# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms M J F Lorenzo**

**Respondents:** **(1) Barclays Bank UK Plc**
**(2) Mr S Whitehead**

**Heard at:** **East London Hearing Centre**

**On:** **27, 28, 29 January; 12 February 2021 and**
**(In Chambers) 22 February 2021**

**Before:** **Employment Judge C Lewis**

**Members:** **Ms J Clark**

**Mr L Bowman**

**Representation**

Claimant: In person
Respondents: Mr Jeremy Lewis

***This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.***

# RESERVED JUDGMENT

**The unanimous judgment of the Tribunal is that:-**

1) **The Claimant's claim for whistleblowing detriment fails and is dismissed.**

# REASONS FOR RESERVED DECISION

1 By a claim form issued on 14 April 2020, following a period of early conciliation from 19 February to 19 March 2020 the Claimant brought claims against the First and Second Respondents for having subjected her to detriments for having made public interest disclosures, contrary to s47B of the Employment Rights Act 1996. The issues in the claim were clarified at a Preliminary Hearing before Employment Judge Russell on 24 August 2020 at which the claims for unfair dismissal and redundancy payment were withdrawn; the issues to be decided by this tribunal were agreed to be as follows:

2 **The Issues**

*Public interest disclosure (PID)*

2.1 Did the Claimant make one or more protected disclosures? The Claimant's case is that she disclosed information tending to show a breach of legal obligation about handling customer data on the following occasions:

(a) April 2014: at a team leadership meeting chaired by Mr D Herrick, the Claimant stated that they should not be registering customers without their consent;

(b) June 2014: at a team leadership meeting chaired by Mr D Herrick, the Claimant stated that her team were misleading Barclays leadership by publishing figures which falsely claimed that they had registered 1 million customers by 19 May 2014;

(c) July 2014: in a conversation with Mr C Smith (HR manager), the Claimant reported the irregularities in registering customers and that she was being pressured to report false customer registration numbers;

(d) August 2014: in her exit interview, the Claimant stated that she had been mistreated by her team and that after her refusal to follow instructions to report and use fake customer registration numbers, her life had been made difficult;

(e) 18 February 2020: the contents of a whistleblowing report, reference number RC390445, repeating the above concerns.

2.2 Did the Respondents subject the Claimant to any of the detriments listed below because she made a protected disclosure?

(a) From the end of December 2019, repeatedly delaying the Claimant's start date;

(b) 15 January 2020: falsely telling the Claimant that she had been dismissed from her previous period of employment;

(c) 23 January 2020: the Second Respondent withdrew the offer of employment;

(d) Wrongly labelling her as ineligible for employment with the First Respondent;

(e) February 2020: closed the Claimant's whistleblowing complaint without adequate investigation.

2.3 If the Claimant succeeds, in whole or in part, to what remedy is she entitled?

**The Hearing**

3 The Tribunal was provided with a copy of an electronic bundle and a hard copy bundle was provided to the Judge. The witness statements, cast list and chronology were provided both electronically and in hard copy. A supplemental bundle was provided for the hearing and further additional pages were added during the course of the hearing. The Claimant pointed out that the chronology provided by the Respondents was not agreed and so the Tribunal placed no reliance on that. The timetabling of the witnesses was agreed so the Claimant would know who was to be called, in which order to assist her in preparing her questions for cross examination as well as to ensure proportionate timetabling of the time available. However, in the event it became necessary to add a further day to the hearing which the Tribunal was able to accommodate on 12 February.

4 The Tribunal heard evidence from the Claimant on her own behalf and from two witnesses who attended as a result of Witness Orders obtained by the Claimant. The Claimant was reminded on at least two occasions by the Employment Judge of the implication of calling those witnesses, namely that she would be bound by the contents of their evidence. The Claimant acknowledged that she was aware of this and accepted that she would be bound by their evidence and proceeded to call them in any event. Those witnesses were Mr Elliott Goldenberg who attended via video link from the United States and Ms Claire Lane who attended from her home in the United Kingdom.

5 The Claimant had not obtained witness statements from her two witnesses. She was given an opportunity to establish what her witnesses were going to say in advance of calling them to give evidence. The Claimant emailed her questions and the witnesses helpfully emailed their responses to her overnight. Having seen the contents of the responses the Claimant confirmed that she still wished to call them as witnesses and proceeded to do so.

6 The Respondent called Jenine Lee, the Screening Subject Matter Expert for Barclays Global Screening Policy, who gave evidence in respect of the recruitment procedure; Mr Chris Smith who is currently employed in the Talent Acquisition Area of the business but who was employed in a hybrid role at the time of the Claimant's employment in 2014 as HR Manager for Digital Market Place, a business area within the Barclaycard Business Solutions; Stephen Whitehead who is the Head of HR Operations and Payroll and Co-head of HR Delivery and Advisory and is named as a Respondent; Cameron Stuart employed by

Barclays Execution Services Limited, his role is to provide employment legal advice in relation to the group of companies that make up the banking business known as Barclays Bank and at the relevant time in 2020 he was Interim Head of Employment Law for Barclays Execution Services Limited; Sharon Brown who is employed as Legal Counsel and who was covering for a colleague on maternity leave in the Digital Market Place area of the business in the period from September 2013 to around June 2014; Lawrence Gibson who is employed as Raising Concerns Team Lead; Sheldon Chuan currently employed as Head of Digital Product, who joined the Digital Market Place business at Barclays in 2014 as Head of Product Management where he was responsible for overseeing the Digital Market Place Website and its app and for trying to optimise those digital channels. Mr Chuan was part of the Digital Market Place Leadership Team along with the Claimant and around 8 other colleagues; the internal name of the business unit was Digital Market Place, the external brand was Bespoke Office or Bespoke.

7 On 12 February a series of emails were added to the documents having been disclosed following the evidence of Mr Chris Smith as a result of his recollection that there had been some emails in respect of his dealings with the Claimant other than the ones that were in the bundle. Those emails were disclosed to the Claimant immediately upon the Respondent sending them to their solicitors and Mr Smith was recalled to give evidence as to their provenance and how they came to be disclosed so late.

8 The Claimant accepted those documents should go before the Tribunal and did not object to their inclusion. The Claimant cross-examined Mr Smith in respect of those additional documents and she made no reference to any difficulty in dealing with those documents in her oral closing submissions, she prepared written submissions in the interval between the last day of hearing as initially listed (29 January 2021) and the reconvened hearing on 12 February.

9 The Claimant's written closing submissions were sent to the Tribunal and the Respondent on 4 February and Mr Lewis provided the Claimant with a copy of his note for his closing submissions on 5 February 2021. Mr Lewis had also provided a note dated 25 January 2021 for the first day of the hearing on 27 January, setting out the issues, a brief overview of the facts and relevant legal principles. This had been provided to the Claimant in advance of the hearing and in response she had produced her document headed "Bespoke -introduction my raising concerns" in advance of the hearing.

10 The evidence was concluded on 12 February. The Tribunal then heard the parties' submissions and the parties were informed that the Tribunal would reconvene "In Chambers" on the first date available to it, which was 22 February 2021.

11 On 14 February the Claimant sent an email to the Tribunal with additional submissions, copying in the Respondent, consisting of 5-pages of a table, or schedule, headed "Closing Submissions Rationale" and a document running to 6-pages headed "Legal Framework Evolution" addressing the law and submissions.

12 On 15 February the Respondent's solicitors emailed the Tribunal to object to the Claimant's additional documents being considered by the Tribunal on the basis that:

(1) The final hearing ended on Friday 12 February and the Claimant had an

opportunity at that hearing to make her closing submissions; and

(2) The Respondents would not have the opportunity to rebut what is stated within the Claimant's email and therefore their position could potentially be prejudiced. They copied the Claimant into that email.

13 The Tribunal considered whether to take into account the attachments to the Claimant's email of 14 February before starting its deliberations. We took into account that both parties had a considerable period of time to prepare their submissions. The hearing was due to conclude on the 29 January and by that date the vast majority of the evidence had been heard; the Claimant had had the Respondent's opening note in advance of the first day of the hearing and heard the thrust of the arguments that the Respondent was seeking to make and made through cross-examination; she had been provided with the content of the Respondent's closing submissions almost word for word in the written speaking note provided to the Claimant by Mr Lewis in advance of the hearing on 12 February. We concluded that the Claimant had ample opportunity to consider what she needed to say in her closing submissions and to respond to the points raised by Counsel for the Respondents. We took into account the fact that the Claimant was a litigant in person but were satisfied that she had been left in no doubt as to the Respondents' defence to the claims, and its analysis of her claims. The Claimant sought to suggest that her application was equivalent to allowing the additional documentation to be introduced at less than 24 hours prior to the last hearing (the documents disclosed as a result of Mr Smith's recollection). As set out above the Claimant was provided with those documents as soon as they were obtained by the Respondents, before the final day of the hearing, she then had an opportunity to cross-examine Mr Smith about them and she made no objection to their inclusion; we do not find that the two situations are equivalent.

14 The Tribunal took into account the overriding objective and the need to do fairness to both parties but also to deal with matters fairly and proportionately. We do not consider that it is fair to one party to take into account further submissions sent to the Tribunal before our deliberation but after the closing submissions have been concluded. The Respondents rightly complain that if these further submissions are to be considered they ought to be allowed to rebut or respond to those submissions. We do not consider that considering these further submissions would be a fair or proportionate way to conduct the litigation; there must be some finality to the proceedings. Both parties were well aware of the time available on the last day and the intended timetable. We see no reason in the circumstances to depart from the usual course of proceedings and we did not go on to read the contents of the two additional documents submitted by the Claimant.

**Relevant law**

15 We were provided with a combined bundle of authorities and written submissions setting out the parties' respective positions as to the law. We read and considered those carefully and have set out below a summary of the legal principles we found to be most relevant to the issues in this case.

16 Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

17 Section 43B provides that 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 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 (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.

18 In ***Cavendish Munro Professional Risks Management Ltd v Geduld*** [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In ***Kilraine v London Borough of Wandsworth*** [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

19 The effect of Section 43B Employment Rights Act 1996 is that to amount to a qualifying disclosure, at the point when the disclosure was made, the worker must hold a belief that (1) the information tends to show one of the failings in subsection 43B(1) (a) – (e) and (2) that the disclosure is in the public interest. If that test is satisfied the Tribunal need to consider whether those beliefs were objectively reasonable. The proper approach was set out in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731, CA** where Underhill LJ said:

> *26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1).*
>
> *27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.*
>
> *28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the*

*public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.*

*29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.*

*30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.*

20 When going on to consider what was required to establish that something was in the public interest Underhill LJ said at paragraph 37:

"….. *in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."*

21 The 4 relevant factors identified by Underhill LJ were (at paragraph 34):

*"(a) the numbers in the group whose interests the disclosure served – see above;*

*(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*

*(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*

*(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."*

22 Section 43C provides that a qualifying disclosure will be a protected disclosure if it is made to the employer.

23 Section 47B provides (as far as is material):

*47B Protected disclosures.*

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

*(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*

*(a) by another worker of W's employer in the course of that other worker's employment, or*

*(b) by an agent of W's employer with the employer's authority,*

*on the ground that W has made a protected disclosure.*

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

*(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*

24 In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: ***Babula v Waltham Forest College*** [2007] IRLR 346 CA, provided a whistleblower's subjective belief that a criminal offence has been committed is held by the Tribunal to be objectively reasonable, neither the fact that the belief turns out to be wrong, nor the fact that the information which the Claimant believed to be true does not in law amount to a criminal offence [or breach of a legal

obligation] is sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.

25 Section 47B provides that 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. The meaning of the word 'detriment' in Section 47B is the same as in a claim of direct discrimination under the Equality Act 2010.

26 Section 48 provides that a Tribunal shall not consider such a complaint unless it is presented 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 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 have been presented before the end of that period of three months.

27 Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

28 In ***London Borough of Harrow v Knight [2003] IRLR 140*** the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In ***Fecitt v NHS Manchester [2012] ICR 372***, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

**The evidence and findings of fact**

29 Digital Marketplace is a business area within Barclaycard Business Solutions. In 2014 the Digital Marketplace Leadership Team was trying to promote and grow a new business area known as 'Bespoke' or 'Bespoke Offers'. Bespoke Offers was the external name known by customers. It was an online offers program which connected customers and retailers through an offers based system similar to Groupon, offering discounts and vouchers to customers.

30 The Claimant was employed as Marketing Analytics Director at Bespoke from 6 January 2014 to August 2014 when her employment came to an end under a compromise agreement.

31 In August 2019 the Claimant applied to Barclays for a role which she described as VP Senior Manager Risk Modelling and Data Governance in the Lending Products division but which the Respondents say was Vice President Cyber Innovation Lead. Following the selection process, which included the Claimant attending a number of interviews, Stephen Whitehead wrote to the Claimant on 4 December 2019 offering her the position of Vice President Cyber Innovation Lead subject to her satisfying Barclays' recruitment and screening conditions and procedure. In January 2020 the Claimant was informed that she had failed the screening process and her job offer was withdrawn.

**Public interest disclosure /allegations of wrongdoing**

32 The central allegation of wrongdoing relied on by the Claimant as a public interest disclosure is set out at paragraph 24 of the Claimant's witness statement, namely, that from March 2014 David Herrick "ordered the tampering of the gross metric 'customer registration', automatically creating fake customer accounts by wrongly labelling 'unregistered' customers, visitors or users as registered customers".

33 The Claimant set out what she described as her reasonable belief in probable wrongdoing at paragraph 39C of her witness statement that "Illegitimate emails classified by email providers (Gmail, Yahoo …) as 'spam' protecting email users from 'illegitimate emails'), emails rightfully being sent to the spam folder because email users never fully registered."

34 The Claimant relied on section 43B(1) (b) failing to comply with a legal obligation but was unable to identify the specific legal obligation that she alleged was being breached, or put another way that the Respondent was failing to comply with, other than an obligation not to send spam emails, or alternatively an obligation not to sign customers up to a service to receive emails without their consent. We accepted that the latter could amount to a legal obligation in the broad sense.

35 At paragraph 41 of her statement the Claimant put her claim in the following way:

> " My reasonable belief is that we were at great risk of breaching our legal obligation by deliberately mismanaging customer data, spamming customers, and misleading retailers."

36 In paragraph 2 of her closing submissions the Claimant put her claims as follows:

> " This case is centred on the definition of a "Registration" and its natural and intrinsic link to the rights of customers and merchants. LITE registrations processes were indeed executed, enabling Barclays to breach legal obligation by sending emails to customers without their consent."

37 We have used the term wrongdoing in this judgment as shorthand for the failure to comply with a legal obligation as provided by s 43B(1) (b).

**Disclosure 1: March/April 2014**

[The list of issues refers to the first disclosure as taking place in April but in evidence this was identified more precisely as a meeting on 27 March 2014.]

38 According to the Claimant at a meeting of the Senior Leadership Team on 27 March 2014 David Herrick, MD of Digital Marketplace, announced a change to the way they were going to define customer registrations and that in future if a Barclays customer opened a Bespoke email, they would consider the customer registered. At paragraph 23 of her statement the Claimant described this as "the manipulation of 'customer registrations'". The Claimant believed that the term "registered customer" should only be used about a person

who had entered their personal information on the Bespoke website or app and had agreed to the terms and conditions, and had also clicked the link in their welcome email to confirm their registration.

39 The Claimant told us that she thought Mr Herrick's announcement was, "a huge red flag", so in good faith she spoke up at the meeting immediately, expressing concern and clearly opposing the change. At paragraph 49 of her witness statement she sets out the words that she used as follows: *"We should not be registering customers without their consent and spamming them. This change in the metric is also misleading to retailers*". She relies on this as her first protected disclosure.

40 The Claimant alleges that her concern was shut off swiftly and David Herrick replied, "If we do not do it, we do not eat" and then moved on to a new topic, and there was no discussion.

41 A number of the people who were present at that meeting gave evidence to the Tribunal, namely, Elliott Goldenberg, Claire Lane, Sheldon Chuan, Chris Smith and Sharon Brown. None of them remembered David Herrick announcing the change to who was to be called a registered customer in the terms that the Claimant suggests, or the Claimant making a comment to the effect that there was anything wrong in what was being proposed or making any reference to spamming or registering customers without consent. Nor did any of them recall David Herrick saying, "If we do not do it, we do not eat", or any change in the atmosphere after the Claimant's contribution.

42 None of the witnesses who were present at the meeting in March and from whom we have heard evidence understood the comment made by the Claimant, or any objection she had to any change to the registration process, to be an allegation that there was any wrong doing involved in what was being proposed or to be conveying information to that effect. There was some consensus amongst those witnesses that there had been a broader discussion ongoing about who should be counted as a registered customer and in respect of 'light' and 'full' registration, but no-one considered that the Claimant was suggesting that the customers were being signed up as registered without their consent or that figures for registered customers were being used to mislead any retailers or stakeholders. With the exception of the claimant each of the witnesses from whom we heard was clear that consent to receiving emails from other parts of the Barclays Banking Group had been provided by the group's customers before they were included in Bespoke's email list, whilst new customers were generated through the promotion of the service. We were told that retailers were able to select the numbers and types of customers on Bespoke's database whom they wished to receive their offers via the Bespoke emails but obviously it was up to the customers whether they chose to take up those offers.

43 Mr Goldenberg, Ms Lane, Mr Chuan and Mr Smith all believed that any registration or promotional emails that resulted in links leading to registration would only have gone out once they had been approved by the Legal department. They told the tribunal that their understanding was that due to the heavily regulated sector in which they were operating, i.e. the financial sector, these things were taken seriously and marketing material and processes for registering customers were passed by Legal for approval.

44 Ms Brown was employed as Legal Counsel, during the period from September 2013

to June 2014 she was providing maternity cover for a colleague and attended the Leadership Team meetings as part of her role. Given her role she told the Tribunal that she was, and is, particularly sensitive to any terminology that might refer to or suggest 'misrepresentation' or 'falsifying' of information. She told the Tribunal that if she had heard such allegations, or such serious language being used, she would have reacted and considers that she would have remembered the allegations and the person making them. She did not remember the Claimant and did not recall anyone ever raising concerns relating to fake customer registrations or of being asked to alter numbers of customers for data reporting purposes. The Claimant accepted that Ms Brown was a stickler for the rules and not someone who had any difficulty standing up to David Herrick if need be. Ms Brown told us that she was confident that the Bespoke system was conducted correctly and was fully compliant with all relevant legislation and regulations. She was also clear that had any concerns been raised they would not have been brushed under the carpet.

45 The Claimant accepted that she did not take her concerns to Sharon Brown directly nor to anyone else in Legal. She also accepted that she did not use the word 'spamming' but she definitely, she thought, used the words 'misleading retailers'. She could not explain why she had not gone directly to Sharon Brown or even queried with her whether what they were doing was appropriate or legal.

46 We are satisfied that with the sole exception of the Claimant each of the witnesses who had worked for Bespoke at the relevant time understood that consent had been given for such email contact. The Bespoke business model was to use the millions of Barclaycard customers and members of the Barclays Banking group who had consented to their emails being used for marketing or other purposes by other divisions of the Barclays group as a resource. New customers could also visit Bespoke's website in response to promotions, register and access hundreds of offers from prominent UK retailers. Some promotions were in the form of an email (to people on Bespoke's database) inviting them to click on a link to access an offer or offers. Some emails were sent to registered and unregistered customers, that is customers who had signed up and registered on the Bespoke website and to Barclaycard customers.

47 The Claimant maintained that to count someone who clicked through a link in an email to the website as a customer (sometimes called a "light" or "lite" registration), amounted to wrongdoing: she told us that it was wrong to treat anyone other than a 'full' customer who signed up, providing their details and acknowledging terms and conditions, as a customer and to do so was a misrepresentation of true customer numbers.

48 Mr Chaun was responsible for the online and app customer experience. Mr Chuan gave evidence in respect of the customer registration process. Customers would generally sign up by completing a registration form, the registration process was a key step and was designed to gather specific information on the customer's preferences so that products could be tailored to those preferences, the customer was presented with a list of lifestyle choices that they could receive information on through the service. Some customers may have been automatically enrolled for newsletters containing offers if they had given their permission to receive marketing emails from the Barclays' business. The Bespoke service was free, there was no obligation to buy anything and customers could unsubscribe at any time. There were different types of customers, some signed up to receive newsletters but did not activate any deals or offers, others might buy one deal and not use the service again and others might be regular users. Mr Chaun was clear that none of the customers could

be registered, or receive emails, without their consent. We accept his evidence which was largely unchallenged by the Claimant and which we find is consistent with the documentary evidence referred to in his statement as well as the with the evidence of the other witnesses who were employed by Bespoke.

49 In support of her contention that she was a whistle-blower the Claimant relied on an email to David Herrick on 31 March (page 187) in which says that she would like to talk to him about Monetisation and Revenue Management in their next meeting. The email states,

> "We are using our data against us.
>
> We are making decisions without considering its impact on revenue or customer engagement.
>
> The business logic is not there. I would like to outline a frame that would support our decision making and KPI's.

Kind regards Maria. [sic]

in the wrong way, to support how we manage our revenue streams.

I am putting together a brief ppt to explain why we cannot make money as we are operating and how we can use th [sic]

Best Regards."

We considered the two parts of the email as a whole and also the context in which the Claimant told us it should be read (following the 'announcement' of the new classification of customer registration at the SLT meeting on 27 March) however we are satisfied that it does not contain any information to suggest wrongdoing or that Bespoke was in any way acting in breach of any legal obligation.

50 The Claimant also relied on an email that she sent on 16 April 2014 about the unusual number of customers not opening any emails. In her evidence, the Claimant sought to make the link between that email and what was said in the Leadership Team Meeting on 27 March 2014. The email [at page 202] referred to

> "the unusual number of users in our marketable base that have never opened an email, 2.3 Million, meaning we have sent at least 5 emails but our emails were never opened."

In her email the Claimant suggested there were several possible reasons for this, stating, "However I suspect something is wrong with Cheetahmail",

She suggested obtaining a report from Cheetahmail. The Claimant relied on this email in support of her case that she was making a disclosure of wrongdoing by the Respondent (by sending spam emails). She believed that David Herrick was annoyed with her for raising the issue and took against her as a result; she relied on his response on 18 April 2014 [page

195] in which he used the phrase "I stir things up as well", as evidence that he considered she was stirring things up unnecessarily.

51 The Claimant told the Tribunal [paragraph 40 of her statement] that she suggested Bespoke stopped emailing customers as a 'preventative measure' [see page 196] i.e. to prevent possible wrongdoing, she says that in response David Herrick told her, 'not to stir things up' [page 195] which she saw as an intimation that he thought she was causing trouble. The Claimant told us that her complaints were perfectly valid and the Leadership Team should be aware of it and this was why she included Pravina Ladva, the Chief Technology Officer, in her email. The Claimant maintained that she was 'very' or 'extremely' careful in her language. We find that she was so careful that her email made no reference to the actual or potential wrongdoing that she was seeking to persuade the Tribunal she was seeking to raise by sending the email.

52 The Claimant relied on one other document which she says she hinted at, or alluded to, her concerns and that is page 202 in an email in which she says "my concern that hype is good but also increases the pressure to deliver financial results." This was in response to an email from David Herrick as to how he should respond if he was asked about the use of algorithms.

53 We do not find that it could be inferred that this email was an allegation of wrong doing, or information that wrongdoing was potentially being committed, nor do we find it possible to read it as such by referring back to any prior allegation of that kind.

54 The Claimant accepted in cross-examination that she had not used the words that she put at paragraph 49 of her witness statement. The Claimant accepted that she had not said anything verbally about 'fake' or 'false' registrations or 'misrepresentation' at the relevant time. She told the Tribunal that she used the word "misleading". She accepted that she did not raise, or say, anything about spamming; she accepted that she did not use the word 'spam' or 'spamming' in the meeting in March 2014, or the word 'consent'. As we have already noted, neither of the Claimant's own witnesses recalled her saying anything out of the ordinary, or any reaction from Mr Herrick; nor did Mr Smith, Miss Brown or Mr Chuan.

55 We do not find that the Claimant disclosed information tending to show that Bespoke or anyone at Bespoke had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject at the Senior Leadership team Meeting in March/ April 2014.

56 We find that the concerns the Claimant sets out in her witness statement were never expressed or hinted at to anyone in Bespoke or the wider Respondent in writing and that the emails she relies upon cannot be read as doing so by putting them in the context of any previous statements.

**(b) The second protected disclosure June 2014**

***That at a team leadership meeting chaired by David Herrick the Claimant stated her team were misleading Barclays leadership by publishing figures with falsely claiming they had been registered one million customers on 19 May 2014.***

57 During 2014 there was some discussion about Bespoke reaching the milestone of 1 million customers: with the exception of the Claimant, each of the witnesses we heard from accepted that this was an internally identified milestone and that figure was not represented externally as a number of active customers. It was not disputed that an internal milestone had been celebrated in relation to reaching one million customers. The Claimant's contention was that this milestone of one million customers was then falsely presented to ExCo (the Executive Committee responsible for Bespoke within Barclays) to inflate the success of and/or the potential for growth of the business. We were taken to the presentation that was put forward to the ExCo committee in July as well as other ExCo presentations from the relevant period in which light registrations and full registrations were shown separately and numbers identified for 'active' and 'engaged' customers.

58 We note that there was discussion around the terms and the classification of lite or light registration and full registration. We find that Abishek Khotari (whom the Claimant criticises as going along with David Herrick's wishes) in his email dated 19 March 2014 [at page 19 of the supplement bundle] identifies the potential problem with classifying light registrations and full registrations as customers; he clearly spells out that including both categories does not mean that there is an engaged base of one million customers. At page 4 of the supplemental bundle, John Hardcastle the Data Architect, has already in March clarified that there are different types of light registration and that those clicking through the website should more accurately be called prospects. We are satisfied that there was ongoing discussion about what was validly a 'light' or 'lite' registration.

59 The Claimant suggested that there were three different subscription packages being marketed to retailers, at different monthly rates and that the number of customers that they were told they would reach was inflated to persuade the retailers to take up a subscription. Mr Goldenberg (who was called as a witness by the Claimant and by whose evidence she is bound) gave evidence that the subscription package was a draft proposal which was never implemented and that no customer numbers, inflated or otherwise, were provided to retailers in connection with those packages.

60 The Claimant referred to an instruction she said she was given by David Herrick to minimise the data points required for customer registration [at page 228]. We were taken to the agendas for SLT meetings on 29 May 2014 and the 25 and 26 June meeting: against the agenda item 'analytics', is recorded, 'agreed and minimum data points required for customer registration ML to schedule meeting with LT'; it was suggested LT should be read as IT and that the Claimant was instructed to do this by the end of June. The Claimant told the Tribunal that as a result of this instruction she was told she had to visit the IT team in Northampton the next day to resolve the issue as a matter of urgency; she considered this to be a very unusual instruction, from which we should infer that something suspicious was going on. The Claimant told the tribunal that reference to the minimum data points pointed to wrongdoing because this did not allow for the customer to accept the terms and conditions which should be done in a separate step. However, immediately below the entry referred to by the Claimant, against the same agenda item is the entry "when does the registration pop-up appear and does it link to the correct Ts and Cs?", Sheldon Chaun's initials were recorded against this item which was recorded as complete. We accept Mr Chaun's evidence that customers were not signed up to receive offers without their consent.

61 During cross-examination the Claimant drew back from her wider allegation in relation to misleading customers and retailers and relied on the figures being misleading to

internal stake holders, that is, the wider Barclays Senior Management who were investing in the Bespoke business and funding it to keep going. The ExCo presentation is at page 238 onwards, at 253 the document shows full registration as 0.5 million and light at 1.3 million. We find that the figure of 0.5 million is in line with the figure reported by the Claimant in May to Ms Lane.

62 The leadership team meeting in June 2014 was also attended by Claire Lane, Sheldon Chuan, David Herrick and Chris Smith. The Claimant does not allege that Sharon Brown was at that meeting. Claire Lane (Called as a witness by the Claimant), Sheldon Chuan and Chris Smith each gave evidence to the tribunal in respect of that meeting; none of them had any recollection of the Claimant raising concerns or reporting irregularities in registering customers as false registration numbers. We do not find that the Claimant used the words 'misleading' or 'false' in relation to customer registrations as she has alleged.

**(c) Disclosure 3 July 2014 to Chris Smith**

63 The Claimant alleges that in a conversation with Mr Smith she reported the irregularity in registering customers and that she was being pressured to report false customers registration numbers. This is dealt with the Claimant's witness statement at paragraphs 80 – 83. The Claimant sought out a meeting with Mr Smith after being told that her probation period had been extended after the six months date had passed. The Claimant states that she asked Mr Smith if David Herrick could legally do this extension after her period had already passed over a month ago, to which Chris Smith said "yes" and mentioned that David had expressed concerns about her not having the best interest of the business at heart. David was not happy with her performance. The Claimant states that she responded, "You know David is trying to silence me regarding my concerns with the customer registrations, fake reporting and I am being pressured with more workload and harassment". She states she made an analogy regarding the mixing of the registered customers with non-registered customers as being like labelling and treating apples and pears as one fruit. The Claimant also alleges that she said that it was time to escalate and make a formal complaint about the mis-management of customer registrations. She relies on this as her third protected disclosure.

64 When asked about this meeting in cross-examination the Claimant's evidence was somewhat different and what she put to Mr Smith was different again. In her oral evidence the Claimant told the Tribunal that she had said to Chris Smith, "This is related to my comments on customer registration". Her evidence was to the effect that she thought Mr Smith knew what she was referring to: she accepted that she did not use the words fake reporting. In her cross-examination of Mr Smith the Claimant suggested that she had said the words 'misleading' and 'spamming' in previous meetings and that she had challenged Mr Herrick.

65 Mr Smith recalled a debate around full registration and light registration, he did not recall language such as 'false' or 'fake' or 'misleading' being used in meetings with Mr Herrick and he did not recall the Claimant using the words 'false' or 'fake' or 'misleading' at their meeting in July either. Mr Smith believed that the Claimant was aware that there was a grievance procedure in place but was certain that she did not mention to him that it was now time to escalate the matter.

66 Chris Smith, although working as part of the Senior Leadership Team for Bespoke, reported through the HR function and his line manager was Sarah Miller. He was not answerable to Mr Herrick and told us that he did not have any particular loyalty to him. He did not understand the Claimant to be making an allegation that there had been any wrongdoing at their meeting in July 2014. If he had heard or understood the Claimant to be suggesting that the figures were manipulated or misleading the business then he would have escalated it, but he did not hear that. He told the tribunal that if he had thought that the Claimant was raising any issues or concerns about wrongdoing, he would have gone straight to his line manager. He did not have any concerns about taking a potential whistleblowing concern to her; rather, he thought that doing so would have stood him in good stead as it would show that he was doing what he ought to be doing and following the correct process and it would also demonstrate integrity.

67 Chris Smith did not recall that the Claimant came across as overly critical in the leadership team meetings in March or June. He did recall a sentiment generally that at times the Claimant came across as critical, in that she would raise problems without providing solutions, and that she was felt by some people to come across as rude and had been the source of conflict with people outside her team as a result of the way she treated them; he remembered that this was starting to have an impact on her direct reports and was felt to be disruptive to the wider team.. He was also aware from his own experience that she sometimes appeared unfocused at meetings and her presentations would often trail off. By July 2014 David Herrick had given him a list of performance concerns which he then reported on to the ER function. The performance issues raised by Mr Herrick were not a surprise to him as he recalled they were things that had come up before and he had noticed them for himself before David Herrick raised them with him.

68 The Claimant's probation was extended on 17 July 2014. Mr Smith told the Tribunal that performance issues with the Claimant were not only raised by David Herrick, Mr Chuan and others had also identified performance issues. Mr Smith was in contact with the ER function about putting in place a performance improvement plan but following a conversation between David Herrick and the Claimant it was suggested that the Claimant could leave on a compromise agreement rather than going down the performance improvement route. Mr Smith did not therefore take up or complete the performance improvement plan documentation sent to him by ER [at 138 and 139] on 31 July 2014 and instead progressed the compromise agreement.

69 In between the extension of the probationary period and the documents being received from ER there had been an 'Away day', which was in fact a couple of days, at which there had been some negative feedback about the Claimant which tied in with the concerns David Herrick had raised. As part of the 'Away day' process feedback from colleagues was documented in a report, in the Claimant's case a number of colleagues had raised the same or similar issues about the Claimant's performance, in particular in respect of creating conflict with other teams in the way that she dealt with people and the negative impact on others. For instance at page 235 – 236, "Maria is highly critical of other groups", comments in respect of the Claimant isolating herself from others and not building relationships around the team, and that her approach is sometimes considered to be rude. It did not occur to Mr Smith that any of the issues that were being identified were being raised about the Claimant because she was making allegations of wrongdoing; he did not believe that was the reason and if he had thought that was behind the complaints he would have refused to go along with it.

70 Mr Smith was asked about the report to HR and Legal which justified the use of the compromise agreement. He recalled that there were elements of risk to the business identified at the time, these included that there was a new team and the leader of the team (i.e the Claimant) was not seen to be performing; and that David Herrick lived in the US and spent two weeks there and two weeks in the UK which made it more problematic in terms of managing the performance of a Senior Team Leader [page 136 – 137].

71 We do not find that at their meeting the Claimant conveyed to Mr Smith an allegation in relation to Mr Herrick in terms from which he understood or could be expected to understand that she believed she had made an allegation of wrongdoing and that his treatment of her was in any way a response to that. We do not find that she provided Mr Smith with information that he understood, or ought to have understood, to be an allegation of wrongdoing, or which ought to have alerted him to an allegation that there had been wrong doing; nor do we find that she conveyed to Mr Smith that she thought was being exited as a result of having raised concerns that there had been or might be wrong doing.

**(d) 15 August 2014 exit interview**

72 We found the Claimant's evidence on this point to be particularly confused. The Claimant referred to having an exit interview with somebody whom she believed was called Kim. She had in her diary an appointment with someone called Kim on 15 August 2014. It was pointed out that this was a meeting to go through her expenses and the Claimant was taken to the email chain that set that meeting up [304-303]. The Claimant accepted that she met Kim to discuss her expenses and told us that there must have been another meeting with somebody else which was not in her diary which was her exit interview. The Claimant maintained that it was at this interview that she made a further disclosure and filled out the exit interview form stating that she was being exited having raised concerns.

73 We are satisfied that there was no separate exit interview. There is no satisfactory evidence before us from which we could conclude that there was any other meeting or interview in 2014. We accept the Respondent's contention that it made no sense to hold an exit interview in the circumstances where the Claimant was being exited under a compromise agreement and where Mr Smith was already aware of the reasons given for that compromise agreement, namely the Claimant's performance. We are also satisfied from the evidence before us in respect of the Respondent's policies on Whistleblowing and Raising Concerns and the regulatory environment in which it operates that had the Claimant made any reference to wrongdoing or having raised wrongdoing in a form which she returned to the Respondent then action would have been taken to investigate that.

74 We find that it is more likely the Claimant has convinced herself that she recalls the exit interview during in the intervening period. The relevant events took place in 2014 which is now some considerable time ago.

75 The Claimant has made a number of other allegations in her statement and in her oral evidence which we have not addressed in this judgment as we have not found it necessary to set out our findings on those matters in order to deal with the issues we have been asked to decide.

**Findings – whether public interest disclosures were made**

76 We are unable to find any reliable or cogent evidence upon which we can base a finding that there had been a qualifying disclosure. We accept that none of the other witnesses who were present recall the Claimant raising the issue or providing any information to suggest that what was taking place amounted to or potentially could amount to wrongdoing. The Claimant had various opportunities to point this out or to caveat her own in-put. We find that she did not do so directly with any of the other members of the Senior Leadership Team verbally or in writing in an email.

77 We have not found that the Claimant made any verbal protected disclosures in 2014 as she claims.

78 The Claimant pointed to her email of 16 April as written evidence of her concerns. We are satisfied that the email does not mention any wrongdoing and indeed identifies another issue that also have problems with Cheetahmail. We are satisfied it was not possible to put this in the context of any earlier remarks and come to a conclusion that there was a disclosure of information tending to show a breach of legal obligation or other wrongdoing. We find it falls far short of supporting that and rather it points to her having identified a commercial problem.

79 We do not find that there was any information disclosed by the Claimant that tended to show either wrongdoing in respect of customer registration, or misleading of customers, retailers or stakeholders.

80 We found the Claimant's account of past events to be unreliable and we find that in the intervening period of time she has reconstructed past events to fit her own narrative. We note that in cross examination the Claimant frequently had to accept that her recollection or description of events was inaccurate. Likewise, we are unable to place any reliance on her claim that she deliberately changed the font to her email at page 276 to flag ***to herself*** that it contained false data. The Claimant was unable to explain how, having flagged the issue to herself so cryptically, anyone else was supposed to understand what those concerns were. The Claimant could not explain when asked why she had not taken her concerns to anybody else in the Senior Leadership Team or explained clearly in writing or to anyone at the time who was in a position to do something about it. We do not find at all credible her evidence that there is a conspiracy to cover up wrongdoing.

**The Claimant's belief**

**Registering customers for emails without their consent**

81 When asked what she believed the wrongdoing to be, the Claimant answered that it was spamming customers, however, she accepted in evidence that that was not what she alleged at the time. The Claimant resiled from the contents of her witness statement and her evidence changed considerably. We are satisfied that there is no reliable evidence upon which we could make a finding that any subjective belief she may have formed subsequently was, firstly, the belief she held at the relevant time, and secondly, was a reasonable one for her to hold in the circumstances.

82 We have found that the issue of terms and conditions was on the SLT agenda and had been recorded as having been addressed. We do not find it reasonable for the Claimant

to believe that the issue of consent and agreeing to terms and conditions was being omitted from the process.

**Misrepresenting the number of registered customers**

83 In respect of misleading retailers, customers or stakeholders we are satisfied that any belief that she had that the number of customers was being falsely reported was not a reasonable one for her to hold. We find that the reports that were produced clearly differentiated between the different classifications. The presentation to ExCo July distinguished between full and light registration, active customers and visitors and those who make purchases and we are satisfied it was not reasonable to believe that Barclays leadership was being misled.

**Public interest**

84 The Claimant accepted that the whistleblowing policy was covered in induction training and was something that all Barclays employees ought to be aware of. Mr Smith confirmed that Induction training would normally be expected to cover any policies and recent updates current at the time the employee is recruited and there is refresher training during the course of the year. The Claimant accepted that she was aware, at least to some extent, of a whistle-blowing policy being in existence and that there were channels to report potential wrongdoing. On her own account, she accepted that she did not raise this at the time. She was unable to explain why if she genuinely thought there was a public interest in what she was raising, she did not take the matter further, or raise it through the whistleblowing channel, or with Ms Brown, or someone outside of her team. In these proceedings the Claimant, alleged she raised it with Mr Smith but we found that she did not do so.

85 The Claimant did not suggest that she had sought to caveat the information she provided to be included in the report to ExCo which she sent to Claire Lane, as we have seen that Abishek Khotari had done previously. We consider that if the Claimant genuinely had a public interest in her mind as a concern at the time, she would have done more to raise the matter either with Miss Brown or through other channels. The Claimant was the person responsible for the data sets that were being relied upon. We do not find that she held a subjective belief at the time that the matter was of any public or wider interest.

86 We find that the manner in which the Claimant alleges that she raised the issues is not consistent with a contention that the disclosures relied on were made in the public interest. We find the emails pointed to by the Claimant demonstrate the issues raised by her at the time were being raised as a matter of Bespoke's commercial interest. We are satisfied that if the Claimant had genuinely considered that the matters were of public interest then she would have taken steps to raise them either through the whistleblowing channels that she knew were available at Barclays or at the very least with Ms Brown in Legal.

87 The Claimant also referred to a conversation with Philip Mc Hugh in which she said she told Mr McHugh of her concerns, but when asked about what took place in that conversation her evidence was that he asked if the customer numbers were real and that in response, she shook her head and then quickly left the room. We do not find that we can

place reliance on the Claimant's account of events for the reasons we have already given but even if this happened we do not find this supports the Claimant's case that she was either disclosing information or being a critical voice. Similarly, the Claimant asserted that she expected Nayan Kindsnawala or Usama Fayyad to open an internal investigation but could give no cogent or credible explanation as to why, or point to anything she had said to them that might lead them to do so.

**Events in 2019 and 2020**

**Allegation (e)** *18 February 2020: the contents of a whistleblowing report, reference number RC390445, repeating the above concerns*.

[The Claimant provided the date of 18 February 2020 as the date of the relevant whistleblowing report although the reference was raised on 31 January 2020.]

88 The Claimant re-applied for employment with Barclays and was interviewed in 2019. The process was ongoing from August 2019. After a final round of interviews, she was told that she had been successful, but a job offer would be subject to final checks and pre-screening. It was in the pre-screening that an issue was flagged up which resulted in her start date being delayed from December 2019.

89 The screening process in relation to the Claimant was escalated to Jenine Lee, the Screening Governance Manager, on 31 December 2019 by Barclays Onboarding Team (pages 345 – 346). The initial pre-employment screening was carried out by HireRight as part of Barclays usual recruitment procedure and Miss Lee was not directly involved in that process but has seen the documents produced.

90 Part of the Respondent's standard recruitment screening checks in 2019 – 2020 involved checking the reason for the Claimant leaving her previous employment with Barclays in 2014. Miss Lee told the Tribunal that the recruiter should have flagged that there had been previous employment with Barclays and checked the exit reasons at the very early stage of recruitment. She acknowledged this is not what happened in this case and it was the Screening Team who noticed the previous employment; on checking they saw that the Claimant had left under a compromise agreement. The screening policy [PSTE] provides that where a candidate has previously left Barclays under a compromise agreement their application must be escalated to screening exceptions to ascertain the reason why such an agreement was put in place [page 98].

91 The query about the application came to Miss Lee and she contacted the Barclays internal EIP Legal to ask for more information as to why the compromise agreement was used. As a matter of standard practice, the record noting the compromise agreement would also contain a reference to either eligible, ineligible or redundancy. Miss Lee was told by the Legal team that this refers to whether they were a 'good' or 'bad' leaver in terms of being entitled to benefits from Barclays' employee share plans and does not relate to whether they would be re-hired or not. We accept this is an accurate reflection of the term and its use in this context.

92 The Claimant was recorded as having left by 'compromise agreement - ineligible'. The Claimant has read that as being ineligible for re-employment. We find that that is a mistaken interpretation and ineligible refers to her not being eligible for benefits under

employee share plans.

93 Miss Lee explained that where the reason for the compromise agreement was redundancy that would not warrant further investigation as the candidate would not be disqualified from reapplying for employment. If it does not say redundancy, then the exceptions team would investigate further and contact the EIP Legal Team. Miss Lee told us that she always acts upon the recommendation of the EIP Legal Team as to whether they think someone should be rehired or not. In this case, the EIP Legal Team recommended that the Claimant should not be rehired as she was exited for poor performance. We were referred to the email correspondence where this was set out [326-327].

94 Cameron Stuart gave evidence as to the involvement of the EIP Legal team and his discussion with his colleague Ms Mou. We found his evidence to be consistent with the documentary evidence, both the emails from 2014 and those from 2020. We accept that he was not aware of any whistleblowing allegations in relation to the Claimant in 2014 or when he spoke to Ms Mou on 10 January 2020. We accept his evidence that he only became aware that the Claimant had raised allegations that she had been retaliated against for having been a whistle-blower on 1 February 2020 when Ms Mou emailed him to this effect.

95 Miss Lee relayed the EIP Legal Team's response to the Barclays UK Onboarding Team on 14 January 2020 [email page 345 and attachment at 347]. As a result of EIP Legal Team's response the Claimant's application met the criteria for disqualification. The standard procedure, which we accept was followed in this case, was that the decision not to rehire would be communicated to the UK Onboarding Team in India who then update the Taleo portal for their recruiter's information.

96 On 15 January 2020 the recruiter, Rikki Weekes, queried the reason for the Claimant failing the screening process and Winston Churchill of the Onboarding People's Screening Team responded by email at 09:29 [page 337] stating:

"The screening failure is due to the previous dismissal with Barclays".

This was relayed to the Claimant and Ms Weekes replied to Winston Churchill at 11:44 querying the reason for leaving, "As I have been informed that Maria left the business under a compromise agreement rather than being terminated."

Mr Churchill responded at 11:53 the same day with apologies and confirmed the reason for leaving was "Compromise agreement - ineligible".

97 The Claimant queried the reason provided and Miss Lee was contacted again on 22 January 2020 to clarify. Miss Lee confirmed the reason on the same date, forwarding on her email of 14 January sent to the Onboarding Team.

98 Miss Lee told us that the decision to withdraw the offer of employment was made without any input by Stephen Whitehead as a result of the advice from EIP Legal Team and was communicated on 15 January 2020 to the recruiter [335]. We accept Miss Lee's evidence, which was largely unchallenged by the Claimant. We find that the Claimant's

employment offer was withdrawn on 15 January, not 23 January 2020.

99 At 16:34 on 21 January 2020 Daniel Cinque, Business Experience Manager in Talent Acquisition, who the Claimant had also been emailing in connection with her delayed start date, emailed the Claimant [340] informing her that she had failed the screening process due to:

> "Unsatisfactory records in relation to prior employment with Barclays or a related entity",
>
> He also informed her that,
>
> "In the circumstances you have failed to meet the pre-employment conditions in the contract of employment. As a result, Barclays will not be continuing with this offer to you".

The Claimant responded asking what unsatisfactory reference was being referred to and at 17:06 Mr Cinque replied,

"Unfortunately, I do not have further information to share with you, but I will speak with Chris Smith regarding your feedback, I am sure he will be happy to discuss with you if you wish".

The Claimant's next response at 17:35 (copying in Rikki Weekes and her formerly prospective Line Manager) was in the following terms and is the first time she makes reference to fake user registration numbers,

> "It is unacceptable, all the time wasted and cost of opportunity for both parties.
>
> Since I am willing to take a lower ranked job, I clearly am eager to clear my name.
>
> If it was not a dismissal, what information was recorded that makes me "not eligible"?
>
> Given the circumstances and leadership of the division at the time, could the judgment and interest of the hiring manager be biased (pressure to report fake user registration numbers)?
>
> Is the HR report "real"?
>
> Kind regards, Maria."

100 On 21 January 2020 the Claimant emailed Tristram Roberts, Barclays Group HR Director, complaining about what had happened, this email was referred on to Stephen Whitehead who emailed the Claimant on 23 January 2020 in his capacity as Head of HR Operations. Mr Whitehead apologised to the Claimant for the fact that she had been incorrectly advised that the reason for leaving Barclays had been recorded as dismissal and informed her that the screening process included a review of records relating to past performance and that her record identified concerns with her performance which was not satisfactory to Barclays. He confirmed that in the circumstances she had failed to meet the

pre-employment conditions in the contract of employment and as a result, Barclays would not be continuing with its offer [of employment].

101 The Claimant replied to Stephen Whitehead [350-352] the same day complaining about the decision and setting out her reasons for saying that the decision was unacceptable and unfair. In her email she alleged that her performance had been good until she was "asked to report fake user registration numbers in front of the directors at a weekly Bespoke strategy meeting". She alleged that after that her manager ostracised her in front of other directors and requested changes in the reports behind her back; that the funding of Bespoke was based on this KPI that David (Herrick) created a whole PR internal campaign covering the results … elevators were decorated with fake numbers : 1 M[illion] registered users; that she passed the probationary period and the unsatisfactory records were created after the probationary period to justify her "redundancy" and that the HR partner Chris Smith knew about the situation.

102 The Claimant has named Stephen Whitehead personally as a second Respondent in these proceedings. When asked why she had done so the Claimant told the Tribunal that she took particular issue with Mr Whitehead's statement that he was "comfortable with the decision we have made" this was stated in his follow-up email to the Claimant on 29 January 2020 in which he also stated that the decision "is in keeping with our normal approach in such circumstances",

103 Following the Claimant's email of 30 January 2020 in which she referred to, " the prejudice caused by a whistle-blower situation", Mr Whitehead referred her emails to the Raising Concerns Team. The Claimant was contacted by Lawrence Gibson on 31 January to inform her that her emails had been escalated to the Raising Concern Team for a review and she was given the reference number RC390445. The Claimant was contacted by Katharine Platt of the Global Raising Concerns Team on 3 February 2020 and asked to clarify a number of points [389].

104 The Claimant responded on 3 February [389-391] setting out her allegations in respect of 'fake user numbers', including: " The meeting was not about how to improve or achieve the target it was about changing the definition of "registered user" from registered user providing email and password to one who just visits the website". The Claimant alleged she was ostracised as a result of raising her concerns and then subsequently asked to leave for the good of the team. On 7 February 2020 the Claimant was informed by Katharine Platt that the matters had been assessed and as a result it had been decided that they fell within the scope of Employee Relations (ER) Team.

105 On 11 February 2020 Stephen Whitehead sent an email to the Raising Concerns Team [page 396 – 397] informing them that he had received a call from the Claimant that day asking him if he was able to reconsider the decision that had been taken in relation to her offer of employment at Barclays. He stated that he had explained that her concerns were being managed by Raising Concern Team and he was not able to discuss them and nor was he in a position at present to reconsider previous decisions but had reiterated that he was comfortable with the decision that had been taken.

106 On 17 February 2020 in response to a query from Jeremy Howarth, from ER Case Management, asking why the matter had been referred to the ER team to investigate

Lawrence Gibson told Mr Howarth the following [398 – 399]:

> "… The allegations relating to the mis-reporting of MI would not fit the CSO criteria for investigation. In addition, the allegation is aged (dating back to April 2014). Furthermore, the Reporter's primary concern appears to be in relation to their failed screening – a point which Stephen Whitehead has already provided a comprehensive response on – and which we would see as an ER matter……"

107 The date of 18 February 2020 provided by the Claimant as the date of her whistleblowing report appears to come from the correspondence between the Claimant and Jeremy Howarth the ER Case Manager. Mr Howarth emailed the Claimant on that date at 9:40 a.m [page 357] informing her that her concerns had been considered and explaining why it was not considered appropriate to take the matter any further. The Claimant responded at 10:30am in the following terms [358]:

> "There is a connection between the whistleblowing situation, fake numbers reported in the balance score card of Bespoke and my settlement agreement, including the "unsatisfactory" HR records."

the Claimant goes on to complain about Chris Smith not doing anything at the time and alleges that she was kicked out for not complying with her ex-boss's "delusional vision", that he wanted to show growth by presenting his own fake numbers to ExCo and that others in the team including HR went along with it.

108 Mr Smith was recalled to give evidence in respect of the chain of emails he had disclosed relating to his involvement with this matter in 2020. These emails were added to the supplementary bundle at pages 57-96. Page 92 of the supplementary bundle is a copy of the email of 15 January 2020 from the UK Onboarding People's Screening to Rikki Weekes informing her that the reason for leaving had been corrected to "compromise agreement – ineligible" and her response to Daniel Cinque [page 91] already seen by the Tribunal. The additional emails are between Daniel Cinque and Chris Smith, who in 2020 both worked in Talent Acquisition, and a number of others including Qian Mou.

109 In his email sent on 15 January 2020 [90] Mr Smith raised the possibility that it could be appropriate to re-employ the Claimant given that the previous employment was some time ago and the Claimant had previously been employed as a Director and had applied for a lower grade i.e VP post. This led to Kris Bell's response on 20 January 2020 [89] which Mr Smith sought to put into action by seeking an exception [89 and 88]. However, by this time Qian Mou had already advised that the decision would be not to re-employ based on the fact that the Claimant had left as a result of performance issues and Mr Smith was told it would be difficult to go behind this advice [88]. Mr Smith did not then seek to go behind that advice but did seek some clarification from Qian Mou in respect of an appropriate response to the Claimant [87].

110 We are satisfied that Chris Smith did not play any part in deciding not to re-employ the Claimant; we find that he would have been happy for her to have been re-employed but that he deferred to the advice from the Legal Team, as Stephen Whitehead had done.

111 As set out above, having heard from Mr Smith we are satisfied that he did not understand that the Claimant had been exited from the Bespoke Team by David Herrick as a result of anything she may have said, he was not aware of any comments that could be interpreted as allegations of wrongdoing or information disclosing wrongdoing, whether in respect of spamming or registered or unregistered customers or misleading information to ExCo or stakeholders. We are satisfied that he believed the Claimant was exited as a result of genuine concerns about her performance which had been raised by Mr Herrick and others, including Sheldon Chuan, and evidenced in 360 feedback.

112 We are satisfied that no-one in the Legal Team in January 2020 was aware that the Claimant considered herself to be a whistle-blower at the time the advice that she should not be re-employed was given, nor was there any information on her file or within the compromise agreement to suggest that she had disclosed any potential wrongdoing or was a whistle-blower or had been exited as a result of having raised any concerns.

113 It was put to the Claimant that in 2020 she was only concerned with her own personal interest, that is, the reasons for her not being offered the job with Barclays. The Claimant accepted that this was her concern, she subsequently qualified this by saying it was part of her concern and that she was raising her concern in 2014 about mis-leading customers. We find that the Claimant did not mention any issue about spamming customers, or misleading retailers in January 2020. There was no reference to misleading customers or spamming in her emails to Mr Howarth or to Mr Whitehead. The only issue raised was that of 'fake customer numbers' which she alleged were used for mis-leading ExCo.

114 We accept that by 2020 the Claimant subjectively held the belief that there had been a misrepresentation of customer numbers to ExCo however we have found the Claimant's belief that there was mis-representation of the position to ExCo was not a reasonable one for her to hold in the circumstances.

115 We are satisfied that in 2020 the complaint that the Claimant was making was that she was not re-employed as a result (she alleged) of having previously raised issues with fake customer numbers. We find that the concern that she was raising in respect of this was a personal one, that is, the personal impact on her of the withdrawal of the job offer.

116 In evidence the Claimant suggested that she was raising a concern of wider interest in that Barclays ought not to be able to subject whistleblowers to detriment as a result of having been whistleblowers in the past. We find that is an explanation of her motivation that was not in her mind at the time she raised her complaints in January and February 2020 and has been introduced subsequently in order to include a broader public interest to the concerns that she was raising. We are satisfied that the complaints made by the Claimant in 2020 were made in respect of her personal interest and were not made in the public interest.

117 In case we are wrong about that and for the sake of completeness we have set out our findings in respect of the detriments relied upon by the Claimant below.

**Detriments**

**(a) From the end of December 2019, she repeatedly delayed her start date;**

118 It was not disputed by the Respondent that the Claimant was not provided with a start date while the screening process was carried out. The explanation was that their pre-screening checks had to be completed and the screening pre-employment check process was applied as it was to all applicants. We accept Miss Lee's evidence on this. We find the offer of employment was made conditional on the Claimant satisfactorily completing the screening process. The Respondent followed its process as it would with any other prospective employee.

119 We are satisfied that at the point that the checks were being carried out none of the people who had any connection with that process were aware that the Claimant had considered herself to be a whistle-blower or that she had done anything that might lead her to be considered by anybody else to be a whistle-blower.

**Detriment (b) – 15 January 2020 falsely telling the Claimant she had been dismissed from her previous period of employment.**

120 We have set out above the sequence of events that led to this error being made by Winston Churchill. He immediately rectified it and apologised, as did Stephen Whitehead in his subsequent correspondence. We find that there is no connection between the Claimant having classed herself as a whistle-blower and that mistake being made. Mr Churchill was not aware of any of the background or the reason for the compromise agreement. He could not have been aware that the Claimant considered herself to be a whistle-blower let alone that anybody else might possibly have reason to consider her to be one.

**(c) 23 January 2020 the Second Respondent withdrew the offer from employment**

121 We have found the offer of employment was withdrawn on 15 January 2020 because the Claimant failed the pre-employment screening checks.

122 We accept Mr Whitehead's evidence that he saw no reason to go behind the decision that had been made by the Legal team. We accept that he was satisfied that the processes which he was responsible for as Head of HR Operations had been applied and followed correctly; that the decisions made had been within those processes and within the policy and there was no reason for him to interfere with them. We accept this is the explanation for his use of the description of being "comfortable" with the decisions and has nothing to do with whether the Claimant was, or was considered to be a whistle-blower or not.

**(d) Wrongly labelling her as ineligible for employment from the First Respondent.**

123 We have found that the Claimant was not labelled as ineligible for employment for the reasons already given. The term good or bad leaver was used in respect of eligibility for share options and other deferred employee benefits and being treated as eligible or ineligible for those depending on the circumstances of their leaving employment. We accept that if someone was made redundant they would be classed as 'eligible', the Claimant

having left as a result of performance related issues was classed as ineligible. We have set out our findings in respect of the termination of the Claimant's employment in 2014 above, we have found that she was offered a compromise agreement as a result of genuine concerns about her performance and not because of any alleged disclosures.

**(e) – February 2020 closing the Claimant's whistle-blowing complaint without adequate investigation**

124 We heard from Lawrence Gibson of the Raising Concerns Team who told us that all whistle-blowing concerns are investigated proportionately and in a timely manner and escalated and reported as appropriate. Mr Gibson was employed as the Raising Concerns Team Lead, he had been employed by Barclays since 2014. As part of his role he was very familiar with Barclays whistle-blowing policies and requirements. We were referred to the whistle-blowing standard and policy in the bundles [page 58 – 75] and also to a Whistleblower's Charter available to all employees (a copy was at page 57 of the bundle) the charter encourages employees to report any concerns they may have and directs the employees where to go should they wish to raise any concerns, it also sets out Barclays' no retaliation policy.

125 The Raising Concern Team does not investigate the issues or concerns itself but assesses the query to understand the type of issue which is being raised as a triage process and then refers the issue on to the appropriate team for review and investigation. The team is primarily designed to catch any whistleblowing issues and have a lot of guidance on how to assess whether a query or concern is a whistleblowing issue. Mr Gibson described how he uses a decision tree in carrying out this exercise (a copy of the decision tree is at pages 437 – 438 of the bundle). The decision tree was followed by Ms Platt in the Claimant's case and, as with each case, once the tree process has been completed the decision was eye-checked by someone else in the team as part of the review process. The team has regular twice weekly stand-up meetings where they discuss complex cases, and these are attended by HR, Compliance and Legal Representatives as they are cross-functional in terms of oversight and the team is accountable to two different areas within the business.

126 In general, the team refers to three main other teams, the ER Team typically where a concern relates to a personal grievance matter, a colleague/team complaint or an issue relating to a policy which impacts colleagues; the chief security office, if it relates to a security issue such as a physical threat or an insider threat issue including cyber security as well as information and data breach issues; or the whistle-blowing team; occasionally the matter might be referred to other teams where appropriate.

127 Mr Gibson explained that the main focus for considering whether an issue needs to be investigated by the whistle-blowing team is whether the concerns have a broader impact on others beyond the individual raising the issues. He gave as an example, for instance, if the concern alleged potential detrimental impact to customers. The detriment may be in terms of financial damage or any other type of detriment to customers, or if the issue relates to potential criminal activity or a breach of Barclays regulatory obligations.

128 Mr Gibson's evidence that at the time of the Claimant's application for a role in 2019 he was not aware of her application and had never heard of or met the Claimant before becoming involved in the matter in January 2020 was unchallenged. He became involved

as a result of the Claimant's email dated 30 January 2020 to Stephen Whitehead in which she mentioned a whistle-blower situation. Stephen Whitehead sent the Claimant's email on to the Raising Concerns team. Mr Gibson worked closely with his colleague Katherine Platt. Ms Platt emailed the Claimant [383 – 397] in an attempt to gain further information to understand whether there was a whistle-blowing issue. Mr Gibson told us that generally, the interaction with the reporter is normally limited to one set of questions to get further information but in this case the team went backwards and forwards with the Claimant more than once. The Claimant's complaint (paragraph 15 of his witness statement) taken from that exchange of information and the Claimant's emails, was stated in the following terms,

> "in [the April] meeting, [Mr Herrick] stated very clearly that we needed to report better user registration numbers, meaning users were providing their emails and completing registration at the Bespoke Website", and "The meeting was not about how to improve or achieve the target. It was about changing the definition of "registered user" from registered user providing email and password to one who just visits the website"; "I raised concerns stating this change was a mis-representation of the numbers".

129 The information provided led Mr Gibson and Ms Platt to understand that the Claimant was referring to an inflation of customer registration numbers to hit a specific internal target by changing the definition of what would be classed as a registered user.

130 Mr Gibson told us that Ms Platt assessed the complaint using the decision tree and he was the second pair of eyes on that decision. They decided that there was no whistleblowing issue and the most appropriate team to review the concerns would be ER. This was because the issues raised were firstly, the screening process in relation to her recruitment which is an ER issue; secondly, issues to do with the Claimant's team in 2014 and the way she felt treated by the team which is also an ER issue; and thirdly, there was no other more appropriate team to whom they could refer the report of allegation as mis-reporting of user registration numbers.

131 Mr Gibson told the Tribunal that the assessment did not conclude this was a whistleblowing issue as there was no detriment to customers being alleged and it did not engage the public interest test in any other way. The information provided to the team by the Claimant at that time made no reference to spam or to retailers being misled as she subsequently alleged before the Tribunal. Mr Gibson explained that he and Ms Platt could also see that the change in the definition of registered user was something which was included in an internal report at the time and was not a concealed issue. The Claimant's statement that, "Even if the "new definition" is stated in the report for ExCo, most people would understand the registration means email registration, not visitor", suggested to them that the re-definition had been caveated in the report at the time. In the absence of any public interest or criminal activity being alleged the complaint did not meet the test for whistleblowing and he and Ms Platt considered it was appropriate that the ER Team would look into it. Ms Platt emailed the Claimant on 7 February [392 – 394] to explain that the Raising Concerns teams had concluded their assessment.

132 Mr Gibson also referred us to the emails from Jeremy Howarth of the ER Team to the Claimant on 18 February and 21 February to explain that following the referral to the ER Team no further action would be taken by them in relation to her concerns [ 357 – 360]. Mr

Gibson understood that the reason that investigation would not be continued was because the concerns raised were in relation to the Claimant failing the screening process in her recent job application, that failure had already been subject to a separate review and Mr Whitehead had already responded on those issues. Mr Howarth explained that the ER Team had no scope to reconsider the screening failure; the other matters that the Claimant allegedly complained about during her previous employment with Barclays were of a historical nature and the principle subject concerned (Mr Herrick) was no longer working for the business.

133 We were given no reason to doubt that Mr Gibson's account was an accurate and true reflection of what took place and of the reasons for not taking the Claimant's complaints any further at that time.

134 Mr Gibson also addressed the further allegations made by the Claimant in her ET1 form which he accepted gave a different flavour to the concerns. In her ET1 the Claimant alleged customer detriment, 'mishandling of customer data' and issues with the 'legal management of customer information' including 'being registered into the Bespoke division without consent' and 'receiving spam emails from Bespoke'. He pointed out that this information was not provided to his team when they were communicating with the Claimant, despite Ms Platt asking for clarification.

135 The new information contained in the ET1 was treated as a new referral to the Raising Concerns Team and a new triage assessment was conducted. As a result of the Claimant mentioning potential customer detriment and data mishandling this was treated as a potential whistleblowing scenario and was referred to the whistleblowing team for investigation.

136 Mr Gibson was surprised that the Claimant had not mentioned this information previously when they had been contacting her in February 2020 to try to gather information about her allegations.

137 We accept Mr Gibson's evidence. We also accept that it was reasonable for him to expect the Claimant to set out the complaints that she was making in her emails in January and February 2020, particularly in light of the subsequent communication from Ms Platt when she was asked for clarification.

138 We are satisfied that the process used by Mr Gibson and his colleague was the correct one under the Respondent's policies and that it was a robust process. We accept that the information provided by the Claimant at the relevant time did not lead the Raising Concerns team or the ER team to conclude that there was any public interest or wider interest involved in the complaint that the Claimant was making for the reasons given by Mr Gibson and we are satisfied that was a reasonable assessment for them to reach. We do not find that the complaint that was referred to the team at the end of January 2020 was closed in February 2020 without adequate investigation.

139 We find that as a result of the further information provided by the Claimant in her ET1 the Respondent has attempted to open a further investigation under the whistle-blowing policy and that it has been referred to the whistleblowing team. We find that the allegations have been taken seriously. We find that the Claimant has decided not to co-operate with

that investigation until after the conclusion of these proceedings.

**Summary**

140 We have found the Claimant has inaccurately quoted or has misconstrued the evidence in a number of instances in her closing submission, some of these instances have been set out in Mr Lewis's closing submissions. We find that this consistent with her approach to the evidence generally as illustrated during her oral evidence before us, she appeared to be selective in respect of her interpretation of events and prepared to embellish her account. On a number of occasions for instance the description of the words she alleged she used at the meetings in March/ April and June 2014, the Claimant resiled from her witness statement when challenged but then repeated her previous assertion in submissions. In some instances the Claimant fixed on an interpretation of a word taken out of context– for example being called a bad leaver, or her reliance on Mr Whitehead being " comfortable" with the decision not to re-hire her as justifying his being brought in to these proceedings as a Second Respondent.

141 We have not found that the Claimant made any protected disclosures in 2014, any information disclosed by the Claimant lacked sufficient factual content and specificity and did not satisfy section 43B(1), were not made in the reasonable belief that there had been wrongdoing or in the public interest. We have found that the 'whistleblowing' report made in 2020 was not made in the public interest, nor was the Claimant's belief in wrongdoing a reasonable one.

142 For the reason set out above we have not found that any of the detriments alleged were as a result of, on the ground that, or materially influenced by, the matters relied on by the Claimant as disclosures, regardless of whether those were protected disclosures or not.

143 The claim fails and is dismissed.

**Employment Judge C Lewis**
**Date: 8 June 2021**