Case Number: 2202216/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Diavita	**v**	**Baker Hughes Limited**

Heard at: London Central **On**: 15 – 19, 22 – 25 February and (in Chambers) 20 - 21 April 2021

Before: Employment Judge E Burns
Mr P de Chaumont-Rambert
Mr R Miller

Representation

For the Claimant: Ms S Aly, Counsel

For the Respondent: Ms O Dobbie, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The Claimant's claims that she was subjected to detriments on the grounds of making protected disclosures pursuant to section 47B of the Employment Rights Act fail and are dismissed.

(2) The Claimant's claims that she was subjected to detriments because she did protected acts pursuant to section 27 of the Equality Act 2010 fail and are dismissed.

(3) The Claimant's claim that she was automatically dismissed because she had made protected disclosures pursuant to section 103B of the Employment Rights Act 1996 fails and is dismissed.

(4) The Claimant's claim that she was unfairly dismissed pursuant to section 98 of the Employment Rights Act 1996 succeeds.

(5) There is, however, an 80% chance that she would have been fairly dismissed on or before the date she was dismissed.

(6) A deduction of 75% should be made to the Claimant's basic award to reflect the Claimant's conduct.

(7) An uplift of 20% should be made to the Claimant's compensation pursuant to section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

(8) The Claimant's claim for a bonus payment for 2018 fails and is dismissed.

The majority judgment of the Employment Tribunal is that the Claimant was not wrongfully dismissed and this claim is therefore dismissed.

REASONS

CLAIM

1. The Claimant commenced her employment with the Respondent on 8 June 2014 (having transferred to it from Baker Hughes (Ghana) Limited where she had been employed from 1 June 2011). The Claimant was dismissed by the Respondent on 14 February 2019.

THE ISSUES

2. The issues to be determined had been agreed between the parties and were as follows:

1. Jurisdiction

1.1 The claim form was presented on 6 June 2019. As such, claims in respect of acts / omissions occurring wholly before 7 February 2019 are prima facie out of time (Acas EC having been commenced on 22 February 2019 and ceased on 22 March 2019). The Tribunal had to decide:

1.2 Did any or all of the alleged protected disclosure detriments constitute a series of similar acts or failures within the meaning of s.48(3)(a) Employment Right Act 1996 (ERA)?

1.3 If so:

(a) was the last such act / failure in time; and
(b) was there a break in the series of more than three months (following the *Bear Scotland* decision in respect of the time limits for allegations of a series of matters under the ERA)?

1.4 If not, in respect of each matter that is held to be prima facie out of time, was it not reasonably practicable for the Claimant to bring the claim within the normal time limit and if not, was the claim brought within a reasonable period thereafter?

1.5 In respect of the victimisation detriments, the Tribunal will have to decide:
(a) Did the acts / omissions occur wholly before 7 February 2019 (as above) or did they form part of an act extending over the relevant period (a continuing act), the last act of which was in time?
(b) In respect of all matters that are deemed to be out of time, would it be just and equitable to extend time?

2. Protected Disclosures

2.1 The Claimant alleged that she made 12 protected disclosures of information, numbered PD10 – PD22 about 9 different matters / failings.

2.2 The Respondent had accepted that PDs 12-14, 18-19 and 21-22 contain protected disclosures (but not necessarily in respect of the all the matters/failings alleged). The Tribunal needed to determine whether the other six alleged disclosures amounted to protected disclosures, as follows.

2.3 Did the Claimant disclose information on any of the following occasions:

2.3.1 PD10: On 10 March 2017, in an email to Mr Kuppuswamy (s 43C ERA);
2.3.2 PD11: On 24 May 2017, the Claimant emailing Mr Kuppuswamy to inform him that the Respondent had placed pressure on Mr Boateng’s family to transfer him to Ghana (s 43C ERA);
2.3.3 PD15: On 1 December 2017, the Claimant disclosing informtin to Mr Elsinga in a meeting (s 43C ERA);
2.3.4 PD16: On 1 December 2017, the Claimant disclosing information to Mr Simonelli in his office (s 43C ERA);
2.3.5 PD17: On 15 December 2017, the Claimant disclosing information (one document – Staff Profile). The information was alleged to show that Baker Hughes Inc was misleading the New York Supreme Court to cover up negligence by that company and was provided to Mr Boateng’s legal team (ss 43D and/or 43G ERA);
2.3.6 PD20: In around early April 2018, the Claimant disclosing information (policy documents). It was claimed that Baker Hughes Inc had acted in a negligent manner towards Mr Boateng, with applicable policies breached and this disclosure augmented that of PD17. It was made to Mr Boateng’s legal team (ss 43D and/or 43G ERA).

2.4 If so, did she reasonably believe that each such disclosure of information tended to show a relevant failing?

2.5 If so, did she reasonably believe that each such disclosure was made in the public interest?

2.6 In relation to PDs 17 and 20, were such disclosures:

(a) made to a legal advisor in the course of the Claimant receiving legal advice? (s.43D ERA); and/or
(b) made in accordance with the requirements of s.43G ERA, specifically:

i. did the Claimant believe that the information disclosed and any allegation contained within it was substantially true?
ii. had the Claimant previously disclosed substantially the same information to her employer?
iii. in all the circumstances of the case, was it reasonable for her to have made the disclosure, having regard, in particular, to the matters listed at s.43G(3) ERA?

2.7 Did the following acts, or any of them, occur:

2.7.1 From March 2017 to the EDT, failing to respond substantively or at all to the Claimant's repeated requests for information and/or complaints, in particular about Mr Boateng, specifically:

a) Mr Kuppaswamy failing to reply to C's email of 10 March 2017 (i.e. PD10);
b) Mr Kuppaswamy failing to reply to C's email of 24 May 2017 (i.e. PD11);
c) Messrs Simonelli and Elsinga failing to reply to C's email of 4 September 2017 (i.e. PD14);
d) Messrs Simonelli and Elsinga failing to reply to C's concerns raised on 1 December 2017 (i.e. PDs 15 and 16);
e) Messrs Simonelli and Elsinga failing to reply to C's email of 26 January 2018 (i.e. PD 18);
f) The recipients of the email sent to the African American Forum failing to reply to the email of 30 January 2018 (i.e. PD 19).

2.7.2 On 5 January 2018, suspending the Claimant, and doing so until her dismissal on the 14th February 2019;
2.7.3 On 20 December 2017, commencing and pursuing a disciplinary investigation into the Claimant's conduct and pursuing the disciplinary process for 14 months;
2.7.4 From 2 January 2018 to 14 February 2019, taking around 12 months to conclude the disciplinary process;
2.7.5 On around 13 December 2018, refusing the Claimant's postponement request of the disciplinary hearing;
2.7.6 From 30 June 2017 to March 2018, failing to provide an outcome to the Claimant's first grievance timeously;
2.7.7 From 12 May 2018 to the EDT (and to 10 November 2019), failing to provide an outcome to the Claimant's second grievance timeously;
2.7.8 From 21 February 2019 to 22nd January 2020, failing to provide a dismissal appeal outcome timeously; and

2.8 Was / were any of the above done on the ground that the Claimant had made one or more protected disclosure(s)?

3. Automatic Unfair Dismissal

3.1 Was the sole or principal reason for the Claimant's dismissal the fact that she made one or more of the protected disclosures?

4. Victimisation

4.1 The Claimant relies upon PDs 12, 13, 15, 17, 18, 20 and 22 above as protected acts within the meaning of s.27(2) EqA. The Respondent has accepted that PDs 12 and 13 (the Claimant's first grievance and comments made at the hearing of that grievance) contain protected acts. The Tribunal will need to decide:

a) In respect of PDs 15 and 18: Did the Claimant allege that a person had contravened EqA? (s.27(2)(d) Equality Act 2010(EqA);

b) In respect of PDs 17 and 20: Did the Claimant do any other thing for the purposes of or in connection with EqA? (s.27(2)(c) EqA). The Claimant contends that by disclosing information in support of Mr Boateng's legal claims the Claimant believed her actions to be aimed at correcting, explicitly or otherwise, the discriminatory treatment he had received in being provided less adequate medical treatment/insurance than a white and/or European/American comparator.

4.2 Further and alternatively, did the Respondent believe that the Claimant had done, or may do, a protected act? If so, when did this belief begin?

4.3 Did the Respondent subject the Claimant to any or all of the above detriments and/or dismiss the Claimant because the Claimant had carried out a protected act or acts or because the Respondent believed the Claimant had done, or may do, a protected act?

5. *Unfair Dismissal*

5.1 What was the sole or principal reason for the Claimant's dismissal? Was it conduct (as relied upon by the Respondent) or was it due to protected acts or protected disclosures (as the Claimant contends)?

5.2 If the reason was conduct, did the Respondent:

a) Genuinely believe that the Claimant was guilty of the misconduct alleged;
b) Have reasonable grounds for such a belief; and
c) Reach such belief following a reasonable investigation?

5.3 In all the circumstances of the case, did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant under s98(4) of the ERA 1996?

6 ***Breach of Contract***

6.1 Was the Claimant entitled to notice pay (in accordance with the terms of her contract) or did she commit a repudiatory breach of contract entitling the Respondent to terminate the contract summarily?

6.2 Did the Claimant satisfy the qualifying criteria for entitlement to an annual bonus for the year ending October 2018? In particular, was there a contractual criterion that only employees employed on the payment date (March 2019) were entitled to such bonus?

THE HEARING

3. The hearing was a remote video hearing. A face-to-face hearing was not held because it was not practicable due to the Covid pandemic and all issues could be determined in a remote hearing.

4. The Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net

5. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. At one point, we swapped the witness order around with the agreement of the parties because of technical difficulties. We also had extra breaks.

6. A journalist present at the hearing asked for copies of the written witness statements and the bundles of documents. The parties agreed that these could be sent to her by email subject to conditions that were agreed between the parties and the tribunal. Some of the documents included medical information about Mr Boateng who was not a party the proceedings and who lacked capacity to give consent. Before releasing these documents, the Tribunal satisfied ourselves that the individual's legal guardian was content for us to do this. He joined the hearing, but because of technical difficulties provided his consent via the Claimant. The parties were satisfied with this in the circumstances.

7. The Claimant gave evidence and also called a late additional witness (Francis Sallah, Deputy General Secretary of the General Transport, Petroleum & Chemical Worker's union of TUC (Ghana)) discussed further below.

8. For the Respondent evidence was given by:

- Ms Sara Christopher, Senior Internal Audit Manager (Claimant's first grievance)
- Mr Harry Elsinga, independent consultant, former Chief HR for BHGE

- Mr Shane O'Neill, Europe HR Director
- Mr Lee Howard. Digital Technology Director for Oilfield and Industrial Chemical (disciplinary investigation)
- Ms Kay Mutch, Digital Solutions Finance Manager, (disciplinary hearing)
- Mr James Overton, Operations Supply Chain leader Europe (appeal against dismissal)
- Mr Mark Freeman, Global Tax Lead for Oilfield Equipment (second grievance process)
- Mr Paul McHardy, M&A Total Rewards Team Manager

9. There was a main agreed bundle of 2509 pages, together with two supplementary bundles of 72 and 99 pages. We also admitted into evidence additional documents from both parties as the hearing progressed. We read the evidence in the bundles to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

10. We explained our reasons for our various case management decisions carefully as we went along. The following were of particular note.

11. Mr McHardy was a late witness for the Respondent. The Respondent made an application to adduce late witness evidence at the start of the hearing. The statement had only been served on the Claimant at 9:42 pm on the Sunday evening before the start of the hearing on the Monday. The Claimant objected to the statement being admitted, together with two documents referred to within in.

12. We decided to admit the witness statement because we considered it contained relevant evidence. We gave oral reasons for our decision at the hearing. The Respondent called Mr McHardy last so that the Claimant's counsel had plenty of time to prepare for his cross examination. In rebuttal of Mr McHardy's statement, the Claimant was given permission to admit a supplemental statement and an additional document.

13. The Claimant also made an application to adduce further witness evidence towards the end of the hearing. This was opposed by the Respondent, but we decided to admit this evidence and again, gave oral reasons for our decision at the hearing. The witness was Francis Sallah, Deputy General Secretary of the General Transport, Petroleum & Chemical Worker's union of TUC (Ghana). He had difficulties joining the hearing by video as he was in an area without broadband on the only day available. With the agreement of the parties, we heard his short evidence by audio only.

14. With the agreement of the Respondent, we paused during the Claimant's evidence on two occasions to enable her to have time to compare transcripts of meetings she had attended with the audio recordings of the meetings so that she could correct any transcription errors.

15. Due to the time available in the hearing and the complexity of the case, the parties and the tribunal preferred written submissions. The parties were

given an opportunity to respond to each other's written submissions. We adjusted the dates for submission at the request of the parties.

16. Employment Judge E Burns apologises to the parties for the length of time it has taken to prepare this reserved judgment.

FINDINGS OF FACT

Introduction

17. Having considered all the evidence, we set out our findings on the facts. The burden of proof we have applied when deciding disputed facts is the balance of probabilities.

18. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

19. The findings of fact are split into the following sections:

    - Relevant Background Information
    - Andrews Boateng and Clarice Tsogou Mabengou
    - Chronology of relevant events from 2017 to 2019

Relevant Background Information

The Respondent Group

20. The Respondent is the UK subsidiary of a group of companies which provide the oil and gas industry with products and services across the globe.

21. During the Claimant's employment, the group of companies known as the Baker Hughes group merged with the General Electric group. The merger was announced on 1 July 2017. In this judgment, any references to the Group at a time prior to this are to the Baker Hughes group. References to the group after 1 July 2017 are to the merged group of companies.

22. The merger expanded the global reach of the Group. At the time of the Claimant's employment, it operated across 120 countries, employing approximately 60,000 employees worldwide. The parent company of the Respondent was known as Baker Hughes, a GE Company (BHGE) and had its head office in Houston. There were also other sites in the US.

23. The Respondent (i.e. the UK subsidiary) had 5,000 employees who were based in various locations in the UK. The HR function for that population numbered 5-6 people. There was also an internal legal function which included an employment lawyer, Neil Adam.

Global Mobility

24. The global nature of the work being undertaken by the Group at the time of the Claimant's employment, meant that it had subsidiary companies across the world and a high degree of staff mobility. This led to several different employment arrangements.

25. In countries where there was a Baker Hughes subsidiary company, employees were employed on local contracts which contained terms and conditions that reflected the market conditions and laws in that country. The employees would usually be based in that country, but often required to undertake business travel to other locations and perform work in those locations. The country where they had their contract of employment would be known as their home country.

26. In addition to locally employed individuals, the Group operated a Global Mobility programme. Employees were often assigned to work in countries other than their home countries on short-term and long-term international assignments, usually up to a maximum of four years.

27. It is not necessary for the purpose of this judgment to set out the arrangements in detail, other than to note that individuals on international assignments were not employed on the same local contracts that applied in the country to which they were assigned. Nor did they remain employed on their original home contracts. Instead, they were transferred to the Group's International Payroll Resources Services, which were registered in Dubai, and were given Global Mobility contracts of employment. Their contracts included enhanced terms in terms of pay and in connection with matter such as relocation expenses and similar.

28. The Group employed Global Mobility Team specialists who were responsible for such matters as arranging international assignments, sorting out visas and work permits and dealing with taxation.

29. The Global Mobility programme was ultimately controlled by the parent company in the USA. However, for countries in the Eastern Hemisphere of the world, it was predominantly managed in the UK by employees employed by the Respondent. For countries in the Western Hemisphere (the Americas) the Global Mobility programme was predominantly managed by Global Mobility teams based in the USA. There were also some Global Mobility teams working elsewhere in the world at different times, however.

The Claimant's Employment Background with the Respondent

30. The Claimant is a black woman who originates from France. French is her first language.

31. The Claimant first started working for the Respondent in the UK as a in 2009. She was a contractor who was engaged for an initial period of six months as the French Statutory Accountant. After that engagement had ended, the Claimant left for a period and then re-joined in March or April 2010 working

again a contractor through a temping agency. At this time, she started to become involved in the tax side of the work of the Global Mobility teams.

32. In June 2011, the Claimant accepted a position as a permanent employee on a local contract based in Ghana with Baker Hughes (Ghana) Limited. This was a new role in a Global Mobility Team based in Africa.

33. In the new role, she reported to Gale Leake. He was a US citizen who had been working in the UK specialising in African tax issues. He relocated from the UK to Ghana at the same time as the Claimant. Mr Leake was on different contractual arrangements to the Claimant. After a period of three years, they both returned to the UK and the Claimant became an employee of the Respondent on a UK contract with effect from 8 June 2014.

34. When based in Ghana and the UK, the Claimant worked as a Global Mobility tax specialist with responsibility for some of the countries in Africa where the Respondent's Group operated. Her role involved dealing with tax audits and investigations initiated by the authorities in the countries for which she was responsible. She continued in a similar role on her return to the UK.

35. Although the Claimant was an international tax specialist, her role meant she had to have a good broad understanding of the Global Mobility programmes. She had access to the electronic files of the employees on international assignments.

Claimant's Terms and Conditions of Employment

36. The Claimant was issued with the contract of employment that was in place at the time of her dismissal on 9 June 2014 (240). Her contractual documentation consisted of a Statement of Particulars of Employment with various appendixes. We set out below extracts from her contractual documentation which are relevant to the issues we have to consider. The relevant appendices are Appendix 1: Additional Benefits, Appendix 3: Company's Confidential Information and Inventions Agreement, Appendix 6: Grievance Policy and Appendix 7: Discipline Policy.

37. The Claimant signed the documents contained in the contractual package on 7 July 2014. This included signing each document as well as initialling each page of each document.

Confidential Information

38. Clause 5.1 of the Statement of Particulars deals with confidential information. It says:

"It is a condition of your employment that you comply with the terms of the Company's Confidential Information and Inventions Agreement which is enclosed as Appendix 3 with this agreement ("CIIA"). You hereby undertake to comply with the terms of the CIIA and further undertake to sign and return the enclosed CIIA upon the commencement of your employment." (224)

39. The CIIA in Appendix 3 defines confidential information as follows:

"Confidential Information" shall mean trade secrets or confidential information including but not limited to such information relating to technical data, formulae, know~how, information relating to research, development, manufacture, purchasing, accounting, engineering and technical information, marketing, merchandising and selling, business plans or dealings, existing and potential projects, business and financial information dealings and plans, sales specifications or targets, customer lists or specifications, customers, business developments and plans, research plans or reports, or policies or plans, price lists or pricing policies, employees or officers, source codes, computer systems, software, firmware, designs, prototypes, past and proposed business dealings or transactions, information about the development and performance of products and processes, product lines, services, research activities, information related to manufacturing, purchasing, inventories, data processing, marketing, sales and pricing, knowledge regarding the training, skills and abilities of the Company's or any Associated Company's employees, belonging to or which relate to the affairs of the Company or any Associated Company, or any document marked "Confidential" (or with a similar expression), or any information which you have has been told is confidential or which you might reasonably expect the Company or any Associated Company would regard as confidential or information which has been given in confidence to the Company or any Associated Company by a third party (234 – 235).

It includes the following obligation:

I shall neither during the Employment (except in the proper performance of my duties) nor at any time (without limit) after the termination thereof, directly or indirectly

(i) use any Confidential Information for my own purposes or for those of any other person, company, business entity or other organisation whatsoever; or
(ii) disclose any Confidential Information to any person, company, business entity or other organisation whatsoever. (235)

Bonus

40. There is no mention of an entitlement to bonus in the body of the Claimant's statement of terms and conditions. Bonus is mentioned in paragraph 5 of Appendix 1, however. This says:

"ICP Bonus Plan

You will be eligible to participate in the Baker Hughes Incorporated ICP Bonus Plan which will be pro-rated to whole months from your start date to the end of the calendar year.

All employees must be actively employed before 1 October to be eligible for that plan year.

Payments cannot be guaranteed as awards are based upon both financial and non-financial performance.

You will be advised, in writing, each year of eligibly levels. Your Expected Value level is 15% and any award made will be paid annually in March." (231)

41. A copy of a document called the Profit Incentive Program for 2017 was contained in the bundle. It provided more detail about the calculation of bonuses and set out conditions of eligibility for the bonus year 2017. A key condition was that employees needed to "Continually employed through the date the incentive is paid following the Plan Year" (2467). This is said to be subject to the reason for termination of employment. The document does not say that employees who meet this condition, but are dismissed for gross misconduct do not qualify for bonus payments. (2470).

42. The Incentive Compensation Program for 2016 was also contained in the bundle and contains the same provisions (2475 and 2483).

43. With the merger taking place on 1 July 2017, two bonus schemes were in operation for different sections of the Respondent's workforce during 2017. The Group decided to continue with the legacy bonus schemes for 2017 and 2018 and then introduce a new bonus scheme for 2019. Legacy Baker Hughes employees were sent a company-wide email communication explaining that the 2017 scheme would be extended for a year.

44. We were not provided with a copy of the email. According to the evidence of Mr O'Neill, it was sent in early 2018 and therefore unlikely to have been seen by the Claimant as she had been suspended without access to her email at the time it was sent.

The Spirit and the Letter

45. Following the merger, the Group introduced a document called "The Spirit and the Letter". The document contains a short Code of Conduct which is then expanded upon in two further sections called The Spirit and the Letter respectively (1158 – 1182). It is intended to be a document which has global application.

46. The Respondent required all of its employees to attend on-line training on the Spirit and the Letter. The Claimant attended this training because she referred to it in her letter of appeal (1963). Employees were not issued with a hard copy of the document, but could download and keep a pdf copy.

47. The Spirit and the Letter is essentially a document dealing with compliance issues. The four-point Code of Conduct includes a requirement to:

"Fulfil your obligation to be the voice of integrity and promptly report concerns you have about compliance with law, policy or this Code" (1161)

and provides details of how and to whom this should be done. The document says that "*Any retaliation – whether direct or indirect – against employees who raise a concern is grounds for discipline up to and including dismissal*" and provides details of a BHGE Ombudsperson to whom integrity questions and concerns can be raised (1165). The document does not refer to whistleblowing or use the term protected disclosure.

48. The Spirit and Letter also includes a section obliging BHGE employees to safeguard BHGE's intellectual property (1176). It does not otherwise say anything about confidentiality. It includes a general obligation such that everyone in the Group "*needs to ensure that we hold ourselves to the highest standards, are compliant at all times with necessary policies, procedures and regulations in every country, and abide by the spirit and letter of the law.*" (1160).

Andrews Boateng and Clarice Tsogou Mabengou

49. The majority of the purported protected disclosures upon which the Claimant relies were made in connection with matters arising from a car accident which took place on 24 April 2014 in Port Gentil in Gabon involving Andrews Boateng and Clarice Tsogou Mabengou.

50. Mr Boateng and Ms Tsogou Mabengou were Baker Hughes employees. They were passengers sitting in the rear of a rental car being driven by another Baker Hughes employee. The car was hit as it turned left from a dual carriageway by a vehicle that had mounted the central reservation.

51. Ms Tsogou Mabengou, who was eight months pregnant at the time of the accident, died shortly after it took place. Her unborn baby also died. Mr Boateng survived the crash, but was left with long term brain damage and extensive physical disabilities. He was airlifted out of Gabon to South Africa following the accident. He has remained in South Africa ever since. Initially he was treated in a rehabilitation centre, but after local doctors decided he would not recover further, he was moved to a care facility. He has been placed in several different facilities since the accident.

52. The Claimant has made purported protected disclosures about the accident and Mr Boateng's care. The Tribunal therefore heard a lot of evidence about both these matters. Much of that evidence was not agreed between the parties. We have avoided making findings of facts on these matters, except where strictly necessary for the purpose of this hearing.

The Accident

53. The accident occurred while the Claimant was still employed in Ghana. It was around only six weeks later, however that she moved to take her up role in the UK. The Claimant considered both Mr Boateng and Ms Tsogou Mabengou to be her friends. She maintained contact with their families after the accident.

54. The Claimant and her colleagues were understandably very distressed to hear about the accident. The Claimant recalled there being rumours among her colleagues that the car that Mr Boateng and Ms Tsogou Mabengou were travelling in was unsafe.

55. Following the accident, the Group conducted an investigation. This led to the preparation of a Fatal Vehicle Accident Report (dated 26 June 2014) (1187) and a Root Cause Analysis Report (June 2014) (1202 – 1222). The reports were later leaked by an employee (not the Claimant) to Ms Tsogou's Mabengou's daughter in 2016 who had some discussions with the Claimant about them.

56. The Claimant told the Tribunal that she could not recall exactly when she first saw and read the reports, but believed it was late 2017. We accepted her evidence on this point as it is plausible that she saw the documents at around the same time she provided documents to assist the legal action being pursued by Mr Boateng and Ms Tsogou Mabengou's families.

57. The reports say that the accident was the fault of the other driver who was driving erratically/illegally. There is no criticism of the roadworthiness of the car, although the reports note that the car did not have side-air bags and that this "*likely played a role in the severity of injuries to [the] occupants*".

58. In addition, the reports note that the although the driver had Defensive Driving Certification, this had run out in August 2013 and not been renewed. The reports concluded that the driver was familiar with the driving culture, was operating the vehicle in the proper manner and could not have avoided the collision because she did not have time to react and take evasive action. The reports included a number of recommend corrective actions (949).

59. In a table at the back of the Fatal vehicle Accident report (1198) the following can be found:

Legal Implications	
Permit violations / claim etc	Yes

The Claimant told us that she interpreted this as an admission of legal liability for the claim.

Mr Boateng's Employment and Insurance Cover

60. One area of dispute between the parties concerned Mr Boateng's employment status at the time of the accident.

61. It was not in dispute that Mr Boateng, an engineer, was originally employed by the Ghanian subsidy on a local contract. In this role he performed worked in Ghana and travelled to under work in other countries. It was also not in dispute that he had been offered and accepted an International Assignment, and was in the process of negotiating the contract that would apply to him at the time of the accident. The Claimant had used her access rights as a member of the Global Mobility Team to locate emails discussing the

negotiation of Mr Boateng's internal contract and an application for a work permit which were included in the bundle and are dated March 2014. The Claimant accessed the emails before March 2017.

62. The dispute between the parties was whether he had started in the new role at the time he travelled to Gabon and had the accident. The Claimant asserts that he had, albeit that the contractual documentation had not been finalised or signed at the time. The Claimant told the Tribunal that her belief that the Claimant had started his new role was based on her work as a Global Mobility Team Member. She had found examples of other employees in the Group that were working without contracts being in place.

63. The Respondent told is that Mr Boateng was in Gabon on a business trip he was undertaking in his original role at the time of the accident.

64. We have not found it necessary to resolve this dispute about Mr Boateng's employment status. The relevance to this case is that the Claimant believed Mr Boateng should have been covered by the Group's Global Mobility health cover at the time of the accident, but was not. The Respondent does not dispute that Mr Boateng did not have the same coverage as an International Assignee at the time of the accident, but says this has made no difference to his treatment and care.

65. At times during her employment, the Claimant appears to have believed that Mr Boateng was not covered by any insurance at the time of the accident. This was what she told Mr Freeman at the time she met him for the purposes of her second grievance. By the time of the hearing, however, the Claimant had revised her position, and acknowledged that Mr Boateng was covered by insurance at the time of the accident. She asserted before us that it was "*very cheap local insurance that had limited cover (or potentially none at all) for foreign work*" and offered far less generous than the cover available for International Assignees.

66. The Claimant obtained this belief through speaking with Murali Kuppaswamy. This is dealt with in paragraphs 82 and 83 below.

67. The Claimant told the Tribunal that the insurance policy applicable to International Assignees provided for employees to be transferred to any country in the world for treatment. She believed this to be the case, based on her experience of working in a Global Mobility Team and having some knowledge of the enhanced benefits enjoyed by International Assignees. In addition, she had read various policy documents and/or summary documents that referred to Baker Hughes Inc offering a comprehensive global healthcare program for international assignees which allowed "*employees and their families to access quality healthcare anywhere in the world*." Copies of samples of these were contained in the bundle.

68. The Claimant believed that had Mr Boateng been covered as an International Assignee, the cover would have provided funding for him to be treated in the US or Europe. She was wrong to believe this.

69. The reference to accessing quality healthcare worldwide in the medical cover documentation for International Assignees refers to the ability to access treatment in the location where the employee is currently living or visiting at the time the treatment is needed, rather than a right to choose to be treated anywhere in the world. The plan also provides for individuals to be transferred back to their country of residence for treatment if approved by the insurance company.

70. Furthermore, Mr Boateng was covered by insurance when he had the accident. The insurance cover in place for Mr Boateng provided him with the same level of emergency treatment cover as under the Global Mobility cover and via the same mechanism. This was provided through a third party contractor called International SOS (ISOS). The cover is high value and, according to the Respondent, potentially would pay for Mr Boateng to be treated in the US or Europe if this was justified medically. On an ongoing basis, the insurance cover has paid out USD 1.446 million for medical care for Mr Boateng as at the date of the hearing.

Mr Boateng's Medical Treatment and Care

71. The Claimant had two strongly held beliefs about Mr Boateng's medical treatment and care:

    - First, she did not agree that Mr Boateng should have been placed in a care facility. She believed he should have continued to receive specialist inpatient rehabilitation treatment and that this should be in Europe or the US.

    - Second, regardless of the medical position, she believed that the care facilities where Mr Boateng was placed provided substandard care and that he was suffering neglect as a result.

72. The medical records in the possession of the Respondent (which were include in the bundle) do not support the contention that Mr Boateng would benefit from specialist treatment in the US or Europe. When Mr Boateng's family requested that Mr Boateng be transferred for treatment in the US, ISOS sought the opinion of a rehabilitation specialist in Florida. The doctor involved provided an opinion that Mr Boateng would not benefit from rehabilitation treatment because the severity of his injuries was too great. Approval was not therefore given by the insurance company to transfer Mr Boateng.

73. In addition, the records do not suggest that the care that Mr Boateng received was persistently sub-standard. Issues were identified in relation to one care home, but this led to him being moved.

74. According to the Respondent, medical records in the possession of the Respondent were shared with Mr Boateng's family. In addition, Mr Boateng's family were provided with regular updates on his treatment and care via ISOS. Despite this, and her ongoing contract with the family, the Claimant had not seen any of the medical information prior to the hearing.

75. The Claimant's views instead were based on information she was given by Mr Boateng's family members and a colleague who had visited him in his care facility. They had taken pictures and videos which they shared with the Claimant. The Claimant had visited Mr Boateng in one of the care homes and she was in regular contact with a woman (Tina) who visited Mr Boateng regularly.

76. Mr Boateng's family and colleagues (including the Claimant) had mounted a public relations campaign in the Autumn on 2015 about Mr Boateng's care. They were unhappy with the care he was receiving in a particular care home where he had suffered a fall. Some local newspapers in Ghana picked up the story and there was correspondence between Mr Boateng's family and Baker Hughes Inc as it was then. This appeared to have led to the transfer of Mr Boateng to a different care facility.

77. In addition, the Claimant helped Mr Boateng's family obtain a medical report from Dr Greenwood, a Consultant Neurologist based in London in December 2015. Dr Greenwood's report recommended Mr Boateng be transferred to the Acute Neurological Rehabilitation Unit at the Wellington Hospital, London under his care. Dr Greenwood did not examine Mr Boateng, but based his assessment on video footage.

78. During the period of time the Tribunal is concerned with, Tina expressed concern about Mr Boateng's treatment to the Claimant and members of his family contacted her to express concerns about various matters.

Chronology of Events from 2017 – 2020

79. Although this section is largely chronological, we have strayed from following a strict time-line where sensible to do so.

PDs 10 and 11: Detriments 1(a) and (b)

80. Claimant relies on two purported protected disclosures made in 2017. At this time the Claimant was employed by the Respondent and working in London in the UK.

81. The Respondent required employees in the UK to complete a Code of Conduct Questionnaire in the first half 2017. Although the deadline for completion was 15 May 2017, HR sent an email to members of the Global Mobility Team asking them to do this by 10 March 2017.

82. Murali Kuppaswamy was a senior member of the Baker Hughes Group HR team at this time. He left Bakers Hughes at around the time of the merger. He did not give evidence to the Tribunal. The Claimant told us that she had had previous discussions with Mr Kuppaswamy about the car accident involving Mr Boateng and Ms Tsogou Mabengou and raised concerns about Mr Boateng's care in South Africa with him. This was not disputed by the Respondent and we accepted her evidence on this point.

83. The Claimant told us that she had challenged Mr Kuppaswamy about the quality of Mr Boateng's care. Her interpretation of his reaction during the discussion led her to conclude that she was right to believe that Mr Boateng had been moved to a care home because inadequate insurance cover had been in place at the time of the accident.

84. We note that the last time the Claimant discussed these matters with Mr Kuppaswamy, prior to sending the email on 10 March 2017, was in October 2015.

85. The Claimant's reaction to the email she had received was to email Mr Kuppaswamy on 10 March 2017. The Claimant relies on the email as PD10.

86. The email said the following:

"Good evening, Murali,

I have started a code of conduct questionnaire as requested by the business and I paused for the below reasons:

I watched the recent leadership conference videos where I heard things such as…"being unique, being different, delivering HS&E while being compliant at the same time…"

I listened to the leadership talking (with great sadness) about the terrible loss of a colleague in India.)

But still, Murali, no one until today has mentioned the death of Clarice and her unborn child! Not one amongst the Executive team, past and present.

No corrective actions have been taken to avoid such a horrible thing to happen again. Because we did not talk about it!

And Andrews, Boateng is still waiting to receive the serious medical care he needs.

Business code of conduct and business ethics are not only to be talked about, or to be completed through online questionnaire. They are to be fully and truly embraced and applied throughout all areas and levels of the business.

I just want to say that I do not understand why I am pushed questionnaire way before the deadline of May 15 (when there is so much more to be done to improve our business conduct and ethics at many levels). If you could explain that to me, in the meantime I will not complete the questionnaire just yet." (635)

87. Mr Kuppaswamy responded in an email dated 16 March 2017 advising the Claimant that if she wished to take the maximum time available to complete the compliance training and questionnaire, she was free to do so. He added:

"With regard to our ethics and compliance program. Please know that our Baker Hughes program is a premier program and is a model for top tier compliance programs. We are committed to process improvements and welcome feedback related to our program. Please address any process improvements to Wole Onabolu or Le Hammer." (637)

88. The Claimant did not pursue the matter further.

89. On 24 May 2017 the Claimant sent Mr Kuppaswamy a further email. She relies on this email as PD11. The email said:

"Good afternoon Murali

Yesterday I spoke with Janet, Andrews' Boateng sister, who is currently visiting Andrews in Johannesburg. Janet told me that as she arrived in South Africa, she received a call from Hilary who is Baker Hughes (Ghana) receptionist in Takoradi.

During that call Hilary was persistently trying to convince Janet to sign all documents related to Andy's transfer back to Ghana. Janet was seriously disturbed and upset by the call.

I do not think Hilary's act was ethical (knowing of the family has been going through and still is…) and in line with Baker Hughes' claim not to interfere with the decisions as to where/what care is needed for Andrews.

I thought I would let you know." (638)

90. According to the Claimant, Mr Kuppaswamy did not respond to the email. He left the Group shortly after this, as a result of the merger with General Electric, announced on 1 July 2017. The Respondent has been unable to establish whether or not a response was sent. Our finding is that no response was sent.

First Grievance: PDs 12 and 13; Detriment 6

91. On 30 June 2017, the Claimant raised a grievance. She sent it to her manager, Mr Leake, by email (08:11). The grievance contained two complaints (243 – 245).

92. The primary complaint related to her employment during the period between 6 January 2011 and 8 June 2014. The Claimant said that she believed she had been the victim of racial discrimination. The Claimant alleged that she, Mr Leake and another Global Mobility team colleague Nancy Fixter had all left their home countries to work in different countries at the same time. She said that Mr Leake and Ms Fixter had been placed on international assignee contracts, but she had been placed on a local contract with less favourable terms. She considered this to be less favourable treatment due to her being black and her colleagues being white.

93. The Claimant relies on this complaint as PD 12 and a protected act.

94. The Claimant said in her email that she wanted the grievance to be considered under the Respondent's formal grievance policy. This is what happened. The Respondent does not dispute that it took until 7 March 2018 for it to provide an outcome to the Claimant (630 – 634). This was a period of just over 8 months. The Respondent rejected the Claimant's grievance.

95. We note that the Respondent's Grievance Policy in place at the time does not specify a timescale for how quickly a grievance should be acknowledged or progressed (298 – 302).

96. We set out below, our findings on what happened during the 8 month period.

97. Initially, Mr Leake did not immediately recognise that someone other than himself would need to consider the grievance. The Claimant involved HR by copying them into the email exchange between herself and Mr Leake on 3 July 2017 (08:21) (249). Not having had a response, she chased by email of 11 July 2017 (10:11) (253). At this point HR replied to say that it was not appropriate for Mr Leake to consider the grievance and that an independent investigator would need to be appointed. The email anticipated this would take "up to a couple of weeks." (257)

98. The Respondent's approach when dealing with formal grievance and disciplinary matters is to identify a suitable person to "Chair" the process. That person is then supported by an HR partner. The Chair, however, is responsible for making any final decisions. In this case the HR partner was Cheryl Reid and the Grievance Chair was Sara Christopher. They were also assisted by the Respondent's in-house employment lawyer, Mr Adam.

99. The Claimant did not hear anything further about her grievance until 21 August 2010 when Ms Reid contacted her by email to introduce herself and confirm that Ms Christopher would be the chair for her grievance (396). Ms Reid contacted the Claimant again on 23 August 2017 to suggest a time and date for a meeting (395) and a formal invite letter was sent for the agreed date and time, 11 am on 30 August 2017 (297).

100. We were not provided with an explanation as to why it took nearly two months to appoint a grievance chair and invite the Claimant to a meeting to discuss her grievance in this particular case. Mr O'Neill, the Respondent's Europe HR Director provided a general explanation as to why delays can occur at this stage of the Respondents processes, however.

101. Mr O'Neill explained that HR will ask approach employees of the Respondent they consider to be suitable taking into account the issues involved, the employees' experience of and training in dealing with grievances, the knowledge of the business that may be required and the levels of seniority involved. A critical factor is that the Grievance Chair must not have a conflict of interest, so ideally will not know the individual involved and will not have been involved in any process involving the individual.

102. Mr O'Neill also told us that the Respondent had a limited pool of appropriately experienced HR professionals from which to choose someone to undertake the HR support role. He explained that the Respondent sought to ensure the HR supporter had not been involved in previous dealings with the individual as well.

103. It is relevant to note that the Claimant had previously raised a grievance prior to this grievance which she was appealing. This ruled out two of the HR team.

104. At the time she was appointed to chair the grievance, Sara Christopher, held the job title Senior Forensic Audit Manager. She had no knowledge of the Claimant and worked in an entirely different areas of the business.

     We note that Ms Christopher had not dealt with a grievance from start to finish previously and had received no training in investigating and considering grievances. She could not tell us whether she had had any training at all in Equality and Diversity before her appointment. Her professional expertise as an auditor, however, meant that she had investigation experience and was used to scrutinising the practices of the Respondent and forming an independent view.

105. Before Ms Christopher's appointment, Ms Reid had begun to collate relevant documents contained in the Respondent's HR records. She had also begun to make enquiries of individuals who may have had direct knowledge of the matters about which the Claimant was complaining.

106. The meeting on 30 August 2017 proceeded as planned. An audio recording was taken. The recording was used to produce notes (443-460). The Claimant relies on what she said at the meeting as PD 13 and her second protected act. This is not disputed by the Respondent.

107. Following the meeting, there was then an initial period during which Ms Christopher (with Ms Reid's assistance) investigated the Claimant's complaints. Over the course of the next two weeks, she interviewed three witnesses and collated various documentation. Ms Christopher also emailed the Claimant to ask her some questions. The Claimant provided prompt responses to these queries.

108. By 13 September 2017, Ms Christopher had prepared a draft analysis which she sent to Ms Reid. She was then required to undertake a business trip which meant that she did not do any further work on the grievance until her return.

109. In the meantime, the Claimant was sent the notes of the grievance meeting. She exchanged emails with Ms Reid about the transcript to make various amendments, returning a signed copy on 26 September 2021.

110. On her return, Ms Christopher decided she needed to interview a further witness. She did this on 12 October 2017. Having done this, she then sent a further email to the Claimant on 25 October 2017 asking for her comments

on various points. She gave the Claimant the option of responding in writing or having a further meeting with her (526-543)

111. The Claimant responded on 31 October 2017 with answers to the points. In addition, the Claimant highlighted that there appeared to be no correlation between Ms Christopher's analysis and her claim of racial discrimination. She questioned whether the investigation ought to be undertaken by someone in a department more familiar with race discrimination (544-546). Ms Christopher did not respond.

112. On 27 November 2017, Ms Christopher sent the Claimant an email telling her it was taking longer than anticipated to finalise the grievance. This was because she wanted input from legal. On 5 December 2017, Ms Christopher sent the Claimant the documents she had obtained, including witness statements, and asked her for her comments on them. Ms Christopher offered her the opportunity to respond in writing or to meet.

113. The Claimant replied straight away to say that she was unclear how to respond as Ms Christopher had not asked her any specific questions. She noted again that Ms Christopher did not appear to be focusing on the central element of her complaint, namely the allegation of race discrimination, as raised in her email of 31 October 2021.

114. Ms Christopher replied to say that she had not asked any specific questions because the information was relatively self-explanatory and she "*did not wish to limit or guide [the Claimant's] comment as to the content and relevance of the documents.*" She added that once she had the Claimant's comments, she would take them into consideration in her final review. She also said that she was considering the complaint of race discrimination.

115. Ms Christopher emailed the Claimant on 12 December 2017 to chase a response by 15 December 2017. The Claimant replied on 15 December 2017 saying she was on sickness absence leave. Ms Christopher replied to extend the time for her to comment to 3 January 2018 (617 – 618).

116. The Claimant did not send any comments by 3 January 2018. As well as being on sickness leave, she also took annual leave during this period. Ms Christopher made enquiries from HR on 3 January 2018 as to the Claimant's likely return to work and was informed that the Respondent was waiting to hear from her and it was anticipated that it would be the following week.

117. The Claimant did not return to work, however, as she was suspended with effect from 5 January 2018 without access to her work emails. Ms Christopher did not learn of the suspension until around mid-February 2018. She was unable to explain to the Tribunal why she took no follow up action between 3 January 2018 and mid-February 2018 other than tell us that she was travelling on business from 3 to 22 February 2018.

118. Having learned of the suspension, Ms Christopher decided it would not be appropriate to contact the Claimant and instead finalised the grievance outcome without her further input. A grievance outcome was therefore sent

to the Claimant on 7 March 2018. The Claimant did not appeal against the outcome.

119. Ms Christopher concluded that the reason the Claimant was offered a different contract other colleagues was not due to race discrimination. She did not therefore uphold the Claimant's grievance. She also rejected the Claimant's assertion that mobile employees from the US and Europe were offered better contract terms than other mobile employees more generally having analysed records of this information. She did not investigate if there was a wider race issue, however, because the Group did not keep records of contracts by ethnicity.

PD 14, Detriments 1 (c) and (d)

120. While the grievance process was ongoing and following the merger which was announced on 1 July 2017, the Claimant sent an email to Lorenzo Simonelli, the CEO of BHGE in the US. She sent the email on 4 September 2017 to bring the accident involving Mr Boateng and Ms Tsogou Mabengou to Mr Simonelli's attention.

121. The email had the subject heading "Andrews Boateng BH employee – further abuses from South Africa medical facilities." It said:

"Good afternoon Lorenzo,

I am reaching out to you as I am no longer sure who is in charge of a friend and colleague severely injured while serving the business: Andrews Boateng (Andy).

I have in the past emailed several times Murali (BH HR Vice President) about Andy…

A few days ago I received an alarming and rather sad call from Tina from Johannesburg.

Tina, is a lady (not a direct family member) who has kindly cared for Andrews Boateng for the past 3 years and daily since Joseph, Andy's brother, has not returned to South Africa to care for Andy since December 2016.

A few mornings ago, when Tina arrived at the rehabilitation Center (like every morning for the past 6+ months) where Andy is currently kept, Tina found Andy entirely naked on his bed, not one piece of clothing on him.. and no one around.

Tina didn't know for how long he was left like that! Tina was heartbroken and said "he was like an animal, all his dignity taken away and they just keep on humiliating him..

Andy is a grown up man, not a child".

South Africa still has a long way to go in regards to Human Rights and that should be taken into consideration when leaving Andy there.

Lorenzo, this is not acceptable and something must be done once and for all.

In all the South African medical facilities where Andy has been, Andy has either been neglected and/or abused; from lack of adequate therapies to head injuries and starvation. Andrews Boateng treatment has been of poor standard by the South African medical facilities and we cannot let this happen any longer.

I have been told that:

1/ Andrews has currently no legal immigration documents. As a friend and colleague I demand that urgently his immigration status to be legalised by BHGE.
2/ the company no longer provides for Andy's nappies, Tina is buying them! Please can BHGE resume buying the nappies.
3/ Andy's clothes are regularly stolen from his room.

Also I understand the only offer made by the business is to bring Andy back to Ghana.. .offers rejected by the family, which is perfectly understandable. Please read the story below

http://boame.org/blog/story-of-baffour-awuah-tabury-lets-help-baffour-walk-again/

Each story is unique and medical needs are different from one case to the other; but it is also common knowledge that ***there are NO facilities in Ghana who can rehabilitate Andy as much as a US or European medical facility could do. Andy needs state of the art surgeries, therapies and robotics therapies before returning to Ghana.***

Taking Andy back to Ghana prematurely will only ,lead to his death.

I just read our Statement of integrity and decide to contact you with no fear of any retaliation as our (almost biblical..) Business Code of Conduct and Good Ethics encourage us to care for one another and to openly report any concerns we may have.

Surely as we care for our colleagues in Houston, Texas, affected by the hurricane, how much more should we care for Andrews Boateng who was injured while serving the business in Gabon.

Andy has the right to the best medical facilities in the World and not only limited to South Africa or Ghana.

I am waiting to hear from you with the hope that we as a business will do the right thing for a human life."

122. The Claimant relies on the email as PD14. The Respondent accepts that the email contains protected disclosures.

123. Mr Simonelli replied to the Claimant on the same day saying: “Not knowing all the details and history, I have asked Human Resources to take a look.” (644) He forwarded the email to Harry Elsinga, BHGE Chief Humans Resources Officer asking him to look into it (641). Mr Elsinga also emailed the Claimant on the same day. He thanked the Claimant for bringing the situation to BHGE’s attention and said, “*we will follow-up*” and “*Keep you updated*” (644). He copied Sandra King-Hutchinson, Global HR Workforce Governance & Compliance Leader and Mr Simonelli into his response

124. As the Claimant had heard nothing further over a week later, she chased a response by replying all to the email on 13 September 2027. Mr Elsinga replied the same day saying that he had asked Sandra King-Hutchinson Compliance Leader in HR to update the Claimant on the situation.

125. Ms King-Hutchinson emailed the Claimant later the same day saying:

“*Celeste, please note that BHGE is currently involved in a litigation regarding this case.*

BHGE is taking the required steps and actions to investigate and evaluate this matter further through the course of the pending litigation. As a result of such litigation, at this time no actions will be taken on the issues you have raised below - again these issues will be addressed in the course of the pending litigation.

Thank you.” (643)

126. Ms King-Hutchinson did not give evidence to the Tribunal. She provided a written statement to Mr Freeman who investigated the Claimant’s second grievance.

127. Ms King-Hutchinson told Mr Freeman that at the time she was copied in to the email chain, she was aware that there had been discussions between one of BHGE’s senior lawyers (not Amy Blumrosen) and its Chief Medical Officer, Dr Hoffman, about Mr Boateng’s case. They had liaised in response to an anonymous letter received by the Respondent about Mr Boateng earlier in 2017. This had led to Dr Hoffman reviewing the case. Ms King-Hutchinson told Mr Freeman that she understood “*Dr Hoffman’s opinion was that everything legacy BH had done looked appropriate, including the quality and calibre of the various facilities that AB had attended in Africa*.” She took internal legal advice on the appropriate response to send to the Claimant, which was not to tell her anything about this earlier review and hence emailed as she did. She told Mr Freeman that she had no further involvement in the case because it was normal procedure for HR compliance to remove themselves when cases were under litigation (888).

128. On 26 October 2017, the Claimant emailed Ms King Hutchinson saying:

"*Thank you for your email below [referring to the email of 13 September 2017] which only brings more question.*

- Does this means the abuses can continue while the litigation is pending?
- Does this means that Andrews will remain an illegal immigrant in South Africa while the litigation is pending?
- Knowing that litigations can take several years, allow me to be concerned as to the fate of my colleague, my friend. Has Andrews been abandoned?
- Would legal disputes supersedes on-going compliance, social responsibility, good ethics and respect of basic human rights?
- We declared that "doing the right thing must always come first" ... is it conditional to pending litigation?

Please help me understand where we, BHGE/GE, stand as to our core values as a business." (647)

129. Ms King-Hutchinson replied on 30 October 2017, reiterating her previous message and stressing that, because of the litigation, the matter would be addressed only through the litigation.

130. The Claimant was well aware of the litigation as she was actively helping the families of Mr Boateng and Ms Tsogou Mabengou to pursue personal injury claims in the US. The families were getting legal advice from an American lawyer, Mr Pradal.

131. Because the Claimant was aware of the litigation, she was aware that it was being vigorously defended by the BHGE. Based on Ms King-Hutchinson's response, she formed the view that BHGE was only concerned with the legal defence and was not doing anything else to investigate the concerns she had raised about Mr Boateng's care.

132. Shortly after the final exchange with Ms King Hutchinson in connection with the legal proceedings, the Claimant was asked by Mr Boateng's family if he was still employed by a Baker Hughes company. She checked the internal employee network system which was accessible to all Baker Hughes employees globally and found his entry. She printed it out that day and sent it to them in early December 2018 (1048).

PDs 15 and 16, Detriment 1 (d)

133. Mr Simonelli and Mr Elsinga travelled to the UK at the start of the December 2017. The Claimant introduced herself to Mr Elsinga at a drinks event. Rather than discuss Mr Boateng's case there, he suggested she make an appointment to see him while he was in the UK. She did and met with him for about 20 mins on 1 December 2017. After the meeting with Mr Elsinga, she walked along the corridor and into Mr Simonelli's office.

134. The Claimant relies on what she said to Mr Elsinga and Mr Simonelli as her PDs 15 and 16. The Respondent disputes that what she said to the two men amounted to protected disclosures.

135. No notes exist of the meetings. The Claimant's version of events, contained in her witness statement, is as follows:

"*I informed Mr Elsinga that I believed that Mr Boateng was receiving less favourable treatment due to his race; I specifically referred to the fact that Mr Boateng would not have been treated in that adverse manner if he were white. If he were white he would have had his international assignment contract in place, with the benefit of proper healthcare (funded by US underpinning health insurance) and would not have been sent into Gabon without a visa in place (expected to work illegally).*

I complained that the Respondent had not fulfilled its duty of health and safety to Mr Boateng. I showed him Andy's picture bleeding on the floor I explained the accident and the appalling lack of proper care since that time. I spoke about the transfer of Mr Boateng without his family's consent and the refusal to transfer him to a hospital when he fell and injured his head.

I explained that the international contract (although agreed and standard) had not been put in place and the issues that had caused.

I then repeated the same disclosure to Mr Simonelli immediately afterwards, that same day. I showed him the same picture."

136. Mr Elsinga told us that the Claimant brought pictures of Mr Boateng to the meeting. He recalls her telling him that Baker Hughes was at fault for the accident, but did not recall her saying that Mr Boateng was being transferred to a different hospital without family consent and he was sure she did not say anything about Mr Boateng being sent to Gabon without an international contract and in breach of immigration law and without proper health and medical care.

137. At this time, this encounter took place the Claimant believed, based on the emails that she had seen and her interaction with Mr Kuppaswamy that Mr Boateng had been sent to Gabon without an international contract and full Global Mobility medical insurance.

138. Given that these were important parts of the background story explaining why she felt BHGE ought to take action in connection with Mr Boateng, we find that she did cover these matters with Mr Elsinga. Based on her manner when giving evidence to us and her obvious distress when discussing Mr Boateng, we find that she was not as coherent in her account as her witness statement suggests, but that she did cover the key elements. She also expressed concern about Mr Boateng's care arrangements.

139. We do not find that she mentioned a link to Mr Boateng's race to Mr Elsinga. This finding is based on what she later said to Mr Freeman during the second grievance meeting. When speaking about Mr Boateng to him, she was very reluctant to raise the issue of race in connection with Mr Boateng. Applying the balance of probabilities test we consider it unlikely she raised this in her first face to face meeting with Mr Elsinga.

140. We did not hear evidence from Mr Simonelli about the meeting. We find that the Claimant repeated the key elements of what she had told Mr Elsinga to him.

141. The Claimant expected some action to be taken following the meeting. She told us that Mr Elsinga promised her feedback in two weeks. Mr Elsinga accepted, when giving his evidence, that he probably did give her the impression she would hear something in this timescale. Despite this, neither Mr Elsinga or Mr Simonelli sent the Claimant any update.

142. As Mr Simonelli did not give evidence to the Tribunal and we were not told why he did not follow up with the Claimant. However, we infer that he did not think it was necessary for him to do so because he had delegated the matter to HR.

143. Mr Elsinga said he did not respond because he was told by Ms King-Hutchison not to have any further correspondence with the Claimant. She told Mr Freeman, however, that she had no further involvement with the case after exchanging emails with the Claimant.

PD 17

144. In December 2017, an in-house lawyer employed by the US parent company, Amy Blumrosen, became aware that the lawyer acting for Mr Boateng and Ms Tsogou Mabengou Mr Pradal, had a number of Baker Hughes documents in his possession. The documents included the Fatal Incident Report, the Root Cause Analysis and the website print out of Mr Boateng's employee profile that the Claimant had accessed.

145. Because the employee profile showed that it had been printed out by someone called "Celeste", the Respondent suspected that the Claimant was responsible for leaking these confidential documents to Mr Pradal. Shannon Reid, a member of the HR Team who had been dealing with Mr Boateng's case, was able to identify the Claimant as likely to be the "Celeste" involved as a result of the email the Claimant had sent to Mr Simonelli on 4 September 2017 and her previous knowledge of the Claimant's interest in Mr Boateng's case (975 – 976)

146. The Claimant confirmed to the Tribunal in her evidence that she had given the Employee Profile to Mr Pradal in early December 2017. The Claimant relied on this as PD 17. The Respondent disputed that this amounted to a protected disclosure.

147. At the time the Claimant passed the document to Mr Pradal, she was also a client of his. Her purpose in providing the documents to Mr Pradal was to assist with the legal claim, being pursued by the families of Mr Boateng and Ms Tsogou Mabengou, however, rather than to obtain advice on her own position.

148. The Claimant told us that Mr Pradal's strategy was to try and establish a link between Mr Boateng and the New York subsidiary of the BHGE Group. This

was necessary because the limitation period has passed to pursue a claim in the State of Texas, but the claim was within time in New York.

149. We note that the printout shows Mr Boateng's job title as being a Lead Technical Support Specialist at the LPB band in Africa. His line-manager is shown as being Christine Bader. The hierarchy above her shows three people who, we were told, were all based in New York. His payroll is given as GH Baker Hughes Acquisition payroll with Mr Boateng's organisation being:

Industry:	Baker Hughes GE
Segment:	Baker Hughes GE Global Operations
Sub-Business	BHGE GO Sub Saharan Africa
Organization:	BHGE GO-SSA-West Africa

150. The Claimant considered the print-out might be helpful because of the three people shown on it based in New York.

151. The Claimant told the Tribunal that when she gave the documents to Mr Pradal she told him that they demonstrated that the BHGE Group was attempting to conceal that Mr Boateng had been in Gabon in his capacity as an international assignee and that therefore in defending the litigation, the Group was attempting to conceal a breach of its legal obligations.

152. We do not accept the Claimant's evidence. We find instead, that at the time of providing the documents to Mr Pradel, the Claimant simply told him that she had found documents that might help Mr Boateng's case because they showed a potential link to New York. The Claimant said in her evidence that the case "*became all about New York*." This suggests to us that she did not genuinely believe that Mr Boateng's employment was linked to New York, but that it might be possible to establish a paper trail to New York and give life to the legal action.

Suspension – Detriment 2

153. When it was discovered that Mr Pradal was in possession of internal confidential BHGE documents, the Respondent decided to conduct a disciplinary investigation and to suspend the Claimant on full pay pending the outcome of the investigation.

154. The task of suspending the Claimant was undertaken by Shane O'Neill, who, at that time, was the Respondent's HR Manager for England/Ireland. He gave evidence to the Tribunal and told us that the decision to suspend was taken by "*taken by senior members of the HR function in the US responsible for tax being the area that the Claimant was assigned with advice from the legal department.*" He was informed of the suspension by Mr Adam, the Respondent's in-house lawyer with specific responsibility for employment matters in Europe.

155. A letter dated 20 December 2017 was prepared explaining the suspension (895). The letter gave minimal detail about the reason for the suspension other that saying that it was "*pending investigation into allegations of the possible violation of the BHGE Code of Conduct and the Spirit and the Letter"* and adding that the Respondent considered suspension to be warranted because of "*the seriousness of the allegations*."

156. The suspension took place on 5 January 2018. Mr O'Neill visited the Claimant at home for this purpose. At this time, it had been agreed that the Claimant would work from home regularly. Ass she was away, it took several visits between 20 December 2018 and 5 January 2018 before Mr O'Neill found the Claimant at home.

157. Mr O'Neill did not call ahead to arrange the visit, but arrived unannounced. The reason was because he was also tasked with recovering the Claimant's laptop and mobile phone for the purposes of the investigation. The Respondent did not want to give the Claimant any forewarning of the suspension in case she tried to delete evidence from these items.

158. There is little dispute between the parties as to what occurred during Mr O'Neill's visit. The dispute concerns the 'tone' of the visit. The Claimant portrays the visit as distressing and inappropriate and says that it left her "devastated and shaken". Mr O'Neill says it was a cordial meeting.

159. We find that the meeting was conducted in a cordial manner. The Claimant accepts that she was welcoming to Mr O'Neill and during the visit, she offered Mr O'Neill tea and coffee and told him all about the accident and showed him the pictures of Mr Boateng. Mr O'Neill accepts, however, that she said she needed to speak to her lawyer and that he did not leave her to do this in private.

160. The Respondent does not dispute that when the Claimant asked Mr O'Neill what the alleged breach of company policy was, he told her that she was unable to elaborate further.

161. On the morning of the suspension the Claimant's IT access was removed meaning that, thereafter, she had no access to the Respondent's internet or email system.

162. Mr O'Neill asked the Claimant for alternative telephone and email contact details. The Claimant chose not to provide these and asked that all correspondence be provided by post.

163. Following the suspension meeting, as a result of feeling stressed and the fact that Mr O'Neill had arrived at her home unannounced, the Claimant decided not to remain at home alone and opted to stay with friends. She told us that she stayed with friends, on and off, for the next few months until around mid-March to April 2018. The Claimant did not notify the Respondent of her change in address. She continued to visit her home to check her post once or twice a week.

PD 18, Detriment 1(e)

164. On 26 January 2018, the Claimant sent a further email to Mr Simonelli and Mr Elsinga. The email was sent from a personal email account the Claimant had created using the names Andy and Clarice (after Mr Boateng and ms Tsogou Mabengou). Her email said:

"Dear Lorenzo, Dear Harry,

Monday, September 4th, 2017 I reported to you abuses that your employee, my friend and colleague, Andrews Boateng, was subjected to in the medical facility where he is currently kept in South Africa.

We also met in the company's offices in London in November 2017 where I re-iterated my concerns on the matter.

I am writing to you both today to let you know that last Friday January 19th, Andrews was admitted in the Intensive Care Unit following serious complications on a surgery on his throat.

The complications where so serious that the hospital resuscitation team was called in. The doctor who performed the surgery did NOT have the family's approval.

I attached the pics of Andy in the recovery room. Tragic!

This is another set-back to Andy's recovery. Another trachea had to be placed. It is a 3 years set-back.

This is an employee who went on international assignment.

Since 2015 I have not stopped raising concerns internally over Andy's treatments again and again and I will not stop as long as he is not given the care he deserves.

After the falls, injuries, abuses, unspeakable humiliations, no respect for his dignity I have continuously raised concerns over questionable medical ethics in South Africa.

I am not the only one to have complained over Andy treatment; but colleagues have been bullied to silence.

Family, friends and colleagues have demanded Baker Hughes to transfer Andy to facilities in Europe or the USA for more appropriate treatments where there are better medical ethics.

So here I am again. I re-iterate the demand.

After meeting with you, I believed that indeed you were not aware of the story; but now that you know, what will you do?

You have said that GE takes such things very seriously but they have to go through processes and procedures.

I am afraid, Andy cannot wait!

Yesterday it was physical injuries and abuses. Today it is an un-approved operation which resulted in serious complications and needed the resuscitation team to intervene ad a placement in ICU!

Look at the pictures attached and tell me if you would accept your brother, son, relative to go through what Andy is going through.

In the "Western World" people campaign against animals' abuses! Please!!!

Our Business Code of Conduct encourages us to do the right thing first and always; should you not lead by example and do the right thing too?

Someone needs to take responsibility. This is above our jobs and positions within the business!

Do you think Andy's ordeal reflect our Core Values, Good Ethics and Business code of conduct?

As I previously said our almost biblical company Ethics, core values and "Business code of conduct and the Spirit & Letter" surely must invest in Andy's life and recovery not in his further suffering and death!

Finally,

You have suspended me for a "possible violation of our business code of conduct..." Fine. I shall wait for the conclusion of your investigation.

That tragic car accident took the lives of Clarice and her unborn baby. Clarice was also my friend but there is nothing I can do for her.

As for Andy, either in or out your payroll, it is a moral responsibility to continue to speak up and speak out for him. And I shall do so in every available channels.

The business is capable of far more than what has been done so far for Andy:

example: a BH employee had cancer; just by "few clicks on SAP" he was "virtually" transferred to a better payroll group company in a different country, to avoid him a financial burden of the out of pocket medical bills of over 100K USD for his cancer treatment; Expenses he would have paid should he remained in his original payroll group.

That employee cancer was not business related but still the business decided to provide him with a better medical insurance for financial reasons.

How greater is the company duty of care for Andy who was injured while on a company international assignment?

Waiting on GE to do the right thing

Celeste" (902 – 903)

165. The email attached pictures of Mr Boateng including pictures of him in the ITU (2457 – 2458). The Respondent accepts that the email contains protected disclosures.

166. It is relevant to note that the Claimant would only have known what she was told by Mr Boateng's family about Mr Boateng's surgery.

167. According to the medical notes that were included in the Tribunal bundle, Mr Boateng's treating physician had recommended in December 2017 that he have a surgical procedure on an elective basis to repair a condition that had developed related to his treatment since injury. Before proceeding, authorisation was awaited from Mr Boateng's brother. The notes say that the surgery took place on 20 January 2018, but do not mention whether it was with or without authorisation. There is reference to that fact that the evening after the surgery, Mr Boateng developed a complication which meant he needed a further emergency procedure in the ICU (30 -31) The Respondent told us that it believed that if the procedure had been carried out without authorisation, this was because it became an emergency.

168. The reference in the Claimant's email to a Baker Hughes employee being transferred to a better payroll group is a reference to her understanding of what happened in the case of her line manager Mr Leake. Mr Leake was diagnosed with a cancer which required treatment in 2015. The Claimant believed that the Respondent had switched Mr Leake onto its Dubai payroll in order for him to receive treatment in the US. Her belief appears to stem from an email contained in the bundle that she accessed using her Global Mobility Access (2097). We were told by the Respondent that because Mr Leake was a US citizen he was able to return to the US for treatment.

169. Mr Simonelli and Mr Ensigna did not respond to the Claimant's email and did not arrange for anyone else to respond to it. Mr Elsinga told the tribunal that alerted Ms King-Hutchinson to the email, but was was unable to provide a forwarded email confirming this. In light of what Ms King-Hutchinson told Mr Freeman, we find he did not take this action.

PD 19, Detriment 1(f)

170. On 30 January 2018, the Claimant forwarded the email she had sent to Mr Simonelli and Mr Ensinga to three employees of BHGE that were members of an internal group called the "African American Forum." (2204-2211) She sent the email from the same personal email address she had created from the names Andy and Clarice. One of the members replied promptly on the same day saying the following:

"Celeste. Thank you for sending your note. This is the first I've heard of this situation, and I will inquire about what is being done.

I'm not familiar with the policy on international medical treatment, but will do our best to find out. This situation may be between BHGE and Andrew's family or appointed guardian, so information may be limited."

171. There was no further follow up. We did not hear evidence from the person who sent this email and so we do not know why.

PD 20

172. In early April 2018, the Claimant travelled to New York to attend a court hearing where a judge was to decide whether there was jurisdiction to hear the cases being brought by Mr Boateng's and Ms Tsogou Mabengou's families in New York State. She met with Mr Pradal in advance of the hearing and gave him several of the Respondent's policy documents. She relies on this as PD20.

173. We note that all of the policy documents were marked confidential.

174. The New York court hearing took place on 11 April 2018. On the morning of the hearing Mr Pradal handed copies of the additional policy documents to the lawyer acting for BHGE. This was not Ms Blumrosen, but external counsel she was instructing. Ms Blumrosen was not present at the court. She was later told about the additional disclosure by the other lawyer.

175. A transcript of the hearing was included in the bundle (2212 – 2235). According to the transcript, Mr Pradal told the New York court that two Baker Hughes employees were involved in providing the documents to him. He explained that an employee called Igor Anouvet sent the Fatal Accident Report and Root Cause Analysis Report to Ms Tsogou Mabengou's daughter who passed it to him. He appears, according to the transcript to be about to refer to the Claimant as having provided him with other documents but is interrupted by the Judge. Although BHGE sought to object to the documents being admitted, they were. The decision of the Court was not to permit the legal case to proceed, however.

176. The transcript of the hearing was produced by the Court shortly after the hearing. The version in the bundle was date stamped 18 April 2018 and our finding is that it was likely it was sent to both Mr Pradal and Ms Blumrosen at the same time on or around this date. The Claimant only acquired a copy of it later in connection with her employment litigation after her dismissal.

Disciplinary Investigation: Detriment 3

177. It is not disputed that the disciplinary investigation into the allegation that the Claimant had leaked confidential documents to Mr Pradal was not competed until 7 September 2018 (1134 - 1137). This was eight months after the Claimant had been suspended on 5 January 2018. Furthermore, the Claimant was not sent the investigation report until 10 December 2017

(1625). This was a further period of three months. The total period between her suspension and finding out the outcome of the investigation was therefore eleven months and 5 days.

178. It took the Respondent until 5 March 2018 to appoint someone to conduct the investigation. The person appointed was Lee Howard, then Engineering Excellence Director – Oilfield and Industrial Chemicals. He had worked for the Respondent since 1998 and his normal place of work was Liverpool.

179. Mr Howard had never met the Claimant. He worked in a completely different area of the Respondent's business to her. He had previous experience of conducting disciplinary investigations. Mr Howard was assisted by Victoria Roughsedge, HR Business Partner. Ms Roughsedge had also not had any dealings with the Claimant previously.

180. It is relevant to note that Mr Howard confirmed to the Tribunal that, at the time he undertook the investigation, his familiarity of the legislation protecting whistleblowers in the UK was at a very high level only. This did not include any knowledge of the provision (section 43J Employment Rights Act 1996) which renders confidentiality provisions void in certain situations. He told us that he did not consider whistleblowing at all in his investigation.

181. The first investigative step that Ms Roughsedge took was to contact Shannon Reid, Global Benefits, Integration Lead, Total Rewards. Amy Blumrosen had first contacted Shannon Reid when she had discovered that Mr Pradal had Baker Hughes documents in his possession.

182. Ms Reid provided Mr Routledge with three emails that appeared to link the Claimant to Andrews Boateng (897 – 905). Two of the emails were emails which the Claimant relied upon as protected disclosures (4 April to Mr Simonelli and 26 January 2018 to Mr Simonelli and Mr Elsinga). The third email was not sent from the Claimant's account. It was an email sent on 8 November 2016 seeking support from colleagues to sign a petition requesting the transfer Mr Boateng to Jackson Memorial Hospital in Miami Florida.

183. Mr Howard and Ms Roughsedge had a 45 minute call with Amy Blumrosen. The call was on 5 March 2018. No minutes were created of the discussion. Instead, based on the call, Ms Roughsedge prepared a statement for Ms Blumrosen, which she considered and amended (967 - 973). Ms Blumrosen also sent copies of the relevant documents to Ms Roughsedge. At this point in time, Ms Blumrosen was only aware of Mr Pradal having five documents in his possession, namely:

- The Fatal Accident Report
- The Root Cause Analysis
- Employee Profile
- 2 Job Adverts

184. Ms Reid was also asked to review and agree a statement prepared for her by Ms Roughsedge. She signed it on 9 March 2021. Her statement included the following paragraph:

"[Mr Pradal] would not have access to these documents as they are saved in the internal company systems. And these documents should not be in the possession of a non-Baker Hughes employee as the documents are considered company confidential." (973).

185. Mr Howard and Ms Roughsedge also spoke to Mr O'Neill about the Claimant's suspension and a statement was also prepared for him (978 – 979).

186. We note that this was the method used for all the witness evidence relied upon in the disciplinary investigation. This reflects the practice operated within the Respondent when dealing with grievance and disciplinary issues whereby recordings/notes are taken of the meetings with the main protagonist (the employee raising the grievance or facing disciplinary allegations), but for other meetings / interviews, statements are prepared instead which the relevant individuals are asked to check and sign.

187. The Claimant was sent a letter, by post, dated 16 March 2018 inviting her to attend an investigation meeting on 21 March 2018. All that the letter said about the scope of the investigation was as follows:

"I write further to your suspension from work effective January 2 2018 pending investigation into allegations of the possible violation of the BHGE Code of Conduct and the Spirit & Letter.

As per the Company's Discipline Policy (HR-GLB-En-100160), the allegations made are under investigation and I have been appointed as Investigation Manager. My role is to gather all of the facts and evidence and make a decision based on the facts and evidence gathered on whether there has been breach(s) of policy, which then would progress to a formal disciplinary hearing."

188. The letter indicated that the Claimant would have the opportunity to provide evidence "*by way of a statement*" in response to the allegations made against you at the meeting. She was told that if she was unable to attend the meeting, she could contact Ms Roughsedge by telephone. Nothing was enclosed with the letter.

189. The Claimant's evidence, which we accepted, was that she did not receive the letter until 21 March 2021. The Claimant was not living at home when the Royal Mail attempted to deliver the letter to her because she was staying with her friends, meaning she had to collect the letter from her local post office. She later explained this to the Respondent (990).

190. On receipt of the letter, the Claimant rang Ms Roughsedge and left a voice mail message explaining that she had only just received the letter. She also wrote to Mr Howard by post (980). The Claimant's letter was dated 21 March

2018 and was posted to Mr Howard on 22 March 2018 (981). In addition to explaining that she had only received his letter on 21 March 2018, it said:

"Prior to scheduling another meeting, I would appreciate that a summary detailing each issue(s)/serious allegation(s) made against me and under your investigation to be set out, otherwise I will not be able to prepare a statement in response." (980)

The Claimant did not request copies of any of the policies referred to in Mr Howard's letter.

191. Neither Mr Howard nor Ms Roughsedge responded to the Claimant's letter on receipt. Mr Howard received the letter on 28 March 2018.

192. On 4 and 5 April 2018, Mr Howard conducted two further investigation interviews which had been arranged by Ms Roughsedge at Ms Reid's suggestion. The conversations were very brief because neither of the people he interviewed had relevant evidence.

193. The Claimant was invited to attend a re-arranged investigation meeting on 9 May 2018. She was sent a letter dated (Friday) 3 May 2018 by recorded delivery and first class post that day (982). The letter was also emailed to the personal Andy and Clarice email address which the Claimant had created on (Saturday) 4 May 2018.

194. The letter noted that the Claimant "*had failed to attend [the previous] investigation meeting.*" In response to her query to be provided with a summary of each allegation under investigation, it said:

"As previously advised, the investigation relates to an alleged breach of the Company's Code of Conduct. We are not yet in a position to determine whether any specific allegations should be raised but we are investigating whether Company confidential information has been shared inappropriately." (989)

195. The letter asked the Claimant to confirm her attendance by telephone by 5 pm on Monday 7 May 2018. Monday 7 May 2018 was a bank holiday. It explained that as Mr Howard and Ms Roughsedge would be travelling from Liverpool to meet the Claimant, they needed this information "*in order to avoid a further wasted journey*."

196. The Claimant's evidence, which is not disputed by the Respondent, was that she received the letter on 8 May 2018. The Respondent used the Post Office Tracking Service which confirmed that the letter was delivered to the Claimant at 12:25 pm on 8 May 2018.

197. The Claimant rang Ms Roughsedge at around 4.30 pm on 8 May 2018 to say she had only received the letter that day and in light of the short notice, would not be attending the investigation meeting the following day. The Claimant followed this up with a further letter to Mr Howard.

198. In her letter the Claimant reiterated her request for further information about the allegations against her. She asked for a copy of the Code of Conduct highlighting the sections where the "alleged violations" might have taken place and for a copy of the Respondent's policies related to internal investigations, explaining that she needed hard copies because she no longer had access to the Respondent's intranet. The Claimant's letter confirmed that she was looking forward to attending an investigation meeting, but requested better planning and advance notice (990 – 991).

199. The Respondent sent a further letter to the Claimant on 23 May 2018, inviting her to a re-scheduled investigation meeting on 1 June 2018. The letter enclosed the Respondent's Code of Conduct and the Sprit and The Letter but did not highlight any particular alleged violations. The Respondent's Disciplinary Procedure was not enclosed. The letter said that the Claimant should confirm her attendance at the meeting on 1 June 2018 by 5 pm on 29 May 2018 (995).

200. Royal Mail tried to deliver the letter to the Claimant's home address on 24 May 2018, but she was not at home. The Claimant did not make contact with Ms Roughsedge by 29 May 2018 as had been requested. On 30 May 2018, Ms Roughsedge tried to call the Claimant three times on the mobile number that the Claimant had previously called her from, but the phone was switched off. Later that day, Mr Howard sent a text message to the same number asking if the Claimant planned to attend the meeting. He received no reply (1,000). Mr Howard and Ms Roughsedge decided not to travel to London for the meeting and to procced to draft an investigation report without the Claimant's input.

201. The Claimant's evidence was that she did not retrieve the letter from Royal Mail until after 1 June 2018. She said she did not see the text message because she was not using the phone regularly. However, even after she had retrieved the letter, she did not write to the Respondent.

202. The Claimant had, on 21 May 2018, posted by recorded delivery, a document dated 19 May 2018 headed "Formal Grievance" to John Flannery CEO and Chairman of General Electric and Mr Simonelli in the US. We deal with the content of the grievance further below, but note here that the Claimant expressly stated that she believed, "*some of my concerns amount to Protected Disclosures and should have been dealt with under the Company Whistleblowing policy*" (656 – 658).

203. Our factual finding, relevant to the disciplinary investigation, is that having submitted the grievance, the Claimant decided she no longer needed to respond to correspondence about the investigation. She was expecting the investigation to be put on hold while her grievance was considered. We find that she was aware that a letter was waiting for her and could have collected it before 1 June 2018, but chose not to do so.

204. Mr Howard and Ms Roughsedge were unaware of the grievance. No-one in BHGE informed them of it. The Claimant did not send it to them nor write to them to tell them that she had submitted it.

205. Although Mr Howard and Ms Roughsedge had decided to proceed to conclude the investigation without the Claimant's input, they did not do this quickly. The investigation report was still in a draft form when on 29 August 2018, the Respondent's in-house employment lawyer Neil Adam informed them that a second set of documents had been provided to Mr Pradal and that the Claimant had been in attendance at the New York Court Hearing. Mr Howard told us that the reason the report was still in draft form at this point in time was due to a combination of him having to travel for business purposes and he and Ms Roughsedge taking annual leave.

206. Ms Blumrosen prepared an updated statement which she had signed and dated 27 August 2018 (1143 – 1144). This together with copies of the additional leaked documents were sent to Mr Howard and Ms Roughsedge. Ms Blumrosen did not provide them with the transcript of the court hearing. Mr Howard and Ms Roughsedge did not speak to Ms Blumrosen directly or ask her any questions about her updated statement.

207. It is relevant to note that in her statement Ms Blumrosen included the following:

"*In April 2018 I became aware of who was providing adverse attorney, Mr. Pradal with documents. During Baker Hughes' oral arguments on its motion to dismiss, Baker Hughes outside counsel relayed to me the following during the heating: upon arrival at the courthouse in New York City, NY Baker Hughes' outside counsel was approached by plaintiffs' counsel Mr. Pradal who asked whether Baker Hughes would object to the admission of a spiral-bound packet of documents that had not previously been submitted to the court with any of the briefing. Baker Hughes' outside counsel advised that Baker Hughes would object to the lateness of the documents and also the documents were not authenticated, just as the documents attached to Mr. Pradal's response to Baker Hughes' motion to dismiss were not authenticated. Mr. Pradal told outside counsel that Celeste Diavita, an employee of Baker Hughes, was in the courthouse (and he pointed her out) and was prepared to testify to the authenticity of the new documents and the documents previously submitted to the court.*

It is apparent that while employed and while having access to the Baker Hughes' system, Celeste Diavita supplied Mr. Pradal, an attorney representing parties adverse to Baker Hughes, with numerous company confidential documents. Rather than go through the due process of discovery, Celeste and plaintiffs' counsel circumvented this process and used insider knowledge and access to gather documents for Mr. Pradal's lawsuit against Baker Hughes." (1642-1643)

208. Mr Howard and Ms Roughsedge updated and finalised the four page Investigation Report and signed it on 7 September 2018 (1134 – 1137).

209. Mr Howard's conclusions were that it was highly likely that the Claimant had disclosed confidential company information in contravention of the Respondent's policies and that the matter should proceed to a disciplinary

process. The report noted that the Respondent's disciplinary procedure listed breach of confidentiality as a disciplinary offence which amounted to gross misconduct (1137).

Second Grievance: PDs 21 & 22, Detriment 7

210. As noted above, the Claimant had sent a document with the heading "Formal Grievance" to Mr Flannery and Mr Simonelli by post on 21 May 2018. The grievance is relied upon as PD21. In this section, we set out our factual findings in relation to this second grievance.

The grievance stated the following:

"As you are now aware, on the 24th of April 2014 a road traffic accident ('the accident') involving two employees of Baker Hughes ('the Company') resulted in the death of Clarice Tsogouma-Bengaou along with her unborn child and caused serious injury to Andrews Boateng, a colleague working on his new international assignment in Gabon.

Since the accident I have repeatedly raised concerns over the failure of the Company to comply with its legal duty of care towards Andrews and to honour its moral obligation to him. Despite my repeated requests and occasional vague assurances from various representatives of the Company, nothing tangible has been done and Andrews has remained in hospitals in South Africa without provision of adequate care and therapies. Please see Appendix 1.

The Company has tried to sweep the matter under the carpet and has simply paid lip service to my concerns in the hope that they, or I, would go away. Clear evidence for this is the fact that when the Company was acquired by General Electric the matter, including proposed legal action against the Company, was not brought to the attention of General Electric as part of the due diligence process.

I have tried my best over the past 3 years to do what is right; I have brought genuine concerns in relation to Andrews and continued health and safety violations to the attention of various managers and still my concerns are ignored. I believe that some of my concerns amount to Protected Disclosures and should have been dealt with under the Company Whistleblowing policy.

The Company has consistently refused to listen to my concerns over Andrews and his poor state of healthcare and therefore I consider that I now have no alternative but to raise a formal grievance in line with the Company Grievance Policy…

I believe that the failure of the Company to look after a member of staff injured during the course of his duty is contrary to the often stated core values and principles of the organisation.
…..

I understand that you have a duty to protect the interests of shareholders and ultimately your primary objective is to make profit. However, the claim brought by Andrews is an insurable risk and, if successful, will have a very limited impact on the bottom line.

Shareholders not only want to protect their financial interest but generally want to invest in a company which upholds its core values and protects its public image and assumes its corporate and social responsibilities.

I would therefore respectfully ask that you not only take my grievance seriously but that you honour your commitments, be accountable for the actions of the Company, stand for what is right and treat Andrews fairly and in a way that is consistent with the values that the company advocates, remembering that he was injured, through no fault of his own, whilst on duty with the company." (656 – 657)

211. It is not disputed that the Respondent did not provide the Claimant with a grievance outcome until 10 November 2019, nearly 18 months after the date she submitted it.

212. It took until July 2018 for the Respondent to appoint Mark Freeman, Global Tax Lead for Oilfield Equipment, to consider the grievance. He was supported by Diletta Arischi, from HR. Neither Mr Freeman nor Ms Arischi had had any significant dealings with the Claimant previously.

213. The Claimant was sent a letter by recorded delivery on 26 July 2018 inviting her to attend a grievance meeting on 8 August 2018 with Mr Freeman (662). The Claimant did not attend the meeting. The Claimant emailed Mr Freeman directly (using the Andy and Clarice email address) on 8 August 2018 at 15:09 to say that she had only just received the letter having not been in a position to collect it sooner. She apologised for missing the meeting and suggested an alternative date (663). Via email it was agreed that the meeting would take place on 30 August 2018.

214. The meeting took place as planned. A recording was taken by the Respondent of the meeting which led to the production of a transcript (672-688). The meeting was lengthy and the Claimant recounted that she had previously raised concerns about Andrews Boateng and what she believed had happened. The Claimant said that her primary concern in raising the grievance was for the Respondent to accept liability for the accident and to arrange for Mr Boateng to be transferred to Europe or the US so that he could have rehabilitative therapy. She relies on what she says as PD22.

215. Specifically, the Claimant told Mr Freeman and Ms Arischi:

- that she believed that the internal investigation into the accident had identified that the car was not safe and the driver was not authorised to drive the car. She added that she believed that the report included an admission of liability;

- she believed, based on what Mr Kuppuswamy had told her, that Mr Boateng was not covered by insurance at the time of the accident which was why he was not receiving rehabilitative care, but had been moved into a care facility;

- she believed the reason that Mr Boateng was not covered by insurance was because he had been sent on international assignment without a contract;

- that when Africans were sent out of their home country to work in other locations they were not provided with the same packages (including medical) as when western employees were sent on international assignment and she considered this to be racial discrimination;

- in addition, African employees were often sent to work in other locations without contractual documentation being in place, which she considered was another example of race discrimination;

- she believed that under the terms of the Global Mobility insurance policy that should have been in place for Mr Boateng, funding would have been available for him to receive treatment anywhere in the world;

- in any event, regardless of the insurance position, BHGE, should pay for Mr Boateng to receive the best treatment in Europe or the US because he was injured while on duty;

- she believed that BHGE had demonstrated that it was prepared to take action to support white western employees and gave the example of Gale Leak. She claimed had received funding worth 250,000 USD for his chemotherapy treatment through being moved onto the international assignment payroll operated from Dubai; and

- that she had raised a grievance about race discrimination relating to the contrasting positions between herself and her white colleagues when they transferred to Ghana, which had been "crushed" by the Respondent rather than considered properly.

216. Although the Claimant talked at length about Mr Boateng, she did not provide Mr Freeman and Ms Arischi with the relevant documents. She took the view that the primary onus was on them to obtain the records of the concerns she had raised rather than be provided with them by her. She also told them that she believed that Mr Freeman's investigation would be "shut down" in the same way she had been shut down when trying to raise concerns about Mr Boateng, because of the ongoing litigation and that she had lost her job because of raising concerns.

217. The Respondent sent the recording of the meeting to the Claimant on 12 September 2018 (704). She was not, however, sent the typed transcript of the meeting at this stage

218. On 11 October 2018, Mr Freeman emailed Mr O'Neil and Ms Arischi for advice on the scope of the grievance. His email said:

"Having considered the contents of the grievance letter dated May 2018 and the meeting with Celeste on 30th August, I come down to the following initial conclusions and next steps:

Celeste's demeanour in the meeting was increasing emotional and therefore there are a number of repetitions, digressions and statements on various issues which are serious, and which should be noted by HR and Legal, but which I do not believe are the subject of the grievance. Within this were a number of references to what Celeste believes is racial bias, though she said quite specifically towards the end of the meeting that that was the subject of a separate grievance and that it was not the subject of <u>this</u> grievance.

After careful , therefore, I believe there are four aspects which require investigation (3 explicitly stated by Celeste and 1 to ensure the company follows best practice):

1. *We should investigate what more can and should be done for Andrews Boateng in terms of treatment and care, if anything further is possible;*

2. *We should assess what lessons were learnt from the accident and whether there are aspects of the car policy, and its application, which can be improved;*

3. *We should review the contracts under which employees operate in Africa and the insurance and emergency medical care contingencies associated with them;*

4. *We should confirm whether or not any action was taken in response to Celeste's 2015 emails to the Ethics hotline." (694)*

219. Mr Freeman did not check with the Claimant that he had correctly interpreted what she wanted him to investigate, even though on 25 October 2018 she emailed him (using the Andy and Claire email address) to ask for an update. He responded briefly on 31 October 2018 to say that he was looking into her concerns, but had nothing further to update her with at that point (750 – 751).

220. Mr Freeman spoke to Ms Blumrosen in October 2018 who informed him that she believed that the Claimant provided internal confidential information to an attorney representing Mr Boateng's family in litigation against BHGE. Mr Freeman took form this that he should be careful in relation to giving the Claimant information in case she leaked it.

221. Mr Freeman had no further contact with the Claimant until 1 April 2019, after she had been dismissed. On 11 February 2019, the Claimant had emailed Mr Freeman (again using the Andy and Claire email address) to ask for a copy of the grievance meeting transcript. Mr Freeman did not respond to her

until 1 April 2019, but on that date sent the transcript to her with a short email. He provided no other update.

222. Mr Freeman issued the Claimant with the grievance outcome on 10 November 2019 (890 – 894). His explanation for the delay was that it was a complex investigation and it genuinely took that long, bearing in mind he was doing it alongside his ordinary job.

223. Although Mr Freeman had obtained extensive documentation during his investigation including a 64 page report from ISOS about Mr Boateng's medical care and full details of the insurance arrangements that were in place for Mr Boateng, he did not provide this to the Claimant. This was because of the concerns that the Claimant would breach company confidentiality. It was also to protect Mr Boateng's privacy with regard to his medical information. Mr Freeman did not ask Mr Boateng's family whether they consented to the Claimant having access to Mr Boateng's private information.

224. In the outcome letter to the Claimant, Mr Freeman explained who ISOS were and how they had been involved in Mr Boateng's care since April 2014. He confirmed that he had reviewed the notes provided by ISOS from April 2014 to date and said, *"I have seen nothing in my review to suggest that the Company acted and continues to act otherwise that in good faith and, through its global insurance company, has provided fill medical care coverage for Mr Boateng throughout his treatment and rehabilitation*." He deliberately did not provide further details because of his concerns about confidentiality and protecting Mr Boateng's private medical information (890 - 891). Mr Freeman did not investigate what had occurred in the case of Mr Leake by way of comparison with Mr Boateng's position.

225. Mr Freeman explained that he had investigated what action had been taken in connection with the accident. He confirmed that the accident investigation report had found that the accident could not have been avoided by the driver, but had nevertheless made some recommendations for improvements which had been implemented (891 – 892).

226. He confirmed he had considered whether "the company" had adequately responded to the Claimant when she raised concerns about Mr Boateng's treatment. He identified eight occasions when the Claimant raised concerns and documented, to the extent he was able based on his investigations, what had been done as a result. He concluded that clearer responses could have been provided to the Claimant on several occasions and in two cases partially upheld her grievance because she had not been provided with responses at all. Overall, he considered that "the company" did take appropriate action in response to the concerns raised by the Claimant, albeit that the action was not fully communicated to the Claimant at the time (892 – 894).

227. The letter did not advise the Claimant that she could appeal against the findings of the grievance.

Disciplinary Process: Detriments 4 and 5

228. In this section, we return to the disciplinary process.

229. Although the investigation report was completed on 7 September 2018, the Claimant was not notified of this until 10 December 2018.

230. It took the Respondent two months to identify a disciplinary Chair. On 5 November 2018, the Respondent asked Kay Mutch, then Measurement and Control – Europe and Russia/CIS Region Finance Manager to Chair the disciplinary process. Ms Mutch had no knowledge of the Claimant and came from a completely different area of the Respondent's business. This was the first disciplinary she had chaired, but she had previously been involved in conducting disciplinary investigations.

231. Ms Mutch was to be assisted by Diane Reid, Senior HR Manager, who had also had no previous involvement with the Claimant.

232. Ms Reid sent Ms Mutch the investigation report and attachments on 27 November 2018, 3 weeks after Ms Mutch agreed to be involved. On 4 December 2018, Ms Reid noticed that there was a page missing from Mr O'Neill's statement which needed to be resolved before the disciplinary pack was sent to the Claimant. This was resolved by 7 December 2018.

233. On 10 December 2018, Ms Reid sent the Claimant two emails to the personal email address she had previously used. The first email attached a letter from Ms Mutch inviting the Claimant to attend a disciplinary hearing on 18 December 2018. The email attached the first half of the documents contained in the Disciplinary Pack, with the second email attaching the remainder documents. The Disciplinary Pack consisted of 27 documents in total including the Investigation Report, the Respondent's Disciplinary policy (July 2018 version), the BHGE The Spirit and the Letter, the Claimant's contract of employment and the evidence which had been collated by Mr Howard (1626 – 1833)

234. The Claimant's evidence was that she opened the email on 13 December 2018 and immediately responded by emailing Ms Reid at 21:19 (1842). The Claimant acknowledged receipt of the email and attachments noting that the pack contained over 200 pages. She requested that the disciplinary meeting be postponed to 17 January 2019 to enable her to "fairly prepare" for the hearing (1835).

235. Ms Reid responded on 16 December 2018 informing the Claimant that meeting would proceed as planned as she considered the Claimant would have had reasonable time to prepare prior to the hearing (1834).

236. The Claimant replied by email on 17 December 2018 (16:49) reiterating her request that the disciplinary hearing should be postponed. The Claimant had assistance from a lawyer with the email. It said:

"I acknowledge receipt of your rejecting my request for a postponement of the disciplinary hearing scheduled for tomorrow to 17 January 2019.

In accordance with the ACAS code of practice, particularly in relation to disciplinary action which could result in my dismissal I should be given the opportunity to fairly prepare to respond to the allegations against me. I do not believe that I have been given this opportunity for the reasons listed below:

1. *I filed a formal grievance regarding serious concerns over business ethics and policy violations which have resulted in the serious injury of one employee and the death of another. My grievance was heard on 30th August 2018, almost 4 months later my grievance has not yet been concluded and I am still to hear further from the investigator. I believe that any disciplinary action against me is related to my grievance and therefore it should be suspended pending the conclusion of the grievance process. I believe that I have made a protected disclosure and that I am being subjected to a detriment with the business's intention to pursue disciplinary action and to pursue this action before my grievance is concluded. Please provide me with a copy of the business' protected disclosure policy.*

Notwithstanding the above, if it is still the intention to continue with the disciplinary process despite my outstanding grievance I rely on the following:

2. *It took the business almost 12 months to gather information, documents and statements upon which you rely for the purposes of the disciplinary action. This was forwarded to my email address on 10 December 2018. You have given me just a week to review the documents and prepare my response. This is unreasonable and unfair. I have not had the opportunity to seek advice nor arrange for a companion to attend the meeting with me.*

3. *I am entitled to be accompanied to the meeting in accordance with my statutory right and the ACAS code of practice. My companion is in a different location and I am still in the process of obtaining their dates of availability to attend the mutually convenient date agreed to allow my companion to attend the meeting with me.*

4. *I am still awaiting policy documentation that I requested from Lee Howard several months ago that are relevant to the allegations against me. These policies still have not been provided to me and I ask that the meeting tomorrow is postponed until such time as I am provided the documents and have time to consider them.*

5. *Given the volume of documentation you have provided to me and the allegations against me it is not unreasonable to request a postponement to look at all the evidence you have collated, particularly given the intervening Christmas and New Year period.*

6. *Some of the evidence sent to me seems to have been provided over 6 months ago from very senior legal and Human Resources employees of the business. I have not been afforded the same or any opportunity to seek evidence from colleagues who would be able to provide statements in support of me and against the allegations I face. This is not feasible in the few days that I have been given.*

7. *You stated in your rejection of my request that a detailed knowledge of the documents is not necessary. I disagree. If these documents are documents you intend to rely on in my disciplinary investigation then I should have a reasonable timeframe to review the documents and seek advice as no doubt the business has done so before commencing disciplinary proceedings.*

8. *Given the serious consequences of any disciplinary action, I should be allowed to fully prepare before any such meeting takes place as this meeting will have a direct impact on my reputation and the future of my employment.*

9. *I feel that your comment that my non-attendance tomorrow would result in being viewed as misconduct is heavy handed and demonstrative of the unreasonable nature in which this disciplinary action is being pursued.*

10. *I made a subject access request in November 2018 and I have yet to receive a full response to this. I consider that the documents from my subject access request could be relevant to both my grievance and the disciplinary allegations against me and therefore the disciplinary action should be postponed pending my receipt of these documents and conclusion of my grievance.*

For all the above reasons and in order to have a fair disciplinary hearing I reiterate my request of a postponement of the disciplinary hearing tomorrow. Given that you will treat my non-attendance as misconduct I would appreciate your urgent reply today." (1840-1841)

237. Ms Reid responded about an hour later saying

"I confirm that the disciplinary hearing will go ahead as scheduled tomorrow and your attendance will be required

I would be happy to discuss your concerns [raised in your email] further at our meeting but I do not agree with the points you have made and feel that 8 days is a reasonable timeframe to prepare for this disciplinary hearing

The grievance which you have raised and the subject access request which you have brought are both separate matters which we are not involved in considering" (1840)

238. The Claimant did not attend disciplinary hearing on 18 December 2018. Ms Mutch and Ms Reid met and discussed the case. Ms Reid prepared a note

of their discussion which she sent to Ms Mutch for approval on 20 January 2019 (1854 – 1856). The note recorded not simply the discussion on 18 December 2018, but also what happened afterwards.

239. With regard to the Respondent's decision to proceed in the Claimant's absence, the note recorded the following:

- The Claimant's request to postpone the hearing was to 17 January 2019, which would have been a month after the original planned date. This was not considered to be a reasonable request.

- Ms Mutch determined that as the Claimant had failed to attend any of the three investigation meetings, it was unlikely that she would attend a rescheduled disciplinary hearing

Notwithstanding this, the Respondent did not decide the outcome at this point.

240. On 24 December 2018, Ms Reid wrote to the Claimant. The letter was sent by email, first class and special delivery post. The letter noted that the Claimant failed to attend three investigation meetings. It said: "*The Company has made every effort to understand your side of the matters against you, but you seem to have been unwilling to put forward your account, despite the best efforts of those investigating these matters. I regret that it appears you are taking the same approach to the disciplinary hearing."*

241. The letter explained the following:

- *"We are not involved in the consideration of your grievance or subject access request and these are entirely separate processes from the disciplinary hearing. The grievance you have raised I understand relates to your concerns about the treatment of Mr Boateng whereas this disciplinary hearing has been convened to determine whether or not you have disclosed company documents in breach of your obligations of confidentiality.*

- *As I have said, a detailed knowledge of the documents is not required for the purposes of the disciplinary hearing as the key issue is whether or not the documents were disclosed in breach of your obligations of confidentiality rather than a detailed discussion of the contents.*

- *You are, as you say. entitled to be accompanied to a disciplinary hearing. However, the request must be a reasonable one; you have not named a proposed companion but have suggested a delay until 17 January 2019 (one month after the date of the original hearing) in order that such person can attend. This is not reasonable in the circumstances. In any event, postponements to accommodate companions should not exceed five working days in accordance with the Acas guidance.*

- *You advised you are still awaiting policy documentation that you requested from Lee Howard. These documents were sent to you on 23rd*

May 2018 along with the letter inviting you to the rescheduled investigation meeting scheduled for 1 June 2018."

242. The letter concluded by explaining that Ms Mutch would be considering the evidence to reach a decision on the allegations against the Claimant. It advised her that if the Claimant had any representations to make, either in person or in writing, these would need to be received by Monday, 7 January 2019. (1849)

243. The Claimant did not respond to the letter from Ms Reid. Instead on 7 January 2019, she sent a letter by email to Mr Simonelli and Mr Culp. Again she had help from a lawyer drafting the letter. It:

- included a number of criticisms about the investigation and disciplinary processes

- highlighted that the Claimant had requested copies of the Respondent's policies on Protected Disclosures and relating to Internal Investigation procedures, but not been provided with them. The letter noted that the Disciplinary Procedure she had been sent had been updated on 17 July 2018 after the date her suspension had been decided. The Claimant requested a copy of the policy in force at the relevant time

- said that the Claimant did not understand the urgent need to proceed with the disciplinary hearing given that she had been suspended for over a year

- said that the Claimant did not consider that the disciplinary hearing should go ahead or be determined as she had an outstanding grievance which was related to her disciplinary

- included the following:

  "I believe that i am being subjected to a detriment because i have made protected disclosures about the Company failing in its legal obligations in respect of staff and in particular black members of staff being rotated and posted in Africa.

  It is my belief that the Company continues to fail in its legal obligations, and this is putting further individuals at risk.

  I have communicated this information to Larry and to Lorenzo between September 2017 and November 2017 as well as others within both Baker Hughes (legacy) and 66. The documents that you sent to me on 10 December 2018 relate to the consequences of these failures which I believe has resulted in the fatality of a heavily pregnant member of staff, Clarice Tsogou Mabengou, and the wholly inadequate care and continued suffering of another member of staff, Andrews Boateng which could have been prevented.

Andrews continues to suffer and the Company has still failed to take any steps to ensure that he receives the medical care and rehabilitation care that he needs to recover. Andrews remains in a facility unequipped and unable to care for him. The suffering caused to Clarice's family, Andrews and to his family is unimaginable.

I do not accept your contention that the disciplinary and grievance actions are unrelated."

244. The letter also included a section relating to the Claimant's health. It said:

"I have already informed the business of my state of health since you have come to my house without notice and un-invited. The visit caused to me and my family an incredible amount of anxiety and stress and I do not believe that other employees are treated in the same way.

Because of the determent I have suffered since making my protected disclosures, my health has been significantly impacted. I now suffer from panic attacks. I attach a fit note from my doctor who has advised that I should for the sake of my health, avoid stress." (1850-1852)

245. The Claimant had obtained a fit note signing her off work from her GP for one month from 4 January to 4 February 2019 for "*Anxiety States*". By accident, she did not attach it to her email or the hard copy of the letter she also sent.

246. The letter was forwarded to Ms Mutch and Ms Reid. On 21 January 2019, Ms Reid responded by email to the Claimant's email to Mr Simonelli and Mr Culp. The letter noted that the Claimant had not addressed the allegation that she had disclosed company confidential information and indicated that Ms Mutch would now proceed to conclude her consideration of disciplinary matter and provide her position shortly.

247. The letter acknowledged and responded to the criticisms of the investigation and disciplinary process, rejecting them. In particular, the Respondent reiterated that it considered that the grievance was entirely sperate to the disciplinary process. The letter explained that BHGE's policy on protected disclosures was encompassed in its Spirit and Letter and that its Disciplinary Procedure was the relevant policy for internal investigations. The letter did not say that the Claimant's fit note was not attached (1858 – 1860).

248. The letter attached the following documents:

- UK Disciplinary Policy (1861 – 1870) – version 1 July 2018
- UK Disciplinary Policy (1905 -1904) - version 21 June 2017
- Global Disciplinary Policy (1871 – 1879) – version 15/2/2017
- The Spirit and the Letter (1880 – 1904)

The differences between the 2017 and 2018 UK Disciplinary Policies were minimal and relate mainly to formatting.

249. Ms Reid and Ms Mutch met to review the case on 25 January 2019. Ms Reid made a note of their discussions. The note confirmed that, having considered the evidence available to her, Ms Mutch considered the Claimant's conduct amounted to gross misconduct and that she should be summarily dismissed from her employment with the Company (1916 – 1920).

250. Ms Mutch's decision was confirmed in writing to the Claimant in a letter dated 14 February 2019. The letter advised the Claimant of her right to appeal within 5 working days of the date of the letter.

251. The rationale given in the letter of dismissal was as follows:

- Ms Mutch found that the Claimant was responsible for disclosing 15 documents to Mr Pradal in two tranches, one in around November 2017 and one in or around April 2018.

- Mr Mutch reached this factual conclusion because one of the documents had been printed by "Celeste". In the letter Ms Mutch stated that the Claimant was the only Celeste with access to the BHGE systems, she knew Mr Boateng personally and had previously petitioned the company about his case. In addition, Ms Blumrosen had provided a statement saying that the Claimant has been identified by Mr Pradal as being able to testify to the authenticity of the documents.

- The disclosure of the documents to Mr Pradal was in breach of the contractual confidentiality obligations owed by the Claimant to the Respondent

- The breach was serious

- The Claimant's actions were deliberately calculated to assist a plaintiff in their case against the company. The intention was to assist Mr Boateng in his claim against the company and so the Claimant's actions were performed with the intention of causing loss to the company

- The strength of feeling the Claimant had about Mr Boateng's situation did not mitigate her actions

- The Claimant had not sought to explain her actions nor express any regret or apology for them

- The behaviour was treated as gross misconduct under the Company's Disciplinary Rules (1938-1945).

Disciplinary Appeal: Detriment 8

252. The Claimant submitted an appeal by email dated 21 February 2019 (1946-1949). It is accepted that the appeal outcome was not sent to the Claimant until 9 January 2020, nearly 11 months later.

253. James Overton, OFS Europe Operations Support Leader was appointed to Chair the appeal. His HR support was provided by Debbie Paul, HR Representative. Mr Overton had never met the Claimant. He worked in a completely different area of the Respondent's business to her. He had previous experience of conducting disciplinary investigations and hearings. Ms Paul had also not had any dealings with the Claimant previously.

254. When giving his evidence, Mr Overton told the Tribunal that at the time of considering the appeal he did not realise that the Claimant was claiming to be a whistleblower. This was because she used the terminology protected disclosures rather than refer to herself as a whistleblower. He was also not aware of any legal provisions releasing employees from confidentiality obligations when whistleblowing.

255. Mr Overton wrote to the Claimant on 6 March 2019 to introduce himself. He provided dates towards the end of March / beginning of April 2019 when he was able to conduct the appeal hearing and asked the Claimant to contact Ms Paul to agree a date. The letter informed the Claimant that she was entitled to be accompanied to the appeal hearing by a work colleague or accredited trade union representative. (1993) The letter was sent by post (first class and special delivery) and email on 7 March 2019 (1994).

256. The Claimant acknowledged receipt of the letter by email on 12 March 2019, saying she would get back to the Respondent with a suitable date in a few days. In fact, it was not until 12 April 2019, that she contacted the Respondent again to suggest the appeal hearing take place on 8 May 2019 (2001). This was agreed by the Respondent.

257. The Claimant emailed Mr Simonelli, Mr Elsinga, and members of the African American Forum (copying in Ms Paul) on 22 March 2019. In her email she noted that to date, only white employees have been involved in the consideration of her grievances and throughout the dismissal process. She asked if it was possible to have a more ethnically diverse panel to hear her appeal. This did not lead to any change and Mr Overton, who is white, continued in the role of Appeal Chair.

258. The appeal hearing took place in person on 8 May 2019. An audio recording was made of the appeal hearing, and a transcript prepared (2004-2019). Prior to the appeal meeting, Mr Overton did not read the disciplinary pack provided to him, only the Claimant's appeal letter.

259. In her appeal letter, the Claimant claimed that she had been unfairly dismissed. She said that she believed that her suspension which spanned in excess of a year, the failure to respond to her [second] grievance and her dismissal amounted to detriments because she had made protected disclosures.

260. She stated that she had been making protected disclosures since 2014 pointing out that "*Baker Hughes, a GE Company (the Company) has failed and is still failing to comply with its duty of care in respect of these employees and hundreds of others who are being placed at risk due to the*

illegal activity of the Company in moving employees out of their home country without securing the appropriate employment contracts, visas and without providing health or medical insurance."

261. She added:

"Today Mr Boateng has been abandoned without legal immigration documentation (since June 2016), and he is still not being provided with the medical care and therapies he needs. He was airlifted and left in a country with social challenges where he has even suffered further injuries and abuses which I duly reported since 2015 as all employees are encouraged to do so in our Business Code of Conduct.

The Company's Global Mobility Rotator policies clearly stated that Andrews as an international rotator was entitled to choose any medical facilities in the World, but the Executive team has failed to honor their own policies, Core Values and promises of being socially responsible while conducting its businesses worldwide through good ethics.

It is also my believe that the Company would not treat a non-African employee in the same manner (please refer to my email regarding Gale Wesley Leake who was provided with one of the best Company's medical insurance to treat a condition not caused while on duty, unlike Andrews). I also reported this unequal treatment in healthcare benefits."

262. The Claimant provided details of her other protected disclosures, saying that she had first reported concerns in February 2015, but more recently to Mr Elsinga and Mr Simonelli. It is clear from the content of her letter that she is referring to the email dated 4 September 2017, to the meetings with the two men on 1 December 2017 and the email dated 26 January 2018. She says, *"I made my protected disclosures before any legal proceedings in the US Court to the highest levels of the Company yet no action has been taken." (1947)*

263. The Claimant also raised the following as grounds of appeal in her letter of appeal:

- the disciplinary hearing should have been suspended pending determination of her grievance
- she had not been given sufficient information during the disciplinary investigation and process
- she was given insufficient time to prepare for the disciplinary hearing, which included reading the documents and finding a companion
- she did not leak the Fatal Accident report, Root Cause Analysis Report and two other documents she was accused of leaking
- she claimed her leaking of the documents constituted a protected disclosure saying, *"In respect of the documents that I disclosed, I made*

a protected disclosure having exhausted all available reporting channels ignored by the Company".

- she added that this meant that the confidentiality provisions relied on by the Respondent should not have been applied to her. Specifically, she said: *"[Ms Mutch] relies on the confidentiality provisions of my contract, my contract of employment cannot prevent me from making a protected disclosure and I should not be subjected to a detriment or dismissal for having done so."*

- She challenged the assertion by Ms Mutch that she had not provided any mitigating or extenuating circumstances relying on the fact that she had made repeated disclosures but "*Nothing was done.*"

264. In addition, she added, *"Furthermore, as stated in my letter of January 7 2019 I have been informed that Olubokola Sanni has been recruited to take charge of the Employment Tax Audits matters in Africa. This is my role. I believe this was a clear indication that my dismissal has been predetermined." (1949)*

265. At the appeal hearing, when asked about the protected disclosures upon which she was relying, the Claimant said that she thought her appeal letter provided sufficient clarity.

266. The Claimant admitted to Mr Overton that she had shared some, but not all of the documents that were the subject of the disciplinary investigations with Mr Pradal and was specific about this. She did not, however, tell him how the other documents had got into Mr Pradal's possession. Mr Overton formed the view that because she failed to tell him this information, it meant she had leaked all of the documents. We note that he did not ask her a direct question on this point.

267. The Claimant asked Mr Overton to consider her conduct in light of her ongoing concerns about Mr Boateng's case and the lack of feedback she had received when raising concerns about him. She did not argue that the documents were not confidential or that Mr Boateng was entitled to copies of any them.

268. Rather than go through the history of Mr Boateng's case again, the Claimant specifically asked Mr Overton to listen to the recording of the two hour meeting she had had with Mr Freeman where she had outlined it. She suggested that Mr Overton could not reach a conclusion on her appeal while her second grievance was outstanding and complained about the length of time that process was taking. At this point, the grievance outcome had been outstanding for nearly a year.

269. The Claimant also complained about the disciplinary process. Her specific complaints were about the length of time she was suspended and then the "rush" to dismiss her without giving her sufficient time to prepare for the disciplinary hearing. She also said she had not been informed of the allegations against her nor given the correct policies. She added that she

believed that someone had been hired to replace her, suggesting the outcome was prejudged.

270. Following the appeal hearing, Mr Overton decided that he should wait until Mr Freeman had concluded the grievance investigation and have regard to his findings before considering the appeal. As we know from above, the outcome for the second grievance was not finalised and provided to the Claimant until 10 November 2019. Once this was done, Mr Overton reviewed the outcome letter prepared by Mr Freeman. It confirmed that he had identified eight occasions when the Claimant had raised concerns about Mr Boateng's medical treatment. Mr Overton's interpretation of Mr Freeman's conclusion was:

"*The conclusion was reached that whilst the company could have provided with respect to some matters a clearer response, all of Ms Diavita's concerns, so far as Mr Freeman could investigate, had been reviewed and properly considered*."

271. Mr Overton decided he did not need to investigate any of the matters in the grievance further. He did, however, interview one employee in December 2019 to seek clarity about what the Claimant may have said at a town hall meeting in 2014. Having obtained a witness statement from that employee he reviewed the disciplinary pack and prepared his appeal outcome letter. The outcome was provided to the Claimant on 9 January 2020 (2021-2027). He used a table format to assist his thought process (2028 – 2029).

272. Mr Overton upheld the decision to dismiss. Taking into account what is said in his letter, the contents of the table and what Mr Overton told us when giving evidence, his reasons were as follows:

- The Claimant had correctly raised concerns within the company before sharing the leaked documents with Mr Pradal

- As she had not explained how the documents, she claimed not to have leaked, got into Mr Pradal's possession, he considered it likely she had leaked them all. However, to some extent this did not make any difference to him because the Claimant admitted she was responsible for leaking the majority of the documents

- There was no justification for her leaking any of the documents. He accepted that the Claimant had been motivated by her concern for Mr Boateng. He considered that Ms Mutch had taken this into account as a potential mitigating factor when reaching her decision.

- The documents that had been leaked were confidential

- The table states that the correct process was that the court should have requested the documents. In his letter, Mr Overton concludes that the Claimant's actions "circumvented the formal disclosure protocols that should be followed in litigation". However, when giving evidence to the

Tribunal, Mr Overton admitted he did not have any knowledge of court disclosure processes.

- He said in the letter: "*I was not able to understand why you thought Mr Pradal was an appropriate recipient of the documents or had the ability to resolve or address your complaints. In those circumstances, I do not agree that it was reasonable for you to provide the documents to Mr Pradal at a stage when the Company was still investigating Mr Boateng's treatment and when it was clear to you that those materials would be used in the course of a litigation against the Company*" (2023)

- He adds: *"I did not see any evidence that your making complaints about Mr Boateng's treatment resulted in disciplinary action against you; it was the provision of confidential documents to a third party acting against the Company without its knowledge that resulted in your dismissal.*" (2023)

- The Respondent was required to treat the disciplinary and grievance processes separately

- Although the Claimant's suspension lasted for a significant time, he considered this was in the interests of carrying out a full investigation and did not negatively affect the fairness of the decision or process followed

- The grievance process was "extremely long" but this was not because the Claimant had made protected disclosures

- Although the timeline the Claimant was given to read the 27 documents in the disciplinary pack "*seem[ed] tight, the process that was followed [was] in line with acas guidelines*" and therefore it was reasonable to proceed with the disciplinary hearing on 18 December 2018. In any event the Claimant was given the opportunity to make representations either in person or in writing by 7 January, but declined to do so

- No-one had been appointed in her role such that the decision to dismiss her was predetermined for that reason

273. The outcome letter confirmed that the Claimant had no further right of appeal. The Claimant had presented a claim to the employment tribunal prior to the appeal outcome. She commenced the Acas conciliation process on 22 February 2019 and was issued with the certificate on 22 March 2019 (21). Her claim had been presented on 6 June 2019.

LAW

Protected Disclosures

Right to be protected from detriment / dismissal

274. Section 47B(1) of the Employment Rights Act 1996 says:

"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."

275. The term "detriment" is not defined in the Employment Rights Act 1996 and tribunals have therefore looked to the meaning of detriment established by discrimination case law. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

276. A detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss.

277. Section 103A ERA provides that "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

278. Section 47B(1) will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the worker, whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. In both cases, (subject to the *Jhuti* exception explained further below), an enquiry into what facts or beliefs caused the decision-maker to act is necessary.

What constitutes a qualifying protected disclosure?

279. According to section 43A of the Employment Rights Act 1996 the term "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.

280. Section 43B(1) says "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.

281. There must be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

282. The court of appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. …….Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

283. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

284. It is possible for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication would not on its own. In addition, the information imparted by a disclosure should be viewed in the context in which it is made. This is largely question of fact for the Tribunal. (*Norbrook Laboratories (GB) Ltd v Shaw* UKEAT/0150/13; *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601, *Kilraine*)

285. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3), ERA 1996).

Reasonable belief and made in the public interest

286. There is no need for the relevant failure to have actually occurred, be occurring or be likely to occur for a disclosure to be a qualifying disclosure. (*Darnton v University of Surrey* 2003 [ICR] 615, EAT; *Babula v Waltham Forest College* [2007] ICR 1026, CA).

287. The test is whether the Claimant reasonably believed the information disclosed tends to show a relevant failure has occurred, is occurring or is

likely o occur. This test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure, including whether any laws which are alleged to have been breached actually exist.

288. The requirement for reasonable belief requires the tribunal to identify what the Claimant actually believed at the time of making the disclosure relied upon and to consider whether it was objectively reasonable for the Claimant to hold that belief, in light of the particular circumstances at that time.

289. This enquiry includes such matters as the context in which the disclosure is made and any relevant background matters, the manner and to whom the disclosure is made, the Claimant's knowledge at the time, and her access and to information to verify her beliefs. The truth or otherwise of the information disclosed and whether or not the relevant failure in fact occurred can be relevant when assessing reasonable belief. (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT, *Darnton*)

290. The burden is on the Claimant making the disclosure to establish the requisite reasonable belief (*Babula*).

291. The leading case dealing with when the public interest test is met is *Chesterton Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of the worker's own contract of employment, or some other matter under section 43B(1) where the interest in question is personal in character, there may be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker.

How and to whom the disclosure is made

292. As noted above, the making of a qualifying disclosure will only attract protection if it is made by a worker in accordance with any of sections 43C to 43H.

Contractual duties of confidentiality

293. It is relevant to note for the purposes of this case that section 43(J) of the Employment Rights Act 1996 contains the following provision:

(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.

Victimisation

294. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.

295. Section 27(1) of the Act provides that:

 ‘A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.’

296. The definition of a protected act is found in section 27(2) and includes:

 (a) bringing proceedings under the Equality Act 2010;

 (b) giving evidence or information in connection with proceedings under the Equality Act 2010;

 (c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and

 (d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010

297. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith (section 27(3)).

298. If the tribunal is satisfied that a Claimant has done a protected act, the Claimant must show any detriments occurred because she had done a protected act.

299. The analysis the tribunal must undertake is in the following stages:

 (a) we must first ask ourselves what actually happened;

 (b) we must then ask ourselves if the treatment found constitutes a detriment

 (c) finally, we must ask ourselves, was that treatment because of the Claimant’s protected act.

300. The EHRC Employment Code says about detriments: ‘*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage……. However, an unjustified sense of grievance alone would not be enough to establish detriment*.” (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.

301. The essential question in determining the reason for the Claimant's treatment is what, consciously or subconsciously, motivated the Respondent to subject the Claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the Respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt to punish the Claimant or dissuade them from containing with a protected act. In other cases, the Respondent may subconsciously treat the Claimant badly because of the protected act. A close analysis of the facts is required.

302. It is only if the necessary link between the detriment suffered/dismissal and the protected act can be established, the claim of victimisation will succeed. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10).

303. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the reason for any unfavourable treatment was because of the Claimant's protected act. If the Claimant succeeds, discrimination is presumed to have occurred, unless the Respondent can show otherwise.

Unfair Dismissal

304. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

305. Under section 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

306. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in *British Home Stores v Burchell* [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:

    (a) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?

    (b) did it hold that belief on reasonable grounds?

    (c) did it carry out a proper and adequate investigation?

307. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the Respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the Respondent (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, [1997] ICR 693).

308. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the Claimant for that reason in all the circumstances of the case.

309. We reminded ourselves that our proper focus should be on the Claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved (*Ham v the Governing Body of Bearwood Humanities College* [UKEAT/0397/13/MC]

310. We also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

311. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA)

312. We accept that when considering the question of the employer's reasonableness, we must take into account the disciplinary process as a whole, including the appeal stage. (Taylor v OCS Group Limited [2006] EWCA Civ 702)

313. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

Breach of Contract

314. When considering a claim for wrongful dismissal, the tribunal is required to ask itself was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate contract of employment.

315. We must be satisfied, on the balance of probabilities, that there was an actual repudiatory breach by the Claimant. It is not enough for the Respondent to prove that it had a reasonable belief that the Claimant was guilty of such serious misconduct.

Remedy Issues

Polkey

316. In accordance with the principle established in *Polkey v AE Dayton Services* Ltd [1988] ICR 142, we are required to consider the possibility that the Respondent would have been in a position to fairly dismiss the Claimant and reduce the compensatory award by an appropriate percentage accordingly. This includes considering *when* a fair dismissal would have been able to take place *(Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division)* [1993] IRLR 512).

Did the Claimant's conduct contribute to the dismissal?

317. Section 122(2) of the Employment Rights Act 1996 says: "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

318. Section 123(6) says: "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

Failure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures.

319. *Section 207A* of the Trade Union and Labour Relations (Consolidation) Act 1992, enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances.

Time Limits

Ordinary Unfair Dismissal /Automatic Unfair Dismissal Time Limit

320. The normal time limit for a claim of unfair dismissal is found in subsection 111(2)(a) of the Employment Rights Act 1996. That section provides that a claim must be brought before the end of the period of three months beginning with the effective date of termination of employment (as defined in section 97 of the same act).

321. Subsection 111(2)(b) goes on to say that a tribunal may still consider a claim presented outside the normal time limit if it is satisfied that:

- it was not reasonably practicable for the claim to be presented within the normal time limited and
- the Claimant has presented it within such further period as the tribunal considers reasonable.

322. The normal three month time limit in both cases needs to be adjusted to take into account the early conciliation process and the extensions provided for in subsections 207B(3) and (4) of the Employment Rights Act 1996.

Detriments under section 47B(1) Employment Rights Act 1996 Time Limit

323. The time limit to bring a claim under section 47B(1) is found in section 48(3) of the Employment Rights Act 1996. That section says that an employment tribunal shall not consider the claim unless:

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

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

324. According to section 48(4), for the purposes of subsection (3):

(a) where an act extends over a period, the “date of the act” means the last day of that period,

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

325. For alleged acts of detriment to form part of a series of similar acts, there must be some relevant connection between the acts. It is also essential that each of the acts forming part of the alleged series is in itself unlawful (*Oxfordshire County Council v Meade* UKEAT/0410/14).

Victimisation Time Limit

326. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

327. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

328. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

329. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time.

330. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

Breach of Contract Time Limit

331. The normal time limit for a claim of breach of contract is found in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. It provides that claims must be brought (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated.

ANALYSIS AND CONCLUSIONS

Did the Claimant make Qualifying Protected Disclosures / do Protected Acts?

332. The Respondent accepts that PDs 12, 13, 14, 18, 19, 21 and 22 contain protected disclosures, but not PDs 10, 11, 15, 17 or 20.

333. The Claimant also relies on PDs 12, 13, 15, 17, 18, 20 and 22 as protected acts. The Respondent accepts that PDs 12 and 13 were protected acts, but not PDs 15, 17, 18 or 20.

PD 10

334. The Claimant relies on the email she sent to Mr Kuppaswamy on 10 March 2017. The Respondent contends that the content of the email is mere assertion / opinion rather than discloses facts which could amount to a relevant failure. The Respondent also disputes that the Claimant reasonably believed the assertions in the email tended to show a relevant failure or that any disclosure was made in the public interest.

335. The judgment of the Tribunal is that the email contains two qualifying disclosures of information which, were made in accordance with section 43C of the Employment Rights Act 1996.

336. We have accepted the evidence of the Claimant that she had previously discussed the accident involving Ms Tsogou Mabengou and Mr Boateng with Mr Kuppaswamy. He would have been fully aware that the Claimant was referring to the accident and her ongoing concerns about Mr Boateng's care in South Africa in her email. In our judgment, the significant timelapse between the Claimant's last conversation with Mr Kuppaswamy and this email does not negate this context.

337. The first disclosure is contained in the email where it refers to the death of Ms Tsogou Mabengou and her unborn child and says "*no corrective actions have been taken to avoid such a horrible thing to happen again. Because we did not talk about it.*"

338. When the context described above is taken into account, the first disclosure is understood as a disclosure that because no corrective actions had been taken following the accident, a similar accident could happen again. In our judgment the disclosure is of information tending to show the health or safety of the Claimant's colleagues is likely to be endangered pursuant section 43B(1)(d).

339. Turning to the Claimant's beliefs about the accident at this time, when the Claimant sent this email, she was recalling the discussions with her colleagues at the time of the accident during which suspicions that the car involved in the accident was not safe had been raised. She was also aware that Ms Tsogou Mabengou had been killed and Mr Boateng had been catastrophically injured.

340. The Claimant had not read a copy of the internal accident documents at this time and was not part of any health and safety group that would have dealt with any corrective actions. Her email was prompted by learning about a "stand down" situation. We find it was reasonable for her, in light of the knowledge she had and being aware that the same measure had not been taken following the accident, to believe, albeit incorrectly, that no corrective actions had been taken and this was generating risk for other colleagues. We judge that the reasonable belief test is met and also that, as the Claimant raised this issue in the interests of her colleagues, the public interest test is also met.

341. The second disclosure in the email concerns Mr Boateng's medical treatment. The email simply says, "*And Andrews Boateng is still waiting to receive the serious medical care he needs*."

342. Again, this sentence needs to be read with the previous context in mind. When it is, we find that the Claimant was re-informing Mr Kuppaswamy that she believed that the Claimant's medical care was lacking. We judge this to be a disclosure of information which tended to show Mr Boateng's health was being endangered pursuant to section 43B(1)(d).

343. Turning to the reasonableness of the Claimant's beliefs about Mr Boateng's medical treatment, the email was sent about 14 months after the Claimant had helped the family to obtain a medical opinion from the UK consultant

recommending Mr Boateng be transferred for specialist rehabilitation. It was, in our judgment, objectively reasonable for her to believe that what she had said in the email was true, albeit unknown to her, a different doctor had expressed a different opinion to the Group. We find that this disclosure was made in the interests of Mr Boateng, in his capacity as an injured employee, and was therefore made in the public interest.

PD 11

344. The next purported disclosure on which the Claimant relies is the email sent to Mr Kuppaswamy on 24 May 2017. We judge this does not meet the requirements of a protected disclosure.

345. The Claimant complains in the email about an interaction between a member of the Respondent's staff, Hilary, and Mr Boateng's family. She expressly says that she considers Hilary's conduct is "unethical" rather than constitutes one of the relevant failings set out in section 43B(1) Employment Rights Act 1996.

346. In our judgment, it is a leap too far to interpret the email as amounting to a protected disclosure even if the relevant context of the previous discussions with Mr Kuppaswamy are taken into account.

PDs 12 and 13

347. The Respondent accepts that the Claimant's first grievance contained protected disclosures, which she reiterated in the grievance meeting. It also accepts that in raising these matters the Claimant did protected acts.

PD 14

348. The Respondent accepts that the email which the Claimant sent to Mr Simonelli on 4 September 2017 contained protected disclosures.

PDs 15 and 16

349. For the next two disclosures, the Claimant relies on verbal disclosures made to Mr Elsinga and separately to Mr Simonelli on 1 December 2017.

350. We have found, as a matter of fact that the Claimant told both men that she believed that Baker Hughes was liable for the accident and that Mr Boateng was sent on an international assignment without the proper contract and health insurance. She also expressed concern about Mr Boateng's care arrangements.

351. In our judgment the information provided to Mr Elsinga and Mr Simonelli was sufficient to constitute several protected disclosures.

352. In telling Mr Elsinga and Mr Simonelli that the accident was the fault of Baker Hughes she was disclosing information that tended to show that the health or safety of an individual had been endangered pursuant to section 43B(1)(d) Employment Rights Act 1996. The Claimant's belief that this was

the case had now been informed by having read the accident reports, which she interpreted as containing acknowledgments of liability for the accident.

353. We find that it was a reasonable belief for her told hold at the time. In reaching this view, we have taken into account that she is not legally qualified and lacked experienced in interpreting accident reports. Furthermore, she was engaged in helping the families pursue litigation in relation to the accident and had therefore had reason to believe that an American lawyer thought the reports contained sufficient information to establish liability. The public interest test is also met as the disclosure was made for the benefit of Mr Boateng and with a view to avoiding a similar accident in the future rather than in her own self interests.

354. When expressing concern for Mr Boateng's care arrangements, she was disclosing information that tended to show that the health or safety of an individual was being endangered, pursuant to section 43(1)(d). The Claimant's belief that this was the case was based on her recent communications with Tina who had reported finding Mr Boateng in a distressing state. It was this that had prompted the Claimant to write the September 2017 email to Mr Simonelli. It was reasonable for her to have this belief, based on the information to which she had access. The Claimant's disclosure was made in the interests of Mr Boateng rather than her own interests which we judge to be sufficient to meet the public interest test.

PD 17

355. For PD 17 the Claimant relies on the documents she gave to Mr Pradal in around December 2017. Our factual finding was that she only gave Mr Pradal the Employee Profile and not the accident reports.

356. The Tribunal rejects the Claimant's contention that this amounted to a protected disclosure.

357. In our judgment, the Employee Profile does not contain any information tending to show any relevant failure has occurred.

358. The context of the Claimant providing the document to Mr Pradal was to try and establish a link between Mr Boateng's employment and New York. When we take into account what we found, as a matter of fact, she said to him at the time of giving him the document, our judgment remains the same and we do not consider there to have been a qualifying disclosure. We do not consider that the Claimant reasonably believed that Mr Boateng was employed by a New York subsidiary of the Respondent's Group. She was hoping that the information in the Employee Profile might help with the case, but in our judgment, did not actually believe this was the position herself.

359. A further reason for rejecting the Claimant's argument that giving the Employee Profile to Mr Pradal was a protected disclosure is because the disclosure of the information was not made in accordance with sections 43C

to 43H of the Employment Rights Act. Sections 43D, 43G and 43H are relied upon by the Claimant.

360. Section 43D does not apply in our judgment because the Claimant did not disclose the documents to Mr Pradal in the course of obtaining legal advice for herself. The purpose of the disclosure was to assist with Mr Boateng's claim.

361. In order for the Claimant to be able to rely on section 43G of the Employment Rights Act, the Claimant would need to satisfy one of the three conditions in section 43G(2). We do not consider any of those conditions are satisfied.

362. No action had been taken to prevent the Claimant from continuing to raise concerns about Mr Boateng at this time even though she had been raising concerns about Mr Boateng since 2015, and with very senior people. Nor had she been subjected to any detriments. It was not therefore reasonable for her to believe that if she sent the documents to the Respondent with an email saying she thought the Respondent was trying to conceal its obligations to Mr Boateng she would be subjected to a detriment (section 43G(2)(a)). Nor did she have any reason to believe that the Respondent would conceal or destroy the documents (section 43G(2)(b)). Finally, the Claimant had not made the same disclosure to her employer or a prescribed person (43G(2)(c)).

363. For section 43H to apply, the information disclosed would need to be information which tended to show a relevant failure of an exceptionally serious nature had occurred, was occurring or was likely to occur. As noted above, the Tribunal's view is that the information disclosed to Mr Pradal fails to show any relevant failing. It follows that we do not consider that same information shows a relevant failing of an exceptionally serious nature.

PDs 18 and 19

364. The Respondent accepts that the email that the Claimant sent to Mr Simonelli and Mr Elsinga on 26 January 2018 contained protected disclosures. It also accepts that the Claimant made protected disclosures when she forwarded the same email to the three employees of BHGE, who were members of the Internal African American Forum, on 30 January 2018.

365. The Claimant argues that in sending the email to Mr Simonelli and Mr Elsinga she also did a protected act. This is disputed by the Respondent.

366. The Claimant relies on the fact that the email compares the position of Mr Boateng to the position of Mr Leake, the point being that Mr Boateng is a black African and Mr Leake is a white American. She does not, however, articulate this is the email. In our judgment, the context and background are insufficient to lead to the reader to conclude that the email is alleging of race discrimination as it stands.

367. Furthermore, the Respondent has argued that even if the email contained a clear allegation of discrimination, it would not form a protected act. This is

because there would be no territorial jurisdiction to consider the alleged discrimination under the Equality Act 2010. The Tribunal agrees with this analysis. All four limbs of section 27(2) of the Equality Act 2010 make express reference to the Equality Act 2010. In our judgment, in order for an allegation of race discrimination to amount to a protected act it must be one that can be determined under the Equality Act 2010. This is and could never be true for Mr Boateng because he has never worked in the UK or been employed by the Respondent.

PD 20

368. The Claimant argues that when she gave the Health and Safety policy documents to her lawyer Mr Pradal, this constituted a protected disclosure when viewed in conjunction with the context and what she said at the time. This is disputed by the Respondent.

369. The tribunal agrees with the Respondent. Of themselves, the policy documents contain no information which tends to show a relevant failing has occurred, is occurring or is likely to occur. They are merely documents which set out the health and safety standards to which BHGE group requires its employees to work.

370. In addition, there is no basis for the Claimant's claim that giving the documents to Mr Pradal was a protected act under the Equality Act 2010. None of the requirements in section 27(2) of the Equality Act 2010 is met. The claim being pursued by the families of Mr Boateng and Ms Tsogou Mabengou was a personal injury claim. As noted above, Mr Boateng had no standing to being a claim under the Equality Act 2010.

PDs 21 and 22

371. The Respondent accepts that the Claimant's second grievance dated 19 May 2018 contained protected disclosures, which she expanded upon verbally in the second grievance meeting held on 30 August 2019. It disputes, however, that she said anything in the second grievance meeting which amounted to her doing a protected act.

372. The judgment of the Tribunal is that the Claimant did do a protected act during the course of the second grievance meeting, but this was not when she spoke about Mr Boateng.

373. The Claimant expressly stated during the meeting that she believed that Mr Boateng's circumstances had arisen because he was a black African rather than a white American or European. This was not a protected act because of the lack of territorial jurisdiction under the Equality Act 2010. The Claimant was not making an allegation of race discrimination that could be determined under the Equality Act 2010.

374. She also, however, informed Mr Freeman and Ms Arischi that she had personally raised a grievance alleging she had been the victim of race discrimination. She said that the grievance had been "crushed" by the

Respondent. This allegation is one that could be determined under the Equality Act 2010 and therefore constituted a protected act for the purposes of section 27(2) of that Act.

Was the Claimant subjected to any detriments, and if so, why?

375. We turn now to our assessment of whether the Claimant was subjected to any detriments, and if so, whether this was on the ground that she had done protected disclosures and/or protected acts.

Detriment 1(a)

376. It is not factually correct that Mr Kuppaswamy failed to respond to the Claimant's email of 10 March 2017. The Claimant asked a specific question in her email to him, which was to be permitted to take until the original deadline of 15 May 2017 to complete the Code of Conduct questionnaire. Mr Kuppaswamy responded on 16 March 2017 answering this question. He also added further information about action the Claimant could take if she had concerns about the Code of Conduct questionnaire process. We do not consider that there was any detriment to the Claimant on this occasion.

377. We add that this claim is, in any event, out of time, as discussed further below.

Detriment 1(b)

378. Mr Kuppaswamy did not respond to the Claimant's email of 24 May 2017. There is, however, nothing in the Claimant's email that says that she requires a response. We do not know whether Mr Kuppaswamy interpreted the email as simply providing him with information, but we consider it would not have been unreasonable for him to do so, particularly when there was no follow-up email sent. We do not consider that there was any detriment to the Claimant on this occasion.

379. We add that this claim is, in any event out of time, as discussed further below.

Detriment 1(c)

380. It is not factually accurate that Mr Simonelli and Mr Elsinga failed to respond to the Claimant's email of 4 September 2017.

381. Mr Simonelli sent the Claimant a short reply, effectively saying that he was delegating the task of dealing with the email to HR. He then forwarded it to Mr Elsinga and asked him to deal with the issue. This was an entirely appropriate action for Mr Simonelli to take.

382. Mr Elsinga made contact with the Claimant that same day and informed her that HR was dealing with the email. He in turn delegated the task of responding to the Claimant to Ms King-Hutchinson. The Claimant had to chase a response from Ms King-Hutchinson, but only waited a week after the original email to receive one. The response explained that BHGE was

involved in litigation regarding the case and informed the Claimant, politely that, no action would be taken, except in the course of that pending litigation.

383. Although no doubt distressing for the Claimant and appearing to lack a touch of humanity, this was an appropriate response for Ms King-Hutchinson to send in the circumstances. It was not appropriate for her to enter into correspondence about Mr Boateng with one of his former colleagues when he was being represented by a legal attorney. We do not consider that there was any detriment to the Claimant on this occasion.

384. We add that this claim is, in any event out of time, as discussed further below.

Detriment 1(d)

385. The Claimant did not receive any feedback about any follow up action taken following her meetings on 1 December 2017 with Mr Elsinga or Mr Simonelli.

386. Although he did not appear as a witness to explain his position, we inferred that the reason that Mr Simonelli did not provide the Claimant with any feedback was because he had delegated the matter to HR.

387. We have found that Mr Elsinga told the Claimant that he would update her in two weeks. He did not do this, however, nor did he ask anyone to do this. This was discourteous, particularly when the Claimant had expressed obvious concern about Mr Boateng. However, in our judgment it does not meet the threshold required to constitute a detriment for the purposes of section 47B of the Employment Rights Act or section 27 of the Equality Act 2010.

388. Regardless of whether there was a detriment, however, we find that Mr Elsinga's conduct was not done on the ground that the Claimant had made protected disclosures or done a protected act.

389. Mr Elsinga was aware that the Claimant had been raising concerns about Mr Boateng since 2015 because she had told him this. There was no evidence before us, however, that Mr Elsinga was aware that the Claimant had raised a grievance about her own personal situation alleging race discrimination. That grievance was of course, still outstanding at December 2017. Mr Elsinga would have had access to the information had he enquired about the Claimant's background, but there is no evidence he did this.

390. The conclusion we have reached is that Mr Elsinga did not want to engage with the Claimant or her concerns because he did not consider them to be important to him and, therefore, he avoided further interaction with her for that reason. He had delegated responsibility to Ms King-Hutchinson back in September 2017 and thought that was the end of the matter. The Claimant then made an appointment to meet him and he felt obliged to have that meeting, but that was the end of the matter as far as he was concerned.

391. We add that this claim is, in any event out of time, as discussed further below.

Detriment 1(e)

392. There was no response to the email which the Claimant sent to Mr Simonelli and Mr Elsinga on 26 January 2018.

393. Our conclusions about the failure to respond to this email are essentially the same as for detriment 1(d). The failure to respond to the concerns about Mr Boateng was discourteous, but in our view does not meet the threshold for a detriment. Furthermore, the reason Mr Simonelli responded was because he had delegated the matter to others. Mr Elsinga did not respond because he did not consider the matter to be important to him.

394. We note that, in addition to raising concerns about Mr Boateng, the Claimant referred to her suspension in this email. We have, therefore, also considered whether the failure to respond to her on this point amounts to a detriment.

395. We do not consider that it did. In the email, the Claimant does not seek to challenge the suspension, or ask that it be reviewed. Instead, she simply mentions that she has been suspended and says she is awaiting the conclusion of the investigation. Had the Claimant been actively raising a grievance about the actions of Mr O'Neill in connection with the suspension, the situation would have been different. She was not, and it was therefore discourteous not to respond, but not a detriment.

396. We add that this claim is, in any event out of time, as discussed further below, save in relation to the mention of her suspension being a possible detriment.

Detriment 1(f)

397. Although one of the members from the African American Forum acknowledged the Claimant's email sent to them on 30 January 2018, there was no substantive response. We do not know the reason why there was no further response, but it is likely that the African American Forum decided that the matter was beyond their remit.

398. We do not consider that the failure to respond substantively amounts to a detriment to the Claimant.

399. We add that this claim is, in any event out of time, as discussed further below.

Detriment 2 – Claimant's Suspension

400. Although suspension is always described as a neutral act, it almost inevitably constitutes a detriment to the employee involved. In this case, the degree of that detriment was exacerbated by the duration of the suspension, the Respondent's failure to appoint someone as a welfare point of contact

for the Claimant and the lack of any reviews while the suspension was in place. As explained further below, we consider that the disciplinary investigation could have been completed in a much shorter period of time. Instead, the Claimant was kept on suspension for over a year with very little contact from the Respondent and with very little knowledge of the allegations against her.

401. The Claimant's claim under this head does not succeed, however, because we judge that the suspension was not done on the ground the Claimant had made protected disclosures or because she had done protected acts. Neither of these things, in our judgment, materially influenced the decision to suspend the Claimant.

402. The reason for the suspension was because the Respondent had discovered that confidential internal documents had been shared with the lawyer acting for Mr Boateng and Ms Tsogou Mabengou and suspected that the Claimant was responsible for that leak. It was reasonable for the Respondent to hold that suspicion because the Claimant's name was on one of the documents. The decision to suspend was made by senior HR people in the US, in consultation with legal. Due to his seniority, we consider it likely that Mr O'Neill could have challenged the decision if he had wanted to do so.

403. The disclosure of the documents to Mr Pradal by the Claimant not only materially influenced the decision to suspend her, it was the reason for the suspension. However, we have held that it did not constitute a protected disclosure. In our judgment, there is no evidence that the decision to suspend was materially influenced by any of the other protected disclosures or the Claimant's protected acts.

404. The people involved in making the decision had some awareness of the Claimant's earlier protected disclosures, but there was no evidence they materially influenced the decision to suspend. The decision to suspend was so clearly fully justified solely based on the leaked documents.

405. Shannon Reid, from the US HR Team, had used the Claimant's email dated 4 September 2017 to Mr Simonelli, which contained protected disclosures, to identify that the Claimant was the most likely person to be the "Celeste" whose name was printed on the Employee Profile. We do not consider this amounts to her being materially influenced by the protected disclosures in that email. The email was used solely for identification purposes. It revealed that the Claimant was interested in and linked with Mr Boateng and that therefore the Celeste who had sent the email and printed off the Employee Profile were likely to be the same person.

406. The only protected acts that were relevant at this time were the ones associated with the Claimant's first grievance (PD 12 and 13). We know that Mr Adam was aware of that grievance, because Ms Christopher and Ms Reid had sought his advice on it. It is also likely that Mr O'Neill was aware of the grievance, although not the detail of it. Even if Mr Adam and Mr O'Neill informed the relevant people that made the decision to suspend, we do not

consider it materially influenced their decision, because the decision to suspend the Claimant was so clearly fully justified by the circumstances.

Detriment 3 – Disciplinary Investigation

407. It follows, from the above, that we consider that conducting a disciplinary investigation into an employee's conduct also constitutes a detriment, but that in this case, the Respondent was entitled to do that and therefore the claim for detriment 3 fails.

408. We set out below, in the section on ordinary unfair dismissal, a number of criticisms of the investigation. There is no doubt in our minds that the length of time the investigation took was outside the range of reasonable responses of a reasonable employer. We do not accept that the investigation needed to take as long as it did. In addition, Mr Howard failed to investigate some key issues. We are, however, satisfied that this was not done on the ground that the Claimant had made protected disclosures or done protected acts. Her protected disclosures and earlier grievance did not materially influence the disciplinary investigation.

409. Mr Howard and Ms Roughsedge were aware that the Claimant had sent the email dated 4 September 2017 to Mr Simonelli and also of the later email dated 18 January 2018. These were provided to them by Shannon Reid. We are satisfied that they treated them purely as evidence that showed a link between the Claimant and Mr Boateng which pointed to her being responsible for the leak of confidential documents and were not otherwise influenced by the content of the emails.

410. All three of the Claimant's protected acts are potentially relevant, taking into account the chronology of events. Her first grievance had been submitted and she had met Ms Christopher before the investigation began. She had also met Mr freeman for the purposes of the second grievance by the time the investigation report was finally completed. Mr Howard and Ms Roughsedge were not aware, however, that the Claimant had submitted either of her grievances and there was no evidence that they were manipulated by anyone who was aware of them into taking a particular approach towards the investigation.

411. In our judgment, the detrimental failures in the disciplinary investigation arose instead because of a failure to prioritise it, frustration with the Claimant's lack of engagement and Mr Howard's failure to approach the investigation with a sufficiently enquiring and open mind.

Detriment 4 – Disciplinary Process

412. Our conclusion on the next detriment claim also follows from the above. We conclude that, although there was a detriment to the Claimant because of duration of the disciplinary process, this was not done on the ground that the Claimant had made protected disclosures or done protected acts.

413. The disciplinary process was initiated and pursued because the Respondent considered the disclosure of internal confidential documents by the Claimant to Mr Pradal constituted misconduct.

414. The knowledge and position of Mr Howard and Ms Roughsedge is dealt with above.

415. We consider that Ms Mutch and Ms Reid were in a similar position. Although they were aware that the Claimant had raised concerns about Mr Boateng previously, this knowledge did not materially influence their approach.

416. Ms Mutch and Ms Reid were not aware of the Claimant's first grievance. We consider that like Mr Howard and Ms Roughsedge, they were not manipulated by anyone who was aware of it to approach the disciplinary process in a particular way.

417. They became aware that the Claimant had submitted a second grievance, because she expressly referred to it in her correspondence with them sent on 17 December 2018. She also expressly referred to having made a protected disclosure in that correspondence. Ms Mutch and Ms Reid replied saying that they were not involved in considering the grievance and that it was entirely separate. This was accurate. They were not provided with a copy of the grievance, any detail of what it contained and were not informed what the Claimant had said at the grievance meeting held on 30 August 2018.

418. Although Mr O'Neill was responsible for maintaining oversight of the separate processes involving the Claimant, there is no evidence that he sought to manipulate Ms Mutch or Ms Reid's approach to the disciplinary process. Similarly, although Mr Adam advised on both processes from a legal perspective, ultimately it was up to Ms Mutch and Ms Reid, whether they took that advice. We are satisfied that the grievance did not influence them.

Detriment 5 – Refusal to Postpone Disciplinary Hearing held on 18 December 2018

419. As noted below, we have concluded that the Respondent's decision to refuse to postpone the Disciplinary Hearing on 18 December was outside the range of reasonable responses of a reasonable employer. It follows that we consider it constituted a detriment.

420. We do not, however, uphold this claim because in our judgment, the reason the Respondent refused to postpone the disciplinary hearing, was not because the Claimant had made protected disclosures or had done a protected act.

421. The decision not to postpone the disciplinary hearing was taken because Ms Mutch and Ms Reid thought (unfairly in our judgment) that the Claimant was repeating the behaviour she had demonstrated during the investigation

and had no intention of attending a disciplinary hearing. In colloquial language, they thought she was simply “stalling for time.”

422. They genuinely considered that she had had reasonable sufficient notice of the hearing. They were also mindful that if the hearing was postponed, it would not be possible to hold it before Christmas due to Ms Mutch’s annual leave plans and they were reluctant to put it back until the New Year. Their reasoning was influenced by practical considerations and not the protected acts done or protected disclosures made by the Claimant.

Detriment 6 – Claimant’s First Grievance

423. The Claimant’s complaint about the first grievance concerns the length of time it took. During the course of the hearing, it became clear that she was also unhappy with other aspects of the grievance process and outcome. This was not, however, identified as an issue in the agreed list of issues and we have not reached a conclusion as to whether either of these things constituted detriments to her.

424. We do record, however, that it was surprising to the Tribunal that Ms Christopher did not initially appreciate that the Claimant’s grievance included a complaint of race discrimination relating to her colour and not simply her nationality. in our judgment, this arose because she was uncomfortable (possibly consciously, but most likely unconsciously) about confronting the colour discrimination allegation. It is also disappointing that, having discovered that the Respondent did not keep statistical information about ethnicity and colour, Ms Christopher did not consider whether there was another way she could investigate the Claimant’s concern that her situation was typical of other black employees.

425. We note that her conclusion that the Claimant was not subjected to race discrimination, was reached because she was satisfied that the circumstances of her recruitment to the role in Ghana was different to that of her two white colleagues. This may well be an accurate conclusion for her to have reached, but we are not satisfied that her investigation was as robust as it could have been.

426. It is also surprising that once Mr Christopher learned that the Claimant had been suspended, she was not advised that she could nevertheless contact her about the grievance.

427. It took Ms Christopher 8 months to deliver the grievance outcome. This was a long time to leave an employee waiting, but does not, in our judgment, meet the threshold of a detriment for the purposes of this claim because of the particular circumstances.

428. In our judgment, the amount of time taken was reasonable when the complexity and the need to investigate something that had taken place in 2011, six years earlier, is taken into account. Ms Christopher was dealing with the grievance alongside a demanding job. In addition, the Claimant had not raised a concern about an ongoing problem that needed to be resolved

urgently. Instead, the grievance was about a historical matter. The Claimant deserved to have her concerns investigated and was entitled to be compensated if she had lost out financially, but she was not urgently seeking changes to be made to her current working conditions.

429. In any event, there is no evidence that the reason for the length of time it took to conclude the grievance was because the Claimant had made protected disclosures or done a protected act.

430. At the time of the grievance, the Claimant had been raising concerns about Mr Boateng for several years including making protected disclosure PD10. There is no evidence that Ms Christopher was aware she had been doing this.

431. Ms Christopher was obviously aware that the Claimant had done protected acts, because the protected acts were the concerns that were set out in the grievance (PD12) and expanded upon at the grievance meeting (PD13) and in subsequent emails exchanges with the Claimant.

432. In our judgment, Ms Christopher was not motivated, consciously or unconsciously, to unnecessarily delay the investigation of the grievance because it was a grievance about race discrimination. As noted above, she was, in our judgment, uncomfortable about confronting the colour discrimination allegation, but this led her to failing to investigate the grievance sufficiently robustly rather than delay it.

433. Finally, we add that this claim is, in any event out of time, as discussed further below.

Detriment 7 – Claimant's Second Grievance

434. The Claimant's complaint about her second grievance also concerns the length of time it took to reach a conclusion. In this case, it is accepted that it took one year, 2 months and 10 days before Mr Freeman provided the Claimant with an outcome letter.

435. This was, in our judgment, an excessive amount of time, even taking into account the complexity and historical nature the investigations undertaken by Mr Freeman.

436. In our judgment, the delay did constitute a detriment to the Claimant. We have reached this conclusion, despite the fact that the investigation focused on Mr Boateng and his treatment. This could have meant that any detriment was to him rather than the Claimant. We consider there was a direct detriment to her as well because the delay impacted on the Claimant's disciplinary appeal and caused that to be delayed.

437. We do not uphold the Claimant's claim, however, as we do not conclude that the reason for the delay was because she had made protected disclosures or done protected acts.

438. Mr Freeman was aware of the Claimant's protected disclosures, as one of the matters she asked him to investigate was what had been done about the concerns that she had raised about Mr Boateng. She also told him about her first grievance so he was aware of that and the fact that she had alleged race discrimination. This information did not influence his approach.

439. The reasons Mr Freeman's investigations took so long was because he was trying to conduct them alongside a demanding job which meant they were not given the priority they needed. It took time for him to identify the correct people with whom he needed to speak and obtain documents. He was not assisted by the fact that the Claimant left it to him to discover what had happened previously rather than provide him with relevant documents.

Detriment 8 – Disciplinary Appeal

440. The Claimant's complaint about her disciplinary appeal also concerns the length of time it took to reach a conclusion. It is accepted that it took Mr Overton until 9 January 2020 to provide the Claimant with an appeal outcome, even though she had submitted her appeal on 21 February 2019. This was a duration of nearly 11 months.

441. This was, in our judgment, an excessive amount of time, which meets the threshold for a detriment in our judgment. As can be seen below, it is one of the factors that we have taken into account in reaching our conclusion that the Claimant was unfairly dismissed.

442. We do not conclude that the reason for this delay was because the Claimant had made protected disclosures and done protected acts. The reason for the delay was because Mr Overton decided that he needed to wait for the grievance outcome before considering the appeal.

Manipulation Argument

443. Before turning to the unfair dismissal claims, we note here that the Claimant invited the Tribunal to find that this was a case where the decision makers, Mr Howard, Ms Mutch and Mr Overton, were manipulated into making their decisions by others. The Claimant cites Ms Blumrosen, Mr Adam, Mr Simonelli and the HR Team generally as responsible for the manipulation.

444. The Claimant argued that the Respondent deliberately selected Mr Howard, Ms Mutch and Mr Overton because they knew little about whistleblowing and so could be manipulated. She also argued that Ms Blumrosen's investigation statement was deliberately misleading and that she concealed evidence from Mr Howard, namely the transcript of the New York proceedings.

445. We reject this argument outright. In our judgment, Mr Howard, Ms Mutch and Mr Overton were all suitable choices for their respective roles. All were appropriately senior employees with some experience. It is true that they had limited understandings of the whistleblowing legislation, but it is a complex area of law and the Tribunal would not expect them to have had

specialist knowledge prior to being selected. Each of them was also supported by an HR specialist.

446. It is correct that Ms Blumrosen's investigation statement was misleading because it asserted an inaccurate assumption that she, Ms Blumrosen, had reached, as fact. Ms Blumrosen had assumed that because the Claimant attended the court hearing and was available to authenticate all the documents, she was responsible for leaking them all to Mr Pradal. Although inaccurate, it was not an unreasonable assumption for Ms Blumrosen to make based on what she was told. Although we consider it likely that Ms Blumrosen was sent a copy of the transcript of the New York hearing in April 2018, this was several months before she made this statement. She had made an earlier statement in March. Given that it took Ms Blumrosen until late Summer to inform Mr Adam about the additional disclosure of the policies, but the Claimant, we conclude that she does not appear to have taken a proactive interest in the Claimant's situation.

Automatic Unfair Dismissal

447. We have held that PD17 and PD20 do not amount to a protected disclosures. We therefore reject the Claimant's claim for automatic unfair dismissal based on the argument that her actions in leaking the documents amounted to protected disclosures.

448. We also reject the argument that the reason for the Claimant's dismissal was because of protected disclosures the Claimant or because she had done protected acts.

449. Ms Mutch and Ms Reid had limited knowledge of the Claimant's protected disclosures and no knowledge of any of her protected acts.

450. In relation to their knowledge of her protected disclosures, they took them into account in two ways:

- They used the information that the Claimant had raised concerns about Mr Boateng to identify that she was the Celeste referred to on the Employee Profile. Ms Mutch concluded from this (and the statement of Amy Blumrosen) that she was responsible for the leak of all the documents to Mr Pradal; and

- Ms Mutch also considered whether the Claimant's concerns about Mr Boateng might operate as a mitigating factor against her dismissal, but decided that they did not.

451. Our conclusion is that Ms Mutch was not motivated to dismiss the Claimant because she had raised concerns about Mr Boateng nor is there any evidence that Ms Mutch was manipulated by anyone to dismiss the Claimant because she had raised such concerns. Ms Reid appears to have had a significant influence over Ms Mutch's decision making processes, but we are satisfied that she was not motivated to act in any particular way by any of the protected disclosures or protected acts.

452. We are satisfied that the reason for the Claimant's dismissal was because Ms Mutch (assisted by Ms Reid) genuinely believed that the Claimant had leaked confidential documents to Mr Pradal in breach of the obligation of conditionality that the Claimant owed to the Respondent. Ms Mutch considered that the Claimant acted otherwise that in the best interests of BHGE because of the assistance she gave Mr Boateng and took the view that this constituted gross misconduct.

Ordinary Unfair Dismissal

Was there a fair reason for dismissal?

453. We find that the reason for the Claimant's dismissal was as stated above. It is correct to categorise this as misconduct. The Respondent has therefore established that there was a fair reason for dismissal.

Was the dismissal fair?

454. The Tribunal has upheld the Claimant's claim for unfair dismissal because we consider that there are a number of areas where the Respondent's conduct fell outside the band of reasonable responses of a reasonable employer.

Initiation of Disciplinary Investigation and Suspension

455. The Tribunal does not consider that the decisions to treat the matter as a disciplinary matter, to initiate an investigation or to suspend the Claimant were objectively unreasonable. Nor do we have any concerns about the manner in which the suspension was implemented, by Mr O'Neill, in person on 5 January 2018.

Delay

456. The first area where we consider the respondent did not behave objectively reasonably is the duration of the process. We consider that the length of time that the Claimant was kept on suspension before the disciplinary process was concluded fell outside the range of responses of a reasonable employer. In reaching this conclusion we have taken into account the size of the Respondent and the resources available to it.

457. The Acas Code calls upon employers to deal with disciplinary issues promptly and not to unreasonably delay meetings, decisions or confirmation of decisions. There was minimal compliance with this requirement. Although the Respondent's own Disciplinary Policy does not include timescales for steps to be taken, it includes as a core principle, the requirement to "*deal with issues as thoroughly and promptly as possible*" (1630).

458. In the Claimant's case, when considered cumulatively, there was a total period of entirely unjustified delay of between six months and eight months.

459. There was no justification for the Respondent taking from mid-December 2017 to 5 March 2018 to appoint someone to conduct the disciplinary investigation. The explanation provided was not acceptable for such a large employer, even one that had recently undergone a significant merger.

460. In addition, there was no justification why Mr Howard did not conclude his investigation report shortly after the Claimant failed to attend the investigation meeting on 29 May 2018. The final investigation report is only four pages long, one page of which consists simply of a list of documents. Whilst we appreciate that when he learned of the second disclosures in August 2018, a small amount of further work needed to be undertaken, but there was a period of nearly three months where there was needless delay. The speed with which Mr Howard was able to conclude the report in early September 2018 demonstrates that he could have finalised it much earlier.

461. There is also no justification as to why, once the investigation report was finalised on 7 September 2018, it took the Respondent until 10 December 2018, more than three months later, to inform the Claimant it was complete and send it to her. The explanation given by the Respondent (the delay in appointing Ms Mutch and the need to collate the documents) did not provide an acceptable excuse bearing in mind the size of the Respondent.

Information about the Allegations

462. In addition to the delay, we consider the Respondent failed to provide the Claimant with adequate detail of the allegations against her. All she was told was that the Respondent was investigating whether company information had been shared inappropriately. This was insufficient and also fell outside the range of reasonable responses of a reasonable employer.

463. It is very surprising that Mr Howard did not simply set out in a short letter that the Claimant was suspected of giving Mr Boateng's lawyer documents and telling her what those were. Given that she had been suspended and her access to BHGE's systems had been removed, there was little risk in providing her this level of detail.

464. We note that this lack of information about the allegations being investigated would have been remedied at an investigation meeting had the Claimant attended one. Once the Respondent had decided to give up trying to have a face to face meeting with the Claimant at the investigation stage, it was reasonable to provide the Claimant with the information in writing. This was done when the Claimant received the disciplinary pack on 13 December 2018, but done earlier might have led to the Claimant attending an investigation meeting.

Lack of Face to Face Meeting with the Claimant

465. A key procedural defect with the investigation and disciplinary process was the failure to hold a face to face meeting with the Claimant before deciding to dismiss her.

466. We have been careful to set out exactly what happened in relation to the investigation meetings which were arranged and which the Claimant did not attend. Our findings were that the Claimant did not receive notice of the first meeting (21 March 2018) until the day of the meeting. It was not reasonable to treat her as being at fault for not attending that meeting. The same is also true, in our view, of the second meeting (9 May 2018). After a gap in communications of around six weeks, the Claimant had received just 24 hours' notice of the meeting.

467. The Respondent did, however, ensure that it sent sufficient notice of the third meeting (29 May 2018) to the Claimant. She is entirely culpable for not attending that meeting. We found that the reason the Claimant did not respond to the third invite was because she had, by then, submitted a grievance. She did not inform Mr Howard or Ms Roughsedge of this directly, but it was not unreasonable for her to expect that it would be communicated to them or that they would learn that she had attended a grievance hearing. Even where an employer reasonably decides to treat disciplinary and grievance investigations entirely separately, the Tribunal would expect the individuals involved to be made aware that both processes were taking place.

468. In our view, a reasonable employer would have made at least one more attempt to invite the Claimant to an investigation meeting, particularly where the investigation was not concluded until more than three months after the third attempt at a meeting and where, in addition, new evidence had come to light.

469. The procedural failure to conduct a face to face meeting with the Claimant at the investigation stage would have been remedied in part had a face to face disciplinary hearing taken place. As we know, this did not happen.

470. The first opportunity was the disciplinary hearing of 18 December 2018. The Claimant asked that it be postponed, but the Respondent refused. Although we consider the Respondent's refusal to postpone the hearing for a full month until 17 January 2019 was reasonable, for it not to agree to a shorter postponement was objectively unreasonable for several reasons.

471. The Claimant had had no contact from the Respondent in connection with the disciplinary investigation between 1 June and 13 December 2018. She was expected, after nearly a year on suspension, to read and digest the 200 page disciplinary pack and to attend the disciplinary hearing on 18 December 2018. This was outside the range of reasonable responses particularly when taking into account that this was the first time the Claimant had been informed of the actual allegations against her and that dismissal for gross misconduct was a very real possibility. It was understandable that the Claimant wanted to take legal advice in the circumstances and to be allowed time to do so.

472. Although the Claimant was on paid suspension at this time the Respondent's requirements of the Claimant during the suspension had been very lax. The lack of communication with her was such that she could not

be expected to be checking for news of the investigation every day. She had not been expected to keep herself available to work, nor had she been required to keep anyone at the Respondent informed of her whereabouts. She had, for example, taken holiday without needing to seek approval including travelling to New York. In this context, she was not in a 'standard' suspension situation where the employee would be expected to devote the equivalent of what would have been her normal working time to preparation for the disciplinary hearing.

473. It was correct that arguably the Claimant did not need to read all 200 pages of the disciplinary pack in detail. Any lawyer she spoke to however, would have wanted to read the documents in full before advising her. In addition, it was not unreasonable for her to want to take time to refresh herself regarding the document content.

474. The Respondent based its decision to proceed in her absence on an unfair assessment that she had deliberately avoided attending three investigation meetings, when she had only done this once.

475. As it transpired, although Ms Mutch and Ms Reid held a disciplinary hearing of sorts in the Claimant's absence, they reflected on the position and took no final decision. This led to her being sent a letter inviting her to make further representations. Although the letter invited her to do this in person it provided no explanation as to how she might do this. In reality, the most that the Claimant was offered was the opportunity to submit written submissions.

476. When the Claimant sent her letter of 7 January 2019 to Mr Culp and Mr Simonelli, she expressly asked that she be given the opportunity to attend a meeting in person before a final disciplinary decision was made. The Respondent did not arrange one, even though it then took more than a month to conclude the process.

477. Our conclusion, therefore, is that although the offer to provide written submissions in part remedied the procedural defect of not postponing the 18 December 20218 hearing, it did not go far enough and correct it sufficiently to ensure a fair process.

Quality of the Investigations

478. In addition to the procedural defects, the Tribunal had several concerns about the substance of the investigations.

479. It was not unreasonable that both Mr Howard and Ms Mutch inaccurately reached the conclusion that the Claimant was responsible for leaking all of the documents to Mr Pradal. Although written evidence (the court transcript) existed that proved the Claimant was not responsible for leaking the Incident Report and Root Cause Analysis to Mr Pradal neither of them were aware of the document.

480. Ms Mutch and Mr Howard failed, however, to give any detailed consideration as to whether the documents leaked contained genuinely confidential

information. Neither of them had any understanding that UK legislation deems confidentiality provisions to be void in certain circumstances.

481. In addition, neither Ms Mutch nor Mr Howard asked Ms Blumrosen to explain the US litigation disclosure process to them. This meant that they did not consider whether Mr Boateng had any right to access the documents, whether as a former employee of the company, the person involved in the accident or via the litigation process. Ms Mutch reached the conclusion that, "*The Disclosures were made outside of the normal disclosure process, potentially affecting the proper course of the US Proceedings."* but had not explored this. The Tribunal considers an investigation conducted by an employer acting within the range of reasonable responses would have included these aspects without having to be prompted by the Claimant.

Suspension of Disciplinary Pending Grievance Outcome

482. As indicated above, the Tribunal were surprised to learn that Mr Howard and Ms Roughsedge were not made aware that the Claimant had submitted a grievance. Although she did not alert them to this herself, a reasonable employer would have ensured that they were informed. As they were responsible for determining the scope of their investigation, they needed to be satisfied whether anything in the grievance fell within that scope rather than have this decision made for them.

483. Ms Mutch and Ms Reid were made aware of the grievance. Rather than give genuine consideration as to whether it raised issues they should consider, they took the view that the disciplinary and grievance processes were entirely separate. The evidence given by Mr Overton that this approach followed the Acas code was not correct. He treated the Acas code as containing an absolute rule that says a disciplinary process should not be suspended pending the outcome of a grievance submitted while it is ongoing.

484. In fact, the Acas Code says that what is required will depend upon the facts of the particular case. In some circumstances, fairness may demand that the employer suspend the disciplinary process pending the outcome of a grievance. In other circumstances, fairness requires that the issues raised in the grievance should be incorporated into the disciplinary process because they are linked.

485. Although Ms Mutch said in her disciplinary outcome letter that she had considered whether the Claimant's concerns about Mr Boateng mitigated her actions, it is difficult to see how she could have done this without understanding the history of the concerns. Although the Claimant did not provide this information to Ms Mutch directly, by the time the disciplinary decision was being made, a transcript existed of the appeal meeting where the history is set out in a fair amount of detail. Understanding this may not have made any difference to the conclusion Ms Mutch reached. It was, however, an important matter that was given insufficient attention by Ms Mutch.

Appeal

486. We have considered to what extent the failings we have identified in the investigation and at the disciplinary hearing stage were remedied by the appeal.

487. Mr Overton did not resolve the factual issue of which documents were actually leaked by the Claimant. She told him very clearly what she leaked and what she did not leak. He did not check on her version of events. This was because he took the view that it made no difference in any event because of her admission with regard to the other documents.

488. Unlike Ms Mutch, Mr Overton sought to obtain a better understanding of the Claimant's relationship with Mr Boateng and her history of raising concerns and thereby her motivation for acting. He relied on the grievance investigation outcome for this rather than undertake any investigations of his own, but in our judgment this was a reasonable approach in the circumstances.

489. What did not fall within the range of reasonable responses of a reasonable employer test was to make the Claimant wait nearly a year after her dismissal for an appeal outcome. Although Mr Overton said that he approached the appeal with an open mind and would have offered the Claimant reinstatement had he concluded this was the appropriate outcome, we find this to be an entirely unrealistic prospect in the circumstances.

490. In our judgment, an employer acting within the reasonable range of reasonable responses would either have taken steps to speed the grievance investigation up, so that the appeal could be properly informed by it, or would have reallocated the relevant parts of the grievance investigation (that needed to be resolved for the purposes of the appeal) to Mr Overton. It was not necessary to wait for all of Mr Freeman's four areas of investigation to be concluded. The important part of the grievance investigations, for the purposes of the appeal, was to understand what concerns the Claimant had raised and what had happened in response to them in order to understand the context for her actions.

491. Finally, Mr Overton's lack of understanding about the protected disclosure legislation meant that he was not in a good position to evaluate the Claimant's actions in the context of her being a potential whistleblower.

Other Matters

492. For the sake of completeness, the confusion about which was the correct version of the disciplinary policy and when it was provided to the Claimant is not a factor we have taken into account when reaching our decision regarding the fairness of the Claimant's dismissal. In our judgment, it made no difference to the outcome at all.

Breach of Contract – Notice Claim

493. The Claimant is not entitled to notice or payment in lieu of notice on termination under her contract of employment if the reason for termination is gross misconduct.

494. The Respondent determined that when she leaked documents to Mr Pradal this constituted gross misconduct for two reasons:

(a) the documents were confidential, and sharing them was in breach of the confidentiality obligation to which the Claimant was subject and constituted gross misconduct under the Respondent's Disciplinary Policy

(b) the Claimant's actions were deliberately calculated to assist a plaintiff in their case against the company. The intention was to assist Mr Boateng in his claim against the company and so the Claimant's actions were performed with the intention of causing loss to the company.

495. The Tribunal has found that the Claimant was responsible for leaking the Employee Profile and the policy documents, but not the Accident Report or Root Cause Analysis. We have also found that the Claimant was motivated by a desire to help the families of Mr Boateng and Ms Tsogou Mabengou succeed in litigation against BHGE.

496. The non-legal members of the tribunal are satisfied that the Claimant's conduct amounted to gross misconduct for the purposes of the contractual wrongful dismissal. As their conclusion is the majority view, the Claimant's claim for notice fails.

497. The reason the non-legal members reached this determination was because they considered that it was sufficient that the policy documents were marked confidential, but nevertheless the Claimant gave these to Mr Pradal. In their judgment, this constituted gross misconduct because it was identified as such in the Respondent's Disciplinary Policy.

498. The minority view of Employment Judge E Burns is that account needs to be taken of the nature of the documents that were leaked. In her judgment, the policy documents, although marked confidential, do not contain information that is of a confidential nature. The policy documents simply contain health and safety procedures which are not, inherently confidential. With regard to the Employee Profile, this contains the personal information of Mr Boateng. Leaking this to anyone other than Mr Boateng's legal guardian or legal representative would have been a breach of confidentiality, but as the document was only shared by the Claimant with Mr Pradal, there was no breach of confidentiality.

Polkey / Claimant's Conduct / Acas Uplift

499. Having reached a decision that the Claimant's dismissal was unfair, the Tribunal has considered what adjustments, if any should be made to the Claimant's compensation.

500. We unanimously agree that there should be a 80% reduction to the Claimant's compensatory award pursuant to the principle in *Polkey*.

501. From the perspective of the non-legal members, this reflects their decision that the Claimant was guilty of gross misconduct and therefore there was an 80% chance that the Respondent would have been in a position to fairly dismiss her. They have not calculated this as higher than 80% because in their view, there was a 20% chance that a reasonable employer would have given the Claimant greater credit for what motivated her to commit the act of gross misconduct so that there was a 20% chance that she would not have been dismissed, had it been better understood.

502. Employment Judge E Burns does not agree that the Claimant's actions constituted gross misconduct. She nevertheless considers that the relationship between the Claimant and the Respondent had broken down to the extent that there was an 80% chance that the Respondent would have been in a position to fairly dismiss the Claimant for some other substantial reason.

503. Given the length of time it had taken to reach the decision to dismiss, following a fair procedure would not have added extra time onto the disciplinary process.

504. The Tribunal unanimously agrees that it would be just and equitable to reduce the Claimant's basic award by 75% pursuant to section 122(2) of the Employment Rights Act 1996 to reflect her conduct. We have not applied a contributory conduct deduction to the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996. We do not consider it would be just and equitable to apply a further deduction in light of the significant reduction applied because of the *Polkey* principle.

505. Finally, the Tribunal has decided that the Claimant's remaining compensation should be increased to reflect the Respondent's failures to comply with the Acas Code of Practice on Disciplinary and Grievances. We have referred to the failings above, but reiterate that in our judgment, the delays experienced by the Claimant were unjustified. The Claimant also failed to comply with the Code of Practice, however. She did not fully engage with the processes and it is fair to reflect this as well. The adjustment that we consider is just and equitable in the circumstances is an uplift of 20%.

Breach of Contract - Bonus

506. The final claim is the Claimant's claim that she was should have been paid a bonus under her contract for the calendar year 2018. We have upheld this claim.

507. The Claimant's entitlement to a bonus stems from the bonus clause in her contract of employment. We interpret that clause as saying that she is entitled to a bonus, in the region of 15%, for each Plan Year, payable in

March of the following year, subject to the conditions set for any particular Plan Year. A Plan Year is a calendar year.

508. No conditions were set for the Plan Year 2018. Other employees who were employed throughout that year received bonuses however.

509. In the absence of any documentation setting specific conditions for Plan year 2018, it is reasonable to assume that any general conditions set for the previous year would be adopted. In previous years, a condition was set that required employees to be continually employed throughout the bonus year and up until the date the bonus was payable.

510. The Claimant was employed for the entirety of the 2018 calendar year, but was not employed at the time the bonus became payable, in March 2019. The conclusion of the Tribunal is that the Claimant was not therefore entitled to be paid a bonus for the 2018 Plan Year.

Time Limits

511. Based on the dates of the Acas early conciliation period and when the Claimant presented her claim, her claims about any matters arising before 7 February 2019 are potentially out of time. This does not include her the Claimant's claims relating to her dismissal, appeal (detriment 6), second grievance (detriment 7) and for the 2018 bonus which the Respondent accepts were presented to the tribunal in time.

512. Although we have not found upheld any of the detriment claims, we conclude by recording our reasons for which of these claims would be in time, if we had found the Respondent's conduct to be unlawful.

513. In our judgment, the claims relating to the disciplinary process form a continuing act / series of linked detriments such that, had we upheld the claims, they would have been in time. This includes detriments 2, 3, 4 and 5.

514. We do not consider that the following detriments complained of by the Claimant constituted a series of detriments or continuing act, however. This is because they were done by people who were unconnected to the others involved:

- Detriments 1 (a) and (b) – involved the same person, Mr Kuppaswamy. He left the business in July 2017. There was no link between his email exchanges with the Claimant and those of anyone else. It would not be just and equitable to extend time back to July 2017.

- Detriments 1(c), (d) and (e) – involved the same people, Mr Simonelli and Mr Elsinga. The communications were not part of a continuing act / series of detriments which included the suspension, investigation and disciplinary process. These latter processes were carried out by different people. The last email was dated 26 January 2018. The claim was not

brought until over a year later. It would not be just and equitable to extend time back to January 2018.

- Detriment 1(f) – the actions of the African American Forum were isolated and were not linked to the later actions. The email was sent on 30 January 2018. The claim was not brought until over a year later. It would not be just and equitable to extend time back to January 2018.

- Detriment 6 - the Claimant's complaint about the first grievance is also out of time. The investigation of her first grievance was concluded by March 2018. There was no link between that and the subsequent disciplinary process such that it forms a continuing act / series with the elements of that disciplinary process. The Claimant's claim was brought nearly a year after the grievance process was concluded. It would not be just and equitable to extend time back to January 2018.

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Employment Judge E Burns
27 January 2022

Sent to the parties on:

31/01/2022................................

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For the Tribunals Office