Case number: 2600563/2019

Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr N Barnatt		Network Rail Infrastructure Limited

AT A FINAL HEARING

Held: At Nottingham and via CVP

On: 5 - 14 July 2021 and in chambers on 24 September 2021

Before: Employment Judge R Clark.
Mrs J Bonser
Ms H Andrews

REPRESENTATION
For the Claimant: Mr J Heard of Counsel
For the Respondent: Miss R Thomas of Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The claim of unfair dismissal **succeeds** under s.98(4) of the Employment Rights Act 1996. Remedy to be determined at a further hearing if not agreed.

2. Insofar as the claim of automatic unfair dismissal relied on s.103A of the Employment Rights Act 1996, it **fails and is dismissed**.

3. The claims of suffering detriments on the ground of making a protected disclosure **fail and are dismissed.**

REASONS

1. Introduction

1.1. In 1969, Dr Laurence Peter and Raymond Hull published “The Peter Principle”. Aspects of that satirical management philosophy have resonated throughout the 8 days of this case. Our task has been to determine what lies behind the employer’s decisions to embark on a performance management process and, ultimately, dismiss Mr Barnatt. Does it flow from the fact that his acknowledged competence as a Principal Assurance Engineer was exceeded upon his promotion to Engineering Assurance Director; or does it flow from the fact, as he says, that he made a protected qualifying disclosure in 2016 which meant those in power wanted to see him out?

2. Preliminary Issues

2.1. The case was heard in a hybrid format with one panel member and the respondent’s witnesses attending remotely. We suffered delays on the first day dealing with necessary housekeeping issues, applications in the case and an estate problem requiring us to move hearing rooms. We were then unavoidably behind our ideal timetable throughout the hearing and were forced to reserve our decision. We apologise to the parties for the delay that has necessarily followed. First, in the delay in the panel being able to reconvene and, secondly, in this reserved judgment being promulgated thereafter which has itself been further delayed by a period of covid related absence.

3. The Substantive Issues

3.1. The parties were well represented and agreed a list of issues. That captures the essential questions of fact and law to be able to determine liability and we adopt it. The agreed list did not explicitly address matters which might inform remedy under s.123 of the Employment Rights Act 1996 and for that reason we have not done so here.

4. Evidence

4.1. We have heard from Mr Barnatt himself. We have also heard from Mr Dave Barnes who was the claimant’s trade union representative.

4.2. For the respondent we have heard from the following individuals: -

a. Helen Samuels, who was Mr Barnatt’s line manager for most of the material time in this case and the central focus of his complaints.

b. Graham Botham, who conducted the appeal to the first grievance.

c. Brian Tomlinson, to whom the claimant reported when on secondment.

d. Kevin Robertshaw, who conducted the appeal to the second grievance.

e. Eoin O'Neil, who conveyed the decision to dismiss.

f. Penny McIntyre, the head of HR who made the decision to dismiss.

g. Neil Thompson, who conducted the review of the dismissal decision.

h. Julie Watret, a senior HR adviser involved in the employer's management of the issues.

4.3. The respondent also relied on a witness statement from Mr Jon Shaw, the claimant's manager at the time of his promotion. He did not attend and is no longer employed by the respondent. We were invited to treat his evidence as hearsay and give it such weight as was appropriate. Our findings relating to Mr Shaw's involvement are drawn primarily from our assessment of the contemporaneous documentation.

4.4. All live witnesses adopted written witness statements by oath or affirmation and were questioned.

4.5. We received a substantial bundle running to 900 pages and a supplementary bundle of "abc" additions containing further documents omitted from the main bundle.

4.6. Both parties made closing submissions speaking to written closing argument and an agreed authorities' bundle.

5. Facts

5.1. It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. We do not intend to set out a blow-by-blow recital of the evidence we have heard but, even then, we have some extensive ground to cover. Against that basis, and on the balance of probabilities, we make the following findings of fact.

5.2. The respondent is company responsible for maintaining the national rail network. To the outsider, it has a complicated organisational structure. Its organisational structure is described as a "matrix" structure. Put as simply as we can, we understand that means individual areas of responsibility and accountability cut across many divisions, directorates and teams. Work is necessarily and routinely delivered through cross departmental working groups.

5.3. The part of the organisation that we are concerned with is the Infrastructure Projects Directorate ("IP"). Other directorates include operations and strategy/government. The purpose of IP is to develop and improve the rail infrastructure. In simple terms, any modification of the assets for which the respondent is responsible means it is first decommissioned from the division operating it in service and handed over to the relevant part of IP for the work to be managed. Upon completion, it is then "commissioned" back to the relevant operating directorate. Projects vary in scale and significance, as one would expect.

5.4. There are reasons for tension at the point of any commissioning. At the public interface, such projects will routinely involve disruption, delay or cancellation of normal train services. Within the organisation, that tension can appear at the interface between IP managers and managers of other divisions. Within IP itself, all the usual tensions that can arise in any industry can be seen between getting the work done, on the one hand, and getting it done right, on budget and safely on the other.

5.5. Mr Barnatt has had a long career in engineering in various parts of the rail industry. In recent years, his focus has been on technical assurance and compliance in the context of engineering and safety. This had led him to pursue a PhD in railway safety and risk. He commenced his period of employment with the respondent on 16 June 2010. His role was then as Principal Assurance Engineer. This was a band 2 role, a senior technical employee but below that of director level.

5.6. Before going into the relevant chronology, we need to reach some findings of fact about the claimant. The evidence before us has necessarily analysed his various strengths and weakness.

5.7. We find Mr Barnatt has a high level of confidence in his own technical skills and knowledge. He is comfortable in describing himself as having an “exceptional level of expertise”. That appears to be justified and certainly no one on the respondent’s side suggested his technical knowledge did not warrant this sort of characterisation. We find this meant he was very well suited to the function and role expected of a Principal Assurance Engineer. That was an established role and well settled in the organisational structure. All knew what needed to be done and how it would be done within the remit of this role. Mr Barnatt was free to exercise his own particular expertise in order to address the technical issues arising in any particular project or problem referred to him. That suited his style of work. We find he preferred the detail of a problem and applying his technical knowledge to the situation to find a solution within the legislation and the engineering constraints involved. His ability to engage with these technical issues within the various applicable rules and regulations for the rail sector meant he was generally regarded as doing well in that band 2 role. His ability to find a technical answer gave him a degree of status and professional respect.

5.8. Like many employers, the respondent operates a system of annual reviews. This view of Mr Barnatt’s technical skills was reflected in his previous annual reviews which were all generally “good”. They were not, however, without some hints to the sort of issues that would become front and centre in the case now before us. Even in his previous role as a band 2 engineer, there were issues about how he communicated and interacted with his peers. This is a criticism the claimant does not seek to duck. Mr Barnatt acknowledges difficulties with interpersonal issues. He attributes his focus on compliance, programming, and detailed technical work to have turned him into quite an analytical person who, in his words, “does not do small talk”. We found Mr Barnatt’s own description of the sort of interpersonal interactions, communications and leadership required of a director level job gave us a reasonably clear insight into why the tensions in this case soon emerged. His language, to describe what we find are the necessary essential skills for the director level role, was that they amount to

"office politics". We found that could only be interpreted as a dismissive view of the necessary skill set. He has been described by colleagues as having generated friction and being an introvert meaning that when he did communicate with others in the course of his responsibilities it was direct or robust and would be characterised as confrontational. As we find that the director level role could only really hope to succeed by influencing and engaging others to achieve a desired outcome, we can't avoid reaching the conclusion that the problems in this case seem to have been present at the time the claimant was appointed to the Director role.

5.9. Mr Barnatt reported to Mr Shaw, then the Engineering Director. We find Mr Barnatt and Mr Shaw were well acquainted and got on well. The two had known each other for around 15 years, working together at a previous stage of their respective careers. Their paths crossed again when Mr Shaw was appointed to the respondent in 2015 as Engineering Director for IP. We find one of Mr Shaw's own objectives was to reshape the IP compliance work. We find it was as a part of that project that led to the creation of the new post of Engineering Assurance Director. A senior leadership role within the respondent's organisational structure, graded as a "band 1" director post, the first of 3 levels of directors.

5.10. Mr Barnatt applied, was interviewed by Mr Shaw and was appointed. He took up post in March 2016.

5.11. We find that restructure and the process leading to Mr Barnatt's promotion cannot have involved the clearest analysis of what was required and expected of the director role. To the extent that Mr Shaw and others had in mind an expectation of how this new role would be performed, we find Mr Barnatt's understanding was different. There must also have been some deficiency in the appointment process so far as any such process seeks to match the needs and expectations in the role with the skills of the candidates. That mismatch manifested on a number of levels including the exact nature of the role; understanding the change of focus from a principal engineer "doing", to a director "influencing"; the demands placed on a director of creating and developing a new team with all the practical management issues that entailed of securing finance and people; forging the culture needed for a new interface with the rest of the directorate and the wider organisation.

5.12. We regret to have to find that Mr Barnatt seems not have been well equipped to succeed in the challenges of this particular director level role. We suspect that may have been the case in any well-structured and long-established role, but the task was made even more of a challenge as we find it largely fell to Mr Barnatt to find his way in this brand-new role. The result of that would quickly highlight the differences between what others thought this role was about, and what Mr Barnatt, left to his own devices, tried to make it.

5.13. We heard evidence from Mr Barnatt of him taking it upon himself to read up extensively on soil mechanics over one Christmas break. This was not presented to us in the context of broadening general understanding but in the context of him specifically acquiring the technical knowledge to provide a technical answer to a particular engineering problem. We find this level of specialised technical activity may have been something the Principal Assurance Engineer could have engaged in but it was not something the organisation

expected of the Engineering Assurance Director. It highlighted the difference between doing it, and making it happen. We find this example was symptomatic of a number of facets of Mr Barnatt's approach to the new role. This expectation was in delivering through others. Another was in managing a departmental workload. In particular, knowing when to say no to requests for work. We find taking on additional tasks became a factor that compromised delivery on key objectives. We find there was a tendency for Mr Barnatt to be drawn into areas of interest or of perceived technical expertise. This exposed a deficiency in managing his own time and work, not to mention that of his team. Unsurprisingly, this led to him feeling personally overloaded with work. The compounded the pressure of an already large agenda for the assurance team.

5.14. Looking at things from the other direction, we find of all Mr Barnatt's undisputed strengths, they did not include dealing with people or organisational systems. Unfortunately, we find these are the sort of key characteristics required of a director level role in this matrix organisation where areas of accountability are delivered through influencing and engaging with others, and not necessarily though the "doing" oneself. Our assessment of his mismatch to this new role is fortified by what would later become Mr Barnatt's own assessment of his ideal role. That was one of "technical expert". This is a role he would, in due course, seek to have created for him as an alternative solution to the performance managing issues he soon began to face. We find this type of isolated technical role does exist, or at least has existed, in some areas of the respondent's business. It has been used to accommodate an individual with a particularly high level of technical expertise outside of the usual management hierarchy of the organisation but, in this case, was not a role the respondent was prepared to create.

5.15. Mr Barnatt's previous performance issues in respect of his engagement with peers was something Mr Shaw either omitted, overlooked or did not feel was an obstacle to his appointment. We have seen the job description but there is little for to explicitly state how the role was to be performed in practice. That may not be unusual at this senior level. Having regard to all the various sources of evidence on what it means to be a band 1 director and the claimant's own approach, we conclude this role was not envisaged to be one of hands-on execution on each project undertaken. It was to develop, oversee and improve the organisational systems that would themselves lead to the relevant areas of "assurance", be it safety, compliance or otherwise. We also find that the seniority of this role was such that the post holder was expected to manage their own and their team's workload and resources. This is a long way from the sort of technical role where one might more legitimately perform only against what one is asked to do and only with the resources one is given to do it with. At this level, we find the director was expected to understand and manage priorities and resources, to know what they and their team could take on and could not take on, to secure additional resources to meet targets and deadlines and review and influence progress at all stages and within sometimes complex and competing priorities. It was not a role where missed targets could be explained by the fact that others were at fault. If others were not doing what was expected of them, it remained the role of the director, as with all directors, to then take appropriate steps to ensure those others delivered what was expected. The

claimant accepted in evidence that the nature of his role was such that he had to deliver through the engagement of others, including those not in his team.

5.16. We now turn to consider the safety culture. We accept that safety is embedded throughout the respondent's culture. That is not to say the tensions we have mentioned between delivery and safety do not still arise, but the experience of this organisation in high profile safety incidents is such that we are satisfied it is a priority for all. We find it permeates all aspects of the work and we have seen this reflected in the documentation.

5.17. So far as the safety of a specific IP scheme is concerned, we find it is ultimately the responsible of the "proposer". That is, the engineer in charge of the particular project. The safety process is integral to each project to the extent that each project has to be reviewed by an independent assessment body. One such body is the Network Certification Body known as "NCB". This is a subsidiary company of the respondent that contracts, at arms-length, with IP to scrutinise the safety plans of engineering projects. A system is in place where, in simple terms, the project is proposed and NCB respond with their view. They will either approve the plan as proposed, in which case the project goes ahead as planned, or they don't. If they don't approve it that is not the end of the matter as the proposer will then either change the plans and resubmit them, or he can disagree and issue a written rebuttal. A rebuttal, in other words, is a response effectively saying "I hear what you [NCB] say, but we can ensure safety in this way" - then setting out how it is proposed it will deliver the project safely notwithstanding the NCB view. Clearly, we accept that the process is far more iterative than that simple description and that, in practice, NCB representatives would usually be engaged with the project boards to contribute and scrutinise as the projects evolve and as they go throughout the various phases towards implementation.

5.18. We find the claimant's role of Engineering Assurance Director did not sit on these project boards. In the instant matter we are concerned with, he was not previously involved at all.

5.19. We have formed the view that this new director role may have been created without the required clarity for Mr Barnatt, and indeed other stakeholders, to know the nature and limits of the role. That in turn has left Mr Barnatt to have to decide for himself what it was he should do and how he will do it. That is confirmed to us by the fact that 3 months into the job, Mr Shaw had to speak with Mr Barnatt after certain actions on his part in order to set out again his expectations of the role more clearly. We find it significant that both of these interactions raised a similar concern about Mr Barnatt's engagement with other stakeholders but only one is relied on as a protected disclosures in the case before us. Similarly, that one incident is, we find, no more than one point in a landscape that contains a number of matters contributing to what would eventually become the performance improvement plan.

5.20. That one incident focuses on what has been called a "stop work notice". We have not been taken to anything identifying any necessary form of such a notice or the parameters for when such an order should or should not be given. There is nothing limiting or prescribing the authority to issue one, the consequences if one is issued, or how one is discharged. It seems to us that it is not a term to describe a part of any system or process, but a simple

factual description of what happens in any order to stop work. Anyone in authority could issue one. The underlying cause for doing so would then be the focus of how it is resolved. If it was issued by someone not in direct control of the work itself, the person who was responsible for the works would clearly then need to engage with its substance. The consequences of continuing the work in the face of any such perceived risk then materialising would clearly put them in the spotlight should any adverse incident occur from any lack of relevant control measures.

5.21. We accept a stop notice is extremely rare and it was common ground they should be used as an absolute last resort. We accept that they may not be conducive to an embedded safety culture where all carry responsibility for safety as they encourage the notion of it being someone else's responsibility. Nevertheless, we find if one is issued it is taken seriously for the reasons we have set out. We find part of their rarity arises from the fact that the systems for managing the projects safely have evolved to such a state that the safety issues should not emerge as a surprise. Safety is, as we have found, central to the culture of all project management. Safety risks, therefore, should be identified and managed before the project goes ahead. Although rare, we heard evidence of others having made them in the past including Mr Robertshaw. We do not accept that the culture of the organisation is such that raising safety concerns is discouraged, even in the extreme of a stop work notice. Indeed, Mr Shaw expressly confirmed in the contemporaneous documentation that Mr Barnatt was right to raise the safety issue. Mr Barnatt has issued only one stop notice. This one. He too accepts they should be a last resort.

5.22. Anyone contemplating issuing a stop notice is expected to have reasonable cause to do so. Those that might have to deal with safety would effectively discharge this function within the role they were playing in the particular project group for the project in question. As we have said, it is built into the process. The claimant's role, however, did not have any structured input to the many infrastructure projects taking place. Indeed, in this particular case his involvement is entirely down to chance. He also had no part to play in approving or withholding approval for the project's go ahead.

5.23. We then turn to the actual notice itself. In 2016, IP was involved in a major engineering project to remodel the junction at Chiselhurst. This necessarily concerned the railway points. There were three phases to the project. The preparatory phases 1 and 2 were planned to start on the evening of 10 June 2016 with works taking place over that weekend. The work on the points would ultimately involve procedures known as clipping and scotching the points, interlocking and would rely on map data which had to be tested. It was a project being managed by Pablo Fortezza, and Phil Jeyes, the proposer and Cameron Downey the project manager. The assessment body was NCB. At the time relevant to this matter, NCB were represented on the project board by a Mr Sterry. He was a principal conformance engineer. NCB had been involved in the project for at least a year but it seems their involvement had stalled before Mr Sterry was brought onto the project in April 2016. He reviewed the delayed project and what had happened so far. In a letter to Mr Jeyes dated 27 May 2016, Mr Sterry concluded that: -

> ***"it is my belief that this project is not in a position to commence installation on site as it has not demonstrated compliance with the above legislation nor with network rail's health and safety management system"***

5.24. We find Mr Sterry's principal concern was focused on what was phase 3 of the project, that is the ultimate remodelling objective, but he also cautioned against the commencement of the preparatory works in what we understand to be the initial phases commencing on 10 June. The letter sets out the technical and project management areas of concern.

5.25. We find not only was Mr Barnatt not involved in the project or on its board, but neither was he being copied into any of the correspondence or minutes of the meetings so as to be up to date with the developments for the project. The letter from Mr Sterry was not addressed to the claimant. This is all consistent with the focus of his director role being strategic and not operational.

5.26. We find Mr Barnatt became aware of that letter on or around 2 June 2016. We find despite the content, it did not prompt any action on his part. It follows in our conclusions that there must have been an assumption that the processes in place were being followed and this was simply part of the normal exchange between NCB and project board. As we have outlined, one option would be for the board to vary the project plan so as to achieve NCB approval, another would be for it to rebut it with an alternative safety plan.

5.27. Similarly, we find work on the project was continuing after Mr Sterry had written his letter setting out his initial review of progress. It was not proportionate for Mr Sterry to give evidence in this case and we resist the temptation to go further than necessary with any findings about his approach to the project but it seems to us not to be that unusual for such a professional with such a remit to potentially approach any new project for the first time with the sort of caution expressed in this initial review of the situation contained in his letter. That caution may then be proved, or might dissipate, on further engagement with the plans for the project and after further discussion. Whilst Mr Barnatt knew, or ought to have known, this project work was continuing, it was work that was continuing without his involvement. He had no knowledge of what was happening since Mr Sterry had become actively involved. In fact, we find Mr Sterry attended the project board on 7 June at which the concerns he had articulated were explicitly explored by all those in attendance. Indeed, we find they were addressed to everyone's satisfaction, at least as far as the initial phases 1 and 2 were concerned. The result was that approval was given for the work to be completed within a safe system. Significantly, that was the work scheduled to start on 10 June 2016. That work was recorded as not being "CSM significant" in itself but, even so, it was recognised this would leave the railway in an inappropriate state should the later remodelling work (Stage 3) that did require further approval be delayed. Mr Sterry was invited to contribute to the plans then in place. The result is that he would confirm that no safety assessment report was required for stages 1 and 2. He confirmed how the initial concerns had arisen, where they had since been satisfied and that the resulting designs were compliant albeit they had taken non-standard route. A plan was put in place and agreed with the board to reconcile the remaining areas, in particular to show ownership of the risks identified. Various actions were noted by board members in anticipation of the next meeting on 16 June.

5.28. We therefore find that work was continuing to progress through the necessary approvals for the critical stage 3 of the project. The result of the meeting, however, was that stages 1 and 2 could proceed.

5.29. In line with the agreement reached at this meeting, on Thursday 9 June, Mr Sterry approved the Safety Assessment Report. Though "approved", that report retained some caveats about the design process and assessments which we find would have had to have been dealt with before stage 3 commenced, either by a change of plan or by a rebuttal.

5.30. None of those intervening developments were known to the claimant. As we have already stated, the original Sterry letter of 27 May was not in itself sufficient to prompt Mr Barnatt into any action, whether appropriately within his remit or otherwise.

5.31. On the morning of Friday, 10 June 2016 the claimant says he learned that the safety work referred to in the original correspondence had not been done, that an unfavourable safety assessment report had been given and that no rebuttal had been produced. The team were still planning to go ahead with the work. Exactly how and what he learned is not clear and we have to say it has led to some caution on our part in our ability to reach firm facts. Much of what is said to have happened that morning is not found in the contemporaneous documentation. Whatever it was, we have to accept in the absence of contrary evidence, that at some point the head of NCB spoke with Mr Barnatt. We have some doubt that he had the safety assessment report before he issued his stop notice as it is not referred to but he seems to have had it at some point that day. Even then it seems the concern that was then in existence was about the plan for stage 3 of the project, not the preparatory work for that weekend.

5.32. We find Mr Barnatt spoke with Mr Shaw. We do not have Mr Shaw's evidence on this and accept the claimant's account that Mr Shaw told him to do what he thought was right. So far as there might be safety related actions to be taken, that is entirely consistent with Mr Shaw's own contemporaneous account that he (Mr Barnatt) was right to raise the safety issues. We find Mr Barnatt attempted to telephone Pablo Forteza who he understood had the overall responsibility for the project including health and safety. He was unable to contact him. He says he also tried to contact his assistant, Jeff Hills without success. There seems to us to have been a large number of senior individuals involved in that project who might have been contacted at that point. Instead of any further attempt to speak with anyone, Mr Barnatt sent an email to Pablo.

5.33. He did so at 08.38 and this was copied to Jon Shaw. This email is the focus of the alleged protected disclosure and deserves setting out in full with the original emphasis. It says: -

> *Pablo,*
> *Having read the letter from NCB that you are not legally compliant. I want you to* ***STOP WORK****. There needs to be a discussion about legal compliance.* ***Under no circumstances must this commissioning take place*** *unless legal compliance is demonstrated* ***before*** *the work commences*
> *I shall be sending a similar email re High output works*
> *Please confirm conformance by return*
> *Kind regards*

Neil

5.34. We have set out the limited knowledge the claimant had of the project and how we find he had gained an incomplete and out of date picture of the planning work to date. In particular, we find he was not considering the three stages of the project and Mr Sterry's position that stages 1 and 2 could go ahead without a safety assessment report. We find he had taken limited steps to raise this issue or to try to engage with anyone actually involved in the project and we did not find convincing Mr Barnatt's explanation for why those steps were so limited for what was an extreme response. It seems to us that, on balance, he was mistaken about the relationship between the work to be started that night and the preceding safety assessments and compliance. All that said, we are equally satisfied that his discussions that morning with someone at NCB had led him to genuinely believe that work was about to commence that evening that was in some way deficient against the expected compliance procedures.

5.35. We find he took the view that it was better to issue the notice sooner rather than later. We are equally satisfied that aspects of Mr Barnatt's character informed the choice to email rather than continue with any attempts to speak with those involved in the project and explore his concern. One only has to imagine the potential implications of a legitimate stop work notice not being seen by the intended recipient before the work actually commenced.

5.36. Thankfully, Mr Forteza did receive the email later that day. This led to other work being dropped to engage with Mr Barnatt in explaining the steps that had been taken in the project over the previous weeks to enable the initial stages of the work to take place that weekend. That was, in particular, the discussions and agreements noted following the meeting on 7 June. NCB rescinded the letter of 27 May and the safety assessment report, which we find had been focused on the final stage of the works. Mr Barnatt described this as a pragmatic solution. The process of rescinding seemed to us to be directed at removing any potential argument that there was an obstacle for the work to go ahead that weekend as it was always intended by the group with responsibility for its safe delivery that there would have to be a safety justification report in rebuttal for stage 3.

5.37. Emails continued to be exchanged into the early evening. Mr Barnatt wrote at 18:33 identifying the three stages of the project and confirming that NCB have identified a risk assessment for stage 1, a small project to replace a single set of points, has been undertaken by competent people and the risks are under controlled. He was content that the works proceed subject to a declaration of control of risk being in place before hand. He then set out his position with stages 2 and 3.

5.38. In the end the work did go ahead.

5.39. On Saturday 11 June, Steve Featherstone, the Programme Director for IP emailed Jon Shaw. The immediate consequences of the claimant's actions led to widespread frustration and disappointment about the claimant's role in the operational decisions within the systems in place. The following week, Mr Shaw met with Mr Barnatt to express his own disappointment with the way Mr Barnatt had engaged with his colleagues. He suggested that

Mr Barnatt should try to smooth things over with the programme director, something Mr Barnatt says he accepted and did do.

5.40. We find that after only a short spell of Mr Barnatt being in his new role, Mr Shaw had begun to develop growing concerns about his suitability and particularly his engagement with others at this senior level. Whilst the claimant has for obvious reasons put the circumstances of the stop work notice at the centre of his case, we find this incident was just one example of a similar theme of that type of interaction in practice and it was not the only source of that particular concern. To be clear, we do not accept that the underlying safety concerns Mr Barnatt had was itself a problem for Mr Shaw. As we have already found, he had indicated in their brief discussions that previous Friday morning to do what he felt necessary and would later state explicitly that he was right to raise any safety concerns.

5.41. Another, very similar issue arose in respect of an IP scheme at Hereford in respect of which the claimant also involved himself. We do not need to set out the terms of the exchanges in detail other than to find it led to extreme dissatisfaction for those concerned that the claimant had acted on incorrect information. His actions in this matter are not said to be a protected disclosure. The exchange prompted a response from Kevin Robertshaw, the IP signalling Programme Director suggesting Mr Barnatt was wide of the mark, did not have all the facts. His contact suggested that an apology to “Les”, a member of the team wrongly on the receiving end of an email from the claimant, would go down well at his end. The significance of this email for us was the central concern was to avoid creating a culture where safety was seen as someone else’s problem.

5.42. On 13 June 2016, Mr Shaw sent an email to HR headed “Confidential - Behaviours Feedback with Neil Barnatt”. He referred to the issues he had with Mr Barnatt arising from his involvement in these projects. This the email in which Mr Shaw explicitly states that Mr Barnatt “was right to challenge the teams in respect of separate safety concerns” but sets out his concern about the way he has gone about his interactions with colleagues. We find the sentiment expressed in this email is consistent with our finding of the safety culture. Mr Shaw set out how he had already made Mr Barnatt explicitly clear on where his behaviours fall short of what he and network rail expected of collaboration. It seems the purpose of recording this conversation with HR was simply a fear on Mr Shaw’s part that there might be repeats of this sort in the future in how he went about his director role.

5.43. We then turn to the change in senior director. Mr Shaw did not remain the claimant’s immediate line manager for very long before he moved, in or around July 2016, to a new role. His old role as engineering director was temporarily filled by Mathew Spence who became the claimant’s new line manager for the time it took the permanent appointment to be made. The successful appointment was Helen Samuels. She started in the role in January 2017.

5.44. Before she took up post in the new year, on 7 November 2016 the claimant had an interim performance review with Jon Shaw, as his recent manager< and Matthew Spence as the interim. We find Jon shaw remained involved in this process simply because of the respondent’s established practice that where line managers change roles during a year, wherever possible they will contribute to the performance review of their previous staff

members alongside the new manager. The process follows broadly what one would expect of an annual review. In this case, it starts with the initial objective setting. There is a stage for a review document to be prepared in advance of the review. The employee then attends a review meeting with evidence of their achievements against targets. This respondent measures both the "what" has been achieved alongside the "how" it is achieved. Those two concepts reflect the objectives and what might be described as behaviours. These two measures are sometimes referred to on a graph as "the wave". The manager assesses the result and completes their comments. The process is split to include an interim review sometime over the summer before a final review is completed the following spring. The outcome of the annual review can lead to one of five levels of performance assessment. They range from the lowest, "significant performance improvement required", up to the highest of "Outstanding".

5.45. We find that Mr Barnatt was felt to be struggling in the new role. It records how he had undoubtedly worked hard and conscientiously but that his interactions generated friction. Moreover, the review identified a difficulty in him grasping the nature of the role and identifying him being focused on the individual issues rather than the "required broader and more strategic leadership aspects and processes". There was agreement to support Mr Barnatt in these areas. It identified "Interactions with team members" and "generating friction" as part of the headline summary of the assessment. It noted how "improvement was required in this behavioural area not least to improve Neil's broader credibility". In terms of the growing sense of mismatch between Mr Barnatt's technical skill set and that needed for the director role, we note the summary recorded how

> ***"Neil's focus has also often been around individual or specific issues rather than the required broader and more strategic leadership aspects and process is - the establishment of the role, team and associated process is therefore not where it needs to be"***

5.46. We do not accept Mr Barnatt's view that this comment was solely about Chiselhurst. We find it is explicitly a concern about the way the leadership role is being, or not being, established and performed. To some degree, we find Mr Barnatt's challenge may itself arise from the fact he continues to struggle with what it means to operate at in the director role.

5.47. Mr Barnatt was assessed as "partially achieved" objectives. On the scale of performance outcomes available, this is one up from "Significant Performance Improvement Required".

5.48. Mr Spence had had only a short time as the claimant's temporary line manager but we find formed a view during that time that he was struggling with objectives, priorities and a lack of progress on issues in his control and a tendency to get distracted form his role.

5.49. On 8 January 2017, Helen Samuels took over from Mr Spence. We need to say something more about how we found her as she is very much the focus of the claimant's case. We find she was new to the rail industry although her engineering career appears to have been in what is collectively known as "infrastructure" industries. In her case, her most recent work has been in the water industry.

5.50. We find the relationship was doomed to some tension and strain from the outset as Mr Barnatt held a view that the rail industry was a safety critical environment in contrast to the water industry which, by implication, he did not regard as being a safety critical environment. Whilst the nature of the hazards, risks and regulation are no doubt quite different, we do not agree with his general assessment and prefer Ms Samuels' characterisation of the similarities and differences. His opinion manifested itself in his very early interactions with Ms Samuels. In part, they led to some positive tones in that Ms Samuels recognised his technical expertise and drew on it. In turn, the opportunity to articulate complicated regulations and systems was something Mr Barnatt enjoyed. It was, however, part of the foundation for what would become his low level of respect for Ms Samuels.

5.51. We find Ms Samuels to be a competent and experienced manager to operate at the senior director level. We find she understands the role is to "deliver", not to "do". She clearly understands systems and processes within this type of complex organisation and we have no doubt she can manage a very demanding workload. We find she demonstrates the sort of attributes necessary to operate successfully at the top of a corporate structure. Her role meant she was one of the IP division's top team, reporting to the IP managing director, Frances Paonessa. She also clearly understands people and how to bring out their strengths. Similarly, we find she is able to see where there may be gaps in delivery and is able to articulate what she expects from her people. She uses the informal and formal management interventions with staff to drive the objectives of her team. We have no doubt that working for a manager with these characteristics can feel demanding to subordinate employees if they are not equally driven and on top of their role.

5.52. Prior to her starting in her role, we find she had discussions with both Mr Shaw and Mr Spence to understand more of the detail of her role, the work, the structure and particularly the team she would inherit. We find this to be a perfectly normal process typical of anyone entering a new senior leadership role. We found nothing sinister in the fact it happened nor the content of what was shared. She was responsible for a team of about 12 including the claimant, all of whom were themselves at a very senior level. We do not accept that any members of the team were discussed at any length. This was a process of painting a picture and part of handing over the baton. We accept that there were varying pictures painted of the individuals in that team and that there were some where specific issues were identified. That may, in due course, have led Ms Samuels to address it within the usual cycle of informal 1:1 meetings with her staff. We do accept, however, that the summary given of Mr Barnatt in this process of baton handover did include the sort of performance concerns that Mr Shaw and Mr Spence had identified in the interim review, particularly in the area of his engagement with peers.

5.53. We accept Ms Samuels' evidence that she had no concept of the stop notice or the possibility of any protected disclosure. In summary, we found no basis for concluding that the stop notice was the reason for those discussions and every reason for concluding the information conveyed waw simply their genuine view of Mr Barnatt in this new director role.

5.54. Upon taking up the role early in the new year, we find Ms Samuels undertook her own initial assessment of her team. She needed to understand where each was with their various

objectives. We have no doubt that the views she inherited of Mr Barnatt will have been cause for particular scrutiny of his work but we find further areas of concern were quickly identified first hand. Those concerns related in part to the delay in achieving outcomes. Some of his objectives appeared to her to be substantially behind time and did not have a particularly clear plan for recovery. We saw evidence of delays causing issues for other areas of the business leading to Mr Barnatt having to send written apologies. Aspects of the delays may be explained by the fact that Mr Barnatt was carrying a number of vacancies in his team without there apparently being any plan to recruit or second others. Part of Mr Barnatt's explanation was lack of budget. We find the structure for his new department, created about 9 months earlier, had in fact been approved and a budget had been agreed. We accept there had been some administrative blockage in the finance department to set that up but the ease with which this issue was sorted when Ms Samuels got involved leads us to accept her assessment that Mr Barnatt had simply not addressed the issue. It was, therefore, another matter that gave credibility to Ms Samuels' independent assessment that Mr Barnatt's performance in the director role required some structured intervention.

5.55. During her introductory meetings with the wider team, we find Ms Samuels began to receive further feedback from subordinates of Mr Barnatt about him which only served to give more grounds for concern. One significant project being undertaken by Mr Barnatt's team was what is known as building information modelling, or "BIM". In simple terms, this is a process of digitising the infrastructure assets to provide future efficiencies and improvements when working on those assets in the future. This was being championed by Mr Spence when he was acting in the role. Coincidentally, it was also something Ms Samuels had previously had direct experience of leading in her previous employment. In that regard, whilst the balance of technical power between Mr Barnatt and Ms Samuels may have tipped in his favour in respect of the specific rail industry regulations, on this issue it tipped the other way. Of greater concern, we find Mr Barnatt did not regard this work as a priority. It was not seen by him to have the immediacy of the engineering, safety or assurance work he had previously been involved in. The feedback Ms Samuels received from parts of the assurance team cited various negative and dismissive comments by Mr Barnatt about the project which opened up yet another area of first hand concern Ms Samuels had about how the claimant might be managing and supporting his team.

5.56. We find that this theme of concerning feedback arose from a number of sources including the claimant's peers. Whilst the issues varied in magnitude, we find they created a consistent theme of Mr Barnatt's engagement with others. Some of them, if true, demonstrated the claimant was expressing himself in a way that was not consistent with the role of director. In questioning before us, time was spent analysing why the various criticisms were not singled out and addressed with the claimant at the time in the form of formal disciplinary allegations. We find Ms Samuels' decision not to take that course was logical and genuine for a number of reasons. First, some of these views were expressed by subordinates of Mr Barnatt who would have had to work under him in the future. Secondly, almost none was prepared to go on record with these concerns. Thirdly, we find Ms Samuels took the view that a disciplinary type of challenge, even done informally, may not be the best way to deal with the issue in a way that builds and improves relationships for the long term.

That applies to any employee, still less a very senior one. We therefore accept Ms Samuels' evidence that she felt the best way to engage with the underlying issues in a non-confrontational way was to suggest the claimant engage in 360º feedback in the hope that the themes she was hearing privately would emerge but in a way that would lead to reflection and change.

5.57. Mr Barnatt's end of year performance review was held on 8 March 2017. As before, it was conducted with input from two managers. This time, Matthew Spence as his interim line manager and Ms Samuels. We find Mr Barnatt went into the review underestimating Ms Samuels' view of his shortcoming in the director role. It may be, as Mr Barnatt advanced, that his experience of previous performance reviews was that the review process would accept mitigation for delays and other aspects of objectives not being achieved. We did not find that to be of great assistance to him. He has not previously had a year-end review in the post of director and we found nothing in Ms Samuels' assessment to be outside the scope of the assessments available to her under the policy and on the evidence before her. Much of Mr Barnatt's criticism was that he had too much work on too many jobs. We found Ms Samuels to have been doing no more than setting her assessment against the standard of what was expected of the director level appointment. Specific issues, that the claimant seemed to accept, relating to deadlines, budgets, team structure and recruitment only served to reinforce her assessment as reasonable. For reasons we have already touched on, Ms Samuels' view was that it was no mitigation to blame the failure to meet deadlines on the fact there were vacancies, or that he was under resourced, or that there were administrative blockages in the set-up of the department. We find Ms Samuels' reasonable view was that these were all issues that sat on his desk to be resolved within his director level role.

5.58. The review noted that Mr Barnatt had taken on board the interim review outcome and of the two areas identified, it noted how he had attempted to address some of the issues raised in respect of relationships. However, in respect of the strategic role required of the post, it noted that his: -

> ***"progress developing the required and more strategic leadership aspects and process issues has remained limited. Neil has struggled to maintain the focus on the priorities at his interim review and as such the associated output has been less than effective."***

5.59. It concluded that an area of deficiency seemed to be the claimant's understanding of the "what" and the "how" needed to perform in the role.

5.60. The claimant's evidence was that he left this review meeting thinking he would receive a "partially achieved" grading as he had during the interim review. In fact, the overall assessment became one of a substantial improvement in role required, or "SPIR". We do not find that to be a change of position on the part of Ms Samuel but simply reflects the difference between Mr Barnatt's own interpretation of where he might end up and hers. This, in turn, was a consequence of him not seeing the extent to which he had misunderstood the requirements of the director role. Ms Samuels' view was that the gap was a sufficient issue to consider him in post as potentially a risk to the business.

5.61. In his own comments and self-reflection in the review, he did acknowledge the deficiencies and his own naivety. He drew a link to taking strong action and stopping jobs which was said to be a direction of others and not his style. We found there to be a continuing flavour of misunderstanding the measures of success. Mr Barnatt referenced an individual piece of work which clearly was a success but we find to be in the nature of the work done before as assurance engineer rather than the type of leadership role now expected as the director. Again, we want to stress there has never been any criticism of his technical skills.

5.62. It is necessary to record that there is sometimes a sixth, additional, category of end of year assessment review in addition to the five previously described. That is termed "developing in role" but is limited to those whose end of year assessment occurs within 6 months of their appointment to the new role. The claimant has contended that this was an appropriate assessment to deal with the levels of concern that applied to him at the time but we find it was not available at that time.

5.63. On 23 March 2017 Mr Barnatt and Ms Samuels met again. Ms Samuels confirmed the SPIR rating. This assessment carried serious implications. Firstly, it meant he did not receive a financial bonus for that year. Secondly, the respondent's financial support for his PHD programme was suspended. Thirdly, and potentially of greatest significance, was that the SPIR automatically triggered the respondent's procedures for a performance improvement plan, or "PIP".

5.64. Ms Samuels informed the claimant of these consequences of the review. We find she was concerned about the implications of a PIP. She was alert to the sensitivity of being subject to a PIP, in his case that being more than might ordinarily be the case because of Mr Barnatt's senior position, his past record with the organisation and his personal and professional integrity. We find based on that concern, Ms Samuels did raise other options with him. They were whether he might contemplate a return to a lower graded role, perhaps more suited to his technical expertise or he may not want to continue in employment at all. Save for exploring those alternatives and any decisions he might come to in response, we find she was bound to embark on the performance improvement plan.

5.65. It is understandable why Mr Barnatt has described this as a threat to force him out. However, we do not accept that is what it was. We accepted Ms Samuels' account of why these options were discussed in this meeting. We accept that rather than threatening him with a PIP, she was explaining that this would be a difficult process for someone in his senior position and was not the only option. Mr Barnatt rejected all of the possible alternatives and elected instead to continue in his role unhindered by any PIP. We find that was not an option. We also reject that Ms Samuels had any settled outcome in mind. It may be right to say that the evidence and response from Mr Barnatt meant Ms Samuels and others anticipated that he would struggle to achieve what was expected in the role and that, to that extent, the end result might seem likely, but that is quite a different matter to an employer embarking on a path towards achieving a settled outcome irrespective of what the employee did.

5.66. We have reached those conclusions in part because of Ms Samuels' approach in other aspects of addressing this issue. An important aspect of that was her approach to dealing with the concerns expressed by Mr Barnatt's team and subordinates about him. It may well be that she could have forced that into a disciplinary context as, indeed she was criticised in questioning for not doing. However, we find it was Ms Samuels' genuine view in her professional opinion that disciplinary matters would not be conducive to future improvements and would in fact be counterproductive as a means of improving future relations in the team.

5.67. We find the 360º feedback route she opted for instead is a tool which focuses on the "How you do it" rather than the "what you do". The fact of suggesting this indicates a degree of commitment to Mr Barnatt's future development as we find the feedback one gains from it is the start of a development plan, not the end in itself. It is also potentially a reference point for future comparison to demonstrate development in the role. We find it was a means of positive support.

5.68. At this time, we find Ms Samuels sought input from other senior managers on their interactions with Mr Barnatt. She sought concrete examples of areas where improvement might be needed based on Actual interactions with Mr Barnatt. We find this was to form a meaningful basis of the PIP plan. One such example was in respect of Mr Shaw's engagement with the claimant following the aftermath of his various interactions with others, one of which included the circumstances surrounding the stop notice. We reject the suggestion that Ms Samuels' request was indicative of Ms Samuels looking for a reason to manage Mr Barnatt out of the business. Weight was placed on a turn of words used by Mr Spence in correspondence with Ms Samuels to the effect of (299) "I don't think this will be what you are looking for". That supports our finding there was the request for evidence of performance in role but that is no more indicative of reasons to get rid of him as it is looking for genuine evidence of the sort of deficiencies she was herself experiencing at the time. We are satisfied Ms Samuels had a genuine concern about Mr Barnatt's performance in the role and as the next step was going to be setting a plan for improvement it was necessary to furnish the plan with real areas of problems to address.

5.69. On 2 May 2017, Ms Samuels emailed Mr Barnatt enclosing a summary of his year-end performance review. This was in preparation for a meeting to prepare the PIP and would form the basis of the plan. Within this email, Ms Samuels also expressed concern about the iELC technical stage gate roll out and the need to prepare a recovery plan to get the project back on track.

5.70. We accept that the fact an employee embarking on a PIP clearly raises the theoretical possibility of future formal stages of management intervention. We find all understood the process well enough to be alert to that. We do not, however, draw from the language that this was inevitable. Mr Barnatt placed reliance on Ms Samuels agreeing to Mr Barnatt's request that he be accompanied by his trade union representative even though, as she stated, it was not *at this stage* part of any disciplinary process. That is not something we are prepared to elevate to indicate anything more than what it says as a matter of fact.

5.71. On 4 May 2017, a meeting was held to plan the PIP process with Mr Barnatt, his trade union representative and Ms Samuels. It is significant to our understanding of the case that this meeting again sought to reinforce the distinction between Mr Barnatt's understanding of providing director level assurance and systems as opposed to him trying to "do" everything or funnel everything through him. The notes of the meeting, whilst not all accepted by the claimant, identify improvements had not been achieved since the interim review, that he was performing on the "bottom left of the wave" (i.e., the performance management tool referred to above) and that he was landing in the significant improvement required category but didn't have the answers to improve matters. Aspects of the leadership characteristics of a band 1c role were discussed to identify Mr Barnatt's deficiencies. A plan was put together including the 360º feedback, hitting the targets he had committed to, producing delivery plans by theme, completing a high-level review of the iELC process and producing dashboard reports. The plan also identified specific actions including the recruitment into the team, presenting a delivery plan to the heads of engineering,

5.72. On 18 May 2017, a first PIP review meeting took place. By now the format of the PIP had been settled and plans put in place for the 360º feedback process. The methodology in the development of this peer feedback was criticised by Mr Barnatt. We do not find there to have been any justification in that criticism. We do not accept that those who might be supportive of compliance were removed from the 360º process by Ms Samuels as suggested or that those who might be critical were included. We do find she encouraged him initially to choose a balanced mix of those to participate and did discourage those of previous working areas (such as the STE team) where the value of the feedback may be diminished. If anything, we find Mr Barnatt was himself seeking a relatively narrow and supportive pool from which to obtain feedback.

5.73. It is important to record a finding that this meeting otherwise appeared to demonstrate positive steps being achieved. We find Ms Samuels recorded that she was "really pleased with the progress on planning what needed to be done, and how this had been received by stakeholders". She also recorded how the Heads of Engineering meeting was positive and engagement in discussions had been "noticeably different to how they were before". We find these early steps show a genuine approach to the purpose and role of the PIP process as a tool to bring about and support the improvements required.

5.74. On 23 June 2017 Mr Barnatt and Ms Samuels held a second PIP review meeting. There was further discussion about the names to be invited to participate in the 360º feedback but this was then finalised for completion in July. Progress on the areas of the plan were discussed and recorded. Further specific "to do's" were identified.

5.75. One issue arising in this review meeting was some analysis of the claimant closing off his actions points. Ms Samuels had analysed this and arrived at a figure of 23% of actions being closed late. We do not regard it as relevant to engage in the detail of this analysis and whether 23% is an accurate figure. It may well be. But even if there is some legitimate variation to the arithmetic, the takeaway finding we make is that there was a real concern arising about delay and managing targets and deadlines sufficient for the analysis to be undertaken. We find this was more than simply missing deadlines and included the manner

in which commitments were given to other senior managers in meetings about project delivery without any follow up to the resources or planning to deliver them. The issue was that in many cases these were not just missed deadlines but missed commitments that had been given by the claimant and then not maintained. This raised the area of concern that Mr Barnatt did not have a handle on the capacity and resources of his team and the skills involved in renegotiating plans with others or, simply, saying no to requests.

5.76. Around this time other, more task focused, targets were being missed. Mr Barnatt had been asked to provide a draft of a presentation in respect of the iELC project. It was provided but only on the day before meaning she could not review it and contribute and putting her under additional last-minute pressure.

5.77. We find the results of the 360º feedback that followed seemed to demonstrate a significant gap between Mr Barnatt's perception of his own behaviours and that held of him by others. In all areas, Mr Barnatt's self-assessment was significantly higher than his peers and that of Ms Samuels. In all cases, Mr Barnatt accepted that the view others held of him against the relevant criteria was skewed on the wrong side of the norm score of 100. We do not take too much from this evidence. We understand it is a reflective tool for managers and not an absolute measure. It does, however, tend to add to the overall impression of some sense of mismatch between what was required in the role and how Mr Barnatt went about things which only serves to reinforce the findings we have otherwise reached behind why Ms Samuels was taking the steps she was.

5.78. On 19 July 2017, the next periodic PIP review meeting took place. There were a number of criticisms of progress raised including in areas of basic interactions and provision of information. Mr Barnatt was reminded that as a Band 1c director it should not be necessary for Ms Samuels or others to be chasing him to deliver on providing information of things he has committed to provide. Even before then, the PIP process had clearly become a source of tension. By its nature, there is both a focus on areas of deficiencies and tangible actions expected. The events in the intervening period generated some further grounds for concern on Ms Samuels' part and further ground for frustration on Mr Barnatt's part. He had sought help on budgeting but then, from Ms Samuels' perspective, left the issue unanswered for some time before progressing it further. In other aspects, he sent requests for input to her so late after she had required it meaning she had to deal with the issue herself. For his part he had been trying to move forward some areas of work he felt were significant and pressing such as the implications on Brexit, particularly on the legislative landscape relevant to health and safety and that he felt that he was getting to the bottom of a number of his actions points.

5.79. During this time, we have seen evidence of Ms Samuels bringing in resource and expertise on certain projects that fell within Mr Barnatt's role, and therefore her responsibility. One was the review of the adequacy of the Engineering Technical Stage Gate (iELC) and Technical Assurance implementation plans. The nature of the request was to pose a number of strategic questions concerning these "business critical" projects in a way that was explicitly said to be for the purpose of "supporting Mr Barnatt in getting his plans successfully implemented". An initial action plan was proposed to the recipients and included Mr Barnatt. Whether or not she was frustrated that she was doing what he should have been doing to

lead this sort of process, her actions demonstrate to us that Mr Barnatt was being supported in achieving what was expected of him in role.

5.80. The initial view Mr Barnatt had formed of Ms Samuels upon her appointment was only reinforced as his performance had become questioned further. We find the gap between his understanding of the director role and Ms Samuels' expectations of it, and how he might go about demonstrating that only added to the growing tensions. We find he felt he was not being listened to in explaining why he was not meeting targets or deadlines and felt he was doing better in the role than she thought. He had "small g" grievance throughout the PIP process. When the PIP was to move to the more formal stage of consequences, this became a formal grievance.

5.81. On 25 July Mr Barnatt raised his formal grievance in writing to the Managing Director, Mr Paonessa. In it he made a number of allegations focused on Ms Samuels' management of him alleging that she had indicated his removal from post and commenced PIP only after he refused that route. That she predetermined the informal stage to manipulate unachievable goals, that she was biased in the selection of peers for his 360º feedback, that she had not provided coaching support to improve performance; that she had been critical of his process of task prioritisation and had not acknowledged his achievements; that she had been late in providing minutes of their review meetings and had failed to review the extent to which he had met his objectives against changing priorities.

5.82. As a result of the formal grievance on 31 July 2017, the formal PIP process was suspended. We find that did not dispose of it, only that it was paused in order to conclude the dispute that had now arisen under the grievance process.

5.83. Simon Ancona, the Chief Operating Officer, was appointed to hear the grievance. We find he contacted relevant parties for evidence. He met with Mr Barnatt and his trade union representative on 11 August 2017. We find this was a lengthy and detailed meeting in which Mr Ancona appears to have explored all of the areas of concern raised by Mr Barnatt. Mr Barnatt's desired outcome was, essentially, to continue in the director role with help to improve to be the best he could. Mr Ancona wrote to ask if that might include a modified PIP? Mr Barnatt replied, acknowledging a range of strengths and weaknesses, and saying: -

> ***I also recognise that I have changed from one role to another in a different part of the company at the start of last year and whilst at the start I possessed some of the attributes there is some adjustment to the requirements of the different role and strengthening required for those less familiar parts of the role. With this background I would have thought development would have been an appropriate mechanism. At this level coaching seems to be a really good vehicle?***

5.84. We find within this response there is some recognition of the difference in expectation between the two roles that we have found to be at the heart of this case. We have not detected any reference to the stop notice.

5.85. Mr Ancona met with Ms Samuels on 17 August and, in an equally lengthy meeting he put the claimant's areas of concern to her for her to respond to which she did.

5.86. One area arising from this process was the difference of opinion about the support provided by Ms Samuels to MR Barnatt. She was of the opinion that she had provided tangible suggestions to support his performance. One of those was coaching on presenting. We found the questioning before us focused on this, both with Ms Samuels using it as an example of her support and Mr Barnatt using it to illustrate the lack of support in other areas as this was the only thing she did. There is an extent to which they may both be correct. On the one hand, the nature of the functions within a director role is not something Ms Samuels' would have expected to have had to articulate in such specific detail. We do not find it means she was not supportive simply because there are no other examples of tangible instruction given. On the other hand, the example that was given clearly demonstrates not only a tangible deficiency to be addressed and the means of addressing it, but in this example Ms Samuels particularly recalls it because it was quickly followed by an obvious improvement. We accept her evidence of how she recalled Mr Barnatt "holding the meeting", that is taking the attendees with him in his presentation and something she was pleased to see an improvement in.

5.87. That leads us to other areas of the working relationship and how, around the time of the formal grievance it deteriorated to such an extent that we find it quickly became, frankly, unworkable. We find Mr Barnatt stopped any communication with Ms Samuels save for essential emails. He also refused to attend the established system of 1:1 meetings with her and this extended at times to other meetings at which it was known to him that she would be in attendance. We find there was no meaningful telephone discussion either. We find that faced with this, a proposal was made by HR that meetings between them took place by phone or face to face but in either case with a "chaperone" in attendance. Mr Barnatt rejected those suggestions and we doubt that they truly would have been more than a short-term sticking plaster solution in any event. We accept Ms Samuels' evidence that the only interaction she was able to have with Mr Barnatt was through email. We do not accept Mr Barnatt's contention that this state of affairs provided a workable form of line management or that their working relationship could be maintained on a purely "transactional" basis, as he put it.

5.88. We find this state of affairs came to a head in September 2017 in managing the immediate aftermath of a derailment at Waterloo station. This necessarily required Ms Samuels and Mr Barnatt to work together quickly, closely, collaboratively and with others in a dynamic situation. We accept Ms Samuels' evidence that the dynamics were such that this was simply not possible to be limited to email only and placed her in an intolerable position of having to hold discussions with Mr Barnatt's subordinates, instead of with him, and for the issues to then be confirmed in writing in a later email.

5.89. By this time, we find it unsurprising that the wider senior management was concerned about the notion that a director could refuse to engage with their senior director. On 20 September 2017, options were proposed to Mr Barnatt to either reinstate 1:1 interaction with Ms Samuels, including a third party being present if he felt unable to do so without, or that he considered a secondment to another division. We find Mr Barnatt took the option of a temporary secondment and, from 25 September 2017 he commenced a temporary role within

Mr Shaw's new area of control, reporting to Brian Tomlinson the Chief System Assurance Engineer. The role was announced publicly to undertake an important piece of work on Brexit implications.

5.90. In the meantime, we find Mr Barnatt's work was taken over by a Mr Willcock who stepped into the role and seemed to get to grips with the demands of the role.

5.91. We accept that this secondment was intended to be temporary and pending the resolution of the grievance. We also accept Ms Samuels was clear that, on his return, Mr Barnatt would resume the PIP process. We understand that that would not, as indeed it could not, be against the original plan as aspects of it would no longer be relevant but a new plan would be applied addressing the same themes as were previously identified. In fact, the initial temporary secondment was extended and Mr Barnatt would never in fact return to his substantive role.

5.92. In the meantime, Mr Ancona continued his investigations into the claimant's grievance interviewing various individuals from HR, Mr Shaw and Mr Spence. On 31 October 2018, Mr Ancona reinterviewed Mr Barnatt clarifying certain aspects. By this time, Mr Barnatt's view, expressed through his trade union representative, was that the "root cause of where things had gone wrong with his performance started with Mr Shaw's criticism of the decision to instruct projects to stop work". Mr Ancona's decision was given at an outcome meeting held on 3 November 2017. In a letter confirming that, dated 10 November 2017, Mr Ancona set out his decision on each of the 9 specific issues raised in the grievance in turn. Overall, it is fair to describe the outcome as rejecting the grievance but, within some of the specific allegations, there are findings leading to the specific point being partially upheld. The outcome of the specific allegations was: -

a. "Unfairly declared that I will be removed from my position in breach of Network Rail's policies" – rejected.

b. "Commenced a performance improvement process only after Mr Barnatt refused to accept being unfairly removed from his post" – rejected.

c. "Predetermined the outcome of the informal stage performance improvement process by manipulating the goals, making them unachievable and to justify a negative outcome" – Rejected as no evidence to suggest that the PIP was actively manipulated but partly upheld on the basis that there was some evidence to show that the PIP was not fully agreed.

d. "The selection of peers for the 360 review was biased in that many of Mr Barnatt's suggestions were rejected" – Rejected.

e. "Positive coaching support has not been provided to improve performance" - Rejected

f. "Mr Barnatt's method of task prioritisation has been criticised without any review of the tools used" - Upheld as the task prioritisation list was not reviewed.

g. "The positive parts of Mr Barnatt's performance were not acknowledged at the final meeting and only the negative aspects were pursued giving a biased outcome" – Partially upheld as although there was acknowledgement of achievement initially, some elements of this point were true around the decrease in acknowledgment of positive aspects of performance.

h. "The minutes of the 21 June were not provided until the evening of 11 July giving limited time prior to the 19 July meeting to review and investigate the substantial post meeting content, which was negative" – rejected

i. "The original objectives, and the extent to which Mr Barnatt met them, were not reviewed in the final meeting nor were they amended at and agreed to during other meetings to reflect changing priorities" – This was partially upheld to the extent that the two-way nature of the process was not reflected in the policy.

5.93. Overall, Mr Ancona found there had been a breakdown in the line management relationship and recommend further work to establish the extent of it and whether mediation was a realistic possibility. He also made recommendations on the PIP process and suggested that Ms Samuels' carried out a 360 review.

5.94. We find the prospect of mediation was a possibility at that stage but was not pursued further only because it is an alternative to a grievance process in this organisation and where the formal grievance is maintained under appeal, the conclusion of the grievance process takes precedence. In this case, on 17 November 2017, Mr Barnatt appealed against the grievance outcome which had the result of maintaining that dispute and mediation would not therefore feature in this case for some time yet.

5.95. The grievance appeal was based principally on a perception of unfairness that he was required to prove his allegations beyond reasonable doubt as opposed to the balance of probabilities. He alleged there was a campaign to get rid of him stemming from safety incidents and the electrical clearance job which were misconstrued and not understood by those involved. He concluded indicating his willingness to consider mediation, acknowledging that the relationship needed repair, but on condition that Ms Samuels' perception of him shifted significantly.

5.96. Graham Botham, the respondent's Strategy and Planning Director, was appointed as the grievance appeal manager. In mid-January 2018, he met with Mr Barnatt at an appeal meeting. Mr Barnatt had by then provided further summary reasons why he regarded Ms Samuels' actions unfair and unlawful and why he felt this was a plan to see him removed from the business. During the meeting Mr Barnatt expanded on his points of unfairness. He drew comparison to what he had been doing whilst on secondment and that he had completed two significant pieces of work demonstrating he could deliver albeit "not at the pace that Ms Samuels expected"

5.97. Mr Botham reviewed these new points against the original evidence and set out his decision in an outcome letter dated 22 January 2018. His conclusion was that the original decision would stand. He repeated his view that the proposal for mediation was a sensible

part of the next step as, after having spoken with Mr Barnatt, he too shared Mr Ancona's opinion that the relationship between Mr Barnatt and Ms Samuels had broken down.

5.98. As had happened on two previous occasions, that relevant period of time meant two managers were to assess his overall performance. The period from April 2017 until September, was when Mr Barnatt reported to Ms Samuels under the PIP. Thereafter, Mr Barnatt was on secondment reporting to Mr Tomlinson and the PIP was paused. The issue of his annual review in these circumstances was identified as something requiring special treatment and plans were put in place to modify the process to adopt an independent review of Mr Barnatt's work achievements from April 2017 based on a recommendation of Mr Ancona's grievance outcome. Agreement was reached that Simon Blanchflower, the respondent's Major Programme Director for Thameslink, would act as an independent reviewer of his annual review.

5.99. There was some dispute in the evidence before us as to the understanding between the claimant and the respondent about his role. Mr Barnatt's view was it was closer to that of actually undertaking the annual performance review, effectively revisiting the individual managers' assessments in real time in a four-way meeting involving himself. The respondent's view was that it was to oversee the review that was conducted by the two assessing managers and determine the overall outcome. We find the process was to include any areas of differences with the managers basis for their assessments but was not a process of re-assessing it.

5.100. In the course of preparing for this process, emails were exchanged between Mr Barnatt and Ms Watret concerning the detail. On 4 April Mr Barnatt wrote expressing his view that Ms Samuels' section was to be based on what has happened and already judged as not satisfactory from her perspective which had been a point of dispute. As a consequence, he expressed his view that this was not really appropriate to a fair end of year review. The manner in which Mr Barnatt subsequently interpreted Ms Watret's response was fundamental to much of the later events. It is a short email and for those reasons we set it out in full. She said: -

> ***This is part of the annual performance process and will be reviewed according to the input of the two line managers relative to their expectations of your performance. The dispute over your performance in substantive role was reviewed and closed and this was one of the recommendations by the reviewing line manager. As your end of year review we look at the component parts of your work as before. Mediation, as we agreed would be the next step in terms of ways of working together in the future. The two are different areas as you say.***

5.101. We do not accept that the second sentence of this email is saying that the issue of a PIP has been permanently closed. The area of dispute about performance being referred to was Mr Barnatt's earlier *grievance* about his performance shortcomings which had been determined and closed and not that the underlying issue about his performance was resolved or closed. We accept that on returning to the substantive director role, the respondent's position was that some form of PIP process would resume.

5.102. We pause there to note how the evidence of how Mr Barnatt had interpreted what was said against what was meant has arisen at various stages of this claim including things said

by Mr Barnatt which he has felt the need to explain. An example relevant to the PIP is illustrated in Mr Barnatt's own witness statement where he has deciphered at length numerous extracts of one of his own items of correspondence on the independent review process to provide lengthy translations of what he says he actually meant by the words used at the time. This difficulty in keeping track of what was said and what was actually meant arose on this issue of PIP in a most pronounced manner. In his evidence and communication at the time, there could not have been a clearer statement that he was not prepared to return to his substantive role with Ms Samuels if there was any PIP in place. We return to that in the chronology below. In fact, however, in evidence Mr Barnatt advanced a position whereby he asserted he did understand that a PIP could be implemented as soon as he returned and the only distinction that seemed to remain was that such a PIP could not be imposed against the old objectives. That was, in essence, what was being proposed by the responded. When asked, he conceded that what he expressed at the time would not have conveyed the impression later conveyed to us.

5.103. Returning to the independent review, the process was otherwise conducted in accordance with the usual performance management processes. On 20 April 2018, Mr Blanchflower met remotely with Ms Samuels and Brian Tomlinson to review the 2017/18 performance review process. Each of them had provided their input to the respective parts of the year already. By an email of the same date, Mr Blanchflower set out his opinion and recommendations for the full year assessment. Understandably, this involved him expressing an opinion on the two constituent part year assessments before settling on an overall outcome. He concluded: -

a. For the period April to September 2017 (whilst subject to the PIP) there was clear evidence that Mr Barnatt's performance both in terms of the 'what' and the 'how' remained well below what would be expected of someone in his position. He was satisfied that he was still at a performance rating of "SPIR", as there had not been sufficient and measurable improvement that would have improved his rating from where it was at the end of the previous review year.

b. For the period October 2017 to March 2018 (whilst on secondment assigned to STE) his performance improved. Mr Blanchflower considered the work was more aligned with his technical strengths and he delivered what was requested although not without some ongoing concern. He concluded the performance was a "low" good. He qualified that by noting that the level of work that he was undertaking on secondment was probably more at a band 2 level than a band 1C director role.

5.104. Bringing together the two to an overall rating for the year, he recommended a rating of partially achieved.

5.105. On 27 April 2018, Mr Barnatt lodged his second grievance focusing on the outcome of this performance review. Mr Barnatt set out 14 key points of concern but before us split his grievance into three categories that: -

a. Ms Samuels' criticisms were unfair and the review outcome was unfair.

b. the independent review was not independent and had failed to prevent the unfairness.

c. That the PIP threat was wrongly back on the table.

5.106. We are clear that both parties were genuinely expressing their positions but it is also clear that these formal processes were not bringing the parties together. They were entrenching them in their respective positions. Whatever the merits of the individual challenges, we find the employer had to address a situation where any input from Ms Samuels would be perceived as biased or unfair by Mr Barnatt. The process sought to address that. It may have been the case that different steps could have been taken but we remain satisfied that the qualitative input to the review was what the two managers genuinely believed was appropriate, the assessment that Mr Blanchflower made of the evidence that they each had relied on was reasonably open to him as was the overall conclusion that he came to.

5.107. This second grievance was assigned to Kevin Robertshaw, Major Programme Director, for IP Signalling. He was assisted by an external investigator, Tracey Dixon, appointed with the claimant's agreement. An initial meeting was convened and held on 28 June 2018.

5.108. Mr Barnatt set out in detail his view of Ms Samuels' assessment of his performance and the process undertaken by Mr Blanchflower. Much of the attack on Ms Samuels' assessment went to the merits of why she was wrong to be critical of his performance. Mr Barnatt followed up the grievance meeting sending further emails and attachments to Mr Robertshaw on certain aspects of his work.

5.109. On 11 July 2018, Mr Robertshaw met with Mr Blanchflower and Ms Watret as part of his grievance investigation. Mr Blanchflower set out his methodology for the independent review of the assessments of Mr Barnatt performed by Ms Samuels and Mr Tomlinson. He denied the expectation that there would be a four-way meeting including Mr Barnatt. He restated his view that the "good" assessment for the work done for Mr Tomlinson was both a low good and also had to be set against the level of work which was seen as band 2 work being done by someone now employed in a Band 1 director role.

5.110. The focus of the interview with Ms Watret was on the email of 5 April we set out above and whether the PIP would cease or not, and on the role of Mr Blanchflower and the feasibility of mediation, something Ms Watret understood Mr Barnatt had dismissed as being inappropriate.

5.111. On 12 July 2018, Mr Robertshaw met with Ms Watret and Mr Prescot. The latter was a relevant interviewee due to having previously expressed to Mr Barnatt a view about Mr Barnatt's performance being exemplary. Mr Prescot had contributed to both Ms Samuels' and Mr Tomlinson's assessments on specific tasks Mr Barnatt had been tasked with. He accepted he may well have used a phrase like that, not in the context of applying behaviours to a band matrix, but in the context of achieving specific objectives.

5.112. Mr Robertshaw also met with Ms Samuels on 17 July and Mr Tomlinson on 18 July. Ms Dixon met again with Mr Barnatt at a further interview primarily to explore specific issues raised. We find Mr Robertshaw assessed the points raised in the grievance and convened a further meeting at which to give his decision. That meeting took place on 13 August 2018 and the decision was confirmed in writing the following day. In short, the grievance was essentially rejected overall, and it was certainly viewed as a disappointing outcome by Mr Barnatt. A number of specific aspects of his grievance which were either upheld or at least described as being partially upheld, even though the thrust of the complaint overall was rejected. The decision was confirmed in writing in an outcome letter dated 22 August. The points partially upheld were: -

a. That the short duration of the review meeting gave some support to his concern that the pre-meeting fixed the ratings.

b. That it would have been good practice to engage with the employee in discussion on the issues.

c. That it was a fair challenge for Ms Samuels to question why a poorly performing candidate was interviewed a second time but, in view of the fairness to the candidate and minimal effect on the process it was unfair to state Mr Barnatt was wrong to do it. (a reference to a specific issue in a recruitment exercise)

d. That in respect of the criticism of him not immediately appointing Tony Wilcox, that the recruitment team could have provided better more timely guidance on his position in respect of redeployment but it was reasonable to expect a Band 1 employee to be aware of the requirements.

5.113. He also upheld the complaint that Ms Samuels had unfairly declared that the work Mr Barnatt had undertaken on secondment was worth less than other work and therefore the rating that work was lowered. His reasoning was that the performance appraisal process should rate achievements against objectives and the level of work should not feature in the assessment. Despite disagreement about the actual words used, it was common ground that the first half of the year was worked as a band 1 and the second half of the year reporting into a band 1 post. We find that distinction continues to have relevance to the issues before us in this claim.

5.114. Perhaps the most crucial of all the findings was in respect of PIP. Mr Robertshaw upheld the complaint that Ms Samuels unfairly stated that if Mr Barnatt returned to his Band 1 role, he would be immediately placed on PIP. Mr Barnatt had alleged this was in contravention of a communication received from HR that the process was terminated. This is the email of 5 April 2018 that we set out above. Mr Robertshaw accepted there was some “miscommunication” and that the intention was to make it clear that the PIP would not be in effect during the period whilst Mr Barnatt was on secondment. He interpreted the email as being “very specific in stating that the PIP is closed” and as such set aside whatever he viewed as the intention behind it and found it to be “reasonable for you to assume that means it will not be reopened in future”.

5.115. By way of concluding his grievance process, Mr Robertshaw commented on what he found clear to be a significant breakdown in relationship. He noted the previous recommendations to try and improve the relationship that have not been successful or have not been followed through in full that improving a difficult relationship was a two-way process and cannot be instigated and led by one party. He restated his overall conclusion that the grievance was not supported by the evidence but that the proposed mediation to improve the relationship remained a valid approach and recommended that step.

5.116. In respect of the finding on the unfairness of resuming the PIP, the controversy did not end here. We are cautious about how far we take the different conclusion we have come to on the facts of this email as we are tasked with different considerations to that which Mr Robertshaw was. Further, it is clear that the evidence before us is not identical to that before him. Whilst we are not able to see the email as conveying the decision that the PIP would not be reopened in the future, we need to record these findings in the context of how it may have led both parties to then conduct themselves further. It was a finding the claimant was entitled to rely on to some degree in the steps he then took and may have bolstered his confidence in arguing for certain future outcomes. Following the grievance, he and Ms Watret were in discussions about moving things forward and this issue became central. As a result, she emailed Mr Robertshaw on 7 September 2018 and explained how his decision on the existing disagreement about the email had in fact led to more disagreement rather than clarity (although that may be a view seen only from the employer's perspective). The practical issue, however, was that steps were being taken to engage in mediation with a view to Mr Barnatt returning to his substantive role. A new obstacle now existed in that Ms Samuels intended, as had always been her position, that the return would have to be with some resumption of a PIP albeit updating the themes of the previous objectives with new objectives as time had moved on. On the other hand, Mr Barnatt was relying, with some justification, on Mr Robertshaw's grievance outcome that there would be no PIP. Ms Watret therefore asked Mr Robertshaw to revisit his notes and clarify his decision.

5.117. Mr Robertshaw replied on 11 September with a response we think is best characterised as political in that it seems to us to say both were correct in their interpretation. We confess to struggling to understand, with any confidence that we have done so correctly, the distinction he sought to draw. In short, Mr Robertshaw's position was that he accepted that the PIP had not been discharged and had only been "paused" at the time of Mr Barnatt's grievance and later secondment. From Mr Barnatt's perspective, however, he stated how Ms Watret's email was read and understood in the way that Mr Barnatt had read it and, as such, his grievance decision was to uphold Mr Barnatt's *subjective* interpretation of its meaning which, because that interpretation was reasonable, meant that Ms Samuels' statement of her intention to resume the PIP was unfair. That conclusion, he said, did not mean that the PIP could not in fact be resumed or that it would be wrong to do so. We remain unclear about why there was any unfairness on Ms Samuels' part in stating what she was entitled to state, particularly as she had no hand in the wording of Ms Watret's email at the root of this disagreement. We suspect the conflict is reconciled when one appreciates what Mr Robertshaw "upheld" in favour of the claimant was not sufficient for the thrust of his grievance

overall to succeed and amounts to little more than him saying, in effect, “I understand why you feel it is unfair”.

5.118. Although we do not agree with Mr Barnatt’s interpretation of that email, we do find that having had that interpretation validated by Mr Robertshaw’s grievance findings, his disappointment in Mr Robertshaw’s change of position was itself quite understandable. In short, he accused Mr Robertshaw of revising his grievance outcome on the employer’s request which Mr Robertshaw denied. Mr Barnatt then set out his and his trade union’s position that they do not accept the “company’s revised interpretation of the grievance outcome”. Unfortunately, this episode simply gave a sense of validity to Mr Barnatt in his argument that he could return to his substantive role and do so without any form of PIP and we find that is the settled position he put between then and the end of his employment. We have already referred to how, in fact, his position seemed somewhat different in evidence before us to that presented to his employer at the time.

5.119. The parties’ focus then returned to various options for long term resolution including the option of mediation, resurrected by Mr Robertshaw’s recommendations. On 10 August 2018, Ms Watret and Mr Barnatt met to discuss options as they had done a number of times during the secondment. We accept options were limited and the secondment could not last indefinitely. Possible permanent solutions were explored and ruled out by one or both parties. For example, early retirement could not be financed by the business. Mr Barnatt was applying for other band 1 roles in the business but without success and without seeking any support from HR. We find these posts were rare and, in all likelihood, he would face other stiff competition such that Mr Barnatt may have been unlikely to have been successful in any competitive process.

5.120. The mediation was set up. We find there is some force in Ms Watret’s assessment that mediation was only acceptable to Mr Barnatt following the other options he put forward being exhausted. However, we do not find that unusual or the fact it was a third or fourth preferred option to detract from the potential benefits of the process if the relationship was to continue into the future.

5.121. Before it happened, on 15 August 2018, Mr Barnatt was offered a permanent alternative role of “Principal Engineer – Assurance” this time working within the STE division to which he had been seconded. The role was a band 2 role, not a band 1 director role. We find that it was offered with a view of returning Mr Barnatt to the areas of technical work in which he had previously been successful. That necessarily meant a lower pay scale and a loss of status although much of this new role was, in fact, what had been carved out for him under the secondment role. As to the loss of status, that was a matter of grading and job title but perhaps something to be weighed against the potential loss of professional status arising from the situation he was then in if a solution could not be found. As to the pay itself, we find the offer included protection of his salary associated with the current band 1c remuneration to last for a period of 2 years.

5.122. Mr Barnatt made various counter proposals to this role, in particular to retain certain roles representing Safety, Technical and Engineering at the Network Rail Assurance Panel.

We find that although these changes were not needed for the proposed role, the respondent agreed as part of facilitating an acceptable permanent solution and which went some way to meeting Mr Barnatt's desire to retain status and reputation.

5.123. We find an important part of this later chronology occurs in correspondence from Mr Barnatt when seeking confirmation of what would happen should he accept or refuse this alternative role. There were only three options available and these were made clear. First, return to the substantive role reporting to Ms Samuels and resume and conclude the PIP. Second, take a further period of 3 months to find alternative employment in the busines, albeit with priority over other candidates on the redeployment list. Third, accept this alternative role as offered.

5.124. On 28 August 2018, Mr Barnatt gave his response. The terms of his response do not accord with any of the three options offered. His response was in reality a counter-offer to return to the substantive role, reporting to Ms Samuels but *without* any PIP in place. It was this option that once again resurrected the dispute concerning Mr Robertshaw's grievance outcome and Ms Watret sought further clarification from him which, as we have already said, was simply that the process had only been paused. As a result, Ms Watret confirmed that the PIP process had to be included in this substantive role but she extended the deadline for considering the alternative job offer. At the end of that period, on 28 September 2018, Mr Barnatt declined the alternative offer on the ground it did not retain the necessary status and made clear that he wanted a suitable Band 1 role or a return to his own band 1 role without the PIP. At the same time, he sought figures in respect of the retirement option which had already been dismissed as feasible. Mr Barnatt did, however, seek to pursue the Mediation.

5.125. We find mediation was then arranged and took place on 23 and 24 October 2018. The mediation itself was, we find, relatively successful considering the positions that Mr Barnatt and Ms Samuels were in at the start of it. We find no substantial movement was achieved on either side in terms of the scope for the potential practical routes forward for a long-term solution. We do find, however, that on a personal level a great deal of progress was achieved by both parties in understanding each other. That was the first step to any form of working relationship in the future.

5.126. Around this time, we find there were discussions taking place in the background at the highest level of the IP division which would lead ultimately to a decision to terminate the claimant's employment. By November 2018, the ongoing issue of Mr Barnatt became an issue for the managing director. By this time, the temporary secondment had been in place for over year. The matter had been investigated at length by various grievance hearings. Mr Barnatt had declined the option of taking on a permanent role forged out of the secondment duties especially for him to retain his skills in the business. There did not appear to be a basis for him moving forward with the substantive role reporting to Ms Samuels. We accept this was a serious state of affairs for the business as much as Mr Barnatt and that something had to happen to break the deadlock. In this case, that was a decision taken, ostensibly, by Ms McIntyre. She decided that all options had now been exhausted and that his employment would be terminated.

5.127. We find in reaching that decision Ms McIntyre was not aware of Mr Barnatt's stop work notice.

5.128. Ms McIntyre began setting out her reasons for dismissal although, in the end, we find the text used to convey the decision was mainly the work of Ms Watret. We do not understand why, having reached a summary decision to terminate based on the previous years of effort being exhausted, the decision was then not the conveyed to Mr Barnatt for another 3 weeks or so. Nor has it been explained why it was not conveyed by Ms McIntyre herself. Time passed after she had apparently made her decision without it being conveyed to Mr Barnatt. She then took an extended pre-Christmas holiday. The task was therefore delegated to another member of the senior management, Mr Eoin O'Neill. He was then the acting Commercial and Development director.

5.129. On 6 December 2018 we find Ms Samuels had written an email to HR asking for formal review of a way forward at the highest level following the mediation which had not found a way forward to address the performance issues she had with Mr Barnatt in his substantive role. This might seem odd as Ms Samuels was part of the senior management team and ordinarily would have been aware of decisions made by the senior management team. We find, however, that she was not aware of Mr Paonessa's involvement and Ms McIntyre's review which had happened around 2 weeks earlier. However, the timing of her email raised other concerns in the claimant's case to the effect that she caused or influenced the decision to dismiss. We do not accept that. We find she sent her email to Ms McIntyre and Ms Watret at a time when, it seems, Ms McIntyre was on her extended leave. This is actually the day after the invitation was sent to Mr Barnatt to attend the meeting. On balance, it seems Ms Samuels may have been deliberately excluded from these decisions.

5.130. We do find that there clearly was a continuing problem for the employer to address. Over and above the fact the issue had been ongoing for 18 months or more, the temporary secondment was continuing to throw up other tensions in managing practical work responsibilities within IP. It is reasonably clear to us that the time had arrived when a hard decision may have to be made.

5.131. The invite to attend the meeting was sent to Mr Barnatt on 5 December but dated 6 December. It is headed simply "invite to meeting" and says: -

> ***It has now been six weeks since your mediation sessions on the 24 October and I would like to invite you to a reconvened meeting on Thursday 13 December at 3pm in Eversholt Street, London to discuss next steps. I have spent the time since the sessions understanding the outputs of the mediation, reviewing your requests and considering the next steps to resolution, some of which I have provided initial feedback on. During this meeting I would like to provide clarity on next steps to conclude the matter.***
>
> ***Please consider this a formal meeting and, as such, you have the right to be accompanied by your Trade Union representative or a fellow colleague. Given that Dave Barnes has represented you to date I expect you would like him to be present and would ask that you forward him a copy of the invitation and check his availability.***
>
> ***If you are unable to attend the meeting please advise me of an alternative date as soon as you are able.***

5.132. We were invited by the respondent to view this letter with forensic hindsight and to note references to the “formality” of the meeting, the implications of having a “right to be accompanied” as well as the intention to provide clarity on the next steps to “conclude” the matter. We do not find those references give the letter the clarity or formality suggested by the respondent before us for it to be understood as an invite to a disciplinary procedure. We find both Mr Barnatt and his trade union representative, Mr Barnes, simply understood this was part of the ongoing internal resolution. Mr Barnes believed there were steps to be taken to improve the relations with Ms Samuels. We find neither had any indication that this meeting would be to convey the decision that had been reached some week’s earlier to terminate Mr Barnatt’s employment.

5.133. Mr Barnatt and Mr Barnes attended as arranged on 13 December 2019. We find there was no discussion about the issues. Mr O’Neil chaired the meeting as planned. He described his role as being there “on behalf of the senior leaders of IP”. We find he simply read out the statement of reasons drafted by Ms Watret. That is best described as a script. It included an interlude to explore any responses from Mr Barnatt before continuing with Mr O’Neil purporting to have then reached his own decision. The script stated: -

> ***Following this discussion, I regretfully take the decision to dismiss you on the grounds of 'some other substantial reason' effective from today.***

5.134. The opening words of this extract seem to us to be more of a stage direction. We have no doubt that Mr O’Neil decided nothing in this matter other than to agree to read out what he was given. The decision had been made some weeks earlier.

5.135. Whilst it must have been the case that Mr Barnatt and Mr Barnes must have previously asked themselves how long this working arrangement could continue for, this announcement was nevertheless a shock to them both. Ms Watret and Mr Barnes then spent some time exchanging their respective positions on the recent history. The decision was confirmed in writing the next day. It said: -

> ***As you are aware the dispute over your performance in your substantive role and subsequent breakdown in relationship with your line manager has been ongoing since May 2017.***
>
> ***During that time the business has explored all potential avenues to resolve the dispute including our internal grievance and appeal processes and the offer and refusal of an alternative role with protected terms and conditions for a period of two years. Lack of progress with any of these avenues culminated in independent mediation on 24 October this year with the external mediation company TCM. As discussed in our meeting yesterday, failure to reach successful mediation outcomes and your refusal to take up the offer of an alternative role with protected terms and conditions has meant that we therefore have no other option but to terminate your employment with the Company for some other substantial reason.***
>
> ***Your dismissal will take effect from yesterday’s meeting date of 13 December 2018. You will be paid in lieu of your notice period of 6 months. This will be paid to you in the January payroll and your P45 form will be sent to you shortly thereafter. All terms and benefits associated with your employment will cease as of 13 December 2018.***
>
> ***You have the right to request a review of the decision to dismiss you.***

5.136. The respondent has sought to stress that fact that there was no right of appeal in the circumstances of this type of dismissal. IT has, however, offered a high-level review of the decision if Mr Barnatt so wanted.

5.137. We find this to be similar to an appeal in the sense that it would only happen on Mr Barnatt asking for it and setting out his own request. It was substantially different, however, in that it was a management led process with terms of reference which we find were, in part, to "confirm" the decision reached.

5.138. Mr Barnatt did seek to "appeal" in the terms he was permitted and did so in a letter dated 9 January 2019. In that he set out in summary, 18 points of dispute concerning the basis of the decision and it being reached when it was, in the manner that it was.

5.139. Also in early January 2019, the respondent sought to agree a form of words to explain Mr Barnatt's departure. It proposed: -

> ***Having completed his secondment with STE, Neil Barnatt has now left Network Rail to pursue alternative opportunities. The IP Assurance Director role will continue to be covered by Tony Wilcock whilst a permanent replacement is recruited. Helen Samuels and Brian Tomlinson would like to thank Neil for his contributions to both IP and more recently STE, and wish him every success in his next role.***

5.140. Through Mr Barnes, Mr Barnatt declined to agree, noting how such a form of words would predetermine the review process he wished to pursue. We find this further reinforces the purpose of the review process was not to genuinely hear Mr Barnatt's challenges to the decision to dismiss, but to justify the decision.

5.141. On 15 January 2019, the respondent appointed Neil Thompson to conduct "an independent review on the dismissal". He was then its Regional Director responsible for capital projects in the Western, Wales and Crossrail areas. We find the remit given to him was limited to the following: -

a. To determine the reasoning for dismissal.

b. To confirm that the decision to dismiss was reasonable.

c. To undertake the review in a timely manner ensuring that both Neil Barnatt and his line manager Helen Samuels are given an opportunity to present their view.

5.142. He was provided with Mr Barnatt's letter of "appeal" and the minutes of the dismissal meeting on 13 December 2018. On 8 February 2019, Mr Thompson met with Mr Barnatt and Mr Barnes. The meeting was introduced stressing the limitations on its function. Mr Thompson set out something close to the ground rules of the approach to the process. These were that there was no specific process and no specific requirement to meet; that this was a review and not an appeal; that the content of mediation was not to be discussed; he was seeking to ascertain whether breakdown in relationship with Ms Samuels leading to termination of employment for some other substantial reason; that the focus of the review was on the reason for termination and not poor performance; and that the meeting would not be minuted.

5.143. On 13 February 2019, Mr Thompson held a telephone meeting with Ms Samuels and obtained her views on the situation.

5.144. In a letter dated 5 March 2019, Mr Thompson provided the “outcome of the independent review”. He concluded: -

> ***I have reviewed your dismissal for 'some other substantial reason' and my decision is to uphold that decision on the basis that the decision is fair in that a personality clash has broken the employment relationship between yourself and your Line Manager. It is evident that reasonable steps have been taken to resolve the issue including performance reviews, sourcing alternative employment opportunities, and mediation. However, all have failed to address the significant relationship breakdown to such an extent that a direct future working relationship is deemed irreconcilable.***

5.145. The letter enclosed the investigation report. It does not explicitly address the areas Mr Barnatt raised in his ground of appeal. It splits Mr Thompson’s analysis into various headings under which he reaches his own independent conclusion on the matter. The significant conclusions were as follows. In respect of the relationship breakdown, he concluded: -

> ***It is clear that whilst there are personality differences between Helen and Neil, this should not be sufficient to cause a relationship breakdown. In my opinion personality differences in Network Rail should be embraced not challenged. The issue is that Neil Barnatt and Helen Samuels have different perspectives probably and primarily in regard to the 'how' the role of Engineering Assurance Director is undertaken as opposed to the 'what'. Both agree that their differences are not about technical competence rather communication, inter-personal relationships, and timely closure or not of actions. There have been protracted performance issues that have been subject to numerous reviews and appeals that have all identified in some way an underlying issue regarding relationships.***
>
> ***The relationship breakdown manifested itself in a total communication breakdown between two senior personnel in Network Rail in safety critical positions and as such I deem this a critical business issue.***
>
> ***There were other relationship strains including the eight IP Heads of Engineering (four Regions, Track, Thameslink and Signalling) which had commenced prior to Helen Samuels joining Network Rail and manifested itself during the Period Heads of Engineering meetings.***

5.146. He then dealt with “performance”. Recognising this was outside the scope of his review he concluded: -

> ***It is evident to me that the Performance Improvement Plan put in place for 2016/17 had not been concluded and has been continually frustrated by the relationship breakdown between Neil Barnatt and Network Rail. The Investigation Manager however in his Outcome correspondence advised to the contrary and upheld Neil's perspective. Regardless performance is not the reason for the dismissal, rather the protracted correspondence and differences clearly illustrates the relationship breakdown. The significance of the PIP in this review is the delay it caused to commencing the mediation process.***

5.147. He then dealt with mediation, finding no breaches by anyone involved. He then considered alternative employment and concluded: -

> ***I have therefore concluded that there is no evidence of a plan to prevent Neil Barnatt from securing an alternative Band 1 position and if anything in my opinion Helen Samuels was enthused to support a move. In the absence of alternative Band 1 positions there was a willingness by Network Rail to identify Band 2 opportunities, which Neil Barnatt declined.***

5.148. Finally, he turned to the crux of his remit which was the reason for dismissal and the dismissal process. He concluded a breakdown in relationships was the reason for dismissal. He was critical of the process, concluding that: -

> ***It is my view that the invite notice letter should have been more transparent in regard to the 13th December 2018 meeting and arguably there could have been an advance consultation process. However, I do not believe this would have affected the ultimate dismissal decision.***

5.149. Overall, he decided to uphold the decision to dismiss deciding that: -

> ***It is clear to me that the decision to dismiss is 'fair' given that other processes available have been exhausted. These include, sourcing alternative employment opportunities within Network Rail, and a mediation process. Options in regard to changing reporting lines and changing location factors are not feasible in this case.***
>
> ***However, it is my considered view that the dismissal process could have been conducted more transparently in that a more reasonable notice could have been provided in regard to the 13th December 2018 meeting intent (reference 'Invite to Meeting' dated 6th December 2018). Whilst I find it regrettable that more notice was not given, [and whilst the intent of the letter of the 13th December 2018 could have been expressed more clearly], I do not find this issue resulted in the process adopted being fundamentally unfair or the outcome unreasonable.***

6. ISSUE 1 – Protected Disclosure

Law

6.1. We start with the relevant statutory provisions which are contained within Part IVA of the Employment Rights Act 1996. The right is set out at s.47B, which provides that:

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

6.2. S.43A defines "protected disclosure" as:

> ***"[…] a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."***

6.3. S.43B of the Employment Rights Act 1996 provides, so far as is material:

> ***"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—***
>
> ***(a)that a criminal offence has been committed, is being committed or is likely to be committed,***
>
> ***(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***
>
> ***(c) …***
>
> ***(d)that the health or safety of any individual has been, is being or is likely to be endangered,***
>
> ***[…]***

6.4. S.43C provides:

> ***"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—***

(a) to his employer; …"

6.5. And s.43L(3), setting out "Other interpretive provisions" provides:

"(3) Any reference in this Part 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."

6.6. Pursuant to s.43B, the disclosure must be "of information". We recognise that the distinction drawn in **Cavendish Munro Professional Risk Management Limited v Geduld [2010] ICR 325**, between a "disclosure of information" and "an allegation" is to be considered carefully and does not add to the test. It may be that an allegation conveys information and vice versa. (**Kilraine v London Borough of Wandsworth [2018] IRLR 846**)

6.7. We accept Mr Heard's submission on the approach to reasonableness of belief in the context of this case being as was stated in **Babula v Waltham Forest College [2007] IRLR 346** that: -

Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute"

6.8. Similarly, there is no dispute that the belief held by the employee has to be objectively reasonable in terms both of the failure it conveys and that it is in the public interest. **(Chesterton Global Ltd v Nurmohamed [2018] ICR 731)**

Discussion and conclusions

6.9. We are satisfied that the claimant did make a qualifying protected disclosure in his email of 10 June 2016.

6.10. The first step we have taken is to ask whether the disclosure conveyed information. In that regard we accept the respondent's contention that it is thin and on first reading appears to be little more than an instruction to stop work. In her submissions, Ms Thomas argues that

"The only element which could be said to be a disclosure of 'information' is the first part 'Having read the letter from NCB that you are not legally compliant'.

6.11. We agree that this too is thin on information. However, we have concluded that it was not so thin as to not amount to conveying information. We also note that the essence of what was conveyed was an opinion. However, it is not the opinion of the discloser, Mr Barnatt, but what he reasonably believed to be the opinion of the body explicitly contracted as the assessment body to carry out the safety assessments of the project. There is a contractual framework with the wider organisation for this to take place in the interest of safety and legal compliance. Whether Mr Barnatt had a role to play in this project or not, it seems to us that the fact this letter comes into his possession and, together with the phone call he had with someone of NCB that same morning, appears to convey what he summarises in the email and is enough to convey factual information that the body contracted to assess safety say it is not safe to go ahead.

6.12. The next question is whether in his reasonable belief it tended to show one or more of the relevant failures. Three are relied on. Offence, legal obligation and safety. Ms Thomas argues that it does not in itself contain sufficient factual content and specificity to show any of the categories in s43B. We have concluded that there is a standard of common understanding to be applied to both the author and the recipients of the meaning of this sentence that, by its nature, conveys the potential relevant failure. We are satisfied all would understand the implications of NCB not signing off a projected would mean that if it went ahead, the relevant failures would be engaged. In the context of railway infrastructure, we are satisfied that the reasonable belief in the endangerment of health and safety as a relevant failure would itself be very easy to establish.

6.13. That is not to say Mr Barnatt's reasonable belief was not an appropriate argument for the respondent to advance. There are aspects of this case which question Mr Barnatt's engagement in the process and why it was that the letter, which he had had sight of for some time did not prompt his action until some other party contacted him on the Friday. The respondent has rightly attacked the level of understanding he had, or should have had, in the systems applied to the management of such projects and whether the state of affairs from some previous date remained the case as at Friday 10 June. It points to how he had not spoken to any of the individuals directly involved and had not sought any response or further communication since the letter. He had not reviewed the minutes of the project board since and could not explain why he had not attempted to contact the proposer, Mr Jeyes. All those issues properly raise the question of whether the belief was reasonable. However, on balance, we have concluded those factors do not prevent the belief being reasonably held. The key to our decision is the evidence of the call that morning from NCB. That person was, it seems, potentially as badly informed as the claimant on the more recent developments with the project group, the various phases and Mr Sterry's later engagement. However, even if that is the case, we do not accept that prevents Mr Barnatt's own belief being reasonably held.

6.14. Moreover, the fact that Mr Barnatt's belief was essentially wrong in fact, does not undermine the belief being genuine at the time of the disclosure.

6.15. Finally, there can be no real challenge to the reasonable belief that the disclosure was reasonably believed to be in the public interest. There is no ulterior personal basis put forward to explain why Mr Barnatt did what he did. We have no doubt the core of what the claimant was doing was done under a concern to prevent works taking place which had the potential to endanger the health and safety of workers or passengers or others.

6.16. For those reasons we are satisfied that the email constituted a protected disclosure.

7. Issue 2 - Detriments

Law

7.1. Turning to the relevant law, we start with the enforcement of a worker's right. Section 48(1) of the 1996 Act provides the Cause of action. Section 48(2) provides that:

> ***"(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. …"***

7.2. By reference to **Ibekwe v Sussex Partnership HS Foundation Trust UKEAT /0072/14** and **London Borough of Harrow v Knight [2003] IRLR 140**, we interpret the effect of s.48(2) to be evidential, rather than creating a strict legal burden such that if the employer fails to show the ground, the claim does not automatically succeed. We still have to consider the ground for the action but we would then be entitled to draw such inferences as are proper arising from the employer's failure to show the ground.

7.3. There are two important aspects of analysing that causal relationship arising. One is the threshold necessary to establish it, the other is whether other reasons are at play which might arise in close proximity to the circumstances of any disclosure.

7.4. As to the threshold, the Court of Appeal explained how the threshold was similar to discrimination claims in **Fecitt v NHS Manchester [2012] ICR 372**, where it held at paragraph 45 that:

> ***"Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than trivial influence) the employer's treatment of the whistleblower."***

7.5. As to competing reasons, it remains for the tribunal to determine the factual reason that causes the employer to act which may be something other than a disclosure even if the two factually arise in close proximity. In **Bolton School v Evans [2007] ICR 641**, the Court of Appeal accepted the distinction in any grounds for an employer taking action between a disclosure and the conduct involved in making the disclosure. In that case, the disclosure concerning the insecurity of the computer system was separate from the employee's act of hacking into the computer system to demonstrate it. The conduct, although related to the disclosure, was separable from it. We have kept in mind the note of caution sounded by the Court of Appeal in *Bolton* that tribunals: -

> ***"should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself"***

7.6. Similarly, in **Martin v Devonshires Solicitors [2011] ICR 352**, the EAT accepted that the reason for dismissal, though factually arising in proximity to the disclosures, was separate to them. The EAT repeated the observation that: -

> ***"Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."***

7.7. Other cases have supported this distinction. In so doing, the EAT in **Panayiotou v Kernaghan and another UKEAT/0436/13** analysed further the apparent restriction on this approach set out in **Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773** and concluded that there was no requirement for the distinction to be exceptional, only that there was a true distinction in the grounds.

Discussion and conclusion

7.8. The starting point of these claims, and indeed that of the reason for dismissal, is our analysis of where the disclosure fits in the overall picture before the employer at the relevant times.

7.9. First, we regard the circumstances that give rise to the events that ultimately led to the protected disclosure were but one small point of many and varied points on the landscape before the employer that caused it to act as it did.

7.10. Secondly, we regard the evidence of the safety culture to be such that the expressions we have seen from Jon Shaw that making a safety related concern was not the problem are genuine and we separate the disclosure *itself* from the concerns about how the claimant performed his director role.

7.11. Thirdly, Mr Shaw's concerns arising at the time were about the claimant in his new role and were drawn from a number of examples, only one of which has any factual nexus with the protected disclosure.

7.12. Fourthly, all the allegations of detriments are levelled at Helen Samuels. She was not in post at the time of the protected act. The high point of the claimant's case is that there is a line of communication from Jon Shaw to her in which the surrounding circumstances of the protected act are communicated to her as examples of his performance in role. However, by the time this arises, we have found Ms Samuels was herself already growing in concern about whether Mr Barnatt's skill set matched that required of the director role.

7.13. Fifthly, the extent of those concerns go a long way beyond simply the manner with which he engaged with colleagues to advance the objectives of his remit. It included rather more fundamental matters such as securing resources and managing workloads.

7.14. Sixthly, by the time the events reached a breakdown in working relationships, the links to any views of information given to Helen Samuels at the time of her appointment had become distant and irrelevant in the face of a wide range of new concerns wholly unconnected with that earlier single event.

7.15. We have concluded that the protected disclosure as we have found it was not a reason for any of the actions of Ms Samuels and, if we are wrong in reaching that conclusion, any role it played was so minor and trivial as to fall outside the necessary causation test established in **Fecitt**.

7.16. On the discrete allegations of detriment alleged, we conclude as follows.

Helen Samuels' conduct during the February 2017 performance review (PoC para 7 and 33.1) including giving him a 'performance improvement required' rating.

7.17. We are satisfied that this outcome was a genuine assessment made by Helen Samuels of the impression she had gained of Mr Barnatt's performance in the director role.

7.18. It is true that after only two months in post, there had been little time for her to assess him and there will be some degree to which her assessment has been influenced by the

assessment of the other half year manager to whom Mr Barnatt reported, Mr Spence. However, we do not accept that it is not possible for a manager to look at progress against targets and reach a decision on achievement and performance in the role.

7.19. This allegation has a second limb. That is Ms Samuels "conduct" during the meeting. We entirely accept her management style may well have been something Mr Barnatt had not previously encountered and may not have relished. We characterised her as a driven and efficient senior manager focused on the job. We have no doubt that that may be a management style that can cause friction, particularly where she is forced to challenge the performance of her staff. However, there is nothing about her conduct which we regard as amounting to a detriment, particularly at that very senior level and still less one that was on the ground of Mr Barnatt having made a protected qualifying disclosure.

Helen Samuels telling him, in March 2017, that she considered him to have performance issues and on 23 March giving him options of resignation, demotion or a disciplinary process (PoC para 8 and 33.2).

7.20. The reason why these three options were explored with Mr Barnatt was, we concluded, because Ms Samuels had concluded that SPIR was the appropriate performance review assessment for him. That, in turn, meant that there would be a PIP plan put in place as an automatic consequence under the employer's policy. We find this discussion was not one to be characterised as an ultimatum, but simply setting out other options faced with what would inevitably be a very difficult situation to work through. The fact remains this case involves very senior people in terms of status and salary. Mr Barnatt had a technical reputation which was potentially being tarnished by the view of his poor performance in the director role. Such a discussion in those circumstances is not to be unexpected or out of place. The outcome of the discussion itself is not itself causative of any future steps taken under the PIP as that particular ball was already rolling and Mr Barnatt's dismissal of that topic of discussion did not in itself lead to any further consequence. We are just about satisfied that it is capable of amounting to a detriment as an employee in such a situation may seek to demonstrate through the PIP that they do have what it takes to succeed in the role.

7.21. We have reflected closely on the timing of this. It is relatively soon into their working relationship. We have questioned whether Ms Samuels has been a puppet for an existing plan in the organisation to get rid of Mr Barnatt. We have rejected that. We did not find any evidence of such a plan, although we do note there was some second thoughts and doubts in the mind of Jon Shaw about the suitability of the appointment he had made. On balance, we conclude that is more a reflection of the claimant's underlying unsuitability. In addition, we found Ms Samuels to be of a particularly strong professional mind such that we doubt very much she would bend to the view of others about members of her own staff unless she herself was of that view. One aspect of the discussion engages with the notion of returning to a role for which Mr Barnatt may have been more suited and we have concluded, as such, it undermines any plan to remove Mr Barnatt from the organisation. If anything, it focuses us back on the central conclusion we have reached in this case of the unsuitability of the claimant's skill set with the role he was then occupying.

7.22. Overall, there is nothing in this exchange which we can say was in any way because of the protected disclosure.

Helen Samuels instigating on 4 May 2017 and continuing the Performance Improvement Plan process (PoC para 9 and 33.3).

7.23. This and many of the remaining allegations flow from the earlier conclusions. We are satisfied the annual performance review assessment was one that was open to Ms Samuels on the evidence she had of performance. The PIP flowed from the SPIR rating as an automatic consequence under the policy and its instigation, and continuation, was not on the ground of the protected disclosure.

Helen Samuels adopting a 'combative approach' in his performance reviews of 18 May, 21 June and 19 July 2017. (PoC para 10 and 33.4).

7.24. We dismiss this allegation as a matter of fact. We have already referred to the management style of Ms Samuels in general terms. She had her view of his performance and, from her perspective, there were few occasions on which she saw evidence demonstrating progress.

7.25. To the extent that any aspect of Ms Samuels approach could be described as combative, we reject any connection between that and Mr Barnatt's protected disclosure.

Failing to engage in good faith in the mediation on 23-24 October 2018 (para 33.4)

7.26. We dismiss this allegation as a matter of fact. Our findings suggest the tone of the mediation was a success on a personal basis. Both participants expressed views in their evidence about their experience of this. Whilst the overall outcomes did not change, they each left finding they were able to engage with each other on a more positive, inter-personal basis. Good faith is not synonymous with moving wholesale to the other party's position although there does have to be movement for any mediation to achieve a successful outcome. We note Mr Barnatt's position on the substantive issues was such that he came out of the mediation in the same position as he had gone into it. Indeed, his response to earlier prospects of mediation was expressly in terms that the other party would have to substantially change their approach for it to be a success. We therefore struggle to see how this charge can be levelled at Ms Samuels and yet not apply equally to Mr Barnatt.

7.27. As with the previous allegation, in any event the alleged conduct must be material caused by the protected disclosure. There is nothing about how Ms Samuels conducted herself in this mediation that we can conclude was materially on the ground of the protected disclosure.

Giving the poor rating and making critical comments on 25 April 2018 (para 19).

7.28. Ms Samuels reached her conclusion on the part year input to the annual review. It is no surprise that this should be a poor rating. Ms Samuels started the year with an employee on a PIP and during the course of the relevant period the working relationship deteriorated

further in a number of respects. We are satisfied that the annual review rating is capable of amounting to a detriment.

7.29. In this case, there seems to be justification as to why that was but we prefer to analyse in on the basis that the ground on which the claimant suffered that detriment was the genuine view of performance held by his manager and based on reasonable grounds. In other words, it was not because of his protected disclosure.

8. Issue 3 – unfair dismissal

The law

8.1. The law of unfair dismissal is well settled. Section 98 of the 1996 Act states, so far as relevant:

> ***"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case."***

8.2. The legal burden of proving a fair reason for dismissal in fact and law rests with the employer. The true reason for dismissal is a question of fact for us to determine on the evidence. The "reason" referred to in s.98(1) is the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. (**Abernethy v Mott Hay and Anderson [1974] ICR 323)**. To discharge the legal burden, that factual reason must itself either fall into one of the specific categories of potentially fair legal reasons defined in s.98(1)(b) of the 1996 Act or be of another kind sufficient to justify dismissal. In this case, the respondent relies on position the parties had arrived at following the dispute over Mr Barnatt's performance and the subsequent breakdown in the relationship with his line manager, particularly following attempts at mediation and finding alternative solutions. The respondent says that state of affairs amounts to a substantial reason of a kind to justify dismissal.

8.3. On the question of procedure, we have been addressed on the application of the ACAS Code No1 and whether it applies to dismissals for other substantial reasons. Whilst the application of a code may be relevant to both liability and remedy, its application to liability under the statute does not, in this case, add anything to our analysis as we take the view that whether sections 207 and 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies, the essence of the code applies in any event in this case in the general requirements expected of the reasonable employer to adopt a fair procedure. We engage with those under s.98(4) of the 1996 Act and do not, at this liability stage, need to express a view as to whether the code applies further.

8.4. In this case, not only does the respondent have to prove its reason, within that, we have to address Mr Barnatt's evidential contention that the real reason (or principal reason) was that he had made the protected qualifying disclosure. Section 103A provides: -

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

8.5. The claimant carries only an evidential burden to advance his contention. The legal burden remains on the employer. That means, should the respondent's contention fail, it does not automatically mean the alternative contention succeeds. Whilst that may be the case in many claims, the question is always one of fact for us to determine and there may be a third reason found which neither party advances. (**Kuzel v Roche Products Ltd [2008] EWCA Civ 380**)

8.6. We accept Mr Heard's submission that for a relationship breakdown to amount to a substantial reason the situation must be irredeemable. In practice, that means exhausting every step short of dismissal to try to improve the relationship (**Turner v Vestric Ltd [1980] ICR 528**). Where we disagree is that this is the only issue engaged in the reasoning in this case. Whilst a significant central issue, this is not simply a case of personality or relationship breakdown. It flows form the employer's genuine underlying issue with the claimant's performance in the role and the dispute goes beyond personalities and includes matters of managements legitimate right to engage with those matters. The totality of the context must be considered. We do agree with both counsel that that reason must satisfy the long-standing requirement that for such a reason to amount to a substantial reason it must not be whimsical or capricious (**Harper v National Coal Board [1980] IRLR 260**).

8.7. If the employer discharges this burden, we then consider the test within s.98(4) of the 1996 Act on the evidence before us, the burden then being neutral. In applying that test we have had regard to the approach in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and also **Post Office v Foley [2000] IRLR 827**. A reasonable procedure is central to the test of fairness and the range of reasonable responses applies as much to the steps taken to reach a decision as the decision itself (**Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588**). The final consideration is whether, everything else being within the range of reasonable responses open to a reasonable employer, the sanction imposed by the employer was itself one that was reasonable. In other words, was the sanction of dismissal a response that was reasonably open to the hypothetical reasonable employer or not.

Discussion and Conclusions

8.8. We can start with our conclusion on the relevance of the protected disclosure to the decision to dismiss. We are entirely satisfied that the claimant's disclosure was not the reason for his dismissal, still less the principal reason. We were satisfied that Ms McIntyre the decision maker did not have any knowledge of the disclosure for it to form any part of her reasoning. We are satisfied that her focus was solely on her assessment of where the situation had reached by the end of 2018. That was influenced by the steps she understood had been taken to find a solution, the impracticability of continuing with an open-ended secondment, the underlying issue of the claimant's performance improvement plan, the options that had been made available and rejected and the failure of the mediation, the relationship with Ms Samuels. We accept all of that resulted in the state of the impasse she felt the organisation had reached.

8.9. We have not accepted Mr Barnatt's contention that all his difficulties in his new post can be traced back to that disclosure. At most, the events surrounding the manner in which Mr Barnatt engaged with his colleagues in the circumstances leading to the protected disclosure form just one small reference point on the landscape before the employer, too minor in our view to be elevated to a material consideration. We have not been satisfied that Ms McIntyre had knowledge even of that but even if we were wrong to conclude that, we nonetheless remain satisfied that this falls a long way short of being the principal reason for the decision to dismiss which remains those reasons we rely on in our primary conclusion.

8.10. In rejecting the protected disclosure as the reason, we have considered Mr Heard's submission on the principle established in **Jhuti v Royal Mail Group [2019] UKSC 55**. In summary, that is that the disclosure could be the true reason where it has been hidden from the decision maker by an individual holding the proscribed and true reason to act, and who then controls the actions of the other decision maker by presenting permissible, but false, reasons for the action that follows. That has been acknowledged to be an extreme case on its facts. In this case, we are not satisfied that the facts get close to that state of affairs. There is no basis for us concluding that Jon Shaw or anyone involved at the time of the protected disclosure or with knowledge of it has manipulated the situation to bring about the dismissal. Even if such a state of affairs could have been inferred from any of the facts, which we do not infer, it would raise the question as to how such a person could have controlled the outcome when alternatives were being offered which included ways for the claimant to remain employed. We have dismissed as a fact the suggestion that Ms Samuels prompted the dismissal decision in her email of 6 December.

8.11. Moreover, we are satisfied that the underlying reasons that caused the employer to arrive at the ultimate decision, were based on a genuine assessment of the facts. There was a reasonable basis for concern about the claimant's performance in the director role, there was a reasonable basis for the SPIR rating which engaged the PIP. There was the breakdown in the relations with Ms Samuels and the parties were at the point where they appeared to have reached a stalemate after a number of potential alternatives options had been explored and rejected. Those are the factual reasons that underpin Ms McIntyre's decision to terminate the claimant's employment. Not only have we found no basis to

conclude that that decision was in any way improperly manipulated by others with an ulterior reason related to the disclosure, but we are satisfied that the reasons she considered were factually accurate and were the real reason she took the decision she did. That reasoning is, in our judgment, neither whimsical nor capricious and amounted to a substantial reason potentially amounting to a fair reason to dismiss under s.98(1).

8.12. We then come to the question of how that reason plays out against the test of fairness under s.98(4) of the Employment Rights Act 1996. A number of practical elements of that test were argued by the parties in the context of this case to show the decision fell within or outside the range of reasonable responses.

8.13. The absence of any apparent procedure is a substantial signpost pointing, potentially but not determinatively, towards an unfair dismissal. In all cases it requires us to consider carefully the reasons relied on as to why that decision was reached without any meaningful procedure. Ms Thomas argued in closing that when some other substantial reason is relied on, it is governed by the general principles in s.98(4) and does not require any particular procedure, that the reasonableness of the dismissal will depend on the particular facts of the case. She points to the fact that dismissals have been found to be fair on appeal in cases where no procedure has been adopted and cites **Gallagher v. Abellio Scotrail Ltd 0027/17**. That is a recent case where an employee was told they were dismissed at an annual appraisal and not offered an appeal. We did find some value in the judgment in reflecting how we approach this case, particularly insofar as Gallagher recognises the relevance the seniority of the individuals concerned and the effect the functioning of their working relationship could have on the operation of the business. It also informs the view that formal procedures expected in more junior employment disputes may actually be detrimental to future improvements. However, we take the view that this case does not establish any general principle of law. It was a case decided on its facts which we do not accept are engaged here. Moreover, the respondent's submission only goes so far. What we need to grapple with under section 98(4) is not the fact that others have been dismissed fairly without a procedure being adopted, but the reasons why this respondent says not adopting any meaningful procedure in this case fell within the range of reasonable responses.

8.14. That question takes on particular importance against the particular background of this case. The reason why there was no meaningful procedure in advance of the decision to terminate employment is not something that we are satisfied the respondent has advanced within any clarity. At best it is that the respondent had tried everything and reached the end of the line. We have already stated how there were, indeed, options explored through which the claimant could have retained employment. We accept that that would have been a demotion and he had firmly rejected it but that rejection was in the context, in part at least, of Mr Barnatt's understanding of the situation he was then on. Not only was he not attuned to the possibility that the employer was about to terminate his employment, but Mr Robertshaw's interpretation that it was reasonable for him to conclude there would not be a PIP on returning to his substantive role, even with its shifting adjustment, only served to fortify his stance.

8.15. We also note that there was something in the region of three weeks or more between the decision to dismiss and the actual dismissal meeting. There is no case before us of

urgency or pressure to resolve the situation. We accept the state of affairs had been ongoing for some time but we have not been given any adequate explanation as to why there could not have been some meaningful procedure during that period and within which the respondent's position that it was then contemplating could have been put to the claimant.

8.16. Accordingly, we are not satisfied the absence of any final procedure was a step that fell within the range of reasonable responses.

8.17. As to what aspects of a procedure might be said to have occurred, in our judgment nothing of real substance assists the employer and some of it undermines fairness. The letter of invite to what became the dismissal meeting was written in terms that were interpreted, not unreasonably, as simply indicating a next stage to the existing dispute, albeit to potentially conclude it. That is as much an indication that it might be concluded to Mr Barnatt's satisfaction as anything else. The attended hearing itself served no more purpose that a letter would. In effect, Mr O'Neil simply read out the pre-prepared script of the decision. The fairness of this part of the process was, if anything, made worse by the impression it sought to give of there being some genuine scope to influence a decision yet to be made. First, Mr O'Neil was introduced as a decision maker when he was not. Secondly, the "script" invited input from Mr Barnatt without, we have found, there being any scope at all for it to influence the outcome. The outcome, of course, had been decided some weeks earlier.

8.18. These conclusions envelope a number of Mr Heard's specific submissions on fairness. The first is to inform the employee that the employer considers that there has been a breakdown in the relationship. We accept that such a position was put to the claimant as part of the totality of the picture put to him in the context of these options. We do not accept it was put in the context of the dismissal decision and not doing so fell outside the range of reasonable responses, for the reasons already given. Mr Heard invites us to conclude that the respondent failed to investigate thoroughly in a way that took matters outside the range of reasonable responses. We do not think there reasonably was any further investigation to be done beyond that which would have flowed from engaging with the claimant in a transparent process that set out the fact the employer had reached a position where dismissal was being considered and inviting his reflection on the options being put.

8.19. Similarly, we do not take the view that anything is added to the claimant's case by the submission that there was a failure to provide the employee with relevant information and evidence. In the circumstances of this case everything that needed to be known was known. The same can be said of any lack of warning. Warning that the dispute was reaching the point of an ultimate dismissal is something which, in our judgment, a reasonable employer would do. Not doing so might be open to a reasonable employer in certain circumstances but we are not satisfied any existed here. The claimant's rejection of the options was not against an alternative of losing his employment, at least not explicitly so. The existence of potential alternatives that would have retained his employment one way or another very much engages the lack of notice. Whilst the respondent may say it offered alternatives, it did not do so against the alternative of dismissal. Again, however, these are all specific manifestations of unfairness within the absence of any meaningful procedure.

8.20. All those submissions address the absence of process, the circumstances of which we conclude fall outside the range of reasonable responses that a reasonable employer could have deployed in this case.

8.21. We are not persuaded that other matters advanced add to the question of unfairness, for example, we do not accept the situation was then one where the hypothetical reasonable employer ought first to have given Mr Barnatt an opportunity to demonstrate that he could fit back into the workplace without undue disruption. That may have arisen in the context of him accepting the PIP as part of a return to his substantive role but this is not a case solely based on an inter-personal relationship breakdown with a superior. It is not an irrelevant consideration, but we do not think it adds to the fundamental observations we have that the prospect of the decision to terminate it was not put to him which gave him meaningful opportunity to respond.

8.22. Finally, a right of appeal against a decision is another fundamental aspect of fairness and its absence in any particular case will be at least a signpost to a potential unfairness. We accept it is not determinative and that there may be circumstances where the hypothetical reasonable employer could say it will serve no purpose but we are not satisfied that is the case here.

8.23. This case stands on unusual ground in that the respondent has been at pains to stress the claimant could not “appeal” against a decision based on “some other substantial reason” but has then put in place scope for what it termed a high-level management review of the decision to dismiss. There has, therefore, been some second assessment of decision to dismiss and we recognise that we must look to the substance, rather than the label, of what happens when assessing the reasonableness of any dismissal process overall. We have to consider whether what that did was enough to remedy the unfairness we have found present in the original decision making. It clearly does add something to the process compared to there being no second level consideration at all, but we are not satisfied that what this adds to the disciplinary decision-making process is sufficient to bring it within the range of reasonable responses.

8.24. Our reasons for this conclusion are, first, that it does not hold itself out as an appeal. It is called a management review as opposed to an appeal. That label would, in itself, be of very little consequence to us but it was conducted against specific terms of reference. Part of those terms of reference sought to establish the reasonableness of the decision that had been made and the input of the claimant (otherwise the “appellant”) was relegated only to taking into account his views and, even then, doing so along-side the views of Ms Samuels. Secondly, although Mr Barnatt was permitted to set out his views in his original areas of challenge and those were put before Mr Thompson, his report does not explicitly address them. Thirdly, we found the organisation’s mindset was in any event settled on the outcome as can be seen in the public statements drafted to explain Mr Barnatt’s departure in anodyne terms. All of which takes place following a private decision reached outside of a procedure. Fourthly, our central concern about fairness is the absence of any meaningful process leading to a hearing at which Mr Barnatt was all but ambushed with the ultimate decision to terminate his employment. To his credit, Mr Thompson clearly identified the unsatisfactory nature of the

opaque invitation letter as a matter of real concern. However, he rejected it as not having any fundamental effect on fairness and concluding that the outcome was not unreasonable.

8.25. For those reasons we have concluded that the review process does not remedy the unfairness that existed in the decision-making process overall. Looked at as a whole, this remains a process which we do not accept was reasonably open to the hypothetical reasonable employer and therefore fell outside the range of reasonable responses so as to amount to an unfair dismissal.

9. Conclusions

9.1. The claims related to the protected disclosure fail. The claim of ordinary unfair dismissal succeeds. Unless the parties are able to reach agreement, a remedy hearing will be convened before the same panel to include matters related to “Polkey” and otherwise to arrive a just and equitable figure of compensation. What the Thompson review may well do, despite not remedying the unfairness, is to provide a platform for argument either way on these secondary decisions. A significant aspect of which will be the assessment of whether this employer, and not the hypothetical reasonable employer, could have dismissed fairly at any point having regard to the substance of the underlying position the parties had reached by the end of 2018.

EMPLOYMENT JUDGE R Clark
DATE: 3 December 2021

JUDGMENT SENT TO THE PARTIES ON

……...……

AND ENTERED IN THE REGISTER

……...……
FOR SECRETARY OF THE TRIBUNALS