THE EMPLOYMENT TRIBUNALS

Claimant: **Mr P Hodgson**

Respondent: **Oil Consultants Ltd**

Held at: **Middlesbrough**

On: **13-17 September 2021 and (in chambers) 12 and 29 October 2021**

Before: **Employment Judge Aspden**
Ms P Wright
Mr S Wykes

Appearances

For the Claimant: Mr S Rahman, counsel
For the Respondent: Mr T Gillie, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaints that the respondent contravened section 47B of the Employment Rights Act 1996 by subjecting him to detriments on the ground that he made a protected disclosure are not well founded and are dismissed.

2. The claimant's complaint that his dismissal was unfair by virtue of s103A of the Employment Rights Act 1996 is not well founded.

3. The claimant's complaint that his dismissal was unfair by virtue of s98 of the Employment Rights Act 1996 is well founded.

4. The claimant's complaint that the respondent made unauthorised deductions from wages and breached his contract of employment is well founded.

REASONS

Claims and issues

1. The Claimant was employed by the Respondent from July 2018 to July 2020. He makes the following complaints:

   1.1. Complaints that the respondent subjected him to detriments on the ground that he made protected disclosures, contrary to section 47B of the Employment Rights Act 1996, by the following acts or deliberate failures to act:

      1.1.1. On 20 November 2019 Ms Walker directed the Claimant to desist from conducting an NCR investigation.

      1.1.2. On an unknown date before or around 30 January 2020 Ms Walker sent Ms Smith a document that the claimant had annotated, namely an email sent by Ms Smith to a colleague who was pregnant and attempting to address her maternity leave.

      1.1.3. The respondent failed to follow the grievance policy and procedure on or around 30 January 2020.

      1.1.4. On or before 5 March 2020 Ms Walker made a false allegation to Ms Smith along the lines that the claimant had effectively disclosed sensitive personal data about two employees to another employee by referring to them as 'Tweedle Dum and Tweedle Dee', thereby revealing their identity, and disclosing information about injuries they had sustained in an accident at work.

      1.1.5. On or around 24 April 2020 the respondent placed the Claimant on furlough leave.

      1.1.6. On 30 April 2020 the respondent reduced the Claimant's pay by 25% and failed to top up his salary.

      1.1.7. The respondent failed to follow the grievance policy and procedure on or around 1, 3, 4, 23 and 28 July 2020.

      On 20 August 2021 Employment Judge Jeram directed the claimant to list the paragraphs in the grievance policy and procedure that it is said had not been followed. In response to that direction the claimant said:

      'I assert that Respondent Failed to Follow Grievance Policy in respect of:

      22.1 The Respondent did not 'ensure that complaints, concerns, and problems to do with employment are dealt with fairly and consistently.'

      22.3 The Respondent did not 'ensure our investigation is fair and thorough.' or 'interview you and will consider all relevant documents'

      22.4 The Respondent did not 'invite you to a meeting, usually within five days of you lodging your grievance.', inform me 'You can bring

somebody with you to the meeting' or 'take any investigative steps that are considered appropriate.''

1.1.8. On or around 30 July 2020 the respondent failed to follow the redundancy policy and procedure.

On 20 August 2021 Employment Judge Jeram directed the claimant to list the paragraphs in the redundancy policy and procedure that it is said had not been followed. In response to that direction the claimant said:

'The Respondent did not have a defined Redundancy Policy which can be referred to by paragraph numbers.
The Respondent failed to conduct 'the economic review of the post will be conducted by [Mr Ramplin] and myself [Ms Smith].' in accordance with Mrs Smith's email which partially clarified some concerns I had raised with process flaws. Or offering 'full and correct use of the consultation process' In lieu of a fair process, the Respondent failed to accord with the ACAS Code to;
- *Listen to my ideas*
- *Try to come to an agreement with me*
- *Not discriminate because of concerns I had raised about whistleblowing*
- *Offer a meaningful appeals process*

Further to this the Respondent did not
- *Consider working fewer hours*
- *Keep staff informed and supported throughout the process*
- *Effectively talk with staff about the redundancy process and plans.'*

1.1.9. On or around 20 August 2020 Ms Smith notified Kaplan Financial that the Claimant was not working for the Respondent and failed to inform them this was due to redundancy (which resulted in his apprenticeship training being forfeited).

1.2. Complaints that his dismissal on or around 31 July 2020 was:
1.2.1. a further act of detriment on the ground that he made protected disclosures, contrary to section 47B of the Employment Rights Act 1996;
1.2.2. automatically unfair pursuant to section 103A of the Employment Rights Act 1996; or
1.2.3. unfair pursuant to section 98 of the Employment Rights Act.

1.3. A complaint that the respondent was in breach of contract and/or made unlawful deductions from wages by reducing his pay to £2,500 per month whilst he was on furlough leave. The claimant contends he was contractually entitled to be paid 80% of his salary as a condition of going on furlough leave by virtue of an agreement between himself and the respondent.

2. In his claims of detriment and automatic unfair dismissal the Claimant relies upon twelve alleged protected disclosures. On 20 August 2021 Employment Judge Jeram directed the claimant to identify the words said or written which he says amount to qualifying disclosures. In response to that direction the claimant provided further information.

3. The alleged protected disclosures are as follows:

First Alleged Protected Disclosure

4. The claimant alleges that he made a protected disclosure to Ms Smith of the respondent on or around 4 October 2019 as set out in paragraphs [4] and [5] of the Particulars of Claim by stating to Ms Smith that there had been 'a massive data breach.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I … said that to lose a laptop along with its password meant that the data held in CIR was unsecure; as there were more than 70,000 consults' records including (medical certification and financial data), there was risk to the consultants and that there was a massive data breach. I proposed to inform the ICO in spite of the 72 hour timeline being missed and stated that the incident needed to be investigated'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b) or (f) of section 43B(1) ERA 1996.

Second Alleged Protected Disclosure

5. The claimant alleges that he made a protected disclosure to Mr Ramplin of the respondent on 15 November 2019 as set out in paragraph [7] of the Particulars of Claim ie by reporting to Mr Ramplin that 'he had identified approximately 10 jobs that evaded tax or the taxes were otherwise incorrect.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said '…I reported on an operational error which resulted in it being uneconomic to pay over local taxes in the Netherlands. I stated that the issue was not limited to the 2 originally identified incidents and that my initial audit showed that there were approximately 10 jobs that I had been able to identify; this amounted to a widespread tax evasive position which was a corporate crime'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (a), (b) or (f) of section 43B(1) ERA 1996.

Third Alleged Protected Disclosure

6. The claimant alleges that he made a protected disclosure to Ms Smith and Ms Walker of the respondent on 21 November 2019 as set out in paragraph [9] of the Particulars of Claim ie by informing them 'that the [tax] issues were not restricted to the 2 jobs they were aware of and that his investigation had identified nearly a dozen jobs in which the taxes were not billed correctly. He stated this was tax evasion.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I made my position clear that based on his previous meeting with Mr Ramplin and his email correspondence with Miss Walker the previous evening; stated that it had not been appropriate to ask Mrs Alexander to take action to amend the operational process as she lacked the understanding of taxes or the consequences and the company was currently evading a significant amount of Dutch taxes.' The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show

one or more of the matters set out in paragraphs (a), (b) or (f) of section 43B(1) ERA 1996.

Fourth Alleged Protected Disclosure

7. The claimant alleges that he made a protected disclosure to Ms Smith on 30 January 2020 as set out in paragraph [11] of the Particulars of Claim ie in that he 'raised concerns that Kelly Walker's disclosure was a data breach and that she had breached confidentiality.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I reminded Mrs Smith that Miss Walker had breached sensitive personal data on 2 January 2020 about a medical issue suffered by Miss Bell while Mrs Smith was in witness to the data breach as well as a breach of confidentiality and trust; I stated that Miss Walker had disclosed details of a condition to the open office apparently without consent of Miss Bell. Consequently, staff had knowledge of symptoms that they did not at the time, a provisional diagnosis and details of medical appointments. In spite of any other relationship Miss Walker had with Miss Bell, she was her line manager and had not abided by a professional code of conduct or Data Protection Policy'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b) or (f) of section 43B(1) ERA 1996.

Fifth Alleged Protected Disclosure

8. The claimant alleges that he made a protected disclosure to Ms Smith on 30 January 2020 as set out in paragraph [11] of the Particulars of Claim ie in that he 'raised concerns about Kelly Walker's attitude to data confidentiality and her abuse of position in respect of the breach of 29 January 2020.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I stated that the company was not meeting the bare minimum required by its duty towards data protection. This was a conscious decision as the main culprit was repeatedly Miss Walker in reference to the incident, 4 October 2019, 21 November 2019 and now 2 January 2020. I stated [I] was uncomfortable with the matter and was compromising [my] integrity and duty as DPO and was at the point of resigning [my] role as DPO due to the now several issues regarding data breaches surrounding Miss Walker and Mrs Smith was hiding these from me so [I] would not inform the ICO'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b) or (f) of section 43B(1) ERA 1996.

Sixth Alleged Protected Disclosure

9. The claimant alleges that he made a protected disclosure to Ms Smith on 30 January 2020 as set out in paragraph [11] of the Particulars of Claim ie he stated that '[Ms Hird] was dissatisfied with the offer and upset about her treatment as it wasn't compliant with the law and that the her doctor or midwife had informed her that the stress was not good for the development of her twins and that the meetings with [Ms Smith] and [Ms Walker] felt 2 vs 1. In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying

disclosure, the claimant said 'Mrs Smith and Miss Walker had offered what was very apparently an unlawful maternity contract to Miss Hird which effectively saw her commission being given to Miss Walker's friend. I had explained that this was clearly a maternity detriment, Miss Hird was very distressed and had been advised by her midwife the stress the matter was causing was detrimental to the development of her unborn twins. I further stated that the format and conduct of Mrs Smith's meeting with Miss Hird was unhelpful and that the meetings felt to Miss Hird that it was "2 v 1". Mrs Smith produced the document recovered from my computer as evidence I had interfered. I had stated that the advice had been in a personal capacity hence it was over personal email addresses.' The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b), (d) or (f) of section 43B(1) ERA 1996.

Seventh Alleged Protected Disclosure

10. The claimant alleges that he made a protected disclosure to Ms Smith on 31 January 2020 as set out in paragraph [12] of the Particulars of Claim ie in an email he 'raised concerns about Kelly Walker's aggressive and/or passive aggressive behaviour towards another colleague … and other colleagues who had made confidential disclosures and bullying.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said he relied on the following words in the email 'Kelly's aggressive and/or passive aggressive behaviour towards you and select colleagues who have previously made confidential disclosures and are protected under our whistleblowing policy'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b), (d) or (f) of section 43B(1) ERA 1996.

Eighth Alleged Protected Disclosure

11. The claimant alleges that he made a protected disclosure to Mr Parker a few days prior to 5 February 2020 as set out in paragraph [13] of the Particulars of Claim in that he 'stated that he felt Kelly Walker was "ruling the office through acts of intimidation" and that there was a ''protracted effort" on her part to get the Claimant dismissed.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I expressed concerns that Miss Walker was utilising her ability to influence certain social sections of the staff to rule the office by force and intimidation'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b), (d) or (f) of section 43B(1) ERA 1996.

Ninth Alleged Protected Disclosure

12. The claimant alleges that he made a protected disclosure to Ms Smith on 3 March 2020 as set out in paragraph [15] of the Particulars of Claim in that he 'reported [to Helen Smith] that the bullying was "still rife and this was not right" and she "had a responsibility to her staff" to address the matter.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a

qualifying disclosure, the claimant said 'I stated that bullying was still rife within the company and that Mrs Smith wasn't doing enough to tackle the issue, furthermore, she had a duty to her employees' health and safety to ensure the issue was addressed'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b), (d) or (f) of section 43B(1) ERA 1996.

Tenth Alleged Protected Disclosure

13. The claimant alleges that he made a protected disclosure on 7 April 2020 in an email to Ms Smith, as set out in paragraph [18] of the Particulars of Claim, in that he said there were 'isolated instances regarding data protection of which the board are aware'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (b) or (f) of section 43B(1) ERA 1996.

Eleventh Alleged Protected Disclosure

14. The claimant alleges that he made a protected disclosure on 1 July 2020 as set out in paragraph [21] of the Particulars of Claim, in that he sent a letter to Ms Smith 'raising a number of grievances'. …That Kelly Walker has been indirectly involved in or has had knowledge of several data breaches in recent months and that the Claimant was inhibited in his duty to inform the ICO of internal and external data breaches. In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I rely on the words "data protection can only be as strong as the weakest link; the operations director has been directly involved in or had knowledge of several data breaches in recent months. Over the course of this same time period I have been inhibited from my duty to inform the Information Commissioner's Office (ICO) of numerous internal and external data breaches." and "this letter has established that I have previously raised concerns that remain unaddressed about our corporate behaviour and that the behaviour of a director who represents the board...the above concerns extend beyond that remit and as such I believe I should be afforded due protection under company whistleblowing policy as well as employment law."' The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (a), (b), (d) or (f) of section 43B(1) ERA 1996.

Twelfth Alleged Protected Disclosure

15. The claimant alleges that he made a protected disclosure on 23 July 2020 as set out in paragraph [25] of the Particulars of Claim in that he sent an email 'stating that he has raised concerns about data breaches, and that there remained an open action with regards to concerns previously raised in a minuted meeting' and that 'the company had knowledge of tax evasion as early as October 2019 whereas the matter was not ought to the attention of the tax authorities until 22 January 2020; a quality management system was undermined; there was a breach of a colleague sensitive data; there was inaction and cover up; concerns about the investigation of data breaches at the company; that threats of violence and damage to person and property were made against staff in person and via social media

where individual behaviour was challenged.' In response to the Order of EJ Jeram directing the claimant to set out the words said/written that constituted a qualifying disclosure, the claimant said 'I rely on the paragraph "Over the course of our correspondence on the matter, I believe I've detailed that: - the working environment that the Operations Director has created breaches the employment rights of myself and the wider staff; - management have continually turned a blind eye to her behaviour and mismanaged the situation; - action plans implemented have failed or have otherwise been uncommitted to in efforts to resolve the issue or rectify the working environment or many of the detrimental aspects of the working environment; and - your tolerance of the Operations Director's sustained behaviour was at the expense of the wider staffs' employment rights which is also contrary to company policy."'. The claimant alleges that this was a disclosure of information that in his reasonable belief tended to show one or more of the matters set out in paragraphs (a), (b), (d) or (f) of section 43B(1) ERA 1996.

16. Until the start of this hearing the claimant also relied on a thirteenth alleged protected disclosure. At this hearing, however, Mr Rahman confirmed the claimant no longer relies on that alleged disclosure as it was made after the last of the acts of (allegedly) detrimental treatment about which the claimant complains.

17. The issues for the Tribunal to determine were agreed as follows:

Whether the claimant made protected disclosure(s)

17.1. Did the claimant make a disclosure of information as alleged?
17.2. Did the Claimant reasonably believe that the information disclosed tended to show one of the matters set out in Section 43B(1) ERA 1996?
17.3. Did the Claimant reasonably believe that the disclosure was made in the public interest?

Detriment complaints

17.4. Was the claimant subjected to detriment as alleged?
17.5. If so, was the Claimant subjected to the detriment on the ground that made a protected disclosure?
17.6. Was the claim brought in time?

Unfair dismissal

17.7. What was the reason (or, if more than one, the principal reason) for dismissal?
17.8. Was that reason that the claimant made a protected disclosure? If so, the Claimant's dismissal is automatically unfair.
17.9. If not, was that reason one within s.98(2) ERA? The Respondents rely on the potentially fair reason of redundancy.
17.10. If so, did the Respondent act reasonably in all the circumstances in treating that reason as a sufficient reason for dismissing the Claimant, applying the test in s.98(4) ERA?

Breach of Contract/Unlawful Deduction of Wages

17.11. Did the Respondent agree to pay the Claimant 80% of his salary as a condition of going on furlough leave?

17.12. If the amount paid to the claimant was less than the amount properly payable, was the respondent authorised to make such deductions by virtue of a statutory provision, a relevant provision of the Claimant's contract, or by previously signified written consent?

Remedy

18. To what compensation (if any) is the Claimant entitled? In this regard, we agreed that we would hear evidence and submissions relevant to the Polkey issue and the issue of whether disclosures were made in good faith alongside evidence and submissions concerning liability but that other issues concerning remedy would be determined only after hearing further evidence and/or submissions once the parties were informed of the Tribunal's decision on liability.

19. In his closing submissions, Mr Rahman referred, for the first time, to section 105 of the Employment Rights Act 1996, submitting that if the claimant's dismissal was not automatically unfair by virtue of section 103A of the 1996 Act then it was automatically unfair by virtue of s105. The claimant had not, at any stage of the proceedings, applied to amend his claim to allege that his dismissal was unfair by virtue of s105 and no reference had been made to the issues arising under s105 in the agreed list of issues. On behalf of the claimant, Mr Rahman applied for permission to amend the claim to allege that the claimant's dismissal was unfair by virtue of s105. Mr Gillie opposed the application. We refused the application to amend for reasons given at the hearing. We have not been asked for written reasons for that decision and will not repeat them here.

Legal framework

Detriment for making a protected disclosure

20. The Employment Rights Act 1996 gives workers the right not to be subjected to detriment for making what are commonly referred to as whistleblowing disclosures. The right is set out at section 47B, which says this:

47B Protected disclosures.

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

(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority,
on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or
(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) . . . This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, 'worker', 'worker's contract', 'employment' and 'employer' have the extended meaning given by section 43K.

Meaning of 'protected disclosure'

21. In order for a whistleblowing disclosure to be considered as a protected disclosure, three requirements need to be satisfied (ERA 1996 s 43A). Firstly, there needs to be a 'disclosure' within the meaning of the Act. Secondly, that disclosure must be a 'qualifying disclosure', and thirdly it must be made by the worker in a manner that accords with the scheme set out at ERA 1996 ss 43C–43H.

22. In this regard, the following provisions of the 1996 Act are relevant:

43A Meaning of 'protected disclosure.

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

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

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

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

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

23. The definition of a qualifying disclosure comprises a number of elements. As was set out in Williams v Michelle Brown Am UKEAT/0044/19 (29 October 2019, unreported):

'First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'

24. As to what amounts to a 'disclosure of information', the Court of Appeal held in Kilraine v Wandsworth London Borough Council [2018] ICR 1850, that in order for a statement to be a qualifying disclosure for the purposes of section 43B(1), it must have a sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a)–(f) of that subsection; the concept of 'information' is capable of covering statements which might also be characterised as allegations, although not every statement involving an allegation would constitute 'information' and amount to a 'qualifying disclosure' within section 43B(1).

25. The claimant in this case relies on s43B(1)(a), (b), (d) and (f). In the context of section 43B(1)(b), the EAT has held that the term 'likely' requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation: Kraus v Penna plc [2004] IRLR 260, EAT. The word 'likely' must have the same meaning in paragraphs (a), (d) and (f).

26. Provided the whistle-blower subjectively believes that the information disclosed tends to show relevant wrongdoing and that belief is objectively reasonable, the

fact that the belief turns out to be wrong is not sufficient of itself to render the belief unreasonable and thus deprive the whistle-blower of the protection of the statute: Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] IRLR 346.

27. The words 'in the public interest' in s 43B(1) were considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837. The leading judgment of Underhill LJ made it clear that the question for the tribunal is whether the worker believed, at the time he or she was making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The judgment also held that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it.

28. In order to qualify for protection, the disclosure must be to an appropriate person. The effect of section 43C is that any qualifying disclosure made to the employer will be a protected disclosure.

Detriment

29. The concept of detriment is very broad and must be judged from the view-point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and the Court of Appeal in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] ICR 1226 confirmed that it has the same meaning in whistle-blowing cases.

30. A detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had thereby been disadvantaged in the circumstances in which he had thereafter to work.

31. Section 47B(2) excludes a claim against the employer in respect of its own act of dismissal. However, the Court of Appeal held in Timis and another v Osipov [2018] EWCA Civ 2321, [2019] IRLR 52 that it is open to an employer to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). In *Osipov*, Underhill LJ observed that this has the odd result that 'an action under s 47B(1A) can be used to fix the employer (if solvent) with vicarious liability under s 47B(1B), even if a direct action would have had to be under s 103A….'

Reason for detrimental treatment

32. Section 47B requires that the act, or deliberate failure to act, is 'on the ground that' the worker has made the protected disclosure. That requires the Tribunal to ask itself why the alleged discriminator acted as they did: what, consciously or

unconsciously, was their reason? In Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372, the Court of Appeal held that the test for detriments is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.'

33. The burden of showing the reason is on the employer: section ERA 1996 s 48(2). If the Tribunal rejects the employer's explanation for the detrimental treatment under consideration, it may draw an adverse inference and find liability but is not legally bound to do so: see Serco Ltd v Dahou [2015] IRLR 30, EAT and [2017] IRLR 81, CA. In the Court of Appeal, Laws LJ said: 'As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right.'

Unfair dismissal

34. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.

Ordinary unfair dismissal

35. It is for the employer to show that it dismissed the claimant for a potentially fair reason i.e. one within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held.

36. The respondent's case is that it dismissed the claimant by reason of redundancy. Dismissal because an employee is redundant, as defined in section 139, is a reason for dismissal falling within section 98(2), so is a potentially fair reason. The definition in section 139 provides that an employee will be taken to have been dismissed by reason of redundancy if their dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished or were expected to.

37. If the respondent shows that the reason for dismissal, or the principal reason, was redundancy then it is for the Tribunal to consider the fairness of the dismissal applying the test in section 98(4). Section 98(4) provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
    37.1. 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
    37.2. shall be determined in accordance with equity and the substantial merits of the case.

38. In considering this issue it is not the function of the Employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is

whether the dismissal lay within the range of conduct which a reasonable employer could have adopted: Williams v Compair Maxam Limited [1982] IRLR 83.

39. Where an issue before the Tribunal is whether an employer acted reasonably in identifying the pool of candidates for redundancy, the Tribunal must bear in mind that the question of how the pool should be defined is primarily a matter for the employer to determine: it is difficult for the employee to challenge it where the employer has genuinely applied his mind to the issue: Taymech v Ryan EAT/663/94.

40. In the case of Williams, the Employment Appeal Tribunal (EAT) set out further guidelines to assist Tribunals in determining whether an employer acted reasonably in relation to redundancy dismissal. In that case the EAT said relevant considerations include:

    40.1. whether any selection criteria were objectively chosen and fairly applied;
    40.2. whether employees were warned and consulted about redundancies; and
    40.3. whether any alternative work was available and considered.

41. In Williams, the EAT suggested that an employer should give as much warning as possible of impending redundancies so as to enable those affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

42. On consultation, in Williams it was said that consultation with the employee should include confirmation of the basis on which they have been selected, an opportunity for the employee to comment on any redundancy selection assessment, consideration of alternative vacancies and an opportunity to discuss other relevant matters. Fair consultation generally involves giving those consulted a fair and proper opportunity to understand fully the matters about which they are being consulted and to express their views on those subjects, and thereafter considering those views properly and genuinely: Rowell v Hubbard Group Services Ltd [1995] IRLR 195.

43. The Acas Code of Practice on disciplinary and grievance procedures confirms expressly that it does not apply to redundancy dismissals.

Automatic unfair dismissal – section 103A

44. Section 103A of the Employment Rights Act 1996 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.’

45. If the tribunal does not accept that the reason for dismissal (or the principal reason for it) was redundancy then the Tribunal may, but is not obliged to, accept the reason put forward by the claimant. As the Court of Appeal made clear in Kuzel v

Roche Products Ltd [2008] IRLR 530, CA, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it.

Remedy

46. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 of the Act.

47. Section 123(1) ERA provides that, subject to certain other provisions, the compensatory award shall be such amount as is just and equitable having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

48. In Polkey v AE Dayton Services Ltd [1987] ICR 142, the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed. As the Employment Appeal Tribunal said in Software 2000 Ltd v Andrews [2007] IRLR 568 a degree of uncertainty is an inevitable feature of this exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

Unlawful deduction/breach of contract

49. Section 13(3) of the Employment Rights Act 1996 provides that there is a deduction from wages where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions).

50. The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (New Century Cleaning Co Ltd v Church [2000] IRLR 27). The Claimant contends that his legal entitlement to payment of 80% of his wages whilst furloughed derives from his contract of employment with the Respondent, as varied by an agreement reflected in a letter dated 24 April 2020. The respondent's position is that the claimant agreed to his pay during furlough being £2500 per month.

51. When construing or interpreting contractual documents, the Tribunal's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. In doing so, the Tribunal must 'consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used': Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune') [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep. 654. The starting point in construing a contract is that words are to be given their ordinary and natural meaning unless the context indicates that

the words used had acquired or should be understood as being used in some other special sense. Where the meaning of a contract term remains ambiguous, the contra proferentem principle enunciated in the case of Canada Steamship Lines Ltd v The King [1952] AC 192 suggests that the ambiguity should be resolved against the party who put the clause forward and relies upon it.

52. Questions put to the claimant by Mr Gillie during the hearing suggested that the respondent may be arguing that even if the parties originally agreed that the claimant would be paid 80% of his pay while furloughed, the parties subsequently agreed that the claimant's pay would be limited to £2500 per month. That argument was not pursued in submissions by Mr Gillie. Nevertheless, we have considered the matter.

53. In deciding whether the terms of the claimant's contract were effectively varied, the question for the Tribunal is whether the claimant expressly or impliedly accepted such a variation.

54. Solectron Scotland Ltd v Roper [2004] IRLR 4 is a case in which the EAT addressed the question of whether an employee could be said to have impliedly consented to a change in contract terms by his conduct. Elias J said:

> `*The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.'*

55. The Court of Appeal applied that approach in Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] EWCA Civ 397, [2010] IRLR 715, holding that 'the relevant test is whether the employee's conduct, …, was only referable to his having accepted the new terms imposed by the employer.' On the facts of that case, the Court of Appeal held that it would be wrong to infer from all the circumstances that the claimant had accepted changes to his contract. In reaching that conclusion, the Court said 'Particularly striking was the fact that the claimant did not use the method of acceptance of the new terms specifically called for in the offer letter, namely signing it. That reinforced the inference that he had not accepted the new terms.'

56. The case-law on implied acceptance was reviewed again by the Court of Appeal in *Abrahall v Nottinghamshire County Council [2018] EWCA Civ 796*, *[2018] IRLR 628.* In that case Underhill LJ held:

'First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms. That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.

…

Thirdly, in Solectron, Elias J stated that 'it may be possible to infer that [employees] have by their conduct after a period of time accepted the change in terms and conditions'. The phrase 'after a period of time' raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay-cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis. That said, the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay-cut does not mean that the question has to be answered once and for all at the point of implementation.

57. The Court of Appeal also held that where a pay cut is proposed as a package of measures some of which are (at least arguably) to the employee's benefit and the employee continues to work without protest following implementation, taking the good parts as well as the bad, it is usually easy to infer that they have accepted the package in its entirety. But where that is not the case it is more difficult to say that they are not simply putting up with a breach of contract because they are not prepared to take positive steps to remedy it, whether by taking industrial action or by bringing proceedings.

Evidence and facts

58. We heard evidence from the claimant himself. For the respondent we heard evidence from Ms Smith and Mr Ramplin. Ms Smith is the chief executive officer and a director of the respondent. She manages the operations team with the operations director, Ms Walker. Mr Ramplin is the group finance director for a group of companies which involves the respondent. He has held that position since April 2018. He is a member of the respondent's board and manages the respondent's finance team.

59. We were also referred to certain documents in a bundle, and a supplementary bundle, prepared for this hearing.

60. On 26 August 2021 the claimant applied for a witness order requiring a Ms Chapman to give evidence. That application was considered and refused by EJ Beever at a preliminary hearing on 31 August 2021. After 3pm on the afternoon of 13 September 2021, the working day before this hearing was due to start, the

claimant applied again for a witness order requiring Ms Chapman to give evidence. He did not mention in his application that he had already applied for, and been refused, a witness order. EJ Johnson considered that application and made a witness order that afternoon.

61. A decision made by an Employment Judge in relation to the conduct of proceedings is a case management order. Such a decision may be varied, suspended or set aside by a further case management order 'where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made' (rule 29). In Serco Ltd v Wells UKEAT/0330/15, [2016] ICR 768, the EAT held that the 2013 Rules must be taken to have been drafted with the principle of finality, certainty and the integrity of judicial orders and decisions in mind, a principle that, as the authorities indicate, usually means that a challenge to an order should take the form of an appeal to a higher tribunal rather than being looked at again by the same judge or another Employment Judge except where (a) there has been a material change of circumstances since the order was made; (b) the order was based on a misstatement or omission; or (c) there is some other 'rare' and 'out of the ordinary' circumstance. It is not clear to us whether EJ Johnson was aware of the earlier decision of EJ Beever. We noted that, in his second application for a witness order, the range of issues that the claimant had said the witness could give evidence about was wider than those referred to in his original application that had been refused by EJ Beever. It is possible that EJ Johnson was aware of EJ Beever's decision but considered that the claimant's assertion that there were other matters about which the witness could give evidence was a new matter that had not been considered by EJ Beever. The alternative, perhaps more likely, explanation for EJ Johnson's Order is that he was simply unaware that the matter had been the subject of an earlier decision.

62. The Tribunal Rules do not require a party to copy applications for witness orders to other parties and the claimant did not do so on this occasion. The respondent was, therefore, unaware that an application was being made until after the Order had been made. At this hearing the respondent objected the witness giving evidence on two grounds: (a) that the witness' evidence was not sufficiently relevant to the issues to be determined by the Tribunal, as already ruled upon by EJ Beever; and (b) that the claimant had not served a witness statement for the witness as required by an Order made by EJ Pitt on 14 January 2021 and, therefore, the claimant should not be permitted to rely on the evidence of the witness without permission from the Tribunal, which permission had not been and ought not to be given. As the respondent had not seen the claimant's second application for a witness order, it was unaware that the claimant had said the witness could given evidence about a wider range of issues than appeared to have been referred to at the preliminary hearing before EJ Beever. The claimant said he would be able to obtain a witness statement from the witness that evening, setting out her proposed evidence. We therefore directed the claimant to do so and said that if the respondent maintained its objection to the witness giving evidence we would hear submissions from the parties the following day.

63. The claimant duly obtained a witness statement and served it on the respondent and the respondent maintained its objections to the witness being permitted to give

evidence. After hearing submissions from the parties' representatives we considered the matter and decided that the witness should not be permitted to give evidence and the witness order should be set aside. We gave our reasons orally at the hearing. We have not been asked to set out those reasons in writing and therefore have not done so. For present purposes it suffices to record that the evidence set out in the witness statement was that which EJ Beever had already ruled was insufficiently relevant to the issues the Tribunal had to decide and we agreed with that decision. The witness statement did not contain evidence about the other issues that the claimant had said the witness could give evidence about when he made his second application for a witness order. The granting of a witness order prior to a hearing does not usurp the authority of the Tribunal hearing the case to determine whether or not evidence is sufficiently relevant so as to be admissible. In any event, EJ Johnson's witness order was made in reliance on the claimant's submission as to what the witness could give evidence about. The production of the witness statement containing the witness' evidence was a material change of circumstances that warranted setting aside the witness order.

64. We make the following findings of fact. References to numbers in square brackets are to pages in the bundle of documents.

65. The main business of the respondent is recruitment for the oil and gas industry. The respondent works for companies which provide engineering services to oil and gas companies. The personnel the respondent recruits for its clients are predominantly engineers who work in oil installations in a number of countries across the world. For some clients the respondent arranges transport for engineers to the location where they will be working and deals with matters such as immigration and visa requirements for the relevant location.

66. The respondent has an employee handbook containing various policies, including a grievance policy. The policy begins with an 'Overview', which explains that the policy 'helps the Company ensure that complaints, concerns, and problems to do with employment are dealt with fairly and consistently'; does not form part of employment contracts; and that the company may depart from the policy. The policy describes how employees can take informal action and that the company will attempt to resolve most issues informally. It goes on to explain that employees may raise a formal complaint if an informal approach does not resolve their problem. The policy describes the stages of the formal process. The first stage says: 'You will need to set out the details of your complaint in writing. Include dates, names of individuals involved, and any other relevant facts, and tell us clearly that you want to lodge a formal grievance.' It goes on to say 'You must co-operate with us to ensure our investigation is fair and thorough. How the matter is investigated will depend on the nature of your grievance. The Company may need to take a statement from you and from other people able to provide information. The Company may also interview you and will consider all relevant documents.' The second stage says 'The Company will invite you to a meeting, usually within five days of you lodging your grievance. The meeting is your opportunity to explain your problem and how you think the Company should resolve it. … After the meeting, the Company will take any investigative steps that are considered appropriate. Sometimes, the Company may ask you for more information or for another meeting.'

67. On 11 July 2018 the claimant started work for the respondent as Quality and Compliance Manager. He was employed under a contract which appeared page 101 of the bundle. His job description was at page 274 the bundle. In September 2018 the claimant also became the respondent's data protection officer. The claimant was part of the operations team. From time to time he also did work for the finance team.

68. Immediately before the claimant's recruitment the respondent did not have a quality and compliance manager. The role had been previously held by another individual from 2012 to June 2015. In June 2015 that individual was made redundant due to the oil industry downturn. The quality manager role was one of the first positions to be made redundant at the time. When that individual left his tasks were absorbed by the business operations manager, the recruitment manager and the CEO until the claimant was recruited.

69. In late August 2019 Ms Walker reported to the respondent's IT director that her laptop computer and case had been stolen. The IT director checked the company's systems and told Ms Walker that her laptop had not been used to access them for several days and that he would change the password to prevent unauthorised access. Ms Smith's evidence was that Ms Walker found her laptop inside her home that same evening. The claimant's evidence, in contrast, was that the laptop was never recovered. We prefer the evidence of Ms Smith on this matter, which evidence is supported by contemporaneous emails from Ms Walker to the head of IT. We find that Ms Walker found her laptop inside her home and told the head of IT this by email the next morning.

70. Some time later, but before 4 October 2019, the claimant became aware that Ms Walker had reported her laptop as stolen. He did not know that the laptop had been found. One of the claimant's responsibilities was to report breaches of data protection legislation to the Information Commissioner's Office (ICO). On 4 October 2019 the claimant said to Ms Smith that to lose a laptop along with its password meant that the data held in CIR was unsecure and that he proposed to tell the ICO. This is the first alleged protected disclosure. Ms Smith knew that the laptop had in fact not been stolen, had been found and that there had been no data loss. She told the claimant that there was no need to report the incident as there had been no data loss.

71. In October 2019, Mr Ramplin became aware that the company had made a mistake in its tax accounting for two consultants in the Netherlands the previous month. There was a staff member absent from the Finance Department at the time with the result that the finance department was very busy. So Mr Ramplin asked the claimant to do some checks covering a 3 to 4 month period to identify whether the issue was confined to the examples he had come across or was more widespread. The claimant explained to Mr Ramplin the process for raising a non-conformance report (NCR) and Mr Ramplin asked the claimant to raise one.

72. Subsequently the claimant and Mr Ramplin met again to discuss the claimant's findings. The claimant told Mr Ramplin that the issue was not limited to the two original incidents and that he had identified approximately 10 jobs where the taxes

were incorrect. This is the second alleged protected disclosure. We accept Mrs Smith's evidence that she was unaware of what the claimant had said to Mr Ramplin on this occasion.

73. Mr Ramplin made Ms Smith and Ms Walker aware that there had been mistakes accounting for tax. On 6 November Ms Walker emailed the relevant teams reminding them of the correct process for dealing with consultants in the Netherlands.

74. On 20 November 2020, the claimant was speaking with Ms Smith about some other NCRs that he was involved with. He mentioned to Ms Smith that he was investigating the Netherlands tax issues. Ms Smith had already decided that a report into what had gone wrong and how a recurrence should be prevented could not be completed until they had a better understanding of what had happened and the extent of the problem. She had, therefore, decided to delay creating an NCR until matters had been investigated more fully.

75. Later that day, Ms Walker emailed the claimant, copying in Ms Smith and forwarding her email of 6 November. In her email to the claimant she said 'if there is an NCR ongoing on this, we need to be aware of it. I can't see any open or closed NCRs on the system for it, and it's weeks old. My concern is that if we do add an NCR and face any external audits … that we potentially highlight this issue, as we've marked up for the taxes and have been unable to pay them. My understanding from the conversation that I had with Helen, Andy, and Carl, was that we didn't want to raise as an NCR, and would put in preventative action internally, which has already been completed.' The claimant replied saying 'I was asked to raise the NCR last week with a view to establishing a preventative process. I wasn't aware of changes to the CIR checklists but I'm concerned that the below negates the NCR process - it's there for a reason but I understand this could be a tedious process at times and I can only apologise if that's a frustration. We did pass the Netherlands audit last week but if and when discovered we'd risk our operations and the subject to …fine in addition to penalties, back-payment and interest.' Ms Walker responded 'I just did [as] I was asked, and with immediate action.' We infer from that email that Ms Walker had been asked by Ms Smith to send her earlier email of that day about the NCR.

76. The next day, 21 November, Ms Smith asked the claimant and Ms Walker to meet with her to discuss the Netherlands tax issues. The claimant said in the meeting that the issue was widespread, that the company was evading tax and that they could be fined. This is the third alleged protected disclosure.

77. At the meeting, the claimant and Ms Smith discussed whether an NCR report should be created. The claimant said an NCR should be raised immediately; Ms Smith disagreed. Ms Smith told the claimant that the matter was being investigated and told the claimant, in effect, to stop what he was doing on the NCR. We accept Ms Smith's evidence that the company did investigate what had gone wrong and subsequently reported the failings to the Dutch tax authorities and paid the tax that was owing.

78. It is clear that, at the time of these events, the respondent's employees did not all get along with each other. Some employees were unhappy with Ms Walker and believed she favoured certain colleagues that she was friends with (referred to in one email by Mr Ramplin as Ms Walker's 'circle'). They also alleged she bullied others. The claimant was one of those who held Ms Walker in low regard. It is clear that some of those who were unhappy with Ms Walker and her 'circle', including the claimant, talked to each other about their concerns. In late 2019 some employees made complaints against Ms Walker of bullying and data protection breaches and she was suspended for a while whilst an investigation was carried out. Following the investigation, a series of briefings were held with staff and guidance was given about the respondent's code of conduct, data protection and the need for mutual respect.

79. On 2 January 2020 Ms Walker made a comment in the office about a colleague having an eye infection and going to see a doctor about it. The claimant, Ms Smith and others were present at the time.

80. On 11 November 2019 Ms Smith had sent an email to a company employee, Ms Hird. Ms Hird was pregnant and the email set out what would happen during her maternity leave. On 29 January 2020, a different employee, whose name is Nicole, gave the claimant a copy of that email. The claimant understood Ms Hird was distressed about the email and wanted his advice as a friend. The claimant made some notes on the paper copy of the email, scanned that document, then shredded it and emailed the scanned document to Nicole using his private email account. Ms Walker saw the claimant and Nicole speaking to each other and saw the claimant writing on a document, scanning it and shredding it. She asked someone in IT to find out what the document was. That person subsequently identified the document that had been scanned and emailed a copy to Ms Walker, telling her that the claimant had immediately deleted it.

81. Ms Walker emailed that document to Ms Smith as an attachment to an email dated 29 January 2020. In her email to Ms Smith Ms Walker said:

> *'I need to talk to you at some point please. This afternoon, Phil and Nicole have been acting suspiciously up and down from desks, in and out of the kitchen. Nicole handed him a piece of paper, which he sat and read, and then you will see he has gone through it with a pen, and changed words, and crossed out lines. Phil scanned the document, then shredded it, then gave Nicole the nod the amended document was on it's way to her. I rang Carl S, and he said the scanned doc had been immediately deleted, but he has been able to send it to me. See attached!!! Why on earth they have this, and what on earth they're doing with it I have no idea. Carl is going to check and confirm he forwarded it to Nicole on email after he scanned it. For when you're back, Carl raised that Phil had been asking for a number of people's passwords over Xmas, and he was wondering why on earth he needed them. I believe he's been trying to get access to the central folder, hence the reason I changed the password, and asked for a number of passwords to be changed. All the ones he had asked for, as he has been on their PC's. I never go on anyone's PC. There is a list of issues / major concerns this week, but I'll talk to you when you're back. I needed to alert you to this however, as it concerns you. I don't*

know what the pair of them are up to, but he is behaving extremely dishonestly and clearly supporting Nicole in whatever vendetta she's still carrying on. Please don't speak to Phil on this until I've managed to talk to you about everything else.'

82. We infer that the other 'issues/major concerns' Ms Walker referred to concerned the claimant in some way.

83. The claimant alleges that he met with Ms Smith on 30 January 2020 and, in the course of that meeting, made certain protected disclosures. Ms Smith's evidence, however, is that she was in the USA on this date and the meeting referred to by the claimant did not take place until February after her return. The claimant accepted in cross-examination that was the case.

84. In the meantime, on 30 January 2020, the claimant met with a colleague, Ms Nef, to discuss some concerns she had raised about, amongst other things, Ms Walker. The next day the claimant emailed Ms Nef. In his email he summarised his understanding of the concerns she had raised. He said:

'The concerns raised were
-Kelly's aggressive and/or passive aggressive behaviour towards you and select colleagues who have previously made confidential disclosures and are protected under our whistleblowing policy.
-Overt office conversation about social activities which you find divisive and exclusive as they have been titled and pertain to a former colleague's leaving party.
- Threats and other activity on social media.
- Continued presence of a former colleague on work grounds.

I've also noted your concerns subsequent to our meeting regarding the gathering in the car park in which Kelly was involved with a group meeting away from the office in the car park. …'.

85. Later that day the claimant forwarded that email to Ms Smith. This is said to be the seventh protected disclosure. In his email to Ms Smith the claimant said 'As discussed. Below notes concerns for reference and directs [Ms Nef] back to a more appropriate manager (yourself). She has confirmed she won't follow up….' We infer that Ms Nef had told the claimant she did not want to take her concerns any further.

86. When Ms Smith returned from the USA the following week she met with the claimant. She asked the claimant why he had a private email she had sent to Ms Hird about her maternity leave. The claimant said he had been offering advice to Ms Hird in a personal capacity using personal email addresses. The claimant told Ms Smith that Ms Hird was unhappy with the arrangements. He said that it was clearly a maternity detriment as he did not regard the offer to be lawful, that Ms Hird was distressed and her midwife had said the stress was potentially detrimental to the development of her unborn twins, that the way Ms Smith had conducted a meeting with Ms Hird had been unhelpful and that Ms Hird may raise a grievance. This is said to be the sixth protected disclosure. Ms Smith said the best way for Ms Hird to handle the matter would have been directly with either her or Ms Walker. Ms Smith also said something to the effect that the best way to handle personal

situations was to discuss them and come to an agreeable solution rather than raising a formal grievance.

87. During that meeting the claimant complained to Ms Smith about the fact that Ms Walker had obtained a copy of the email he had annotated. We infer that Ms Smith had told the claimant Ms Walker had passed the document to her. The claimant said to Ms Smith that Miss Walker had breached data and the company was not meeting the bare minimum required by its legal duties towards data protection. This is said to be the fifth protected disclosure. The claimant referred to what had happened on 2 January 2020, saying that Miss Walker had disclosed details of a colleague's medical condition on that day. This is said to be the fourth protected disclosure. The claimant told Ms Smith he was considering raising a formal grievance.

88. A few days later the claimant met a colleague, Mr Parker, in a pub. The claimant said to Mr Parker that he believed Ms Walker was 'ruling the office by force.' This is said to be the eighth protected disclosure. For his part, Mr Parker said he was considering resigning. Neither the claimant nor Mr Parker told Ms Smith what the claimant had said about Ms Walker. We accept her evidence that she was unaware of what the claimant had said.

89. The claimant thought about raising a formal grievance against Ms Walker and decided against it.

90. On or around 3 March 2020 the claimant had a conversation with Ms Nef in the staff room. She was upset because of the way, she said, she was being treated by a colleague, who was described by the claimant as one of Ms Walker's 'associates'. As they were talking, Ms Smith entered the room and Ms Nef left. The claimant's case is that he then made a protected disclosure to Ms Smith (said to be the ninth protected disclosure). The claimant's evidence to the Tribunal of what he said differs from the evidence given by Ms Smith. The account given by the claimant in his evidence in chief also differs from the account he gave in response to EJ Jeram's direction to identify the words he says he used in making the alleged protected disclosure. Looking at the evidence in the round, and given the inconsistencies in the claimant's accounts, we find it more likely than not that the claimant simply said to Ms Smith, as Ms Smith acknowledged in her evidence, 'things are still not right', and that in saying that he was alluding to the complaint that staff had previously made about the alleged behaviour of Ms Walker and her 'circle'. We are not satisfied that the claimant went any further than that, referring to bullying being rife or Ms Smith having a responsibility to her staff to address the matter (as claimed in the grounds of complaint) or that Ms Smith was not doing enough to tackle the issue and had a duty to her employees' health and safety to ensure the issue was addressed (as claimed in the response to EJ Jeram's Order) or that the claimant told Ms Smith she 'didn't care about the bullying' (as the claimant said in his witness statement).

91. At some point before 5 March 2020 an employee told Ms Walker that the claimant had said something about two colleagues who had had an accident at work and had referred to them as 'Tweedle Dum and Tweedle Dee', and that by doing that the claimant had effectively revealed their identities (as a married couple employed

by the company) and disclosed information about injuries they had sustained in an accident at work. Ms Walker then relayed this allegation to Ms Smith.

92. In February and March 2020 the respondent experienced a very severe reduction in its business as a result of the global pandemic and the reduction in oil prices. Ms Smith and Mr Ramplin discussed this and decided on cost saving measures to protect the business. These included putting employees on furlough and taking advantage of the Government's furlough grant scheme to pay salaries.

93. On 1 April Ms Smith emailed the workforce, including the claimant, explaining the financial difficulties the respondent was facing. She said:

    '*These are unprecedented times as the world attempts to manage the Covid 19 pandemic. We are starting to see some very real effects to our business now that international mobility is so severely restricted. That is also compounded with an extraordinary low oil price as a result of the disputes between some of the oil producing nations.*

    Most of our clients are now starting to reduce their own headcounts to reflect their trading and we are beginning to see reduction in use of contractors as a result. It is extremely difficult to forecast how long these events will continue for, and what the longer term impact will be on the business.

    As a consequence of this we will need to take action to protect the business and reduce some of our costs accordingly. We have already reviewed all of the external costs that we incur but as part of this process we need to review our resources and consider the most appropriate staffing levels in the immediate term. I know that this will not be welcome news but it is important that we protect the business and as many jobs as possible in these circumstances.

    [Mr Ramplin] and I would like to speak to everyone over the next couple of days and discuss any impact that this may have on yourself in the immediate term and so will be calling each of you directly.

    Please bear with us while we complete these calls.'

94. The respondent put 12 employees on furlough with effect from 1 April 2020. The claimant was not one of them. He was a Royal Marine reservist and, in March 2020, had told Ms Smith that he might be mobilised to assist in dealing with the pandemic and that, if he was, the company would be provided with funding to cover his pay. In anticipation of the claimant being mobilised, arrangements were made for the claimant's work to be absorbed by others in the company.

95. As well as putting staff on furlough, the respondent implemented other cost reduction measures, including, amongst other things, salary reductions and ending bonus schemes.

96. On 7 April 2020 the claimant sent an email to Ms Smith about a report he had prepared on data protection issues for a management review meeting [218]. In the email he said he had removed certain information from the report because he was 'not comfortable reporting the DPO's report if it's going to get [Ms Walker's] back up over the investigation and the further incident in January.' He then went on to set out the text he said he had removed from the report. Amongst other matters, that text included the following statement: 'There were isolated instances regarding

data protection of which the board are aware.' Ms Smith replied that day saying 'Thank you Phil. Received and acknowledged.'

97. In April Ms Smith and Mr Ramplin decided to put more staff on furlough to reduce costs further. Arrangements had been made for the claimant's work to be done by others in the expectation that he was to be mobilised. However, the claimant had not, in fact, been mobilised as a reservist. In addition, there had been some reduction in his workload because the business as a whole was doing less work. Ms Smith decided that what needed to be done in his role could be absorbed by others and the claimant should be put on furlough. The claimant himself had previously said to her that he would understand if he was placed on furlough and acknowledged that he was quite a costly resource.

98. Ms Smith spoke to the claimant in April and explained that she had decided he should be furloughed. She followed that up with a letter dated 24 April [198]. That letter was in largely the same terms as other letters that had been sent to staff whom it was proposed to furlough. It started with an explanation of the downturn in work and the factors that were behind it along the lines of the email that had been sent to staff on 1 April. It went on to say:

'As a consequence of these factors we need to take action to protect the business and reduce our operating costs accordingly. There is no realistic prospect of us achieving the cost saving we need through suspending recruitment, the use of contractors or overtime, or through retraining, alternative employment, temporary lay offs, or through any other alternative measure that we can think of.

This means that we need to make reductions to our staffing levels and I must advise you that your role will be affected by these changes. The roles that have been selected are based on the immediate needs of the business alongside considering how we can retain skills and experience held, along with the likely future workload requirements. In accordance with our discussions over the last few weeks we have also been preparing for your potential mobilisation with RMR and have also been able to handover the core components of your role in the business which means that your current workload is even more significantly affected.

However, there are some helpful initiatives that the UK government have implemented which means that we are able to obtain support in the form of grants to Furlough some of our personnel rather than implement redundancies for staff who would otherwise be affected. These grants mean that we can claim funding to cover 80% of the monthly salary for affected individuals after 1st March through to 30th June , to a maximum of £2,500 per month, which is calculated in accordance with the scheme rules and are subject to tax and National Insurance contributions. Furloughed individuals are placed on Leave of Absence and do not continue to work during the period. This 'breathing space' is designed to allow businesses to protect staff and jobs wherever possible during these difficult times until a clearer picture becomes evident.

We now need to seek your agreement to vary the terms of your contract of employment with the Company in order that we can implement and take advantage of the Governments Coronavirus Job Retention Scheme (the Scheme).'

99. The letter continued with a section headed 'Contract Variation', which said:

> ***Contract Variation***
> *You will be placed on 'Furlough Leave' from 27th April 2020. This means that your contract of employment continues, but you are not required to work. Your Furlough Pay will be based on 80% of your gross salary as at 1st April 2020 excluding any fees, commission or bonus. Your Furlough Pay will be subject to deductions for tax and employee national insurance contributions and employee pension contributions. As far as practicable, payments will be made on your normal pay day at the end of each month. During Furlough Leave your continuity of employment will continue. The number of days of contractual holiday you accrue over the year will be reduced in proportion to the amount of time you spend on Furlough Leave.*
> *Your Furlough Leave shall last at least three weeks and shall end on the earliest of the following events:*
> *1. The government Scheme ending (we expect the Scheme to be in place until at least the end of June 2020) or the Company no longer being able to claim under the Scheme in respect of you; or*
> *2. the Company requiring you to return to work (whether or not working from home). We will try to give you at least 3 days' notice of when we need you to return.*
> *…*
> *In order to proceed we now require you to complete the following actions:*
> *1. Confirm your contact details…*
> *2. Confirm your agreement to proceed*
> *It is important that we have a record of your agreement to the terms in this letter as an indication of your agreement in order to place you on Furlough Leave and pay you Furlough Pay. Please confirm your agreement by email stating the following:*
> *'I confirm my agreement to the variation of my terms and conditions of employment to place me on Furlough Leave as described in the letter from the company dated 24th April 2020'*

100. The claimant confirmed his agreement to being furloughed with effect from 27 April 2020 on the terms set out in the letter.

101. On 28 May 2020 the claimant received his pay for that month. He was paid less than 80% of his salary for the time during which he was on furlough. He emailed Mr Ramplin and Ms Smith that day saying: 'I was wondering if I could ask for some clarification as there appear to be some discrepancies in the furlough letter (attached) and the payslip/BACS payment which I received today.' He went on to raise a query about holiday accrual and pay before going on as follows: 'The second issue is the letter states under contractual variation my Furlough Pay will be based on 80% of my gross salary as at 1st April 2020 whereas the payment detailed on the payslip is 75% of that figure which is the retention scheme's cap. I couldn't in good conscience raise the matter retrospectively if I stood to benefit from the discrepancy especially if that was multiplied by the number of months furlough lasted.'

102. Ms Smith replied to the claimant's email about his furlough pay the next day. In her response she said '…In terms of payments to furloughed staff the company is

only in a position to make payments to staff to match the government funding that we receive. This is either at 80% of salary or to the £2,500 maximum grant that we receive. The £2,500 maximum cap is only applicable to a couple of our staff, yourself included. This could have been a little clearer in our letter, and so we will revise that and let you have an updated letter shortly….'

103. The respondent subsequently sent a letter to the claimant that was identical to the letter dated 24 April except for the third sentence under the heading 'Contract Variation', which now said 'Your Furlough Pay will be based on 80% of your gross salary as at 1st April 2020 excluding any fees, commission or bonus, although will be subject to the government grant cap of £2,500 per month.' Like the original letter of 24 April, this letter said 'we now require you to complete the following actions: …2. Confirm your agreement to proceed' and asked the claimant to confirm his agreement by email stating the following: 'I confirm my agreement to the variation of my terms and conditions of employment to place me on Furlough Leave as described in the letter from the company dated 24th April 2020'.

104. The claimant did not respond to that email either by sending an email to confirm his agreement to the changed terms or by telling anyone at the respondent company that he agreed to his furlough pay being capped at £2,500.

105. There is a conflict of evidence between the claimant and respondent as to whether Ms Smith told the claimant that his pay would be capped at £2,500 per month when she discussed furlough with him in April 2020. The claimant's evidence was that she did not. Ms Smith's evidence as to what she said was, we found, somewhat unclear. In her statement she said 'I had discussed with the claimant the fact that the amount he would receive on furlough would be in line with the government's scheme at 80% of salary although that would be subject to a cap of £2,500 per month.' She did not say when she had had that discussion, however. When questioned about this Ms Smith said that she had said this to the claimant in a discussion on 7 April. Although she could not recall the words used when talking to the claimant about being furloughed, she said she was 'pretty certain' she 'would have talked about a cap as it was quite prevalent in the advice' and that she believes she raised it in the context of describing the government scheme. She also said she believes she used similar words when talking to all staff about furlough. In her email of 29 May Ms Smith did not suggest that she had previously explained to the claimant that furlough pay from the company would be limited. We note that she referred in that email to the claimant being only one of two staff affected by the £2,500 limit. Looking at the evidence in the round, we are not persuaded that Ms Smith did tell the claimant that his pay from the company would be capped at £2,500 per month when she discussed furlough with him in April 2020. We find it likely that she told staff, when being furloughed, that they would be paid 80% of pay during furlough. We find it far less likely that she went further than that with the claimant and told him that his pay would be capped at £2,500 per month. Whilst it is possible that Ms Smith mentioned that the government grant scheme enabled the company to claim money from the government towards salaries during furlough, it does not follow from that that she told the claimant that the amount he would be paid during furlough would be limited to the amount claimable from the government.

106. In May 2020 Ms Smith's husband was taken on as an employee by the company. We accept Ms Smith's evidence as to why that was. Up until this time Ms Smith had carried out a number of her own administrative tasks. In the past, the Board had suggested to her that she should not be spending as much time on administrative matters. At this difficult time for the business it was even more important for her to focus and spend time on strategic and operational matters without the distraction of administration. She was doing a lot of work from home at this time. She agreed with her husband that he would take on a number of her administrative tasks. Consequently, he entered into a contract of employment with the company, his role being to help Ms Smith with administrative matters. The position was not advertised externally: the fact that Ms Smith was working from home so much meant that much of her paperwork was at home and there were advantages to having help at home, rather than remote assistance. Ms Smith took a salary reduction to fund his salary.

107. The cost saving measures the company introduced in March and April 2020 did not achieve sufficient savings to make the business profitable. Ms Smith and Mr Ramplin discussed this with the non-executive directors and together decided they should make some employees redundant to reduce costs further. In early June 2020 Ms Smith and Mr Ramplin decided that the respondent would need to make about 20 employees redundant. They agreed that Ms Smith would decide who would be made redundant in the Operations team and Mr Ramplin would do the same for the Finance team. Ms Smith and Mr Ramplin agreed to consult employee's individually about the redundancies. Mr Ramplin was responsible for consulting the Finance team. He also agreed to consult the claimant and two other employees from the Operations team as Ms Smith had more redundancy consultation calls to make than him.

108. On 29 June 2020 Ms Smith sent a letter to employees [210-211] telling them about the proposed redundancies and the redundancy consultation process which would be used. That letter was sent to most employees, including the claimant, but not to Mr Ramplin, Ms Smith, Ms Walker or Ms Smith's husband. The letter began by referring to the difficulties within the market resulting from the Covid-19 pandemic and significant reductions to the global oil price; the resulting reduction in business; the difficulty of forecasting how long the conditions would continue and the scale of disruption that the oil industry would suffer; and the measures that had already been taken to make cost savings. The letter went on

> *'Whilst industry demand continues to remain low we now believe that some current positions are unlikely to be supported by the business going forwards and need to consider any positions that may potentially become redundant. We will be considering all positions across the company, irrespective of whether staff are in work or on furlough leave, including the following roles: Recruitment Consultants, Support Coordinators, Quality, Finance Operations and Accounts. Unfortunately, your post is therefore one of those at risk of redundancy.'*

109. The letter went on to explain that the company would engage in a consultation process with staff, which period would last for a minimum of 30 days. The purpose of consultation was described as being to 'discuss and explore ways of avoiding or reducing the number of redundancies and reach agreement if possible; give you

the opportunity to make suggestions and raise any questions you may have; consider possible suitable alternative employment within the organisation; seek to agree criteria for selecting staff if redundancies are necessary; identify your needs during the process and provide you with any necessary support or assistance.' The letter went on to say 'We will keep you informed and involved throughout the process. In the next few days we will arrange an individual consultation meeting to discuss the issues outlined in this letter, and any other concerns that you may have.'

110. In a covering email sent to the claimant on 29 June Ms Smith told the claimant that Mr Ramplin would hold a telephone consultation 'meeting' with him on 1 July. She said 'the aim of the meeting will be to brief you on the process and also to get your comments, thoughts and feedback on how we can make some of the cost reductions that are necessary, so that we can give full consideration to your comments.'

111. By this time, although Ms Smith and Mr Ramplin had had a number of discussions about whether the company needed a dedicated Quality and Compliance Manager, no decision had yet been reached.

112. Ahead of the individual consultation discussions with affected employees, the respondent had prepared a document setting out what was to be discussed [206-7]. The document was used by Mr Ramplin and Ms Smith as a kind of agenda or script in meetings.

113. On 1 July 2020 Mr Ramplin telephoned the claimant as scheduled. He worked his way through the 'script/agenda' document. He asked the claimant if he had any thoughts as to how the company could make cost savings and so avoid or reduce redundancies and whether they could organise themselves differently or restructure or plan the future differently. The claimant offered some suggestions, including that he would be willing to take a lower salary, and said he had transferable skills that could be put to use doing other work, such as in operations or sales, if his role was reduced. He said it was reasonable to assume that the oil price would normalise and demand would recover post-Covid and that the company should continue to take advantage of the furlough scheme in the meantime.

114. They then came to the part of the agenda/script that dealt with selection for redundancy. The agenda/script said: 'If redundancies are necessary, we would consider using the following criteria within the section process: Capability and individual performance; Skills held by an employee including the variety and flexibility of skills; Length of service and experience; Attendance; Performance and disciplinary record.' Mr Ramplin said he tried to follow the script during this conversation. We infer that Mr Ramplin relayed that information to the claimant. This prompted the claimant to ask, understandably, who he would be compared against in this process. Mr Ramplin did not know the answer. The claimant made the point that his role was unique, a point with which Mr Ramplin agreed, and it would not be appropriate to put him in a pool for selection with others and apply the selection criteria. Mr Ramplin agreed with the claimant that this was a point that

needed to be addressed by Ms Smith. Mr Ramplin agreed to raise it with Ms Smith and they adjourned the call.

115. Mr Ramplin spoke to Ms Smith and explained what had been discussed. They agreed that Ms Smith would contact the claimant to continue the consultation with him.

116. The claimant also contacted Ms Smith on 1 July. He sent an email to her saying 'In response to your letter to all staff and interview with Carl today, I feel I would be appropriate to make some of my concerns known as attached. Out of respect to you this letter is draft form has not been seen by the other directors at this point. Although I alluded in my consultation interview that I would raise a matter directly with yourself, I have not discussed my concerns during the consultation interview and consequently probably not made full and correct use of the consultation process ...'

117. Attached to the email was a three-page letter and a number of other documents. After acknowledging that 'a review of business cost and company structure may be necessary', the claimant said 'for the reasons detailed below I have difficulty with any criteria that my role, skills, performance, and ultimately output might be measured upon prior to a decision of redundancy given that I have been unable to operate successfully in my role either directly due to the actions of the operations director or by carrying her position in the business at your direction. These factors have therefore made any criteria or testing that my role or performance may have been judged upon both unfair and leading to constructive dismissal.' He then suggested his performance, or the way his performance was perceived by others, had been affected by a number of issues, including: others taking credit for his efforts; an 'horrendous' workload; a toxic working environment. He said 'It is my strong preference to handle my concerns informally' but then added 'I'm sure you will agree that in all parties' interest to invite comment from the directors who may have the luxury of an impartial position regarding the events and/or an objective opinion of the operations director who indirectly or directly has caused these issues.'

118. The claimant then went on in the letter, over two pages, to set out a number of allegations, including that: he had been inhibited from performing his duty to inform the ICO of numerous data breaches; that in October 2019 Ms Walker had failed to notify the DPO or 'follow any data protocol upon the apparent theft of an unencrypted company laptop along with access passwords'; that Ms Walker had 'breached data protection laws pertaining to a colleague's sensitive personal data' and the subsequent investigation was 'subverted' by a friend of hers; that Ms Walker had, in January, 'detailed in open office a colleague's medical condition, symptoms along with time and location of her medical appointment'; and that he had subsequently been prevented from notifying the ICO. The claimant said 'I cannot accept that a DPO could be successful in regard to their responsibilities in a company where a director is in constant breach of data protection laws and senior management have no appetite to challenge such behaviours at best or at worst prohibit the DPO from fulfilling his duties.' The claimant then went on to allege that Ms Walker and Ms Smith had undermined and subverted the NCR process in relation to the Netherlands tax issue in November 2019.

119. The claimant ended the letter by describing himself as a 'whistleblower' and saying 'I believe I should be afforded due protection under company whistleblowing policy as well as employment law.' He added 'I believe the letter also aptly demonstrates my role has been spectrally and systematically undermined for a period of time which sets precedent for constructive dismissal and I have difficulty with any notion that the two are coincidental. It remains for me to inform you that I intend to reject any offer of redundancy and if the impasse remains will be forced to formally pursue unfair and constructive dismissal of an employee that should be regarded as a whistleblower against Oil Consultants.'

120. Ms Smith believed that the claimant's intention in that letter was to explain why he thought he should not be selected for redundancy and the claims he could make against the respondent. That being the case, and in light of the fact that the claimant had said the letter was in draft, Ms Smith did not understand the claimant to be raising a grievance under the respondent's formal grievance process.

121. On 2 July 2020 Ms Smith telephoned the claimant. He was in his car at the time and they agreed to speak later once he had returned home. Ms Smith called him back later that day. She made a note of the conversation as they were speaking [232]. She also made notes against a copy of the agenda/script document, which she went through with the claimant. During the call the claimant expressed concern about being compared to others who were not in similar roles and that he would be selected for redundancy on the basis of performance in comparison with others. Ms Smith explained that the claimant's role could not be compared with that of others and so would not be scored against redundancy criteria. She told the claimant that the issue in his case would be simply whether the respondent should economise by doing without his role. She explained that that was an economic decision, not reflective of his performance; and the decision as to whether the Quality Manager role was viable was one that would be made by her and Mr Ramplin and that Ms Walker would not be involved. The claimant did not say in this conversation that his email to Ms Smith of the previous day (and the draft letter attached) was intended as a grievance.

122. Ms Smith believed she had addressed the claimant's concerns about the redundancy selection process by explaining that selection criteria would not be applied to him because his role would not be pooled with others, that his performance was not a relevant factor, and that the question was one of whether his whether his role was economically viable.

123. The claimant suggested in the discussion that part of his role was comparable with the role of the Operations and Quality Coordinator, Ms Alexander. Ms Smith had already considered whether that was the case and she explained that to the claimant. She said the duties of the role of Operations and Quality Coordinator were substantially different to those of the claimant and it was a significantly more junior, and lower paid, position than that of the claimant and also Ms Alexander's role had changed when some staff were put on furlough on 1 April and she had agreed to work as a Support Coordinator. The claimant said he was willing to accept a pay cut in line with others in the company. He also suggested costs savings could be made with continued working from home and that the company

should keep people on furlough rather than making them redundant. In addition he said that the company could not do without quality.

124. During the conversation the claimant referred to obstacles having been put in his path which he considered 'constructive dismissal.' He did not suggest that he was resigning.

125. On 3 and 4 July the claimant spoke with Mr Ramplin and raised again the complaints he had put in his draft letter of 1 July. They agreed that Mr Ramplin would send an email to Ms Smith. On 6 July Mr Ramplin emailed Ms Smith summarising what he and the claimant had discussed [238]. He said 'Phil clearly believes that over the past months there have been concerted efforts by Kelly to undermine him and his efforts in the business to the point that: he could not be properly assessed over measures under a consultation process; his reputation has been damaged by the continual 'sleeve tugging'; there are sufficient untruths or exaggerations that there would be no opportunity to rationally review performance; he clearly tried to work effectively with [Ms Walker] and it was only a short time before her tricks started again.' He went on to say the claimant does not want to be made redundant, although he acknowledges that there are economic considerations that may result in redundancy. Mr Ramplin added that the claimant 'feels that raising a grievance under constructive dismissal is his only option. He has more examples which will be verified by other staff members as required…'

126. Ms Smith understood the email to be no more than Mr Ramplin reporting to her what the claimant had said to him. She did not understand the email to be the claimant raising a formal grievance.

127. Ms Smith considered that the things he said about Ms Walker and the difficulties in assessing his performance were not relevant to the issue of whether the claimant's role should be made redundant. For Ms Smith, the relevant issue the company had to decide was whether the respondent should continue to employ someone in the role the claimant held in the future.

128. On 20 July 2020 Ms Smith emailed the claimant [242]. She referred to the claimant's initial consultation call with Mr Ramplin, his letter of 1 July, and subsequent conversations and said she was contacting him to clarify matters in writing. She explained that, when the claimant and Mr Ramplin had had their first consultation call, Mr Ramplin had run through a 'standard set of points' that were not all relevant to the claimant. She reiterated that the criteria based scoring approach, and the selection criteria it was based on, were being applied in other teams where several individuals held identical roles and the number of such roles was being reduced but was not relevant to the claimant as the Quality Manager role did not have any comparable roles and therefore could not be scored or compared with other post holders. Ms Smith acknowledged that Mr Ramplin's reference to the selection criteria may have caused some confusion and concern to the claimant. She also confirmed that the economic review of the Quality Manager post would be conducted by herself and Mr Ramplin and would turn on whether the company was able to afford the position. Ms Smith also referred to some of the complaints the claimant had raised in his letter.

129. On 23 July 2020 the claimant replied to Ms Smith by email, attaching a long letter. The letter is said to contain the twelfth Protected Disclosure. He began the letter by saying he was 'underwhelmed and disappointed by the fact that a formal grievance was raised nearly 3 weeks ago, and your reply fails to address any of the concerns raised.' He asserted that 'the grievance' had become 'formal' by virtue of Ms Smith having shared his draft letter of 1 July with Mr Ramplin. The claimant suggested, again, that there had been 'a sustained a deliberate endeavour to constructively dismiss' him and that efforts were being made to avoid addressing the concerns he had raised about data breaches and he asked why he had not been invited to a grievance meeting. The claimant went on, in the letter, to make similar points to those he had made in his draft letter of 1 July. He then said 'I have been and continue to be constructively dismissed as a whistle blower; the working environment that the Operations Director has created breaches the employment rights of myself and the wider staff; management have continually turned a blind eye to her behaviour and mismanaged the situation; action plans implemented have failed or have otherwise been uncommitted to in efforts to resolve the issue or rectify the working environment or many of the detrimental aspects of the working environment; and your tolerance of the Operations Director's sustained behaviour was at the expense of the wider staffs' employment rights which is also contrary to company policy.' He added that he believed that redundancy 'would seem to be a foregone conclusion in support of the Operations Director's endeavour to constructively dismiss me.' He concluded by saying he wanted his letter to be treated as a formal grievance.

130. Ms Smith responded by email the following day, which was a Friday. She acknowledged that the claimant wished to raise a formal grievance and told the claimant they needed to review the points he had raised in detail and were aiming to revert back to him as soon as possible early the following week. The next Tuesday Ms Smith emailed the claimant again saying that, having read the letter carefully, it was not clear to her what grievance the claimant was raising. She pointed out that many of the matters to which he referred had been already been considered and dealt with by the company. She asked the claimant if he could specify the grievance he wanted to raise, in bullet points format if possible, and said she would then arrange for it to be addressed.

131. Ms Smith and Mr Ramplin had several discussions in July 2020 about what costs they needed to save, what redundancies should be made and, in particular, whether the claimant's position should be made redundant and whether any alternative employment was available which could be offered to the claimant, or if any other steps could be taken to avoid his redundancy. They had started discussing whether the claimant's role was necessary in April 2020 and discussed the issue again on a number of occasions over the following months and into July. One of the issues they considered was whether the claimant and others should be kept on furlough instead of being made redundant. They decided against that, however, because the furlough scheme was due to change, meaning that there would in future be some increased costs in connection with furloughed staff and they considered it imperative to reduce costs as much as possible as business was still decreasing in June and July and they believed there was no economic recovery in sight.

132. As his line manager Ms Smith had a better understanding than Mr Ramplin of the day to day duties and work carried out by the claimant and how these were managed in the business. The workload of the claimant's role had reduced because of the drop in the demand for recruitment in the oil and gas industry. As he was on furlough his work was already being done by others, including Ms Smith herself. She believed that, in the future, the essential elements of the claimant's role could be carried out by others, as had been the case before he was appointed. Taking all of that into account, Ms Smith decided, towards the end of July 2020, that in the economic situation the company faced the claimant's role should be made redundant. She made the final decision to make the role redundant on her own without involving Mr Ramplin. Mr Ramplin's evidence, which we accept, is that he was unsurprised that Ms Smith had concluded that the company could manage without a Quality and Compliance Manager. He had, however, thought that Ms Smith might delay terminating the claimant's employment because the claimant had raised a grievance.

133. We accept Ms Smith's evidence that Ms Walker was not involved in the discussions or decisions about whether to put the claimant on furlough or to make his role redundant, or in his redundancy consultations or in the termination of his employment.

134. Ms Smith told the claimant of her decision by letter of 30 July [260]. The letter notified the claimant that it was no going to be possible to continue the claimant's role, that there were no suitable roles into which the claimant could be redeployed and that his employment would end on 31 July 2020. The letter explained the claimant had a right of appeal. Thirteen other employees were made redundant on the same day.

135. After learning that he was to be made redundant the claimant emailed Ms Smith to tell her that it would not be appropriate to continue with his grievance as an ex-employee.

136. Before his employment ended, the claimant had enrolled on a course with Kaplan Financial. When an employee leaves the business it is the respondent's standard practice that emails received for them are auto directed to the respective line manager. This is what happened after the claimant left: emails to the claimant's business email address were directed to Ms Smith. On or around 20 August 2020 a call was taken by the respondent's call centre for the claimant from Kaplan Financial which asked him to urgently return the call. The call was directed to Ms Smith to return the call as per standard procedure. The caller advised he was calling regarding the claimant's course. He had already spoken to the claimant that morning about his course during which the claimant had stated that there was some restructuring being undertaken by the respondent but the caller was under the impression that the claimant remained an employee of the respondent. Ms Smith told the caller that the claimant was no longer employed by the respondent although he had been at the time of his enrolment. The caller said he would contact the claimant on his mobile phone.

137. Ms Smith's evidence was that what she said to Kaplan Financial was not influenced in any way by any of the disclosures the claimant claims to have made.

Conclusions

Claim of breach of contract/unlawful deduction from wages

138. We have found as a fact that Ms Smith did not tell the claimant that his pay from the company would be capped at £2,500 per month when she discussed furlough with him in April 2020.

139. It is common ground that the terms on which the parties agreed the claimant would be paid were those set out in the respondent's letter sent to the claimant on 24 April 2020. The question for us to decide is whether, properly construed, the agreement was to pay the claimant 80% of his salary (as the claimant contends) or £2,500 per month, as contended for by the respondent.

140. Mr Gillie submitted that a reasonable person having all the background knowledge which would have been available to the parties would have understood the letter sent to the claimant on 24 April to mean the respondent would pay the claimant a maximum of £2,500 per month, being the most it could claim from the Government towards the claimant's salary under the furlough grant scheme as it then stood. He submits that this was because the 'overall purpose' of the contractual variation was to take advantage of the furlough scheme in lieu of paying its employees. He further submits that the respondent assumed the cap would apply, the claimant was aware of the cap and did not say it should not apply, and the construction contended for by the claimant would produce an unreasonable result.

141. We reject the construction of the contract contended for by the respondent for the following reasons:

141.1. The letter of 24 April plainly stated 'Your Furlough Pay will be based on 80% of your gross salary as at 1st April 2020 excluding any fees, commission or bonus.'

141.2. That clear statement appeared in a section of the letter headed 'Contract Variation'. In our judgement, that section of the letter was intended to set out the changes to the contract that the parties were agreeing to. That construction of the letter is further supported by the fact that the terms 'Furlough Pay' and 'Furlough Leave' are capitalised and the letter ends with the following statements: 'It is important that we have a record of your agreement to the terms in this letter as an indication of your agreement in order to place you on Furlough Leave and pay you Furlough Pay. Please confirm your agreement by email stating the following: 'I confirm my agreement to the variation of my terms and conditions of employment to place me on Furlough Leave as described in the letter from the company dated 24th April 2020.'

141.3. That wording demonstrates that the respondent, in sending the letter, was inviting the claimant to agree to a period of leave, which it described as 'Furlough Leave', on the terms set out in the section of the letter headed 'Contract Variation'. One of those terms was the payment of 'Furlough Pay', which the respondent said would be '80% of your gross salary'. There is no

mention in that section of the letter to the claimant's pay from the respondent being capped at £2,500 per month.

141.4. The only mention of any 'maximum' of £2,500 per month appears in the part of the letter prior to the section headed 'Contract Variation'. It is clear that, there, the respondent was explaining the grants it could claim under the Coronavirus Job Retention Scheme (CJRS), which was launched by the government in April 2020 to support businesses affected by the Covid pandemic. At that time the scheme offered businesses the opportunity to apply for a grant equivalent to 80% of employee wages (capped at a maximum of £2,500 per employee per month) for all employees who were furloughed as a result of Covid.

141.5. Although there was a limit to the grant available to employers, the amount the employer was contractually obliged to pay an employee during furlough was a matter for agreement between the employer and employee. Nowhere in the letter did the respondent say that the amount it would pay to the claimant was limited to the amount of any grant it could recover from the government. Nor, we find, was that implicit. Although it was a condition of claiming a grant under the CJRS that the employer paid the employee in question at least 80% of their wages or £2,500 per month, whichever was lower, there was nothing in the CJRS scheme to prevent an employer paying more than that minimum amount. It does not follow from the fact that the respondent did not need to pay more than the minimum in order to claim a grant that it must have only intended to pay that minimum. Still less does it mean that the claimant must have shared that intention. It was not open to the respondent to unilaterally reduce the claimant's pay as it saw fit. Had the claimant not agreed to be furloughed and to take a reduction in salary, the respondent would not have been able to reduce his pay without being in breach of contract. Any reduction required the claimant's agreement.

142. In our judgement, a reasonable person having all the background knowledge which would have been available to the parties would have understood the letter sent to the claimant on 24 April to mean that the respondent would pay to the claimant during furlough leave an amount equivalent to 80% of his salary and not that the amount paid would be capped at £2,500 per month. Neither the fact that the amount the respondent could claim from the government towards the claimant's wages was limited to £2,500, nor the fact that the claimant knew that was the case, detract from the plain words used by the respondent in setting out the terms of the proposed variation. We reject Mr Gillie's submission that such a construction produces an 'unreasonable' result or one which undermines the purpose of the agreement: by furloughing the claimant the respondent was able to take advantage of the CJRS and, in doing so, received a substantial financial contribution to the claimant's wage costs.

143. As noted above, questions put to the claimant by Mr Gillie during the hearing suggested that the respondent may be arguing that even if the parties originally agreed that the claimant would be paid 80% of his pay while furloughed, the parties subsequently agreed (after the claimant, on 28 May 2020, drew attention to the fact that he had been paid less than 80%) that the claimant's pay would be limited to £2,500 per month. That argument was not pursued in submissions by Mr Gillie. Nevertheless, we have considered the matter.

144. On 29 May 2020, Ms Smith told the claimant the respondent was 'only in a position to make payments to staff to match the government funding that we receive'. She subsequently sent the claimant an amended version of the letter of 24 April, this time saying 'Your Furlough Pay will be based on 80% of your gross salary as at 1st April 2020 excluding any fees, commission or bonus, although will be subject to the government grant cap of £2,500 per month.' That was an offer to vary the terms of the claimant's contract. Like the original letter of 24 April, this letter said 'we now require you to complete the following actions: …2. Confirm your agreement to proceed' and asked the claimant to confirm his agreement by email stating the following: 'I confirm my agreement to the variation of my terms and conditions of employment to place me on Furlough Leave as described in the letter from the company dated 24th April 2020'. The claimant did not respond to that email either by sending an email to confirm his agreement to the changed terms or by telling anyone at the respondent company that he agreed to his furlough pay being capped at £2,500. We find, therefore, that the claimant did not expressly accept the proffered variation.

145. As for whether the claimant impliedly accepted such a variation by his conduct we note that the claimant did not express any objection to the proposed variation at the time it was suggested. Indeed, his own email of 28 May was somewhat ambiguous and could be interpreted as inviting the respondent to take the course it did. Nor did the claimant voice any objection when he received his pay (£2,500) at the end of June 2020 or in July 2020. We consider it a relevant fact, however, that by the end of June and through July 2020 the claimant knew he was at risk of redundancy and that, therefore, his employment may well be ending soon. Also of great significance, in our view, is the fact that the claimant did not use the method of acceptance of the new terms specifically called for in the revised letter, namely sending an email containing the prescribed wording.

146. Looking at the evidence in the round, we do not find that the claimant's conduct, by not responding to Ms Smith's email of 29 May, not responding to the letter setting out the proposed reduction in salary, and continuing to take a reduced salary for two months without raising any further objection are only referable to the claimant having accepted the new terms imposed by the respondent. The claimant's conduct did not clearly evince an intention to agree to his pay being capped at £2,500 per month. Indeed, the failure to expressly agree to the reduction as requested by the respondent implies that the claimant did not agree to the variation. Accordingly, we find that the claimant did not accept a variation by conduct.

147. From the date his period of furlough leave began until his employment was terminated the claimant was contractually entitled to be paid 80% of his gross salary. For the purposes of s13 of the Employment Rights Act 1996, that was the amount 'properly payable' to him. The respondent paid the claimant less than was contractually due to him (and therefore properly payable) for the date his period of furlough leave began until his employment was terminated. In doing so, the respondent breached the claimant's contract of employment and made an unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996.

148. The Tribunal expects the parties to agree the amount due to the claimant as damages for breach of contract and/or the amount that the respondent should be ordered to pay under ERA s24. If they cannot agree then the matter will have to be determined at a remedy hearing.

Claims of detriment on grounds of protected disclosures

149. All of the alleged detrimental acts or omissions in this case were done by either Ms Smith or Ms Walker. Those things could only have been done on the ground that the claimant made a protected disclosure if, at the time they did the alleged act or deliberate omission, they were aware of the things the claimant had said that he relies on as being a protected disclosure.

150. Two of the alleged protected disclosures were made to people other than Ms Smith or Ms Walker. They are:

150.1. the claimant telling Mr Ramplin that the Netherlands tax issue was not limited to the two original incidents and that he had identified approximately 10 jobs where the taxes were incorrect (which the claimant refers to as the second protected disclosure); and

150.2. the claimant telling Mr Parker that he believed Ms Walker was 'ruling the office by force' (which the claimant refers to as the eighth protected disclosure).

151. We have found that Ms Smith was unaware of what the claimant had said to Mr Ramplin and Mr Parker. It follows that her actions cannot have been influenced by those alleged protected disclosures.

152. Nor is there any evidence that Ms Walker knew what the claimant had said to Mr Ramplin and Mr Parker on those occasions. Mr Ramplin did not suggest in evidence he had told Ms Walker, or anyone else, what the claimant had said to him. Nor is there any reason to suppose Mr Parker told Ms Walker what the claimant said to him about her in their conversation in a pub. We are not satisfied that Ms Walker was aware of the things the claimant said that he relies on as the second and eighth protected disclosures. It follows that her actions cannot have been influenced by those alleged protected disclosures.

153. It is unnecessary for us to consider further whether what the claimant said to Mr Ramplin was a protected disclosure given that we have found that it did not influence either Ms Walker or Ms Smith.

154. It is, however, clear that the statement made by the claimant to Mr Parker that he believed Ms Walker was 'ruling the office by force' did not contain sufficient factual content and specificity capable of tending to show that a person had failed, was failing or was likely to fail to comply with a legal obligation to which they were subject, or that the health or safety of any individual had been, was being or was likely to be endangered, or that such matters had been, was being or was likely to be deliberately concealed. Therefore, it was not, in any event, a protected disclosure as alleged.

155. Similarly, neither of the following statements made by the claimant contained sufficient factual content and specificity capable of tending to show that a person had failed, was failing or was likely to fail to comply with a legal obligation to which they were subject, or that the health or safety of any individual had been, was being or was likely to be endangered, or that such matters had been, was being or was likely to be deliberately concealed:

155.1. The email the claimant forwarded to Ms Smith on 30 January 2020 in which he said a colleague had raised a concerns about Ms Walker behaving in an 'aggressive and/or passive aggressive' way towards her and others (the seventh alleged protected disclosure).

155.2. The claimant's statement to Ms Smith on or around 3 March 2020 that 'things are still not right' (the ninth alleged protected disclosure).

156. It follows that they were not protected disclosures.

The complaint that, on 20 November 2019, Ms Walker directed the Claimant to desist from conducting an NCR investigation.

157. This complaint concerns Ms Walker's email the claimant of 20 November in which she said they needed to be aware of any ongoing NCR in relation to the Netherland's tax issues, expressing concern about adding an NCR and saying that her understanding was that they 'didn't want to raise as an NCR, and would put in preventative action internally, which has already been completed.' We have found that Ms Smith asked Ms Walker to send that email.

158. Ms Walker sent her email after the claimant's conversation with Ms Smith on 4 October 2019, in which he made a comment about data loss in connection with his belief that Ms Walker had lost her laptop (which the claimant submits was the first protected disclosure).

159. In our judgment there is no proper basis on which we could conclude that Ms Walker's decision to send her email of 20 November was in any way influenced by what the claimant said on that occasion. There is no evidence that Ms Walker even knew what the claimant had said or indeed that he had said anything at all to Ms Smith about her laptop. We find that Ms Walker's actions in sending this email were not materially influenced by the first alleged protected disclosure.

160. As for Ms Smith's actions in asking Ms Walker to send the email, we find Ms Smith did that because she had decided that a report into what had gone wrong and how a recurrence should be prevented could not be completed until they had a better understanding of what had happened and the extent of the problem and that, therefore, they should delay creating an NCR until matters had been investigated more fully.

161. We are satisfied that that decision had nothing to do with what the claimant had said to Ms Smith about Ms Walker's laptop several weeks earlier. Ms Smith knew that Ms Walker had not had her laptop stolen and there had been no data loss. She knew the claimant was labouring under a misunderstanding about what had happened and had no reason to be concerned should the claimant refer the matter

to the ICO. It is fanciful to suggest that her later actions in an entirely different and unconnected context were influenced in any way by what the claimant said about Ms Walker's laptop.

162. Nor can Ms Walker's actions in sending this email, or Ms Smith's actions in asking her to send it, have been influenced by any of the subsequent alleged protected disclosures, all of which happened after this alleged detrimental treatment.

163. That being the case, this complaint is not made out.

164. It is unnecessary for us to determine whether Ms Walker's instruction constituted a detriment to the claimant.

The complaint that Ms Walker sent Ms Smith a document that the claimant had annotated.

165. This complaint concerns the email Ms Walker sent to Ms Smith on 29 January 2020 to which Ms Walker attached a copy of a document she had seen the claimant discussing with a colleague, annotating, scanning and shredding. That document was a copy of an email Ms Smith had sent to a different employee about her maternity leave.

166. In light of what Ms Walker said in her email to Ms Smith on that date, we find that the reason Ms Walker sent the email to Ms Smith was that she had discovered that the claimant and a colleague (Nicole) had in their possession and were discussing – in a secretive manner - and making notes on a letter that Ms Smith had sent to a different employee about a matter that was personal to that employee, before scanning and shredding the document. Ms Walker had no way of knowing that the employee had asked the claimant, as a friend, for advice about the contents of the letter. Most managers would have been somewhat concerned by the actions of the claimant and his colleague and alerting the claimant's line manager was obviously an appropriate thing to do.

167. Ms Walker sent her email after the claimant's conversation with Ms Smith on 4 October 2019, in which he had made a comment about data loss in connection with his belief that Ms Walker had lost her laptop (which the claimant submits was the first protected disclosure). There is no proper basis for concluding that Ms Walker's decision to email Ms Smith on 29 January 2020 attaching the document she had seen the claimant annotating was in any way influenced by what the claimant said to Ms Smith on 4 October 2019 about Ms Walker's laptop (the first alleged protected disclosure). As noted above, there is no evidence that Ms Walker even knew what the claimant had said.

168. Nor is there any proper basis for inferring that Ms Walker's decision to email Ms Smith on this occasion was in any way influenced by the fact that, at a meeting two months earlier the claimant had said about the Netherlands tax issues that the issue was widespread, that the company was evading tax and that they could be fined (the third alleged protected disclosure).

169. We find that Ms Walker's actions in emailing Ms Smith on 29 January 2020 were not materially influenced by the first or the third alleged protected disclosures.

170. Nor can Ms Walker's actions in sending this email have been influenced by any of the subsequent alleged protected disclosures, all of which happened after this alleged detrimental treatment.

171. This complaint is not made out.

The complaint that the respondent failed to follow the grievance policy and procedure on or around 30 January 2020.

172. This complaint concerns the fact that, when the claimant complained to Ms Smith about Ms Walker in the meeting they had after Ms Smith returned from the USA (not on 30 January 2020, but soon after), Ms Smith did not treat those complaints as grievances under the respondent's grievance procedure.

173. In that meeting, however, the claimant only said that he was considering raising a grievance. Having given the matter more thought he decided not to raise a grievance. No reasonable worker in the position of the claimant would or might have taken the view that it was to their detriment that Ms Smith did not deal with the claimant's complaints as a grievance under the company policy. That was not a detriment to the claimant.

174. This complaint is not made out.

The complaint that Ms Walker made a false allegation to Ms Smith that the claimant had effectively disclosed sensitive personal data about two employees.

175. This complaint concerns the fact that, at some point before 5 March 2020, Ms Walker relayed to Ms Smith an allegation made by another employee that the claimant had said something about two colleagues who had had an accident at work and had referred to them as 'Tweedle Dum and Tweedle Dee', and that by doing that the claimant had effectively revealed their identities (as a married couple employed by the company) and disclosed information about injuries they had sustained in an accident at work.

176. There is no evidence that Ms Walker knew of any of the following:

176.1. The fact that, in a conversation with Ms Smith on 4 October 2019, the claimant had accused Ms Walker of data breaches (the first alleged protected disclosure).

176.2. The email the claimant forwarded to Ms Smith on 30 January 2020 in which he said a colleague had raised a concerns about Ms Walker behaving in an 'aggressive and/or passive aggressive' way towards her and others but did not want to take the matter further (the seventh alleged protected disclosure, which we have in any event found was not a qualifying disclosure).

176.3. The complaints the claimant made about Ms Walker when he met with Ms Smith upon her return from the USA (the fourth, fifth and sixth alleged protected disclosures).

176.4. The fact that the claimant said to Ms Smith on or around 3 March 2020 'things are still not right' (the ninth alleged protected disclosure, which we have in any event found was not a qualifying disclosure).

177. We find that none of those matters influenced Ms Walker to relay this complaint to Ms Smith.

178. Nor is there any proper basis for inferring that Ms Walker's decision to relay this allegation to Ms Smith was in any way influenced by the fact that, at a meeting two months earlier the claimant had said about the Netherlands tax issues that the issue was widespread, that the company was evading tax and that they could be fined (the third alleged protected disclosure).

179. We find that Ms Walker's actions in relaying the allegation to Ms Smith were not materially influenced by any alleged protected disclosures made by the claimant.

180. This complaint is not made out.

The complaint that the respondent placed the Claimant on furlough leave.

181. We are satisfied that the reason the claimant was placed on furlough leave was in order to reduce wage costs in response to a significant downturn in business experienced by the respondent.

182. We are satisfied that the decision to place the claimant on furlough was not materially influenced by any of the things the claimant said that he relies on as protected disclosures. We say that for the following reasons:

182.1. The claimant was one of a number of employees placed on furlough leave. He was not singled out for such treatment. Nor was he one of the first to be placed on furlough.

182.2. The claimant was only furloughed after it became apparent that he was not going to be mobilised. By this time, not only had the work that needed to be done in his role reduced somewhat due to the general downturn in business, but arrangements had already been made to distribute the claimant's duties to others because it was thought he would be mobilised. It made sense to place the claimant on furlough and benefit from the grant available to pay towards his salary.

182.3. The claimant himself acknowledged at the time that he would understand if he was placed on furlough and in April agreed to go on furlough.

183. This complaint is not made out.

The complaint that the respondent reduced the Claimant's pay by 25% and failed to top up his salary.

184. The fact that the claimant's pay was reduced was simply a consequence of the decision to place the claimant on furlough. As recorded above, we have found that the claimant had agreed to his pay being reduced to 80%, which was the same arrangement made with all other employees who were furloughed. The respondent in fact reduced the claimant's pay to below the 80% agreed by the claimant. We find that had nothing to do with any of the things said by the claimant that are alleged to constitute protected disclosures: the reason the respondent reduced the claimant's pay to £2,500 per month was that this was the limit of what they could recover from the government grant scheme and they misunderstood the contractual obligations they had entered into with the claimant.

185. This complaint is not made out.

The complaint that the respondent failed to follow the grievance policy and procedure on or around 1, 3, 4, 23 and 28 July 2020.

186. The claimant's case is that Ms Smith deliberately failed to treat the email he sent her and its attachment as a grievance and deal with it under the respondent's grievance procedure, and that she did so because it contained protected disclosures and because he had made protected disclosures in the past.

187. We reject this complaint.

188. Th ereason Ms Smith did not treat the claimant's letter and attachment as a grievance that ought to be dealt with under the grievance procedure was that she, quite reasonably, did not think he intended it to be so treated. Rather, Ms Smith believed that the claimant's intention in that letter was to explain why he thought he should not be selected for redundancy and the claims he could make against the respondent if he was. Ms Smith had good reason for her belief. The claimant had himself described the attachment as a 'draft letter'. That implied that it was not intended to be treated as a grievance under the grievance procedure (which procedure says an employee must 'tell us clearly that you want to lodge a formal grievance'). In any event, and crucially, it was clear from the timing of the email (immediately after the abortive first redundancy consultation call with Mr Ramplin), the reference in the covering email to the consultation process and the opening paragraphs of the draft letter that the claimant's concern was with the redundancy selection process and stemmed from his belief that it would not be fair to apply selection criteria to him. The various complaints set out in the draft letter must be seen in that context. That being the case, and in light of the fact that the claimant had said the letter was in draft, Ms Smith did not understand the claimant to be raising a grievance under the respondent's formal grievance process. Furthermore, the following day, Ms Smith explained that the claimant's role could not be compared with that of others and so would not be scored against redundancy criteria. The claimant did not say in this conversation that his email to Ms Smith of the previous day (and the draft letter attached) was intended as a grievance and Ms Smith believed she had addressed the claimant's concerns about the redundancy selection process by explaining that selection criteria would not be applied to him because his role would not be pooled with others, that his performance was not a relevant factor, and that the question was one of whether his whether his role was economically viable.

189. We find that no reasonable worker in the claimant's position could have taken the view that they had been disadvantaged by Ms Smith failing to treat the claimant's email and draft letter of 1 July as a grievance under the company's grievance procedure. There was no detriment to the claimant. Even if there was, the reason for failing to treat the email and draft letter as a grievance was that Ms Smith simply did not think it was a grievance.

190. The claimant submits that Ms Smith should also have treated him as having submitted a grievance after Mr Ramplin emailed her on 6 July summarising what he and the claimant had discussed over the weekend. We have found, however, that Ms Smith understood the email to be no more than Mr Ramplin reporting to her what the claimant had said to him. She did not understand the email to be the claimant raising a formal grievance. Again, the claimant's concerns were centred on the redundancy selection process rather than anything independent of that and Ms Smith thought she had addressed the claimant's concerns by explaining that the claimant would not be subject to any selection process and that the issue was one of whether his role remained economically viable. In the circumstances, we are satisfied that the reason Ms Smith did not treat the claimant as having raised a grievance under the grievance procedure was that she did not believe he had done so.

191. In an email of Thursday 23 July 2020 the claimant made further complaints. His case is that Ms Smith subjected him to detriment on the ground that he made a protected disclosure by failing to then arrange a meeting under the grievance procedure within 5 days. It is correct to say that Ms Smith did not arrange a meeting within 5 days. However, that was not an absolute requirement of the company's policy. Ms Smith responded promptly to the claimant's email, acknowledging that the claimant wished to raise a formal grievance and telling the claimant they were aiming to revert back to him as soon as possible early the following week. Early the next week Ms Smith emailed the claimant again saying it was not clear to her what grievance the claimant was raising and asking him to specify the grievance he wanted to raise, in bullet points format if possible, and said she would then arrange for it to be addressed.

192. We accept that the reason Ms Smith did not immediately arrange a grievance meeting was that it was not clear from the claimant's long letter what he wanted the respondent to address that had not already been dealt with previously. In the circumstances, asking the claimant to clarify his grievances was a perfectly proper and reasonable thing for Ms Smith to do. No reasonable worker in the claimant's position could have taken the view that they had been disadvantaged by Ms Smith failing to immediately arrange a meeting with him and instead asking for clarification of the grievance. There was no detriment to the claimant.

193. This complaint is not made out.

The complaint that the respondent failed to follow the redundancy policy and procedure.

194. The respondent did not have a redundancy policy and procedure, a fact that the claimant acknowledged after he was directed to provide information about the policy and procedure referred to.

195. Having acknowledged that the respondent did not have a redundancy policy and procedure the claimant suggested that the respondent had failed to follow 'the ACAS Code'.

196. ACAS does not have a Code of Practice governing redundancy situations. It does have a Code of Practice on Discipline and Grievance but, as recorded above, that policy clearly states that it does not apply to redundancy situations. We, therefore, reject the claimant's claim that the respondent subjected him to detriment by deliberately failing to follow a 'redundancy policy and procedure'.

197. The claimant also suggested that the statement made by Ms Smith in her email of 20 July 2020 that the economic review of the Quality Manager post would be conducted by herself and Mr Ramplin was a redundancy policy and procedure that the respondent failed to follow because Ms Smith took the decision to delete his post herself. We reject the contention that the fact that Ms Smith took the decision to delete the claimant's post herself constituted a failure to follow a 'redundancy policy and procedure'. Ms Smith's statement that she and Mr Ramplin would be conducting an economic review of the claimant's post was not a 'redundancy policy and procedure'. In any event, Ms Smith and Mr Ramplin spoke on several occasions about whether the claimant's position should be made redundant: Ms Smith's eventual decision was not made without consultation with Mr Ramplin. In that sense the 'economic review of the Quality Manager post' was conducted by them both. To the extent that the eventual decision was taken by Ms Smith, we find that it was not a detriment as a reasonable worker would not have taken the view that that was to their disadvantage that a decision as to the viability of their role was taken by the person who was most familiar with their role and what the department required ie Ms Smith.

198. Furthermore, we accept that the decision was made by Ms Smith because she had a better understanding than Mr Ramplin of the day to day duties and work carried out by the claimant and how these were managed in the business. We are satisfied that that decision was not materially influenced by any of the things the claimant said that were alleged to constitute protected disclosures.

199. This complaint is not made out.

The complaint that Ms Smith notified Kaplan Financial that the Claimant was not working for the Respondent and failed to inform them this was due to redundancy

200. This complaint concerns the fact that, when someone from Kaplan Financial telephoned the respondent company to speak with the claimant, Ms Smith told the caller that the claimant was no longer employed by the company. That was a straightforward statement of fact made in response to someone who had contacted the company because they wanted to speak with the claimant. Ms Smith's response to the caller was entirely proper and uncontroversial. No reasonable

worker in the claimant's position could have taken the view that it was to their detriment.

201. The claimant objects to the fact that Ms Smith did not tell the caller that his employment had ended due to redundancy. However, Ms Smith had no reason to divulge anything to the caller about the circumstances of the claimant's departure and there is no proper basis for an inference that she deliberately decided not to tell the caller the reason for the claimant's departure because the claimant had previously said the things that he relies on as alleged protected disclosures.

202. In any event, the claimant himself could have told Kaplan Financial of the reason for the termination of his employment if he thought it important that they know. No reasonable worker in the claimant's position could have taken the view that it was to their detriment that Ms Smith did not volunteer that information to the caller.

203. This complaint is not made out.

204. In light of those conclusions, it is unnecessary for us to make any further findings as to whether any of the things the claimant said constituted qualifying, and therefore protected, disclosures.

205. None of the claimant's complaints that the respondent contravened section 47B of the Employment Rights Act 1996 by subjecting him to detriments on the ground that he made a protected disclosure are well founded.

Claims about dismissal

Reason for dismissal

206. The decision to terminate the claimant's employment was taken by Ms Smith.

207. Before the dismissal, the respondent had experienced a very severe reduction in its business as a result of the global pandemic and the reduction in oil prices. The respondent had taken a number of steps aimed at reducing costs, including putting employees on furlough, salary reductions and ending bonus schemes. The cost saving measures the company introduced in March and April 2020 did not achieve sufficient savings to make the business profitable. Ms Smith, Mr Ramplin and the non-executive directors together decided they should make some employees redundant to reduce costs further. In June, all but a handful of the company's employees were told they were at risk of redundancy. Ms Smith and Mr Ramplin consulted those affected about proposed redundancies, including the claimant. Ms Smith and Mr Ramplin had a number of discussions about whether the company needed a dedicated Quality and Compliance Manager. The workload of the claimant's role had reduced because of the drop in the demand for recruitment in the oil and gas industry. Furthermore, as he was on furlough his work was already being done by others. In July 2020 Ms Smith decided the company could manage without a dedicated Quality and Compliance Manager. She believed that, in the future, the essential elements of the claimant's role could be carried out by others, as had been the case before he was appointed. Taking

all of that into account, Ms Smith decided, towards the end of July 2020, that in the economic situation the company faced the claimant's role should be made redundant in order to save costs. The claimant was one of several employees dismissed at the end of July 2020. The reason for his dismissal was given as redundancy at the time.

208. We are satisfied that the only reason the claimant was dismissed is that Ms Smith decided that the company no longer needed a dedicated Quality and Compliance Manager and, consequently, decided to abolish the post that the claimant held.

209. The respondent's need for an employee to undertake the particular work of a Quality and Compliance Manager had ceased and the claimant's dismissal was wholly attributable to that fact. We conclude, therefore, that the claimant is to be taken to have been dismissed by reason of redundancy, which is a reason for dismissal within section 98(2).

210. The reason for the claimant's dismissal was not that he made a protected disclosure. Therefore, the complaint that the dismissal was unfair by virtue of section 103A of the Employment Rights Act 1996 is not well founded.

Ordinary unfair dismissal – reasonableness

211. The claimant was given ample warning that he may be made redundant. It was, or should have been, clear to the claimant that his job was at risk as soon as he received Ms Smith's letter and email of 29 June 2020.

212. One of the claimant's criticisms of the respondent concerns the identification of the pool of candidates from which his selection was made. In this case, the claimant was not pooled with others. The claimant's position is that he should have been.

213. We are satisfied that, after the claimant raised the issue of pooling at his first consultation call with Mr Ramplin, Ms Smith genuinely applied her mind to the issue. She decided that the claimant was in a singular role – as he clearly was and as the claimant had himself suggested to Mr Ramplin the previous day - and that it was not appropriate to put him in a pool for selection with others. She considered whether, as the claimant suggested, his role was comparable with the role of the Operations and Quality Coordinator, Ms Alexander, and decided it was not, for reasons Ms Smith explained to the claimant on 2 July. We find that the respondent's decision not to place the claimant in a pool for selection with others was within the range of reasonable approaches open to a reasonable employer.

214. In his grounds of claim the claimant alleges that the selection criteria adopted by the respondent were not fair and objective, were not applied fairly, that the claimant was not informed of his score and could not challenge it, and that he was not consulted about the selection criteria or their weightings. However, as the claimant knew, he was not selected for redundancy by reference to selection criteria as he was not in a pool with others.

215. Nor do we accept the claimant's submission that the decision to dismiss him was 'pre-determined'. We find that the decision to terminate the claimant's employment was not made until late July 2020, after the telephone conversations about redundancy between the claimant and, initially, Mr Ramplin on 1 July and then Ms Smith on 2 July.

216. Furthermore, the claimant says in his grounds of claim that the respondent failed to comply with 'its redundancy policy'. We reject that allegation. The respondent did not have a redundancy policy. In so far as this allegation concerns the fact that Ms Smith made the decision to abolish the Quality and Compliance Manager role herself, rather than taking that decision jointly with Mr Ramplin, we find that was a reasonable approach to take in all the circumstances. Ms Smith and Mr Ramplin spoke on several occasions about whether the claimant's position should be made redundant: Ms Smith's eventual decision was not made without consultation with Mr Ramplin. In that sense the 'economic review of the Quality Manager post' was conducted by them both. To the extent that the eventual decision was taken by Ms Smith, that was not to the claimant's disadvantage and, in any event, it was reasonable for the respondent to adopt that approach given that Ms Smith had a better understanding than Mr Ramplin of the day to day duties and work carried out by the claimant and how these were managed in the business. We note that Mr Ramplin was unsurprised by Ms Smith's conclusion that the company could manage without a Quality and Compliance manager.

217. In addition, the claimant alleges that the respondent failed to offer him suitable alternative employment. We accept, however, that there were no vacancies to offer the claimant.

218. The claimant also alleges that consultation was inadequate.

219. In this regard, we accept that the respondent approached the redundancy consultation exercise with an open mind. They invited suggestions as to alternatives and considered them. In particular, they considered whether they should keep employees on furlough instead of making them redundant. Mr Rahman was critical of the decision not to do so. However, we find that was a decision that was within the range of approaches open to a reasonable employer. We acknowledge that some employers in a similar position might have decided to defer any decision on redundancies. That this respondent chose not to take that option does not mean its decision was unreasonable, particularly given that the furlough scheme was changing.

220. The respondent can be criticised for causing confusion at the outset of the redundancy process when Mr Ramplin gave the claimant the impression he would be going through a selection process, being scored against certain criteria, but was then unable to explain the relevance of the selection process and criteria to the claimant, nor who he would be pooled with, when the claimant suggested it would not be appropriate for him. Either Mr Ramplin should have been better informed or Ms Smith should have conducted that meeting herself. The confusion was remedied by Ms Smith's conversation with the claimant the following day, however, in which she made it clear the claimant would not be in a pool with others and that the decision would depend on whether his post remained economically viable. She

subsequently confirmed that in writing and the claimant cannot reasonably have had any lingering doubts on the matter. We find that, looking at all the relevant circumstances, that initial confusion did not render the claimant's dismissal unfair.

221. After those initial consultations with the claimant on 1 and 2 July, some further discussions between the claimant and Mr Ramplin on 3 and 4 July, and Ms Smith's letter to the claimant making it clear that they would be considering whether the company needed a Quality and Compliance Manager, there were no further discussions about the redundancy until the claimant was told at the end of the month that his post was not needed and, therefore, his employment was to end with, almost, immediate effect. There was no discussion in which the respondent told the claimant that it had been decided that his role was not economically viable. The claimant knew that this was under consideration, and had been given an opportunity to express his views on the matter when he spoke with Ms Smith on 2 July. Indeed he did express his views, making the point that he did not think the company could manage without 'quality', in effect saying that the role of Quality and Compliance Manager was not dispensible. At that stage, however, there was no discussion about what the implications for the claimant would be if it was decided that the company could manage without a Quality and Compliance Manager. The matter had been touched upon to some extent in conversations at the start of the month but at that stage, the idea that the claimant's post may be abolished was still theoretical. Ms Smith acknowledged when questioned at this hearing that she could have had a telephone conversation with the claimant to explain her decision and matters such as the reason for rejecting the claimant's suggestion that employees be retained and kept on furlough for the time being in the hope that business would improve. In our judgement, any reasonable employer would have had such a conversation with the claimant before confirming the termination of his employment.

222. The claimant also criticises Ms Smith for not postponing a decision about his future with the business without first addressing his grievance. We find that this criticism is misplaced. In so far as his grievance concerned the claimant's selection for redundancy, Ms Smith had addressed those matters by explaining to the claimant that he was not in a pool for selection, that his performance in the role would not feature in her decision-making and that the question was whether the respondent could afford to keep a dedicated Quality and Compliance manager role. She explained that to the claimant over the phone on 2 July and then again by letter of 20 July 2020. In as far as the claimant's grievance concerned matters that were separate from the redundancy process, the decision not to defer the claimant's redundancy whilst those matters were looked into was within the range of reasonable responses open to a reasonable employer.

223. The claimant also appears to criticise the respondent on the ground that it could have made costs savings elsewhere. For example, in the course of the hearing he was critical of the fact that the company took on Mr Smith as an employee not long before he and other employees were told their jobs were at risk and Mr Smith was not considered for redundancy. We do not consider either of these matters undermined the fairness of the claimant's redundancy. It is an almost inevitable feature of any redundancy exercise that employees will be able to identify other, different ways of saving costs. It is not the role of the Tribunal in a case such as

this to investigate whether costs could be saved elsewhere. In any event, in so far as Mr Smith's role is concerned, Ms Smith took a pay cut to release funds to pay his wages. It is by no means apparent that there would be any saving to the company if it had not taken on Mr Smith.

224. In our judgement, the decisions made by the respondent and the process it followed were reasonable except for its failure to have a telephone conversation with the claimant to explain the decision that the company could manage without a Quality and Compliance Manager and matters such as the reason for rejecting the claimant's suggestion that employees be retained and kept on furlough. Taking into account all the circumstances, that was a significant enough failing to lead us to conclude that the respondent acted unreasonably in treating redundancy as sufficient reason to dismiss the claimant.

225. The claimant's complaint of unfair dismissal is, therefore, well founded.

Remedy for unfair dismissal

226. The compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed.

227. If a fair procedure had been followed, Ms Smith would have arranged a further telephone conversation with the claimant to explain the matters outlined above.

228. Had she done so, it is likely that the claimant would have challenged the decision to abolish the Quality and Compliance Manager post. We find that, had he done so, there is no chance that Ms Smith would have changed her decision and that would be a reasonable position for her to adopt.

229. It is likely that the claimant would have repeated his opinion that the respondent should continue to make use of the furlough scheme. We are satisfied that Ms Smith and Mr Ramplin had already considered that option and ruled it out and nothing the claimant could have said at this juncture would have changed their position on that. Had the respondent acted reasonably Ms Smith would have explained the reasons for that decision to the claimant.

230. It is likely that the claimant would have repeated that he was prepared to take a pay-cut. That was something the claimant had already said, however, and there is no reason to think that his repeating it would or might have caused Ms Smith to reconsider her decision that the claimant's post was no longer needed.

231. It is possible that the claimant would have queried the extent of Ms Walker's involvement in the decision to make him redundant. Had he dome so, it is inevitable that Ms Smith would have told him that she had not been involved in the decision at all.It would have made no difference to the decision to dismiss him.

232. It is also possible that the claimant would have asked about whether there were any other vacancies. Had he done so, Ms Smith would have told him there were no other vacancies, as there were none at the time.

233. Given the way in which this claim was pursued at the hearing, it is also possible that the claimant would have suggested that the respondent should consider making someone else redundant and moving him into their role. In particular, it is possible that the claimant would have suggested that he should be considered for the role of Operations Director in place of Ms Walker. In our view, had the claimant done so there is no chance that Ms Smith would have agreed. There is no way that Ms Smith would have countenanced replacing the incumbent Operations Director, who was established in the business, with the claimant, who had been with the company just over two years and had never worked in this company in an operations role, particularly at such a difficult time for the business. That would clearly be a reasonable position for Ms Smith to take and is undoubtedly the position she would have taken.

234. In conclusion, we find that, if Ms Smith had arranged a further telephone conversation with the claimant to explain her decision to abolish his post and the reasons why keeping him on furlough were not considered appropriate, it is inevitable that the claimant's employment would have been terminated fairly by reason of redundancy, albeit that the termination of his employment is likely to have been delayed by a short period. In all the circumstances, we consider it likely that, had the respondent acted reasonably, the claimant's employment would have ended one week later than it did.

235. The Tribunal expects the parties to agree the amount due to the claimant as compensation for unfair dismissal. Assuming the claimant was paid the correct amount as a statutory redundancy payment he will not be entitled to a basic award. The amount of any compensatory award will be limited by reference to our conclusion on the Polkey issue. If the parties cannot agree then the matter will have to be determined at a remedy hearing.

Dismissal as detriment

236. The claimant also contends that his dismissal constituted a detriment contrary to section 47B of ERA 1996. Mr Gillie submitted that this claim must fail because it is excluded by section 47B(2). To the extent that the claim is a claim in respect of the respondent's own act of dismissal we agree.

237. We do not think the claim against the respondent can properly be interpreted as a claim under s47B(1B), complaining that the respondent is vicariously liable for the acts of a co-worker (Ms Smith) under s47B(1A). That is not how the case was put in the claim form or at the hearing.

238. If we are wrong about that, we find, in any event, that Ms Smith's decision to dismiss the claimant was not materially influenced by any of the things he said that he alleges constitute protected disclosures. In this regard we note the following:

238.1. The decision to terminate the claimant's employment stemmed from a genuine desire to save costs following on from a significant downturn in business.

238.2. The claimant had been furloughed for reasons unconnected with any protected disclosures. His work had already been distributed to others to do and had been done by others for some three months.

238.3. Ms Smith and Mr Ramplin had started considering whether the company could manage without a dedicated Quality and Compliance Manager before the claimant submitted his grievance on 23 July 2020 (the twelfth alleged protected disclosure) and his draft letter on 1 July 2020 (the eleventh alleged protected disclosure). The facts do not support an inference that anything the claimant said in those letters had any material influence on the decision to dismiss the claimant.

238.4. Nor is there any proper basis for inferring that the decision to dismiss the claimant was materially influenced by what the claimant said to Ms Smith about matters concerning data protection in his email of 7 April 2020 (the tenth alleged protected disclosure) or in the conversation with Ms Smith in early February 2020 in which he criticised Ms Walker's attitude to data protection (the fourth, fifth and sixth alleged protected disclosures), the claimant's comment about the Netherland's tax issue on 21 November 2019 (the third alleged protected disclosure), or anything the claimant said in early October 2019 about what he thought was the theft of Ms Walker's laptop (the first alleged protected disclosure).

238.5. As recorded above, we have found that the seventh and ninth alleged protected disclosures were not, in fact, qualifying disclosures and Ms Smith was not aware of the second and eighth alleged protected disclosures.

EMPLOYMENT JUDGE ASPDEN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 13 December 2021

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