EMPLOYMENT TRIBUNALS

Claimant:		**Respondents:**
Dr E Heslop	**v**	Oxford Said Business School Limited (1) Dr A White (2) The Chancellor, Masters and Scholars of the University of Oxford (3)

Heard at: Reading **On:** 8 - 11, 14 - 18 September & 6 October 2020 and In chambers: 7 October & 16 December 2020

Before: Employment Judge Anstis
Mrs A E Brown
Mr J Appleton

Appearances
For the Claimant: Mr J Kendall (counsel)
For the Respondent: Ms J Danvers (counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the first respondent.

2. The claimant's dismissal was not automatically unfair.

3. The first and second respondent subjected the claimant to the following detriments (which are described in the reasons) on the ground of protected disclosure(s):

    - Detriment 1 (in part)
    - Detriment 2
    - Detriment 3
    - Detriment 4
    - Detriment 5 (in part)
    - Detriment 6 (in part)

4. The second respondent subjected the claimant to the following detriments on the ground of protected disclosure(s), and the first respondent is vicariously liable for those detriments:

- Detriment 8
- Detriment 9

5. The claimant's claim in respect of the following detriments is dismissed:

   - Detriment 5 (in part)
   - Detriment 6 (in part)
   - Detriment 7

6. The first and second respondents unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

7. The claimant's claims against the third respondent (and any remaining claims not referred to above) are dismissed on withdrawal.

REASONS

A. INTRODUCTION

Introduction

1. The claimant was employed by the first respondent as Director of Custom Programs from 1 January 2016 until her resignation on 6 November 2018.

2. During her employment, the first respondent reported to the second respondent. The second respondent is an employee of the third respondent. His job title is "Associate Dean, Executive Education and Corporate Relations".

3. The first respondent is a company which is wholly owned by the third respondent. It offers bespoke business education (known as "custom programs") to corporate customers. The first respondent is responsible for devising, selling and delivering courses to corporate customers, based on their individual requirements. In practice the staff delivering the academic element of the courses will be comprised (wholly or partly) of "faculty" or "associate faculty" either employed by or otherwise connected with the first or third respondent. This close relationship between the first and third respondent, and its consequences, were a feature of this case.

4. One consequence of this close relationship is that there was at the start of the hearing a live issue between the parties as to whether the claimant was an employee or worker of the third respondent, as well as being an employee of the first respondent. During the hearing the parties agreed that this was not something they wished us to consider at this stage, and during closing submissions Mr Kendall withdrew all the claimant's claims against the third respondent. They are therefore dismissed on withdrawal. Where we refer to "the respondents" in these reasons we are (unless the context requires otherwise) referring to the first and second respondent.

5. On 6 September 2018, following a period of holiday, the claimant returned to work and was told by the second respondent that her team had lost confidence in her. There followed a sequence of events which the claimant says led (together with the meeting of 6 September 2018) to her resignation. She says that her resignation is a constructive dismissal, that that dismissal was unfair, and that it was automatically unfair as being by reason of a number of protected disclosures she had made. She also claims to have been subject to a number of detriments arising from those protected disclosures.

6. In his written submissions, Mr Kendall set out what he called the claimant's "core case" on the following basis:

> *"At the meeting on … 6 September 2018 R2 (acting as admitted agent for R1) breached a fundamental term of C's contract of employment, namely the implied term of trust and confidence. In doing so he subjected C to a significant and serious detriment for the purposes of s47B of the Employment Rights Act 1996.*
>
> *This detriment led inevitably and inexorably to C's resignation and therefore her dismissal.*
>
> *This detriment was materially influenced by the protected disclosures, in particular the 'Group 4' disclosures. That is the inevitable inference to be drawn from the remarkable … circumstances of not just the … meeting itself, but the lead-up to the meeting and its immediate aftermath."*

7. The respondents do not accept this, and point to explanations for the second respondent's behaviour described later on in these reasons, which (on their case) show that any protected disclosures (if there were any at all) did not have any influence on the second respondent's behaviour towards the claimant.

8. The parties have agreed a list of issues which is set out below, and which we adopt for the purposes of this judgment. In essence we have to determine whether protected disclosures were made by the claimant, whether her resignation amounted to a constructive dismissal, whether that dismissal was unfair, whether it was automatically unfair, and whether the claimant was subject to unlawful detriments.

9. This hearing was to determine liability only (but including any points in relation to contributory fault or an uplift or reduction in compensation under the ACAS code of practice).

The list of issues

10. The list of issues agreed between the parties is as follows. We have omitted references to appendices. Sections noted as "OMITTED" reflect changes agreed between the parties from the version of the list at the start of the hearing to the final version adopted by the parties for the purposes of their submissions, or (in the remedy section) covered matters we were not to address at this hearing. "DOC" is an abbreviation for the claimant's "details of claim" document. As referred to above, any claims against the third respondent were withdrawn

by the claimant during final submissions, but for ease of reference they remain in the list of issues as prepared by the parties and set out below.

Employee / worker status

1. OMITTED

2. OMITTED

Detriment for making a protected disclosure (s.47B ERA 1996)

Disclosures

3. Did the Claimant make any disclosure(s) of information which, in her reasonable belief, were made in the public interest and tended to show one or more of the matters set out in s.43B (1)(a)-(f) ERA 1996?

   The Claimant relies on the following disclosures of information:

   3.1 Group 1 (paras 111-112 DOC): In relation to alleged self-allocation of work resulting in additional payments to Dr Chapman**.**

   She alleges the disclosures were made to:

   3.1.1 Mr Harris on:

   3.1.1.1-4 OMITTED

   3.1.1.5 12 June 2018;

   3.1.2 the Second Respondent on:

   3.1.2.1 OMITTED;

   3.1.2.2 12 June 2018; and,

   3.1.2.3 9 August 2018;

   3.1.3 the First Respondent and Third Respondent in a grievance on 14 September 2018.

   3.2 Group 2 (paras 113-114 DOC): In relation to the submission of allegedly misleading data to the Financial Times Rankings.

   She alleges the disclosures were made to:

   3.2.1 various individuals by the following emails:

   3.2.1.1 12:31 on 27 February 2018;

   3.2.1.2 07:27 on 28 February 2018;

   3.2.1.3 16:28 on 28 February 2018;

   3.2.1.4 16:47 on 28 February 2018;

   3.2.2 to the Second Respondent by WhatsApp message on 1 March 2018 at 18:04;

   3.2.3 to the Second Respondent and Ms Williams during a conference call on 1 March 2018;

   3.2.4 OMITTED; and,

   3.2.5 that she repeated her disclosure to the Second Respondent and/or made a disclosure to the Third Respondent in a grievance on 14 September 2018.

   3.3 Group 3 (paras 115-116 DOC): In relation to the alleged proposal to offer a 20% reduction to the Infrastructure and Project Authority (IPA) to retain the contract for the Major Project Leadership Academy (MPLA).

   She alleges the disclosures were made to:

3.3.1 the Second Respondent by email on 12 June 2018;

3.3.2 that she repeated her disclosure to the Second Respondent and/or made a disclosure to the Third Respondent in a grievance on 14 September 2018.

3.4 Group 4 (paras 117-118): In relation to the IPA and the Cabinet Office allegedly being misled about the creation of intellectual property rights in the MPLA.

She alleges the disclosures were made to:

3.4.1 the Second Respondent during a meeting on 9 August 2018;

3.4.2 the Second Respondent during a telephone conversation on 13 August 2018;

3.4.3 that she repeated her disclosure to the Second Respondent and/or made a disclosure to the Third Respondent in a grievance on 31 October 2018.

3.5 OMITTED

Detriments

4. Did the Respondents (or their employees or agents) act as follows:

4.1 if and to the extent that concerns were in fact raised about the Claimant, the First, Second and/or Third Respondent solicit some or all of the supposed complaints about the Claimant referred to at the meeting on 6 September 2018;

4.2 the First and/or Second and/or Third Respondent hold a "disciplinary" meeting with the Claimant on 6 September 2018 in the absence of a fair process and contrary to the First Respondent's disciplinary policy;

4.3 the First and/or Second and/or Third Respondent inform the Claimant on 6 September 2018 and/or on 7 September 2018 that she had lost the trust and confidence of the senior team and/or of the Second Respondent;

4.4 the First and/or Second and/or Third Respondent refuse to permit the Claimant to return to work on 6 September 2018 and/or suspend the Claimant from her post and/or place the Claimant on indefinite forced leave in breach of her contract;

4.5 the First and/or Second and/or Third Respondent fail or refuse to provide the Claimant with the details of the alleged wrongdoing and/or performance issues both at the meeting on 6 September and continuing until her resignation on 6 November 2018;

4.6 the First and/or Second and/or Third Respondent failing or refusing, on 6 September 2018 and during the period of two months thereafter prior to the Claimant's resignation on 6 November 2018, to identify the alleged complainants;

4.7 the First and/or Second and/or Third Respondent instigate an investigation into the unspecified and un-particularised allegations against the Claimant;

4.8-4.14 OMITTED

4.15 the Second Respondent's unlawful actions on 6 September 2018 which resulted in the Claimant's dismissal, namely those referred to at paragraph 121(a)-(g) of the Grounds of Claim and already specified above, and the matters referred to at paragraph 125 of the Details of Claim, namely:

4.15.1 OMITTED

4.15.2 failing to warn the Claimant at any point before or after arranging the aforesaid meeting on 21st August 2018 about the matters to be raised at the meeting or that its purpose was to inform the Claimant that supposed 'concerns' had been raised about her/or to prevent her from returning to work;

4.15.3 presenting the plan for the Claimant to be removed from her post as a fait accompli notwithstanding the failure to follow any or any proper process;

4.15.4-5 OMITTED

5. If so, in so acting:

5.1 Did the First Respondent subject the Claimant to a detriment on the ground that the Claimant had made a protected disclosure, pursuant to section 47B(1)? And/or

5.2 Subject to the Claimant being found to be an employee or worker of the Third Respondent, did the Third Respondent subject the Claimant to a detriment on the ground that the Claimant had made a protected disclosure, pursuant to section 47B(1)? and/or

5.3 Did the Second Respondent subject the Claimant to a detriment on the ground that the Claimant had made a protected disclosure contrary to section 47B(1A)(a) or (b)? In particular:

5.3.1 In so acting was the Second Respondent acting in the course of his employment with the same employer as the Claimant? (It is denied that in respect of the above alleged conduct the Second Respondent was acting in the course of any employment with the First or Third Respondent or that he had the same employer as the Claimant); or

5.3.2 was the Second Respondent acting as an agent of the Claimant's employer with the employer's authority? (It is admitted the Second Respondent was acting as an agent of the First Respondent, who was the Claimant's employer. It is denied the Second Respondent was acting as an agent of the Third Respondent or that the Third Respondent was the Claimant's employer).

5.4 If so:

5.4.1 It is accepted that the First Respondent is liable for the Second Respondent's actions in accordance with section 47B(1B)-(1E).

5.4.2 Is the Third Respondent liable for the Second Respondent's actions in accordance with section 47B(1B)-(1E)?

5.5 If the Third Respondent is not found to be the Claimant's employer, in respect of any detriment which the Third Respondent is found to have subjected the Claimant to, as per paragraphs 5.2 above, is the First Respondent liable for the same in accordance within section 47B(1A)(b) and section 47B(1B)-(1E)?

Constructive Unfair dismissal (s.94/98 ERA 1996)

6. Was the Claimant dismissed by the First Respondent or Third Respondent (subject to her being found to be an employee of the Third Respondent) within the meaning of s.95(1)(c), in particular:

6.1 did the First or Third Respondent, without proper cause, conduct itself in a manner calculated or likely to destroy or seriously undermine the trust and confidence between the parties? The Claimant relies on a breach/breaches of the implied term of trust and confidence. In particular by:

6.2 the acts/omissions set out above at para 4 above, except for para 4.14.

6.3 the conduct of the meeting of 6 September 2018 (as specified at para 125(b) DOC and at para 4.15 above); and

6.4 the failure to follow the First and/or Third Respondent's procedures as set out in the HR Handbook, in particular sections 12, 17, 18 and 19, in relation to the supposed allegations against the Claimant, or any fair process.

7. Did the Claimant waive any alleged breach, thereby affirming the contract?

8. Can the First or Third Respondent show that the reason for dismissal was a potentially fair reason within the meaning of s.98(1) ERA 1996?

9. If so, was the dismissal fair or unfair under s.98(4) ERA 1996, having regard to the reason shown by the First or Third Respondent?

Automatic unfair dismissal s.103A ERA 1996

10. Was the sole or principal reason for the Claimant's dismissal that she had made a protected disclosure?

Jurisdiction

11. OMITTED

Remedy

12. If the Claimant succeeds in any of her claims, the Tribunal will be concerned with whether

    12.1 OMITTED; and

    12.2 issues of remedy, including but not limited to:

        12.2.1 whether her compensation should be reduced due to contributory fault/conduct;

        12.2.2 whether any basic award should be reduced under s.122 ERA;

        12.2.3-4 OMITTED

        12.2.5 whether there should be any ACAS uplift/reduction to any award;

        12.2.6-7 OMITTED

The hearing

11. The hearing was originally listed for 7-18 September 2020, but the start was put back by one day by the tribunal on account of a lack of available judges or non-legal members. The hearing started on 8 September 2020, at which point a number of preliminary matters were dealt with. In summary:

    - The respondents applied for the evidence of Caroline Williams, Max Todd and Wendi Foster to be given by video for various reasons associated with the Covid-19 pandemic. This was not opposed by the claimant, and the application was granted by the tribunal.

    - The respondents sought various orders under rule 50, including anonymising two individuals who would be referred to during the course of proceedings. The claimant adopted a neutral stance in respect of this. A number of minor matters that the respondents had concerns about were dealt with by agreement between the parties that it was not necessary for the tribunal to be referred to or to address particular detailed personal matters in respect of certain individuals. As regards two names for which anonymisation was sought, after hearing full submissions from the respondent on 8 September we refused to grant the rule 50 application applied for, for reasons given at the time and which will not be provided in writing unless sought within fourteen days of the parties receiving this written record of the decision.

- The claimant had applied for three witness orders. It appeared that these witness orders had been granted by the tribunal but the orders had not yet been produced. They were immediately produced. Later on in the hearing the claimant indicated that she did not want to call those witnesses. While it may be said that the witnesses remained obliged to attend under the terms of the witness orders, neither party suggested that the witnesses should be called by the tribunal if the claimant no longer wished to call them, and no further action was taken in respect of the witness orders.

12. The remainder of the day and the morning of Wednesday 9 September were taken by the tribunal as reading time.

13. The hearing took place during the Covid-19 pandemic. The hearing room was configured to allow social distancing, but this severely limited the number of people who could attend the hearing in person at any one time. For the second and all subsequent days up to and including 17 September 2020 the hearing proceeded both within the hearing room and via CVP. Except for the final day, the CVP system was used only to enable observation of the hearing by the public and others connected with the case who wished to observe it. On the final day, the witnesses named above gave their evidence remotely via CVP. From 8-17 September 2020 the tribunal panel, advocates and those most closely associated with the case (such as the claimant and the second respondent) were in the tribunal room, with others observing or attending via CVP. Except for those mentioned above, every witness gave their oral evidence within the tribunal hearing room. By agreement with the parties, the hearing on 6 October 2020 took place entirely via CVP.

14. The claimant has moderate hearing loss. Adjustments were made from time to time during the hearing to ensure that the claimant could fully participate in it.

15. The hearing proceeded largely in accordance with a timetable agreed by the parties, as follows:

- Tuesday 8 September: preliminary matters and reading
- Wednesday 9 September: reading and the start of the claimant's evidence
- Thursday 10 September: the claimant's evidence
- Friday 11 September: the claimant's evidence
- Monday 14 September: Melanie Francis (HR Director),

  Nicholas Blandford (Client Director)
- Tuesday 15 September: Aileen Thomson (Client Director),

  the second respondent

- Wednesday 16 September: the second respondent
- Thursday 17 September: Peter Tufano (Dean),

  Jo Harris (Director of Finance and Administration)
- Friday 18 September: Chantel Moore (Commercial and Operations Director),

  Sara Wright (Client Director),

  Wendi Foster (Head of Executive Education Programme Services) (by CVP),

  Caroline Williams (Director of Open Programmes) (by CVP),

  Max Todd (Assistant Registrar – information compliance) (by CVP)

16. This did not leave any time for the parties' submissions, which were then dealt with (by agreement with the parties) through written submissions being exchanged by 2 October 2020 with a further hearing for short oral submissions and/or a reply to the other party's submissions taking place by CVP on the morning of 6 October 2020.

17. Following that, the tribunal panel took the remainder of 6 October and the whole of 7 October and 16 December 2020 for discussion in chambers.

18. We are grateful to both counsel for their professional approach to this case and for their assistance in enabling us to reach our decision.

B. THE FACTS

Introduction and background

The claimant

19. The claimant was herself a former student at the third respondent, having completed her PhD at the University of Oxford. It is not in dispute that she enjoyed a distinguished career prior to starting work with the first respondent. Immediately prior to her appointment she had worked for Deloitte as a director within their strategy and operations consulting practice, leading Deloitte's Higher Education Consultancy team. In this capacity the first respondent had been a client of hers, and since 2013 she had worked with the first respondent on a strategy to grow its Executive Education portfolio, working personally during this time with the second respondent and Caroline Williams. She eventually served as a member of the International Advisory Board of the Oxford Said Business School.

20. Encouraged by both the second respondent and Caroline Williams, she applied for and was appointed to the position of Director of Custom Programmes at the respondent. She relocated from Edinburgh to Oxford, and her appointment took effect on 1 January 2016.

The Oxford Said Business School

21. The Oxford Said Business School is a department of the third respondent, operating within the Social Sciences Division. It provides both undergraduate and postgraduate courses. These include degrees and postgraduate qualifications in respect of which it functions in much the same way as any other university department: students apply and are accepted for study in accordance with prescribed syllabuses and programs of study or research.

22. Academics employed by the third respondent within the Oxford Said Business School are known as its "faculty". There are also "associate fellows", known collectively as the "associate faculty". These are individuals of academic distinction associated with but not employed by the third respondent. The designation "associate fellow" is granted by a committee of the third respondent. In practice the degree of connection between any individual associate fellow and the third respondent appears to vary – some will be very closely connected with the third respondent and others less so. Associate fellows will typically have interests outside the third respondent.

23. Unlike many other university departments, the Oxford Said Business School also offers what is known as "Executive Education", which itself has two separate divisions. They are "open programmes" – publicly available programmes, in respect of which individuals can apply to study on standard terms, and "custom programmes" which are devised specifically to the requirements of particular corporate customers. The market for these "custom programmes" is worldwide, and encompasses both private and public sector clients.

24. Professor Peter Tufano is the Peter Moores Dean of the Oxford Said Business School, and therefore in overall charge of a department of the third respondent. Dr White is an Associate Dean and reports to him. Both are academics in their own right and members of the faculty of the Oxford Said Business School.

25. "Custom programmes" are devised, sold and delivered by the first respondent rather than the third respondent. We were told this was because of the different VAT treatment that they benefitted from. The first respondent has its own structure and operations, but both the first respondent and the relevant department of the third respondent operate under the name "Oxford Said Business School". In practice there is considerable overlap between the two. The first respondent is wholly owned by the third respondent, and its directors are largely, perhaps entirely, employees of the third respondent.

26. Devising, selling and organising the delivery of custom programmes was the responsibility of the first respondent's "client directors" or "senior client directors". The client directors reported to the senior client directors, and the senior client directors reported to the claimant. All of these individuals, and a

substantial number of other staff, were employees of the first respondent. In practice the delivery of the custom programmes (and even the devising and selling of the custom programmes) was carried out by the first respondent in close collaboration with the third respondent's faculty and associate faculty.

27. While we have outlined the general position above, the overlap between the first and third respondent meant that in practice boundaries were much more blurred. We heard of faculty and associate faculty participating in the sale and development of custom courses, and of them being the leaders of such courses. The client directors and senior client directors were not simply salespeople. While not regarded as members of faculty or associate faculty they were themselves subject matter experts (we heard that a senior client director had gone on to take up a role as a professor in another institution) and would often participate in the delivery of the courses.

28. Although it was not described to us in quite this manner by any of the witnesses, it appears to us that for practical purposes the first respondent was the means by which the third respondent offered the expertise of its faculty and associate faculty to corporate customers, with any resulting revenue helping to fund the third respondent, as sole owner of the first respondent.

29. The close connection between the first and third respondent led to considerable overlap. Both operated under the name "Oxford Said Business School", and staff employed by the third respondent, such as Prof Tufano and Dr White, held management roles or responsibilities in respect of the first respondent. Both Mel Francis and Jo Harris (as, respectively, HR director and finance director) had responsibilities for both the first respondent and for the Oxford Said Business School as a department of the third respondent. Many of the first respondent's HR and other policies and procedures were derived from or mirrored those of the third respondent.

30. When we use the term "Oxford Said Business School" within this judgment we intend to refer to the overall operations of the first respondent and the department of the third respondent which is known as the "Oxford Said Business School".

The claimant's role

31. The claimant was director of custom executive education. As we shall see, the structure within the first respondent was subject to a number of changes during her tenure in the role, but for the purposes of this judgment we will describe the structure as it appears on an organisation chart dated 1 May 2018. At that time the claimant had four direct reports, who were:

    - Nigel Spencer, senior client director
    - Andrew James, client and markets director
    - Chantel Moore, client operations director
    - Caroline Lomas, executive assistant.

32. Below Nigel Spencer were six client directors. We understand them to have been responsible for devising and selling custom education programs to their

clients, and that their work was broadly divided into market segments, with individual client directors specialising in working with, for instance, professional service organisations. Programmes would typically be developed in close collaboration with the relevant client. The client directors would also participate in the delivery of the programs. We heard much less about the work of the teams who reported to Andrew James and Chantel Moore, but broadly speaking they appear to have been responsible for preparing responses to invitations to tender for work and ensuring the effective delivery of the custom programmes. Between 30-40 people ultimately reported to the claimant at that time, although this figure seems to have varied through various reorganisations that took place when she was in post.

33. The claimant rejected a suggestion from us that she was the “sales director” of the first respondent. However, it is clear that an important part of her role was to (either herself or through her team) bring in new clients and increased revenue to the first respondent. While we accept that there was more to the claimant’s (and her team’s) work than simply selling courses, in practice much of the evidence we heard about her work was concerned with bringing in business – either herself or through her team. Typically the respondent’s customers for custom education programs would be large blue-chip organisations or governments, and its market was worldwide.

34. There was a dispute between the parties as to how much of the sales work the claimant was to personally undertake, and how much her role was simply to be the supervision of sales made by the senior client directors and client directors.

35. This is not ultimately a significant point for our decision, but by way of context we find that at the time the claimant started her role, the custom education work was facing difficulties. It was too dependent on a small number of large clients, and some of those large contracts were coming to an end. There was an imperative to increase revenue, and it was expected that the claimant would take the lead in that and be personally involved in high-value sales herself. This would involve a considerable amount of international travel. Having said that, we also find that (i) towards the end of her time with the first respondent the first respondent had invested heavily in building up a senior and experienced team of client directors and would, at that time, have been looking for the claimant to lessen her personal involvement in sales and move to more of a position of enabling and supporting her team of client directors in their sales and (ii) this message or need to change was never explicitly told to the claimant by the first or second respondent.

Other relevant roles

36. We have outlined above the roles of those above the claimant (Dr White and Prof Tufano) and those who immediately reported to her. We will refer to various other individuals and their roles to the extent they become relevant in our more detailed fact finding. For now, we also mention Caroline Williams, who was a peer of the claimant’s. While the claimant was responsible for custom programmes, Caroline Williams was director of open programs. We understand open programmes to still fall within the category of executive education (as opposed to the standard undergraduate and postgraduate courses offered by

the third respondent) but to be standard programmes which are open to public application and will typically be undertaken by individuals applying and being accepted for study, in contrast to custom education being bespoke courses offered to organisations who will then send along their own nominated individuals to undertake the course. Open programmes were offered by the third rather than the first respondent. Both the claimant and Caroline Williams reported to Dr White, who held responsibility for Executive Education overall within the Oxford Said Business School.

Other matters

37. Both parties have approached this case on the basis that no stone is to be left unturned and no avenue of evidence unexplored in the search for material in support of their particular positions. We will not in this decision be referring to all the evidence we have heard, but only to the matters we have found relevant or helpful in reaching our decision. That is particularly so given that parts of the claimant's claim were withdrawn in closing submissions or are no longer pursued.

38. There are two unusual features of this case. The first is that a dispute which is (on both sides) about leadership and managerial judgment and decisions has played out within a business school. The Oxford Said Busines School is much more than a management or leadership training academy, but a number of the witnesses we heard from (particularly the client directors) had professional expertise in matters of leadership and management, and strong and well-informed views on the right and wrong approach to such matters. We will refer to this in more detail later.

39. The second is that much (but not all) of the material we are dealing with had been the subject of a detailed investigation and report by Dee Masters (of counsel) during the course of the third respondent's consideration of the claimant's grievances. The tribunal bundle for the hearing was structured around her report and its appendices. Ms Masters did not have the benefit of speaking to the claimant during her investigation, and was not considering matters of law in the same way that we were, but the notes of her investigation interviews with various witnesses, and her conclusions on various points, played a large part in Mr Kendall's cross-examination of the respondents' witnesses.

The alleged protected disclosures

40. At this stage of our decision we are simply finding facts. We will consider whether the facts we have found show that there were protected disclosures in our discussion and conclusion. In many cases the alleged protected disclosures are in writing, and there is no dispute that that writing was communicated to the first or third respondent. Where that is the case we will set out below the relevant extracts from any alleged written protected disclosure so as have it available for our later discussion. The disclosures are broken down into four groups.

Group 1

41. We heard a lot about the arrangements that prevailed for the engagement of the third respondent's faculty or associate faculty as tutors or to develop and run courses for the first respondent. Such engagement operated on the basis of a standard scale of charges that may in some circumstances allow faculty or associate faculty to claim fees separately for overseeing and teaching on a course, even if those duties were carried out at the same time on the same day.

42. Each member of faculty (but not associate faculty) had an allocated "stint", which was a notional period of their working time that they were supposed to devote to teaching. If a member of faculty was "overstint" – that is, taught more than their allocated teaching time - they would be paid more by the third respondent for this additional teaching time. They would receive their usual salary, plus payment on top of that for the teaching over and above their "stint".

43. If someone was "understint" – that is, taught less than their allocated stint, there was no reduction in their salary.

44. In some circumstances, a faculty member with responsibility for a particular course may allocate teaching or assessment duties to themselves for that course, and as a result go overstint and receive additional payments.

45. In broad terms, the claimant and Mr Harris saw these arrangements as being detrimental to the first respondent (or, in Mr Harris's case, possibly the third respondent's) financial performance, whereas Dr White considered them to be long-standing arrangements which were to the long term benefit of the Oxford Said Business School and were necessary in the interests of ensuring harmony within the faculty and associate faculty, ensuring good relationships between the first respondent and its clients and to enable faculty members to develop their areas of interest and expertise.

46. It is only necessary for us to consider these points in one limited area. The claimant's first group of alleged protected disclosures are said to have occurred in a written disclosure (an email) to Mr Harris and Dr White on 12 June 2018, in spoken form to Dr White on 9 August and in her grievance on 14 September 2018.

47. The email appears at p2042 of the tribunal bundle. It reads, so far as is relevant:

> *"… the overstint for* [named faculty member] *largely relates to the fact that he does all the final assessment panels. I wonder if is there an opportunity as part of his year end/performance review process to talk about* [him] *creating the opportunity for* [other members of who are understint to carry out this work]*. We have tried this softly but it hasn't gained traction. This may be because* [he] *is very personally financially incentivised to maintain the status quo. From my perspective sharing the assessment panels would help on three fronts: (a) reduce our key man issue regarding* [him] *and the panels and create resilience (b) create the space for* [him] *to take his requested sabbatical (c) upskill* [the other named individuals] *… it will support their development more broadly, and enable succession and development …"*

48. We were asked by Mr Kendall to read this with the email it was effectively a reply to, in which Mr Harris notes:

> *"… I would like to understand what progress we have or can expect to make on rebalancing stint. If I had understood the data correctly* [named individual] *is at the end of March 270 points over so will be higher still by year end.* [The other two named individuals are] *… under stint. Resolving this issue would save over £40k a year, and is the right thing to do both financially and operationally."*

49. The alleged oral disclosure on 9 August 2018 is accepted by the claimant to be at most a passing reference during a much more detailed discussion with Dr White about other matters. The claimant puts it in this way in her witness statement:

> *"I raised* [the individual's] *allocation of work to himself with Andrew White again on 9 August 2018. I again reinforced the conflict of interest and the detriment to the Custom Business that Andrew White had fiduciary responsibility for … I implored him to deal with the issue."*

50. Dr White does not recall this being said. In her submissions, Ms Danvers points to the claimant not having raised this conversation at all in her first grievance, and in her second grievance only having referred to it as being "*a reminder … that the matter had not been resolved*". She also points to the DOC in which the claimant simply says "[I] *raised* [the individual's] *allocation of work to himself again with the second respondent on 9 August 2018.* [I] *said that he still had to deal with the issue.*"

51. The significant part of the oral disclosure would be in the mention of Dr White having fiduciary responsibility for the first respondent, since as appears below it is the question of fiduciary responsibility which is said to be the relevant legal obligation in respect of this disclosure. It is notable that the claimant's witness statement does not say explicitly that she mentioned fiduciary responsibility to Dr White. She simply notes that Dr White had fiduciary responsibility as a director of the first respondent. We find that the words "fiduciary responsibility" were not used by the claimant in this conversation. Her second grievance and DOC (both compiled much closer to the relevant time than her witness statement) are an accurate account of what occurred – she reminded Dr White of her earlier mentioning of the overstint issue.

52. At paragraph 112 of the DOC the claimant sets out how it is that these are said to be protected disclosures:

> *"The claimant thereby disclosed information … which she reasonably believed tended to show that the second Respondent, by failing to take action on or before the dates of her disclosures … to address* [the] *self-allocation of work, was failing, or likely to fail, to comply with a legal obligation to which* [he] *was subject, namely his duty as a director of the first respondent to act in the best interest of the company, including its financial interests, and to protect its reputation."*

53. As with most of the other alleged protected disclosures, these disclosures are repeated or developed in one of two grievances raised by the claimant. Any disclosures in these grievances are likely to be of less significance than the early disclosures, since they post-date the meeting of 6 September 2018 that is central to the claimant's claim. They do, however, need to be addressed by us in this decision.

54. In her first grievance (dated 14 September 2018) the claimant refers to these matters in the following way (at p259-260 of the tribunal bundle):

> *"Dr Heslop repeatedly raised concerns to Dr White during 2017 about the separation of duties in the allocation and execution of "pointable" activity through "stint" ...*
>
> *Faculty members are appointed under a contract of employment which sets out a "stint" number expressed in "points" which they are obliged to achieve during the year in return for their salary. Faculty members are expected to fulfil their "stint" obligations through teaching and other academic related activities for the school, and may be employed on variable numbers of stint points. Staff receive additional remuneration for any work carried out over and above their contractual stint points referred to as "over stint". Dr Heslop was critical of, and highlighted the issue of the practice of* [named individual] *of allocating paid work to himself at the expense of other colleagues when he would have been aware that his self allotted work allocation would mean that he would be substantially overstint by the end of the financial year.*
>
> *Dr Heslop stated that she was deeply concerned that* [named individual] *had sole responsibility for allocating the assessment panels solely to himself which attracted a large number of stint points whilst aware that there were other appropriately qualified colleagues who were "under stint". As a result, he was in receipt of significant "over-stint" payments. This practice had cost the business tens of thousands of pounds over a number of years and was to the financial detriment of the Business School. Dr Heslop told Dr White that appropriately skilled colleagues were not being utilised and were not achieving their points and were "understint". She assumed they were in full receipt of their salary notwithstanding they were not fulfilling the stint obligations under their contracts. Dr Heslop said she was disappointed that Dr White, who was* [named individual's] *line manager, had failed to act on this issue for over 18 months despite the issue having been brought to his attention on a number of occasions. The situation was highlighted again in June 2018, when Dr Heslop spoke to Dr White and Mr Harris about* [this] *practice, and the governance issues that it raised. Mr Harris was also concerned about* [this] *practice. Further to these discussions, in an email dated 12th June 2018 to Dr White, Dr Heslop said that* [named individual] *was "very personally incentivised to maintain the status quo" of giving himself work. Mr Harris noted that the continued practice was expected to result in contributed to a forecast overstint payment personally to* [named individual] *for the FY17/18 financial year, whilst other faculty were fully renumerated and did not fulfil the teaching stint obligation of their*

> *contract. In the financial year FY17 the Business School made payments of £412k in "over-stint" to Faculty members, including a payment of £46k to* [named individual] *over and above his contractual salary. Dr Heslop stated she believed there was a breach of obligations to act in the best interest of the Business School.*
>
> *She believes that no action has been taken to address the situation by the Business School to date, and that* [named individual] *remains the sole academic responsible for the assessment panels."*

55. Thus the alleged wrongdoing for the purposes of this group of disclosures was not the individual's practice of allocating work to himself (there is no allegation that that was unlawful or against the first or third respondent's policies and procedures), but what was said to be Dr White breaching his legal duties as a director of the first respondent by failing to prevent this happening.

56. We understand that Dr White did not take any direct action to address the problem identified by the claimant, although he did say that, with his encouragement, those who the claimant had identified as being understint and potentially able to cover the assessment work undertaken by the overstint individual had developed their own interests to the extent that they were now flourishing in their own right. We understand his approach to be that this was a better long-term outcome than these individuals making up their stint points by simply covering for another colleague.

Group 2

57. The "group 2" alleged protected disclosures relate to "*the submission of allegedly misleading data to the Financial Times Rankings*".

58. Each year the Financial Times publishes a league table of international business schools. We were not told the particular methodology used nor the criteria relied upon, but the essence of this process is that the Financial Times carries out various surveys through which they then feel able to produce league tables showing the "best" international business schools. The business schools are assessed separately on open access and custom programs, and are also given an overall ranking.

59. This league table is considered to be significant and influential within the world of international business schools, presumably on the basis that a higher ranking reflects or establishes a better reputation and is more likely to attract students or corporate clients. The level achieved in this ranking was a component in the performance related pay that the claimant and others at the Oxford Said Business School may earn.

60. The rankings rely at least in part on material submitted by the business schools themselves. For the purposes of the group 2 disclosures what matters is the Oxford Said Business School's response to question six on the submission form, which starts (6a at p646 of the bundle): "*How many full-time faculty members from your business school taught on your customised programmes in*

the past year?" Further questions in relation to diversity within those faculty members followed.

61. It appears that historically in responding to this question (or similar previous questions) the Oxford Said Business School had taken a generous view of what might count as a "*full-time faculty member*". We were told that that generous view may have arisen from the way in which the question was previously worded, from the previous status of "associate faculty" or from historic practices within the business school and wider market. The claimant favoured a stricter view, taking it to only refer to full-time employees (defined as 0.8 FTE and higher) of the third respondent. Caroline Williams supported the wider view, or at least wished to maintain continuity with the previous manner in which the question had been answered.

62. All involved in the preparation of the submission were aware that changing from the wider to narrower approach would result in a considerably smaller number appearing in the submission to that which had appeared in prior years, and were concerned that this may either of itself lower the ranking of the Oxford Said Business School and/or prompt the Financial Times to ask questions of the previous submissions which may lead to previous rankings being downgraded or other sanctions being applied by the Financial Times.

63. This issue had first arisen during the 2017 submissions, where the claimant had only become aware of the detail of the submissions at a very late stage. She had at that point gone along with Caroline Williams's approach of adopting the previous wide approach to this question. She complains that she only did so under unfair pressure from Caroline Williams. This issue, and the subsequent problems with the 2018 submission, appears to have contributed to a considerable amount of ill-will between the claimant and Caroline Williams, with the claimant making various accusations against Caroline Williams. While we heard substantial evidence on the question of this dispute or difficult relationship, it appears to be of only very limited relevance given the way the claimant now puts her claim, and we need not refer to it in any detail.

64. The claimant's alleged protected disclosures arise in relation to the 2018 submission. They are largely (but not entirely) in documentary form. We adopt the approach that Ms Danvers did in her submissions, of addressing this by reference to the documentary extracts cited by the claimant in her witness statement, as follows. In this we have kept the references to other emails for the sake of context, but the emails said by the claimant to be her protected disclosures are underlined.

> *"On 26 February 2018 at 14:20, Caroline Williams sent an email … which was headed: "Caution for FT Rankings Submissions."*
>
> *Caroline Williams stated in that email:*
>
> > *"It would be helpful for us to stick to alignment on previous year submissions on faculty numbers rather than drastically change this year, as this will be likely to have the FT investigate the sudden change in numbers.*

> *If an investigation takes place and you are found to have been submitting incorrect data previously (which open programmes has also inherited), we will be disqualified from the rankings."*

I responded to that email on 27 February 2018 at 12:31, stating:

> *"I think this is the same rationale that we used last year. As with last year I am concerned about this as the question explicitly says full time and that they are to be employed by our organisation. It doesn't feel right to knowingly continue submit [sic] the wrong data …"*

Caroline Williams responded on 27 February 2018 at 12:37:

> *"Just a red flag to caution that short term decision making on this one question could have potentially damaging consequences for the business school (removal from rankings across MBA, Exec Ed, accredited degrees etc) so it would be important to make a conscious choice."*

I replied by email on 28 February 2018 at 07:27:

> *"I know it is something that we have inherited, and I know there are consequences – it just feels ethically wrong to submit data that doesn't meet their definition – I can't see how it can be interpreted differently…"*

Caroline Williams responded on 28 February 2018 at 16:06:

> *"I think Elaine you and Andrew must decide if you take the risk. If they see a large difference they will naturally investigate and there is a risk that IR35 will not be quite the right answer as you will be declaring you have been submitting incorrect data throughout the past 10 years. "*

I further stated in an email on 28 February 2018 at 16:28:

> *"From a personal standpoint, having also raised this last year I don't feel comfortable knowingly submitting data that isn't a bit wrong but actually not right. I am perhaps being overally [sic] ethical which is why I would be grateful if there is some form of rationale that goes beyond not correcting previous errors."*

In response to an email from Caroline Williams, in which Andrew White was copied in, I replied by email on 28th February 2018 at 16:47:

> *"I am just uncomfortable as the question is unambiguous. I did raise this in the same way last year so my point is not new."*

On 1 March 2018, I sent Andrew White a message on the WhatsApp, stating that I was being put under pressure by Caroline Williams to

submit the wrong data. I had been warned not to rock the boat because of the risk of an investigation and disqualification (p654-655):

> *"I felt under significant pressure to fall into line last year by Caroline and she pressured me a lot on the consistency argument. The implied threat last year is the same as this year that if I "rock" the boat then an investigation will be opened and then we will be disqualified. Even if we aren't disqualified it could result in a rankings tumble for both of us."*

On 1 March 2018, during a conference call with Andrew White and Caroline Williams, I refused to submit false data ..."

65. The claimant also relied on an oral disclosure on 18 July 2018 to Dr White, which is described at paragraphs 221 onwards of her witness statement. This discussion appears largely to have concerned the claimant's difficult personal relationship with Ms Williams, encompassing Ms Williams's behaviour towards the claimant concerning the FT submission. The claimant complained to Dr White that he had taken no action against Ms Williams in respect of her behaviour at that time.

66. Plainly the written disclosures were made as described by the claimant. There is no dispute about that. As for the two oral disclosures on 1 March 2018, we do not need to address them in any detail. There is nothing in the claimant's description of the discussion on 1 March 2018 that adds anything to what she had previously said in writing, and the conversation on 18 July 2018 was in relation to Ms Williams's behaviour and Dr White's response to that, not to do with any underlying disclosure of wrongdoing as described below.

67. The final alleged protected disclosure in this group is in the written grievance on 14 September 2018 (the first grievance) as follows:

> *"'On the 28th February 2018, Ms Williams sent an email to Dr Heslop, Dr White, and Mr Ackroyd, headed: Caution for FT Rankings Submissions. Ms Williams indicated that they should agree to provide misleading data to FT regarding the number of their full time employees. She appeared concerned that the correct figure would spark a FT investigation into the matter and that the school could be disqualified from the rankings. Dr Heslop responded that it did not feel right to "knowingly continue to submit the wrong data". She said the correct figures should be provided but gave some suggestion to avoid further questions by the FT. She requested Dr White's assistance to resolve the matter. Dr White's response was that both departments could not give different data. Dr Heslop reiterated that she was not prepared to provide misleading data and that she was aware that incorrect data had been submitted in the past to the FT, a practice which had been knowingly perpetuated by Ms Williams and approved by Dr White.*
>
> *During a conference call on 1st March 2018 between Dr White, Dr Heslop, and Ms Williams, Ms Williams was rude and aggressive to Dr Heslop in front of Dr White about Dr Heslop's stance on the matter. Dr*

> *White later said that he was not prepared to lie to the FT however he took no action against Ms Williams either in relation to her intention and clear desire to submit misleading data to the FT to maintain a high ranking and avoid a potential investigation, nor in relation to her hostile behaviour to Dr Heslop during the conference call."*

68. The way in which these disclosures are said to amount to protected disclosures is set out in para 114 of the DOC as follows:

> *"The claimant disclosed information … which she reasonably believed tended to show that a misrepresentation had been made in 2017 to the Financial Times, and was being made in February/March 2018 to the Financial Times by the proposed deliberate submission of false data in the executive education rankings process, amounting to a likely breach of the first respondent's … legal obligations towards the Financial Times and/or likely resulting in the commission of a criminal offence."*

69. This does not identify what legal obligation or criminal offence the claimant had in mind. In Appendix D to the list of issues these are identified as being "*false representation of data*" and the criminal offence of fraud. In oral evidence the claimant pointed (for the first time) to what she called a "statement of truth" required in the FT submission. She did not specifically refer to what she was thinking of in saying that, but it appears to be a tick box at in the submission (at p643 of the tribunal bundle) certifying "*I hereby confirm that the data that will be submitted to the Financial Times in this survey is, to the best of my knowledge, accurate and verifiable.*" In his closing submissions Mr Kendall described the criminal offence as being "*an attempt to obtain a pecuniary advantage by deception*".

70. Although not relevant to the question of whether these amounted to protected disclosures, we note that following consultation with colleagues, Dr White supported the claimant's interpretation of the question rather than Ms Williams's. The day after the discussion on 2 March 2018 he personally wrote to the Financial Times to explain why the numbers in the submission that year would be fewer than in previous years. This explanation appears to have been accepted and there seems to have been no sanctions applied or effect on the Oxford Said Business School's ranking. As appears from the terms of the written grievance, after the event the claimant's primary concern was with what she saw as Dr White's failure to address Ms Williams's behaviour during this sequence of events, rather than a failure in dealing with the submission itself.

Group 3

71. Both the group 3 and group 4 disclosures concern the MPLA (Major Projects Leadership Academy), which is a custom programme that has been run by the first respondent for many years for the Cabinet Office. This programme was developed to equip senior civil servants to run major public sector projects. It was described to us as being the first respondent's "flagship" programme, which seemed to encompass a number of qualities including the revenue that it brought in, the prestige attached to it and possibly the opportunities that it gave for sales of similar programmes to governments around the world. The claimant

described it as being "*the most lucrative contract within the Custom Executive Education client portfolio*" and said that in some years it accounted for 25% of all the revenue earned within custom education. She said that it had provided £16.5m in revenue in the period to October 2018.

72. The MPLA had been developed by the first respondent in response to a public procurement tender issued by the Cabinet Office, and had started in January 2012. It was due to expire in January 2019. While the MPLA was generally regarded as a success, there was inevitably some concern with in the Oxford Said Business School about what approach the Cabinet Office would take to any renewal or retendering of the contract ahead of his expiry.

73. In an attempt to address this, the faculty member responsible for the MPLA proposed that, with adjustments to the program, the first respondent could offer to the Cabinet Office the opportunity to renew the contract at a 20% discount (per person attending) to its previous price. It appears to have been thought that this would make renewal of the contract an easier choice for the Cabinet Office. In setting out this proposal, the faculty member responsible did, however, note that "*public procurement is rightly subject to rules to avoid corrupt or unfair behaviour. We therefore need to engage with* [the client] *'on the record' and be sensitive to his need to not only do the right thing but to be seen to do the right thing.*"

74. In response to this proposal, on 11 June 2018 Dr White's Executive Assistant wrote to a colleague who had a background as a commercial solicitor, saying "*Andrew has signed* [this proposal] *in principle but would like to chat this through with you on the phone tomorrow before I send off the letter*". Dr White explained that in accordance with his usual practice he had signed the letter prior to leaving on a business trip (in order to prevent any difficulties with getting his signature while he was away) but given strict instructions that the proposal was not to be sent to the client pending further thought by him and these further discussions.

75. On 12 June 2018 the claimant wrote to Mr Harris and Dr White in the following terms, which she says amount to a protected disclosure. This is the second paragraph of the email of 12 June 2018 which has previously been referred to when looking at the group 1 disclosures:

> *"As a final note, I am perhaps being sceptical, but I am unsure as to how this proposal can get past the procurement legislation, and OJEU etc – do* [we or the client] *know of someway around this? I'd be keen to know if there is a clause in our existing contract that permits this .... if it does it would be really rather brilliant and a huge contribution to the business plan."*

76. On further consideration, Dr White did not proceed with this proposal. He says in his witness statement:

> "*I felt deeply uncomfortable. It did not seem to be appropriate because it could seen that it could look as if* [the first respondent] *was inadvertently*

> *incentivising the Government to postpone a procurement exercise and this felt wrong to me.*"

77. In September 2018 the MPLA was renewed for two years from January 2019 – apparently on the previous terms and without the proposed discount.

78. The claimant's second alleged disclosure in relation to this is in her grievance of 14 September 2018 (the first grievance), as follows:

> *"In June 2018, Dr Heslop voiced concerns to Mr Harris, Director of Finance and Administration, and Dr White regarding plans being advanced … to retain a lucrative contract with the UK Government by making an unsolicited offer to the Cabinet Office. Dr Heslop wrote to Dr White and Mr Harris on 12th June 2018 that she considered the Business School's actions could amount to a breach of the procurement rules. She questioned whether there was any contractual clause which allowed them to approach the Cabinet Office and retain the business in a way that would avoid this transgression. Mr Harris was also concerned about the potential approach. In a separate conversation, Ms Emmeline Bryant, Associate Director, Contracts and Business Operations, confirmed that she was also worried that the Business School's actions could be construed as bribery. Following Dr Heslop's email and conversations with Ms Bryant, Dr White told Dr Heslop that Ms Bryant had spoken to him, and that the Business School would not proceed with the offer and instead would explore different avenues under the existing contract. Dr Heslop expressed her relief as she shared Ms Bryant's concern that the offer could amount to bribery."*

79. The details of claim, at para 116, say that these disclosures were the disclosure of information which the claimant reasonably believed tended to show that a breach of public procurement rules was likely to take place. In his closing submissions Mr Kendall made it clear that this was intended to mean that the first respondent (not the Cabinet Office) would be in breach of public procurement rules.

Group 4

80. The group 4 disclosures were the ones that the claimant placed most weight on. They again relate to the MPLA.

81. The terms of the agreement under which the MPLA was provided contained provisions in relation to "*developed IP Materials*". These included that (i) the "*developed IP Materials*" were the property of the first respondent, but (ii) there would be a "gain-share" (the amount or proportion of which was to be agreed) between the Cabinet Office and the first respondent in the commercial exploitation by the first respondent of any "*developed IP Materials*".

82. In an email dated 30 November 2017, one of the claimant's colleagues described the point as "a complex area" and noted that:

> *"It appears that the client's aim is to recoup some of the original design fee of £934,900 although we note that this assumption was made by a former employee of the client."*

83. The point seems to be that at least from the point of view of the Cabinet Office it had funded (in whole or in part) the development of the MPLA programme and contemplated that the materials developed in the course of this may be of value in any subsequent programmes offered to other governments. Accordingly the Cabinet Office had provided that it would receive a proportion of the proceeds arising from the re-use of those materials by the first respondent in subsequent programmes that it may offer. Whether this was actually what the parties had intended on signature of the agreement in 2012, or whether it was wishful thinking on the part of the client, was less clear, but there was clearly room for dispute on the question both of what amounted to "*developed IP Materials*" and on what terms any gain share would eventually operate. The claimant says that "*the issue of gain share was often superficially discussed and never resolved*".

84. Matters seem to have come to a head in July 2018 when the first respondent was pitching for work from the State Government of Victoria, Australia, for a similar course, and the Cabinet Office through its own contacts was speaking to the Canadian government about a similar course.

85. The third respondent offered a Masters in Major Project Management ("MMPM") on an open basis. This predated the MPLA. The claimant refers in her evidence to the original proposal for the MPLA, in which it is said that the first respondent will "*undertake a series of development activities that will amend and adapt the MMPM module design and content to align it with the requirements of the MPLA*". It was thus no secret that the MPLA was to be derived from the MMPM.

86. In the course of bidding for the Victoria government work, the claimant (with the permission of Dr White) engaged an IP lawyer to investigate the position in relation to "*developed IP Materials*" and the gain-share.

87. On the advice of the lawyer, the claimant commissioned a small team to investigate the MPLA materials. On 3 August 2018 she wrote to a colleague saying:

> *"I need to compare the course materials for MPLA with the course materials for MMPM from back to 2010. This is because the MMPM materials form the background IP for MPLA and we need to establish what developed IP has been created specifically for the Cabinet Office. I have a need to do this swiftly as we have to agree with the Cabinet Office the gain share clause in our contract with them, prior to forming any contract with the Australian government."*

88. The advice received by the claimant had been that "*background IP for MPLA*" would not be considered to be "*developed IP Materials*" and so would not be subject to the gain share. Only "*IP … created specifically for the Cabinet Office*" would be subject to the gain share.

89. The claimant's team reported back to her on 9 August 2018. The claimant says:

> *"… there appeared to be only a handful of sessions that would qualify as developed IP from which the Cabinet Office … could expect to share a gain …*
>
> *The team shared with me examples of presentations where even the typographical errors were transposed between the* [MMPM] *and the purportedly customised MPLA."*

90. She goes on to describe a conversation with Dr White on 9 August 2018, at which she said, amongst other things:

> "*I was worried that we had a 'portfolio issue' which could mean that we were potentially in breach of a number of client contracts."*
>
> *… the Cabinet Office had paid approximately £1 million in fees for the development of a bespoke program which appeared to have negligible developed IP …*
>
> *… the Cabinet Office would feel 'ripped off' and I had felt physically sick when I had seen the 'cut and paste job' when I had examined the programme materials.*"

and

> "*I described to Andrew the work* [my team] *had done in comparing all of the written assets and presentation materials from the MMPM with the written materials for the first cohort and most recent cohort of the MPLA …* [they had found] *numerous examples of where the materials were identical – including the transposing of typos and use of legacy branding …*
>
> *… the fact that* [the Cabinet Office] *had spent so much on development fees* [meant] *they would have a reasonable expectation that tailored written materials did exist.*
>
> *I warned Andrew that there were numerous emails over many years that showed that the Cabinet Office clearly thought that this was the case …*"

91. Dr White describes this meeting slightly differently, but to much the same effect:

> *"*[the claimant] *told me that she believed* [the first respondent] *had misled the Cabinet Office regarding the customised nature of the MPLA and she thought this was in breach of contract. She was concerned about the fees they had been charged and that in her view only minimal IP had been created. She referred to the 'gain share' which was the contractual arrangement with the Cabinet Office regarding developed IP.* [She] *said she was arranging an investigation …*
>
> [She] *appeared to be suggesting that we were defrauding the client, which was clearly a pretty serious thing to be saying."*

92. Dr White goes on to say that, on further consideration, he felt the claimant's allegations were misconceived given that course development amounted to far more than preparing written materials for the course, and that the Cabinet Office and been involved at every stage of the development of the MPLA so would have been well able to assess for themselves whether they were getting value for money. However, he acknowledged that the issues around gain share needed to be resolved.

93. The claimant describes a second conversation on the topic with Dr White on 14 (or possibly 13) August 2018 when she was in Chicago. Dr White does not recollect the claimant mentioning IP issues during that call, although "*it is possible that she may have done so*". The claimant's description of what she said during that call does not seem to add anything to any disclosures made on 9 August, except that she identified the problem as being now very pressing, given hopes of a deal with Victoria.

94. The final disclosure in this group is in the claimant's grievance on 31 October 2018, where she (broadly speaking) repeats what she says she said to Dr White on 9 August.

95. Directly following her phone call on 13 or 14 August 2018 the claimant was on holiday, only returning to work on 6 September 2018. On 5 September 2018 she was notified that the first respondent had won the work for delivery of a major projects course for Victoria.

The detriments

96. The alleged detriments are centred on a meeting the claimant had with Dr White and Mel Francis immediately on her return from holiday on 6 September 2018.

Context

97. By this time the claimant had been employed for around 2½ years. Dr White had been her line manager throughout that period. It is not in dispute that no substantial issues concerning her work or performance had been raised during that time by Dr White or anyone else. There may have been occasional friction between individuals, some of which is referred to above when discussing the protected disclosures, but there was nothing that Dr White considered to require any action on his part.

98. On a scale of 1 (lowest) to 5 (highest) the claimant had been graded at between 4 - 4.5 (with different grades for different criteria) in her review for the period January 2016 to July 2016 and between 2 - 4 for her review from August 2016 to July 2017. In the latter review the lowest score was a "2" in relation to a drop in the FT rankings list (apparently unrelated to the matters that were the subject of the group 3 disclosures) and the highest was a "4" for "citizenship and working with others", in respect of which Dr White had noted:

> "[the claimant] *has done an outstanding job motivating and leading her team, and embedding the new structure to ensure that she has time to focus on business development*"

99. The claimant's review (which under the respondent's processes was to take effect as a 360 degree feedback process) for August 2017 to July 2017 was due to take place in September/October 2017.

100. In her evidence the claimant pointed to a number of occasions on which her work had been praised by Dr White. We will not recite those but it is clear that up until the points we refer to below Dr White had no substantial reason to doubt the claimant's work or her relationship with her team.

Detriment 1 (soliciting complaints) & detriments alleged against the second respondent only

101. Chantel Moore started work for the first respondent in February 2017 as interim client operations director, taking on the role on a permanent basis in September 2017. Throughout this time, she reported to the claimant. In her witness statement she describes her role as being "*responsible for the management of the existing client portfolio which included the resourcing, commercial, contractual account management and delivery of custom programmes*". While perhaps not entirely accurate, we formed the impression during the hearing that she headed the team responsible for delivering and administering the custom education programmes, as opposed to the senior client director/client director reporting line which was concerned with business development. Both she and Dr White describe her as being the claimant's deputy, but this can only be in an informal sense as she was herself the manager of one of the three groups that reported to the claimant and is not senior to the claimant's other reports in the formal hierarchy.

102. In her witness statement Chantel Moore contrasts 2017 (in which she says she "*had a good working relationship with the claimant*") to the first six months of 2018 when "*I started to feel concerned about how* [custom education] *was performing … my relationship with the claimant was deteriorating … I felt increasingly unhappy in my role … I started to consider my options and seriously thought about resigning.*" Chantel Moore was a longstanding friend of Mel Francis, who had encouraged her to apply for the role with the first respondent. She confided in Mel Francis, who encouraged her to speak to Dr White about her concerns. No complaint is made by the claimant of this. Chantel Moore met Dr White on 9 August 2018, which was the same day that the claimant had raised her concerns about the lack of developed IP in the MPLA.

103. Chantel Moore describes in her witness statement what she told Dr White:

> *"I told Dr White that the* [custom education] *team were very unhappy. The atmosphere in the office was not good … when the claimant was away from the office the atmosphere was … calmer and more positive.*
>
> *… tasks were sprung on people. The claimant was very last minute …*
>
> *… I did not feel that the claimant provided leadership for the client directors … there was a lack of clarity about their roles and responsibilities and about the overall strategy … when she was back in*

> *the office it was like a whirlwind of activity which distracted many in the team …*
>
> *… I felt on edge when* [the claimant] *was around …. If she wanted something done it had to be done straightaway; she did not appreciate that everyone in the team had deadlines and other priorities.*
>
> *… I did not trust the claimant because I did not trust the information she provided to me and other senior members in the … team … It felt as if she was not being straight about what was going on.*
>
> *… the claimant did not stick to agendas for meetings or there was no agenda at all circulated prior to meetings … she wanted her own way … I had not come across anyone else in a senior role behave in this way … she ran away from problems because she was away so much …*
>
> *…* [she] *was not capable of being a leader … there was no direction from her as far as I could see.*
>
> *Dr White asked me on a scale of one to 10, with 10 being the lowest, how confident was I in the claimant's ability to lead the custom team. I said 9 as I did not have confidence in her.*
>
> *… I felt that it was the point of no return based on where we were and the way she was behaving. I was getting to the point where I could not carry on working with her."*

104. Dr White broadly agrees with this account of the meeting given by Ms Moore. He says that he had been told by Ms Francis that it was not just Ms Moore who had concerns about the claimant. He presented the document at page 325 onwards of the tribunal bundle as being notes he had taken of his meetings with Ms Moore and others. There is dispute about what happened to any handwritten notes that formed the basis of these notes, but for now we note that these notes are consistent with the account of the meeting given by Ms Moore and Dr White.

105. Chantel Moore told Nick Blandford and Andrew James (Clients & Markets Director, who also reported to the claimant) about this conversation with Dr White.

106. From 15 August 2018 the claimant was on leave.

107. Mr Blandford was a client director. Following his discussion with Ms Moore he approached Dr White on 16 August 2018. He describes the meeting as follows, and gave examples in support of his concerns:

> "[Dr White] *opened the meeting by saying that he understood there were concerns about how things were going in the custom team and he asked me to tell me more about these concerns.*
>
> *I said … that the claimant was fundamentally unsuited to a role leading people … whilst she had great energy and lots of enthusiasm, she*

channelled this in such a way that I thought had put people under undue pressure …

The claimant was a poor leader …

I also said … that people kept away from the claimant as much as possible …

… when the claimant was involved, things get worse …

I also referred to the 'maelstrom of Elaine' … this was because she gave colleagues things to do with last minute deadlines …

I told Dr White that I did not think that the claimant could recover from the point that the team had reached because she did not have the skills to lead people. She was not able to make a genuine emotional connection with people … I felt strongly that I would resign if the claimant continued in post as I could see things getting worse and worse … I had very little confidence in the claimant to lead the custom team."

108. Mr Blandford said that he had told the claimant that her approach when in the office was like a "drive-by shooting".

109. On 21 August 2018 Dr White sent the claimant an invitation to a meeting to take place at 08:00 on 6 September 2018 – that is, directly on her return from holiday. There was nothing in the meeting invitation to suggest the purpose of the meeting, other than it being headed "1:1". At this point he had only spoken to Ms Moore and Mr Blandford.

110. Aileen Thompson was a client director reporting to Nigel Spencer. She describes being invited by Dr White's PA to a meeting with Dr White on 23 August 2018. At that meeting Dr White said that he had concerns about how things were going in the Custom team, and asked her what her perspective was about how the team was going. She described her frustration at the second reorganisation, which was in progress at the time. She said (and Dr White noted) that she felt the team was succeeding in spite of rather than because of the claimant's leadership, saying that her frequent absences meant that decisions were being delayed, and that she "*had barely seen the claimant for around 12 months*". While Dr White noted her as having said that the claimant had "*no – capability or understanding of the business she is running*" she denied having put things so strongly. Later during the course of discussions about the claimant's subject access request she described Dr White's note of their conversation as "*out of context and misrepresents some of our conversation*". She did, however, give the claimant a "low" score when asked if she had confidence in her leadership, and agreed with Dr White's note that the score she gave was 10 – the lowest possible score.

111. The next person Dr White spoke to was Lauren Lamb, on 23 August 2018. Lauren Lamb was a member of the HR team. Dr White said that Mel Francis had suggested that he speak to her to get her perception of the claimant, and that he took the opportunity to ask her questions about the claimant when she

(Ms Lamb) came to him about something else. His notes record her criticism of the claimant, along with her awarding her a "10" when asked about her confidence in the claimant's leadership of her team.

112. On 4 September Dr White spoke to Sara Wright. Ms Wright gave evidence to us. She was a client director who reported to Nigel Spencer, and was a relatively recent recruit, having held her role only since 30 April 2018. We have mentioned previously that these events took place within the environment of a business school where people may be particularly attuned to issues of management and leadership, and that was particularly evident when Ms Wright gave her evidence. Around five weeks into her employment she had volunteered to Dr Spencer and the claimant a four page document setting out her views on how the team was currently working and what could be improved. The claimant appeared to receive this document well. Ms Wright praises many aspects of the teams work and working methods, while particularly criticising what she saw as a "silo" approach across custom and open education. In follow up discussions she had offered to lead a workshop addressing some of these matters. This offer was not taken up by the claimant.

113. The claimant introduced her planned reorganisation to Ms Wright at the end of June 2018, which would mean Ms Wright taking on two people newly reporting to her. Ms Wright was critical of how the claimant broached this with her, and also of the underlying logic of the restructure. She sent an email to the claimant asking for an explanation of the intended restructure, but says she received no substantial response to this. The claimant made a broader announcement to the whole team on 6 July 2018, but Ms Wright was not present for that. She continued to press for the rationale, sending an email to Dr Spencer on 11 July 2018. Dr Spencer forwarded this on to the claimant with a request for her to meet Ms Wright to explain matters.

114. On 20 July 2018 Ms Wright says "*I had to sit through various meetings that felt to me to be a wate of time … I was very unhappy and I was aware that I was not contributing or engaging and that my mood was not improving. I had deadlines on client work and I did not see the value of two of these meeting.*" At the end of the day the claimant came to see Ms Wright, and pressed her for a discussion of matters, which Ms Wright resisted given her disenchantment and it being the end of a long day. She suggested that any discussion could wait until a planned meeting with the claimant the following Monday. She criticises the claimant for insisting on a discussion at a time when she (Ms Wright) felt very uncomfortable. She says "*there was a lack of emotional intelligence on the part of the claimant … it was not the right time for me to have this discussion with her and I was shocked and shaken by her behaviour*".

115. The meeting the following Monday (which Dr Spencer also attended) did not improve matters, and Ms Wright openly criticised the claimant's approach to the reorganisation. Later in her evidence she describes the claimant as being "emotionally volatile" and as "micro-managing" people. She heard from Mr Blandford that he had spoken to Dr White about the claimant, and Mr Blanford invited her to do the same. She did, having prepared her own note for the meeting, under the headings "lack of leadership capability", "lack of emotional intelligence", "culture created" and "lack of org design capability". It was in those

terms that she presented a critique of the claimant to Dr White during a 45 minute meeting. She gave the claimant a "10" rating for the amount of confidence she had in her. As with the others, this was the lowest possible rating.

116. Nigel Spencer was the subject of a witness order sought by the claimant and granted by the tribunal, but as referred to above he was not ultimately called upon by the claimant to give evidence. As senior client director he would have been expected to have worked particularly closely with the claimant. The client directors who had raised complains about the claimant in fact all reported to him rather than to the claimant. Dr White's notes of his meeting with Dr Spencer record the following:

> *"I approached Nigel as a missing piece in the jigsaw.*
>
> *I opened the meeting with a simple statement – 'I understand there are concerns about how things are going in the Custom team – can you please, in complete confidence – tell me more about these?*
>
> *Nigel was less critical than the rest of the team – he noticed a reduction in EH performance but did not give me details."*

It appears from this note that Dr Spencer was not asked to score his confidence in the claimant.

117. As for discussions between Dr White and Caroline Williams about the claimant, these seems to have taken place some time in August, although it appears last on his note. In her witness statement she describes her long-term doubts about the claimant's suitability for her role, and gives examples of her (the claimant) overworking her team. She scored the claimant 9-10 on the question of her confidence in her ability to lead the team. She says "*I believed that Dr White need to have a discussion with the claimant about her performance*".

118. During this process Dr White was also preparing for his intended meeting with the claimant. On 3 September 2018 he and Ms Francis met with Peter Tufano. Dr White says:

> *"I told Professor Tufano about the concerns I had heard and said that I would meet the claimant when she returned from her holiday to discuss this with her. He agreed that I should speak to her and advised me to brief … the University Registrar .. which I did by telephone."*

119. Professor Tufano identified this conversation at the start of September as following on from a conversation he had first had with Dr White on 9 August 2018 – the day that Chantel Moore had come to see Dr White.

120. There is no doubt the claimant should be "spoken to" about the issues her colleagues raised, but it is clear that the discussion that Dr White had with Professor Tufano contemplated that things would go further than that. Professor Tufano said in his witness statement that he contemplated two possible outcomes from that meeting – either a formal performance management

process or a protected conversation leading to an agreed exit for the claimant. However, he also acknowledged what he initially called the "*strong sentiment*" from Dr White that there was a "*catastrophic breakdown*" in the relationship between the claimant and her team. He later accepted this as being Dr White's conclusion about matters, rather than simply a "*strong sentiment*".

121. Given that Professor Tufano and Dr White both contemplated a negotiated departure for the claimant, we are surprised that there is no documentation recording this or the terms that may be on offer for the claimant. Professor Tufano said that Dr White had no authority to offer a settlement payment to the claimant, and that if discussions were to be had they would have to be between the claimant (or her legal representatives) and (probably) Professor Tufano as representative of the first respondent's board. Ms Francis said there had been discussions about the maximum award for unfair dismissal, but on the respondents' evidence there was remarkably little consideration of the risk inherent in the approach that Dr White had been authorised to take. We appreciate that Professor Tufano would not at that point have appreciated quite how badly the meeting would be handled by Dr White and Ms Francis.

Detriments 2-5 – the meeting on 6 September 2018

122. On 5 September 2018 the claimant had had to attend to some family medical difficulties, but had also learned that the first respondent had won the work it had bid for with the State of Victoria, on top of work for a major law firm. As she puts it in her witness statement, "*on the back of two client wins, I went to sleep buoyant and looking forward to my return to work*".

123. On 6 September 2018 she returned to work with the first item in her diary being the meeting with Dr White, to take place at 08:00.The claimant had no reason to suspect this meeting would be bad news for her, nor did she know anything of the complaints that had been made against her.

124. What occurred in that meeting is not substantially in dispute. The claimant was the first to document the meeting, preparing notes on her arrival home shortly after it ended. Despite what might be expected, Ms Francis was not taking notes of the meeting. Dr White accepts the claimant's notes as being broadly accurate.

125. The first sign that something was amiss was the presence of Ms Francis in the meeting. That was not what the claimant had expected.

126. Dr White got straight to the point. In his witness statement he says:

> *"I told* [the claimant] *that things were not working, that serious complaints had been made whilst she was away and that she had lost the trust and confidence of a significant proportion of her senior team."*

127. The claimant describes the start of the meeting in very similar terms.

128. This came as a complete shock to the claimant, who responded by questioning who had raised those concerns. Dr White refused to tell her who had raised the

concerns or what they were. The claimant was very upset. She asked if Dr White wanted her to leave. Dr White replied that he did want her to leave. In her note the claimant records him as saying "*you've lost the trust and confidence of your senior team and I don't want you to continue as Director of Custom programs*". Dr White disputes saying those particular words, but does not dispute that the message behind those words is an accurate description of things from his point of view, nor does he dispute that he told the claimant he wanted her to leave. Ms Francis accepted in cross-examination that this was "*as close to a dismissal as you can get*".

129. The meeting continued with a brief further discussion in which the claimant pressed him for who had raised the complaints and he again refused to say what the complaints were or who had raised them. The claimant was shocked and upset. The meeting ended without any resolution or clear way forward. Neither the claimant or Dr White suggest that the meeting even got as far as him raising the question of an agreed termination of her employment. The claimant left to go home, where she wrote up her notes of the meeting. She never returned to work.

130. The meeting had gone very badly for both sides. This was the fault of Dr White and Ms Francis, not the claimant. The claimant had returned to work expecting good news, but instead had been confronted without warning with allegations that members of her team (but without specifying who) had raised serious allegations (without specifying what they were) against her, and Dr White did not want her to return to work. It is not surprising that the claimant reacted badly to that.

Detriments 5-7 – subsequent events

131. Professor Tufano was out of the country at the time, but Dr White updated him on the meeting shortly after the end of the meeting. He told him that the claimant had been very upset and that he (Dr White) would follow up with another meeting. He told Prof Tufano that as a precaution he had cut off the claimant's IT access shortly before the meeting. Prof Tufano told him to restore IT access, which he did.

132. In the early hours of 7 September 2018 the claimant send an email to Dr White, saying:

> *"I was shocked by the nature of our meeting … without any prior warning of what you intended to discuss …*
>
> *At the meeting, you clearly communicated to me that you felt that 'we could not go on' and you did not wish for me to continue as Director of Custom Executive Education following my return to annual leave. Given that you have asked me not to come back to work, which is not my wish, I am expecting to be paid my full salary while I seek appropriate advice and support …*
>
> *During this meeting you claimed that a number of my team (which you declined to specify) and faculty had been to you with concerns regarding*

their lack of confidence in my plan, and reported issues with morale. Therefore I am seeking further advice on this point and ask that you provide me with more detail and evidence of the alleged concerns in writing. I also ask that you provide me with more detail and evidence of the alleged concerns in writing. I also ask that you provide me with any further information and evidence relating to your decision to hold the meeting … to inform me that you no longer want me to hold the post of Director of Custom Executive Education. I am asking for this information as I … have significant evidence of the success of Custom Executive Education under my strategic and operational leadership …

The meeting was a significant shock to me, and has made me feel exceptionally stressed. I will be in contact again after I have received the information that I have requested in writing …

In the meantime, given that you have requested that I do not return to work as you stated that this was better for the team, please can you confirm by return that I will continue to be paid in full."

133. In sending this, the claimant set out a very early stage a number of the matters we are looking at as detriments – the meeting had come with no warning, she had been given no information about the complaints or complainants in the meeting, and she was told to stay away from work against her will.

134. Dr White sent a brief holding response on the morning of 7 September 2018, and then later in the day sent an email that had been drafted for him by Ms Francis. He says:

> *"… the meeting yesterday was not formal … As I told you, I have been approached, unsolicited, by a significant number of colleagues since you went on annual leave, and the nature of the concerns has been consistently about your behaviour and the impact you have on the Custom Executive Education team as a whole and the wider School … As stated in the meeting you have lost the trust and confidence of your senior team and, based on the information I have received, my trust and confidence in you has broken down.*
>
> *It was clear in the meeting that you were shocked to hear this … and your decision to leave the office and go home is understandable. I am happy to continue our conversation when you feel ready …*
>
> *At this stage, I am not prepared to share the detail of the feedback, and to ask those who have approached me for their permission to share theirs. However, please be assured that I would be willing to follow a formal process, if this is your preference and this detail would form part of that process …*
>
> *At this stage, we are not in a formal performance management process and you have not been asked to leave, but there are serious issues and concerns I wish to continue to discuss with you when you feel ready."*

135. The claimant described this as being "*a deliberate attempt to misrepresent the clear conversation we had on 6 September 2018*". Ms Francis accepted that it was drawn up more on the basis of how they had originally intended the meeting to go rather than on how it had actually occurred.

136. The claimant did not reply to this. On 12 September 2018 Ms Francis sent an email to the claimant saying "*Andrew and I would like to meet with you to continue our conversation please. Could you let me know when and where you would prefer to meet?*". Dr White wrote later on 12 September 2018 inviting the claimant to attend a meeting at a hotel with Ms Francis on 14 September 2018 in order to "*continue our conversation from last week*".

137. On 13 September 2018 the claimant wrote to Dr White and Ms Francis to say:

> *"I have found this week extremely stressful and continue to seek support and advice. I have made an appointment to see my General Practitioner next week.*
>
> *I do not feel in a position to attend this meeting tomorrow and request politely that we seek to find an alterative date."*

138. Dr White replied saying that he would come back with some different options for meeting. Ms Francis replied saying:

> *"I … think that it might help your stress to continue our conversation so you can be clear on the situation and think about how we might move forward. You left the conversation at a point where we had not discussed any detail, and so this might help. For now, I will mark your absence as sickness due to stress and will await your communication following your GP appointment."*

139. She went on to suggest a meeting on 18 September 2018.

140. Unbeknownst to Ms Francis, by the time she had sent her email the claimant's lawyers had submitted a lengthy grievance to the third respondent's registrar, who was also a director of the first respondent.

141. We do not need to go into the detail of that grievance, but note that it starts by referring to "*the Business School's decision to terminate her employment*", and sets out many of the points raised by the claimant in this case, along with other complaints.

142. On 18 September 2018 the claimant's lawyers wrote to Ms Francis enclosing a copy of the grievance, saying:

> *"Dr Heslop remains extremely aggrieved and distressed by her employer's recent actions, and in particular the conduct of Dr White and Ms Francis. We note the invitation to the meeting* [on 18 September 2018] *although the purpose of that meeting remains unclear. Given Dr Heslop's serious complaints and her concerns about both Dr White and Ms Francis, she does not believe it is appropriate that they take part in any meeting with her …*

In the meantime, Ms Francis has also stated that Dr Heslop's absence be recorded as sick leave which is incorrect. So that it is clear, Dr Heslop was instructed to leave the office by Dr White on 6 September 2018 … Dr Heslop … has not been signed off sick at the current time."

143. From this point Dr White and Ms Francis had no further involvement with the claimant other than as participants in the grievance investigation. Matters were then in the hands of the third respondent's HR and legal team. Kylie Morsley, a employment lawyer employed by the third respondent replied to the claimant's lawyers to acknowledge the grievance.

144. On 21 September 2018 the claimant submitted a subject access request. Nothing in this case now depends on that, although we note that it was only in response to the subject access request that the claimant eventually found out details of the allegations against her, as recorded in Dr White's notes, and that this was not received until substantially after her resignation.

145. On 27 September 2018 Kylie Morsley wrote to the claimant's lawyers to say that an independent investigator would be appointed to hear the claimant's grievance. She said that "*Your client's employment continues and she is currently on paid leave. This will continue until further notice to enable investigations to take place. Your client is not signed off sick and her absence is therefore not being recorded as sick leave.*"

146. The claimant's lawyers replied on 1 October 2018 saying "*Dr Heslop has no immediate objection to* [the independent investigation]" but wanted to know who the investigator was and their terms of reference. They asked for details of the allegations that had been raised against the claimant. They also say "*Dr Heslop has been placed on extended leave against her will which amounts to an unlawful suspension from her position*".

147. On 4 October 2018 Kylie Morsley said that an external barrister would be the investigator, and that the claimant would be provided with a copy of their terms of reference. She continues:

> *"We note your comments regarding your client's anxiety about being placed on paid leave. As previously mentioned, this is considered necessary in order to conduct an investigation into the concerns raised about her."*

148. On 17 October 2018 Kylie Morsley wrote to the claimant's lawyers saying:

> *"We are now in a position to supply your client with further information regarding the concerns raised against her.*
>
> *In summary, a number of different individuals approached Andrew White to express serious concerns they had about your client's leadership, performance and conduct. The following list is a non-exclusive summary supplied in order to give your client more information at this stage of the investigation. Further allegations may be raised as a result of the investigation.*

We will be supplying your client with a copy of the instructions to the investigator …

Serious concerns expressed include alleged:

1. *Poor leadership and communication;*

2. *Unpredictable and unprofessional behaviour; which has contributed to a culture of fear and unhappiness in the team;*

3. *Lack of operational strategy, including lack of clarity around roles, responsibilities and KPIs, and concerns over cost control and custom business performance;*

4. *Poor stakeholder management; and*

5. *Unwillingness to accept feedback."*

149. In the letter Kylie Morsley said the that investigator was to be Dee Masters of Cloisters Chambers. Ms Masters' appointment took effect on 19 October 2018.

150. The paragraph set out above is the first time the claimant had been given details of any of the allegations against her, but we note that even at this stage the allegations were only outlined in the most general or generic terms.

151. In an exchange of emails from 22-24 October 2018 Dee Masters got in touch with the claimant's solicitors with a view to meeting with the claimant later that week or the following week. The claimant's lawyers replied criticising the lack of any detail in the allegations against the claimant that they had been given and the linking of the claimant's grievance to an investigation into these allegations. On 24 October 2018 the claimant's lawyers wrote to Dee Masters to say that the claimant was very unwell and "*unable to provide instructions in any meaningful way*". Pending the claimant's recovery, Dee Masters went on to interview others for her investigation. The claimant's solicitor was away from 24-31 October 2018. On 31 October 2018 the claimant submitted her second grievance, which was referred to Dee Masters to become part of her investigation.

152. The immediate trigger for the claimant's ill-health appears to be a conversation that she had with Nigel Spencer on 23 October 2018, when she approached him about accompanying her to the meeting with Dee Masters. She puts it this way in her statement:

> *"I called my colleague Nigel Spencer on 23 October, with the intention of asking him if he might consider accompanying me to the meeting with Dee Masters. It was a profoundly awkward conversation. He said that he had no idea what was going on and that all he knew was that I was on extended leave. It felt absurd and shameful asking someone if they would consider coming to a meeting with me when I didn't know what I had purportedly done or who the complainant(s) was/were.*

On the basis that I couldn't articulate either the concerns or the complaints, Nigel Spencer told me that he didn't feel comfortable with my request for him to consider accompanying me.

The conversation was deeply upsetting to me in terms of its impact. I felt that I had been made to look to Nigel like I had done something that was so wrong I had had to be immediately removed from the business ...

Following my conversation with Nigel on 23 October, the reality of my situation hit me. I felt that instead of responding, as I had expected them to regarding my grievance, the university was trying to bully and punish me for speaking out and that I was being silenced …

This led to a precipitous decline in my mental health …"

153. On 2 November 2018 the claimant's solicitor wrote to Kylie Morsley questioning various aspects of the referral to Dee Masters and her terms of reference.

The claimant's resignation

154. The claimant resigned with immediate effect on 6 November 2018. In her resignation email she said:

> *"In view of the appalling and unlawful conduct of Dr White and OSBSL towards me, which has caused me considerable upset and mental distress, I believe I can no longer continue in my post …*
>
> *I believe that I have been unlawfully expelled from the school and forced from my role as a result of blowing the whistle …*
>
> *… I have no faith… in the 'independent' investigation which is being conducted by Dee Masters. Correspondence … informs me that she has begun to interview individuals about alleged concerns into my conduct and performance when I am still to be provided with substantive information regarding the concerns or the identity of the complainants. I find this situation completely unacceptable and I believe it is designed to intimidate and distress me …*
>
> *I resign today 6th November 2018 with immediate effect."*

Subsequent events

155. Dee Masters continued with her investigation. Despite a number of attempts she was unable to meet with the claimant and so complied her report without having spoken to the claimant. Her lengthy report was submitted to the third respondent on 1 March 2019. This ultimately resulted in a meeting between the claimant and Dr Glover to discuss her grievance on 15 May 2019, and the outcome letter provided by Dr Glover to the claimant on 21 June 2019, the conclusion of which is set out below.

The grievance outcome

156. On 21 June 2019 Dr Glover wrote to the claimant setting out his final decision on her grievance. He concluded:

> *"a. I do not believe that your failure to engage with the investigation materially altered its outcome.*
>
> *b. I do not believe that the various whistleblowing issues raised by you were behind Dr White's decision that your position became untenable.*
>
> *c. I do not believe there is any evidence of gender or disability discrimination.*
>
> *d. I believe that a number of colleagues had raised concerns with Dr White and that these concerns were behind his loss of confidence in you. On the other hand I do not believe that those concerns constituted 'serious allegations', and in themselves they did not in my view justify his conclusion that you would be unable to continue in your role.*
>
> *e. The meeting on 6 September was extremely badly handled by Dr White and Ms Francis. It is not surprising that you construed this meeting as an attempt to dismiss you without due process, even though that was not the intention as subsequently clarified."*

C. THE LAW

Protected disclosures

157. A "qualifying disclosure" is (s43B(1) of the Employment Rights Act 1996):

> *"any disclosure of information which, in the reasonable relief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …"*

158. There is no dispute that the claimant's disclosures were made in line with s43C(1)(a) – to her employer. If they are "qualifying disclosures" then they are "protected disclosures" as they have been raised with the correct person.

Detriments

159. Under s47B:

> *"(1)* A *worker has the right not to be subjected to any detriment … by his employer done on the ground that the worker has made any protected disclosure*
>
> *(1A) A worker ("W") has the right not to be subjected to any detriment …*

(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 had made a protected disclosure.

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

(2) This section does not apply where:

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal …"

160. Section 48 of the Employment Rights Act 1996 provides that:

"(2) On [a complaint of detriment due to protected disclosures] *it is for the employer to show the ground on which any act … was done …*

(5) In this section … any reference to the employer includes … in the case of proceedings against a worker or agent under s47B(1A), the worker or agent."

161. As Ms Danvers says in her submissions, the obligation on the respondents under s48(2) is one that must be discharged on the balance of probabilities.

162. In whistleblowing detriment claims, "*s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" Fecitt v NHS Manchester [2011] EWCA Civ 1190 (para 45).

163. At para 115 of International Petroleum Limited v Osipov (UKEAT/0058/17) Simler P accepted the following was the correct approach to drawing inferences in cases of detriment:

"(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them ...

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

Constructive dismissal

164. The law in relation to constructive dismissal is well established, and we will discuss the legal significance of the parties' submissions in our discussion and conclusions.

Automatically unfair dismissal

165. Under s103A of the Employment Rights Act 1996:

> *"An employee who is dismissed shall be regarded … 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."*

The detriment of dismissal

166. Although s47B(2) may seem to prevent a claim in relation to dismissal being brought as a detriment claim that is not necessarily the case. In Timis v Osipov [2018] EWCA Civ 2321 the Court of Appeal consider the question of a dismissal claim being brought as a detriment claim against a worker or agent of the employer.

167. After a detailed consideration of the authorities, Underhill LJ concluded at para 91 of Osipov that:

> *"(1) It is open to an employee to bring a claim under s 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under s 47B(1B). All that s 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.*
>
> *(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."*

168. Thus a claim against a worker or agent for the detriment of dismissal (or a detriment which results in dismissal) can give rise to both direct liability (against the worker or agent) and vicarious liability (against the employer) for the dismissal.

Remedy issues

169. We will address the law in respect of the remedy issues we have to determine during the course of our discussion and conclusions on the relevant remedy issues.

D. DISCUSSION AND CONCLUSIONS

Protected disclosures

Group 1

170. The nature of the group 1 disclosures is set out at para 112 of the DOC:

> *"The claimant thereby disclosed information … which she reasonably believed tended to show that the second Respondent, by failing to take action on or before the dates of her disclosures … to address* [the] *self-allocation of work, was failing, or likely to fail, to comply with a legal obligation to which* [he] *was subject, namely his duty as a director of the first respondent to act in the best interest of the company, including its financial interests, and to protect its reputation."*

171. As referred to in our findings of fact, none of the group 1 disclosures in fact raised any issues in relation to Dr White failing in his fiduciary duties to the first respondent. We also have some doubts about whether the claimant can reasonably have believed (as she seemed to suggest) that Dr White had a fiduciary duty to maximise the profit of the first respondent (to the exclusion of other considerations) – but this point does not arise for consideration because in fact the claimant did not make any disclosures alleging that he had breached any fiduciary duties.

172. None of the group 1 disclosures are protected disclosures.

Group 2

173. The group 2 disclosures are referred to at para 114 of the DOC as follows:

> *"The claimant disclosed information … which she reasonably believed tended to show that a misrepresentation had been made in 2017 to the Financial Times, and was being made in February/March 2018 to the Financial Times by the proposed deliberate submission of false data in the executive education rankings process, amounting to a likely breach of the first respondent's … legal obligations towards the Financial Times and/or likely resulting in the commission of a criminal offence."*

174. As we have pointed out above, this does not itself identify any legal obligation or criminal offence that the claimant had in mind. During the course of the hearing the legal obligation in question was described in a number of different ways – variously as "*fraud*" or "*an attempt to obtain a pecuniary advantage by deception*".

175. The problem for the claimant is that the attempts by her counsel to categorise this in terms of various different criminal offences do not assist when the question is whether at the time of the disclosures she reasonably believed that they showed breaches of legal obligations or criminal offences. They do not, of course, have to actually amount to breaches of legal obligations or criminal offences, but the claimant must reasonably believe that the disclosures show such breaches.

176. No legal obligations or criminal offences were referred to by the claimant at the time of her disclosures. The most that she seems to be suggesting is that

submitting incorrect data is bad practice. That is not sufficient for the disclosures to amount to protected disclosures. The multiple attempts by the claimant and her counsel to identify the relevant legal obligations or criminal offences during the course of this hearing strongly suggest to us that the claimant did not have any legal obligations or criminal offences in mind at the time of her disclosures. If she had done it would have been straightforward for her to refer to them in support of her arguments. We find that these were not protected disclosures because the claimant did not reasonably believe them to suggest breaches of a legal obligation or a criminal offence as having been committed.

177. None of the group 2 disclosures are protected disclosures.

Group 3

178. The group 3 disclosures are described at para 116 of the DOC:

> *"The claimant … disclosed information … which she reasonably believed tended to show that a breach of public procurement rules was likely to take place, amounting to a likely breach of legal obligations to which the … first respondent* [was] *subject."*

179. In her email of 12 June 2018 the claimant says: "*I am unsure as to how this proposal can get past the procurement legislation*", going on to say that it would be "*brilliant*" if this could be done without offending against the legislation. In her submissions Ms Danvers describes this as simply being a question and as such not something that conveys facts or discloses information tending to show that a legal obligation had or was likely to be breached.

180. We accept that there will be cases in which simply asking a question about whether something is lawful or not will amount to information tending to show breach of a legal obligation, but the claimant phrased her question in a very particular manner, which makes clear that she starts from a position that the actions contemplated are unlawful. What she is effectively saying is that she considered that the actions contemplated are in breach of legal obligations the respondent is subject to, and asking if anyone knows how this problem of being in breach of legal obligations can be avoided. We consider that this does fall within the definition of a protected disclosure, and the reference to public procurement legislation plainly makes this a point of public interest. We accept that the email of 12 June 2018 amounted to a protected disclosure.

181. As for the grievance of 14 September 2018, as Ms Danvers points out the substance of this is to say that the first respondent did not in fact breach any public procurement legislation, so we do not see how that can be considered to be information tending to show that the first respondent was or was likely to be in breach of a legal obligation.

182. The email of 12 June 2018 contained a protected disclosure.

Group 4

183. The group 4 disclosures are described at para 118 of the DOC:

> *"The claimant disclosed information … which she reasonably believed tended to show that the … Cabinet Office had been misled about the creation of intellectual property rights in the MPLA programme, amounting to a breach of the first respondent's legal obligations towards the Cabinet Office."*

184. The respondents accept that the discussion on 9 August 2018 amounted to the disclosure of information which the claimant believed tended to show that the first respondent was in breach of a legal obligation and was in the public interest. However, they take issue with whether such a belief was reasonable, given that her investigations had solely focussed on the course materials, and ignored that the Cabinet Office had had first-hand involvement in the development of the course so would have known whether any worthwhile IP had been created for them.

185. The claimant's conclusions that the course materials were substantially derived from the MMPM is not disputed by the first respondent. They simply say that the course materials do not show the full picture of developed IP. It is not surprising to us that in her investigation the claimant focussed on the most concrete and obvious example of potential developed IP – the written materials for the MPLA – particularly as she had taken legal advice to the effect that IP could only exist in written material. It is hard to see how a quantitative analysis of the kind she was attempting could be carried out on any other forms of developed IP. Her conclusions on that are not undermined by her failure to go further in investigating, or to speak to the academic who devised the course. She had at that point reached a reasonable conclusion. We find that she did at that point have a reasonable belief that the information she was providing showed that the first respondent was in breach of its legal obligations to the Cabinet Office.

186. It is, of course, an entirely separate point as to whether the first respondent was in fact in breach of its legal obligations to the Cabinet Office. It is not necessary for us to express any view on that, and we will not express any view on that.

187. The conversation of 9 August 2018 amounted to a protected disclosure. Given Dr White's acceptance that "*it is possible*" that there may have been a later conversation on the same topic, we also find that these disclosures were repeated (but not added to) on 13 or 14 August 2018 and in the grievance of 31 October 2018.

188. The claimant made protected disclosures in conversations with Dr White on 9 August 2018, 13 or 14 August 2018 and in a written grievance on 31 October 2018.

Summary of conclusions on protected disclosures

189. The claimant's only protected disclosures are as follows:

    a. The email of 12 June 2018,

    b. Conversations on 9 and 13/14 August 2018, and

c. The grievance of 31 October 2018, insofar as it related to IP developed for the MPLA.

190. We will now address the alleged detriments, considering first whether they occurred and whether they are detriments, and then whether they were on the ground that the claimant had made protected disclosures.

Detriments

Detriment 1 – soliciting complaints

191. This detriment is described as: "*solicit*[ing] *some or all of the supposed complaints about the Claimant*".

192. This requires consideration of what may be meant by "*soliciting*" the complaints. If it was ever the claimant's case that the complaints were not genuine – that they had been fabricated by Dr White with or without the co-operation of those complaining – that certainly was not her case by the end of the hearing. The complaints she faced were genuine complaints and on the whole those who made the complaints had come to Dr White. Dr White had not gone out to find people willing to complain about the claimant.

193. It is, however, clear from Dr White's note that after the initial complaint from Ms Moore the purpose of him speaking to the others was to hear the criticisms they had to make of the claimant. He was not setting out to conduct a dispassionate investigation into the positives and negatives of the claimant's behaviour or relationships more generally within the custom team. There are three things that make this clear:

a. Dr White's notes show that he started every conversation by saying that he wanted people to tell him about concerns they had in relation to how things were going in the custom team ("*I opened the meeting with a simple statement – 'I understand there are concerns about how things are going in the custom team – can you … tell me more about these?*" or in the case of discussions with Caroline Williams, "*things appear to be getting worse*").

b. Dr White paid far less attention to positive comments than he did to negative comments. That is evident from his notes in relation to the discussion with Dr Spencer, which are by far the shortest of all his notes. Despite identifying Dr Spencer as being a "*missing piece in the jigsaw*" he is content simply to note that Dr Spencer was "*less critical*" than the others. He did not ask Dr Spencer or record any score for Dr Spencer's confidence in the claimant, when he did for those who were more critical of the claimant.

c. He omitted to speak to others who would have relevant things to say, including not speaking to two out of the claimant's four direct reports.

194. We find that this detriment is made out, in the sense that Dr White tended during his discussions and the resulting notes to emphasis the negative aspects of

what he was told and in speaking to people was interested in and looking for negative comments about the claimant's behaviours rather than positive comments. In that sense it occurred and was a detriment.

Detriments 2-5 – the meeting on 6 September 2018

195. The second detriment is:

> "*the* [respondents held] *a "disciplinary" meeting with the Claimant on 6 September 2018 in the absence of a fair process and contrary to the First Respondent's disciplinary policy*"

196. The respondents considered the claimant's behaviour to be a matter that required action. They ought to have followed a disciplinary and/or capability process in accordance with the ACAS Code of Practice (see below for our discussion of whether this Code of Practice applied). It isn't entirely clear what is meant by including "disciplinary" in quote marks for this detriment. The meeting did not take the form of a disciplinary meeting. Instead it was intended by Dr White as a substitute for a disciplinary meeting: a way of convincing the claimant to leave without going through a disciplinary meeting. However, the essence of this detriment is made out – Dr White held the meeting on 6 September 2018 for the purpose of ending the claimant's employment, and did so outside any recognised form of disciplinary procedure. In that sense it occurred and was a detriment.

197. The third detriment is:

> *"the* [respondents informed] *the Claimant on 6 September 2018 and/or on 7 September 2018 that she had lost the trust and confidence of the senior team and/or of the second respondent"*

198. This occurred as is a detriment.

199. The fourth detriment is:

> "[the respondents refused] *to permit the Claimant to return to work on 6 September 2018 and/or suspend*[ed] *the Claimant from her post and/or place the Claimant on indefinite forced leave in breach of her contract.*"

200. As with a number of the other detriments which follow, this is expressed in terms of what occurred on 6 September 2018 and in the subsequent months.

201. It is clear from the fact that Dr White and Ms Francis suspended the claimant's IT access that they did not expect or contemplate that the claimant would return to work after their meeting on 6 September 2018.

202. By 7 September 2018, the claimant was unambiguously attributing her non-attendance at work to a request from the respondents to stay away from work. While the respondents' reply says that it was the claimant's decision to leave the office, they do not invite her to return or suggest that she was not asked to stay away from work pending resolution of the issues raised. Her statement that

she had been instructed to stay away was repeated on 18 September 2018, without being challenged or corrected by the respondents.

203. We find that the respondents did tell her to stay away from work on 6 September 2018. This was a detriment that continued through to her resignation.

Detriments 5-7 – subsequent events

204. The fifth detriment is:

> "*the* [respondents failed] *or refuse*[d] *to provide the Claimant with the details of the alleged wrongdoing and/or performance issues both at the meeting on 6 September and continuing until her resignation on 6 November 2018*"

205. This occurred and was a detriment.

206. The sixth detriment is:

> "*the* [respondents] *failing or refusing, on 6 September 2018 and during the period of two months thereafter prior to the Claimant's resignation on 6 November 2018, to identify the alleged complainants.*"

207. This occurred and was a detriment.

208. The seventh detriment is:

> "*the* [respondents] *instigate*[d] *an investigation into the unspecified and un-particularised allegations against the Claimant"*

209. We understand this to be a reference to Dee Masters investigating the allegations against the claimant as part of her overall investigation into the claimant's grievances. The allegations against her were, at that point, at least so far as the claimant was concerned, unspecified and un-particularised. This was an aspect of the fifth and sixth detriments – at the point the investigation commenced the claimant had been given no real idea of what the allegations against her were.

210. There is, however, a difficulty in attributing this detriment to the second respondent. He had no part in instructing Dee Masters or in instigating an investigation. One of the criticisms made against him is that he did not carry out any investigation as such. We do not see that this detriment can be upheld against the second respondent, but in respect of the first respondent it did occur and is a detriment.

Detriments 8 & 9 - detriments alleged against the second respondent only

211. Two particular detriments are alleged against the second respondent. We will call them detriments 8 & 9, although in chronological order they would come much earlier in the list of detriments:

> *"failing to warn the claimant at any point before or after arranging the aforesaid meeting on 21st August 2018 about the matters to be raised at the meeting or that its purpose was to inform the Claimant that supposed 'concerns' had been raised about her/or to prevent her from returning to work; and*
>
> *presenting the plan for the claimant to be removed from her post as a fait accompli notwithstanding the failure to follow any or any proper process"*

212. The second respondent did not give the claimant any warning of the purpose of the meeting, and had formed the concluded view that the claimant should be removed from her post without having followed any proper process. These both occurred and are detriments.

Summary of findings on detriments

213. Each of the alleged detriments occurred and were detriments – although in some cases only to the limited extent referred to above, and the second respondent was not responsible for the seventh detriment.

The reasons for the detriments

General points

214. The central question for determination in this case is what prompted Dr White to hold the meeting of 6 September 2018 that eventually lead to the claimant's resignation and what, if any, effect the protected disclosures had on his decision.

215. It is not said by the claimant that the apparent complaints from her colleagues are fabrications by Dr White. Mr Kendall puts the claimant's case this way in his submissions:

> "[The claimant] *does not suggest that what was being reported to Dr White* [by her colleagues] *played no part in his conduct of the 6 September 2018 meeting and subsequently.*
>
> *But it is submitted that the inevitable conclusion … is that the … disclosures at least materially influenced Dr White's treatment of* [the claimant]*."*

216. We start this consideration with some points we do not believe to be in dispute:

    a. Chantel Moore approached Dr White of her own initiative to complain about the claimant, describing the problems within the custom executive education team in stark terms. Others he spoke to (although not everyone) raised similar concerns. He had previously been unaware of these issues, and could reasonably have concluded from that that there were substantial issues concerning the claimant's leadership of the team which required urgent action on his part.

b. By the time of the meeting of 6 September 2018 Dr White had reached the conclusion that the action that was required was for him to end the claimant's employment. The only question left in his mind was the means by which that was to be achieved.

c. Dr White had reached that conclusion in the claimant's absence, without any discussion with the claimant, without seeking or taking the claimant's views into account at all, and without any warning to the claimant.

d. Dr White had reached that conclusion despite apparently previously having a high opinion of the claimant and her work, and without any attempt to balance the claimant's good points against the complaints he had heard.

e. Dr White's actions followed almost immediately after the claimant's protected disclosures (particularly the group 4 disclosures).

217. It is Dr White's rapid (and one-sided) conclusion that the claimant's employment must end that gives the respondents difficulties in this case. In her report Dee Masters identifies five "red flags" suggesting that his decision was influenced by protected disclosures. By the time of Mr Kendall's submissions he had developed these into "at least" 21 red flags. We have mentioned some of these above, but set out below the ones that we find particularly significant:

a. The speed of Dr White's change of position set against his prior personal knowledge of the matters being brought to his attention.

b. The complaints from the claimant's colleagues did not justify a conclusion that there had been "*a catastrophic breakdown of leadership in the custom team*" (Mr Kendall sets this out as two red flags).

c. Dr White having made the decision on 21 August 2018 that a meeting was necessary having only spoken to two of the claimant's colleagues.

d. Dr White failing to speak to all relevant colleagues (including all her direct reports) before forming his view of the claimant's performance.

e. Dr White's emphasis of negative as opposed to positive matters in his notes (for instance, the lack of any substantial record of discussions with Dr Spencer, who appears to have been broadly supportive of the claimant, and apparent failure to ask him to score his confidence in the claimant).

f. Dr White having mis-recorded what Ms Thomson said about the claimant.

g. Dr White failing to take into account that at the time the team was going through a difficult reorganisation.

h. Dr White failing to take account of any comments thus far on the "values feedback" that was in preparation at the time and would have given the

fullest assessment of the claimant's actions along with a ready-made opportunity for him to take any areas of weakness up with the claimant.

i. Dr White having formed his view (and communicated it to the claimant in the meeting) that she should leave, without having had any prior discussion or investigation with her.

j. The subsequent failures to act properly in the events that followed the meeting on 6 September 2018.

k. The identification of these problems, and Dr White having reached the conclusion that the claimant's employment should be ended, very shortly after the Group 4 disclosures.

l. The lack of documentation explaining Dr White's decision or internal discussions about the future of the claimant with the first respondent.

218. In his submissions, Mr Kendall placed considerable weight on Dr Glover's finding that "*I do not believe that those concerns constituted 'serious allegations', and in themselves they did not … justify his conclusion that you would be unable to continue in your role*", describing that as now representing the first respondent's 'official' view of the matter. From what we have seen of the allegations, we broadly agree with Dr Glover's conclusions. While the allegations required Dr White to take action, they did not justify Dr White's conclusion that the only way (or best way) for them to be dealt with was by ending the claimant's employment. Fundamentally it is very hard to understand why Dr White leapt to the conclusion that these allegations required the claimant's employment to be ended, particularly given that by that time she had over two years' service and in other respects appeared to be performing well if not, as had sometimes been suggested, being a "star performer".

219. In <u>Osipov</u> Simler P reminds us that it is for the claimant to show that the disclosures had a more than trivial influence on the detrimental treatment, but also that s48(2) requires the respondent to show the reasons for their actions, and that if they do not do so inferences may be drawn against them.

The individual detriments

220. The first detriment: ""*solicit*[ing] *some or all of the supposed complaints about the Claimant*" is a convenient place for us to start our consideration of this. We have found it to be proven, in the sense we have described above. The purpose of Dr White speaking to the claimant's colleagues was to hear the criticisms they had to make of the claimant, not to conduct an objective appraisal of her conduct and capability.

221. Under section 48(2) the respondents are responsible for showing why he did this.

222. We understand and accept that what Dr White had heard from Ms Moore was alarming and had to prompt action on his part, but the most obvious action that it should have prompted was a full informal or formal investigation into the

claimant's conduct and capabilities as a leader, not what actually happened, which was Dr White gathering only negative material about her and then deciding (without any form of discussion with the claimant) that her employment needed to be terminated. That difference is particularly striking when considering Dr Glover's conclusion (after a detailed investigation) that in fact the allegations against the claimant were not serious allegations. Dr White plainly overreacted to the allegations he was presented with, and thereby set on course a chain of events leading to the claimant's eventual dismissal.

223. The explanation for this behaviour is set out in Ms Danvers' submissions as follows:

> *"Dr White had been told by HR that there were issues with C's reports. Meeting with individuals to seek information about those concerns is entirely reasonable and proper. … to suggest that all questions he put to employees in this context had to be entirely neutral and open-ended is unrealistic and too high a standard.*
>
> *… there is no evidence at all to undermine Dr White's position that the reason he had the conversations he did was to understand the matters raised with him by HR. The tribunal is invited to accept Dr White's explanation for why he had the conversations with the witnesses (in order to understand and explore their concerns) and that it was not because of C's alleged disclosures."*

224. The respondents say that Dr White acted in the way he did because he had to understand and explore the concerns of the claimant's reports about her actions.

225. That may be an adequate explanation of his actions if at this early stage he was simply gathering material from which to conclude whether there was any substance to the allegations against the claimant, or whether there was a disciplinary case for the claimant to answer, but the problem for the respondents is that if that is what was intended it does not accord with his subsequent actions and his early conclusion that the claimant's employment must be terminated. It may be that the claimant would have no complaint if Dr White had simply gathered this material and then used it as the basis for a proper disciplinary process (which going by Dr Glover's conclusions would eventually have cleared the claimant) – but instead Dr White used this material to form his own concluded view that the claimant's employment had to be terminated. The respondents have not shown on the balance of probabilities the reason for this detriment. Bearing in mind the "red flags" we have identified above, we infer that it was materially influenced by the protected disclosures – in particular the group 4 disclosures.

226. Detriments 2 & 3 relate to what was said in that meeting and immediately after. In her submissions, Ms Danvers says that:

> *"Dr White's intention and motivation for the way he conducted the meeting was to convey the seriousness of the situation, to be*

> *straightforward with C and to give her the opportunity to avoid a formal process."*

She goes on to accept that the meeting was mishandled, but *"this was not intentional or because C had raised protected disclosures"*.

227. The "mishandling" of the meeting is plainly a reference to Dr White's admission that he wanted the claimant's employment to end. The difficulty for the respondents is that in saying that Dr White revealed that the meeting was not – at least as far as he was concerned - for the purposes of enabling the claimant to avoid a formal process. Dr White had already reached his conclusion that the claimant's employment would end. It was just a matter of how that was to be achieved. The meeting on 6 September 2018 was not for the purpose of warning the claimant of the allegations and offering her a way of avoiding a formal process. Dr White's intention in holding that meeting, as revealed in his comments, was to start a process that one way or another would lead to the end of the claimant's employment. It was, as it was put in one of the detriments, a 'fait accompli'. There was no way back for the claimant once that meeting was held. As with detriment 1, the respondents have not shown on the balance of probabilities the reason for this detriment. Bearing in mind the "red flags" we have identified above, we infer that it was materially influenced by the protected disclosures – in particular the group 4 disclosures.

228. Detriment 4 relates to the claimant being suspended from work. We have found that this was a detriment.

229. While accepting that this occurred, Ms Danvers gives three reasons why the claimant could not go back to work on 6 September 2018 – those were that she was upset, had been made aware of concerns from her team who she would then have to interact with and that she needed some time and space to reflect on matters. In respect of matters from 7 September 2018 onwards, Ms Danvers says that ongoing suspension was justified pending a further meeting and in the light of the need to investigate the complaints she later made.

230. The difficulty for the respondents is that the points they rely on only arose as a result of the approach that Dr White was taking to the allegations he had received against the claimant. He should have dealt with those properly, but chose not to do so. Instead he embarked on a meeting which became very upsetting for the claimant. In arguing that the suspension was justified the respondents are relying on ill-effects which only arose because of Dr White's conviction that the claimant's employment should be ended. If he had handled things properly there may have been no need for the claimant to be suspended. In those circumstances we find that the respondents have not shown on the balance of probabilities the reason for this detriment. Bearing in mind the "red flags" we have identified above, we infer that it was materially influenced by the protected disclosures – in particular the group 4 disclosures.

231. Detriments 5 & 6 relate to the claimant not being informed of the detail of the allegations against her, or who had made them.

232. In her submissions Ms Danvers says that the reason for that was the assurances of confidentiality that had been given to the complainants and the close working relationship between the claimant and the complainants. She also refers to "*the need to allow the investigator to provide details as and in whatever way she saw fit*".

233. We understand the difficulties that may arise when allegations are raised by people who have a close working relationship with the person they are complaining about, but we have to contrast that with the difficulties that arise when (as in this situation) a person is given only the vaguest information about complaints but at the same time is supposed to make a decision on their future. An aspect of this scenario that the respondents appear to have overlooked in their planning for the meeting on 6 September 2018 was that even if things had gone according to plan the claimant (or her representatives) were then supposed to negotiate an agreed exit with no understanding at all of what it was that the claimant was supposed to have done wrong or how strong the case was against her. Dr White simply announced that the claimant's team had complained about her and had no confidence in her without providing any details as to what had lead him to that conclusion. On the very limited basis of what the claimant had been told at the meeting the claimant would have been entitled to take the view that there were no such complaints and that Dr White was making them up. We do not see how the respondents could possibly have expected her (as they seemed to be intending at the meeting) to conclude that she had misbehaved and ought to take the easy way out by negotiating an agreed termination package.

234. We see this as simply being another aspect of Dr White's imperative to remove the claimant from her employment. There is no good reason why he could not have followed a proper process, which would have involved proper investigation and a full description of the allegations the claimant faced. While he had assured the complainants of anonymity there is nothing to suggest that he ever checked with them whether they continued to insist on anonymity ahead of the meeting of 6 September 2018. We reject the respondent's explanation, and we find that the respondents have not shown on the balance of probabilities the reason for this detriment. Bearing in mind the "red flags" we have identified above, we infer that it was materially influenced by the protected disclosures – in particular the group 4 disclosures.

235. In saying this, we draw a distinction between the elements of these detriments for which Dr White was responsible or had control, and those which fell under the remit of others. From 18 September 2018 onward matters were within the control of the third respondent's legal and HR teams. Detriments 5 & 6 are alleged to extend through to the time of the claimant's resignation, and require a consideration of the motives of those who were dealing with matters from 18 September 2018 onwards. The "red flags" apply in respect of the actions of Dr White, but not in respect of the actions of others. On receipt of the claimant's grievance of 18 September 2018 the third respondent's legal and HR teams were faced with the very difficult (perhaps impossible) task of trying to correct what had occurred and attempting to start some sort of orthodox investigation of the kind that Dr White and Ms Francis should have implemented in the first

place. That ultimately resulted in the appointment of Dee Masters as investigator. We do not see anything to suggest that the actions of those in control after 18 September 2018 were motivated by the claimant's protected disclosures. They were simply trying to make the best of a bad situation. For detriments 5 & 6 our findings that they were because of the claimant's protected disclosures are limited to the period up to (but not beyond) 18 September 2018.

236. Detriment 7 relates to the commissioning of Dee Masters' investigation, and the inclusion of the allegations against the claimant within that.

237. Dr White did not have any responsibility for this. It was dealt with by the third respondent's HR and legal teams. We have found that this is a detriment in respect of the actions of the first respondent only. However, that is on the basis that the allegations were understood by the claimant to be unspecified and un-particularised. In fact, those responsible for commissioning the investigation had by that time received Dr White's notes, so knew better than the claimant what the allegations are. Those who commissioned the investigation are also not the subject of the "red flags" we identified above. As we have stated, they found themselves in a very difficult position, which a wide range of allegations being made against and by the claimant. In those circumstances we see nothing wrong with asking the investigator to consider matters as a whole. This detriment was not because of the protected disclosure(s).

238. Detriments 8 & 9 relate back to Dr White's actions in the meeting of 6 September 2018. Ms Danvers says:

> *"It is admitted that C was not told about the matters that would be raised with her prior to the meeting of 6 September 2018; it is denied that this failure was without reasonable and proper cause. This meeting was an initial informal meeting. The tribunal is invited to take judicial notice … of the fact initial meetings simply to inform an employee that concerns have been raised and the need for an investigation often take place without notice as to what is going to be discussed beforehand. Many employees would consider it preferable to have such information provided in person rather than receiving a letter out of the blue. Further Dr White at that stage considered the details of the matters that had been raised with him to be confidential …*
>
> *Dr White regrets having said in response to C's question that he thought she should leave, but when considering the content of the meeting of 6 September 2018 in the round, the tribunal is invited to reject the suggestion that this 'in the moment' response from Dr White meant that her departure was presented as a fait accompli."*

239. This explanation covers material we have previously considered and rejected in discussing the other detriments. We accept Ms Danvers' proposition that informal meetings may take place ahead of (or together with) notification of a formal investigation, but that was not the purpose of Dr White's meeting. We have previously considered and rejected the respondents' contentions in relation to the need for confidentiality as to the allegations behind the meeting.

240. As for the question of whether the meeting amounted to a 'fait accompli', we have found that it did, so what is required for the respondents to succeed is an explanation as to why it was a fait accompli, not arguments that it was not a fait accompli. Since it is the respondents' position that the meeting was not a fait accompli they have not attempted to justify it as being a fait accompli, and there is no explanation offered for why it was a fait accompli.

241. The respondents have not shown on the balance of probabilities the reason for these detriments. Bearing in mind the "red flags" we have identified above, we infer that they were materially influenced by the protected disclosures – in particular the group 4 disclosures.

Conclusion on the reason for the detriments

242. All of the alleged detriments except detriments 5 & 6 (for the period 18 September 2018 onward) and 7 were because of the claimant's protected disclosure(s). In the case of detriment 1, this is in the modified form set out above.

Vicarious liability

243. The first respondent accepts that the second respondent was acting as its agent and thus it is vicariously liable for any detriments that he subjected the claimant to.

Constructive unfair dismissal

244. We have no hesitation in concluding that the claimant was constructively dismissed. As Ms Francis admitted, the 6 September 2018 contained a statement by Dr White that was tantamount to a dismissal. We have no doubt that a meeting conducted in the way the 6 September 2018 was could by itself amount to a breach of the term of mutual trust and confidence. Matters did not get any better from there. The respondents persisted in not telling the claimant what the allegations against her were, eventually responding in only the most general terms. No meaningful steps were taken to get the claimant back to work or to repair (if possible) the damage that had been done in the meeting on 6 September 2018.

245. The most that can be argued for the first respondent on this point (and it was argued by Ms Danvers) is that by not resigning immediately after the meeting of 6 September the claimant had waived any breach or had affirmed her contract of employment. Ms Danvers says that the claimant affirmed any breach of contract by saying that she wanted to return to work, by remaining employed for two months and by raising her grievance. She says that the claimant's resignation letter shows that any resignation was more about Dee Masters' investigation than the previous events. She says that if (as the claimant) suggests, she (the claimant) was seriously unwell at the time that may have affected her decision to resign, but did not change the underlying point that breaches of contract had to be viewed objectively. She says that what caused the claimant's resignation was the actions of a third party (Dee Masters) not the second respondent.

246. In response, Mr Kendall points out that the resignation letter refers to "*the appalling and unlawful conduct of* [the respondents]", that any breach during the 6 September meeting was aggravated by the respondents' subsequent actions, and reminds us of the claimant's ill health at the time of her resignation (brought on, she says, by the actions of the respondents).

247. We do not accept the respondents' arguments on waiver, affirmation or the reason for the claimant's resignation.

248. The claimant resigned within two months of the original breach of contract by the respondents. As Mr Kendall says, that initial breach was aggravated by the actions of the respondents thereafter, which themselves amounted to breaches of contract. The claimant was entitled to complain about this by raising her grievances, but raising the grievances did not amount to waiving the breach of contract or affirming her contract in these circumstances, nor to we accept that it was Dee Masters' decisions that amounted to the "final straw" leading to the claimant's resignation. As Mr Kendall points out, the substantial basis for the claimant's resignation is "*the appalling and unlawful conduct of* [the respondents]". This was the reason for the claimant's resignation. It was a constructive dismissal. The first respondent did not seek to argue (and we do not see how they could have argued) that if it was a constructive dismissal it was nevertheless substantively fair. We find that the claimant was unfairly dismissed.

Automatically unfair dismissal

249. To succeed in her claim of automatically unfair dismissal, the claimant must show on the balance of probabilities that the reason or principal reason for her dismissal was that she made protected disclosure(s). When addressing the question of automatically unfair dismissal, she does not benefit from the provisions of section 48(2).

250. As we have stated above, it is clear that Dr White had to do something about the allegations that were made to him. We have found that in responding to those allegations the respondents subjected the claimant to a number of detriments. We have rejected the respondents' explanation for those detriments and have inferred by reference to the "red flags" that the detriments were materially influenced by the protected disclosure(s).

251. That reasoning cannot apply (at least not without modification) when considering whether the claimant has shown on the balance of probabilities that the reason or principal reason for her dismissal is her protected disclosures. Our conclusion that the detriments were materially influenced by the protected disclosure(s) does not mean that the reason or principal reason for the claimant's dismissal was her protected disclosures. There is a qualitative difference between "*materially influenced*" and "*principal reason*". Where "*material*" is understood as "*more than … trivial*" (Fecitt) it is clear that there can be a substantial gap between "*materially influenced*" and "*principal reason*".

252. It is clear to us that the protected disclosures cannot be said to be the only reason for the claimant's dismissal. The allegations brought to Dr White were

alarming, even if later found not to be serious by Dr Glover. We have found that Dr White had to take some action in respect of them. The allegations were genuine. This is not a case in which accusations have been fabricated in order to provide an excuse for the dismissal of a whistleblower.

253. There is no sign that Dr White was looking to take action against the claimant prior to these allegations being made to him. The “red flags” provide material from which we draw inferences that the detriments were materially influenced by the protected disclosures, but do not go so far as to say that the protected disclosure(s) were the principal reason for the claimant’s dismissal.

254. We conclude that in this case, while the detriments were materially influenced by the protected disclosures, the claimant has not shown on the balance of probabilities that her protected disclosures were the principal reason for her dismissal. She faced a number of difficult allegations. Dr White overreacted to them. However, this does not imply or lead us to the conclusion that the whistleblowing disclosures were the principal reason for her dismissal. The principal reason for Dr White’s decision that her employment had to end (and his subsequent actions) were the allegations that had been made against her. However, for the reasons we have set out above in relation to the separate statutory regime in relation to detriments, his actions were materially (that is, more than trivially) influenced by her protected disclosure(s).

255. We are conscious that despite our conclusion that the claimant has not shown that the principal reason for her dismissal was her protected disclosures, our findings on the detriments may ultimately provide the claimant with a remedy for the consequences of her dismissal under the terms of the whistleblowing legislation (in addition to any remedy for ordinary unfair dismissal). We do not see any difficult with that as it is a consequence plainly contemplated by the Court of Appeal in Osipov.

E. REMEDY

256. The remedy issues for consideration at this hearing are limited to any deduction for contributory fault (from the compensatory or basic award) and any question of an uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Contributory fault

257. The respondents contend that any award for unfair dismissal should be reduced to nil on account of the claimant’s conduct. Ms Danvers set this out in her closing submissions by reference to the claimant’s behaviour when giving evidence, which she said showed the faults that had lead to her dismissal (if that is what it was) – overreaction to insignificant matters, being attached to her own agenda and being overly analytical. She gave examples of what she said was the claimant’s volatile and bullying behaviour while employed, along with her refusal to accept any criticisms of her actions.

258. Mr Kendall disputed Ms Danvers’s analysis, questioning whether it had any application in a constructive dismissal case such as this. He relied on the case

of Frith Accountants Limited v Law [2014] IRLR 510 in which Langstaff P said (para 9):

> *"It will be unusual, though there is no test of exceptionality, for a constructive dismissal to be caused or contributed to by any conduct on behalf of an employee ... What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which amounts to the employer abandoning and altogether refusing to perform the contract (the modern test or expression of 'fundamental breach'). That is conduct which is, centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour."*

259. Ultimately we have to apply the statutory provisions. As regards the basic award the relevant section is s122(2) of the Employment Rights Act 1996:

> *"Where the tribunal considers that any conduct of the claimant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award to any extent, the tribunal shall reduce … that amount accordingly."*

260. In respect of the compensatory award, s123(6) applies:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable ..."*

261. The constructive dismissal in this case primarily arises from Dr White's actions. These in turn arose (on our findings) at least in part from the complaints he had received in relation to the claimant's behaviour.

262. It is well established that in order for there to be a deduction for contributory fault the employee's actions must have been "*culpable or blameworthy*". The difficulty for the respondents in this case is that while some of the claimant's actions were unpopular with her colleagues it is very difficult to categorise her actions as being "*culpable or blameworthy*". Dr White never investigated them so his actions do not assist us in deciding that the claimant's actions were "*culpable or blameworthy*", as opposed to simply arising from misunderstandings, innocent confusion as to what was expected of her or some lack of finesse in dealing with her colleagues. The fullest investigation into matters was undertaken by Dee Masters, leading to Dr Glover's conclusion that these were not "*serious allegations*" and would not have justified her dismissal. In those circumstances we are not persuaded that the claimant's actions were "*culpable or blameworthy*" so as to justify or require a deduction in either the basic or compensatory award for unfair dismissal.

ACAS uplift

263. The claimant seeks an uplift in any award of compensation under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides:

> *"(2) If, in the case of proceedings to which this section applied* [which include proceedings in respect of detriment and unfair dismissal] *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%."*

264. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant code for these purposes. Mr Kendall points to Holmes v Qinetiq Limited [2016] IRLR 664 which he said showed that the code applied "*where an employee faces a complaint or allegation that may lead to disciplinary action*". Ms Danvers replied that Holmes only said that an ill-health dismissal did not engage the ACAS code. It did not say when the code would be engaged. She said there was no breach of the code since whatever had happened occurred before the claimant had been told there was any disciplinary case for her to answer. She said that this was a case in which the claimant's resigned. While that could be deemed to be a dismissal under the Employment Rights Act 1996 there was no such deeming provision in the ACAS code of practice.

265. The code itself says it is (para 1):

> *"… designed to help employers, employees and their representatives deal with disciplinary … situations in the workplace*
>
> - *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in the Code should still be followed, albeit they may need to be adapted."*

266. We note the comments of Keith J in Lund v St Edmund's School UKEAT/0514/12, at para 12, where he said:

> "[the Code] *is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action .... If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. … The Code applies where*

disciplinary proceedings are, or ought to be, invoked against an employee."

267. This application of the Code of Practice was considered by Simler P in Holmes, where she said (at paras 12 & 13):

> *"… para 1 in particular and the subsequent paragraphs of the code demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee. If the employee faces an allegation of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the code applies to the disciplinary procedure under which the allegation is investigated and determined."*

268. The claimant's case at most involved poor performance. We have set out above why we are not satisfied that it involved "*culpable*" conduct, but it is clear that from the point of view of the respondents they were dealing with allegations of culpable conduct against the claimant. By 6 September 2020 Dr White had convinced himself that the claimant's conduct was culpable, but rather than conducting a disciplinary or capability procedure in accordance with the ACAS Code of Practice, he and Ms Francis decided to hold the meeting during the course of which he fundamentally breached the claimant's contract of employment, resulting ultimately in her constructive dismissal. We were in the circumstances contemplated by Simler P in which "[an] *employee faces an allegation of culpable conduct that may lead to disciplinary action*" and where she consequently identified that "*the code applies to the disciplinary procedure under which the allegation is investigated and determined*". To use Keith J's language, the Code applies as the respondents ought to have invoked disciplinary proceedings against the claimant.

269. In this case there was no attempt whatsoever by the respondents to conduct any form of disciplinary procedure. Instead, they decided to take a chance on holding the meeting of 6 September 2018, in the hope that the claimant would leave of her own accord rather than the respondents being required to conduct a disciplinary procedure. We do not see how the respondents should be in any better position so far as the Code of Practice is concerned by constructively dismissing rather than actually dismissing the claimant.

270. The ACAS Code of Practice applied in that situation, but the respondent decided not to follow it.

271. We must consider whether the failure to follow the Code of Practice was reasonable. Since it was the respondents' contention that it did not apply in the first place we did not hear any substantial argument on whether they had reasonably refused to follow it. The most that could be said is that Dr White and Ms Francis decided that it was not appropriate to follow the procedure in the light of the claimant's seniority. There is no exception to the procedures on the basis of seniority. There may be some specific scenarios in which such

behaviour is a reasonable failure to follow the Code of Practice, but there is nothing in the claimant's scenario that suggests to us that the respondents' failure to follow the Code of Practice was reasonable. We find that the respondents unreasonably failed to follow the Code of Practice.

272. A number of cases, most recently Banerjee v Royal Bank of Canada UKEAT/0189/19, decided after submissions in this case, have emphasised that the tribunal ought not to set a percentage uplift figure under s207A without taking account of the overall figure that may result from such an uplift. We are not in a position to do that at this stage of proceedings and will need to hear argument from the parties on this at any subsequent remedy hearing. We note, however, that our provision view (subject to arguments as to the overall amount of compensation and any further points the parties may raise at the remedy hearing) is that this was a serious failure of the kind that brings into contemplation an uplift of up to the maximum 25% permitted.

F. NEXT STEPS AND REMEDY HEARING

273. At the end of the hearing, 10-11 May 2021 were set aside as dates for a provisional remedy hearing, and the remedy hearing will now take place on those dates. In view of the ongoing Covid-19 pandemic the hearing will be listed to take place by CVP, but the parties may apply for it to be heard in person if they consider that that is the better way of proceeding. Directions were agreed between the parties for exchange of evidence and preparation for such a hearing, and they will be issued separately, subject to some additions by the tribunal.

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Employment Judge Anstis

Date: 29 December 2020

Sent to the parties on: ....

....
For the Tribunals Office

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