EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr G L Ford	AND	Alfresco Concepts (UK) Limited (1) and David Ezrine (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton ON 2, 7, 8, 9, 10 and 11 June 2021
(by Hybrid, Assisted CVP and CVP) Deliberation day 30 June 2021

EMPLOYMENT JUDGE GRAY **MEMBERS** **MRS C DATE**
MR J EVANS

Representation
For the Claimant: Ms J Danvers (Counsel)
For the Respondents: Mr G Self (Counsel)

RESERVED JUDGMENT ON LIABILITY ONLY

The unanimous judgment of the tribunal is that:

- **The complaints of unfair dismissal, detriments for making a protected disclosure, automatic unfair dismissal (section 103A Employment Rights Act 1996), harassment related to nationality, and victimisation, fail and are dismissed.**

- **The complaint of wrongful dismissal (notice pay) succeeds.**

REASONS

Background of the Claim

1. The Claimant claims that he made protected disclosures (about GDPR) and did protected acts, and because of those he was subjected to acts of detriment that range in date from February 2018 to November 2018. The acts of detriment claimed are the same for the protected disclosures and the protected acts. The Claimant also claims that his dismissal on the 11 October 2018 was unfair and automatically unfair for making protected disclosures. He also argues that his dismissal on the 11 October 2018 was wrongful (being without notice pay). The Claimant also claims harassment related to nationality.

2. The Respondents deny all the complaints, saying the dismissal was fair and for a conduct related reason, that it was gross misconduct, so not wrongful

as they could dismiss without notice. They dispute the Claimant's asserted protected disclosures and protected acts and that the alleged detriments either happened or if they did that they happened because of the disclosures or protected acts. They also deny there was any harassment.

3. This claim has an added complexity in that the Claimant had, prior to his dismissal on the 11 October 2018, been dismissed with notice for, as the Respondent communicated at that time, reason of redundancy, and his employment was due to end on the 13 October 2018. The Claimant argues that the giving of notice of dismissal by reason of redundancy, following an unfair and pre-determined process, was an act of detriment or victimisation.

4. The Claimant presented a claim form on 4 February 2019. The dates of the ACAS early conciliation certificate for both Respondents are 16 November 2018 until 16 December 2018 (a period of 31 days). An act occurring on or after the 6 October 2018 (31 days back from 5 November 2018) will be in time.

5. Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

6. Please note that references to GDPR in this claim are to the data protection laws that were applicable at that time.

7. As is helpfully summarised on the Information Commissioners Office (ICO) website The Data Protection Act 2018 sets out the framework for data protection law in the UK. It updates and replaces the Data Protection Act 1998 and came into effect on 25 May 2018. It was amended on 1 January 2021 by regulations under the European Union (Withdrawal) Act 2018, to reflect the UK's status outside the EU….. The 'applied GDPR' provisions (that were part of Part 2 Chapter 3) enacted in 2018 were removed with effect from 1 Jan 2021 and are no longer relevant.

8. As an observation 2018 is well known for businesses and consumers, customers and clients to be a period of significant change in the management of personal data.

The Hearing

9. This final hearing was listed to determine liability only. It was converted to take place as a Hybrid hearing, so by video and in person at the Southampton Employment Tribunal.

10. The suggested hearing timetable (as per the Case management order of Employment Judge Cadney from the hearing on the 22 August 2019) (a copy of which is at page 92 of the evidence bundle)) was as follows:

    Day 1 – reading

Day 2 – C's evidence
Day 3 – AM conclusion of C's evidence
- PM R's evidence
Day 4 – R's evidence
Day 5 - Submissions – deliberation – judgment
Day 6 – deliberation - judgment

11. For the hearing we were presented with:
    a. An agreed pdf evidence bundle of 463 pages.
    b. Witness Statements
        i. Respondents: David Ezrine, Valerie Lewis, Nicola Cook and James Doyan
        ii. Claimant: Gavin Ford and Izzie Hickman
    c. At the start of day two we were also presented with the Claimant's key dates document and cast list.

12. Day one was taken as a reading day and the parties did not attend.

13. The parties' agreed list of issues to be decided in this case were copied at pages 103 to 108 of the hearing bundle. These issues had been confirmed as agreed at the two previous case management hearings before this hearing.

14. At the start of day two it was identified to the parties that the agreed list of issues did not include much detail on the dates of when things are said to have happened (and we were not assisted for matters pre July 2018 by the Claimant's key dates document) and it did not confirm that the Tribunal had to consider time limit jurisdictional issues concerning the detriments and the complaints of harassment. It was also not clear which part of section 43B (1) of the Employment Rights Act 1996 the Claimant submitted his alleged disclosures related to.

15. Time was taken to confirm these matters, and this resulted in the below agreed list of issues being presented to the Tribunal by the parties.

16. It was also confirmed that the Claimant no longer pursued allegation 4.1.6 of the previously agreed list of issues (about the Claimant being excluded from a team photograph event) nor one of the two harassment complaints (issue 7.1 of the previously agreed list of issues).

17. In respect of the time limit jurisdictional issues, after hearing representations from the parties it was determined that the time limit issues were best addressed after hearing all matters, rather than as a discrete preliminary issue.

18. The Claimant also applied to add a new document to the bundle (identified as page 447) which the Respondents opposed. After representations and on confirmation that the Respondents had time both in evidence in chief and cross examination to address this document its inclusion was permitted.

19. The evidence did not commence until just after 14:00 on day two, with us hearing from the Claimant's supporting witness.

20. The Hybrid format then caused difficulties for the parties. The hearing was taking place physically at the Southampton Employment Tribunal and by video (CVP) however due to the size of the Court and the limited microphones, audio was an issue for those attending by video (CVP).

21. The panel was attending in person.

22. The Claimant and his representatives had requested they attend in person so that the Claimant could have his representatives physically alongside him to assist with navigation of the evidence bundle. It was also submitted the Claimant would need regular 15-minute breaks when giving his evidence. Allowance was made for the Claimant to have the requested breaks, but the Claimant did not subsequently need them.

23. Only the Respondents' Counsel was physically in attendance with the rest of the Respondents' party attending by video (CVP). Efforts were made to resolve the matter with different devices being used which assisted for the evidence of the Claimant's supporting witness. At the end of day two it was agreed (and tested that it worked) that the hearing would continue as an assisted video hearing, with the Claimant's party being able to use the Court room for his evidence on day three, being presented via video, with all other parties including the panel attending by video. Then from the conclusion of the Claimant's evidence (which was from day four onwards) the parties all attended by video (CVP) without the need to use the physical court room.

24. Although we were assisted with helpful and full written submissions from the parties Counsel, evidence and submissions did not conclude until around 13:00 on day six. This only left half a day for deliberations (the original timetable had envisaged at least a day and a half of deliberations). The Judgment was therefore reserved, and the parties released.

25. A further deliberation day was then listed for the panel which took place on the 30 June 2021.

The issues

26. The agreed issues:

Unfair dismissal (s.94/98 ERA 1996)

1. Can the Respondent show that the reason for dismissal was a potentially fair reason within the meaning of s.98(1) ERA 1996? The Respondent relies on conduct, or, in the alternative, some other substantial reason on the basis of a business reorganisation.
2. If so, was the dismissal fair or unfair under s.98(4) ERA 1996, having regard to the reason shown by the employer?

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

3. Did the Claimant make any disclosure(s) of information which, in his reasonable belief, were made in the public interest and tended to show one or more of the matters set out in s.43B (1(b) ERA 1996? The Claimant relies on the following disclosures of information about the GDPR:
    3.1. the information provided about the GDPR and the First Respondent's data processes as set out in the Details of Claim at paras 10–12 (between February – April 2018 and in May 2018);
    3.2. his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018, as set out in the Details of Claim at para 21;
    3.3. his email of 3 July 2018 to Ms Lewis;
    3.4. his letter of 31 July 2018, to Ms Lewis
    .
4. Did the First Respondent (its employees or agents) or the Second Respondent act as follows:
    4.1. as set out in para 13 of the Details of Claim:
    4.1.1. avoided liaising with the Claimant directly and communicated via Ms Lewis (following the meeting between Mr Ezrine and the Claimant on around 10 / 11 April, which was held after the Etch meeting, until 2 July 2018);
    4.1.2. unfairly and unjustifiably criticised the Claimant's work without giving any indication to the Claimant as to why the work allegedly fell short of the required standards (between February/March 2018 – 2 July 2018);
    4.1.3. excluded the Claimant from a number of senior management meetings which the Claimant had previously attended (following the meeting between Mr Ezrine and the Claimant on around 10 / 11 April, which was held after the Etch meeting, until 2 July 2018);
    4.1.4. regularly shouted and swore at the Claimant in an aggressive manner (between February/March 2018 – 2 July 2018);
    4.1.5. on or around 26 June 2018, removed the Claimant's line management responsibilities without any justification; and
    4.2. encouraged employees to fabricate reasons for his dismissal in or around June 2018;
    4.3. gave the Claimant notice of dismissal by reason of redundancy on 13 July 2018 following an unfair and pre-determined process;
    4.4. refused to deal with the Claimant's appeal against redundancy (in writing between 25 July 2018 and 30 September and/or at all from 1 October 2018 onwards) and grievance (in writing between 6 August 2018 and 30 September and/or at all from 1 October 2018 onwards);
    4.5. instigated a disciplinary process against the Claimant (26 September 2018);
    4.6. curtailed the disciplinary process so as to ensure the Claimant was dismissed for gross misconduct before his contract would have ended by reason of redundancy (11 October 2018);
    4.7. failed to provide the Claimant with the information to which he was entitled in response to his SAR (5 October 2018) ***[Please***

note that this allegation was withdrawn by the Claimant in submissions];

4.8. dismissed the Claimant for gross misconduct on 11 October 2018;

4.9. refused to provide the Claimant with a proper right of appeal against dismissal (between 19 October 2018 and 16 November 2018).

5. If so, in so acting, did the First or Second Respondent (in the course of his employment), subject the Claimant to a detriment on the ground that the Claimant had made a protected disclosure?

Time limits (s48(3))

6. In relation to those acts / omissions that took place on or before 5 October 2018:
   6.1. Did they form part of a series of similar acts of failures, the last of which took place on or after 6 October 2018? Or
   6.2. Was the claim in respect of those acts / omissions presented within such further period the tribunal considers reasonable in a case where it was not reasonably practicable to present the complaint before the end of the period of three months (taking into account the Acas Early Conciliation Extension period)?

Automatic unfair dismissal S.103A ERA 1996

7. Was the reason or principal reason for the Claimant's dismissal that he had made a protected disclosure?

Harassment related to nationality (s.26 EqA 2010)

8. Can the Claimant show facts which, in the absence of any other explanation point to a breach of s26 EqA 2010 having occurred. In this respect, did the Second Respondent make the following comments:
   8.1. around the time when the new GDPR rules came in (in or around April/May 2018) stating "you fucking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a shit".

9. If so, in making those comments:
   9.1. did the Second Respondent engage in unwanted conduct related to nationality; and
   9.2. did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In particular:
      9.2.1. does the Claimant perceive themselves to have suffered the effect in question and, if so,
      9.2.2. was it reasonable for the conduct to be regarded as having that effect.

Victimisation (s.27 EqA 2010)

10. Did the Claimant do a protected act or did the Respondents believe that the Claimant had done or may do a protected act? The Claimant relies on the following as protected acts:
    10.1. his conversations with Ms Lewis between February 2018 and June 2018 in which he stated that the Second Respondent had made discriminatory comments;
    10.2. his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018 in which he stated that the Second Respondent had made discriminatory comments that had offended him;
    10.3. the Claimant's email of 3 July 2018 in which the Claimant alleged that the Second Respondent had made discriminatory comments;
    10.4. his letter of 31 July 2018 in which the Claimant alleged that the Second Respondent had made discriminatory comments.

The above includes consideration of whether information was given or the allegations were made in bad faith.

11. It is also averred that as of on or around 3 July 2018, the Respondents believed that the Claimant may bring proceedings under the Equality Act 2010.

12. If the Respondents acted as set out above at Issue 4, in so acting did the Respondents subject the Claimant to a detriment because the Claimant had done or they believed the Claimant had done or may do a protected act?

Time limits - harassment and victimisation (s.123 EqA 2010)

13. In relation to those acts / omissions that took place on or before 5 October 2018:
    13.1. Did they form part of conduct extending over a period the end of which period was on or after 6 October 2018? Or
    13.2. Was the claim in relation to those acts / omissions brought within such other period as the Tribunal thinks just and equitable?

Wrongful dismissal

14. Was the Claimant dismissed in circumstances that amounted to a breach of contract?

REMEDY ISSUES (to be considered at liability stage)

15. If the Claimant succeeds in any of his claims, the Tribunal will be concerned with issues of remedy, including but not limited to:
    15.1. Whether the Claimant would have been dismissed fairly in any event, either on 11 October 2018 or 13 October 2018;
    15.2. whether any protected disclosures were made in bad faith;

15.3. whether his compensation should be reduced due to contributory fault/conduct;

15.4. whether there was a failure on the part of the Respondents to comply with the ACAS Code (the amount of any uplift being a matter to be determined at the remedy stage).

The Facts

27. All of the witnesses who had submitted witness statements gave evidence at this hearing.

28. We would note the following general observations about some of the witnesses:

    a. The Claimant's evidence lacked specifics on dates and details, particularly as to those matters relating to the February to May 2018 period. The Claimant did explain this in his oral evidence by saying he was more unwell than he realised at that time. From this we observe that the Claimant's recall of certain matters is incomplete.

    b. The Claimant's supporting witness, Isobel Hickman, wanted to provide detail on her relationship with the Respondents as well as her observations of the Claimant's treatment (in particular paragraphs 3 to 15 deal only with her position at the First Respondent and her relationship with Mr Ezrine). This the Respondents submitted should bring in to question her credibility.

    c. David Ezrine attended the hearing via a video link from Australia, so it was much later in the day for him when he was giving evidence. This was accounted for with the offer of breaks when required. We observed that during cross examination Mr Ezrine could come across as trying to avoid questions and replace them with the questions he wanted to answer, but we recognise this could also be him wanting to be clear exactly what was being asked of him.

    d. Valerie Lewis is a witness called by the Respondents but notes at the end of her witness statement (at paragraph 66) that she did not find Mr Ezrine a pleasant man to work with and she did not enjoy her time working at the Company. The parties though seemed to accept that she was an honest witness. As was confirmed by the Claimant in cross examination with his response of yes, when asked if Mrs Lewis had an honest and decent recollection. We note that there are no allegations made about Mrs Lewis' conduct by the Claimant.

29. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

30. The Claimant presented a claim form on 4 February 2019.

31. The dates of the ACAS early conciliation certificate for both Respondents are 16 November 2018 until 16 December 2018.

32. We have seen from the Grounds of Resistance that the First Respondent describes itself as a producer of luxury outdoor cooking products. The

Second Respondent, Mr Ezrine, owns 51 % of the First Respondent's issued share capital. The remaining shares are held by his wife.

33. Mr Ezrine explains in his witness statement at paragraph 2 about the business of the First Respondent that he had …"obtained the distribution rights for the BBQ product the Big Green Egg (BGE), and having bought the assets we started to trade. Initially the business was just Ellie (my wife), myself and one other employee. The business grew immediately, and it was an exciting time as we doubled out revenues each year and Ellie and I had a good business as well as personal partnership. Ellie looked after the admin side of the business and I looked after the sales and we organically built the business from nothing…".

34. Then at paragraph 3 of his witness statement … "My aim was to distribute the product through the traditional retail sites … but also to develop a direct website approach to selling the product.".

35. Then at paragraph 8 of his witness statement Mr Ezrine confirms that … "We grew to around 15 employees at the time of the company restructure in the summer of 2018, and currently we have 9 employees supported by a number of contractors.".

36. Then at paragraph 9 of the witness statement …. "When we were developing the new company website with an agency, Tom & Co, it became clear that we needed to strengthen our team and to add an employee to work with the agency as our primary partner. I asked Tom & Co what they thought I needed from this employee and they advised me what I should recruit for. We advertised for an Ecommerce Manager and Gavin was introduced to us through a recruiter. I interviewed Gavin and appointed him to the Ecommerce Manager role.".

37. The Claimant's employment relationship with the First Respondent commenced on the 6 June 2016. This is confirmed by reference to the Claimant's contract of employment, as this date has been hand-written in as the employment start date (see page 134).

38. The Claimant is employed as the Ecommerce manager as can be seen confirmed at clause 3.1 of the contract (at page 134).

39. There is a job description included as part of the employment contract (see page 141) and the duties and responsibilities have a website and web-based sales focus.

40. It is the Claimant's evidence that he (as per paragraph 19 of the Claimant's witness statement) …. "… had raised the GDPR with David in around late September 2017 and David's initial response was along the lines of *"do whatever you need to do, but the last thing we need is to have more rules"*. I recall that, on this occasion, he referenced USA legislation being better because it supported business development rather than hindering it (compared to UK legislation).". Therefore, at this point GDPR would not

appear to be an issue between the Claimant and Mr Ezrine, who instructed the Claimant to do whatever he needs to do.

41. It is Mr Erzine's evidence (as per paragraph 15 of his witness statement) about the Claimant that … "… Our relationship started to deteriorate from around November 2017 when I just felt that the website project that he was supposed to be responsible for, wasn't developing.".

42. This position is supported by the Claimant within his own evidence (see paragraphs 16, 17 and 18 of the Claimant's witness statement), which is consistent with Mr Ezrine. In particular, paragraph 17… "Almost immediately upon giving my proposal to David, he said he was not happy with the timescales I had set out.".

43. The Claimant also makes reference in his email on the 3 July 2018 timed at 13:57 (see page 202) to … "There has been an increasingly tense and difficult atmosphere towards me since November 2017, when the project plan to update the website was first proposed. Since then, David has seriously undermined my authority and has publicly criticised my performance in front of my peers and external contacts wholly without justification.". The Claimant clearly links his relationship matters with Mr Erzine to the website work.

44. The concerns of Mr Ezrine about the Claimant are raised with an external source on the 8 February 2018. This can be seen by the email at page 147 of the bundle from Mr Erzine asking of an external party **…** "I would be interested to hear your feedback from Gavin Ford's old boss. I am hoping focus, structure and a tight management plan could bring out the best in him; something we have not been able to see to date. He is a very smooth talker and rarely will take direct accountability. I will send you various bits he has done for us that I have found highly lacking. Very frustrating to think you have a guy who seemingly knows what to do .... but somehow doesn't.".

45. This interaction is detailed at paragraph 16 of Mr Erzine's witness evidence … "… I also asked the opinion of another agency we worked with, Athito. Athito are digital retail experts and in early 2018 I asked Carleen Brennan from Athito to give me her assessment on Gavin's ability, and also to follow up with his previous employer as I was having doubts about the ecommerce marketing experience that he said he had (see page 147). Having had Carleen's feedback, and knowing that having the website up and working properly was the primary way we earn money, I took the decision to employ a Digital Marketing Manager, and Laura Desert-Lacey came on board.".

46. It is not in dispute between the parties that a Digital Marketing Manager was appointed around this time.

47. As to the commencement of employment of Mrs Lewis with the First Respondent (who was responsible for HR and acting as Operations Manager – see paragraph 1 of her statement), she formally commences

employment on the 7 March 2018, although it was accepted that she had attended around once a week in February 2018 before she started as an employee. Mrs Lewis observes (paragraphs 2 and 3 of her witness statement) that the focus of the Company was the website which was not yet ready for the upcoming busy season.

48. It is the Claimant's case that around this time he made a protected disclosure about GDPR and also carried out a protected act by raising discrimination concerns with Mrs Lewis.

49. **The first alleged protected disclosures (issue 3.1). The Claimant asserts that in the period February to April 2018, and in May 2018 he provided information to the Respondent about the GDPR and data processes as set out in the Details of Claim at paragraphs 10 to 12.**

50. We have reviewed paragraphs 10 to 12 of the Grounds of Claim.

51. About the disclosures in February 2018 and April 2018, as to what information the Claimant says he disclosed, this is it at paragraph 10 of the Grounds of Claim … "In particular, the Claimant was concerned that the way in which the First Respondent was handling, storing and using the personal data of its customers fell foul of the new legislation. For example, the Claimant raised concerns about the lack of clear consent preferences for a large number of customers and the fact that there were no records of the customers expressly opting into the marketing materials the First Respondent was sending to them.", (see page 17 of bundle).

52. Then at paragraph 11 of the Grounds of Claim the Claimant asserts he … "delivered a Power Point presentation to the Second Respondent in or around April/May 2018 highlighting his concerns, the First Respondent's data protection failings and his detailed recommendations. For example, he detailed the number of individuals on the First Respondent's database who had not consented to the way in which the First Respondent was handling and using their personal data.".

53. Copies of any such Power Point presentation and any contemporaneous correspondence around it (if they existed as the Respondents assert they do not) were not presented to this Tribunal so we cannot interrogate the content of it and if it satisfies the definition of a protected disclosure or not.

54. Then at paragraph 12 of the Grounds of Claim the Claimant asserts … "In May 2018, the Claimant raised concerns about the lack of information provided to customers in respect of their personal data and the way in which it was being handled by the First Respondent. Specifically, the Claimant said that the First Respondent was loading the data of its customers into Facebook but had not sought any of their permission.".

55. The Claimant addresses these disclosures in his witness evidence at paragraphs 22 to 30 under the heading "**February 2018 – May 2018: GDPR Compliance**" and the May 2018 at paragraphs 45 to 48 under the heading "**May 2018: GDPR**".

56. From these paragraphs of the Claimant's evidence, the Claimant's responses to questions put to him in cross examination, and the evidence of Mr Ezrine and Mrs Lewis as well as the documents contemporaneous to the time we find:
    a. The information that the Claimant says in his witness evidence that he expressed to either Mr Ezrine or Mrs Lewis does not match the grounds of claim and is vaguer than the grounds of claim. For example, in paragraph 23 he says … "As we got closer to the GDPR implementation, I got increasingly concerned about Alfresco's existing processes not being compliant. Between when Valerie joined in February/March 2018, and April 2018, I raised these issues with her in person on around a weekly basis in one-to-one meetings.". The Claimant does not articulate what issues he raises.
    b. When the Claimant relayed this information is also unclear from the evidence we have been presented.
    c. Although the Claimant says (in paragraph 23) that it was … "Between when Valerie joined in February/March 2018, and April 2018, I raised these issues with her in person on around a weekly basis in one-to-one meetings.", he accepted in cross examination when asked when he says he first discussed GDPR (relevant to the alleged disclosures he asserts were made) that it was early March 2018 when he created a document to discuss the challenges. This could well be the Power Point presentation he refers to in paragraph 24 of his statement, but copies of any such Power Point presentation and surrounding correspondence to it were not presented to this Tribunal so we cannot interrogate the content of it and if it satisfies the definition of a protected disclosure or not.
    d. Neither Mr Ezrine nor Mrs Lewis (at paragraph 16 of her witness statement) could recall a power point presentation that the Claimant says he created and presented. About this at paragraph 29 of his witness statement Mr Ezrine says … "I know that Gavin has said that he presented a Power Point presentation to us about GDPR. I cannot recall that and despite searching we have not been able to find a Power Point presentation. I would also point out that we hardly use Power Point and I'm sure I would have remembered if he delivered such a presentation.".
    e. During cross examination of Mrs Lewis, she confirmed when asked if the first time the Claimant raised GDPR with her was in early March, she confirmed that she started on 7 March 2018 so could well be.
    f. The Claimant is predominantly reliant on Mrs Lewis passing what he says he disclosed about GDPR to Mr Ezrine (as at paragraph 27 of

his statement) … "The reason I chose to raise my concerns about GDPR compliance predominantly with Valerie after she joined was because I was scared of David's reaction, particularly after his overreaction to my website proposal and his negative reaction in my original meeting with him where I raised the GDPR back in September 2017. I was afraid of how he might react if I told him that the business was heading to be in breach of new legislation.".

g. As Mrs Lewis says at paragraph 14 of her witness statement … "I passed on the points which Gavin did raise with me to David Ezrine on several occasions, mostly in the presence of people like Julia Tasker and Mrs Ezrine.". Exactly what information was received by Mrs Lewis and then what was passed to Mr Ezrine is unclear. The Claimant accepted in cross examination that he did not know if Mrs Lewis had passed information to Mr Ezrine that would amount to a protected disclosure or not.
h. It is also not clear what information the Claimant is saying Mr Ezrine received directly from him as he acknowledges in his statement at paragraph 26 … "… Despite specific issues about GDPR compliance being raised, David did not engage with the discussions and chose to come and go from the room repeatedly throughout the meeting...".
i. The Claimant's perception of Mr Ezrine's lack of engagement on GDPR is also the view of others as noted from the comments of Mrs Lewis in her statement at paragraph 16 … "David just didn't care about GDPR and wasn't particularly interested in anyone talking about GDPR. I even remember an email that David's wife sent to David, Gavin, Julia Tasker and me saying that we need to do something about GDPR and David just ignored it (pages 171a - 171c).".
j. Mrs Ezrine in this email dated 17 April 2018 says … "I'm really concerned that we don't have a plan for the changing data protection laws on May 25th." … also, "I know david is busy but this is not a task we can fob off. All the work we're doing to launch remarkable campaigns could be undone if we continue to market under defunct GDPR regs after may 25th. It only takes one techy person or another competitor to make a public proclamation that we're not legally compliant to throw us under the bus and undo our hard work. … I've tried raising it and got short shrift. Therefore Val, can you please as third party HR legal beaver put it infront of David as a must do item not an optional item for some point in the future.".
k. We note that the way Mrs Ezrine describes Mr Ezrine's position about GDPR is consistent with his expressed position (disinterested and frustrated), and that he has given his wife "short shrift" when she raises such issues.
l. The lack of clarity as to what the Claimant is disclosing about GDPR and when, is also apparent from what Mrs Lewis and Mr Ezrine recall they were told. Mr Ezrine in paragraph 27 of his witness statement recalls … "While I know that Gavin has said he raised a number of

specific concerns regarding GDPR, I do not remember him doing this. He did raise the point as a task that needed to be dealt with, which we were aware and doing as a company, and he was instructed to make the required modifications to our website and other software systems to meet the upcoming GDPR regulations as this was his job. The only point that could be remotely interpreted as a "concern" was a perceived deadline Gavin raised about sending an email to our existing database of customers over the upcoming GDPR regulations. This issue was not raised in a one-to-one setting but in a group meeting and was widely known in the company as an issue to be dealt with.".

m. Mrs Lewis says at paragraph 13 … "Regarding Gavin and the GDPR, it is correct that I held weekly 1:1 meetings with Gavin, but only about 4 or 5 altogether. Gavin probably raised concerns he had about the new rules a few times during our 1:1s as we got closer to the GDPR implementation date. Gavin's main worry was that we were not cleansing our customer database and that we should be emailing everyone on our database asking them to opt back in. I believe Gavin put something on the website to cover customer information and the way it was being handled at the company. Gavin had also raised issues about the handling and storage of personal data at events pre the GDPR rules. I do not believe the sharing of customer personal data with suppliers or partners of the company without the knowledge or consent of customers happened, although Gavin may have raised his concerns on the outcome "if' we did, and I am also not aware of discussing the sharing of confidential personal data by email without adequate security measures in place with Gavin or of this happening. Gavin did not raise concerns regarding open databases and lists which could be searched by anyone in this office with me. Gavin may have used the words "breach of the GDPR", but only in respect of "would" and "if', not that we "are" and I am not aware that the company ever did breach the GDPR and Gavin did not raise these concerns with me.".

n. The documents that have been presented to the Tribunal suggest that GDPR was not the significant concern the Claimant suggests he was raising in the way he says. It does not feature at all in the Claimant's top priorities list for April/May 2018 (see page 159). Nor for May/June (pages 159 and 160).

o. GDPR does not feature in the Claimant's Ecommerce Team task list for May 2018 (see pages 173 to 177) save for the reference to it on page 175 … "Create email campaign for GDPR. Does this need a landing page?".

p. The Dudley meeting (referred to in paragraphs 25 and 26 of the Claimant's witness statement) takes place on the 2 May 2018 as can be seen from the email of the same date at page 178 of the bundle. About GDPR the email records GDPR being talked about under desktop security (see paragraph 8b of the document). There is

nothing to suggest, as the Claimant says in his statement (at paragraph 26), that during the meeting he reiterated information he had previously given about GDPR concerns.

q. Why the Claimant reasonably believes what he is disclosing is in the public interest is set out in paragraph 30 of his witness statement … "In my view the information I provided showed that Alfresco was likely to be in breach of its legal obligations as of May 2018. Alfresco held data for approximately 30,000 named customers, so I genuinely believed that it was in both Alfresco's and the public interest for me to raise this information.". This was not challenged by the Respondent.

r. About the May 2018 disclosure the Claimant says he raised GDPR concerns with Mrs Lewis (see paragraph 45). He then describes how he circulated an agenda (as at pages 180 to 181) and we can see that this references GDPR at item 1, and the Claimant says that GDPR matters were then discussed at a meeting on the 9 May 2018 (paragraph 46). We note, and the Claimant does not assert this, that the material referred to in the agenda does not relate to his alleged disclosures, it is just to show matters about managing GDPR were being discussed as the Claimant says it was …"to address the broader GDPR considerations" (paragraph 46).

s. The Claimant, who had the data officer role with the Company also acknowledges that not all the matters he was raising were likely to be a breach of GDPR (see paragraph 45 of his witness statement) … "… I felt Alfresco could be getting itself in even deeper with breaches of the GDPR. I raised these concerns with Valerie, particularly pointing out that there was no company policy on managing customer data, because I was so uncomfortable about what was being asked of me. In response, Valerie suggested that I speak with Etch and get their opinion, which I did. Etch said this was a grey area – i.e. it was not strictly forbidden in their view. The fact that they were also up to date on GDPR guidelines and did not feel it was a clear and obvious breach gave me reassurance…".

t. In paragraph 48 of the Claimant's statement he describes discussions about GDPR at a different meeting in April/May 2018 where he says the power point presentation is made. It is said this is where the alleged harassment comment is made, and this is considered below.

57. It is unfortunate that there is such a lack of specificity in the Claimant's witness evidence to the disclosures he says he made. We recognise that recall alone about verbal interactions can be unreliable, so it is also unfortunate that despite the Claimant engaging the assistance of Solicitors as early as the end of June 2018 that the particulars of the alleged disclosures were not recorded at that time. The Claimant confirmed in cross examination that his Solicitors had looked at the email dated 3 July 2018 and that he had given them instructions as to what had taken place. The

references in the email dated 3 July 2018 and the letter of grievance dated 31 July 2018, also relied upon by the Claimant as being protected disclosures (see below), do not contain details of what the Claimant says he was disclosing in May 2018 and before.

58. From these facts what we can find is that what the Claimant evidences about what he says he disclosed from March 2018 onwards, until GDPR comes into force at the end of May 2018, has the potential to be information tending to show the Respondent is likely to fail to comply with data protection legal obligations. We note that this is the emphasis placed on the information the Claimant is said to have disclosed in the written submissions of Claimant's Counsel. The undisputed evidence at paragraph 30 of the Claimant's witness evidence also supports why the Claimant can say he held a reasonable belief it tended to show this and that it was in the public interest.

59. What is certainly not proven on the balance of probability is that the Claimant made such a disclosure before March 2018, nor when Mr Ezrine received the information that the Claimant alleges is a disclosure.

60. **The first alleged protected acts (issue 10.1). The Claimant assets that his conversations with Ms Lewis between February 2018 and June 2018 in which he stated that the Second Respondent had made discriminatory comments, are protected acts.**

61. There is limited evidence about this in the Claimant's witness statement. It is referred to in paragraph 35 as … "There were many times when David made comments expressing his frustration with British laws, rules and regulations. I raised these comments with Valerie and would do so whenever they happened. This would often be during my weekly review meetings or when we were making tea or coffee, because it was a small office and there wasn't always a private place to speak. I would raise with Valerie how inappropriate these 'rants' were and how offensive I found them. Valerie would just tend to say to me "we all know what David is like.".

62. About these conversations Mrs Lewis says at paragraph 8 of her witness statement … "I spent quite a lot of time with Gavin in the 4 months that we worked together and he could be quite negative about David, particularly about him changing his mind regarding the instructions he was giving to complete certain aspects of work, but Gavin always accepted that it was how David was. He would sometimes moan to me about David's work style, but he never wanted to formalise any complaint about David, and he certainly never complained about David swearing, or about David's attitude to British people in general.".

63. During the cross examination of the Claimant he accepted that he had not used the word discriminatory. Mrs Lewis when cross examined also could

not recall the word discriminatory being used. We note as well that the only complaint of harassment that the Claimant pursues at this Tribunal is in respect of a comment allegedly made in April/May 2018.

64. We therefore do not find that the Claimant has proven on the balance of probability that he did do a protected act as he asserts.

65. **The detriment alleged as issue 4.1.2, that between February/March 2018 and 2 July 2018 the Respondents unfairly and unjustifiably criticised the Claimant's work without giving any indication to the Claimant as to why the work allegedly fell short of the required standards**.

66. The Claimant addresses this allegation in paragraphs 32 and 33 of his witness statement saying that from around February/March 2018 he … "increasingly received negative feedback and criticism, often given in offensive terms. The feedback was not constructive but tended to be just negative and dismissive comments. For example, on one occasion in around March 2018 I asked David why he was not happy with my marketing plan, and his response was "*Everything is sh*t*". I wasn't provided with any other feedback. In fact, feedback was rarely given directly to me, instead it would be in meetings between David and Valerie which I could hear from my desk (as described above). I would hear David say, "*this is sh*t*" "*that's not what I asked for*" and "*what the f*ck is this?*". Further, that …. "It would often be the case that David and I were the first people in the office in the mornings (around 7:20am) and this is when David would make comments directly to me about my work on the website or marketing strategy. From February/March 2018 onwards the things that David said to me got worse and worse, I remember him saying things to me such as: *"Why the f*ck are you doing this?"; "You're f*cking useless"; "Why haven't you f*cking done this?"…."*.

67. **The detriment alleged as issue 4.1.4, that between February/March 2018 and 2 July 2018 the Respondents regularly shouted and swore at the Claimant in an aggressive manner**.

68. The Claimant addresses this allegation on paragraph 31 (in addition to the references he makes to is in paragraphs 32 and 33 as referred to above). He notes that there is a clear change in David's attitude towards me from around February/March 2018. The Claimant says …. "Although David would swear in the office and could have days where he was in a bad mood and difficult to engage with, around this time his language and behaviour became far more personal towards me. I was subjected to intimidating and degrading treatment by David regularly. I was sworn at aggressively or otherwise just completely ignored. For example, I recall him saying to me *"Stop being a c**t, we're all riding into battle and you come riding through on your pink pony to f*ck everything up".* David also said things like *"You're a c**t"* directly to me in an aggressive way, and in fact I was bought a card by the team (I believe it was by David's wife Ellie) which said "I [heart] to

say c**t". There was often banter in the office and a culture of bad language which was led by David. I knew it was not acceptable, but I confess I did play along with it on occasions where the words were used in a jokey tone because this was part of what was expected in terms of office banter and in order to fit in. However, I never used that term towards anyone individually, and never in a serious or angry tone as it had been used against me.".

69. Mr Ezrine in his evidence (at paragraph 24) says … "It is true that I get frustrated and as a result I do swear but I never swear at people, I simply use profanities in my every day language, and the more frustrated I get the more profanities I use. I also speak bluntly, and I call people out if I think that they are not producing what is expected of them. I do this with everyone and certainly did not target, or single Gavin out in this way. I do not consider that I am a bully, but I accept that my manner can at times come across as aggressive. I would also point out that Gavin also swore in the office and he had no problem in using expletives when he was talking to me and others in the office.".

70. Mrs Lewis notes at paragraph 7 of her witness statement ... "David's relationship with Gavin blew hot and cold at the start of my employment in March 2018 and some days he would be praising Gavin and then other days he would be heavily criticising him. I have to say that I did not enjoy working with David. He is extremely blunt and he swears regularly, but I do not consider that he specifically targeted Gavin in this respect - he swore at everybody in the office, including his wife. I also found it frustrating to work with David as he would give instructions to do something and then when those instructions were followed, he would then "move the goalposts" and the instructions would change. He rarely put anything in writing, so it was difficult to argue with him to say that we had carried out the work that he had asked us to do. David was the same with everyone and it was not just Gavin who was frustrated by David changing his mind.".

71. The Claimant does not dispute that he used offensive language in the workplace including what is perceived to be one of the most offensive four-letter words. There is a photograph in the bundle at page 427 that shows the Claimant appearing pleased with the card he has been given that he refers to in paragraph 31 of his witness statement.

72. We can see that so far as the Claimant and Mrs Lewis are concerned, they convey that working at and for the Respondents was not a pleasant working experience for them. We also note that Ms Hickman expresses a similar view about working with the Respondents.

73. Evidentially though it is not apparent that this was not always the case and that it didn't occur independently of any alleged protected disclosure or protected act. In cross examination the Claimant was referred to his reply to a request for further information (which is at page 82 of the bundle) which says that … "The Second Respondent shouted and swore at the Claimant on an almost daily basis during his entire employment with the First Respondent. The Second Respondent usually shouted and swore at the

Claimant whenever he was in a bad mood. However, the shouting and swearing at the Claimant became more frequent following the concerns the Claimant raised about compliance with the GDPR (from around February 2018 onwards).". The Claimant maintained in cross examination that matters escalated as it says.

74. The Claimant was also asked during cross examination to give specific examples of being sworn at and he said that he can't because he was very unwell and in retrospect he was suffering in November/December 2017 when matters escalated with the website.

75. This position, as confirmed in oral evidence by the Claimant, is also consistent with how he refers to matters in his email sent on the 3 July 2018 (page 202) that suggests this situation was continuous from November 2017 … "There has been an increasingly tense and difficult atmosphere towards me since November 2017, when the project plan to update the website was first proposed.". This is also consistent with the evidence of the Claimant and Mr Ezrine as we have referred to above, so we find any escalation, if there were any, would be from November 2017.

76. We also note that by reference to an email dated 9 March 2018 from Mr Ezrine (see page 155) to the Claimant that the website is still the predominate issue for him and the Claimant… "IF YOU DEVATE FROM THE UX PLAN IN ANY MAJOR WAY FROM MY UNDERSTANDING OF IT; YOU MUST INFORM ME IMMEDIATELY - Martial Law still in effect!".

77. It is the evidence of Mr Doyan (see paragraph 6 of his witness statement) that Mr Ezrine was too hands on in driving ecommerce development and more was needed from someone in Gavin's role to take ownership and maintain momentum. Mr Doyan communicates his views to Mr Ezrine in an email dated 5 April 2018 (page 161) … "You do need a competent e-commerce person. No question about that. However you don't need a unique approach and you don't need to boil the ocean. You need an exceptional customer experience with all the relevant elements covered with someone and something to deliver that. The key word there is relevant. The proposition online needs to be relevant to what the customer will want and need based on your known types. I loved what I saw of your screen shots but you driving this I not the answer - nor it appears that Gavin is capable of taking it forward to where it needs to be. However does he have the capability to keep the ship sailing once it has been rigged for the right conditions - maybe. But improving the set up going forward - unlikely. Hence why you need someone bigger and better. You know that. We can plug the gap and take it forward with Greg for sure and I know that Carleen would also have worked out (she really would). Taking you from where you are now to £10m on line would have been achievable with her and maybe Gavin would have been lost on the journey but a new team would have been built who are the next level up. With Jules going and Gavin in the chair, that is a real concern.".

78. In the cross examination of the Claimant he accepted that this was an outside view. The views of Mr Doyan were not challenged by the Claimant.

We note that there is no evidence to suggest that such a view is formed by the Claimant making a protected disclosure or doing a protected act.

79. **The second alleged protected disclosure and protected act (issues 3.2 and 10.2). The Claimant assert he made a protected disclosure in his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018, as set out in the Details of Claim at paragraph 21. He also asserts he did a protected act in his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018 in which he stated that the Second Respondent had made discriminatory comments that had offended him**.

80. Paragraph 21 of the Grounds of Claim (see page 20 of the bundle) says … "21. Accordingly, the Claimant arranged to meet with the Second Respondent in the converted double decker bus in the lower warehouse a few days after the 9 April 2018 meeting. In that meeting the Claimant explained that the Second Respondent's behaviour in the Etch meeting had upset him, the effect that the Second Respondent's behaviour was having on his health, and that the Second Respondent's discriminatory comments had also upset him. During this meeting, the Claimant made it dear that he found the Second Respondent's discriminatory comments and bullying behaviour wholly unacceptable.".

81. We note that paragraph 21 of the Grounds of Claim does not describe the Claimant making a protected disclosure about GDPR.

82. At paragraph 41 of the Claimant's witness statement he says … "I also took this as another opportunity to raise my concerns about Alfresco heading towards a breach of the GDPR, and also how the negative comments David made continually about British people and about me being British had upset me. I felt this was a good opportunity to say these things, as David was otherwise avoiding having to have meetings with me one on one. I tried to make these comments non-confrontational, as I was feeling fragile and I had just experienced David shouting and swearing at me in an agency meeting. So, for example, I remember saying that he was very negative and dismissive of anything British and British processes and attitudes, but I also did offer some sympathy that some processes were antiquated. However, I then said that I thought Britain was a great place to be and that I was proud to be British. With respect to the GDPR, I also expressed empathy that it was going to constitute a significant change, and would require lots of work, but that nevertheless we couldn't just do nothing otherwise we would be in breach. I said that David did not have to follow my recommended course of action, but that I really did need some input from him on an alternative GDPR plan if that was what he wanted to do. I explained that I was finding it difficult to continue working in this negative environment because my health was suffering as a result. I tried to express how much everything was getting to me, particularly the discriminatory comments and what I felt was bullying. At the time, it seemed that David was at least willing to listen to what I was saying because he acknowledged that he could get "*carried*

away". However, at no point did I receive an apology nor any assurance that his behaviour towards me would change.".

83. Mr Ezrine refers to the meeting at paragraph 37 of his witness statement … "I did have a meeting with Gavin a few days after the Etch meeting and I remember we sat in the double decker bus in the lower warehouse. However, although Gavin did say that he had been embarrassed by me calling him out at the meeting and that he was upset by that as he felt that I made him look bad in front of everyone, he did not mention his health, or that anything was making him ill, and he did not mention that he thought that my comments were either discriminatory or bullying.".

84. In cross examination it was put to the Claimant that he was too scared to speak or raise GDPR issues with Mr Ezrine, (which is consistent with the Claimant's own evidence at paragraph 27 of his statement). The Claimant agreed and that he did not believe he had raised GDPR at the meeting.

85. It appears to be accepted (as confirmed by the Panel's questions of the Claimant) that Mr Ezrine remained calm at the meeting, the Claimant acknowledged it was a constructive meeting. This would be consistent with Mr Ezrine's recollection of what was discussed.

86. On the basis that what was discussed at this meeting is based on recall of verbal discussions only, and the Claimant's account in his witness statement, saying he raised GDPR when he accepted in cross examination he did not, and he does not say this in his Grounds of Claim, means that we accept Mr Ezrine's recollection of matters and do not find that the Claimant has proven on the balance of probability that the discussion is as how he describes it. Therefore, we do not find that he raised a protected disclosure about GDPR, nor that he did a protected act as he asserts.

87. **The detriment alleged as issue 4.1.1 that following the 10 / 11 April 2018 Etch meeting, until 2 July 2018 the Respondents avoided liaising with the Claimant directly and communicated via Ms Lewis**.

88. About this matter it is the Claimant's evidence (as set out in paragraph 22 of his witness statement) that … "I noticed that David was avoiding contact with me in around February 2018. Our contact had gone from several hours per day in 2017 to maybe once per week on very specific topics by February/March 2018. It almost felt like he wanted to avoid having to discuss things with me. I noticed that David was using Valerie to communicate with me, instead, and Valerie and I would have one-to-one meetings on a weekly basis.". This, on the Claimant's own evidence, is something that was happening before the 10 and 11 April 2018.

89. We also note that there is evidence of cordial email communications between the Claimant and Mr Ezrine on 19 April 2018 about work matters (see page 172).

90. Mrs Lewis explains in her witness statement (paragraph 9) … "It is true that David became increasingly frustrated with Gavin around the end of April or beginning of May 2018 and he asked me to take over communicating with Gavin. I think that this was to do with the difficulty in getting Gavin to give a straight answer to a straight question, and I think that David thought I would be more patient with Gavin than he was.".

91. Mr Ezrine's evidence at paragraph 22 of his witness statement is … "We employed Valerie Lews in March 2018 in order to take on the responsibility for HR in the business, and also to take on an Operations Manager type role. As the business was growing, I was beginning to realise that we needed to have a better understanding as to what everyone did day to day, and then what was actually needed for the business going forwards. I tasked Val with doing this piece of work and I also asked her to take over day to day communication with Gavin and others and to hold them to account about what they were actually doing and producing. Julia Tasker also took over some of this responsibility. Asking Val to take over the communication with Gavin was partly because I was becoming increasingly frustrated with Gavin and struggling to have a sensible dialogue with him, but also because I did not have time to hand hold him as I was focused on growing the business.".

92. We find that what has been evidenced to us on the balance of probability is that it is a decision about management processes, rather than Mr Ezrine seeking to avoid "liaising with the Claimant directly" because of any alleged protected disclosure or protected act. This is reinforced by the Claimant's own evidence being that he perceives being avoided by Mr Ezrine in around February 2018, which predates any protected disclosure or evidenced protected act, and there being direct liaising still in April 2018, as evidenced in the email dated 19 April 2018.

93. **The detriment alleged as issue 4.1.3 that following the 10 / 11 April 2018 Etch meeting, until 2 July 2018 the Respondents excluded the Claimant from a number of senior management meetings which the Claimant had previously attended**.

94. The Claimant describes matters concerning this allegation in paragraph 44 of his witness statement … "I had hoped that, after I raised my concerns about David's behaviour with him, things would improve. Instead, it became even worse and I was also purposely being excluded from meetings that I would normally join, which left me feeling isolated. David frequently pulled all senior level staff into the Board Room on short notice, to discuss a new idea he had had or to discuss something we were working on. I had previously always been included in these group meetings but suddenly, from this point onwards, I was never included. As I was being left on my own in the open plan office I could see and hear that there were meetings being held that I would normally be involved in. This gave me a strong sense of where things were heading and I had a feeling that David was going to try and get rid of me. I tried to work as normal but, as a senior member of the team, I couldn't see how I could do my job properly if I was being excluded from these conversations.".

95. Also, at paragraph 55 … “I then found out on or around 28 June 2018 that I was excluded from a team event and photoshoot. This was just another sign to me that I was being singled out, and that David had decided to get me out. I felt more isolated than ever and incredibly low.”.

96. Mrs Lewis explains in her witness statement (paragraph 9) … “… it is not true to state that David excluded Gavin from any decision making as I was present at many meetings with both of them. Gavin would create the "Top Priorities" lists which he would send out after meetings just to ensure that he was on track with what David wanted (see pages 159-160, 173-177, 180-181).”.

97. On reviewing the documents referred to, pages 159 to 160 which is the Claimant’s top priorities, April/May 2018, pages 173 to 177 which is a team task list May 2018, and pages 180 to 181 which is a meeting agenda 9 May 2018, these do appear to record meetings happening and the Claimant’s involvement.

98. Mr Ezrine’s position is set out in paragraph 39 … “Although Gavin has said that he was excluded from a team photograph and related event around 28 June 2018, this is not accurate. The only issue I can think of regarding this is a "photoshoot" as I am not aware of any group photograph. Gavin did not attend the photoshoot as he was instructed to continue focusing on the website build not attend the photoshoot as other people were tasked with that job and capable of doing it without Gavin as he was needed elsewhere. His efforts were more important to stick to his primary remit. Gavin would often try to justify attending extracurricular matters that would be more fun or distractions from his primary objectives.”.

99. It is for the Claimant to prove on the balance of probability that he was excluded from a number of senior management meetings which he had previously attended, and we do not find that he has proven this on the balance of probability.

100. **The allegation of harassment (issue 8.1) that around the time when the new GDPR rules came in (in or around April/May 2018) the Second Respondent stating "you fucking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a shit".**

101. Firstly, to dealing with matters of fact concerning the time limit matters in respect of just and equitable. It is the Claimant’s supplemental evidence that was given orally at this hearing, that the reason he did not submit his claim before he did was, at the time he hoped that the internal processes would prevail. Mrs Lewis was still new, and he hoped it would resolve itself through the process. The Claimant confirmed that he believed the internal process would resolve matters and that he needed to go through it before he went to ACAS. This was his primary reason, although his health was not good from early July 2018 and he had instructed solicitors to deal with it on his

behalf. The Claimant also said that between 16 December 2018 and the 4 February 2019, he was extremely poorly, under health care and unable to get out of bed, and it was extremely difficult to work with his legal team. We have not been presented any medical evidence to support the Claimant's health position.

102. This harassment allegation is not one of the alleged detriments because of a protected disclosure or protected act. A similar issue and evidence about regularly shouting and swearing at the Claimant in an aggressive manner (in respect of issue 4.1.4) has been considered and is something from the Claimant's expressed position in this litigation to have happened from the start of his employment … "The Second Respondent shouted and swore at the Claimant on an almost daily basis during his entire employment with the First Respondent.". Although the Claimant asserts this escalated, we have found on the balance of probability that, if it did escalate, this was from November 2017 onwards.

103. Looking therefore at the discrete assertion of this being an act of harassment, we observe that the allegations of harassment were narrowed from two to one at the commencement of the hearing as the Claimant only presented specific evidence in his witness statement about this allegation.

104. The Claimant describes the incident in paragraph 48 of his witness statement… "I delivered this PowerPoint as a training session on the GDPR. David seemed to get increasingly irritated as I went through it, eventually losing his temper and shouting at me *"You f*cking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a sh*t".* This was said to me in the presence of Valerie, Julia Tasker and Izzie Hickman. I felt very upset and humiliated by David's comments at the time. I was also disappointed that David clearly had no interest in trying to comply with the GDPR, and had instead chosen to lash out at me for raising the matter again. I found David's comments about British people deeply offensive….".

105. The Claimant says in paragraph 8 of his witness statement that he is "… of British nationality and David is American.". Mr Ezrine confirms in his statement at paragraph 2 that he has applied for and been granted British Citizenship.

106. Mr Ezrine gives his recollection at paragraph 31 of his witness statement … "In terms of the alleged discriminatory comments about British people that I am supposed to have made during Gavin's employment, I do not believe I ever did that. I am sure that I would have made comments about the British Government's regulations and policies and how they impacted businesses in the UK, but it would never have been directed at individuals. If I did make the comments that are alleged, they would have been made as a joke. The jokes that I do remember making about this were all taken as such and everyone laughed, including Gavin. For example, I remember joking about the obstacles that are put in place around planning permission and saying something like "who votes for this sort of fucking Government?" and

everyone laughed. Gavin never once said that he felt offended by my comments, and in fact he regularly participated in making similar comments.".

107. In cross examination Mr Ezrine denied that he referred to British people in the way the Claimant describes in paragraph 34 of his witness statement.

108. As to what he actually said in the April/May time he said that he could not remember the exact words but he says it was said in the context of a joke situation, it was not written down or recorded, but he says it was directed at bureaucracy. Mr Ezrine was asked if he was frustrated and if it was said aggressively, he agreed that he was frustrated but did not agree it was said aggressively. He was aware that GDPR was coming in, there was ambiguity, and this was a lot of what was being talked about.

109. Ms Hickman refers to the incident in paragraph 21 of her witness statement confirming … "…David made a disparaging and insulting comment about the issues that had been raised, although I cannot recall exactly what was said.".

110. Mrs Lewis deals with this incident in paragraph 12 of her witness statement … "As I have already mentioned, David regularly swore in the office but this was never specifically targeted at one person. I do remember a meeting when we were talking about the upcoming GDPR requirements and David said something like: "you fucking British people would line up if you saw a sign telling you to jump off a cliff'. This was said in frustration but as a joke and everyone laughed about it, including Gavin. There had been many other examples of jokes like this in the office about how difficult it could be sometimes for David to do business in Britain which Gavin himself initiated or participated in. I should say that Gavin himself many times made jokes about Irish people - and as the only Irish person in the office, I could have taken offence but I was aware that they were just a joke and I took them in that spirit. Although I do not believe Gavin used the word "discriminator", I do remember that he often said, and that I also witnessed, several occasions when David was rude to Gavin. However, I also witnessed several occasions where Gavin was rude to David, as well as to other members of the team. I do not believe that Gavin was in any way offended by David's comments about British people, and he certainly never mentioned anything to me about feeling offended.".

111. We find on the balance of probability that this comment or something similar was said by Mr Ezrine and it does refer to British nationals in a negative way.

112. In cross examination of Mrs Lewis she was asked why she recalls this particular comment of Mr Ezrine and she confirmed that it sticks in the mind as such an outrageous thing, shock factor of it so laughed in shock, it was pretty extreme to be fair. Mrs Lewis was asked if it was in an aggressive way, and she confirmed she believed it was. She also accepted if someone does laugh, they may not find it funny and that was the way she dealt with the Claimant's Irish jokes.

113. The Claimant in his witness statement refers to the comment being shouted at him and said to him (paragraph 48 of his statement). This is not supported by the evidence of Mr Ezrine, Mrs Lewis, nor Ms Hickman. In cross examination the Claimant was asked if it was directed at him, he replied it doesn't need to be directed at him, the question was repeated - directed at you – yes, I am a British person. This is an unclear response on the basis that the Claimant had said in his witness statement … "This was said to me". His response in cross examination is therefore consistent with the other accounts, and we therefore find on the balance of probability that it was not shouted at or said to the Claimant as he asserts in his witness statement.

114. Mrs Lewis was also asked if the Claimant did complain about Mr Ezrine being rude to him, and she confirmed that he did. Mrs Lewis was then asked if also about that comment and she confirmed that it is likely yes. Mrs Lewis confirmed that she passed complaints to Mr Ezrine and also offered the Claimant the opportunity to raise a grievance at that time.

115. We have not found (in connection with the alleged protected act that predates this complaint) that the Claimant was raising that references to British people was discriminatory in the way he asserts. The first time it is recorded in a document as being raised by the Claimant is the email of 3 July 2018 (page 203).

116. Therefore, there is nothing to suggest, external to what the Claimant tells us, that this particular comment was viewed differently to the other swearing and comments that were happening before that. The Claimant has accepted that bad language in the workplace was commonplace and does not say he did not make comments to Mrs Lewis about her Irish nationality.

117. From this we observe that Mrs Lewis does not confirm in evidence exactly what was said to her about the comment or what she passed to Mr Ezrine about it. She does not confirm the Claimant says the reference to British people has caused him offense or that he has suggested discrimination without using the word. Mrs Lewis accepted it was likely the Claimant raised the comment in the context of saying Mr Ezrine was rude, but it is important to note that this is not the Claimant's evidence. He says in paragraph 48 … "… I found David's comments about British people deeply offensive. I was so impacted by all that had happened that I spoke to my wife, Sarah, as soon as I got home, because I just didn't know how to manage the situation.". He does not say he complained to Mrs Lewis about this at that time, nor does he raise a grievance about it at that time.

118. **The "Restructure"**

119. Mr Ezrine deals with this in his witness statement at paragraphs 41 to 43:

"41. My understanding is that Gavin and Val put together the various structures that are set out at pages 183 - 187 and 190 - 193 and this was

part of Val's remit in her Operations Manager role to look at the Company as a whole and consider what everyone was doing and what we needed going forward.

42. As I said at paragraph 23 above, around this time I also had lengthy discussions with Athito and with Tom & Co where they vouched for Gavin but then said there were things that he needed to do and I realised that we needed to break the job he was doing into the different parts. The clear commercial savvy of ecommerce and marketeering was not being achieved with the team I had. I was learning and discovering this as we were going along but we didn't have sufficient meaningful data and I realised that the only way that I could achieve the model that I was looking to build was with new leadership that wasn't being delivered by the current structure (pages 161 and 166 - 171). Something had to change and the change that was decided was not to ostracize Gavin but to take away the things that he wasn't good at and allow him to focus on the things that he was good at.

43. I definitely had a period where I thought that we should terminate Gavin's employment and I had a discussion with Val who told me that as he was coming up to having 2 years employment we should make a decision, but I wanted him to remain part of our company. The email that Val sent me at pages 188 - 189 of the Bundle was following on from a conversation that we had about what employment rights Gavin had and if we needed to terminate his employment what we had to consider, legally. I was aware that if we got the process wrong that Gavin was likely to bring a claim against us. However, I wanted to keep him in the business so that he could thrive in the role he was good at. I knew that it would be less risky to dismiss him before his 2-year anniversary but I chose not to do that."

120. Mrs Lewis says in paragraphs 17 to 20:

"17. Whilst I wasn't totally sure what Gavin's role as Ecommerce Manager involved, I was aware that there was generally a lack of resource and Gavin was extremely busy. I worked with Gavin to put together some plans to try to understand what each area of the business needed in terms of resource (pages 182 - 187 and 190 - 193 of the bundle). Gavin did the majority of the work on these charts because he knew more or less what everyone did whereas I was still relatively new to the business.

18. It appeared from doing this piece of work with Gavin that the business definitely needed more support and we were looking to recruit someone with digital marketing experience. However, on 16 April 2018, I forwarded to David an email I had received from an external candidate who was interested in the digital marketing job vacancy (pages 164-165) but she did not have significant experience in the digital sphere. This was Lauren Mitchener I believe, and David and I interviewed her. We also met with another candidate, Laura Desert-Lacay, and we were impressed by her and her skills and David was keen to offer her a Marketing Manager's role in order to get her into the business. As with other recruits that David made

(including me), he was happy to see if she could grow into the role that the business really required.

19. We continued to work on the resource requirements for the business and I am aware that David was also asking consultants to carry out work for the business during this time.

20. On 26 June 2018, I emailed David with a link to the ACAS guidance on redundancies (pages 188-189). The reason that I did this is that I was trying to explain to David that there was a difference between dismissing someone for redundancy and dismissing someone for poor performance. David by this time was thinking about restructuring the Company but he was unsure as to whether Gavin had a future in the business following the restructure because David had been so disappointed with Gavin's performance particularly in relation to the responsibilities he had for the website development."

121. We can see from emails in the bundle (at page 253) dated 21 June 2018 that communications are underway with a recruiter to set up Head of E-Commerce interviews.

122. We were also referred to the emails between Mrs Lewis and Mr Erzine dated 26 June 2018 (pages 188 to 189) dealing with the provision of ACAS guidance on redundancies. We note from page 188 that Mrs Lewis says to Mr Ezrine … "It's all fine. Only thing to say, bad performance is legally not a reason for redundancy, so we must be mindful of that.".

123. It was also drawn to our attention that in one of the emails (page 189) Mr Ezrine says … "Guaranteed, he will look for a way to hurt us.". This is a response by Mr Ezrine in the context of emails from Mrs Lewis flagging … "It's very important that we follow due diligence with this procedure. The process is straightforward but essential". It was not put to Mr Ezrine that this was expressed because of the Claimant making a protected disclosure or doing a protected act.

124. In cross examination Mr Ezrine confirmed that the decision to restructure was made in the period 26 June 2018 and 2 July 2018.

125. He explained that the business was going into peak and our restructure plan in this time frame had a long tail, with input from Mr Doyan and Tom & Co, He explained that things were not working and he needed to understand what was wrong which led in the process to hiring Laura, but ultimately needed to restructure.

126. Mr Ezrine also confirmed that he considered that it was not just the Claimant on Ecommerce, but also himself and Tom & Co. He did not accept the Claimant was heading it up. We note that this position is consistent with the uncontested analysis of Mr Doyan (as set out in his email dated 5 April 2018 at page 161 and referred to above).

127. Mr Ezrine was asked in cross examination if he was going to restructure it makes sense to consult with Claimant. Mr Ezrine confirmed, no, I don't need to consult with him, not when I thought he might be part of the problem, no. This supports that Mr Ezrine's considerations are about the job roles and what the Claimant can do.

128. With reference to page 253 (the 21 June 2018 recruitment emails) it was put to him that he was asking for a recruiter to arrange interviews. He agreed initial interviews yes definitely. It was put to Mr Ezrine that by the 21 June 2018 he had decided he wanted to fill the role of e-commerce with someone other than the Claimant. He confirmed this was not the case and he needed to look at the candidates available, he was doing the research needed, looking at options if going to restructure completely reasonable and it does not mean he would hire them. It was put to him that the poor candidates as there is no way they would get appointed; Mr Ezrine confirmed you don't meet them once it's a process.

129. In the cross examination of the Claimant he is asked about the Respondent's restructure plan dated the 2 July 2019 (pages 205 to 206) and he confirmed about that restructure plan that it makes a lot of sense and he accepted that he had written something similar. The role of Ecommerce manager is no longer in the structure.

130. We accept the evidence of the Respondents on the restructure decision process, it appears a genuine and externally informed trajectory to which the Claimant has contributed and who has confirmed in evidence that he believes it makes a lot of sense.

131. **The detriment alleged as issue 4.2 is that the Respondents encouraged employees to fabricate reasons for his dismissal in or around June 2018**;

132. The Claimant addresses this allegation in paragraph 50 of his witness statement … "Around that time during one of my regular catch-up meetings with Valerie, she sat me down at the outside bench by the main entrance to the office and told me that David had asked her to fabricate evidence against me so that he had grounds to sack me…".

133. Mrs Lewis addresses this matter in her witness statement at paragraph 48 a. and denies it. This is consistent with her record of statement dated 9 August 2018 as can be seen at pages 333 to 334, which also denies it.

134. We accept the recollection of Mrs Lewis, particularly as it is consistent with a record of statement by her in August 2018, so more contemporaneous to the matter in factual dispute.

135. **The detriment alleged as issue 4.1.5 is that the Respondents on or around 26 June 2018, removed the Claimant's line management responsibilities without any justification**;

136. The Claimant addresses this allegation in paragraph 53 of his witness statement … "On or around 26 June 2018… my line management responsibilities were taken off me completely out of the blue and with no explanation as to why this was happening. Valerie was allocating tasks to me, which was very odd given her role was the HR Manager, and between Valerie and David they took over my management responsibilities for my direct reports. This was never discussed with me….".

137. Mr Ezrine addresses this matter in his witness statement at paragraph 40 … "Although I know that Gavin has said his line management responsibilities were removed from him, the company did not ever have "direct line management responsibilities" in place anywhere. We are a small business led in an entrepreneurial style. Laura Desert-Lacey was never a subordinate to Gavin; it was made very clear to him and Laura that they were equal colleagues and had equal job titles as managers but with different responsibilities. Dan Almeroth did not report to Gavin; he reported directly to me. Gavin was tasked to manage our primary agencies and vendors, not our internal team. We were a very small team that did not need such defined structure at that time."

138. This was challenged with Mr Ezrine in cross examination and he confirmed that the Claimant did not have line management for Dan, so it was not taken away.

139. We accept the Respondent's evidence on this matter.

140. It is then chronologically, as the Claimant describes at paragraph 54 of his witness statement, that … "On 27 June 2018, I saw two calendar entries for the next week labelled as "interviews for Head of E-Commerce role" or something similar. I was able to see this in Julia Tasker's calendar because I had access to everyone's calendar as part of my role. I felt so upset seeing this. I had no idea that this role was being created within the team I (until a few days before) had been managing, and I wasn't even being given the opportunity to apply for it. E-Commerce was my specific area of expertise, I was currently the most senior person doing it, had already been doing work equivalent to 'Head of E-Commerce' duties and I was more than capable of performing the role.".

141. The Claimant confirmed in cross examination that it was on the 28 June 2018 that he instructed solicitors. The Claimant was asked in cross examination if it was the discovery about job interviews that was the trigger for instructing them, and he said yes partially.

142. It is not in dispute that at the end of that week the Claimant left his work keys and work laptop in the office. The Claimant confirmed in cross examination that he intended to see his GP on the Monday (2 July 2018). Mr Ezrine describes his understanding of the Claimant leaving work at the end of the week in paragraph 44 … "… He cleared his desk, on Friday 29th June 2018, cleared his desk of any personal effects, left his Company laptop behind and said goodbye to people (which was not made known to me until after the fact)…".

143. We also note that it was on the 2 July 2018 (as confirmed in paragraph 22 of Mrs Lewis statement) that the Claimant … "… emailed me on 2 July 2018 at 8:07 a.m. to say he had been up all night feeling sick and anxious, would not be in the office that day and that he was going to see a doctor that morning (page 195).".

144. We were referred to the Claimant's sick note dated 2 July 2018 at page 194 of the bundle which confirms the Claimant was signed as unfit for work at that time for 12 days for a stress related problem.

145. It is then on 3 July 2018 (as confirmed in paragraph 23 of Mrs Lewis statement that the Claimant … "… responded to say he had not seen any announcement and asked me to forward it to him, which I did at 08:55 on 3 July 2018 (see pages 200-201).".

146. This chronologically then takes us to the next alleged protected disclosure and protected act.

147. **It is the Claimant's email on 3 July 2018 (timed at 13:57) at pages 202 to 203 that the Claimant asserts is a protected disclosure and a protected act. It is also averred that as of on or around 3 July 2018, the Respondents believed that the Claimant may bring proceedings under the Equality Act 2010 (issue 11)**.

148. The Claimant's evidence about the 3 July 2018 email is at paragraph 59 of his statement "…On the same day I informed Alfresco that I was raising a formal grievance [202 – 203]. I was already taking legal advice on my options with respect to David's behaviour towards me before hearing about my redundancy, and I had already begun preparing a formal grievance but this development meant my grievance needed to be updated further. In my grievance I raised a number of concerns, including David's pattern of worsening behaviour towards me, that he had been avoiding or minimising contact with me, and his discriminatory comments about British people, in particular in response to me raising the GDPR issues [202-203]. When I drafted that email I was very upset and struggling to think straight so that did not contain everything I was upset about and it did not go into as much detail as I have in my witness statement, but I made it clear it would be followed by a more detailed grievance.".

149. What the email dated 3 July 2018 (pages 202 and 203) says about GDPR is … "…When advising him of how we should behave as a company in relation to the new GDPR guidelines, he told me that they were nothing to worry about…" and …" In view of the company's historical and current failures to comply with. its statutory obligations under data protection legislation, I also reserve the right to make a formal complaint to the Information Commissioner should my subject access request not be taken seriously…".

150. It is not clear this is information tending to show a failure or a failing to comply with a legal obligation as the words do not appear to impart such information. We note that the Claimant has not said that it is such a disclosure of information within his own witness evidence. Further, the Claimant has not presented any evidence to address why it tended to show this or was made in the public interest, in his reasonable belief. This was raised with Claimant's Counsel during submissions and it was submitted to us that we should infer what he thought about this from what he says was his belief about the disclosures he makes in February to April 2018 and May 2018. We do not see how this can be inferred as the alleged disclosure in the 3 July 2018 email is different in content to the issues the Claimant says he was raising in May 2018 and before, which is understandable based on when the GDPR was due to and did come into force.

151. The content of the email on the 3 July 2018 and the subsequent grievance dated 31 July 2018 (pages 319 to 327) use wording that does support that the Claimant is raising matters which allege a contravention of the Equality Act 2010, and this is not disputed by the Respondents. As can be seen at page 203 … "4. David regularly comments about how he feels about this country and the way we always abide but the rule and along the lines of "Stupid Fucking British people ... #157;. I find these continuous disparaging and discriminatory comments very offensive. When advising him of how we should behave as a company in relation to the new GDPR guidelines, he told me that they were nothing to worry about and that "You fucking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a shit...#157;".

152. We note that words alleged to have been said by Mr Ezrine are similar to what Mrs Lewis recalls was said.

153. We note though that despite the Claimant having assistance with this email from Solicitors what it does not say is the way he has been treated to that point is because of him making a protected disclosure or doing a protected act.

154. We also note from page 203 that it says … "notwithstanding the above, I would be prepared to have a Skype call or a face to face meeting with David in order to discuss my very serious concerns.". It was accepted by the Claimant in cross examination that he was suggesting a face to face meeting.

155. The Claimant was unable to access his work emails at that time, so he had not seen the restructure announcement on the 2 July 2018.

156. A further email is sent to him on the 3 July 2018 at 14:10 (page 204) and this email confirms that the Respondent would like to meet with him to discuss it.

157. On 5 July 2018 the Claimant makes a Data Subject Access Request (DSAR) to the Respondent (see pages 232 – 233 and paragraph 63 of the Claimant's witness statement). It is accepted by the parties that Mrs Lewis was tasked with and completed the DSAR process and she sends a response to the DSAR on the 5 October 2018 (see pages 363 to 365). As a result of this evidential position being accepted the Claimant withdrew his allegation about it (issue 4.7) during submissions.

158. By email dated 6 July 2018 (page 234) the Claimant is offered a phone conference as an alternative to an in-person meeting. The Claimant opts for the phone conference option.

159. It was confirmed with the Claimant in cross examination that there is no medical evidence submitted to support he couldn't attend a meeting. The Claimant said that he wasn't asked for that, he says he was told to rest for a fortnight and not drive. The Claimant was asked if he could have written to say he is not fit to attend for the next couple of weeks and the Claimant confirmed that he could.

160. The telephone meeting then takes place on the 9 July 2018. The notes of this meeting this start at page 245 (note that there are two sets of notes the Claimant's (pages 247 and 248) and the Respondents' (pages 245 and 246). From these notes it can be seen that the Claimant does not communicate he is not fit and cannot take part.

161. There is then a further telephone meeting on the 11 July 2019. The notes of this meeting start at page 276. (note that there are two sets of notes the Claimant's (pages 280 and 287) and the Respondents' (pages 276 and 279). The Claimant confirmed in cross examination that he did not make a request to postpone this meeting, he agreed it was 2-way discussion, and he accepted there was no evidence that he was too unwell to take part.

162. By a sick note dated 12 July 2018 (page 288) the Claimant is signed unfit for a period of 2 weeks (until 25 July 2018) for reason of work-related stress.

163. **It is by letter dated 13 July 2018 (issue 4.3) that the Claimant is given notice of dismissal by reason of redundancy which the Claimant alleges is following an unfair and pre-determined process**;

164. The letter of dismissal is at pages 290 to 291. It says that the Claimant is dismissed by reason of redundancy and that his employment will terminate on the 13 October 2018 allowing for his 3 months' notice period. It records:

> "As you are aware, we have recently conducted a review of the business and the structure of our current roles. During that process it was identified that there was no longer a requirement for your particular role, placing you at risk of redundancy. Your role was a unique role and it was not appropriate to place any other individuals into a redundancy selection pool.
>
> Having identified that your role was redundant, we have considered how we may be able to avoid your own redundancy and we have discussed this with

you during the consultation process. We have two vacant roles in our new structure and you were provided with details of these in the event that you wished to be considered for either or both. You have not yet decided if these roles are suitable alternatives for you. We have considered all the circumstances including the options for avoiding redundancy but unfortunately, we have not identified any alternatives and you did not have any other suggestions."

165. The letter records the Claimant being offered a right of appeal and it also notes… "Up to the Termination Date we will continue to consider the availability of suitable alternative employment for you. However, we do not wish to falsely raise your hopes and therefore please bear in mind that the chances of another role becoming available are not guaranteed….".

166. From the dismissal letter we can see that the Respondent is keeping the employment relationship alive at this point by the Claimant being given notice in time rather than being paid in lieu (which the Claimant's contract of employment does allow for, as can be seen at page 137 of the bundle) and the Respondent re-iterating the vacant roles and that it will continue to consider the availability of suitable alternative employment for the Claimant.

167. Mr Ezrine confirmed in cross examination, when asked to confirm that performance has nothing to do about the Claimant being given notice of dismissal, that was correct the Claimant was not dismissed on performance grounds. Mr Ezrine confirmed in oral evidence that it was his decision to dismiss the Claimant, and explained that the Claimant was dismissed on restructuring, as despite them having a consultation with the Claimant and sending him job descriptions he was clearly not interested. He explained that the Claimant did not apply so need to move on, make the job role redundant and serve notice of termination of employment.

168. Mr Ezrine accepted that he was aware of the content of the Claimant's email dated 3 July 2018 at that point. Mr Ezrine did not accept that was the reason for the notice being served.

169. It is then on the 15 July 2018 that the Claimant says to the Respondent he is too unwell to take part directly, (see page 292) … "This process is only making my health worse and as such I would like for my lawyers to deal with this on my behalf from now on".

170. We were referred to the Claimant's appeal against his dismissal dated 20 July 2018 (pages 299 to 304) which is submitted by his Solicitors. It was drawn to our attention as part of the cross examination of the Claimant that at page 303 it says, the following, which is the first expression of a link to a protected disclosure or protected act being the cause for what is happening:

"Ground 8: Protected disclosures

Since April 2018, my client has raised serious concerns about issues about Mr Ezrine, including his refusal to comply with his legal obligations and his discriminatory comments…"

171. The Claimant accepted that this is the first expression of a link to a protected disclosure or protected act being the cause for what is happening. The Claimant did not know why it had not been raised before, for example in the 3 July 2018 email.

172. We note that it is stated to be "Since April 2018" that serious concerns about issues are raised, and the Claimant was asked about this in cross examination and he explained that from April 2018 it was more serious.

173. **It is then the Claimant's grievance letter dated 31 July 2018 (at pages 319 to 327 of the bundle) that the Claimant asserts is a protected disclosure and a protected act**.

174. The Claimant's evidence about the 31 July 2018 grievance letter is at paragraph 76 of his statement … "I sent my formal grievance to Alfresco on 31 July 2018 and asked for any issues to be directed to my solicitors [319 – 327].".

175. In respect of the alleged protected disclosure contained in the grievance letter dated 31 July 2018 (pages 320 to 327) what it says about GDPR is … "In fact when the new GDPR guidelines came in, I was advising him of how we should behave as a Company in order to be legally compliant and his response to me was that they (the GDPR guidelines) were nothing to worry about…" (page 322) and … "…Finally, since you have not yet acknowledged my data subject access request, I reserve the right to take further action in respect of any failure by the Company to comply with its obligations under the GDPR. As explained above, I know David does not care remotely about GDPR and his obligations under it, but you may wish to let him know the serious financial penalties the Company may well face for failure to provide me with what I have requested." (pages 326 and 327).

176. This may potentially be information tending to show a failure, a failing or likely failure to comply with a legal obligation (as is acknowledged by Respondent's Counsel in his written submissions). We note though that the Claimant has not specified that it is such a disclosure of information and why within his own witness evidence. As with the email dated 3 July 2018 the Claimant has not presented any evidence to address why it was in his reasonable belief it tended to show this or why it was made in the public interest. As with the alleged disclosure on the 3 July 2018 what the Claimant says was his belief about the disclosures he makes in February to April 2018 and May 2018 we do not see how from this it can be inferred to apply to the alleged disclosure in the 31 July 2018 letter. The potential disclosure is different in content to the issues the Claimant says he was raising in May 2018 and before, which is understandable due to when the GDPR was due to and did come into force.

177. **Between 25 July 2018 and 30 September and/or at all from 1 October 2018 onwards (issue 4.4) the Respondents refused to deal with the Claimant's appeal against redundancy (in writing between 25 July 2018 and 30 September and/or at all from 1 October 2018 onwards) and grievance (in writing between 6 August 2018 and 30 September and/or at all from 1 October 2018 onwards);**

178. The Claimant appeals against his redundancy by letter dated 20 July 2018 from his solicitors (pages 298 to 304).

179. By a sick note dated 24 July 2018 (page 305) the Claimant is signed unfit for a period of 2 weeks (until 6 August 2018) for reason of work-related stress.

180. At paragraph 74 of the Claimant's witness statement he refers to the redundancy appeal matter… "On 25 July 2018, I received a letter inviting me to an appeal meeting on 30 July 2018 to be heard by Ellie, David's wife. The letter said that if I was not well enough to attend they anticipated postponing the meeting [311-312]. My solicitor replied on 27 July 2019 and requested that the appeal be dealt with in writing and heard by someone independent [316-317].".

181. On 31 July 2018 the Claimant submits the full details of his grievance (see pages 319 to 327). He sends it by email (see page 319) to Mrs Lewis and his solicitors and asks Mrs Lewis to liaise directly with his solicitors if she has any issues.

182. Ms Lewis writes on the 6 August 2018 (see page 331) to ask if the matter can be dealt with informally and that a meeting could be arranged when the Claimant is fit.

183. On the 8 August 2018 the Claimant's solicitors request that the grievance not be dealt with informally and remind that a request for the redundancy appeal to be dealt with in writing has been made (see pages 330 to 331).

184. This is followed up by the Claimant's solicitors on the 23 August 2018 (see pages 335 to 336). About this letter Mrs Lewis says (at paragraph 59) …"Gavin's solicitor emailed me again on 23 August 2018 (pages 335 - 336). Within this email, she refers to a post I made on Linkedln which is at page 426 of the Bundle. I would point out that the comment about me not being "properly qualified" did not relate to my role as HR Manager (as I had 8 years' experience at that time and was CIPD qualified) but to my role as Operations Manager. Once again, I found her comments (at page 336) to be highly offensive and ill informed.". What Mrs Lewis says is not challenged by the Claimant.

185. The Claimant observes at paragraph 79 of his witness statement that … "On 23 August 2018 my appeal and grievance still remained outstanding, and my solicitor wrote to the Respondents asking why [335 – 336]. David responded to this on 28 August 2018 stating that there would be no further

correspondence with my solicitor and confirmed that he would remain in direct contact with me [337].".

186. Mr Ezrine response on 28 August 2018 (page 337) says … "Your communications with us have been highly unprofessional and clearly designed to thwart the correct and lawful process set forth by ACAS, to which we are following to the letter regarding Gavin Ford's situation. We will be seeking legal advice, not regarding the HR process with Gavin Ford, but regarding your unprofessional and disruptive actions in this matter, that are in conflict with the correct and fair process we are undertaking. It has now become quite clear your only motives are to wilfully and unlawfully disrupt this process for unfair and illegitimate financial exploitation.".

187. It also says … "We will remain in direct contact with Gavin Ford, respectfully wait until his current medical condition allows him to resume the required process, and then complete his appeal process and address his separate grievance accordingly. He remains our employee and this is the correct process as described by the law." And … "Please do not continue to harass, intimidate or mislead us into deviating from the correct ACAS process we are currently following.".

188. Mr Ezrine's view of the Claimant's solicitor and their correspondence was not challenged by the Claimant.

189. By a sick note dated 31 August 2018 (page 339) the Claimant is signed unfit for a period of 3 weeks (until 16 September 2018) for reason of ongoing glandular fever complications.

190. The Claimant observes at paragraph 80 of his witness statement … "My solicitor emailed David on 3 September 2018 and confirmed that they had been instructed to act on my behalf, so would continue to correspond directly with the Respondents. My solicitor, again, asked for the matters relating to my outstanding appeal and grievance to be addressed [340].".

191. Then at paragraph 81 … "I felt that I had no choice but to email the Respondents on 26 September 2018 because of their refusal to deal with my solicitor. In this email I made it clear that I did not want my grievance to be dealt with informally, given the serious nature of the issues I had raised, and asked for details of who would be running these processes. I also questioned why the matters couldn't be dealt with in writing, because I still wasn't well enough to participate in the processes in person [342 – 343].".

192. The Claimant's direct response on the 26 September 2018 by an email timed at 17:19 is at pages 342 to 343 of the bundle and says … "I am still not at all well enough to physically attend either my appeal hearing or my grievance hearing, but I am now prepared to deal with these in writing in order to move things forward. I see no reason why you should refuse to do this as it does not prejudice you in any way, and I am advised that this would be considered a fair and reasonable adjustment for someone in my position.".

193. We observe here that there is no medical evidence presented by the Claimant to this Tribunal to support this and it would appear other than the fit notes none is provided to the Respondents at the time. It also appears to be on the 26 September 2018 that the Claimant says he is … "… now prepared to deal with these in writing in order to move things forward.".

194. We observe that the Claimant has not alleged that the Respondents refusal to deal with matters via his solicitors is an act of detriment. This is important because as can be seen from these factual findings the involvement of the Claimant's solicitors and the way it is perceived by the Respondents clearly influences the way the Respondents are acting towards the Claimant at this time.

195. The Claimant then refers to the matters in October 2018 at paragraph 85 of his statement … "On 1 October 2018 David informed me that my appeal and grievance would not be dealt with pending the outcome of the disciplinary process that had been commenced against me [353], despite the fact that both my appeal and grievance had been raised on 29 July and 31 July 2018, respectively. I could not believe that, out of nowhere, David had now come up with a disciplinary matter against me. This had no basis and I felt it was yet another way to try to target me and make me feel afraid (which it did). It seemed that David was trying to avoid even paying me a statutory redundancy payment. It felt as though I was being punished for standing up to David, and for raising issues about unlawful practices and discrimination. My prior complaints against Alfresco and David were being ignored altogether, and instead the sole objective was now dismissing me for gross misconduct [353]. I imagine that the fact my solicitor had put David on notice that I was considering making a claim for discrimination and in relation to the rest of his behaviour he wanted to 'punish me' in advance.".

196. The Claimant is complaining about the disciplinary being raised, rather than the refusal to deal with the appeal and grievance.

197. Mr Ezrine refers to this correspondence in paragraph 56 of his witness statement … "I also wrote to Gavin on 1 October 2018 (page 353) to acknowledge his email headed "Doctors Note" sent on 26 September 2018 (pages 342-343). I confirmed in this email that we were satisfied the issues raised in Gavin's grievance and appeal had no relevance or bearing on the disciplinary procedure. To the extent he disagreed, I invited Gavin to set out why within his response to the disciplinary allegations. I also confirmed to Gavin that we would not be proceeding with a grievance or appeal process pending the outcome of the disciplinary process but would review the position once an outcome had been reached.".

198. We have considered the email dated 1 October 2018 from David Ezrine (at page 353 of the bundle) and note it says … "We are satisfied that the issues raised in your grievance and appeal have no relevance or bearing to that disciplinary procedure. To the extent that you disagree, you are invited to set out why in your response to the disciplinary allegations and evidence, which you have been given until 3rd October 2018 to provide. … We will not be proceeding with a process in respect of your grievance or appeal,

pending the outcome of the current disciplinary process. We will review the position once an outcome has been reached.".

199. This is addressed by the Claimant in his response dated 3 October 2018 (see page 362 of the bundle) and he says … "As you will see, I have already made a number of comments above which show that my grievance and appeal are entirely relevant to the issues you have now created as part of a so called disciplinary procedure. Just as a couple of examples, the fact that you asked people to fabricate evidence before dismissing me, and now clearly seem to have followed through with this, is relevant. The fact that you have bullied me and now seem to be doing so with the other employees too, is relevant. You are simply living up to the reputation and character everyone within the company knows you have and trying to intimidate me even more than you already have.".

200. The Claimant's employment is then ended on the 11 October 2018 by the Respondents decision to dismiss him with immediate effect.

201. **The detriments alleged concerning the dismissal on the 11 October 2018 (so issues 4.5, 4.6 and 4.8) starting with, on the 26 September 2016 (issue 4.5), the Respondents instigated a disciplinary process against the Claimant**;

202. This allegation is referred to in paragraph 83 of the Claimant's witness statement… "On 26 September 2018, the Respondents sent me a letter [344 – 348] explaining that as part of their search into my DSAR, and information provided by other employees, they alleged that they had found disciplinary issues which were being investigated. In the letter they did not invite me to a meeting and said that in light of me saying that I was not well enough to attend a grievance appeal meeting in person they could "*only conclude that [I] will not be able to attend a disciplinary hearing in the timeframe required*"". Therefore, I had until 3 October to reply to the allegations and that if I did not reply by that date, they would move forward with making a decision in any event [348].".

203. The Claimant submitted his DSAR on the 5 July 2018 (see pages 232 to 233 of the bundle).

204. As detailed in paragraph 31 of Mrs Lewis' witness statement …"31. I emailed Gavin on 25 July 2018 at 18:19 to confirm receipt of the DSAR and to say that the Company intended to respond by no later than 6 October 2018 (pages 313 to 314). Mistakenly, this email was initially sent to Gavin's work email address. David therefore forwarded it to Gavin's personal email address on 1 August 2018 (page 329).".

205. Then at paragraph 32 … "32. I responded substantively to Gavin's DSAR on 5 October 2018 (pages 363-365). In my letter, I explained to Gavin that the company had carried out a reasonable and proportionate search, that we had searched hard and soft files and applications and that information turned out in the search not provided to him had been identified as internal business communications and therefore not within the scope of the GDPR.".

206. Mr Ezrine addresses the disciplinary issues in paragraphs 52 to 58 of his witness statement.

207. Mr Ezrine confirms about the allegations in paragraphs 52 to 54 … “52. As a result of Val's search for documents following Gavin's DSAR I was increasingly concerned that he had been involved in some serious misconduct. Firstly, it appeared that he had deleted Julie Connor's entire GoogleDrive account. Julie had been a contractor working with the business and in charge of certain programmes reaching out to experts and managing external contacts. Her work was vital and by deleting her account we had no way of getting in touch with her contacts.”. Also, …. “53. He also deleted a file called "Quidditch" which contained important passwords. This was something that had been created by Gavin (together with Julia Tasker and my wife Ellie Ezrine) to create a safe repository for passwords. It could only be accessed by Gavin and Ellie, but once Gavin had deleted it, Ellie could not access it.”. Also, … “54. We also realised from the metadata log of the software that he had downloaded our entire customer database. Whilst he may have done this previously, I was seriously concerned that on this occasion he had done so with the sole intention of damaging the business.”.

208. We observe that this is similar to the fear expressed by Mr Ezrine in the 26 June 2018 email (as at page 189 of the bundle and as referred to above) which is pre any protected act as we have found and not shown that it relates to what the Claimant was saying about GDPR.

209. Mr Ezrine says he took legal advice on the steps he needed to take and wrote to the Claimant on the 26 September 2018 setting out the allegations and including statements from four employees (see pages 344 to 352) (see paragraph 55 of his witness statement).

210. From this letter we can see there are four main allegations raised with the Claimant:
    a. Wilful deletion of Julie Connor's entire GDrive account;
    b. Wilful deletion of password data (this includes reference to the deletion of the “Quidditch” file which the letter says was identified when “As part our investigations for the purposes of responding to your DSAR” (page 346));
    c. Attempts to disrupt staff or encourage them to leave the business;
    d. Downloading of our entire customer email database (as at page 347 about this allegation it is said …“A review of the log of the '.dot.mailer' application as part of our preparations 'to respond to your DSAR indicates that you downloaded our entire database of customer emails prior to your departure on sick leave on 3rd July. It appears clear from the manifest log that this data has been downloaded and removed via your computer to which only you should have had access. The data does not currently appear to be on your work computer at all but we all, but we are nonetheless attempting to work with a vendor and data recovery company to better understand how this data may have been transferred on or to, a third party device, assuming it was not extracted by another method (i.e. printing).”)

211. It is written in the letter (page 348) that the Respondent is offering a modified procedure to deal with the matter in writing due to the Claimant maintaining over the last several weeks that he is unfit to attend internal meetings at that time. A response is requested by the 3 October 2018.

212. The Claimant does not ask for a meeting in person. This is consistent with the position expressed by the Claimant in his email on 26 September 2018 (as at page 342 of the bundle).

213. During cross examination the Claimant accepted that the matters raised could potentially be gross misconduct if true and where it is potential gross misconduct it is reasonable to ask questions about such matters, potentially, if the answers are not known.

214. During cross examination the Claimant confirmed that he understood the allegations and that he could respond to them and do so with the assistance of his solicitors. The Claimant accepted that at no point did he ask for a hearing in person. The Claimant also agreed that he had been able to look at the evidence that was provided to him.

215. During cross examination the Claimant accepted that on 3 October 2018 he set out a 6-page response document written with the assistance of Solicitors and accepted if in a meeting he probably would provide the same explanations.

216. As Mr Ezrine says in his witness statement at paragraph 57… “Gavin responded to the disciplinary allegations via an email on 3 October 2018 (pages 354- 362). I considered Gavin's points but I felt that the evidence was sufficient to support his summary dismissal and I wrote to Gavin on 11 October 2018 (pages 369-380), confirming his summary dismissal and attaching six further statements from other employees who Val Lewis had interviewed. In my letter, I set out my findings in respect of each of the allegations against Gavin and did not uphold the allegation that he had wilfully deleted the file called "password". However, I did uphold each of the other allegations and noted that Gavin had entirely failed to acknowledge, respond to or explain the allegation that he had downloaded the entire customer email database. At the end of the letter, I set out Gavin's right of appeal and the arrangements concerning the termination of his employment with effect from 11 October 2018.”.

217. About some of this evidence we make the following observations. As recorded in the interview notes Mr Ezrine is present along with Mrs Lewis (see for example pages 350 to 352). We recognise that the Respondent is not a large employer, but it does have the benefit of Mrs Lewis’ HR experience and it is not helpful that Mr Ezrine was so involved in the investigation process given he was considering the outcome. It does raise concerns as to the impartiality of those giving evidence in the process.

218. However, we note that there are allegations against the Claimant that are said to be raised by the Claimant’s subject access request.

219. Mr Ezrine was asked in panel questions to confirm how the connection to the disciplinary matters was raised by the Claimant's subject access request and he confirmed:
    a. That in respect of the Quidditch file this was an index to all passwords and was needed for the passwords to search the databases.
    b. This was the same for the client database (allegation 4), that was searched as part of the Claimant's subject access request and in doing so the metadata was discovered showing what he believed the Claimant had done.

220. We therefore accept that these allegations are raised without being connected to the process of interviewing that Mr Ezrine was present at and are generated from the Claimant's subject access request.

221. As to those more reliant on the interview notes (such as attempts to disrupt staff or encourage them to leave the business), Mr Ezrine confirmed in cross examination that these were less serious matters.

222. Focusing then on those allegations generated from the Claimant's subject access request. As Mr Ezrine says in the dismissal letter (as at page 371 of the bundle) … "I note your admission that you deleted the file. I am satisfied that you did so without authorisation or prior discussion with a manager. I find this to be, in itself, an act of gross misconduct.". Mr Ezrine did not accept there was good reason for the deletion of the Quidditch file and he had no explanation presented to him in respect of allegation 4.

223. As the Claimant acknowledges he did not respond to allegation 4 at all and that both he and his solicitors missed it. He was asked in cross examination if he accepted that the findings about allegation 4 (see page 373) were factually accurate and he confirmed yes.

224. The Claimant accepted in cross examination that the matters raised with him could potentially be gross misconduct. The Claimant was not asked though if he accepted, he had committed an act or acts of gross misconduct.

225. **The alleged detriment that between 19 October 2018 to 16 November 2018 (issue 4.9), the Respondents refused to provide the Claimant with a proper right of appeal against dismissal**.

226. The letter of dismissal tells the Claimant of his right of appeal at the conclusion of the letter (see page 374).

227. What the Claimant says about his appeal against the dismissal is in paragraphs 102 to 108 of his witness statement.

228. His allegation of detriment is that the Respondents refused to provide him with a proper right of appeal against dismissal. We need to consider what the Claimant means by this.

229. The Claimant notes his solicitor raising concerns about Mrs Ezrine hearing the appeal (paragraph 102).

230. On this matter Mr Ezrine says in his witness statement at paragraph 58 that … “Ms Rai emailed me on 16 October 2018 (page 381) to say that my wife, Ellie Ezrine, would not be suitable to hear the appeal that her client would be submitting. I forwarded this to Gavin on the same day (page 382) highlighting that the appeal process was set out within my 11 October 2018 letter.”.

231. The Claimant submits his appeal on the 19 October 2018 (pages 384 to 391) and he now responds to allegation 4.

232. Allegation 4 in the investigation letter (at page 347) refers to … “A review of the log of the 'dot.mailer' application as part of our preparations to respond to your DSAR indicates that you downloaded our entire database of customer emails prior to your departure on sick leave on 3rd July.”.

233. The Claimant’s response in the appeal to allegation 4 (at page 389) says … “I can only apologise that my full response was missing from my letter of 3 October 2018. It is by no means an excuse, but I am, as you are well aware, still very unwell and I felt pressured by the Company into responding to the allegations within the very short and wholly inappropriate deadline that was set by the Company, notwithstanding my continued ill health. I am not sure what date you are suggesting this download happened, but I can think of several times that it was essential for me to download the full customer database as illustrated below:”. The Claimant then provides examples in November/December 2017, February 2018, March/April 2018 and how it was done on a frequent basis (once a month when there was time). He does not expressly deal directly with anything prior to his departure on sick leave.

234. Mr Ezrine then says in paragraph 60 of his statement … “Ellie responded initially to Gavin on 23 October 2018 (page 392) and then wrote again on 5 November 2018 (page 400). In the 5 November email, Ellie explained to Gavin that because he had requested his appeal be heard by someone else, Gary Wells had been appointed to hear the appeal. Once again, I had taken legal advice on this and although I was satisfied that Ellie would be able to impartially assess Gavin's appeal I was advised that it would be better if it was someone unconnected to me personally. Gavin did question Gary Wells' position at the company and said that he wanted an external independent senior expert to deal with his appeal (page 401). I did not think that this was reasonable, and I was aware that this could be very costly for the Company.”.

235. Mr Wells is therefore appointed to hear the appeal instead.

236. The Claimant then raises in his witness statement his concerns about the appeal being he does not know who Mr Wells is, how Mr Wells reached his decision without ever speaking to him or corresponding with him, and that Mr Wells had not given reasons or explanation as to how he had reached his decision (see paragraph 108).

237. We did not hear any evidence from Mr Wells on this matter. We do note the following though from the evidence that we were presented:

238. In paragraph 107 of the Claimant's witness statement he says … "On 10 November 2018, I received an email from Mr Wells explaining that he was travelling extensively during the week commencing 12 November 2018 and would respond to me by 16 November 2018 [407]. I responded on 12 November raising my concerns about the process that was being carried out by Mr Wells, including the lack of information about him, the evidence that he was claiming to review as part of the appeal, and the considerable length of time that it was taking to deal with my appeal [408].".

239. What it says in email at page 408 is … "Whilst you may be away this week, I am afraid this is not my problem. My appeal was lodged on 19 October and there is simply no excuse for me having to wait this long for it be to dealt with. You had the majority of last week to contact me with your investigation queries and failed to do so. As such, and since by your own admission, you are reviewing the papers anyway this week, you can contact me today with your questions in writing. I am then prepared to wait until close of business this Wednesday 14 November for the appeal outcome before contacting ACAS.".

240. Mrs Lewis in her witness statement at paragraph 65 says … "I am aware that Gavin appealed his summary dismissal (pages 383-391) and criticised the appointment of Gary Wells to hear his appeal (page 401). Mr Wells was newly appointed to the business and in my view was very competent and had not had any previous involvement with Gavin and so was an appropriate choice to consider Gavin's appeal. In consultation with David, I therefore emailed Gavin regarding his criticism of Mr Wells' appointment (pages 402-404). Mr Wells reviewed the file of documents. I remember that Mr Wells did ask me to clarify one of my letters to Gavin where I had disagreed with one of the points that he had raised, and I also sent Mr Wells the email at page 409 of the bundle, but other than that I was not involved in the appeal process.".

241. The email from Mrs Lewis to Mr Wells at page 409 was sent on the 14 November 2018 and is advising him on the correspondence received from the Claimant about the appeal process (at page 408).

242. This evidence all suggests that Mr Wells is looking into matters and considering the disciplinary papers and the Claimant is keen to get a response from him.

243. The appeal outcome is sent to the Claimant on the 16 November 2018 (see pages 410 and 411).

244. We note from this is does not include any title designation for Mr Wells and it is a brief rejection letter of the Claimant's appeal.

245. The Claimant has not proven on the balance of probability that his concerns (save for a lack of information about who Gary Wells is) are reality. He does not agree with the outcome but that does not mean the Claimant has been refused a proper right of appeal. The Respondents recognising the Claimant's solicitors' objections to Mrs Ezrine appoint Mr Wells and he deals with the matter after a request for a speedy response by the Claimant.

246. We noted during the cross examination of the Claimant about this matter he confirmed, when asked if he were reinstated by Mr Wells what would happen, that if the appeal was overturned for gross misconduct then made redundant shortly after, that being made redundant is one thing but being accused of gross misconduct is not something prepared to swallow.

The Law

247. Within the written submissions of Claimant's Counsel, we were provided with a very helpful summary of the relevant law. Respondent's Counsel confirmed in his oral submissions that he has no issue with the legal summary provided.

248. This agreed legal summary is therefore referred to below as supplemented by some additional clarification considered appropriate to complete the summary of relevant statutory provisions and legal considerations relevant to the matters in this claim.

Unfair dismissal (s.94/98 ERA 1996)

249. Pursuant to s.94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with s.98 ERA 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…
>
> …(b) relates to the conduct of the employee, …
> …(c) is that the employee was redundant, or…

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

250. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

251. In conduct cases, when considering whether or not the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:
    a. genuinely believed that the employee was guilty of misconduct;
    b. had reasonable grounds on which to base that belief;
    c. at the time it had carried out as much investigation as was reasonable in the circumstances (*British Home Stores Ltd v Burchell* [1978] IRLR 379).

252. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (*Sainsbury PLC v Hitt* [2003] ICR 111).

253. A failure on the part of an employer to follow their own published procedures may render a dismissal unfair (see *Sinclair v Wandsworth Council* UKEAT/0145/07/DM at para 32).

254. We have also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). The ACAS Code does not apply to redundancy dismissals (paragraph 1). The ACAS Code confirms at paragraph 3 that … "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.".

255. In respect of overlapping grievances and disciplinary matters, the ACAS Guide on disciplinary and grievances states as follows:

What problems may arise and how should they be handled?

Acas Code of Practice on disciplinary and grievance procedures Extract

Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related, it may be appropriate to deal with both issues concurrently.

When an employee raises a grievance during the meeting it may sometimes be appropriate to consider stopping the meeting and suspending the disciplinary procedure – for example when:

- the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have
- bias is alleged in the conduct of the disciplinary meeting
- management have been selective in the evidence they have supplied to the manager holding the meeting
- there is possible discrimination. (p23)

256. When considering the procedure followed by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process (including at appeal stage) will be considered as part of the determination of whether the overall process was fair (*OCS Group Ltd v Taylor* [2006] ICR 1602).

257. For completeness we also note the statutory definition of redundancy at section 139 of ERA 1996. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".

Protected disclosures (s43B ERA 1996)

258. Under section 43A of the ERA 1996 a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) 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 is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that

information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

259. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

260. We note that in this claim it is not in dispute that the alleged disclosures (if made) were made to the Claimant's employer.

261. We also note, as was confirmed in the agreed list of issues the alleged disclosures relate to the legal obligation part of section 43B, so section 43B(1)(b) … "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,". The legal obligation relates to GDPR.

262. Claimant's Counsel in her written summary of the relevant law on this aspect emphasises that the relevant part of that statutory provision for us is the … "is likely to fail…" part.

Disclosure of information

263. A disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (s.43L(3)).

264. Although it is not possible to draw a clear dichotomy between information and a mere 'allegation' or expression of opinion, in order to amount to a 'disclosure of information' the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)' (*Kilraine v Wandsworth LBC* [2018] EWCA Civ 1436; [2018] ICR 1850 at para 35 and at paras 21 and 29-36).

265. Disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which a claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence (*Kilraine* paras 41-42).

266. For completeness of this summary we have noted in respect of these paragraphs that Respondent's Counsel wanted us to note that he and Claimant's Counsel were not together as to the alleged disclosures satisfying that test. He submits that the content of the 3 July 2018 email is not sufficient. Further, as to the various disclosures allegedly made in the February to May period, which he highlights are not addressed in the Claimant's Counsel's submissions, there is no clarity it was said at what

time and when it was known by Mr Ezrine. It is for the Claimant to prove the facts not for the Tribunal to guess.

In the reasonable belief of the worker is made in the public interest and tends to show one or more of the matters at 43B(1)

267. The focus is on whether in the reasonable belief of the worker (at the time) the information provided tended to show one or more of the matters relied on. It is not whether the worker genuinely / reasonably believed that there had been such a failure. The worker must also believe at the time that the disclosure is made in the public interest.

268. Both aspects involve a subjective and objective element; i.e., that the worker believes the information tended to show the matters relied on/was in public interest *and* that they were reasonable in holding that belief (*Chesterton v Nurmohamed* [2017] EWCA Civ 979; [2018] ICR 731 at paras 8(1) and 27).

269. A belief can be reasonable even if it is wrong (*Chesterton* at para 8(2)).

270. There may be a range of reasonable views as to whether a disclosure is made in the public interest (*Chesterton* at para 28).

Detriment on the ground of a protected disclosure (s.47B)

271. Under Section 47B 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. This provision does not apply to employees where the alleged detriment amounts to dismissal.

272. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

273. S.47B and S48(2) provides:

> ..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.

> …48 Complaints to [employment tribunals]
> (2) On a complaint under subsection (1)…(1A)… it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

274. Detriment has been broadly interpreted in the whistleblowing and discrimination context and will be made out if a reasonable worker would or might take the view that the treatment had been to their detriment; it does not require a physical or economic consequence (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

275. As Claimant's Counsel notes, "Shamoon is a discrimination case, but the Court of Appeal in Tiplady v City of Bradford Metropolitan District Council [2020] ICR 965 at para 35 said it was 'highly persuasive' in relation to the meaning of detriment in the whistleblowing context and that it made sense to interpret whistleblower and discrimination legislation in the same way where identical language was used."

276. Dismissal of an employee by an employer cannot amount to a detriment under s.47B(1). However, a worker can pursue an action against another worker under s47B(1A) in respect of a detriment that results in a dismissal and the employer may be vicariously liable for that action/omission under s47B(2) (*Timis v Osipov* [2018] EWCA Civ 2321; [2019] ICR 655). In this case the First Respondent has not run the statutory defence or suggested they are not liable for the Second Respondent's actions and so vicarious liability is not understood to be in issue.

277. A worker is subjected to a detriment *on the grounds of* a protected disclosure if the protected disclosure was a material (more than trivial) influence on the alleged perpetrator's treatment of the whistlebower (see *Fecitt and Ors v NHS Manchester* [2011] EWCA Civ 1190; [2012] ICR 372 at para 45).

278. In respect of the operation of the burden of proof LJ Elias said as follows in *Fecitt*:

> 41…The fact that it was the claimants, the victims of harassment, who were redeployed was obviously not a point lost on the tribunal. It was evidence from which an inference of victimisation could readily be drawn. But the tribunal was satisfied that the employer had genuinely acted for other reasons. Once an employer satisfies the tribunal that he has acted for a particular reason - here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in Igen Ltd v Wong.

> …51.... I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical—indeed sceptical—eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

279. Simler J gave guidance on the operation of the burden of proof provisions in *International Petroleum Limited and ors v Osipov and ors* UKEAT/0058/17/DA: (We note, as highlighted to us by Claimant's Counsel, that this case was appealed to the Court of the Appeal on other grounds.)

> 115. Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:
> (a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
> (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.
> (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

Automatic unfair dismissal

280. S.103A provides:

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

281. In *Kuzel v Roche Products* [2008] ICR 799 the Court of Appeal made some preliminary observations on the operation of s.103A and its interaction with unfair dismissal generally, and we were invited to read these in full as set out at paragraphs 47 to 61 of that decision.

282. We observe that the Court of Appeal held in *Kuzel* that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party.

Harassment related to nationality (s.26 EqA 2010)

283. S.26 provides:

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

284. 'Unwanted conduct' covers a wide range of conduct and essentially means the conduct was unwelcome or uninvited (see paras 7.7-7.8 of the Employment Code). The question is whether the conduct was unwanted by the employee so the enquiry necessarily involves a subjective analysis of the conduct at this stage.

285. 'Related to' is a broad test, which requires an assessment of evidence in the round; the perpetrator's own perception of whether or not the conduct related to a protected characteristic is not conclusive (see *Hartley v Foreign and Commonwealth Office Service* UKEAT/0033/15/LA at paras 23-24).

286. The concepts of violating an employee's dignity or creating an intimidating, etc., environment, convey a degree of seriousness, as per the guidance given by Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at para 47:

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

Victimisation

Burden of proof

287. s.136 EqA 2010:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

288. The guidance set out in *Igen v Wong* [2005] ICR 9311 (approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054) still sets out the correct approach to interpreting the burden of proof provisions. In particular:
    a. it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also *Ayodele v Citylink Ltd and anor* [2018] ICR 748 at paras 87 - 106);
    b. it is unusual to find direct evidence of discrimination and '[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in"' (para 79(3));
    c. therefore the outcome of stage 1 of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal' (para 79(4));
    d. 'in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts' (para 79(6));
    e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic and for the tribunal to 'assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question' (para 79(11)-(12));
    f. '[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect **cogent evidence** to discharge that burden of proof' (para 79(13) own emphasis).

289. In *Igen v Wong* the Court of Appeal cautioned tribunals 'against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground' but made it clear that a finding of 'unexplained unreasonable conduct' is a primary fact from which an inference can properly be drawn to shift the burden (para 51).

290. In *Bahl v Law Society* [2003] IRLR 640, Elias J, reviewed the law on the link between unreasonable treatment and discrimination at pars 93-101. He noted that an inference of discrimination cannot be drawn from

unreasonable treatment alone. However, where treatment is unreasonable, a tribunal will want to know why the alleged discriminator acted as they did and '…[i]f the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend on why it has rejected the reasons that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct…' (para 101).

291. In *Madarassy v Nomura International PLC* [2007] ICR 867 Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination' (para 58).

Victimisation provisions

292. s.27 EqA 2010:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

293. Merely making reference to a criticism, grievance or complaint without suggesting in some sense that it was in some sense an allegation of discrimination will not amount to a protected act (*Beneviste v Kingston University EAT 0395/05* at para 29*).* However, it is not necessary to refer specifically to the Equality Act or allege a contravention, per HHJ Richardson in *Beneviste* at para 29:

> …There is no need to for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development" her statement is not protected. If a woman says to her employer, "I am aggrieved with you for

> holding back my research and career development because I am a woman" or "because you are favouring the men in the department over the women", her statement would be protected even if there was no reference to the 1975 Act or to a contravention of it…

294. In respect of the meaning of detriment, the Employment Code provides:

> 9.8 'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards.
> 9.9 A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Wrongful dismissal

295. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

296. The legal issues are set out in the list of issues in respect of this claim. That is "Was the Claimant dismissed in circumstances that amounted to a breach of contract?".

297. The Tribunal must determine whether, on the balance of probabilities, the Claimant acted in repudiatory breach of the contract as alleged.

Polkey (Polkey v A E Dayton Services Ltd [1988] ICR 142 HL)

298. The Tribunal is referred to the principles set out by Elias J in in *Software 2000 Ltd v Andrews* [2007] ICR 825 at para 54. (We note, as highlighted by Claimant's Counsel that we should disregard references to the effect of s.98A(2) in this paragraph, which has been withdrawn).

299. When considering *Polkey* in this case, the Tribunal will need to consider whether the redundancy notice of dismissal was fair. This will engage the principles set out in *Williams and ors v Compair Maxam Ltd* [1982] ICR 156 and subsequent cases. The Tribunal should consider:
    a. Whether the Claimant was reasonably warned and consulted about the redundancy – was he given a fair and proper opportunity to understand fully the matters on which he was being consulted,

express his views and did the Respondents consider those views properly and genuinely?

b. Did the Respondents do what it could so far as was reasonable to identify alternative work?

300. There is no rule of law that employees do not have to be consulted on any restructure that might result in redundancy: it is for the Tribunal to decide what was reasonable in the circumstances in accordance with s.98(4).

301. The Respondents have also referred to 'business reorganisation' in their Response. To show this is some other substantial reason such as to justify dismissal, they must show that it was genuinely considered as a matter of importance and had discernable advantages (see for example, *Banerjee v City & East London Area Health Authority* [1979] IRLR 147). When it comes to reasonableness the Tribunal must consider all the circumstances and it is submitted that whether there was meaningful consultation is likely to be an important matter going to reasonableness where the reason for dismissal was reorganisation.

Time limits

302. Of relevance to the question of time limits are the provisions in relation to both s.48 ERA 1996 and s.123 EqA 2010.

303. Section 48(1A) of the ERA 1996 confers jurisdiction on claims pursuant to section 47B to the employment tribunals, and section 48(3) provides that an employment tribunal shall not consider a complaint under this section unless it is presented – (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Section 48(4) says for the purposes of subsection (3) – (a) where an act extends over a period, the "date of the act" means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on.

304. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

305. Distinct forms of claim can amount to conduct extending over a period and the question is whether there was an ongoing situation or continuing state of affairs as opposed to unconnected or isolated specific acts (see *Robinson v Royal Surrey County Hospital NHS Foundation Trust and others* UKEAT/0311/14/MC and the authorities referred to therein at paras 21-22 and *obiter* comments at 65).

306. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 the Court of Appeal noted the Tribunal has a very wide discretion in respect of the just and equitable extension and is only required not to leave a significant issue out of account:

> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

307. Respondent's Counsel made oral submissions in respect of the legal matters concerning time limit jurisdictional issues. He submitted that although he does not accept there is an act continuing over a period for the protected disclosure and victimisation claims, he acknowledges that the claims and allegations are against the same person over time and the last acts are in time. So, for the complaints of victimisation and detriment due to making a protected disclosure he has no issue.

308. However, for the harassment complaint he submits it is substantially out of time. He submits that the complaint relates to April/May 2018 and the claim was not brought until 16 November 2018 and it is for the Claimant to show why it is just and equitable to extend time. He refers to Claimant's Counsel's submission about *Robinson* … "and the authorities referred to therein at paras 21-22 and obiter comments at 65", and submits that it is not clear that it supports you can roll together different acts (for example direct and harassment). He says that in *Robinson* there is a series of reasonable adjustments. Matters are different in this claim as a complaint of harassment and victimisation are very different in nature. The first is discrimination because of nationality the second is that someone made a complaint. He submits that there is insufficient nexus between those complaints to link them together, so it is out of time.

309. We note from paragraph 65 of *Robinson* … "When considering whether a Claimant has made out a prima facie case that that of which she complains amounts to conduct extending over a period, however, I can allow that it might be appropriate to consider that conduct as comprised of acts that, taken individually, fall under different headings. Such an assessment will inevitably be fact- and case-specific, but if the Claimant was, for example, complaining that putting her on particular shifts was a continuing act of direct

discrimination and then, as the other side of that particular coin, that failing to put her on different shifts was a failure to make reasonable adjustments, I cannot see why she would not be entitled to say that those matters should be considered together as constituting conduct extending over a period.".

The Decision

310. The logical place to start with this claim is to determine in a chronological way whether the Claimant has made a protected disclosure or done a protected act, and if so when.

311. The issues relevant to this matter are set out in paragraphs 3, 10 and 11 of the agreed list of issues. These are:

> 3. Did the Claimant make any disclosure(s) of information which, in his reasonable belief, were made in the public interest and tended to show one or more of the matters set out in s.43B (1(b) ERA 1996? The Claimant relies on the following disclosures of information about the GDPR:
> 3.1. the information provided about the GDPR and the First Respondent's data processes as set out in the Details of Claim at paras 10–12 (between February – April 2018 and in May 2018);
> 3.2. his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018, as set out in the Details of Claim at para 21;
> 3.3. his email of 3 July 2018 to Ms Lewis;
> 3.4. his letter of 31 July 2018, to Ms Lewis
>
> 10. Did the Claimant do a protected act or did the Respondents believe that the Claimant had done or may do a protected act? The Claimant relies on the following as protected acts:
> 10.1. his conversations with Ms Lewis between February 2018 and June 2018 in which he stated that the Second Respondent had made discriminatory comments;
> 10.2. his conversation with the Second Respondent shortly after the meeting with Etch on 9 April 2018 in which he stated that the Second Respondent had made discriminatory comments that had offended him;
> 10.3. the Claimant's email of 3 July 2018 in which the Claimant alleged that the Second Respondent had made discriminatory comments;
> 10.4. his letter of 31 July 2018 in which the Claimant alleged that the Second Respondent had made discriminatory comments.
>
> The above includes consideration of whether information was given or the allegations were made in bad faith.
>
> 11. It is also averred that as of on or around 3 July 2018, the Respondents believed that the Claimant may bring proceedings under the Equality Act 2010.

312. About these we find as follows:

313. **Issue 3.1** - … the Claimant accepted in cross examination when asked when he says he first discussed GDPR (relevant to the alleged disclosures he asserts were made) that it was early March 2018 when he created a document to discuss the challenges.

314. There is a lack of clarity as to what the Claimant says he is disclosing about GDPR and when. There is a lack of detail and consistency between what the Claimant asserts in his Grounds of Claim and his witness statement. Further, there is a lack of consistency between the Claimant and what Mrs Lewis and Mr Ezrine recall the Claimant telling them. The documents that have been presented to the Tribunal suggest that GDPR was not the significant concern the Claimant suggests he was raising in the way he says. It does not feature at all in the Claimant's top priorities list for April/May 2018 (see page 159). Nor for May/June (pages 159 and 160). Further, GDPR does not feature in the Claimant's Ecommerce Team task list for May 2018 (see pages 173 to 177) save for the reference to it on page 175 … "Create email campaign for GDPR. Does this need a landing page?".

315. It is unfortunate that there is such a lack of specificity in the Claimant's witness evidence to the disclosures he says he made. We recognise that recall alone about verbal interactions can be unreliable, so it is also unfortunate that despite the Claimant engaging the assistance of Solicitors as early as the end of June 2018 that the particulars of the alleged disclosures were not recorded at that time. The Claimant confirmed in cross examination that his Solicitors had looked at the email dated 3 July 2018 and that he had given them instructions as to what had taken place. The references in the email dated 3 July 2018 and the letter of grievance dated 31 July 2018, also relied upon by the Claimant as being protected disclosures (see below), do not contain details of what the Claimant says he was disclosing in May 2018 and before.

316. What is supported by the correspondence generated with the assistance of the Claimant's solicitors (see the redundancy appeal letter at page 303 of the bundle) is reference to issues being raised from April 2018.

317. What the Claimant evidences about what he says he disclosed from March 2018 onwards, until GDPR comes into force at the end of May 2018, has the potential to be information tending to show the Respondent is likely to fail to comply with data protection legal obligations. We note that this is the emphasis placed on the information the Claimant is said to have disclosed in the written submissions of Claimant's Counsel. The undisputed evidence at paragraph 30 of the Claimant's witness evidence also supports why the Claimant can say he held a reasonable belief it tended to show this and that it was in the public interest.

318. What is certainly not proven on the balance of probability is that the Claimant made such a disclosure before March 2018, nor when Mr Ezrine received the information that the Claimant alleges is a disclosure.

319. We have noted what Respondent's Counsel submits at paragraph 12 of his

written submissions … "Taking into account the divergence of views it would appear that the belief was reasonable and Respondent witnesses accepted that. There is a lack of clarity about precisely what the disclosure of information was or when it was made but on the balance of probabilities it would have been later in the process i.e., April / May.". From the facts we have found we agree with this.

320. That said, we do go on to consider what influence such a protected disclosure, in the period potentially from March 2018 to May 2018, had on the actions of Mr Ezrine as the Claimant alleges.

321. **Issue 10.1** - There is limited evidence about this in the Claimant's witness statement. During the cross examination of the Claimant he accepted that he had not used the word discriminatory. Mrs Lewis when cross examined also could not recall the work discriminatory being used.

322. We also note what is submitted by Respondent's Counsel (at paragraph 19 (a) of his written submissions) that even if Mrs Lewis was told what the Claimant alleges, that Mr Ezrine had made discriminatory comments, Mrs Lewis would still need to pass that information on to Mr Ezrine and there is no evidence at all that she did do so. This appears so, particularly as both her and the Claimant accept the Claimant never used the word "discriminatory" as the Claimant asserts.

323. We therefore do not find that the Claimant has proven on the balance of probability that he did do a protected act as he asserts.

324. **Issues 3.2 and 10.2** – There is an inconsistency in the Claimant's evidence about what was said at this meeting. We have noted that paragraph 21 of the Grounds of Claim does not describe the Claimant making a protected disclosure about GDPR. The Claimant agreed in cross examination that he did not believe he had raised GDPR at the meeting. Mr Ezrine does not accept that the Claimant raised issues of GDPR or discrimination with him at the meeting. It appears to be accepted (as confirmed by the Panel's questions of the Claimant) that Mr Ezrine remained calm at the meeting, the Claimant acknowledged it was a constructive meeting. This would be consistent with Mr Ezrine's recollection of what was discussed.

325. On the basis that what was discussed at this meeting is based on recall of verbal discussions only, and the Claimant's account in his witness statement, saying he raised GDPR when he accepted in cross examination he did not, and he does not say this in his Grounds of Claim, means that we accept Mr Ezrine's recollection of matters and do not find that the Claimant has proven on the balance of probability that the discussion is as how he describes it. Therefore, we do not find that he raised a protected disclosure about GDPR, nor that he did a protected act as he asserts.

326. **Issues 3.3** - What the email dated 3 July 2018 (pages 202 and 203) says about GDPR is … "…When advising him of how we should behave as a

company in relation to the new GDPR guidelines, he told me that they were nothing to worry about…" and …" In view of the company's historical and current failures to comply with. its statutory obligations under data protection legislation, I also reserve the right to make a formal complaint to the Information Commissioner should my subject access request not be taken seriously…".

327. It is not clear this is information tending to show a failure or a failing to comply with a legal obligation as the words do not appear to impart such information. We note that the Claimant has not said that it is such a disclosure of information within his own witness evidence. Further, the Claimant has not presented any evidence to address why it tended to show this or was made in the public interest, in his reasonable belief. This was raised with Claimant's Counsel during submissions and it was submitted to us that we should infer what he thought about this from what he says was his belief about the disclosures he makes in February to April 2018 and May 2018. We do not see how this can be inferred as the alleged disclosure in the 3 July 2018 email is different in content to the issues the Claimant says he was raising in May 2018 and before, which is understandable based on when the GDPR was due to and did come into force.

328. We have also noted from paragraph 16 of the submissions of Respondent's Counsel that … "In so far as the letter of 3 July is concerned it is not accepted that there is any protected disclosure in that letter. The only wording pertaining to GDPR is "When advising him of how we should behave as a company in relation to the new GDPR guidelines…" and he then describes Mr Ezrine's reaction. It needs to be remembered that the Claimant had the benefit of legal advice at the time. It is averred that this statement does not pass the Kilraine specificity test so as to bring in within the auspices of section 43B. All the Claimant says in the letter is that he was advising the Respondent about steps that needed to be taken. It is insufficient…".

329. We therefore do not find that the Claimant has proven facts that are necessary to show that the contents of the email 3 July 2018 is a protected disclosure. The Claimant has not evidentially demonstrated and therefore proven any facts as to why such references to GDPR in this email were in his reasonable belief tending to show a failure or a failing to comply with a legal obligation or in the public interest.

330. **Issue 3.4** - In respect of the alleged protected disclosure contained in the grievance letter dated 31 July 2018 (pages 320 to 327) what it says about GDPR is … "In fact when the new GDPR guidelines came in, I was advising him of how we should behave as a Company in order to be legally compliant and his response to me was that they (the GDPR guidelines) were nothing to worry about…" (page 322) and … "…Finally, since you have not yet acknowledged my data subject access request, I reserve the right to take further action in respect of any failure by the Company to comply with its

obligations under the GDPR. As explained above, I know David does not care remotely about GDPR and his obligations under it, but you may wish to let him know the serious financial penalties the Company may well face for failure to provide me with what I have requested." (pages 326 and 327).

331. This may potentially be information tending to show a failure, a failing or likely failure to comply with a legal obligation (as is acknowledged by Respondent's Counsel in his written submissions). We note though that the Claimant has not specified that it is such a disclosure of information and why within his own witness evidence. As with the email dated 3 July 2018 the Claimant has not presented any evidence to address why it was in his reasonable belief it tended to show this or why it was made in the public interest. As with the alleged disclosure on the 3 July 2018 what the Claimant says was his belief about the disclosures he makes in February to April 2018 and May 2018 we do not see how from this it can be inferred to apply to the alleged disclosure in the 31 July 2018 letter. The potential disclosure is different in content to the issues the Claimant says he was raising in May 2018 and before, which is understandable due to when the GDPR was due to and did come into force.

332. We therefore do not find that the Claimant has proven facts that are necessary to show that the contents of the letter dated 31 July 2018 is protected disclosure. Although the Respondent accepts the 31 July 2018 contains information that potentially makes a disclosure, the Claimant has not evidentially demonstrated and therefore proven any facts as to why such references were in his reasonable belief tending to show this and the public interest.

333. **Issue 10.3, 10.4 and 11** - It is clear from the content of the email on the 3 July 2018 and the subsequent grievance dated 31 July 2018, which uses similar wording (pages 319 to 327) that the Claimant does raise matters which allege a contravention of the Equality Act 2010, and this is not disputed by the Respondents. As can be seen at page 203 … "4. David regularly comments about how he feels about this country and the way we always abide but the rule and along the lines of "Stupid Fucking British people ... #157;. I find these continuous disparaging and discriminatory comments very offensive. When advising him of how we should behave as a company in relation to the new GDPR guidelines, he told me that they were nothing to worry about and that "You fucking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a shit...#157;".

334. The Respondents accept these are protected acts and we agree that these protected acts have been proven factually. For completeness we also note that we have found on balance that the content of the comment, as alleged in the protected act correspondence, or something similar, was said by Mr Ezrine. We are not therefore dealing with a false allegation to raise issues of bad faith.

335. So, we have found the Claimant appears to have made a protected disclosure about GDPR no earlier than March 2018 (and this is likely to be April 2018 onwards), and that he has done protected acts on the 3 and 31 July 2018.

336. We now consider the alleged detriment complaints in chronological order and determine as follows:

337. We observe initially that the allegations are all linked to a common individual, Mr Ezrine, and relate to his interactions with the Claimant in his job role, including the termination of that role. We acknowledge that Respondent's Counsel recognises this and therefore determine that it can be found that the allegations, if proven, do form part of a series of similar acts or failures, the last of which took place on or after 6 October 2018. Also, that they did form part of conduct extending over a period the end of which period was on or after 6 October 2018.

338. **4.1.2**. unfairly and unjustifiably criticised the Claimant's work without giving any indication to the Claimant as to why the work allegedly fell short of the required standards (between February/March 2018 – 2 July 2018); and **4.1.4**. regularly shouted and swore at the Claimant in an aggressive manner (between February/March 2018 – 2 July 2018);

339. We can see that so far as the Claimant and Mrs Lewis are concerned, they convey that working at and for the Respondents was not always a pleasant working experience for them. We also note that Ms Hickman expresses a similar view about working with the Respondents. In the Claimant's case this evidentially escalates from November 2017 and is linked to work on the website. Mr Doyan is also critical of the Claimant's work capabilities in the role. In cross examination of the Claimant he accepted that this was an outside view and the views of Mr Doyan were not challenged by the Claimant. We note that there is no evidence to suggest that such a view is formed by the Claimant making a protected disclosure or doing a protected act.

340. We have not found facts proven on the balance of probability that the actions of Mr Ezrine that the Claimant complains about in these two broad allegations to support that it is anything other than the way Mr Ezrine manages the Claimant's work and in particular matters concerning the website. Mrs Lewis and Ms Hickman are also critical of the way Mr Ezrine acted towards them and they do not assert they made a protected disclosure nor that the actions of Mr Ezrine were materially influenced by it.

341. In any event we have already found that the Claimant has not proven that he made a protected disclosure or carried out a protected act in February 2018 so there can be no causative link to what the Claimant complains about.

342. **4.1.1**. avoided liaising with the Claimant directly and communicated via Ms Lewis (following the meeting between Mr Ezrine and the Claimant on around 10 / 11 April, which was held after the Etch meeting, until 2 July 2018);

343. Mr Ezrine avoiding contact with the Claimant, based on the Claimant's own evidence, is something that was happening before the 10 and 11 April 2018. We have also noted that there is evidence of cordial email communications between the Claimant and Mr Ezrine on 19 April 2018 about work matters (at page 172).

344. We have found that the Claimant has not done a protected act at this point (up to April 2018). We have also not found that the Claimant has proven that he made a protected disclosure about GDPR that was received by Mr Ezrine in February 2018 when the Claimant says that Mr Ezrine was avoiding contact with him.

345. We therefore find that what has been evidenced to us on the balance of probability is that it is a decision about management processes, rather than Mr Ezrine seeking to avoid "liaising with the Claimant directly" because of any alleged protected disclosure or protected act. This is reinforced by the Claimant's own evidence being that he perceives being avoided by Mr Ezrine in around February 2018, which predates any protected disclosure or evidenced protected act, so there can be no causative link to what the Claimant complains about, and there being direct liaising still in April 2018, as evidenced in the email dated 19 April 2018.

346. **4.1.3**. excluded the Claimant from a number of senior management meetings which the Claimant had previously attended (following the meeting between Mr Ezrine and the Claimant on around 10 / 11 April, which was held after the Etch meeting, until 2 July 2018);

347. On reviewing the documents referred to in evidence, pages 159 to 160 which is the Claimant's top priorities; April/May 2018, pages 173 to 177 which is a team task list May 2018; and pages 180 to 181 which is a meeting agenda 9 May 2018, these do appear to record meetings happening and the Claimant's involvement, which is consistent with the evidence given by Mrs Lewis.

348. It is for the Claimant to prove on the balance of probability that he was excluded from a number of senior management meetings which he had previously attended, and we do not find that he has proven this on the balance of probability. Issues concerning the photoshoot had been claimed as a separate allegation of detriment by the Claimant, but this was withdrawn at the start of the hearing, the Claimant therefore no longer asserting his exclusion was a detriment.

349. **4.2**. encouraged employees to fabricate reasons for his dismissal in or around June 2018;

350. Mrs Lewis addresses this matter in her witness statement at paragraph 48 a. and denies it. This is consistent with her record of statement dated 9 August 2018 as can be seen at pages 333 to 334, which also denies it. We accept the recollection of Mrs Lewis, particularly as it is consistent with a record of statement by her in August 2018, so more contemporaneous to the matter in factual dispute.

351. It is for the Claimant to prove on the balance of probability that this alleged detriment happened and we have not found him to have done so.

352. **4.1.5**. on or around 26 June 2018, removed the Claimant's line management responsibilities without any justification;

353. We accept the Respondents' evidence on this matter as to whether the Claimant did have his line management removed. It is for the Claimant to prove on the balance of probability that this alleged detriment happened and we have not found him to have done so.

354. **4.3**. gave the Claimant notice of dismissal by reason of redundancy on 13 July 2018 following an unfair and pre-determined process;

355. We accept the evidence of the Respondents on the restructure decision process, it appears a genuine and externally informed trajectory to which the Claimant has contributed and who has confirmed in evidence that he believes it makes a lot of sense.

356. Mr Ezrine confirmed that he considered that it was not just the Claimant on Ecommerce, but also himself and Tom & Co. He did not accept the Claimant was heading it up. We note that this position is consistent with the uncontested analysis of Mr Doyan (as set out in his email dated 5 April 2018 at page 161 and referred to above).

357. Mr Ezrine was asked if he was going to restructure it makes sense to consult with Claimant. Mr Ezrine confirmed, no, I don't need to consult with him, not when I thought he might be part of the problem, no. This supports that Mr Ezrine's considerations are about the job roles and what the Claimant can do.

358. We have found that the Claimant has made a protected no earlier than March 2018 and on the balance of probability it is probably from April/May 2019. The input from Mr Doyan that Mr Ezrine relies upon is in an email dated 5 April 2018 (page 161). Mrs Lewis is also engaged in the restructure and it is not suggested that she is influenced by any alleged protected disclosure. From these facts we cannot find that the proposed restructure has been set in motion because of the Claimant's alleged protected disclosure, and in any event, this is not what the Claimant alleges, he complains about the unfair and pre-determined process.

359. We have not found that the Claimant has done a protected act at this point to suggest this course of conduct was being done as an act of victimisation. We have found that the Claimant does do a protected act based on the

contents of his email dated 3 July 2018 which is after the restructure decision is made and announced. We also note that despite the Claimant having assistance with this email from Solicitors what it does not say is the way he has been treated to that point is because of him making a protected disclosure or doing a protected act.

360. Following that there are two telephone consultation meetings with the Claimant which he engages in. The Claimant does not apply for either of the two available vacancies so it cannot be said what the outcome of such a process would have been.

361. From the dismissal letter we can see that the Respondents are keeping the employment relationship alive at this point by the Claimant being given notice in time rather than being paid in lieu (which the Claimant's contract of employment does allow for, as can be seen at page 137 of the bundle) and the Respondents re-iterating the vacant roles and that it will continue to consider the availability of suitable alternative employment for the Claimant.

362. Mr Ezrine confirmed in cross examination, when asked to confirm that performance has nothing to do about Claimant being given notice of dismissal, that was correct the Claimant was not dismissed on performance grounds. Mr Ezrine confirmed in oral evidence that it was his decision to dismiss the Claimant, and explained that the Claimant was dismissed on restructuring, as despite them having a consultation with the Claimant and sending him job descriptions he was clearly not interested. He explained that the Claimant did not apply so need to move on, make the job role redundant and serve notice of termination of employment.

363. It is the Claimant's complaint that he was subjected to the detriment of, by letter dated 13 July 2018 being given notice of dismissal by reason of redundancy, which the Claimant alleges is following an unfair and pre-determined process.

364. As to the reason for dismissal at that time, the parties conducted themselves on the basis of it being a redundancy dismissal as their view was the Claimant's specific role as Ecommerce manager was ceasing and it was also intended for the Claimant to receive a redundancy payment. We have heard submissions from the parties Counsel that it may be a redundancy or a re-organisation (so some other substantial reason) and we recognise that the difference between a 'redundancy' and a 'reorganisation' can be unclear. It is quite possible that changes employers propose to make to their working structures could amount to just a reorganisation or they may give rise to a redundancy situation and entitle the employee to a redundancy payment. We recognise that redundancy and reorganisation are not necessarily mutually exclusive. 'Redundancy' is a technical, legal definition, while 'reorganisation' simply means a change in working structures and has no specific legal meaning.

365. What we need to determine in this matter is whether there was an unfair and pre-determined process and the Claimant was given notice of dismissal by reason of redundancy, on the ground that he made a protected

disclosure or as an act of victimisation. The Claimant was given notice of dismissal by reason of redundancy, but we do not find that there was an unfair and pre-determined process that led to that conclusion.

366. We do not find that the Claimant did a protected act before the restructure process was considered and then actioned. We have also found that there was a process of consulting about the consequences of the restructure after the protected act on the 3 July 2018 which the Claimant engaged with.

367. As to the alleged protected disclosures, on the basis one was made in March 2018 onwards, we do not find that the Claimant has shown that a ground or reason for the detrimental treatment of being given notice of dismissal for reason of redundancy is a protected disclosure he made. The Respondents have shown, based on the facts we have found, that they acted the way they did to implement a genuine restructure process. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018.

368. Whether in law the Claimant's dismissal at that time was for reason of redundancy (which appears to be what the Respondents thought at the time) or some other substantial reason, we do not find that it was for the reason or principal reason of the Claimant making a protected disclosure.

369. **4.4**. refused to deal with the Claimant's appeal against redundancy (in writing between 25 July 2018 and 30 September and/or at all from 1 October 2018 onwards) and grievance (in writing between 6 August 2018 and 30 September and/or at all from 1 October 2018 onwards);

370. From our findings of fact about this allegation we find that the Respondents' actions of not dealing with the appeal against redundancy and grievance are caused by the following matters:

a. The Respondents have informed the Claimant that they do intend to address the grievance and the redundancy appeal. It is not clear though what the Claimant personally is then seeking as correspondence is coming from him and his solicitors. His fitness to take part in any of the processes suggested by the Respondent is not backed up by any medical evidence other than fit notes which do not make clear what the Claimant can or cannot do in respect of the processes. There is no medical evidence presented by the Claimant to this Tribunal other than the fit notes. It also appears to be on the 26 September 2018 that the Claimant says he is … "now prepared to deal with these in writing in order to move things forward.".

b. The Claimant is not alleging that the Respondents' refusal to correspond with his solicitors is an act of detriment and this is something the Respondents can chose to do particularly as they considered the interactions with the Claimant's solicitor to be unprofessional and unhelpful. This is important because as can be seen from our factual findings the involvement of the Claimant's solicitors and the way it is perceived by the Respondents clearly

influences the way the Respondents are acting towards the Claimant at this time.

c. Matters are then overtaken with the disciplinary matter.

371. We note that the focus of the Claimant's complaints certainly about the matters as at the 1 October 2018 is about the disciplinary being raised, rather than the refusal to deal with the appeal and grievance.

372. We accept that a refusal to deal with the Claimant's appeal against redundancy (in writing between 25 July 2018 and 30 September and/or at all from 1 October 2018 onwards) and grievance (in writing between 6 August 2018 and 30 September and/or at all from 1 October 2018 onwards can amount to a detriment (being where a reasonable worker would or might take the view that the treatment had been to their detriment; it does not require a physical or economic consequence).

373. As set out in the legal summary concerning detriment for making a protected disclosure, it is:

a. for the Claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subjected is a protected disclosure he made.

b. The Respondent must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them.

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

374. We do not find that the Claimant has shown that a ground or reason for this detrimental treatment to which he is subjected is a protected disclosure he made. The Respondents have shown, based on the facts we have found, that they acted the way they did in response to the correspondence they were receiving from the Claimant and his solicitors about the appeal and grievance process at that time. Matters are then overtaken by the disciplinary process, which is what the Claimant's concerns then move to. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018

375. For the same reasons we do not find that the Respondents' actions are because of the protected acts done by the Claimant on the 3 or 31 July 2018. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal'. From these primary facts we are satisfied that the Respondents have acted for a particular reason, being their reaction to the correspondence they were receiving from the Claimant and his solicitors about the appeal and grievance process at that time which is then overtaken by the disciplinary process. We do not find facts to infer discrimination.

376. **4.7**. ~~failed to provide the Claimant with the information to which he was entitled in response to his SAR (5 October 2018)~~ [***This allegation was withdrawn by the Claimant in submissions so has not been determined by us]***;

377. **4.5**. instigated a disciplinary process against the Claimant (26 September 2018); **4.6**. curtailed the disciplinary process so as to ensure the Claimant was dismissed for gross misconduct before his contract would have ended by reason of redundancy (11 October 2018); **4.8**. dismissed the Claimant for gross misconduct on 11 October 2018; and **4.9**. refused to provide the Claimant with a proper right of appeal against dismissal (between 19 October 2018 and 16 November 2018). These issues overlap with our findings on the unfair dismissal and automatic unfair dismissal complaints which we detail below.

378. **The allegation of harassment (issue 8)**… "around the time when the new GDPR rules came in (in or around April/May 2018) [the Second Respondent] stating "you fucking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a shit".

379. Firstly, to consider matters concerning time limit jurisdiction.

380. Did this discrete complaint of harassment form part of conduct extending over a period the end of which period was on or after 6 October 2018? This would require it being connected to the complaints of victimisation. As the complaints of victimisation are before and after this complaint, we accept the submission of Respondent's Counsel on this point, that there is not enough nexus between the complaints of victimisation and the complaint of harassment to connect them. The Claimant has chosen to keep this allegation discrete from those allegations of detriment so from the way he pursues this claim, he has not connected them.

381. We therefore need to consider whether this complaint of harassment was brought within such other period as the Tribunal thinks just and equitable.

382. It is the Claimant's supplemental evidence that was given orally at his hearing, that the reason he did not submit his claim before he did was, at the time he hoped that the internal processes would prevail. Mrs Lewis was still new, and he hoped it would resolve itself through the process. The Claimant confirmed that he believed the internal process would resolve matters and that he needed to go through it before he went to ACAS. This was his primary reason, although his health was not good from early July 2018 and he had instructed solicitors to deal with it on his behalf. The Claimant also said that between 16 December 2018 and the 4 February 2019, he was extremely poorly, under health care and unable to get out of bed, and it was extremely difficult to work with his legal team. We have not

been presented any medical evidence to support the Claimant's health position.

383. We have noted the submissions by Claimant's Counsel at paragraph 120 which say … "Alternatively, in relation to the Equality Act complaints, it is just and equitable to extend time. Allowing the claims to proceed causes the Respondents no prejudice (presumably if it had, they would have raised the matter of time limits themselves). They had to deal with the factual matters relied on in any event and were able to do so in evidence. The issues were raised in a grievance in early July 2018 so they have had plenty of notice of the claims and opportunity to save/record any relevant evidence. No prejudice can be identified from the delay to the Respondents other than them having to face claims of harassment and victimisation. It is also relevant that the Claimant was very unwell over the relevant period and waiting to see what the internal processes resulted in.".

384. We note that the Respondent does not appear to have been prejudiced as a written complaint about this alleged act of harassment was raised on the 3 July 2018, and the Respondent has not submitted it could not defend this matter in these Tribunal proceedings. There was no outcome to the Claimant's grievance so there was no conclusion that would arguably move the Claimant off the internal process.

385. On this basis we consider it is just and equitable to exercise our discretion to extend time for this complaint to be within the Tribunal's jurisdiction. We have therefore gone on to consider if there has been an act of harassment.

386. Considering carefully the wording of section 26 of the Equality Act 2010 and the case authorities we have been referred to, we find as follows:
    a. The alleged unwanted conduct based on the Claimant's witness evidence is that Mr Ezrine shouted at and said to the Claimant words like "You f*cking British people would line up if you saw a sign telling you to jump off a cliff, I don't need a risk assessment to take a sh*t".". We find on balance that this comment or something similar was said by Mr Ezrine and it does refer to British nationals in a negative way. We do not find on balance that it was said to the Claimant in the way he asserts.
    b. The Claimant says that the comment was shouted at and said to him and he… "felt very upset and humiliated by David's comments at the time" and that he found "David's comments about British people deeply offensive….".
    c. The asserted perception of the Claimant is therefore that the comment is shouted at and said to him and he is upset, humiliated and offended by it.
    d. As to the other circumstances of the case, we have found this is a working environment where swearing is commonplace and the Claimant is comfortable with swear words, using them himself and also not disputing that he made comments about Irish nationality. The Claimant does not say he reported the matter at the time to Mrs Lewis, saying he informed his wife. Mrs Lewis does not confirm that the Claimant complained to her about references to British people.

We recognize that Mrs Lewis acknowledged in cross examination that in her perception there was an expression of shock about what was said. She did not confirm there was offense about what was said. The Claimant did not raise a grievance at the time. The first documented recording of the comment is the Claimant's email on the 3 July 2018. We also note that this is the only harassment allegation now pursued (the other being withdrawn) and we do not find that this comment was said to the Claimant in the way he says it was.

e. Considering whether it is reasonable for the conduct to have that effect. We do not find the comment was directed at the Claimant in the way he says, nor that he raises it with Mrs Lewis at that time as being upsetting, humiliating or causing him offense because of the British national references. Therefore, we do not find it is reasonable to have the effect as the Claimant says, of upsetting and humiliating him or causing him offense related to British nationality.

387. Although this is not argued as a detriment because of the Claimant making a protected disclosure we accept that the motivation of Mr Ezrine at that time is as he says, caused by a frustration with GDPR coming in. This is also noted, and we agree with the written submission of Respondent's Counsel (at paragraph 10(b)(v)) … "There is, however, no evidence that the comment was because of Mr Ezrine being told that he was to be in breach of a legal obligation as opposed to the fact that this was an over regulated area or any other aspect of the presentation. There is a material difference between the two.".

388. **The complaints of unfair dismissal and automatic unfair dismissal (issues 1, 2 and 7)**.

389. The Respondent asserts that it dismissed the Claimant on the 11 October 2018 for gross misconduct, and this was fair.

390. We therefore need to start our determination of these complaints (and the associated determents) by determining what the principal reason for the dismissal is and considering the fairness of the process.

391. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

392. We also note that the ACAS code says at paragraph 3 that … "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when

deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.".

393. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

394. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):
    a. that the employer did believe the employee to have been guilty of misconduct;
    b. that the employer had in mind reasonable grounds on which to sustain that belief; and
    c. that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

395. Considering then the conduct allegations and how they arose. We accept that some of these, in particular those concerning the Quidditch file and allegation 4, were discovered when actioning the Claimant's subject access request.

396. The Claimant's employment is due to end on the 13 October 2018.

397. The Respondent sets out the allegations to the Claimant in correspondence and offers a modified process due to their understanding of the Claimant's fitness to attend internal meetings. The Claimant does not ask for a meeting in person. This is consistent with the position expressed by the Claimant in his email on 26 September 2018 (as at page 342 of the bundle).

398. During cross examination the Claimant accepted that the matters raised could potentially be gross misconduct if true and where it is potential gross misconduct it is reasonable to ask questions about such matters, potentially, if the answers are not known.

399. During cross examination the Claimant confirmed that he understood the allegations and that he could respond to them and do so with the assistance of his solicitors. The Claimant accepted that at no point did he ask for a hearing in person. The Claimant also agreed that he had been able to look at the evidence that was provided to him.

400. During cross examination the Claimant accepted that on 3 October 2018 he set out a 6-page response document written with the assistance of Solicitors and accepted if in a meeting he probably would provide the same explanations.

401. The Claimant's response to the allegations is then considered by the Respondents and he is then told he is dismissed for gross misconduct. Although Mr Ezrine accepted in cross examination that some of the allegations were less serious, he did maintain his position on the Quidditch file and allegation 4. About those allegations, as Mr Ezrine says in the dismissal letter (as at page 371 of the bundle) … "I note your admission that you deleted the file. I am satisfied that you did so without authorisation or prior discussion with a manager. I find this to be, in itself, an act of gross misconduct.", Mr Ezrine did not accept there was good reason for the deletion of the Quidditch file and he had no explanation presented to him in respect of allegation 4.

402. As the Claimant acknowledges he did not respond to allegation 4 at all and that both he and his solicitors missed it. He was asked in cross examination if he accepted that the findings about allegation 4 (see page 373) were factually accurate and he confirmed yes.

403. For these reasons we find that the principal reason for the Claimant's dismissal was conduct. The Respondents genuinely believed it to be gross misconduct. The Claimant accepted it could potentially be gross misconduct. We find that the Respondents had in mind reasonable grounds on which to sustain that belief.

404. We also find that the Respondents at the stage at which they formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

405. The Claimant does challenge the appeal process alleging as a detriment that he was refused a proper right of appeal against dismissal. The Claimant was though provided with an appeal and we do not find it proven on the balance of probability that this was not a proper appeal under the circumstances of this case. The First Respondent is not a large employer and when concerns are raised with Mrs Ezrine determining the appeal an alternative is offered. From the evidence we have been presented the Claimant has not proven on the balance of probability that his concerns (save for a lack of information about who Gary Wells is) are reality. He does not agree with the outcome but that does not mean the Claimant has been refused a proper right of appeal. The Respondents recognising the

Claimant's solicitors' objections to Mrs Ezrine appoint Mr Wells and he deals with the matter after a request for a speedy response by the Claimant

406. We do not find any procedural unfairness (including in respect of the ACAS code) when considering all the circumstances of this case.

407. We find that the decision to dismiss the Claimant on a genuine belief of gross misconduct, fell within the band of reasonable responses which a reasonable employer might have adopted.

408. We do not find that the reason or principal reason for the dismissal was the Claimant making a protected disclosure.

409. Dealing then with the remaining detriments having made these findings:

410. **4.5**. instigated a disciplinary process against the Claimant (26 September 2018);

411. We do not find that the Claimant has shown that a ground or reason for this detrimental treatment to which he is subjected is a protected disclosure he made. The Respondents have shown, based on the facts we have found, that they acted the way they did in response to what they discovered when actioning the Claimant's subject access request which they considered could be gross misconduct. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018.

412. For the same reasons we do not find that the Respondents' actions are because of the protected acts done by the Claimant on the 3 or 31 July 2018. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal'. From these primary facts we are satisfied that the Respondents have acted for a particular reason, being their response to what they discovered when actioning the Claimant's subject access request which they considered could be gross misconduct. We do not find facts to infer discrimination.

413. **4.6**. curtailed the disciplinary process so as to ensure the Claimant was dismissed for gross misconduct before his contract would have ended by reason of redundancy (11 October 2018);

414. We do not find that the disciplinary process was curtailed based on the Claimant's responses to the questions he was asked in cross examination. The Respondent's position is that the matter needed to happen then as the Claimant was already under notice and that was what was driving the time scale. This is the factual reality of the position; the Claimant's employment was due to end on the 13 October 2018. In any event the Claimant was able to participate with a full response from him with input from his solicitors to

the information he had been sent by the Respondents. We do not find this detriment is proven on the balance of probability.

415. We do not find that the Claimant has shown that a ground or reason for this detrimental treatment (if he were subjected to it) is a protected disclosure he made. The Respondents have shown, based on the facts we have found, that they acted the way they did due to the circumstances of the case at that time, the Claimant not wanting to meet and his employment ending on the 13 October 2018. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018

416. For the same reasons we do not find that the Respondents' actions are because of the protected acts done by the Claimant on the 3 or 31 July 2018. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal'. From these primary facts we are satisfied that the Respondents have acted for a particular reason, being the circumstances of the case at that time, the Claimant not wanting to meet and his employment ending on the 13 October 2018. We do not find facts to infer discrimination.

417. **4.8**. dismissed the Claimant for gross misconduct on 11 October 2018;

418. We find that the principal reason for the Claimant's dismissal by the Respondent on the 11 October 2018 was their genuine belief of the Claimant's misconduct. We accept that Mr Ezrine genuinely believed the Claimant had committed acts of gross misconduct and that this was based on reasonable grounds, in particular in respect of allegation 4 which was not responded to by the Claimant.

419. We do not find that the Claimant has shown that a ground or reason for this detrimental treatment to which he is subjected is a protected disclosure he made. The Second Respondent has shown, based on the facts we have found, that he genuinely believed the Claimant was guilty of gross misconduct. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018

420. For the same reasons we do not find that the Respondents' actions are because of the protected acts done by the Claimant on the 3 or 31 July 2018. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal'. From these primary facts we are satisfied that the Respondents have acted for a particular reason, being they genuinely believed the Claimant was guilty of gross misconduct. We do not find facts to infer discrimination.

421. **4.9**. refused to provide the Claimant with a proper right of appeal against dismissal (between 19 October 2018 and 16 November 2018).

422. We do not find that the Claimant has been refused a proper right of appeal against his dismissal in the circumstances of this case.

423. We do not find that the Claimant has shown that a ground or reason for this detrimental treatment (if he were subjected to it) is a protected disclosure he made. The Respondents have shown, based on the facts we have found, that they acted the way they did due to the circumstances of the case at that time, the Claimant not wanting Mrs Ezrine to hear his appeal and requesting a speedy response. We do not find that the Respondents' actions are materially influenced by a protected disclosure potentially made at some point between March and May 2018

424. For the same reasons we do not find that the Respondents' actions are because of the protected acts done by the Claimant on the 3 or 31 July 2018. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on 'what inferences it is proper to draw from the primary facts found by the tribunal'. From these primary facts we are satisfied that the Respondents have acted for a particular reason, being the circumstances of the case at that time, the Claimant not wanting Mrs Ezrine to hear his appeal and requesting a speedy response. We do not find facts to infer discrimination.

425. As we have noted above during the cross examination of the Claimant about the appeal process he confirmed, when asked if he were reinstated by Mr Wells what would happen, if the appeal was overturned for gross misconduct then made redundant shortly after, that being made redundant is one thing but being accused of gross misconduct is not something prepared to swallow. This response does seem wholly consistent with what we have found that the termination for the restructure is of less significance to the Claimant suggesting it was not unreasonable, particularly as he had identified a need for a restructure also.

426. For all these reasons it is the unanimous judgment of the Tribunal that the complaints of unfair dismissal, detriments for making a protected disclosure, automatic unfair dismissal (section 103A Employment Rights Act 1996), harassment related to nationality, and victimisation, fail and are dismissed.

427. As to the complaint of **wrongful dismissal (issue 14)**; was the Claimant dismissed in circumstances that amounted to a breach of contract?

428. The Claimant has not admitted that the motives for his actions amounted to gross misconduct and he claims that he has been wrongfully dismissed.

429. It is for the Respondent to show on the balance of probability that the Claimant actually committed the gross misconduct alleged. Although we accept that Mr Ezrine genuinely believed matters, particularly with regard to the Quidditch file and allegation 4, we do not find that the Respondent has discharged this burden. We have not been presented any of the meta data for example to show the data base download. Mr Ezrine himself accepted that the soliciting of staff allegation was less serious, and there are concerns as to the impartiality of the interviews where Mr Ezrine sat in the meeting.

430. We do not find that the Respondent has proven on the balance of probability that the Claimant has committed an act of gross misconduct, so for these reasons it is the unanimous judgment of the Tribunal that the Claimant's complaint of wrongful dismissal (notice pay) succeeds.

431. For completeness as to the "**REMEDY ISSUES (to be considered at liability stage)**", based on the findings we have made the relevant findings to make about these is that the Claimant's employment would have ended in any event on the 13 October 2018.

432. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 26; the findings of fact made in relation to those issues are at paragraphs 30 to 246; a concise identification of the relevant law is at paragraphs 249 to 309; how that law has been applied to those findings in order to decide the issues is at paragraphs 310 to 431.

Employment Judge Gray
Date: 4 July 2021

Judgment and Reasons sent to the Parties: 09 July 2021

FOR THE TRIBUNAL OFFICE