EMPLOYMENT TRIBUNALS

Claimant: John Martin

First Respondent: Prudential Distribution Limited

Second Respondent: David MacMillan

Third Respondent: Robert Hickson

Fourth Respondent: David Ellis

Heard at: Birmingham Employment Tribunal

On: 5 – 8, 12 – 15 October hearing with parties 16, 19 and 20 October tribunal members only

Before: Employment Judge Cookson sitting with Mr T Liburd and Mrs R Pelter

Representation
Claimant: Mr A Richardson (counsel)
Respondent: Mr T Sadiq (counsel)

RESERVED JUDGMENT ON LIABILITY

It is the unanimous decision of the Employment Tribunal that:

1. The claimant's complaint that he was unfairly dismissed by the First Respondent contrary to s94 of the Employment Rights Act 1996 (ERA) is well founded and is upheld;

2. The claimant's complaint that the First Respondent made an unlawful deduction from his wages contrary to s13 of the ERA by failing to pay him his Q1 bonus is well founded and is upheld. This was also a breach of contract. The claimant is entitled to payment of an unpaid bonus of £10,800.

3. The first respondent's failure to respond to the claimant's grievance's about the non-payment of his bonus was an unreasonable failure to comply with the ACAS Code of practice and in accordance with s207A Trade Union and Labour Relations (Consolidation) Act 1992 the award to the claimant in regard of bonus should be increased by 25% ;

4. The claimant's complaints of direct age discrimination contrary to s13 of the Equality Act 2010 (EqA) against all the respondents are not well founded and are dismissed;

5. The claimant's complaints under s27 of the EqA are dismissed on withdrawal;

6. The claimant's complaints under s47B of the ERA fails and is dismissed;

7. The claimant's complaint against the first respondent that the failure to pay him 7 weeks pay in lieu of notice which was alleged to be a breach of contract or an unlawful deduction from wages fails and is dismissed;

8. The claimant's claims that he was subject to discrimination arising from disability contrary to s15 of the EqA are dismissed on withdrawal;

9. The claimants complaints under s111 and 112 of the EqA fail and are dismissed.

REASONS

Introduction

1. The first respondent in this case is a company in the Prudential group of companies. It provides insurance and pension services. The second, third and fourth respondents are senior managers of the first respondent. In the main section of this judgment the individual respondents are referred to as Mr MacMillan, Mr Hickson and Mr Ellis respectively to avoid confusion.

2. The claimant was employed by the first respondent, latterly as an account director, from 12 June 2000 until dismissal with effect on 28 February 2019. By a claim form presented on 5 July 2019, following periods of early conciliation from 8 May 2019 to 7 June 2019 in respect of the first respondent, and from 24 of June 2019 to 24 June 2019 in respect of the second, third and fourth respondents, the claimant brought complaints of:
   a. Unfair dismissal contrary to s94 of the ERA
   b. Automatically unfair dismissal contrary to s103 of the ERA
   c. Detriment contrary to s47B of the ERA
   d. Direct age discrimination contrary to s13 of the EqA
   e. Discrimination arising from disability contrary to s15 of the EqA
   f. Victimisation contrary to s27 of the EqA

g. Breach of contract/deduction from wages contrary to s13 of the ERA
h. Instructing or aiding a contravention contrary to s111 and s112 of the EqA

3. In the course of this hearing the claims of discrimination arising from disability and victimisation were withdrawn and the claims in relation to instructing or aiding contravention were not pursued in evidence, cross examination or submissions. Those claims are dismissed, the disability and s27 victimisation claim are dismissed on withdrawal and the s111 and 112 claims are dismissed because they have not been actively pursued.

4. This claim is essentially about the claimant's dismissal, set against a background of alleged discriminatory treatment and victimisation of one sort or another. In summary, the respondent's defence is that the claimant was dismissed fairly in the course of a restructuring exercise which applied across the first respondent's wealth solutions business.

5. In reaching our judgment the employment tribunal has considered:

a. An agreed bundle of documents prepared by the respondent (simply referred to as the bundle in this judgment) which runs to some 471 pages;

b. Three further bundles of documents prepared by the claimant;

c. the evidence given in the claimant's witness statement ("C1") and his oral evidence;

d. the evidence in witness statements and given orally by:
i. Mr Ellis ("R1");
ii. Mr MacMillan ("R2");
iii. Ms Doig ("R3");

e. The evidence in the witness statement of Mr Hickson ("R4");

f. A list of issues ("R5") which is included in the bundle;

g. A skeleton argument produced by Mr Sadiq for the respondent at the conclusion of the hearing ("R6") which was supplemented by oral submissions, together with a bundle of authorities ("R7");

h. A skeleton argument produced by Mr Richardson for the claimant at the conclusion of the hearing ("C2") which attached extracts from the Insurance Conduct of Business Sourcebook (ICOBS) and s138D of the Financial Services and Markets Act 2000 and which was supplemented by oral submissions ("C3");

i. A schedule of missing documents produced by the claimant (C4).

Applications made in the course of the hearing

6. I will explain briefly the circumstances which led to a number of applications being made in the course of this hearing.

7. This hearing had originally been listed to be heard in person. The first day of the hearing was conducted as a hybrid hearing with the parties attending by video link and the tribunal panel in-person. The respondents had applied for its three witnesses who were to give evidence, Mr Ellis, Mr MacMillan, and Ms Doig, to give their evidence by video. That application was agreed. Their evidence was duly given remotely.

8. The respondents made an application that this hearing should be conducted entirely remotely. The claimant objected to that application and wished to attend this hearing to give his evidence in person. Whilst the tribunal had been content to grant the respondents' application to attend by video to accommodate their witnesses, and counsel if he chose, we considered that it would be unfair to force the claimant to give evidence remotely against his wishes. This tribunal was satisfied that we would not be influenced as to the weight which should be attached to evidence based purely on whether a witness had attended before us in person or by video link. The application was refused. We made clear to Mr Sadiq that we would have no objection to him attending the hearing remotely although he chose to attend in person on all but the final day before tribunal deliberations began, when we heard submissions from the claimant.

9. On the first day there was discussion about the attendance at the hearing of Mr Hickson. For personal reasons which it is not necessary to set out in this judgment, we were informed that Mr Hickson would not be attending to give evidence in person. The claimant objected to that. The claimant sought for the tribunal to compel Mr Hickson's attendance. However, it was also made clear to us that the claimant did not wish for this hearing to be adjourned. If the hearing had been adjourned it is unlikely that it would have been possible to relist the hearing before August 2021.

10. The only way that a respondent could be compelled to attend a hearing would be by way of a witness order. On the morning of the second hearing the claimant pursued an application for such an order in respect of Mr Hickson. That application was refused as the tribunal was satisfied that it would not be in accordance with the overriding objective for such an order to be made. Good reasons for Mr Hickson's non-attendance were provided and it would be wholly inappropriate for us to have made an order compelling his attendance at this time. It would have been necessary to adjourn the hearing if we were to compel his attendance. Not only had the claimant made clear that he did not wish the hearing to be delayed, the tribunal was mindful that if Mr Hickson had been called as a witness for the claimant he could not be cross-examined by Mr Richardson as a matter of course which was clearly the purpose of seeking to compel Mr Hickson's attendance. It was pointed out to both parties that without Mr Hickson attending to give sworn evidence and be subject to cross-examination, the tribunal would have to give careful consideration to the weight which could be applied to his evidence. However, in light of Mr Hickson's personal circumstances no adverse inference was drawn from his non-attendance.

11. There had been a long-running dispute between parties about disclosure of documents. At a preliminary hearing before Employment Judge Dimbylow on 26 November 2019, conducted by telephone, a standard order was made for mutual

exchange of lists of all documents that the parties wish to refer to at the final hearing which are relevant to any issue in the case, with the provision of copies of documents if requested. At a preliminary hearing before me, again conducted by telephone, on 19 May 2020 issues relating to disclosure were raised. On behalf of the claimant it was alleged that a large number of relevant documents had not been disclosed by the respondents. The respondents disputed the existence and/or relevance of those documents.

12. I made an order that in relation to each of the documents referred to by the claimant in the document produced to me at that hearing, the first respondent was to provide clarification as to whether those documents existed; whether they were in the first respondent's possession or control; if it was accepted that they existed but the disclosure of those documents was refused, the reason for that refusal; and if it was disputed that documents existed information was to be provided about the specific searches which had been undertaken for them. Where electronic searches were undertaken the respondents were to provide details of the search terms used and details of the computer systems which had been searched. I had also ordered that if this process failed to resolve the dispute between the parties, the claimant would be able to apply for a witness order for an appropriate officer of the first respondent to give evidence as to the existence of the contested document.

13. The first respondent failed to comply with my order. It appears that responses were provided to the matters I have set out above only in the broadest terms but specific information was not provided, particularly in relation to electronic searches. The claimant made an application in writing to the tribunal for the witness order I had anticipated prior to the hearing. Unfortunately, that application was overlooked by the employment tribunal staff as the tribunal staff coped with unprecedented volumes of correspondence at a time of reduced staff being present in the office due to the continue d impact of the covid-19 pandemic. The first time it could be considered was at this hearing.

14. No satisfactory explanation was offered to the tribunal to explain the first respondent's failure to comply with my order. However, in light of the strong desire of the claimant not to delay or adjourn this hearing, we considered that we had limited options available to us. Making an order for the attendance of the witness to give evidence as to the existence of documents would have caused delay. Mr Sadiq's instructing solicitor, Ms Cooper, addressed us to explain the searches which have been undertaken and to offer an assurance on behalf of the first respondent that all relevant documents had been disclosed. In the circumstances we made clear that we would consider this as a matter which could cause us to make adverse inferences in relation to the evidence offered to us by the respondent's witnesses, but that it was in the interests of justice for the hearing to proceed.

15. This dispute about documents also led to issues in relation to the bundle of documents which became relevant to the course of the hearing.

16. We had before us a bundle of documents prepared by the respondent which reflected the documents it had sought to propose as the agreed bundle. It appears that the claimant's representatives had insisted that a large number of additional documents were included in the bundle. Ms Cooper, addressed us to explain that

she had asked for those documents to be indexed so that she could incorporate them into the agreed bundle, even though the respondents disputed their relevance. That was not done and the claimant's representatives then insisted on exchange of witness statements before an agreed bundle of documents had been finalised. The claimant produced two lever-arch files of additional documents to this tribunal which had not been included in the agreed bundle of documents which we understand to compromise the additional documents not included in the agreed bundles. Only one document in those two lever arch files was ever referred to by Mr Richardson. That tends to suggest Ms Cooper's assessment that they were not relevant was correct.

17. The claimant told us that he had not seen the bundle of documents when he prepared his witness statement. In consequence of that the claimant's witness statement does not comply with the terms of paragraph 9 of Employment Judge Dimbylow's order that the witness statements must be cross-referenced to the bundle. Mr Richardson said this was because of the respondent's failure to send them the agreed bundle. It is unfortunate that a paginated bundle of documents was only provided to the claimant at a late stage but that resulted, in part, from his representative's refusal to provide the respondents' solicitors with an explanation of the additional documents and his insistence on exchanging witness statements before the bundle had been finalised. It seems to this tribunal that both parties were at fault to some extent in this series of events. If the respondent had complied with my order as they should this deadlock could have been avoided. Both parties seem to have lost sight of their duty to cooperate with each other and the tribunal (Rule 2). These matters created some difficulties for the tribunal but we have sought as far as we can to identify relevant documents which the claimant refers to in his statement and we have done the best we can.

18. A significant number of matters set out in the list of issues are not referred to by the claimant in his witness statement. The respondent's witnesses were also subject to limited cross examination on some matters. The claimant was professionally represented throughout these proceedings. We have determined our findings of fact and our conclusions in this case based on the case that was argued before us and where matters in the list of issues were not put to the respondent's witnesses or evidence given by the claimant in his witness statement we have taken that those matters are not being pursued.

Findings of Fact

19. We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

20. The claimant was 60 years of age at the time of this hearing. He was 59 at the time of his dismissal. He is a qualified chartered insurer and has worked in the insurance and financial services industry since 1977. He joined the first respondent as a national account manager and at the time of his dismissal was employed as an

account director. It is clear to the tribunal that he has enjoyed a very successful career.

The reorganisation and the claimant's selection for redundancy

21. The first respondent's organisation is structured around various different areas of business. The claimant was employed within the intermediary sales channel which is part of "Wealth Solutions" and he was employed in a team called "Key Accounts". The background to this case is a restructuring across the Wealth Solutions part of the first respondent's business which was undertaken from 2018 onwards.

22. The key account team was established in around 2013. By January 2015 the team comprised of four account directors: the claimant, Mark Sangster, Mr Graham Taylor and Mr Ellis. All four were employed at Grade 4 which is a senior management grade. At that time the team was managed directly by Mr Hickson who was employed at grade 5. In 2015 there was an appointment process to appoint a new head of key accounts. Mr Ellis was appointed to that role. The claimant had chosen not to apply for the position. In his role as head of key accounts Mr Ellis undertook various line management responsibilities for the team. He conducted annual appraisals, half yearly reviews, handled various governance and compliance requirements and was part of the senior management team which reported into Mr Hickson which meant he attended weekly and monthly strategy and operational management meetings.

23. The claimant made a number of allegations about the appointment process for the head of key accounts role but he accepted that he did not apply for that role at the time and we have not found it necessary to make any findings on those matters beyond this.

24. In his evidence the claimant suggests that Mr Ellis was a "player manager" who, in his words, picked up" internal administration duties and attended internal meetings on behalf of Mr Hickson". The tribunal does not accept that evidence and prefers the evidence of Mr Ellis that he undertook a head of team role involving all of the duties set out in his witness statement. In essence a new layer of management was inserted between the claimant and the rest of the team and Mr Hickson. Mr Ellis continued to be a "grade 4" manager like the claimant, but we accept that Mr Ellis undertook a management role in relation to the claimant and did not do the same work. Around 40% of his work was similar to that undertaken by the claimant and the rest of the team, but the rest of the time Mr Ellis undertook management and related responsibilities.

25. In 2017 one of the grade 4 account directors, Mr Taylor retired. A decision was taken at that time to replace him with a less senior employee, employed at grade 3, Mr Douglas Mutch. Mr Mutch was given the job title of key account director. The key account team was therefore the claimant, Mr Sangster and Mr Mutch, managed by Mr Ellis. It is material to the disputes in the cases that Mr Mutch is some 15 or so years younger than the claimant. Mr Sangster is approximately a year younger.

26. In 2018 the first respondent began a restructuring process. We accept the evidence of the respondents that the reason for the restructuring was driven in part

by the need to meet the demands for a better digital offering which had resulted in a 5 year digital transformation plan, and by changes in the financial services industry more generally. We accept the evidence given in Mr Hickson's witness statement (which is not challenged in the claimant's evidence) that across the business that he managed, the transformation process has resulted in some 160 redundancies since the start of 2018 and that there were 24 redundancies in the intermediated distribution division.

27. The planning for the transformation process began in July 2018. A decision was made to reduce the size of the key accounts team which would result in the loss of one post. A decision was also taken that Mr Ellis would remain in place. Only two of the three remaining team members were put at risk of redundancy and it is the decisions about that which form the major dispute in this case.

28. In his witness statement Mr Hickson states that he told the senior leadership team reporting into him that they had to drive down costs but that he did not tell them how they were to do this (para 10, R4). He suggests that the decisions taken in relation to the key accounts team were made solely by Mr Ellis supported by a member of the HR business team.

29. The tribunal found that Mr Ellis did not give us consistent evidence about who was responsible for the decisions about the structure of the key accounts team. At times his replies seemed to be evasive. At a relatively late stage in his evidence, in answers to questions from the panel, Mr Ellis told us that a manager called Mr Brendan Hughes was involved in the approval of the transformation planning process, reporting into Mr Hickson. That evidence is not consistent with what Mr Hickson said in his statement that he was not involved. We did not have sworn evidence from Mr Hickson and could not we ask him to explain his evidence. We were not offered any evidence from Mr Hughes or the HR team involved. The tribunal panel has had to make findings on the somewhat limited evidence offered by the respondents and to decide what weight we could attach to that evidence.

30. We did not find Mr Hickson's evidence on this issue to be credible. We were told that it was necessary for Mr Hickson to achieve cost saving across the area of business which he managed and we accept that. However, it seems improbable that each of the senior managers reporting into Mr Hickson would make decisions about their teams in isolation from each other and without any input from, or the approval, of Mr Hickson. If Mr Hickson did not have any involvement it is unclear how he could ensure that the teams plans when taken together could achieve what he required. Mr Hickson's transformation plans could only be achieved if there was oversight by him of those individual decisions and approval by him of the approach that was being taken by the senior managers.

31. There were two key decisions. What the new structure of the team would be and, linked to that, which employees would be included in the selection pool for redundancy. In such a small team those decisions are linked. Mr Hickson's evidence was that the selection pool was Mr Ellis' decision (para 11 of R4). Mr Ellis told us that he did not decide that he would be part of the selection pool and he gave vague answers about whose decision it was. Mr Ellis suggested at one stage that it was the HR department's decision, but this was a structural and strategic business decision. Based on the industrial experience of the tribunal this seems

unlikely. In any event in his evidence Mr Ellis later referred to others being involved inn that decision, including Mr Hughes. This is an important matter because it is the claimant's case that because Mr Ellis undertook similar work to him, Mr Ellis should have been considered for redundancy and he should not have made that decision. Taking into account the evasive nature of Mr Ellis' replies and his inconsistent replies, coupled with the lack of plausibility of Mr Hickson's evidence and the fact his written evidence contradicts Mr Ellis' sworn evidence, we find that that the evidence of Mr Ellis and Mr Hickson is unreliable on this issue. On the balance of probabilities, we have concluded that Mr Hickson was involved in the decision making about the key accounts team structure. He approved the decision to reduce the size of the team, that Mr Ellis would not be considered for redundancy and the approach which Mr Ellis took to the pool for selection. He was much more actively involved in the decisions about the claimant's selection for redundancy than his statement suggests.

32. The bundle of documents contains various emails between Mr Hughes, members of the HR team and Mr Ellis in connection with the restructuring of the key accounts team. It can be seen from these and the option documents at pages 192 - 193 of the bundle of documents that two possible options were considered as the structure for the new team. However, it is clear from the emails between Mr Ellis and HR that this was not a case where a new structure was determined in isolation from other decisions about who would be appointed into the new structure. It is clear that considerations about who might leave the team and who might be retained were being considered at the same time.

33. Option 1 was that there would be one key account director and one account director. The options document identifies that means either the claimant or Mr Sangster will be retained. There is a comment at the bottom of that document which, we accept was the comment of the HR business partner who prepared the document not Mr Ellis, stating *"risks – both want to leave and the remaining employee is unhappy in role. Or neither want to leave. Does this set you up for the future if they're likely to retire shortly anyway?".*

34. Option 2 is that the account director role is removed entirely. The notes indicate that both Mr Sangster and the claimant would be made redundant and a new grade three key accounts director appointed. The risk identified in this case is as follows *"Risks – gap when John and Mark leave and getting the new KAD up to speed. High redundancy costs."*

35. The claimant points to the reference to retirement in the document setting out option one as evidence that his age was the reason for his selection for redundancy. In his later appeal letter the claimant referred to the fact he might wish to retire within a year or so and the tribunal panel understand this was something he was contemplating in any event. The claimant's possible retirement was something the respondent's HR team could be expected to identify as a future business risk in light of his seniority and the small size of the team. At the time of the redundancy process the claimant was 58 years of age and Mr Sangster was 57. Mr Mutch was 44.

36. In both options Mr Mutch is shown as being retained in his role. In his witness statement at paragraph 8 of R1 Mr Ellis states "*the Grade 3 key accounts director*

role was excluded from the selection pool since it was also significantly different to the account director role in terms of the accounts allocated namely less complex, smaller in terms of business production and business potential and the remuneration package was significantly less".

37. In light of the issues in this case it was necessary for us to consider whether the grade 3 key account director and grade 4 account director did the same or substantially the same work. Mr Ellis' evidence was that Mr Mutch, the grade 3 employee, did not undertake the same work as the claimant and Mr Sangster . In paragraph 4 of R1 he makes a similar point to that noted above, that the accounts that Mr Mutch was responsible for were *"less complex, smaller, less of a priority for the business than those in the account director role"*. He points to the fact that Mr Mutch was paid less than the claimant and Mr Sangster as evidence of that, although it was conceded that Mr Mutch participated in the same bonus scheme.

38. The claimant disputes that Mr Mutch did different work from him and Mr Sangster. He points out that whatever the size of the accounts that will be managed, the work involved for those clients and the products involved is substantially the same. He also points to the fact that Mr Mutch took over accounts which had previously been managed by Mr Taylor, who was employed at grade 4. Mr Ellis told us that the nature of clients was also changing, but it did not appear to be disputed that after the claimant's redundancy Mr Mutch took over some of the claimant's client relationships. In cross-examination Mr Ellis conceded that the difference between Mr Mutch, the claimant and Mr Sangster, was that Mr Mutch was "less senior", that he did not have the same knowledge and experience as the account directors but, importantly, that their day-to-day work was similar.

39. Mr Mutch was paid substantially less than the claimant and Mr Sangster. We were shown evidence that he was responsible for significantly less business. Mr Ellis referred to the fact that one of the aims of the transformation was to cut costs. The evidence is that the sales the claimant generated were substantially higher than the difference in salary between the claimant and Mr Mutch. It was reasonably put to Mr Ellis in cross examination that any consideration of saving cost by cutting salary must also consider the sales that employee is generating in assessing the significance of the salary difference. Mr Ellis replied that was a question he was unable to answer and it would have to be considered by accountants. That was a surprising answer from an experienced senior manager managing a team whose performance in providing sophisticated financial products to commercial financial services clients is measured in large part by their financial performance. It suggests that if salary costs were taken into account this was done on a superficial basis.

40. We find that the claimant as a grade 4 manager performed the same or very substantially the same work as Mr Mutch employed at grade 3. Mr Sangster and the claimant were more experienced and they generated more income. Their remuneration packages and grading reflected that, but the work they did was essentially the same as Mr Mutch. Our finding in this regard is supported by the terms of the appeal outcome letter from Mr Richard Caldicott to the claimant which is dated 17 December 2019 at page 341-343 of the bundle. This was raised with the claimant during his cross examination. In that letter Mr Caldicott states that *"in 2017 Intermediated Distribution decided that future account director roles will be*

based on the role profile and the expectations of the role holder adjusted accordingly. A subsequent decision was made to retain the existing G4 roles as it was recognised that the existing roles holders have added considerable value in the roles and it was not considered beneficial to regrade the roles." We understand Mr Caldicott to be saying in that letter that the work done by the key account team members should be regarded as grade three level work but that had not been applied to the claimant and Mr Sangster. That is consistent with the work being undertaken by all three employees being substantially the same as the claimant asserts and as Mr Ellis eventually appeared to concede, at least partially. Mr Caldicott goes on to say in this letter *"HR have confirmed that it would not be standard practice to include individuals across grades in the selection pool due to the diminished status and varied remuneration"* to support his finding that the selection pool was not unfair.

41. The tribunal has concluded that the work undertaken by the claimant, Mr Sangster and Mr Mutch was substantially the same. The differences between them in pay grade arose from their status based on past performance and experience and the remuneration which had been awarded to them as a result, not on the basis of any difference in their duties or the clients they worked for.

42. In the spreadsheet at p210 and p211 the account director roles are given an impact code of K, that is *"diminished pool, roles remains but the number of roles is reducing*" and the key account director role is coded as C, *"role remains unchanged*". However, that was not correct. We were told that when the claimant was eventually dismissed Mr Mutch took over some of the claimant's clients. In the new structure it was not only Mr Sangster whose role was changed. The conclusion of the tribunal, based on the evidence we heard, was that the two retained roles were both significantly affected by the reorganisation.

43. The emails in the bundle of documents show that Mr Ellis asked the HR business partner a number of questions between 1 – 9 August. These questions are asked in the context of the option he should choose. They show that in considering the options Mr Ellis was concerned about who would be appointed to any available roles rather than which roles were affected by a reduction in work, *"should the G4 become redundant would the G3 role not be considered a match (80%) therefore loosing [sic] two ADs isn't an option"*. The response of the HR business partner was that "*it [the G3 role] wouldn't be "suitable alternative" due to the reduction in status and remuneration so we couldn't match them into the G3 automatically. Of course one of the G4s would have the option to put their hat in the ring for the G3 position and we could offer it to them without too much hassle as it would be an alternative role for them. Does that make sense?"* (p195 of the bundle)

44. The reply from Mr Ellis to HR raises a further question, *"would the G4 would retain all benefits of the current level (i.e. salary, car allowance, pension contrib [sic], flexi leave etc?"* The HR reply to that is *"then they'd be retained in a G4 role so back to the option of a diminished pool for those two"*. The tribunal panel have concluded from these emails that Mr Ellis' concern was the impact of the first respondent's salary protection policy.

45. Discussions between Mr Ellis and the HR business partner continued over the next few days. Mr Ellis' evidence is that the content of these emails was purely

reflecting questions he was being asked by the claimant and Mr Sangster. The claimant explained in his evidence under cross-examination that at this time he and Mr Sangster had a series of meetings with Mr Ellis. He described these as informal meetings over breakfast which were held away from the office. We accept that the emails reflect Mr Ellis seeking clarification about points being raised by the claimant and Mr Sangster as he met them, but we conclude that they also reflect him trying to work out which option will minimise future employment costs including in relation to salary protection.

46. In his witness statement Mr Ellis describes these meetings in a paragraph which begins "*the business embarked on a period of collective and individual consultation*"' but the meetings Mr Ellis had with the claimant and Mr Sangster in early August were not consultation as part of the formal redundancy process which included meeting with employee representatives. These meetings occur before the announcement of any redundancy process being made. The claimant told us that these were very informal breakfast meetings. The timing of the emails which Mr Ellis sent to HR on 2 and 3 August, when emails were sent before or shortly after 9 o'clock in the morning, lends weight to the claimant's explanation for those meetings. Mr Ellis had pre-empted the collective and formal consultation process. It seems likely that Mr Ellis had hoped that either the claimant or Mr Sangster would volunteer for redundancy before the formal process began. However on 8 August Mr Ellis emailed the HR business partner to inform her that "both" (presumably the claimant and Mr Sangster) "wish to continue in the accounts director role", essentially confirming that there would have to be a formal redundancy process which would require one employee to be selected for redundancy from the team.

47. On 10 August 2018 the HR business partner emailed a number of senior managers including Mr Hughes and Mr Hickson as well as Mr Ellis and a number of others, referring to a meeting the previous day. Attached to that email are spreadsheets which set out details of different teams identifying roles which will be placed at risk of redundancy and other possible outcomes. What was said about the key account team in that spreadsheet is noted above. At page 220 there is a timetable of events which shows that the briefing for the union and employee forum was to begin on Thursday 9 August. Mr Ellis played no part in that formal consultation process and he relied on HR to tell him if anything in the collective consultation process impacted on the decisions which he had already taken.

48. The announcement to employees about the transformation process was not made until 4 September 2018. The bundle of documents contains a letter sent to the claimant dated 4 September 2018 at page 264. However, on that date the claimant was abroad on holiday. Mr Ellis states in his witness statement at paragraph 10 that individual consultation ran in parallel with collective consultation. He describes a telephone conversation with the claimant on 4 September 2018 when he spoke to the claimant about the business rationale, the diminished pool process, the impact on him and the briefing documentation. The claimant told us that what happened was that Mr Ellis telephoned him while he was on holiday to tell him that the redundancies would be going ahead. He described a short telephone call. Mr Ellis and the claimant agree that the claimant told Mr Ellis that he did not want to discuss the matter on holiday. We prefer the claimant's evidence about the nature of that telephone call. We find that the most likely version of events is that Mr Ellis simply confirmed to the claimant that the scenario which he had made the claimant

aware of in August, namely that the claimant and Mr Sangster would be put at risk of redundancy, was all that was discussed.

49. The claimant described how being given this information had a devastating effect on him. He described it as having a negative impact on his mental health. We have no reason to doubt his evidence. We accept that the claimant reached the conclusion that his dismissal by reason of redundancy was probably inevitable at this stage based on the conversations he had in August with Mr Ellis.

50. The claimant was due to return to work from annual leave from 17 September 2018. The claimant felt unable to return and was eventually signed off sick although he did some work for clients and replied to emails. He contacted Mr Ellis to tell him that he was feeling unwell. Mr Ellis' evidence is that the claimant told him that the claimant was suffering from fatigue and that it was suspected that he had an underlying thyroid problem. We accept that the claimant did not refer to mental health problems at that time.

51. The respondent's redundancy procedure required that the claimant fill in a form to enable the redundancy selection process to proceed. This was referred to as the "JAF" – the joint assessment form which includes an evaluation of the employee completed by the individual and their manager.

52. We were referred to a series of emails between Mr Ellis and Mr Martin in relation to the completion of paperwork starting on 5 October 2018 and continuing until 31 October 2018. In those emails Mr Ellis encouraged the claimant to raise any concerns he had about the process but he put the selection process itself on hold because of the claimant's absence and the timetable set by the business was not kept to. On 31 October 2018 the claimant returned the paperwork. His covering email referred to finding the process stressful and mentioned concerns about the way the process has been applied. He raises concerns about the selection pool and asks for an explanation of the rationale for that pool only including him and Mr Sangster.

53. Mr Ellis' reply on 2 November says amongst other matters, that *"the key account director at grade 3 is still part of the new TOM [i.e. the new structure] and therefore outwith the reduction in headcount. There is someone in this role and they were matched into it accordingly.*" (P310 of the bundle).

54. In terms of the application of the scoring in the "JAF" form, there were significant differences between how Mr Ellis scored the claimant and how the claimant scored himself. In accordance with the first respondent's redundancy process those differences required a meeting to discuss the scoring but the claimant was still off sick at this point. We accept Mr Ellis's evidence that he offered to speak to the claimant either face-to-face or by telephone to discuss the reasons for the scoring. In the meantime, the scoring process had also been carried out for Mr Sangster. Mr Ellis was not challenged on his scoring of the claimant.

55. On 5 and 6 November a matching panel exercise took place to decide which of the claimant and Mr Sangster would be matched into the account director role in the new structure. It was the employee who scored the lowest scoring in the exercise who would be appointed into post. Mr Sangster scored nine points less than the

claimant and accordingly it was Mr Sangster who was matched to the account director's role. It was not suggested by the claimant in evidence or cross examination that Mr Sangster's scoring was incorrect or that Mr Ellis was biased in Mr Sangster's favour.

56. The claimant was informed of the outcome of the scoring process which had resulted in his selection for redundancy, on 7 November 2018 by Mr Ellis (page 315 of the bundle). He was offered the chance to meet to discuss the scoring. The claimant emailed Mr Ellis stating that he was keen to try and be positive and resolve things constructively (p319).

57. Later that same day Mr Ellis emailed the claimant to explain the redeployment process. His evidence was that the claimant told him that he was not interested in redeployment. We accept that evidence. We note that there is no suggestion in the claimant's witness statement that he has any complaint about that.

58. On 13 November 2018 Mr Ellis wrote to give the claimant notice of dismissal with effect from 31 December 2018 (p324 to 325 of the bundle). The letter explained that the claimant was entitled to received 12 weeks' notice of redundancy in accordance with his contract of employment, but that he would be paid in lieu of notice for 6 weeks. The letter goes on to set out the claimant's right of appeal, the position in relation to redeployment, redundancy payment and holidays and pension.

59. On 17 November 2018 the claimant appealed against his dismissal (p332 – 336). His appeal letter asserts that there has been a flawed consultation process, an unfair selection pool, a flawed selection process and he disagrees with his scoring. In that email he makes clear that he considers that it is "inconceivable" that the redundancy should be "*confined to a contest between the two oldest, most experienced, most senior and best performing directors and not include the others one of which [sic] has only been in the role for one year*". He does not specifically refer to discrimination, but the tribunal accepts that claimant made clear in that appeal that he considers the procedure is tainted with a bias which relates to age.

60. The claimant's appeal was considered by Mr Richard Caldicott, chief of staff of Wealth Solutions. There was a meeting between the claimant and Mr Caldicott in Edinburgh on 29 November 2018, Mr Caldicott notified the claimant that his appeal against his dismissal by reason of redundancy had been unsuccessful by letter dated 17 December 2018 (p340 of the bundle). Although the claimant makes some criticism of the appeal decision in his witness statement no matters of unfairness in relation to the appeal were identified in the agreed list of issues and it is not necessary for us to make findings on those matters.

The HSBC tender and the alleged protected disclosures

61. Within the key account team the claimant had responsibility for the first respondent's relationship with HSBC. HSBC was one of the first respondent's most significant customers. It was also the first respondent's own bank. Despite having been given notice of dismissal the claimant continued to be an important point of contact between HSBC and the first respondent.

62. At around this time an opportunity had arisen for the first respondent to provide pension services to HSBC. The claimant was significantly involved in the tendering process for that but in the initial stages the first respondent had not performed well. It appears to be common ground between the parties that HSBC had concerns about the first respondent's digital capacity. The claimant himself made attempts to alleviate HSBC's concerns by inviting them to attend the first respondent's offices in Edinburgh where the first respondent had established a digital team.

63. On 20 December 2018 Mr MacMillan who is the Chief Customer and Distribution Officer for M&G plc and Mr Hickson's line manager, attended a call with HSBC which involved various senior managers from HSBC and the first respondent. The meeting was chaired by Ms Claire Bousfield the first respondent's chief financial officer who was the relationship manager for HSBC. Mr Macmillan's evidence was that at that meeting HSBC expressed concern about how the claimant was demonstrating the first respondent's digital capability in the course of the tender. The tender was a large one in terms of value and Mr Macmillan was understandably concerned to seek to try and improve the first respondent's chances of success.

64. After the meeting Mr Macmillan emailed various managers including Mr Gary Latimer who leads the digital team, to suggest that the HSBC team might want to come to Edinburgh to visit the digital studio. In essence Mr Macmillan had sought to offer the same solution to demonstrating digital capability that the claimant had already explored. Mr Hickson replied to Mr Macmillan to explain that the possibility of the Edinburgh visit had already been discussed but that HSBC had made clear they wanted any tender meetings to happen in Southampton not Edinburgh.

65. In his reply to an email from Mr Macmillan on 21 December 2018 (p349) Mr Hickson expressed the following concern *"My major area of concern/sensitivity however remains the potential implications of conflict and/or potential leverage regarding the HSBC Banking relationship with Prudential and HSBC Wealth Relationship with Prudential that may have without any intent occurred earlier in this RFI process. For both organisations we must keep both aspects entirely separate*". He also says that *"if HSBC feel anything other than this clear separation prevails irrespective of who has been involved they are more likely and inclined to be negative on our proposition and offering".*

66. The Tribunal understands from the evidence that we heard that this concern relates to the fact that the Prudential Group is both a supplier to, and customer of, HSBC so there is a risk that the desire to retain Prudential as a banking customer may influence HSBC's decision on the tender. This in turn could give potential for the first respondent to appear to have exercised improper leverage on HSBC in making a decision about who to award the tender to or to give the first respondent some advantage in the tender process. These concerns were being raised at this stage because it was HSBC Banking managers, i.e. those interested in retaining Prudential as a customer, who had raised concerns about the tender at the meeting, not managers from the HSBC Wealth Relationship who were running the tender process.

67. Later that same day the claimant emailed Mr Macmillan, Mr Hickson, Ms Bousfield, Mr John Foley who is the Chief Executive Officer, Ms Irene McDermott Brown who

is the Chief HR officer, Mr Caldicott and Mr Sangster to express similar concerns to those which Mr Hickson had already expressed (p350). He says *"we have never had to leverage our banking relationship with HSBC to win business and I'm not starting that game now. This tactic puts everyone in jeopardy but mostly the business that pays all of our wages."* He also says *"At the end of the day these people are my friends and I won't compromise them, their customers or the business on anything less than a fair and compliant outcome".* The end of the email says "*ps HSBC will not be coming to Edinburgh on the 7th. We need to go to them. Thereafter I have invited them to Edinburgh which they have accepted if we get through this next round, currently we are lying 3rd out of 3*" (p350). The claimant relies upon this as his first protected disclosure.

68. In that email the claimant does not explain what has happened to make him believe that any attempt has been made to "leverage" the relationship. He does not say what the "tactic" is. He doesn't say how HSBC will be compromised or what he means by a "less than fair and compliant outcome". There is no reference to any legal obligation.

69. In his witness statement the claimant says "*on 21/12/18 I was informed about activity which I viewed as a serious potential risk. It became clear that this activity was irregular and potentially placed both businesses at risk of regulatory sanction and reputational risk*" (para 231). His statement goes on to explain that his contact at HSBC Wealth had told him banking colleagues had suggested to him that the tender meeting should go ahead in Edinburgh and that he considered this unacceptable because the request had already been made by the claimant and refused.

70. At paragraph 232 of his witness statement the claimant refers to "Insurance Conduct of Business Sourcebook Rule 2.3 Inducements". He then says *"everyone working in the UK Financial Services Industry is bound by our own moral code and legislation*", but he does not offer any further explanation than that. In his claim form, the claimant suggests that Mr Macmillan's actions constituted an inducement contrary to the insurance conduct of business sourcebook but offers no further explanation.

71. At the hearing neither the claimant nor Mr Richardson were able to explain to the tribunal in terms how making a request to HSBC for its tender team to visit the first respondent's Edinburgh offices rather than the first respondent visit HSBC's offices in Southampton, was an inducement which breached Rule 2.3. The claimant appears to relate this to the banking relationship issue above, but the basis for that assertion was confused. It was not suggested that Mr Macmillan had done more than the claimant – it was not alleged he had added a "sweetener" or anything similar in return for the request being agreed for example so that the offer could be seen as a benefit to HSBC. We received no evidence that the visit suggestion has been accompanied by any threats or promises made by Mr Macmillan. It was not put to Mr Macmillan that he had made any suggestion about the Edinburgh visit knowing the claimant's suggestion had already been refused.

72. There was an immediate response to the claimant's email from Mr Hickson. He responded to offer reassurance to the claimant that the significance of the banking/wealth relationships was well understood. Separately Mr Hickson also

emailed Mr Foley, Mr Macmillan, Ms Bousfield, Ms McDermott Brown to reassure them that there was no need for them to respond to the email and to ask them to support the sentiment that the HSBC commercial banking relationship and HSBC wealth relationship should be kept separate. In response to that email Mr Macmillan emailed Mr Hickson to question why Mr Foley, Ms McDermott Brown and Ms Bousfield had ever been copied into the email by the claimant. Ms Bousfield subsequently contacted Mr Macmillan to express her surprise at the apparent change of heart by HSBC but also to express some displeasure about the claimant's actions, the email says "*we definitely need a new account lead!*". In response to that Mr Macmillan replied "*he's all over the place. Acting more like he works for them. Rob will sort*". It is clear to the tribunal that Mr Hickson and Mr Macmillan were dismayed that the claimant had involved a number of the most senior executives in the business in this matter and were concerned that by doing so he would cause them some professional embarrassment.

73. On 3 January 2019, the claimant followed up his email from 21 December with another email (p357), copied to the same group of senior managers and now including a number of additional senior managers from the M&G business. He attached to that email what he describes as a file note "Exec risk and compliance" dated 28 December 2018 (p358-359). He stated in the email that "*everyone involved needs to read this*". This is the second protected disclosure. In that note the claimant sets out some background to the first respondent's relationship with HSBC and highlights the dual relationship with HSBC. He refers to the reputational risk to the financial brands and says that the organisation must be conscious of "*heightened regulatory due diligence*".

74. In the key paragraph he said "*contrary to previous practice there has been material engagement with the HSBC banking relationship people. There is a conflict of interest here and this activity should be avoided or referred. It is important to stress that we have always developed our business with HSBC wealth on our own merits. We owe nothing to our corporate banking relationship and cannot risk the inference that one is influencing or dependent on the other*". He goes on to say *"we must appreciate that all shortlisted providers and HSBC are required to follow a procurement process with a strict risk and compliance oversight. Having successfully navigated to this stage we are now required to present a future digital proposition. Other contenders have already presented at HSBC offices so any departure from the process has to be justified*".

75. The claimant then explained the invitation to present to HSBC in Southampton and explained that he had already offered the Edinburgh facility which had been turned down. He went on to state that the repeat of the invitation for HSBC to attend the respondent's office in Edinburgh has resulted in the meeting being cancelled but that "*unless our presentation is impossible to replicate "off-site" that we respect the process and travel to Southampton. If Edinburgh is genuinely the only option then we need to produce a document detailing the unique reasons why it is in everyone's interests for HSBC to travel*".

76. The claimant then made various criticisms of the digital department and commented on the fact that he is leaving the business but is continuing to provide continuity during the handover period and talks about his past successes involving HSBC. He suggested that no-one is more experienced than he is at managing

initiative and expressed a desire to avoid seeing years of work "potentially go to waste or be credited elsewhere". At the conclusion of the email he says *"Finally, having always been paid on results, nothing changes here, and I expect to be remunerated for success in sales production achieved*". To the tribunal these comments suggest that the claimant is mainly concerned that the actions of his colleagues may have jeopardised the prospects of the tender succeeding and the financial advantage that might have offered the claimant.

77. In that document the claimant refers to there being a conflict of interest, but he does not say that the conflict of interest is in itself a breach of a legal obligation or explain what breach of a legal obligation he says has occurred. He does not refer to Rule 2.3 of the Insurance Conduct of Business Sourcebook Rule 2.3. The claimant says the conflict should be "avoided or referred" and "*that it is important to avoid any risk of an inference being drawn that one relationship is influencing the other*". He does not say who that inference may be drawn by or what the implications of that might be.

78. The final alleged protected disclosure was sent on 28 February 2019 by the claimant to Michael Wells and John Foley and is headed cause for concern (page 446 of the bundle). The email begins *"I've never been a good loser, but our failure to secure this recent +£300 m pa opportunity into the Prufund really grates*." Later he says *"due to this experience with "new" M&G Prudential I feel duty bound to bring some serious concerns to your attention. There is a worrying level of incompetence, conduct risk and apathy across the business. Admittedly, lots of smart new people saying the right things, but in my experience they are worryingly ineffective when it matters. I have produced a short report which highlights the key issues in this case – attached together with the original file note sent to the Exec 28/12/18*". The only attachment to that document which the tribunal's attention was drawn to is at page 447 – 448 which is a further copy of the document attached to the email of 3 January 2019.

79. There is no reference to a specific legal obligation nor is it clear how "incompetence", "apathy" and "ineffectiveness" could amount to a breach of legal obligations in this context. It is not clear what the claimant means by "conduct risk" and this is not explained in his witness statement.

The extension of the claimant's notice period

80. The claimant's involvement in the HSBC tender had arisen close to the date his employment was due to end on 31 December 2018. A decision was taken by Mr Hickson to extend the claimant's employment and on 27 December 2018 Mr Ellis wrote to the claimant at page 354 in the bundle. This provides that the claimant's leaving date would now be 31st of January 2019 to allow additional time for the handover of key accounts and the letter also stated, "as discussed", the claimant would still be paid in lieu of seven week's notice.

81. On 8 January 2019 the claimant wrote to Mr Ellis querying the terms of that letter. His expectation was he would be given a new 12 week notice period from 31 January 2018. This would mean the termination of the claimant's employment would be the end of April 2019. Mr Ellis responded on the same day to inform the claimant that he was being given 12 weeks' notice from the date the variation had

been agreed which was the 27 December 2018 notifying him of the new leaving date of 31 January 2019. The claimant would work 5 of those weeks so be paid the balance of the contractual entitlement of 7 weeks. The notice given on 27 December 2018 mirrors the original notice of termination the claimant had been given in October 2018.

82. On 12 February 2019 the claimant's employment was extended again. This time the respondent did not restart the contractual notice but instead extended the period of time the claimant would be required to work of his notice period and reduce the amount of payment in lieu of unworked notice. As a result the claimant's employment ended on 28 February 2019.

83. The claimant was unhappy about this. He believed that the respondent should take the same approach that it had done previously. However, the claimant did not give us evidence that he had reached any express agreement with Mr Hickson or Mr Ellis in relation to this matter. He regarded the payment of the "in lieu" element as a benefit which was being withdrawn. In his claim the claimant asserts that this change in relation to his notice arises from the fact that he had made a protected disclosure or is direct age discrimination. These allegations appear to arise from a general sense that he was being treated differently from other employees and that he was being treated unfairly but he did not give us evidence of how other people had been treated differently who were otherwise in similar circumstances to him nor did he explain why he connected this treatment to his perception of unfairness.

84. The claimant did not allege or give us evidence to suggest that during the final four weeks of his employment he did not have work to do. Although we were not taken to specific documents it would appear that during this final period the claimant was engaged in handing over his clients.

The Q1 Bonus

85. At around the same time, Mr Ellis was considering the claimant's bonus entitlement for the final period of his employment. The first respondent has a bonus scheme for employees at the claimant's grade. The terms of that scheme are set out in the Intermediary's Bonus Booklet Accounts Director Renumeration Plan 2018 (simply referred to as "the bonus" in this judgment). This is found at ages 152 to 177 in the bundle. Alongside performance in role, the amount to which an account director can earn is qualified by their performance in relation to compliance. This is measured by something called "the Quality Balanced Scorecard". That measures any issues relating to non-sales performance such as compliance with the first respondent's policies on compliance, including entertaining, the submission of key account reviews and other factors. Entitlement to bonus can be affected by a "Fail" which is classed as a regulatory or technical failure which would or could result in a detrimental customer impact or a failure to meet Quality Balanced Scorecard" requirements.

86. Bonus is paid quarterly. Bonus is paid the month following the end of a quarter, so bonus payments are made in May for Quarter 1 (which is January – March); August for Quarter 2 (April – June); November for Quarter 3 (July – September); and February for Quarter 4 (October – December).

87. It appears that bonus entitlement is initially assessed by line managers with information on compliance from the compliance team who will identify any “Fails”. There is an appeal process if a fail is identified which is determined by the intermediaries sales director but the final Operational Sales Remuneration Committee ("the Committee") makes decisions about reducing or withholding bonuses – that committee comprises 5 very senior executives and is chaired by Ian Luke, Group Reward Director, M&G plc.

88. We received evidence from Ms Heather Doig who is the first Respondent’s Head of Reward. She is the secretary for the operational Sales Remuneration Committee and for the Sales Remuneration Committee. She was a credible witness who was familiar with the bonus scheme rules and process but she was candid about the fact that she is not a member of the committee and she would not have played any part in the decisions in relation to the claimant’s bonus. We did not receive evidence from any individual who would have played any part in the final decision-making stage. The claimant’s bonus was never considered by the committee because one of its members, Ms Nimmo who was Head of HR for Wealth Solutions, told Ms Doig that the claimant was pursuing litigation against the fist respondent and “the bonus issue would be resolved via that route” (paragraph 18, R3)

89. The claimant’s sickness absence from the end of his annual leave on 17th September 2018 until 19th November 2018 could have resulted in his bonus for the 4th quarter of 2018 being partially withheld. The scheme rules contain a provision allowing an affected employees line manager to exercise their discretion to recommend that bonuses reduced or withheld for sick leave absence and Mr Ellis and Mr Hickson exercised this discretion and recommended to the committee that the 4 Quarter 4 be paid in full.

90. The claimant recorded three “balanced scorecard fails” in December 2018 which under the rules of the bonus scheme would impact on his bonus for Q1 in 2019. The claimant did not appeal against those fails but his evidence was that he still expected to receive his bonus because he would be able to satisfy the committee he should still be entitled to it. Clearly there were some unusual factors in his case, not least that at the time of the relevant fails he had been leading on a tender which he suggested would have been worth over £300million to the first respondent. Ms Doig’s evidence was that three fails could result in a 50% reduction to the bonus which would otherwise have been paid on the basis of performance but the committee could have decided to pay the bonus in full. She told us candidly that this was not a situation she had ever come across before and she thought it would be unusual for the committee to consider three fails.

91. Mr Ellis evidence was that by email on 28 January 2019 he was informed by a risk & controls analyst, that the claimant had three scorecard fails in quarter one. He says that those scorecard fails were for the claimant (1) not logging retrospectively business entertaining within the required time frame of 5 days; (2) not loading the December 2018 compliance return on time and (3) failing to complete and submit account plans for Q4 2018 on time. Mr Ellis discussed this with Susan Crawford, Risk & Controls Manager and they also discussed the claimant's failure to pre-authorise business entertaining spend that was above policy limits. This related to the meal the claimant had had with his HSBC contact on 21 December 2020 which

had resulted in the alleged protected disclosures. Mr Ellis' evidence was that this would have amounted to a fourth scorecard fail. That would mean a 100% loss of bonus. Mr Ellis informed Ms Nimmo of his conclusions. Mr Ellis recommended to Mr Hickson that the 100% loss of bonus should be reviewed by the sales remuneration committee "because of the claimant's mental health issues" which Mr Ellis suggested could have influenced his behaviour. This approach was approved by Mr Hickson.

92. Although this was not fully explained to us, by the time Ms Doig was reviewing the papers for the sales committee the claimant was identified as having three not four scorecard fails. These were his failure to get retrospective approval for exceeding allowable business expenses, for not completing compliance forms by the month end deadline and for failing to submit account plans for the final quarter of 2018 within the relevant time scale. The late submission of entertaining expenses appears to have been dropped. This explains why Mr Ellis referred a 100% reduction in bonus but Ms Doig to a 50% reduction. The claimant's then solicitors had written to the first respondent raising complaints of unfair dismissal and age discrimination on 21 February 2019 this is what appears to have prompted Ms Nimmo to tell Ms Doig not to submit the claimant's case to the Operational Sales Renumeration Committee. However, by the time the matter was passed to the committee for consideration it had been accepted that the claimant was entitled to 50% of his bonus. That is apparent from Ms Doig's evidence so the issue for the committee would have been whether the balance of 50% would be withheld because of the scorecard fails.

93. The claimant's employment ended before the sales remuneration committee was due to meet. In any event the bonus payment would not have been paid until May, that is one month after the end of the first quarter of 2019. When he received no payment the claimant raised a grievance on 29 May 2019 but the respondent refused to consider that because its policy on post termination grievances meant that grievances must be submitted within two months of termination of employment. It was not explained to the tribunal how the claimant would have been able to raise a grievance about the non-payment of a bonus not payable until May within that timescale.

94. The claimant did not dispute Mr Ellis evidence that the amount of the bonus, if paid in full would have been £10,800.

Submissions

95. Both parties made written submissions which due to their length we do not repeat here, supplemented by oral submissions highlighting relevant evidential matters in support of those submissions. Mr Sadiq helpfully provided with a bundle of the relevant authorities referred to in his submissions.

The Law

96. The relevant statutory provisions which fall to be determined in this case are:

97. Age discrimination Equality Act 2010 (EqA)

s13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

s136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

98. Protected Disclosure claims under the Employment Rights Act 1996 (ERA)
s43B.— Disclosures qualifying for protection.
(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

[…..]

s47B (ERA) Protected disclosures.

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

S 103A (ERA) Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

99. Unfair Dismissal

s98 ERA

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

[….]

(c) is that the employee was redundant,

[…]

(4) the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

s139 Redundancy ERA

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)the fact that his employer has ceased or intends to cease

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business—

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

100. S13 ERA - Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

s27 ERA— Meaning of “wages” etc.

(1) In this Part “wages” , in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise…

s207A Trade Union and Labour Relations (Consolidation) Act 1992: Effect of failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures : adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Age Discrimination

101. An employer directly discriminates against a person if it treats that person less favourably than it treats or would treat others, and the difference in treatment is because of a protected characteristic.

102. Direct discrimination is rarely blatant, and the law recognises that it is unlikely that an employer will be explicit that its motives for a particular act are related to a protected characteristic. For this reason, the legislation applies the burden of proof for a claimant bringing a claim in a particular way. If a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate — S.136 EqA.

103. The approach we should adopt was explained in *Laing v Manchester City Council and anor* 2006 ICR 1519. A claimant can establish a prima facie case of direct discrimination by showing that he or she has been less favourably treated than an appropriate comparator. At the first stage 'the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn'. That requires that we consider 'all material facts" but not the employer's explanation. It is only if the claimant succeeds in establishing that less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment.

104. Further, something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. As explained in the judgement of Lord Justice Mummery in *Madarassy v Nomura International plc* 2007 ICR 867, CA, *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' In determining whether the claimant has gone from showing that there could be discrimination to showing there are facts which suggest that discrimination has occurred we can take into account any evasiveness or inconsistency in the employer's case. However, the fact that the claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination (*Glasgow City Council v Zafar* 1998 ICR 120). In *Chief Constable of Kent Constabulary v Bowler* EAT 0214/16 Mrs Justice Simler explained as follows *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic*.' Unreasonable treatment may go to credibility, but our prime consideration is likely to be whether the primary facts we find provide another and cogent explanation for the conduct.

105. If an employment tribunal has decided to draw an inference that has enabled the claimant to show a prima facie case of discrimination, it must uphold the complaint of discrimination unless the respondent can prove a non-discriminatory explanation — see S.136(2) EqA.

106. In *Talbot v Costain Oil, Gas and Process Ltd and ors* 2017 ICR D11, EAT, His Honour Judge Shanks provided employment tribunals with the following principles to consider when deciding what inferences of discrimination may be drawn:

    a. it is very unusual to find direct evidence of discrimination;

    b. normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;

c. it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances;

d. the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;

e. assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities;

f. where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations;

g. the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;

h. if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

107. When deciding what inferences can be drawn when considering whether a prima facie case has been made out for the purposes of applying the shifting burden of proof rule, the respondent's explanation for the alleged discriminatory treatment should generally be discounted, because this is a matter for the second stage (i.e. consideration of whether the respondent can prove that discrimination has not occurred based on the evidence presented). However, we are permitted at the first stage to take account of the respondent's rebuttal of any evidence adduced by the claimant to establish a prima facie case. If and when the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931).

Unfair Dismissal

108. Where an employee argues that his dismissal was not by reason of redundancy, the statutory presumption under S.163(2) ERA that a dismissal is for redundancy does not apply and the employer must show the reason for dismissal.

109. For a dismissal to be by reason of redundancy, a redundancy situation must exist bearing in behind the statutory definition or disappearing work or a reducing

requirement for work of a particular kind. However, it is not for tribunals to investigate the reasons behind such situations. A good commercial reason was enough to justify the decision to make redundancies (*James W Cook and Co (Wivenhoe) Ltd v Tipper and ors* 1990 ICR 716, CA). Any employer does not have to show that redundancies are required to save a business. It may simply decide that it can produce the same results in a more efficient way.

110. Guidelines for what might be expected of a reasonable employer in making redundancy dismissals was set out in *Williams and ors v Compair Maxam Ltd* 1982 ICR 156, EAT. In assessing these guidelines we must ask ourselves whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

111. The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

    a. whether the selection criteria were objectively chosen and fairly applied;

    b. whether employees were warned and consulted about the redundancy;

    c. whether, if there was a union, the union's view was sought; and

    d. whether any alternative work was available.

112. As our findings of fact identify, the claimant's case of unfairness dismissal relies upon his selection for redundancy and more particularly the pool for selection used.

Identification and application of the pool for selection for redundancy

113. In the absence of a customary arrangement or agreed procedure that specifies a particular selection pool, employers generally have a good deal of flexibility in defining the pool from which they will select employees for dismissal (*Thomas and Betts Manufacturing Co v Harding* 1980 IRLR 255, CA). However, the employment tribunal must be satisfied that the employer acted reasonably in the circumstances.

114. Our attention was rightly drawn to the guidance in *Capita Hartshead Ltd v Byard* UKEAT/0445/11/R. In that case the claimant was selected for redundancy but was the only person in the selection pool. That was held to be unfair by the employment tribunal because there were other employees who could have been included in the pool; and that it "took a lot of value away from the resultant consultation period activated by the claimant being told that she was at risk of redundancy but in a pool of one".

115. The EAT dismissed the appeal on the basis that the ET was entitled to scrutinise the decision in the light of s98(4) of the ERA. The statement of Mummery J in the case of *Taymech v Ryan* [1994] EAT/663/94 that "the question of how the pool should be defined is primarily a matter for the employer to determine" did not mean that the Employment Tribunal was precluded from holding that a decision by an employer was flawed.

116. The Honourable Mr Justice Silber reviewed relevant authorities and said the following

> *“Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that*
>
> a. *"It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]*
>
> b. *[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);*
>
> c. *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan [1994] EAT/663/94);*
>
> d. *The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that*
>
> e. *Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.”.*

117. We must judge the employer’s choice of pool by asking ourselves whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in *Kvaerner Oil and Gas Ltd v Parker and ors* EAT 0444/02, *‘different people can quite legitimately have different views about what is or is not a fair response to a particular situation … In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band*.’

Protected disclosures

118. The relevant legislative provisions are set out above.

119. Section 43B(1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the ‘reasonable belief’ of the worker:

> a. be made in the public interest, and

b. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.

120. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure. As the EAT put it in *Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14, there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.

121. The wording of S.43B(1) indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. The statutory language is cast in terms of 'the reasonable belief of the worker making the disclosure'. In *Korashi v Abertawe Bro Morgannwg University Local Health Board* 2012 IRLR 4, the EAT held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. For example in the first instance decision of *Carmichael v Torch Partners Corporate Finance Ltd* ET Case No.2202141/15 a tribunal rejected the claim of C, the former managing director of TPCF Ltd, that he had made protected disclosures in a meeting when he complained to the CEO about the way in which some valuable shares that the company had acquired had been transferred to an employee benefit trust rather than being treated as an asset on the balance sheet. The tribunal found that C's motivation for raising this was his concern to receive some share of the return on the investment. It was only later, when he was dismissed following this meeting, that he sought to put his complaint in terms of the company's failure to file fair and true accounts and the CEO's fiduciary and statutory duties to the company. The tribunal noted that C had a long and sophisticated background in finance and that, had he wanted to, he would have been well able to articulate the alleged illegality rather than allude to it in the vague terms he used at the meeting.

122. The requirement that the worker's belief that information tends to show a relevant failure must be 'reasonable' indicates that there can be a qualifying disclosure of information even if the worker is wrong.

123. However, truth and accuracy are not entirely irrelevant considerations when determining whether a worker has a reasonable belief. Where the claimant relies on breach or likely breach of an unspecified legal obligation as the relevant failure, he or she may have difficulty in persuading a tribunal that his or her belief was reasonable.

124. In the *Cavendish Munro Professional Risks Management Ltd v Geduld* case (see above) the EAT considered what amounts to a 'disclosure of information' for the purposes of S.43B. In its view, the ordinary meaning of giving 'information' is 'conveying facts'. Later cases have shown, this does not mean that we should make an unduly rigid distinction between information and allegations. In *Kilraine v London Borough of Wandsworth* 2018 ICR 1850, CA, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might

also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication, but a statement which is generally devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure has or is likely to occur.

125. Disclosures relating to criminal offences and breaches of legal obligations. Following the Court of Appeal's decision in *Babula v Waltham Forest College* 2007 ICR 1026, CA a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based. It is sufficient that the worker reasonably believed such an offence or legal obligation existed. Where the disclosure is claimed to show a breach of a legal obligation under S.43B(1)(b), the worker is not required to specify exactly what legal obligation he or she has in mind but the nature of the legal obligation must be clear. Some specificity is required. In *Fincham v HM Prison Service* EAT 0925/01 the EAT upheld an employment tribunal's decision that an employee's complaint that she felt 'under constant pressure and stress' did not identify a potential breach of the implied contractual term of trust and confidence. Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'.

126. A worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under S.43B(1)(b). Where it is 'obvious' that some legal obligation is engaged then the disclosure can potentially qualify for protection without specifics as to the legal obligation envisaged. However, in less obvious cases, the worker will have to at least identify the nature of the legal wrong that he or she believes to be at issue, as opposed to setting out a mere moral or ethical objection.

Discussion and our Conclusions

127. The list of issues the parties had agreed included in the bundle of documents raise a number of questions for this tribunal. To assist the parties to understand our decisions in this case we have answered those questions in the terms asked.

Age discrimination (issues 1-3)

128. *Issue 1: Did the First, Second, Third and/or Fourth Respondent directly discriminate against the Claimant because of his age, specifically his particular age and/or his age group (over 55) by subjecting him to each of the following detriments*
    a. *The claimant was pooled together with Mr Sangster to be considered for redundancy, without the two younger members of the team;*
    b. *The claimant was not considered for alternative employment*
    c. *The claimant was dismissed;*
    d. *The claimant was paid only 3 weeks pay in lieu of notice rather than the 7 weeks that had been agreed;*
    e. *The claimant was not paid his Q1 bonus.*

Was the pool tainted by direct discrimination?

129. We considered whether the claimant had established a prima facie case of direct discrimination by showing facts from which an inference of discrimination could properly be drawn. We reminded ourselves that it is not enough to show a difference in treatment, there has to be something to suggest that was because of the claimant's particular age or age group.

130. We were not assisted by the fact that nowhere were we told who the comparator the claimant relies upon is, except perhaps in question (a) which suggests the comparators are Mr Mutch and Mr Ellis, the Fourth Respondent. We have therefore looked at questions b, c, d and e by reference to a hypothetical comparator. If the comparator is someone whose circumstances were the same as the claimant but in a different, younger age group we considered that should be a hypothetical Grade 4 account director who was not over the age of 55.

131. We found that the claimant had not shown a prima facie case that the reason for being pooled with Mr Sangster was his age. We were satisfied that respondent's had refuted any inference of discrimination because the evidence of Mr Ellis' emails was that the reason why the claimant and Mr Sangster were pooled to be considered for redundancy was the fact Mr Sangster and the claimant were the only grade 4 account directors without management responsibilities. That was what distinguished them from Mr Mutch, because he was grade 3, and Mr Ellis, because he had management responsibilities.

132. We did consider whether in relation to this matter we should draw an adverse inference in relation to the failure of the respondent to comply with the orders in relation to disclosure and from the unreliability that we found in the evidence offered to us by Mr Ellis and Mr Hickson. The failure to comply with the disclosure order was a serious matter, but what struck the tribunal in this case was the volume of documents both in the agreed bundle and the claimant's bundles of documents which we were never referred to and by the fact that a number of documents which were clearly not helpful to the respondent were documents the claimant had not previously been aware of, such as the options document which refers to retirement. These had been disclosed Other than a script document which it became clear had been omitted from the bundle by an error and which the claimant's representative had seen in any event, and a vague reference to some emails by Mr Ellis, there was no suggestion in the course of the hearing that there were missing documents. We were satisfied that material relevant documents had not been withheld.

133. For the reasons explained below we found unfairness in how the pool for selection was determined, but the evidence was that because of a desire to retain in the team the role of the employee, who was employed on what was considered to be the "correct" grade for the responsibilities of the account director role, as set out in Mr Caldicott's appeal response. Whatever the vagueness of the evidence we heard from Mr Ellis we were satisfied by his evidence that the reasons for the design of the pool was about the employee's grades. Grade and age are not intrinsically linked. If proof of that was needed, Mr Hickson is a grade 5 and is younger than the claimant.

134. The tribunal panel had been concerned about the evasive nature of Mr Ellis' evidence, the fact that Mr Hickson had suggested in his statement that he played no part in the decision and the fact HR had appeared to raise proximity to retirement age as a potentially relevant matter. We did not find the distinction between the respondent's explanation for the alleged discriminatory treatment to only be considered at the second stage in the assessment of the possible reversal of the burden of proof, and the rebuttal of the claimant's prima facie case which is possible at the first stage, an easy one to make in this case. In case we were wrong about the claimant meeting the initial burden to show a prima facie case, we also considered whether the respondents had shown us, on the balance of probabilities that they had not directly discriminated against the claimant. We were satisfied that the respondents had shown that the reason for the difference in treatment was because of the grades of the employees (in the case of Mr Mutch) and the fact that he performed a different team management role (in the case of Mr Ellis) and not because of age. We were satisfied that the reason why the claimant was pooled with Mr Sangster alone was because they were the only grade 4 account directors without management responsibilities. We were satisfied that a hypothetical grade 4 account director who was 55 or younger would have been pooled for redundancy with the claimant and Mr Sangster.

Alternative employment?

135. The claimant gave us no evidence that he had expressed any interest in alternative employment, that he applied for any roles or that he was aware of any alternative employment which was available but not offered to him. He failed to establish a prima facie case of direct discrimination by showing facts from which an inference of discrimination could properly be drawn in this regard.

Discriminatory dismissal?

136. We have concluded that the claimant's inclusion in the selection pool was not because of his age. He was dismissed because he did not score as well as Mr Sangster in the scoring process that was applied to the pool. It was not suggested to Mr Ellis that the scoring between Mr Sangster and the claimant was discriminatory. That is not alleged in the claimant's witness statement. We find that the claimant failed to establish a prima facie case of direct age discrimination in this regard by showing facts from which an inference of discrimination could properly be drawn.

137. We also considered what the position would be if we should have reversed the burden of proof. We concluded that the evidence showed that the reason the claimant was dismissed was because he was the lowest performing grade 4 account director in the redundancy selection scoring and not because of his age.

Payment in lieu of notice as detriment

138. The claimant failed to establish a prima facie case of direct discrimination by showing facts from which an inference of discrimination could properly be drawn in this regard.

139. We have concluded below that there was no breach of contract in this regard. In addition a payment in lieu of notice is a payment of damages in light of early termination of a notice period. It is not an additional benefit but rather a payment which arises out of the timing of notice and termination of employment. We are unable to conclude that a decision to extend the worked period of notice, thereby reducing the amount of damages paid on termination, is a detriment as asserted. However even if we are wrong about that, the claimant did not establish facts from which we could draw an inference that he was required to work an extra period of notice because of his age. Rather it appears that the respondent had a continuing need for the claimant to perform the obligations under his contract for which he was paid. There was no suggestion that from the claimant that during the final 4 weeks of his employment he had not had duties to carry out which it was proper for him to do. According this was not an act of age discrimination.

Non-payment of Q1 bonus as act of direct discrimination

140. There was a failure by the first respondent to pay the claimant his Q1 bonus but the claimant did not establish facts from which we could draw an inference that the non-payment was because of his age. The reason why the claimant was not paid any bonus was because the papers were not submitted to the bonus committee on the instruction of Ms Nimmo. That decision appears to have motivated by the fact that the claimant had threated litigation against the first respondent. That litigation included an allegation of discrimination. That may have been act of unlawful victimisation, but it was not act of direct age discrimination. It was not because of his age but rather the litigation threat which was the reason the bonus was not paid.

141. In light of our conclusions above it was not necessary for us to consider paragraphs 2 and 3 in the list of issues.

142. <u>The claims against each of the respondents have not been upheld and are dismissed.</u>

Victimisation (issues 4 and 5)

143. The claimant withdrew this claim in the course of his evidence. I note here that he did so when invited to by Mr Sadiq after being cross-examined about a letter sent by his solicitors. Mr Sadiq put to the claimant that this claim was unsustainable because the document in the bundle did not refer to discrimination.

144. In fact what Mr Sadiq, and indeed everyone else at that point, had failed to notice was the copy of that letter in the bundle had been incorrectly copied by the respondent's solicitors. The proposition he had put to the claimant was entirely unfair although the tribunal accept that was an inadvertent mistake by Mr Sadiq. He had not seen the full copy of the letter but the actual letter does clearly refer to a discrimination claim. When this error became clear I informed the claimant the tribunal would be prepared to disregard his previous withdrawal because of the circumstances in which the withdrawal had been made. However, the claimant confirmed that he still wished to withdraw the claim. In his submissions Mr Richardson did not suggest to us that that decision was made in the heat of the moment or that its implications had not been understood. The claimant was

professionally represented and in those circumstances the tribunal has concluded that we had no option but to dismiss this this claim on withdrawal.

145. The claims against each of the respondents under s13 of the Eq A are dismissed on withdrawal.

Protected disclosure (issues 6 – 9)

146. *Did the first, second and third protected disclosure (as defined in the details of the claim) constitute a protected disclosure within the meaning of ss43A-C of the Employment Rights Act 1996? The claimant relies on the following;*

    a. *The claimant's email dated 21 December 2018 to his employer;*
    b. *The claimant's email dated 3 January 2019 to his employer;*
    c. *The claimant's email dated 28 February 2019 to his employer. (issue 6)*

Findings common to all of the protected disclosures

147. The tribunal panel found that the claimant had not made a disclosure of information which in his reasonable belief was made in the public interest, and which tended, or tends to show that either a criminal offence has been committed, is being committed or is likely to be committed in any of the three disclosures.

148. The claimant and his barrister were unable to explain what criminal offence the claimant believed had been, was being or was likely to be committed. It was suggested to us that any breach of the Sourcebook or the FCA rules would be a criminal offence, but we were provided with no statutory or other authority for that proposition. The claimant told us that he is a very experienced chartered insurer. He is an experienced professional. We did not consider that a person in the claimant's circumstances could reasonably hold such a vague belief.

149. In relation to whether the claimant had made a disclosure of information which in his reasonable belief was made in the public interest, and which tended or tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, we made the following findings common to all three disclosures.

150. In his witness statement the claimant refers to the Insurance Conduct of Business Sourcebook (ICOBS) Rule 2.3 Inducements. Mr Richardson provided us with a copy of that and a copy of an extract showing how these provisions may be actionable in damages. This is the only specific legal obligation which the claimant has sought to rely upon in his witness evidence to us.

151. ICOBS Rule 2.3 Inducements provides as follows:

(1) Principle 8 requires a firm to manage conflicts of interest fairly, both between itself and its customers and between a customer and another client. This principle extends to soliciting or accepting inducements where this would conflict with a firm's duties to its customers. A firm that offers such inducements should consider whether doing so conflicts with its obligations under:

(a) Principles 1 and 6 to act with integrity and treat customers fairly; and

(b) the customer's best interests rule

(2) An inducement is a benefit offered to a firm, or any person acting on its behalf, with a view to that firm, or that person, adopting a particular course of action. This can include, but is not limited to, cash, cash equivalents, commission, goods, hospitality or training programmes.

152. The extract in relation to actions for damages provides as follows

ICOBS Sch 5 Rights of action for damages

ICOBS Sch 5.1 G **01/04/2013** The table below sets out the *rules* in *ICOBS* contravention of which by an *authorised person* may be actionable under Section 138D of the *Act* (Actions for damages) by a *person* who suffers loss as a result of the contravention.

ICOBS Sch 5.2 G **01/04/2013** If a "Yes" appears in the column headed "For private person?", the *rule* may be actionable by a *private person* under Section 138D (or, in certain circumstances, his fiduciary or representative; see article 6(2) and (3)(c) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256)). A "Yes" in the column headed "Removed" indicates that the *FCA* has removed the right of action under section 138D(3) of the *Act*. If so, a reference to the *rule* in which it is removed is also given.

ICOBS Sch 5.3 G **06/05/2008** The column headed "For other person?" indicates whether the *rule* may be actionable by a *person* other than a *private person* (or his fiduciary or representative) under article 6(2) and (3) of those Regulations. If so, an indication of the type of *person* by whom the *rule* may be actionable is given.

ICOBS Sch 5.4 G **01/04/2013**

Rule	Right of action under Section 138D			
	For *private person*?	Removed?	For other *person*?	
All *rules* in *ICOBS* with the status letter "E"	No	No	No	
Any *rule* in *ICOBS* which prohibits an *authorised person* from seeking to make provision excluding or restricting any duty or liability	Yes	No	Yes	Any other *person*
ICOBS 8.2.9 R	Yes	No	Yes	Any other *person*
All other *rules* in *ICOBS*	Yes	No	No	

153. Rule 2.3 does not have a status letter E so it appears to fall within the final row in this table, that is there is a right of action for damages for a private person in the event of a breach.

154. Accordingly we accept that a breach of Rule 2.3 *could* amount to a breach of a legal obligation and therefore we considered whether the three disclosures of information were "qualifying disclosures", that is disclosures of information which,

in the claimant's reasonable belief was made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with Rule 2.3.

The First Disclosure

155. The paragraph referring to any breach is the following *"we have never had to leverage our banking relationship with HSBC to win business and I'm not starting that game now. This tactic puts everyone in jeopardy but mostly the business that pays all of our wages"*.

156. Rule 2.3 refers to conflicts of interests being managed by a firm "fairly, both between itself and its customers and between a customer and another client". In his evidence the claimant appeared to conflate "leverage", putting pressure on HSBC Wealth via the HSBC Banking relationship, with having a conflict of interests under Rule 2.3, but we cannot see how the claimant would reasonably believe that was the case. There could be a conflict of interest for HSBC if it believed that it might damage a valuable banking relationship if it did not make concessions for the first respondent in the tender process. However, Rule 2.3 does not say that a conflict of interest would be unlawful per se but that the conflict would have to be managed fairly if one arose. Perhaps more significantly there is no conflict of interest for the first respondent. It has a commercial interest in the tender being successful. There is no suggestion that if it was successful in the tender its products would not be in the interests of either the first respondent's customers or indeed the HSBC's customers. Using its bargaining position with HSBC to achieve that the commercial interest of the tender succeeding may be improper and unethical but it is not a conflict of interest for the first respondent. Rule 2.3 does not refer to leverage or applying improper pressure to obtain an advantage. It refers to inducements but it is clear from the wording that means offering a positive benefit.

157. In his witness statement the claimant says the activity he was concerned about was "irregular" and although he goes on to say he believed it potentially placed both businesses at risk of regulatory sanction and reputational risk, the fact that he was unable to explain to the tribunal how those risks arose leads us to conclude the claimant did not actually believe there were or could be any breaches of legal obligations by the first respondent or Mr Macmillan. If the claimant had genuine regulatory concerns he could have used the whistleblowing reporting procedure or contacted the compliance department and the fact that he did not do that is telling. We conclude that the claimant felt that Mr Macmillan had acted in a way which has caused professional embarrassment to HSBC because the suggestion had previously been turned down, and the claimant was embarrassed in turn by the fact his HSBC contact had been critical of the way the matter had been raised. The claimant's belief that what had happened was inappropriate and if repeated could damage the commercial relationship, was no doubt genuinely held. The claimant thought that what had happened had made it less likely that the tender would succeed but that was a commercial matter not a breach of legal obligation.

158. The claimant is an experienced qualified professional who told us that he had expertise in this area. We consider that if the claimant did hold a reasonable belief that this email referred to a breach of a legal obligation he would have been able to explain that to us and indeed would have expressed that in terms in his email.

The Second Disclosure

159. The information disclosed in that second note relates to the suggestion made by Mr Macmillan that instead of the first respondent's tender team travelling to Southampton the HSBC team could travel to Edinburgh. Mr Macmillan was not offering any benefit to HSBC, the benefit would be to the first respondent because it was concerned that this would allow it to better demonstrate its digital capacity. The claimant is an experienced chartered insurer. He is an intelligent professional and we do not accept that he can reasonably believe there was an offer of a benefit which he could reasonably consider was an inducement.

160. We applied the same reasoning as above in relation to whether this could be regarded as a breach of rules in relation to conflict of interests in Rule 2.3. We concluded that it is not a conflict of interests and we could not see how, even taking the allegation at its highest, that applying "leverage" could said to a create a conflict of interest for the first respondent that it had not managed fairly.

161. We do not consider that the claimant, taking into account his professional experience, can have held a reasonable belief that his email tended to show that a breach of Rule 2.3 had arisen or was likely to arise.

162. In his witness statement the claimant says the activity he was concerned about was "irregular" and although he goes on to say he believed it potentially placed both businesses at risk of regulatory sanction and reputational risk, the fact that he was unable to explain to the tribunal how those risks arose leads us to conclude the claimant did not actually believe there were or could be any breaches of legal obligations by the first respondent or Mr Macmillan. We conclude that the claimant felt that Mr Macmillan had acted in a way which has caused him professional embarrassment that he thought what had happened was inappropriate and if repeated could damage the commercial relationship was no doubt genuinely held. The claimant thought that what had happened jeopardised any hope of the tender being successful and that would mean he would not reap the financial rewards from that. That is shown in the final sections of the note. However we do not think the claimant reasonably believed the information he disclosed tended to show breach of any actual legal obligation. He would have been clearer if that was the case.

The Third Disclosure

163. The disclosure in the third email refers to incompetence, conduct risk, apathy and ineffectiveness which the claimant relates to the lack of success in the tender exercise. He suggests that if these things are not addressed the businesses of M&G will not be successful. These are not matters relating to legal obligations. We do not consider that the claimant, taking into account his professional experience, can have held a reasonable belief that this amounted to a disclosure of information that tended to show that a breach of Rule 2.3, or indeed any other legal obligation, had arisen or was likely to arise.

The alleged detriment/dismissals (issue 7)

164. Even if we are wrong about whether the disclosure made by the claimant amounted to a qualifying disclosure was wrong, the tribunal was satisfied from the evidence that the irritation shown by Mr Macmillan and others to the claimant's emails had little to do with the concerns being raised, but rather how they had been raised. After all Mr Hickson had himself raised very similar concerns with Mr Macmillan on 21 December 2018. The emails we were referred to between Mr Macmillan and his colleagues which the claimant relies upon, shows it was the fact that the claimant had chosen to copy his concerns to some of the most senior executives in the business that caused the negative reaction. The fact he did it once was considered to have been inappropriate, when he did it again on 3 January was regarded in a similar way to an act of insubordination.

165. We do not find that any of the acts set out in paragraph 7 a, c, and d of the list of issues were detriments which were done on the ground that the claimant has made a protected disclosure. The act at b (dismissal) was withdrawn by the claimant in the course of the hearing as he accepted that as the decision to terminate his employment was taken before he made any alleged protected disclosure the decision to dismiss him cannot have been by reason of the disclosures.

166. In light of our answers above it is not necessary for us to consider paragraphs 8 and 9 in the list of issues).

167. <u>The claims under ss103A and /or 105(6A) of the ERA are not upheld and are dismissed.</u>

Unfair dismissal (issue 10)

168. We are satisfied that the reason for the claimant's dismissal was that he was redundant. The first respondent had genuinely determined that it needed to restructure its business and in consequence of that decision, it was determined that the size of the team the claimant worked in would be reduced. That was a decision the first respondent was entitled to make. It is clear from his statement that the claimant disagreed with the commercial decisions taken by the first respondent in this regard but that is not a matter for us (issues 10 a- c).

The selection pool (issue 10 (ii), (iii) (iv) and (v))

169. We are mindful that it is not for this panel to determine the selection pool we would have applied. Rather we must consider whether the approach taken by the first respondent fell within the range of reasonable responses to the circumstances. Taking to account the guidance from the authorities referred to us we have approached that by considering if Mr Ellis, in conjunction with HR, Mr Hughes and Mr Hickson had "genuinely applied" their minds to the issue of who should be in the pool for consideration for redundancy; and if they had, whether the exceptional circumstances which would allow the claimant to challenge the pool arise.

170. We found that Mr Ellis did not undertake substantially the same work as the claimant. It was not suggested that since the restructuring he has reverted to the account director role without the additional management responsibilities. He has

and had a unique management role in the team. It was reasonable for him to excluded from the pool and for him to consider selection from redundancy within the team he managed (issues iii and v).

171. Mr Sadiq made the following submission in writing *"As regards fairness under s98(4) of the Employment Rights Act 1996, it is trite law that the pool is primarily a matter for the employer to determine and is and it is difficult for an employee to challenge it where the employer has genuinely applied his mind to it – see Taymech v Ryan UKEAT/0663/94, followed in Capita Hartshead Ltd v Byard [2012] IRLR 814, EAT at [31] (Tab 17). In Wrexham Golf Club v Ingham UKEAT/0190/12 the golf club case - the ET erred in law in finding the dismissal unfair because they thought that a wider pool should have been used – see [11] and [24-25] (Tab 18). That was a case in which only one employee was considered and there was no consideration given to developing a pool or even considering the development of a pool. Here, it is clear that DE did genuinely apply his mind to the selection pool, his decision was within the range of reasonable responses and the ET shouldn't interfere with his decision.*

172. We agree with Mr Sadiq that the approach we should adopt is helpfully set out in the Taymech and Capita Hartshead cases and we have applied those decisions to our findings of fact.

173. The witness statement evidence given to us was the primary reason for the selection pool in this case was that the work undertaken by the key account director and the account director was not the same. We were told that the HR department had a view that employees in different grades should not be pooled together (as evidenced by Mr Caldicott's appeal outcome). However, on the basis of the evidence before us we have concluded that the work of Mr Mutch, Mr Sangster and the claimant was essentially the same. We consider that if Mr Ellis had genuinely applied his mind to what work the team members were doing he would not have concluded that they did different work. Mr Ellis repeatedly referred to remuneration and seniority in explaining the differences between the key director and the account director roles but those are not differences in the work that the employees are undertaking, those are differences in the characteristics of the employees doing that work. In essence Mr Ellis approached this question on a flawed basis and reached a conclusion we consider that no reasonable employer could reach. We have concluded that if the employer has not applied its mind to the question of which employees are undertaking the same work and therefore should be considered for the pool for selection, the employer cannot be said to have genuinely applied his mind to the selection pool.

174. We were also told that HR had a standard rule that employees on different grades are never pooled together. That was referred to in Mr Ellis evidence, it is in the letter from Mr Caldicott and that fact this was the approach adopted in relation to other teams was used as evidence that the treatment of the claimant could not be discriminatory. No reason for that approach was offered to us. A standard approach which is applied without consideration of the particular circumstances of the group of employees means the employer has not genuinely applied its mind to the appropriateness of a pool based on a single grade in a particular set of circumstances.

175. We accept that there may be reasons why an employer acting reasonably would not wish to pool employees in different grades together when considering the appropriate pool in a redundancy case, but no such reason was offered to us. It is clear to us that the differences in the grade 3 and grade 4 remuneration package were significant here – we have explained our conclusions on that in our findings of fact. However Mr Ellis told Mr Sangster and the claimant that the reason why they were not pooled with Mr Mutch was because they did not do the same work. We consider that no employer acting reasonably could define a pool on one basis (remuneration costs) but tell the employees that the reason for the pool being defined is another (they don't do the same work). HR and Mr Ellis appear to have been concerned about the implications of salary protection. If an employer has agreed salary protection we do not consider that an employer acting reasonably could decide to frame its pool for selection to avoid that agreed protection and particularly it could not do so without being transparent about that. If cost was the reason for the pools being defined as they were and the claimant had been told that he would have given the opportunity to engage with Mr Ellis about the appropriateness of the pool on an entirely different basis. He would have been able to engage with the appeal process with Mr Caldicott on a different basis.

176. At this hearing we heard evidence that the financial performance of Mr Sangster and the claimant significantly exceeded that of Mr Mutch. In any event in cross examination about the implications of financial performance versus salary cost if that was relevant to selection, Mr Ellis suggested that was a question he was unable to answer and it would have to be considered by accountants. The tribunal found that answer from an experienced senior manager managing a team whose performance is measured in large part on their financial performance in providing sophisticated financial products to commercial clients in financial services to be evasive and disingenuous. We can only conclude that Mr Ellis had not genuinely applied his mind to the relationship between financial performance, profitability, and remuneration cost. No employer acting reasonably would take that approach..

177. In conclusion, the decision taken by the respondent in relation to the employees who should be considered for possible redundancy in the claimant's case was one that no employer acting reasonably in the circumstances could have taken. Our answer to issue (ii) is that it was not appropriate for the claimant to be pooled together only with Mr Sangster (although we accept it was appropriate that Mr Ellis was not included in the pool).

178. The application of unfair selection pool in a redundancy situation such as the one which applied in the claimant's case, is fatal to fairness. However careful the consultation, scoring process and however diligent the consideration for alternative employment, once that flawed decision was taken it was inevitable that the claimant's dismissal would be unfair. The unfairness was not corrected at the appeal stage because Mr Caldicott did not address his mind to whether the pool was fair and appears to have accepted that if the approach taken by Mr Ellis was consistent with the HR policy he would not look at that further. Mr Caldicott did not ask himself the right questions.

179. <u>We find that the claimant was unfairly dismissed contrary to s94 of the ERA.</u>

180. It has not been necessary for us to consider in detail the remaining questions in the list of issues, but the tribunal agreed with the submissions of Mr Sadiq on the remainder of the issues. We would not have found unfairness on any other ground (issues i, vi, vii and viii). These were not matters which were meaningfully pursued in the claimant's witness statement or in cross examination. In any event Mr Ellis did not meet with the claimant to consult or discuss scoring because the claimant was off ill but the claimant could have met with Mr Ellis if he had wanted to and the timetable for the team was delayed to allow for meetings. There was no evidence there was any alternative employment which was available for the claimant that he was not considered for..

181. A 'just and equitable' reduction under S.123(1) ERA should be applied to compensation for unfair dismissal if an unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed (*Polkey v AE Dayton Services Ltd* 1988 ICR142, HL). This reflects the basic principle that 'it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed' (*W Devis and Sons Ltd v Atkins* 1977ICR 662, HL). The burden for proving that an employee would have been dismissed in any event falls on the employer. We have no evidence which enables us to make appropriate findings in this regard because we do not know how Mr Mutch would have been scored if he had been included in the pool for selection. The issue of remedy and the matters to be determined are not referred to in the list of issues and the original listing of this case for hearing anticipated that further evidence may have to be heard. We invite the parties to make further representations to us on the approach which we should take in the circumstances.

Pay in lieu of notice (issue 11 and 12)

182. *Did the first respondent breach the claimant's contract of employment or another contract connected with his employment by failing to pay him 7 weeks in lieu of notice.*

183. The claimant's leaving date was extended twice because of his involvement with the HSBC tender, something he seemed to have taken professional satisfaction from. Clearly the respondents valued the claimant significantly enough in terms of his performance and ability to take the perhaps surprising decision to involve an employee so close to his dismissal in such a significant project.

184. On each occasion the notice of termination letter creates an entitlement to 12 weeks' notice – usually an employer is entitled to require an employee to work all of their notice period if they are to receive payment for that period. On 14 November and the 27 December the first respondent waived the requirement for the claimant to work 6 and then 7 weeks' of those notice periods. Legally a payment in lieu of notice is a payment of damages in light of early termination of a notice period. It is not an agreement to pay an extra lump sum on termination – it is a payment for part of the notice period.

185. The claimant's original notice was varied when he was given a further 3 months termination of employment on 27 December 2019. The claimant accepted that letter and we find that created a contractual entitlement to a payment of a sum

equivalent sum to 7 weeks when his employment ended on 31 January 2020, but it was not an agreement to pay a sum equivalent to 7 weeks pay whenever his employment ended. When the first respondent extended the amount of notice the claimant was required to work to the end of February 2020 the claimant could have asserted that was a unilateral variation of the agreement reached about the termination of his employment and the notice arrangements. He could have refused to work the extra weeks of his notice period unless he was paid extra for those weeks or indeed refused to work them at all, but we have not been taken to any evidence that this happened. The claimant's expectation that he would receive an additional payment for a payment in lieu of notice was based on an assumption that he would receive a payment on the same basis as had been agreed for him working until 31 January 2020 but an assumption is not enough to create a contractual entitlement.

186. The claimant's contractual entitlement to notice was determined by the letter of 27 December. The claimant received payment for the 12 weeks notice he was given in that letter albeit that he worked a longer period of the notice than had originally been indicated. If there was a breach of contract the claimant affirmed the contract by his conduct in February and in any event he has not suffered any financial loss. The claimant does not dispute that that he was paid for all of the notice period he was given by the letter on 27 December 2019.

187. As the claimant has not established that he had an contractual entitlement to an payment of a sum equivalent to 7 week's pay, the first respondent did not make an unlawful deduction from wages when it failed to pay him that sum.

188. <u>The claimant's claims for breach of contract and for an unlawful deduction from wages in relation to his notice period is not upheld and is dismissed.</u>

Q1 Bonus (issues 13 to 15)

189. *Did the first respondent breach the claimant's contract of employment or another contract connected with his employment by failing to pay him the Q1 bonus?*

190. *Did the first respondent make an unlawful deduction from the claimant's wages contrary to s13 ERA [in regard to the Q1 bonus].*

191. *Did the first respondent breach the ACAS Code of Practice by failing to investigate the claimant's grievance made following the termination of his employment regarding the decision not to pay the claimant his Q1 bonus and if so should an uplift be awarded in damages (if so by what percentage).*

192. Mr Sadiq made brief submissions on this issue. He did not make any submissions about whether there was an unlawful deduction from wages nor on the approach that we should take to the failure to consider the claimant's grievance. The written submissions are as follows:

"Breach of contract

51. The question is what would have happened if the bonus had been reviewed by the remuneration committee? It is submitted that it is likely that the bonus would have been reduced by 50% because

(a) The committee was entitled to make a decision to reduce the bonus by 50% because of the 3 scorecard fails;

(b) HD's evidence was that it would have been unusual for the committee to grant a 100% bonus in light of the three scorecard fails;

(c) This is especially the case given the 3 scorecard fails happened after C's sickness absence,

(d) DM's unchallenged evidence that these scorecard fails and others (including the unauthorised business lunch of £459.00) would have resulted in disciplinary action had C remained in employment – see para.20 of DM's statement.

52. DE's unchallenged evidence is that 100% of the bonus payable would have been approximately £10,800 – see para.26 of DE's statement. 50% of this figure is £5,400".

193. The tribunal was troubled by the first respondent's evidence about the bonus. Despite the apparent suggestion in Mr Ellis' evidence that 100% of the bonus could be withheld it appears to be accepted by Mr Sadiq in his written submissions and by Ms Doig that the claimant was entitled to at least 50% of the bonus.

194. The tribunal had extremely limited evidence on this matter. Mr Ellis suggested that the scorecard fails could have resulted in disciplinary action against the claimant but the scorecard fails were known in January and the claimant's employment did not end until February. If disciplinary action would have been taken it should have been taken within that timescale in any event. We therefore attached no weight to that evidence. We fail to see why if the committee had previously agreed that the claimant should be paid a bonus despite sickness absence, that would cause them to withhold bonus in the future. Indeed this could equally be regarded as supporting the claimant's proposition that he was well thought of and the committee would be sympathetic to him. We cannot accept that submission.

195. The claimant told us that he was confident the committee would have exercised their discretion to pay him the full amount of bonus. The first respondent could have called a witness to refute that and to explain us the approach the committee would have taken rather than calling Ms Doing who was able to tell us what the rules of the scheme are, but was frank about the fact that she could not tell us what the committee would have decided in this case. The first respondent's case is that it is the committee who would have decided this issue and not Mr Ellis or Mr Hickson. In the circumstances we consider that it is appropriate for us to draw the evidential conclusion that respondent has avoided calling evidence from a committee member because that evidence would have supported the claimant's case and that he would have been paid the bonus in full.

196. <u>On the balance of probabilities we find that the first respondent breached the claimant's contract of employment by not paying him 100% of his outstanding bonus on the termination of his employment.</u>

197. <u>If the claimant should have been paid the bonus amount in full the failure to pay that to him in May was an unlawful deduction from his wages.</u>

198. The bonus payment was not properly considered or paid at the correct time because the claimant had indicated an intention to bring tribunal proceedings. That was unreasonable. The respondent then took what is in the tribunal's view an unreasonable approach to the claimant's grievance. It is understandable why an employer would not deal with grievances about matters which were known at the time of termination if they are not raised within 2 months of termination, but that is not true when it comes to a grievance about an issue which the former employee was not aware of when employment ended and could not have not known for some time within the grievance timescale. We have taken into account the comment made by Ms Nimmo to Ms Doig and have drawn the inference that it is likely that the reason why the grievance was not considered was also retaliation for the claimant was expressing an intention to bring litigation against the first respondent. That was unwholly unreasonable, especially given the first respondent's resources.

199. The ACAS code of practice on grievances is intended to find a way to resolve workplace disputes without litigation. Although it does not expressly refer to grievances from former employees it does not exclude such grievances from the scheme. The employment tribunals should not be asked to resolve disputes of this nature by employers of the size and resources of the first respondent without any attempt by them to resolve the dispute using their internal procedures. The failure by the first respondent to comply with the ACAS Code of Practice in these circumstances was unreasonable and it is appropriate to apply an uplift of 25% to the compensation for the non-payment of the Q1 bonus.

Discrimination arising from disability (issues 16 -21)

200. This claim was withdrawn in the course of the proceedings and is dismissed.

s111 and 112 of the EqA (issue 22)

201. The claimant' complaints under s111 and 112 of the EqA were not pursued in evidence or submission and are dismissed. (issue 22)

Remedy and orders

202. The parties are encouraged to seek to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by the same tribunal panel on **11 and 12 January 2021** after hearing any relevant evidence and submissions from the parties.

203. As there has been a delay in issuing this judgment we consider that the following orders will ensure the efficient conduct of the remedy hearing if it is required.

204. **Accordingly the parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):**

Statement of remedy / schedule of loss

205. The claimant must provide to the respondent, copied to the tribunal, **by 4pm 28 January 2021** an updated Schedule of Loss – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated, together with copies of any documents and/or statement of evidence that he wishes to rely upon at the remedy hearing.

Counterstatement of remedy / counter- schedule of loss

206. The respondent must provide to the claimant, copied to the tribunal, a counter schedule of loss if it disagrees with the claimant's schedule by **4pm on 4 January 2021** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

Remedy bundle

207. The claimant has already submitted a remedy bundle and therefore no order has been made for the preparation of a bundle but if the parties wish the tribunal to consider any updated remedy bundle one electronic and four hard copies of any updated bundle together with any supporting witness statements written opening submissions / skeleton argument must be lodged with the Tribunal b**y 10 am on 6 January 2021 by whichever party wishes to rely on those documents.**

208. **Public access to employment tribunal decisions**: The parties are reminded that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

209. Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

210. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Cookson
Date 14 December 2020