EMPLOYMENT TRIBUNALS

Claimant: Mr J Foster

Respondent: EE Ltd

RESERVED JUDGMENT

Heard: Remotely by Cloud Video Platform ('CVP') **On: 20, 21, 22, 23, October 2020 (deliberations 20, 26 November)**

Before: Employment Judge Sweeney

Representation:

For the claimant: In person
For the respondent: Anisa Niaz-Dickinson

The Judgment of the Tribunal is as follows:

1. **The claim of unfair dismissal is not well founded and is dismissed.**

2. **The claim of detriment contrary to section 47B Employment Rights Act 1996 is not well founded and is dismissed.**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

REASONS

The Claimant's claims

1. By a Claim Form presented on 15 September 2019 the Claimant brought the following complaints:

1.1.1. a complaint under section 111 Employment Rights Act 1996 of unfair constructive dismissal,

1.1.2. a complaint under section 48 ERA that he had been subjected to a detriment contrary to section 47B of that Act.

2. As to the unfair dismissal complaint, Mr Foster complained that:

2.1.1. He was automatically unfairly dismissed because the reason or principal reason for his dismissal was that he made a protected disclosure (section 103A ERA) ('automatic unfair dismissal');

Alternatively,

2.1.2. He was unfairly dismissed within the meaning of section 98 ERA ('ordinary unfair dismissal').

3. The Claimant relied, in his constructive dismissal claim on a breach of the implied term of trust and confidence. That term means:

An employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust.

4. The conduct which he says was likely to destroy or seriously damage the relationship of trust and confidence was:

4.1.1. Being placed unjustly on to a performance plan in about October 2018;
4.1.2. Being subjected to disciplinary proceedings in connection with a complaint from a customer of unprofessional conduct (this is the matter referred to in the Respondent's grounds of resistance, paragraph 19) and
4.1.3. Being suspended following a complaint by a colleague (this is the matter referred to in the Respondent's grounds of resistance, paragraph 20).

5. Mr Foster's case was that these acts were done to him because he had made protected disclosures, that they constitute a fundamental breach of the term of mutual trust and confidence, and that he accepted this repudiatory breach by terminating his employment on 01 July 2019. The disclosures and detriments complained of are set out in a table of further particulars, consisting of 23 rows of information [**pages 27-39**].

6. The Respondent did not admit that the Claimant had made protected disclosures and, in any event, denied that he had been dismissed at all or that he had been subjected to any detriment short of dismissal because he had made any disclosure. The Respondent maintained that Mr Foster resigned because he was facing allegations regarding his conduct and in any event he was not entitled to terminate the contract of employment without notice by reason of the Respondent's conduct.

The Hearing

7. The Claimant represented himself and the Respondent was represented by counsel, Ms Niaz-Dickinson. The complaints were originally to be heard by a full tribunal. However, shortly before the first day of the hearing, the parties agreed in writing to a judge sitting alone. The parties had prepared an agreed bundle consisting of 791 pages with some additional documents being added to the bundle in the course of the hearing.

8. The Claimant gave evidence on his own behalf. In addition, he called Mr Jonathan Burley, Business Account Manager, or 'BAM' who had been employed by the Respondent up until December 2019.

9. The Respondent called the following witnesses:

   (1) Mr Gareth McWilliams, Director for Desk, Digital and Retail
   (2) Ms Sarah Anderson, Sales Manager
   (3) Ms Emma Barnes, Sales Team Leader
   (4) Mr Barry Strong, Operations Manager
   (5) Mr Simon Mountford, Fraud Operations Analyst
   (6) Mr Scott Craggs, Senior Operations Manager
   (7) Mr Gary Benjamin, Head of Acquisition SME Desk, Digital and Retail

The issues

10. The issues were confirmed at the commencement of the hearing and were agreed to be as set out in the earlier case management summary of 22 January 2020:

    10.1.1. Did the Claimant make a public interest disclosure ('PID') within the meaning of the legislation?

    10.1.2. If so, was he subjected to any detriment because he made a PID?

    10.1.3. Was the Claimant entitled to resign without notice by reason of the Respondent's conduct (as set out above)?

    10.1.4. Did he resign in response to such repudiatory conduct?

    10.1.5. If so, can the Respondent show a potentially fair reason for the (constructive) dismissal?

    10.1.6. Was the reason or principal reason for the dismissal that he had made a PID?

11. During the course of the Hearing, Mr Foster made it clear that, in so far as he is claiming to have been subjected to a detriment on the ground that he made a

protected disclosure, the public interest disclosures ('PIDS') he relies on are those he made after April 2018 and not before. He said that he did not make any PIDS prior to then.

12. As regards the matters referred to row 1 of his further particulars namely, an email of 31 August 2017 to Mike Tomlinson (headed 'serious concerns') [**page 261-262** of the bundle] Mr Foster accepted that, at the time he sent this email he did not believe that he was raising a concern about criminal activity or breaches of legal obligations or the deliberate concealment of information tending to show those things.

13. Therefore, the first PID on which he relies for the purposes of his section 48 complaint is the one which he refers to in row 4 of his further particulars [**page 29**]. Even then, Mr Foster clarified that he did not make any protected disclosure at the meeting with Mr McWilliams in April 2018, referred to in row 4 and that the actual disclosure he relies on was set out in a subsequent email of 14 May 2018 [**pages 412-414**]

Findings of fact

14. Having considered all the evidence (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

The nature of the Respondent business and the Claimant's role

15. The Respondent company is a telecommunications company. The Claimant was employed from October 2010 until 01 July 2019 as a Sales Adviser at its premises in Doxford, Sunderland.

16. In early 2016, British Telecommunications ('BT') acquired the Respondent.

17. It is necessary to set out the position and roles of some of the various witnesses who gave evidence on behalf of the Respondent. Emma Barnes was at the relevant time a Sales Team Leader based at Doxford. She joined the team as Mr Foster's Team Leader in January 2018. Prior to that, and throughout 2017, his Team Leader had been Adam Stephenson. Mr Mountford was a Fraud Operations Analyst based at Doxford. Barry Strong was employed at all relevant times as an Operations Manager. Gary Benjamin was employed, at the relevant time, as Head of Acquisition SME Desk, Digital and Retail. Both Mr Strong and Mr Benjamin were based at Doxford. Scott Craggs was a Senior Operations Manager based at the Respondent's Darlington office. Gareth McWilliams, at the relevant time, was Director for Desk, Digital and Retail, based in the Respondent's Belfast office.

18. There are three sectors within the Respondent's business (at least there are three which were referred to in these proceedings): (1) the 'Corporate Sector' - these are business customers of EE which employ more than 100 employees; (2) the 'SME' sector - SME businesses are those that employ up to 100 employees; (3) the 'Consumer' sector – individuals not in those categories.

19. Mr McWilliams had overall responsibility for the SME channels of desk based sales within the SME sector. The SME Managing Director was Mike Tomlinson.

20. On 31 August 2017 Mr Foster emailed Mr Tomlinson. He said that that they had met about a year earlier and that Mr Foster understood Mr Tomlinson had regarded him positively, as a person who would speak his mind and who had ideas to improve things. Mr Foster said in his email that he was concerned about the day to day running of the B2B department and that the matters he was concerned about had cost himself and others a considerable amount of money.

21. Mr Tomlinson asked Mr McWilliams if he would attend a conference call to discuss the issues raised by Mr Foster. This conference call was arranged for 26 October 2017. During that call Mr Foster raised his concerns about call quality and other operational matters where he felt improvement could be made. The sort of issues raised were re-grades being routed to his team from the North Tyneside ('NT') office. He questioned why Doxford advisers were paid only half the rate NT advisers were apparently getting; he raised the lack of calls coming into the team at Doxford and that he was not busy. Mr Foster did not mention fraud or anything of the sort on that conference call, nor did he raise anything to do with 'BSOL' (of which see below). The matters discussed were operational matters and the discussion was about how things could be improved.

22. Mr McWilliams subsequently informed Mr Benjamin and Mr Strong about the call to update them. To the extent that Mr Foster complains that this put him under pressure or that it resulted in him being placed under pressure or that it was wrong of Mr McWilliams to mention to Mr Strong and Mr Benjamin what they had spoken about, I reject this. Mr Foster was raising his genuine concerns about issues within Doxford and if any improvement was necessary in respect of the things discussed, it was right and proper for Mr McWilliams to refer to Mr Benjamin and Mr Strong about those local issues, which were not expressed by Mr Foster to have been raised in confidence. There was no evidence of any undue scrutiny or pressure being put on Mr Foster as a result and his allegations in that regard were put in these proceedings in the vaguest of terms.

23. Given the nature of the business, it is not unusual for fraudsters to target it. The Respondent has a designated fraud team to help combat fraudulent activity. Mr Mountford is employed within the fraud team. One of the main, if not the most widespread, frauds takes the form of a person who pretends to be a prospective customer setting up a new mobile phone contract. In brief, the bogus customer

gives false details and with a view to receiving a mobile phone, which is never paid for.

24. Mr Foster would frequently discuss the issue of fraud with Mr Mountford on a general basis. However, there was nothing specific in the conversations between the two that caused Mr Mountford to believe that Mr Foster was doing anything other than (properly) saying that orders should be looked at carefully to ensure that they were not fraudulent. It was in everyone's interests to keep an eye out for and combat fraud against the company. It was not an unusual toic of conversation within the business.

25. It was suggested in row 13 of the further particulars [**page 35]** that Mr Benjamin had instructed the fraud team, and Mr Mountford in particular, to ignore fraud and to carry on processing fraudulent orders. I reject this and accept the evidence of Mr Mountford and Mr Benjamin. This was a wild accusation without any basis whatsoever and was not put to either of the individuals by Mr Foster. Ultimately, it was clear that the only issue between Mr Foster and Mr Mountford was a difference in opinion as to how best to combat fraudulent activity (for example, the use of a fraud report). Mr Mountford's job was to combat fraud and he was always receptive to the input of others.

26. An element of Mr Foster's pay, and that of all other sales advisers, was performance related. Each year sales advisers are given a score to reflect their individual performance measured against set KPIs. Before allocating a final score to an employee the line manager should also have regard to personal behaviours.

27. It was Ms Barnes' responsibility, as the Claimant's new Team Leader, to relay the 2017 scores to her team, including Mr Foster. Ordinarily, Mr Stephenson would have done this but he had moved on by this time. Ms Barnes did this. However, Mr Foster was unhappy with the score.

28. On 20 March 2018 he met with Ms Barnes and Mr Strong to discuss his performance related pay and score. Mr Strong explained how the scores were arrived at. Mr Foster's score based on the KPI metrics was 4.3 but was rounded down to a 4 as is the normal practice. Once this score is produced, the line manager is required to consider adjusting the score further to reflect the EE values, 'Personal, Simple and Brilliant' and any other behaviours. Mr Strong – who had no role in adjusting the score - explained that there had been an issue in the middle of the year regarding what he described as an aggressive call by Mr Foster with a customer, which resulted in his KPI score being reduced to '3' by Mr Stephenson, who had retained his own personal note. Mr Foster disputed this, saying that the customer had been rude and abrupt and that he had simply muttered under his breath '*you wouldn't say that if I was standing in front of you*'. Mr Foster said that Adam had been aggressive towards him.

29. Mr Foster was unhappy with the reduction and was concerned that by being marked down from 4 to 3, this had cost him a percentage of his wage.

30. Before this, on 12 March 2018, Mr McWilliams had emailed Mr Foster to say that he was planning to visit Doxford on 25th or 26th April and that he would like to meet for a coffee to get an update on things in the centre from his perspective. This was to be a follow-up from the conference call of October 2017. They did indeed meet around that date. Mr Foster mentioned the subject of BSOL at that catch up and expressed his concern that any significant diminution of BSOLs would impact on him and the sales team hitting their targets.

31. BSOL stands for 'Business Solutions'. BSOL was the acronym used by the Respondent to describe the activity of moving customers from the Corporate sector to the SME sector and vice versa.

32. Annually, the Respondent analyses the business customers that make up its Corporate sector, to see if any are declining in size and spend with a view to offering them to its SME sector, i.e. to transfer them from the corporate to the SME side of the business. There are reasons for this, which are of no import to these proceedings. It does the same with the SME customers who are growing in size and spend with a view to transferring them from SME to Corporate. There is also movement between SME and 'Consumer'. Once the Respondent agrees with the customer that they will be moved, an agent moves them from one services platform and installs them on another.

33. The movement from Corporate to SME and vice versa is internally recorded as a sales transaction because the Respondent has to disconnect from the corporate system and reconnect to a different system. The Respondent uses the phrase 'internal churn' to describe movement from one system to another.

34. When a customer is moved off one platform to another, the system does not know that the customer remains with the Respondent and is simply moving on to another platform. At this point, the system automatically generates an ETF ('Early Termination Fee'). Ordinarily, if a customer terminates a contract early in order to move to an alternative supplier, the customer will incur an ETF.

35. Whenever there is a move from corporate to SME the computer simply sees a termination and automatically creates an ETF. However, there is no real money to be paid by customers and nor is money lost to the business. The ETF has to be cancelled or zeroed out - 'credits' are issued for these purposes. This is simply to reconcile the figures. Real early termination fees apply when a customer leaves to go to another provider. However, when it is a case of moving from the Corporate to the SME platform, the Respondent simply cancels the charge internally. The fee is only generated to keep the computer happy (more accurately to reconcile the numbers 'wrongly' generated by the computer).

36. Mr McWilliams was in Doxford in April 2018, among other things, for the purposes of delivering a 'roadshow' presentation to the staff. That roadshow was held on 28 April 2018 at the Doxford office. These roadshows take place every six months. The purpose of the roadshow is to celebrate successes and motivate the teams. BSOL was a small part of the Respondent's operations. BSOL numbers were not part of the presentation on the day. However, at roadshow Mr Foster asked a question in the 'Q&A' session. He asked how many migrations there had been from Corporate to SME. Mr McWilliams said there had been about 3,000 migrations. He was reliant for this information on Mr Strong and/or Mr Benjamin. As it did not form part of the presentation, the information was not to hand. When Mr Foster asked his question about BSOLs, Mr Strong gave a figure of about 3,000 to Mr McWilliams. This was, he understood, an approximate figure for the past 6 months. The Respondent's managers did not give much consideration to the issue. There was no discussion about the matter at the roadshow beyond simply asking the question.

37. I should add that none of the managers was making an issue about BSOLs. They simply responded to a question from Mr Foster on a subject which assumed greater importance to him than to them. Accepting that the figure stated may well have been wrong, I am satisfied that neither Mr McWilliams nor Mr Strong was intending or trying to mislead anyone.

38. However, when he heard a reference to 3,000 connections Mr Foster felt that this was wrong. He was sure the number would have been higher than that. He went looking for information to support this belief. He saw a report referring to 6460 connections and believed that there was something amiss. In his evidence to the Tribunal, Mr Foster said that he only became aware of an apparent difference in the numbers after the roadshow.

39. He was convinced that Mr McWilliams had understated the number of BSOLs and thus the importance of BSOLs to targets. Mr Foster understood that BSOL figures contributed to those targets. This is because each time a sales adviser secured a transfer from one platform to another, the transaction was recorded as a 'sale' by them which they could include in the total numbers of sales for the purposes of achieving their sales target. If BSOLs were to dry up or diminish in numbers, the ability to achieve target would be adversely affected. He wanted Mr McWilliams to know the true impact on target achievement that the BSOL figures had. He drew to Mr McWilliams' attention that there were in fact 6,460 transfers from August to April.

40. As stated above, Mr Foster contended that his first 'PID' was made following the meeting with Mr McWilliams in April 2018, in a subsequent email dated 14 May 2018.

41. In that email [at **pages 412-414**] he breaks his concerns into subject areas/headings as follows:

41.1.1. Commission/Targets (this covered issues such as targeted overtime and the reduction of his KPI scores from 4.3 to 3)

41.1.2. Call path – Business Web sales General Enquiry 08009566100 (this was on the subject of 'noise calls')

41.1.3. BSOL (this was raised in the context of sales figures and hitting targets)

42. In the email Mr Foster said *'Since July 17, the department sales figures have been inflated by the bsol leads from the corporate side of the business. Without these leads contributing to sales figures we would not have had the success in Q3 and Q4 that was mentioned in the road show. My concern is now that these BSOL leads are diminishing how are we to succeed in hitting our targets when coupled with the amount of noise calls we are receiving?*'

43. Mr Foster referred to the Roadshow in April adding: '*in the road show you stated a figure of 3000 BSOL connections had moved from corporate the (sic) system to small business, however the reporting shows a different figure. The reports confirm that we have moved at least 6460 connections from corporate so I'm keen to understand where the difference is*'.

44. What Mr Foster had done after the roadshow was to analyse the BSOL movement from corporate to SME to demonstrate the importance of those figures to hitting targets. He also carried out what he called a 'time and motion' study to demonstrate the interference of 'noise calls' which hindered his and others' ability to meet their targets.

45. His concern was entirely about targets and the interference with the ability of primarily himself but also – albeit to a lesser extent – of other sales people to meet those targets. It was inherently a concern about his ability to earn commission. He wanted to know how they were going to replace these diminishing 'sales' as without them the department would have missed most targets (**page 634**).

46. When I asked where in that email there was information which would or might or 'tends' to show that any criminal offence had been or was being or was likely to be committed or that any person was failing or had failed or was likely to fail to comply with a legal obligation. Mr Foster referred me to the words set out in italics in paragraph 43 above.:

47. He explained that he was not saying that in his email he disclosed information that tended to show any criminal activity or any breach of a legal obligation had been, or was likely to be committed. However, he believed that the above words showed, or tended to show that there had been deliberate concealment of information tending to show the commission of a criminal offence or a failure to comply with a legal obligation. He did not, however, specify what offence or legal

obligation he had in mind or how he believed the true BSOL figures would have shown the commission of an offence of breach of a legal obligation (and which information he said was being deliberately concealed)

48. When I asked, by him pointing out this discrepancy in the figures what criminal conduct or offence or breaches of legal obligation he believed this tended to show, he said he was not sure; that there was possibly misrepresentation to shareholders if the figures were not accurate. However, he expressed this with a degree of reluctance and with considerable uncertainty.

49. Mr Foster believed that Gary Benjamin had given Mr McWilliams incorrect numbers on the movement of BSOL leads from corporate base to SME base in that Mr Benjamin had understated the numbers. By failing to state the correct numbers (i.e. those as set out in Mr Foster's email) I find that Mr Foster believed that there was no appreciation within senior management of the true impact of BSOL on earnings potential. If, as was generally perceived, BSOLs were to reduce in number (from a much higher base than that given to Mr McWilliams) then combined with the added hindrance of 'noise calls', Mr Foster believed that he and others would be negatively affected in their ability to hit their targets in future. Put bluntly, the essence of his concern and his belief was: if you take away/reduce the BSOL sales there will have to be some other sales opportunities to replace this to keep earnings up. He felt that local management were not addressing this and therefore took it up directly with Mr McWilliams. He did not actually believe there was any criminality or breaches of legal obligations. It was only subsequently, in the litigation, that he came to think that 'perhaps' these amounted to 'whistle-blowing' concerns. However, at the time, his thinking did not beyond wondering if something was amiss with the information supply and figures and a concern about the impact on his earnings and those of others.

50. In row 5 of his further particulars [**page 30**] Mr Foster alleged that he was pressured by having high pressure meetings and that Mr Strong and Mr Benjamin stared and hovered around him. I reject the allegation that Mr Strong hovered around Mr Foster, with the implication being that he was intimidating him in some way. It was part of Mr Strong's role to move around the sales floor, speaking to sales advisers and others as the case may be and at times observing what is happening on the floor. It may have been, from time to time, that Mr Foster perceived Mr Strong to be 'hovering' but at its highest it was no more than a perception of his. I reject the allegation that Mr Benjamin hovered around Mr Foster or stared at him with a view to intimidating him. I certainly do not rule out or reject the notion that a manager may behave in this way and a tribunal will always have an open mind to complaints about such treatment. However, there has to be a firmer evidential basis than an accusation or perception. The difficulty for Mr Foster was that there was no context given to these vague allegations and no information at all as to what was meant by high pressure meetings.

51. Not satisfied with the explanation given to him by Mr Strong about his annual score reduction, on 13 June 2018 Mr Foster raised a grievance. The complaint on **page 288** of the bundle was that '*Annual Pay rise/Review. I was given no information about my yearly scores no feedback – my yearly ratings came out at 4.3 which would have qualified for a 2% pay rise and without and satisfactory rational this was downgraded to a 3 and resulting in a 1% rise*.' Mr Foster's desired outcome was '*for the decision to be reversed and my 2% backdated*.'

52. As Mr Foster emphasised a number of times in the course of the hearing, his intention in raising the grievance was to counter the challenge to his own performance. He said that he only ever raised a grievance when management questioned or challenged his own performance. This grievance was a direct response to the down-grading of his score from 4.3 to 3. He then used the grievance process as a medium in which to address other matters referred to in the grievance, all of which related to his ability to make sales: noise-calls, BSOL, targeted overtime.

53. On 25 July 2018 Mr Foster emailed Ms Barnes expressing concern about cross-sell penalties and referring to him losing £300 the previous month. He said that '*over the weekend it was highlighted that Brentwood are failing to spot fraud however they are getting their attachment rate for this so no penalty and they will be paid on the sales I do not see that this is fair*.' He said he had looked at Brentwood's sales for the previous week and he was shocked at the findings, which he attached. He asked for some feedback saying that he will raise it higher up the chain if no resolution is found. Of the issues raised by Mr Foster, this was the only issue which related to fraudulent activity. It is identified in row 6 of Mr Foster's further particulars [**page 30-31**]. It is the same issue as that referred to in relation to Sarah Anderson. The Respondent conceded, in closing submissions, that this amounted to a protected disclosure.

54. BT's Brentwood office took orders on behalf of EE products. They were then sent through to the admin team in Doxford for the orders to be processed. It appears that Brentwood had been targeted by fraudsters. Mr Foster was concerned that the advisers in Brentwood were not carrying out security checks and that lots of their referrals subsequently turned out to be fraudulent. When the orders came through to the admin team in Doxford they were processed as 'good to go' without further checks being carried out.

55. Ms Barnes forwarded Mr Foster's email to Mr Strong within about 45 minutes of receiving it. The concern was that Brentwood were processing sales whether or not third party fraud was suspected. Mr Strong took the issue seriously and he liaised with Mr Mountford.

56. She and Mr Strong agreed with Mr Foster that the Brentwood situation was unacceptable and had to be addressed. They asked the admin team and BT agents to be extra vigilant and to compile a checklist for identifying suspicious

email addresses and other things such as reporting to the fraud team before the admin team spend time processing the order.

57. Action was taken on Mr Foster's concern within about 7 days of him raising it. A flow chart summarising the process to be followed was prepared (**page 373** of the bundle). In a subsequent email to Mr McWilliams of 29 August 2018, Mr Foster accepted that by 31 July 2018 the fraud had been stopped (**page 431**).

58. It forms part of Mr Foster's complaint (row 7, **page 32**) that he and those in his team was removed from communications regarding certain management information ('stats and performance') and that he was subsequently told by Mr McWilliams not to email Mr Tomlinson, the Managing Director of SME and that these were detriments done to him because he made this PID. The Respondent agrees that Mr Foster was prevented from having access to certain information. During correspondence with Mr McWilliams, it became obvious to Mr McWilliams that Mr Foster had access to management level reporting which should not have been made available to him or any other sales adviser. Mr McWilliams asked for a review of the reporting permissions so that only role specific reporting was available within the sales team generally.

59. On 01 August 2018, Mr Strong directed that managers and team leaders were to stop sending the daily sales and Compass report around their teams. He also referred to a recent GDPR review which highlighted that the report should be kept in a secure SharePoint due to the volume of customer data contained in the report. He instructed team leaders to share the content of the report with their teams, for example screen shots of the front page but that the 'details' tab should be treated as confidential. He added that if a sales adviser queries their own data it was fine for them to be sent as they have access to the account already but to ensure that the information is expressed as being confidential.

60. The grievance which Mr Foster submitted, had been heard by Antoinette Scouler, Call Centre Manager – Business Retention on 25 July 2018. It was successful. Ms Scouler wrote to Mr Foster on 03 August 2018 [**pages 422-425**]. She upheld his concern that he was not at the time made aware of the behavioural issues by Mr Stephenson and was not shown any notes by him at the time the issues arose. Ms Scouler concluded that before any score is adjusted or pay award reduced, any score-affecting issue should be discussed, addressed and the employee be given an opportunity to fix them. This had not been done in Mr Foster's case. Therefore, his score was amended back to 4 and his pay was amended accordingly.

61. On 03 August 2018, Mr McWilliams emailed Mr Foster in response to his email of 30 July 2018 (**pages 402-405**). Mr Foster complains that Mr McWilliams warned him not to email Mr Tomlinson again and that this was because he had made the PID in relation to Brentwood. However, as accepted by Mr Foster in cross-examination, Mr McWilliams did not in fact warn him against emailing Mr Tomlinson. He merely pointed out that he considered it unacceptable to blind

copy Mr Tomlinson or anyone else into an email and that he would not accept this from anyone in the organisation. That was a perfectly reasonable instruction by Mr Mr McWilliams.

62. In fact, Mr McWilliams – and the other managers – were pleased that Mr Foster had raised the issue of the Brentwood fraud. Mr McWilliams thanked him for doing so.

63. The Respondent's policy is that if a sales adviser does not hit their standard volume sales target (namely, 85% out of 100%) they are placed on an informal improving performance plan. On 08 October 2018, Ms Barnes held an informal meeting with Mr Foster to inform him that he was to be placed on such a plan. She emailed him on 08 October 2018 with all the relevant information.

64. Mr Foster was not happy with this. At this point in time, Mr Foster's sales figures were, as Ms Barnes understood it, running at 74%. By the following week they had dropped further to 52%. Mr Foster accepted in evidence that the information was correct and that he had not hit his target. However, he was unhappy about this because, according to Mr Foster, others had been doing a lot of overtime and they should have been subject to a different target.

65. It was Ms Barnes' decision to place Mr Foster on the informal target plan. She said that the plan was designed to improve performance and that Mr Foster's performance did in fact improve thereafter. Mr Foster accepted in evidence that the performance plan helped saying that this was undeniable. Having hit his target by the following month he was then signed off the performance plan. Ms Barnes also implemented the performance plan in precisely the same way for her other direct reports. Of six employees who were placed on a performance plan four of them did not work overtime. Mr Foster was, in no way, singled out. Indeed, at his stage 1 meeting on 12 November 2018 (**page 495**) Mr Foster says that half the team were placed on performance plans after September 2018 for achieving less than 85% sales.

66. Mr Foster raised a second grievance on 18 October 2018 [**pages 461-463**]. The essence of this grievance was that Mr Foster regarded targets as unfair because staff who worked more overtime were easier able to achieve their targets than those, like him, who did not work much overtime. He regarded this as unfair. He submitted this grievance because his performance had been challenged by Ms Barnes in putting him onto a performance plan.

67. Within his grievance, Mr Foster complained of the following:

    67.1.1. Noise calls (the issue being that Mr Foster was employed on the sales line but was receiving re-routed 'query calls' described as 'noise calls' because they affected his ability to sell and thus hit his sales target);

67.1.2. Availability in the sales queue (the issue being that Mr Foster is often sat 'in available' waiting to take a call, the effect being that the longer he is waiting the less time he has to sell, thus impacting on his ability to hit sales target);

67.1.3. The effect of overtime on targets (the issue being that advisers were permitted to work unlimited overtime increasing their availability to take sales calls and contribute to their target achievement whereas overtime hours were supposed to be subject to a 'target increase');

67.1.4. Fraud (the issue being that other advisers, less experienced than Mr Foster, processed sales which they should have picked up as fraudulent, taking commission which is not clawed back when fraud is subsequently detected);

67.1.5. Corporate to SME Migration ('BSOL') (the issue being that 'leads' from the Corporate side of the business which are 'migrated' over to the 'SME' side of the business are unfairly distributed)

68. In row 9 of his further particulars [**page 32**] Mr Foster says that this is 'background' only. He does not assert he made any PID in this further grievance.

69. On 02 November 2018 Mr Foster raised a report with 'BT Speak Up' [**page 471**]. This is identified in row 10 of the further particulars [**page 32**] as a further PID. BT Speak Up is a confidential mechanism or 'hotline' available to staff to report concerns in the business on a confidential basis [**page 475**]. In that report he refers to the BSOL figures and the Brentwood fraud. There was no evidence that the content of this report was made known to any of the Respondent managers, Mr Strong, Mr Benjamin, Mr McWilliams or anyone else. It was not put to them that they did know of the fact of or the content of the report and I conclude that they did not. Mr Foster did not address it in his evidence nor did he ask any witness about it.

70. Mr Craggs was appointed to consider the second grievance and he met with Mr Foster on 19 November 2018 at a grievance meeting **[pages 511-517**]. In the course of that meeting Mr Foster again discussed the issue of 'BSOL'. His concern was that the BSOL figure mentioned by Mr McWilliams at the roadshow was incorrect and that he had queried what will happen when the BSOLs dry out, that they have not been told how they will bridge the gap and that as far as he was aware no one was looking into BSOLs [**513-514**]. In row 11 [**pages 33-34**] Mr Foster says that he gave information at this meeting to Mr Craggs which tended to show the commission of a criminal offence, namely fraud. The information was said to be that set out in italics on **page 33**.

71. On 03 December 2018 Mr Craggs interviewed Mr Benjamin [**pages 529- 536**] and Mr Strong [**pages 537-543**]. He was told that whilst BSOL figures contributed towards the total sales figures for individuals (so that they could count them towards their target) the targets themselves were not based around the availability of BSOL transfers.

72. I conclude from all the evidence that BSOLs were not factored into targets but that BSOLs were simply a means by which a sales adviser may record a 'sale' or transaction which contributed to their achieving their targets. If there were fewer BSOLs then yes there would be fewer 'sales'. But when setting the targets for sales staff, those targets were not calculated on the understanding that BSOL opportunities were available to the sales team. It would have been open to management to have told the sales team that no BSOL transaction would be taken into account when considering whether they hit their targets; but if they had, this could well have attracted the criticism of being unfair to the sales team.

73. Mr Craggs also discussed the Brentwood fraud issue with Mr Foster [**page 516**]. The only issue of fraud mentioned by Mr Foster was in relation to Brentwood.

74. Mr Craggs responded to the grievance on 31 December 2018 [**page 563-568**]. On 07 January 2019 Mr Foster emailed Mr Craggs to say that he would be lodging an appeal against the outcome. He set out his grounds of appeal in a further email dated 11 January 2019 addressed to Conal Duffy, General Manager Customer Development SME [**pages 573-574**]. In his appeal grounds, the only reference to fraud is again, in relation to the Brentwood issue (point 4). The appeal was heard by Mr Duffy on 04 February 2019.

75. In the interim period, Ms Barnes commenced an investigation into an issue regarding an upgrade. On 31 January 2019, Michael Sutcliffe emailed Claire Scott regarding the pricing of an upgrade for a customer [**page 585**]. The subject line in the email referred to an 'incorrect deal build.' Ms Scott forwarded this to Mr Benjamin asking for it to be investigated as a matter of urgency. He, in turn, forwarded it to Ms Barnes [**page 584**]. Ms Barnes met with Mr Foster the same day for the purposes of investigating and clarifying how the upgrade was processed.

76. Ms Barnes was satisfied with Mr Foster's explanation and the matter was closed. It went nowhere. Mr Foster accepted that Ms Barnes did nothing untoward. However, he suggested without any basis for it that she was pressured by more senior management to investigate the matter. Ms Barnes, I find was not put under any pressure whatsoever and the steps which she took were perfectly rational, reasonable and measured.

77. Mr Foster spoke to Mr McWilliams by telephone on 26 March 2019. Although he initially alleged that Mr Strong and Mr Benjamin were covertly listening into this telephone call Mr Foster withdrew this during the course of the hearing. This

allegation emerged solely because, in the course of disclosure, the Respondent disclosed a redacted email [page 632]. After I had ordered disclosure of the unredacted version during the hearing, Mr Foster withdrew the allegation.

78. On 29 March 2019 (page 633), Mr Foster emailed Mr McWilliams about a number of matters, including, yet again, BSOL. In that email, he refers to the movement from Corporate to SME as costing the business £500,000. As described above, when a customer is moved from one platform to the other the computer generates an ETF. With the numbers involved, the 'apparent' termination fees can add up – Mr Foster was saying that they added up to £500k.

79. Following this email, Mr McWilliams arranged to meet with Mr Foster. He emailed him on 06 May 2019 to say that he would be in Doxford at the back end of that month. They met on 29 May 2019.

80. Mr Foster originally alleged that at this meeting, Mr McWilliams basically said that he was 'sick of him'. In cross examination, Mr Fosters accepted that Mr McWilliams did not say this but that this was the impression he was left with. That may have been Mr Foster's belief. However, it was not a reasonable belief. What Mr McWilliams told him was that the issues he had raised had been independently investigated and that he needed a way to find closure. Mr McWilliams did not do so aggressively. I find that Mr McWilliams gave his time generously to Mr Foster with a view to providing him with reassurance. He was simply saying that the matters had been looked into and the message he tried to convey to Mr Foster was, I find, a reasonable one in the circumstances. I accept Mr McWilliams' evidence on this.

81. On 11 June 2019 one of the Respondent's customers tagged the Respondent in a tweet on Twitter. She said that she had been on the phone to a sales adviser and heard swearing in the background. The tweet said: '*love ringing @EE Business for the rep not to notice he had picked up my call and sat swearing and talking about the pub – professionalism at its best*'.

82. The tweet was picked up by an EE employee, Charlotte White who spoke to the customer. It was identified that the sales adviser who had spoken to the customer was the Claimant, Mr Foster. She then informed Ms Barnes by email on 12 June 2019 [page 656]. Ms Barnes commenced an investigation. She spoke to Mr Foster and interviewed other sales advisers who were on duty at the time.

83. At the investigation meeting with Mr Foster [**pages 663-669**] Mr Foster accepted that he was the one who had the conversation and that he could understand why the customer felt it was inappropriate. He said he was talking to James Weldon at the time. Mr Foster and Ms Barnes both listened to the recorded conversation.

84. Ms Barnes adjourned the meeting to take advice from HR. When it resumed, Mr Foster said that it was Mr Burley that he had been talking to. Ms Barnes advised

Mr Foster that the matter would proceed as a disciplinary allegation of misconduct, but not gross misconduct and that he was not to be suspended.

85. I find that Mr Foster did agree with Mr Barnes that he had been the one who took the call and that he had sworn. She was perfectly entitled to proceed on that basis.

86. Mr Burley was interviewed on 17 June 2019. No further disciplinary proceedings were taken against him as there was no admission of swearing and no evidence that he had sworn.

87. On 20 June 2019 there was an altercation between Mr Foster and another employee, Claire Gardiner which led to Ms Gardiner bringing a complaint against Mr Foster. She alleged that she had asked Mr Foster to be quiet while she was talking to a customer and that Mr Foster had responded aggressively and threateningly, along the lines: "Don't fucking speak to me like that, my own fucking wife doesn't speak to me like that". Ms Gardiner was pregnant at the time, although Mr Foster may not have been aware of this. She left the workplace immediately after the altercation. She said she did so because she was upset. Whatever happened, she complained about Mr Foster's behaviour. Mr Strong was informed of the incident by Ms Barnes, who was a witness. Therefore, he met with Mr Foster on 20 June 2019.

88. During the investigation meeting on 20 June 2019 [**pages 721-722**] Mr Foster explained that Ms Gardiner had said to him 'will you shut up' in a loud tone. He said that he said to her 'do not talk to me like that'. He accepted he pointed his finger at her and that he did raise his voice. When asked whether he felt his actions could have been considered threatening or aggressive he said it mirrored the tone given to him and that every action creates a reaction. He said he went from perfectly calm to angry because of the way he had been spoken to, that she belittled him and he will not take that from anyone.

89. That same day Ms Gardiner texted Mr Strong [**pages 723-725**]. She was clearly expressing concern about her safety and that she felt threatened by Mr Foster. Having read the texts, I am satisfied that any reasonable manager receiving them would be concerned by the content and that Mr Strong was genuinely concerned. That is not to say that the allegations against Mr Foster would have been proved. That remained to be seen. However, they were reasonably serious and in light of what was alleged, Mr Strong had to take advice.

90. Mr Strong met with Mr Foster again the following day, 21 June 2019. He had taken advice from HR. At the meeting he suspended Mr Foster on full pay pending an investigation. The notes of that meeting are on **pages 727-72**8 and the letter of suspension, of the same date, is on **pages 739-741**. In his evidence to the Tribunal Mr Foster accepted that 'if' the incident happened as described by Ms Gardiner, it was a serious incident. However, he denied her version of events. He accepted that it was reasonable for the Respondent to investigate the

complaint. He accepted that 'if it happened' it was reasonable to suspend him from the workplace.

91. Mr Strong was absent from work after this due to an eye condition. Mr Foster had been suspended on Friday 21st June. On the following week he was in the office very little and, to the extent that he did not update Mr Foster on the investigation in that time or offered him support, had reasonable cause for failing to do so. He returned to work on Monday 01 July.

92. However, on 01 July 2019 Mr Foster resigned [**pages 748-749**]. Mr Strong asked Mr Foster to reconsider his resignation saying that no decision had been taken on the disciplinary allegation.

93. When asked why he did not mention the performance plan in his resignation letter, Mr Foster said it was because he was off the plan by then. He said the recent suspension was unfair and he felt that he had been treated unjustly throughout.

Relevant law

Public interest disclosures

Section 43B ERA 1996 provides:

(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,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional

legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part *"the relevant failure"*, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

94. The Act provides a broad definition of disclosure. The worker must disclose information: **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT. In **Kilraine v Wandsworth Borough Council** UKEAT/0260/15/JOJ Langstaff J observed that tribunals should observe the principle in **Cavendish Munro** with caution to the extent that it must not be 'seduced' into thinking that it must decide whether something is either 'information' or an 'allegation'. Information may be provided in the course of making an allegation. However, the requirement is still for information to be disclosed.

95. If there is a disclosure, it is necessary to consider whether that disclosure is a qualifying disclosure. This will depend on the nature of the information disclosed.

96. As can be see from the exercise undertaken by Langstaff J (in paragraphs 31-35 of the **Kilraine** case) it is a question of carefully assessing what was said or written so as to determine whether information was provided (which meets the qualifying criteria in the Statute) whether or not an allegation was made as well, or whether what was said does not amount to information, for example because of the vagueness or lack of specificity or clarity.

97. Each of the six categories involves some form of malpractice or wrongdoing and are often referred as the 'relevant failures'.

98. The worker is not required to establish that the information is true. He must establish that at the time he made the disclosure, he/she held a reasonable belief that the information disclosed tended to show. It is not a question of whether a hypothetical reasonable employee held a reasonable belief, but whether the particular worker's belief was reasonable.

99. There is a subtle but vital distinction, in that it is not a case of asking whether the worker reasonably believed that a breach of a legal obligation had occurred, is occurring or is likely to occur. Rather, it is a case of asking whether he held a reasonable belief that the information he was disclosing tended to show that such a breach had occurred, is occurring or is likely to occur. He must also reasonably believe that he is making the disclosure in the public interest. That aspect is to be determined in accordance with the guidance of the Court of Appeal in **Chesterton Global Ltd (t/a Chestertons)v Nurmohamed** [2018] I.C.R 731.

100. Further, when assessing the worker's belief, the test is not a wholly subjective one. It is the reasonableness of the belief of the particular worker which is being assessed.

101. In cases where a claimant relies on breach of a legal obligation, the source of the legal obligation must be identified before going on to assess the reasonableness of the belief of the employee.

102. If a disclosure is a qualifying disclosure then it becomes 'protected' if (among other things) it is made to the employer (s43(c)(1)(a)).

> **Section 47B** provides:
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
> (a) by another worker of W's employer in the course of that other worker's employment, or
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

S47B:- causation and burden of proof

103. Causation under s47B has two elements:

103.1.1. Was the worker subjected to the detriment by the employer?

103.1.2. Was the worker subjected to that detriment because he or she had made a protected disclosure?

104. When considering a case of detriment due to making one or more protected disclosures, a tribunal should be precise as to the detriments and disclosures and should not just roll them up together: **Blackbay Ventures Ltd v Gahir** [2014] IRLR416, EAT (see paragraph 98 of the judgment). The word 'detriment' is to be construed broadly. As observed by Lord Hope of Craighead in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, this is a test of materiality, taking all the circumstances into account. The question to be asked is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. An unjustified sense of grievance cannot amount to a detriment. It is not necessary to demonstrate any physical or economic consequence.

105. If the Claimant has established on the balance of probabilities that he made protected disclosures, that there was a detriment and that the employer subjected him to that detriment, then the burden shifts to the employer to show that he was not subjected to the detriment on the ground that he made the protected disclosure.

106. The employer must then show that, in subjecting C to the detriment (if indeed it did) that the protected disclosure did not materially influence its decision to do so: **Fecitt v NHS Manchester** [2012] I.C.R. 372.

Constructive dismissal

107. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is **entitled** to terminate it without notice, by reason of the employer's conduct. This is known as 'constructive dismissal'.

108. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: Western Excavating (ECC Ltd) v Sharp [1978] I.C.R. 221, CA.

109. In this case, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in **Woods v WM Car Services (Peterborough) Limited** [1981] I.C.R. 666

"It is clearly *established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct* themselves *in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee* ***Courtaulds Northern Textiles Ltd. v. Andrew*** [1979] I.R.L.R. 84. *To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*: ***see British Aircraft Corporation Ltd. v. Austin*** [1978] I.R.L.R. 332 and ***Post Office v. Roberts*** [1980] I.R.L.R. 347. *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v. Roberts****"*

110. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. However, the resignation may still amount to a constructive dismissal it the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'.

The last straw must itself contribute to the previous continuing breaches by the employer although it does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial**: *Omilaju v Waltham Forest London Borough Council*** *[2005] IRLR 35*.

111. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire Council** UKEATS 0017/13 (27 June 2013).

112. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract. In determining this factual question, the tribunal is *not* to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer: ***Buckland v Bournemouth University*** [2010] IRLR 445, CA.

113. In a case of constructive dismissal, the reason for dismissal is the reason for which the employer fundamentally breached the contract of employment.

114. Finally, the law protects the worker only against the act of disclosure. If the principal reason for dismissal is not the act or fact of disclosure then there can be no unfair dismissal contrary to s103A ERA. Similarly, if the worker was not subjected to a detriment because he made the disclosure, there is no contravention of section 47B.

S103A: The reason for dismissal

115. By **s103A ERA** 1996, if the reason or principal reason for dismissal is that the employee made a protected disclosure, that dismissal is regarded as being automatically unfair. If the Claimant establishes that he was dismissed, he carries an evidential burden and not a legal burden as to the reason for dismissal. This requires the Claimant to show that there is an issue that warrants investigation and which is capable of establishing the automatically unfair reason advanced: **Maund v Penwith District Council** [1984] I.C.R. 143, CA.

116. If the evidential burden is satisfied, the legal burden reverts to the Respondent to show that the principal reason for the (constructive) dismissal was not the asserted impermissible reason. However, an employee, will only succeed in a claim of s103A unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. A 'principal' reason is the reason that operated in the employer's mind at the time of the dismissal.

117. When faced with a case in which a claimant alleges that he or she has made multiple protected disclosures, a tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal: **El-Megrisi v Azad University (IR) in Oxford EAT** 0448/08.

118. If the fact that an employee made a protected disclosure(s) was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s103A will fail.

Discussion and Conclusions

Protected disclosures

119. The first PID is said to be in the email of 14 May 2018 [at **pages 412-414**]. I take this as being the alleged disclosure in row 4 in the table of further particulars as contended by Mr Foster at the hearing in place of the reference to the April meeting.

120. The issue for me is whether Mr Foster disclosed information in this email which at the time he disclosed it in his reasonable belief tended to show the matters in section 43B(1)(a), (b) or (f).

121. I conclude that Mr Foster did not disclose information which in his reasonable belief tended to show the matters identified in section 43B(1)(a)(b) or (f). On his own evidence, Mr Foster did not in fact genuinely believe that there had been or that there was likely to be criminal activity or a breach of any legal obligation. The absolute highest he was prepared to put it during his evidence was that there was 'potentially' some criminal activity or concealment; that it was 'possible'. Therefore, it follows that he did not believe that the information in the email tended to show the deliberate concealment of information which tended to show such things. How could he believe it tended to show deliberate concealment when he did not believe that there had been criminal activity or a breach of a legal obligation in the first place? He had never suggested that the true BSOL figures tended to show the commission of a criminal offence or the failure to comply with any legal obligations. He had no actual belief therefore that the true information tended to show the relevant failures and no reasonable belief that his email

tended to show that this information had been, was being or was likely to be deliberately concealed. My conclusion is based not only on Mr Foster's own evidence but on what he has set out in row 13, page 34 where he says: '*I believe that the information that Gary or Barry are providing the business is incorrect in some way, to what end I am not sure?*'

122. Even if I am wrong and he did actually believe the information tended to show deliberate concealment of information within section 43B(1)(f), I conclude that Mr Foster's belief was unreasonable. As regards the BSOL issue, he did not know over what period Mr McWilliams was referring when he formed his view that he had been mis-leading. Nor did he pause to consider whether there was anything to be gained by understating the BSOL numbers. Mr Foster was not able to articulate any reason why someone (he was unsure who and opted for 'possibly Gary or Barry') would underplay the number of BSOL transfers. He said he read an article about an Italian fraud and thought to himself, 'maybe there is more to this'. That hardly provides any basis for sustaining a 'reasonable' belief that the words he was conveying to the reader or listener tended to show the commission of offences/breach of legal obligations or 'deliberate concealment'. He did not express to the reader or listener his thoughts about the 'BT Italian' fraud [**788A-B**]

123. I conclude that Mr Foster did not make a protected disclosure as set out in row 4 of his further particulars. I need not address the issue of 'public interest' in light of my conclusion.

124. As to the alleged PID in row 6 of the further particulars, it is accepted that in relation to the Brentwood fraud issues, Mr Foster did make a protected disclosure in that he reasonably believed that the information he conveyed (about the sales processes in Brentwood) tended to show that criminal offences (fraud) was being committed against the Respondent by bogus customers.

125. As to the alleged PID in row 10 of the further particulars (BT Speak Up), I conclude that, in relation to the Brentwood fraud matter, Mr Foster made the same protected disclosure. However, Mr McWillliams, Mr Strong, Mr Benjamin, Ms Barnes and the other witnesses involved in these proceedings were unware that he had done so.

126. As to the alleged PID in row 11 of the further particulars (the grievance meeting of 19 November 2018) Mr Craggs accepts that Mr Foster raised the issue set out in row 11, that some advisers at Doxford processed fraudulent sales in order to take the commission in the knowledge that there was no clawback provision on sales which turn out to be fraudulent.

127. I have carefully considered this and conclude that this was a pure allegation with no information being provided. I acknowledge the need not to take a bright line between making an allegation and providing information. Nevertheless, this amounts to no more than an allegation that there is fraud going

on within the business at Doxford. No information was provided. No names were given. No accounts were given. No figures were given. Nothing – just the bare allegation.

128. Even if I were wrong about that and that the proper way to regard this is indeed the provision of information tending to show the commission of a criminal offence, I conclude that Mr Foster's belief was not a reasonable one. As articulated above, at no stage did he provide a name of any adviser who did this or any other information on which to sustain such a belief - neither during his employment nor during the proceedings. He had not reasonable basis for the belief.

129. As to row 13 of the further particulars, I conclude that insofar as the appeal referred to the Brentwood fraud issues, Mr Foster repeated his protected disclosure which he had made earlier. Insofar as it related to other matters such as BSOL and advisers processing sales fraudulently at Doxford I repeat my above conclusion that Mr Foster's belief that he conveyed information that tended to show the commission of criminal activity, or the breach of a legal obligation or the deliberate concealment of those matters was not a reasonable belief for the reasons given above.

130. As to row 16 of the further particulars, I conclude that in relation to the BSOL figures Mr Foster did not in fact give any information to Mr McWilliams when they spoke on the phone on 26 March 2019 that tended to show any relevant failure within section 43B(1). Mr Foster's own note of this call says that he told Mr McWilliams only that Mr Strong or Mr Benjamin were lying to him about the BSOL figures. Again, bearing in mind that there is no bright line between the making of an allegation and the provision of information, nonetheless I conclude that this was an allegation in its purest form and in any event, not information which in his reasonable belief tended to show one or more of the relevant failures.

131. As to rows 18 and 19 of the further particulars, this repeats the Brentwood issue and the BSOL issue. I repeat my conclusions on those matters above. There was a protected disclosure in respect of the former but not the latter.

Detriments

132. I turn now to consider the alleged detriments as they are set out in the table of further particulars.

133. I should point say, in general terms that, whether or not the matters which Mr Foster raised with his managers were or were not protected disclosures within the meaning of the legislation, the Respondent has entirely satisfied me that Mr Foster was not subjected to any detriment because he had made a disclosure or raised any issue. None of the managers was motivated consciously or in my judgement unconsciously by the making of any disclosures by Mr Foster. The conduct of which he complains as amounting to repudiatory conduct was not in

any way motivated by the fact that he made disclosures. Nor were they materially influenced by them.

134. Those alleged detriments are set out in the following paragraphs (the letter 'D' stands for Detriment and 'FP' stands for Further Particulars)

Intimidating behaviour by Mr Benjamin and Mr Strong (identified as 'D1' – from row 2 of the FP)

135. I have not found that there was any intimidating behaviour by either Mr Benjamin or Mr Strong. The allegations were simply too vague and unspecific. In paragraphs 16/17 of Mr Foster's witness statement he refers to them frequently staring at him or standing behind his desk. However, he did not elaborate on this or provide any context and did not put it to the Respondent's witnesses. In the interview of 19 November 2018, Mr Craggs urged Mr Foster to let him know if he is treated differently on the floor (giving an example of 'the death stare'). However, Mr Foster did not go back to Mr Craggs or to anyone even though he had an opportunity to do so.

136. It is for the Claimant to prove that the things that he complains of happened and he has failed to establish on the balance of probabilities that Mr Benjamin or Mr Strong subjected him to any intimidating behaviour. In any event, the time-line in the further particulars for this vague allegation was before Mr Foster says he made any protected disclosure.

Downgrading of Mr Foster's score from 4 to 3 (D2' – row 3 FP)

137. Mr Foster's score was indeed down-graded but reinstated on appeal. This pre-dated any alleged protected disclosure in any event and therefore cannot amount to a detriment <u>because</u> he had made a protected disclosure. Indeed, the Respondent decided to reinstate Mr Foster's score and increase his pay after he made what he maintains was his first protected disclosure and at the time when he was raising the Brentwood fraud issues.

Being put under pressure by management and intensified intimidation by Mr Strong and Mr Benjamin with more constant staring and hovering around his workplace (identified as 'D3' – row 5 FP)

138. I have not found there to be any intimidation of the sort described here. As already discussed above, Mr Foster presented no evidence of these things other than to make bare allegations.

Being warned by Mr McWilliams not to email Mike Tomlinson & Removal of the Claimant from access to certain information ('D4' – row 7 FP)

139. I have found that this did not happen. Mr McWilliams was simply concerned by the practice of 'blind copying'. Mr Foster was not, therefore,

subjected to the detriment as claimed. I also conclude that no reasonable employee would consider it to be a detriment to be instructed not to blind copy a more senior manager into an email. Mr McWilliams was simply giving a reasonable management instruction. Further, he was not in any way motivated by any disclosure which Mr Foster had made.

140. Whilst the trigger for the instruction to restrict access to certain information was Mr McWilliams' realisation that Mr Foster had access to higher management-level information, and whilst it is right to say that he (and others) were restricted from having unrestricted access to this information from August 2018, this was not a detriment to Mr Foster. No reasonable employee would consider it to be a detriment not to have access to non-role specific information or information which was unnecessary for them to access for the performance of their role. It may have been otherwise had only Mr Foster been restricted. However, as he accepted the restriction applied to everyone. Mr McWilliam's decision to limit access to senior employees was not motivated by the fact that Mr Foster had made protected disclosures. The content of what Mr Foster conveyed to Mr McWilliams was neither here nor there and neither he nor Mr Strong were materially or significantly influenced by any disclosure. It was the confidential nature of the information and the level of access that should properly be permitted for that information that was the issue for Mr McWilliams, nothing more.

Being placed on a performance plan ('D5 and D6' – row 7 AND ROW 12 FP8)

141. The Respondent submitted that this did not amount to a detriment. That was not the easiest of issues to resolve, principally because Mr Foster said that it was undeniable that the performance plan helped. I can readily see that the performance plan has benefits in that it focuses the employee's mind and involves some input and assistance from the line manager. However, on balance I conclude that putting an employee on a performance plan (even an informal one) is within the concept of 'subjecting to a detriment'. It is a precursor to a formal plan which is itself a precursor to potential disciplinary action and something which a reasonable employee would see as a detriment in the workplace.

142. However, the Respondent has satisfied me entirely that Mr Foster was placed on the informal performance plan entirely for reasons related to performance and that it was in no way whatsoever motivated by or influenced by any disclosures he had made. Mr Foster accepted that Ms Barnes was motivated properly but then suggested that she was put under pressure by Mr Strong or Mr Benjamin. However, he had no evidence whatsoever to support this and Ms Barnes (who was not challenged on this) said that it was her decision, which I accept. She placed other direct reports on performance plans also at the same time (something recognised by Mr Foster). The plan was short lived and Mr Foster came off it the following month. Her actions were perfectly reasonable.

Meeting with Scott Craggs as part of the Claimant's grievance ('D7' – row 14 FP)

143. Of the allegations this is the most difficult to comprehend. It boils down to this: that Mr Foster was subjected to a detriment by having to meet with Mr Craggs to pursue his grievance, which he only pursued because his performance had been challenged and that the whole department knew he was in another grievance meeting.

144. Mr Foster said, on a number of occasions, that he only ever presented a grievance when his own performance was challenged. From that I conclude that he used the grievance procedure as a weapon to combat challenges to his performance by management. It was quite a 'tit-for-tat' approach from his perspective. In any event, to suggest that by arranging to meet with him to hear those grievances that the Respondent was thereby subjecting him to a detriment is absurd. Certainly, no reasonable employee would consider that to be a detriment. In any event, as a matter of logic, the reason for meeting him to hear his grievance was entirely because he presented a grievance and the Respondent had an obligation under its procedures to meet with and address the grievance (which I find it did, genuinely, fairly and comprehensively).

Commencing an investigation into an upgrade ('D8' – row 15)

145. I just about conclude that Ms Barnes, by holding an investigatory meeting with Mr Foster to obtain an explanation from him in respect of a pricing query on an upgrade was subjecting him to a detriment, although it is extremely borderline given that most employees would probably understand the need for an employer to investigate the sort of issue that arose on this occasion. A reasonable employee might, nonetheless see this as being to his or her detriment in the workplace. The real issue is not whether an investigatory interview is a detriment but why she interviewed Mr Foster on 31 January 2019. The answer is clear. She did so solely because of the query that had been raised elsewhere. I am satisfied that this had nothing whatsoever to do with any disclosures Mr Foster had or may have made. It was entirely motivated and influenced by the apparent discrepancy which had been brought to her and Mr Strong's attention. The steps which Ms Barnes took were eminently sensible, reasonable and proportionate. She acted quickly and acted fairly. Mr Foster gave his explanation to her and that was it. Therefore, if Mr Foster was subjected to a detriment by interviewing him about this issue, the Respondent was entitled to do so and it did so for reasons entirely unconnected with any issue Mr Foster had raised.

Mr Benjamin and Mr Strong listening to the telephone call with Mr McWilliams on 26 March 2019 ('D9' – row 17 FP)

146. It was conceded by Mr Foster during the hearing that this did not happen. He was not subjected to this detriment.

Mr McWilliams told Mr Foster that he was basically sick of him and that he should stop contacting Mr McWilliams and Mr Tomlinson ('D10' - row 20 FP)

147. As I have set out in the findings above, Mr Foster accepted in evidence that Mr McWilliams did not in fact say this. Mr McWilliams was not conveying to Mr Foster that he was sick of him. He tried to explain that the matters which he had raised had been looked into and that he should now look to move on from them. Mr Foster was not subjected to any detriment by having this explained to him. No reasonable employee would consider this to be a detriment. Mr McWilliams was not trying to hush the Claimant up on any issue.

Investigating the Claimant regarding a customer complaint about swearing ('D11' – row 21 FP)

148. As with 'D8' above, I am prepared on balance to conclude that by investigating an employee in respect of an allegation of misconduct constitutes subjecting the employee to a detriment. However, as with the above example, the Respondent was perfectly entitled to do so. Employers are not precluded from subjecting their employees to detriments, just as they are not precluded from subjecting them to benefits. More often or not the issue will be 'why' the employee was subjected to the detriment. In Mr Foster's case I am entirely satisfied that the sole reason for subjecting him to a disciplinary investigation was the customer tweet and subsequent email from Charlotte White and that it was not in any way influenced by any disclosure or issue that he had raised. Yet again, the Respondent acted reasonably and fairly, assuring Mr Foster that although proceeding to a disciplinary hearing it would not be considered a case of gross misconduct.

Suspending the Claimant ('D12' – row 22)

149. For the same reasons, I conclude that Mr Foster was subjected to a detriment by being suspended on 21 June 2019. However, also for the same reasons I conclude that he was not subjected to this detriment because he had made a protected disclosure. I am entirely satisfied that Mr Strong's sole motivation was the nature of the allegation and the expressions of concern for her well-being sent to him by Ms Gardiner. He was not in any way influenced by any disclosure or issue which Mr Foster had raised. It is notable that he did not suspend Mr Foster on 20 January when he interviewed him. Therefore, the decision was no knee-jerk reaction, nor was it a case of a manager who wished to see the back of a difficult employee and simply seizing on an issue to remove him from the workplace. It was a considered decision taken with advice from HR following Ms Gardiner's texts. Mr Strong acted rationally and reasonably. Mr Foster accepted that 'if' the allegations as expressed by Ms Gardiner were true, suspension was warranted. His point was that they were not true. But that was something that remained to be investigated.

150. For the above reasons I must dismiss the complaint that Mr Foster was subjected to detriments because he made protected disclosures.

Constructive dismissal

151. I turn now to the complaint of constructive dismissal. In light of my findings of fact and conclusions on the 'detriment' claim I can take this fairly briefly.

152. The three matters which Mr Foster relied on in support of his claim of constructive dismissal are:

152.1.1. Unjustly placing him on the performance plan in October 2018;

152.1.2. Being subjected to a disciplinary procedure due to a customer complaint in June 2019;

152.1.3. Being suspended following a complaint by a colleague.

153. Having already addressed those particular complaints above, I conclude that it was not unjust or even unreasonable to place Mr Foster on the performance plan, nor was he singled out. It was in keeping with the Respondent's practice and policy. Mr Foster accepted that it was helpful and he came out of it very quickly. It was handled very well by Ms Barnes. Looked at in isolation and objectively, this was not something that would seriously damage or destroy the relationship of trust and confidence and it was not mentioned in his letter of resignation because, as Mr Foster said he had been taken off it by then. The Respondent's processes were well known: if you do not achieve 85% you are placed on a performance plan. The act of placing an employee on an informal plan in those circumstances, for a short period is not, on an objective analysis, conduct which is capable of seriously damaging the relationship of trust and confidence. Even if it were, I find that the Respondent acted with reasonable and proper cause in so doing.

154. As regards the customer complaint and the colleague complaint resulting in Mr Foster's suspension, again, the Respondent acted with reasonable and proper cause in my judgement. The act of investigating a matter such as swearing in a call centre and then, in light of an admission of swearing, to proceed to a disciplinary hearing as misconduct short of gross misconduct, is on an objective analysis, not conduct by the employer which is capable of seriously damaging the relationship of trust and confidence. However, even if I were wrong about that, the Respondent acted with reasonable and proper cause in so doing. It behaved reasonably throughout.

155. I apply the same reasoning in respect of the suspension. Certainly, an unjustified suspension is, on an objective analysis, capable of seriously damaging the relationship of trust and confidence. However, on the fact of this case, Mr Foster's suspension was not so capable. He was at the receiving end

of a significant complaint of intimidating and threatening behaviour by a pregnant female colleague who expressed to her manager that she was concerned for her well-being should she return to the workplace alongside Mr Foster pending investigation. That Mr Foster might not have known she was pregnant or that he might turn out to be innocent of the allegations is something that would be looked into during the investigation. However, the justification of the suspension must be judged at the time of the act of suspension. Mr Foster accepted that 'if' the allegations were true then suspension was warranted. No manager could proceed on the basis that the allegation was 'true' or not 'true'. Mr Strong established that something happened, that there were witnesses and proceeded on the basis that suspension on full-pay was reasonably necessary given the nature of the allegations and the proximity in the work-place of the two individuals. He was not in fact expressing a view as to the truth or otherwise and he did not rush into suspending Mr Foster on the day of the incident. Even if the suspension were capable of seriously damaging trust and confidence, I am entirely satisfied that Mr Strong acted with reasonable and proper cause in suspending Mr Foster.

156. Therefore, looking at each element of conduct complained of in isolation, and then standing back and looking at the conduct as a whole, I conclude that Mr Foster was not entitled to terminate his contract of employment without notice by reason of the Respondent's conduct. The Respondent did not fundamentally breach his contract of employment. He was not constructively dismissed. Therefore, his claim of unfair dismissal (ordinary and automatically unfair) must be dismissed.

Employment Judge Sweeney

8 December 2020