EMPLOYMENT TRIBUNALS

Claimant: Ms P Malpeli

Respondent: Gen2 Property Ltd

Heard at: London South **On: 4, 5, 6 & 7 January 2022**

Before: Employment Judge Khalil sitting with members
Ms A Boyce
Mr P Morcom

Appearances

For the claimant: Mr Price, Counsel
For the respondent: Mr Wilding, Counsel

JUDGMENT WITH REASONS

Unanimous Judgment:

The claim for constructive unfair dismissal pursuant to S.94/95 Employment Rights Act 1996 is well founded and succeeds.

The claim for wrongful dismissal succeeds.

The claim for holiday pay is dismissed upon the claimant's withdrawal of the claim.

The clam for unfair dismissal pursuant to S.103A Employment Rights Act 1996 is not well founded and fails.

The claim for detriments for making a protected disclosure pursuant to S. 47B Employment Rights Act 1996 is not well founded and fails.

In relation to the claim which has succeeded, the parties are strongly encouraged to resolve remedy privately. If this is not possible, the parties should write to the Tribunal 28 days after receiving this record of the Judgment confirming whether more time is required or whether a Remedy Hearing should be listed and if so, the time estimate.

Reasons

Claims, appearances and documents

1. This was a claim for constructive unfair dismissal under S. 94/95 Employment Rights Act 1996 ('ERA'), unfair dismissal for making a protected disclosure under S.103A ERA and for detriments for making a protected disclosure under S.47B ERA.

2. The claimant was represented by Mr Price, Counsel and the respondent was represented by Mr Wilding, Counsel.

3. The Tribunal had an agreed E-Bundle running to 341 pages.

4. The Tribunal heard from the claimant and Ms Streek, an ex-employee of the respondent. For the respondent, the Tribunal heard from Mr Ben Sherreard, Programme Manager (and the claimant's former line manager) (now employed by KCC) and Ms Helen Bonneville, former Asset Director of the respondent and who heard the claimant's grievance.

5. The claimant also relied on a witness statement of Mr Jeff Stibbons of Bond Bryan Architects but who was not called to give oral testimony.

6. The respondent also relied on a witness statement of Ms Hayley Porter-Aslet, the former COO of the respondent (and the person who heard a grievance appeal) but who was not called to give oral testimony.

7. Those statements were read but given limited weight as their evidence could not be questioned or challenged by the other party or the Tribunal.

8. The Reading, evidence and submissions completed in 2.5 days. A written skeleton was received from Mr Price, which he spoke to; Mr Wilding delivered submissions orally. Thereafter following Tribunal Deliberations, this Judgment was reached. It is unanimous.

Findings of fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The claimant was employed as a Project Manager for the respondent until her resignation with effect from 12 September 2019.

12. The claimant was employed by the respondent since 1 May 2016. She had TUPED over to the respondent from Kent County Council ('KCC'). Her continuous employment was from 6 August 2009. With effect from 1 April 2013, the claimant agreed a reduction to her hours from 37 hours to 22.5 hours.

13. The respondent provides property management services to KCC. The respondent's role was primarily in relation to school expansion projects in Kent to increase pupil capacity.

14. In 2017, the claimant was, along with other work, responsible for project managing a school expansion at Regis Manor Primary School ('RM').

15. The tender process lasted between September and November 2017 with four tenders submitted.

16. The lowest tender submitted was from a company called Built Offsite. It was significantly cheaper than the next cheapest option. The variance was significant: £380,000. This tender was also £800,000 cheaper than the most expensive tender.

17. The claimant raised concerns that this tender was non-compliant as it did not meet the tender specifications in relation to heating and cooling systems. The claimant conveyed these concerns to Mr James Sanderson, her line manager, who was the Programme Manager at that time.

18. Notwithstanding her concerns, on the tender documentation submitted for approval to KCC, no concerns were expressly recorded. In response to a question about whether there were any concerns and if so, had these been discussed with her manager, the claimant said no (question 10, page 85). This form was signed by the claimant and Mr Sanderson. Given the value of the tender was over £1M, it required Cabinet Member approval. It was thus a significant expenditure of public funds.

19. The claimant says she raised the non-compliance issue more than once with Mr Sanderson, verbally, but was told by Mr Sanderson that the tender would still need to be submitted for approval. The claimant said she went along with this as she was subordinate to Mr Sanderson and did not want to jeopardise her job. Mr Sanderson did not give evidence. The claimant's evidence was accepted by the Tribunal.

20. In March 2018, additional projects were assigned to the claimant and another Project Manager, Ms Janet Streek. This was consequent on a departing Project Manager. The claimant did not herself commence any additional work on these until May 2018 (paragraphs 4.4 and 4.5 of the claimant's witness statement).

21. Line Management of the claimant changed from Mr Sanderson to Mr Sherreard in or around July 2018. This was part of a reshuffle which was in itself not a contentious issue in this case.

22. There was no evidence of any formal or written 1 to 1s held by Mr Sanderson in relation to the claimant nor of any formal handover notes or documentation. The handover to Mr Sherreard was informal.

23. Mr Sherreard held a 1 to 1 with the claimant on 29 August 2018. The minutes of this meeting were at pages 113 -114. The claimant raised her workload at this meeting. In response, Mr Sherreard proposed handing the RM project to Mr Brian Hirst, who the Tribunal understood to be another Project Manager. The claimant did not say at this meeting that she had previously raised her workload. In consequence there was also a potential to re-organise the claimant's working week. Mr Sherreard also requested the claimant to make weekly calls to Tunbridge Wells Boys Grammar School ('TWBGS') and St Gregory's school, two of the projects the claimant was working on. The Tribunal accepted Mr Sherreard's oral testimony that was in response to requests made by those schools for more communication. The claimant requested contract administration training. (It was agreed in this case that this training was neither arranged nor ever take place, though the Tribunal noted that in the 1 to 1 meeting in November 2018, the claimant was to have reviewed a particular training programme and assess its suitability). The claimant's working hours under 'TRACE' were recorded as 114 which was above the expected hours of 90. This was not challenged by the respondent.

24. Mr Sherreard stated in oral testimony that all of the project managers were over-worked, whether working part-time or full-time. This evidence was accepted. He was a senior manager in the business and able to make that assessment. This was not challenged or rebutted by the claimant by reference to Ms Streek.

25. Mr Sherreard, Jo Taylor (another Manager and Mr Sherreard's peer) and Mr Sanderson (who were part of the Senior Management team) had discussed concerns regarding the claimant's performance around day-to-day issues relating to contract administration (processes, cost management, form filling, getting approvals). This was around June/July 2018. This was discussed in one of the weekly huddle meetings amongst them. This was relayed (much later) during an investigation meeting into the claimant's grievance on 14 June 2019 (page 233). It was never raised with the claimant prior to this.

26. Mr Sherreard's evidence was that he did not want to raise performance concerns so early into his line management of the claimant. On 20 November 2018, another 1 to 1 meeting took place with the claimant. The minutes were at pages 116 to 118. In this meeting, the claimant said her workload was 'much better now' now that RM had been handed over. In oral testimony, the claimant said whilst she had ownership of this project, it could sometimes consume almost her whole week, but as an average, it occupied 30% of her time.

27. On 29 January 2019, the claimant was asked to attend a 'catch up' meeting with Mr Sherreard. (This date coincided with an all-staff announcement about a proposed restructure.)

28. Jo Taylor was also present at this meeting. Mr Sherreard started the meeting by saying 'this was not a conversation he wanted to be having with the claimant'. This was agreed under cross examination.

29. The claimant's performance in relation to 4 matters was discussed: an overspend on the RM project (£300,000); over-provision of 3 classrooms at TWGSB; lack of drainage surveys at TWGSB and St Gregory's; uploading of tender documents on to the respondent's internal IT system.

30. The previously discussed concerns relating to day-to-day contract administration were not raised.

31. The claimant accepted an error had been made regarding the extra classroom provision at TWGSB including an error made by the project's architect.

32. Regarding the RM project, the claimant said this had no longer been under her responsibility since September 2018. There had been an exchange of emails between 27 January and 29 January 2019 involving the claimant and Jo Taylor prompted by the new contract requisition total increasing by approximately £300,000 (pages 122-123).

33. Regarding the drainage surveys, the claimant said she had instructed them to be done (and thought they had been) but realised in December 2018 they had not been done.

34. The claimant explained she had some IT issues which she had also reported to IT. The claimant's email to IT of 23 January 2019 supported this (page 120).

35. In advance of this 'catch -up' meeting, Mr Sherreard had sought advice from HR regarding the process and conduct of the meeting. The Tribunal found that given the nature of the issues discussed and the manner of the meeting, including the presence of Jo Taylor and the seeking of prior HR advice, it was a formal performance and capability meeting. As such, it would have required 5 days advance notice and notification to the claimant of her right to be accompanied (Policy, page 312). Mr Sherreard confirmed he had not read the policy at the time.

36. Instead, Mr Sherreard was provided with a template script to follow. HR had informed Mr Sherreard that this needed to be tailored to the circumstances (page 135) but this did not happen. Mr Sherreard read from the script at page 136, without any circumstantial context or reflection, which included all possible scenarios, including a without prejudice conversation and an option to resign. In oral testimony Mr Sherreard accepted the claimant was visibly shaken and upset at this meeting. He also referred to this meeting as being the 'dropping of a bombshell' at a subsequent grievance investigation meeting (page 234).

37. The Tribunal did not need to decide whether the meeting was in fact stated to be without prejudice. It was not without prejudice as there was no known prior existing dispute. The Tribunal would probably have found it was more likely than not that the meeting was said to be without prejudice based on the script which was followed but this does not mean it was explained or likely to have been understood by the claimant.

38. A follow up letter was written to the claimant on 30 January 2019, pages 125 - 126. This summarised what had been discussed at the meeting and the options going forward. The option to resign was also made clear. The letter also referred to the separate option to resign subject to a settlement agreement. The other option was to be subjected to a 3-month performance and capability procedure. The claimant was given until 4 February 2019 to indicate her preference. In oral testimony, Mr Sherreard said he had intended and hoped for the claimant to accept being managed under the performance procedure. This was not stated or conveyed neither was this implicit. The Tribunal found the 'open' option for the claimant to resign remarkable.

39. A Solicitor's letter dated 4 February 2019 was received by the respondent on behalf of the claimant. This was at pages 128-129. Proposals for resolution were invited and the claimant's position was generally reserved. The letter referred specifically to the option to resign of her own volition as clearly demonstrating the respondent did not wish to retain the claimant. The letter did not cite or make any reference to alleged whistleblowing in relation to the claimant's belief regarding the non-compliant RM tender.

40. The letter was not responded to. A fit note certifying the claimant as unfit for work until 21 February 2019 was subsequently received (page 132 – 133). In fact, the claimant remained signed off sick until her resignation on 12 September by reason of stress at work.

41. Mr Sherreard emailed the claimant expressing his concern she was unwell and cancelling her leave booked for 11 February. He also disputed the account in the Solicitor's letter regarding the meeting not being stated to be without prejudice. He repeated the offer (to consider the settlement agreement) stood until 15 February 2019.

42. The claimant submitted a data subject access request ('DSAR') on 6 March 2019 by a letter addressed to Mr Dennis Markey, the CEO.

43. On 11 March 2019, a further Solicitor's letter was received. This was at page 142-144. This letter set out a grievance on behalf of the claimant and included information in relation to the RM tender and the alleged non-compliance. It was also stated that the planned restructure was one of the main reasons the claimant was asked to resign at the meeting on 29 January and that the performance concerns had been raised to force the claimant to resign before the restructure.

44. In relation to proposed restructure, the claimant was not communicated to about this until 1 March 2019 whereas other employees were informed on 19

February 2019. The claimant was also 'slotted' back into her Project manager role following the restructure. This was confirmed to the claimant. The letter confirming this was dated 12 April 2019 but the email to the claimant was sent on 23 April 2019 (page 167). Whilst this was not good practice and unprofessional, the Tribunal accepted the reason why there were delays was because the respondent had overlooked that the respondent's emails had gone to the claimant's work email address. At this time the claimant was off sick (pages 167-168).

45. Helen Bonneville, Asset Director was appointed to hear the claimant's grievance. She wrote to the claimant about her grievance on 1 April 2019 confirming that an investigation was required and that a Manager would be appointed to do so (page 156).

46. In error, the claimant was provided with a copy of the KCC grievance procedure when in fact the respondent had a Resolution procedure which was to be used. This was corrected by Ms Bonneville's email of 3 April 2019 (page 157).

47. On 11 April 2019, the claimant was informed that Helen Page, Interim Head of Countryside and Community Development (KCC), had been appointed to investigate the claimant's grievance.

48. The claimant chased her DSAR by her email of 15 April 2019. This email was sent to Jo Taylor. Around this time, Mr Markey, the CEO, had left the business. The Tribunal found it more likely than not that this was the reason it had not been actioned or completed sooner. Mr Sherreard replied to the claimant on 23 April 2019 (page 165) confirming that he had now picked up responsibility for the DSAR and committed to providing a response by 3 May 2019. This did happen by delivery by hand to the claimant's home on Friday 3 May 2019.

49. On 9 May 2019, Ms Bonneville wrote to the claimant impressing the importance of the claimant needing to meet with Ms Page to progress her grievance. This was in the context of 3 unanswered emails from Ms Page to the claimant on 15 & 24 April and 2 May 2019. The Tribunal accepted that the claimant had not received these emails. Having instigated the grievance, there was no basis for her to say otherwise. Equally, the Tribunal was satisfied that the emails had been sent. The date, time and narrative of each email was forwarded to the claimant as part of chain by Helen Page on 9 May 2019 following the claimant's request (180-181). Subsequently she also requested the original emails as attachments. These were not provided as the respondent informed the claimant, that because of a mailbox clean up, emails before 9 May 2019, could not be provided (page 184). To mitigate against further issues, Ms Bonneville said she would ask Ms Page to send her correspondence to another email address of the claimant too and to send hard copies too (page 187).

50. An investigation meeting took place with the claimant on 4 June 2019. The minutes were at pages 191-198. Although these were subsequently amended by the claimant, neither party questioned the other about the changes, the Tribunal was not taken to them and no submissions were made about them. The claimant was accompanied by Ms Janet Streek, an ex-employee.

51. The claimant commented at this meeting that it was not her intention to whistle blow, only to defend herself against the allegations made against her by Mr Sherreard. This was asserted by Ms Streek too. The Tribunal found this could only have related to the meeting in January, not when she had informed Mr Sanderson of her concerns at the end of 2017. The claimant also said that in 2017, she and other project managers had been given contract administration responsibility, for which training had been requested but not provided.

52. Ms Page interviewed Mr Sherreard, Ms Taylor and Mr Sanderson on 14 June 2019. In these meetings all three confirmed that performance discussions about the claimant had taken place at 'their' level. Mr Sherreard referred to dropping his 'bombshell' in the meeting, which the Tribunal found to mean one of the two resignation options. He also said he had referred to resignation as it was one of the options on the script. He also said he did not think he could line manage the claimant again. There was very little discussion with Mr Sanderson around the whistleblowing issue, one question only and none of the detail set out in the grievance of 11 March 2019.

53. In oral testimony, the claimant confirmed that she believed that the whistleblowing issue was likely to have been discussed between Mr Sanderson, Mr Sherreard and Jo Taylor in their weekly 'huddle' meetings. The claimant had not previously said this. However, Mr Sherreard accepted that concerns around the RM tender were likely to have formed a discussion point at the meetings and with the claimant.

54. An investigation report was produced which was at pages 246 – 257. The complaints regarding the performance process and the delay in receiving the restructuring information were upheld by Ms Page. The whistleblowing complaint was not because it was said, no formal process had been used by the claimant and because it was not included in the discussions around her performance. She also found communications in relation to the DSAR, the grievance procedure and the restructure were not deliberately withheld.

55. A grievance hearing was subsequently held with Ms Bonneville on 17 July 2019. The outcome mirrored the findings reached by Ms Page. This was confirmed by Ms Bonneville in oral testimony. Her outcome letter dated 18 July 2017 was at pages 261-264. A phased return to work was proposed and it was stated that if there were performance matters that still needed to be addressed after the settling in period, this could happen in accordance with good management practice as set out in the performance and capability procedure. The claimant was given a right of appeal to the COO, Ms Hayley -Porter-Aslet.

56. The claimant exercised her right of appeal. In the appeal letter, amongst other things, she provided further particulars in relation to her whistleblowing complaint namely the variance from the tender (the heating and cooling system being replaced by a cheaper air conditioning system) which was not compliant with KCC specifications and said there had been no consideration of her concerns regarding Mr Sherreard's improper behaviour at the meeting on 29 January or that action would be taken. The letter was at pages 268 – 272.

57. An appeal hearing before Ms Porter-Aslet took place on 15 August 2019. At the hearing, Ms Porter-Aslet stated that she felt the claimant had been let down by the system. She explained she had joined the organisation to improve it and was looking at this matter with fresh eyes. She explained that things had not been run correctly and she wished for the claimant to return with a clean slate. She also made a categoric statement that there were no performance issues with the claimant and none would be on her record. She offered to line manage the claimant herself and encouraged a formal submission of her whistleblowing complaint. She also accepted the restructuring process aspect of the grievance had been correctly upheld. She also offered to transfer the claimant to the project management team within the commercial team. The claimant also made reference to her nil % pay award conveyed to her in an undated letter sent in June or July 2019 which also stated that 'performance improvement was required'.

58. The above options and sentiment were conveyed to the claimant in the appeal outcome letter dated 19 August 2019 at pages 282 to 285. This confirmed in particular, wiping the slate clean regarding performance (accompanied by an apology for how it had been handled), upgrading her end of year rating to 'achieved the required standard' and back-dated a pay award to reflect this. For reasons of confidentiality, it was not stated whether or what action had been taken against others.

59. By a letter dated 12 September 2019, the claimant resigned. She referred in her resignation letter to her workload in the past and the meeting on 29 January 2019. She did not make any reference to whistleblowing in this resignation letter.

Applicable Law

Constructive Unfair Dismissal

60. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

61. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606****.*

62. The correct test for constructive dismissal was set out and established in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*** as follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

63. In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence was repudiatory.

64. In ***Ishaq v Royal Mail Group Ltd UKEAT/0156/16/RN***, the EAT, following a review of relevant authorities, approved the principle that it is enough that an employee resigns in response, at least in part, to a fundamental breach by the employer citing the Court of Appeal decision in ***Nottinghamshire County Council v Meikle 2004 EWCA Civ 859.***

Protected Disclosure claims

65. Under S.103A ERA, an employee shall be regarded 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.

66. By virtue of S.47B ERA, a worker has the right not be subjected to a 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. In ***NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

67. A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

    S.43B ERA says:

    Disclosures qualifying for protection:

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

    (a) that a criminal offence has been committed, is being committed or is likely to be committed,
    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
    (d) that the health or safety of any individual has been, is being or is likely to be endangered,
    (e) that the environment has been, is being or is likely to be damaged, or
    (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

68. S.43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to

show one of the six matters listed above (subjective test) and if so, was that belief a reasonable one (objective). ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174.***

69. Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However, this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

70. In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in ***Kuzel v Roche Products Ltd [2008] EWCA Civ 380, CA*** **:**

"57…*when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

71. *60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."*

Conclusions and analysis

Protected Disclosure

72. The Tribunal was satisfied and concluded that the claimant did disclose information to her manager Mr Sanderson (which Mr Sherreard became aware of), in which she had a genuinely held belief, which was objectively reasonable, that the respondent was in breach of its legal obligation to award a public tender to a company who did not meet the tender specification. This was specifically in relation to a different/variant heating and cooling system as a result of which the tender was significantly cheaper. The claimant was an experienced project manager of 10 years who was used to dealing with tender work. Her position in relation to this tender (awarded to Built Offsite) was consistent and steadfast. It mattered not that Mr Sherreard's view was that technically the tender was legally compliant. The claimant's belief, even if wrong about legal compliance, was genuinely and reasonably held. In relation to the claimant's belief that it was made in the public interest, the Tribunal was also satisfied that it was a genuinely held belief, which was objectively reasonable. This was about a significant expenditure of public funds in relation to school expansion and a tender at variance from that specified, reducing the costing by a significant sum. The amount of the tender also required sign off by a Cabinet member. It was objectively reasonable that the wider community interest could be engaged, it was an allegation of more than minor wrong-doing, it was more deliberate than inadvertent and it involved senior personnel as only senior personnel could sign off and submit such a tender.

Detriments

Unreasonable workload

73. The Tribunal accepted Mr Sherreard's evidence that all project managers, not just the claimant were overworked. As a manager in the business with responsibility and oversight, he was better qualified to make that assessment. The Tribunal noted the addition of projects in March 2018 was in relation to the claimant and Ms Streek. The Tribunal also noted that the lack of training on contract administration which may have alleviated workload pressure was not given to the wider project management team, not just the claimant (page 197). When workload issues were raised in the August 1 to 1, without any reference to earlier concerns, the RM project was removed from the claimant the next month. This would have made a significant impact on the claimant's workload at least 30% on the claimant's own say so (she also said in some weeks that project could take up almost all of her time). The claimant confirmed the favourable reduction in her 1 to 1 in November 2018. There was no detriment. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

The grievance process

74. The Tribunal concluded that the change in process was simply from using the KCC procedure to the respondent's own procedure. The email of 9 May 2019 was forthright and disconcerting but it was not aggressive and/or threatening.

The Tribunal had regard to the context – 3 emails had been sent to the claimant unanswered which the Tribunal have found were sent. The complaint in the issue was not about why telephone contact had not been made instead. The claimant was provided with copies of the emails as a chain under cover of an email. Although the emails were not separately attached or sent to the claimant (as they had since been deleted), the claimant's enquiry about searching the archive was never put to any witness and no submissions were advanced about that. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

75. In relation to the minutes of the investigation meeting on 4 June 2019, the revised version submitted by the claimant was agreed. The Tribunal drew upon its collective industrial experience that note taking is seldom verbatim and have different styles and depth. No party questioned the other about the minutes, the Tribunal was not even taken to them, no submissions were advanced on the alleged omissions or errors. The issue, in the Tribunal's unanimous conclusion, was effectively abandoned. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

76. In relation to the span of the grievance process and communications during it, the process commenced from 4 June 2019 and concluded on 18 July 2019. That was about 6 weeks. This entailed a grievance investigation meeting on 4 June 2019 with the claimant, 3 meetings with senior managers on 14 June 2019, compilation of a grievance investigation report, a grievance hearing on 17 July 2019 and an outcome on 18 July 2019. There were communications in the form of invitations and outcomes throughout. This was a completely reasonable process and timeframe. There was no detriment. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

77. In relation to the grievance outcome, it did uphold 2 of the complaints. The Tribunal concluded there was inadequate and/or improper consideration of the making of the whistleblowing complaint. This was a detriment, but this was not materially influenced by the *making of* the protected disclosure itself. It was because of an erroneous belief that because a disclosure had not been made formally under the procedure, it did not qualify for investigation.

78. In relation to the suggestion that the claimant return to work on a phased return basis, the Tribunal concluded this was completely reasonable and proper in the circumstances. The claimant was at the time signed off. In relation to the statement that a performance procedure could still be followed if necessary, there was nothing improper in such a statement. The performance related grievance upheld was in relation to the process and manner of dealing with

performance, not the performance concerns themselves. There was no detriment. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

79. In relation to the appeal outcome, the Tribunal concluded that there was no heavy-handed pressure by the COO for the claimant to return to work for the respondent. The Tribunal concluded that Ms Porter-Aslet acted in desperation (for the right reasons) and manifested persistence in trying to provide solutions to encourage the claimant to return – including wiping the performance slate clean, upgrading her performance rating and consequently, her pay and to offer alternative line management or an alternative role. None of this was detrimental. It was after all the outcome from an appeal process with the provision of resolution options. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

Restructure process

80. In relation to the restructure process, there was a delay, twice, in the claimant receiving information in relation to the proposals and confirmation that she had in fact been slotted into the new structure. This was a detriment. However, the Tribunal concluded this was due to incompetence and/or oversight as, by reason of the claimant's sickness absence, the communications were going to her work email address. The Tribunal drew on its collective industrial experience and concluded that this was not an uncommon occurrence, particularly as such processes are often intense focusing on the face-to-face meetings and individual or group queries. It was also the case that during this period the respondent's CEO left the organisation, which the Tribunal concluded may well have added further pressure on senior managers. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

DSAR

81. The Tribunal concluded that the DSAR was either unactioned or not completed owing to the impending and/or actual departure of Mr Markey, the CEO, to whom the DSAR was addressed. It was actioned within a reasonable timeframe thereafter when the claimant chased a response. The Tribunal rejected that in receiving the documents by hand on Friday 3 May 2019 (in the evening) was detrimental treatment. There was no prescription around the manner or format of delivery and the Tribunal concluded that by then, the respondent would have been anxious to ensure actual delivery of the output from the DSAR, without further delay, given that it was late already. There was no evidence that documents were deliberately withheld. In so far as there was a

further DSAR for outstanding documents, the Tribunal was not taken to this issue at all, there were no questions by either party of the other and no submissions. This particular issue was effectively abandoned in the Tribunal's conclusion. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

Pay Award letter

82. The pay award letter giving the claimant a nil % pay change and stating that performance improvement was required was a detriment. The performance process was not complete and no conclusion had been reached. The Tribunal concluded that the letter was sent out in error owing to incompetence of HR and/or Mr Sherreard and was intrinsically linked to the performance discussions which had commenced on 29 January 2019. It was a template letter which would only have been appropriate if the performance process had been concluded (adversely against the claimant). If it was still outstanding, as it was here, the letter should have been tailored. It wasn't. The Tribunal concluded this was down to management and/or HR incompetence. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

Lack of communication

83. The complaint in this issue was about a complete lack of communication which could have demonstrated a desire to keep the claimant rather than remove the claimant. The claimant was provided with 2 outcome letters, the first suggesting a phased return to work, the second a return to work with a clean slate and alternative line management and/or another role. There was an apology with the second (appeal) outcome letter too. The claimant was also informed she was slotted into the new structure. The claimant had instigated and went through a formal grievance/resolution process. She had engaged Solicitors too. It would not have been appropriate for the respondent to comment outside of this process. This was not a case of an employee on long term absence who was complaining about a lack of care. There was no detriment. Even if the Tribunal was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

Denied opportunity to communicate with colleagues

84. There were no questions asked by either party of the other. The Tribunal was not taken to any emails or other documents about this. There were no submissions advanced either. It was not clear or apparent in what way it was alleged the claimant was denied by the respondent to communicate with long-standing colleagues. On that basis there was no detriment. Even if the Tribunal

was wrong in reaching this conclusion, the Tribunal rejected that there was any or sufficient evidence from which it could conclude that the claimant's protected disclosure materially influenced the respondent's treatment of the claimant in this regard.

'Ordinary' constructive Unfair Dismissal

85. The Tribunal concluded that the meeting on 29 January 2019 was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, specifically the inclusion of the option, without more, to resign. There was no reasonable or proper cause for this. There had been no performance related discussions until that point. The Tribunal concluded it was not an attempt to resolve matters informally. That could not be case if the respondent positioned resignation by the claimant as an option. It was a formal process whereby no formalities had been relied upon at all. There was no advance notice, no right to be accompanied was made known. Mr Sherreard read, on his own admission, from an untailored script. It was surprising that HR were not in attendance knowing that the script included complicated issues and potentially the need to separate out issues in the meeting. Concepts of without prejudice and pre-termination discussions are specialist areas or at least require training or experience.

86. It is right that the law allows an out of the blue pre-termination discussion, absent a pre-existing dispute, checked only by the prohibition against improper behaviour. Section 111A however is prescriptive and makes inadmissible pre-termination conversations where an offer is made or discussions had with a view to employment being terminated on terms agreed. The free-standing resignation option did not fit into this category. As such it was not caught by S.111A. It was admissible and it was conduct in itself which destroyed or seriously damaged the relationship of trust and confidence. The claimant was a long-serving employee with an unblemished record and on the respondent's own case, the performance concerns raised were not serious, before even taking into account the claimant's response/reply to the charges levelled.

87. As a result of the foregoing conclusion, it was not necessary for the Tribunal to determine whether or not the option to resign on terms to be agreed was rendered admissible by reason of improper behaviour.

88. The Tribunal attributed the respondent's conduct in this regard to a significant lack of competence and experience on the part of Mr Sherreard in undertaking such a process and/or inadequate support and assistance from HR. Mr Sherreard read from an untailored universal script. HR should have been all over this issue. That was, in the Tribunal's view, almost a complete answer to why the meeting took place and occurred in the way it did. The Tribunal also considered, on a secondary basis, that Mr Sherreard, Ms Taylor and Mr Sanderson may have had the restructure in mind, which, more than coincidentally was announced on the same day and this process may have presented an opportunity to save potential costs of a redundancy. It did not matter in the Tribunal's conclusion that the claimant was ultimately slotted in.

That was post-grievance and post 2 Solicitors letters. At the time of the meeting, the Tribunal considered this was a secondary motive.

89. The claimant did not resign at that point. She remained employed and initiated and went through a grievance process. She relies on subsequent procedural shortcomings relating to the grievance process, the DSAR and the pay award letter (being the alleged last straw).

90. In so far as the claimant initiated the grievance procedure before electing to resign, the Tribunal concluded, relying on paragraphs 22-24 of the EAT Judgment in *Gordon v J&D Pierce (Contracts) Ltd 2021 IRLR 266* that this not indicative of affirmation.

91. The Tribunal also observed that throughout the period from 29 January 2019, the claimant was signed off sick. The time off was supported by fit notes. The claimant was a long-serving employee of 10 years. In ***Chindove v WM Supermarket PLC UKEAT/0043/14/BA*** Justice Langstaff observed, having commented from ***Buckland v Bournemouth University Higher Education Authority 2010 EWCA Civ 121*****,** that giving up a job was a serious consideration for multiple reasons, that, in the context of affirmation, an employee being off sick has nothing like the same consideration as an employee at work.

92. The Tribunal also concluded in the alternative or otherwise that the pay award letter – giving the claimant a nil % pay award with a statement that performance improvement was required, resurrected/revived the respondent's earlier repudiatory breach which had crossed the *Malik* threshold or alternatively, had the cumulative effect of crystalising the breach at that point. On either approach to the last straw doctrine, made clear in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA***, the respondent was in repudiatory breach and the claimant had not affirmed the contract/waived the breach when she resigned.

93. The claimant resigned wholly or partially in response to the breach or breaches.

94. The claimant was constructively unfairly dismissed. In consequence, the claimant's claim for wrongful dismissal also succeeds.

S.103A ERA 1996 – automatic unfair dismissal

95. In pursuance of the foregoing analysis, the Tribunal concluded that the claimant's protected disclosure was not the reason, or the principal reason, for the claimant's dismissal. The reason or principal reason was a combination of management incompetence, HR incompetence and the pending restructure. There was a contemporaneous trigger in relation to the overspend on the RM project. It was not disputed by the claimant that there was an overlooking of the 3 extra classrooms in relation to the TWGSB project; it was not disputed by the claimant that drainage surveys at TWGSB and St Gregory's had not happened. There were thus catalysts in relation to performance which also provided a disconnect, causally, to the protected disclosure.

Holiday pay

96. This claim has been paid and is dismissed upon the claimant's withdrawal.

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All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Khalil
26 January 2022