EMPLOYMENT TRIBUNALS

Claimant: Miss A Curtis

Respondent: Milltek Sport Ltd

Heard at: Midlands (East) Region by Cloud Video Platform
On: 24, 25 and 26 May 2021

Reserved to: 16 July 2021 for deliberation with members

Before: Employment Judge R Broughton

Members: Ms C Hatcliff
Mr C Goldson

Representation

Claimant: Ms McGee of Counsel
Respondent: Mr A Barnes, Solicitor

RESERVED JUDGMENT

1. The clam of detrimental treatment pursuant to section 47B Employment Rights Act 1996 is well founded and succeeds.

2. The claim of ordinary unfair dismissal pursuant to section 98 Employment Rights Act 1996 is well founded and succeeds.

3. The claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996 is well founded and succeeds.

RESERVED REASONS

1. The claim was presented to the Employment Tribunal on 13 January 2020 following a period of ACAS Early Conciliation which started on 6 January 2020 and ended on 7 January 2020.

2. The claim in essence, relates to disciplinary action which was taken against the Claimant and which resulted in the termination of her employment on 8 November 2019 on the grounds of gross misconduct.

3. The Claimant was employed by the Respondent as its Accounts and HR Manager. The Claimant's employment commenced on 1 July 2015.

4. The Claimant complains not only that the termination of her employment was unfair but that the reason, or principal reason, for the dismissal was that she had made a protected disclosure. Further, she complains of detrimental treatment in connection with the disciplinary proceedings.

5. The legal issues for the Tribunal to determine were agreed between the parties and those legal issues are as set out below.

The Issues

Detrimental treatment under section 47B ERA 1996

Did the Claimant make a qualified disclosure to the Respondent?

The Claimant asserts that a disclosure was made verbally to the Chair of the Respondent, Mr Phillip Millington in April 2019. The Claimant relies on section 43C ERA 1996.

a. Was that disclosure a disclosure of information?

The Claimant asserts that a qualifying protected disclosure was made verbally to Mr Phillip Millington in April 2019. During this conversation, the Claimant alleges that she disclosed Mr Pound's misuse of expenses in addition to the misuse of company credit cards.

The Respondent accepts, if the above disclosure was made, then it would be a disclosure of information. However, the Respondent disputes that such a disclosure was made and disputes that it would be a qualified disclosure.

b. Did the Claimant have a reasonable belief that the disclosure was a qualifying disclosure.

The Claimant relies on subsection(s) 43B(1)(a) and/or 43B(1)(b). The Claimant asserts that she had a reasonable belief that the disclosure of information tended to show:

a) A criminal offence has been committed, is being committed or is likely to be committed namely that Mr Pound was using company expenses and credit card for his own personal benefit which the Claimant submits is fraudulent; and

b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject namely that Mr Pound failed to comply with his legal obligations and fiduciary duty to promote the business of the Respondent.

The Respondent defends the claim on the following basis in particular: that the Claimant cannot have held a reasonable belief that the Managing Director was in breach of his duties as a director or had committed a criminal

act because it was his own company. Further the Respondent has no knowledge of any such conversation, or why, if it happened it can be considered as a protected disclosure as it would simply be the Claimant's job to point out anomalies in expenses.

Did the Claimant have a reasonable belief that the disclosure was in the public interest?

The Respondent disputes that the disclosure was in the public interest as it would not affect others.

Did the Respondent subject the Claimant to any detriments, as set out below;

Subjected the Claimant to unfounded allegations against her

and/or

The Claimant was not given a fair disciplinary procedure.
The Claimant alleges that her;

i. immediate suspension,
ii. lack of an investigatory meeting and
iii. lack of evidence provided prior to the disciplinary was because a protected disclosure was made.

If so, was this done because the Claimant made a protected disclosure?

6. In discussing the issues at the outset, counsel for the Claimant clarified and it was not contested by Mr Barnes, that in terms of the unfound allegations complaint, it covers the allegation that Mr Pound created or added to a document relating to an alleged discussion with a witness on 2 September 2019 and the discussions between Mr Pound and Mr Thorpe before the decision to dismiss.

Issues: Time limit

Was the claim under section 47B brought within three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them?

The Claimant asserts that Mr Pound subjected the Claimant to unfounded allegations because of the qualified disclosure. It was those unfounded allegations that the Claimant ultimately says lead to her dismissal on 8 November 2019. Therefore, the Claimant asserts that time should start from 8 November 2019.

Further, the Claimant asserts that she was subjected to an unfair disciplinary process in relation to the investigation carried out by Mr Pound. The disciplinary meeting did not take place until 6 November 2019. The Claimant asserts that time should run, in the alternative from 6 November 2019.

The Claimant asserts that the immediate suspension forms part of a series of acts included in the unfair disciplinary process.

If not, was the complaint brought within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the

complaint to be presented before the end of that period of three months.

Issues: Automatic unfair dismissal under section 103A ERA 1996

What was the principal reason for the Claimant's dismissal?

Was the Claimant's dismissal because she had made a protected disclosure?

The Claimant asserts that, following Mr Pound becoming aware of the protected disclosure, the witness statement taken during the investigation was added to or created by Mr Pound. The Claimant asserts that this witness statement was relied upon by Mr Thorpe in reaching his decision to dismiss. Further, the Claimant asserts that Mr Thorpe and Mr Pound had discussions prior to the Claimant's dismissal which also influenced the decision to dismiss.

Issues: Unfair dismissal under section 94 and 98 ERA 1996

What was the principal reason for dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the ERA 1996?

The Respondent asserts that it was conduct for breaching data protection legislation.

Did the Respondent act reasonably in treating the alleged misconduct as a sufficient reason for dismissing the Claimant?

Did the Respondent have a genuine belief in the Claimant's guilt?

Did the Respondent have reasonable grounds upon which to base that belief?

Did the Respondent carry out a reasonable investigation in all the circumstances?

Did the Respondent's decision to dismiss fall within the band of reasonable responses?

If the decision to dismiss was procedurally unfair, would following a fair procedure have resulted in the same outcome? Should a Polkey deduction be applied?

If the reason for the dismissal was unfair, did the Claimant's conduct amount to contributory conduct? Should a deduction be made to any basic and/or compensatory award?

Did the Respondent fail to follow the ACAS code and, if so, was that failure unreasonable? Would it be just and equitable in the circumstances to increase any award up to 25%?

The Claimant asserts that the Respondent's failure to follow the ACAS code was due *to the lack of investigation and lack of an investigatory meeting that was carried out.*

Did the Claimant fail to follow the ACAS code and, if so, was that failure unreasonable?

The Respondent asserts that the failure on part of the Claimant to appeal was unreasonable.

Evidence

7. The parties had agreed a bundle of documents which numbered 229 pages. There was then a supplemental bundle which included a further 29 pages of documents.

8. The Claimant did not call any witnesses. She produced a witness statement for liability and a witness statement for remedy. The Respondent relied upon two witnesses and produced witness statements for them. The first witness, was Mr Steven Pound, the Respondent's Managing Director; the second witness was Mr Robert Thorpe, the Respondent's Factory Manager, both of whom were cross-examined by the Claimant.

Preliminary Matters

Application to amend: section 92 ERA

9. The Claimant's further and better particulars as identified by Employment Judge Heap at a preliminary hearing on 23 April 2021, made reference to a breach of section 92 Employment Rights Act 1996. An application to amend was made as directed by Employment Judge Heap, in writing to the tribunal on 30 April 2021 however, Ms McGee confirmed at the outset of today's hearing that the Claimant was not pursuing that application.

Application for redactions of Claimant's witness statement

10. At the commencement of the hearing an objection was raised by the Respondent to the inclusion within the Claimant's witness statement of what the Respondent alleges to be an amendment to the claim. The objection related to three sentences; one in paragraph 6 of her statement and two within paragraph 9.

11. The sentence in paragraph 6 (second sentence) refers to Mr Pound booking holidays and gifts for girlfriends and the Respondent objects to its' inclusion within the statement on the basis that it includes innuendo that; "*there are girlfriends and something untoward"* when Mr Barnes states, Mr Pound is a happily married man.

12. There are also a couple of sentences in paragraph 9, which are on the same sort of theme in terms of how it is alleged Mr Pound used the company credit card for similar purposes.

13. The objection had been raised in writing to the tribunal prior to the hearing to be considered before the tribunal today.The objections are two-fold; firstly that these are new facts which are now pleaded and thus this is an amendment and the second is that there is no evidence, it is asserted, to support these allegations and that they are derogatory and impugn the character of Mr Pound.

14. The tribunal considered the content of the original claim form, which appears in the (p.14) and note that paragraph 8 of that original claim form makes references to the Claimant's concerns about Mr Pound's personal and alleged fraudulent claim for expenses. It does not specifically refer to the detail now contained in the witness statement, about the type of personal use (including for alleged girlfriends of Mr Pound), but it does raise concerns about personal use and potential *fraudulent* misuse.

15. There was a preliminary case management discussion on 9 April 2020 (p.50), as a result of which further and better particulars were ordered. The Claimant had settled the pleadings initially without legal representation.

16. What the Claimant raised within those further particulars are the same concerns around

personal use of expenses and credit cards and refers to an example of such misuse being the upgrading of flights to business class despite Mr Millington's rule that that staff members are to book upper economy flights.

17. At a further preliminary hearing on 23 April 2021 before Employment Judge Heap, an Order was made for the claimant to provide further particulars including the date of the alleged protected disclosure to Mr Millington. The further and better particulars that were provided several weeks before this hearing on 30 April 2021 went beyond what had been Ordered by Employment Judge Heap in terms of the disclosure to Mr Millington and provided further details of the allegations relating to the misuse of company expenses and the company credit card and refers to Mr Pound permitting his girlfriend to use the company account and that he used company funds to pay for a present for his girlfriend.

18. In terms of the alleged protected disclosures, they concern allegations of misuse of company expenses and credit cards and allegations of a criminal offence, they are serious allegations which of themselves potentially impugn the character of Mr Pound but are central to the section 47B and section 103A claim.

19. The tribunal looked at and considered the documents within the bundle and noted that there are a number of documents which include documents disclosed by the Respondent and relied upon by the Respondent in its defence of this claim, which make reference to Mr Pound's relationship with one or more members of staff. By way of example the Claimant set out in her statement for the purposes of the disciplinary hearing (p158/159), reference to such relationships. Indeed, one of the allegations that was put to the Claimant was her disclosure of the home address of a female member of staff, a Ms Wagstaff. The disciplinary hearing notes record discussions between the Claimant and the disciplining officer, Mr Thorpe, about the living arrangements of Ms Wagstaff and the knowledge or gossip about those involving Mr Pound (p.194/ 196/220).

20. In terms of whether the addition of the detail of how Mr Pound misused his credit card gives rise to an amendment, the tribunal applied the guidance in ***Selkent v Bus Co Ltd v Moore 1996 ICR 836***. This information amounts to additional factual information that was not contained in the claim form which was prepared by the Claimant when unrepresented. It is not detailed in the second set of further and better particulars. The Claimant has provided further detail around the nature of the alleged misuse of personal expenses in the second set of further and better particulars and is contained in the Claimant's witness statement. This the tribunal find is the addition of new factual detail not contained in the initial pleading. It is not, however, (and neither party asserts that it is) a new complaint or a new claim. It is a factual detail about the one disclosure that is being relied upon which relates to misuse of expenses.

21. Because the amendment does not give rise to a new complaint, the tribunal are not required to have regard to time limits and the Respondent did not submit otherwise. The tribunal had regard to the timing and manner of the application itself. The formal application to amend is effectively being made today; it was set out in further and better particulars a few weeks ago in April but no formal application was made.

22. The tribunal is required to balance the injustice and hardship to the parties of allowing or not allowing the amendment. The Respondent's representative candidly informed the tribunal that there would be no hardship or prejudice to the Respondent in allowing this additional factual detail to be included. It has not given any examples of any practical difficulties it would create in dealing with this amendment. Mr Pound is going

to give evidence before the tribunal and who can be given the opportunity to deal with this amendment by way of supplemental questions in the event that the amendment is allowed. The Respondent's only hardship it is submitted, is not to the Respondent itself, which is the only party to these proceedings but to Mr Pound personally because it impugns his character. It is also asserted that there is no evidence to support this allegation and it is malicious.

23. The tribunal are mindful that in cases of discrimination and whistleblowing, the tribunal has to be cautious about making any determination as to the merit of a claim, before hearing all the evidence and allowing that evidence to be tested. With respect to what was said in the meeting with Mr Millington, which is central to this case, the Respondent was at liberty to call Mr Millington, who was the only other party present and therefore the only witness for the Respondent in a position to comment on the veracity of this detail. The Respondent for reasons which it never sought to explain to the tribunal, did not call Mr Millington as a witness. The tribunal therefore only has the evidence of the Claimant concerning what she said at the relevant meeting when the alleged disclosure was made. The issues for the tribunal are first whether that disclosure was made and only then to consider whether the Claimant had a reasonable belief that it tends to show the alleged wrongdoing.

24. Neither party raised any concern about the impact on the hearing time of allowing this amendment and neither party argued that a fair trial if permitted, would not be possible. In terms of the hardship or prejudice to the Claimant, the Claimant argued that this is more detail of what she had said and if it cannot be put in to give the full factual context to her claim, it will prejudice her ability to present her case in full.

25. The tribunal reached a decision given orally at the hearing itself, that the amendment is relevant to the issues in the case, Mr Pound's personal relationships were raised during the disciplinary process and in terms of his character being impugned, the claimant alleged disclosure included allegations of alleged fraudulent use of expenses, which is of itself has the potential to impugn his character. Balancing the injustice and prejudice as the tribunal are required to do, the tribunal determined that hardship and prejudice favours the claimant and the addition of this factual detail, was allowed.

26. We now turn to the findings of fact.

27. All findings of fact are reached on a balance of probabilities. All the evidence has been considered but only facts relevant to the findings are set out. All reference to pages numbers in round brackets, are to the pages in the joint bundle.

Findings of Fact

28. The Respondent is a manufacturing company which sells after market performance exhaust systems. The Respondent had two shareholders and statutory directors prior to Mr Pound joining the business; Mr Phillip Millington, the Chairman, and his wife Mrs Millington the Company Secretary.

29. Mr Pound's undisputed evidence is that when he joined the Respondent, Mr Millington put in place a detailed shareholder's agreement which dealt with how Mr Pound would acquire shares. On his appointment, Mr Pound was awarded a small number of B shares which would acquire value dependent on the growth of the business and which he alleges could be removed in certain circumstances.

Shareholders Agreement

30. The evidence of Mr Pound is that the shareholder's agreement permits him to spend up to £5,000 in total without Mr Millington's agreement. The shareholder's agreement itself was not contained within the tribunal bundle to evidence this level of authority and Mr Pound did not dispute the Claimant's evidence that this was not something that she had knowledge of. On a balance of probabilities the tribunal find that such an agreement exists and permits this level of company related expenditure but that the Claimant would not have been aware of it.

Claimant's role

31. The Claimant had worked for the Respondent since 2015 and had a clean disciplinary record. There is some dispute over her role. The Claimant in her evidence in chief refers to herself as the Accounts and HR Manager with her main function being to ensure that the accounts function of the business ran smoothly. The Claimant sets out her daily duties within her statement which in the main relate to accounts and "*handling general HR tasks such as employing staff, dealing with disciplinaries and dismissals*". Consistent with her witness statement, the Claimant described her role as Accounts and HR Manager in her claim form and the Respondent confirmed in its response, that the Claimant's description of her job or job title was correct. Despite this, Mr Pound appeared to the tribunal, to be attempting to elevate the seniority of her position by giving evidence under cross examination that she was in fact the Respondent's HR Director.

32. Mr Thorpe gave evidence under cross examination that he understood the Claimant to be the Accounts and HR Manager.

33. During the disciplinary hearing the Claimant was asked about her experience in HR and she explained, the truth of which is not disputed, that she had received no HR training and had not carried out any CPD training. She found information she needed online. The Claimant it is not in dispute, is not a statutory director.

34. The tribunal find on a balance of probationers that the Claimant's description of her title and responsibilities is accurate.

35. The Claimant's evidence, which the tribunal accept, is that her experience in HR matters was; *"in life, not formal*" and that she had not held an HR role prior to joining the Respondent.

36. Either Mr Pound did not know what the Claimant's role and title was or, he has sought during these proceedings to deliberately elevate her title to that of a director and in doing so, her apparent seniority and experience. As Mr Pound worked closely with the Claimant and given his role as Managing Director, the tribunal find on a balance of probabilities, , it is the latter.

Expenses

37. It is not in dispute, and Mr Pound accepted in cross-examination, that part of the Claimant's role as part of the accounts team, was to regularly ask for expense receipts and at the end of each month she would try to reconcile the credit card statement with the receipts she had been given. Mr Pound accepted that the Claimant would chase him for receipts for payments on the company credit card, which were outstanding.

38. Mr Pound denied that the Claimant had made him aware of concerns about his spending on the credit card and that " *all amounts to repay were repaid as soon as*

possible". He conceded that " *mistakes had been made*" and he went on to give evidence when asked by the tribunal, that the company credit card details had auto saved and he had made payments on the company credit card on occasion by *"accident".* The tribunal find that this was a concession by Mr Pound that his spending on the credit card was on occasion not for legitimate company expenditure. Mr Pound's evidence however is that when he was asked to repay, he did.

39. Mr Pound's evidence is that all amounts that he had to repay were repaid as soon as possible. He accepted that mistakes had been made and that he had on occasion paid for things on his Company credit card accidentally and when asked to repay, his evidence is that he had done so.

40. Mr Pound recalled an occasion where he had had to pay for an emergency flight home; he had had a problem with his personal credit card and paid for the flight on the company credit card – about £4,000. His evidence is that he informed Mr Millington why he had used the company credit card and repaid it and that he had followed that up with an email. The email was not disclosed within the bundle and Mr Millington did not give evidence.

41. It was put to Mr Pound in cross examination, however, that the £3,000 which the Claimant alleges remained unpaid was not one single amount but consisted of a number of expense items. Mr Pound denied any knowledge of any such amounts which remaining outstanding as at April 2019. When put to him that the Claimant had raised with him that his spending on the company credit card was inappropriate his evidence was; "*no – not to my recollection*." It appeared to the tribunal to be a less than emphatic response to an accusation that someone from the accounts team had raised with him in his position as Managing Director, inappropriate spending. He also denied that the Claimant had raised within him an issue over the gifts which he had bought for people on the company credit card.

42. The Claimant's evidence is that in January 2019 she had some reservations about the manner in which Mr Pound was using Company expenses; that she discovered that around £3,000 worth of expenses was owed by Mr Pound to the Respondent. She had noticed that Mr Pound was using expenses for personal use and when this was raised with him he repaid some of the sums but not all of them and he continued to owe about £3,000 to the Company.

43. Mr Pound's expenses spreadsheet/receipts and credit card statements for the relevant period, were not disclosed by the Respondent. The Respondent did not explain why the documents were not provided to the tribunal. The two other shareholders with access to this information, did not present any evidence to support Mr Pound's evidence.

44. The Claimant's evidence is that after a meeting in April 2019 with the Chairman, Mr Millington, she disclosed details of how much Mr Pound owed, what he had spent the money on and explained that she had made unsuccessful attempts to recover the money from him. Her evidence is that she had also raised with Mr Millington, Mr Pound's personal spending on the credit card, including business class flights, which were not essential, and other items. Her evidence is that she referred to this during her meeting with Mr Millington as a misuse of the Company credit card and that she believed at the time that the information she was disclosing to Mr Millington showed that there had been an intention by Mr Pound to misappropriate company funds and that it could constitute fraud. She also believed that Mr Pound was breaching his duties as a Director to promote the best interests of the business.

45. There was some confusion about the date of the meeting within the Claim Form; the claim form referred to her disclosing this information in 2018 or rather "*the fourth quarter of 2018*".In the request for further particulars of the claim (p.44), the date of this meeting was given as April 2019.

46. That inconsistency in dates and whether it was 2018 or April 2019 was put to the Claimant in cross-examination. The Claimant maintains that the correct date is April 2019 and the incorrect date had been inserted in the Claim Form.

47. The only person present at that meeting according to the Claimant, was the Claimant and Mr Millington.

Meeting April 2019

48. The Claimant's undisputed evidence is that she would meet regularly with Mr Millington but it was only at this meeting on a day she cannot recall, in April 2019 that she alleges she made a protected disclosure.

49. It is unusual in that Mr Millington, who remains the Chairman of the Respondent and the only person on behalf of the Respondent who could comment on the meeting in April 2019, whether and when it took place and whether the alleged protected disclosure was made, did not give evidence before this tribunal.

50. Not only did Mr Millington not attend to give evidence, he did not even produce a witness statement.

51. The tribunal expressly invited the parties to address the inferences to be drawn by the failure to call Mr Millington as a witness and even when expressly invited to do, no explanation was put forward for the absence of Mr Millington by the Respondent.

52. Further, within the bundle is a letter from the Claimant to Mr Millington on 29 April 2021. That letter was sent in connection with these proceedings. It refers expressly to the case and the case number and it refers to Employment Judge Heap who had made orders for the Claimant to clarify the date for the meeting that she had with Mr Millington relating to Mr Pound. The Claimant states within that letter that because her access has been revoked immediately on her suspension, she was not able to access her notes or diary to confirm the dates. She states:

> "…*Please confirm urgently the dates of our meetings about Mr Pound for the period November 2018 to the end of June 2019****. In particular, the meeting in April 2019 where I disclosed the amount of money Mr Pound still owed to the company, Milltex Sport Limited****. For clarification, I believe our meeting was towards the end of April 2019.…*"
>
> *[Tribunal stress]*

53. Had there been no such meeting in April 2019 relating to the disclosure of money owed by Mr Pound to the Respondent, it would reasonably be expected that Mr Millington would have said so. However, enclosed within the bundle is a letter received by the Claimant from Mr Millington which is dated 30 April 2021. The Respondent does not allege that Mr Millington did not send this letter, although it does not bear his signature.

54. The letter (page 16 of the supplemental bundle) states as follows:"…

> *"You have requested confirmation of dates of meetings about Mr Pound for the period November 2018 to the end of June 2019, unfortunately I don't keep dates of my visits to Derby going back that far nor do I have any meeting notes relating to any discussions about Mr Pound…"*

55. Mr Millington therefore does not deny within this letter that meetings took place and specifically he does not deny that the Claimant had a meeting with him where she disclosed money owed by Mr Pound to the Respondent. Within his letter he states that in effect he cannot confirm the dates that they took place and that he had no notes of the meetings.

56. The Claimant's evidence is that she considered that this could be fraud, that such behaviour was prohibited, and that it could impact on the company in terms of its reputation and that she believed that Mr Pound was breaching his legal obligations to the Respondent. Mr Pound himself conceded under cross examination, that had he being doing as she alleged, he was, he would consider it a breach of his legal obligations and potentially fraud.

Disclosure : April 2019

57. We then turn to what was specifically discussed at the meeting in April 2019 with Mr Millington. The Claimant gives her evidence at paragraphs 8 through to 11 of her witness statement.

58. The evidence of the Claimant was that she believed Mr Pound's actions were detrimental to the business which is why she raised them with Mr Millington. The Claimant's evidence under cross-examination was that she had said to Mr Millington that Mr Pound was "*misusing expenses and his credit card*".

59. The Claimant's evidence is that ; " *I was saying he was misusing expenses and the credit card – he didn't know Steve Pound had high value* expenses *on top of this credit card".* She gave evidence in response to questions from the tribunal, that what is set out in her statement about fraud is what she not only believed but what she expressly said to Mr Millington; *"I believed this to be an intentional misappropriation of funds by Mr Pound that could constitute fraud"*.

60. What the Claimant alleges she said, as set out in paragraph 9 of her statement is as follows;

- *She had concerns regarding Mr Pound's personal spending of the company credit cards which were often for personal items such as business flights which were not essential.*
- *Import fees and carriage charges charged on the Respondents UPS account for a gift send from Mr Pounds' then girlfriend*
- *Car parts for Mr Pound's privately owned vehicle.*
- *I believed this to be an intentional misappropriation of funds by Mr Pounds that could constitute fraud.*

61. The Claimant also gave evidence that she had said that his actions had the potential to affect company negotiations if people externally found out.

62. The information set out in paragraph 10 and 11 of her statement, she confirmed is what she *believed* at the time she was identifying but not what she said, including that she believed he was breaching his duty as a director to promote the interests of the Respondent.

63. The Claimant's evidence is that she believed this disclosure was in the public interest because it could constitute fraud and in the further and better particulars refers also to the impact this could have on the workforce. In her evidence in chief she also refers to Mr Pounds duties to act in the best interests of the Respondent, the negative impact on the reputation of the Respondent and the financial risk to the business.

64. Her evidence is that in discussions with Mr Millington in that April meeting, Mr Millington also raised his concerns about Mr Pound and told her that he did not know that Mr Pound had high value expenses on top of his credit card, that he shared with her his concerns about how Mr Pound was running the business and specifically that Mr Millington asked her about a female employee Mr Pound had employed, Brittany Wagstaff, and about Ms Wagstaff's salary and whether Ms Wagstaff was in receipt of any benefits.

65. The evidence of the Claimant is that Mr Millington asked the Claimant to keep their discussions about Mr Pound private.

66. That Mr Millington had concerns, is supported to an extent by a WhatsApp message between the Claimant and Mr Golding on 28 February 2019, a couple of months prior to his meeting (p.9 s/b). Mr Golding was at this time, the Respondent's Sales Manager. The Claimant sent a message to Mr Golding asking whether Mr Pound had messaged him about Mr Millington (it was not disputed that the reference to Steve is to Mr Pound and the reference to Phil is to Mr Millington). The Claimant goes on to refer to Mr Pound asking her if Mr Millington has any concerns. Mr Golding responds stating that Mr Pound had also asked him; "*yeah same*" and that he had told him that it was nothing out of the ordinary or to worry about. The Claimant goes on to remark that Mr Pound appeared worried.

67. Mr Pound in cross examination gave evidence that he could not recall being worried at this time, but then contradicted himself under further questioning, by giving evidence that it was the first operating year of the new division , that an office had opened in Germany and that this brought pressure and Mr Millington wanted to ensure it was not "*bringing risk to the business".*

68. The Claimant's evidence is that Mr Millington advised the Claimant to keep monitoring Mr Pound's behaviour and report back to him and that he confirmed to her during the meetings that he held had a *"deep mistrust*" of Mr Pound. The Claimant's evidence is that Mr Millington would ask her from time to time about his whereabouts when Mr Pound would disappear for long periods of time. The evidence of Mr Pound was that his father and brother were ill, and it meant that he could not always inform people that he had to leave but if possible, he would make contact with the office. It appears therefore not to be in dispute that Mr Pound would leave the office at times without informing staff of the reason for his absence.

69. The Claimant's evidence is that Mr Millington would ask her if Mr Pound still owed the Respondent money after this April meeting, and had told her that if she saw any other invoices of concern to let him know but not to use the Company's email address, to write it down and print it off rather than email it to him. She alleges that she did print off the invoice for the hotel which she had concerns about, with the name crossed out

which was not in Mr Pound's name.

70. The Claimant's evidence is that from April 2019, she had regular meetings with Mr Millington to discuss her observations and air any concerns about Mr Pound's running of the business and that Mr Millington's own concerns resulted in him requesting external accountants to investigate Mr Pound.

71. There are no notes or record of that April meeting. The Claimant's evidence is that neither she nor Mr Millington kept notes because Mr Millington asked her to keep the meetings private. She did not consider that she needed therefore to keep any record of the meeting.

72. The Claimant accepted under cross-examination that she never used the term whistleblowing to Mr Millington and did not realise there was a whistleblowing policy in the staff handbook but in any event she was discussing her concerns with the Chairman, there was no one more senior to raise these issues with. In terms of her role under cross examination, it was put to her that as Head of HR she should have been aware of the policies however, she referred to this title as overstating her role and the extent of her HR duties were; completing paperwork for new starters, interviewing people and anything else Mr Pound got her involved with.

73. Mr Pound gave evidence that following the Claimant's departure, there had been an independent audit carried out by chartered accountants and that no anomalies had been found in the accounts and that HMRC had also done a VAT audit which had focussed on expenses and had come back with no anomalies.

74. Neither of those audits, even redacted copies, were included within the bundle. The explanation which was attempted to be put forward to the tribunal by Mr Barnes, for their omission from the bundle, was that, despite the Respondent's witness seeking to rely upon them in evidence (albeit no mention had been made of them within his witness statement), the audits had been carried out after the decision to dismiss had been made and thus were not relevant. Mr Barnes then referred to the bundle of documents having been produced before the witness statements had been prepared as a secondary explanation. When Mr Barnes was reminded of the Respondent's ongoing duty of disclosure however, his only response to this was; "*fair comment*". Mr Barnes first explanation for not disclosing these documents, however, was that they were not relevant because the audits had taken place post dismissal. No application was made to admit them into evidence. Given the absence of any mention of such audits in the witness statements of the Respondent and the absence of those audits in the documents disclosed by the Respondent, and the Respondent's explanation for not enclosing them being initially because they related to events post dismissal ie were not relevant, the tribunal is cautious about the weight attached to this evidence by Mr Pound regarding what those audits did or did not find. It is of course possible, that if there were outstanding expenses, they had been repaid by the date of the audits, without sight of the alleged reports, the tribunal can make no finding on their evidential value.

Meeting with the accountants: May 2019

75. The Claimant's evidence is that after the meeting in April 2019, a meeting was arranged between her and the Respondent's Accountant, Mr Roe.

76. The Claimant's evidence is that she had monthly meetings with the Accountants, but these meetings were different. The regular 'normal' monthly meetings were about the

management accounts and held with a different Accountant. The Claimant's evidence is that for perhaps 5 or 6 months prior to the meeting with Mr Millington in April 2019, she had been asking Mr Pound to repay the expenses. She had not raised it in these regular monthly meetings with the Accountants previously because it was a "*big decision"* for her to raise it and when she did, she raised the issue with Mr Millington only after several months of trying to resolve it with Mr Pound directly.

77. The Claimant alleges that Mr Millington told the Claimant that he was investigating Mr Pound and that she was not the only one to meet with the Accountant. Her evidence is that she understood there was an investigation taking place and that she, Mr Golding, and Mr Thorpe separately had meetings with the Accountant. She did not know, however, what Mr Thorpe discussed with the Accountant.

78. The Claimant's evidence is that she was aware that Mr Golding had issues of his own that he raised those with the Accountant in a separate meeting. She understands that the concerns that he had were that he wanted more clarification on what he and his staff could spend on shows and track days and visitors from GMBH (the Holding company).

79. In terms of her meeting with the Accountants, there is within the bundle an undated document (p.228) headed "*Accounts Review*". The Respondent's asserts that it had been located on her computer after her dismissal and they disclosed it for the purpose of these proceedings. Although there were parts of the document she had no recollection of inserting into the document, the Claimant does not dispute that this was a document which she had created.

80. The Accounts Review document does not expressly refer to any concerns being raised or discussed with the Accountant regarding Mr Pound. At page 229 it does include under expenses, the following entry:

    "*Although expense sheets are completed, may we have clear guidelines on what is an appropriate spend on flights, hotels etc … or if not needed then also let me know especially as we are trying to save money and be more cost effective*."

81. The Claimant, however, does not recall making that particular entry.

82. The Claimant under cross-examination gave evidence that the Account Review document was not a finalised document in respect of the meeting with Mr Roe. Her evidence is that although the meeting took place in May 2019 with the Accountant, she was still working on it in August 2019 before she was suspended and deciding what she was going to say. The Claimant's explanation for not including within this document a reference to any discussion about Mr Pound's misuse of the credit card and his expenses, is confusing in that she refers to this document not being complete hence why it made no reference to this and yet she did not dispute the Respondent's account that they had located it on her computer after her employment had ended, meaning that she had had circa 3 months to complete it. However, we also take into account that she had been told, according to her evidence, to keep this matter confidential.

83. Although there is no express reference to concerns regarding Mr Steve Pound in the Account Review document, the Tribunal have taken into account the document in the supplemental bundle at page 17. This is a letter that the Claimant had sent to the Accountant, Mr Mark Roe on 29 April 2021. This letter refers to Employment Judge Heap requiring clarification of the dates of meetings and within this letter, the Claimant

states:

> "*… Judge Heap made orders to clarify the date of the meeting I had with you, that I believe was in the second quarter of 2019* ***and was regarding issues with Mr Steve Pound and the accounts of Milltek Sport Limited****.* ***For clarification, our meeting was requested by Mr Philip Millington."*** *[Tribunal stress]*

84. It was open to Mr Roe to of course deny in his response that any such meeting had taken place or refute that the meeting had been requested by Mr Millington or refute that the meeting was concerned with issues about Mr Steve Pound and the accounts of the Respondent. It is not in dispute that an email in the bundle (page 18) was sent by Mr Mark Roe on 30 April 2021 in response. That reads as follows:

> "*… I have now had the opportunity to have a read of the attachments to your email but I'm afraid that* ***I can't help with the date*** *that you're looking for as I simply don't have the records this far back." [Tribunal stress]*

85. Considering that the Claimant is writing in connection with an Order made by a Judge in connection with legal proceedings, it would be reasonable to expect Mr Roe to have taken the step of either checking the files or discussing the request with his client and he does not within this email deny that any such meeting took place or deny that the meeting related to Mr Steve Pound.

86. In terms of the spreadsheet that she states had been created showing the expenses outstanding, this was the Respondent's document and they did not enclose a copy of it within the bundle, nor did they explain why it was not included. The Respondent has not disclosed any record of what was discussed at the meeting with Mr Roe and Mr Roe was not called as a witness by the Respondent to refute the allegations of the Claimant.

87. We have taken into account the Claimant's oral evidence, we have also take into account that Mr Millington has not, for reasons not explained to this tribunal, chosen to provide a statement or attend this hearing to rebut the evidence of the Claimant and the tribunal consider that it is reasonable to draw an adverse inference from the Respondent's decision not to call Mr Millington, who is a key witness (the only other person present during the conversation when it is alleged the protected disclosure was made) to give evidence before this tribunal. We have also taken into account the evidence relating to the meeting with Mr Roe.

88. Weighing up the evidence, the tribunal also accept the Claimant's evidence that a meeting did take place between the Claimant and Mr Roe, in May 2019 and further. that the Claimant did make the alleged disclosures at the meeting with Mr Millington in April 2019 that; she had concerns regarding Mr Pound's personal spending of the company credit cards which were often for personal items such as business flights which were not essential, that import fees and carriage charges were charged on the Respondents UPS account for a gift send from Mr Pounds' then girlfriend, that car parts for Mr Pound's privately owned vehicle were being charged to the Respondent and that she believed this to be an intentional misappropriation of funds by Mr Pound that could constitute fraud.

89. We also accept the Claimant's evidence that Mr Millington had disclosed to her his own concerns about how Mr Pound was running the business; had asked her to continue to monitor Mr Pound's expenses and, further, that he had asked her questions regarding

the appointment and the remuneration package of Ms Wagstaff.

90. The Claimant's evidence is that she believed what she was disclosing, amounted to an intention to misappropriate funds that could constitute fraud and a breach of his legal obligations as a Director to act in the best interests of the Respondent Company. We accept the evidence of the Claimant that this was her genuine belief and we accept the Claimant's evidence that she believed that the information that she had disclosed to Mr Millington in their meeting tended to show that type of malpractice and we accept her evidence on a balance of probabilities, that she had been chasing Mr Pound for payment of his expenses, otherwise she would not have felt the need to raise these concerns with Mr Millington. We find that Mr Millington and Mr Roe would have refuted the suggestion of issues with Mr Pound in their letter, had there not been some basis for her raising her concerns. The Respondent could have produced copies of expenses and shown payment but have not done so.

Incident with Mr Golding: August 2019

91. There was then an incident involving Mr Golding. Mr Golding had been absent from work on sick leave. It is common between the parties, that Mr Golding was using a company car with a tracker fitted to it. The undisputed evidence of the Claimant is that Mr Pound had checked the tracker of the car when Mr Golding had not turned up for work on the morning of 14 August 2019 and found that the vehicle had been parked outside a gym. The tribunal must stress however, that Mr Golding was not called as a witness to this hearing and thus has not had an opportunity to comment on the allegation and the evidence presented to this tribunal generally. We have made findings based only on the evidence put before us.

92. Mr Pound asked that the Claimant conduct a back to work interview with Mr Golding. The Claimant conducted that back to work interview on 15 August 2019 and Mr Pound's evidence is that the Claimant was the one to inform him about the tracker on his car and what it had showed, information Mr Pound had given to her.

93. The Claimant's undisputed evidence is that Mr Golding was very angry during that meeting and stated he no longer wanted to work for the Respondent. In response to questions from the tribunal when attempting to clarify the cause of Mr Golding's annoyance, the Claimant gave evidence that his back to work interviews were normally carried out by Mr Pound who he reports into and he was angry that Mr Pound had left the office to collect a vehicle rather than be present at his meeting. He also expressed upset about commissions payments and that he had not received what had been agreed and fed up with being set targets he could not meet. The Claimant believes he was angry with her because she had asked him about leaving his home during his sickness which is not a question which would normally be asked and that she did not reveal to him that she had been asked by Mr Pound to put these questions to him.

94. Following the meeting, the Claimant sent Mr Pound a WhatsApp screenshot of Mr Golding's back to work form (page 177). This form includes Mr Golding's handwritten comments about what remedial action he had taken. He states that he had self-medicated with anti-sickness and diarrhoea tablets and "*stayed in and rested as much as possible throughout my time off*".

95. Within the WhatsApp message, the Claimant informed Mr Pound that Mr Golding had said to her during the back to work interview, that he had stayed indoors when she had asked what he did, although he did mention that he had taken his dog out for 20 minutes and that he seems "*really fed up though"..*

96. In response, Mr Pound states in his message: "*Ok I'm at a loss with him*".

15 and 16 August 2019

97. On 15 August, the undisputed evidence of the Claimant is that Mr Pound then held a meeting with Mr Golding and, following that meeting, she was asked by Mr Pound to produce a letter for Mr Golding confirming his suspension.

98. The next relevant event is that Mr Pound had a meeting with Mr Golding on the morning of 16 August 2019 at a local coffee shop. That this meeting took place is not in dispute.

99. The Claimant's evidence is that the meeting was requested by Mr Golding via an email that Mr Pound received on the evening of 15 August and that Mr Pound shared the content of the email with her. Mr Pound's evidence is that he did not inform the Claimant he was meeting Mr Golding. Nothing much turns on this however, as the Claimant had conducted the back to work interview and produced the suspension letter and Mr Pound does not allege there would have been any reason not to have told the Claimant about the meeting, the tribunal find on a balance of probabilities that Mr Pound had mentioned the meeting to her; he had at this stage no reason not to do so.

100. The evidence of Mr Pound is that when he met with Mr Golding, Mr Golding made allegations about the Claimant's behaviour and in particular that she had had inappropriate discussions with him about information which was confidential, including; disclosing the salary and dividend payments of the Chairman, disclosed to him the salary of the previous manager of Milltek GMBH (German Holding Company), disclosed of the salary of the current of Milltek GMBH and disclosed the address of one of the Respondent's current employee. The address of the employee that was allegedly disclosed by the Claimant was Ms Wagstaff.

101. The evidence of Mr Pound is that the details of the salaries and dividends disclosed to him by Mr Golding during this conversation, were current and accurate and that this information was not public knowledge.

102. Mr Pound in answers to questions from the tribunal gave evidence that Mr Golding had offered his resignation at this meeting. Mr Pound the tribunal find, was reluctant however, when giving his evidence to disclose the circumstances around Mr Goldings departure or indeed express any clear opinion regarding his view of Mr Goldings candour in connection with his sickness absence. When it was put to him in cross examination that there had been issues of honesty around his behaviour when off work sick, his evidence was; *"not sure I would have gone that far - there was concern over what he was saying*". Mr Pound accepted however eventually under cross examination, that what Mr Golding had said to the Claimant at the back to work interview had been "*misleading".*

103. When asked whether Mr Golding had been suspended, Mr Pound's answer was; "*Yes, I believe he was" .* Given that Mr Pound confirmed that he had been the person to suspend Mr Golding, his response seemed to imply no direct knowledge of the fact of suspension.

104. Mr Pound stated only under cross examination, that he had considered whether Mr Golding was being vindictive in making these allegations against the Claimant. Mr Pound stated that Mr Golding had explained that his absence was due to personal reasons and he apologised and that nothing he had said made him Mr Pound consider that he was being vindictive – this is despite the fact that the Claimant had conducted

the back to work interview when he had been questioned about his absence which had lead to his suspension, that he was now negotiating his exit before any disciplinary action may be taken and that he had never previously raised complaints about the Claimant . Mr Pound agreed to let Mr Golding resign with a payment in lieu of notice.

105. Mr Golding would of course be the primary witness against the Claimant. The tribunal find on a balance of probabilities that the most likely explanation for Mr Pound's less than straight forward answers, when being questioned about the circumstances surrounding Mr Golding exit and his candour in connection with his sickness absence, was because Mr Pound was aware of the possible issues which may be raised over the reliability of Mr Golding as a credible witness and the extent to which the Respondent did or did not, consider that.

Record of Mr Golding's alleged disclosure

106. Mr Pound's evidence is that he took manuscript notes of what Mr Golding had said to him at this meeting on a notepad during the meeting at the coffee shop. A copy of those notes which he alleges he took during that discussion with Mr Golding, when he was allegedly "*shocked*" that Mr Golding was able to give him the *accurate and current* salary and dividend details of various individuals, were not included within the bundle. Indeed, Mr Pound had not mentioned within his witness statement that he had taken any notes, however his evidence under cross-examination was that he had done so.

107. When it was put to Mr Pound that those notes were relevant documents which should have been disclosed, his evidence was that the notes were "*superseded by the statement*. *I suffer from extreme dyslexia; you would struggle to read them*".

108. His explanation therefore before this tribunal, for not disclosing the notes appeared to be that a further note which he subsequently created during a follow up telephone call with Mr Golding (allegedly on the 2 September 2019) superseded the detail within those initial manuscript notes. Further, that the notes were not capable of being read because of his dyslexia.

109. The Claimant alleges that Mr Pound returned to the office after meeting with Mr Golding, he did not tell her what had been discussed but made some comment to her, implying that there had been some "*unusual and improper activity*" in the office. The Claimant alleges that she requested a meeting with Mr Pound, but he refused to have a meeting with her. Mr Pound stated that he did not remember making that comment but that it was "*likely she asked, and I said something*" but he could not recall.

110. We find on a balance of probabilities, given how clear the Claimant's evidence was and how equivocal Mr Pound's evidence was, that Mr Pound did make a comment to this effect and that the Claimant did ask for a meeting, but Mr Pound refused to meet with her.

111. The fact that such a statement was made, we find is supportive of something having been said by Mr Golding at the meeting with Mr Pound. There is no assertion by the Claimant or Respondent, that there were problems with the Claimant's relationship with Mr Pound prior to this. The tribunal find therefore that Mr Golding had mentioned something to Mr Pound and on a balance of probabilities, this concerned the Claimant.

112. It was put to Mr Pound during cross examination that during this meeting with

Mr Golding, Mr Golding had disclosed to him concerns that Mr Millington had about him. Mr Pound refuted that Mr Golding had mentioned anything of the sort. It was also put to Mr Pound that Mr Golding had reported to him that the Claimant had raised concerns about him to Mr Millington but, again, Mr Pound denied that Mr Golding had told him that. It was put to Mr Pound that he had become aware on that date of the disclosure that the Claimant had made, and that Mr Golding knew about her disclosure because Mr Millington had asked Mr Golding questions with reference to Mr Pound. Mr Pound denied that any such information was disclosed to him by Mr Golding.

113. There is no direct evidence that Mr Golding had disclosed to Mr Pound at the meeting on 16 August 2019 that the Claimant had been having discussions with Mr Millington about Mr Pound's expenses. There is no direct evidence that Mr Golding was himself aware of the Claimant's disclosure. Mr Golding was not called as a witness by either party.

114. The Claimant was not suspended on Friday 16 August 2019.The Claimant would be suspended several days later on Tuesday 20 August 2019.

Claimant's suspension – 20 August 2019

115. Mr Pound's evidence-in-chief is that he had, following that meeting with Mr Golding "*made some further investigations* ***which seemed to corroborate what I had heard, so*** *in agreement with my outsourced HR team, I suspended Angela on full pay*".[Tribunal stress]

116. The disciplinary policy provides for suspension (p.108); "*We may suspend you on full pay during the period of any suspension …"*

117. There are, however, no documents within the bundle relating to this alleged further investigation by Mr Pound, despite this appearing to be instrumental in his decision to suspend.

118. Mr Pound although the Respondent has been legally represented throughout, neglected within his witness statement to include any detail about that further investigation including what it consisted of and what the findings were. He states quite clearly however that it seemed to support/ corroborate what Mr Golding had told him thus he decided to suspend.

119. In answer to questions from the tribunal, Mr Pound stated that the further investigation that he referred to in his witness statement included discussions with employees Sam Nye and Ethan Burrell.

120. The relevance of those alleged interviews to the decision to suspend is not only addressed in Mr Pound's evidence-in-chief but in the defence of the claim where, in the Grounds of Resistance, it states as follows (page 25):

> " …
>
> *2. The Managing Director, Steve Pound, was advised* [sic] *by a resigning member of staff, during an exit interview, that the Claimant had been spreading details of Directors' salaries and the salaries and terms and conditions of the team in the German arm of the business to other members of staff.*

> *3.* ***The MD felt it was important to remove the Claimant while he carried out further investigations****. The Claimant was advised that she was suspended on full pay.*
>
> *4.* ***Following investigations, it became clear that many of the team were aware of exact details regarding various salaries and benefits of the senior teams in the UK and Germany. The MD felt that there was enough information to commence the disciplinary process****. He asked the Factory Manager, Rob Thorpe, to hold a disciplinary meeting. The MD was not responsible for any decision made with regards to the Claimant's employment*"*[Tribunal stress]*

121. Mr Pound's evidence when asked by the tribunal whether those investigations helped him decide whether to move to a disciplinary was that they; "*gave me confirmation of the seven points on disciplinary*".

122. The seven allegations are those set out in the invitation to the disciplinary meeting in the letter of 3 September 2019 (page 121).

123. Despite the alleged corroborating evidence from these witnesses, Mr Pound gave evidence that he never disclosed to Mr Thorpe that he had carried out any further investigation. He never disclosed to Mr Thorpe what had been discussed with those witnesses.

124. When asked by the tribunal to clarify to what extent he had taken the further investigations into account when deciding to suspend, his evidence was that the suspension was based on the information from Mr Golding only and that "*Once he told me, I could find no explanation*" and that the further investigations actually, corroborated only "*one minor point*". That response was wholly inconsistent with his evidence-in-chief and the Grounds of Resistance in terms of the relevant of the further investigations and the degree to which they lent support to the accusations made by Mr Golding.

125. Despite the alleged corroboration from the witnesses he spoke to during the alleged further investigations, he made no record at all of what they had said, he made no notes, he never mentioned those interviews to Mr Thorpe, he never disclosed to Mr Thorpe that those interviews had ever taken place and he failed to even identify in his evidence in chief who he spoken to and in what way they corroborated what Mr Golding had said to him. Indeed, Mr Pound asserted when asked by the tribunal why he had not made Mr Thorpe aware of those investigations, that this was because Mr Thorpe had been asked to carry his own investigation.

126. If Mr Pound felt convinced after the discussion with Mr Golding that there was no other explanation than the Claimant had disclosed this information to Mr Golding, then why did he not suspend immediately? Why did he feel it necessary to speak to anyone else? If he did not speak to anyone else, why does he allege he did so? Why does he allege that these other witnesses supported Mr Golding's account and then contradict himself and the Respondent's grounds of resistance, by giving evidence that actually their evidence was relevant to only one minor point? Mr Pound's evidence was contradictory and unsatisfactory.

127. We find that Mr Pound either; conducted further investigations with witnesses which he considered corroborated the evidence of Mr Golding but failed not only to record it, he failed to mention it to the disciplining officer (despite allegedly basing his

decision to suspend on that evidence), or he carried out investigations but contrary to his evidence and the defence to the claim, what they said did not support what Mr Golding had told him, or he never carried out any further investigations and alleged that he had done so presumably to justify his treatment of the Claimant.

128. Mr Pound gave evidence that the Claimant had to leave the Respondent immediately because he alleged it was the "*normal policy for our business*"; that she was in a position of trust and that she had access to bank accounts and that he had taken advice from their outsourced HR legal team. He also alleges that he took advice from an external data protection officer and the advice was not to have people in the business where there has been that level of breach. His evidence was that he had taken this advice via a telephone outsourced HR team and data protection officer. His evidence was that he believes there is a log of those calls, although he was not sure, but he had not asked for a copy and they were not disclosed as part of the bundle.

129. Mr Pound had intended to carry out the disciplinary process himself. He would then have had control over the whole process, from the investigation to disciplinary stage. He only appointed Mr Thorpe to carry out the disciplinary, not because he felt he should not do it, but because, due to the Claimant's ill health and delay in proceeding with the disciplinary process, Mr Pound was going to be abroad and evidently, he wanted the matter dealt with before he returned.

130. The tribunal note that Mr Thorpe himself conducted interviews with those same two individuals who Mr Pound alleges he spoke with during his further investigations. A copy of the notes appear in the bundle (p. 167/168). The evidence of Mr Thorpe is that he was not aware that there had been any further investigation by Mr Pound and therefore the Tribunal find on a balance of probabilities that those two witnesses when interviewed by Mr Thorpe did not mention that Mr Pound had already spoken with them and asked them the same or similar questions.

131. The tribunal have considered the evidence these two witnesses gave to Mr Thorpe and the extent to which they corroborated the alleged information from Mr Golding.

132. With regards to Mr Burrell (p. 168), he only gives some evidence about the wrapping of the car and the Claimant asking why they were paying the amount that they were paying for it. No evidence is given by him in support of any allegation about the disclosure of personal data including about salaries or dividends.

133. Sam Nye (p.167) was not present when the wrapping of the car was discussed and gives no evidence to support any allegation that the Claimant had disclosed personal data including about salaries or dividends.

134. Mr Pound's account in his evidence in chief and the claim in the grounds of resistance, that Ethan Burrell and Sam Nye had given him evidence which corroborated the evidence from Mr Golding, is not we find, credible based on his own evidence in response to questions from the tribunal and from the record of the evidence they would later provide to Mr Thorpe..

135. What this Tribunal considers is the most likely on a balance of probabilities, given the witnesses never mentioned to Mr Thorpe ever speaking with Mr Pound about similar matters and the failure by Mr Pound to mention any further investigations to Mr Thorpe, is that no further investigations were carried out by Mr Pound, but even if they were, they did not corroborate what Mr Golding had alleged with respect to the serious

allegations concerning breach of personal data (disclosure of salary and dividend payments and the address of an employee) .

136. The next issue for the tribunal to consider, is why Mr Pound misrepresented in his evidence in chief the relevance of the alleged further investigations to the decision to suspend. We have considered the evidence in relation to events which happened after this, in reaching a finding.

Period before Suspension

137. It was put to Mr Pound in cross-examination that following his discussion at the interview with Mr Golding on 16 August, that over the course of that following weekend he had discussed with Mr Millington what had been said by Mr Golding, before he decided to suspend the Claimant.

138. This allegation that Mr Pound had spoken to Mr Millington after the discussion with Mr Golding before suspension, had not been raised by the Claimant in her evidence-in-chief and had not been put to Mr Pound. The Claimant had raised it only under cross-examination and Mr Barnes request to recall Mr Pound to respond to this allegation was acceded to.

139. Mr Pound's evidence was that he had indeed telephoned Mr Millington as part of normal practice and explained to him what had come to light and that he would be discussing with external HR about next steps and that Mr Millington had simply said he would leave it with him.

140. Mr Pound denied when it was put to him, that Mr Millington had during that discussion with Mr Pound in that intervening period, disclosed to him what the Claimant had reported back to him about his misuse of expenses.

141. The Claimant's assertion is that it Mr Pound's knowledge of the alleged protected disclosure, that led Mr Pound to suspend and that he went on to make or add to the unfounded allegations which Mr Golding had put forward to justify the removal of the Claimant.

142. The Claimant does not allege that she had been told by Mr Millington that there had been such a discussion nor is there any direct evidence that that such a discussion took place between Mr Pound and Mr Millington that weekend. The Respondent's position is that Mr Pound remained unaware of the discussion that the Claimant had had with Mr Millington about his expenses.

143. It is left therefore for the tribunal to consider the primary findings of fact and whether it may be reasonable to infer from those facts, what was said during the discussion between Mr Pound and Mr Millington in the intervening period before suspension, and whether that includes that the alleged protected disclosure about Mr Pound.

144. The key piece of evidence presented by the Claimant is a remark which she alleges was made to her on 20 August 2019 when she arrived for work on the day she was suspended. The Claimant alleges that Mr Pound told her not to go upstairs or to clock in. He advised her that there was evidence showing that salaries and benefits of directors had been discussed and this was information that only the Accounts Team would know. He also mentioned that salaries of colleagues in the German Company, Milltek Sport GMBH, had been wrongly disclosed and he mentioned that the address

of Ms Wagstaff had also been disclosed. The evidence of the Claimant is that she denied the allegations and asked Mr Pound if they could go to a private area to discuss this because at the time they were stood in the hallway. They moved to the hallway next to the garage but was interrupted by a colleague a number of times. Mr Pound had to leave for a moment to retrieve a copy of the suspension letter and the Claimant alleges that as he went upstairs, he shouted:

"*What have you been saying to Phil about me behind my back, think about that, whilst I go and get the letter*".

145. That allegation is set out in the Claimant's particulars of claim (para 30). Mr Pound was therefore aware at the outset of this claim that this allegation had been made however, he does not refute that he made this comment in his witness statement although the grounds of resistance deny that he said anything.

146. When this allegation was put to Mr Pound in cross-examination, he denied it. However, the Tribunal note that his response was not as emphatic as his denial of other allegations. His response was: "*I don't believe I said that*".

147. We have taken into consideration that Mr Millington, who could have supported Mr Pound's evidence that he did not disclose to him information disclosed by the Claimant about Mr Pound's expenses during their discussion that weekend, has not given evidence before the Tribunal and there is no explanation for his failure to do so.

148. We also take into consideration that despite this being clearly pleaded as a whistleblowing claim from the outset, relating to an alleged protected disclosure to Mr Millington, Mr Pound in his evidence-in-chief makes no mention of having any discussion with Mr Millington in between the discussion with Mr Golding and the decision to suspend. We also take into account that Mr Pound does not comment on the specific allegation which is clearly set out within the claim form, that he made the comment at the time of suspension, about what the Claimant had been saying behind his back to Mr Millington.

149. The tribunal have also taken into consideration, the typed up notes that Mr Pound alleges he prepared of his record of the follow up conversation that he had with Mr Golding on 2 September, which seeks to confirm what Mr Golding had told him on 16 August (p.161), and includes the following:

"*The next point I remember being discussed that after the event I felt was not for discussion with myself was* ***with regards to what our external accountants are doing****, was made aware that someone called Mark from Haines Watts was looking into the business in detail and it would suggest to me that* ***it was specifically looking for issues***".

[Tribunal stress]

150. It may be that more was said by Mr Golding about what those issues were or it may be that Mr Pound, concerned about what the accountants were *looking into*, raised this with Mr Millington following the meeting with Mr Golding and that Mr Millington disclosed to him the concerns that had been disclosed by the Claimant and that those were the *"issues*" the accountants were looking at.

151. Mr Pound does not allege that there were any other matters which the Claimant had raised with Mr Millington that he may have been referring to, he simply denied

having made this comment (albeit not in the Tribunal's view, as emphatically and convincingly as he had denied other matters put to him).

152. The Tribunal have taken into account the following; that the Claimant has remained consistent from the issue of the claim in terms of this allegation about what was said to her at the time of suspension, Mr Pound does not seek to provide an explanation for what he could have meant by this alleged comment but rather he denies making the comment, Mr Pound (although legally represented throughout) did not refute the allegation within his evidence in chief. Further, Mr Pound had not mentioned speaking with Mr Millington during the weekend before suspension until this allegation was raised during the hearing. The tribunal have considered therefore how the Claimant would have known that Mr Pound had spoken to Mr Millington over that weekend unless he had made the comment to her as alleged. Mr Pound does not mention any such discussion in the witness statement or the defence to the claim and there is no reference to it during the disciplinary hearing. Further, the note of the discussion with Mr Golding would seem to indicate that mention was made to Mr Pound of issues being looked into by the Accountants. Further, Mr Millington who could have given evidence about what was said to him that weekend and whether he mentioned the alleged protected disclosure by the Claimant, was not called to give evidence and the tribunal was not provided with proper reasons and credible explanations' as to why that witness could not be called. Taking all those matters into account, the tribunal prefers the evidence of the Claimant that this comment was made to her.

153. The tribunal also considers it reasonable in the circumstances, to draw an inference that, in the absence of any explanation for this comment, and taking also into account the inconsistent evidence of Mr Pound that he had obtained supportive evidence from other further investigations which he carried out pre- suspension; that Mr Millington had told him about the protected disclosure which had been made by the Claimant. That would explain why when he was not prepared to suspend the Claimant immediately after speaking with Mr Golding, and while still not having, (despite alleged further investigations), any further evidence to support those accusations, he suspended her after the discussion with Mr Millington, Further, we take into consideration, the manner in which he suspended, he did so without even holding a proper meeting with her and giving her a chance to respond. He suspended her unceremoniously in a public area in the office, making reference to what had been said to Mr Millington by her 'behind his back'.

154. We therefore find that on a balance of probabilities that Mr Pound was aware that the Claimant had made the alleged protected disclosure to Mr Millington in April 2019 before he suspended her 20 August 2019 and before he created the record of the discussion with Mr Golding on 2 September 2019 (p.161).

155. Mr Pound did not give evidence that he had made the decision prior to the 20 August 2019 however, we find on a balance of probabilities that the decision was made during the weekend of the 18/19 August 2019 and communicated on the 20 August 2020 after his discussion with Mr Millington when he was told about the alleged protected disclosure.

156. The act of suspension would continue until the Claimant went on sick leave and was notified that she was removed from suspension on 16 September 2019 (p.135).

Suspension Letter

157. The letter of suspension the Claimant received (page 118) merely stated that

she had been suspended and;

"…*to allow us to pursue our investigations into allegations that you have been discussing salaries and benefits, the directors in particular, to other members of staff. As well as a significant breach of confidentiality, such action would have breached the Data Protection Act and General Data Protection Regulations".*

and

"It may be necessary to hold a further meeting with you as part of the investigation..."

158. The wording implies that there had already been an investigation, when there had not been, and despite indicating that an investigation meeting may be necessary, (and despite Mr Pound not having carried out any we find, further investigation, and in any event none which corroborated in the allegations in any material way), there was no attempt to conduct an investigation meeting with her.

159. The Claimant is informed that the investigation will take 8 to 10 days, that she may need to be interviewed as part of that investigation and that she will be advised of the outcome of the investigation.

160. There was the Tribunal find, no further investigation carried out, not until after the disciplinary hearing with the Claimant. She was not called to an investigation meeting.

161. Mr Pound's evidence is that he carried out the initial investigation but that could not be progressed because the Claimant became unwell. There was of course nothing preventing the Respondent from interviewing other staff while the Claimant remained off work sick. However, the suspension letter states that the investigation will take from 8 to 10 days, that would cover the period from approximately 20 August to about 3 September, counting only working days. The Claimant did not submit a sick note and inform the Respondent that she unwell due to stress until 11 September 2019 (P.132). There was therefore the opportunity to hold an investigation meeting with the Claimant during that period of 20 August to 11 September and interview other staff. Her sickness absence does not explain the lack of further investigation.

162. The Claimant was not told within the suspension letter who had made the allegations, who she is alleged to have disclosed information to, which directors the disclosures concerned or when she is alleged to have made these disclosures. All information which she needed to fully state her case and defend the allegations.

Evidence of Mr Golding

163. The evidence of Mr Pound was that he took physical, hand-written notes of the discussion with Mr Golding on 16 August, but he did not include them for disclosure because he has " *extreme dyslexia*" and, "*you would struggle to read them*". He contacted Mr Golding again on 2 September by telephone and captured what had been discussed at the meeting on 16 August and typed it up (p.161). He alleges that this document *"superseded*" his hand-written notes. It is not signed by Mr Golding and Mr Pound did not offer any explanation why it was not.

164. The evidence of Mr Thorpe, who conducted the disciplinary hearing, is that he was given a copy of the hand-written notes from the 16 August meeting, and he did not allege that the notes were incapable of being read but rather his evidence was that he

had checked them against the document of 2 September and that it was consistent. Mr Thorpe then destroyed the handwritten notes.

165. Therefore, despite Mr Pound's explanation for not disclosing the notes to this tribunal, or indeed to the Claimant, is in part because the contemporaneous notes of the conversation with Mr Golding were notes which could not be read, the evidence of Mr Thorpe was that these were disclosed to him, he could read them and he checked that they were consistent with the statement of 2 September. The evidence of Mr Thorpe about the quality of the notes does not therefore appear consistent with Mr Pound's evidence.

166. Mr Thorpe makes no reference in his evidence in chief to receiving the manuscript notes or of destroying them.

167. According to Mr Pound what convinced him that the Claimant had disclosed the information around pay and dividends was that the information from Mr Golding was accurate in terms of the figures he gave him. However, Mr Thorpe's evidence is that he was never made aware of what the figures were which Mr Golding had given to Mr Pound. Mr Thorpe's evidence was that he accepted Mr Pound's evidence that they were correct and up to date and it was not historic information which could have been obtained from other possible sources, such as accounts from companies house.

168. However, the salary and dividend details which Mr Golding is alleged to have disclosed to Mr Pound on the 16 August, are not recorded in the typed note of the 2 September 2019. Mr Thorpe therefore only had Mr Pound's word that they were up to date and accurate.

169. Mr Pound gave evidence that he had not included within his typed note of the 2 September 2019, details of the salaries and dividends because it was a GDPR issue and it would not be appropriate to include that personal data. The tribunal find it highly unlikely however, that when Mr Pound was taking his own personal manuscript notes of what he was being told by Mr Golding, if Mr Golding had disclosed to him the exact salary and dividend payments of the relevant individuals, that he would not for his own record (and to check) have made a note of what Mr Golding was telling him in terms of those figures. It is one thing for him to have removed them from the written record he later created on 2 September and quite another thing for him not to have recorded them in his own notes.

170. Mr Thorpe's evidence is that he was never told what the dividends and salary payments were that were disclosed by Mr Golding to Mr Pound, therefore either Mr Thorpe did not give an honest account to this tribunal about knowing what those details were (because they were in the manuscript notes he was given) or, he gave an honest account of not being aware of them (because they were not included in Mr Pound's original manuscript notes).

171. Mr Pound does not assert that he did record in his original notes what the figures were which Mr Golding had given him.

172. The tribunal find on a balance of probabilities, that Mr Pound never recorded in his original notes what salary and dividend payments Mr Golding allegedly disclosed to him during this meeting and Mr Thorpe never knew what they were.

Anonymity of Mr Golding

173. Mr Golding's identity was concealed in the statement/note of the meeting that Mr Pound had prepared (p. 171). The evidence of Mr Thorpe, which is not disputed by Mr Pound, is that Mr Pound never told him who had made the allegations against the Claimant.

174. Mr Thorpe apparently conducted the disciplinary hearing without any knowledge of who it was that had made the allegations' other than being made aware of the Claimant's suspicions.

175. Mr Thorpe had also never questioned Mr Pound as to why the identity of Mr Golding was being concealed. He had never asked Mr Pound what the reasons were and whether there was an opportunity for him to speak to whoever it was who had made the allegations, so he could obtain further details from him and assess his credibility for himself. It is not clear to this tribunal what had been discussed as between Mr Pound and Mr Thorpe that led Mr Thorpe to conduct a disciplinary without raising any questions about the reasons for the anonymity of the accuser.

176. Mr Pound gave evidence that Mr Golding did not want his name to be recorded at the point at which he had spoken to him. The Respondent's evidence is that he was liaising with his external HR team and receiving advice on how to proceed. Mr Pound was therefore in receipt of expert HR advice. When it was put to him in cross examination, that it was important for a person who is facing accusations to know the identity of the person making the accusations, Mr Pound stated that he did not see how a name makes a difference. What was also lacking in the statement was precise dates when it was alleged the disclosures were made, where and if witnesses may have been present.

177. In answer to questions from the tribunal, Mr Pound gave evidence that Mr Golding wanted his identity concealed because he was concerned about the impact on his future career if he got on the wrong side of the Claimant because he was trying to change jobs and a reference request would be answered by the Claimant. Mr Pound was asked to clarify why he could not simply have offered to deal with any reference request himself and hence remove this alleged concern about the Claimant, to which Mr Pound stated: "*Yes in hindsight but generally they are sent to the HR manager and the Claimant would open all the post of the business*". Mr Pound was then asked why he could not simply have provided his email address to Mr Golding to which he gave no satisfactory response.

178. Despite being legally represented in these proceedings, nowhere within the Grounds of Resistance or in Mr Pound's own evidence in chief is there any reference to Mr Golding wanting to remain anonymous which is clearly highly material to the fairness of the process. Further, Mr Pound's note of their alleged conversation on 2 September, makes no reference to such a request or to any concerns raised by him.

179. Further, Mr Pound in answer to questions from the tribunal gave evidence that he continued to remain in contact with Mr Golding for a few weeks after he had left and he contacted him again to run through the notes with him and that their relationship remained amicable. He did not, he says, inform Mr Thorpe that Mr Golding remained willing to assist (so that Mr Thorpe perhaps could have made his own contact with Mr Golding and discussed his evidence and allegations further) and in fact he stated: "*I did not directly discuss it with Mr Thorpe*".

180. Therefore not only did Mr Pound accede apparently to Mr Golding's request to remain anonymous because of some concern about a reference, which quite frankly

Mr Pound could have resolved quite easily the tribunal find by giving his contact details for a reference, he failed to inform Mr Thorpe who Mr Golding was, that he remained willing to assist and may be prepared to discuss his evidence further with Mr Thorpe. This gives rise to serious concerns as far as this tribunal is concerned in terms of not just the fairness of the process, but the motivation of Mr Pound in concealing the identity of Mr Golding and in effect restricting the access of the disciplining officer to the evidence of the main witness on whose evidence an employee with a clean disciplinary record was facing summary dismissal for gross misconduct.

181. On a balance of probabilities, taking all the evidence into account, the tribunal do not find that Mr Golding requested anonymity. In any event if he had, the alleged concerns about a reference could easily have been addressed by Mr Thorpe.

Disciplinary Process

182. The Claimant was then suspended on 20th August 2019 and that suspension continued until 16 September 2019 when the Claimant was then placed on sick leave following submission of a doctor's certificates (p. 135).

183. The Claimant was then sent a letter on 3 September 2019 (p.121).This informed her that she was required to attend a disciplinary meeting with Mr Pound himself on 12 September 2019. Despite the fact that Mr Pound had carried out the investigation with Mr Golding (and the alleged further investigation meetings) he intended to conduct the disciplinary hearing.

184. The Tribunal find that this would have been contrary to the ACAS Code paragraph 6 which provides that;

"*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing".*

185. The Tribunal also find that this would have been in breach of the Respondent's own disciplinary policy which states (page 107):

> "***51. Disciplinary procedure –***
>
> *If you:*
>
> - *commit any act of misconduct; or*
> - *appear incapable of performing the duties or doing the work allocated to you; or;*
> - *we contemplate terminating your employment for some other substantial reason,*
>
> *we require* ***a manager to investigate the matter.***
>
> ***An alternative manager*** *will then write to you settling out our concerns and will arrange to meet with you to discuss them before deciding on any action to be taken. …*"

186. The policy goes on to provide (page 108):

" ..*You may appeal against any disciplinary decision in writing to the Managing Director …*" *[Tribunal stress]*

187. Not only was Mr Pound acting in breach of the disciplinary policy, intending to carry out the disciplinary and the investigation, he was also according to the Company policy supposed to be the person who would have conducted any appeal, which would be more reason to remove himself from the disciplinary process.

Disciplinary process.

188. Despite being told that there would be a further period of investigation, the Claimant on the 3 September received a letter which did not refer to the outcome of further reinvestigations or invite her to give her account of events at an investigation meeting, it told her that she was required to attend a disciplinary hearing with Mr Pound on 12 September.

189. The grounds of resistance (p.26) allege that ;"*Following investigations, it became clear that many of the* ***team were aware of exact details regarding various salaries and benefits*** *of the senior teams in the UK and Germany".* This statement the tribunal find is not true. There are no statements from any witnesses who attest to this. It goes on to allege; "*The MD felt that there was enough information to commence the disciplinary process"* and in specific response to the Claimant's allegation that there was no investigation meeting, defends this on the basis that ;

"The MD conducted an investigation, it is agreed that he did not hold a formal investigation meeting with the Claimant as it was thought to be pointless

190. The tribunal find that the statement that the investigation was pointless, on the basis that there are been further investigations which corroborated d the accusations, is not clearly, on Mr Pound's own evidence not correct, there were no further investigations prior to the disciplinary process and therefore this cannot be the real reason why an investigation meeting was not held with the Claimant.

191. The Respondent did not give evidence about the date when it was decided not to hold an investigatory meeting. The Claimant had been informed that there would be a further investigation. The tribunal find that the date the decision was made not to hold an investigatory meeting but a disciplinary hearing, in the absence of any evidence from the Respondent to the contrary, is the date when the Claimant was notified that she would be going straight to a disciplinary hearing which was by letter of the 3 September 2019.

Offences

192. The offences set out in the letter of the **3 September 2019** (p.121) were that the Claimant had done the following:

1. *Discussed directors' salaries with other members of staff.*
2. *Discussed bonus payments.*
3. *Revealed the salaries of the German team to operatives in the UK.*
4. *Suggesting that the German team have different benefits.*
5. *Revealing the home address of team members.*
6. *Discussing confidential information with regards to our accountants.*
7. *Discussed project costs with members of the team.*

193. Not only was there an issue in terms of Mr Pound carrying out the disciplinary for the reasons stated above, the issue about the home address of a team member was an allegation that the Claimant had revealed that Ms Wagstaff was living with Mr Pound. Mr Pound had a clear conflict of interest and yet was prepared to carry out the disciplinary hearing.

194. Further, despite Mr Pound giving evidence that in fact, the " *further investigation"* it is alleged he carried did not support the allegations but did no more than corroborate one *minor point*", he makes no reference in the letter inviting the Claimant to the disciplinary hearing, not only to no further investigation having been carried out but makes no reference to any intention of carrying out any further investigation. By 3 September the Claimant has been suspended for 2 weeks and yet Mr Pound had done nothing to investigate the accusations made by Mr Golding, a potentially disgruntled former employee who had left the tribunal find on a balance of probabilities, rather than face disciplinary proceedings for misleading his employer about the reasons for his absence from work.

195. Mr Pound's evidence under cross examination, when asked about the failure to provide the Claimant with more detail about the alleged offences, was that he considered those 7 short sentences covered the points to be discussed. She did not know however from that letter; when she was supposed to have carried out these acts, whom she is supposed to have revealed the information to, whose salaries and dividends she was supposed to have revealed and what project she was alleged to have discussed and with whom; all of which is basic but important detail for her to know in order to properly put her case.

196. The letter of the 3 September (p.121) states;

"*During the interview, you will be given the opportunity to explain your actions. If your explanation is not satisfactory, disciplinary action may be taken against you, in accordance with the Company's disciplinary policy.…*

I will chair the disciplinary meeting and Adrian Barnes of Premier Legal will also be present".

197. What appears clear, is that the intention was not to carry out any further investigation but to make a decision at that hearing. That may explain why the Respondent had in its defence of the claim, alleged that a more thorough investigation had been carried before suspension out which was repeated within Mr Pound's witness statement, and which was patently the tribunal find, not the case.

198. The letter inviting the Claimant to this hearing, informed her that the allegations " *amount to Gross Misconduct and may result in your summary dismissal*..."

199. The tribunal find that Mr Pound was it would seem, intent on rushing the Claimant through a disciplinary process. Had he intended to approach this fairly, he would have carried out the investigation he had informed her he would do and his sole explanation or not doing so, was that she was unwell and he did not ultimately deal with the disciplinary, but this does not stand up to scrutiny. He was intending initially to Chair the disciplinary hearing and there had been ample time to carry out an investigation.

200. Mr Pound did not conduct any further investigation and certainly nothing which provided any evidence which corroborated the main accusations made by Mr Golding,

and which may explain the decision not to conduct any investigation meeting with the Claimant.

8 September 2019

201. On 8 September 2019, the Claimant then contacted Mr Barnes in writing (page.123) and in that letter she refers to a telephone conversation on 5 September with him in which she had told him that the letter of the 3 September does not provide her with enough information for her to understand the allegations. Given the threat of dismissal and the lack of detail about the allegations, the tribunal find that it was reasonable for the Claimant to feel under pressure and anxious about how the process was being conducted.

202. The tribunal find that the letter of 3 September 2019 did not include sufficient detail to enable the Claimant to prepare fully for a hearing which she is told may result in disciplinary action should her explanation not be satisfactory. How is an employee to prove she has not done something, when the employee is not told when she is alleged to have committed the act, *who* she is supposed to have given the information to and *what* precisely she is supposed to have said?

203. The Claimant askes for more information and time to consider it, she also raised concerns that the Company intended to be supported at the disciplinary hearing by a solicitor. Mr Barnes then responds by email of 9 September 2019 (page 124).

204. Mr Pound did not dispute in cross-examination that Mr Barnes had asked him what evidence was available and from the way the email is written, the tribunal find on a balance of probabilities, that Mr Barnes had spoken to Mr Pound about what further evidence that was available. Mr Barnes responds as follows:

> "…*Hi Angela*
>
> *Thanks for this.* ***I have asked Steve*** *if there is any written evidence to be presented,* ***but it may well be that there is not any****. …"[Tribunal stress]*

205. Firstly, the Respondent had legal representation throughout the internal process and yet it appears from this email, that there had been no discussion prior to this about what written evidence may be relevant and should be disclosed to the Claimant, despite this being a fundamental requirement of a fair process and set out in the Acas code (paragraph 9) and the Respondent's own disciplinary policy, which the tribunal would have expected the legal representative supporting the Respondent and/or the Managing Director to have considered and/or been familiar with;

(page 107)

"*When writing to you setting out our concerns, we* ***will also enclose any relevant written evidence and documents to be relied upon or referred to at the disciplinary hearing."***

[Tribunal stress]

206. Mr Pound provided no explanation for the comment by Mr Barnes in the email to the Claimant but confirmed that Mr Barnes had asked him about written evidence. Again the tribunal found Mr Pound to be noncommittal in his answers. When it was put to him whether he had disclosed the written evidence to Mr Barnes, his response was

that he believed he had *"but cannot confirm, I would have to check records.".* If there are relevant records they should have been disclosed and the tribunal would have expected Mr Pound to have checked before the hearing. He did not say what records he needed to check and there was no application to admit into evidence any alleged records.

207. Mr Pound under cross examination maintained that by the date of this email he had his manuscript notes and typed 'statement' from the interview with Mr Golding on 19 August and 2 September 2019. The email made no reference to these documents.

208. In summary; Mr Barnes the tribunal find, on a balance of probabilities based on the content of this email, had had a conversation with Mr Pound after receiving the letter from the Claimant on 8 September challenging the fairness of the process, or least after the telephone conversation on 5 September 2019 (when the Claimant had raised the lack of evidence in support of the allegations), about the Claimant's request for written evidence. Mr Barnes reported back that Mr Pound had told him there may well not be any documents. This is despite the fact that Mr Pound's evidence is that he had written notes of the meeting and the notes that he took of his follow up conversation with Mr Golding created on 2 September. Both these documents therefore existed prior to 5 September 2019 and yet Mr Barnes (the Respondent's legal adviser), is informing the Claimant that Mr Pound has told him there may not be any written evidence.

209. The tribunal find that the most likely explanations are (the Respondent did not offer any alternative explanation) that either; Mr Pound had not disclosed the existence of the record of the discussions with Mr Golding to Mr Barnes or if he had, but Mr Barnes had instructions not to mention them.

210. The Claimant then responds by letter of 10 September 2019 (page 131). She states that if the proof is not in writing then it is just hearsay, which would make the allegations unfair.

Provision of the disciplinary evidence

211. On the **10 September** by email timed at 10:18am, Mr Barnes now sends the typed statement but not the alleged manuscript notes, despite according to the evidence of Mr Thorpe, the original notes were still in existence at this stage;

"*You requested information with regards to your hearing on Thursday and I attach the notes of a meeting held by Steve with your main accuser".*

212. There as actually only one accuser, the email seemed to imply more than one with Mr Golding being the 'main one'.

213. The statement was disclosed only 2 days before the hearing planned for the 12 September 2019, 1 week after the letter inviting her to the disciplinary hearing. The Respondent does not explain why she was not given this evidence sooner.

214. If Mr Pound had not mentioned the notes to Mr Barnes; the tribunal find the most likely explanation for that is that Mr Pound had chosen not to inform Mr Barnes as to the existence of his own notes and the notes of 2 September, or no such notes existed and/or that it was only after the Claimant had asked for written evidence that Mr Pound then created the documents. Further, Mr Pound had then waited a further 7 days to disclose the notes of the 2 September to the Claimant, two days before the

hearing.

215. On the balance of probabilities, the tribunal find that the documents were created after the email from Mr Barnes indicating there may not be any evidence and after the letter from the Claimant challenging the fairness of the process in the absence of any written evidence (ie at some point between 8th and 10 September 2019) which would explain the response from Mr Barnes and the delay in disclosing the documents. No other explanation for the delay or the content of Mr Barnes' email has been provided by the Respondent.

216. The Claimant's evidence is that being suspended and being subject to these unfounded allegations subjected her to a considerable amount of upset and stress. She says in paragraph 41 of her witness statement that she felt distressed and had to see her GP on 10 September (p.134).

217. She writes on 11 September 2019 referring to suffering from stress and attaching a note from her doctor dated 10 September signing her off work until 25 September (page 134) with "*stress-related problem*".

218. She is then informed on 16 September 2019 that she is no longer suspended but will be treated as being on sick leave (page 135).

219. The Claimant then submits a further sick note on 26 September until 11 October 2019 for "*Stress-related problem*".

220. The Claimant then had an accident and injured her knee and is signed off work, not due to stress but to knee pain, from 14 October to 29 October 2019 and asks for the disciplinary hearing to take place on or after 5 November 2019.

221. Mr Pound was then going to be out of the country for 12 days at an annual event in America and therefore asked one of his direct reports, the Production Manager Rob Thorpe, to hold the disciplinary meeting.

222. The evidence in chief of Mr Pound is that:

"I had no input into the findings of the disciplinary and subsequent summary dismissal of Angela" (w/s para 3)

Accuracy of the 2 September document

223. To what extent did Mr Pound add to or make unfounded allegations?

224. Mr Pound's evidence is that Mr Golding disclosed the precise figures for the salaries and bonus payments. He could have disclosed these confidentially to Mr Thorpe so that Mr Thorpe could at least have been satisfied that those figures were indeed accurate, but he did not.

225. Mr Thorpe says he had Mr Pound's handwritten manuscript notes and checked those against the typed note of 2 September, and they were consistent. Given that Mr Thorpe's evidence, which is consistent with Mr Pound's, is that Mr Thorpe never saw the figures, we infer from that that the handwritten note that Mr Pound created on 16 August did not include the figures either. The Tribunal is not satisfied with Mr Pound's explanation that it would be a breach of data protection to have made a note of them (which he could have redacted later). That may explain why he does not record it in

the typed up note for use at the disciplinary hearing more generally on 2 September but does not explain why he did not in his own note record what the salary and bonus information was that he had been given so that he could at least check it on his return to the office and have a full and accurate note of what he had been told – why leave out what he alleges was the 'shocking' and most crucial information disclosed?

226. At no point did Mr Pound say that he had redacted his own handwritten notes before handing them to Mr Thorpe and nor does Mr Thorpe say those handwritten notes were redacted.

227. We find on a balance of probabilities, that Mr Golding may have made these allegations about the Claimant, that she had been gossiping about bonuses and salaries (when in reality according to the Claimant it was actually Mr Golding who was doing that and that he had obtained the information from Mr Pound). We find however that on a balance of probabilities, Mr Pound embellished the evidence when he told Mr Thorpe that the financial details that were provided by Mr Golding about salary and bonus were correct and up to date. We find on the balance of probabilities that Mr Golding did not provide specific financial details otherwise those details would have been contained in the original notes which Mr Pound had allegedly taken. Mr Pound does not allege that he had taken advice from his data protection compliance adviser on whether and in what circumstances he could disclose the details to Mr Thorpe confidentially to satisfy him, as the disciplining officer, that they were accurate and up to date. We have also taken into consideration our finding that by this stage, Mr Pound knew about the alleged protected disclosure and had suspended the Claimant on the basis of unsubstantiated accusations, contrary to what he had alleged in his evidence in chief (and in the Grounds of Resistance).

228. This would also explain why Mr Pound concealed even from the disciplining officer, the identity of the accuser. Mr Pound's explanation for why he kept Mr Golding's identity anonymous not only from the Claimant but from the disciplining officer, does not stand up to even a modest degree of scrutiny. Without being able to speak with Mr Golding, Mr Thorpe was unable to verify the evidence Mr Pound alleged had been given by Mr Golding.

229. It was on the basis that Mr Pound alleged that the accurate financial information given by Mr Golding could only have come from the Claimant (because it was accurate and up to date) , that Mr Thorpe would then go on to consider that there was no other explanation but that the Claimant must have disclosed it.

230. The tribunal found Mr Pound to be an unreliable and unsatisfactory witness. His evidence was contradicted and undermined not only by his own evidence but by the evidence of the Respondent's only other witness, Mr Thorpe. Mr Pound told this tribunal that he did not speak to Mr Thorpe during the disciplinary process, however we find that this is not true, as set out below,

Disciplinary hearing – 6 November 2019

231. There is then a disciplinary hearing on 6 November 2019 with the Claimant.

232. In preparation for that hearing, the Claimant produced a statement (page 155). Within this statement she raises her belief that the accusations probably came from Mr Golding, a former employee of the Company who had lied about the reason for his sickness absence which had led to, she believes the termination of his employment by Mr Pound on the grounds of misconduct. She attacks in this statement the veracity of

any evidence that Mr Golding would give in those circumstances.

233. The Claimant denies having informed Mr Golding about any dividends or salaries or addresses of staff.

234. The Claimant recounts an occasion when Mr Golding had told her that he had had had a conversation with Mr Pound when Mr Pound had told him that he was not taking his dividend payments either and Mr Golding did not believe him. She refers to information about Directors' dividend payments being available at Companies House.

235. In terms of the allegation about wrapping a car, she accepts there was a discussion between four or five staff in the office and that she did make a flippant remark: "*Blimey, that's expensive*" when told how much wrapping the car would cost. She makes this admission before any further witnesses are interviewed and in the absence of seeing any statements from witnesses.

236. The Claimant also denies having any discussions about salaries of directors and that Mr Golding had told her he had looked up the Respondent on Companies House and he knew the share split between Mr Pound and Mr Millington.

237. With regards to allegations about the disclosure of salaries of GmbH staff, she recounts that Mr Golding had told her that while outside on a cigarette break with Mr Pound at the end of 2018, Mr Pound had been complaining about the cost involved in running the German arm of the business and that he had told Mr Golding of the salaries of two individuals; Ollie Kroll and Ollie Weiden. She also refers to receiving the salary information but would only give it a cursory glance when checking and that she does not read them as they are in German

238. She also denies disclosing the address of Ms Wagstaff but refers to it being common knowledge in the office that Ms Wagstaff and Mr Pound were "*seeing each other*" and that Mr Pound would leave the office on his own and then return with Ms Wagstaff in his car and this gave the impression to staff that they were living together and this is what she believed the staff assumed.

239. With respect to bonus payments, she refers to Mr Golding complaining to her about warehouse staff being given monthly bonuses and she had told him to keep the information confidential.

240. There had also been an allegation about the probationary period for a member of staff, Katie Bromley. Within Mr Pounds note of the 2 September it records Mr Golding raising a concern over how Ms Bromley was treated over her probation being extended and that that she had gone to Mr Golding in tears over the way the letter was written and that he believes this was part of the reason she had left. The Claimant's account is that Mr Golding had told her the reasons for the probationary extension, she had written it down as requested by him and shown the letter to Mr Golding and asked whether he wanted to make any changes and that he had asked for only one amendment, namely that the extension to the probationary period would be less i.e. 3 months rather than 6 months. The Claimant's account of that conversation Mr Thorpe accepted in cross examination, was corroborated by a WhatsApp message between her and Mr Golding on 10 October 2018 (page 163) which the Claimant attached with her statement prepared for the purposes of the disciplinary hearing:

> "*Hello Dave, can I have the paperwork back that you had for Katie, I need to put it in her file. Thanks Amgela* [sic]"

In response, Mr Golding states:

> *"Hi Anmgela [si]), the paperwork had 6 month extension… I thought it was 3 month to run until Jan? I don't think it needs to be 6 months for her to sort the issues out.*"

241. It would appear therefore, that the Claimant's account regarding this issue and the evidence she supplied, undermined the 'concern' which Mr Golding had apparently raised.

242. The Claimant's account of the open conversation about the wrapping of the car would also be supported by witnesses which Mr Thorpe interviewed after the disciplinary hearing.

243. Generally in terms of the statement she prepared for the disciplinary hearing, she sets out her position and complains within it that she has not had the opportunity before the disciplinary hearing to put her own questions to the unnamed witness and she has received no evidence from the Company that has corroborated his statement.

244. The disciplinary hearing then takes place on 6 November 2019. There is an agreed transcript of that meeting (page 179-224).

Evidence of Mr Pound

245. It was put to Mr Pound that as recorded in the transcript of the disciplinary hearing (page 189), it is put to the Claimant that both Mr Pound and Mr Golding are both saying that the Claimant had told Mr Golding the exact figures for the salaries of Ollie Kroll and Ollie Weiden. It was therefore put to Mr Pound in cross-examination that this clearly shows that Mr Pound had himself made allegations against the Claimant and therefore he must have spoken to Mr Thorpe and put forward those allegations, to which Mr Pound denied having done so.

246. Mr Pound was at that time away in the United States. When it was put to him in cross-examination that Mr Thorpe had discussed the disciplinary with him, his evidence was:

> "*No, I was on an 8 hour different timeline, only discussion were prior to the disciplinary and after when he had made his decision*."

247. The clear evidence of Mr Pound was therefore that he only spoke to Mr Thorpe before the disciplinary hearing and then again afterwards when he had made his decision to dismiss. He repeatedly under cross examination denied having a conversation with Mr Thorpe during the disciplinary hearing.

248. After the disciplinary hearing, Mr Thorpe created a document headed "SUMMARY OF THE INVESTIGATION FINDINGS AFTER THE DISCIPLINARY HEARING OF ANGELA CURTIS ON 06/11/2019" (page 169) and this states:

> "*…I have also been able to speak to Steven Pound who is currently at the Law Vegas Sema show…*
>
> *3. I have had confirmation that neither Brittany Wagstaff not Steven Pound disclosed to any employee other than HR the address of Brittany Wagstaff when she joined Milltek Sport. …*

> *4. I have spoken to the MD regarding if any of his or Phil Millington's wage slips have ever gone missing or looked as though they had been tampered with. I have had confirmation that they have not.*
> *…*
>
> *5. In regards to the salaries of the previous and present managers of Milltek GMBH. This information is only available to accounts. Once it is sent over from German by Vicky it is in German but there are the employees names with amounts next to them. (As this is restricted information to accounts, I cannot see where the witness can get the **exact salaries** of past and present managers of Milltek GMBH other than by Angela as claimed by the witness).*"

249. With regards to the reference to the witness knowing the "exact salaries", it was put to Mr Pound in cross examination that Mr Thorpe must have been relying on Mr Pound's evidence however, Mr Pound denied this saying that Mr Thorpe had carried out his own investigation and that Mr Pound had not influenced the evidence.

250. Mr Pound had the tribunal find, spoken to Mr Thorpe during the disciplinary proceedings and provided evidence which Mr Thorpe took into account. The tribunal find that Mr Pound's evidence that he never spoke to Mr Thorpe during the disciplinary process, was not the truth. Mr Thorpe and Mr Pound work together, they were the only witnesses for the Respondent and gave evidence remotely, while together in the same room. Mr Thorpe therefore heard the evidence of his Managing Director before giving his own evidence, he did not seek to re-sile however, from what he had recorded in that document at page 169.

251. Mr Thorpe accepted under cross examination that the only evidence presented to him that the information Mr Golding had provided was up to date and accurate, was evidence from Mr Pound. Mr Pound had not provided a witness statement however for the purposes of the disciplinary or investigation process setting out what evidence he had provided.

252. Mr Thorpe gave evidence that he had not, even during the disciplinary hearing, been aware that it was Mr Golding who made the allegations. His evidence is that he did not, however, make any enquiries of Mr Pound about who the 'accuser' was, why he had to remain anonymous not only to the Claimant but to him as the disciplining officer, whether the reasons for his anonymity remained valid or whether he could speak with the witness.

253. Mr Thorpe gave evidence that he was not aware of the circumstances surrounding the discussion with Mr Golding and Mr Pound on the 16 August and was not aware that Mr Golding had been suspended, only that he was no longer with the Respondent at the time. Mr Pound for reasons not explained, did not pass this information on to him.

254. Mr Thorpe conceded under cross examination that the Claimant had to make assumptions when responding to the allegations, because of a lack of specificity in the allegations.

255. Mr Thorpe also gave evidence under cross examination that he had asked Mr Pound about the Claimant's allegation that there had been a discussion between Mr Pound and Mr Golding during a smoking break in 2018 about the salaries of Ollie Kroll

and Ollie Weiden and that Mr Pound had denied this. Mr Thorpe had not kept any formal record of this conversation with Mr Pound and this evidence was not disclosed to the Claimant.

256. Mr Thorpe's evidence is that he accepted what Mr Pound told him. Under cross examination , Mr Pound gave evidence that he did not " *recall*" the conversation with Mr Golding, he did not give evidence that he would not have had this sort of discussion with him and he further alleged that the Claimant had not mentioned in her statement for the disciplinary hearing that he had revealed salaries to Mr Golding, however she had clearly done so, her statement at paragraph 37 states;*" Dave also told me that Steve had told him the salaries of Ollie Kroll and Ollie Weiden.."*

257. With regard to the disclosure about Ms Wagstaff's address being the same as Mr Pound's, and the Claimant's allegation that this was common knowledge , although Mr Thorpe would carry out some interviews after the disciplinary hearing with the Claimant he never asked those members of staff whether they were aware of this and whether it was common knowledge amongst the staff.

258. In terms of the document of 2 September 2019 and the allegation that the Claimant had disclosed the address of Ms Wagstaff, Mr Thorpe accepted that the document did not actually record Mr Golding confirming the address disclosed by the Claimant. Mr Thorpe's evidence was that it was Mr Pound who had told him that it was the correct address but the statement does not record it.

259. Mr Thorpe accepted that the Claimant had given a truthful account of the arrangements regarding Ms Bromley but despite this he accepted that he had not considered whether this undermined the credibility or reliability of Mr Golding as a witness;

"*To be honest, as no longer in the Company I did not dwell on it – it was not part of what I was using for my decision*".

260. However, when it was put to Mr Thorpe in cross examination that although he may not ultimately have made a finding against the Claimant in relation to that allegation, the fact that this anonymised witness was making an allegation that he had found not to be true should have been taken into account in assessing his reliability on other disputed matters, his evidence was simply that he had not considered that.

261. Mr Thorpe gave evidence that he had contacted Mr Pound while he was in Las Vegas and that this was: "*After the disciplinary hearing, it was late in the evening as he was in the USA*". When asked whether this discussion with Mr Thorpe was the same day as the disciplinary hearing, his evidence was; "*I believe so or may have been the following day*".

262. Mr Thorpe gave evidence that after the disciplinary meeting he wanted clarification about the figures, the address and "*everything else David Golding had given him*". It was clear from Mr Thorpe's evidence that the evidence from Mr Pound was decisive in the decision that the Claimant had disclosed personal data.

263. Mr Pound had not mentioned this discussion in his evidence, in fact he had repeatedly given evidence that he had no direct involvement once the disciplinary process started until it completed.

264. The tribunal find on a balance of probabilities that Mr Thorpe had, spoken to Mr

Pound the day of or after the disciplinary hearing . His evidence was clear, forthright and detailed including about the discussion over the telephone regarding Ms Wagstaff and it is consistent with the document at page 169 . Mr Thorpe had no apparent motive for providing false evidence and in doing so, he contradicted the evidence of his Managing Director. The Respondent's representative did not in submissions, seek to argue that Mr Thorpe's evidence was unreliable.

265. In terms of the allegation about the Claimant disclosing Ms Wagstaff's address, only when the tribunal asked for clarity in terms of whether he had spoken to Ms Wagstaff about who she may have told, did Mr Thorpe reveal that he had actually spoken to Ms Wagstaff after the disciplinary hearing (but before deciding to dismiss). There is no written record of that discussion and it is not in dispute that nothing was disclosed to the Claimant about it. Mr Thorpe's evidence is that he had contacted Mr Pound on the telephone in Las Vegas . Ms Wagstaff was with Mr Pound at the time in the US. Mr Thorpe did not ask to speak to Ms Wagstaff directly, rather Mr Pound relayed Mr Thorpe's question about whether Ms Wagstaff had told anyone about her address to her and Mr Pound relayed her answer back to Mr Thorpe over the telephone. Mr Thorpe never asked to speak direct to her. Mr Thorpe was told by Mr Pound what her alleged evidence was namely that she had not divulged her address to anyone . Mr Pound told Mr Thorpe that he had also personally not divulged her address. Mr Thorpe did not allege that he has raised with Mr Pound his behaviour in collecting Ms Wagstaff after work, in his car.

266. Ms Wagstaff was due back from America a week later, but Mr Thorpe did not consider waiting to have a discussion with Ms Wagstaff privately without Mr Pound in attendance. He took no notes or kept any record of those discussions.

267. Ms Wagstaff works at the Derby office as a Marketing Manager and works alongside an employee called Ollie. Given the Claimant's evidence about what was common knowledge within the office, Mr Thorpe in answer to a question from the tribunal, confirmed that he had never asked anyone not even the member of staff who worked closest with Ms Wagstaff, whether she had mentioned where she was living. Mr Thorpe simply took Ms Wagstaff's evidence as relayed to him via Mr Pound.

268. Mr Thorpe gave evidence that he had no reason to disbelieve what Mr Pound told him and therefore he evidently did not seek to verify it. Mr Pound was after all the Managing Director to whom Mr Thorpe directly reported. Mr Thorpe referred to making a note of his discussion with Mr Pound but "I *did not put it down in a document"*, those notes were not disclosed and not provided to the Claimant and Mr Thorpe failed to explain why not.

269. When asked how he had investigated the Claimant's allegation that Mr Golding had been given information direct from Mr Pound his evidence was; " *I didn't [investigate] I took the statement of the interview between Mr Pound and Mr Golding to be the truth. .."*

270. It was clear to this tribunal that Mr Thorpe never applied his mind to the possibility that Mr Golding or indeed, Mr Pound may not have been telling the "*truth"* or that their evidence may not be reliable.

271. Only after the disciplinary hearing with the Claimant on 6 November 2019 did Mr Thorpe then carry out any further investigations with other staff. There are notes of telephone discussions with Zoe Hanrahan on 7 November, Sam Nye on 7 November and Ethan Burrell on 7 November.

272. The Claimant was not told about the outcome of the discussions with Mr Pound and Ms Wagstaff or the other interviews. None of this further evidence was disclosed to her before she was dismissed.

273. The Claimant in response to a question from the tribunal gave evidence that she had not been informed that she could call witnesses to the hearing and there is no mention of this in the invitation to the disciplinary hearing.

Further Interviews

274. Mr Ethan Burrell was asked by Mr Thorpe about an issue regarding smoking breaks and whether the Claimant dealt with people taking breaks and is asked about the wrapping of the car, Miss Nye is also asked about the wrapping of the car about smoking breaks. Zoe Hanrahan is asked about whether she and the Claimant would be aware of how much the German employees are.

275. Mr Thorpe under cross examination when questioned about the failure to disclose this evidence to the Claimant before dismissing, gave evidence that he did not take the evidence of Ms Hanrahan into account but then gave evidence that he did consider part of Ms Hanrahan's evidence to be relevant regarding the salary information of the German Manager at the time and how the information was sent to the UK. Her evidence was that the invoices for Millitek GMBH were received by the Claimant who checked them and forwarded them to the accountants and that although in German it is possible to see the names of the German employees and the salaries and only accounts had access to the information.

276. Mr Thorpe also in answer to a question from the tribunal mentioned for the first time that he had actually interviewed other staff in the office namely someone called Stacey and someone in marketing who he later identified as "Ollie" who worked with Ms Wagstaff. Mr Thorpe wrote down their evidence, but it was not disclosed in the bundle and that evidence was also not disclosed to the Claimant. Mr Thorpe's evidence was that these witnesses had no evidence to give about the allegation about the Claimant commenting on the cost of wrapping the car. He does not allege that he had asked them about their knowledge of Ms Wagstaff's address or whether they are aware of discussions in the office about directors and managers pay and dividends and if so, who may have disclosed that information. He had accepted Mr Pound's account of the discussion with Mr Golding and took no steps to check the accusation from Mr Golding with any of the staff.

277. Mr Thorpe gave evidence that he destroyed his handwritten notes of the interviews, after a couple of months because the Claimant did not appeal and he did not take any advice from their data compliance officer on how long he should retain the records.

278. The Claimant gave evidence to the tribunal, that had she been aware of what Ms Wagstaff had said about not telling people about her address, she would have wanted Ms Wagstaff to be asked about her going to a shows and events with staff who knew she was sharing a hotel room with Mr Pound and that he collected her from work. Further, she stated that had she been aware that Ms Hanrahan had been interviewed she would have wanted her to be asked whether she had ever heard her discussing confidential information with anyone and whether she is was careful as the Claimant about not leaving information on the desk and whether she knew of anyone who may have spoken to Mr Golding. Further, the Claimant stated that she would have asked her to confirm that the Claimant had mentioned to her about Mr Golding telling her

about the information he had about the German Company.

Evidence of Mr Pound during the disciplinary process

279. The Tribunal find that Mr Pound did not give reliable evidence when he repeatedly stated that he had not spoken to Mr Thorpe during the disciplinary hearing. One explanation for this is that, Mr Pound denied having any direct involvement in the disciplinary process, to distance himself from a process and an outcome, which he was influencing. In the absence of an alternative explanation from the Respondent, the tribunal consider on a balance of probabilities, that this is the most likely explanation.

Dismissal

280. Mr Thorpe concluded as he explained in cross examination, that current salaries and dividends of the directors and managers are not available on companies house but would be about 18 months out of date, and therefore he concluded that the information could only have come from the accounts department, based on his finding that the information provided by Mr Golding was correct and that Mr Pound had not disclosed it to Mr Golding. In his evidence in chief, great emphasis is placed by Mr Thorpe on Mr Golding's evidence and specifically that he had provided the 'exact address' for Ms Wagstaff and the ' exact' salaries of both past and present managers and knew the 'exact' dividend payments paid to the Chairman. The tribunal find that the evidence from Mr Pound about the accuracy of the salaries and dividends was therefore instrumental in the finding that Mr Thorpe made, that the Claimant must have provided this information to Mr Golding.

281. The Claimant received a letter dated 8 November 2019 (page 173) and informed that she was being summarily dismissed. The offences for which was dismissed were:

> "*1. Disclosure of salary and dividend payments of the chairman*
> *2. Disclosure of the salary of the previous manager of Milltek GMBH*
> *3. Disclosure of the salary of the current manager of Miltek GMBH*
> *4. Disclosure of the address of a current Milltek Sport employee*"

282. The Claimant when asked by the tribunal, gave evidence that she believed the document dated 2 September 2019 had been doctored by Mr Pound. That he had added into the statement the allegation that Mr Golding was made aware of details of directors remuneration and that the exact details were confirmed for salary and dividend details to Mr Millington. Her evidence is that what was also added was the paragraph in the statement which includes the allegation that she disclosed the salary details of the previous manager at the German office Oliver Kroll and the current Sales and General Manger Oliver Wielden.

283. The Claimant also alleges that the second paragraph on p. 162 is added and that she never mentioned Ms Wagstaff's salary or where she was living.

284. With regards to paragraph 3 on p.162 her evidence is that Mr Golding overheard a conversation that she was having with the Warehouse Manager and he spoke to her about not realising the warehouse staff were entitled to payments to which she informed him this was not something he should have overhead and he should keep if to himself.

285. The Claimant also gave evidence that the paragraph where she is alleged to have informed Mr Golding that Mr Pound was still taking dividend payments even

though the company was not hitting target, had been added.

286. The Claimant did not disclose during the disciplinary process that she had made a protected disclosure about Mr Pound, her evidence was that she still understood that Mr Millington was investigating this. She was not of course aware of the extent to which, Mr Pound was involved in providing evidence during the disciplinary hearing.

287. It is not the Claimant's case that Mr Thorpe was aware of the alleged protected disclosures and that he was therefore motivated by them. It is the Claimant's case that Mr Pound however, who was it is not disputed, Mr Thorpe's direct line manager and therefore above him in the management hierarchy, influenced the outcome of the disciplinary process and was motivated by the alleged protected disclosures.

Appeal

288. The Claimant was told that she has a right to appeal if she is not satisfied with the outcome and that she can send a written appeal to Adrian Barnes at Premier Legal LLP. She is not told who will hear the appeal, however, the Company's disciplinary policy states that any appeal will be heard by the Managing Director. She is not told that someone other than Mr Pound will hear the appeal. The evidence of Mr Pound is that Mr Millington would have been asked to hear the appeal because the Claimant had made allegations against him however, this was not communicated to the Claimant. The Claimant's evidence under cross examination was that she understood that it would be Mr Pound who heard the appeal and did not make enquires to Mr Barnes because she considered it would be pointless. The tribunal find that the Claimant could have made enquiries of Mr Millington but did not do so.

289. The Claimant did not appeal.

Time limits

290. With respect to the detriments and the act of suspension, the Claimant accepted under cross examination that she understood the relevant time limit to bring a claim was 3 months but she assumed the 3 months started from the date of dismissal on 8 November 2019.

Remedy

291. The Claimant has provided a witness statement on remedy. Her evidence which is not disputed is that she had registered with agencies in November 2019 and started getting job alerts from November 2019 and that since preparing her statement in March 2021, she has had 3 interviews and had an interview arranged for the day after this hearing ,which is a vacancy for finance manager role.

292. Under cross examination the claimant gave evidence that prior to working for the Respondent she worked as an Assistant Accountant with qualifications of AAT to level 3 and is currently studying for level 4.

293. It was put to the Claimant, which she did not dispute that most of the jobs she had applied for attracted a salary of between £35,000 and £45,000 which is more than the £33,000 she was being paid by the Respondent. However the Claimant disputed that they were more senior, her evidence was that these were roles doing exactly the same jobs as she had done for the Respondent and that she had not applied for jobs outside finance because finance is all that she knows but she has tried for payroll jobs.

Her undisputed evidence is that she has applied for more junior roles but been turned down because she was considered overqualified and may get ' bored'

294. She has had some interviews for temporary jobs, she refers to 6 in her witness statement but due to the Covid pandemic it was very difficult to secure temporary positions but that she had noticed that there were now more jobs available and she has applied for temporary and permanent roles. One role she applied for was put on hold in February 2020 because of the pandemic.

295. Mr Barnes referred to the mitigation evidence as a *'comprehensive'* pack and which contains somewhere in the region of circa 250 to 300 responses to applications for jobs. The Claimant in response to a question from the tribunal, gave evidence that the number of jobs applied for in total was almost 400

296. The Claimant widened her search geographically from the 20 mile commute and a commute time of half an hour to 35 minutes to 40 miles and a commute time of an hour to and hour s at the beginning of 2020 . Her undisputed evidence is that a lot of employers turn her down for being located too far away although she has reiterated that she is prepared to travel and has her own vehicle.

297. The Claimant accepted that she had not applied for jobs in a supermarket or shop work to tide her over because she had expected, with her experience to have secured a finance role.

298. She did not apply for benefits and cashed in her pension. She was cross examined about her right to claims benefits, her evidence was that she was not sure of her entitlement because her partner works full time. It was put to her in cross examination that had she applied for benefits she may have had more assistance through the government services in helping her find employment.

299. There was no dispute between the parties over the calculation for the basic award and the renumeration details, salary and benefits and the details were confirmed with the parties at the close of the hearing.

Submissions

300. The parties were invited by the tribunal to address it on the cases of; **Av B 2003 IRLR 405 EAT**; **Ellis v Home Office 1953 2 QB 135 CA** and **Linfood Cash and Carry Ltd v Thomson and Ors 1989 ICR 518, EAT.** The parties were also asked to address the tribunal on the Acas code and the inferences to be drawn from the no- attendance of key witnesses.

301. I have considered the parties submissions in full and set out below only a brief summary;

Claimant's submissions

302. With respect to the disclosure to Mr Millington, counsel referred to the notes of the preliminary hearing dated 9 April 2021 and the reference within it to Mr Barnes accepting that there had been a meeting with the "*Chairman during which the Claimant had alleged that Mr Pound had put private expenses totally £3000 on his business card*." (para 12). That the Respondent accepts if such a disclosure was made it was a disclosure of information and that Mr Pound had accepted that misuse of expenses on the company credit card was potentially fraudulent and would amount to a failure to

comply with a legal obligation namely the obligation on a director to act in the best interests of the company.

303. Counsel on the issue of public interest referred to **Chesterton Global Ltd. v Nurmohamed [2018] ICR** 731 CA and referred to the those affected by Mr Pound's conduct being not only the shareholders but all the employees and that there would also be the impact of the altered view of clients of the Respondent in terms of the reputation of the company. Counsel referred to the nature also of the interests affected and the extent to which Mr Pound's actions had the potential (as the Claimant alleges in her w/s para 10) to "*affect the Respondent negatively, as a company is expected to have healthy and required finances to continue running efficiently but Mr Pound's actions disrupted this".*

304. Counsel submits that what the Claimant disclosed was over and above what she was required to do in her role, what she was reporting was fraud.

305. Counsel confirmed the number of shareholders is agreed to be 3 and the number of employees she stated, she understood from her research was over 100. Counsel clarified that the alleged impact of Mr Pound's alleged behaviour, was predominantly on the shareholders and employees rather than clients.

306. Counsel reminded the Tribunal of the failure to disclose in the suspension letter the documents pertaining to the allegations which Mr Pound had in his possession by that stage in support of the Claimant's case that she was subject to unfounded allegations as a detriment arising from the disclosures and that the Claimant did not know the full extent of the allegations until the witness statement of Mr Golding was sent to her which it is asserted was an attempt by Mr Pound to put the Claimant on the ' back foot' .

Time Limit - detriments

307. Counsel submitted that the first detriment was the unfounded allegations which were first raised with her on 20 August 2019 which lead to her dismissal on 8 November. The Claimant asserts that the acts amount to a series of similar acts in that she was being continually subject to unfounded allegations bemuse of the discloses she made.

308. The disciplinary process in terms of the investigation was unfair and ended when the disciplinary took place on 6 November 2019 and thus it is argued, the time limit should run from that date.

309. Alternatively, the Claimant applies for an extension of time on the grounds that she was unrepresented when she submitted the claim, she was in the middle of the disciplinary process until 8 November 2019, she was aware of the 3 month time limit but believed that it ran from the date of dismissal. It was brought within a reasonable period after the date of dismissal.

Dismissal;

310. It is submitted that the Claimant received the invitation to the disciplinary letter on 3 September which set out the allegations but there was no documents attached with it. The Claimant protested about the lack of information such that she was unable to understand the allegations. External HR were assisting the Respondent however the Respondent did not produce any documents to support the allegations. It was only after

she challenged the failure to disclose documents that the Respondent disclosed the documents, however it does not set out detail such as dates when it is alleged she discussed the personal information.

311. Counsel refers to the absence in the Respondent's disciplinary policy to anything about the right of the Respondent to remove names from the statements used in disciplinary proceedings. The witness had handed in his resignation and counsel submits that who made the allegations was important information. There were, counsel argues no other documents in the case to back up the allegations and it is submitted that taking into consideration that the 2 September notes were only provided after the Claimant challenged the lack of anything provided in writing and the lack of detail , that Mr Pound added to the notes and that Mr Pound influenced the outcome.

312. Mr Pound gave evidence that Mr Thorpe called him to only update him on the outcome of the disciplinary hearing, however, Mr Thorpe contradicted his evidence. Counsel submits that relying upon **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC,** Mr Pound had invented a reason to disguise the real reason for dismissal and that was adopted by Mr Thorpe when coming to his decision.

Unfair dismissal

313. Counsel submits that the Respondent could not have had reasonable grounds to sustain the belief that the Claimant was guilty of the alleged misconduct', There was no objective evidence to back up the statement of accusations. There were two conflicting accounts and to resolve that conflict required some objective evidence. .

314. Counsel submits that the Respondent was required to carry out as much investigation as is reasonable. There is no absolute legal requirement to have an investigation meeting but counsel refers to the Acas code on the importance of an investigation meeting to allow the employee to respond to the accusations.

315. The Claimant was not provided with the evidence from the additional witnesses, those witnesses were not asked about whether there were discussions about salaries and if so whether they knew who disclosed them. Mr Thorpe focussed when questioning the witnesses (other than Mr Pound and Miss Wagstaff) only on the less important issues of wrapping of the car and smoking breaks.

316. There was no record of the salaries and address Mr Golding was alleged to have disclosed. Mr Thorpe was not aware until the disciplinary of the identify of Mr Golding as the witness but made no enquiries and Mr Thorpe accepted that in terms of the allegation regarding Ms Bromley, he accepted the Claimant's account was supported by the evidence but did not go on to consider the relevance of Mr Golding's credibility more widely.

Acas

317. Counsel submits that para 5 of the Acas Code has been breached in that the Respondent failed to carry out necessary investigations. Paragraph 9 of the Code had been breached in that there was a failure to notify the Claimant of the disciplinary case she was to answer and, she had to chase up the written evidence. Counsel submits that paragraph 12 of the Code has also been breached in that employer should set out the case and call relevant witnesses.

318. The appeal would have made no difference in that the company handbook

provided for Mr Pound to hear the appeal as Managing Director. The Claimant had a clean disciplinary record and dismissal was not it is submitted, within the band of reasonable responses.

319. The Respondent was in a position to call Mr Millington and the Tribunal is invited to draw an inference. Counsel referred to **Habinteg Housing Association Ltd V Holleron UKEAT/0274/14/BA** and the commentary in Harvey. Langstaff J P in Habinteg made the following comments within his decision;

"[29] …First it seems to me that a tribunal is entitled to take into account the absence of a witness who could give contradictory evidence in assessing whether the assertion made by a party is accurate. That is because it is sound principle that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to produce to support or refute the allegation, In simple terms, if a conversation is critical, then if a party has within its power to call a person who could give evidence of that conversation which is supportive of its case and does not do so, a tribunal is entitled to draw an inference. It does not do so, however, under s 136. This is not a question of reverse burden of proof. This is a question of establishing the probabilities of what has or has not been said."

Anonymity

320. Counsel submitted that Mr Golding's evidence was not examined at the disciplinary stage and the statement was only a summary of what he had said, not a note of exactly what he had said. The disciplinary officer did not know what questions had been asked, and essential information was omitted.

Remedy

321. Counsel invites the Tribunal to make an Acas uplift of 15% for breaches by the employer of the Code. The Claimant included within her schedule of loss a claim for £20,000 injury to feelings. Counsel referred to the witness statement at para 41 which relates to the suspension having a significant impact and making her distressed and that she was signed off with stress and was of sick for a number of months . Counsel argues it is a middle band Vento case because the detriments, led to the Claimant losing her employment in a place where she hoped to continue working.

322. Counsel also submitted that even if the section 103A is not successful, the detriments namely the allegations, led to her dismissal in any event and an amount should still be awarded for loss of salary. Counsel informed the tribunal that she could not see how loss of earnings could be awarded however, if suspension was held by the tribunal to be the only detriment.

Respondents submissions

323. After an adjournment to allow the the Respondent's solicitor to receive from the Claimant and consider the authority of **Habinteg Housing,** Mr Barnes made his submissions.

324. Mr Barnes referred to the fact that the Claimant has failed to identify the date of the disclosure and only at the 'last moment' provided the date in April 2019 and that she had to be ordered by the tribunal to provide it. Mr Barnes also referred to the Claimant's letters to Mr Millington and Mr Roe asking them to confirm the date of the meeting and the absence of any mention of a protected disclosure in these letters.

325. Mr Barnes also submits that to disclose this issue about expenses was part of her job and thus not a protected disclosure and that it is ' incongruous' that she took no notes of the meeting. It is submitted that meetings with the accountants was to 'streamline the function' and no disclosure was made as supported by the notes found on her computer and that the Claimant mentioned in evidence she had followed up the concerns with Mr Millington but only under cross examination.

326. Mr Barnes refers to the Claimant asserting that Mr Pound had been told by Mr Golding about the disclosure and then makes a 'leap' to allege he was told about it by Mr Millington. It is submitted that Mr Pound had no knowledge of the disclosures and therefore the notes he made of the meeting with Mr Golding, could not have an thing to do with the disclosures.

327. Mr Barnes submits that the information Mr Golding had could not have come from anyone else but the Claimant and that what is alleged is an elaborate plot by Mr Pound to get back at the Claimant. He submits that it was right to suspend where such a serious allegation had been made against the Claimant and for Mr Pound to have put actual salary and dividend figures in his note would have breached the Data Protection Act.

328. It is submitted that the Claimant was the HR Manager but she never consulted the company handbook during the process. It is submitted that the Claimant made no request for information which may have supported her case such as expenses spreadsheets. That she was aware the Respondent had outsourced legal advisors but did not contact them.

Time limit

329. Mr Barnes submits that the 3 month time limit runs from the suspension and so is out of time, and that there has been no 'real' application made to extend time.

Dismissal

330. It is submitted that Mr Thorpe was unequivocal in that he made the decision to dismiss alone and the serious allegations warranted it. He used evidence he had received from the disciplinary hearing and exit interview with Mr Golding . Mr Barnes referring to *Linwood Foods* and submits it was not appropriate to disclose Mr Goldings identify when he asked to remain anonymous however, she knew he was the accuser and she put '*two and two'* together because she knew Mr Pound had held meetings with Mr Golding or because she knew who she had spoken to. It was impossible to provide dates because Mr Golding never suggested that the information she disclosed to him happened in specific meetings.

331. The Claimant was in an important role, charged with holding personal data and Mr Thorpe cannot be faulted in his decision to dismiss. He had a reasonable belief she was guilty and dismissal was within he band of reasonable responses. It is submitted that there was no obligation to hold an Investigation having and that it would have only been a *'copy'* of the disciplinary hearing and would have led to just repetition. Mr Barnes referred to: **Sunshine Hotel Ltd T/A Pam Court Hotel v Goddard EAT 0154/19** as the authority for the principle that there is no legal obligation to hold an investigation meeting.

332. Mr Barnes referred to the burden of proof being with the Claimant to establish that there was a disclosure and that she could have asked Mr Millington to attend as

a witness her for but had not done so and he invited the tribunal to draw an adverse inference from that. In terms of public interest; Mr Barnes argued that this is not a public limited company and if the Respondent lost money it would be Mr Pound who would be impacted and the argument staff and clients would be impacted as suggested by the alleged disclosure, was a nonsense.

333. In respect of paragraph 9 of the Acas code; it is submitted that the Claimant was notified of the case to answer. She prepared a statement and addressed the allegations. Mr Barnes disputes the Claimant had a lack of evidence to enable her to present her case at the disciplinary, because she was able to put together a detailed statement in rebuttal. In terms of paragraph 12 of the Acas Code, it is submitted that calling witnesses is not a legislative requirement and even if it were, she never asked the Respondent to speak to any witnesses.

334. Mr Golding it is submitted was a good solid informant.

335. Mr Barnes in response to questions from the Tribunal clarified that he was not submitting that if someone who works in accountants disclosed fraud it could not be a protected disclosure (which appeared to be his submission) but that misuse of a company credit card "*is not necessarily fraud.*"

336. Mr Barnes was invited to address the Tribunal on **Ellis V Home Office**; his submission was only that the Claimant had not proven that she had made a disclosure.

337. Mr Barnes was asked directly by the Tribunal (given that he had not addressed this point as put by Claimant's counsel) about his apparent concession at the preliminary hearing that a meeting had taken place with the Claimant and Mr Millington where the Claimant had alleged that Mr Pound had put private expenses of £3000 on the company credit card, to which Mr Barnes stated; " *Mr Pound had discussed with Mr Millington a flight back"* and that there was no suggestion that this conversation did not happen. He did not therefore seek to rebut that he had conceded on behalf of the Respondent at the preliminary hearing that there had been a meeting where the Claimant had made this allegation.

338. Mr Barnes was invited to address the tribunal on the applicability of **A v B** given the allegation of breaching the Data Protection Legislation and that deliberately disclosing personal data may carry a criminal sanction, and what relevance if any he considered this had on the level of investigation that was undertaken, to which his submission was that the Claimant was not accused of anything which would lose her entitlement to work was an accountant, that she is not a qualified accountant and therefore it is not a situation that would lead to her exclusion from employment.

Appeal

339. Mr Barnes submits that the Claimant could have appealed and even if she believed that Mr Pound would hear the appeal she would at least have had her concerns 'noted' and that it could have made a difference and the process could have gone back to '*square one'*

Mitigation

340. Mr Barnes submitted that the Claimant had failed to take reasonable steps to mitigate her loss in that she failed to sign up to the normal government scheme which would have provided her with an income and support. He commented that the Claimant

had shown that she had applied for a lot of jobs and *'confessed'* that he had not looked at all the mitigation documents but looked at a random sample and some are at a salary of £50,000 or £40,000 and that to apply for jobs she is not qualified for is not mitigating her losses. Further, it is submitted that she had not mitigated her losses because the Claimant did not apply for a lesser job because she believed a good job was '*around the corner*.

341. The amount the Claimant was seeking he argues an award for injury to feeling which was more appropriately put "*in the middle to lower band"*

Legal principles

342. Unfair Dismissal

The Reason for Dismissal – section 98 (1) and (2) ERA

343. It is up to the employer to show the reason for dismissal and that it was a potentially fair one namely that it falls within the scope of section 98 (1) and (2) of the Employment Rights Act1996 (ERA) and was capable of justifying the dismissal of the employee. A 'reason for dismissal' has been described as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA

Reasonableness - section 98 (4) ERA

344. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (1) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4) ERA which provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer);

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

b) Shall be determined in accordance with equity and the substantial merits of the case.

345. What a tribunal must decide is not what it would have done but whether the employer acted reasonably.

346. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** firmly established that procedural fairness is highly relevant to the reasonableness test under section 98 (4). If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

347. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

21.1 It believed the employee guilty of misconduct

21.2 It had in mind reasonable grounds upon which to sustain that belief
21.3 At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

348. In **A v B [2003] IRLR 405** the EAT held on the issue of the investigation;

"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. ***Serious allegations of criminal misbehaviour, where disputed,*** **must** ***always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges.*** *This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.*
…
In the present case, the employers' investigation into the very serious allegations which had been made ***against the*** **applicant** ***fell short of the even-handed, careful inquiry that was required. Statements which were taken and might have been of some assistance to the applicant were not provided to him and certain members of staff who may have given relevant evidence were not interviewed at all. Although there is no hard and fast rule that statements should always be provided, in this case the material, if provided, may have helped to undermine the credibility of the complainant whose evidence was fundamental to the decision".***

Anonymity of witnesses

349. ***Linfood Cash and Carry Ltd v Thomson and ors 1989 ICR 518, EAT*****,** the EAT set out guidance with the express purpose of trying to maintain a balance of interest between protecting the anonymity of the informant and providing a fair hearing for the employee. The EAT made the following suggestions:

"Every case must depend upon its own facts, and circumstances may vary widely — indeed with further experience other aspects may demonstrate themselves — but we hope that the following comments may prove to be of assistance:

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.

2. In taking statements the following seem important: (a) ***Date, time and place of each or any observation or incident.*** *(b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. (d)* ***Whether the informant has suffered at the hands***

of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

3. Further investigation can then take place either to confirm or undermine the information given. ***Corroboration is clearly desirable.***

4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.

5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is ***satisfied that the fear is genuine,*** *then a decision will need to be made whether or not to continue with the disciplinary process.*

6. If it is to continue, then it seems to us desirable that ***at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information****.*

7. The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.

8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.

This case also appears to highlight the problems facing an industrial tribunal when considering credibility. As Mr. O'Hara confirmed to us, the tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question — ***could this employer acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did?*** *The evidence is that given during the disciplinary procedures and not that which is given before the tribunal.*

..
The issue is; did this employer upon the facts and circumstances reasonably accepted by him at the relevant time (which imports the notion that there had been sufficient investigation) act fairly and reach a reasonable and reasoned decision. In the present appeal the industrial tribunal found that the employers had failed to satisfy them upon the Burchell test and we can find no flaw in the reasoning of the tribunal. It was essentially a question of fact. It follows therefore that this appeal must be dismissed."

350. **In *Ramsey and ors v Walkers Snack Foods Ltd and anor 2004 IRLR 754, EAT***, : when considering whether the approach taken was fair, the focus should be on

the reasons for granting anonymity in the first place.

Acas Code

351. The reasonableness of an employee's dismissal will normally be assessed by reference to the Acas Code of Practice on Disciplinary and Grievance Procedures.

352. The Acas Code provides;

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

Contributory Fault

353. In Nelson v BBC (No.2) 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy
- it must have actually caused or contributed to the dismissal
- it must be just and equitable to reduce the award by the proportion specified.

354. With regards to the basic award, the relevant statutory provision is section 122 (2) ERA; "*where the tribunal considers that **any conduct** of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

355. The equivalent provision in respect of the compensatory award is section 123 (6) ERA; "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

356. Section 122 (2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any* kind of conduct on the employee's part that occurred prior to the dismissal. To justify a reduction to the compensatory award the conduct must be shown to have caused or contributed to the employee's dismissal.

Polkey

357. The question of whether procedural irregularities rendering a dismissal unfair, really made any difference to the outcome is to be taken into account when assessing compensation: **In Polkey V Dayton Services Ltd 1988 ICR 142 HL**.

Section 103A and section 43C claims: Disclosures qualifying for protection

358. The term "protected disclosure" is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:

(1) Section 43A defines a protected disclosure as a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H .

(2) Section 43B defines a qualifying disclosure essentially by reference to the subject-matter of the disclosure: I set it out in full below.

(3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

The opening words of section 43B of ERA provide that:

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

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

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

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

(d) that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".

Disclosure of information: section 43B ERA

359. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT.**

360. The word 'disclosure' does not require that the information was formerly unknown. Section 43L(3) provides that 'any reference in this Part (i.e. the provisions of Part IVA) to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.

Reasonable belief

361. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *'reasonable belief'* of the worker:

- be made in the public interest, and
- tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is likely to take place.

Public Interest

362. We have had regard to: ***Ellis v Home Office 1953 2 QB 135, CA**,*

363. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR** 731 CA at paragraphs 27 to 30;

…
"All that matters is that the Tribunal finds that one of the six relevant failures has occurred, is occurring, or is likely to occur and should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29.Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the Tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on

whether he really thought so at all; but the significance is evidential not substantive.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it…"

364. **In Chesterton** the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in *Babula v Waltham Forest College 2007 ICR 1026, CA*. On appeal, the Court of Appeal agreed that the test as set out in *Babula* remains relevant and made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker;

"Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026 . Two points in particular are emphasised in that case, though in truth both are clear from the terms of the section itself:
(1) The definition has both a subjective and an objective element: …The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1). The objective element is that that belief must be reasonable.
(2) A belief may be reasonable even if it is wrong. That is well illustrated by the facts of Babula , where an employee disclosed information about what he believed to be an act of criminal incitement to religious hatred, which would fall within head (a) of section 43B (1) . There was in fact at the time no such offence, but it was held that the disclosure nonetheless qualified because it was reasonable for the employee to believe that there was".

365. When considering the public interest the Court of Appeal in Chesterton made the following observations of Lord Justice Underhill;

35. I am satisfied that Mr Linden's submission on behalf of PCaW is wrong. An approach to the concept of "public interest" which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions. It would be extremely unsatisfactory if liability depended on the happenstance of the circumstances of other employees. ..It is in my view clear that the question whether a disclosure is in the public interest depends on the ***character of the interest served*** *by it rather than simply on the numbers of people sharing that interest. …*

36. …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. ..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.

Reasonable belief in the wrongdoing

366. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.

367. As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*****,** there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

368. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT***..

Criminal offence

369. Lord Justice Morris's in ***Ellis v Home Office 1953 2 QB 135, CA***, commented on the public interest in justice being seen to be done.

370. Court of Appeal's decision in ***Babula v Waltham Forest College 2007 ICR 1026, CA*** made it clear a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based.

Identifying legal obligation

371. In ***Fincham v HM Prison Service EAT 0925/01*** **:** Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'. However, in ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did not in terms identify any specific legal obligation' and no doubt 'would not have been able to recite chapter and verse', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability

Likelihood of occurrence

372. **Kraus v Penna plc and anor 2004 IRLR 260, EAT** : In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant legal obligation'. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation'

Disclosure to employer

373. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Automatic Unfair Dismissal

374. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

375. Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.** If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A will not be made out.

376. As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*,** A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker.

Reason – causation

377. Court of Appeal decision in **Co-Operative Group Ltd v Baddeley 2014 EWCA *Civ 658, CA*** .In the course of giving the only judgment of a unanimous Court, Lord Justice Underhill stated: '*There was some discussion before us of whether… there might not be circumstances where the actual decision-maker* acts *for an admissible reason but the decision is unfair because (to use Lord Justice Cairns' language [in Abernethy v Mott Hay and Anderson 1974 ICR 323, CA]) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation — for short, an Iago situation. [COG Ltd] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct*'.

378. Court of Appeal in **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC.** On appeal, to the Court of Appeal - Underhill LJ referred to **Orr v Milton Keynes Council 2011 ICR 704, CA** If a person in the *hierarchy of responsibility* above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. Lord Wilson reasoned that if this is limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

379. When Jhuti was before the Court of Appeal, Underhill LJ considered four different circumstances in which it might be argued that the unlawful motivation of a 'manipulator' should be imputed to an innocent decision-maker including where the manipulator is the victim's line manager but does not have personal responsibility for the dismissal; the manipulator's motivation can be attributed to the employer or, where the manipulator is 'a manager with some responsibility for the investigation', albeit not the actual decision-maker; Underhill LJ stated that there would, in his view, be 'a strong

case' for attributing to the employer both the motivation and the knowledge of the investigating manager, even if they are not shared by the decision-maker.

Burden of Proof

380. The burden is on the employer to show the reason for dismissal. Where the employee who argues that the real reason for dismissal was an automatically unfair reason, the employee acquires an evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. Once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal: ***Maund v Penwith District Council 1984 ICR 143, CA*.**

381. The burden of proof under S.103A was considered by the Court of Appeal in *K**uzel v Roche Products Ltd 2008 ICR 799,** CA*, Lord Justice Mummery set out essentially a three-stage approach to S.103A claims.

Drawing inferences.

382. ***Kuzel v Roche Products Ltd*** Mummery LJ: a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

383. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.

Detrimental Treatment

384. ***Ministry of Defence v Jeremiah 1980 ICR 13, CA*,** Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage'.

385. House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*.** Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. It is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment.

386. **Agoreyo v London Borough of Lambeth [2017] EWHC 2019 QB.** Case confirming that suspension is not neutral in that it "*inevitably casts a shadow over the employee's competence"*

Causation

387. In order for liability under S.47B to be established, the worker must show that the detriment arises from the act or deliberate failure to act by the employer: ***Abertawe***

***Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT*.**

Burden of Proof

388. Section 48(2) of the Act provides:

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

389. **Court of Appeal in NHS Manchester v Fecitt [2012] IRLR 64,** the tribunal must determine whether the protected disclosure in question materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower

390. The EAT summarised the approach to drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17*:** the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made, the employer (or worker or agent) must be prepared to then show why the detrimental treatment was done otherwise inferences may be drawn against the employer.

Knowledge of protected disclosure

391. ***Malik v Cenkos Securities plc EAT 0100/17*** Mr Justice Choudhury considered that it was impermissible to import the knowledge and motivation of another party to the decision-maker for the purpose of establishing liability under S.47B. Choudhury J disagreed with the comments in *Western Union Payment Services UK Ltd v Anastasiou* (above), noting that they were obiter, and also distinguished the Court of Appeal's decision in *Royal Mail Group Ltd v Jhuti* on the basis that it was a claim for unfair dismissal rather than detriment. In Choudhury J's view, it is permissible to attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances because the liability for the dismissal lies only with the employer. However, the same does not apply in a detriment case, where provision is made for individual liability of the workers;

"93. The case of Royal Mail Group v Jhuti does not assist the Claimant for the simple reason that that was a dismissal case and not one relying upon detriment. One can attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances. That is 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.

Time Limits - detriments

392. S.48(3)(a) ERA provides that;

48 Complaints to employment tribunals.

(3)An employment tribunal shall not consider a complaint under this section unless

it is presented—

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

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

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of .that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done

393. ***Barclays Bank plc v Kapur and ors 1991 ICR 208, HL***: Their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

394. In ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA***, it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts'. The concepts of 'policy, rule, scheme, regime or practice' are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'.

395. Court of Appeal in ***Aziz v FDA 2010 EWCA Civ 304, CA*** in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

396. In ***Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16*** an employment tribunal found that the decision to commence a disciplinary investigation against the employee was an act of discrimination, but it was a 'one-off' act and was therefore out of time. The EAT observed that the tribunal had lost sight of the substance of the employee's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed, suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue

until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject the employee to further steps under it from time to time.

397. The employment tribunal will need to consider the point in time at which the alleged detriment is said to have occurred, not the disclosure: ***Canavan v Governing Body of St Edmund Campion Catholic School EAT 0187/13*.**

Analysis and Conclusions

Did the Claimant make a qualifying disclosure to the Respondent?

398. The tribunal has found, as set out in its findings of fact, that there was a discussion between the Claimant and Mr Millington in April 2019 in which the Claimant informed Mr Millington that she believed that Mr Pound was mis-using the Company credit card and expenses and that she believed this to be an intentional misappropriation of funds by Mr Pound that could constitute fraud. She disclosed that Mr Pound's mis-use included paying for personal items, charging the company to send gifts to his girlfriend and paying for parts for his own car.

Was that a disclosure of information?

399. The Respondent accepted that if the Claimant had disclosed the matters alleged within paragraphs 8 and 9 of her witness statement, that would amount to a disclosure of information.

400. In any event, the tribunal find that what the Claimant was doing was disclosing facts and not merely making an allegation. Had she simply alleged that Mr Pound was committing fraud or breaching a legal obligation, that would be a mere allegation however not only was she disclosing to Mr Millington the misuse of the company credit card and expenses, she set out specific examples of the alleged mis-use. The requirement for a disclosure to have sufficient factual content and specificity to be capable of tending to show one of the matters listed in section 43B (1), has been met.

401. The Claimant made a disclosure of information during the meeting in April 2019 with Mr Millington.

Reasonable belief : malpractice

<u>Criminal act - fraud</u>

402. The Claimants case is that she held a reasonable belief that the disclosure tended to show that a criminal offence at that time; has been committed, is being committed or is likely to be committed, namely that Mr Pound was using Company credit card and expenses for his own personal benefit which could amount to fraud: section 43B(1)(a) ERA.

403. The Tribunal have considered that the Claimant did not have access to the shareholder agreement, she was not privy to what arrangements formal or otherwise were agreed between Mr Millington and Mr Pound about what expenditure he was allowed to incur. However, the items that she specifically cited appear to be personal expenditure and what is relevant is whether she reasonably believed the information was disclosing tended to show the malpractice.

404. The tribunal conclude that the Claimant did genuinely believe that this information tended to show fraudulent activity. She stated to Mr Millington that she believed this *could* constitute fraud, which we conclude disclosed more than a possibility or a risk of that malpractice: **Kraus v Penna plc and anor 2004 IRLR 260, EAT**

405. Further, the Tribunal accept, objectively that this belief in what her disclosure tended to show was reasonable. Her reference to fraud, clearly identified a criminal offence. Mr Pound himself, accepted that if he had done what she was alleging this could constitute fraud.

Breach of fiduciary duties

406. It is not in dispute that Mr Pound as Managing Director owed fiduciary duties to the Respondent business and Mr Pound himself accepted under cross examination that he had a duty to promote the interests of the company and further, he accepted that misusing the company credit card or expenses would not be acting in the interests of the company.

407. It is argued on behalf of the Respondent that Mr Pound could not be said to be in breach of a legal obligation because he was a director and it was his own business and thus his own money he was spending. The business however, is a limited company and a legal entity in its own right hence why fiduciary duties are owed toward it. That argument the tribunal considers is legally erroneous however, what matters is what the Claimant reasonably believed.

408. The tribunal conclude that the Claimant did genuinely believe that this information tended to show a breach of a legal obligation. The Claimant made express reference to fraud but although she believed that what she was identifying was a breach of his duty as a director to promote the interests of the Respondent, she did not expressly use those words to Mr Millington. However, the tribunal conclude that nonetheless it would have been obvious to Mr Millington, that her concern was that Mr Pound was acting unlawfully and contrary to his obligations as a director regardless of her failure to identify the specific legal obligation: ***Bolton School v Evans 2006 IRLR 500, EAT***

409. The tribunal find that it was objectively reasonable for the Claimant (who is not a lawyer) to hold the belief. Mr Pound's own evidence adds weight to the objective reasonableness of the Claimant's belief that the disclosure tended to show malpractice pursuant to section 43B(1)(b) ERA.

410. Mr Barnes for the Respondent at the outset of the case and appeared to indicate initially in his submissions, that as it as the Claimant's job to point out anomalies in expenses, this cannot be a protected disclosure. The tribunal find that the Claimant was not merely pointing out 'anomalies' but what she considered to be fraud. Further, a point which Mr Barnes appeared to accept later in his submissions, the mere fact that someone is tasked to have oversight over financial matters does not mean that they lose the protection granted to whistle-blowers when disclosing financial malpractice. It may be argued that if someone is employed to raise issues, it is unlikely they would be subjected to a detriment for doing so, but that is a separate issue. Mr Barnes did not refer to any line of authorities in support of his argument and nor did he develop his argument on this point any further and it is not accepted by the tribunal.

Reasonable belief: public interest

411. The Respondent is a small privately run business and because of that the Respondent avers that there cannot have been a reasonable belief that this disclosure was in the public interest.

412. As set out in Chesterton an "*approach to the concept of "public interest" which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions"* and further *"the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest.*

413. The Claimant in her evidence refers to these actions being 'prohibited' and she also goes on to refer to the impact such conduct may have on the business and its reputation.

414. The tribunal find that the Claimant did believe that she was disclosing something which was in the public interest.

415. In terms of whether that belief was reasonable, the fraudulent behaviour of a director may tarnish the reputation of the business and create a stigma for the company and those working for it. It was not disputed by Mr Barnes that there are circa 100 employees working at the company. As also set out in Chesterton, 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.

416. We have also considered the guidance in respect of disclosures of criminal activity as per Lord Justice Morris in ***Ellis v Home Office 1953 2 QB 135, CA***, who commented that;

*"When considering the public interest, and when considering what might be "*injurious *to the public interest," it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done".*

417. If Mr Pound was using the company credit card and expenses for personal use, without the appropriate approvals and with intent to defraud the business, this would constitute the tribunal find a criminal act regardless of the fact that he had a share in the business. The company is not only a separate legal entity and in any event, he does have other shareholders.

418. The tribunal conclude, that society generally has an interest in its citizens complying with the law and that there is within a society a general public interest in the disclosure of criminal activity wherever and whenever it may arise. To permit criminal activity to take place, is the tribunal find, contrary to the interests of society and its citizens. The tribunal accept that it was reasonable for the Claimant to believe that she was acting in the public interest by disclosing what she believed could be fraud.

419. In terms of the stigma or impact of the fraudulent behaviour on employees or shareholders because of damage to the reputation of the business, the tribunal accept that in principle reputational damage could have such an effect and that to disclose malpractice may therefore be in the public interest, depending on the nature of the employer, the nature of the interests or number of people impacted by it.

420. The tribunal is not persuaded that in this case however, given the nature of the malpractice which did not involve third parties outside of the Respondent's business and was not such that it was putting the Respondent business at serious financial harm, that it was objectively reasonable to believe that if this conduct was known about, it would impact on the employees and shareholders (or indeed clients) to such an extent that disclosure of it, on those grounds, was in the public interest .

421. However, given the criminal nature of the activity which the Claimant was disclosing, the tribunal accept that objectively it was reasonable for the Claimant to believe that disclosing what she believed could be fraud/a crime, was a public interest matter.

422. The Tribunal conclude that the Claimant therefore made a protected disclosure within the meaning of section 43B (1)(a) ERA.

Detriments

(1) The Claimant was subject to unfounded allegations

423. Section 48(2) provides that once the claimant has proved on the balance of probabilities that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

424. The tribunal find that the Claimant made a protected disclosure. The tribunal find that the Claimant was subject to a detriment namely the tribunal have found that Mr Pound embellished the evidence which Mr Golding had provided to him during his meeting with him on 16 August 2020 in material respects, namely by including detail about the salary and dividend information she was alleged to have disclosed and the address of Ms Wagstaff . This additional detail was instrumental in the decision by Mr Thorpe, that the Claimant must have provided this information.

425. The Claimant was disadvantaged by the way in which Mr Pound manipulated the evidence, in that she was then subject to the allegations that she had provided this information during the disciplinary process which fatally undermined her ability to defend her position. Any reasonable person would consider this to be a disadvantage and we conclude that this amounted to a detriment: ***Ministry of Defence v Jeremiah 1980 ICR 13, CA***.

426. Mr Pound continued to repeat these allegations and reiterated that Mr Golding had given accurate information when he spoke to Mr Thorpe on 6 or 7 November 2019.

427. We conclude that the disclosure to Mr Millington materially influenced Mr Pound's treatment of the Claimant in adding to/embellishing in material respects, the evidence of Mr Golding and that she suffered a detriment pursuant to section 47B ERA.

428. The Respondent denies that Mr Pound embellished the evidence of Mr Golding. No explanation therefore has been put forward by the Respondent to explain why the Claimant was subjected to this detriment. The Respondent cannot prove that the Claimant was not subjected to the detriment on the ground that she had made the protected disclosure and therefore the tribunal find that the Claimant was subject to this detriment on the ground that she made the protected disclosure.

429. We shall return to the issue of time limits.

430. We conclude that the disclosure to Mr Millington materially influenced Mr Pound's treatment of the Claimant in embellishing the evidence of Mr Golding and that she suffered a detriment pursuant to section 47B ERA.

(2) The Claimant was suspended

431. The act of suspension is not a neutral act: it "*inevitably casts a shadow over the employee's competence"* **Aggrey v London Borough of Lambeth [2017] EWHC 2019 QB** or rather in the case before us, over her conduct and integrity.

432. Suspension created a disadvantage for the Claimant and indeed, resulted in her feeling stressed and unwell.

433. For the reasons we have set out in our findings, Mr Pound did not suspend the Claimant on 16 August 2019 . He alleges that he carried out further investigations which "*corroborated what I had heard*" and "*so"* (which implies he was persuaded by the corroborating evidence) he then discussed the situation with his HR team and suspended. However, despite the emphasis placed in his evidence and the grounds of response, on those further investigations, his evidence on this point was not credible or reliable. He did not obtain corroborating evidence in terms of the material allegations, by his own admission under cross examination. The only intervening event we have found is the information from Mr Millington about the protected disclosure the Claimant had made.

434. After acquiring knowledge of the protected disclosure we have found that Mr Pound then decided to suspend and did so in an unceremonious manner, not giving the Claimant any opportunity to respond to the allegations first and doing so in a public area of the office.

435. While suspension for alleged gross misconduct including breaching the personal data of colleagues, may well be a reasonable step to take, in the circumstances of this case, the Respondent has sought to explain its decision by reference to ' further investigations' which we have found did not actually take place or if they did, did not corroborate as the Respondent tried to allege, the accusations.

436. The tribunal reject the reason the Respondent gave for making the decision to suspend and conclude that it is reasonable in the circumstances, taking into account the unreliable evidence of Mr Pound, that the decision to suspend was materially influenced by the protected disclosure.

437. The act of suspension would continue until the Claimant went on sick leave from 16 September 2019. The suspension was the application of the Respondent's disciplinary policy which provides for suspension, during this period.

438. We conclude that the disclosure to Mr Millington materially influenced Mr Pound's treatment of the Claimant in suspending her and that she suffered a detriment pursuant to section 47B ERA.

(3) Lack of investigatory meeting

439. While the Acas Code does not provide that an investigatory meeting must take place, it does provide under paragraph 5 that it is important to carry out necessary

investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case and that in some cases this will require holding an investigatory meeting with the Claimant.

440. Any reasonable person would consider that not having the opportunity to meet and clear their name potentially, or at least have a chance to understand better the accusations, outside of a formal disciplinary hearing (which inevitably causes not only anxiety but potentially harm to the employment relationship) would constitute a disadvantage. Therefore we conclude that this was a detriment.

441. In this case, the accusations were made by an anonymous witness and the details were vague. There was we find, no corroborating evidence.

442. The Claimant had been expressly told in the suspension letter that the suspension was to allow the Respondent to continue its investigations. However, Mr Pound did not carry out any further investigations.

443. Further, the Claimant was informed in the suspension letter, that it may be necessary to have a further meeting with her as part of that process, however, there would not be, despite what this letter would seem to indicate, any attempt to hold an investigation meeting with the Claimant.

444. The Claimant was never called to an investigation meeting despite the indication that she may be. The explanation that the investigation could not be progressed because the Claimant was unwell, does not stand up to scrutiny and tribunal have found that the latter was not the real reason. The explanation that it was pointless because there had been further investigations which rendered it pointless, the tribunal has found, as set out in its finding, wasnot the real reason.

445. In the absence of any satisfactory explanation, the tribunal consider that it is reasonable to draw an inference that the decision not to meet with the Claimant and give her an opportunity to respond to the accusations, was materially influenced by the protected disclosure.

446. Mr Pound notified the Claimant on 3 September 2019 of the decision to move to a disciplinary hearing and that we conclude, is the date that the decision was made (no other date being proposed by the Respondent) to finish the investigation stage of the process.

447. We conclude that the disclosure to Mr Millington materially influenced Mr Pound's treatment of the Claimant in not holding an investigation meeting with her and that she suffered a detriment pursuant to section 47B ERA.

(4) Lack of evidence provided prior to the disciplinary hearing

448. For the reasons set to in detail in our findings, the tribunal have found that Mr Pound created the document of the 2 September only after the Claimant challenged the absence of any documents. The typed notes were not provided until 2 days before the hearing. It may not have made a difference to the outcome of the hearing, but the need to chase for evidence causes unnecessary anxiety, putting additional pressure and worry on an employee facing allegations which may result in her dismissal.

449. Any reasonable person would consider that delay and the late provision of relevant documents, is a disadvantage, not only in terms of the anxiety of having to

chase for relevant documents but the time to consider that information and prepare for the hearing. We conclude that this amounted to a detriment.

450. There was no explanation given for the late disclosure of the 2 September 2019 notes and no satisfactory explanation for informing the Claimant that no documents may actually exist. We have found that Mr Pound created the 2 September document only after the Claimant questioned the absence of relevant documents, however this was not admitted by the Respondent and in any event, if such a document did not exist at the time, Mr Pound could have disclosed his manuscript notes and his explanation that they were not legible is not accepted, because Mr Thorpe's evidence is that he was able to read them and he did not complain that they were difficult to decipher.

451. In the absence of any satisfactory explanation, the tribunal consider that it is reasonable to draw an inference that the late provision of those documents, was materially influenced by the protected disclosure.

452. We conclude that the protected disclosure materially influenced Mr Pound's disclosure of relevant documents to the Claimant and that she suffered a detriment pursuant to section 47B ERA.

Time Limit – detriments

453. The acts complained of were all carried out by Mr Pound in connection with the Claimant's protected disclosure and with the intention we conclude on a balance of probabilities, in removing her from the Respondent's employment. They formed a series of similar acts pursuant to section 48 (3) (a) ERA.

454. The last act of detrimental treatment, as set out above, was when Mr Pound was involved in giving evidence during the disciplinary proceedings, on the 6 or 7 November 2019 while in the US. As set out in our findings, Mr Pound confirmed to Mr Thorpe, that Mr Golding had given specific details of salaries and dividends when we find that he had not done so. That would mean that the 3 month time limit expired on 6 February 2020 and that the claims presented on 13 January 2020 (even before applying an extension pursuant to section 207B ERA(Acas conciliation period), were brought in time.

455. We therefore determine that the claims pursuant to section 47B ERA are brought within time.

Causation

456. The tribunal accept the evidence of the Claimant, that she suffered with stress as a result of the allegations. The Claimant saw her GP complaining of stress after receiving the typed statement on 10 September 2019 and we find that this period of stress was caused by the treatment she received, including the act of suspension, the failure to hold an investigation meeting with her to explain the allegations and late provision of the 2 September 2019 statement.

Automatic unfair dismissal under section 103A ERA

457. What was the principal reason for the Claimant's dismissal?

458. We have found that Mr Pound had embellished the evidence of Mr Golding as set out in the findings of fact and that this had a material impact on the outcome of the

disciplinary hearing.

459. Mr Thorpe accepted at face value what Mr Pound had told him, namely that the information provided from Mr Golding could not have been obtained from Companies House, which only held historic information, and that the only explanation therefore, in light of Mr Pound's denial that it had come from him and his evidence that the financial details were correct, must be that it was disclosed by the Claimant.

460. We find that the information falsely presented by Mr Pound went to the heart of the decision by Mr Thorpe that the Claimant had committed the offences.

461. We find that the disciplinary process was manipulated by Mr Pound, his line manager and Managing Director, such that he accepted at face value what he told him. Mr Thorpe did not carry out any meaningful interrogation of Mr Pound or Ms Wagstaff or indeed other potentially relevant witness regarding the alleged disclosure of personal data. He did not even record the evidence of Mr Pound or Ms Wagstaff and provide it to the Claimant so she could challenge it.

462. In the circumstances, the tribunal conclude that Mr Pound had an unlawful motivation, and that he manipulated the evidence and because he was Mr Thorpe's line manager and held a very senior position in the company, Mr Thorpe did not question the evidence he had been given. The extent to which Mr Pound's influence reached is evident in the fact that Mr Thorpe never even questioned the identify of the 'accuser' , he permitted Mr Pound to relay evidence from Ms Wagstaff and accepted without question the evidence of Mr Pound about the accuracy of the detail (not recorded in his manuscript notes or the 2 September notes) about the personal data and never asked why this information was not recorded (even if later redacted by Mr Pound)..

463. Although Mr Pound did not personally make the decision to dismiss, he was both the Claimant and Mr Thorpe's line manager and despite the Respondent alleging that Mr Thorpe carried out his own investigation, Mr Pound had responsibility for a key part of the investigation, namely the interview with the 'accuser'. Mr Pound therefore had not only some responsibility for the investigation, he had conducted the only interviews with the sole 'accuser;

464. In the circumstances, we conclude that this is a case where it is appropriate to attribute to the decision maker/employer both the motivation and the knowledge of Mr Pound.

465. Mr Pound was in the *hierarchy of responsibility* above the decision maker, he determined that because of the protected disclosures, the Claimant should be dismissed but he hid that reason behind an invented reason, namely the disclosure of personal data, which the decision-maker adopted. As identified by the Court of Appeal in **Orr v Milton Keynes Council 2011 ICR 704, CA, Co-Operative Group Ltd v Baddeley 2014 EWCA *Cave 658, CA,* Royal Mail Group Ltd v Jute 2020 ICR 731, SC.** It is this tribunal's duty to penetrate through the invention rather than to allow it to infect its own determination. The tribunal consider it appropriate to attribute to the employer Mr Pound's state of mind rather than that of the deceived decision-maker.

466. We conclude therefore, that the reason or principal reason for the termination of the Claimant's employment was the protected disclosure and therefore the claim pursuant to section 103A ERA is well founded and succeeds.

Unfair dismissal: sections 94 and 98

Reason for dismissal : section 98 (2) ERA

467. The reason for dismissal was on the face of it, conduct which is a potentially fair reason pursuant to section 98(2)(b) ERA.

468. The burden of proof is on the employer to show the reason for dismissal. The tribunal has however made findings of fact and for the reasons set out above, we conclude that the real reason for dismissal was not misconduct but attributing to the employer, Mr Pound's state of mind rather than that of the deceived decision-maker, the reason (or principal reason) was the protected disclosure, which is not a fair reason pursuant to section 98 ERA.

469. The tribunal is not satisfied on this evidence that the sole or principal reason for the dismissal action was the conduct as alleged. We have found that there was an unlawful motivation which is imputed to the decision maker.

470. The Claimant's claim of unfair dismissal pursuant to section 98 ERA is therefore well founded and succeeds.

Reasonableness - section 98 (4) ERA

471. We have nonetheless gone on to consider the reasonableness pursuant to section 98 (4) for completeness, applying the test in **British Home Stores v Burchell.**

Suspension

472. The tribunal find that the Claimant was suspended before she was given an opportunity at an investigation hearing to give her account of events. While this does not constitute a breach of the Acas code or the Respondent's own disciplinary policy, the Respondent's stated reason for deciding it had sufficient cause to dismiss was not made out in that there were no further which corroborated the accusations.

473. Mr Pound's own evidence, is that he did not consider prior to the alleged 'further investigations', that he had evidence to corroborate Mr Golding's account and he did not take the step of speaking to the Claimant before making his decision. We find that it was not within the band of reasonable responses to suspend based on the vague accusations of a witness who the Respondent chose, for reasons which (as set out further below), we find to be outside the band of reasonable responses, was kept anonymous.

Investigation

474. The allegation was a serious one. The deliberate disclosure of personal data in these circumstances, may give rise to a criminal sanction. The seriousness of the alleged offence is a matter to be considered when determining whether the investigation process was within he band of reasonable responses: **A v B [2003] IRLR 405.**

475. The Claimant was not provided with any details of the allegations prior to the disciplinary hearing to allow her to comment and direct the investigation toward certain witnesses or other evidence. Mr Pound gave evidence that he did not consider the Claimant needed to know the details of the allegations which we consider to be

perverse.

476. Further, the identify of the 'accuser' was not disclosed to the Claimant albeit she was able to express her opinion about how it may have been.

477. The Respondent was in receipt of expert HR advice and yet the guidelines in Linwood Cash and Carry were not considered. The information it is alleged (but which we find was not actually provided) by Mr Golding about the specific financial details were not even recorded, even if redacted later. The accuser provided only vague information about dates and did not identify the place where the discussions had taken place (which would possibly assist the employee in trying to identify possible witnesses or other evidence to establish she was not present as alleged). Mr Thorpe did not apply his mind to whether Mr Golding may have a grudge against the Claimant, indeed he made no enquiries about him at all, and was not even aware of the circumstances around his departure and the involvement of the Claimant in that.

478. The tribunal have found that Mr Golding did not request anonymity and, in any event, if he had, the alleged concerns about a reference could easily have been addressed by Mr Pound. The Respondent did not persuade the tribunal that Mr Golding's alleged 'fear' was genuine. We conclude that it was outside the band of reasonable responses, in these circumstances to keep the ' accuser' anonymous.

479. Mr Thorpe did not himself interview the informant and satisfy himself what weight is to be given to the information. Even when asked about an allegation which Mr Thorpe accepted the Claimant has satisfactory refuted in the hearing (relating to Ms Bromley) he still did not consider what that may mean in terms of wider issues of credibility. He simply accepted at face value what the anonymous complainant had alleged as relayed to him second hand by Mr Pound.

480. The tribunal conclude that acting reasonably and fairly in these circumstances, the Respondent could not have properly accepted the facts and opinions which it did from Mr Golding without further investigation. However, we are mindful that Mr Thorpe was being told by Mr Pound that Mr Golding had given specific financial data, that he was unaware of the protected disclosure about Mr Pound and had no reason to doubt the word of his Managing Director. However, he was the disciplining officer and should have satisfied himself that the information was correct and informed himself about the accuser.

481. Mr Thorpe then interviewed a number of staff, but he failed to ask any of them whether Mr Pound had ever spoken to them about salary and dividends whether Mr Golding or the Claimant had ever done so or indeed, whether they otherwise had knowledge or access tot at information.

482. In terms of the allegation about Ms Wagstaff, not only does Mr Thorpe not interview her, he allows Mr Pound to pass on her evidence ever the telephone in circumstances where it may have been be difficult for her to reveal to Mr Pound that she had disclosed this information. Mr Thorpe then failed to ask any of the witnesses, including those she worked closest with, whether they were aware of where she was living and how.

483. Further, although Mr Thorpe spoke to witnesses, this was not until the 7 November 2019, over 2 months after the allegations were made. Mr Pound had stated that he would carry out investigations while the Claimant was suspended but failed to do so. The delay in carrying out the investigations was unreasonable, it could have

been carried out sooner, during the suspension. The Respondent defends the claim on the basis as set out in the Grounds of Resistance, that the decision was made to proceed to a disciplinary hearing when he felt he had enough information when "*following investigations, it became clear that many of the team were aware of **exact** details regarding salaries and benefits of the senior team in UK and Germany".* However, as we have found, this is not true, no such investigations were carried out prior to the disciplinary and no such evidence was obtained at any stage in the process. We conclude that the failure to carry out investigations promptly and then to fail to ask those witnesses relevant questions, was a breach of paragraph 5 of the Acas Code.

484. The Respondent had access to expert HR advice throughout this process.

485. The investigation process, we conclude was outside the band of reasonable responses. The defects were obvious and fundamental.

Disciplinary hearing

486. The information contained in the invitation to the disciplinary hearing, the tribunal find was inadequate, it failed to set out anything other than an headline description of the offences and was in breach of paragraph 9 of the Acas code. The notification should contain sufficient information about the alleged misconduct to enable the employee to prepare to answer the case at a disciplinary meeting, but it failed to do so.

487. The Claimant attended the disciplinary hearing when it was still not confirmed that Mr Golding was in fact the accuser. Further interviews took place after the disciplinary hearing, however she was not informed of what the outcome of those interviews were. Had the Claimant known in advance what Mr Golding had alleged she had disclosed and what evidence had been provided by Mr Pound and indeed Ms Wagstaff and the limited nature of the interviews conducted with other witness, she may well then have been in a position to direct Mr Thorpe to other witnesses, documents or questions to ask the witnesses. This was the tribunal conclude a breach of paragraph 12 of the Acas code. There was a failure to provide her with all the relevant evidence prior to making the decision to dismiss.

488. The disciplining officer failed to consider the identify and circumstances of the ' accuser'. He failed to make any effort to understand why his identify was kept from him . He made no effort to speak with him or make any enquiries about him which it may be reasonable to consider in terms of weighing up his credibility and motive.

489. At the stage at which Mr Thorpe formed the belief that the Claimant was guilty of misconduct, the tribunal conclude that the Respondent had failed to carry out as much investigation into the matter as was reasonable in the circumstances.

490. Even, had if the Respondent had established a fair reason for dismissal, and it had not been appropriate to impute the knowledge of Mr Pound, we conclude that the investigation was outside the band of reasonable responses and that the Respondent did not have in mind reasonable grounds upon which to sustain a belief that the Claimant had committed the alleged misconduct.

491. The Claimant's claim or unfair dismissal pursuant o section 98 ERA is well founded and succeeds.

Polkey

492. Polkey is not appropriate in this case.

493. The sole or principal reason for dismissal was the protected disclosures. This is not a case where we are concerned only with the process but with the reason for dismissal. The evidence about the exact details of the salaries and dividends, we do not accept was given by Mr Golding and that was instrumental to the decision taken by Mr Thorpe. Even, if he had provided this, Mr Thorpe failed to question any of the witnesses about their knowledge of the salaries and dividends, whether they were aware that Mr Golding knew and if so how he knew and/or whether they were aware of anyone, whether the Claimant or anyone else, discussing this information.

494. The flaws with the investigation process were so fundamental, that putting aside the conduct of Mr Pound, we do not consider it possible to conclude that there is a prospect that the outcome would have been the same.

Contributory

495. In terms of contributory fault, the tribunal has not found evidence to support a finding that the Claimant is guilty of any culpable or blameworthy conduct. Our findings do not support a conclusion that the Claimant committed any of the serious acts of misconduct, on a balance or probabilities.

Acas Uplift – compensatory award

496. There were serious and fundamental errors in terms of the way in which the investigation and disciplinary process was dealt with.

497. The Respondent had received legal advice throughout, and we find that the breaches were therefore not only serious but deliberate.

498. There was a failure to carry out *necessary* investigations and a delay in carrying the investigation contrary to paragraph 5 of the Code. There was a failure to provide the Claimant with sufficient information about the allegations contrary to paragraph 9. The Respondent for reasons set out above, also acted in breach of paragraph 12 of the Code.

499. However, we have also taken into account that there was a disciplinary hearing and the Claimant was offered the right of appeal. We conclude that it would be just and equitable not to award the full uplift but apply an uplift 20% to the compensatory award.

ACAS adjustment for Claimant's failure to appeal

500. The Respondent argues that there should be an adjustment because the Claimant failed to comply with the ACAS Code, in that she did not appeal the decision to dismiss.

501. The Claimant's evidence is that she believed that she would have to appeal to Mr Pound (and indeed that is set out in the Company policy). We take into account, however, that at no point did she assert during the disciplinary process that she believed that Mr Millington had a hand in the unfairness of the process and she could

therefore have requested that the appeal was dealt with by Mr Millington. However, given the direct involvement of Mr Pound in both the investigation, as a witness and his intention to hold the disciplinary hearing, and that at no time was the Claimant informed that the appeal would or could be heard by anyone else, we consider that a nominal adjustment is made for this breach at 5%.

That provides an overall uplift of 15%.

Remedy

Basic award

502. The parties are not in dispute and agree that the basic award is £3,150.

Compensatory award

503. The Claimant's evidence is that she applied for circa 400 jobs. She widened her geographical scope and applied for more junior positions.

504. She did not give evidence, nor did her Counsel give evidence, about how much longer it will take her to find another job after the tribunal hearing However, her evidence is that there was a lot more work now available and she was applying for permanent as well as temporary work.

505. In the circumstances, we consider that it would be just and equitable to award the Claimant her loss of earnings from the date of termination up to the hearing. In deciding on that length of time, we have taken into account the exceptional circumstances that the Covid pandemic has had on the labour market and the extent of the evidence she had produced of mitigation. We conclude that it is reasonable for her to initially restrict her search to more senior roles closer to home and that she expanded her search more widely within a reasonable period.

506. The Respondent's own representative commented on the 'comprehensive' evidence of mitigation and the Respondent produced no evidence of its own regarding appropriate jobs which she could but had failed to apply for or any evidence regarding the job market within her professional field to refute her evidence on how difficult it has been to secure temporary or professional work.

507. The Respondent did not dispute her evidence on the more junior roles she had applied for but been rejected from because of her experience.

508. Given that the labour market is at the date of the hearing in recovery and the Claimant confirmed that she had interviews pending and is optimistic about securing new employment, we make no award for losses from the date of the hearing. We also note that The Claimant in one of her schedules of loss (p.58) had sought loss of wages up to the date of the hearing and not beyond and we consider it just and equitable to limit her losses to that period.

Injury to feelings

509. The injury to feelings award relates to the detriment claims only, it cannot relate to the act of dismissal, which was not alleged to be a detriment but only pursued under section 103A against the Respondent.

510. The Claimant's evidence in relation to injury to feelings is set out in paragraph 41 of her witness statement.

511. No application was made to amend or introduce further evidence. The totality of the evidence is limited to paragraph 41 which provides:

> "*The whole situation made me feel distressed and so I saw my GP about this. She signed me off with stress. I felt that I was under unnecessary and unfounded stress from the Respondent for no genuine reason.*"

512. The Claimant was signed off by her GP during the period of suspension only, from 10 September. The last certificate for work related stress is 11 October 2019 (page 137).

513. From 28 October, the Claimant's absence from work is due to knee pain, which has nothing to do with the detrimental treatment (page 149).No medical evidence has been produced in relation to any stress or medication that she required after 28 October when she was absent with knee pain.

514. It is accepted that she was subjected to suspension and allegations in circumstances where she was effectively marched off the premises and not allowed an investigation and where she was trying to obtain further evidence and clarity about the allegations from the Respondent, which must have been distressing.

515. The Claimant had got a clean disciplinary record prior to this incident and was in a job which we accept , she had enjoyed and had hoped to continue.

516. The period during which she suffered hurt feelings is quite short. There was no need for medication and there is limited evidence in terms of injury to feelings. However, we accept that given the way in which she was treated in respect of the suspension, and the undignified way in which she was treated, including being suspended in the hallway of the offices with another employee who had witnessed their conversation, the lack of investigation and the need to chase the Respondent to disclose relevant evidence, an appropriate award for injury to feelings would be a sum of £4,750.

Summary of award:

- Basic Award: £3,150 (gross).
- Loss of statutory rights : £500
- Injury to feelings : £4,750
- Compensatory award : Total loss of salary and benefits earnings to date of hearing: 8 November 2019 (date of termination) to 26 May 2021 (17 months) . Amount over £30,000 to be grossed up.
- Acas uplift : 15% to compensatory award only

The recoupment provisions do not apply.

The hearing is adjourned to allow the parties time to calculate, and if possible, agree, the amount due in respect of tax the Claimant will have to pay on receipt of her compensatory award and the final figure for salary and benefits.

Employment Judge R Broughton

Date: 6 October 2021

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