EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms Clara Heath	University of Kent

Heard at: **London South Employment Tribunal**

On: **1 March – 10 March 2022**

Before: **EJ Webster**
Ms S Goldthorpe
Mr A Adolphus

Appearances
For the Claimant: **In Person**
For the Respondent: **Ms M Tether (Counsel)**

JUDGMENT

1. The claimant's claim for constructive unfair dismissal is not upheld and is dismissed.

2. The claimant's claim for automatic unfair dismissal under s103A ERA is not upheld and is dismissed.

3. The claimant's claim for detriments pursuant to s43B ERA 1996 are not upheld and are dismissed.

RESERVED REASONS

The Hearing

4. By an ET1 dated 22 August 2018 the claimant brought claims for constructive unfair dismissal and associative disability discrimination. The claimant subsequently withdrew her claim for associative disability discrimination and applied to amend her claim to include claims for whistleblowing detriment and automatic unfair dismissal. That amendment application was allowed and is reflected in the List of Issues below.

5. At the outset of the hearing we went through the Issues to ensure that both parties and the Tribunal were aware of the matters to be decided. The issues had been set out across the two separate Case Management Notes on 11 May 2020 and 12 February 2021. The parties agreed that the issues were accurately reflected in those case management notes though Ms Tether submitted that the Tribunal needed to ensure that it followed the 5 separate stages of decision making with regard to whether the claimant had made protected disclosures. That was agreed and is reflected in the list below. On considering this further clarity of the issues, the claimant stated that there were two alleged breaches of a legal obligation that she reasonably believed were demonstrated by her disclosures. Both those alleged breaches are in the list below.

6. The Tribunal was provided with an agreed bundle numbering 1230 pages, a supplementary bundle numbering 77 pages, written witness statements for all 10 witnesses, a chronology from each party and a reading list from each party. The respondent also provided a written opening note which set out the relevant statutory framework and some caselaw. Ms Tether also provided written submissions and a bundle of authorities at the end. We heard live evidence from all 10 witnesses:

   (i) Clara Heath (the claimant)
   (ii) Jennifer Beecham (JB)
   (iii) Tracey Myhill (TM)
   (iv) Karen Jones (KJ)
   (v) Alison Webster (AW)
   (vi) Tim Hopthrow (TH)
   (vii) Joanne Bembridge (JB2)
   (viii) Paul Allain (PA)
   (ix) Claire Griffiths (CG)
   (x) Julien Forder (JF)

7. The claimant found the hearing challenging at times. The claimant was reassured that the Tribunal was used to hearing from litigants in person. At the outset of day one she highlighted that she was experiencing chest pains. We explored with her whether she was well enough to continue and she said she was. At the outset of every day we asked the parties whether there was

anything we needed to be aware of before starting and nothing was reported save for an issue regarding documents on Day 6. The Tribunal ensured that regular breaks were taken (generally every hour) and all witnesses and parties were informed regularly that they could ask for a break. On Friday 4 March the claimant was particularly fatigued at the end of the day. We broke for 10 minutes to see if the claimant wanted to finish questioning the witness or not and she was told that the witness could be carried over the weekend for Monday morning. She declined and the claimant finished cross examining the witness. On Day 6 of the hearing, the claimant expressed that she felt nauseous following the answer to a question from the last witness. The Tribunal intervened and asked her if she needed a break. She said it did not matter, which the Tribunal did not accept. It was made clear to the claimant that the hearing could be adjourned if she was not well. She insisted she was well enough to proceed and the Tribunal made it clear that they were only doing so because they trusted her assertion that she was well enough and were only proceeding on that basis. On the final day, before submissions the claimant again indicated that she was feeling unwell. The Tribunal again checked whether she needed more time to consider the respondent's written submissions which had been sent to the claimant the evening before. The claimant confirmed she did not want more time and would proceed.

8. During the cross examination of the respondent witnesses the Tribunal did step in on occasion to assist the claimant with framing her questions and to ensure that the issues that the Tribunal were going to be considering were covered. On all occasions the Claimant expressed that she agreed with the Tribunal's input and was grateful for the assistance.

9. On the final day of evidence (Day 6) the claimant applied for two additional documents to be added to the bundle namely documents relating to the Freedom of Information Requests that she made long after her employment had ended. The respondent objected to their addition on the basis that it was late in the process, the representative did not have the opportunity to take instructions or cross examine the claimant about the documents, the documents were an incomplete part of the Freedom of Information request process and they were irrelevant to the claim that the claimant was bringing. The claimant maintained that they were relevant to the issue of whether timesheets had been provided (or not) as part of her grievance process and the reasons behind any failure to provide those time sheets. The Tribunal struggled to follow the claimant's arguments in this respect and having considered the documents found them to be irrelevant to the issues that the tribunal had to decide as they post-dated her grievance and her resignation and any of the matters that she relied upon as part of her detriment claim. Therefore, assessing the relative prejudices to the parties, the fact that this was so late in the hearing, the fact that the documents appeared irrelevant to the Issues to be decided by the tribunal because of their dates and that the claimant was able to put her questions regarding any failure to produce the timesheet data to the

witnesses in any event, we found that it was not in the interests of the overriding objective to allow new evidence at that late stage.

10. Evidence was concluded on Day 6 at lunch time and the parties made submissions in the morning on Day 7. The Tribunal used the remaining time of Day 7 and 8 to reach its decision.

The Issues

Constructive unfair dismissal & wrongful dismissal

11. Was the claimant dismissed, i.e. (a) was the conduct referred to in the ET1 and more particularly at paragraph 14 a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

12. If so, did the claimant affirm the contract of employment before resigning? The respondent will state that the outcome of the grievance appeal was sent to the Claimant on the 28 March 2019 and she did not purport to resign until the 6 July 2019. The Respondent will contend that the Claimant resigned because her sick pay had been exhausted not due to any breach by the Respondent. (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation — it need not be the reason for the resignation)? If the claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.

13. The conduct the claimant relies on as breaching the trust and confidence term are:

a. Failing to address the 'wrongdoings' in the grievance;

b. Failing to provide a safe working environment;

c. Failing to properly deal with the grievance;

d. Breaches of health and safety.

14. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"): and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Was there a Public Interest Disclosure?

15. Ms Heath relies on the points raised at paragraph 15 of the Amended Details of Complaint, as being the alleged disclosures i.e. that

Dr Karen Jones had mismanaged the MAX projects, both of which were funded by the Department of Health and Social Care (DHSC), for a period of many years as she had:

(i) allowed members of the MAX project team to work on non—DHSC funded projects (Kamilla Razik) or study for a masters degree (Diane Fox) during MAX (i.e. DHSC-funded) time,

(ii) repeatedly failed to ensure that members of the MAX project team were fulfilling their allocated responsibilities (Diane Fox, Kamilla Razik) and/or were producing work that complied with the criteria proposed to, and agreed with the DHSC (Stacey Rand, Danielle Roche),

(iii) permitted members of the MAX project team (Diane Fox on two separate occasions, Kamilla Razik) to leave the projects before the end of their DHSC funded period and without fulfilling their allocated responsibilities.

(iv) Dr Karen Jones had ceased to contribute to the MAX projects, despite being funded to do so, and had taken credit for the Claimant's work (on the development of the MAX toolkit).

As a direct consequence of these actions, neither of the MAX projects had achieved the objectives agreed with the DHSC and had, thus, wasted considerable amounts of funding or assigned other duties, or left the project without completing their duties.

16. She states that these disclosures were made cumulatively across the following:

(i) Her grievance letter dated 8 August 2018
(ii) Her conversation with TM on 13 September 2018
(iii) Her further information provided on 11 October 2018
(iv) Her grievance meeting on 30 October 2018

17. Were the disclosures relied upon there disclosures of information?

18. If so, did she believe that the disclosure was made in the public interest? She relies on the fact that public money was wasted or misapplied. Was that belief reasonably held?

19. Did that disclose information which in her reasonable belief tended to show that a person (Dr Karen Jones) had failed to comply with a legal obligation?

The legal obligations relied upon by the Claimant are:

(i) Their contractual responsibilities to the DHSC in respect of the project; and
(ii) Research-related fraudulent activities

<u>Public Interest Disclosure - Detriment complaints</u>

8. If so, was Ms Heath subjected to a detriment by the University or another worker as a result in that (see paragraph 16 of the Amended Details of Complaint):

a) she was pressurised to have her grievance dealt with informally;

b) her grievance was not upheld;

c) the outcome accused her of purposely working less hours than she was

paid for;

d) the University resisted making her contract permanent; and

e) no timely reference was provided

On review of paragraph 16 during our deliberations we also note that paragraph 16 includes:

f) Failed to refer her to the relevant internal policies – in particular, their Fraud Prevention and Respondent policy (2018) and Whistleblowing Policy and Procedure (2018) both of which include a no-retaliation policy'.

g) failed to notify me of my legal rights to protection under the Employment Rights Act 1996

h) allowed one of the key witnesses, Kamilla Razik ('KR') to leave the University 10 working days after suddenly and unexpectantly resigning despite her contract obligation to give 3 months' notice The University did not interview her, and it seems from witness accounts of KR's remarks and behaviour on her last day that she may have received a substantial pay-out.

Note – all of the above matters were dealt with in evidence by the parties and so have been considered and decided.

Public Interest Disclosure - Dismissal complaints

20. Ms Heath needs to show that these detriments amounted to a fundamental breach of contract and that she resigned in response to them.

21. If so, and since Ms Heath has over two years' service, has she has produced enough evidence to raise the question whether the reason for her (constructive) dismissal was the protected disclosure(s)? This is, inevitably, very similar to the issue above.

22. If so, can the University then satisfy the Tribunal that there was another reason for the dismissal?

23. If not, does the Tribunal accept that it was the protected disclosure(s) or that other reason?

Time limits

12. The claim form was presented on 22 August 2019, within a month of the end of efforts at early conciliation through ACAS and so the unfair dismissal claim is in time.

13. In the case of the whistleblowing complaints, Ms Heath must prove:

a) that it was not reasonably practicable for the claim to be made within the time limit; and

b) if so, that it was made within a further reasonable period.**The Facts**

General Observations

14. The purpose of this Tribunal was to determine the claims as set out in the List of Issues above. These were agreed in two previous PHs and at the outset of this hearing. We have only made findings in relation to the facts that assist us in reaching our decision for those issues. We have only considered the evidence that we were taken to either by the witness statements or in the course of cross examination in the hearing. Where we do not reference either a document or an issue that arose during the hearing - that does not mean we have not considered it in reaching our conclusions.

15. All our conclusions are reached on the balance of probabilities. Where we have not set out the evidence supporting each specific detail for each finding of fact, we will have reached that finding because we preferred one person's evidence over the other.

16. As an overall observation we consider that the claimant was very well prepared for this hearing but was not always clear in her understanding of its purpose and limitations.

17. Overall, we found the claimant to be an unreliable witness in some respects. We recognise that memory can often be reconstructive, but we found that much of the claimant's evidence was intentionally reconstructed in order to fit her current claim. This has meant that where there was a conflict between the claimant's memory or interpretation of events and that of the respondent witnesses, we have largely preferred the respondent witnesses' evidence.

18. On a number of occasions throughout the evidence before this Tribunal, the claimant has assumed knowledge or a level of understanding by her colleagues of what the claimant was thinking or feeling without ever expressly telling them what she was feeling or thinking. Instead it appears that she assumed knowledge, particularly regarding her health and stress levels, on the part of her colleagues. We provide examples of this below. The impact of this on her communications with managers and how she approached her grievance process was profound in that she provided information that she considered demonstrated something important without ever actually spelling out what that important something was. She has said latterly in the course of this hearing that this was because she was advised by ACAS not to make any unsubstantiated allegations and she was just trying to signpost people to information in the hope that they would find something untoward amongst the information. Again we provide details below. We write this paragraph here because we consider that it is important that the claimant understands that we the Tribunal cannot take the information she provides and shape it into a case for her. That is not our

role. We have taken the evidence that has been provided, weighed it up and reached a conclusion on the balance of probabilities as to whether the legal case that she has put before us is well-founded.

General Background

19. The respondent is an academic institution. The claimant worked within the Personal Social services Research Unit (PSSRU') which is part of the School of Social Policy, Sociology and Social research ('SSPSSR'). She was originally employed in 2012 partly as a PA to Director and partly as a Research Assistant and after a few months worked solely as a research assistant at Grade 6. She was promoted to Grade 7 on 1 October 2017.

20. As a research assistant she worked almost exclusively on the MAX project. This was a research and development project which aimed to find ways to support Local Authorities in England to use outcome data collected by the Adult Social Care Survey and the Personal Social Services Survey of Adult Carers in England to inform and improve adult social care services. This project had two distinct phases. It was agreed that the first phase ended with the production of something called the MAX toolkit which was a practical online tool that Local Authorities used in recording and analysing data that they collected regarding social care. The second phase of the project ran from 1 July 2016 and was due to end in December 2018. The ultimate output of that stage of the project was to create case studies of how the Local Authorities were using the toolkit. Professor Jones took the decision (in conjunction with Professor Forder) that due to a lack of Local Authorities ready to participate in research for the case studies, they would bring the MAX project to an end early in June 2018 The claimant originally appeared to agree with that view but subsequently stated that she felt it was the wrong decision. That is explored more fully later.

    In the years prior to the claimant's grievance, there were several other Research Assistants who worked on the MAX project with the claimant. The management of the project also changed from Professor Malley to Professor Jones in 2014 (initially to cover maternity leave). It was widely acknowledged throughout the hearing that the claimant was good at her job and was the expert with regard to the MAX project. She was probably the only person that worked exclusively on the MAX project for its duration and hence had a huge amount of valuable and valued expertise and information.

21. It appears that other Research Assistants on the MAX project were assigned far more finite roles within the project. It also appears that they often did not finish them or did not do them properly. This frequently led to the claimant being asked to finish other people's work. The extent of the 'failings' in others work was impossible for us to assess (nor were we asked to) but it is clear that the claimant took on work throughout the project that had originally been assigned to others or assigned as a joint responsibility between her and others.

22. It is important to note however that the claimant always agreed to take on this work. She did not complain about having to do the work – she complained about the failures of her colleagues. It was clear that the claimant knew that if work was not completed in accordance with the project plans, then the time frame for completion of the work was simply extended. We reach this conclusion because she was present at most if not all of the project planning meetings when extensions to deadlines were agreed without problem. She may not have been aware as to how this was communicated to the funder (DHSC) but she must have realised that they were told about the delays and agreed them given the length of time that the two MAX projects stages took and were funded for.

23. There was no expectation by the project managers (latterly KJ) that the claimant do double the work in the same time frame – instead the time frame was extended. We find that whilst she knew that deadlines were loose, the claimant did not always take advantage of that and she would often do work in accordance with the original deadlines. This was primarily due to her dedication to the MAX project which she was passionate about. She willingly and often unbidden worked extra hours. Again this is because she was dedicated and a very good employee. We also consider that she was ambitious and as has transpired during the grievance process, wanted to progress and produce work that would enable her career to develop. We find that she took TOIL as and when she wanted to and there was a culture of flexible working throughout the department enabling her to balance her work and life to some extent if she needed to.

24. There was recognition by the respondent that the claimant worked very hard. This was reflected in the fact that despite her contract being reduced to 0.9 FTE, when it became apparent that she was in fact working full time hours, her pay was raised accordingly and backdated even though on paper she had only been a 0.9.

25. A statement to this effect in the grievance outcome report was interpreted by the claimant as reading that she was deliberately working fewer hours than she had been paid for. The statement made by AW in the grievance report was:

    “Ms Heath stated in her interview that her hours were adjusted to 0.9 for a period of time but she continued to be paid as a full—time member of staff, ie, 1.0, in order to recognise the extra hours she was working.”

26. It was unclear to the Tribunal as to how the claimant could interpret this statement as anything other than a recognition that she was working more hours than her contract suggested and that she needed to be (and subsequently was) paid as full time because those were the actual hours she was working. This part of AW’s findings informed her conclusion that the claimant had a high workload and that this contributed to her stress levels.

27. This was the first of several factual statements or comments that the Claimant wholly and inexplicably misinterpreted during the grievance, appraisal and this tribunal process. We detail them as they arise, however we consider it is worth noting here that the claimant's apparent tendency to misinterpret and accordingly become very upset by various innocuous or factual statements has informed our view as to the overall reliability of her interpretation of events and conversations.

28. The claimant had annual appraisals. We had the written records of the claimant's annual appraisals with JB and KJ. It is clear in those appraisals that the claimant expresses the desire and intent to produce articles from the projects. In the last appraisal it is recognised by KJ that the delay in the article was as a result of the pressures of the MAX project itself both on KJ's workload and the claimant's.

29. JB told us in evidence that during an appraisal someone simply expressing the desire to achieve an output was not the same as someone asking for her help in producing one. We think as a line manager that is a somewhat obtuse approach to take. Nevertheless, we can see no lack of willingness from KJ to support the articles drafted by the claimant which went through various iterations as demonstrated by various emails over several years. It is correct that there were delays caused by the claimant's workload, KJ's workload and the fact that the MAX project was extended over time due to the staffing issues meaning that the appropriate dates for any article were also pushed back.

30. The importance that the claimant attached to the production of 'Gold Standard' outputs was, we conclude, disproportionate to their actual importance. She insisted in her questions to almost every witness, that peer reviewed articles were in effect the only outputs that mattered when it came to obtaining promotion or an alternative role. Every academic witness disagreed. They accepted that in the past they were an important measure for recruitment and promotion but insisted that at least in the last decade, the academic world had moved on. We accept that. The claimant's position regarding the importance of articles appeared to shift towards the end of the Tribunal hearing as her questions to JF started to suggest that her belief in the importance of Gold Standard outputs was shaped by her application for promotion within the university because the application form required her to list her publications. Whilst that might have been the case, at the point at which she raised this concern with KJ and JF, they intervened and told her that her blogs for the MAX project could be relied upon and they ensured that the promotion panel allowed for her application to be considered even though it was out of time. She was promoted because of her outputs even though they were not the Gold Standard ones that she stated were essential. Her belief therefore that Gold Standard articles were the only ones that matter was demonstrated as incorrect by her

own promotion in 2017. Despite this she continued to argue at the Tribunal that they were the only important output that could secure a new role.

31. It is noteworthy that the claimant suggested to the Tribunal that the problem that JF and KJ had stepped in to assist her with for her promotion application in 2017 was the lack of articles. Their view was that they were stepping in because she had failed to submit the application in time. We understand that she delayed putting in the application because she did not know what to say in the list of outputs/publications – but that was not the issue that KJ and JF were having to solve for her even if it was the issue that they had to give her guidance on. They had to deal with the fact that she was out of time and persuade the panel to consider her out of time application. What is also not in doubt is that they fully recognised, as did the promotion panel, that the claimant's outputs were worthy of promotion. It was not evidenced by the claimant that any other institution would not recognise them either and we find it implausible that her work on the MAX projects would be considered unworthy for the purposes of securing a commensurate role or even a higher role elsewhere.

Claimant's Health and management relationship with KJ

32. It is clear (and the respondent accepts) that the claimant began to suffer from physical manifestations relating to her stress from October 2017. However, the email on 15 November 2017 (p 152) reflects the tone and substance of what the claimant communicated to KJ about her health until she was signed off sick and produced a note stating that she was suffering from work related stress.

33. The Claimant states that after this email she had a meeting with KJ at which she elaborated on this point and told her that the chest pains were stress related and the stress was related to work. We do not accept that any meeting that may have taken place informally after that would have communicated any different information from what was in her email . Our reasons for this are various.

34. The claimant has repeatedly sought to assert, after raising her grievance, that emails and conversations that are noted, included elements or information in them that on plain reading, they do not.

35. We saw no evidence that KJ would be anything other than supportive to the claimant and other members of staff when they sought support. There was email evidence of her being very understanding of the claimant's emails over the years wanting to work from home or take TOIL for a whole variety of reasons. There was also evidence to show that when another colleague (DF) presented with stress, KJ took steps to ensure that her workload was reduced – in fact this led to some of the many tasks that was assigned to the claimant that she now says added to her stress levels. We have no reason whatsoever to doubt that KJ would have reacted similarly if she had known that the claimant was as unwell as we now understand.

36. Further the relationship between KJ and the claimant was relaxed and friendly. The claimant asserts that this shows that she would have told KJ of her real concerns regarding her health. Whilst that may have been the case on some occasions, in this instance, we find that the nature of their relationship meant that had KJ been aware of the claimant's health, she would have taken relevant steps.

37. One matter the claimant relied upon as being evidence that KJ knew how stressed she was the claimant's withdrawal from a term of her course (pg 153**).** This email was not copied to KJ and we accept her evidence that she did not know that the claimant was going to withdraw from one term on the course to reduce her stress levels. Had the claimant wanted her to know or felt it was important for her to know, she would have emailed her the withdrawal. We understand that the claimant says that they had an open door policy and she had conversations with KJ as opposed to sending her emails. We accept that both will have occurred. However, we consider that had the claimant been clear that she wanted KJ to know that her chest pains were due to work-related stress, she would have said so in the email dated 15 November 2017. She did not do so and we therefore consider that at this time she did not draw KJ's attention to her work-related stress.

38. One of the claimant's clearly headlined grievance elements was that KJ withdrew her management support for the claimant. She did not address this in her witness statement for the Tribunal or indicate, save for the delays in commenting on the draft articles, what she meant by a withdrawal of support. In cross examination she was taken to various emails between pages 619-636 in which several meetings were organised between the two of them to discuss MAX-related matters. The claimant did not dispute that these had taken place but said that she expected more formal documentation of the meetings and what was agreed in them. She classified the meetings that occurred as informal and therefore not sufficiently supportive.

39. We can see that the meetings that were evidenced to us were by and large instigated by the claimant which could indicate that she was chasing KJ for input. Perhaps in the past KJ had instigated more meetings herself both minuted and otherwise. However we do not see evidence of KJ not being responsive to requests for meetings or failing to offer support within any meetings – formal or otherwise.

<u>Claimant's contractual position and the termination of the MAX project</u>

40. We conclude that the claimant was upset by the decision to end the MAX project early as she considered it brought to an end her ability to produce the articles she had worked so hard on and finalise a project she had put so much work into. We conclude that this was at a time when the claimant was on a fixed term

contract that she believed was coming to an end and had had no assurance was to be renewed.

41. The respondent witnesses' evidence regarding how the claimant would have known that her contract was to be renewed was not convincing. JF stated that as she had known that they had secured 2 large funding bids, the claimant would have known that her contract would be renewed. However we do not accept that. It was clear that the claimant was not abreast of how the funding of the department and cost allocation worked (something the respondent has relied upon in its defence against the whistleblowing claim). Therefore, the fact that funding had been secured for other projects does not mean that someone on a fixed term contract who has always worked on a single project that was now being prematurely terminated, should, without being told directly, know that new funding meant a new role. The respondent produced no evidence that, in the lead up to the application for the contracts to be renewed, there were any emails or meetings informing those affected that their contracts would be renewed. The claimant asserts that others were being personally reassured but she was not. We cannot assess the validity of that assertion but on assessing the evidence given by the respondent's witnesses we think it more likely than not that the claimant was never expressly told that an application was being made to make her contract permanent.

42. We conclude that the claimant was unaware that her contract had been submitted for renewal or that it had been made permanent until she was told as part of the grievance process. She would not have asked about it in the grievance meeting with TM had she been aware of the fact that it had been submitted.

43. However we also conclude that the claimant's contract was renewed as part of this process. We do not accept the claimant's subsequent allegations that the documents at p122 are fake or that she was not part of that batch of renewals. The claimant put forward no reason as to why the respondent would lie about the renewal of a contract in these circumstances. We remain unclear as to the motivation the claimant assigns to the respondent on this point. Our view is that had the respondent been intent on not renewing her contract or dismissing the claimant because of her grievance, they would have confirmed that her contract had expired and she was being dismissed. Not the other way round.

44. Nevertheless, we accept that part of the context for the claimant's grievance and its various assertions, was that she believed her job was at risk because her contract was due to expire and the MAX project was coming to a premature end. This caused her understandable stress and made her very worried for her future career.

45. In this context, we consider that she has reverse engineered the lack of minuted meetings or as she has termed it 'formal' meetings to imply that KJ had planned

or known about the decision to end MAX early for some time and for that reason had begun to distance herself from the work and the claimant. We find this implausible. It is possible and even perhaps appropriate that KJ spent less time on the MAX project but not to the extent that it amounted to a withdrawal of management support.

46. In any event this does not square with the claimant's other argument that KJ was trying to take credit for the claimant's work on the MAX project at her expense. If that had been the case then presumably KJ would not have wanted to end the MAX project early.

The Grievance

47. The claimant submitted her grievance on 8 August 2018 in a letter at page 321-329 via email. She then had a telephone conversation on 13 September 2018 with HR rep TM in which the claimant says she clarified her grievance and relies upon as being part of her disclosure. Subsequently she sent supporting documents and further detailed information on 11 October 2018 (361-453). Then she attended the meeting on the 30 October 2018 with TM and AW. It is this series of correspondence/conversations that, according to the claimant, contained the cumulative alleged public interest disclosures.

48. From the claimant's evidence and her cross examination, we consider that the claimant's assertion that the grievance was not dealt with properly can be broken down into the following:

    (i) Failure to correctly frame or amend the Terms of Reference (TOR)
    (ii) Pressurising her to follow an informal process
    (iii) Failure to revert to the claimant regarding the evidence gathered by the investigator
    (iv) Failure to collect relevant information in particular the time recording data for her colleagues
    (v) Failure to interview other colleagues/peers
    (vi) Failure to keep the Head of School (JF) informed
    (vii) Failure to provide her with the right policies
    (viii) Failing to provide her with the notes of the meetings with KJ and JB

49. The TOR for the grievance were originally drafted by the respondent and TM, after her first conversation with the claimant and were based on the overview letter dated 8 August 2018. The claimant subsequently replied commenting on and proposing changes to the TOR on 215-217. On 18 October there was a discussion between TM, AW and TH and they changed the TOR as set out in the document at page 258.

50. We were not provided evidence that this was sent to the claimant or that, in writing, she agreed to these changes. However at the outset of the meeting on

30 October the claimant and her union representative raised no concerns regarding the TOR which were read to them. In the appeal there were no challenges to the TOR and therefore we consider that it was reasonably understood by the respondent that the claimant's concerns were as set out at page 258. Reinforcing this conclusion is the fact that when the claimant appealed against the grievance outcome, the appeal was on the basis of perceived bias and not based on procedural irregularity or new facts. Nothing about the TOR being wrong was referred to in the appeal.

51. The claimant has said that the notes of the meeting on 30 October 2018 were not verbatim. We accept that they were not verbatim which is common for notes of this kind. The respondent provided the claimant with copies of the notes for the grievance meeting and the appeal meeting and she was given the opportunity to comment on them. Whilst some words and small matters may have been omitted we do not consider that anything of substance or relevance has been omitted and consider that the topics that were discussed are reasonably accurately reflected in these notes. Had they not been the claimant and her TU representative would have said so beyond the comments that they had made as part of reviewing the notes–We therefore accept these notes as a reasonably accurate record of what was discussed at that meeting including that the TOR were agreed by the claimant.

52. There was some disagreement as to the level of representation and advice that the claimant had during the grievance process. She has said that she was given little assistance by her Trade Union representative because she had joined the union less than 3 months earlier. She stated that the Trade Union rules meant that she was not therefore entitled to legal advice/support. We accept that it is probable that the claimant was not eligible for legal advice from the union's lawyers, however she was clearly entitled to support and representation by a trained union representative at the relevant internal meetings. Had she not been, the union representative would not have been at the meetings.

53. Therefore whilst they will not have been giving her legal advice, we find that they would have been giving her advice on how to approach her grievance and guiding her through that process and her appeal. That is clear from the notes of the meetings that they attended together. We accept that the support from union representatives can vary immensely in their efficacy; nevertheless we find on balance that the claimant had the support and advice (albeit not technically legal advice) of her union representative during the grievance process. Further we consider that the respondent would have no reason to doubt that level of support given thei representatives'attendance at the meetings. The fact that they knew the claimant had only just joined the union does not alter our conclusions on this matter.

54. The claimant now seeks to advance that her grievance was far more nuanced and less personally motivated than that which is enshrined in the TOR and that the TOR ought to have been changed to accommodate what she now says were allegations of fraud and mismanagement in Appendix 8/Note 5 which was part of the additional grievance information she provided on 11 October 2018.

55. On the Tribunal's reading of Appendix8/Point 5 – taken at its highest, it is a critical commentary on the decision to stop Stage 2 of the MAX project early. She provides evidence regarding the usage of the toolkit and questions the basis for the decision to terminate it early and appears to suggest that it ought to be revisited. The respondent sought to suggest that the only reasonable way for those investigating this matter was to tie it back to the original TOR as had been agreed by the Claimant which were:

> 1.3. Clara has submitted a formal letter of grievance, raising concerns about her line management and the management of the projects that she has worked on. It is Clara's view that:
>
> 1.3.1. She has received unequal access to training, promotion and career development opportunities which has been career damaging/limiting.
>
> 1.3.2. The negative impact of work has affected her physical health and family life.
>
> 1.3.3. Management support has been increasingly withdrawn despite having knowledge of health issues and concerns regarding long-term career prospects.

56. The Claimant was saying that the inclusion of Appendix 8/Point 5 ought to have led the respondent to expand its TOR as it was entitled to do as the investigation progressed. We accept that the respondent could have expanded its TOR if it was necessary to do so - but we do not consider that the existence of Appendix 8 or its contents raised issues that should or could have prompted them to understand that the claimant was alleging potential fraud or a breach of the university's legal obligations to the funder. There is no express reference any sort of wrongdoing or inappropriate behaviour that might suggest fraudulent activity. Within Appendix 8/Point 5 (p 448) she says:

"Delaying the data collection activities as I suggested and engaging in further collaborative work as originally planned could potentially have served to fulfil the overall objectives of both MAX projects and produce the case studies needed to further promote the MAX toolkit and include the MAX projects in the forthcoming REF submission. This, in turn, could have maximised the considerable time and money allocated to the projects and, on a personal level, provided me with the much needed – and indeed, promised – opportunity to produce the two articles."

The underlining is by the Tribunal and represents the phrase that the claimant relies upon as being evidence that she informed the respondent that time and money was or had been misspent.

57. However this does not in our view indicate that anything untoward has happened previously as it is said in the context that there is a way to ensure that the project potential is maximised in the future and the project need not be closed.

58. In the context of the initial grievance letter, the telephone call with TM, the investigation interview on 30 October and the agreed TOR; this appendix does not suggest a whole new line of enquiry. It suggests that the claimant has identified concerns about the conclusion of the MAX project including (though not limited to) a negative personal impact on the claimant. We do not see the Trade Union representative or the claimant, at any stage of the grievance or the appeal, make any explicit reference to fraud, misallocation of hours, misspending of money or failure in meeting the contractual obligations of the MAX project beyond disagreeing with it being closed early without delivering the end of stage 2.

59. The TOR do not make reference to a general concern by the claimant regarding the project management, however we are content that this point was explored in the grievance through questions to the claimant and the professors as it was recorded in the minutes of those meetings and it is also addressed in the grievance outcome which we come to later.

60. We conclude overall that the claimant has sought repeatedly during these proceedings to attempt to apply a retrospective gloss to the information she supplied and how she perceived its importance and relevance at the time. She has even said that she only realised at some point in May 2020 that what she said might have inadvertently been a relevant disclosure.

61. We find that at the time that she raised her grievance and during the grievance process, she felt that the project should not have been brought to an early close because she considered that there had been significant delays to the project, caused by the staffing difficulties (perhaps) and that this meant that if they delayed the closure further, they would be in a position to gather the information that was needed to produce the outputs originally agreed with the DHSC.

62. We do not consider that this means the respondent ought reasonably to have understood that she was making an allegation of misappropriation of funds or misallocation of resources or fraudulent activity or a failure to comply with the respondent's contractual obligations to the funder prompting them to open a whole new line of enquiry that did not fit under any of the agreed terms of reference for her grievance.

Comparison to colleagues/ Time recording data

63. Part of the claimant's sense of grievance in relation to her situation came from her perception of how other colleagues were being treated and their achievements. The claimant clearly outlines that she felt that other colleagues were allowed to walk away from their obligations to the MAX project and spend their time doing personal work. She felt that this was manifestly unfair because (i) it enabled them to do other work on project time and (ii) they produced 'Gold Standard' output because of that 'other' work and she had not had that chance.

64. JB was questioned most closely by the claimant during the hearing as to the comparisons between her and her colleagues. JB answered that it was impossible to compare both the achievements and the likely impact on their careers based on the information provided in the table at pg 266 She stated that she would need to know more about, for example:

    (i) Their undergraduate degrees
    (ii) The journals that publications had been placed in
    (iii) Whether the articles were first-authored
    (iv) What the subject matter of those articles was

65. We accept that a comparison of an individual's employability comes down to far more than their 'outputs' – however sterling those outputs may be, and as stated above we conclude that the claimant's conviction that they they held so much more weight than the other factors was misplaced.

66. We consider that the claimant's view that she had been unfairly treated when compared to her colleagues was prompted by her belief that she was going to be out of a role soon which caused her to reflect that her efforts to support colleagues and the MAX project had not provided her with the outputs she felt were necessary to allow her to move on – which she felt was in stark contrast to her colleagues.

67. The claimant does, in her written grievances make clear references to:

    (i) allowed members of the MAX project team to work on non—DHSC funded projects (Kamilla Razik) or study for a masters degree (Diane Fox) during MAX (i.e. DHSC-funded) time,
    (ii) repeatedly failed to ensure that members of the MAX project team were fulfilling their allocated responsibilities (Diane Fox, Kamilla Razik) and/or were producing work that complied with the criteria proposed to, and agreed with the DHSC (Stacey Rand, Danielle Roche),
    (iii) permitted members of the MAX project team (Diane Fox on two separate occasions, Kamilla Razik) to leave the projects before the end of their DHSC funded period and without fulfilling their allocated responsibilities.

These allegations are primarily included in Point 4 of the additional information she gave AW.

68. The purpose that the claimant sought to achieve in providing this information, was to demonstrate that she was not getting those opportunities. This is clear in Point 4 in that, for example, she says in the opening line:

"At the same time that my career has been slowly destroyed, my MAX project colleagues have been released from their project responsibilities and been provided the opportunities "required to progress their careers. Several have since been promoted"

69. This purpose is also demonstrated by the desired outcomes that the union representative put forward which included:

"a controlled and monitored workload to enable her to deliver outputs" (pg209)

70. The claimant felt that the time recording for her colleagues would allow the investigators to establish that they had been allowed to work elsewhere whilst she was taking on all the MAX work and working far harder than anyone else for very little gain or recognition. However, the claimant did not have the time recording data. She submitted a table (pg 370) which stated that she did not have the information. The claimant has, during the course of this hearing, attempted to recast what she was saying about the hours her colleagues were allegedly spending elsewhere. She has asserted that in effect the fact that when the colleagues were assigning/billing their work to the MAX project but not delivering the work, they were defrauding the DHSC because the DHSC were the funders for the MAX project. She also says that she considers she had 'inadvertently' flagged that the university were using money from DHSC to perform alternative work and that this in turn was what led to the early termination of the MAX project and the contractual 'failure' to deliver the second project in full. She considered that had the DHSC been aware that the MAX project had not in fact been staffed in the way that it was meant to be or in the way that the hours recorded suggested, they would have been (i) aware that the project was being run in a way that was in breach of their contract with the respondent and (ii) aware that this had led to the outputs of Stage 2 being delayed not because of lack of engagement by the Local Authorities but because of unnecessary delays and understaffing by the respondent.

71. The claimant has been open in saying that she made this connection after she had submitted her ET1 and only after speaking to Protect, a whistleblowing charity.

72. Whilst we can see the potential logic in such an argument, we find that this is not what the claimant was thinking at the time nor what she communicated to the respondent. She told the respondent that she was concerned that she was overworked and working too many hours because she was continuously taking on other people's responsibilities. It was this context that AW considered. She concluded, without comparing the claimant's hours to others, that the claimant did have a high workload and therefore she did not need to see what hours others were contributing to the MAX project. She therefore did not ask for that information, nor did it form any part of the respondent's consideration of the claimant's grievance or appeal.

73. We find that the respondent did not consider the possibility that the claimant was alleging that how her colleagues were working was somehow fraudulent for two reasons. Firstly because the claimant had not said this; but even if she had inadvertently drawn attention to people's hours being allocated to the wrong projects, it was clear from KJ and JF's witness evidence to this tribunal that it would not have mattered to the DHSC or them because they had an envelope of funding that allowed them to allocate workers to various projects as they saw fit. They also had the trust and confidence of the DHSC to run the projects as they chose and were reporting back to the funder regularly as to how the MAX project was progressing, including, presumably, any delays. The claimant accepted that she was largely unaware of how reports were made to the funders and that she was not part of those conversations.

74. Therefore if this was, as the claimant now states, an inadvertent disclosure of something potentially unlawful, the respondents would not have interpreted or viewed it in this way because it in no way breached their funding or contractual arrangement with DHSC, much less put their future funding bids at some sort of risk.

75. This was supported by the audit that the respondent obtained after the claimant had clarified through an application to amend her claim to the Tribunal, that she was asserting that the respondent had defrauded DHSC. No wrongdoing was found by the audit.

76. The claimant disputes the veracity of the audit and suggests that it was not given the appropriate data. She has asserted as part of the Tribunal process that time sheets that would have supported her assertions were deliberately destroyed by the respondent and that digitally retained data recording the same information was not disclosed as part of the audit. We disagree. We conclude that the respondent destroyed the time sheets as part of their GDPR compliance exercise not because the claimant had brought a grievance and they were attempting to hide the timesheets. As stated above we find that the respondent did not know at the time that the physical time sheets were destroyed that the claimant was raising concerns of fraud and therefore had little or no motivation to destroy such data. Secondly we find that the audit was

provided with information equivalent to the time sheet data as described at page 1026 which enabled them to track which projects had been charged for the two colleagues' time We accept the evidence we heard that the auditors would have been able to assess whether funds were correctly spent from that alternative data.

Grievance process

77. The claimant has alleged that she was pressurised to deal with her grievance informally. The claimant's questioning around this topic during the Tribunal was at times confusing. It was common ground that she had told the respondent she did not want to deal with the matter informally. Her justification for that was that she felt she had tried to raise the matters informally with KJ and JB in the past and not achieved anything and she was concerned that others who had raised concerns in the past informally had not achieved anything. She felt that a formal process was the only way to have it sorted out properly. She felt that the open door policy in the department meant that problems dealt with through conversation were not recorded and were in effect swept under the carpet. Whilst the respondent may have disagreed with whether or not the claimant had tried to deal with the matters informally with her line managers, it is our view that in any event, they were responding to the submission of the written grievance letter and asking whether this letter and the issues being raised therein could now be dealt with informally.

78. TM asked the claimant whether it could be dealt with informally as the first stage of Ordinance 42 (the respondent's grievance process) is to explore whether it can be dealt with informally. She explained her reason as to why she wanted that option considered which was that it could avoid a lengthy and often damaging process for both sides. This suggestion was reiterated at the outset of the investigation meeting and the claimant's TU rep confirmed that the claimant wanted it dealt with formally. The respondent did not object and dealt with the claimant's grievance formally.

79. The fact that the TU representative put forward the claimant's arguments about following the formal process does not, in our view, mean that there is evidence that the claimant's view was correct; it means that the TU representative was doing her job and representing the claimant.

80. We can see no pressure from the respondent to make the claimant explore it informally, simply a suggestion that it may achieve more and require less stress to do so. Something that may well have been true.

81. The claimant stated during cross examination of several witnesses that she was surprised that it was being alleged that she had somehow failed to follow the correct process or that in not following the informal process she was somehow wrong. For example she relied on the statement in the grievance outcome that states,

"It is noted that the opportunity to resolve the complaint informally was not accepted by Ms Heath. In future, each stage of the grievance resolution process should be followed."

The claimant challenged the references in the respondent witness statements (e.g. Tracey Myhill paragraph 7) where she says that the claimant did not follow the process stating that this was an unfounded allegation against her.

82. We disagree with the negative interpretation that the claimant has applied to all and any references that she did not follow the informal grievance process. It was a statement of fact – once she submitted her grievance she did not follow the informal part of the process. It is difficult to see how that is an allegation of wrongdoing against the claimant. It is irrefutable and more importantly not contested by the claimant that the informal process was not followed because she did not want to follow it. The fact that the investigator considered that in the future, as a recommendation, the informal process should still be considered, is not a criticism of the claimant. It is perhaps a comment on the level of stress the grievance had caused the claimant and her colleagues. We do not consider it objectively reasonable for the claimant to interpret these comments in that way..

83. Further, the decision to follow the formal process only was not held against her by the respondent. This question was put to JB2 by the Tribunal and she confirmed that it was not and we accept her evidence because it is a matter of fact that the respondent went on to conduct a full investigation, provide a full report and allow the claimant to appeal. They also, went on to uphold part of the claimant's grievance and make recommendations as to how things could be improved to enable the claimant to return to work.

84. The claimant criticised TM for not providing her with the whistleblowing policy and the Fraud Prevention and Response policy. She considered that it was TM's role to ensure that the claimant was guided through the correct process and that TM ought to have realised that what the claimant was saying was a whistleblowing complaint. Part of the basis for the claimant's criticism of TM was that she ought to have known that the claimant was not getting legal advice or full support from her union representative because she had just joined the union.

85. Addressing the union point first. TM had no reason to doubt the level of representation given that the trade union representative was in attendance at the meetings which is the normal role played by union representatives. TM had no reason to think that the claimant would not be given appropriate advice regarding the polices.

86. As to why the claimant was not given the or directed to the other policies – we accept TM and AW's evidence that they did not think at the time and even now, that the claimant's grievance was her blowing the whistle or making allegations of fraud because at no point did the claimant say that she was making such allegations. We suggest that this is also the reason the TU representative did not give the claimant those policies. On plain reading of the claimant's grievance she is not blowing the whistle or making allegations of fraudulent behaviour. This is supported by the claimant's own statements that she did not realise she was making such allegations herself until many months after her employment had ended.

87. Another argument advanced by the claimant regarding the grievance was that she felt she had not been given the correct opportunity to comment on the evidence provided by the other people interviewed regarding her grievance. She submitted that had she been able to review the hours worked by others or the explanations provided by KJ she would have been able to challenge them which would, in turn, have led AW to reach a different conclusion because she would have placed less weight on the evidence provided by KJ and JB and also raised concerns about for example, the failure to obtain the hours worked by others.

88. We find that it was within the range of a reasonable investigator not to go back to the claimant just because she obtained evidence from JB and KJ that contradicted what the claimant was saying. At the outset of the investigation meeting TM did manage the C's expectations as to whether she would be reverted to regarding evidence. This is recorded in the minutes. It is very common for a grievance investigator to obtain two conflicting accounts of the same situation and have to weigh those accounts against each other without recourse either to other evidence or to allow the individuals to have in effect a ping pong match regarding commentary on each other's evidence. It was entirely reasonable for AW to weigh all the accounts and evidence she had collated and come to a conclusion.

89. The claimant has not provided us with any specific questions that ought to have been put to JB or KJ as part of AW's investigation that would demonstrate that her grievance was not appropriately covered or that the investigation was not thorough. We recognise that as part of the appeal the claimant effectively stated that AW took JB and KJ's evidence at face value (particularly KJ's) and did not challenge it. From what we could glean from the claimant's witness statement and questions to the witnesses, her main concern was the failure to obtain the time recording data (dealt with above) and the failure to question the veracity of KJ's management notes.

90. With regard to the management notes – the Tribunal had two different versions at pgs 506 and 1170. Page 1170 showed comments by KJ as to when she had added certain dates and events. The claimant asserted that they had been

added after she had raised her grievance. This was not challenged by KJ. KJ described the document as a 'living' document and something she used as a notebook to comment in as and when she needed to.

91. AW did not see pg1170 and so did not know when the notes she had at p506 were created. She took them at face value and had no reason not to. The claimant is suggesting that now that we do know that KJ had updated her management notes after the event, it shows that AW should not have relied upon KJ's notes as she did.

92. Whilst it is correct that notes created after an event can be less reliable, we do not find it suspicious that at the point at which KJ became aware of the claimant's grievance, she checked her emails and added to her management notes. The very fact that she records that she has added entries having reviewed her emails rather than contemporaneously suggests that no subterfuge was intended. Had she intended to mislead she would not have recorded the timing of her amendments in her notes. From what we could see, the notes simply make reference to emails which were included in the bundle and are demonstrably correct. We accept that one note records that KJ says she 'would' have spoken to the claimant following her email about her chest pains as opposed to 'did' which is what she said in her interview. It casts doubt on whether she remembered the conversation at all and AW placed weight on KJ's memory of the conversation where she says that the claimant did not tell her the chest pains were stress related.

93. Nevertheless, it was not unreasonable for AW to ask KJ about the conversation with the claimant following the email to establish whether she thought KJ knew about the extent of the claimant's ill health and when. We are not sure that the presence of this note would have changed AW's mind in any way given the email evidence that was available. In addition, the claimant did not put this to AW during this Tribunal hearing. The failure to interrogate the notes further does not mean that AW's investigation was unreasonable. AW reasonably relied on the evidence she had before her.

94. AW was entitled to weigh up the evidence as she saw fit. We accept that she reviewed the evidence that the claimant put to her and that she weighed it and made a judgment and that was not an unreasonable process to follow. The claimant appears to be unable to accept that her 'documentary' evidence was not absolute proof that what she was saying was right. She considers that the documentary evidence she produced ought to be given greater weight that KJ's evidence. However she has provided us with no evidence that makes us question whether AW's conclusions were reasonable. It is not for us to determine what AW's conclusions ought to have been – simply to consider whether they were reasonable and based on a reasonable investigation.

95. The claimant posed no questions to the witnesses and in particular AW as to why AW did not interview the other researchers as part of the investigation. We are therefore unclear as to what she says AW could or would have gleaned from them. She did not raise this as a concern in the appeal.

96. One person who she now says ought to have been interviewed was KR. She suggests that KR leaving without having to serve her notice was a direct result of the claimant's grievance. The claimant put forward no evidence that allowed us to determine this point nor how KR's evidence would have ensured a different outcome to her grievance. She did ask the respondent witnesses if they knew why KR had left early and they did not. Given that KR's departure came days after the claimant's overview letter but before she submitted Appendix8/Point 5 which the claimant relies upon as being the point at which she raised concerns about KR's hours being wrongly allocated to the MAX project, we do not consider that the claimant has established a link between the two events.

97. During the telephone call between TM and the claimant it was agreed that the then head of school (JF) would be kept informed about the grievance. JF was not the commissioning manager for the grievance because he felt that he was too close to the unit and could not be independent. This was a judgement call for the respondent to make. We see nothing improper in JF distancing himself from the process for fear of lack of independence. Nevertheless, during the Tribunal hearing the claimant was very emotional when she realised that as a result of that, JF had not seen Point 5/Appendix 8. She said in her question that it had been meant for him. When he said in evidence that he had not seen it until this tribunal process, she said that she felt sick.

98. We are not sure as to why this answer prompted such a response from the claimant. She knew that JF had nothing to do with the investigation nor the appeal. He had not corresponded with her regarding it nor had anything other than minor involvement at the beginning. The claimant has not said what involvement he ought to have had save that she hoped he had read Appendix 8/Point 5. To what end was not made clear. We can only guess that as head of school she thought he may like to have known or ought to know that the MAX project was being mismanaged by KJ in various ways and could have been resurrected and finished. If that was the case though, the claimant has given absolutely no explanation as to why she did not contact JF directly and raise those concerns with him earlier and before the grievance process began. She accepted and in fact criticised the open door policy at the respondent – yet had not sought to raise what she now says were key concerns, with the person she felt she had written this section of the grievance almost exclusively for. Had that been correct we have no doubt that she would have spoken to him about it or sent him an email saying what she says in Point 5. Her gloss on the importance of Appendix 8/Point 5 is entirely retrospective and she has provided no evidence whatsoever that this information was intended for JF at the time.

99. One of the claimant's allegations before this Tribunal is that the investigation into her grievance was not fair and independent. We consider that the fact that it was not deal with by JF suggests that it was independent insofar as an internal investigation can be. Nobody who was being complained about took part in the decision making process at the investigation, recommendation or appeal stage. The claimant has not advanced before us, how the decision makers at any stage were not independent. She has suggested that they preferred other people's accounts over hers, but she has not put to us how the grievance process was not sufficiently independent. We believe that we deal with the allegations of unfairness elsewhere in detail.

100. The claimant did not explain to the Tribunal why she expected the grievance report to be pseudonymised. It appears from her representations during the appeal process (e.g. 732) that she did not like the fact that the report found against her in some instances, and, in her view, made unsubstantiated slurs about her character, and contained private information about her and her son. We do not understand why she considered it was the respondent's responsibility to retrospectively apply a level of anonymity to the report when she had made no requests for this at any stage nor, that we can see, were any conclusions reached that provide personal information other than that which she included in her original grievance.

101. We do conclude that the respondent failed to provide the claimant with meeting notes from the grievance investigation interviews with KJ and JB in a timely fashion. We accept the respondent's explanation that they needed to tell KJ and JB that they were sharing the notes of their interviews – but that does not explain the three month delay (they were supplied on 18 March). No proper explanation was provided to the Tribunal for such an extended delay. They were received only 2 days before the deadline for the appeal and we accept that this would have been stressful for the claimant.

102. However, we do not accept that the delay had a detrimental impact on the claimant's ability to consider, understand or object to the findings reached in the grievance outcome report. We reach this conclusion because the claimant has failed to raise either 10 days later at the appeal hearing, or before this Tribunal, what she would have said differently in her appeal or how those notes affected the findings that AW reached.

Grievance Outcome

103. The majority of the claimant's grievance was not upheld but one area was which was that the claimant had a high workload and that this had caused her to be unwell. As a result of this finding, TH put together some recommendations which were put to the claimant at a meeting on 9 January 2019.

104. The proposals were as follows:

(i) *"In order to facilitate Ms Heath's return to work, it is advised that the Head of School consider a temporary change in direct line management for Ms Heath. This would be subject to the feasibility of appointing a suitable replacement. It is also advised that a longer—term or permanent change in line management may be required depending on the success of recommendation.*

(ii) *To further facilitate Ms Heath's return to work, it is advised that if possible mediation between those involved in the grievance is undertaken to ensure that working relationships can be rebuilt.*

(iii) *In order to address Ms Heath's concerns relating to her lack of peer reviewed research outputs, it is advised that personal development time with a mentor is built into her working week to allow her to focus on achieving her research goals.*

(iv) *An individual research plan should be created in consultation with the Head of School and her line manager. The mentor should be appropriate to her needs and could be an individual outside of the Unit. We recommend that this proposal is re—evaluated after 12 months.*

(v) *Dr Jones noted that other members of staff in the Unit were aware of the grievance which caused additional stress. Confidentiality should be maintained by all parties and disciplinary procedures can follow if this is not upheld. In future, measures should be taken to ensure that confidentiality is maintained in order to protect all parties involved.*

(vi) *The Unit to clarify to all staff the expectations on managers and direct reports to raise any concerns relating to health and wellbeing, and to ensure that these are documented.*

(vii) *It is noted that the opportunity to resolve the complaint informally was not accepted by Ms Heath. In future, each stage of the grievance resolution process should be followed."*

105. We do not accept, as is being argued by the claimant, that the proposals to give her protected time to obtain her outputs or a mentor to achieve those outputs in the future was patronising either intentionally or otherwise. This is, in our view, a bizarre and skewed interpretation of some straightforward recommendations that tie in closely to the outcome that the claimant's union rep had put forward at the outset of the process at page 200**.**

106. The claimant did not engage with any of the proposals and instead submitted her appeal.

<u>The Appeal</u>

107. The claimant submitted an overview appeal on 1 February 2019 She then submitted more detail on 20 March 2019**.** She attended an appeal hearing

on 28 March 2019. The claimant stated that the appeal hearing did not focus on the correct aspects of her appeal. She appealed on the basis that AW was biased in her interpretation of the evidence. She made no mention of any fraud or misallocation of hours nor did she suggest that AW had wrongly focussed on certain aspects of her findings. Her appeal was essentially on the basis that AW's interpretation of the evidence she had was incorrect and biased and that the claimant had not had a proper opportunity to respond to the evidence collected prior to AW reaching her conclusion.

108. The appeal was not upheld. The appeal outcome was provided on the same day and confirmed in writing.

109. There then followed a fairly protracted period of correspondence between the claimant's solicitors and the HR business partner, CG. Most of that correspondence is marked 'Without prejudice'. Both parties have agreed to waive this protected status for the purposes of the Tribunal process. We were not taken to large amounts of it by either party but it is clear that the claimant was attempting, through her solicitors, to negotiate an exit which included a personal reference.

110. On 17 June 2019 the claimant was informed that her sick pay entitlement would cease on 6 July 2019 and the claimant resigned with immediate effect on 2 July 2019. That resignation was not fully recognised by the respondent for some time. It was not properly processed until 17 September 2019. No clear explanation for that has been given.

Reference

111. We accept that the university standard policy is to provide standard references but they also allow managers to offer personal references to employees and this was and is a common occurrence. It was not properly explained to us why the reference was so slow to be provide by JF. CG accepted that there was a very long delay. She could not explain it. The claimant did not put any questions to JF as to why he had delayed in providing her with a personal reference. The Tribunal put it to CG that perhaps it was being withheld because of the ongoing without prejudice conversations that surrounded this process and CG disputed that though acknowledged that various conversations were ongoing regarding the various factors that could either get the claimant back to work or form part of an exit. We consider that it was this 'no-mans land/limbo' that the parties found themselves in, which the Tribunal would not normally be told about, that led to at least some of the delay in providing the written reference. It is not clear both what led to the delay nor what prompted it to finally be provided on 25 June 2020. We consider that the grievance process, the manner in which the claimant left the respondent, the attempts to negotiate an exit and the submission of the claimant's Tribunal claim, all contributed to the delay in providing the claimant a personal reference.

112. The claimant has failed to identify what the reference would have been for. No third party made a reference request for her. She has not told us of jobs applied for where she needed a reference but did not get one – nor even of ones that she wanted to apply for but did not dare do so in case of receiving a negative reference. She was told by HR that a standard reference would have been provided which we accept would have happened. As we understand it not even a standard reference was sought.

113. The claimant applied for and secured a place at the University of East London. The claimant received that offer on 4 December 2019 and accepted it. She has now completed that course. This suggests that the reference was irrelevant to her at the time as she was not seeking employment nor needed it to retrain or obtain further qualifications in her chosen field. She was accepted onto her course without a personal reference from JF and does not appear to have applied for anything since that would have required one.

Health and safety

114. The way in which the Claimant's health and safety has been jeopardised by the respondent has not been set out expressly by the claimant. It is accepted by the respondent that the claimant was suffering from stress at work from 5 June 2019 onwards. Her medical evidence confirms this. There are no sick notes in the bundle from before that point. The claimant contends that she was unwell with stress from October 2017 and that she had informed KJ of this both at her annual appraisals and in particular, around the time that she experienced chest pains and had an ECG in November 2017.

115. We accept KJ's evidence that she did not, at this time, know that the claimant was having an ECG due to stress at work. We have set this out fully above. When another member of staff expressed concerns about the claimant's health in December 2017 KJ made enquiries and the claimant did not say that she was overworked or that it was causing her stress. The claimant had perhaps began to manage her health herself by working stricter hours – but we consider that the claimant assumed that KJ would see from the change in her working pattern that she was unwell or stressed because of work. We do not agree. We also note that she did not ask for anything to change at this point regarding her workload. Had she done so we consider that it would be recorded in an email or management notes or in the project plans for the MAX project. We also consider that the claimant's disclosure on 9 January 2018 was fairly vague saying that she had a medical problem that was exacerbated by stress. She did not say that she had work-related stress, nor did she say what that medical condition was.

116. Her case is that she continued to work despite this because she did not want to stop work and it was only when she had a panic attack whilst on holiday

with her son that she felt things had reached such a point that she could not continue. However, even at that point, the claimant's emails regarding this refer to "*a splitting headache and breathlessness that has kept me convalescing at home for the past five days*." She does not talk about stress and this was in the context of having told KJ that she had a virus the week before.

117. The claimant's evidence on this point were that it was clear to KJ that she was stressed because of work because of the conversations that they had in the years prior to this and that this was why she did not feel the need to spell out to KJ that her ill health on these occasions was caused by stress and that this stress was work-related.

118. There is no written evidence to reinforce this submission. As in our findings above that discuss KJ's response to others within the workplace who suffered from stress at work, we consider that had KJ been explicitly aware that the claimant was suffering from work-related stress she would have done something about it. When KJ did become aware that the claimant had work related stress she referred the claimant to Occupational Health on 13 July 2019. This was before the claimant had raised a grievance. We believe that this, coupled with the fact that KJ had been proactive with other members of the team suffering from stress, means that she was unaware until June 2019, that the claimant had work related stress. At the point that she did become aware, she acted.

The Law

Whistleblowing

119. s43A Meaning of "protected disclosure"

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

121. s43B ERA Disclosures qualifying for protection

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

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

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

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

122. Section 43C provides:

(1) A qualifying disclosure is made in accordance with this section if the

worker makes the disclosure –

(a) to his employer, ..."

123. Section 47B ERA gives a worker the right not to be subjected to any detriment on the ground that he made a protected disclosure. Relevantly it provides:

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

124. s. 48 ERA:

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

section unless it is presented –

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

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

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

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

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

125. 103A ERA, Protected disclosure

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.

126. Under section 103A, unfairness is automatic if the reason or principal reason for dismissal is that the employee made a protected disclosure. Section 98(6) of the ERA provides that s. 98(4) is "subject to" various sections of the Act, which include s.103A.

127. The limitation period for a complaint of unfair dismissal under s. 103A is that set out in s. 111(2) of the ERA.

128. The respondent's opening note helpfully referenced the case of Williams v Michelle Brown AM UKEAT/0044/19/OO (unreported) 29 October 2019. We cut and paste the respondent's note in this regard. It was discussed with the parties at the outset.

"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute."

129. Our interpretation and discussion regarding the extensive body of case law regarding protected disclosures is referenced below in our conclusions.

Constructive Unfair Dismissal

130. S95 ERA Circumstances in which an employee is dismissed

(1) For the purposes of this Part, an employee is dismissed by his employer if (and, subject to subsection (2), only if) – ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

130. The respondent's opening note summarised the legal position as follows:

"As is well known, an employee seeking to establish a constructive dismissal must show:

(i) a breach of contract by the employer;

(ii) that the breach was sufficiently important to justify the employee resigning or was the last in a series of incidents which would justify her resigning (the last straw);
(iii) that the employee left in response to the breach and not for some other unconnected reason; and
(iv) that she did not delay too long in terminating the contract in response to the employer's breach, in which case she may be deemed to have waived the breach.

Whether the employer's treatment of the employee constituted a repudiatory breach of her contract of employment is to be judged objectively – see Bournemouth University Higher Education Corporation v Buckland [2010] ICR"

131. Again, we reference the extensive body of case law regarding constructive unfair dismissal where relevant in our conclusions below.

Conclusions and Discussion

Whistleblowing Claims (Detriment and Dismissal)

132. Although EJ Fowell allowed the claimant's application to amend to include her whistleblowing detriment claim, he made no finding or decision as to whether those claims were in time.

133. The question we must consider therefore is whether we have jurisdiction to consider the Claimant's claims. The question we must consider is whether it was reasonably practicable for the claimant to submit the claims in time. The claims were all in effect submitted at the date on which the claimant applied to amend her claim which was 25 May 2020.

134. The detriments relied upon are as follows:
(i) she was pressurised to have her grievance dealt with informally;
(ii) her grievance was not upheld;
(iii) the outcome accused her of purposely working less hours than she was
(iv) the University resisted making her contract permanent; and
(v) no timely reference was provided

135. Save for the provision of a reference which we deal with separately below, all of these events occurred and insofar as they were matters that could amount to a continuing situation, the situation had also ceased, on or before she resigned (2 July 2019), before she submitted her ET1 on 22 August 2019 and before her resignation was processed by the respondent on 17 September 2019. She was fully aware that they had occurred and she detailed many of these events/allegations in her original ET1. One of the reasons that EJ Fowell allowed the amendment to her claim was that very few if any new facts appeared to be introduced in her application to amend.

136. The claimant's justification for not bringing a whistleblowing claim at the time she submitted her ET1 was that she was unaware that she had made a whistleblowing disclosure. This causes significant problems for her claim itself (see below) but it has also not arisen because of any newly discovered evidence or information.

137. A claimant's ignorance of their right to bring a claim could make it not reasonably practicable for them to present their claim in time but the claimant's ignorance must itself be reasonable. Exceptional cases can allow for an extension of time but we do not consider that this is an exceptional case. The claimant was represented by a trade union at the time that she presented her grievance and her appeal. They did not appear to glean from discussions with her or the facts that she presented to the respondent that she was in effect blowing the whistle. Then, from at the latest 25 April 2019 the claimant was obtaining private legal advice from Carmel Sunley, an employment solicitor. Ms Sunley remained instructed, even if only on an ad hoc basis, when the claimant submitted her ET1. The solicitor did not suggest anywhere in any of the correspondence available to the Tribunal or the ET1 that the claimant was making a whistleblowing claim.

138. We do not attempt to guess what the claimant may or may not have told her solicitor, and she gave no evidence to us about this - but whatever her instructions to the solicitor, it is still not reasonable for the claimant to assert that she could not have known about her right to bring a whistleblowing claim when she was receiving expert legal advice at the relevant time. As set out by Lord Denning in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 CA: "*If a man engages skilled advisers to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them."* The claimant has not in any event suggested that her solicitor was in some way negligent in failing to advise her of the possibility of a whistleblowing claim or its time limits but the principle that she had legal advice at the time does affect our analysis of whether it was reasonably practicable for the claimant to submit her claim in time.

139. It is not reasonable for the claimant to now rely upon ignorance of her right to bring a claim within the relevant time limits. She was aware of time limits generally, she was receiving expert legal advice and had previously had the support of her trade union. The fact that she had a later epiphany about a potential interpretation of what she believes she told the respondent, does not make her failure to submit a claim within three months less a day of the date of either the detriments or the termination of her employment, not reasonably practicable.

140. We conclude therefore that with the exception of the alleged failure to provide a personal reference, it is very clear that the claimant's claims for

whistleblowing detriment and automatically unfair dismissal are out of time as they were presented outside the relevant time limits and it was reasonably practicable for the claimant to have submitted it in time.

141. The timing of any failure to provide a personal reference is not as straightforward. It is important to set out first however that there was never any failure or refusal by the university to provide the claimant with a standard reference via its HR department. In the event, no such reference request was ever received.

142. The allegation that the respondent failed to provide a personal reference is a matter that is referred to during the without prejudice correspondence between the parties. The last correspondence we have regarding the matter in the bundle is dated 26 November 2019. In the exchange on that date CG confirms that JF is willing to provide a personal reference confirming that the claimant led on the development of the MAX toolkit and outputs. The claimant thanks her and asks for him to provide her a generic reference. We then have no evidence of any further correspondence until the claimant's letter applying for the amendment to the claim on 25 May 2020. The claimant says that she exchanged a few more emails with CG after this date primarily about outstanding MAX outputs. A personal reference is not provided until 25 June 2020.

143. The claimant is therefore assured that a personal reference will be provided on 26 November 2019. This is more than 3 months before the claimant submits her application to amend to include a whistleblowing claim. Although no reference is actually provided until 25 June 2020, the gap of 6 months is not explained by either party.

144. In order to determine whether this claim has been brought within time we must establish whether the failure to provide a reference is a one off act with continuing consequences or a series of acts. The case law and decision making on this was helpfully summarised by HJ Soole in the case of Ikejiaku v British Institute of Technology Ltd UKEAT 0243_19_0705:

"25 It is necessary first to distinguish between the concepts of 'act' (or 'failure to act') and 'detriment', albeit in reality they are often the same thing: see Royal Mail Group Ltd v Jhuti UKEAT/0020/16/RN per Simler P (as she then was) at [31], citing Flynn v Warrior Square Recoveries Ltd UKEAT/0154/12 per Langstaff P at [3]. Time runs from the date of the 'act', regardless of whether a claimant has any knowledge of the detriment that the act produces. Tribunals should not confuse a continuing detriment with a continuing act: Jhuti at [32-33]. Accordingly, per Langstaff P in Flynn : "…in any case that considers a question of whether a complaint is out of time, it is incumbent upon an employment tribunal to identify carefully the act, or the deliberate failure to act, that the Claimant identifies as causing him a detriment.".

…..

31 …….The question is then whether the imposition/introduction of the new contract falls to be categorised as (i) a 'once and for all' act with continuing consequences, or as (ii) a continuing act, i.e. which extends over the whole period ending with the Claimant's dismissal (s.48(4)(a)).

32. This type of distinction has provoked considerable litigation : see in particular Barclays Bank Plc v Kapur [1991] 2 AC 355; Sougrin v Haringey Health Authority [1992] ICR 650 and Okoro & Anor v Taylor Woodrow Construction Ltd [2013] ICR 580. These authorities show that a typical, but not exhaustive, example in the latter category is where the employer's relevant act constitutes a rule or policy by reference to which decisions are made from time to time: see e.g. Barclays and the categorisation cited in Okoro at [18]. Examples in the 'one-off' category include the act of dismissal; refusal to upgrade (Sougrin); and the banning of construction workers from a site (Okoro)."

122. The claimant has not addressed us on whether the failure to provide a reference was a one off decision with continuing consequences or a continuing act or in this case failure to act. It is possible that between the claimant's first request for a personal reference and this email exchange on 26 November 2019, there was a continued failure to provide a reference by virtue of the policy that HR will not provide personal references and it is at the discretion of individuals as to whether they provide a personal reference. However, any alleged refusal to produce a reference stops when JF's agreement to produce a personal reference is conveyed on 26 November 2019.

123. The failure to actually produce one appears to be down to JF from this point onwards. Yet the claimant does not at any point in the following 6 months, chase the personal reference either through CG or directly with JF. The wording of the claim is that the respondent failed to produce a timely reference but the claimant does not explain her silence on the matter for 6 months before she submits her application to amend her claim in May 2020. We consider that her silence on the point is because she no longer needs a reference during this period. Her application to the University of East London proceeds and is successful without it.

124. In these circumstances, was there a continuing failure by the respondent to produce the personal reference i.e. was JF in a situation where he was continuously failing to produce a reference despite an outstanding and continuing obligation to do so? Or did he, in a one off act, fail to do so on 26 November or shortly thereafter and that failure have a continuing impact until he rectified the situation in June 2020.

125. Unfortunately no questions on this point were put to JF by the claimant. We therefore have no information on his decision making process during this period.

126. Having considered the cases and the situation carefully we believe that this was a one off failure by JF to provide the reference once he had agreed to do so on or around 26 November 2019. This is not a situation where the relevant act 'constitutes a rule or policy by reference to which decisions are made from time to time'. Had the claimant continued to chase him and he had in effect 're-made' that decision by continuing to refuse to produce the reference, then we may have found that this was a continuing failure to act that extended beyond 26 November 2019. However the claimant did not, even on her evidence, continue to request the reference after 26 November 2019. Although our conclusion is not based on whether or not the failure to act had a continuing negative impact on the claimant, it is worth noting what the state of affairs was in the months following the failure. The reason for the claimant's subsequent silence regarding the reference was that she ceased to need it. She obtained her place at university and had no further need for the reference at that time. Therefore there was no negative impact on the claimant for this period.

127. We conclude that JF's failure to provide a reference on or around 26 November 2019 was a one off act. The claimant has not provided for her reasons for not submitting a claim regarding any such failure until 25 May 2020 some 6 months later. We therefore consider that it was reasonably practicable for her to raise a claim regarding the reference before this date and her claim is therefore out of time.

128. Nevertheless, in case we are wrong in our conclusions that the whistleblowing detriment and automatically unfair dismissal claims are out of time, we have gone on to consider the claimant's claims further.

129. As set out in the respondent's opening note, there are essentially five steps to go through to establish whether a claimant has made a qualifying disclosure.

130. The disclosures that the claimant relies upon are:

Karen Jones had mismanaged the MAX projects both of which were funded by the Department of Health and Social Care (DHSC), for a period of many years as she had:

a) allowed members of the MAX project team to work on non—DHSC funded projects (Kamilla Razik) or study for a masters degree (Diane Fox) during MAX (i.e. DHSC-funded) time,
b) repeatedly failed to ensure that members of the MAX project team were fulfilling their allocated responsibilities (Diane Fox, Kamilla Razik) and/or were producing work that complied with the criteria proposed to, and agreed with, the DHSC (Stacey Rand, Danielle Roche),

c) permitted members of the MAX project team (Diane Fox on two separate occasions, Kamilla Razik) to leave the projects before the end of their DHSC-funded period and without fulfilling their allocated responsibilities.
d) Dr Karen Jones had ceased to contribute to the MAX projects, despite being funded to do so, and had taken credit for my work (on the development of the MAX toolkit).

131. The claimant states that these disclosures were made cumulatively across her written overview grievance, her subsequent call with TM, her more detailed information/evidence and her grievance meeting.

132. She states that she reasonably believed at the time that they tended to show that the respondent was defrauding the DHSC or breaching its legal obligation to the DHSC by not staffing the project properly and therefore not delivering the Stage 2 outcomes - and that she reasonably believed at the time that this was in the public interest because the DHSC is a government department spending public money.

133. The respondent's closing written submissions say as follows:

35. In the instant case it is clear beyond all possible doubt that the Claimant did not possess the requisite subjective belief at the points in the grievance process when she claims to have made her alleged disclosures or, for that matter, at any point during her employment by the Respondent. Her witness statement does not say anything about her subjective beliefs and she gave no evidence in cross-examination which would support a finding that she believed at the relevant times that anything in her grievance or supporting documents tended to show fraudulent research-related activity and/or a breach of objectives agreed with the DHSC.

36. The only inference that can be drawn from the evidence is that the possibility of claiming that she had made whistleblowing disclosures did not occur to Ms Heath until May 2020, the month in which she applied to amend to the Tribunal to amend her ET1"

134. 140. The claimant in her evidence to the Tribunal and her submissions stated that her realisation regarding the whistleblowing element of her claim came about because she could not understand why the respondent had treated her the way that they had during her grievance process and its aftermath. It is only having understood that she may have made a whistleblowing disclosure that she has been able to make sense of what she has perceived to be appalling treatment. She also ascribes her realisation to advice from Protect. Subsequently on reviewing the information provided during her grievance process she considers that she provided information that amounted to a disclosure.

135. We have carefully considered this point. We consider that it could be possible for someone to, for example, expressly set out that people's time is being billed to a project which a funder believes that they are paying for and say that they believe that this is in breach of the project rules or a funding arrangement. They may not realise that they are in essence accusing the employer of fraud but this could be what it boils down to. As a result of bringing attention to the situation, a worker could then be treated badly by its employer even if the employee has not realised the extent of what they have disclosed. We believe that this in essence is the case that the claimant is putting forward.

136. However there are, in our view, three significant problems with this case. Firstly, the claimant did not, we conclude, expressly set out that she believed the university was in some way breaching the project rules or a funding arrangement with DHSC. She alludes, obliquely, to the possibility that some people are not working on the project in the way that they ought to.

137. Secondly, the legislation is not drafted in such a way as to protect people who inadvertently draw attention to something. The claimant's reasonable beliefs at the time that they draw attention to the alleged wrong doing is a vital part of the statutory and case law.

138. We are not suggesting that an individual has to have 'good faith' when making a disclosure. The case of *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA*, has established that an individual can have mixed motives when making a disclosure. However in this instance we find that the claimant did not have the public interest in mind at all when she raised her allegations about the failings of the project. This is because she was not thinking in any way about the obligations to the DHSC; she was thinking about the effect on her and at best on the project which she believed in – but not the funder themselves or any possible fraud.

139. There are similarities between the case of *Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA* and the claimant's claims. In the case of Kilraine, nothing in the claimant's witness statement or particulars of claim indicated that she had a particular legal obligation in mind and it was only later in proceedings that her representative suggested that S.11 of the Children Act 2004 and S.175 of the Education Act 2002 might be relevant. The Tribunal struck out her claim because she could not satisfy the subjective requirement in S.43B(1) that she believed at the time of the disclosure that the information in it tended to show that someone had failed, was failing or was likely to fail to comply with a legal obligation.

140. In this case the claimant has freely admitted that it was not until she received advice from Protect that she realised what she might have said and

its possible impact. Although she has sought during these proceedings to suggest that her thought process was different and that the information she gave was more condemnatory than at first suggested; it is difficult to see how she can satisfy us that, subjectively, at the time she provided the information, she believed that the information she was providing was in the public interest and tended to show a breach of contract or a legal obligation. On her own evidence it was not until after she had submitted her ET1 that she herself understood that this might have been what the respondent thought she was suggesting and/or what she was actually suggesting.

141. Thirdly, we have found that the majority of the detriments that the claimant says occurred either did not occur at all, or where they did, the claimant has not demonstrated that they were linked or caused by her disclosures such as they were.

142. By spreading her 'disclosures' across 4 different documents/ meetings it makes it harder to determine whether they were made, and what her beliefs were at the time. The claimant's evidence as to how and why she made these disclosures was frequently vague. The respondent submits that she did not make these disclosures at all and certainly not in a coherent structured way that conveyed all the information cited above.

143. We have approached each disclosure in turn and assessed:

(i) Did she disclose this and if so is it capable of being information?
(ii) Does the worker believe that the disclosure is made in the public interest?
(iii) If yes was that a reasonably held belief?
(iv) Did the claimant believe that the disclosure tended to show that the respondent was in breach of or about to breach a legal obligation or committing or about to commit a criminal offence?
(v) If yes was that a reasonably held belief?

<u>A) Allowed members of the MAX project team to work on non—DHSC funded projects (Kamilla Razik) or study for a masters degree (Diane Fox) during MAX (i.e. DHSC-funded) time</u>

144. When approaching whether information has been disclosed, we have set the bar relatively low. We have reviewed the case law which sets out the different between information and allegation. As Ms Tether drew to our attention, "in Kilraine v Wandsworth London Borough Council [2018] ICR 1850 CA, the Court of Appeal pointed out that the concept of "information" is capable of covering a statement which might also be characterised as an allegation. It

observed that s. 43B(1) should not be glossed so as to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. However, the Court went on to emphasise that a bare allegation, devoid of factual content, will not constitute a protected disclosure."

145. It is clear that the claimant alleged that other members of staff were not working on the MAX project when she believed they ought to be. She specifically states that Ms Fox was studying for her masters and that KR was not working as she ought to be in terms of the ours she was putting in. This could amount to information being disclosed. It is not just a bare allegation with no substance. She does not simply say that she thinks hours are being wrongly charged to the MAX project; she says that specific people are working in a way that is contrary to what she had understood they were meant to be doing.

146. However, she never states that other people's working patterns or failures were in breach of the funding arrangements with DHSC. To have done so would have been strange given that she accepts that she did not know what the funding arrangements were between DHSC and the respondent. She says that by pointing out that people were not working correctly on the project she was in fact pointing out that the DHSC was in effect funding them to do work that had not been agreed to and this was in breach of the Respondent's legal obligations both contractually and in respect of fraud. However, bar working privately on a masters degree, we do not know that the other colleagues were in fact working on non-DHSC funded projects. We have accepted the respondent's evidence that they had an envelope of funding that spread across projects and were therefore free to allocate people to different projects as they saw fit. We also accepted that AW never obtained the information about how others' hours were being billed against the MAX project because she saw it as irrelevant to the question she needed to answer – namely was the claimant working too much? This again points to the fact that the claimant did not in fact disclose that people were wrongly assigning their hours to the wrong project – this was not something the respondent even considered as part of the grievance investigation.

147. We accept that the possibility that if the DHSC was funding work on un-related projects then it could objectively be in the public interest given that it is a government funded project. However, we find that the claimant did not believe at the time that this is what she was saying. We conclude that the claimant believed at the time that what she was saying was that other colleagues were allowed to work in such a way that in order to complete work on the project and meet deadlines, the claimant was having to work very hard. We are not suggesting that she had to have 'good faith' when making the disclosure. However in this instance we find that the claimant did not have the public interest in mind at all when she raised the failings of her colleagues on the project. This is because she was not thinking in any way about the

obligations to the DHSC; she was thinking about the effect on her and at best on the project which she believed in.

148. Finally, separately from whether the claimant believed (reasonably or otherwise) as to whether the disclosure was in the public interest, we find that the claimant might have reasonably believed that by allowing colleagues to work on other projects at the expense of the MAX project, then they might have breached their obligation to deliver the MAX project outcomes because they did not properly staff it. On a basic understanding that DHSC had funded a project with a certain number of people working over a certain period of time to deliver a certain set of outcomes – it is reasonable to conclude that if the right number of people were not assigned to the project and as a result the outcomes were not delivered, then the agreement has been breached in some way.

149. Therefore, on balance we find that this 'disclosure' was a disclosure of information that could reasonably be believed to be in the public interest and which the claimant could reasonably believe to be in breach of the respondent's obligations to the DHSC. However we do not accept that the claimant herself reasonably believed at the relevant time that it was in the public interest. She simply did not have that thought process at the time. She saw this purely in the context of her professional progression and did not consider public interest. She also had no belief, reasonable or otherwise that the information tended to show that the respondent was defrauding the DHSC. At best it was a breach of what they had originally suggested in the project plan.

150. In any event, even if our interpretation of that is incorrect, we find that this disclosure in no way caused any of the detriments relied upon by the claimant and we address that more fully below.

<u>B) Repeatedly failed to ensure that members of the MAX project team were fulfilling their allocated responsibilities (Diane Fox, Kamilla Razik) and/or were producing work that complied with the criteria proposed to, and agreed with, the DHSC (Stacey Rand, Danielle Roche),</u>

122. The claimant does raise the fact that people were not fulfilling their responsibilities but it is in the context that this puts the claimant at a disadvantage and under an increased workload. She does not say, anywhere in the four disclosure opportunities, that her colleagues were not producing work that complied with the criteria proposed and agreed with the DHSC. She does refer to the fact that she had to re-do work on several occasions which could imply that it was not being done well enough or to the standard required. She does not however link this back to being a failure by KJ to fail to ensure that those other members of staff were fulfilling the relevant obligations. Or that this is a repeated failure. Therefore the information the claimant relies upon was not disclosed as described.

123. If we are too exacting in our conclusion there we have nonetheless considered the other elements that make up a qualifying disclosure.

124. We do not accept that raising the fact that two colleagues (DF and KR) are not fulfilling their obligations is objectively in the public interest. This is different from the possibility of defrauding a funder or misleading the funder regarding how much work is being done on a project and by whom. This is simply an assertion that they were not doing their job well and nobody was holding them to account for it. With regard to the second two staff named in this (SR and DR) they were referred to because the claimant felt that she had to re do their work.

125. We do not believe that the claimant subjectively believed at the time that this information was in the public interest. The claimant accepted that she understood that the aims, outcomes and methodology behind such research projects would be changed and updated and usually were. The notes of the project meetings demonstrate that she knew, for example, that deadlines for producing various bits of work moved frequently particularly when staff left or were unwell. She knew that the funder was ultimately provided with the work as she was the person that re-did it to the required standard. Therefore she did not reasonably believe that this information was in the public interest.

126. It is also hard to see how this could objectively be in the public interest. That would suggest that highlighting the shortcomings of any individual who works in the public sector would be in the public interest which we do not accept.

127. In addition, we do not accept that the claimant believed that this information tended to show either that a criminal offence was being committed or that the respondent was in breach of its legal obligations. She believed that it may have harmed the respondent's ability to deliver the project in the time frames agreed, and that it had led to the project being terminated early - but she also knew that the DHSC was informed of developments and that project deadlines and obligations were changed and agreed with the DHSC as things progressed. She could give no examples of the DHSC expressing concern or disquiet about the project as it progressed. No examples were given of sanctions on staff or the respondent as a whole being applied because of late delivery on various project deliverables. She referred to one email by someone at the DHSC apparently expressing that they did not know what was happening or querying the timetable or staffing on the project – but we did not see that email and were shown no evidence to suggest that the DHSC were anything other than in agreement with the respondent about the progress and delivery of the MAX project. The claimant says that this was because they were misled as to the reasons behind the decision to cease and the delays to the project – but she has provided no evidence that the respondent failed to

update the DHSC appropriately at each stage and/or that the DHSC disagreed with the respondent's analysis of the project progress at any stage. She has also, more importantly, not shown us that she believed this at the time that she raised her grievance or during the grievance process. Her conviction that this was what was happening has developed since she left her employment. She raised none of this explicitly during the grievance process or appeal or even in her original ET1.

128. We therefore conclude that the claimant did not disclose this information as described, but even if she did, she did not at the time reasonably believe that it was in the public interest nor that it tended to show that the respondent was breaching its legal obligations to the DHSC or that the respondent was defrauding the DHSC.

Permitted members of the MAX project team (Diane Fox on two separate occasions, Kamilla Razik) to leave the projects before the end of their DHSC-funded period and without fulfilling their allocated responsibilities.

129. The information provided here is not very different from the above two disclosures. On analysis of the four disclosure opportunities, it is clear that the claimant refers to both DF and KR leaving the MAX projects thus leaving the claimant to complete their work. However she does not say explicitly that this was before the end of their DHSC funded period. We consider that by inference she has said that they did not fulfil their allocated responsibilities because she had to complete their work and the deadlines for various deliverables were pushed back. It is not explicit though. It is capable of being information as again this is not simply an allegation without substance, it is specific information.

130. Giving the claimant the benefit of the doubt that she did disclose this information, we nevertheless have reached the same conclusions as we have with the second disclosure and refer to paragraphs 122-128 above as our reasoning and conclusions are the same.

Dr Karen Jones had ceased to contribute to the MAX projects, despite being funded to do so, and had taken credit for my work (on the development of the MAX toolkit).

131. The claimant does make reference to the fact that KJ withdrew her management support for the claimant towards the end of the MAX projects. However that is different from saying that KJ had ceased to contribute to the MAX projects and is also different to saying that KJ was taking credit for the claimant's work.

132. We could not find reference to the claimant saying that KJ was taking credit for her work and therefore do not accept that this disclosure occurred. We also find no reference to the claimant saying that KJ was withdrawing from the MAX projects despite being funded to do so. The claimant's concerns

regarding KJ's involvement was solely by reference to her withdrawing support from the claimant and its impact on the project, the funding of her time was not referenced at all.

133. We therefore conclude that the above disclosure did not take place during the grievance process.

134. We also do not accept that the claimant thought that any such information was in the public interest at the time that she made the disclosure. She was talking about KJ's involvement in her own career development and trajectory and in reference to her ill health and stress at work. She was not talking about how KJ was funded and she did not consider that at the relevant time.

135. Finally, we also do not believe that the claimant believed that KJ's alleged distance from the MAX project or somehow taking credit for the claimant's work tended to show a breach in a legal obligation to DHSC or committing fraud. She has simply provided no evidence that this was what she thought at the time.

136. If we are wrong in our analysis of whether qualifying disclosures took place. We have considered the detriments relied upon.

137. The detriments the claimant relies upon as having occurred because of the above 'disclosures' are:
(i) she was pressurised to have her grievance dealt with informally;
(ii) her grievance was not upheld;
(iii) the outcome accused her of purposely working less hours than she was
(iv) the university resisted making her contract permanent; and
(v) no timely reference was provided

138. We have found as determinations of fact that (i), (iii) and (iv) did not occur. No pressure was applied by the respondent to have her grievance dealt with informally. They suggested that it might be a better process on two occasions but when the claimant said no, they progressed with the formal procedure. They did not accuse her of purposely working less hours that she was contracted to do – in fact they clearly stated the opposite. They did not resist making her contract permanent. They did fail to inform her that they had submitted the application for her contract to be made permanent – but they did not resist actually making it permanent. The failure to inform her was due to a break down in communication whilst she was off sick. It was not a rouse or a cover for not applying for her contract to be renewed. We found that her contract was renewed at the same time as several other people in the department and that the renewal application was made before she raised her grievance.

139. The two events that did occur were, we conclude, not caused by the disclosures relied upon in any event.

140. The grievance was partially upheld. As a result of that the respondent made suggestions as to how the claimant could return to work and continue her career. The areas that were not upheld, were not upheld for numerous reasonable reasons. AW's grievance investigation report is based on a reasonable investigation, she reasonably weighs up the evidence she was provided with and she reached a conclusion. She explains her conclusions in a logical way in the report. There is nothing to suggest that her decision not to uphold some parts of the claimant's grievance was caused by the claimant blowing the whistle. Particularly when this was not how she had interpreted or understood the claimant's grievance in any event.

141. We have found that the respondent did not interpret the information the claimant provided them with, particularly that set out at Appendix 8, Note 5 as being an act of whistleblowing. They did not think that they were being accused of fraud or breaching their obligations with DHSC. They did not approach the grievance investigation with any of that in mind. Despite not upholding the majority of the grievance they nevertheless made various quite significant recommendations to ensure that the claimant's career could continue and be supported at the respondent. This was not the action of a wounded employer seeking payback. The respondent did not believe or understand that the claimant was blowing the whistle just as the claimant did not believe or understand it herself at the time. Such an interpretation of the claimant's grievance has only been placed upon it by the claimant many months after its conclusion.

142. We have accepted that the claimant was not provided with a timely reference. However no questions were put to JF as to why he did not provide it sooner. He does not explain the delay in his witness statement. CG said it simply got lost amongst the other requests the claimant was making during negotiations.

143. Failure to provide a personal reference could amount to a detriment. However we do not accept that the claimant has established that it was in fact a detriment to her at the time. There has been no evidence put forward that the respondent received a request for a personal reference from a third party. The claimant obtained a place on her masters degree without asking for a reference from the respondent and could have asked for a standard reference for that purpose but chose not to.

144. More importantly however, the claimant has not established any link between her disclosures and the failure to provide the reference. We have accepted that until the claimant updated her claim to state that she had blown the whistle, the respondent did not understand or believe that this was what

she had done and had not approached her resignation or the subsequent negotiations in that light.

145. It is possible that JF withheld the personal reference because the negotiations had not concluded – but this was not put to him during the Tribunal. When the Tribunal asked CG whether she thought this might be the case she said she just felt it was part of the process and regretted not putting it further up the list of priorities. There was some suggestion that JF would have been worried that the future funding applications by the DHSC would be jeopardised by the claimant's disclosures – but the claimant has provided us with no evidence of this and in fact the funding was largely secured prior to the claimant leaving.

146. We do not believe that JF was aware of the claimant's specific allegations that she now relies upon as he was separate from the grievance. We therefore cannot draw a link between his delay and the alleged disclosures.

147. For all of the above reasons, the claimant's claims for whistleblowing detriments fail.

148. Consequently, the claimant's claim for automatic unfair dismissal must also fail as the claimant has not established that the protected disclosure was the reason or principal reason for the dismissal. She has not established that she resigned in response to the detriments nor that the detriments were caused by the alleged disclosures, nor, for the main part, that the disclosures relied upon amounted to qualifying disclosures.

Constructive Unfair Dismissal

149. The claimant relies upon the following as being fundamental breaches of contract:
(i) Failing to address the 'wrongdoings' in the grievance;
(ii) Failing to provide a safe working environment;
(iii) Failing to properly deal with the grievance;
(iv) Breaches of health and safety.

150. We conclude that the respondent reasonably upheld one aspect of the claimant's grievance and reasonably did not uphold the rest. We conclude that it was reasonable for AW to reach her conclusions because we consider that she did a reasonable investigation into the claimant's allegations and reached a decision. As a result of upholding one part of the claimant's grievance the respondent suggested several supportive measures to ensure the claimant could return to work. Several of them accorded with the outcomes that the claimant's trade union representative had suggested at the outset of the process. The claimant refused to accept those suggestions and never returned to work. We find that where wrongdoings were found, the respondent

attempted to address them. We therefore find that the respondent did not breach the claimant's contract in respect of point (i) above.

151. The failure to deal with the grievance properly seemed to involve various alleged failures on the part of the respondent. We attempted to list them above and reached conclusions on the following:

(i) Failing to have a independent process
(ii) Failure to correctly frame or amend the Terms of Reference (TOR)
(iii) Pressurising her to follow an informal process
(iv) Failure to revert to the claimant regarding the evidence gathered by the investigator
(v) Failure to collect relevant information in particular the time recording data for her colleagues
(vi) Failure to interview other colleagues/peers
(vii) Failure to keep the Head of School (JF) informed
(viii) Failure to provide her with the right policies
(ix) Failing to provide her with the notes of the meetings with KJ and JB

152. We concluded that (i), (ii) and (iii) did not occur. We find that the remaining points alleged, apart from (ix) were entirely reasonable steps for the respondent to take when investigating the claimant's grievance as they understood it at the time and as she had explained to them at the time. They do not amount to breaches of the claimant's contract and do not separately or cumulatively amount to fundamental breaches of contract.

153. We did find that the respondent failed to provide the claimant with the notes of the meetings with KJ and JB at as an early a date as they ought to have. However they corrected that breach by providing them to her at a later date but still within time for her to be able to respond to them and use them as part of her appeal process. Therefore any breach that may have occurred was not a fundamental breach of the claimant's contract and was rectified long before the claimant resigned. Thus had there been any such breach the claimant waived that breach by remaining employed for such a long period of time thereafter.

154. We deal with the failure to provide a safe working environment and breaches of health and safety together as the claimant has not identified how they are separate. Ms Tether referred us to the case of Marshall Specialist Vehicles Ltd v Osborne [2005] IRLR 672 as authority that we *"must consider separately (i) the precise nature of the duty in the particular circumstances, (ii) the question of foreseeability of harm; (iii) the nature and extent of the breach and (iv) the question of causation arising out of any breach established."*

155. The claimant was suffering from work related stress. The respondent accepts it was from 5 June 2019 but if it was earlier, then it was not plain

enough to the respondent for it to be under any legal obligation to do something about it prior to that.

156. We accept that the claimant did not tell the respondent in plain terms that she was suffering from work-related stress. Her emails do not convey this as she now asserts and we are not persuaded that the claimant told KJ about her stress levels and certainly not that they were work related prior to her going off sick in May 2019. We have set out our detailed findings above but in summary, we do not find the claimant's evidence in this regard reliable. We accept that she had a high workload and that she took on colleagues' work on a regular basis. However she never objected to that and on many occasions the deadlines and objectives of the project were amended to reflect the fact that colleagues had left or work had not been completed as hoped. The claimant cannot therefore just rely on the fact that KJ knew she was doing the lion's share of work on the MAX project as a clear indication that she was overworked and would be stressed. She never communicated that to KJ. We consider that had she done so in clear terms, then KJ would have acted upon it as she had done for other colleagues and as she did when she understood the claimant's ill health and referred her to Occupational Health.

157. There was therefore no breach of the claimant's contract as the respondent has not breached its duty to take care of Ms Heath's health and safety because there were no plain indications of impending harm to the claimant's ill health.

158. We therefore find that there were no fundamental breaches of the claimant's contract of employment.

159. We also find that the claimant delayed for a long time between the outcome of her grievance appeal (28 March 2019) and her decision to resign on 2 July 2019. We conclude that this delay in effect waived any breaches that may have occurred. No explanation was provided by the claimant for this delay other than that she and her lawyer were conducting without prejudice negotiations to attempt an agreed exit. However understandable and perhaps sensible it may be for parties to try to agree an exit in these circumstances, we do not consider that without prejudice negotiations which are intended to exist in parallel with what is actually happening in 'real life' can act as a foil against waiving a breach of contract by remaining employed.

160. If we are wrong and, at best the continuation of the correspondence regarding her exit could suggest that she did not waive any breach, it is still not clear what then prompts her decision to resign when she did. In her witness statement she says that it occurred because of the break down in the exit negotiations. The failure of those negotiations is not argued to be a breach of contract.

161. The breaches of contract she relies upon had happened several months earlier. We consider it more likely than not that the decision to resign when she did occurred partly because the negotiations failed and partly because she was notified that her sick pay had run out and she no longer had anything to gain by remaining in employment. Whilst the grievance process was the background to that decision it was not what prompted her to resign at that time.

162. In conclusion, the breaches relied upon either did not happen or did not constitute repudiatory breaches of the claimant's contract of employment. Further, she did not resign in response to those alleged breaches of contract in any event.

163. For all those reasons we do not uphold the claimant's claim for constructive unfair dismissal.

Employment Judge Webster

Date: 1 April 2022