issuing penalties was clearly considered, both mitigation and in full. If this was the extent of her complaint in relation to this aspect then it falls on the evidence. What I believe Sally's complaint relates to, however is that the paper drafted by Tracy and her was not presented to and discussed at the CIP in full in May.
>
> CIP was a relatively new governance process in May 2013 and was evolving. It is common, however for a panel of this nature, comprised of senior officials, to want the position and options summarised in one paper for ease of understanding. From what I have been told the contents of Sally and Tracy's paper was considered by LBS, Indirect Tax and Solicitors office in drafting the paper'.

91. He could not find evidence to support the claimant's contention that not including her paper was a direct attempt to mislead the CIP. He felt that the claimant's subsequent attempts for her paper to be submitted to the CIP 'were energetic and tipped over what were regarded by some people involved as unacceptable behaviour'. He noted there had been complaints about the claimant's behaviour when she submitted her paper to the CIP without the support of line management. There was evidence that the claimant's views were heard on the 1 July meeting and her paper was resubmitted to Indirect Tax ahead of the third CIP meeting on 10 October.

92. With regard to delay the report acknowledged some delay due to the complex legal issues in applying the penalty.

93. On 10 April 2014 Kelly Adams sent Keith Knight's fact finding report to Russell Murphy asking that he inform the claimant of the findings. She informed him however that the claimant was on two weeks leave and was content to wait until her return to hear from him.

94. On 8 May 2014 Russell Murphy emailed the claimant to arrange to meet face to face in Peterborough on 20 May 2014. The time it took to arrange this was due to his competing commitments and availability to have what he wanted to be a face to face meeting.

95. The claimant accepted in evidence that Russell Murphy was only relaying Keith Knight's report. She said that if she had been given explanations that she understood she would not have made the other disclosures. She says that the detriment is that she was given no satisfactory explanation. In cross examination she explained:

> 'Had they provided me with some answers I wouldn't be here. I wouldn't have had to raise the 3rd or 4th disclosure had the department dealt with the concerns fully in first place. I needed to understand why my information wasn't included…
>
> Their explanations didn't address the concerns I'd raised.
>
> They didn't address the contents of the protected disclosure and therefore the detriment is that it had to be raised again. Had they addressed it we could have moved on and I wouldn't be here. That is the detriment still having to do this.'

96. Prior to his meeting with the claimant Russell Murphy read Keith Knight's report and spoke to him. He was satisfied that the claimant's concerns had been addressed. The conclusion of the report, which he relayed, was that the claimant's views on the subject had been relayed and the content of her paper considered. He was clear that the concerns raised had been addressed and was simply delivering the message. The tribunal accepts his evidence that he was delivering the message and that none of his conduct was because the claimant had made a protected disclosure.

97. Russell Murphy did not give the claimant a copy of Keith Knights report as he had concerns about the references in it to the claimant's 'behaviours.' He had no other reason not to hand it over and accepted in evidence that on reflection he wished he had handed it over. He had at the time conflicting priorities with the two roles he was covering.

98. The claimant presented a 'wish list' to Russell Murphy (page 641). The first desire was to meet with Andrew Scott, the Solicitor who sat on the CIP. She accepted that he might be busy but:

> 'I really do want a conversation as to why they mitigated these penalties so low and failed to take into account the fact the business entered into contracts that were invalid for the sole purpose of exploiting exemptions and reliefs available'

99. The claimant accepted in cross examination that she did get that meeting but stated that as the solicitor did not address the issues, she then had to proceed with her disclosure to the Civil Service Commission.

100. By email of the 7 July 2014 the claimant chased a response from Russell Murphy and he replied the next day. He said he had been meaning to get in touch with her and would put some time aside to 'finalise things and get back to you'. His evidence, which the tribunal accepts, was that he was not sure what else needed to be done. The report had been completed and its conclusions relayed to the claimant. He was also temporarily covering the Assistant Director for CITEX East at that time which meant he was managing a large business with a range of challenges.

101. The claimant chased him again on the 30 July 2014. In that email she stated she had still not received an adequate response to the points she had raised. She made it clear that she was not 'going to go away on this' and suggested that if everything was above board it should not be difficult to provide answers and she still felt the only person that could do that was Andrew Scott. She did not want to 'take this further' but if she did not get an adequate response 'will go elsewhere'. The claimant explained in evidence that by that she meant take it elsewhere internally and never thought about the Employment Tribunal in 2014. It, she acknowledged would not be able to look at her technical concerns. She had not given up on her employer looking into everything properly.

102. The claimant did accept that she knew that Employment Tribunals existed but did not know about the concept of 'whistleblowing' believing it was more to do with those who went to the press. She said she did however know about protected disclosures. She hoped however that her department would address the issues she raised and whenever they had had something in the past that Policy would not address they did in the end.

103. Russell Murphy replied to the claimant in an email of the 1 August 2014. He stated that he found the tone of her email 'disappointing' and felt that

the claimant was suggesting that if the answer she got was not the 'desired one' then she would take it further. He asked her to reflect on the 'patience and considerable time that a whole range of people spent looking into the background and dealing with the range of correspondence'. Whilst acknowledging the claimant's passion he thought it worth reflecting on 'the core principles of our roles which carry different responsibilities and accountabilities'. He suggested that they had to accept the 'professionalism and integrity' of colleagues and sometime 'we may still not agree but we have to move on'. In evidence Mr Murphy explained that he wished that at that point he had encouraged the claimant to accept that she had been heard and to channel her undoubted passion into all their other challenges.

104. As Russell Murphy was about to go on holiday for three weeks he felt he had no alternative but to share the correspondence he had had with the claimant with Jason Shelley, Steve Stoddart and Keith Knight as he felt there was a risk that these matters would escalate during his absence. Although the claimant put questions to him in cross examination about this sharing the issue of confidentiality was not one of the tribunal's issues and it had not been alleged by the claimant to be a detriment. The tribunal was satisfied from hearing his evidence that he did not know that the claimant had made protected disclosures at this point.

105. It was following these exchanges that the claimant felt the need to contact the Nominated Officer, Linda Ridgers-Waite.

<u>Delay - 27 August 2014 to 6 November 2014 – Linda Ridgers-Waite.</u>
<u>27 August 2014 raised concern with Linda as Nominated Officer by attending meeting. 6 November 2014 notified by email it would be raised with an 'appropriate senior officer'.</u>

106. On 8 August 2014 the claimant contacted Linda Ridgers-Waite, Nominated Officer. They met on 2 September 2014 and the Reporting Form she completed was seen in the bundle.

107. Linda Ridgers–Waite had been employed by the respondent since 1974 and retired in 2019. She started work as an administrative officer was promoted to Inspector of Taxes in 1981 and between 2003 and 2019 worked in a variety of HR functions. She was appointed Nominated Officer in May 2006 (having been actively involved in her trade union) and remained in that role until she retired. The role required an understanding of the HMRC guidance on whistleblowing, attending regular training events on the subject, advising colleagues who had concerns and if she believed a protected disclosure was involved advising colleagues on options available to them. From her evidence the tribunal is satisfied that she was very experienced in that role and also as a trade union representative and had absolutely no doubt that she was trying to assist the claimant. She also had her own work and an enormous amount of information of a

technical nature provided by the claimant which she felt she had to get to grips with, in order to be able to assist her. She told this tribunal, which it accepts, that she could not over estimate the amount of time that she and others had to spend in getting to grips with the issues raised by the claimant. The matter had gone to the CIP three times. She read and re-read the papers. She had concerns that the claimant was approaching a very complex issue as if only her technical experience was relevant. She knew however from her trade union background that it was highly likely the head of the CIP could be called to answer questions before the Public Accounts committee. Linda Ridgers-Waite was not trying to deal with the technical issues the claimant had raised but considering the respondent's guidance and the legislation on disclosures and to work out realistic options to address the claimant's concerns. She also had experienced of writing papers for the CIP. In her experience individual submissions or papers would not be and have never been attached to the policy papers. It was the responsibility of the policy owner to address the issues raised, including responses from stakeholders and to concisely explain the options and problems or advantages of each. Individual submissions would increase the workload of the members of the CIP and would require detailed reading across to the summary paper. She could never remember doing that as a policy owner and it would be most unhelpful to the committee.

108. The claimant's case against Linda Ridgers-Waite was difficult to follow. When counsel put to her in cross examination that her allegation must be that Linda Ridgers-Waite caused delay because the claimant had made protected disclosures she replied 'no not at all'. She explained that if she had not made the disclosures then the delay would not have been an issue. It was because she had made the disclosure that delay became an issue. If Linda Ridgers-Waite had really been supporting her she would have moved things along quicker. She said that 'Linda is a lovely person but this delay did not need to happen', she accepted that she didn't have an issue with the claimant as a whistle blower and 'was supportive and a lovely lady'.

109. Linda Ridgers-Waite was supported by Kerry Black senior caseworker giving her expert advice on the HR issues involved to help her as the nominated officer and Allyson Moir who was the HR caseworker supporting Russell Murphy.

110. From the time she was first contacted by the claimant the emails show that she was seeking advice from her HR colleagues and completed her report form on 12 September 2014.

Detriment 22 – Linda Ridgers-Waite - 10 October & 22 October 2014
Email saying 'you already have the detailed reasoning behind the decision' and 'full picture on the legal arguments' & email stating this was an opportunity to review the evidence and 'see whether it can in any respect support your contention'. Also, to reconsider my request to meet with HMRC solicitor, Andrew Scott

I felt the emails were not supportive of my right to raise and have properly investigated Protected Disclosures under the Employment Rights Act. They were not the objective opinion I needed from a Nominated Officer. These caused further delay to progressing the concerns.

111. In the email of the 10 October 2014 Linda Ridgers-Waite explained how she had taken some time reading and re-reading the claimant's concerns. She expressed concern for the claimant and how this issue was impacting on her and her working relationships. She had set out her thoughts to assist the claimant in deciding how to proceed. She considered that the claimant's paper and the official paper 'cover much the same ground'. She considered that the claimant made a good point about delay and the HRA. She felt however that the official paper had also considered the impact of the HRA. She dealt with the sequence of how the papers had gone to the CIP three times which involved the rewriting of the paper and additional legal advice sought. As an independent observer she felt there was a very strong audit trail to support the final decision. She emphasised that she was raising these issues in trying to support the claimant. She explained:

> 'HR doesn't have the power to unilaterally organise a meeting between you and one of the solicitors involved. That could only be done as part of the conclusions from the investigation. I cannot say, obviously, what those would be. I am only concerned that in fact you already have the detailed reasoning behind the decision, and that this covers much of the same ground as your joint paper. I am feeling at a bit of a loss to know why you want this meeting to happen. You already have the full picture on the legal arguments which were invoked and discussed in the paperwork.'

112. She emphasised that it was the claimant's decision and that her role was to ensure the claimant was properly protected and to identify any improvements that could be made in terms of the respondent's guidance. She asked the claimant to take her time in deciding what she wanted to do.

113. The claimant's evidence was that the matter 'got stuck with Linda – caused delay'. She was very frustrated with her comment that she should 'take your time in deciding what you want to do' although she was sure she had the best intentions. The claimant felt she was 'dragging it out'.

114. The claimant put to Linda Ridgers-Waite that she tried to put her off going down the whistle blowing route and the tribunal is satisfied that was not the case. From hearing the evidence, it is satisfied that Linda Ridgers-Waite

did indeed want the claimant to consider taking a more 'strategic view'. She also felt it her role as the Nominated Officer to make the claimant aware of the difficulties she faced. She was, the tribunal is satisfied trying to be supportive. She was very clear, which the tribunal accepts, that it was not for her to agree or disagree with the points the claimant was putting forward but to bring to her attention issues that might be material.

115. The email correspondence continued, and the claimant relies upon Linda Ridgers-Waites email of the 22 October 2014 as a further detriment particularly the fourth paragraph in which she said:

> 'My concern now is your wellbeing. As you say you have had a tough time over the last 2 years, including a MI marking. This is an opportunity to review the evidence – the same evidence that the investigator would use – and see whether it can in any respect support your contention. Please do this'

116. The claimant accepted that Linda Ridgers-Waite did have genuine concerns for her well-being but stated in evidence that she was not going to drop it at this point. She felt it was her job to challenge what she thought was wrong. She made this position clear in the response of the 27 October 2014. The claimant remained adamant that she wanted a meeting with Andrew Scott the solicitor who had sat on the CIP even though Linda Ridgers-Waite had questioned whether such could be arranged. The claimant argued that the department was supposed to be 'open and transparent' and she couldn't therefore see why 'if someone wants an explanation on a decision they think was lacking full knowledge of the facts, which should have been taken into consideration and is prepared to go so far as raising a concern… then it really is beyond me why this meeting cannot happen'. The claimant said that all she was asking was to 'understand their decision more fully and discuss the issues I have raised in the correct way'. She suggested she was 'losing trust and confidence' in the department which was 'an implied term in contracts of employment'. She denied she was suggesting she might have a constructive dismissal claim.

117. At this time Linda Ridgers-Waite was working part time and engaged on a number of other difficult projects with demanding deadlines. By email of the 18 November she sent her report to Jim Harra for him to arrange for the investigation of the concern. She made it clear to him that the claimant was protected by 'whistleblowing legislation'. He wrote to the claimant on the 24 November 2014 confirming receipt and that he would be appointing someone to investigate.

<u>Detriment 21 - Jim Harra delay between 24 November 2014 to 29 January 2015</u>

118. Jim Harra has worked for the respondent for 35 years. On 16 April 2012 he was appointed as the Director General of Business Tax and from October 2016 was the Director General for Customer Strategy & Tax Design and the Tax Assurance Commissioner. On 1 October 2019 he was appointed Interim Chief Executive of HMRC and on 29 October

permanently appointed to that role and the role of First Permanent Secretary of HMRC.

119. As Director General for Business Tax and in his subsequent role Mr Harra had responsibility for the respondent's work to develop and maintain a wide range of policies including the Climate Change Levy (CCL). He did not pay any part in the discussion around the mitigation of penalties for the deficit of Levy Exemption Certificates (LECs) in Combined Heat and Power Operations (CHPs) output records. He was unaware of this matter until appointed as decision maker to deal with the claimant's complaint.

120. Jim Harra first became aware of the emails the claimant sent to Hugh Dorey and to Steve Kellet (her first two protected disclosures) when he read Val Hennelly's investigation report in May 2015.

121. As explained in his witness statement at paragraph 15, which the claimant accepted, his Private Secretary put an email out on 3 December 2014 to make enquiries in other directorates as to whether they could recommend a suitably qualified Deputy Director to carry out the investigation. On 10 December 2014 Val Hennelly's name was put forward and it was subsequently agreed that she would take on the investigation. Linda Ridgers-Waite advised the claimant by email of the 12 December 2014 that a Deputy Director had been appointed. There was then the Christmas period. Val Hennelly contacted the claimant direct on the 29 January 2015 and they spoke on the phone on 5 February 2015 after she had obtained all the CIP papers. The claimant provided her with further documentation, and they met on the 17 February. The claimant sent her further emails following that meeting. Val Hennelly met with nine people to discuss the issues raised by the claimant including Andrew Scott, solicitor on the CIP.

122. By email of the 2 April 2015 Val Hennelly provided the claimant with an update advising that her enquiries were continuing and that she would be in contact again after Easter. She then had discussions with Nikki Stinton and Steve Robinson who outlined the process of reviewing the penalties in preparation for the CIP. On the 8 April 2015 Nikki Stinton emailed Val Hennelly with details of the technical discussions which were had at the time on the mitigation of fines. The claimant also provided her with more detail on this issue.

123. In mid May 2015 Val Hennelly spoke to the solicitors and other stakeholders about including in her report an offer to meet with the solicitors as the claimant had requested.

124. Linda Ridgers-Waite contacted Val Hennelly on the claimant's behalf on the 23 April 2015.

125. Val Hennelly's finalised report was sent to Jim Harra on the 21 May 2015. As she was then on holiday they met on the 10 June to discuss it. She

had concluded that during the preparation of the papers about this issue which were considered by the CIP on three occasions the claimant's concerns communicated to Policy had been taken into account and considered by the CIP. In addition she concluded with the solicitor's advice that the time taken to reach a conclusion on appropriate handling was not a bar to imposing penalties.

126. When the claimant was taken to paragraphs 15 – 19 of Jim Harra's witness statement setting out the steps he had taken, the difficulties of finding a suitable person to investigate and how exceptionally busy he and Val Hennelly were the claimant accepted the reasons he had given stating 'I didn't know that accept it'. The tribunal accepts it as his genuine position.

Detriment 17 – 1 July 2015 – Jim Harra – email received stating the conclusion of Val Hennelley's investigation which was that the CIP paper was drafted to include our comments and conveyed all relevant information. Also, the time to notify the Lead Company of the results of the penalty did not breach the HRA.

Did not address the concerns I raised in any detail that I understood. Concerns remained unresolved.

127. Jim Harra wrote to the claimant on the 1 July 2015 summarising Val Hennelly's report and conclusions. The claimant was asked in cross examination how this letter amounted to a detriment. The claimant explained that it was because it did not address her concerns. She could not say whether he genuinely believed what he had written or not. She did not believe he had addressed the issues she had raised.

128. In his outcome letter Jim Harra summarised the issues the claimant had raised and the background to them. With regard to her first point that there had been a failure to include the views of all stakeholders he reported that Val Hennelly had concluded that the policy leads in Environmental Taxes did not set out to mislead the CIP bur had drafted papers in an inclusive way and made changes to try and reflect the claimant's input and incorporate her concerns. She was satisfied that the final papers conveyed all relevant information.

129. With regard to delay he reported that the conclusion was that the claimant's views on penalty mitigation by reference to behaviours were incorporated into the options in the first two papers presented to the CIP and that approach had been rejected by the CIP after extensive legal advice.

130. The claimant specifically asked Jim Harra in cross examination why the report did not cover section 104 of the Finance Act. He explained that the relevant body to consider that had been the CIP and he did not consider

his role that of adjudicating on or dealing with an appeal from the CIP decision.

131. In conclusion, he offered the claimant a meeting at the solicitor's office to discuss her concerns. Initially the claimant rejected this offer as she told this tribunal she expected all the information to be in the papers. She explained this to Linda Ridgers-Waite in an email of the 8 July 2015. By an email of the 13 July she was asked to reconsider her position on that.

Detriment 18 – 6 August 2015 – Val Hennelly
Email – I received one copy of each investigating officers reports into concerns raised. Both were redacted. (investigating officers were Keith Knight and Val Hennelly)

I did not believe they properly or in any depth, addressed the issues I raised. Keith Knights report was heavily redacted. Both concentrated on my alleged 'inappropriate behaviour'. It as over 18 months since I raised this on 13 January 2014 and he Protected Disclosure had not progressed.

132. By email of the 6 August 2015 Val Hennelly sent to the claimant a copy of her report and that of Keith Knight. She noted they had been redacted in line with Departmental Guidance on Subject Access Requests. Linda Ridgers-Waite was heavily involved in the redactions. There were data protection issues involved. Her understanding was that the SAR guidance was the relevant protocol on redactions. She also decided to do the redaction herself in order to preserve the claimant's anonymity rather than use the Central Redaction Team. She had various emails with the claimant in July about the redaction. The tribunal accepts her evidence that she had extensive previous experience of acting as an investigation manager when she had been advised by HR that redactions be done to comply with Data Protection and later GDPR legislation. The claimant did not ask her about redaction in cross examination. In her own evidence the claimant accepted it was 'considerate' of Linda to do the redactions to protect her but did not believe that the redactions should have been done in the first place. When asked whether she was saying the redactions were done because she was a whistle blower the claimant stated she did not know why they were done and then changed her answer to say they were done as she was a whistle blower.

133. Val Hennelly also confirmed the position on redactions at paragraph 33 of her witness statement which the tribunal accepts. She also believed they should follow SAR guidelines on redaction.

134. As with other allegations the claimant said that it 'felt like' a detriment for there to be this redaction.

Detriment 19 – 14 October 2015 – meeting with solicitors in Parliament Street
Arranged to discuss the principles upon which penalties were due, the basis for the calculation and any mitigation. It was made clear it was not to revisit the conclusion of the investigation. And: on the day I took Annual Leave and paid my own T & S to attend the meeting.

Failed to address the concerns. I had no other option than to take it to an external regulator to investigate which prolonged my involvement with this. This decision caused me stress resulting in physical symptoms. The hours I spent researching and drafting the document that was submitted to the Civil Service Commission was done in my own time. In total it took over 3 months which included time during annual leave.

135. The claimant did decide to take up the offer to meet with the solicitors and this took place on the 14 October 2015. Tracy Blundell who had contributed to the paper to the CIP accompanied her as did Val Hennelly. Also present were Andrew Scott, Gerald Thirkell, Deputy Director, Personal Tax Litigation, Solicitors office, and Patrick Clarke, Senior Lawyer, Solicitors Office.

136. Val Hennelly's notes of the meeting were sent to the claimant on the 25 November 2015. She noted that the purpose of the meeting was to allow the claimant to discuss with the solicitors who had provided the advice which had informed the BT Contentious Issues Panel (CIP) decision about the principles upon which penalties were due and the basis for calculation and any mitigation consequent to several businesses entering into arrangements to enable claims for Climate Change Levy relief on supplies of electricity. It is clear from the notes that all the lawyers contributed explaining their position.

137. In evidence the claimant maintained that they did not address the issues she had raised and believed that her interpretation of the law on the issue of mitigation was correct.

138. It is of note that in his decision at the Preliminary Hearing E J Spencer found that the claimant's belief that the CIP was in breach of a legal obligation was not reasonably held (paragraph 142.4 of his written reasons).

Detriment 20 – Failing to properly investigate issues raised by the claimant with the National Audit Office / Civil Service Commission
2 September 2016 – Jim Harra – email attached report and letter following meeting with Civil Service Commission in June 2016

Failed to address the concerns I raised with the Civil Service Commission which meant they were unable to address the issues. This meant this still had not come to an end for me. This left me feeling more frustrated and despairing.

Detriment 21 – delay
11 March 2016 submitted concerns to the Civil Service Commission. 7 November 2016 – report received by the Civil Service Commission

139. By email of the 4 January 2016 the claimant advised Linda Ridgers-Waite that she was still working on her report to the Civil Service Commission (CSC) and that she intended to send it to Linda prior to submitting it to them. Linda Ridgers-Waite had to advise the claimant that she was not in a position to assist with this as her role did not extend to supporting a complaint against the department to an external body.

140. On the 18 February 2016 the claimant copied to Jim Harra and Val Hennelly the document she intended to send to the CSC.

141. The complaint was then sent to the CSC by the claimant on the 11 March 2016 (disclosure number 3 as found at the Preliminary Hearing). The claimant expressed two concerns:

    1. That HMRC failed in their duty of care and management as provided by the Finance Act 2000 as they failed to consider and failed to collect Climate Change Levy in accordance with the relevant regulations.

    2. HMRC failed to consider mitigation of the penalties correctly (setting out two main reasons).

142. The complaint was acknowledged by the CSC on the 22 March 2016. It was explained that the Commissions interest was restricted to the actions of staff that may have been in breach of the Civil Service Code and which may have resulted in non implementation of policy. It was not clear whether HMRC had examined the case against the standards in the Civil Service Code. Although aware there had been investigations if these had not been in the context of the Code then they may now need to look at it again against the values and terms of the Code. It was suggested the claimant raise this point with her Nominated Officer. Indeed the Commission wrote to Linda Ridgers-Waite on the 23 March 2016 asking her to clarify this. She forwarded this onto Jim Harra and Val Hennelly.

143. Jim Harra responded to the Commission on the 7 April 2016 setting out the investigations there had been and the meeting the claimant had with the solicitors on the 14 October 2015.

144. On the 21 April 2016 the Commission wrote to Linda Ridgers-Waite stating that the case had been considered by their interim First Civil Service Commissioner and Chief Executive who had decided that the matter was within scope for investigation by them as the appeals body for Civil Service Code appeals. However the matter was not straightforward in that the concerns raised were of a highly technical and specialised nature. It was the view of the Commission that the HMRC investigation had not explicitly

addressed breaches of the Civil Service Code and wanted to give them a further opportunity to do so. This email she forwarded to Jim Harra. There was then discussion between Linda Ridgers-Waite, HR policy and internal governance as a result of which it was decided that the fact finder, Val Hennelly, should address the Commissions points.

145. Jim Harra and Val Hennelly suggested a meeting with the Commission and this took place on the 15 June 2016. They both attended as did Linda Ridgers-Waite. Present from the Commission was the Chief Executive Officer. Following the meeting the Commission sent some of their investigators to give the respondent an insight into the type of investigation they were looking for and what it was to cover.

146. Linda Ridgers-Waite kept the claimant updated and, on the 1 July, explained that Val Hennelly was on leave until the 11th and would probably not be able to reply immediately on her return.

147. The claimant replied on the 8 July stating that she 'had a great deal of respect for Val and I am impressed by her ability to deal with information, her professionalism and her consideration'. She told this tribunal that she stood by those words and that she had respect for Val as a colleague. She was not saying that she was lying in her report. She explained that she was not saying that the respondent was 'nasty and vindictive' towards her as a whistleblower but that her concerns were not given priority as she was a whistleblower. They were put on the 'back burner'

148. Val Hennelly had further discussions with Nikki Stinton and Steve Robinson, the Product Owners about the process of incorporating all views into the submissions to the CIP. She sent her report to Jim Harra on 25 August 2016. She focused on whether the claimant's voice had been heard rather than the merits of the technical arguments. The report took longer than anticipated as she had annual leave in July and her mother was in hospital and then had a period of rehabilitation. She concluded there had been no breach of civil service values. She considered the claimant's allegations against the Civil Service Code. Her view was that the claimant's voice had been heard as part of the collective drafting process and although her analysis had not prevailed when considered at the CIP there was no evidence of lack of honesty or integrity or any other breach of the Code.

149. Jim Harra wrote to the claimant on the 22 September 2016 with the outcome of the further investigation. He set out how Val Hennelly had concluded that colleagues in Environmental Taxes did not breach the Civil Service Code when they advised the CIP. He was satisfied that Val Hennelly had thoroughly investigated the claimant's concern and he agreed with her that it was not well founded. He realised that the claimant disagreed with the legal analysis of the matter to the experts in the Environmental Taxes Team and lawyers in the Solicitors Office but the issue was not who was right or wrong but whether there had been a breach of the Code. Val had found no evidence of lack of honesty or

integrity in the way colleagues had handled the matter. In particular she found no evidence that the claimants views were suppressed or ignored.

150. The claimant did not accept that the report had addressed her concerns.

151. The claimant's questioning of Val Hennelly focused on the technical issues before the CIP. She particularly referred to her request that independent counsel be appointed to review the CIP decision which Val Hennelly had refused. The claimant put to Val Hennelly that that request must have given her an indication that she wanted the technical aspect looked at. Val Hennelly was very clear that she was asked to do a review under the Civil Service Code and that the Commission did not want a report on the technical issues. She did not believe that counsel's opinion would change her view on whether there had been breaches of the Code. Even if such counsel had been appointed and came to a different view to the CIP it would not have influenced her view as to whether there had been a breach of the Code.

Detriment 23 – 7 November 2016 – allegation to the Civil Service Commission that the claimant was guilty of bullying others (in particular members of the policy team) which allegation had never been put to the claimant and which the claimant says was without foundation or groundless

This was an unfounded allegation I believe intended to discredit me with the Civil Service Commission as a result of raising a concern and effectively challenging senior members of staff's decision.

152. In Val Hennelly's report she made reference to relations between the claimant and the Product Owners becoming very difficult. She reports that they felt they were 'being bullied by the complainant but decided not to invoke the grievance procedure'.

153. In evidence the claimant accepted that Val Hennelly may have been told that but she should have told the claimant of it first.

154. The tribunal accepts that Val Hennelly was reporting what she had been told by those she spoke to in the Policy team (paragraph 43 of her witness statement). They were upset by the way the claimant had spoken to and treated them. She felt the need to record it in her report as there may have been an issue as to whether the claimant herself was in breach of civil service values. She put it in to show the tension between the parties.

155. Following receipt of Jim Harra's outcome letter there were a number of emails between the claimant and the Commission. In an email of the 8 November 2016 it was explained to the claimant that the Commission could only look at concerns that had already been investigated by the Department. The remit of its investigation was likely to be narrow and confined to the behaviours of the civil servants involved to examine if they

breached any of the four values set out in the Code. The much broader issue at the heart of the claimant's complaint – the non collection off taxes – was not something the Commission would be able to consider. They suggested that may best be considered by another body and suggested the National Audit Office. That would be a matter for the claimant to refer herself.

156. By email of the 24 November 2016 the claimant submitted her complaint to the National Audit Office (the fourth protected disclosure as held at the Preliminary Hearing)

Detriment 24 – 21/22 February 2017 – Nicole Stout – denying the claimant the opportunity to attend or seeking to dissuaded her from attending or denied the right to attend a Climate Change Levy Forum meeting planned for the 3 March 2017 (the relevant email being from an HR Business Partner to the Business Unit Head)

Meeting with Nicole Stout who stated that Jason Shelley had received an email saying it was not appropriate that I attend the CCL Forum meeting dated 3 March 2017 due to the National Audit Office Investigation.

157. In her further information the claimant brought this allegation against Nicole Stout. She accepted in evidence however that all Nicole did was relay information to her and that this 'was not against' Nicole, who she believed she had a good relationship with and has a 'kind heart'. She had also been prepared to give a witness statement for the claimant on the issue of remedy. She said the same about Detriment 26.

158. The email the claimant is referring to is one written by Nikki Stinton on the 9 February 2017 to Judith Kelly and others in Indirect tax. She stated:

> 'We discussed the NAO review of the CHP CIP decision back in 2013…
>
> As you are aware I am not happy with how these repeated accusations are being handled by HMRC. I am finding them vexatious in the extreme and consider that they amount to harassment of those involved. I would like to see somebody in authority push back on yet more investigations, or at least give those being accused the opportunity to know wbbghat they are being accused of and the right of reply. Knowing the outcome of the previous investigations would at least be a start.
>
> I also think it entirely inappropriate for the complainant to attend an event which is designed to look at how we can work better together when this seems to be the last thing on her mind.
> Can I ask that you consider whether in view of the latest developments, it would be appropriate for the invitation to the complainant to be withdrawn'.

159. Claire Hau's advice from HR was sought and she forwarded the email to Jason Shelley. Jason Shelley discussed the matter with Nicole Stout and

they both agreed it would be inappropriate to exclude the claimant from the meeting. They agreed that the claimant should be able to attend and the Nicole Stout would attend with her as support but also to monitor how all behaved. Jason Shelley advised Claire Hau of this decision stating that 'this relationship [between the claimant and Policy] is indeed strained to say the least but it does appear that there have been behavioural issues in both camps'

160. On the day of the meeting the claimant texted Nicole Stout to advise she would not be attending as she could not face the meeting.

161. The claimant did not put any questions in cross examination to Nikki Stinton.

Detriment 25 – Linda Ridgers-Waite – 2 March 2017 – email stating that it was never the case that I was uninvited from the meeting

This made me doubt what the truth was and who I could believe and trust.

162. Linda Ridgers-Waite wrote to the claimant on the 2 March 2017 about the NAO. She also referred to a meeting she had attended including HR and stated:

> 'They are very concerned to learn that you were led to believe you had been uninvited from tomorrow's meeting. **That was never the case –** so far as everyone was concerned you are an integral part of tomorrow's meeting. I understand that it is ironically about working together. So please go along and be your usual professional self and enjoy working with your colleagues.' [emphasis added]

163. The claimant accepted in evidence that Linda was there relaying her honest understanding.

164. The claimant was never told she could not go to the meeting. On the contrary Nicole Stout ensured and told her that she could.

Detriment 26 – 21 or 22 February 2017 - Nicole Stout – when I asked Nicole, who was copied into the email to Jason Shelley she mentioned Katherine Mansfield

I believe this is a breach of confidentiality which I believed I was entitled to under the Employment Rights Act with regard to Protected Disclosure and Employers duty of care.

165. The claimant dealt with this allegation at paragraph 277 of her witness statement. She recalled that when Nicole Stout called her in on the 22 February to discuss the CCL meeting, the claimant had asked her who else was included in the email of Nikki Stinton and was told Katherine

Mansfield. The claimant expressed her concern about the lack of confidentiality and raised this with Linda Ridgers-Waite. Nicola Stinton explained in her witness statement at paragraph 45, which evidence the tribunal accepts, that Katherine Mansfield was to be her co-chair of the meeting which was why she included her in the email.

166. The claimant again seemed to accept in evidence that Nicole Stout was just relaying, honestly, information about someone else's email.

Detriment 27 – 24 March 2017 – Nicole Stout – I was informed I was being redeployed to Customs International Trade and being removed from Environmental Taxes

I felt I was being punished and side lined from Environmental Taxes team as a result of raising a concern.

167. Nicole Stout gave evidence about the discussions she had with Jason Shelley about the claimant's potential redeployment. The claimant accepted in cross examination this was an honest account of her reasoning and thought Nicole had her best interests at heart. The move was to a different tax regime, Customs International Trade but the claimant remained at Peterborough, at the same desk and still line managed by Nicole Stout.

168. Nicole Stout first expressed concerns to Nick Hilton, Portfolio Lead Environmental Taxes on the 3 February 2017 about 'the sustainability of an ET team of 1 person in Peterborough.' She sought his views. He replied that he would not want one person on site doing any regime alone and would recommend the remaining member of staff on ET be redeployed to a different regime. Jason Shelley made it clear to her however that it was their decision.

169. Nicole Stout explained to Jason Shelley the projected workload of CCL for the upcoming year and they both felt that there were not enough cases to justify retaining the claimant in the role. Jason suggested she undertake a SWOT analysis of the strengths, weaknesses, opportunities and threats of potential redeployment. This was seen at page 1638 of the bundle.

170. One of the main concerns (weaknesses) was the loss of the claimant's expertise but as there were anticipated to be less CCL cases that negated that concern. Her main factors leading to the decision were:

    1. The claimant's health. She believed that by giving the claimant a change of scene that may help.

    2. The toxic relationship with the policy team.

3. The claimant's isolation in being the only remaining ET team member in Peterborough.

4. Nicole Stout's management time.

5. The volume of CCL work.

6. The increase in International Trade work.

171. The claimant accepted that her concern for her health was genuine and that her explanation for the restructure was her honest account. She believed however that Jason Shelley was behind this and that he had wanted her redeployed off Environmental Taxes since 2014. The claimant believed that the SWOT analysis was just a 'cover' and done to prove that this was not a detriment.

172. Jason Shelley gave evidence about the wider situation regarding the restructure. By early 2017 most of the CCL team were based in Croydon with two further ET teams in Birmingham and Newcastle. As part of HMRC's regional centre programme all offices are closing apart from 13 regional centres. Peterborough is marked for closure as they cannot recruit into that office. The claimant became the last member of Environmental Taxes. Accepting that ultimately it was his decision in consultation with his manager and Nicole Stout the factors leading to his conclusion were as follows:

1. The claimant being the only employee in ET left in Peterborough which would have left her isolated.

2. That the claimant had closed a minimal number of cases.

3. That the respondent had a long term strategy to reduce the number of ET teams nationally. Peterborough is not a long term strategic office for the respondent.

4. Nick Hilton's view was that ET work be removed from Peterborough.

5. The claimant's working relationship with Policy had not improved.

6. There was insufficient CCL work for the claimant.

7. The claimant's health.

173. It was not suggested to Jason Shelley when the claimant put questions to him in cross examination that he was motivated by the claimant being a whistleblower. Her focus was that some of the reasoning in the SWOT analysis was flawed in some way.

174. The tribunal finds that both Nicole Stout and Jason Shelley took great care over this decision even though Nick Hilton had already said the claimant should be redeployed. They did not merely act on his view but took the time to analyse the options available.

Time limits

175. The claimant explained in evidence that she did not think about Employment Tribunals in 2014 and the first time she thought she had suffered a detriment for raising her protected disclosures was in July 2016. Prior to that and particularly in 2014 she remained confident that the issues she raised would be dealt with internally. At that time she was off work unwell.

176. The claimant had obtained a medical report from her general practitioner dated 4 October 2019. This recorded that she had first presented with stress related symptoms on the 21 October 2013. She first underwent counselling in February 2015.

177. In September 2016 the clamant was off work with stress and anxiety. Subsequent sick notes were issued on the 10 & 24 October, 12 November and 8 December. The claimant had started counselling on the 24 August 2016 and had six sessions up to 19 October 2016. A further sick note was issued on 9 January 2017. The claimant attended her first appointment with the Improving Access to Psychological Therapies Service on 30 January 2017 with a follow up appointment on 6 February 2017. On 17 December 2017 the claimant again presented with ongoing low mood.

178. The claimant explained in evidence that since 2014 the only thing in her head were her concerns about the CIP. She was not able to contact ACAS but could contact the NAO as she hoped that would heal her stress and anxiety. She needed this resolved and honestly believed the respondent would resolve it but they never addressed her issues or concerns.

The Law

179. The claimant's claim is one under s.47B of the Employment Rights Act 1996. This provides as follows:-

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer."

180. S.48 of the Employment Rights Act 1996 deals with the burden of proof and the time limit within which such complaints should be brought: -

"(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

181. Detriment is not defined in the Act but as was made clear in Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337, this occurs when a reasonable worker would or might take the view that he had been disadvantaged. It was however stated in that case that an unjustified sense of grievance cannot amount to a detriment.

182. The legislative language is clear that to succeed in a claim the detrimental treatment must be "on the grounds that" the worker made a protected disclosure. In Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust UKEAT/0047/19, the EAT considered that the Tribunal in that case:-

> "53 … what the Tribunal did not specifically remind itself of was that, in order to decide this question, consideration has to be given to the mental processes of the individual or individuals concerned. This is important particularly in a case where, as I have said, it is possible that there may have been a number of influences, and more than one material influence, on the mind of the individual or individuals concerned."
>
> "54 Similarly, in relation to the burden of proof, in a decision on a section 47B claim, a Tribunal ought to refer to Section 48(2), or what it says; and indeed, without wishing to encourage excessive or over-complicated citation of authority in this area, to show some awareness of the guidance that has emerged now from the authorities on how Section 48(2) may work in practice."

183. The EAT referred to the earlier decision of Fecitt & Others v NHS Manchester (CA) [2012] ICR 372. In that case the claimants were nurses who expressed doubts about the qualifications of a colleague and although their concerns were found to be justified, the employer decided to take no action. When they pursued their concerns relations between staff deteriorated and while accepting they had acted properly the employer redeployed the nurses. Lord Justice Elias giving the decision of the Court stated:-

> "40 … the Tribunal's decision shows that it was satisfied that the reason given by the employer for acting as it did were genuine and demonstrated that the fact that the claimants had made protected disclosures did not influence those decisions. The Tribunal noted in terms at the end of paragraph 39 of its decision that "There must be a causal connection between the protected act and the respondent's acts or omissions to act". It's reasoning thereafter demonstrates in my view that it did not think there was any such causal connection. The Tribunal explained that it was satisfied that, although the employer was open to criticism for not protecting the claimants more effectively than it did, it's failure to act more robustly was not a deliberate omission and was not because the protected disclosure had been made."
>
> "41 As to the positive acts complained of by the claimants the Tribunal again found that two of the claimants were re-deployed because it appeared to management to be the only feasible method of dealing with the dysfunctional situation. The Appeal Tribunal agreed with the observations of the Employment Tribunal to the effect that it is often extremely difficult to resolve the conflict which sometimes arises within the workforce after a protected disclosure has been made. The fact that it was the claimants, the victims of harassment, who were re-deployed was obviously not a point lost on the Tribunal. It was evidence from which an inference of victimisation could readily be drawn. But the Tribunal was satisfied that the employer had genuinely acted for other reasons. Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the prescribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is been given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in Igen Limited v Wong [2015] EWCA Civ 142.
>
> …

> 50 Miss Romney submits that justice is done once it is recognised that the dysfunctional situation and the making of the protected disclosure was so inextricably interlinked that it was not possible for the employer to take action to resolve the former without necessarily engaging the latter.
>
> 51 I disagree. I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, Tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.
>
> 52 The consequence of Miss Romney's submission, however, is that there could be no explanation which the employer could offer in these circumstances which would relieve him from liability. The need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower. I do not think that can possibly be right. It cannot be the case that the employer is necessarily obliged to ensure that the whistleblowers are not adversely treated in such a situation. This would mean that the reason why the employer acted as he did must be deemed to be the protected disclosure even where the Tribunal is wholly satisfied in the facts that it was not."

184. In the case of Panayiotou v The Chief Constable & The Police and Crime Commissioner for Hampshire UKEAT/0436/13 the EAT had to consider the manner in which the appellant had pursued his complaints. It held that the Tribunal was entitled to treat that as separable from the fact that the appellant had made protected disclosures and to decide that those factors were the reason why the employer acted as it did. The court stated:-

> "44 In the present case, reading the decision of the Tribunal as a whole the Tribunal was seeking to draw a distinction between the fact of making the protected disclosures and the manner or way in which [the claimant] subsequently pursued the issues raised. The Tribunal found that the employer was motivated by the fact that (the claimant) would campaign relentlessly if he was not satisfied with the action taken following his protected disclosures. That theme emerges repeatedly as indicated from the passages set out above. It was the fact that (the claimant) would never accept any answer save that which he sought and the sheer effort required to deal with the correspondence which he generated and the further complaints he made if he were not satisfied with the action taken, together with his long absence from sickness from which he would not be returning which explained why the employer acted as it did …
>
> 45 … it is clear that the Tribunal was seeking to distinguish between the making of protected disclosures and the amounts of management time being taken up by (Mr Panayiotou) … it is clear that the Tribunal were distinguishing from the fact that (Mr Panayiotou) had made protected disclosures and the fact that, unless they were dealt with in the way that he wished, then he would not rest until he had altered that course of action. The "campaign" referred to was not the making of the protected disclosures to ensure that information was drawn to the attention of his employers. It was the continued attempts made by Mr Panayiotou to ensure that all complaints were dealt with in the way that he considered appropriate. …

> 49…as a matter of statutory construction, section 47B of ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. A protected disclosure is 'any disclosure of information', [within section 43B(1)]…There is in principle, a distinction between the disclosure of information and the manner or way in which information is disclosed…Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed…
>
> 50…that distinction accords with the existing case law, which recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself..
>
> 54 … in the context of protected disclosures the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question the Tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable …
>
> 55 In the present case, the employment tribunal drew a distinction between the fact of making the protected disclosures and other features of the situation which were related to, but were separable from, the fact that Mr Panayiotou had made protected disclosures. The tribunal explained in its summary that unless matters were handled as Mr Panayiotou believed the should be, he would not rest until he had altered that course of action. If he did not agree with the way that a disclosure was handed, he would simply complain about that as well. By the time of his dismissal, he was occupying huge amounts of management time and, for medical reasons, was no longer able to function.
>
> 56 In my judgment it was permissible for the Tribunal to treat the particular features of this case, and the consequences of the complaints that had been made as separable from the fact that Mr Panayiotou had made protected disclosures. The Tribunal were entitled on the material before it to conclude that the reason why the employer acted as it did was not the making of the protected disclosures but those other separable features. There was ample evidence before the Tribunal which entitled them to reach that conclusion. Furthermore, the Tribunal was careful in deciding which evidence, and which parts of the evidence given by particular witnesses, they believed. The Tribunal did not accept parts of the evidence put forward on behalf of the employer. It went on carefully to consider the motivation for the employer's actions. It considered carefully the question of whether the making of protected disclosures was the reason for the employer's actions and concluded that it was not. By way of example only, the Tribunal considered the impact of particular disclosures in the section detailing the narrative history of matters. It referred for example to the fact that Mr Panayiotou was not subjected to any detriment in relation to the initial disclosures and indeed the force continued to be helpful to him with his business interests between 2001 and 2006 … it interfered from that the making of those protected disclosures was not the reason why the employer acted as it did …"

185. In Shinwari v Vue Entertainment Limited UKEAT/0394/14 the EAT again found that none of the respondent's treatment of the employee after the making of the protected disclosure was on the grounds of or by reason of

the disclosure and was properly separable and genuinely for different reasons. It found that in that case the Tribunal did draw a proper distinction between the fact of making the protected disclosures and the consequences which were related to but separable from the fact that the claimant made those protected disclosures.

186. The EAT was satisfied that both the cases of Martin v Devonshires Solicitors [2011] ICR 352 and Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773 support the conclusion that it is permissible in appropriate circumstances for a Tribunal to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself provided the Tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

Time Limits

187. As set out above s.48(3)(a) provides that the claim should be presented to the Employment Tribunal before the end of the period of 3 months beginning with the date of the act or failure to act. The only power within which the Tribunal can consider extending that period is where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period and it considers such further period to be reasonable. Sub-section 4 provides that where an act extends over a period the "date of the act" means the last day of that period. There are therefore two distinct provisions with regard to a series of acts namely a series of "similar" acts or failures and "an act extending over a period" when time is said to run from the last of those acts.

188. The onus is on the claimant to show that presentation in time was not reasonably practicable. This means something like 'reasonably feasible' Palmer v Southend Borough Council [1984] WLR 1129.

189. With regard to the provision dealing with a series of similar acts or failures, in Arthur v London Eastern Railway [2006] EWCA Civ 1358 the Court of Appeal stated that it was designed to cover a case which cannot be characterised as an act extending over a period but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to be able to rely on them. The court went back to the statutory wording that they must be part of a series and the acts must be similar to one another. It held that the Tribunal should hear evidence to determine whether acts or omissions form part of such a series. The Court of Appeal looked at potentially relevant considerations as follows:-

(i) To look at all of the circumstances surrounding the acts.

(ii) Were they all committed by fellow employees.

(iii) If not, what was the connection if any between the alleged perpetrators.

(iv) Were their actions organised or concerted in some way.

(v) Why did they do what is alleged.

(vi) It is not necessary that acts alleged to be part of the series are physically similar to each other.

190. It may be that a series of apparently disparate acts could be shown to be part of a series or to be similar to one another in a relevant way by reasons simply of them being on the ground of a protected disclosure.

191. The act or failure to act from which time begins to run must be actionable under s47B, i.e. it must be proved to have been done on the ground that the worker made a protected disclosure. It was stated in Royal Mail Group Ltd v Jhuti UKEAT/0020/16 that 'if no contravening (or actionable) detrimental act is proven then the issue of time is irrelevant'. Simler J (as she then was) stated at paragraph 43:

> '…at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s48(3)(a) ERA. Acts relied upon but on which the claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes.'

Burden of proof

192. The claimant must prove that she has been subjected to detrimental treatment. In the case of Chaterjee already referred to, the court explained the way the burden of proof operates:-

> "33 Firstly, it will not necessarily *follow* from findings that a complainant has made a protected disclosure and that they have been subjected to a detriment alone that these must by themselves lead to a shifting of the burden under s.48(2). The Tribunal needs to be satisfied that there is a sufficient *prima facie* case such that the conduct falls for an explanation.
>
> 34 Secondly, if the burden does shift in that way it will fall to the employer to advance an explanation but if the Tribunal is not persuaded of its particular explanation that does not mean that it must necessarily or automatically loose. If the Tribunal is not persuaded of the employer's explanation that may lead the Tribunal to draw an interference against it that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences from all of the facts found that there was an innocent explanation for the conduct (though not the one advanced by the employer) and that the protected disclosure was not a material influence on the conduct in the requisite sense."

Submissions

193. The claimant and respondent handed up written submissions which it is not proposed to recite again in these reasons

Conclusions

194. It was clear throughout the claimant's evidence and in the questions that she put to the respondent's witnesses that she had completely misunderstood the protection given by the Employment Rights Act 1996 to those who make protected disclosures. The claim is one of detriment contrary to s47B and it must be shown that any such detriment was 'on the ground that' the employee had made a protected disclosure. The claimant frequently referred to the respondent not providing her with answers to her complaints, that their investigations did not address her concerns and that if they had done so she would not have had to make further disclosures. She treated the process as if it were in effect an appeal against the decisions of the CIP which she did not agree with. She would often state that something happened because of the CIP issue. That is not the same as it being on the ground of the protected disclosure. The claimant did not agree with the CIP decision. It was her right to raise the concerns she had about that and E J Spencer found that she had made four protected disclosures.

195. The tribunal found considerable parallels with the case of Panayiotou. The court in that case accepted that there was a distinction that could be drawn between the employee ensuring that information was drawn to the attention of the employer (which the claimant did in the case before this tribunal) and the employee's then desire to ensure that those complaints were considered in the way that he or she considered appropriate. The tribunal had been entitled to conclude that although the protected disclosure was the 'genesis' of the employer's treatment, the actions the employer then took were because of the claimant's actions subsequent to the disclosure.

196. The claimant feels, and it cannot be disputed genuinely feels, that everything that happened at work after she made her protected disclosures happened because she made them as 'but for' making them these events would not have occurred. That is not however the appropriate test. In this respect the tribunal has to accept paragraph 2 of the respondent's closing submissions and that, as submitted at paragraph 8 a distinction has to be drawn between the fact of the protected disclosure and the consequences of that disclosure.

197. In a number of areas the claimant did not seek to dispute that the evidence given by a decision maker as to why they took a particular decision or course of action was their genuine view. She even went further in praising the character of some of the witnesses, namely Linda Ridgers-Waite and Nicole Stout.

Detriment 1 – Maureen Brownlee

198. The tribunal does not find the claimant was treated detrimentally when spoken to by Maureen Brownlees. Maureen Brownlees' evidence was clear that she was asked to contact the claimant by Kelly Adams, PA to Steve Kellett. The claimant was not being told not to speak about the matter again but to allow the process to take its course.

199. If the tribunal had found that she was treated detrimentally in this respect it would not have found it was on the ground of making a protected disclosure. Maureen Brownlee spoke to the claimant because she was asked to do so. She had not seen the protected disclosure. All she knew was that the claimant felt her views had not been put before the CIP.

Detriment 2 – Nikki Stinton

200. There was not detrimental treatment. The tribunal accepts that Nikki Stinton's genuine view was that the claimant was seeking to bypass the governance process. The CIP had a number of issues to consider at any one meeting and it was customary for one paper to be put forward summarising the views on the topic. The claimant did not dispute that this was Ms Stinton's genuine view.

201. Nikki Stinton's evidence was also clear that she did not seek to exclude the claimant and her email expressly of the 16 July 2013 stated that they would consider her views. What she wanted was for the claimant to raise her concerns through her line management chain in the usual way. This was important in order to see if her line management supported her view or not. There was no detriment as the claimant remained able to raise her views but through her line management.

202. If it was a detriment it was not for raising a protected disclosure but because of the need to follow the appropriate channels.

Detriment 3 – Julia Williams

203. There was no detriment as the claimant was not being stopped from communicating about the issues but was being asked to go through the appropriate channels. Ms Williams spoke to the claimant as the Policy team were concerned about the claimant's persistent calls. Her concerns were with the claimant's behaviours rather than any of the technical issues she wished to raise. She was not threatened with disciplinary action but reminded that conduct and disciplinary action could be taken if allegations of bullying were made.

204. If there was a detriment then it was not because of the protected disclosure as the tribunal is satisfied that Julia Williams did not know of it and was not influenced in any way by the raising of such. The claimant seemed to concede in evidence that she did not know about the protected disclosure. This was an example of the claimant's confusion as to the

case being put to this tribunal as she conceded that this call was not because she had made a protected disclosure.

Detriment 4 & 6 – Meeting with Julia Williams

205. These two issues were connected as they related to the same meeting at which the claimant's phased return to work and also performance matters were discussed. There was little difference between the claimant's account of this meeting and that of Julia Williams.

206. There was no detrimental treatment. From the evidence heard the tribunal is satisfied that the claimant was not pressurised to go back to work. The policy was that a return to work should not take place over more than 6 months. Julia Williams was explaining and applying standard HR practice and guidance. She was going through the normal return to work procedures and setting out the options. Far from treating the claimant detrimentally she had already supported an extended phased return over the standard three month period.

207. The claimant was not being 'shut up' but told to let process take its course, it being clear that tensions were being caused with the policy team (Maureen Brownlees and Nikki Stinton's evidence)

Detriment 5 – 19 July 2013 telephone conversation

208. This call was part of a standard 'keeping in touch' during the claimant's phased return to work. The tribunal does not find that Julia Williams forced the claimant to increase her hours. It was the claimant who chose to do that. Julia Williams would have asked for fit notes in accordance with policy but to understand the claimant's condition and her progress in returning to work full time.

209. The claimant seemed to concede this call was not because of making a protected disclosure but stated it was an 'accumulation', a term the claimant often used in cross examination as in the claimant's mind this followed the making of the protected disclosure.

Detriment 7 – notes of meeting

210. It cannot be detrimental to forward to the claimant the notes of the meeting of the 8 August 2013. The claimant had requested the information provided.

Detriment 8 – weekly phone calls

211. Julia Williams evidence is accepted that it was common practice to speak weekly as the claimant was working remotely. As the claimant was off work with her back she had to ask about her back so as to understand her condition.

212. This was not detrimental treatment. If it was, it was in no way on the ground of the claimant having made a protected disclosure but because Julia Williams had to manage the claimant's return to work and understand her health condition to enable her to do so.

Detriment 9 - 'must improve' award

213. Julia Williams gave a balanced assessment of the claimant's performance. She gave praise where she considered it warranted in relation to technical aspects of the claimant's role. It is quite clear from her note and her evidence that her issue was not with what the claimant wanted to raised with the CIP or that she had made a protected disclosure (which the tribunal has accepted she did not know about). The concern was with the relationship with the Policy team which was clearly deteriorating. The tribunal is satisfied that Julia Williams did have genuine concerns about the claimant's behaviour towards colleagues and the way she was raising matters and the tone of emails. The marking was not given because of the protected disclosure.

Detriment 10 – Validation Panel

214. This mark was arrived at having heard the recommendations of Julia Williams. The tribunal is satisfied it was not because of the protected disclosure but the claimant's behaviour. Mr Brooks was Chair of the Validation Group and there is no evidence whatsoever that he was motivated, to record in his notes as he did, by the protected disclosure or any evidence that he was aware of it.

Detriment 11 – Performance Development plan

215. The Performance Development Plan was to help the claimant out of the 'must improve' grading and was not a detriment. It contained achievable goals to that end. No formal process was initiated by Julia Williams. This was not detrimental due to the raising of a protected disclosure.

Detriment 12 – 29 January 2014 meeting with Julia Williams

216. Julia Williams acted perfectly reasonably in raising another behavioural issue brought to her attention as it was similar to the matters already raised by her with the claimant. In evidence the claimant accepted it was reasonable to raise it with her. The allegation of 'evasion' appeared to be because when raised Julia Williams did not have anything in writing from Angela Horton. That does not amount to evasion and there was no reason why Julia Williams could not raise it at the earliest opportunity which she did. Further her evidence was that it was Angela Horton who did not want to put this in writing in case it made their relationship worse.

217. There is no evidence that the raising of this matter was in any way linked to the protected disclosure or that she knew of the disclosure by this time

Detriment 13 – 1 May 2014 – 'Must Improve' award for annual performance

218. Julia Williams had genuine reasons for this marking which were not connected to the protected disclosure. It is to be noted that the claimant did move out of this marking the following year even though she was pursuing her complaints.

Detriment 14 – appeal

219. The tribunal is satisfied that Katherine Salter did not know the claimant had made a protected disclosure. It does not accept that she failed to consider the evidence the claimant had submitted to her. There is no evidence that she was not independent.

220. In not upholding the claimant's appeal against her marking she explained she based this on the claimant's behaviours not her involvement in the CIP. This was her genuine belief.

Detriment 16 – meeting Russell Murphy - 20 May 2014

221. The claimant accepted that Russell Murphy was merely relaying to her the conclusions that Keith Knight had reached. This was virtually an acceptance by her that the communication was not because she had made a protected disclosure.

222. Mr Murphy was in any event genuinely satisfied that Keith Knight had dealt with the matters the claimant raised in her email to Steve Kellet. He went so far as arranging a face to face meeting with the claimant rather than just relaying the outcome in correspondence.

Detriment 17 – 1 July 2015 – Jim Harra

223. Jim Harra's letter 1 July 2015 to the claimant is clear in stating the conclusions of Val Hennelly's report and follows the scope of her investigation set out in the email of 5 February 2015. He was satisfied from the report that the claimant's complaint should not be upheld. His evidence that he was not looking at an appeal against the decision of the CIP was very pertinent as it has appeared to this tribunal that that is exactly what the claimant believed she was entitled to when she raised her concerns.

224. The claimant did not put to Jim Harra that he had acted the way he did because she had made protected disclosures but the tribunal is in any event satisfied that he was not motivated at all in the way he dealt with the matter by the fact of those disclosures.

Detriment 18 – 6 August 2015 – Val Hennelly

225. The report was redacted in accordance with the respondent's guidelines and for no other reason. The tribunal accepts as completely genuine the

evidence of Val Hennelly and Linda Ridgers-Waite in this respect. Linda Ridgers-Waite spent considerable time in doing this herself so she was satisfied with it and to preserve the claimant's anonymity. The claimant might disagree with the redaction but it was not done because she had raised a protected disclosure.

226. As with the allegation against Jim Harra the tribunal is satisfied that the report of Val Hennelly covered all of the points raised by the claimant and that the appropriate guidance and practice was followed in the submission of the papers to the CIP. When cross examined by the claimant on particular technical issues, Val Hennelly explained, which the tribunal accepts, that she did not see it as her role to answer each technical point the claimant raised. Her report was looking at whether the views of all interested parties had been incorporated in the papers for the CIP and she was satisfied that they were. In referring to 'inappropriate behaviour' of the claimant she was merely reporting what she had been informed by the product owners. The tribunal accepts that evidence as her genuine view.

227. The claimant also alleges in this detriment that 'the PID had not progressed'. The claimant again seems to be of the belief that there should have been a process to revisit the decision of the CIP as she did not agree with it and as she was raising a protected disclosure. This was not an appeal process against the decision of the CIP. There had been three meetings and a decision made on legal advice.

Detriment 19 - meeting with solicitors – 14 October 2015

228. This had been something the claimant had wanted and eventually agreed to. It was arranged to address her concerns although it was an unusual step to be taken. It cannot amount to detrimental treatment. The reason the claimant sees it as such appears to be because the view of the three lawyers did not accord with her own. That may be the case but there is no evidence at all that they took the view they did on the ground that she had made a protected disclosure. There is no causal connection.

Detriment 20 – failure to properly investigate issues

229. There was no detriment. Val Hennelly was only tasked with looking at breach of civil service code which she did and found that there had been no breach. James Harra, the tribunal accepts genuinely believed that this report and his decision addressed the issue about the Code as required by the Civil Service Commission. They had gone to great lengths before undertaking the further investigation to ensure they understood exactly what it was the Commission required of them.

230. It is incorrect to suggest, as the claimant does in the wording of this detriment, that the Commission were then 'unable to address the issues' due to some alleged failure in the respondent's report back to it. As is seen in the evidence the Commission had to explain to the claimant that it could not look at the non payment of taxes and referred her to the National

Audit Officer. That was due to its remit not the respondent's investigation and certainly not because of any protected disclosure.

Detriment 21 – delay

Russell Murphy

231. The claimant alleges delay between 11 March and 20 May 2014 when she met with Mr Murphy. That time was needed for Keith Knight to complete his report and for Mr Murphy to arrange to meet with the claimant.

232. The claimant alleges a further period of delay from the date of that meeting to 1 August 2014. Mr Murphy had the competing interests of managing a very large department. He believed however that the report had addressed the claimant's concerns and was not sure what more there was to do. If it were found there was any detriment to the claimant by that period of time it was not in any way because the claimant had raised a protected disclosure but due to his competing work pressures.

233. As with other alleged detriments when the claimant questioned Russelll Murphy she did not put to him that any delay was due to her raising the protected disclosure but that because she did not think he understood the issues she had to go to a nominated officer and subsequently raise her concerns with the Civil Service Commission. That is not a detriment 'on the ground that' she had made a protected disclosure.

Linda Ridgers-Waite – 27 August – 6 November 2014

234. There was no delay. Linda Ridgers-Waite was trying to get to grips with the novel technical issues to enable her support the claimant. There was nothing heard in evidence to suggest she was doing anything other than to help and support the claimant as a nominated officer. She was acting not just as a post box. That would be pointless. The whistle blower could just have sent the disclosure his or herself. The tribunal does not find that she was trying to persuade the claimant not to go down the whistleblowing route but just taking a constructive position by debating issues with the claimant. The tribunal accepts that her genuine position was at all times to provide assistance to the claimant and did not in anyway treat her detrimentally and certainly not for raising a protected disclosure.

Jim Harra – 24 November 2014 – 29 January 2015.

235. There was no undue delay. An appropriate person had to be identified at Deputy Director level to undertake the investigation. Once Val Hennelly had been contacted and agreed to take on the matter it was the Christmas period. She had to speak to a great number of people before being able to finalise her report. She obtained more information from the claimant. The claimant in evidence accepted Jim Harra's evidence as genuine of the steps he too to find an appropriate person to undertake the investigation.

236. There was no detrimental treatment in this respect. If it were seen as detrimental it was not because of any protected disclosure but the nature of process that had to be undertaken.

Second period of delay – 11 March 2016 – 7 November 2016

237. As explained by Mr Harra in his evidence, and not challenged by the claimant, the time taken included corresponding with the Commission and meeting with its representatives to understand what was required by it in the further investigation. This work had to be balanced against their other work commitments and holiday periods. There is no basis for concluding that any delay during this time was due to the claimant having made a protected disclosure.

Detriment 22 – Linda Ridgers-Waite emails 10 & 22 October 2014

238. As already noted the claimant's case against Linda Ridgers-Waite was difficult to understand it is not clear if it is still pursued. The way this detriment is framed in the claimant's further information is indicative of her misunderstanding of the legislation. She asserts that the emails of Linda Ridgers-Waite were 'not supportive of my right to raised and have properly investigated' her protected disclosures. The Employment Rights Act does not provide for that. The protection it gives is that the person raising the disclosure must not be subjected to a detriment on the 'ground' of making the disclosure but not that the matter raised must be 'properly investigated'.

Detriment 23 – 7 November 2016 – Val Hennelly

239. This was not detrimental treatment. Val Hennelly felt she had to raise this as she felt there was potential for the claimant herself not to have been acting in the spirit of the Code. It was relevant to explain the tensions between the parties. She was reporting what she had been told and not determining what had occurred.

240. There is no reason to doubt this was Val Hennelly's genuine view and must be seen against the background of Nikki Stinton's evidence of the tensions that had developed.

Detriment 24 – CCL Forum – Nicole Stout

241. It appeared having heard her evidence that the claimant was not pursuing this allegation and detriment 26 against Nicole Stout accepting that she was just relaying information to the claimant. In fact she and Jason Shelley enabled the clamant to go to the meeting even though she did not actually attend. There was no detriment

Detriment 25 – CCL Forum – Linda Ridgers-Waite

242. There was no detriment at all. Linda Ridgers-Waite was telling the claimant that she had not been uninvited and encouraging her to go to the meeting. This was, and the claimant in evidence seemed to accept, her honest understanding.

Detriment 26 – Nicole Stout informing the claimant that Nikki Stinton copied in Katherine Mansfield to her email.

243. There was a reason for Katherine Mansfield to know as she was chairing the meeting.

244. The claimant appeared to accept again that Nicole Stout was just relaying information about another's email. She made it clear she did not seek to challenge her honesty or integrity.

Detriment 27 - redeployment

245. It is not for this tribunal to consider whether this was a good business decision but whether it was made on the ground of the claimant having raised protected disclosures.

246. The claimant accepted the reasons put forward by Nicole Stout and that defeats the claim. However the tribunal has also considered the analysis carried out and had concluded that the SWOT analysis was a carefully though out piece of work and that one of Ms Stout's main concerns was the claimant's health. That the claimant's health did suffer as a result of pursuing the CIP issue was clear but that does not mean that the decision on redeployment was on the ground that the claimant had made a protected disclosure.

247. One of the concerns was the claimant's relationship with the policy team. That was not caused by the CIP issue. Ms Stout's concern was the relationship and not the disclosure. As has been made clear in the case law cited above there is a distinction that can be drawn between the disclosure itself and any dysfunctional relationship that then results from it.

248. The tribunal has also taken into account the timing of this restructure. It was approximately four years after the claimant made her first disclosure. Ms Stout had been the claimant's manager for about two years when the decision was taken. No action had been taken sooner.

249. The redeployment was for a range of reasons as found but not on the ground of the protected disclosures.

Time limits

250. The ET1 was issued on the 23 July 2017 after a period of ACAS Early Conciliation between 22 June and 4 July 2017. Only the last alleged detriment is therefore within the primary limitation period.

251. The first event the claimant relies upon as a detriment is the allegation against Maureen Brownlees on 9 July 2013. There are then allegations against Nicola Stinton but primarily Julia Williams through to May 2014. There are then various allegations against different named individuals.

252. The claimant gave evidence that it was in or about July 2016 that she first thought she was suffering a detriment because of her disclosures. She was however off sick for four months and stated she was not then fit to put in a claim. The 'only thing' in her head was NAO and her concerns. She was not she said able therefore to contact ACAS.

253. During the claimant's period of sickness absence from September 2016 to January 2017 she was, as set out above, involved in detailed correspondence with the Civil Service Commission, the National Audit Office, Linda Ridgers-Waite, Jim Harra and Nicole Stout.

254. The claimant referred to counselling that she attended but there was no evidence from that or her GP's report that she was in anyway, during that time, unable to submit her claim to the tribunal.

255. What the claimant made clear in her evidence was that she was focused on pursuing her concerns firstly with the Civil Service Commission and then the National Audit Office and was well enough to be able to do so.

256. The claimant acknowledged that the process of issuing the claim was not difficult and when she did decide to embark upon it was able to contact ACAS and submit her claim form.

257. As has been be set out above, the tribunal does not find that the claimant was treated detrimentally by virtue of the restructure. It has not found that the claimant was treated detrimentally in any respect on the ground of having raised a protected disclosure. As was stated in Jhuti the issue of time is really irrelevant as although the matter of the restructure was in time the tribunal has not found that or any other act relied upon detrimental treatment.

258. It therefore follows that all the claims have been brought out of time, it being reasonably practicable for them to have been brought in time and the claims are dismissed in their entirety.

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Employment Judge Laidler

Date 23 April 2020

Sent to the parties on: ...11.06.2020...

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For the Tribunal Office