



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

BETWEEN: Dr A Pober **CLAIMANT**

AND

The Money and Pension Service **RESPONDENT**

ON: 13-16 and 20-21 April 2021

Appearances

For the Claimant: In person

For the Respondent: Mr T Brown, counsel

REASONS

Given at the request of the Claimant following oral reasons delivered at the end of the hearing.

1. By a claim presented on 23 March 2020 the Claimant, Dr Angela Pober, claimed that she was unfairly and wrongfully dismissed. She has insufficient service to bring a claim of “ordinary” unfair dismissal and her application to amend her claim to include a claim that she was dismissed for making protected disclosures was allowed by subsequent amendment. The Respondent’s case is that the Claimant was dismissed because she had not met the standards required for the post.
2. Dr Pober also brings a claim of breach of contract. It is her case that she was contractually entitled either to 3 months’ notice, or to notice for the remaining 18-month period of her two-year fixed term contract. She says that her employment was not subject to a probation period. The Respondent’s case is that the Claimant was within her probation period when she was dismissed and was therefore only entitled to one month’s notice. (The Claimant’s outstanding case for unpaid wages fell away as the

Claimant confirmed that she had recovered an overpayment of tax and had received due holiday pay.)

3. We had a considerable discussion at the start of the hearing as to the specific protected disclosures relied upon by the Claimant. These were finally agreed and are set out in the Appendix to this judgment, (numbered for ease of reference) save that the date for the disclosure to Mr Buckingham was agreed to be 27th December (2479) (rather than 27th September.)

Evidence

4. This was a remote hearing by videoconference (CVP). I heard evidence from the Claimant and, on her behalf, from Mr A Jacura, Mr Ben Leighton and from her partner, Mr Ian Stevens. In addition, I read witness statements given on the Claimant's behalf by Mr Marvin Smith, Ms Vinuyon Modupe Ramos, Mr James Spender and Mr Andrew Okwara which were not challenged by the Respondent.
5. For the Respondent I heard evidence from Mr David Reid, Mr Tim Reichardt, Ms Sarah Porretta, Mr Christopher Curry, Ms Jenny Liebenberg, and Mr Steve Buckingham. I had an electronic bundle of documents running to over 4,000 pages. (References to page numbers in the bundle are to the electronic page numbers).

The relevant law

6. I start with a brief reference to the law that applies in this case. Section 103A of the Employment Rights Act 1996 provides that:-

“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”.

7. In this case, because the Claimant has less than 2 years service, she needs to establish that the Tribunal has jurisdiction to hear her claim, by showing that the dismissal was for an automatically unfair reason. If she was not dismissed for making protected disclosures, then the Claimant does not qualify for the right to argue that her dismissal was unfair for any other reason.
8. The term protected disclosure” is defined in Section 43A of the Act as a “qualifying disclosure” which is made in accordance with sections 43C to 43H. 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 of the matters set out in subsections a to f. In this case the Claimant relies on sub- paragraphs b and d namely that the information tends to show...(b) “that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject” or (d) “that the health and safety of any individual has been, is being or is likely to be endangered”.

9. In considering the public interest test, the workers belief that the disclosure was made in the public interest must be objectively reasonable (even if it is wrong), but the disclosure does not need to be in the public interest per se. Nor are the worker’s reasons for making the disclosure strictly relevant.
10. Section 43L specifically provides that a disclosure of information will take place where the information is passed to a person who is already aware of that information. On the other hand a disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that “In order for a statement or disclosure to be a qualifying disclosure., it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).”
11. Guidance on how to approach the question of whether a protected disclosure has been made was given in *Blackbay Ventures Ltd v Gahir* 2014 IRLR 416. In *Eiger Secrities LLP v Korshunova* UKEAT/0149/16 the EAT held that those claiming whistleblowing protection will have to identify the obligation that has or might be breached. “The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.”
12. The claim for unfair dismissal was therefore about the reason for the Claimant’s dismissal. It was not about whether or not the Claimant was good at her job, nor was it about the process which led to the dismissal, unless either of those matters had some evidential value in showing what was the real reason for the dismissal. Much of the Claimant’s evidence was however directed at justifying her various decisions.
13. The claim for breach of contract was about an interpretation of the contract between the Claimant and the Respondent. What was the period of notice to which the Claimant was entitled?

Relevant facts

The issue of the notice period

14. The Claimant Dr Pober is a senior individual who has had a successful career in programme management and has a PhD in pensions governance. She joined the Respondent on 1 July 2019 as Implementation Director of the Pensions Dashboard Program at the Respondent. Her contract was for a fixed 2 year term.
15. The Claimant's appointment was confirmed in a letter of 5th June (312). This stated that the role was a fixed term 2 year contract reporting to the Principal, Mr Curry. It set out the principal terms of her employment under a number of headings (start date, salary, pension etc) and was based on a pro forma. The blanks in the pro forma were not all completed. Under "Start Date" the letter stated that "*Your start date will be TBC continuing in until it terminates on TBC*". Under a heading "Probation Period" it provided that "*1. Your probation period starts from TBC and will last until TBC. 2. During this probationary period, either party may give one month's notice*". After the probation period the notice period was stated to be 3 months.
16. That letter of appointment (in that form) was signed by both Ms Liebenberg on behalf of the Respondent, and by the Claimant on 5th and 7th June respectively. A subsequent letter (2500), also dated 5th June 2019 and addressed to the Claimant, identified a start date of 1st July 2019, a termination date of 30th June 2021 and set out that the probation period was from 1 July to 31 December 2019, but there was no evidence that this letter was ever sent to or seen by the Claimant, and I accept that it was not.
17. The Claimant also had a copy of the Staff Handbook which was said to be non contractual. There is a Probation Policy contained within it, which states that the probationary period would normally be for 6 months unless the employment contract stated otherwise. The Claimant was familiar with the Staff Handbook and had used it in connection with her management of those individuals who she line managed. The Claimant did not query with any member of HR or her line manager, Mr Curry, what her probation period was until after she had been told that her contract was to be terminated.
18. On 14 October 2019 the Claimant attended a meeting with Mr Curry. The Claimant had been told that the meeting was to discuss her objectives and probation and it was noted in her own diary as a "mid Term Probation Review. (408). During this meeting Mr Curry told the Claimant that her relations with her team were a major risk to her passing her probation. The Claimant did not object and I conclude from this that the Claimant understood at that time that she was still in her probation period, and that it was for 6 months.

19. The Claimant's case is that no probation period applied to her because her contract said that her probation period was TBC and it had never been confirmed. The contract did clearly state that there was a probation period- the issue was how long that period was. It also did not contain a start date or a termination date. It is plainly a pro forma document which had not been properly completed by Ms Liebenberg before being sent to the Claimant.
20. The Claimant was also aware of the Probation Policy which provided that the probationary period would normally be for 6 months, "unless the contract provided otherwise". The Claimant's contract did not provide otherwise. Having attended a meeting headed "mid-term probation review" after she had been in post for just over 3 months, received a contract which stated that she had a probation period, and a copy of the Staff handbook the only implication that can be drawn is that the Claimant understood that a 6 month probation period applied to her contract. The reference to tbc was, as the Claimant must have been aware, an oversight.
21. I therefore conclude that the notice period to be given to the Claimant was one month. The Claimant also complains that there was no PILON clause in her contract, so the Respondent was not entitled to pay her one month in lieu of notice. She is of course strictly correct. In not giving her one month's notice the Respondent was in breach of contract, they should have required her to work it. However, the remedy for that breach of contract is to pay the Claimant damages equal to the sum of money she would have received during her notice period. Having received that amount there are no further amounts to be paid.

What was the reason for dismissal?

22. I turn now to the other issue in this case. It is the Claimant's case that she was dismissed because she made protected disclosures. Mr Curry says that while the Claimant was technically good at her job, her relations with both her team, external stakeholders and Respondent's business partners were poor, that she was unable to work collaboratively or to properly take leadership responsibility for the programme.
23. The Claimant has understandably been affronted by this assessment. It is her case that it is not credible that with all her years experience and a successful career till then, she would not be able to lead and manage a program and that the real reason for her dismissal must be her protected disclosures. I therefore looked critically at the evidence of all witnesses and the underlying documentation to consider the reason for the dismissal.

24. It is the Claimant's case that she was dismissed because she made protected disclosures principally in relation to 3 different matters. It is the Claimant's case that she disclosed information
- a. that holidays were not being booked properly by members of her team which meant that holiday allowance could be taken multiple times, and that turning a blind eye to holiday logging was breaking the civil service code of conduct and could cost taxpayers money.
 - b. that Emily White, a contractor, was being treated outside of IR35 in that she was not being required to deliver her deliverables and consequently was being treated as an employee.
 - c. that Cap Gemini, a contractor on the project, would be given an unfair advantage in bidding for future work
25. The disclosures that the Claimant relied on had been the subject of some disagreement prior to the hearing, but were as set out in the Respondent's schedule with the addition of a further disclosure made on 17 September giving me a total of 10 disclosures.
26. It is not in dispute that the Claimant was employed on a fixed term 2 year contract commencing on 1 July as Implementation Director of the Pensions Dashboard Program at the Respondent. The Pensions Dashboard Programme is a programme to design and implement the infrastructure to make pensions dashboards work. Mr Curry explained that pensions dashboards would enable individuals to access their pension information online, securely and all in one place, supporting better planning for retirement. "Dashboards will provide clear and simple information about individuals multiple pension savings, including their state pension. They will also help them to reconnect with any "lost" pension pots."
27. The role of Implementation Director was a senior role. The Claimant was responsible for day-to-day operational performance of the programme to include day-to-day operational performance, detailed planning, definition of scope resourcing and reporting. Her responsibilities are set out in her job description (299) and include an obligation to work with colleagues to foster teamwork and good ways of working.
28. When the Claimant began her employment she had a small team consisting of 4 secondees from the DWP (Mr. Reichardt, Mr Frankham, Mr Chantler and Ms Flinn) who were already working on the programme. The project was also assisted by a contractor, Ms White, and a team of 5 contracted from Cap Gemini. She reported to Mr Curry who was also new to the project. He started working on the programme one week after the Claimant and was contractually committed to work 21 hours a week for the programme.

29. On 11th September Claire Talbot, the DWP policy lead for the pensions dashboard called Mr Curry to say that Mr Reichardt the senior DWP secondee in the Claimant's team was thinking of resigning. Mr. Curry spoke to Mr Reichardt who told Mr Curry that he couldn't continue to work in the team due to how he was being managed and the poor work atmosphere. He resigned on 12 September. He attended an exit interview on 20th September 2019 (950) during which he was highly critical of the Claimant, blaming her leadership on his decision to resign and making some very strong criticisms of her management and leadership.
30. At around the same time some of the other DWP secondees had bought tickets to attend a test match at the Oval cricket ground in London on 16th September but had not booked this day as annual leave through the Respondent's holiday system, Cezanne, nor had they asked the Claimant for permission to take the day off. When the Claimant found out about this on 13th September the Claimant emailed the team to say that said that she expected the whole team to be on Monday as there were no outstanding requests for days off awaiting her approval in Cezanne. (2258). Mr Reid responded by accepting that he had not made any formal arrangements to take the day off, that he had speculatively bought a ticket for the 5th day of the test which he had not expected to go ahead, that he kept his diary clear, had providing an explanation for not recording the leave on Cezanne and had nothing particular to be done and asked if she was content for him to have days leave. He continued *"these are ordinarily the kinds of things that I would talk to a line manager about in a one-to-one, but we have only had a couple and the last one was over 3 weeks ago. This scenario highlights that we have not had any conversations over the last 10 weeks about ways of working, which we ought to have urgently."*
31. Mr Reid's email was impliedly critical of the Claimant, but I agree with Mr Curry's assessment that the Claimant's response to that email (2255) which she compiled over the weekend, was confrontational, overly defensive and that she sought to justify her position and blame others. The Claimant explains that she was particularly upset at that time because Mr Reichardt had resigned, and she had been unaware of this until Mr Curry told her in a telephone call at 7pm on 13th September. She had had to give up her Sunday to work on the email. Although she told the Tribunal that she had then agreed that members of the team could take Monday off, that is not a fair characterisation of her email. Mr Reid was told that if he took the time off it would be "unapproved absence" suggesting that he would be in the wrong if he took the day off. In the event there was no cricket on Monday 16th and Mr Reid worked as normal. The Claimant wanted to take disciplinary action against some of the team at the time but was dissuaded from doing so by Ms Liebenberg.

32. The Claimant spoke to Mr Curry on 16th September to complain that the DWP secondees were not booking the day off in Cezanne properly which meant she was not aware that they had taken leave. This is the first pleaded protected disclosure. I accept Mr Curry's evidence that the Claimant did not say that this failure to book leave in Cezanne meant that holiday allowance could be taken multiple times. The Claimant does not deal with this alleged disclosure on 16 September in her witness statement, and, in cross examination, she said that her concern was about when it was taken, whether it had been approved and how much notice was given - as the policy required individuals to give a number of days notice when asking for leave).
33. On 17th September there was a subcommittee meeting. In her witness statement the Claimant says that at the meeting she "aired her concerns which led to the emails about holiday bookings, in that the same holiday day was being taken several times if not logged." However, in cross examination the Claimant accepted that she did not raise the issue of unauthorised leave as, by then, she had become aware that no unauthorised leave had been taken. Although her agenda referred to unauthorised absence, this was because she had written it on Sunday night before she had been aware of the true position. I conclude therefore that the Claimant did not say at the time that the same holiday day was being or could be taken several times if it was not logged.
34. On 25th September 2019 the Claimant met with Mr Curry and Ms Liebenberg. During that meeting Mr Curry and Ms Liebenberg expressed concerns to the Claimant about her leadership style and informed her that it was the view of members of the team that she was not listening to them. The Claimant was defensive and rejected any criticisms. The meeting resulted in an offer of Executive Leadership Coaching, which was subsequently provided by Ms Parsons
35. It is the Claimant's case that she made a disclosure during this meeting - described in the issues as a disclosure that holidays were not being booked properly which would mean that holiday allowance could be taken multiple times. However, the Claimant's account of that meeting (paragraph 134 of her witness statement) makes no reference to any disclosure. Instead she focuses on her perception that Ms Liebenberg had been aggressive and belittling to her during the meeting. Both Mr Curry and Ms Liebenberg say that the Claimant did raise a concern that the DWP's secondees were not booking their holidays in accordance with the Respondent's policy, but it is their evidence that her issue was compliance with policy, and she did not also say that that meant that holidays could or were likely to be taken multiple times, thereby putting an unnecessary drain on the public purse. On the balance of probabilities, I

accept that evidence. (In her witness statement the Claimant does say that she told Ms Liebenberg on 16th October that, as a line manager, she was contractually obligated to follow HR policies otherwise holidays could be reused and taken multiple numbers of times or cashed in at the end of the year; and that telling her to actively turn a blind eye to holiday logging meant that she was breaking the code of conduct. This is not identified as a protected disclosure and it was not put specifically to Ms Liebenberg in cross examination nor is it referred to in Ms Liebenberg's contemporaneous report of that meeting to Mr Curry. I conclude either that it was not said or, if it was said, Ms Liebenberg thought it sufficiently unimportant not to report it to Mr Curry.)

36. There was also no evidence before me that the Claimant made any such disclosure to Mr Jones on 1st October. There was nothing in the Claimant's witness statement with dealt with disclosures made to Mr Jones, Ms Liebenberg or Claire Deo on 1st October.
37. On 18 September Mr Oakley of Cap Gemini had told Mr Curry that the Claimant was not right for the Programme and was difficult to work with. Mr Curry passed this feedback on to the Claimant. The Claimant's response was set out in an email dated 27th September and is relied on as a protected disclosure (1023). She said that Mr Oakley considered her difficult to work with because she had refused to give Cap Gemini inside information which might give them an unfair advantage when bidding for future work. *"I have asked him to call you to confirm that this comment emanated from the team's requests for me to give them insight into how the programme was being planned and where their deliverables fitted into the bigger picture and my refusal to tell them as this was not a consultancy contract it was a contract for individual deliverables and any more insight may have given them an unfair advantage over any other bidder. Matt said he was not aware of any potential conflict as he obviously would not have known about future lots. Therefore the 'difficult to work with' comment comes from me keeping the field of play fair to all which he and his team were not party to and did not have to be."*
38. I read this email as the Claimant justifying herself to her line manager. This does not disclose information which tends to show that a legal obligation has been or is likely to be breached. Quite the contrary it is the Claimant saying that the reason that Mr Oakley thinks she is difficult to work with is that she is preventing a breach of a legal obligation.
39. Ms Talbot, the DWP Deputy Director Strategy and Private Pensions and who was in charge of the DWP secondees on the Claimant's team, emailed Mr Curry and Ms Liebenberg on 9th October referring to concerns which had been raised about the Claimant's leadership style and

behaviour with the team and contractors as well as concerns about the delivery of the project (1139). It is apparent from this contemporaneous document that both Mr Reid and Mr Chandler had reported to Ms Talbot that they were at breaking point and Mr Reid at least was considering leaving. It was the view of Ms Talbot that, if they left, it would be a risk for the project as their skills and experience and knowledge could not be commercially brought in. Ms Talbot offered to be a coach or buddy for the Claimant to help her understand the new environment that she was operating in

40. On 1st October the Claimant spoke to Mr Curry about Mr Frankham, a DWP secondees in her team. She considered that it was not right he could accrue lieu days by working beyond his contracted hours. The Claimant was challenging the Respondent's policy of lieu days but was not suggesting that it was or might be unlawful. (This is not covered in the Claimant's witness statement nor was Mr Curry cross-examined about this.)
41. The Claimant's witness statement does not refer to her pleaded disclosure to Mr Jones on 1st October save that (para 155) she says that she told Ms Liebenberg on 16 October that she had spoken to Mr Jones on 1st October to the effect that she was contractually obligated to follow the Respondent's HR policies which included holiday logging - otherwise holidays could be reused and taken multiple numbers of times or cashed in at the end of the year and that Mr Jones had told her not to break the civil service code. It is an odd thing not to have recorded in writing, given the importance that Claimant says that she attached to this, and I doubt that the conversation was in those terms. If it was then it was not passed on to Mr Curry who took the decision to dismiss the Claimant.
42. On 3 October 2019 the Claimant emailed Louise Power (1160) to ask for advice. She set out that the ethical wall at Cap Gemini had been breached, which meant that the Cap Gemini team who wished to bid for new work would know costings in the budget which other bidders should not know. She queried whether that would preclude them from bidding. This a query rather than a disclosure of information amounting to a protected disclosure.
43. On 8 October 2019 there was a meeting of the subcommittee. During this meeting the Claimant presented the Risk Dashboard. In the list of issues the Claimant says she was concerned "a member of the governance regime, Yvonne Braun of the ABI having a conflict of interest – as recorded in paras 8.3, 8.4 and 17.2 of the minutes. The Claimant does not deal with this in her witness statement.

44. The relevant sections of the minutes note that the Claimant referred to her concern that Cap Gemini had been recruited into an ABI consortium. Another note records that when the chair asked why the impact on the register was so high for “Senior Stakeholder Expectations” the Claimant had responded that the risk for Senior Stakeholder expectations was high because there was one very strident stakeholder. In cross examination the Claimant said that this was that this was a reference to Ms Braun of the ABI having a conflict of interest. The Respondent’s witnesses on the other hand all said that this was a reference to the Minister for Pensions, who was prone to overpromising. Given the context I prefer the evidence of the Respondents witnesses that the Claimant was not referring to Ms Braun.
45. On 9th October the Claimant chased the advice on any conflict-of-interest in the tender process regarding Cap Gemini. Ms Power responded (1160) “I would need to understand the details to be able to give appropriate advice, but it is almost certainly sounds like Cap Gemini would be precluded if they were privy to the budget/costings”. This was not a disclosure of information but a query which was appropriately answered. There was no suggestion that the Respondent was likely to fail to comply with the breach of the legal obligation.
46. Before the Claimant was appointed Ms White had been engaged on the project as a contractor. The Claimant did not think that Ms White was doing a good job.
47. On 11th October the Claimant emailed Mr Curry expressing concern that Ms White was going to Manchester for a conference, taking her out of the office for 3 days. She said that she needed Ms White to be in the office working on her schedule for her and that she could not be in Manchester. The email assumes that Mr Curry had asked Ms White to go to Manchester thereby diverting resources from the Claimant to him without speaking to her. In fact, Mr Curry had not asked Ms White to go to Manchester. The Claimant says she was not accusing simply asking, though it is fair to say that the email is expressed in terms which most people would read as being angry and accusatory.
48. The issue of Ms White was discussed at the mid-term probation review meeting on 14th October under the heading of “Team Relations”. The Claimant says she told Mr Curry that Ms White had to complete her deliverables at her cost and in her own time because that was what was required by IR35. In cross examination the Claimant said that her concern was that Ms White was underperforming and that, by allowing her not to perform, the Respondent would be in breach of IR35. The Claimant said she needed to treat Ms White differently because of her status as a contractor and that her attendance at external events was not consistent

with her role as a contractor and she should be working in the office. Mr Curry's concern was for sensitive team handling.

49. The Claimant's evidence that she was making a disclosure that the Respondent was breaching IR35 does not accord with contemporaneous evidence. In an email from the Claimant to Mr Curry dated 14th October she told him that "all rules around IR35 are being observed so we as a program and as MaPs stay within the law." At best the Claimant was concerned with a potential breach of IR35 if Ms White did not deliver her contractual obligations. Mr Curry, however had a different view about Ms White's performance.
50. On 20th October Ms Liebenberg reported to Mr Curry that the Claimant was trying to bypass the Respondent's recruitment principles and processes (2496) and had been ignoring advice given to her about the Respondent's recruitment principles and processes. This had in turn been reported to her by Ms Deo of HR.
51. At about the same time Mr Curry also became aware that the Claimant did not wish to retain the DWP secondees on a long-term basis. Ms Deo had been brought in to assist the Claimant's recruitment; but by 11th December she emailed Mr Curry asking for Ms Deo to be removed as her HR Business Partner with immediate effect because the Claimant believed that she was jeopardising her efforts to recruit. Mr Curry's view was that Ms Deo was trying to ensure compliance with the Respondent's recruitment policies.
52. The Claimant and Mr Curry discussed the renewal of Ms White's contract on 19 December 2019. Mr Curry understood that they had agreed to renew Ms White's contract. However, the Claimant subsequently told Mr Curry that she did not want to extend the contract and that, while he might have been under the impression that she had agreed to an extension, she had not agreed; she had simply remained silent during the discussion. I accept that Mr Curry genuinely felt that the Claimant's approach was unhelpful and less than transparent. The Claimant defended her position by saying that Ms White was failing to complete her tasks and taken time off without providing a substitute. She did not agree with Mr Curry's view that it was unfair to expect Ms White to provide additional resources from her company "despite the contract and IR35 stipulation to ensure deliverables are completed in accordance with her contract with MaPS".
53. On 28th November the Claimant circulated a business case for a private secretary to be discussed at the subcommittee meeting on 3rd December. It was Mr Curry's evidence that the business case that was circulated to the subcommittee was for "non-compliant recruitment being offered

through a single tender action without competition” which required his express authorisation as well as approval from Finance, commercial, and Human Resources. The Claimant had told him that he need not look at the business case before it was circulated and that, as a result, he and the programme looked unprofessional in front of the subcommittee. The subcommittee expressed their concerns about this.

54. Over the period of the Claimant’s employment the Claimant’s view and Mr Curry’s views about the leadership, management and resourcing of the project had become increasingly misaligned. Mr Curry’s views were that the Claimant was upsetting the DWP team by her management style. While the Claimant did not believe that Ms White was delivering, Mr Curry had a different view and believed that her contract should be extended. Mr Curry considered that retaining the DWP secondees on the project was important for the success of the project, while the Claimant did not. Mr Curry believed that the Claimant was unnecessarily adversarial and was unwilling to take on board constructive feedback. He also believed that the Claimant was not keeping him properly informed of her plans.
55. On 6th November 2019 Mr Bateman of the DWP told Mr Curry that the Claimant spoken to the DWP about the remaining DWP secondees returning to the Department. Mr Curry was concerned, both because he disagreed with the concept that the DWP secondees should be returned, and also because the Claimant was not informing him of her thinking. The Claimant told Mr Curry that she was only asking about the process of returning them, but he considered that she should have been aware of the importance that he placed on the secondees remaining with the programme.
56. On 4 December 2019 there was a Steering Group meeting. The Claimant had added to her presentation for agreement, at short notice and without Mr Curry’s knowledge, detailed proposals to add a further industry group to the governance of the programme. This possibility had been discussed at the earlier subcommittee meeting on 3rd December at which the Claimant had been warned that the proposal would cause difficulties with the industry representatives on the Steering Group and would need careful handling. Mr Curry was dismayed when, despite the warning, the Claimant went ahead with presenting those proposals.
57. The Claimant met Mr Curry for a 1-2-1 on 9th December (2231). Amongst other things he told her that he still had serious concerns about her relationships and communications with team members and overall ways of working, that the Claimant’s approach was very different from his and that the Claimant managed deliverables rather than individuals or relationships. The Claimant did not accept that. Mr Curry said that he was not comfortable with the Claimant’s approach and said there had been a

number of things that Mr Curry thought had been agreed with her which she had subsequently differently. The Claimant's response was that things changed.

Termination of Employment

58. On 13th December there was a conference call to clarify the discussion surrounding returning secondees to the DWP. Mr Curry concluded from that meeting that the Claimant had no interest in retaining the DWP secondees as part of the programme. Following that discussion Mr Curry asked the Claimant to stay on the line and told her that he continued to have serious concerns about her performance and her handling of the team, that her employment would be terminated at the end of the probationary period on 31 December 2019 and that she should attend a final Probation Review Meeting on 19th December.
59. A follow-up letter of the same date (2219) informed the Claimant that it was his assessment that she had not met the standards required for her role and that he had decided not to confirm her in post but to terminate her employment. At the same time she was invited to a formal review meeting on 19th December at which there would be "an opportunity to discuss my assessment and few to provide any responses you wish to make.". She was sent some further documentation (2277 – 2284) which contained meeting notes from 14 October, 28th November, 9th December and the Claimant's response to the meeting note prepared by Mr Curry of the 28th November meeting.
60. On 17th December the Claimant sent Mr Curry her (critical) feedback on his performance.
61. At the start of the final probation meeting on 19th December the Claimant said that the probationary process had not been followed. She also said that the probationary period did not apply to her and that she had not received a copy of the employment contract which included the dates of any probationary period. The meeting was then cut short as the Claimant had to leave work.
62. Later that day (19 December 2019), the Claimant raised a grievance against Mr Curry. On 20th December Ms Deo wrote to the Claimant recording what had taken place at the meeting on 19 December and informing her that, as a result of the grievance she had raised against Mr Curry, Mr Buckingham would be making the final decision whether to terminate her employment. She was invited to send any submission she wished to make to him by 23rd December. The continuation of Final Probation Review Meeting was conducted by Mr Buckingham, Chief

Financial Officer at the Respondent, by way of a telephone conference on 27th December.

63. Mr Buckingham had had some interaction with the Claimant as he had been present at the Pensions Dashboard Sub Committee of 12th November where the Claimant had presented a business case for funding the IDG without this having been supported by Finance. He had been critical of this at the time as had one of the Directors Ann Harris. (1516). Before the meeting on 27th December he also reviewed a number of relevant documents, considered the Claimant's submissions and the 360° feedback.
64. Mr Buckingham wrote to the Claimant on 30th December saying that he supported the decision of Mr Curry that the Claimant's performance during probation has been unsatisfactory and did not meet the required standards and that her employment should be terminated as of 31st December with one month salary in lieu of notice.
65. Mr Buckingham told the Tribunal that he had considered the issue of the Claimant's employment independently and that he would have been prepared to continue her employment if he disagreed with Mr Curry. He also says that he was unaware that the Claimant had made any of the protected disclosures. He told the tribunal that he had noted that the issues described by Mr Curry were about collaborative working, relationship management and communications with team members. I accept that when asked about these matters during the Probation Review Meeting the Claimant did not respond qualitatively to the examples that were given but effectively denied that there was an issue. The notes support that assessment.
66. I accept that Mr Buckingham was not aware of the Claimant's alleged disclosures save to the extent that during the 27th December meeting the Claimant told Mr Buckingham that Ms White was outside IR35 as she was not delivering, and that Mr Curry had no commercial or business rationale for retaining her and that she had to ensure that public money was spent wisely.
67. The Claimant appealed and her appeal was heard by Ms Porretta on 24th of March 2020. The Claimant did not accept that relationships had gone so badly wrong as to be irreparable and said that there was no evidence to support the opinions of Mr Buckingham and Mr Curry. After the telephone hearing Ms Poretta spoke to Mr Reinhardt, Mr Reid, Mr Curry, Mr Johnson, Gill Parsons (executive coach), Tim Jones, and Mr Buckingham as set out in her witness statement. She upheld the decision to dismiss the Claimant.

Other evidence

68. In addition to the evidence of Mr Curry and Mr Buckingham who took the relevant decisions the tribunal heard from Mr Reichardt, Mr Reid and Ms Liebenberg. Both Mr Reichardt and Mr Reid were critical of the Claimant. Mr Reid considered that the Claimant “exhibited an inherent mistrust of the team” and gave examples. He referred to her lack of understanding of how public sector organisations work and her unwillingness to accept advice from the team. He said she was not providing any coherent leadership and that none of them knew what she was doing. there were other criticisms. Mr Reichardt was similarly critical referring to “little or no interaction with any of the team”, “fundamental misunderstandings about the programme” “a failure to understand the urgency of delivery”, “unrealistic promises”, lack of openness, poor behaviour to external consultants and confusing meetings. Mr Reichardt felt so strongly about her leadership he resigned from the programme and returned to the DWP, taking a drop in remuneration as a result. After the Claimant had left, he returned to the Respondent.
69. Ms Liebenberg gave evidence that the Claimant’s approach could be confrontational and that she wanted to discipline colleagues rather than develop relationships with them and that, at the meetings which she attended, the Claimant appeared not to be hearing what was being said but instead chose to deflect any attempts to provide constructive criticisms. The contemporaneous evidence supports that evidence which I accept.
70. It is to the Claimant’s credit that a number of her former colleagues were prepared to provide her with witness statements and attend to give evidence on her behalf. Mr Leighton who worked as the Claimant’s private secretary (on secondment from his employer) was supportive of the Claimant’s work but was clear that there had been differences of opinion between the Claimant and Mr Curry, including a heated discussions about the performance of Ms White and challenges in the relationship with the DWP secondees.

Conclusions

71. The Claimant has to establish that she made one or more protected disclosure and that this was the principal reason for her dismissal.
72. The Claimant relies on 3 broad heads of disclosure. Unauthorised holiday, breaches of IR35 and conflict of interest relating to Cap Gemini.

73. The Respondent's case was that the decision to dismiss was made by Mr Buckingham. However, the letter from Mr Curry sent to the Claimant clearly refers to his decision to terminate her employment. Although she is then invited to a Probation Review Meeting, the letter is clear that the decision to terminate has been made. Nor does the letter of 19th December suggest that at that meeting the decision may be reversed; rather the meeting is billed as "an opportunity to discuss my assessment for you and to provide any responses you wish to make." If the Review Meeting had been taken by Mr Curry as originally envisaged there was no suggestion that he might reverse his view. In my view the real decision-maker was Mr Curry, and I consider that Mr Buckingham's involvement was more in the nature of an appeal. However, for the sake of completeness, I considered both the reasons given by Mr Buckingham and the reasons given by Mr Curry.
74. I start with the reasons for dismissal because in my view the evidence was clear that the Claimant was dismissed because of genuine concerns that Mr Curry had with the Claimant's management of her team and her relationships with stakeholders, which I have outlined above. It was largely unnecessary for me to consider whether or not matters relied on by the Claimant amounted to protected disclosures, because I was satisfied that none of those matters (whether or not they satisfied definition in section 43 of the Employment Rights Act 1996), were the principal reason for the Claimant's dismissal. Mr Reid and Mr Reichardt were very clear that they had very little faith in the way that the Claimant was managing them and the programme as a whole. Mr Curry was entitled to, and did, take their views seriously, especially as Mr Reichardt, who had led the DWP secondees until he left, had felt so strongly that he was prepared to leave the programme despite the fact that he had no immediate role at the DWP to return to. Mr Curry considered that the DWP secondees were central to the project. Mr Reid, like Mr Curry, considered that the Claimant was not collaborating effectively with the team at Cap Gemini. These are serious matters and I accept that Mr Curry was genuinely concerned that the Claimant was not establishing good working relations with her team and had had upset key individuals at Cap Gemini as well as members of the steering group. Ann Harris a non-executive director had also expressed her reservations in a number of emails (962) (2880).
75. It is clear from the probation meeting notes and subsequent emails that these issues were discussed with the Claimant a number of times. However, by early December the position had not improved, and there was poor communication between the Claimant and Mr Curry and a misalignment of their favoured approaches to issues. I am satisfied that Mr Curry genuinely considered that the Claimant was not right for this particular job, despite being technically good and her excellent qualifications for it.

76. In relation to Mr Buckingham, I accept that Mr Buckingham, in confirming Mr Curry's decision, also accepted that those concerns were genuine and sufficiently serious that the Claimant should be dismissed. The concerns chimed with concerns he had himself had in his limited interactions with Claimant. The suggestion that the Respondent could be in breach of IR35 if Ms White was allowed not to deliver, was incidental to his conclusion that the Claimant was managing the programme in the way that the Respondent wanted.
77. I am also satisfied that Ms Poretta arrived at her decision to uphold the dismissal for reasons unconnected with any disclosures, protected or otherwise made by the Claimant.
78. For the sake of completeness, I have considered the various protected disclosures pleaded in this case. The Claimant's case is that she was dismissed because she made protected disclosures. These can broadly be broken down into 3 categories (i) complaints about holiday recording (ii) complaints about misuse of IR35 and (iii) a conflict-of-interest relating to Cap Gemini. There is also an alleged protected disclosure about Ms Braun having a conflict of interest, which I find was not made.
79. In relation to the holiday issues, I do not consider that the Claimant made a protected disclosure in relation to these matters. This was a complaint about internal processing and not about unlawful conduct. The Claimant had undertaken whistleblowing training at the Respondent and if she had intended to suggest that the Respondent was in breach or likely to be in breach of legal obligations then I consider that she would have made that clear in writing. As to the issue about lieu days the Claimant does not refer in her witness statement to an oral disclosure to Mr Curry and Ms Deo on 1 October 2019 about lieu days being abused. In cross examination the Claimant said that she told Mr Curry she had not known about the policy of lieu days and that this could add up to a lot of extra time off – but she was not disclosing information that tended to show that there had been or was likely to be a breach of a legal obligation. I do not accept that the Claimant disclosed information to Mr Jones about booking holidays multiple times, but even if she had I accept that Mr Curry did not know about it.
80. In any event it is clear from the evidence that I have heard that Mr Curry's concern about the holiday issue was that the Claimant's email responses were unduly harsh, contributing to the DWP secondees losing faith in the Claimant as a manager, and that the Claimant was focusing on policy and losing sight of the real issues. Ms Liebenberg had set this clearly out in her email of 16th September where she says that the Claimant has not established a working relationship with her direct reports and that "*going*

down the process route of holidays not being booked in the proper way will most likely not help you to uncover what is really going on and how you can agree to work together to achieve the business requirements.”

81. In relation to Cap Gemini the Claimant accepted that the email of 27th September does not make a protected disclosure but rather explains how the Claimant had avoided a breach of any legal obligation by her refusal allow those at Cap Gemini to get an unfair advantage in the bidding process. It is information which is used to explain Gemini's view that the Claimant was difficult to work with. The only other pleaded protected disclosure about Cap Gemini was a disclosure said to be to Louise Power on 10 October 2019. As set out above this is not a disclosure it is a query.
82. As to IR35 there were various discussions between the Claimant and Mr Curry about Ms White. Although the Claimant does suggest that Ms White has to deliver her deliverables in order to stay within IR35, I do not consider that the Claimant was suggesting that the Respondent was likely to breach its legal obligations. (This could only refer to the likelihood of a future breach, rather than a breach which had already occurred, because at the same time the Claimant represents to Mr Curry in terms that all rules around IR 35 were being observed. (2493)) The Claimant was setting the bar for Ms White and was responsible for her. She took the decision to release her and did so,
83. However, even if I were to give the broadest interpretation to the term protected disclosure to include this oblique reference to IR35 I am satisfied that Mr Curry's concern was not that the Claimant had disclosed that a failure to deliver by Ms White might potentially lead to a breach of IR 35 -- rather he was concerned (i) about the Claimant's failure to communicate her intentions regarding Ms White and resourcing generally and (ii) with the fact that he considered, which the Claimant did not, that Ms White's contribution was important to the programme.
84. None of this is to say that the Claimant is not a good manager. I note that she has brought a number of witnesses to the Tribunal who have worked for her and who wish to support her. Ms Ramos and Mr Smith had worked with the Claimant before and were pleased to work with her again. Mr Leighton worked pro bono for the Claimant for some 5 weeks and he told the Tribunal that he considered that the DWP secondees were not providing the level of support that the Claimant felt she needed. She also obtained witness statements from a member of the steering group (though this was of no evidential value) and from Mr Jacura who had interviewed a number of candidates with the Claimant, and who attended her probation review meeting as her support. 360% feedback received on the Claimant's management of those that worked for her identified that while the DWP

secondees were not happy working for the Claimant, newer recruits were enthusiastic and positive (2435) and that two of the non-executive directors also differed in their view of the Claimant.

85. The Claimant is understandably upset that the Respondent considered that she had not met the standards for the role. Much of her witness statement is devoted to explaining her actions. She says that her standards and objectives were not set and that she was not given appropriate support. It is not for me to say if that was the case or not, nor if I agree with the Respondent's assessment. The issue is whether that assessment was genuine, or was it given to hide that the real reason for her dismissal was that she had made protected disclosures.
86. The Claimant was not dismissed because she made protected disclosures and her claim for unfair dismissal must fail. I also reject the claim for breach of contract in relation to notice pay for the reasons set out above.

Employment Judge Spencer
27 July 2021

JUDGMENT SENT TO THE PARTIES ON
27/07/21.

.....
FOR THE TRIBUNAL OFFICE

Breach of contract

1. It is agreed that the Claimant's notice period during any probation period that applied to her employment was one month.
2. Was the Claimant's employment subject to a probation period of six months?
3. The Claimant says that there was no probation period.
4. The Respondent says that the Claimant's employment was subject to a six-month probation period.
5. It is agreed that the Claimant was dismissed (on 31 December 2019) within six months of the start of her employment (on 1 July 2019).
6. In light of the answers to the above issues, was the Claimant's notice period one month or three months?
7. If the Claimant's notice period was three months, there is no dispute that she is owed two months' pay.

8. If the Claimant’s notice period was one month, there is no dispute that she is owed no pay.

Unfair dismissal

9. The parties agree that the Respondent dismissed the Claimant.
10. The Respondent says that it dismissed the Claimant for performance.
11. The Claimant did not have two years’ continuous employment at the effective date of termination of her employment.
12. Does the Claimant prove that the reason or principal reason was that she made a protected disclosure (s103A Employment Rights Act 1996).
13. The Claimant relies on the disclosures set out in the Appendix to this List of Issues.
14. In respect of each such disclosure, was it:
- a. a disclosure of information which,
 - b. in the reasonable belief of the Claimant,
 - i. was made in the public interest; and
 - ii. tended to show one or more of the types of wrongdoing or failure listed in s43B(1)(b)or(d) of the Employment Rights Act 1996.
15. Did the Claimant present her complaint of unfair dismissal out of time and, if so, was it reasonably practicable for the Claimant to have presented the complaint within the ordinary time limit.

Appendix to List of Issues: disclosures relied on

1	Date ⁱ	Medium (e.g., oral, email) ⁱⁱ	Addressee ⁱⁱⁱ	Communication relied on ^{iv}	Kind of wrong(s) ^v	Past present or future ^{vi}
1	16 Sep 19	Oral	Christopher Curry	Holidays were not being booked properly and this would mean that holiday allowance could be taken multiple times.	(b) (d)	Present
2	17 th September	Oral	Curry, Liebenberg,	1-2-1 Holiday booking and policy being circumvented by DWP secondees {257}	(b) (d)	

3	25 Sep 19	Oral	Christopher Curry and Jenny Liebenberg	Holidays were not being booked properly and this would mean that holiday allowance could be taken multiple times.	(b) (d)	Present
4	27 Sep19 NB should be 27 December	Oral	Steven Buckingham	Questioning whether, Emily White, a contractor was really outside of IR35 as she was being treated as an employee.	(b)	Present
5	27 Sep 19	Email	Christopher Curry	Concern about Cap Gemini relationship.	(b)	Present
6	Oct 19	Oral	Christopher Curry and Claire Deo	At 1-2-1 meetings (dates TBC by Claimant) of possible IR35 irregularities relating to Emily White as she was being treated like an employee rather than a contractor paid to deliver specific packages of work in a specified time period.	(b)	Present
7	1 Oct 19	Oral	Tim Jones	Holidays not being booked properly and this would mean that holiday allowance could be taken multiple times.	(b)	Present
8	1 Oct 19	Oral	Christopher Curry and Claire Deo	Use of taking in lieu days off by DWP secondees being misused or possibly abused if the process as described to the Claimant by Martin Frankham had been applied.	(b) (d)	Present
9	8 Oct 19	Oral with minutes	Sub Committee attendees	Concern about a member of the governance	(b)	Present

		of this meeting at s.8.3, 8.4 and s.17.2 being relied upon		regime, Yvonne Braun from ABI, possibly having a conflict of interest (as recorded in ss.83., 8.4 and 17.2 of the minutes).		
10	3 Oct 19	Oral	Louise Power	Concern about Cap Gemini relationship.	(b)	Present

ⁱ Cells in this column will contain a single date.

ⁱⁱ Cells in this column will contain a single word.

ⁱⁱⁱ Cells in this column will contain only the name(s) of the person(s) to whom the communication was sent.

^{iv} Where oral, this will be the gist of what was said. Where written, this will be the text said to amount to the disclosure (and no more and no less—so where only part of a written communication is relied on, only the part relied on will be included). The facts relied on will be underlined.

^v Cells in this column will include only the relevant letter with reference to section 43B(1), Employment Rights Act 1996, as follows:

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

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

^{vi} Cells in this column will include only the words past, present and/or future, according to whether the Claimant says that her disclosure was of facts tending to show that something *had* happened (past), *was* happening (present) or *was likely* to happen (future).