Case Number: 2201864/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr V Helenius		(1) Wells Fargo Bank National Association (2) Wells Fargo Securities International Limited

Heard at: London Central

On: 17, 21-25 and 28-29 June 2021

Before: Employment Judge Holly Stout
Tribunal Member Helen Craik
Tribunal Member Sandra Plummer

Representations
For the claimant: Simon Cheetham QC and Emily Skinner (counsel)
For the respondent: Michael Lee (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims that he was subjected to detriments for having made protected disclosures contrary to s 47B of the Employment Rights Act 1996 are not well-founded and are dismissed.

REASONS

Introduction

1. Mr V Helenius (the Claimant), through his personal service company, Simbalite Limited, was supplied by a recruitment agency (Phyton) to work for Wells Fargo ("WF"). WF is a multinational financial services business comprising a group of companies including Wells Fargo Bank National Association and Wells Fargo Securities International Limited (the Respondents). The Claimant worked for WF from 1 October 2018. He left the office on 3 December 2019 after being told that his contract was being terminated / not renewed. He did not return to work thereafter. In these proceedings, he claims that he was subjected to various detriments, including dismissal, because he made qualifying protected disclosures under s 43B of the Employment Rights Act 1996 (ERA 1996) or 'blew the whistle' (to use colloquial language).

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: fully video by Cloud Video Platform (CVP). A face to face hearing was not held because of the pandemic and the part closure of Victory House and because a video hearing was requested owing to the location of some of the witnesses.

3. The public was invited to observe via a notice on Courtserve.net. Many members of the press and public joined. Witness statements, bundles, a transcript of a telephone conversation and audio file were made available by the Respondent's solicitors to any member of the public who requested access for the duration of each Tribunal day.

4. An application by a member of the press to be permitted to broadcast parts of the audio recording (which would in substance have required an exception to be made to the prohibition in s 9 of the Contempt of Court Act 1981 on the recording and broadcast of court proceedings) was refused for reasons given orally at the hearing. In summary, we decided that broadcasting of the audio recording was not required to give effect to the open justice principle as it would not contribute to public understanding of the case, or public scrutiny of the judicial decision-making process, and in fact risked distorting public understanding by giving disproportionate prominence to the audio recording. That recording is of an after-the-event telephone conversation between the Claimant and someone who is not a witness in these proceedings and is thus of only peripheral relevance to the case. The individual concerned had also not had an opportunity to make any representations about the application.

5. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

6. The issues to be determined are as follows:-

Jurisdiction

1. Does the Tribunal have jurisdiction to determine the Claimant's detrimental treatment claims, pursuant to section 48(3) of the ERA (read with section 207B)? In particular:

1.1 Are any of the Claimant's claims prima facie out of time pursuant to section 48(3) of the ERA (read with section 207B)?

1.2 In relation to any claims that are prima facie out of time, can the Claimant show that they relate to an act or failure which was part of a series of similar acts or failures, the last of which was in time within the meaning of section 48(3)(a) of the ERA and/or that they amounted to an act extending over a period ending in time within the meaning of section 48(4) of the ERA?

1.3 If not, was it reasonably practicable for the claim to have been presented within time?

1.4 If so, was the claim presented within a further period of time which the Tribunal considers reasonable?

Protected disclosures

2. Did the Claimant make one or more protected disclosures within the meaning of sections 43A-C of the Employment Rights Act 1996 ("the ERA")? The Claimant relies on the following disclosures (here summarised):

a. The Claimant being asked to provide invoices without VAT to be processed by Phyton in the US amounted to tax fraud. Verbally. December 2018 – January 2019. To Mr Lawson and Mr Mangione.

b. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients. Powerpoint presentation (686-716, especially 691). March – April 2019. To Mr O'Brien and approximately 20 other employees.

c. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients. Verbally (but re 686-719 and 1096). June-August 2019. To Ms Reyes.

d. List of MiFID II compliance gaps would constitute 'reportable concerns' under SYSC 18 and should be deal with accordingly. Email to Ms Reyes, Mr Mangione and Ms Vanhoy (1078-1079). 10 August 2019, email at 10:56 to Ms Reyes and email at 14:23 to all three.

e. Being given a short timeframe of two days to detail complex and important issues was an ad hoc approach not consistent with SYSC 18. 10 August 2019 to Ms Reyes. Email 10:56am (1078).

f. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients (verbally during meetings), and disclosure regarding Chris Smith's name being used to register trades while he was away (pp 1379-1380). August 2019 to Ms Vanhoy, Mr Adams, Nick Bennett, Michael Hipwell and Brooke Meyers.

2.2 In relation to any disclosures of information made, did the Claimant reasonably believe that the information he disclosed tended to show that a person had failed, was failing, or was likely to fail to comply with a legal obligation to which he was subject.

2.3 If so, did the Claimant reasonably believe that the disclosure(s) of information was in the public interest, within the meaning of section 43B(1) of the ERA?

Alleged detriments

3. Was the Claimant subjected to a detriment on the ground that he made a protected disclosure(s), contrary to section 47B of the ERA? In particular:

3.1 Was the Claimant subjected to a detriment by the Respondents? The Claimant relies upon the following alleged detriments:

3.1.1. During meetings in or around August 2019, Alberto Mangione allegedly dismissing the Claimant's concerns about the seriousness of the MiFID II compliance gaps and informing him in an aggressive manner that his detailed explanations were neither required nor desired (GoC ¶16).

3.1.2. In August 2019, Alberto Mangione allegedly removing him from any further programme work on research and excluding him from MiFID II programme meetings (GoC ¶20).

3.1.3. In October 2019, Alberto Mangione allegedly blocking his appointment as EMEA Business Consulting Group Leader, as a consequence of which he was not offered the post (GoC ¶24).

3.1.4. On 3 December 2019, Alberto Mangione allegedly telling the Claimant that his contract was ending in December 2019, and that he would "make things worse" for the Claimant if the Claimant "made any more noises" (GoC ¶27).

3.1.5. The Respondents informing him that his engagement was ending on 3 December 2019 (GoC ¶34-35).

3.1.6. The Respondents allegedly instructing Phyton to withhold payment of business expenses and payments for December 2019 from the Claimant (GoC ¶36).

3.1.7. The Respondents not responding to the Claimant's DSAR within one month and providing only two emails (GoC ¶26).

3.2 If so, was the Claimant subjected to that detriment(s) on the ground that he made a protected disclosure(s)?

7. The above represents the list of issues as agreed between the parties. There was a minor dispute between them as to the scope of the protected disclosures relied on which we deal with in our Conclusions section. The Claimant also sought to rely on two additional detriments, both of which were said to be pleaded. The first was a general allegation of *"Bullying and harassing behaviour by Mr Mangione towards the Claimant"*, said to be pleaded at [33] of the claim form. We note that this point is there pleaded, together with three specific instances, two of which (i and iii) are in the agreed list of issues, but one of which (ii) is not. However, the Claimant in closing submissions did not seek to rely on those specific matters pleaded at [33], but tried to expand this into a generalised allegation of bullying and harassing behaviour.

8. Given that the parties had engaged in extensive correspondence regarding the list of issues during which the Claimant had opportunity to clarify what specific matters he was relying on in that regard (and given that a number of complaints about Mr Mangione are included in the agreed list of issues), we do not consider that we can fairly at this point include as an issue a more generalised allegation. This is not, however, a case of excluding from consideration something that is in the claim form because the position in this case is that the claim form contains a generalised allegation for which further particulars were required in order to enable a fair trial; the Claimant provided those further particulars in the process of agreeing the list of issues and he cannot now fairly be permitted to revert to the more generalised allegation. We have, however, of course considered all the evidence that we have heard about Mr Mangione's treatment of the Claimant as part of addressing the specific issues that the parties had agreed were to be in the list of issues.

9. The second issue that the Claimant asks us to include is *"Rs' alleged sullying of C's name inside and outside the orgnisation resulting in loss of further career opportunities, reputational and stigma losses"*. This is said by Mr Cheetham to be what is pleaded at [40] of the grounds of claim. Mr Cheetham was clear that he was not making an application to amend. Mr Cheetham further said that the reference to sullying of the Claimant's name was to what the parties have been calling 'the defamatory emails', but he also says that

the Claimant was unaware of the defamatory emails until he saw the grounds of resistance, which were obviously filed after the claim form.

10. What [40] of the grounds of claim in fact says is: *"Further, the Claimant is aware that Wells Fargo has sought to sully his name outside the organisation, including to Phyton, a recruitment agency with contacts throughout the financial sector"*. That cannot be a reference to the defamatory emails because the Claimant was unaware of them at the time of drafting. It is not a pleading that there has been sullying of the Claimant's name inside the organisation, and the circulation of the defamatory emails that we have seen appeared mostly to concern circulation within the organisation. No particulars of any sullying of the Claimant's name with Phyton have been provided and we have had no evidence of the same. In the circumstances, we find that the issue that the Claimant has sought to include in the list of issues before us is not what was pleaded in the grounds of claim at [40] and is accordingly (in the absence of an amendment application) not an issue before us at all. We add that even if it were, no case was advanced on the Claimant's behalf to any of the Respondent's witnesses that anything that happened with the defamatory emails was a response to the Claimant's alleged protected disclosures.

11. We emphasise that none of the foregoing is intended to indicate any approval of WF's conduct in including in the grounds of resistance allegations that it had as an organisation found to be unsubstantiated and of which it has never had any evidence. The inclusion of those matters appears to us on its face to have been simply an attempt to discredit the Claimant and prejudice the Tribunal and it should not have been included in the pleading in the way it was.

The Evidence and Hearing

12. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

13. We explained our reasons for various case management decisions carefully as we went along.

14. We received witness statements and heard oral evidence for the Claimant from:
    a. The Claimant himself; and,
    b. Gleison Cabral (Business Change Manager who worked for Wells Fargo between December 2018 and October 2020).

15. And for the Respondent from:
    a. Niall O'Brien (Head of Product Development, Equities);
    b. Xavier Vanhoy (Chief Operating Officer (COO), EMEA Markets);

c. Nigel Adams (Head of Securities Operations, EMEA);
d. Alberto Mangione (Head of Business Execution Services, Corporate and Institutional Banking Shared Services);
e. Patrick Loeffler (COO, Electronic Trading).

The facts

16. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

The Claimant

17. The Claimant is a specialist in strategic business programme management. Before joining WF the Claimant had worked for a number of other major international banks. The Claimant is well-qualified academically, holding four Master's Degrees. Whilst at the Respondent the Claimant was also studying in his own time for an MSc in Major Programme management at Oxford University, which is the leading course in the world. The Claimant completed it after he left the Respondent, gaining a Distinction on the course. The Claimant came highly recommended by referees for his technical and organisational skills, although they also noted (variously) that he sometimes 'ruffled feathers' or was not as 'diplomatic' as he should be. The Claimant for his part says he believes in 'speaking up' when there is 'wrong or injustice'.

Wells Fargo

18. The Respondents are legal entities within the Wells Fargo (WF) international financial services group. They are regulated by the Financial Conduct Authority (the FCA) and the Prudential Regulation Authority (PRA). WF's main business is in the United States (US).

19. WF has in the past been the subject of adverse regulatory findings in the US, including about 22 consent orders (the most serious regulatory action in the US). The Claimant has particularly drawn attention to WF's much-publicised conduct between 2002 and 2016 concerning fake accounts, for which the bank and certain individual managers were fined substantial sums. The Claimant has also pointed to the dismissal of a whistleblower in 2010 for which WF was required by the federal regulator to pay substantial compensation. This is all historic conduct by WF which has no direct relationship to the matters with which we are concerned.

The Respondent's policies

20. WF had not disclosed that it had a Whistleblowing Policy prior to the start of its evidence at the final hearing. It then produced a policy that states on it that it was "Published June 21, 2019". We have not been shown a policy purporting to relate to the period prior to that. This policy appears on its face to apply to contractors working for WF as they fall within the definition of Team Member in the policy. Ms Vanhoy and Mr Adams agreed that the Claimant fell within the definition as they understood it. This contradicts WF's previously disclosed Corporate Nonemployee Policy which describes contractors as not being Team Members. Mr Cheetham submitted that the Whistleblowing Policy would have been relevant evidence to have placed before Employment Judge Segal at the Preliminary Hearing. We observe that while it would have been relevant to the question of whether the Claimant was a 'worker' within s 230(3) of the ERA 1996 – a point that the Claimant did not pursue – its relevance to the question of whether he was a 'worker' under s 43K is less obvious, given that the question under that provision is who 'substantially determined' the terms on which he was engaged. However, there is no doubt that the evidence given by Ms Vanhoy and Mr Adams that the Claimant is covered by the Whistleblowing Policy contradicts the position that the Respondent took at the preliminary hearing as to the applicability of s 43K.

21. The Claimant, however, said he was not aware of any Whistleblowing Policy during his employment, although he did raise a complaint on 25 March 2019 through the Respondent's Ethics Line (which is referred to as a route for complaints in the policy). He also complained on 27 March 2019 to Alicia Reyes (Former CEO, Head of WF Securities, EMEA) that he had been told that as a 'non-managed resource' he had been 'advised not to raise compliance and governance-related concerns within the organisation' and pointed out that FCA SYSC 18 required that any 'worker' should be able to raise concerns. His email (p 654) says that he had discussed this with London Compliance and Operational Risk who agreed, which suggests that there was a policy in place prior to June 2019 which was in similar terms to the ones we have been provided with. We do not have to resolve the question of whether there was a prior policy or not, but what witnesses knew about the policy is potentially relevant.

22. The policy was not well-publicised within the Respondent at that time. The Claimant was not aware of it, and Ms Vanhoy gave evidence that at the time she was working with the Claimant she was not aware of a whistleblowing policy and she did not refer him to any policy when he specifically mentioned 'whistleblowing' to her in August 2019, but referred him on to Ms Reyes.

23. Mr Adams, who joined the Respondent in June 2019, gave quite different evidence. He said that the whistle-blowing policy was covered in induction for all employees and contractors and that as part of the induction process both employees and contractors are required to sign to confirm they have read policies. He suggested that this 'would' have happened with the Claimant too, but accepted he had no direct knowledge of what happened prior to his

starting in June 2019. He also said that the policy is covered in annual training of all staff, but he confirmed (and we so find) that his evidence in this respect relates only to the period after he had joined the Bank and, therefore, predominantly to the period after the Claimant had left the Bank.

The contractual arrangements for the Claimant's engagement

24. The Claimant commenced working for WF on 1 October 2018. He was supplied to WF by Phyton, which is a group of companies who run a recruitment agency headquartered in New York. The Claimant in turn operated through a limited company called Simbalite Limited. Simbalite had a contract with Phyton and Phyton in turn had a contract with WF.

25. By a judgment sent to the parties on 19 February 2021, Employment Judge Segal QC determined that the relationship between the Claimant and WF was one of 'employment' within the meaning of ERA 1996, s 43K, i.e. that the Claimant was someone who was not a 'worker' as defined by s 230(3) of the ERA 1996, but who 'works … for a person (WF in this case) in circumstances in which: (i) he is introduced or supplied to do that work by a third person (Phyton in this case), and (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked (WF), by the third person (Phyton) or by both of them …'. By s 43K(2) a person is an 'employer' if they substantially determine the terms. Employment Judge Segal QC found that both WF and Phyton were the Claimant's employers within the meaning of s 43K(2) because WF substantially determined most of the terms on which the Claimant was to work, but Phyton determined the remuneration. The claims against Phyton were, however, dismissed by Judge Segal on the basis that they stood no reasonable prospect of success for other reasons.

26. The Claimant was issued at the start of employment with a 'Term Schedule' by Phyton which provided for him to be paid 1,600 USD per day / 200 USD per hour plus any expenses as agreed with WF. The Term Schedule described him as 'Programme Director' and provided for an initial approximate one-year term from 1 October 2018 to 1 October 2019 (pp 91-92). There was no provision as to notice.

27. The Claimant's Term Schedule was reissued by Phyton in July 2019 in the circumstances described below. As reissued, it provided for an approximate term of 2 July 2019 to 30 June 2020. The project description remained 'Programme Director'. The fees were £1,260 + VAT. Other terms were the same.

28. These Term Schedules were not shared by Phyton or the Claimant with WF. Instead, Phyton issued Statements of Work to WF for the Claimant's services and those of other contractors that it supplied. One signed in August 2019 includes the Claimant by name, identifying him as a 'Business Analyst Level 5', with a term of 27 June 2019 to 20 December 2019, and his day rate at $1,987. This was more expensive than any of the other four Business

Analysts covered by the same Statement of Work. This Statement of Work includes a provision for termination on five days' written notice.

The Claimant's job title and commencement of engagement

29. When the Claimant started at WF he believed that his job title, consistent with the Term Schedule he had been issued by Phyton, was 'Programme Director'. He understood he was hired by Susan Johnson (Programme Sponsor and Chief Administrative Officer) to take over her role of leading all London-based projects within the Respondent's Business Consultant Group (BCG) as she was moving to the US. The Business Consulting Group (BCG) is responsible for running change projects in compliance or regulatory matters. Susan Johnson moved to the US shortly before the Claimant started, but she continued to be his 'functional' line manager until July/August 2019. We use the word 'functional' because the Claimant was in the category of contractor regarded by WF as a 'non-managed resource' and who therefore was not subject to line management in the usual sense, i.e. he was not subject to WF's performance management processes or disciplinary procedures.

30. The Claimant understood from Ms Johnson that she considered the appointment to be in the category of a 'temp to perm hire', i.e. that if he did well he would be made permanent. We accept the Claimant's evidence regarding this because WF has brought no witness to contradict him and his account is consistent with what documents we have from this period.

31. The Claimant worked on a number of what WF calls 'workstreams' in 2018/early 2019. His main focus was Best Execution and Surveillance, with another called Systematic Internaliser added later. He sat on the Monitoring and Surveillance Steering Committee, which by March 2019 had responsibility for the Best Execution, Trade Surveillance, Real-time Monitoring and Systematic Internaliser workstreams. ("Best Execution" is an investor protection requirement that requires a firm to exercise reasonable care to execute a customer's order in a way to obtain the most advantageous terms for the customer.) In documents produced for this Steering Committee the Claimant was described as "Programme Lead / SME" (SME standing for 'Subject Matter Expert'). In the WF hierarchy for EMEA Business Programme Delivery, the Programme Director role sits directly below the Business Sponsor and above the Business Analyst / Business SME roles. The Programme Director has responsibility for setting the programme strategy and overseeing the workstreams within the particular programme.

32. These were only some of the workstreams that members of BCG were working on.

33. The Claimant says in his witness statement that he was *"the recognised leader of the London BCG team"* and that *"in practice he supervised the BCG team based in London"* and that this is evidenced by the fact that three members of the team, including Gleison Cabral, reported to him. However,

he did not dispute that the BCG team in London comprised 8-10 other consultants, and that the others, including Funsho Oshewa, did not report to him. We find that he did not therefore supervise the whole BCG team and the Claimant has exaggerated his role in this respect.

The VAT issue

34. At the start of his employment, consistent with the original Term Schedule, and as instructed by Phyton/WF, the Claimant invoiced the US-based Phyton company for his services in USD and without charging VAT, despite being registered for VAT in the UK and thus liable to pay VAT on his earnings. The basis for this approach appears to have been that it was considered that the services were being provided to the US company and therefore no VAT was payable and that was how the Claimant was asked to invoice.

35. In December 2018/January 2019 the Claimant made what he alleges to be protected disclosures to Jeff Lawson (Managing Director, Business Consulting Group) and John Kersten (Chief Administrative Officer) verbally regarding VAT. He says that he pointed out that WF processing invoices for contractors based in London through the Bank's US entity meant that it was avoiding paying VAT in the UK which he considered amounted to tax fraud and he says he described it as such to Mr Lawson. He also said that he raised with Mr Lawson that the Bank was deliberately maximising booking of expenses against its US entity rather than the UK entities, which amounted to accounting and transfer pricing fraud. We accept the Claimant's unchallenged evidence as to what he said to Mr Lawson and Mr Kersten.

36. The Claimant also said in his witness statement that he later raised the issue with Mr Mangione, although in his claim form he did not say that. He said ([32]) that *"Mr Lawson told Mr Mangione to deal with the issue"*. Mr Mangione accepted that he was aware that in February/March 2019 the VAT position was looked into and arrangements put in place to rectify it. He did not personally have any dealings with the Claimant until April 2019 and could not recall the Claimant raising the VAT issues directly with him. We find that the Claimant has not satisfied us that he did raise the VAT issue directly with Mr Mangione himself. The issue was raised prior to the point at which the Claimant started working with Mr Mangione and if the Claimant had really raised it with Mr Mangione himself, he would have mentioned that in the claim form given that a central part of his case is that Mr Mangione subjected him to detriments for making protected disclosures.

37. We observe that the obligation to pay VAT rests on the Claimant as the service provider rather than on WF such that a person who is registered for VAT must pay VAT to HMRC on their earnings whether or not they have separately billed their client for VAT, but in any event the Claimant's point was in substance accepted by Mr Lawson and arrangements were changed so that from July 2019 the Claimant and other contractors invoiced Phyton's UK branch for their fees in GBP, plus VAT.

38. The Claimant's Term Schedule was reissued by Phyton in July 2019 as set out above. It now provided for an approximate term of 2 July 2019 to 30 June 2020. The project description remained 'Programme Director'. The fees were £1,260 + VAT per day. Other terms were the same.

The Markets in Financial Instruments Directive (MiFID II)

39. The Markets in Financial Instruments Directive (2004/39/EC) (MiFID) is a European Directive that has been in force in the European Union since November 2007. Its purpose is to improve competitiveness by creating a single market for investment services and activities and ensuring harmonisation of protection for investors in financial instruments. A revised version of the Directive (2014/65/EU) (MiFID II), and accompanying Regulation (EU No. 600/2014) came into force on 3 January 2018. MiFID II was in part a response to the financial crisis of 2008 and introduces a new regulatory framework designed to protect customers, shareholders, and the general public.

40. MiFID II requires firms to have appropriate whistleblowing procedures and protections in place in respect of MiFID II requirements, including a procedure for enabling employees to report internally through a 'specific, independent and autonomous' channel, as now reflected in SYSC 18 of the FCA Handbook.

41. Another element of MiFID II requires that Research and Trade Execution services be 'unbundled' so that charging is transparent, and conflicts of interest and inducements are avoided (i.e. inappropriate fees, commission or non-monetary benefits, such as providing research services for less than their cost of production in order to secure trades). In simple terms, research must not be provided free to clients, it must be paid for at a price that reflects its true cost and thus not act as an inducement to trade. This is referred to by the parties as 'unbundling'.

42. The deadline for securing compliance with MiFID II was 3 January 2018. WF, in common with other financial institutions, has had to undertake work to secure compliance with the new regime.

The Research workstream and FCA notification

43. There was also a workstream which related to Research which was being run in 2018 and early 2019 from the London office by Susan Johnson. There was a team of 8-10 individuals working under Ms Johnson on this workstream, including the Claimant. This was the workstream dealing with the aforementioned MiFID II 'unbundling' requirement to ensure that clients are charged properly and separately for research.

44. The Claimant says that he discovered two particular problems with WF's approach in late 2018/early 2019: (1) research was not being properly logged

so there was no record of what research was being produced on its various distribution channels and many third parties were being provided with free research who had not been 'onboarded' with the Respondent at all, contrary to Anti-Money Laundering (AML) and Know Your Client (KYC) requirements; and (2) WF was working on the basis that clients outside the EU did not need to be charged separately for research, whereas he considered that the rules applied regardless of where the client was located.

45. He says that in December 2018 and January 2019 he raised verbal concerns about these matters with Alicia Reyes, Susan Johnson, Michael Hipwell (Compliance Senior Manager) and Rishabh Bhandari (Senior Legal Counsel, London) regarding the MiFID II research unbundling requirements. We accept the Claimant's evidence in this regard as the Respondent has produced no witness who is in a position to challenge it and it is consistent with the documents that we have.

46. The Claimant believes that it was as a result of him raising these concerns that WF notified the FCA on 23 January 2019 that it was not yet fully compliant with the requirements of MiFID II. However, Mr O'Brien gave evidence he was not aware of the Claimant's involvement at this stage. He said Ms Reyes had brought the issue to his attention and he thought it was possibly an individual called Nick Bowie who had raised it originally, but he was not sure. We do not have to decide who in fact was the person who escalated the issue. As a matter of fact it is clear that the Claimant did raise the issue with Research and from the point of view of whether he made protected disclosures it does not matter if he was alone in doing that. It does matter (to an extent) whether Mr O'Brien knew that it was the Claimant who originally escalated the particular issue that was reported to the FCA. On this, we accept Mr O'Brien's evidence that he was not aware that it was the Claimant who raised this issue as there is nothing to contradict it and Mr O'Brien proved to be a generally reliable witness.

47. The FCA was not satisfied with WF's initial notification and sought more information, some of which was provided by Tina Cope on 15 February 2019. The FCA had many other questions, however, and asked for the internal investigation to be completed by 10 April 2019. The FCA's emails in January and February were forwarded by Tina to Alicia Reyes, the Claimant and Susan Johnson (among others) as the team then leading on the issues.

<u>February 2019 change of team on the MiFID II remediation workstream</u>

48. In February 2019 Mr O'Brien was approached by Mr Riley (Head of Equities Research) about running the research limb of the MiFID II remediation workstream from the US. It was considered it would be better to run the project management element of the workstream from New York because that is where most of WF's research is generated and where most of WF's clients are based. This would have meant that Ms Johnson and the 8-10 people working under her in London, including the Claimant, would no longer be involved in the project. The Claimant's name did not come up at all in Mr

O'Brien's discussion with Mr Riley about this. The New York team began work in February / March 2019. They concentrated on the immediate need to stop the ongoing breaches of MiFID II by cutting all clients off from access to research while it was identified which clients could properly continue to receive research in compliance with MiFID II.

49. The Claimant was not told about this work transfer initially, Mr O'Brien having left it to Ms Johnson to tell the rest of the team. The Claimant continued working on the Research project. He created a project plan to deal with the problems he had identified. He worked out that it would cost the Bank USD 5-8 million to remediate the compliance issues. He mentioned this figure in an email to Susan Johnson, Niall O'Brien and others on 20 March 2019, to which he attached a document with more detailed workings. The Claimant also developed a 30-page presentation on MiFID II Research for the purpose of what he called 'Cross-Functional Workshops' that took place in the US in April 2019. This detailed the key compliance gaps in relation to Research and made a proposal for how to remediate it which the Claimant regarded as being the minimum required.

50. The Claimant presented his slides on email, over the phone and in person in March 2019 and early April 2019 to managers in relevant functions across the Bank, based in London, New York and Charlotte. In late March/early April 2019 the Claimant travelled to the US and met with Mr O'Brien for the first time in his office with Ms Johnson. The Claimant says that he went through his presentation with Mr O'Brien in that meeting, but Mr O'Brien did not recall him doing that, although he said that the Claimant 'may have pulled it out of his bag'. We find that the Claimant at least made Mr O'Brien aware in general terms of the content of his presentation (and the compliance gaps set out in it) in that meeting in the office. The purpose of the trip to the US, so far as Mr O'Brien was concerned, was for the Claimant and two or three other London colleagues to make presentations to the US team about the work they had done on the Research project for the purpose of handing over day-to-day project management of the Research Remediation project to the US-based team. The Claimant was informed of the plan to handover the project to the US while those workshops were ongoing. Once the Research workshops were complete, that was the end of the Claimant's involvement in the Research project so far as WF was concerned. It was also the end of the involvement of his 8-10 other London-based colleagues who had also been working on the project. Some of the consultants were terminated altogether, but the Claimant and some others continued working on other MiFID matters.

51. The Claimant was unhappy with the decision to terminate his involvement with the Research project. He was no longer included in communications or meetings regarding Research or in discussing the final response to the FCA, which he was aware was due on 10 April 2019 (although in fact WF ended up seeking an extension to 30 April 2019).

52. On 8 April 2019 the Claimant approached Mr O'Brien on LinkedIn seeking clarity about his involvement in the research work "if any" going forward. Mr O'Brien agreed to speak to him and they met on 10 April when Mr O'Brien

was in London. The Claimant says that at this meeting he raised concerns about whether the Bank was going to meet the FCA's 10 April deadline and queried why he had been 'suddenly excluded' from the project meetings regarding the research topic. Mr O'Brien, however, saw this meeting as the Claimant 'pitching' to run the research topic. Mr O'Brien was surprised by the Claimant's approach as he felt that it had already been explained to him that a decision had been made to move the project to the US. He explained to the Claimant that the decision to move the projects to New York was because the heads of Advisory/Research for both equity and fixed income were based in New York and 90% of the client base is in the US, and the project had not been working well from London. He also advised that the funding was not available for *"building a superstate research front to back system"*. In oral evidence Mr O'Brien said that this was not necessarily a reference to the Claimant's costing of £5-£8m for the remediation effort required, but we find that it was a reference to that as he was addressing the Claimant and the Claimant had certainly proposed a substantial model for remediating the compliance issues. However, we accept Mr O'Brien's evidence that WF was still at that point concentrating on the initial manual effort to stop the basic breaches of MiFID II in relation to research and to confirm the status of each client in receipt of research so as to be able to report to the FCA. That was clearly a substantial exercise and there is no reason to disbelieve Mr O'Brien on that. Mr O'Brien thought that the Claimant's approach to him was so odd given that he had previously been told that the project was moving to the US that on his return to the US he sent himself an email as a file note of the conversation.

53. WF had not disclosed what was finally sent to the FCA until mid-way through its evidence in these proceedings. Broadly consistent with the oral evidence of Mr O'Brien, what was sent to the FCA on 30 April 2019 describes how following the notification to the FCA, WF took action to stop sending research to all its clients until they had confirmed whether or not they were 'in scope' for MiFID II. It then goes on to describe the previous organisation of the workstream which was regarded as having led to the non-compliance not being addressed earlier. That was under a Research Steering Committee headed by Paul Jeanne, Chris Ferrara and Lee Brading, with 10 'non-voting members' which included four members of BCG (but not Ms Johnson or the Claimant; Mr O'Brien was unable to explain why Ms Johnson was not on the list). The information sent to the FCA also describes the new Research Programme Governance structure as being headed by the Business Sponsors Mike Riley (Head of Equities), Alicia Reyes (Head of WFS EMEA) and Brian Farrell (Head of Spread). The Steering Group is listed as having 13 members comprising both US based and UK based professionals including Mr O'Brien, Mr Lawson (the Managing Director of the Business Consulting Group based in Charlotte, USA), Ms Vanhoy, Mr Noonan, Rishabh Bhandari (EMEA Legal) and Michael Hipwell (EMEA Compliance). Sitting under the Steering Group are five Sub-Committees. Each of those includes an unidentified BCG member, and two of them include an unnamed "PM/BCG" i.e. Project Manager, Business Consulting Group. Mr O'Brien explained that the reason for the absence of a name was because this was a role that had not been filled yet. The role was to be a new role replacing Ms

Johnson's and based in the US. It was advertised internally but the Claimant did not apply as he did not want to move to the US. An appointment to the role was made from June 2019.

54. On 14 May 2019 the Claimant approached Mr O'Brien again on LinkedIn: *"Hi Niall – just wanted to follow up regarding the Research programme work: did you still need help from me or my London team on this?"* Mr O'Brien replied: *"status quo as per we discussed in London … running the project from NY … immediate focus on the remediation plan… waiting to see what $$ are released for longer term projects … should be over in July … so let's discuss then. Hope course is going well, Niall"*.

55. In June/July 2019 the Claimant and Mr Cabral heard that the Respondent was stating that the Research unbundling work had been completed and the FCA informed. In his statement he said that he saw this on formal documentation that went to the Board. Mr Cabral said that he heard it being discussed by Compliance. They were sure that it could not have been completed as the work the Claimant had identified as needing to be done had not been done. The Claimant's evidence in his witness statement was that he believed that false information was provided to the WF Board and to the FCA in relation to this. There is some support for the Claimant's evidence that the WF Board were told that work on MiFID had stopped in Ms Reyes' email of 1 August 2019 (p 1026), although her email shows that the WF Board had raised concerns about this. The Claimant claims that Ms Reyes supports him in relation to the falsification allegation in that in a conversation on 2 April 2020 after they had both left WF she told him an email had been sent to the FCA that *"did not present the truth"*. However, these shreds of evidence from Ms Reyes are not sufficient to support allegations that the FCA was misled or the WF Board was misled and these allegations have quite properly not been pursued by Mr Cheetham on the Claimant's behalf.

PMO complaints: 25 March 2019 EthicsLine report

56. In his witness statement, the Claimant says that in March 2019 he raised concerns regarding the Programme Management Office (PMO) function that they were not executing the remediation work appropriately, in particular regarding Best Execution, Trade Surveillance and compliance (p 820). The PMO managers he was working with included James Hartley and Jason Hearn. He said that after raising these concerns, he was *"forwarded an email trail in which I saw members of the PMO team stating that I was not allowed to raise concerns on the basis that I was not an 'FTE' (full time employee) but was a 'non-managed resource'"*.

57. The email had not been disclosed prior to the Respondent's evidence in these proceedings so the Claimant was not able to recall exactly who said what. The email was disclosed in the course of the hearing, from which it is apparent that the Claimant had indeed been raising concerns about Best Execution, and Trade Surveillance regarding the PMO. In an email to Ms Johnson he expressed concern that the lack of support from the PMO had

been *"causing us not to comply with WF internal government requirements for programme work"* which had *"caused further delays in achieving regulatory compliance on these critical topics"*. The particular point that had prompted a member of the PMO (Josh Kanera) to raise concerns about the Claimant as a non-managed resource challenging their actions, though, was that the Claimant had questioned who had been involved in recruiting candidates to work on Best Execution and Systematic Internaliser workstreams. Mr Kanera's concern was thus about non-managed resources being involved in recruitment decisions, which we find to be an understandable concern and not one that obviously relates to compliance or whistleblowing, but more to matters of internal hierarchy and organisation. The Claimant, however, in an email sent only to Ms Johnson, asserted that under SYSC 18 any 'worker' including contractors could raise regulatory concerns and that recruitment issues such as this were regulatory concerns because appropriate staffing is an aspect of the regulatory requirements (a point that appears to us reasonable once explained even if it was not immediately obvious either to us or Mr Kanera). The Claimant followed this up 45 minutes later with another email to Ms Johnson alone in which he said that the point needs addressing formally so he has submitted it to the WF Ethics Line, given her name as his manager and he assumed that the appropriate team would be in touch with her. He asked her not to forward his email without permission and there is no evidence anyone else saw this.

58. On 27 March 2019 the Claimant also emailed Alicia Reyes directly saying *"There is an ongoing organisational issue here which has manifested itself again this week: I have been advised not to raise compliance and governance-related concerns within the organisation on the basis that I am not a Wells Fargo 'FTE' but a 'non-managed resource'".* He explained to her that as a 'worker' he considered SYSC 18 did apply to him and that he had *"discussed this with London Compliance and Operational Risk who agreed"* (p 654). He asked her not to forward his email without permission as it was confidential and there is no evidence anyone else saw this email either. We note, however, that in it he has distorted the nature of Mr Kanera's original objection, which did not say that 'workers' or non-managed resources could not raise compliance concerns, but only expressed the view that it was not for non-managed resources to express views on recruitment processes.

59. We do not have a copy of what the Claimant originally submitted to the WF Ethics Line, but we have some of the subsequent email trails. Karen Martin, an Employee Relations Consultant based in the US took up the investigation and sought further details from him between April and July 2019 (pp 819-820). However, the Claimant subsequently became concerned that the fact that it was a member of Employee Relations handling the concern was not compliant with the SYSC 18 requirement for there to be an independent person to whom concerns may be raised. In an email of 21 June to Ms Martin he explained that he would not be responding to her further questions for that reason. As those further questions included a request by her to be provided with Josh Kanera's email, we infer that the Kanera email was never forwarded to Ms Martin (pp 833-836). The Claimant in his witness statement was also concerned that HR told his line manager Ms Johnson about the EthicsLine

report, which he says they should not have done under SYSC 18 (although we note that the Claimant had himself raised the matter with Ms Johnson and expected Ethics Line to contact her when he made the complaint). The DSAR (p 2216) indicates (and the Claimant agrees) that the Claimant accepted these concerns had been resolved by 12 July 2019. However, he now says that he continued to experience difficulties with the PMO office.

April 2019 Mr Mangione brought in to work on the MiFID II remediation workstream

60. In April 2019 Mr Mangione was asked by his manager Mr Lawson and Mark Noonan (Managing Director of International COO Team) to become involved in a portfolio of projects in WF's International business, including the MiFID II remediation project. Mr Mangione had not had previous dealings with the Claimant. Mr Mangione has responsibility for c150 projects a year at the respondent. His role is to ensure that projects are run in accordance with WF's policies and procedures and that they stay 'on track'. He had fixed ideas of how WF does things and how it uses consultants such as the Claimant. He was unaware that the Claimant understood himself to be a 'Programme Director' or that he had any particular status as 'Programme Lead'. The Claimant's email footer at that time sometimes (but not always) included reference to the Director job title and he was described as Programme Lead/SME in documentation for the Monitoring and Surveillance Steering Committee, but Mr Mangione did not notice this, regarding the Claimant as a Business Analyst with no particular status other than responsibility in particular for the Best Execution and Systematic Internaliser workstreams. We accept Mr Mangione's evidence as to what he was aware of in this respect. There is no reason for Mr Mangione to have known what was stated in the Claimant's Term Sheet, what he was told by Ms Johnson or (given the breadth of his responsibilities with WF) for Mr Mangione to have noticed how the Claimant was described in the Monitoring and Surveillance Steering Committee documentation.

61. Mr Mangione did not meet in person with the Claimant until 27 June 2019. The Claimant sent his CV to Mr Mangione ahead of that meeting and spent a large part of the meeting talking about his CV, his experience and qualifications. After a period of working with the Claimant Mr Mangione gained the impression that the Claimant was very knowledgeable about MiFID II and confident in his own abilities, although he considered that he could sometimes come across as arrogant and dismissive of the opinions of others. He also considered that the Claimant was not good at presenting to senior leaders, tending to be overly-detailed rather than providing the headlines first. Mr Mangione found that the project was not maintaining appropriate standards of documentation or following WF standard governance and procedures. The Claimant gave evidence that at some point Mr Mangione had threatened to sack the team if the documentation was not straightened out, although we note that when the Claimant reported this to Ms Reyes on 24 August (p 1323) he just said that this was what 'in essence' Mr Mangione said. Mr Mangione denies speaking in such terms. He says he

sought to work with the Claimant regarding documentation, but perceived him to be resistant to adopting WF's standard practices. Mr Cabral, who might have been expected to mention this incident, did not deal with it in his evidence. We find that there was an incident where Mr Mangione spoke firmly to the team as he was disappointed with the state of documentation for the project, but he did not in terms say 'you'll be fired', that was the Claimant's interpretation.

62. Mr Mangione said in oral evidence that he spoke to the Claimant on a number of occasions 1:1 about his approach and also spoke to Mr Hurley of Phyton about the Claimant and asked him to speak to the Claimant too. This goes substantially beyond the evidence in his witness statement which refers only to one specific 1:1 (after the Claimant was perceived to be aggressive towards Ms Reyes in a meeting) and does not mention Mr Mangione speaking to Mr Hurley. There is no evidence from the Claimant as to whether Mr Hurley ever did speak to him, but we see no reason to disbelieve Mr Mangione on this point. It is plausible that he did speak to Mr Hurley.

The Claimant's work in June/July 2019

63. The Claimant says in his witness statement that after he was *"excluded"* from the MiFID II Research unbundling work in April 2019, he *"continued with the rest of [his] job and started to analyse some of the other significant numbers of wider MiFID II compliance gaps"*. He does not suggest that anyone asked him to do this, but he says that, having started on the exercise, he was given 'the green light' by Ms Reyes to speak to people within the business to investigate and document the current state of compliance with MiFID II and identify what needed to be done. He started work on a MiFID II Matrix/Traceability grid identifying key compliance gaps in detail. There is an email in the bundle (p 1019) which is said by the Claimant to relate to this exercise, and refers to a meeting with two individuals for which they were either late or did not attend. He met with Alicia Reyes to discuss the analysis and remediation work needed in mid June 2019 (p 829) and he says in his witness statement that the plan so far as he understood it at that time was for him to continue leading the MiFID II Remediation Steering Committee and that the additional regulatory gaps identified in his analysis would be included in the scope of his work. However, it is not the case that the Claimant was leading the MiFID II Remediation Steering Committee and, while we accept the Claimant's evidence as to his activities during this period, we do not accept that anyone had told him he was leading the MiFID II Remediation Steering Committee. What he had been leading was the Marketing and Surveillance Steering Committee, which had responsibility for only a limited number of workstreams related to MiFID II. Nobody had told him that his role had expanded in the way that he now claims it had.

Defamatory emails

64. In June 2019 Mr Kersten (then Chief Administrative Officer) passed on to other WF employees some allegations about the Claimant which he appears to have received from a contact at Deloittes, where the Claimant had previously worked. These included various serious allegations about the Claimant including that he had been dismissed from previous jobs for misconduct, that he feigns illness, had falsified his CV, had a criminal record for fraud and accumulates corporate information whilst employed. These allegations were referred to Benjamin Rud, a WF internal investigator who ultimately found the allegations to be *"unsubstantiated"* and that the Claimant *"did not appear to be overstating his qualifications and his manager was very happy with his performance"*. Despite this, WF included these allegations in its Response to these proceedings, without saying that the allegations had been found to be unsubstantiated, and failed to produce any evidence in support of them. The Claimant has denied them in his witness statement. We therefore make clear that these allegations about the Claimant have, so far as this Tribunal is concerned, no evidential basis whatsoever. The Claimant submits that they are evidence that WF has sought to retaliate against him as a whistleblower or for bringing this claim. We have therefore considered whether the evidence supports this submission. Otherwise, the relevance of the emails to these proceedings is that, if known to the key decision-makers in respect of the complaints of detriment in these proceedings, they may have influenced the way that they treated the Claimant.

65. The evidence in relation to the making and sharing of these allegations that we have is as follows:- in June 2019 they were forwarded by Mr Kersten to Charlotte Jackson, who forwarded them on 2 July 2019 to someone in WF's Employee Relations department. Mr Kersten was at that point probably still an employee of WF as the Claimant gives evidence that he left *"in June/July 2019"*. Benjamin Rud (WF Internal Investigator) was appointed to investigate. As part of his investigation, the data produced in response to one of the Claimant's subject access requests (DSAR) shows that he searched the internet and spoke to other employees at WF but not the Claimant. The record of the notes made from speaking to other employees (none of whom are identified by name) indicates that most considered he was a good employee who had been delivering well on work. A number of people commented on the Claimant's interpersonal skills, saying he *"sometimes has issues working with other individuals", "sometimes will act aggressively or not understand why others will not follow his advice when it comes to work related issues" "[was coached] on several occasions that he will need to approach people differently if he wants them to work with him", "constantly needs to remind Helenius that WF is not a dictatorship and collaboration is needed with other individuals", "not had any major issues with Helenius, other than to mentor him on skills related to working politely with others"*.

66. It is unclear when Mr Rud concluded his investigation but we infer from the documentation we have that it was in the summer of 2019 because Mr Rud had apparently forgotten about it by 3 December 2019 when Ms Healy of Employee Relations enquired about the outcome early in the morning on the

day that the Claimant was told by Mr Mangione his contract was ending. There is no evidence that the allegations were passed to any of the individuals against whom the Claimant makes claims in these proceedings.

67. On 22 October 2019 Mr Kersten forwarded a slightly longer set of similar allegations about the Claimant on to Jonney Rai, who the Claimant says was a contractor at WF working on the Brexit programme, but Mr Kersten was by then not an employee, there is no evidence as to what Mr Rai did with the information and no evidence that the allegations came to the attention of anyone else at WF at that point. On 15 June 2020 they were forwarded again between various individuals who may or may not have been people working for WF, reaching James Hartley, who was employed by WF. He forwarded it to someone else whose status we know nothing about on 22 October 2020 and then onto Mr Adams on 10 November 2020. This was a year after the Claimant had left. Mr Adams forwarded them to WF's human resources and that was the last he heard of them.

68. Since there is no evidence that any of the witnesses from whom we have heard (or Ms Reyes) was aware of the allegations at any point during the Claimant's employment, and no evidence that any of the people who circulated the allegations were aware of any of the Claimant's alleged protected disclosures (let alone motivated by them), we find that the defamatory emails are irrelevant to the issues that we have to decide.

August 2019 change of team on the MiFID II remediation workstream

69. By the beginning of August 2019 WF had recognised that it had a number of areas in which it was still non-compliant with MiFID II. On 1 August 2019 (p 1026) Ms Reyes emailed Mr Mangione, Mr Lawson, Steven Kiker, Mr Noonan, Ms Vanhoy and Mr Adams to say that Mandy Norton (Chief Risk Officer) had been in London that week and attended a Risk Committee meeting. She wrote, *"During this, Compliance raised Mifid 2 breaches as one of the key concerns for the region and Mandy asked me to come back with a clear ask on what we need to make [to] solve this. I think it would be good for us to sit down and discuss how do we best approach it. I am circling back with the London team today and have already spoken to Sid on this since he is here this week. In my view we need to design a process to connect BAU controls (which is the mechanism through which we identify problems) with a comprehensive Mifid 2 program that picks issues up and puts them through remediation and that is broader than the current two projects that we have now running on Transaction reporting and Best Execution. This way we can all have visibility on the pipeline of problems as we identify solutions. It will also help us address a lot of the concerns that the WFSIL Board has raised about having closed the Mifid program. This may tie with some other things that you are working on and I may not be fully up to speeed on and that is why I am reaching out. I will try to have us on a call this afternoon if you are available."* Mr Mangione responded saying that he was adding in Mr Loeffler and Ms Sedlak as they were also engaged on the MiFID book of work and said he would ask the Claimant to find time on everyone's calendar to

discuss. Ms Sedlak responded to say that she looked forward to the discussion as she had been working on a governance model to address *"this exact thing"*. We observe at this point that this email exchange makes clear that (although Ms Reyes acknowledges that she may not be 'up to speed' with what others are working on), so far as she was concerned the drive to recommence addressing ongoing failings in relation to compliance with MiFID came from Compliance and Mandy Norton and not from the Claimant, although she asked him to set up a meeting to discuss next steps. It also clear from this email exchange that there were others working on MiFID II during the summer of 2019, not just the Claimant.

70. The Claimant then agreed attendees with Ms Reyes and set up a meeting on 2 August 2019 with the agenda *"Discuss MiFID II Remediation Programme"* to which Ms Reyes, Mr Adams, Monika Marks, Jason Hearn, James Hartley (Regional Change Lead), Jennifer Sedlak, Patrick Loeffler, Mr Mangione, Ms Vanhoy, Mr Vyas and Vel Mayooran were invited.

71. On 7 August 2019 Ms Reyes wrote to most of the same people and a few others as follows: *"As a follow-up from the discussion we had last Friday we agreed to set up a MiFID II Remediation steerco this week, to come up with a detailed request for Mandy Norton [Chief Risk Officer] to set up the remediation program that we all have agreed we need. I think we were aiming to kick it off last Monday. James/Jason, I believe you said you were going to reschedule it, please let me know if you are having problems with it and I will be happy to get us help. This really needs to happen asap please. It is really important that we set up a comprehensive program that will group together all the Mifid breaches and day 2 deliverables so that we can approach remediation in a coordinated [manner]."* Mr Hartley replied the same day saying that he, Ms Vanhoy, Mr Adams, Mr Mayooran and the dedicated Project Manager, Gareth Hare had the *"initial kick off session"* on Monday as a result of which they had agreed a programme for setting up governance for the project and embedding that over August and September. He said that 16 gaps had been identified, but that this needed to be discussed further with BCG (i.e. the team in which the Claimant worked) as there may be more. He said that a SWAT meeting had been set up for the next day to *"review artefacts"*. He wrote that Ms Reyes was supposed to be in that meeting. Ms Reyes responded *"Thanks, I thought I was going to be include in the kick off meeting, how has the composition of it been decided and how have we determined that we are including all the stakeholders we need in this programme?"* The Claimant also replied to indicate that he was also not included in the Monday meeting (p 1031).

72. On 8 August 2019 there was a MiFID II Remediation Senior Management meeting at which it was agreed that a *"small nimble Steering Committee"* should be set up to meet regularly (daily initially) to manage the remediation activities. It was proposed that this should comprise 7 people, including one person from BCG. The Claimant was not included in the Senior Management meeting, but he was copied in on the outcomes from it. Ms Sedlak was treated the same (p 1029), and although she was evidently also put out, she indicated on p 1028 that she was *"cool"* with it. It is apparent from the emails

(see especially p 1028 from Mr Hartley explaining that it was Ms Reyes who decided who should be at the meeting) that the Senior Management meeting had been set up by Ms Reyes to include only her, Mr Hares, Ms Vanhoy, Mr Adams, Mr Mayooran, and Mr Hartley. Ms Reyes had obviously been unhappy that the team had started on remediation without including her, and had taken back the reins and made a decision about who she wanted to lead on the project. It was thus Ms Reyes who decided not to include the Claimant in this group.

73. Later that day, Mr Hares wrote to the Claimant, other members of BCG and Compliance saying that *"off the back of Alicia's steer this afternoon",* Mr Mangione had requested him to co-ordinate the population of a spreadsheet *"with as much detail as possible (based on the columns provided) for all the MiFID II remediation items that are currently known. The spreadsheet currently contains 16 items taken from Monika's recent email, however this is not a complete list. The data will start to be discussed in a meeting series commencing Monday 12th August"* with a view to qualifying the impact of each problem, prioritise, source budget, resource, track to solution, communicate progress and risk to sponsors for all remediation items (p 1037). The Claimant was thus being invited to contribute to the creation of what we will refer to as a 'to do' list of currently known MiFID II compliance failings.

74. The next day, 9 August (p 1036) Mr Hares had evidently had a discussion with the Claimant and he emailed again, specifically addressing the Claimant and Ms Oshewa, stating *"James and I have just sat with Alicia and she again stated that on Monday we need to have a list of our 'known' inventory of gaps in a simple format for initial discussion. Please can you add your items on to this format by about 10am Monday? …. Ville, I know we chatted earlier and this format differs somewhat to yours in both data points and level of gap, but please can you try to adapt to this spreadsheet to allow us to take it to the steer co on Monday so that they have an idea of the size of the issue. I will set up a call on Monday morning 10.30am with this group to discuss the spreadsheet"*. The Claimant's reply at 15:48 on Friday 9 August indicates that he had understood the difference between the 'to do' list that Mr Hares was asking for and the more detailed spreadsheet that he had been working on (which became the spreadsheet at p 1096). He indicated that he thought it was better that Mr Hares just get on with producing the 'to do' list, but that the more detailed approach should also be taken in due course to ensure full traceability for the regulators. He said that he would review whatever Mr Hares and others had done if he was sent all the comments so far by about 8.30am on Monday.

75. By 9:48am on Saturday morning, however, the Claimant had had second thoughts about letting Mr Hares get on with producing a 'to do' list. We infer from other emails, including pp 1070 and 1048, that this was in part because he had realised he was not being included in the new 'nimble' steering committee and in part because on reflection he thought the 'to do' list approach was not appropriate and that only his full traceability gap analysis approach would suffice. By email at 9:48am on Saturday morning, the Claimant criticised the format that had been adopted for the 'to do' list. He

said that it was not what he had previously agreed as an approach with Ms Reyes. He asked to be included in meetings. Mr Mangione responded *"right now we are focusing on gathering an inventory of identified remediation issues and have a process flow how this steering group is going [to] document, escalate, prioritize and make decisions. Alicia made it clear that she wants to have a small group for now and we will expand as needed. Others will be invited based on the scope of discussion and deliverables".* The Claimant replied that he was happy to present the work he had done on traceability if Mr Mangione wished, but that otherwise as he considered he had *"not been included in the discussions"* he would *"step out of this until my inputs are required"*. Two minutes after sending that email he 'declined' the email invite to the meeting Mr Hares was arranging for 10.30am on Monday for *"Review of the known inventory of Mifid II gaps for the steer co"* (p 1084) writing *"I will re-engage once Alicia has confirmed I am to be included"*.

76. Mr Mangione replied to the Claimant's substantive email: *"I have had several meetings with you this week, so you are completely in the loop what you need to focus for this specific task. Focus on getting the remediation list to the WPMO. As for the traceability matrix that will be the next steps. We will loop incremental team members into the meetings as we get into the details of specific discussions. We need a small group right now to make decisions and proceed into action. Please communicate with me going forward with any issues. Alicia is extremely busy and does not need to be burden with every little detail. You have frequent 1 on 1 with Alicia on topics and I know that we all appreciate your expertise. We have lots of work in our pipeline so please focus on what you are responsible and incremental tasks that we will continue to assign to you."* We observe that Mr Mangione was thus trying to reassure the Claimant that the exclusion from the small leading group did not mean that there was not going to be work for him to do going forward or that he would not be 'kept in the loop', and also that a more detailed traceability matrix would be the next step. To the Claimant's declining of the meeting invitation, Mr Mangione replied *"Ville - why did you decline the meeting if you were invited?"* and the Claimant responded *"I think we should discuss first thing on Monday – there are aspects here raised by Compliance we should speak about"*.

77. At 12.20pm on the Saturday the Claimant sent a longer email to Mr Mangione and Ms Reyes, copied to Ms Vanhoy, setting out why he considered his proposed 'regulatory traceability approach' was best. This email does not suggest there is anything unlawful in the 'to do' list approach being taken by Mr Hares, but sets out why the Claimant considers his approach to be better. The Claimant also expresses his concerns about being left out of meetings saying *"if you are not at the table, you are on the menu"*, which we consider aptly captures the Claimant's insecurity about how he was being treated at this point, notwithstanding Mr Mangione's attempts to reassure him. At 14:23 the Claimant emailed again. In this email to Mr Mangione and Ms Reyes, copied to Ms Vanhoy, he identified *"further key considerations"* regarding the 'to do' list approach (which he refers to as 'the inventory approach'). He wrote:

> Further key considerations to raise regarding the spreadsheet / process being sent out on email by the WPMO with responses being required by defined deadlines:

> 1. The disclosures requested regarding MiFID II gaps would be expected fall under the FCA SYSC 18 definition of 'disclosure of reportable concerns'
> 2. Appropriate records of reportable concerns under SYSC 18.3.1 (2)(e) should be kept
> 3. The disclosure handling should be as documented in relevant WF / WFS procedures under SYSC 18.3.1(2)
>
> In relation to SYSC 18, I would consider it appropriate that the process is reviewed by Legal and Compliance and approved appropriately before the work progresses further (unless this has already taken place, I am not aware that it has and stand to be corrected)

78. He thus identifies certain legal principles/requirements that he considers to be relevant and suggests that the process being adopted should be reviewed by Legal and Compliance before progressing further. This email was the first time Mr Mangione had heard of SYSC 18 and he 'googled' the term. We asked Mr Mangione in oral evidence whether he had understood the Claimant in this email to be saying that the 'to do' list approach itself was not compliant with the rules in SYSC 18 because the Claimant considered that what had been requested by Mr Hares were *"disclosures"* falling within the definition of *"reportable concerns"* of which *"appropriate records"* should be kept under SYSC 18.3.1(2)(e) and the disclosures *"documented in relevant WF / WFS procedures under SYSC 18.3.1(2)(e)(ii)"*. Mr Mangione said that he did not understand the Claimant was saying it was unlawful and felt the Claimant was over-complicating the specific task of preparing the 'to do' list; Mr Mangione did not understand *"why he was throwing SYSC 18 into this request"*. Although Mr Mangione said he did not understand the Claimant was saying the 'to do' list approach was unlawful, we find that he was aware in general terms that the Claimant was querying the lawfulness of the approach, but he did not understand the legal point the Claimant was seeking to make and did not consider there could be a legal problem, because all they were trying to do was to identify, in headline terms, the compliance gaps for the purpose of scoping the work to be done by the newly rejuvenated MiFID II remediation project.

79. The Claimant for his part sent a further email just to Ms Reyes in which he expanded further on the potential compliance issue with the 'to do' list approach as he perceived it to be. He asked her not to forward the email and there is no evidence she did, so the Claimant's further explanation was not seen by Mr Mangione. The Claimant wrote to Ms Reyes:

> On an individual level, this has moved from a simple analysis of the MiFID II regulations to, in essence, being required to blow the whistle (as per SYSC 18), in writing, on all known MiFID II gaps by 10 am on Monday — this request has been addressed to a number of individuals not just me. I do not believe this kind process ad hoc approach is compliant with SYSC 18. I have declined the WPMO meeting at 10:30 am on Monday as I do not believe the WPMO are the right function to whom reportable concerns / disclosures should be made without involvement of anyone from the control functions — unless you confirm otherwise that this is appropriate. I spoke with Xavier on Friday about the overall WPMO issues without making detailed references on Friday and she suggested I speak with you directly.
>
> In sum:

> 1. I have an understanding of numerous MiFID 11 gaps in WFSIL that are not currently being remediated as well as some of the causes of these gaps
> 2. I am happy to disclose my reportable concerns under the relevant WF/WFS procedures but will require adequate preparation time to provide my comments in full — Monday 10 am does not allow enough time
> 3. I am more than happy to discuss any of this with you in confidence as my executive sponsor, but not working with WPMO individuals who clearly do not understand the bank's legal and regulatory obligations in this space and may therefore further compromise the bank's position.

80. At 09.02 on 12 August (p 1127) the Claimant sent to Ms Reyes his MiFID II Remediation Scoping sheet (p 1096) (which the parties, and we, refer to elsewhere as his 'traceability' document). He described it in this email as what 'we have been working on' and wrote, *"it would be great to get your feedback on the approach so that we are comfortable this is going in the direction you wanted. I do note we have had not help from the PMO on this work as they seem to want to do something different to at least what I thought we had agreed. There are SYSC 18 concerns around the content, hence sending to you direct confidentially"*. He then sent a further email to Mr Hipwell (Compliance) in response to an email that Mr Hipwell had sent in response to Mr Hares' 'to do' list request writing to Mr Hipwell that his list had been given to Ms Reyes and that they were awaiting feedback. He added, *"This space is very political so just copying you for info"*. The Claimant did not contribute to Mr Hares' 'to do' list.

81. On 12 August the Claimant's timesheet for work over the weekend was rejected by WF and the Claimant queried this with Mr Mangione. Mr Mangione asked what it was the Claimant was billing for over the weekend. Mr Mangione did not know at this point that the Claimant had worked on his traceability spreadsheet over the weekend, because so far as Mr Mangione was aware (apart from the few emails complaining about the approach and being left out of meetings, and the email declining to come to the meeting he was invited to) the Claimant had not done any substantive work over the weekend. He had said on Friday that he was not going to contribute to Mr Hares' 'to do' list but would review whatever Mr Hares had done on Monday morning and he had at no point told Mr Mangione that he had changed his mind about that. The Claimant did then explain to Mr Mangione that the work he had done was with Ms Reyes and Mr Mangione then authorised his time sheet (p 1124).

82. On 13 August the Claimant chased Ms Reyes for her feedback on his traceability analysis presentation. On 14 August there was further email traffic and messages about the new Steering Committee meeting taking place later that week. The Claimant was asked by Mr Hares to present at the meeting. An email from Mr Hares to the Claimant on 14 August 14.43 (p 1132) attaches the 'to do' list at that point and asks the Claimant to let him know what items he is working on. The Claimant again contacted Ms Reyes privately about Mr Hares' request and after further explanation from him she wrote that if it was *"a question of format"* the Claimant should attend the Steering Committee meeting with his traceability list. The Claimant thanked her and said that he had therefore sent his version to the team (p 1131). Mr Mangione was more resistant than Ms Reyes. In an electronic chat with the Claimant (p 1129) he

said they should focus on the agreed identified items on the 'to do' list first and that the other items identified by the Claimant that did not relate to workstreams for which he had been responsible should be reviewed by compliance and legal so that they could say whether the items had been remediated or were already being handled, such as *"all of the research items"* which he said were in Mr O'Brien's *"space"*.

83. As part of setting up the new remediation project, it had been decided that Mr Adams and Ms Vanhoy should become the co-sponsors of the new MiFID II remediation project. In the course of various initial meetings (described above), they decided to 'fold' the Monitoring and Surveillance Programme's workstreams for which the Claimant had been responsible into the general remediation effort. Ms Vanhoy at this point took over functional line management of the Claimant. Ms Vanhoy had previously interviewed the Claimant for a Brexit role but had not been impressed with his communication style. That was also her impression when she began working with him in August 2019. She found him to be intelligent and knowledgeable but also *"dogmatic in his views and arrogant about his status and capabilities. On occasion he was also aggressive towards other members of the team"*. She found that he tended to propose *"Rolls Royce"* solutions to compliance issues that did not recognise technical and financial constraints. She also considered that he frequently ignored the organisational structure set up and continued taking issues direct to Alicia Reyes rather than to her or Mr Adams or Mr Mangione to whom he was supposed to report.

84. The Claimant's traceability spreadsheet (p 1096) covered all workstreams, including those that the Claimant was not working on. The budget the Claimant considered was required for the remedial work was 23,280,000 USD. Ms Vanhoy was unsure why he had put it together and like Mr Mangione considered that it had not been vetted by others involved. She did not therefore use the document in the remediation exercise. The Claimant was unhappy about this and told her that if they ignored his presentation they would be forcing him to 'whistleblow' as WF was not MiFID II compliant. Ms Vanhoy was surprised by his reference to whistle-blowing and referred the matter to Ms Reyes.

85. During August 2019 there were a series of meetings of the new MiFID II Remediation Steering Committee and the SWAT team. The Claimant attended and presented at these meetings. He also completed, at the request of the committee, a number of forms detailing compliance gaps in the areas for which he was responsible, and for research (see p 131). Other people completed forms for other areas. We have examples of those in the bundle. They contain brief descriptions of the compliance issues and identify the rules considered to be breached, but not as much detail as the Claimant had in his traceability spreadsheet. The Claimant referred in his witness statement to p 1207 as showing a list of the different meetings and who presented what topics. From this list, it appears he presented on a number of occasions and a number of topics, none of which related to research. In the list of issues, he referred to an alternative record of meetings at p 1297 which does show the Claimant presenting on research distribution/remediation at a meeting on 20

August 2019. The comment from the committee states: *"agreed there is a remediation project in place already prioritised as HIGH. A Research STC needs to be set up to ensure the 5 commitments are delivered. Progress can then be communicated back to this STC"*. Witnesses were not questioned about these two documents, so we take from them only that the Claimant was invited to present on a number of topics, including research, and that WF's position at that time, consistent with its evidence in these proceedings, was that there was a research remediation project in place which was regarded as high priority.

86. The Claimant considered those he spoke to at these meetings were unreceptive and Mr Mangione was hostile towards him saying that detailed explanations on these issues 'were not desired'. The Claimant in oral evidence said that both senior managers and Mr Mangione objected to the content of what he was saying, not just the level of detail. Mr Mangione says that he spoke to the Claimant one-to-one in August 2019 after he had spoken out at a meeting in an acerbic manner, raising his voice and criticising others. The Claimant denies behaving like that. Mr Mangione says he explained to the Claimant that this was not appropriate. Mr Mangione is not a subject matter expert and was not concerned with the content of what the Claimant had said. Mr Mangione denied being hostile. Although Mr Mangione denied on this occasion saying that his detailed explanations 'were not desired', he accepted that there were other occasions where he spoke to the Claimant about his presentation style and overly-detailed approach. Given Mr Mangione's acceptance that he did on a number of occasions speak to the Claimant about being too detailed in the presentations to senior managers, we accept the Claimant's evidence that he did on one occasion say specifically that his detailed explanations 'were not desired'. We also accept the Claimant's evidence that at least on some occasions the objections related to the content of what he said, not just the style of presentation because it is difficult to separate one from the other. However, we also accept Mr Mangione's evidence that the Claimant appeared to be aggressive towards Ms Reyes as this is consistent with other observations of the Claimant by various people on other occasions that we have noted in this judgment.

87. After these initial presentations to the meetings at which the scope of the remediation project was being determined, the Claimant was generally not invited to attend senior MiFID meetings as he was not part of the SWAT or the Steering Committee. The Claimant continued to work on the Best Execution and Systematic Internaliser workstreams. The Weekly Project Working Group documents list the Claimant as 'BCG Lead', ie. as the senior BCG representative, with his three BCG consultants reporting to him. The Claimant suggests, based on an email at p 1268, that these responsibilities were taken away from him, but he has misunderstood that email and as a matter of fact that did not happen and the Claimant continued to lead the work on those workstreams. The Claimant also complained, based on an email at p 1286, that Gareth Hares had been allocated responsibility for the research workstream despite not being a subject matter expert, but it is clear from the email (and also from the meeting records at p 1296) that Mr Hares is just

being allocated responsibility for obtaining updates from those working on that workstream.

Discussion about terminating the Claimant's contract

88. In the meantime, beginning on 10 August there was discussion about possible changes regarding contractors. On 10 August 2019 at 10.54am (i.e. in the middle of the email exchange described above that took place on that Saturday about the remediation 'to do' list), Mr Mangione emailed Mr Adams and Ms Sedlak about an interview for a *"potential BCG resource"* due to take place the following week. Mr Mangione said that he was hoping to bring him on board to manage the remediation issues and possibly participate in the new MiFID II structure. He noted that there was a 'potential new resource' who was 'half the cost' of the Claimant and also said that it would be a good idea to have *"a future back up plan"* for the Claimant because he had *"totally pissed off Alicia in the last 2 weeks"*.

89. Mr Adams replied on 12 August that he would catch up with Ms Reyes about the Claimant as his impression at that stage was that the Claimant was *"very keen to be part of the solution, and maybe if he's getting some guidance from the PMO he can be useful (he appears to be a SME/very knowledgeable on the matters he's managing today) and is willing to go over and above to help"*. (Later, having worked more with the Claimant, Mr Adams revised his opinion of him to some extent as he found the Claimant's communication and presentation style to be poor and like Mr Mangione sought to 'coach' him in this respect.) Mr Mangione in his reply email of 12 August reiterated the point about the cost of the Claimant and wrote *"I am also having other issues with him that I will not put in writing but glad to share with both of you"*.

90. At 8.45am on 12 August 2019 Ms Vanhoy emailed Mr Mangione asking when the Claimant's contract expired. He replied that it had recently been renewed to 10 December 2019 but *"any contractors can be rolled off with 2 weeks' notice"* (1116).

91. On 16 August 2019 Mr Adams requested copies of the contracts for the Claimant and another contractor. In an email to Ms Reyes, Mr Noonan, Ms Vanhoy and Mr Mangione he (Mr Adams) then got the Claimant's contract termination date mixed up with the other contractor, mentioning 11 March 2020 rather than the December 2019 date he had seen on the records. He noted they were both on 5 days' notice. Mr Adams stated that he had spoken to HR about letting a contractor leave the bank early and he wrote that, *"the only questions [HR] asked were (i) are they under any disciplinary/grievance (ii) is the exit as a result of whistle-blowing".* He continued: *"With Ville, we would look to hire someone to join the bank over the coming weeks to work within the overall MiFID team and get a better understanding of the work he is doing before making a decision on exit date"*. Mr Mangione replied suggesting that he and Mr Adams connect on replacing one contractor as soon as possible and *"knowledge transfer on Ville"*.

92. Despite these discussions, it is clear from later emails in October/November 2019 that no decision was in fact made about the Claimant's contract at this point.

93. Mr Cabral gave evidence that in August 2019 he and other team members were interviewed by Victoria Martinez (BCG Office) where she discussed getting rid of the Claimant and said that the purpose of the meeting was to 'detach' Mr Cabral from the Claimant 'as it would not be a good thing to be seen on his side any longer'. Mr Cabral gave evidence in his witness statement that: "*these meetings were at the behest of BCG senior management including Alberto Mangione. Ms Martinez also stated that Mr Helenius was making a lot of 'noise', which was making senior management including Alberto Mangione very uncomfortable, and as a result a new BCG leader would be hired in London. In addition, she told me explicitly that under no circumstance should I tell Mr Helenius about the detail of what I was being told. If I refused to do so by siding with Mr Helenius, I also would be removed from the Bank. I found this to be one of the most unprofessional and unethical experiences of my career. I was deeply shocked by the behaviour of senior managers and their response to the professional and diligent work of Mr Helenius*". Mr Cabral said in oral evidence that, given the threat, he had not told the Claimant about it. This evidence was not referred to in the claim form so WF had no notice of it prior to witness statement exchange and WF's witnesses have not dealt with it. We have not heard evidence from Ms Martinez and insofar as there are allegations here against Mr Mangione they were not put to Mr Mangione by Mr Cheetham. We do not therefore understand it to be part of the Claimant's case that these conversations, if they occurred, took place at Mr Mangione's instruction. It was put to Mr Cabral that the conversations with Ms Martinez concerned work deliverables and not anything about the Claimant being dismissed or the team needing to separate from him, but Mr Cabral maintained his account. We see no reason to disbelieve Mr Cabral as to the essence of what he says, specifically that Ms Martinez spoke to him and other members of the team (not including the Claimant) about the possibility of the Claimant being dismissed and something along the lines of not 'siding' with the Claimant. We find the essence of this evidence to be plausible given that, over the weekend of 10/12 August 2019 the Claimant had set himself at odds with colleagues by refusing to complete the 'to do' list requested by Mr Hares and Mr Mangione and instead preparing his own traceability analysis which he took direct to Ms Reyes. However, as noted above, it is also clear that no decision was made about the Claimant's contract at this point.

Other incidents in August 2019

94. On 19 August 2019 the Claimant emailed Mr O'Brien asking for an update on the MiFID research project and whether things originally scoped had been done. Mr O'Brien responded neutrally to the Claimant saying Ms Vanhoy could update him and *"all these items are in hand"*, but also forwarded his

email to Ms Reyes who wrote *"I will handle this, he should not be asking you for updates"*.

95. The Claimant then emailed Ms Vanhoy on the same day (19 August) expressing concerns about the state of the research remediation project, asking how much of the work that he had originally scoped out had been done and sending her his March/April 2019 research unbundling presentations again (p 1236). Ms Vanhoy forwarded this to Ms Reyes on 20 August (p 1233) stating that the Claimant had said to her in the MiFID II Steering Committee the previous day that he did not think the research project was fully remediated. She wrote that she had asked him on what basis he could say that as he was not involved. Ms Vanhoy stated that Mr O'Brien had also complained to Mr Noonan about the Claimant and she would deal with it. Ms Reyes emailed Ms Vanhoy and Mr Mangione as follows: *"Could you please speak with Ville and tell him that he should not be asking for updates on Research or any other remediation matter outside of his project on Best Execution?"* Ms Vanhoy spoke to the Claimant and asked him to focus on the workstreams under the MiFID II remediation project for which he had responsibility.

96. On 19 August 2019 Ms Vanhoy also emailed Mr Mangione asking whether he had noticed the Claimant's email signature, which said he was "Business Consulting Group – Programme Director / Lead SME" (reflecting his Term Schedule and the further description of the role set out in the EMEA roles and responsibilities schedule). Ms Vanhoy asked *"Is he a programme director? And what does Lead SME mean?"*. Mr Mangione responded, consistent with his understanding as we have set out above, *"He is a business consulting group resource and nothing else. He will remove program director and Lead SME"* (p 1226).

97. On 24 August 2019 (p 1322) the Claimant contacted Ms Reyes on LinkedIn complaining about Mr Mangione's 'speech' to the BCG team on the previous Friday and asserting it was *"legally compromising to the organisation as he has no understanding of UK worker/employee rights"* and suggesting that Mr Mangione's management of consultants in the UK was creating IR35 problems and he was happy to discuss *"but Alberto is guaranteed to retaliate if he finds out who has raised any concerns – the team are afraid to say anything"*. In another message (p 1323) he said that the last time Mr Mangione was in London *"his message to the team was in essence: 'you need to do what I tell you to do, otherwise you are all fired' – it was totally inappropriate then but we disregarded it. Now he has verged into putting into writing things that will cause problems for the bank just due to his lack of understand of what is appropriate in the UK".* Mr Mangione did not see these messages at the time.

98. On 29 August 2019 the Claimant spotted that a number of trades had been wrongly recorded against the name of a trader who was absent (Chris Smith) and emailed a number of people about this, only one of whom (Mr Cabral) has been a witness in these proceedings. By 6 September 2019 a draft error notification form for the FCA had been prepared by another employee

(Andrew Wedge) and circulated to various people including the Claimant, Ms Vanhoy, Mr Hipwell, but without any special mention of the Claimant. The Claimant forwarded it to Ms Reyes to check she was aware of it (pp 1379-1380). She confirmed it would be reported to the FCA. None of the witnesses from whom we received evidence realised that it was the Claimant who raised this issue.

Recruitment of Matt Beattie and Stanley Lay

99. In the latter part of August Mr Adams, Mr Mangione, Ms Reyes and others were discussing the resources for the project. An email chain (pp 1266-1269) indicates that the question of BCG's role generally was up for discussion. Ultimately, what was agreed was for a consultant called Matt Beattie to be brought in to project manage the MiFID II remediation work, having responsibility for all 26/27 workstreams that had been identified. Mr Beattie's name was first mentioned at the end of August (p 1325), but he did not start in post until mid October (p 1556). Mr Beattie had worked closely with Ms Vanhoy on a previous project and she was very keen to have him lead this project. She personally had not even contemplated appointing the Claimant to this role, but accepted Mr Adams' evidence that there was a conscious 'decision' between them not to appoint the Claimant to the role. Mr Adams for his part had formed the view that the Claimant's communication skills and presentation style made him unsuitable for leading the full remediation project. He recognised that the Claimant had hoped to be appointed to that role and was disappointed that he had not been. The Claimant considered Mr Beattie to be an unsuitable appointment as he was not a MiFID II expert. Mr Adams agreed Mr Beattie was not a MiFID expert, but he considered that to be unimportant as what he wanted was someone who could manage 26/27 workstreams and report concisely and clearly to him on progress. He did not consider the Claimant had the skills to perform that role to the standard required as he had had to 'coach' him on a number of occasions about how to present information to stakeholders.

100. After Mr Beattie started, the Claimant was expected to report to him on the two workstreams that he continued to work on (Best Execution and Systematic Internaliser); Mr Beattie reported to Mr Adams; and Mr Adams reported to Ms Reyes.

101. Another consultant, Stanley Lay was also recruited around this time. His name came up at the end of August as well, but he did not actually start until 11 November 2019 (p 1682). He worked alongside the Claimant and was viewed in some ways as the Claimant's replacement. They did not work together very long as the Claimant was off work at the end of November doing his Masters degree and his contract was then terminated at the beginning of December 2019.

EMEA Business Consulting Group Leader role

102. In September 2019 a permanent role of EMEA Business Consulting Group Leader was advertised. It was Mr Noonan's idea to create this role. This role was regarded by WF as the equivalent of Mr Lawson for the EMEA region, i.e. someone responsible for the BCG resources across all projects in the EMEA region.

103. The Claimant applied for the post on 15 September 2019. Both Mr Loeffler and Mr Mangione recommended he apply (or, at least, did not discourage him from applying). The Claimant says in his witness statement that he was already effectively performing the role, but the WF witnesses disagree saying that it was a much more senior and broader role, and we accept the WF witnesses evidence on that point. It is clear from the evidence of Mr Adams and Mr Loeffler (in particular) that the role was a management-style role with responsibility for many more workstreams than the two for which the Claimant was responsible, a budget roughly 10 times the size of that for the work for which the Claimant was responsible and the focus was on project management and liaison with more senior stakeholders rather than subject matter expertise. We also note that the Claimant in his application (p 1616) does not suggest that he was already doing the role.

104. There were over 100 applications from internal and external candidates. The Claimant was one of 10 candidates short-listed by Mr Mangione, Mr Loeffler, Mr Noonan and Ms Sedlak. He was interviewed by Mr Mangione and Mr Loeffler on 15 October 2019. He did not make the final short-list of three because Mr Mangione and Mr Loefller say they were were concerned about his difficulties in communication style and in maintaining strong relationships. This is a concern that Mr Loeffler had before the interview as his email to Mr Mangione of 15 October makes clear (p 1634).

105. There is a lack of documentation regarding this recruitment process and what documentation we have is inconsistent. Both Mr Loeffler and Mr Mangione say that they kept notes during the interview, but these have not been disclosed. No adequate explanation has been given for the non-disclosure of these; Mr Mangione thought that the hard copy might be in his office (albeit boxed up); Mr Loeffler thought that even if notes were originally handwritten they would have been put on email at some point. What we do have are two different versions of a spreadsheet prepared by Mr Mangione which evidently has notes about many candidates, although those relating to people other than the Claimant have been redacted. One version says about the Claimant *"answered questions well. Don't recommend to be advanced based on prior concerns with Alicia"*. The other says *"did not answered [sic] questions well as he was focusing many of his answers seemed to be arrogant and not with great details. Don't recommend to be advanced based on prior concerns with Alicia and Ville being passive aggressive during steerco meetings as a PM"*. The difference between the two entries is not material so far as the issues in this claim are concerned: it is clear that a significant part of the reason why the Claimant did not get the role was, as the WF witnesses articulated it to themselves, his previous perceived conduct towards other people and

communication style and not just his performance at interview. Mr Mangione and Mr Loeffler both considered the Claimant's performance at interview to be good, but not as good as some other candidates. After the interview Mr Loeffler told the Claimant he had done well at interview and he meant that.

106. In the end, no appointment to the role was made, but the decision on that was not taken until December 2019. The Claimant alleges that Mr Mangione blocked his appointment to the post and that Mr Loeffler told him this in their conversation after the interview. This is denied by Mr Loeffler and we accept his evidence as Mr Loeffler was clear that Mr Mangione was the least senior of the people involved in the recruitment process who could not have 'blocked' an appointment, and that in any case it was a joint decision not that of Mr Mangione alone. Further, at the point that Mr Loeffler spoke to the Claimant the recruitment process was still ongoing so it is highly unlikely that he said anything about the outcome of the process. We consider that the Claimant is mistaken on this issue; we suspect he has inferred from the fact that Mr Loeffler told him he had done well that it was Mr Mangione who had blocked his appointment, but that is not what Mr Loeffler said.

Termination of engagement

107. As at 31 October 2019 Mr Mangione was concerned about the cost of the Claimant and another contractor which were £200-500 higher per day than other contractors (having been recruited by Ms Johnson in 2018 at higher rates than others), but his email makes clear that he was nonetheless at that stage expecting to extend the Claimant's contract into 2020. He sought confirmation from Mr Adams and Ms Vanhoy that that was still their intention. Mr Adams replied that they had begun to discuss that internally and would get back to him next week. Not having had a substantive response, Mr Mangione emailed again on 7 November 2019 stating that the Claimant's contract expires in December and querying the *"short/long-term plan"* regarding the Claimant. Mr Adams responded on 8 November agreeing that these were expensive resources, questioning whether another unnamed contractor was needed, and saying that for the Claimant and his team this was still being assessed, but *"I … suspect that we would continue with some of the resources into 2020, especially with the Fixed Income SI due in Feb 2020"*.

108. Following this, it was decided by Ms Vanhoy and Mr Adams that the Claimant's contract should not be renewed. Ms Vanhoy and Mr Adams both say that Ms Reyes participated in the decision and we accept that they may have discussed this with her before she left (which was during November 2019), but it is apparent from Mr Mangione's evidence and his email of 26 November to Mr Loeffler that Mr Adams and Ms Vanhoy were the ultimate decision makers, supported in that by Mr Mangione. Mr Mangione was asked to communicate the decision to Phyton as the organisation with responsibility for handling the relationship with the Claimant. There was a call with HR on 21 November 2019, but no records of that call were kept. The Claimant invites us to conclude that WF is withholding disclosure in relation to the decision

not to renew his contract, but we do not find any basis for this conclusion. There are no obvious gaps in the documentation at this point. Various emails have been disclosed. It is consistent with WF's approach to its 'non-managed resources' that terminations of contract, especially where believed to be at the end of a fixed term, are not documented in any detail, if at all.

109. Mr Mangione spoke to Peter Hurley at Phyton on 26 November 2019.

110. On or around 1 December 2019 the Claimant was told by Phyton that his engagement with WF was ending. He was aware that WF had been trying to contact him before that while he was out of the office doing his Masters course and he was suspicious that they were moving to 'get rid' of him. He also says in his witness statement that in this week *"FCA regulators had visited [WF] to ask questions about the Bank's compliance in relation to the work I had been carrying out on MiFID II and MAD/MAR remediation"*, but we have heard no evidence about this. It was not put to WF's witnesses that the FCA visit either happened or was linked to the decision not to renew the Claimant's contract and we do not therefore accept this assertion by the Claimant which cannot be first-hand knowledge.

111. On 2 December 2019 the Claimant contacted John Langley (Regional President and Head of CIB EMEA) asking for a meeting saying *"I was working with Alicia Reyes before she left – I was left without the appropriate level of contact to work through a number of regulatory issues about which I remain now increasingly concerned"*. Mr Langley responded promptly, offering to meet on 4 December, but the Claimant was unable to do so and Mr Langley then passed his complaint onto Employee Relations (Ms Healy).

112. On 3 December 2019 Mr Mangione told the Claimant in a phone call that his contract was ending. The Claimant became very upset and angry in this call and said words to the effect that Mr Mangione was 'lying' because the Claimant 'knew' his contract was not due to end until June 2020. Mr Mangione's account of the conversation, as given in oral evidence, was very similar, in that he agreed the Claimant had made clear he did not believe him that his contract was ending. Mr Mangione said that the conversation went 'sideways' after this point. The call went on for some time (c 45 minutes, Mr Mangione said). Mr Mangione said that he sought to persuade the Claimant not to make too much fuss about the decision not to renew his contract by saying that there may then be other opportunities for the Claimant in the future. The Claimant, however, alleges that Mr Mangione threatened that he would *"make things worse"* for the Claimant if he *"made any more noises"*. Taking the evidence as a whole, we do not consider that there is any significant difference between them as to what was actually said in this conversation; the difference between them is only as to what inferences should be drawn from it (which we deal with in our Conclusions). Mr Mangione by his own admission was trying to dissuade the Claimant from complaining about his contract termination by suggesting that things would be better for him if he 'went quietly' than if he did not. What the Claimant says that Mr Mangione said is broadly consistent with Mr Mangione's own evidence and we therefore accept that Mr Mangione said words to the effect

alleged by the Claimant (although it does not follow that Mr Mangione was alluding to any protected disclosure of the Claimant; we deal with that aspect in our Conclusions).

113. The Claimant maintains in his evidence in these proceedings that Mr Mangione was 'lying' about his contract end date, but that allegation was not put to Mr Mangione by Mr Cheetham who considered (rightly) that there was no basis for it. It is clear from the prior email traffic that Mr Mangione, Mr Adams and Ms Vanhoy all believed that the Claimant's contract was due to end in December 2019, in accordance with the contract that WF had with Phyton. They had none of them seen the Claimant's contract with Phyton.

114. After the conversation Mr Mangione emailed Mr Adams and Ms Vanhoy saying that the Claimant was not accepting the termination, considered the projects would go sideways without him and he would be in touch. He wrote *"Let's monitor him, and if he is creating any issues we will roll him off before 12/20"* (i.e. before the end of what he understood to be the notice period).

115. The Claimant left WF's office after the call. He told Stanley Lay (p 1789) that he was leaving immediately as *"it would not be appropriate to carry on based on the conversation with Alberto"*. He also told Brian Pressman of Phyton that he would not work his 2 weeks notice and that his not attending a steering committee that week would cause problems. He took with him the laptop that he had been using, although it was the property of WF.

116. On 3 December 2019 the Claimant emailed John Langley again (p 1936) stating that he had left the bank today *"due to actions of Alberto Mangione"* because *"he (working with others) has retaliated against me for raising concerns various issues in the bank".*

117. The Claimant did not say anything of his decision to Mr Mangione. Mr Mangione learnt on 4 December 2019 that the Claimant had not turned up for work and had cleared his desk the night before. Mr Mangione then took steps to suspend the Claimant's access to the IT system.

118. By email of 3 December the Claimant asked Ms Vanhoy if she knew that his contract ran to June 2020 (p 1793). Ms Vanhoy forwarded the email to Mr Adams, Mr Mangione and Mr Loeffler but did not reply to the Claimant. It is again apparent from the email chain that none of them knew that the Claimant's contract terminated in June 2020.

119. The Claimant suffers from depression and his priority following termination was to protect his own mental health, which is why he did not return to work. Medical evidence indicates his mental state was poor following termination.

120. The Claimant's Consultant Psychiatrist, Dr Yousaf, on 12 January 2020 made recommendations for his return to work with reasonable adjustments. The Claimant emailed this report to Mr Langley on 15 January 2020 requesting to return to the office.

121. On 28 January 2020 Victoria Healy of Employee Relations contacted the Claimant indicating that Mr Langley had shared emails with her and inviting him to provide details of his concerns about Mr Mangione's conduct and business/compliance matters. She also confirmed that his engagement with WF had ended on 3 December 2019 and there was no business need to re-engage his services. The Claimant queried this and Ms Healy explained (accurately) that he had been told his contract was terminating and that he chose not to return after 3 December 2019. She also asked for the return of the laptop.

122. By email of 13 February 2020 Ms Healy informed him that the reason his contract was terminated because his services were no longer required. The Claimant disagreed, responding by email of 17 February 2020 that his services were very much required.

Withholding of business expenses and payments for December 2019

123. On 22 December 2019 the Claimant invoiced Phyton for 10 days notice pay and expenses for travel requested/approved by Susan Johnson. The Claimant says that none of the invoice was paid. The Claimant alleges that Mr Mangione instructed Phyton to withhold payment of business expenses and payments for December 2019.

124. Mr Mangione says that his understanding is that the expenses were paid and he refers to an email from Ms Johnson of 28 January 2020 approving the expenses. Neither side have produced any evidence of any money being transferred. The obligation to pay the Claimant would have been that of Phyton. In the absence of evidence that the expenses were paid after being approved, we are prepared to accept the Claimant's evidence that he has not received payment, but (so far as WF is concerned at least) there was clearly an intention to pay.

125. As to the notice period, Mr Mangione says that Phyton did not pass on to WF the invoice for the notice period. The Claimant's timesheet at p 2919 suggests otherwise as it apparently shows the week of 9-13 December being approved by Amina Olupitan of WF and an invoice prepared, but the previous week which refers explicitly to 3 days' notice pay was rejected by her so there is an inconsistency here and this evidence cannot be taken as showing approval for the payment of a notice period. In the circumstances, we accept Mr Mangione's evidence that ultimately Phyton did not in fact present an invoice for the notice pay as it is clear from email of 3 February 2020 from Mr Pressman of Phyton to Mr Mangione (p 2386) that Phyton's allegiance was to WF and it would have been clear to Phyton that presenting an invoice for a notice period that a contractor had refused to work would have been inappropriate. WF did subsequently offer to pay one week's notice if the Claimant returned the laptop. This message was passed onto the Claimant by Mr Pressman of Phyton on 23 January 2020 in the following terms: *"Going forward I will be your point of contact on any financial matters. … We are going to do a full review of our records and determine what the amounts owed*

are, if any. Once I have that total we will talk about delivering this money to you on the successful receipt of [WF] property that you still have in your possession". The Claimant did eventually return the laptop in May 2020, but no money was paid, we infer because all goodwill had by then evaporated given how long it took the Claimant to return the laptop and that these proceedings had by then been commenced.

126. The Claimant says that WF's standard practice was to pay two weeks' notice whether the period was worked or not. For example, he says that happened with Daniel Andonovski. He accepted he had no evidence of someone being paid for a notice period where, as in his case, they were asked to work but refused to do so.

127. On 5 January 2020 the Claimant complained to Mr Langley that he was not being paid and alleged that this was further retaliation by Mr Mangione.

Data Subject Access Request (DSAR) (detriment 3.1.7)

128. The Claimant made a DSAR on 1 December 2019. In his witness statement he explains that he did that because he was aware that WF was trying to contact him and suspected that they were moving to get rid of him. On 20 December 2019 WF responded providing two emails.

129. On 22 December 2019 the Claimant made a second DSAR, to which WF responded on 31 January 2020 providing more documents.

130. On 17 February 2020 the Claimant made a third DSAR, to which WF responded on 17 March 2020 again providing more documents.

These proceedings

131. There was a period of ACAS Early Conciliation between 19 February 2020 and 2 March 2020 for Wells Fargo Securities International Limited and between 23 February 2020 and 2 March 2020 for Wells Fargo Bank National Association. The Claimant had instructed a solicitor by 19 February 2020 (p 2465).

132. The Claimant's claim was received by the Tribunal on 2 April 2020.

133. On the same day the Claimant had a telephone call with Alicia Reyes, who had also left the bank. It is clear from that call that Ms Reyes was very unhappy about WF. In that call Ms Reyes described there being a 'mafia' at WF, that WF *"does a lot of things on the wrong side of the regulation"*, that WF *"wanted to send a communication to the FCA [regarding Research] that didn't present the truth",* that the Claimant has a *"history of mistreatment by [Alberto Mangione] that she had logged with HR"* and that the Claimant had been *"ruffling feathers"* too much. We have taken the whole of this hour-long call into account, but we give significantly less weight to what Ms Reyes says

in this call than we do to the witness evidence we have received in these proceedings, given that it represents what (so far as we can tell) Ms Reyes expected to be a private conversation for the Claimant's ears only and she has not given evidence to us or been cross-examined.

Conclusions

The detriments claims

The law

134. Following discussion during Closing Submissions, the parties confirmed that they were agreed as to the legal principles that we must apply. They are (in our words) as follows:-

135. Under s 47B(1) ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of her employer done on the ground that the worker has made a protected disclosure. Under s 47B(1A)(a) ERA 1006 a worker has the same right not to be subjected to a detriment by another worker of the employer done in the course of that other worker's employment.

136. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] *per* Lord Hope and at [104]-[105] *per* Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123]) agreed with Lord Hope.) The Court of Appeal has confirmed that the same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases: *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180, [2020] ICR 965 at [42].

137. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B(1) as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"*.

138. A *qualifying* disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

139. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, [24]-[26], it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified (at

[30]-[36]) that *"allegation"* and *"disclosure of information"* are not mutually exclusive categories. What matters is the wording of the statute; some 'information' must be 'disclosed' and that requires that the communication have sufficient *"specific factual content".* In *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601, [2021] ICR 695 the CA at [53] approved the approach of the EAT (UKEAT/0016/18/DA) at [42] in relation to the use of questions in an alleged protected disclosure) that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it *"sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation"*.

140. Information disclosed in cumulative communications can constitute a single protected disclosure; whether it does is a question of fact: *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, approved in *Simpson v Cantor Fitzgerald Europe* ibid at [41].

141. A 'disclosure of information' can take place when the information being communicated is already known to the recipient. This is clear from section 43L(3) ERA 1996, and was confirmed by the Employment Appeal Tribunal in *Parsons v Airplus International Ltd* (UKEAT/0111/17/JOJ).

142. What must be established in each case is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed 'tended to show' that someone had failed, was failing or was likely to fail to comply with one of the legal obligations set out there. 'Tends to show' is a lower hurdle than having to believe the information 'does' show the relevant breach or likely breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) [66]. The word *"likely"* appears in the section in connection with future failures only, not past or current failings where what is required is that the Claimant reasonably believe that the information disclosed 'tends to show' actual failures. Where what is in issue is a likely future failure, the EAT in *Kraus v Penna Plc* [2004] IRLR 260 at [24] held that *"likely"* in this context means *"more probable than not"*. On this particular point, *Kraus v Penna* was not over-ruled by *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026, but in *Babula* the Court of Appeal did over-rule *Kraus* in relation to the approach to be taken to assessing the reasonableness of the Claimant's belief.

143. In the light of *Babula* (ibid, [74]-[81]), what is necessary is that the Tribunal first ascertain what the Claimant subjectively believed. The Court of Appeal in *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, [2020] IRLR 224 (see especially [14]-[17] and [25]) has confirmed that it is the Claimant's subjective belief that must be assessed when considering the public interest element as well. The Tribunal must then consider whether the Claimant's belief in both respects was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied, specifically that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with a relevant legal obligation.

The Court of Appeal in *Babula* emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not. As such, it is not necessary that the disclosure identify or otherwise refer to the legal obligation (or any of the matters in s 43B(1)), although whether it does or not may be relevant to the reasonableness of the claimant's belief that the information disclosed tends to show a relevant breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) at [87] and [103]-[104] *per* Linden J.

144. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615. It is to be assessed in the light of all the surrounding circumstances and as such witness evidence will be relevant to determining whether or not a written disclosure satisfies the statutory requirements or not. What was or was not known to the Claimant and relevant witnesses at the time will be relevant to whether or not the Claimant could reasonably believe that the disclosure met the statutory requirements: see *Twist* ibid at [57]-[59].

145. Prior to the amendment to s 43B of the ERA 1996 (by the Employment and Regulatory Reform Act 2013, s 17) to introduce the 'public interest' requirement, it had been held (in *Parkins v Sodexho* [2002] IRLR 109) that a disclosure concerning a breach of the employee's own contract could be a protected disclosure. In *Chesterton Global and anor v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731 the Court of Appeal (*per* Underhill LJ at [36]) made the following observations about the policy intent of the introduction of the 'public interest' requirement:

> The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers—even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

146. The Court of Appeal in that case approved guidance formulated by counsel as to the matters that may be relevant to assessing the reasonableness of the Claimant's belief in the matter being a matter of public interest which included the following ([34]):

> (a) the numbers in the group whose interests the disclosure served [see above];
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
> (c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
> (d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.

147. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment *"on the ground that"* he made a protected disclosure (s 47B(1)). This means that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at [43] and [45]. This requires an analysis of the mental processes of the worker who is alleged to have subjected the claimant to a detriment. In order for a decision-maker to be materially influenced by a protected disclosure, they must have personal knowledge of it: see *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) at [85]-[87]. As Choudhury J explains there, that is because in whistle-blowing cases, as in discrimination, the focus is on what is in the mind of the individual alleged to have subjected the claimant to a detriment. As was held in the discrimination case of *CLFIS (UK) Limited v Reynolds* [2015] IRLR 562, it is not permissible to add together the mental processes of two different individuals.

148. Careful consideration needs to be given to cases where the employer's defence is that the detrimental treatment was not because of the protected disclosure but because of the way in which the protected disclosure was made. The question in such cases is *"whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and, if so, whether those factors were, in fact, the reasons why the employer acted as he did"*: *Panayiotou v Chief Constable Kernaghan* [2014] IRLR 500 *per* Lewis J at [54]. However, the EAT in *Martin v Devonshires* [2011] ICR 352 warned (in a discrimination context) that Tribunals should bear in mind the policy of the anti-victimisation provisions (which policy also underlies the protected disclosures legislation) and *"be slow to recognise a distinction between the complaint and the way it is made save in clear cases"* (*per* Underhill P, as he then was, at [22]).

149. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he was subject to detrimental treatment. However, s 48(2) provides that it is then *"for the employer to show the ground on which any act, or deliberate failure to act, was done"*. It has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as

to causation before the employer will be called upon to prove that the protected disclosure was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at [40] (deciding this point so far as dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at [115]-[116] and *Dahou* ibid at [40].

150. Finally, Mr Lee referred to [93] of *Malik v Cenkos* where Choudhury J expressed the view that the principles in *Royal Mail Ltd v Jhuti* [2019] UKSC 55, [2020] ICR 731 did not apply to detriments cases *"because the liability for the dismissal lies only with the employer, and the injustice which concerned the Court of Appeal in CLFIS does not arise"*. We observe that this *obiter* comment may not be correct since the 'injustice' identified in the *CLFIS* case was that in discrimination claims the individual agent or employee for whose actions the employer is liable is also deemed personally liable under ss 109 and 110 of the Equality Act 2010. However, the whistleblowing provisions do not work that way. There are separate provisions for the liability of the employer (s 47B(1)) and the personal liability of the worker or agent (s 47B(1A)) and while the employer is liable for the actions of the worker (subject to the reasonable steps defence: ss 47(1B) and (1D)), the worker is not deemed liable with the employer. We can therefore see no reason why the principles in *Jhuti* should not apply to detriments claims brought against the employer under s 47B(1A). However, Mr Cheetham has not sought to rely on *Jhuti* in this case. Nonetheless, given the factual complexity of this case, we have kept in mind in our deliberations the possibility of liability arising in a *Jhuti*-type situation, i.e. where a decision-maker has acted on the basis of a reason invented by another person in the hierarchy of responsibility above the employee motivated by the protected disclosures, or there has been similar manipulation of a situation by such an individual. We have not found any evidence that there was a *Jhuti*-type situation in this case.

The protected disclosures

151. We consider first whether the alleged protected disclosures meet the statutory definition in s 43B ERA 1996 according to the legal principles we have set out above.

<u>a. The Claimant being asked to provide invoices without VAT to be processed by Phyton in the US amounted to tax fraud. Verbally. December 2018 – January 2019. To Mr Lawson and Mr Mangione.</u>

152. This alleged protected disclosure has two (or, the Claimant says, three) parts to it:-

153. First, there is what the Claimant said to Mr Lawson regarding VAT not being paid by WF amounting to VAT fraud. It is admitted by WF that this verbal disclosure met the statutory definition, and we agree. We therefore make no further findings regarding this part of the protected disclosures, although we note that the obligation to pay VAT was the Claimant's and not WF's or Phyton's.

154. Secondly, there is the Claimant's allegation that he said the same thing to Mr Mangione at a later date. We found that the Claimant had not on the facts discharged the burden on him in relation to that aspect of the alleged protected disclosure so that alleged protected disclosure is not made out.

155. Thirdly, the Claimant in his witness statement alleged that he had said to Mr Lawson that the problem was not just VAT fraud but also that it resulted in non-compliance with accounting rules as putting the transactions for WF's UK business through the US entities distorted the expenditure of the two organisations. This alleged disclosure was not, however, pleaded and since there is no application to amend it is not an issue before us. In any event, we cannot see what this point would add to the Claimant's case given that the allegation is that it was said only to Mr Lawson and there is no evidence that that particular point was passed onto any of the people alleged to have subjected the Claimant to detriments.

<u>b. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients. Powerpoint presentation (pp 686-716, especially 691). March – April 2019. To Mr O'Brien and approximately 20 other employees.</u>

156. The Respondent accepts that this was a protected disclosure insofar as it was made to Mr O'Brien. It is not accepted for other unidentified employees. However, given the admission, it is immaterial who else the disclosure was made to. A disclosure is a qualifying disclosure if it is made to the Claimant's employer and Mr O'Brien is alone sufficient to constitute 'the employer' for these purposes. Further, while acknowledging that a corporate entity can only act through individuals, it is accepted by WF that the Claimant gave his presentation to a number of employees at workshops organised by WF (Mr O'Brien and others) for the purposes of WF's ongoing business. That is in our judgment sufficient to mean that disclosures made at those workshops were made 'to the employer' within the meaning of s 43C. These disclosures therefore meet the statutory definition.

c. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients. Verbally (but regarding pp 686-719 and 1096). June-August 2019. To Ms Reyes.

157. We find that the Claimant has not discharged the burden on him in relation to this alleged protected disclosure. In the list of issues, it is identified that this alleged protected disclosure was made to Ms Reyes verbally in meetings during this period. However, his evidence of what he said to Ms Reyes regarding research compliance between June and August 2019 is minimal. Such as it is, it is to be found (as identified on the list of issues) at paragraphs 136-139 of his witness statement, but that contains no detail of what he said to Ms Reyes at all. Disclosures concerning research of the sort identified in the list of issues at this point are included in his traceability analysis (p 1096) that he sent to Ms Reyes by email on 12 August 2019, but there is no evidence before us that he sent that document to anyone prior to that point, or that he was talking to Ms Reyes about the ongoing compliance gaps with research before that (or at any time). On the contrary, it is apparent that he was not working on research during that period because the research work had moved to the US in April 2019 and Mr O'Brien had rebuffed his offers of further assistance. The Claimant's own emails to Ms Vanhoy and Mr O'Brien in August 2019 (above, paragraphs 94-95) make clear that he was not aware of what was going on with research in the intervening period, as does the other documentary evidence showing that research was being handled in the US at that point (above, paragraphs 82 and 85). In the premises, we are not prepared to infer, especially in the absence of any specific evidence from the Claimant, that he discussed his concerns about research verbally with Ms Reyes during this period and so the pleaded alleged protected disclosure fails on the facts.

158. We add that there is evidence that after 12 August 2019, the Claimant shared his traceability analysis document (p 1096) with Mr Mangione and Ms Vanhoy and that they refused to use it because it concerned areas that the Claimant had not been working on, had not been 'vetted' by Compliance and Legal and was too detailed for the purposes of the 'to do' list that they were trying to draw up at that point. The Claimant does not in the list of issues identify his sharing of the traceability analysis document with colleagues as being itself an alleged protected disclosure and so we have not considered it as such. Our findings in relation to the facts of the sharing of that document are set out at paragraphs 8284.

d. List of MiFID II compliance gaps would constitute 'reportable concerns' under SYSC 18 and should be deal with accordingly. Email to Ms Reyes, Mr Mangione and Ms Vanhoy (1078-1079). 10 August 2019, email at 10:56 to Ms Reyes and email at 14:23 to all three.

159. Our findings of fact in relation to these two emails, and the wider sequence of emails of which they form a part, are set out at paragraphs 74-81 above.

160. The first email in time that the Claimant relies on as a protected disclosure is that at 14:23 to Mr Mangione, Ms Reyes and Ms Vanhoy. In our findings of fact above, we already noted that prior to this point in the emails the Claimant had not indicated that he considered the 'to do' list to which Mr Hares had requested that he contribute was unlawful. Rather, the Claimant had initially had no concerns about the 'to do' list, he just did not want to contribute as he felt that he had already prepared a more detailed list. Subsequently, in part prompted by his realisation that he had been left out of the steering group, he did argue that his traceability approach was better than the 'to do' list (or 'inventory approach' as he called it). At 14:23 he wrote:

> Further key considerations to raise regarding the spreadsheet / process being sent out on email by the WPMO with responses being required by defined deadlines:
>
> 1. The disclosures requested regarding MiFID II gaps would be expected fall under the FCA SYSC 18 definition of 'disclosure of reportable concerns'
> 2. Appropriate records of reportable concerns under SYSC 18.3.1 (2)(e) should be kept
> 3. The disclosure handling should be as documented in relevant WF / WFS procedures under SYSC 18.3.1(2)
>
> In relation to SYSC 18, I would consider it appropriate that the process is reviewed by Legal and Compliance and approved appropriately before the work progresses further (unless this has already taken place, I am not aware that it has and stand to be corrected)

161. In our findings of fact we observed that in this email the Claimant identifies certain legal principles/requirements that he considers to be relevant and suggests that the process being adopted should be reviewed by Legal and Compliance before progressing further. We further found that although Mr Mangione said he did not understand the Claimant was saying the 'to do' list approach was unlawful, he was aware in general terms that the Claimant was querying the lawfulness of the approach, but he did not understand the legal point the Claimant was seeking to make and did not consider there could be a legal problem, because all they were trying to do was to identify, in headline terms, the compliance gaps for the purpose of scoping the work to be done by the newly rejuvenated MiFID II remediation project.

162. We now consider whether this email meets the statutory definition of a protected disclosure. We find that the Claimant did subjectively believe that this email tended to show that WF had failed, was failing or was likely to fail to comply with a legal obligation. This is because in his mind he had convinced himself that the 'to do' list that Mr Hares had asked for amounted to a request to the team to become 'whistleblowers' as defined in SYSC 18 as in preparing the list they would be 'disclosing' 'reportable concerns' (defined among other things as including anything that would be the subject-matter of a protected disclosure) to WF. He had further convinced himself that the 'to do' list approach was not an 'appropriate' way of keeping such records. However, we are not prepared to accept that the Claimant's subjective belief that his email tended to show this was objectively reasonable. This is for two reasons:- first, because the email itself is in terms

circumspect, it does not assert that what is being done is unlawful, it identifies legal requirements and suggests that the proposals are checked by Legal or Compliance; secondly, because the Claimant's legal point here is not an obvious one and in our judgment merely identifying the legal principles and suggesting the proposals be checked with Legal or Compliance was not enough in this case to convey to the reasonable person reading the email that there could be a breach of a legal obligation. The Claimant's legal point here is based on a highly technical analysis of SYSC 18 which is divorced from its purpose. SYSC 18, like the protections for whistleblowers in the ERA 1996, is generally understood as being addressed to dealing with concerns raised outwith 'the normal course of business', unsolicited by the business and for which legal protection for those raising the concerns may be required, including confidentiality and protection from subjection to detriment. It does not obviously apply to the situation where a firm requests a team of employees to create a 'to do' list of known compliance gaps in order to set up a remediation project as part of its ordinary course of business. There was therefore in our judgment no reason for any reasonable person reading the Claimant's email to consider that the information contained in it about legal principles, even when combined with the preceding emails, tended to show that the firm was failing or likely to fail in that context with the requirements of SYSC 18.

163. On that basis alone, this protected disclosure fails, but even if we were satisfied that objectively the Claimant's email tended to show a breach of a legal obligation, we do not consider that the Claimant subjectively believed it was in the public interest to raise this point. He has given no evidence that he considered it to be in the public interest and our reading of his emails over the course of Friday 9 and Saturday 10 August is that his dominant motive at this point was concern that he had been left out of the steering group for the new project and that because he was not at the table he was going to be 'on the menu' or, in other words, out of a job. That was, we consider (as did Mr O'Brien) his motivation in pursuing Mr O'Brien in relation to the research work even after it moved to the US, and it is also what was concerning the Claimant on 10 August. In raising his concerns about the process on 10 August, and acting as he did in taking his traceability list direct to Ms Reyes on 12 August, he was trying to put 'spokes in the WF wheel' and persuade his colleagues that, with what he regarded as his superior knowledge and expertise, he was so essential to the remediation effort that he needed to be including in the steering group. Notwithstanding his subjective belief that the 'to do' list approach was technically a breach of SYSC 18 (which is undoubtedly a legal framework that is there to protect the public interest), we find that the public interest formed no significant part of the Claimant's reasons for sending this email. We further consider that there was objectively no public interest in the Claimant's alleged protected disclosure at this point. WF was trying to scope out and set up a large-scale remediation project and it was in the public interest that it should be able to do that as swiftly and efficiently as possible. If, down the line, that project failed to take account of the Claimant's more detailed points and approach then there may have been a public interest in him raising them, but there was not at this point.

164. The second email on which the Claimant relies as a protected disclosure is the following email which he sent solely to Ms Reyes and which she did not share with anyone else. The Claimant wrote to Ms Reyes:

> On an individual level, this has moved from a simple analysis of the MiFID II regulations to, in essence, being required to blow the whistle (as per SYSC 18), in writing, on all known MiFID II gaps by 10 am on Monday — this request has been addressed to a number of individuals not just me. I do not believe this kind process ad hoc approach is compliant with SYSC 18. I have declined the WPMO meeting at 10:30 am on Monday as I do not believe the WPMO are the right function to whom reportable concerns / disclosures should be made without involvement of anyone from the control functions — unless you confirm otherwise that this is appropriate. I spoke with Xavier on Friday about the overall WPMO issues without making detailed references on Friday and she suggested I speak with you directly.
>
> In sum:
>
> 1. I have an understanding of numerous MiFID II gaps in WFSIL that are not currently being remediated as well as some of the causes of these gaps
> 2. I am happy to disclose my reportable concerns under the relevant WF/WFS procedures but will require adequate preparation time to provide my comments in full — Monday 10 am does not allow enough time
> 3. I am more than happy to discuss any of this with you in confidence as my executive sponsor, but not working with WPMO individuals who clearly do not understand the bank's legal and regulatory obligations in this space and may therefore further compromise the bank's position.

165. Unlike the previous email, this email spells out the Claimant's legal concerns in terms and as such we accept that his subjective belief that his email tended to show legal breaches was objectively reasonable. This email does reasonably convey to its recipient information that tends to show there is likely to be a breach of a legal obligation, albeit that the breach in question is a technical breach for the reasons we have set out and the Claimant may in fact be wrong that it is a breach at all (whether it is or not, we do not have to decide). However, we do not accept that the public interest test is met, either subjectively or objectively, for the same reasons as we found it was not met in relation to the Claimant's previous email sent moments earlier.

e. Being given a short timeframe of two days to detail complex and important issues was an ad hoc approach not consistent with SYSC 18. 10 August 2019 to Ms Reyes. Email 10:56am (p 1078).

166. This alleged protected disclosure is part of the same email to Ms Reyes alone that we have set out above. We do not consider that the Claimant subjectively believed that being given a short timeframe of 2 days to complete the 'to do' list was itself a breach of a legal obligation and his email does not say so. In the circumstances, we find that the Claimant did not subjectively believe that this email contained information that tended to show a breach of a legal obligation, and it certainly does not objectively do so. We further find that the public interest test is not met either subjectively or objectively for the same reasons as we found it was not met in relation to this email previously.

f. Concerning WF's non-compliance with MiFID II requirements relating to provision of research to clients (verbally during meetings), and disclosure regarding Chris Smith's name being used to register trades while he was away (pp 1379-1380). August 2019 to Ms Vanhoy, Mr Adams, Nick Bennett, Michael Hipwell and Brooke Meyers.

167. This is two completely separate potential disclosures. So far as concerns the first, the alleged verbal disclosures in meetings during August 2019 concerning MiFID II failings regarding research, the Claimant has given no evidence of what he said in meetings at all. At paragraph 157 of his witness statement, he referred us to p 131, which was a short-form identification of compliance gaps in relation to research (in the format set by WF) as an "example" of the kind of form he filled in, and in the list of issues he has referred us at p 1297 to a list of meetings at which it appears he presented on research at a meeting on 20 August. However, the Claimant has given no evidence about the meeting on 20 August at all and nor has anyone else. We do not know what he said, or who he said it to. Page 131 was put to Mr Mangione in the course of cross-examination who said that he was not in the meetings and did not know whether the form contained too much detail or not enough. Page 1297 was not put to witnesses at all. The burden is on the Claimant to show that he made protected disclosures, and he has not discharged that burden on the facts of this case.

168. So far as concerns the alleged protected disclosure about Chris Smith, we accept that this satisfies both the subjective and objective test in terms of being a disclosure of information tending to show a breach of a legal obligation, because although the Claimant raises the point only in the form of a question or query, the requirement for trades to be registered against the correct trader's name is so obvious that it is clear from the email trails that the information he discloses does tend to show to everyone involved that there has been a breach of a legal obligation and steps are taken to notify the FCA. The FCA rules are in place in significant part to protect the public interest and therefore we are also prepared to accept that it is implicit in the Claimant's evidence on this at paragraphs 169-173 of his witness statement that he had a subjective belief that there was a public interest in making this disclosure, and we accept that there was objectively a public interest. We note at this point, however, that none of the witnesses in these proceedings were aware that it was the Claimant who had made this disclosure.

Detriments

3.1.1. During meetings in or around August 2019, Alberto Mangione allegedly dismissing the Claimant's concerns about the seriousness of the MiFID II compliance gaps and informing him in an aggressive manner that his detailed explanations were neither required nor desired (GoC ¶16).

169. We have found that the only protected disclosures the Claimant made were: (i) to Mr Lawson regarding VAT in January/February 2019; (ii) to Mr O'Brien and others in April 2019 regarding MiFID II research compliance in his

presentation; and (iii) to various people (none of whom were witnesses in these proceedings) regarding the Chris Smith trade. We do not consider that any of these had anything to do with Mr Mangione's reaction to the Claimant in relation to the meetings in or around August 2019. We deal with the evidence in relation to this at paragraph 88. We find that Mr Mangione spoke to the Claimant about his detailed explanations being 'neither required nor desired' at this point because the Claimant was being aggressive towards Ms Reyes and because he genuinely considered the Claimant's mode of presentation to be inappropriate. What he said was a direct reaction to how the Claimant conducted himself in these meetings (at which the Claimant has failed to prove he made any protected disclosures) and nothing to do with the presentation the Claimant gave back in April 2019, or a response to the Claimant raising the entirely unrelated VAT or Chris Smith issues. This detriment claim therefore fails.

3.1.2. In August 2019, Alberto Mangione allegedly removing him from any further programme work on research and excluding him from MiFID II programme meetings (GoC ¶20).

170. This alleged detriment did not happen as alleged by the Claimant. The Claimant was removed from work on research in April 2019, not August 2019. The decision was taken by Mr O'Brien and Mr Riley and it was not a decision to exclude the Claimant, but a decision to move the research workstream from London to the US and therefore to remove the work from the whole of the London BCG team. The decision that he should not be included in the new MiFID II steering committee was taken by Ms Reyes on 8 August 2019 (see paragraphs 72-75 above). This is some months after the Claimant's presentation of April 2019 which we found constituted a protected disclosure and we find there was no connection between the two. The decision to exclude the Claimant from the new steering committee was also taken before 12 August 2019 when he first sent his traceability spreadsheet to Ms Reyes. That 12 August 2019 email was not alleged to be a protected disclosure, but we note that it is in the traceability spreadsheet that we have for the first time since April 2019 evidence of the Claimant raising compliance gaps in relation to research, which might have provided a link back to his April 2019 presentations, but it is clear that this traceability spreadsheet is sent partly in an effort to be included in the new MiFID II steering committee from which he had already been excluded. In those circumstances, we find that the decision to exclude him from that committee was unconnected to any previous protected disclosure he had made. Moreover, after 12 August 2019, the Claimant was included in numerous MiFID II programme meetings as detailed at pp 1207 and 1297. Thereafter he continued to be included (indeed, to lead) the meetings relating to the workstreams of Systematic Internaliser for which he was responsible (see our findings of fact at paragraph 87).

3.1.3. In October 2019, Alberto Mangione allegedly blocking his appointment as EMEA Business Consulting Group Leader, as a consequence of which he was not offered the post (GoC ¶24).

171. Our findings of fact regarding this allegation are at paragraphs 102106 above. We found as a matter of fact that Mr Mangione did not 'block' the Claimant's appointment, that nobody was in the end appointed to that role and that the reason the Claimant did not go through to the final round was partly because he did not do as well at interview as other candidates and partly because of prior concerns about his interpersonal skilles, including regarding his communication style and verbal aggression towards Ms Reyes and others previously. None of these matters have anything to do with the protected disclosures that we have found to be established. This claim therefore fails.

3.1.4. On 3 December 2019, Alberto Mangione allegedly telling the Claimant that his contract was ending in December 2019, and that he would "make things worse" for the Claimant if the Claimant "made any more noises" (GoC ¶27).

172. Our findings of fact in relation to this conversation are set out at paragraph 112 above. We found that Mr Mangione did use words to the effect alleged by the Claimant. We have considered what his reasons for doing this were and we conclude that it was because of what the Claimant said to him in that telephone conversation where the Claimant accused Mr Mangione of 'lying' about his contract termination and became angry. What Mr Mangione actually said to the Claimant was to the effect that if he did not make a fuss/'noise' about contract termination there might be more work for him in the future. We infer that he said that, not necessarily because he meant it, but because he was trying to deal with what had become a very difficult telephone conversation. It was not, however, anything to do with any of the protected disclosures that we have found to be made out (or indeed, even to do with the concerns the Claimant had raised about research compliance generally). The words were used as a direct reaction to the Claimant's conduct in that telephone call. This claim therefore fails.

3.1.5. The Respondents informing him that his engagement was ending on 3 December 2019 (GoC ¶34-35).

173. We find that the decision to terminate/not renew the Claimant's engagement was taken at that time principally because that was when Mr Mangione, Ms Vanhoy and Mr Adams considered the Claimant's contract was ending, based on the documentation that they had seen. However, it is evident from the matters we have set out at paragraphs 8893 and 107-112 that there was potentially an option to find the Claimant alternative projects to work on going into 2020, but it was decided not to exercise that option. We infer that this was for a number of reasons, including the Claimant's weak interpersonal skills, and the fact that Mr Adams and Ms Vanhoy had a strong preference for Matt Beattie to manage the MiFID II remediation programme, not because he was not a MiFID II 'expert' but because he was a better 'manager' than

the Claimant. The protected disclosures that we have found to be made out had no bearing on the decision. The April 2019 disclosures had been made six months' previously, the VAT disclosure even longer ago and none of the protected disclosures that we have found to be made out were known to the people who took the decision not to renew/terminate the Claimant's engagement, specifically Mr Adams, Ms Vanhoy and Mr Mangione. This claim therefore fails.

3.1.6. The Respondents allegedly instructing Phyton to withhold payment of business expenses and payments for December 2019 from the Claimant (GoC ¶36).

174. Our findings of fact regarding this are at paragraphs 123127. The Respondents did not instruct Phyton to withhold payment of business expenses. These were approved, and if not paid were evidently not paid through error. As to the claimed notice period, this was not paid because Phyton did not invoice for it (and it was never wholly approved by WF). We do not see that the Claimant had any entitlement to notice pay given that he left the office and refused to work as requested. In any event, even if all these payments were not made, the reasons for that are clear: it is because the Claimant left the office, taking WF property with him (the laptop) and refused to work despite being asked to. It had nothing to do with any prior protected disclosure.

3.1.7. The Respondents not responding to the Claimant's DSAR within one month and providing only two emails (GoC ¶26).

175. Our findings of fact on this point are at paragraphs 128130. The initial burden is on the Claimant to establish that he was subjected to a detriment for making protected disclosures and he has not come anywhere near this. We do not have any evidence from anyone who handled the DSAR. It is not established that that individual had any knowledge at all of the protected disclosures and there is no evidence at all to link the handling of the DSAR to any prior protected disclosure. This claim therefore fails.

Time limits

The law

176. Under s 48(3)(a) ERA 1996 there is a primary time limit of three months beginning with the effective date of termination. By virtue of s 48(3)(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996, any period of ACAS Early Conciliation

is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period.

177. Where an act or omission is part of a series of similar acts or omissions, the three month limit runs from the last of them: s 48(3)(a) ERA 1996. This requires that there be some link between the acts which makes it just and reasonable to treat them as having been brought in time: *Arthur v London Eastern Railway* [2007] IRLR 58. An act may also be regarded as extending over a period under s 48(4), in which case time runs from the last day of the period over which the act continues. By analogy with discrimination cases, conduct extends over a period if it amounts to a 'continuing state of affairs': see *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530.

178. In discrimination cases it has been held that an in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19/OO) at [32]-[33]. We see no reason why the same principle should not apply to protected interest disclosure cases.

179. If an act is not part of a series of acts or omissions ending in time, the tribunal must first consider whether it was reasonably feasible to present the claim in time. This is the same test as applies in unfair dismissal cases: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. Where an employee has knowledge of the relevant facts and the right to bring a claim there is an onus on them to make enquiries as to the process for enforcing those rights: *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488.

180. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

181. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA: 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.' This rule is commonly referred to as the 'Dedman principle'.

Time limits conclusion

182. The first three detriments claims have been brought out of time unless they are part of a series of detriments ending with an in-time act that is found to be unlawful (*cf South Western Ambulance* above ibid). Since all the claims have failed, the first three detriments are *prima facie* out of time. The Claimant has adduced no evidence from which we could conclude that it was not reasonably practicable for him to bring those claims earlier. Since he had instructed solicitors by 19 February 2020, the *Dedman* principle would preclude him establishing this in any event on the facts of this case.

Overall conclusion

183. The unanimous judgment of the Tribunal is that the Claimant's claims that he was subjected to detriments for having made protected disclosures are not well-founded and are dismissed.

Employment Judge
Date: 27/07/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

27/07/21.

FOR THE TRIBUNAL OFFICE