EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4111836/2019

Held at Edinburgh on 1, 2, 3, 4, 5, 8, 9 and 10 March 2021 and 13 May 2021 (deliberation day)

Employment Judge W A Meiklejohn
Tribunal Member Mrs L Brown
Tribunal Member Mr D Frew

Mr M Ford	**Claimant** **In person**
The Scottish Ministers	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims of automatically unfair dismissal, ordinary unfair dismissal and detriment on the ground of having made protected disclosures do not succeed and are dismissed.

REASONS

1. This case was listed for an eight day final hearing starting on 1 March 2021. We took 1 March 2021 as a reading day and the hearing itself began on 2 March 2021. The claimant appeared in person and the respondent was represented by Dr Gibson.

2. The hearing was conducted on an in person basis but, to comply with the Covid-19 protocols introduced by HM Courts & Tribunals Service, it was necessary for one of the members to participate remotely by means of the Cloud Video Platform ("CVP") on each day of the hearing. Mrs Brown and Mr Frew both participated partly in person and partly by CVP.

Procedural history

3. There had been two preliminary hearings. The first of these took place on 11 May 2020 (before Employment Judge d'Inverno). The principal outcome was an Order that the claimant should provide further and better particulars of his complaints. The claimant duly complied in terms of his document dated 6 June 2020 (732-746) in which he set out seven alleged protected disclosures.

4. The second preliminary hearing took place on 7 July 2020 (before EJ Kemp). At this hearing it was clarified that while the claimant's primary position was that he had been dismissed (and had suffered detriments) having made protected disclosures, he also wished to bring a secondary claim of ordinary unfair dismissal. There was discussion about the adequacy of the claimant's document of 6 June 2020 in terms of specifying the disclosures and identifying which detriment was said to flow from which disclosure. The outcome was a further Order that the claimant provide (a) better particulars of his complaints and (b) a Schedule of Loss. The claimant complied in terms of his document dated 3 August 2020 (747-760).

5. Within his Note following the preliminary hearing on 7 July 2020 EJ Kemp set out a list of issues. This included the time bar point taken by the respondent in relation to the detriment claim. It was agreed that this should be reserved for determination at the final hearing. We set out the list of issues below as articulated by EJ Kemp, with some minor alterations to reflect (a) the claimant's document dated 3 August 2020 and (b) the fact that the claimant was no longer seeking reinstatement or reengagement.

List of issues

6. The issues are as follows –

(i) Were any of the disclosures identified by the claimant qualifying disclosures under section 43B of the Employment Rights Act 1996 ("ERA")?

(ii) Were any of the said disclosures protected disclosures under section 43A ERA?

(iii) If so, did the claimant suffer any detriment after having made each such disclosure?

(iv) If so, what was the detriment and when did he so suffer it or over what period of time did he do so?

(v) Where there was an act by the respondent or failure to act which amounted to a detriment, was each or any part of a series of similar acts or failures?

(vi) If so, when was the last of such acts?

(vii) If the claim form was not presented timeously under section 48 ERA was it not reasonably practicable for the claimant to have done so?

(viii) If so, did the claimant present the claim form within a reasonable period of time thereafter?

(ix) What was the reason or, if more than one, the principal reason for the claimant's dismissal?

(x) Was the dismissal in breach of section 103A ERA and automatically unfair?

(xi) If not, was the reason or principal reason potentially fair under section 98(1) and (2) ERA?

(xii) If so, was the dismissal fair or unfair under section 98(4) ERA?

(xiii) In the event that any of the claimant's claims succeed what remedy should he be entitled to, and in particular –

(a) What losses has he sustained as a result of the dismissal?

(b) What losses is he likely to sustain in future as a result of the dismissal?

(c) What award for injury to feelings is appropriate, if any?

(d) Has the claimant mitigated his loss?

(e) Might there have been a fair dismissal had a different procedure been followed?

(f) Did the claimant contribute to his dismissal?

Applicable law

7. The statutory provisions applicable to the complaints brought by the claimant are set out below.

Protected disclosures

8. Section 43A ERA (**Meaning of "protected disclosure"**) provides as follows –

"*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

9. Section 43B ERA (**Disclosures qualifying for protection**) provides as follows –

"*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*

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

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed…."

10. Section 43C ERA (**Disclosure to employer or other responsible person**) provides as follows –

"*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*

(a) to his employer…."

11. Section 43F ERA (**Disclosure to prescribed person**) provides as follows –

(1) A qualifying disclosure is made in accordance with this section if the worker –

(a) makes the disclosure….to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes –

(i) that the relevant failure falls within any description of matter in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true…."

12. In terms of the Public Interest Disclosure (Prescribed Persons) Order 2014 (made pursuant to section 43F ERA – the "2014 Order"), the following are prescribed persons in respect of the matters described –

(a) Audit Scotland – The proper conduct of public business; value for money, fraud and corruption in public bodies

(b) Financial Conduct Authority – Matters relating to the various descriptions set out in paragraphs (a) to (s) of the Schedule to the Order

(c) The Pensions Regulator – Matters relating to occupational pension schemes….

13. Section 43G ERA (**Disclosure in other cases**) provides as follows –

"*(1) A qualifying disclosure is made in accordance with this section if –*

(a) ….

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are –

….(c) that the worker has previously made a disclosure of substantially the same information –

(i) to his employer…."

Automatically unfair dismissal

14. Section 103A ERA (**Protected disclosures**) provides as follows –

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

Unfair dismissal

15. Section 94 ERA (**The right**) provides as follows –

"*(1) An employee has the right not to be unfairly dismissed by his employer…."*

16. Section 98 ERA (**General**) provides, so far as relevant, as follows –

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

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

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

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

….(b) relates to the conduct of the employee….

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

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

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

Detriment

17. Section 47B ERA (**Protected disclosures**) provides as follows –

"*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure….*

(2) ….this section does not apply where –

(a) the worker is an employee, and

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

18. Section 48 ERA (**Complaints to employment tribunals**) provides as follows –

"….*(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B….*

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

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

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

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

Evidence

19. We heard evidence from –

(a) For the claimant –

- The claimant himself
- Mr R Dunn – Friend of the claimant
- Mr I Swan* – Former colleague of the claimant

(b) For the respondent –

- Ms C Heatlie* – Former HR Manager
- Mr G Thomson – Investigating Officer
- Mr G Caldwell – Disciplinary Officer
- Ms L O'Carroll – Appeal Officer
- Mr J Preston – Former Senior Policy Manager
- Mr G Richardson – Nominated Officer

*These witnesses gave their evidence remotely by CVP

20. We had a joint bundle of documents extending to 902 pages to which we refer above and below by page number.

Findings in fact

21. It is not the function of the Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. We have focussed on those parts of the evidence which had the closest bearing on the issues we had to decide.

Description of parties

22. The claimant was a Pensions Administrator with the Scottish Public Pensions Agency ("SPPA"). His employment commenced on 29 April 2002 and ended on 18 June 2019. He worked as a Pensions Administrator throughout that period.

23. The respondent (The Scottish Ministers) is the legal entity which employed the claimant. The SPPA is an executive agency of the respondent. It administers pensions on behalf of the Scottish Government for Teachers, the Police and Firefighters and also for employees of the National Health Service in Scotland. The SSPA also provides policy advice to the Scottish Ministers on public sector pension issues.

Claimant's whistleblowing issues

24. The claimant described these in his document dated 6 June 2020 (732-746) in these terms –

> ***Issue (i)*** *The Police Injury Benefit Scheme was in an extremely poor state of health*. *Medical Assessment dates long overdue, statutory benefits were not being paid at the correct levels and errors were not being corrected by SPPA Managers.*
>
> ***Issue (ii)*** *Numerous Part Time Firefighters who have not paid any pension contributions are receiving full time contribution-based pensions from Public funds. A hypothetical (unpaid) Ill Health pension award for the purpose of in turn calculating their full time Injury Benefits is being paid.*
>
> ***Issue (iii)*** *Billions of pounds are calculated to be paid from Public funds from a law that does not exist. Public Service Scheme pensions which are closed to further accrual are being calculated using future earnings – The Scottish Ministers have not amended Statutory scheme regulations to allow*

closed Public Service final salary pensions to be calculated using future earnings (as is happening) – nor are they allowed to under restrictions imposed by the Public Pensions Act 2013.

25. For ease of reference we will refer to these issues as follows –

Issue (i) – the "Police issue"

Issue (ii) – the "Firefighter issue"

Issue (iii) – the "FSL issue" ("FSL" meaning "Final Salary Link")

Injury Benefit Team

26. Prior to the events described below, the claimant worked in the Injury Benefits Team. He received training on NHS injury benefits and was familiar with the NHS final salary scheme regulations which were relevant to the calculation of injury benefits. The team leader was Ms J Scott and the other team members were Mr Swan and Mr T McCall.

27. In 2015 the SPPA took over the administration of injury benefits for Police and Firefighters. According to the claimant the Injury Benefits Team did not receive training on these schemes. He referred to problems with both schemes.

28. The claimant described the Police injury benefits cases transferred to the SPPA as being in a *"poor state".* Historically these cases had been dealt with by the eight individual Police forces across Scotland, prior to the establishment of Police Scotland in 2013. There were inconsistencies in the way the relevant regulations had been applied, for example in the treatment of transferred-in service. Periodic medical checks on those in receipt of benefit had not been done. The impact of DWP benefits had not been checked. The claimant and his colleagues identified a significant number of over- and underpayments.

Claimant's first disclosure – the Police issue

29. On 2 August 2016 the claimant emailed Ms S Paterson, a senior manager within the SPPA (74), alleging (with reference to a standard overpayment letter which, he said, implied that decisions would be taken dependent on budget) that the SPPA might not be applying the Police (Injury Benefit) (Scotland) Regulations 2007 correctly. He intended that his email should be forwarded to Ms E Guthrie, Operations Manager. On 4 August 2016 the claimant emailed Ms Guthrie requesting a meeting (76).

30. The claimant duly met with Ms Guthrie. The exact date of the meeting was not clear but Ms Guthrie emailed the claimant on 10 August 2016 (78) to summarise the discussion. She identified the concerns raised by the claimant as follows –

(i) Member queries about Police injury benefits were being directed to someone who had no knowledge of injury scheme entitlements, with an inference that payment of arrears might be subject to budgetary considerations.

(ii) Failure to consider for revision cases where the claimant believed there were over/underpayments because of an approach which assumed such cases had been put into payment correctly.

(iii) Disagreement with policy advice in respect of the application of a regulatory change to the assessment of part-time service.

(iv) Technical queries raised by the claimant being passed to the Technical Training Team when they did not have the knowledge or experience to make a determination (and nor, in the claimant's view, did the Policy Team).

(v) Being excluded from team meetings and ignored, with the claimant's suggestions for letter improvements, or queries about casework not being correct, not being acted on.

(vi) An approach of accepting and rubber stamping medical advice rather than the SPPA considering all information and making its own decision.

31. In her email Ms Guthrie also recorded that, subsequent to their meeting, the claimant had asked about legal advice on the SPPA's approach to Police cases and had raised concerns that, in its handling of Police cases, the SPPA was exposing itself to complaints and possibly Ombudsman cases. The claimant did not consider that Ms Guthrie had narrated his concerns correctly. His understanding was that the decisions of previous administrators were not to be revisited. He also alleged that the Technical Training Team had reached different decisions on the same issue.

Claimant meets Ms Heatlie

32. On 8 December 2016 the claimant had a meeting with Ms Heatlie, who had recently been appointed as the respondent's HR Manager. This was set up after Ms Guthrie had told Ms Heatlie that the claimant was unhappy about missing out on a promotion for which he had applied, and also about how the SPPA was paying certain pensions. Prior to their meeting the claimant told Ms Heatlie that he was feeling stressed and anxious.

33. At the meeting on 8 December 2016 the claimant told Ms Heatlie that an appeal he had submitted after his unsuccessful application for promotion had not yet taken place. He presented as "*troubled"* by the issues of pensions being paid incorrectly. There was insufficient time to conclude the meeting and it reconvened on 14 December 2016. The outcome was a referral of the claimant to Occupational Health ("OH"). Ms Heatlie also followed up on the claimant's outstanding promotion appeal (which was subsequently declined on 1 March 2017).

Claimant meets Ms Guthrie again

34. According to the claimant, the SPPA was still paying benefits incorrectly into 2017. He met again with Ms Guthrie on 8 March 2017. In advance of this meeting the claimant emailed Ms Guthrie on 28 February 2017 (79) referring to the National Fraud Initiative and questioning why the SPPA was not correcting all wrong payments. He emailed Ms Guthrie again on 7 March 2017 (80) complaining that wrong payments were not being corrected where a previous administrator had erred or misinterpreted the regulations.

35. The issue of the claimant being moved away from the Injury Benefit Team must have been raised in advance of the claimant's meeting with Ms Guthrie because the claimant said in his email of 7 March 2017 –

"*I would feel unfairly punished and embarrassed to be seconded out of the Injury Team after 16 years. I am genuinely trying to stop the SPPA acting out with the law and trying my best to stop the SSPA being open to charges of gross negligence and maladministration."*

Claimant moves team

36. The outcome of the meeting between the claimant and Ms Guthrie on 8 March 2017 was that the claimant was moved to the NHS Awards Team. Ms Guthrie emailed the claimant on 9 March 2017 (81) to confirm this –

"*You will be undertaking a secondment to NHS awards team until the Police injury issues raised have been satisfactorily resolved and I think that would be around 4 weeks. NHS awards have a high workload which I am keen we address and you will be assisting that team, alongside other work colleagues who are also helping out from other teams in operations as from Monday. This is not a punishment for bringing your concerns to my*

attention but is to give you a break from the casework with which you have concerns until they are resolved."

37. The claimant was unhappy at being moved. Ms Guthrie's email also stated –

"*You indicated you were not happy being seconded, though I think we reached a compromise yesterday as outlined above. However you do have the right to raise a grievance and HR would be able to advise on this matter. I do hope that can be avoided and I believe I have taken reasonable steps to avoid you feeling embarrassed about this temporary change in assignment."*

38. The claimant emailed Ms Guthrie on 13 March 2017 (82-83) setting out a number of suggestions as to what actions he believed the SPPA should take. He referred to both the Police issue and the Firefighter issue but we did not understand the claimant to be arguing that this email was a disclosure.

39. While not mentioned in Ms Guthrie's email of 9 March 2017, we understood from Ms Heatlie's evidence that a reason for the claimant's move away from the Injury Benefit Team was a breakdown in his relationship with his line manager, Ms Scott. Ms Heatlie said that Ms Scott's health was suffering and that the claimant's move was in line with OH advice.

Claimant's second disclosure – the Firefighter issue

40. On 12 June 2017 the claimant emailed Ms Guthrie (84) raising the Firefighter issue. He contended that the SPPA were misapplying the Firefighters Compensation Scheme (Scotland) Order 2006 and asserted that Retained (or part-time) Firefighters were receiving full-time pension

and injury benefits both pre- and post 2006 (when part-time Firefighters were able to join the Firefighters' pension scheme).

41. In response to an email from Ms Guthrie dated 22 June 2018 (85-89) the claimant emailed Ms Guthrie again on 22 June 2017 (90-93). He maintained that Regular (full-time) Firefighters were being disadvantaged. After setting out an example (Regular vs Retained) the claimant continued –

"*Hopefully from these examples you will see the reasons why this matter could not just be of concern to me, but possibly the Fire Authorities, Firefighters Pension Scheme members and indeed members of the general public who contribute to Public Funds. Hopefully you will understand that I have pointed out my concerns to you with good reason and this will not be biased against me in my future career.*

The SPPA will clearly not look further into this matter and without the option for me to discuss my concerns with any SPPA decision makers, I will have to raise any further concerns I have to other appropriate bodies."

42. Some time later Mr Preston spoke to the claimant about the Firefighter issue. Mr Preston explained how the 2006 Regulations operated and referred the claimant to relevant guidance notes. A question arose regarding possible incorrect tax treatment of injury benefits and Mr Preston flagged this up in an email to Ms Scott on 2 August 2017 (94).

43. The claimant did not agree with Mr Preston. This led to a meeting being arranged between the claimant, Mr Preston and the respondent's Chief Executive, Mrs P Cooper. In advance of this meeting the claimant emailed Mrs Cooper and Mr Preston on 15 September 2017 (95-98) setting out his views on the Firefighter issue.

44. The claimant met with Mrs Cooper and Mr Preston on 19 September 2017. The claimant described this as a short meeting at which he "*never really*

got a chance to speak". Mr Preston's evidence was that he explained the position and Mrs Cooper accepted what he said, and *"gave that position"* to the claimant. We understood that to mean that she told the claimant to deal with Firefighter injury benefits in the manner explained by Mr Preston.

Claimant moves team again

45. The claimant regarded his move to the NHS Awards Team as a punishment for speaking out about the Police issue. He said that he had been told not to speak to any of his former team colleagues. Ms Heatlie disputed this. It seemed to us improbable that, in what we understood to be an open plan working environment, such an instruction would be given.

46. The claimant also regarded himself as having been isolated. He described sitting alone at a cluster of four desks. Ms Heatlie described the claimant being seated beside two other members of staff. Mr Swan supported the claimant's account of sitting alone but accepted in cross-examination that there might have been someone else sitting diagonally opposite the claimant. Our view of this was that the claimant had not been deliberately moved in March 2017 to a location where he would be sitting separately from anyone else but there may have been times when he was the only person sitting at the cluster of four desks.

47. Ms S Kellock, a member of Ms Heatlie's team, had contact with the claimant in July/August 2017. According to a timeline which we understood to have been prepared by Ms Kellock (577-586), this involved discussion around a stress reduction plan. As a result of Ms Kellock's meetings with the claimant, Ms Heatlie became aware that his move to the NHS Awards Team was not working out in terms of line management and monthly conversations.

48. This led to a proposal to move the claimant again to a new working environment. The plan was to transfer the claimant to the Service Team where his line manager would be Mr A Hermiston. This was discussed at

a meeting between Mr G McGarry, Operations Manager, and the claimant on 28 September 2017. The claimant was accompanied at this meeting by Mr Swan.

49. Mr McGarry emailed the claimant after this meeting on 28 September 2017 to record their discussion (99-100). The mood of the meeting can be discerned from the following paragraphs of Mr McGarry's email –

"*I advised you that this move was certainly not intended as any form of punishment, rather purely as an effort to provide you with a fresh start in a new business area that would allow a stress reduction plan to be successful.*

You noted that your Occupational Health referral had identified your depression and that you needed mental stimulus in your working day, however you felt that nothing had been done to provide this to you, rather that the "torture tactics" that had been applied to you had continued. You noted your frustration in knowing of a case in Northumberland where a retained firefighter was driving around in a Mercedes, never having contributed to the pension that he was still receiving, much to the annoyance of the other Fire Fighters. Something that you as a Scottish tax payer could not abide.

When I confirmed to you that you were to be moved to the Service team, retaining responsibility for your NHS Injury Benefits work, you stated that I was basically rubbishing what you had achieved in your 18 year career with SPPA. At this point Ian Swan stated that you were in fact being punished and that everyone knew that. Again I confirmed to you that the purpose of what I was doing was only to provide you with a working environment that would support a stress reduction plan.

At this point you stood up and advised that you wished to end the meeting…."

50. Mr McGarry's email went on to confirm that the claimant would move to the Service Team on 16 October 2017 with Mr Hermiston as his line manager. Ms Kellock continued to engage with the claimant regarding his move. The claimant emailed her on 11 October 2017 (107) under the subject "*Minion bullying"* –

"….*Even if by "whistleblowing" I have little doubt that the person will be identified by Managers and there is a strong possibility that they will have to endure the same treatment as I have suffered. Voice taken away, knowledge ignored, isolated from others, subjected to embarrassment and added stresses applied as torture. Absolutely no concern will be given to your health and no effort whatsoever will be made to reintegrate you back into your position of choice – your career will be rubbished and nothing will be done anyway."*

51. Later on the same date the claimant emailed Ms Kellock again in these terms –

"*It has been suggested by SPPA Managers that I have a problem accepting decisions. I think that to be unfair in that I have only questioned decisions I consider to be flawed and with good reason and with references to Regulations, previous decisions etc."*

The claimant then set out eight *"examples where decisions on Law have been made without Senior Management or Senior Policy involvement".*

52. The claimant's move to the Service Team took place on 16 October 2017. As a consequence of this change of team the claimant undertook training along with a group of modern apprentices who were aged 16/17.

Claimant's third disclosure – the FSL issue

53. The claimant emailed Mr R Carruthers, Service Team Leader, on 12 March 2018 (108) in these terms –

"*We will be answering a lot of questions when 2018 benefit statements are issued and there is one issue I cannot understand. Hopefully you can put me right and refer me to the relevant Regulations. More and more people have both final pension and CARE scheme benefits so I imagine the number of queries on this matter will be very high. I am trying to learn service work so if I had reference to the relevant Regulations it would help me when answering member's queries.*

I previously had the understanding that when someone moved from their final salary pension into CARE pension benefits their final salary scheme was calculated and deferred (frozen) at that point. Only PI would increase the accrued benefits up to when benefits were paid. Benefit statements in 2016 and 2017 for those who have moved into the 2015 CARE scheme however appear to recalculate final salary benefits each year and base 1995 benefits on the 2016 and 2017 CARE scheme earnings???? I can't see what regulations allow this so hopefully you will put me right?"

54. "*CARE"* is an acronym for career average revalued earnings. That is the design of public sector pension schemes introduced pursuant to the Public Service Pensions Act 2013 (the "2013 Act"). "*PI"* means price indexation. We understand *"1995 benefits"* to be a reference to benefits payable under the National Health Service Superannuation Scheme (Scotland) Regulations 1995.

55. Later in his email to Mr Carruthers, the claimant refers to *"the consolidation of 1995 regulations in 2011".* We understand this to be a reference to the National Health Service Superannuation Scheme (Scotland) Regulations 2011 (the "2011 Regulations"). The 2011 Regulations superseded the 1995 regulations and the 2008 regulations under which the NHS final salary pension scheme operated. We will refer to the final salary scheme as the "*old scheme"* and the CARE scheme established pursuant to the 2013 Act as the *"new scheme".*

56. The claimant included in his email to Mr Carruthers the text of regulation 14(1) and (2) of the National Health Service Pension Scheme (Transitional and Consequential Provisions) (Scotland) Regulations 2015 (the "2015 Regulations"). Regulation 14(1) provides –

"*For any purpose of the old scheme including the calculation of benefits under that scheme to or in respect of a 1995 officer transition member, the member's pensionable pay and final year's pensionable pay* ***are to be determined by reference to the 2011 Regulations (see in particular Part C of those Regulations.***" (the claimant's emphasis in his email)

Regulation 14(2) of the 2015 Regulations makes the same provision for a 2008 officer transition member.

57. The claimant then referred Mr Carruthers to the definitions of "*pensionable pay"* and *"final year's pensionable pay"* in Part C of the 2011 Regulations. Both of these refer to "*pensionable employment".* The claimant also took Mr Carruthers to the definition of *"pensionable employment"* in Part A of the 2011 Regulations –

"*NHS employment in respect of which the member contributes to* ***this Section of the scheme****." (the claimant's emphasis in his email)*

58. There followed an exchange of emails between Mr Carruthers/ Mr Hermiston and the claimant on 13/14 March 2018 (111-115). In his email to the claimant of 14 March 2018 (115) Mr Hermiston directed the claimant to regulation 6 of the 2015 Regulations –

"*Unless otherwise provided in these Regulations, a person who is an active member of the new scheme is to be treated for the purposes of the old scheme as though he or she continues to be an active member of the old scheme notwithstanding the operation of section 18(1) of the 2013 Act."*

59. In his reply to Mr Hermiston of the same date (115) the claimant disagreed with the argument that this created a FSL. He quoted section 18(1) of the 2013 Act –

"*No benefits are to be provided under an existing scheme to or* ***in respect of a person in relation to the person's service after the closing date***." (claimant's emphasis)

60. Mr Carruthers then met with the claimant on 15 March 2018. There was a record of their discussion (116). Mr Carruthers sought to demonstrate to the claimant that the SPPA was administering the FSL correctly but the claimant was not convinced. The record of the meeting indicates that the claimant told Mr Carruthers –

"*that he had set up a meeting with Audit Scotland to discuss the various issues he had encountered with how certain Police and Fire Injury Benefit cases had been handled and that he would be using that meeting to discuss his concerns around Final Salary Linking."*

Claimant meets with Mr Conway

61. Mr Carruthers took the FSL issue to Mr G Conway, Senior Operations Manager. On 23 March 2018 the claimant emailed Mr Conway (129-134) setting out his argument that there was no FSL allowing old scheme benefits to be based on final pensionable salary in the new scheme. He quoted from the 2015 Regulations, the 2013 Act and the 2011 Regulations.

62. Mr Conway and the claimant met on 23 March 2018. Mr Conway emailed the claimant after their meeting (135) recording that they had "*reviewed some of the regulations and shared our own interpretation of what is intended".* Mr Conway advised the claimant as follows –

"*I have carried out my own investigations into FSL, including consulting Policy, and have carried out some calculations to work out the impact for a single member.*

I can confirm in writing that I am content that we are administering the rule correctly and fairly. The FSL is designed to offer some protection to transitional members. Savings are also being made by the fact that employee and employer contributions are collected for an additional 7 years. (Mr Conway's emphasis)

You advised that you still feel that you have the correct interpretation but would now "drop it"."

63. Mr Conway then set out the process which the claimant was expected to follow if he wished to raise concerns through his line managers. He continued –

"*Once the final decision has been made, it is then incumbent on you to accept that decision, even if you personally do not agree. All protestations must then stop. This rule applies to everyone in the team, not just you. I hope that most of your queries can be resolved by discussion with your line manager."*

64. On 27 March 2018 Mr Conway followed up on his meeting with the claimant by emailing him (144) some guidance on what to say to members when answering calls relating to the FSL.

65. It was apparent from his evidence to us that the claimant did not accept Mr Conway's point about savings being achieved through members contributing to the new scheme for an additional 7 years. The claimant pointed out that this was predicated on members retiring at 67 under the new scheme as opposed to 60 under the old scheme, and there was no guarantee that members would do so.

Claimant goes to Chief Executive

66. Despite having told Mr Conway that he would "*drop it",* the claimant did not do so. He emailed Mrs Cooper, the SPPA Chief Executive, on 26 March 2018 (136-143) repeating the same argument that he had placed before Mr Conway, amplifying his concerns and quoting the same legislative provisions.

67. Mrs Cooper replied to the claimant on 11 April 2018 (145) in these terms –

"*I have been discussing this with colleagues and I am confident that SPPA is following the correct guidance. I therefore think that you can have confidence in the advice you have received from your colleagues. If you continue to have concerns then you can receive guidance on the whistle blowing policy from our HR colleagues."*

68. The claimant responded on 12 April 2018 (145) restating his argument that the legislation did not support a FSL in the old scheme. Mrs Cooper replied on 13 April 2018 –

"*You haven't wasted my time. I have confirmed again and I am confident that we are paying pensions correctly. I expect you to operate within these current SPPA guidelines and procedures. Please confirm to me in writing that you are prepared to do this.*

Once I have received this I will consider this matter closed."

69. In his evidence to us the claimant accepted that he had told the Chief Executive that he would *"drop it"* but did not do so. This was because "*I believed I was right".* The claimant said that the Chief Executive told him he was entitled to whistleblow and *"that's what I continued to do".* The claimant told us that he was following the Civil Service Code (708-714).

70. However, the claimant did respond to Mrs Cooper on 16 April 2018 (389) in these terms –

"*As you have instructed, I will operate within current SPPA guidelines and procedures."*

Claimant's fourth disclosure – Audit Scotland

71. The claimant worked (unpaid) as Bar Steward of Selkirk Cricket Club. Through this he became acquainted with Mr Dunn. Their wives were both part-time NHS employees. The claimant assisted with an issue relating to Mrs Dunn's pension contributions. Mr Dunn's father had been in the Fire Service. The claimant and Mr Dunn became aware of the Firefighter issue.

72. The claimant did not have a home computer or broadband. Mr Dunn agreed to help him in taking his concerns about the Police issue and the Firefighter issue to Audit Scotland. Mr Dunn did this by submitting an online form in his own name to Audit Scotland (146-148). It was clear from the description of the *"issue of concern"* that it related to the Police issue and the Firefighter issue.

73. Mr Dunn told us that it was the claimant who filled in the online form. That was apparent from the last two paragraphs –

"*these are the words of a current sppa employee who has sought the assistance of a* [friend?] *to assist me completing this form, he has no connection with the sppa or the matters involved but he is my go between. given I was put out in the open and isolated for many months for initially raising concerns i hope you will understand that my health has been under great stress albeit I have refused to leave or take sick leave.*

I hope this matter can be treated with as much discretion as possible to safeguard my employment status. I feel very aggrieved and stressed that

I am having to raise these concerns on my own and that sppa management did not deal with this in the correct manner and in adherence to civil laws."

74. Mr Dunn and the claimant attended a meeting with Audit Scotland on 30 March 2018. It was not clear how and when the claimant came to be invited. In the course of the meeting on 30 March 2018, the claimant was spoken to by Audit Scotland separately from Mr Dunn. The claimant raised the FSL issue in addition to the issues raised in the online form. The claimant and Mr Dunn understood that Audit Scotland were to take the issues to a pension expert.

75. The claimant followed up with an email on 16 April 2018 to Ms L McEwan of Audit Scotland (150) in which he articulated the FSL issue.

76. Audit Scotland referred the matters raised by the claimant and Mr Dunn to the SPPA. A meeting was arranged for 19 June 2018 for the auditors to discuss their conclusions with Mr Dunn and the claimant. In advance of this Audit Scotland emailed Mr Dunn on 7 June 2018 (152) setting out those conclusions. They found that SPPA was complying with the relevant legislation in relation to the Firefighter issue and the FSL issue.

77. The claimant replied on 11 June 2018 (153-154). He disputed the Audit Scotland conclusions (and pointed out that they had not commented on the Police issue).

78. Mr Dunn and the claimant met with Audit Scotland again on 19 June 2018. Clearly the claimant did not get the outcome he hoped for because he emailed Audit Scotland on 20 June 2018 (158-161) reiterating his arguments on all three issues. Mr Dunn sent an email to Audit Scotland on 26 July 2018 (164-165) headed "*Public Pensions Scandal".* It was apparent from the detail contained in this email and the language used that it was drafted by the claimant. The email concluded –

"I have not slept for more than 3 hours at a time for more than 2 years now and suffer from daily anxiety knowing that this travesty is continuing, benefitting those that I had raised the concerns to and of course employees of Audit Scotland!"

Claimant's fifth disclosure – The Scottish Ministers

79. On 13 June 2018 Mr Dunn sent an email (157) to Nicola Sturgeon MSP, First Minister and Derek Mackay MSP, then Cabinet Secretary for Finance, Economy and Fair Work. It was headed "*Scottish Public Pensions Authority".* Mr Dunn stated that he was "*sending this email on behalf of a friend who doesn't have a private email account but works for the above authority".* He made reference to the FSL issue and the Firefighter issue. Mr Dunn's email referred to the meeting with Audit Scotland scheduled for 19 June 2018 and invited a representative from the Scottish Government to attend.

80. Mr Dunn's email was referred to the SPPA in accordance with the Ministerial and Corporate Correspondence System ("MACCS"). Mr Preston replied to Mr Dunn on 24 July 2018 (162-163, also 170-171). Mr Preston restated the SPPA's position on the FSL issue and the Firefighter issue. He suspected that someone else might be preparing Mr Dunn's letters and wondered if it was the claimant.

81. Mr Dunn replied to Mr Preston on 3 August 2018 (173-174) and Mr Preston responded on 17 August 2018 (172-173). Within his response, Mr Preston quoted paragraph 7.32 of Lord Hutton's report following his independent review of public service pensions –

"*This means that the final salary link would be maintained for years of service earned in final salary based schemes, up to the date the member is awarded all his or her benefits from that scheme, which could be before, at, or after NPA. In effect that would mean there would be a final salary*

link as long as the member remained within the existing scheme or its successor."

82. This correspondence continued in September/October 2018, escalating within the SPPA to Mr Preston's line manager, Mr L Mackenzie, then Director of Policy. Mr Mackenzie sought to draw a line under this by his letter to Mr Dunn of 29 October 2018 where he advised that (with reference to the FSL issue and the Firefighter issue) –

"*….I am letting you know that any further correspondence covering these particular issues will not be responded to by SPPA."*

83. Mr Dunn and the claimant then engaged in correspondence with Kate Forbes MSP, then Minister for Public Finance and Digital Economy, in November/December 2018 and January 2019 (198-222) regarding all three of the issues.

Claimant's sixth disclosure – FCA and others

84. In January 2019 Mr Dunn and the claimant took their concerns to the Financial Conduct Authority ("FCA"), the Pensions Regulator ("TPR") and the Pensions Ombudsman ("PO"). Since, as described below, allegations relating to whistleblowing were not pursued against the claimant as disciplinary charges, we say nothing further about this.

Claimant's seventh disclosure – Nominated Officers

85. Mr Richardson was employed by the Scottish Government as a Senior Internal Audit Manager. He was one of the Nominated Officers appointed to facilitate whistleblowing cases within the Scottish Government and its executive agencies. The claimant emailed the Nominated Officers' email address on 24 April 2019 (408-413) to whistleblow on the FSL issue. Again, as allegations relating to whistleblowing were not pursued against the claimant as disciplinary charges, we can deal with this briefly.

86. Mr Richardson took the matter to Mrs Cooper (761-766). Mr Preston provided Mr Richardson with information relating to the FSL issue and also the Firefighter issue. Mr Richardson decided that *"third party assurance"* should be gained by having these matters independently reviewed. This was done by a solicitor within the Scottish Government Legal Directorate and the outcome was confirmation that the position taken by the SPPA on these issues was considered to be correct.

Disciplinary investigation

87. On 27 February 2019 Ms Heatlie wrote to the claimant (233-236). Her letter began as follows –

"*It has been brought to my attention that there are causes for concern over your conduct, which relate to allegations of insubordination; refusal to follow reasonable management instructions; misuse of official information; frustrating the implementation of policies once decisions are taken, by declining to take, or abstaining from, actions which flow from those decisions; and negligence causing financial loss, damage or injury to people."*

88. Ms Heatlie's letter then explained that Mr Thomson had been appointed as an independent Investigating Officer. In evidence Ms Heatlie described the process by which Mr Thomson, a retired Police officer, was appointed. As we found nothing untoward in this process, we will not dwell on it.

89. Ms Heatlie's letter referred to the instruction given to the claimant by Mrs Cooper on 13 April 2018 (see paragraph 68 above) and set out seven allegations against the claimant. One of these was sub-divided and related to the claimant allegedly misinforming four pension scheme members. As we detail the matters which were taken forward as disciplinary charges below and refer to those which were not, we will not set out the allegations here.

90. Mr Thomson was advised of the way in which the SPPA expected his investigation to be conducted including the format for recording witness evidence. The claimant was critical of the choice of Mr Thomson as Investigating Officer as he did not have a pensions background. We did not consider that criticism to be well-founded. We agreed with Ms Heatlie that the important point was that the Investigating Officer should be independent.

91. Mr Thomson conducted a thorough investigation. He interviewed 14 witnesses including the claimant and Mr Dunn. Each of these interviews followed a structured format. The claimant took issue with witness interview notes not being signed by the interviewee but we found nothing untoward in this. Mr Thomson prepared a comprehensive report (276-407) for Ms Heatlie. This included (a) as Annexes, the witness statements taken by Mr Thomson and (b) as Enclosures, various items of supporting documentation. Mr Thomson's report was submitted to Ms Heatlie on 17 April 2019.

92. As part of his investigation, Mr Thomson met with the claimant on 5 April 2019. The claimant was accompanied by a colleague, Mr R Banks. The notetaker (Ms G Creamer) prepared a note of this meeting (350-358). The note was sent to the claimant who considered that there were inaccuracies and omissions. The claimant submitted to Mr Thomson a version of the note with extensive annotations (359-374). Mr Thomson included both versions within his report.

Disciplinary charges

93. Ms Heatlie decided on the basis of Mr Thomson's report that the claimant should face a disciplinary hearing to answer a number of charges. She

approached Mr Caldwell to chair the Disciplinary Panel. Mr Caldwell was Deputy Head of Area Offices, SG Agricultural Policy Delivery. He was known to Ms Heatlie through her previous Scottish Government role before she joined the SPPA in 2016. He had experience and training as a Disciplinary Officer. The other member of the Disciplinary Panel was Ms T McFarlane, People Advice and Wellbeing Manager. Her role was to advise Mr Caldwell and ensure compliance with procedure; the disciplinary outcome decision was Mr Caldwell's alone. Neither Mr Caldwell nor Ms McFarlane had any prior involvement in the case.

94. The disciplinary charges were set out in Ms Heatlie's letter to the claimant of 7 May 2019 (416-419). They were expressed as follows –

"*1) From 13 June until 20 November 2018 you shared official information with a third party, Mr Robert Dunn, and used his identity to conceal your own to further your own personal interests and make complaints similar to those already investigated by SPPA. You used Mr Dunn's computer and email account to falsely misrepresent the identity of the sender of the emails and sent emails to various Ministers and Departments about SPPA business under the name of Robert Dunn which were dealt with through the Ministerial and Corporate Correspondence System.*

2) You have deliberately failed to comply with a direct management instruction from the Chief Executive of SPPA on 13 April 2018 to operate within SPPA guidelines and procedures and you have demonstrated insubordination, in particular:

2a) You misinformed a member in September 2018 regarding her ability to change her NHS post to a lower paid one. The effect of this misinformation is considerable as her final salary pension will now be based on a much lower pensionable salary and her Career Average Revalued Earnings pension will also be affected as it will accrue at a lesser rate than if she had not changed posts. Your actions caused financial loss to a member who

was subsequently written to by a Team Leader with the correct information, apologised to and informed of SPPA's complaints procedure.

2b) In October 2018 and in direct contradiction to advice provided to you separately by 2 line managers you misinformed a member about the calculation of whole time equivalent earnings when determining contribution rates. You also sent this misinformation out to 2 Employers namely NHS Borders and NHS Lothian when only NHS Borders should have been informed and this resulted in a minor data breach. This required contact to be made to both organisations to advise them of the correct calculation to use and to instruct them to disregard the emails sent by you. The effect to the member is that her contributions are lower than expected and she will now be required to pay additional contributions to make up the shortfall.

2c) In November 2018 another 2 cases were identified by your managers where you had misinformed members of final salary benefits. In both cases members were querying their Annual Benefit Statements and you re-calculated their benefits using your interpretation of the guidelines as opposed to SPPA guidelines, which resulted in both being provided with incorrect figures. This was in contravention of instruction from 3 line managers on how benefits should be calculated.

2d) You admitted in a meeting with your line manager Andrew Hermiston, that you had provided information to a member based on your own beliefs and in direct contradiction to the policies and procedures that SPPA staff are required to follow and disregarded direct guidance on how to apply these policies. You suggested in an email dated 22nd January 2019 that SPPA managers are corrupt in their actions.

3) You have claimed in correspondence and most recently to your line manager in an email dated 22 January 2019 that you were previously isolated from others for 7 months as a punishment for not obeying orders

and reporting erroneous and fraudulent payments. In doing so, you gave false information to colleagues.

4) You provided false information to the First Minister and other Scottish Ministers by stating in email correspondence on 20th September 2018 that you are being asked to provide false information to members of the pension schemes and "have orders and no option other than to revolt and be disciplined". You have also stated in an email to Ms Kate Forbes, Minister for Public Finance and Digital Economy on 13th December 2018 that when you have raised your concerns, "you allow us to be tortured and punished".

95. Ms Heatlie's letter advised the claimant that she considered the allegations "*would constitute gross misconduct"* and, if determined to be well founded, might result in dismissal. Her letter also advised the claimant of the members of the Disciplinary Panel and that the disciplinary hearing would take place on 23 May 2019.

96. By a separate letter also dated 7 May 2019 (414-415) Ms Heatlie advised the claimant that he was being suspended pending the outcome of the disciplinary hearing due to (a) the *"continued risk of misinformation to the public"* and (b) *"genuine concerns for your health and wellbeing as you have indicated that you feel stressed and that you are not sleeping".*

97. The disciplinary charges differed from the allegations investigated by Mr Thomson in that two of the allegations – relating to the claimant whistleblowing to Audit Scotland and the Scottish Ministers – were not reflected in the charges.

Disciplinary hearing and outcome

98. The disciplinary hearing took place on 23 May 2019. The Disciplinary Panel was as detailed above. The claimant was accompanied by Mr Swan. The note taker was Ms L Pullar. The notes of the hearing were produced (420-426). Mr Caldwell and the claimant were provided with a pack of papers in advance of the disciplinary hearing. This included Mr Thomson's report.

99. The notes of the disciplinary hearing recorded that Mr Caldwell went through each of the charges and gave the claimant an opportunity to comment on these. We did not understand the claimant to dispute the accuracy of the notes.

100. Mr Caldwell issued his outcome letter to the claimant on 18 June 2019 (445-450). In his letter Mr Caldwell set out the charges and his decision in relation to each of them, together with his reasons. Mr Caldwell decided that all of the charges were well founded. In the paragraphs which follow, we summarise Mr Caldwell's reasons (by reference to the charges as set out in paragraph 94 above).

101. In relation to charge 1, Mr Caldwell found that the claimant had shared official information with Mr Dunn. He did not accept that the claimant acted as co-reporter with Mr Dunn because emails to various Scottish Ministers were sent from Mr Dunn's email account with no mention of the claimant. He noted that Mr Dunn had said (when interviewed by Mr Thomson) that the emails were in his name to protect the claimant's identity for fear of the claimant losing his job. He believed that the claimant had deliberately concealed his involvement and knowingly misrepresented his identity.

102. In relation to charge 2, Mr Caldwell was satisfied that the claimant had acted in an insubordinate manner and deliberately failed to follow instructions from SPPA's Chief Executive.

103. In relation to charge 2a, Mr Caldwell did not accept as credible the claimant's assertion that he had received insufficient training. He found

that there was evidence that the claimant had disregarded direct instructions.

104. In relation to charge 2b, Mr Caldwell found that the charge was admitted by the claimant.

105. In relation to charge 2c, Mr Caldwell found that Mr Conway had explained to the claimant the procedure to follow if he had queries or concerns on annual benefit statements. He found that the claimant knowingly went against managers' instructions and issued statements which were incorrect, and chose to follow his own interpretation of legislation rather than SPPA guidelines.

106. In relation to charge 2d, Mr Caldwell found the claimant's explanation for his admission to Mr Hermiston, that he had provided information to a member based on his own beliefs and in contradiction to SPPA policies and procedures, not to be credible. Mr Caldwell found this to form part of the pattern of the claimant operating in an insubordinate manner and knowingly outwith SPPA guidelines and procedures.

107. In relation to charge 3, Mr Caldwell found that the claimant had given false information to colleagues when he alleged that he had been moved (from the Injury Benefit Team) and isolated for 7 months as a punishment for not obeying orders and for reporting erroneous and fraudulent payments. Insofar as this related to the claimant describing himself as "*isolated"*, we felt this was a little harsh, as we believed this was the claimant's perception.

108. In relation to charge 4, Mr Caldwell found the claimant had provided false information to Ministers. However, his rationale referred to the claimant acting in collusion with Mr Dunn, knowingly misrepresenting his identity and sharing official information with a third party without authority (echoing charge 1) rather than focussing on what was stated in the emails of 20 September 2018 and 13 December 2018.

109. Mr Caldwell found that the claimant had failed to meet the standards set out in the Scottish Government's Guide to Standards of Behaviour in that he had failed to respect the dignity of others, behaved in a way that caused offence or distress to his colleagues and failed to behave appropriately towards the people he worked with. Mr Caldwell also found that the claimant had failed to meet the standards contained in the Civil Service Code and that his line managers had irretrievably lost confidence in him as a result of his actions and behaviour.

110. Mr Caldwell's decision was that the charge of gross misconduct was established and that the appropriate sanction was summary dismissal. Notwithstanding our comment about Mr Caldwell's rationale for charge 4, we were satisfied this was a decision which he was entitled to reach on the basis of the information available to him. Mr Caldwell noted that, as the claimant was being summarily dismissed, he was not entitled to work a period of notice or be paid in lieu of notice. He nevertheless decided that, in view of the claimant's long service, he should be paid a sum equivalent to pay in lieu of notice. The claimant was advised of his right to appeal.

Appeal hearing and outcome

111. The claimant exercised his right of appeal. He wrote to Ms Heatlie on 25 June 2019 (452-461). The theme running through his appeal letter was that SPPA was wrong and he was right in relation to the issues he had raised. The claimant followed up his appeal letter with further letters to Ms Heatlie on 1 July 2019 (473-478) and 4 July 2019 (479-523), the latter having 10 attachments. The claimant submitted a further letter to Ms Heatlie/Ms Kellock (526-539) – this was undated but was copied to John Lamont MP who in turn wrote to Mrs Cooper on 17 July 2019 (525).

112. The person appointed to hear the claimant's appeal was Ms O'Carroll, Director of Taxation, Scottish Government. She was supported by Ms K Hunter, People Advice and Wellbeing Manager. Neither Ms O'Carroll nor Ms Hunter had any prior involvement in the case. Ms Heatlie wrote to the

claimant on 1 August 2019 (551-552) to advise the date of the appeal hearing.

113. Ms O'Carroll was diligent in her preparations for the appeal. The appeal hearing took place on 14 August 2019. The claimant was again accompanied by Mr Swan. The notetaker was Ms L Walls. The notes were produced (558-564). These recorded that Ms O'Carroll went through each of the disciplinary charges and gave the claimant an opportunity to explain his position.

114. After the appeal hearing Ms O'Carroll decided that the claimant should be referred again to OH. This was done. A report was provided by Optima Health dated 29 August 2019 (567-569) following a telephone assessment on that date.

115. Ms O'Carroll issued her outcome letter on 26 September 2019 (570-575). She upheld Mr Caldwell's decision in relation to all of the disciplinary charges. Her reasons for doing so are explained in the outcome letter and we will not rehearse them here. We were satisfied that Ms O'Carroll was careful and thorough in her approach to the claimant's appeal.

Loss/mitigation

116. At the time of his dismissal, the claimant's gross pay was £1727.67 per month. His net pay was £1407.87 per month. These figures translated into weekly pay of £398.69 gross and £324.89 net. The claimant had not sought fresh employment. He had continued to act as Bar Steward at Selkirk Cricket Club and anticipated that he would be remunerated for doing so, once current lockdown restrictions were lifted, probably around national minimum wage. He had not claimed benefits. He had accessed his own pension.

Comments on evidence

117. The claimant clearly continues to believe that he is right in relation to the issues he raised. In particular, he maintains that his interpretation of the relevant legislative provisions in the FSL issue is correct. He remains unconvinced that there is a valid statutory basis for preserving the FSL in relation to the old scheme. This belief is in effect the prism through which the claimant perceives his treatment by the SPPA. We had the impression that the claimant viewed these proceedings as an opportunity to demonstrate that he was right in relation to the FSL issue. That was not, however, a matter for us to decide.

118. Unsurprisingly both Mr Dunn and Mr Swan were sympathetic towards the claimant and how he perceived he had been treated. Mr Dunn referred to the claimant being "*on the naughty seat".* Both were credible witnesses but their evidence was coloured to some extent by that sympathy.

119. All of the respondent's witnesses gave their evidence in a measured and straightforward manner. All were credible. Ms Heatlie and Mr Caldwell were robust in their defence of their actions. Mr Preston was clearly knowledgeable in matters relating to pensions legislation. We were struck by the absence of any element of personal animosity towards the claimant.

Submissions

120. There was insufficient time at after the conclusion of the evidence to deal with submissions and it was agreed that there would be written submissions. We are grateful to the claimant and Dr Gibson for the detailed submissions which they subsequently provided. As these are available within the case file, we do not rehearse them here.

Discussion and disposal

121. We approach this by reference to the list of issues set out at paragraph 6 above.

(i) Were any of the disclosures identified by the claimant qualifying disclosures under section 43B ERA?

122. We reminded ourselves of the elements of section 43B –

(a) there had to be a *"disclosure of information"* which

(b) in the *"reasonable belief"* of the worker making the disclosure is

(c) made in the *"public interest"* and

(d) *"tends to show"* one or more of the matters set out in section 43B(1)(a) to (f).

123. The matters set out in section 43B(1)(a) to (f) included at (b) –

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

124. We found a useful summary of recent case law in ***Dobbie v Felton t/a Feltons Solicitors UKEAT/0130/20***. In that case the Employment Appeal Tribunal quote from the decision of the Court of Appeal in ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*** in considering whether a disclosure is in the public interest. In the present case, for the reasons set out below, we had no difficulty in finding that the claimant's disclosures were made in the public interest.

125. We reminded ourselves that if we found that the claimant had (a) made protected disclosures and (b) suffered one or more detriments, we would need to address the issue of causation. In ***Fecitt v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372*** the Court of Appeal said that –

"*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act".*

126. The first disclosure made by the claimant related to the Police issue (see paragraphs 27-29 above). It was made by the claimant to his employer. In his email to Ms Paterson on 2 August 2016 (75) and at his subsequent meeting with Ms Guthrie a few days later (78 refers) the claimant was saying that the Police (Injury Benefit) (Scotland) Regulations 2007 had not and were not being correctly applied.

127. This was a disclosure of information. The claimant had a reasonable belief that it was made in the public interest as Police pensions and injury benefits were publicly funded. It tended to show that the SPPA (and, before the SPPA, Police Scotland and its antecedent Police forces) had not complied and were not complying with a legal obligation to apply the said Regulations correctly. This was a qualifying disclosure.

128. The second disclosure made by the claimant related to the Firefighter issue (see paragraphs 40-44 above). It was made by the claimant to his employer. In his email to Ms Guthrie of 12 June 2017 (84) the claimant was saying that the SPPA was misapplying the Firefighters Compensation Scheme (Scotland) Regulations 2006.

129. This was a disclosure of information. The claimant had a reasonable belief that it was made in the public interest as Firefighters' pensions and injury benefits were publicly funded. It tended to show that the SPPA (and its predecessors as administrators) had not complied and were not complying with a legal obligation to apply the said Regulations correctly. This was a qualifying disclosure.

130. The third disclosure made by the claimant related to the FSL issue (see paragraphs 53-60 above). It was made by the claimant to his employer. In his email to Mr Carruthers of 12 March 2018 (108) the claimant was saying that the SPPA was applying the FSL to benefits under the old scheme when

this was not allowed in terms of the relevant legislation including the 2015 Regulations.

131. This was a disclosure of information. The claimant had a reasonable belief that it was made in the public interest as pension benefits under the old scheme were publicly funded. It tended to show that the SPPA was not complying with a legal obligation to apply the said Regulations correctly. This was a qualifying disclosure.

132. The fourth disclosure made by the claimant related initially to the Police issue and the Firefighters issue, with the FSL issue being added (see paragraphs 72-78 above). It was foreshadowed in the online form submitted by Mr Dunn to Audit Scotland (146-148). It was made by the claimant in person at the meeting with Audit Scotland on 30 March 2018. The FSL issue was referenced in the claimant's email to Ms McEwan of 16 April 2018 (150).

133. In referring to these issues at his meeting with Audit Scotland on 30 March 2018 and in his email of 16 April 2018 the claimant was making a disclosure of information. For the same reasons as set out above, the claimant had a reasonable belief that the disclosure was made in the public interest and tended to show a failure by the SPPA to comply with legal obligations. The claimant had disclosed substantially the same information to his employer. This was a qualifying disclosure within section 43F ERA.

134. The fifth disclosure made by the claimant related to the FSL issue and the Firefighter issue (see paragraphs 79-83 above). Although contained in an email from Mr Dunn of 13 June 2018 (157) this was the claimant's disclosure to the Scottish Ministers. This was confirmed by Mr Dunn's statement that he was "*sending this email on behalf of a friend….who works for the above authority",* the email being headed "*Scottish Public Pensions Authority".* The said email referred to the FSL issue and the Firefighter issue.

135. This was a disclosure of information. For the same reasons as set out above, the claimant had a reasonable belief that the disclosure was made in the public interest and tended to show a failure by the SPPA to comply with legal obligations. The claimant had disclosed substantially the same information to his employer. This was a qualifying disclosure within section 43G ERA (the Scottish Ministers not being a prescribed person in terms of the 2014 Order).

136. The sixth disclosure made by the claimant was that which was made to the FCA, TPR and PO (see paragraph 84 above). We did not have sufficient information to determine whether this was a qualifying disclosure.

137. The seventh disclosure made by the claimant related to the FSL issue and was made to the Nominated Officers in terms of the claimant's email of 24 April 2019 (408-413) (see paragraphs 85-86 above). This was a disclosure of information. For the same reasons as set out above, the claimant had a reasonable belief that the disclosure was made in the public interest and tended to show a failure by the SPPA to comply with a legal obligation. The claimant had disclosed substantially the same information to his employer. We did not have enough information to determine the status of the Nominated Officers relative to the claimant's contract of employment, ie to determine whether disclosure to the Nominated Officers was disclosure to the employer under section 43C ERA or an "*other person"* under section 43G. Either way, this was a qualifying disclosure.

(ii) Were any of the said disclosures protected disclosures under section 43A ERA?

138. With the exception of the sixth disclosure in respect of which we did not have sufficient information, we found that these were protected disclosures. In the case of the first, second and third disclosures, they were made by the claimant to his employer and came within section 43C ERA. In the case of the fourth disclosure, this was made to a prescribed person and came within section 43F. In the case of the fifth disclosure, this was

made to an "*other person"* and came within section 43G. In the case of the sixth disclosure, this came within section 43F in respect of TPR and FCA and within section 43G in respect of PO. In the case of the seventh disclosure, this came within either section 43C or section 43G (as explained in the preceding paragraph).

(iii) If so, did the claimant suffer any detriment after having made each such disclosure?

139. We reminded ourselves of what the House of Lords said in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** (Lord Hope at paragraph 35) –

"This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"…."

140. In his document of 3 August 2019 (747-760), submitted in compliance with EJ Kemp's Order following the second preliminary hearing, the claimant detailed the detriments he alleged he had suffered on the ground that he made a protected disclosure. He linked specific alleged detriments to specific disclosures and we adopt the same approach here.

141. In relation to his first disclosure, we understood the claimant to complain about (a) being moved out of the Injury Benefit Team, (b) being made to sit and work alone for 7 months and not have any contact with other Team members and (c) the issuing of disciplinary charges.

142. We found that there was a link between the claimant raising the Police issue and being required to move teams. That was apparent from Ms Guthrie's email to the claimant of 9 March 2017 (81) (see paragraph 36 above). However, we also found that there was tension between the claimant and his team leader, Ms Scott. In so finding we preferred the

evidence of Ms Heatlie to that of the claimant and Mr Swan. It was credible that Ms Heatlie was concerned about Ms Scott's health. It was also credible that Ms Guthrie should want to move the claimant away from the casework with which he had concerns. We did not consider the fact of the claimant being required to move teams to be a detriment.

143. We were not satisfied that the claimant had been made to sit and work alone for 7 months. We accepted the evidence of Ms Heatlie that at the claimant's new work location he was seated beside two other members of staff. Mr Swan's concession under cross-examination (see paragraph 46 above) supported this. There may have been times when the claimant was seated alone but his team move was not a punishment and he was not isolated as he claimed. For the reason given in paragraph 45 above, we were also not satisfied that the claimant had been instructed not to have contact with other members of the Injury Benefits Team.

144. We found that the bringing of disciplinary charges against the claimant was not on the ground that he had made the first disclosure. It was done because of the claimant's behaviour as detailed in those charges. We considered it significant that those elements of the disciplinary allegations which related to whistleblowing were not reflected in the actual disciplinary charges.

145. In relation to his second disclosure, we understood the claimant to complain about (a) being moved to the Service Team, (b) being put in training with a group of modern apprentices, (c) his access to Police and Fire records being removed and (d) not being allowed to discuss his feelings of unfair treatment.

146. Our findings in respect of the claimant's move to the Service Team are set out at paragraphs 48-52 above. They related to a stress reduction plan for the claimant and the fact that his move to the NHS Awards Team was not working out in terms of line management and monthly conversations. The move was in our view for the claimant's benefit and was not a detriment.

147. It was appropriate for the SPPA to provide training for the claimant in connection with his move to the Service Team and we did not find there to be any detriment in that training involving a group of modern apprentices. We had no evidence, beyond the claimant's own assertion, about the alleged removal of the claimant's access to Police and Fire records. We were not satisfied that the claimant had been prevented from discussing his feelings of unfair treatment – it seemed to us that the claimant was vociferous on this issue when he chose to be, for example see paragraph 50 above. It was clear from his evidence that Mr Swan knew how the claimant felt. We did not find that any of these matters constituted a detriment to the claimant.

148. In relation to his third disclosure, the claimant complained about (a) being prevented from discussing his disclosures and speaking again on the issue and (b) being expected to sacrifice his honesty and integrity and tell lies in order to keep his job. Our view of this was that by the time the claimant's concerns about the FSL issue reached the Chief Executive, the claimant had engaged extensively with Mr Hermiston, Mr Carruthers and Mr Conway – see paragraphs 53-64 above. He was told by the Chief Executive that he should follow SPPA guidelines and procedures. That was a reasonable instruction – it would not have been acceptable to have the claimant acting on his own beliefs in terms of the applicable legislation when SPPA's own interpretation was different. The claimant was not in our view prevented from speaking again on the FSL issue. On the contrary, he was directed by the Chief Executive to his HR colleagues for guidance on whistleblowing if he continued to have concerns – see paragraph 67 above.

149. We could understand that the claimant saw the requirement to follow SPPA guidelines on the FSL issue as sacrificing his honesty and integrity when he was convinced that those guidelines were wrong, and that he regarded this was a detriment. However, when viewed objectively, that was not in our view the true position. The claimant was not prevented from continuing his efforts to persuade others that his interpretation of the relevant

legislation was correct. But while he was doing so, he was expected to follow the SPPA guidelines. We regarded that as a matter of operational necessity and not a detriment to the claimant.

150. In relation to his fourth disclosure, the claimant complained about being placed under intense pressure and having to continue to whistleblow under fear of punishment. It seemed to us that the pressure was to a large extent of the claimant's own making. He referred in his document of 3 August 2019 (at 751) to "*having the option of likely having to commit fraud and telling lies in order to keep my job….or….doing my duty as a Public Servant and Whistleblowing to prescribed bodies".* Our view was that the Chief Executive was respecting the claimant's right to whistleblow – again see paragraph 67 above – but requiring him to follow SSPA guidelines while he did so. Viewed objectively, this was not a detriment.

151. In relation to his fifth disclosure, the claimant complained about having to face disciplinary allegations. The reason for those allegations was, in our view, explained in the paragraph from Ms Heatlie's letter to the claimant of 27 February 2019 (233-236) which we have quoted at paragraph 87 above. It related not to the claimant having made whistleblowing disclosures but to his conduct. In those circumstances, we did not regard the initiation of the disciplinary allegations as a detriment on the ground that the claimant had made a protected disclosure.

152. In relation to his sixth and seventh disclosures, the claimant accepted in his document dated 3 August 2019 that he could not claim further detriment from making disclosures to (a) the FCA, TPR and PO and (b) the Nominated Officers.

(iv) If so, what was the detriment and when did he so suffer it or over what period of time did he do so?

(v) Where there was an act by the respondent or failure to act which amounted to a detriment, was each or any part of a series of similar acts or failures?

(vi) If so, when was the last of such acts?

(vii) If the claim form was not presented timeously under section 48 ERA was it not reasonably practicable for the claimant to have done so?

(viii) If so, did the claimant present the claim form within a reasonable period of time thereafter?

153. In light of our findings, as recorded above, that the claimant did not suffer the alleged detriments, these questions become academic and so it is not necessary for us to answer them.

(ix) What was the reason or, if more than one, the principal reason for the claimant's dismissal?

154. The claimant was dismissed because Mr Caldwell decided that the disciplinary charges were well founded. Those charges, which we have set out at paragraph 92 above, all related to the claimant's conduct. They did not relate to the fact of the claimant having made whistleblowing disclosures. They did relate, in part, to the way in which the claimant had gone about his whistleblowing.

155. In relation to the whistleblowing to Audit Scotland and Ministers, the first disciplinary charge referred to the claimant (a) sharing official information with a third party, (b) using Mr Dunn's identity to conceal his own and (c) falsely misrepresenting the identity of the sender of the emails. The final disciplinary charge referred to the claimant providing false information. The rest of the disciplinary charges referred to misinforming members, failing to follow SPPA guidelines and giving false information.

156. We found that these were all matters which related to the claimant's conduct and that it was his conduct, and not the fact that he had made whistleblowing disclosures, which was the reason for his dismissal.

(x) Was the dismissal in breach of section 103A ERA and automatically unfair?

157. The claimant's dismissal would only be automatically unfair under section 103A ERA if we found that the reason, or principal reason, for the dismissal was that the claimant had made a protected disclosure. We did not so find.

(xi) If not, was the reason or principal reason potentially fair under section 98(1) and (2) ERA?

158. We found that the respondent had shown that the reason for the claimant's dismissal related to his conduct. As stated above, that was what Mr Caldwell decided. Conduct is a potentially fair reason for dismissal in terms of section 98(2)(b) ERA.

(xii) If so, was the dismissal fair or unfair under section 98(4) ERA?

159. We reminded ourselves of the language of section 98(4). We had to look at what the respondent had done (or failed to do) in dismissing the claimant for the potentially fair reason of conduct.

160. All of the disciplinary allegations made against the claimant related to his alleged conduct. Having become aware of these, it was in our view reasonable for Ms Heatlie to arrange for an investigation to be carried out. It was reasonable for her to appoint Mr Thomson, as someone independent of the SPPA, as the Investigating Officer.

161. We found that Mr Thomson carried out a thorough investigation. He spoke to relevant witnesses. When the claimant alleged that there were

inaccuracies and omissions in the notes of his meeting with Mr Thomson on 5 April 2019, Mr Thomson afforded him the opportunity to annotate the notes and included both the original and annotated versions in his report. Mr Thomson produced a comprehensive report.

162. Having received Mr Thomson's report, Ms Heatlie revisited the disciplinary allegations and framed disciplinary charges which did not exactly mirror the allegations investigated by Mr Thomson. The effect of the changes between the allegations and the charges was, as mentioned at paragraph 97 above, to remove the whistleblowing element. In other words, the claimant did not face disciplinary charges because he had made whistleblowing disclosures. To the extent that the charges related to those disclosures, it was the manner in which the claimant had behaved when making the disclosures and not the disclosures themselves which was reflected in the disciplinary charges.

163. We found that the appointment of Mr Caldwell as Disciplinary Officer was reasonable. He had no prior involvement in the case. He was of appropriate seniority and suitably experienced. Mr Caldwell's conduct of the disciplinary hearing was fair. He gave the claimant an opportunity to answer each of the charges. He reached conclusions which he was entitled to reach on the evidence before him. He provided the claimant with his reasoning for deciding that summary dismissal was the appropriate outcome. He mitigated the sanction by giving the claimant a payment equivalent to pay in lieu of notice.

164. The claimant was offered and exercised a right of appeal. The appointment of Ms O'Carroll as Appeal Officer was reasonable. The appeal hearing was conducted fairly. The claimant was given an opportunity to explain his position in relation to each of the disciplinary charges. Ms O'Carroll took time to consider matters. She took the unusual step of arranging for the claimant to go through an OH referral and did not issue the appeal outcome until the OH report was available. She provided the claimant with the

rationale for her decision not to uphold his appeal. As stated above, we found that she was careful and thorough in her approach.

165. In ***British Home Stores v Burchell [1978] ICR 303*** the Employment Appeal Tribunal said the following –

"*What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question….entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

166. In the present case, we were satisfied that the respondent did believe that the claimant had committed the acts of misconduct of which he was accused, as set out in Ms Heatlie's letter of 7 May 2019 (416-419). That was clear from Mr Caldwell's disciplinary outcome letter of 18 June 2019 (445-450).

167. We were satisfied that the respondent had reasonable grounds upon which to sustain that belief. The matters complained of had been brought to their attention. They had evidence of what the claimant had done and said, as contained in the report prepared by Mr Thomson (276-407).

168. We were also satisfied that the respondent had carried out as much investigation as was reasonable in all the circumstances. We found that Mr Thomson's investigation was thorough and his report was

comprehensive. We found that the respondent had complied with all three elements per ***Burchell***.

169. We reminded ourselves of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code"). The Code sets out the steps an employer should take when dealing with a disciplinary matter –

- Establish the facts of each case
- Inform the employee of the problem
- Hold a meeting with the employee to discuss the problem
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal

170. We found that the respondent had complied with the Code when dealing with the claimant's disciplinary process. The question we had to decide under section 98(4) ERA was whether in the circumstances (including the respondent's size and administrative resources) the respondent had acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant. That had to be determined in accordance with equity and the substantial merits of the case. For the reasons set out above under reference to ***Burchell***, we decided that question in favour of the respondent. The claimant's dismissal was not unfair.

(xiii) In the event that any of the claimant's claims succeed what remedy should he be entitled to….

171. In view of our findings that the claimant (a) did not suffer any detriment after having made protected disclosures, (b) was not dismissed for the reason that he had made a protected disclosure and (c) was not unfairly dismissed, no issue of remedy arose. All of the claimant's claims required to be dismissed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 17 May 2021
Entered in register: 25 May 2021
and copied to parties