EMPLOYMENT TRIBUNALS

Claimant:	**Ms C Tay**
Respondent:	**(1) R&F Properties QS (UK) Co Ltd** **(2) Mr Zhai** **(3) Mr Newton** **(4) Ms Tu** **(5) Ms Eddings**
Heard at:	**London South Employment Tribunal**
On:	**30 -31 August 2023, 1, 4 – 8 September 2023** **'Reserved *ex-tempore'* oral judgment with reasons on 29 September 2023**
Before:	**Employment Judge Dyal**
Representation:	
Claimant:	**in person**
Respondents:	**Mr N Roberts, Counsel**

JUDGMENT having been sent to the parties on 24 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided:

WRITTEN REASONS

Part 1: introductory matters, preliminary issues and the conduct of the proceedings

Introduction

1. The matter came before me for its final hearing.

Judge's Declaration

2. At the outset of the hearing I declared that I had been in chambers, Cloisters, with Mr Roberts for a period of time. I was unable to recall the dates between which Mr Roberts had been at Cloisters. He filled in this detail: 2014 – 2018. I told the parties that I had been at Cloisters between 2006 and 2021. I noted that it was customary to make a declaration of this kind but that my preliminary view was that there was no difficulty with me hearing the case. I would be able to approach it with complete impartiality.

3. I asked the parties to consider whether they had any objection to me hearing the case and to make any representations after the next break. We broke between 11.05 and returned at 11.30. Neither side had any objection to me hearing the case. Mr Roberts said that the Claimant had asked him whether or not he and I had ever worked on a case together. He did not think so. I confirmed that I also had no recollection of working on any case with Mr Roberts.

Constitution of the tribunal

4. This matter was listed before a full tribunal. However, due to an administrative error no non-legal members were booked. I raised this with the listing team immediately on day 1 and asked whether non-legal members could be found at short notice. At the outset of the hearing I explained what had happened to the parties, with apologies, and outlined the options:

    4.1. If non-legal members could be found the case could proceed before a full tribunal;
    4.2. If non-legal members could not found the case could proceed before me sitting alone if but only if all parties gave written consent;
    4.3. Failing the above, the case would have to be postponed. It was unlikely to be relisted for at least 6 months but likely much longer more like 12 to 18 month.

5. I gave the parties time reflect on this matter in the course of the morning and made clear that there was no pressure from me to proceed without non-legal members though for my part I was very content to do so. In accordance with s.4 Employment Tribunals Act 1996, I had regard to the likelihood of legal and factual disputes arising (and both seemed to me highly likely) before taking the view I could hear the case sitting alone. I have a great deal of experience of sitting alone (and indeed as part of a full tribunal) in among many other things, wrongful dismissal, holiday pay, and unfair dismissal cases including those involving s.103A Employment Rights Act 1996. This case involved additionally allegations of public interest disclosure detriment which I am equally experienced in dealing with (albeit usually only as part of a full tribunal). I did not think that feature of the

case fundamentally altered the judicial exercise and was satisfied that it was suitable, should the parties consent in writing, for me to sit alone on.

6. It was agreed that pending the resolution of the above the hearing would continue as a case management hearing before me.

7. By lunchtime on day 1 it became clear that no non-legal members were available. The parties consented in writing to the case being heard by a judge sitting alone and the hearing resumed as a final hearing.

The substantive issues

8. The parties had agreed a list of issues in advance of the hearing. I checked with the parties that the issues previously agreed indeed remained the issues for adjudication. The Claimant was in broad agreement but said that in her view Mr Newton had misled the employer and she was not sure if the list of issues needed amendment to reflect this. I considered the way the claim was put in the claim form and on the list of issues and took the view that a complaint of this nature was already 'in the mix'. I was satisfied that the list of issues properly captured the issues. The list of issues is annexed.

Parties' preliminary issues

9. I checked with each party whether they had any preliminary issues. They did as follows.

Claimant's rule 50 application

10. On 25 August 2023, the Claimant applied for a privacy order. She pursued the application on the first day of the final hearing. It was opposed. I refused the application and have given written reasons for that under separate cover.

Claimant's statement and additional documents

11. The Claimant wished to rely on an amended version of her witness statement and to adduce a few additional documents. I allowed her to do so by consent.

Respondent's application for specific disclosure

12. The Respondents applied for further disclosure in respect of mitigation of loss and medical evidence. They further applied for the documents in bundle 3 (mitigation / medical documents) that have already been disclosed be disclosed without redactions or for explanation for the redactions to be given.

13. The Claimant's position was that she had disclosed all she needed to and nothing more was required.

14. I allowed the application, gave oral reasons and made orders for disclosures.

15. In terms of disclosure, the principles of law to be applied are clear and were summarised in among other places ***Santander UK Ltd v Bharaj*** [2021] ICR 580. A number of tests must be met before specific disclosure of a document or category of documents can be ordered:

    15.1. the documents are likely to meet the test for standard disclosure, in other words, are likely to support or adversely affect the case of one or other party and are not privileged.
    15.2. even then disclosure should only be ordered if it in accordance with the overriding objective. Put another way is "necessary for the fair disposal of the issues between the parties".
    15.3. the greater the importance of the documents to the issues in the case the greater the likelihood that disclosure will be ordered.

16. In terms of redaction, there are some circumstances in which this may be justified. Sometimes it is so obvious why redactions have been made and the nature of the thing redacted that if the party making the redactions does not explain them, no difficulty arises. In other cases the redaction needs to be explained in order for it to be understood and in order for an assessment to be made as to whether the redaction is properly made.

17. In order to determine this dispute about disclosure it is necessary to understand how the Claimant's case on remedy and what is in dispute.

18. This is a case in which the Claimant's assessment of remedy if the claim succeeds is deeply disputed. The sum sought in the latest schedule of loss is in excess of £1.5m. The calculations are not entirely clear but it seems that the loss of earnings calculations at least are net and for that and probably other reasons too, grossing up in some way may be required. The true sum claimed, then, may in reality be vastly more than the £1.5m and at a guess might be more like £2.5m – 3m.

19. It is also relevant to note that the Claimant is seeking damages of £46,500 for "*injury to feelings – personal injury – ill health caused by dismissal"*. The expression of this head of loss is rather muddled and in due course that would need careful analysis. However, it is tolerably clear that the Claimant is saying the index events caused her personal injury for which she should be compensated. The injury, or if there is more than one, one of the injuries, appears to be a connective tissue disorder. As I understood the Claimant's case, as she explained in her response to the application, she avers the injury or injuries caused massive financial loss. In essence she says that she is no longer able to work in a 'City' type job. The schedule of loss is not easy to follow in parts, but my understanding is that the Claimant is deducting (what I will call) model B from model A and claiming the difference. Model A is her counter-factual career earnings had she not been dismissed. It assumes she would have moved to a City job and earned a lot of money. Model B is her career earnings now on the basis that she is not fit for such work, though is fit for other less lucrative work. The total loss of earnings arising from this approach is said to be almost £1m (unclear if net or gross). All aspects of this compensatory model are disputed.

20. There are live issues then as to whether the Claimant has mitigated her loss, whether she has suffered a personal injury, whether it was caused by the Respondent's conduct, whether even if so it had the claimed, or any impact, on her ability to mitigate her loss/earning capacity in the short, medium or long-term.

21. The Claimant's disclosure to date on these matters is in volume 3. It is very short and the strong appearance is that it is unlikely to include all remedy documents that would fall under standard disclosure. For instance:

    21.1. There are references in some emails to other correspondence which does not appear in the bundle but would appear to exist and be relevant.
    21.2. There are only about 9 documents relating to job-search.
    21.3. At p10 the claimant identifies a list of about 25 medical appointments. My understanding is that she has chosen those because she thinks they are the relevant ones. However, the underlying documents (e.g. notes of the consultations, clinic letter) are provided only in relation to a fraction of them. Experience shows that medical records very often contain highly probative information in case that involve claims for damages for personal injury.

22. In light of that, and given the applicable legal tests, I did think that further orders for specific disclosure were required and should be made.

23. As to the terms of the orders, I took the view that the orders as drawn the Respondent's application were, with respect, clunky, and sub-optimal in parts. They also went too far in certain respects, such as in seeking all of the Claimant's GP notes without any qualification. The Claimant's GP records would inevitably contain a great deal of irrelevant but also very personal, sensitive and private information. I did not, therefore, think it would be right to order her to disclose *all* of her GP records for her entire life, at least not at that time.

24. On the issue of the timing of the disclosure. I took the view that on balance it was better for the date fixed to be after this trial listing rather than during it:

    24.1. Firstly, the work involved for the Claimant in complying with the orders will be significant.
    24.2. Secondly, the orders were made *during* a heavy trial. The Respondents' application was made in reasonable time but unfortunately it was not heard until day 1 of the trial. The Claimant is a solicitor but she is not an employment lawyer and she is litigant in person. She had some very considerable tasks ahead of her. Cross examining each of the Respondent's 5 witnesses and then, if she wished to, making a closing speech. She had a lot of important matters on her plate already.
    24.3. Thirdly, I did not think that the disclosure I was ordering was is necessary for the fair disposal of the issues of liability, contribution or Polkey which were the matters we were immediately dealing with.
    24.4. Fourthly, it was very unlikely that we will be able to deal with the remaining aspects of remedy in this listing should the claim succeed in full or part. It is to those issues that this disclosure is necessary.
    24.5. fifthly, taking that all into account, whilst I accepted that that there was culpability in the shortcomings in the Claimant's disclosure, on balance, I

nonetheless thought that the overriding objective pointed to setting the date for disclosure after the hearing.

25. The orders I made were as follows:

By not later than 5pm on 13 October 2023 the Claimant shall give to the Respondents' solicitor:

1. *Unredacted versions of the redacted documents in volume 3, or alternatively if an unredacted version of any such document is not provided, an explanation for the redactions made to that document.*

2. *Disclosure of all documents evidencing efforts to find alternative employment following dismissal from R1 not previously disclosed. This should include the CVs used for job applications, job applications themselves, correspondence with recruiters among another other job search documents.*

3. *Disclosure of documents related to the circumstances surrounding the departure from Addleshaw Goddard and the financial aspects of the departure (e.g. documents showing the date of termination and payments made on termination).*

4. *Any further medical records not yet disclosed that are related to, deal with or refer to, any medical condition that the Claimant seeks compensation in this litigation in respect of. (This includes but is not limited to, notes of medical appoints including GP appointments, clinic letters and test results).*

5. *If any of the documents provided pursuant to orders 2 – 4 are redacted, an explanation for the redaction(s) must be given when making the disclosure.*

26. I later revoked these orders as explained below.

The substantive hearing

27. *Documents before the tribunal*:

27.1. Hearing bundle, divided into 4 volumes;
27.2. p1260 (screen shot of Claimant's inbox) added to volume 2 by consent;
27.3. p1261 – 1266, transcript of Claimant's covert recording of a telephone call between herself and Ms Tu on 12 December 2020, added to volume 2 by consent;
27.4. the covert recording itself, admitted by consent;
27.5. witness statement bundle (amended in the hearing to include updated witness statement for the Claimant);
27.6. Respondent's opening note;
27.7. Respondent chronology and cast-list (not agreed documents) and Claimant's comments;
27.8. Respondent's written closing submissions.

28. *Witnesses the tribunal heard from*:[1]

    28.1. The Claimant;
    28.2. Mr Jin Tan, at the relevant times Project Manager of the Respondent (written evidence only). At the outset of the hearing Mr Roberts indicated that he did not have any questions for Mr Tan. As such there was no need for him to be called. The Claimant then said that there were additional matters that she wanted him to give evidence about such as the business culture at the Respondent that were not in his statement. I told her that if she wanted Mr Tan to give additional evidence then she needed to get a supplemental witness statement setting out that evidence, show it to the Respondents' representative and apply for permission to adduce it. The Claimant did not take the further so far as I am aware. Mr Tan's evidence was admitted unchallenged.
    28.3. Ms Roxanne Eddings, Development Manager of the Respondent at the relevant times;
    28.4. Mr Tim Newton, Senior Legal Counsel the Respondent at the relevant times;
    28.5. Mr Donghui (known as Harry) Zhai, Head of HR, Admin and Corporate Legal of the Respondent at the relevant times. Mr Zhai gave evidence through a Mandrin interpreter. The Claimant objected to this claiming that his English was adequate. However, Employment Judge Self had directed that Mr Zhai could give his evidence through an interpreter in advance of the hearing and there was no basis to go behind this. In any event, it was readily apparent from such efforts that Mr Zhai did make to speak in English from time to time when giving evidence that he did need an interpreter in order to give his best evidence in a formal setting;
    28.6. Ms Nicole Tu, Senior Commercial Director of the Respondent at the relevant times;
    28.7. Mr Purefoy, Global Brand Director of the Respondent at the relevant times.

Disclosure of covert recording

29. On resumption of proceedings at 10 am on day 3 (at which point the Claimant was part way through cross-examination), the Claimant and the Respondents' legal team entered the room. The hearing remained a public one but the Respondents' had agreed, in order for matters to progress, to the Claimant's request to address me in the absence of the Respondents themselves.

30. In short, the Claimant said that she had covert recording of a conversation with Ms Tu from December 2020. She briefly described its contents and according to her description it was obviously a document that fell within standard disclosure (in that on her account it supported her case and harmed the Respondents'). She had made the recording. She said she had not thought about it much since but had given it thought since the exchange of witness statements, which was on 2 August 2023. She said she had been looking into the matter recently and had

[1] In these reasons I refer to the First Respondent as 'the Respondent' and the Second – Fifth Respondents by their names.

decided it was admissible. Mr Roberts said that the Claimant had told him at the close of proceedings the day before that she had a recording which was "highly relevant". She would not tell him what it was a recording of because she did not want his clients to know. The Claimant did not demur.

31. I ordered the Claimant to disclose the recording immediately. Mr Roberts asked that she also prepare a transcript over the weekend. She was content to do so. The recording was then disclosed and over the weekend a transcript was prepared. At the outset of day 4, by consent, the recording and the transcript were admitted into the evidence.

32. I was surprised that the Claimant, a solicitor, had failed to disclose this document until part way through the trial. I did not think she had any good explanation for this. She was more than capable of researching and understanding the basic rules of disclosure if she was not already aware of them.

The Respondents' disclosure

33. The Claimant did not make any application at trial in relation to the Respondents' disclosure, but it is a matter that she spent time on during evidence, including by cross-examining each of the Respondents' witnesses about it.

34. Ultimately, having heard the evidence, I am not satisfied on the balance of probabilities that the Respondents failed to disclosure any material document (although Ms Eddings did disclose a document late – see below). Much of the Claimant's case in respect of the Respondents' disclosure was based on conjecture that I find was ill-founded. She was convinced for example that there must be a document setting out internal approvals for her dismissal (as there is for things like framework agreements that the Respondent enters with solicitors firms). I find that there was no such document based on the evidence I heard. It was also her position that her dismissal must have been considered and approved of by group employees in China and that there must be a paper trail for this. However, I reject all aspects of that on the evidence. Her dismissal was determined at local level in the UK, approvals were not sought in China and there is accordingly no paper trail evidencing an approval in China (see further findings of fact below).

Closing submissions and Claimant's evidence on public interest

35. At the end of day 6, Mr Roberts closed the case for the Respondent and in his skeleton argument submitted that the Claimant had given no evidence on whether she had any belief that the disclosures she made were in the public interest. On that basis he said she cannot have made any public interest disclosures ('PIDs'). It was right that the Claimant had not dealt with the matter in terms and that the words 'public interest' did not feature in her witness evidence.

36. On receiving Mr Roberts' submissions, an authority came to my mind though I could not immediately recall the name of the case. I recalled there was a case in which a claimant had not given evidence on the public interest and the appellate court ruled that the tribunal should have asked the Claimant about it. I raised this

matter with the parties during Mr Roberts' closing submissions and indicated that I would try to find the case overnight and asked Mr Roberts to do the same. I indicated that if it said what I recalled, then I wanted the parties views on what the correct course of action to take was, whether that be recalling the Claimant to give evidence on the point or otherwise.

37. Overnight I found the case (as did Mr Roberts). In ***Ibrahim v HCA International Limited*** [2019] EWCA Civ 2007, in Bean LJ said:

> *"In the light of the judgment of this court in Chesterton, and with the benefit of hindsight, it is clear to me that the Claimant should have been asked directly by the ET whether at the time he made the disclosures on 15 and 22 March 2016 he believed he was acting in the public interest. If he had answered "yes" he could have been asked for an explanation, and it would no doubt have been put to him in cross-examination that the suggestion was no more than an afterthought. The ET would then have had to evaluate his evidence on the point and make findings about it. But I am not satisfied, on the material available to us in this court, that this is what happened at the ET hearing."*

38. I raised this with the parties on the morning of day 7. The Claimant's position was that she should be recalled to give evidence on the point. The Respondent's position was that I should hear the Claimant's evidence *de bene esse* but that its substantive position would be that the evidence was inadmissible.

39. The Claimant was recalled, and gave evidence further evidence. She was cross-examined.

40. Mr Roberts then completed his closing submissions and submitted that this further evidence was not admissible. In essence he submitted that the starting point is that in adversarial litigation if a party fails to prove something they have the burden of proving that does not mean they should be recalled to give further evidence. ***Ibrahim*** was a fact specific decision that does not disturb that principle. It is not authority for the proposition that where there is a failure by a claimant to give evidence on this point in every case they must be asked about it. The Claimant had had a fair every opportunity to give evidence on this matter and had failed to. The gap in her evidence should not now be filled.

41. I agree with Mr Roberts that there were particular factors in ***Ibrahim*** that are missing from this case and which were material to the paragraph I have quoted above. I also agree that ***Ibrahim*** is not authority for the proposition that in every case the issue arises the Claimant must be asked to give evidence on the point.

42. However, I nonetheless retained a discretion to allow the Claimant to give further evidence on this point and to admit it. My view was that it was in accordance with the overriding objective that I do so. Simply, it was preferable to hear the evidence on the point and decide the case on the evidence than to decide it on the basis of what might have been nothing more than an accidental failure by a litigant in person to cover a relevant point. The Respondents had counsel to cross-examine the Claimant on this short point. Ultimately, I would be in a position to assess the Claimant's evidence and make of it what I would in the

context of all the other evidence in the case. So on balance I admitted the Claimant's further evidence.

43. The Claimant also made detailed closing submissions. They essentially mirrored her claim form and witness evidence. In the course of his closing submissions Mr Roberts made the point that the Claimant had on the whole done an exceptional job of representing herself. I concur. She had mastered the bundle and witness evidence and was able to conduct very detailed cross-examinations of the Respondents' witnesses that were largely on point.

44. I considered both parties' closing submissions carefully.

45. I note that the Claimant gave oral closing submissions which she read out from a written document. She asked if she could then send the written submissions in. I told her that she could only do so if they were materially the same as her oral closing submissions (which I had in any event made a careful note of). According to the file the written submissions were not sent to the tribunal (this is neither a complaint nor a criticism – the written document would have added nothing given the constraint upon it that it had to reflect the oral submissions).

CMS

46. Some central threads that weave through the facts of the case are allegations the Claimant made and continues to make that CMS acted in breach of its regulatory duties in various ways. The reader should note two important points. Firstly, CMS is not a party to these proceedings so I have not heard from the firm (nor, given the issues I have to resolve, would I have expected to). Secondly, it was not necessary for me to decide whether or not CMS was in fact in breach of its regulatory duties; thus I have not done so.

Reserved ex-tempore judgment and reasons

47. On 29 September 2023, I gave a reserved ex-tempore judgment with reasons. I also revoked, the now otiose, orders for specific disclosure.

Part 2: the substantive resolution of the claim

Findings of fact

48. I made the following findings of fact on the balance of probabilities.

The parties

49. The Respondent is a property developer. It is part of a group of companies that are head quartered in China.

50. The Claimant is both a solicitor and a chartered surveyor. Her legal specialism is construction law. She was appointed Legal Counsel by the Respondent on 1 April 2018 and was promoted to Senior Legal Counsel on 1 April 2020. She is fluent in both English and Mandarin.

51. At the relevant times the Respondent's in-house legal team comprised the Claimant and Mr Newton. Mr Newton was appointed in June 2018 to the role of Senior Legal Counsel. The Claimant and Mr Newton initially reported to Luxin Apple He.

52. In around 2019, Mr Ajaz Khan joined the business as Head of Conveyancing. He was a conveyancing and property solicitor. He worked in the property team rather than the in-house legal team. His role included conveyancing and other matters such as leasehold structures.

53. In around 2019, Mr Zhai transferred to the Respondent's London office and became the Head of HR, Admin and Legal. He took over as the Claimant's and Mr Newton's line manager. In October 2020 his title changed to Head of HR, Admin and Corporate Legal.

54. On 15 September 2020, Ms Nicole Tu, Cost Director, became joint appraiser with Mr Zhai for the Claimant and Mr Newton.

55. At the relevant times, Mr Stephen O'Driscoll was Development Director for the Respondent, part of the Planning and Development team. He was Ms Edding's line manager. She was Development Manager.

56. Until around early 2020, Ning Xia (known as Breaker) was Vice Chairman and *de facto* head of the Respondent's UK operations. In around early 2020, Mr Zhixiong Guan became Chairman of the Respondent and following a transitional period by Autumn 2020 he was the effective head of UK operations.

Claimant's contract

57. A couple of the terms of the Clamant's contract need to be set out as they are of particular relevance to her money claims.

58. Upon promotion to Senior Legal Counsel, it became a term of the Claimant contract that:

Salary: You will be entitled to a basic salary of £6,200 (SIX THOUSAND, TWO HUNDRED POUNDS STERLING) per month and a basic salary of 13 months within every 12-month period will be paid.

59. In practice, the "13 month" was paid every December so the Claimant would be paid two lots of £6,200 in December.

60. The notice provisions of the Claimant's contract provided as follows:

> *14. TERMINATION AND NOTICE PERIOD*
> *14.1 After successful completion of your probationary period as provided in clause 2.2, and subject to clause 14.3, the prior written notice required from you or the Company to terminate your employment will be as follows:*
> *14.1.1 one month's prior written notice until you have been continuously employed for four complete years; then*
> *14.1.2 once you have been continuously employed for five complete years or more, one week's notice for each completed year of continuous employment up to a maximum of 12 weeks' notice.*
> *14.2 The Company reserves the right at its sole discretion to make a payment of salary in lieu of notice.*
> *14.3 The Company will be entitled to dismiss you at any time without notice or payment in lieu of notice if you commit any act of gross misconduct, are guilty of gross negligence, if you cease to be entitled to work in the United Kingdom or in other circumstances which permit your summary dismissal.*

Development Projects and relations between the Claimant and Mr Newton

61. The Respondent had a number of high-value development projects at different sites around central London. These included:

    61.1. Queen's Square (QS)
    61.2. Vauxhall Square (VS)
    61.3. One Nine Elms (ONE)

62. Each project was owned by a different corporate entity in the group, though ultimately owned by the Respondent's parent company.

63. The Claimant and Mr Newton had a difficult and borderline dysfunctional working relationship that pre-existed the index events in this claim. Initially the allocation of work between them was not a clear as it might have been but, in part because of the difficulties in them working together, they came to be assigned different development projects. The projects were assigned to them by management.

64. Separately, the Claimant dealt with the funding side of most projects including projects that were otherwise Mr Newton's.

65. Mr Newton worked on VS from the outset of his employment in 2018 onwards. The Claimant worked on QS. So far as relevant for the purposes of this claim, ONE was Mr Newton's project.

ONE dispute

66. In 2018 a company in the Respondent's group purchased ONE from Wanda, a developer. The international law firm CMS acted on its behalf in the acquisition. Thereafter CMS were also assisting this group company with some planning matters in relation to the site.

67. Wanda had a pre-existing construction dispute with Multiplex Construction Europe Limited (Multiplex) in relation to an aspect of the site. The Respondent group company inherited this dispute with the acquisition. In around October 2018, the Respondent learned that CMS were acting for Multiplex in this dispute when a notice of referral to adjudication was served.

68. As noted, ONE was Mr Newton's project. He, rightly, perceived that it was necessary to consider whether CMS had a conflict of interests. Mr Newton instructed Eversheds Sutherland to act in the dispute with Multiplex and to advise on the conflict issue. He also brought the most senior leaders of the Respondent business operation in the UK into the information and decision making loop. This included Breaker, Ms He, Ms Xia Lya (then managing Director) and members of the senior commercial team.

69. In short, Eversheds Sutherland's advice was that CMS did not as a matter of law have a conflict and thus that an action to try and prevent CMS from acting for Multiplex would likely fail. Further, if the matter were tested with CMS it would likely act defensively and dig in. Taking this course was unlikely to be in the Respondent's interests: it would waste time and cost and likely have no benefit. It was also Eversheds Sutherland's advice that the work CMS were doing on the planning matters for the Respondent would be dealt with by a different team to the CMS team working on the Multiplex dispute and that general mitigation steps like information barriers were sufficient to manage risk in relation to the disclosure of confidential information.

70. However, Eversheds Sutherland also drafted letter to CMS for the Respondent to consider sending. It said this:

> *We refer to your letter of 26 October 2018 to R&F One in which you state that you are instructed to act on behalf of Multiplex in relation to the above matter.*
>
> *R&F One has historically instructed CMS Cameron McKenna Nabarro Olswang LLP (CMS) on matters relating to the Project [Apple/Mike - please provide us details of such instruction].*
>
> *R&F One is concerned that there may be a conflict of interest with CMS having historically*
>
> *acted for R&F One and now for Multiplex with instructions relating to the same Project; particularly whether CMS' duty of confidentiality to a former client and duty of disclosure to a current client may be compromised. We should be grateful if you would explain your position with respect to this.*

71. This was an appropriately moderately worded letter. It did not make any allegation but raised a concern and gave an opportunity for CMS to respond to it.

72. Mr Newton and the senior management, thought the matter through and a business decision was taken not to send the letter. I accept Mr Newton's evidence about this. In essence, the decision was that on balance it was preferable not to send the letter. The view was that CMS did not have a conflict so could not be prevented from acting for Multiplex. It was a large international law firm and it could confidently be assumed that it would have information barriers in place that dealt with concerns about disclosure of confidential information. Raising the matter with CMS was unlikely to achieve anything productive and on the contrary may be counter-productive in costing time, effort and potentially souring relations.

73. I heard Mr Newton's evidence on these matters which was tested in cross-examination. Having heard his evidence tested I find it credible and accept it. This is both because of the way he gave his evidence and because I find the content of it plausible. Further, the contemporaneous documents broadly corroborate his evidence in significant part, showing as they do that Eversheds were involved in assisting with the matter and that the matter was discussed by management in a meeting that had the conflict issue on its agenda. It is also consistent with a comment Mr Newton made to the Claimant to which I now come.

Disclosure (a)[2]

74. In October 2018, when CMS served notice of referral to adjudication on behalf of Multiplex the Claimant "*mentioned to [Mr Newton] that [she] was concerned because it seemed inappropriate, under the SRA Code of Conduct, for CMS to act for Multiplex in the dispute bearing in mind the ONE acquisition*". I accept her evidence that Mr Newton gave her short shrift and said that legal advice had been taken. This corroborates his evidence now that he had taken legal advice and acted upon is.

75. That Mr Newton gave the Claimant short shrift reflected the fact that already by this stage there was pre-existing borderline dysfunctional relationship between them. A particular concern Mr Newton already had was the Claimant interfering with his work and trying to take his responsibilities for her own.

Framework agreement with CMS

76. In March 2019, CMS proposed terms for a fresh framework agreement for the provision of their legal services to the Respondent and group companies. The agreement related to the prospective provision of legal services in relation to all three of the said developments (i.e., VS, QS, ONE). The scope of the services was very wide including:

[2] This is a reference to paragraph 1.a. of the list of issues. Disclosure (b) below is a reference to paragraph 1.b. and so on.

76.1. Construction;
76.2. Real estate;
76.3. Planning;
76.4. Employment;
76.5. Rights to light advice;
76.6. Compulsory purchase order advice.

77. This document required a variety of internal approvals within the Respondent including from in-house legal.

78. On 11 April 2019, the *Claimant* signed off this framework agreement. I consider this be a fact of the greatest significance in the case. When it is put next to the disclosures the Claimant made before and after, this act of corporate governance on her behalf makes for a bizarre fact pattern.

79. At the time this agreement was signed off by the Claimant, the dispute with Multiplex had only escalated since October 2018 when the Claimant made disclosure (a). The Claimant was well aware of this. The dispute with Multiplex was a major issue for the Respondent.

80. In my view, the Claimant has been wholly unable to reconcile signing off this agreement with the position she took in October 2018 and more significantly in autumn 2020 when she made the remaining disclosures. Her explanation for signing off this agreement is essentially that it was necessary to do so because CMS had invoices which needed to be paid and there needed to be an agreement in place for finance to pay them. I reject that explanation:

80.1. I do not follow why a new agreement would be needed in order to pay existing invoices. I found the Claimant's evidence on this matter equivocal and speculative. I asked why a new framework agreement would be needed to pay existing invoices. Her answer was that "*It could be because there was no existing agreement and needed retrospective agreement."* I asked her what the position in fact had been and she said "*I can't recall. I don't know".*
80.2. However, even if an agreement was needed for that purpose it would have taken a completely different form. It would have been about existing work not prospective work. Quite simply it would not have been a framework agreement for CMS to provide more legal services to the Respondent.
80.3. Further, if for some (entirely unexplained) reason the agreement had to be in this form the Claimant would surely have contemporaneously raised massive red flags. She would have indicated in the clearest of terms that notwithstanding what the Framework Agreement said CMS should not be instructed on any further work and that notwithstanding her approval of the Framework Agreement she did not in fact approve it as drawn. She would have indicated that she had signed it for a quite different reason. The Claimant did not, contemporaneously do any such things when signing off the Framework Agreement.
80.4. I asked the Claimant if she had read the framework agreement prior to signing it off. I found the Claimant's answer evasive. She said "*to be frank, when it comes to lawyers' framework agreement, at the time, in 2018 [sic], I*

was asked to sign framework agreements and said to Apple most important clause is payment period, because on rest of it, I think, other than hourly rate, I think would not be paying much attention, within this frame work agreement say what appointments and what does it cost, and priority is to get invoice [sic]." I asked again whether she had read it and she said "*very broadly".* In my view she was being evasive because she knew it was so odd that she had signed off this framework agreement given the way she put her case.

80.5. In any event, even on a broad reading, it was obvious that this framework agreement was with CMS and was for it to provide a range of legal services to Respondent group companies going forward on the Respondent's development projects including ONE and VS. I find the Claimant undoubtedly knew that when she signed the agreement off.

81. Ultimately, I find that when signing off this agreement the Claimant was exercising her professional judgment and approving in principle CMS providing further legal services to the Respondent and group companies including in relation to VS and ONE. I do not accept that this can be explained to any significant extent by a need to pay existing invoices.

82. However, for the avoidance of doubt, I do accept that there was a need to pay outstanding invoices to CMS in 2019 not least because the Claimant's email of 2 November 2020 (see below) makes a reference about the previous year (2019) that corroborates this. Further, the wider evidence in the case supports the proposition that the First Respondent was habitually a late payer of invoices for legal services to the point that it could have an impact on its ability to retain lawyers. What I do not accept is that this was the reason, and certainly not the main reason, why the Claimant approved the framework agreement. The main reason was the obvious one that her signature denoted: that in her professional judgment it was all good and clear for CMS to provide the legal services described in the framework agreement.

83. I further find that both at the time the Claimant signed off this framework agreement through the whole period subsequently through to her dismissal, she was in fact aware that CMS were providing a range of legal services to the Respondent on development projects.

84. I can accept that she was unlikely to be across all of the detail of exactly what CMS were doing since they were not instructed on her projects. However, she was aware that CMS were providing the Respondent legal services including in relation to VS. That is because she had a general awareness of the Respondent's operations and projects, a general familiarity with what external law firms were being instructed and sight of invoices for legal services including from CMS. Further, I found the Claimant's evidence about whether she knew CMS were carrying work for the Respondent at times to be evasive – avoiding direct answers to simple questions. For example, she was asked in cross-examination:

> "Do you agree that CMS were continuing to be instructed as at March 2019 and you signed off on it? *so, I was being investigated by HR in November*

2020. This was more than a year back. So I was asked why did I sign it. I signed it because outstanding invoices."

I infer that the evasiveness was in part because the reality was that the Claimant was aware that CMS acted for the Respondent when she approved the framework agreement and thereafter.

Claimant's inquiries about VS

85. In September 2020, Ms Jiao asked the Claimant to work on a refinancing of VS which was due in October (the 'October' refinancing). This basically involved collecting information to be passed to the funder's lawyers. There had also been a refinancing in April 2020 which CMS were instructed on and had ongoing work on, that the Claimant had not been involved in. The October refinancing was related to the April refinancing. I can accept that it was at this point that the Claimant learned that CMS had been assisting with the April refinancing.

86. The Claimant needed some information in order to report for the purposes of the October refinancing. The Claimant emailed the Senior Project Manager of VS directly asking for various updates including whether agreements had been signed. She did not involve Mr Newton.

87. On 28 September 2020, the Claimant made email inquiries, again without reference to Mr Newton asking for copies of title deeds and the status of leases, negotiations and land registry dealings on VS. The inquiries were passed to Ms Eddings as she was the person dealing with the relevant matters. On 5 October, Ms Eddings responded in the email chain, answering the Claimant's questions and adding Mr Newton to the chain. I accept her evidence that she thought it was wrong for the Claimant to have kept Mr Newton out of the loop since VS was his project. I also find that this reflected the fact that it was odd the Claimant had done so. In her email Ms Eddings referred to CMS assisting the Respondent with an option to purchase a small piece of land related to the VS site.

Discussion with Taylor Wessing

88. On 30 September 2020, the Claimant spoke to two partners at Taylor Wessing. She wanted to instruct them on the October refinancinag. Her account is that she told them that CMS had acted on the April refinancing and said she was unsure if it would be right to instruct them on the October refinancing. They "*told her that there was a potential conflict of interest or a significant risk of one given the number of disputes that had taken place between R&F One and Multiplex (and some of which were, at the time, still ongoing) noting that CMS had been instructed by Multiplex throughout"* (I accept this passage of the Claimant's witness statement).

89. The Claimant then spoke to Ms Jiao and Mr O'Driscoll and told them that she was uncomfortable that CMS had been instructed on the April refinancing and were working on planning matters on ONE. She said she was not sure she could instruct them on the October refinancing. She said this was because CMS were acting for Multiplex in the disputes over ONE which had culminated in a lot of litigation already. She said she was concerned about confidential information

being inadvertently leaked to Multiplex if it was readily available on CMS's database. They told her to use her professional judgment.

Disclosure (b)

90. On 1 October 2020, the Claimant emailed Mr Guan, Ms Wang (his P.A.) and Ms Jiao. She said this:

> *Our company is currently preparing for the VS project financing. With respect to the previous legal documents, such as the land purchase and freehold purchase in April this year, we used CMS Law Firm. CMS is also the law firm acting for Multiplex, so there are conflicts of interest at work. I have talked to Rhianna about this issue and suggested that we should use Taylor Wessing to handle the VS financing which is due this month (around 24 April [sic]).*
>
> *I have asked [Taylor Wessing are] willing to accept this instruction since there are outstanding invoices. I've told him that it's urgent, as the bank has requested to complete it ASAP, within the next few weeks. He did not object, and said that our company had to clear the invoices of £140k in these two weeks.*
>
> *In my opinion, Taylor Wessing is also familiar with VS project since it has handled development planning (on the contrary, as far as I know, CMS has not): this detail must be included in the report submitted to the bank (called Certificate of Title). Recently, I asked CMS about the documents they prepared before, but it took a long time for me to receive their reply. Furthermore, I recently found an agreement on the development of ONE which CMS has been negotiating for almost two years. It's a bit long. I'm still in the process of understanding due to the need for ONE financing.*

91. In cross-examination, it was put to the Claimant that she had done nothing to investigate the issues to make a proper decision as to whether there was a conflict/significant risk of one. She said she "*did not need to understand the issues*". All she needed to consider was whether it was in the Respondent's interests for CMS to act for them on VS given they were acting for an adversary on ONE.

92. The Claimant spoke to Mr Guan on a WeChat call later that day. In the call he said Taylor Wessing should be instructed on the October refinancing.

93. On 2 October 2020, the Claimant had separate WeChat calls with a number of colleagues including Mr O'Driscoll. She said that CMS were conflicted in acting in the October refinancing. Mr O'Driscoll said it was a professional issue and he would rely on her professional judgment.

94. Notably, notwithstanding that Mr Newton was the one with a professional relationship with CMS the Claimant kept him out of the above loop.

Email of 5 October 2020

95. On 5 October 2020, the Claimant emailed Ms Eddings and cc'ed Mr Newton and Ms Jiao among others. She said: "*I will take over dealings with CMS on the second land parcel and all legal issues, as they are related to the VS funding arrangements*."

96. This was a remarkable email. Mr Newton had instructed CMS on the second land parcel, i.e., the option to purchase a piece of land related to VS. This was his project and these were the solicitors he had been instructing on it. The explanation offered in the email that this related to VS funding arrangements did not make sense. There was simply no need for the Claimant to take over dealings with CMS on this matter in order to get the updates/information needed to do the refinancing reporting.

97. This was a declaration by the Claimant that she would be taking over some of Mr Newton's work. Later in the chronology, as will be seen, the Claimant attempts to justify this by suggesting she did not think Mr Newton was dealing with the matter since CMS were. That does not make sense either. She knew that Mr Newton was instructing CMS to deal with the matter. Yes, he was using external solicitors to get the work done but it was still his responsibility, his project and he was the one instructing the solicitors (not in the sense of being the client but in the sense of providing the instructions on the Respondent's behalf.).

98. This also came as bolt from the blue to Mr Newton. Unsurprisingly, he was infuriated. He wrote to Mr Zhai, stating "*this is not acceptable*" and asking for a discussion. At this time he had no idea that the Claimant's email/conduct had any relation at all to any conflict issue.

Disclosures (c) and (d)

99. On 6 October 2020, the Claimant, Mr Newton and Mr Zhai had a meeting on Teams. At the meeting Mr Zhai, essentially, told the Claimant off for trespassing on Mr Newton's work and told her that she must not do so. I accept the Claimant's evidence that he spoke in harsh way, finger pointing and the like, and that she did not appreciate that.

100. Some of the detail of the meeting is disputed. The Claimant's case is that on this call she said Mr Newton had not acted in the best interests of the company by instructing CMS to act on ONE and VS given that CMS also acted for Multiplex. Neither Mr Newton nor Mr Zhai recall the Claimant raising any conflict issue at all.

101. In my view the best evidence on this matter is in an email to which I will come shortly, sent later that day.

102. After the meeting Mr Zhai sent the Claimant and Mr Newton an email in which he set out clearly which project was allocated to which and instructed them not to interfere in the other's work.

103. The Claimant responded to Mr Zhai and copied Mr Newton as follows:

[…]
"Vauxhall Square legal matters

Due to VS funding issues I sent queries to development team to understand the land related agreements. I was informed CMS was instructed to deal with those agreements. In order for me to instruct TW on reporting to funder, I stated to development team that I will liaise direct with CMS and deal with all land related agreements, as I do not believe Mike was dealing with them (since CMS is acting). Please see attached emails.

I have also stated in our call earlier that CMS is not fit to act for us because there is a conflict of interests with them acting for Multiplex on ONE legal issues. I believe Mike is well aware of this conflict, as all lawyers do. At the start of Multiplex disputes, I also reiterated that to him."

[…]

As mentioned in our call, CMS has been instructed throughout the last two and half years: when I joined more than two years ago, Apple said Chairman Zhang instructed that we cannot instruct CMS on all legal matters, as he wanted TW to deal. This was conveyed to everyone R&F UK. My concern here is that CMS should not be dealing because there is a clear conflict of interests given that they are Multiplex's lawyers. I have therefore suggested to Mr Guan and finance team that we should use another firm in the current refinancing, and likewise another firm should be instructed on all legal matters.
On funding matters, there are often time pressures to deliver a huge amount of work for funder. There are huge volume of emails requiring immediate attention / response, otherwise one would get lost in the details. I need support from the company to make sure that this can be completed this month, not unsubstantiated complaints made against me. CMS is instructed by us to deal with those land related agreements, which I must be able to liaise and instruct directly. Development team are not lawyers, they should only be dealing with management of leases with tenants. I am not taking over any legal matters which are dealt with by Mike, they are being completed by CMS.
I am committed to R&F in what it is seeking to achieve here in the UK. However, I need company support whether resources or encouragement, I do not like calls calling into question my work. I mentioned to you the mini-operation on my thumb last Tuesday, my surgeon asked me to rest, but I had to work throughout last week as I was pushed by a lot of people, they probably think that Midgard contract is now completed so I should be very free. Alas, it was not. I have to say I was shocked by the call that we had earlier and to hear the complaint by Mike, I do not believe that it is a correct representation of what happened.

104. As noted, I think this email sheds light on what was said at the meeting earlier that day and I find that a like disclosure was made at the meeting.

105. I find that the Claimant did not state words to the effect that Mr Newton had not acted in the best interests of the company. She simply said, per her later email, words to the effect that he was aware of CMS acting in the dispute with Multiplex and there was a conflict. I also note that the Particulars of Claim (paragraph 14) and the List of Issues (paragraph 1(c)), in stating the Claimant's case do not refer to saying that Mr Newton had not acted in the best interests of the company at this teams meeting.

106. On 12 October 2020, the Claimant contacted CMS asking for a full update on land related matters including leases being dealt with by CMS regarding VS. She did not copy in Mr Newton.

Disclosure (e)

107. On 14 October 2020, the Claimant emailed Mr Guan:
Mr Guan,

There are three points that I need to discuss with you:
1. Refinancing of VS project: our company is currently working on the refinancing report requested by the bank. Previously, you have agreed that this particular refinancing case should be dealt with by TW. But the time is very limited, TW has provided some reasonable suggestions to the bank, however the bank does not accept these. Patrick has called today saying the TW cannot handle this, we need to find another legal firm to work on this, could you please point us into a direction of which legal firm we should use? I can ask some large legal firms and to obtain their quote of service and if we are able to use them. This is quite urgent
2. Redacted
3. The above this the second point, I have previously mentioned we are currently using CMS to deal with real estate related matter, legally this is not suitable, because they are also legal consultant for Multiplex. One and VS projects are the same, so CMS has conflict of interest with our company, could you please suggest what is your view on this? They deal with planning for One: however in the refinancing agreement, TW needs to provide reports about Wandsworth council's agreement (Deed of variation to S.106 agreement), so I have asked planning team to ask GMS for information, so it would make it easier for TW to follow up and handed over to.

Disclosure (f)

108. On 15 October 2020, the Claimant spoke to Mr Guan. They discussed the issue of whether CMS were conflicted and the Claimant referred to the SRA code of conduct. There is little detail. Mr Guan told the Claimant he did not want to take the risk of instructing CMS on the October Refinancing. He said she was to take steps to "*avert suspicion*". Mr Guan told the Claimant to use her "*professional judgment*" in deciding whether to continue instructing CMS any matter. He said she had authority to deal with all instructions to CMS and he would inform Mr Zhai accordingly.

109. In mid-October 2020, the Claimant spoke to the partners at Taylor Wessing again. They declined to act in the October refinancing. They repeated that CMS were conflicted. The detail of the conversation is extremely sparse and the reasoning for the advice not apparent.

110. On 19 October 2020, the Claimant emailed Mr Zhai and said "*I am not sure Mr Guan has spoken to you last week, he has asked me to deal with the legal agreements dealt with by CMS. Can you please let Mike and internal team know as CMS has been slow in providing information and there has been no response to my email sent to them last week*". He responded, "*which case Mr Guan ask you to follow up*?". She responded, "*Vauxhall Square*".

Contact with Solicitors Regulatory Authority (SRA)

111. The content of the SRA Code of Conduct for solicitors is in evidence before me. I will not set out all of the provision of the code for the sake of brevity and because it is well known. The concepts of conflict of interest, matter, related-matter and paragraph 6 are particularly important.

112. Between 15 and 22 October 2020, the Claimant tried to call the SRA ethics advice helpline[3] but did not get through. She emailed for advice on 22 October 2020, on a no names basis:

> *I tried to ring the SRA helpline but have not been able to speak to someone. I have an urgent query regarding conflict of interest and should be grateful for assistance:*
>
> *By way of example, Firm A is acting against C in a series of disputes regarding Development Site A, can that same Firm act for C in transactional work on a different Development Site B. Development Sites A and B are different special purpose vehicles but share the same parent companies.*
>
> *Please can you advise whether there is a clear conflict of interest or significant risk of one for Firm A to act for C?*

113. Mr Newton was on annual leave between 23 and 30 October 2020.

114. On 23 October 2020, an ethics advisor from the SRA contacted the Claimant by telephone. The Claimant's evidence of that conversation is as follows:

> *She talked me through the relevant SRA Code of Conduct and advised me that there was a conflict of interest, or a significant risk of one, as well as potential breaches of confidentiality and disclosure obligations. She stressed that even if a firm were instructed to act in the circumstances, a stringent process must be followed including obtaining a waiver and consent and setting up agreed information barriers.*

[3] I will refer to this service hereafter simply as the SRA for the sake of brevity, but I note that the advice given by the SRA ethics advice service is mere guidance, is not a formal ruling and is not binding even on the SRA.

115. There is a dispute as to whether this is an accurate account of what the SRA ethics advisor told the Claimant on the telephone which I resolve shortly.

116. On 29 October 2020, the Claimant followed up and asked for the advice to be given in writing. Referring to her call on 22 October, she said this *"The advice provided to me, in short, was that for Firm A to act, it could potentially result in breaches in the SRA Code of Conduct involving issues relating to conflict of interest, confidentiality and disclosure. I have since spoken to Firm A and explained as such, they have however denied them acting result in any breaches or potential breaches. As it was a difficult conversation, please can I have written advice on this matter?".*

117. A letter, setting out the SRA advice, followed on 10 November 2020. The letter started by referring to a conversation of 22 October 2020 between the writer and the Claimant and a careful description of the scenario:

> *You informed me that a solicitor's firm "X" is acting for your employer, a developer company "A" in relation to transactional and real estate work regarding construction site 1 . Firm X has taken on a client, a contractor "B" who has brought an action against A in relation to site 2. A different firm of solicitors acts for Company A in relation to that matter, but firm X continues to act for Company A in relation to work regarding site 1. The two sites are linked in that both have the same parent company.*

118. The letter is in the careful, balanced terms I would expect from a service of his kind. After general reference to principles 2 and 3 of the SRA principles, the letter addressed conflict of interest. Conflict is defined as "*a situation where your separate duties to act in the best interest of two or more clients in relation to the same or related matters conflict*". In summary, it stated that a firm must not act in relation to a matter or a related matter if in doing so it would have a conflict of interest or a significant risk of one. In the scenario that the Claimant had posited it was clear that the firm would not be acting on the same matter because in relation to the dispute on construction site 1 they were not acting on both sides. However, whether it would be acting in a related matter given that the two development sites were owned by entities that had the same parent company was not something the adviser could determine as it would depend on the facts.

119. The letter therefore did *not* express a view on whether there was a conflict or a significant risk of one: because a factual inquiry would be needed before expressing such a view.

120. The letter went on to say that even if there was no conflict of interest nor a significant risk of one, paragraphs 6.3 to 6.5 of the code needed to be considered, i.e., duties of confidenitlaity and disclosure. It was a matter of judgment for the firm to make considering those paragraphs whether it was able to act. A large law firm was more likely to be able to comply with those paragraphs in these circumstances.

121. It is plain that the advice given by the SRA on the telephone *as recounted by the Claimant* and the advice in the letter are very different. When challenged

about this in cross-examination the Claimant essentially said this was because she was given different advice on the telephone and then in writing. However, I note that at other times this is not how she has framed matters. For instance in her letter of appeal against dismissal she said: *"I spoke with the SRA over the phone on 23 October 2020 and the ethics adviser advised that there would likely be a conflict of interest or at least a significant risk of one on the part of CMS. The SRA sent me a note on 10 November 2020 confirming their guidance."* As described, that is not what the letter did.

122. In my view, on balance, it is more likely and I find that the SRA's advice on the telephone was consistent with the advice given in writing. I find this for a number of reasons:

122.1. Firstly, I do not see any good reason in this case why the advice given on the telephone and the advice given in writing would differ;

122.2. Secondly, the advice given in writing seems to me to be plainly correct. I do not see how someone could conclude that there was a conflict or a significant risk of one just with the bare outline of the scenario as the Claimant relayed it. There are plainly circumstance in which there is no conflict of interest and no significicant risk of a conflict of interest in a firm of solicitors acting for a company X in matter 1 and acting for company Y against company X in matter 2. For instance where matter 1 and matter 2 are totally unrelated and company Y have no interest in matter 1. The position is no different if we replace X with two group companies that have the same parent company.

122.3. Thirdly, the Claimant's email of 29 October 2020, in which she described the advice of 22 October, is in my view more consistent with the advice in the letter of 2 November than the Claimant's subsequent account of the advice of 22 October. It refers to "potential breaches" relating to conflict, confidentiality and disclosure. It does not say that that there was a conflict or a significant risk of one.

123. On balance, in my view, the advice over the telephone was in materially the same terms as the letter and I so find.

Disclosure (g)

124. On 23 October 2020, the Claimant emailed Mr Guan and Ms Jiao. She did not copy Mr Newton nor Mr Zhai:

> *I raised previously that I found CMS acting for us on Vauxhall Square to be an issue, because that they have been acting for Multiplex on ONE disputes. This creates a conflict of interests as both R&F and Multiplex are CMS's clients, and we are at risk of information relating to our sites being passed on to Multiplex.*
>
> *As this is a major matter, I decided to speak to the Solicitors Regulation Authority ("SRA") to confirm my assessment. The SRA is the governing authority for the conduct of all solicitors and law firms.*

Without disclosing details of One Nine Elms and Vauxhall Square, I asked the SRA whether CMS is able to act for us on any transactional work regarding Vauxhall Square. They confirmed that there is a conflict risk of interests or a significant risk of such conflict if CMS continues to acts for us. This is because as solicitors, when acting for a client, we have a duty to act in the best interests of that client and this includes disclosure of all relevant information relating to the matter in hand.

Mr Guan has asked me to use professional judgement to deal with CMS's existing instructions. I have a call with CMS this afternoon to discuss the ongoing matters being dealt with by them, and will therefore be informing them that we are terminating their legal services due to conflict of interests.

If you have any thoughts/queries on any of the above, please let me know.

Disclosure (h): call with CMS

125. While Mr Newton was on annual leave the Claimant invited Ms Jiao to join her on a call with CMS. She declined. The Claimant says and I accept that this was because Ms Jiao was in finance and she knew CMS would raise the issue of unpaid invoices.

126. On 23 October 2020, the Claimant had a call with CMS. On any view it was a difficult and uncomfortable call.

127. On the call there was a discussion about whether CMS would be instructed on the October refinancing. The Claimant said they would not because CMS had a conflict of interest or a significant risk of one having acted for Multiplex. The Claimant said she had confirmed this with the SRA. This led to a discussion of what should happen in relation to CMS' other work for the Respondent. The Claimant's account is that she said that where work was in progress it should be completed. Where instructions had not yet been given, the Respondent would review and get back to CMS. CMS were unlikely to be able to continue to act on ONE because it seemed clear there was a conflict of interest with CMS acting for Multiplex on the ONE dispute and acting for the Respondent on the planning side. CMS reacted defensively.

128. In my view the Claimant's recollection of this call is not wholly reliable. It is plain to me that she was flustered on this call, that it did not go in the way she anticipated, that she lost control of the discussion and that it was the moment the matter began to snowball in a way she had, rather naively, not anticipated.

129. CMS's impression of the call is captured in an attendance note following the call (which the Claimant obtained through a DSAR). It says:

"…had a call with Corine [sic] on Friday where she essentially said that, given the dispute with Multiplex, we shouldn't have been instructed over the last two years and no one at R&F has had authority to instruct us on any matters. The inference is that a) we are being dis-instructed and b) she doesn't want to pay

us for the work done to date. We thought we were going to be talking to her about a deed of grant and potential refinancing!"

130. I think it is likely, and find, that the Claimant did say or give CMS the impression that the Respondent would be terminating all legal services. After all, that is what she had told Mr Guan and Ms Jiao she was going to do. I think it is also likely that she suggested CMS had not been properly instructed because instructions had not come from 'legal'. Raising this on the call gave the impression that the Respondent was trying to avoid paying for legal services received. This is not what the Claimant was getting at but it is the impression she gave.

Disclosure (i)

131. On 24 October 2020, the Claimant spoke to Mr Guan and told him that she had raised the conflict of issue matter with CMS.

132. On 28 October 2020, Mr Zhai emailed the Claimant and Mr Newton setting out the approval process for different types of work:

We are categorizing current legal work into two categories, corporate and construction legal affairs. I will be approving corporate legal affairs while Nicole [Tu] will approve all legal work related to construction. Please see below details…

Disclosure j

133. The Claimant had a further call with CMS on 29 October 2020. She did not notify Mr Zhai, Ms Tu or Mr Newton that she would be having the call. My findings about the call are as follows:

133.1. The Claimant repeated that CMS had a conflict of interest as a result of acting for Multiplex. The partner at CMS denied that there was a conflict or any breaches of confidentiality or disclosures.
133.2. The Claimant asked if there were any information barriers in place, whether this had been discussed/agreed with the Respondent and whether there was any waiver, but CMS were unable to answer there and then.
133.3. CMS said that when acting on the ONE acquisition for the Respondent they had not been aware of a dispute between Multiplex and Wanda;
133.4. The Claimant said that because of conflict CMS could not be instructed on the October refinancing;
133.5. The Claimant was unclear whether CMS were instructed on a deed of grant for VS and would look into it;
133.6. In terms of other work, the Claimant said the purpose of the call was to agree what CMS were instructed on, what needed to be completed and what CMS could be dis-instructed on.

134. So much is essentially consistent with the Claimant's evidence. However, I make further findings about the call.

135. On 29 October 2020, CMS emailed Mr Newton, Ms Eddings, Mr Khan and Mr O'Driscoll saying that the Claimant had asked them to "*down tools on all matters until we hear back from Corinne with further instructions. We have been told that we are likely to be dis-instructed because we act for Multiplex on one of your other properties."*

136. In my view, this email is likely to, and I find does, reflect the reality of what the Claimant said on the call although I do not think she used the idiom '*down tools'*. It is highly implausible that CMS would want to, or say they had been told to, down tools on all matters unless that is what their client had required/said even if using different words. On the call Claimant did not identify any work CMS should proceed with and essentially said further instructions were needed, from her, in order for CMS to continue any work.

137. I find the Claimant did also, perhaps inadvertently but nonetheless, give CMS the impression on the call that they would not be paid for some of the work they had done to date if the instructions to do it had not complied with the internal protocol and because they ought not to have accepted the instructions in light of conflict. The Claimant said that all instructions had to be issued by the legal department not by Ms Eddings. Although the Claimant does not accept she said this or gave that impression, I find she did. I make this finding based upon:

    137.1. Ms Eddings note of a call she had from one of the solicitors at CMS who had been on the call with the Claimant. She called Ms Eddings on the same day and reported the conversation. Ms Eddings made a note. It is true that late disclosure was made of the note. It came about because in conversation with the Respondents' solicitors the call came up and Ms Edding was asked if there was a note of it. There was, and so she was correctly, told to disclose it. I do not think that the late disclosure is indicative of anything malicious (e.g. deliberately hiding the document nor fabricating it). There would be no rational basis to hide it nor is there any cogent reason to think it has been fabricated.
    137.2. What Ms Eddings later told Ms Johnston when interviewed (see below)
    137.3. Ms Edding's witness evidence about the call and the note of the call which I found credible.
    137.4. CMS' subsequent emails and approach (see below).

Disclosure (k)

138. On 29 October 2020, the Claimant emailed Mr Newton, Ms Eddings and Mr Zhai among others:

> *It seems clear that there Is a conflict of Interest or a significant risk of one with CMS acting for us. We are therefore terminating all or most of their services set out below. It would be helpful if you can confirm by lunchtime tomorrow whether details below are correct or changes to be made:*
> *[email then sets out various pieces of work on both ONE and VS]*

139. It is notable that she sent this email after the event – i.e., after contacting CMS. It is also notable that she was not inviting discussion of whether there was a conflict or significant risk of one nor on the principle of whether CMS should be dis-instructed. She was presenting a decision.

140. Later that evening CMS sent a further email:
Further to our call this morning, and as we said in that call, we have informed the wider CMS team to 'down tools' until we hear from you confirming (1) that we are Instructed to proceed and (2) that our fees for any further work have been agreed and will be paid immediately on completion of the matters. Until such time, we will take no further actions on any of our ongoing matters and will not Incur further time, including responding to ad hoc enquiries or requests from you and your colleagues.

[…]

We remain baffled by your suggestion that we have not been validly instructed on any matters at Vauxhall Square. We do not propose to get drawn into detail here (in particular to the internal workings of R&F), save to draw your attention to the email below from Mike, confirming that our revised fee proposal was agreed, and to remind you that he and the rest of the team were copied into all emails on the Deed of Grant / Option matter.

I have copied both Mike and Roxane into this email far reference, and because where we have got to seems totally at odds with the strong working relationship which we have with them.

As you will hopefully appreciate, we have worked Incredibly hard for R&F for over three years and have provided an excellent level of service and advice. We are disappointed by our recent discussions and think that dis-instructing us will prove detrimental to the overall progress of the projects. However, if this Is your decision, we wish you well and will send you invoices for work done for R&F to date, but not yet billed. If these invoices and the outstanding invoices are not paid within 30 days, we will pass all of the outstanding invoices to our debt collection team for processing…

Mr Newton's complaint

141. On 30 October 2020, Mr Newton wrote to Mr Zhai, forwarding CMS's email of 29 October 2020 and saying as follows:

Harry,
this is outrageous
1) CMS were validly instructed – Corinne does not have sole right to instruct lawyers
2) I don't know what advice she has taken from the law society, but there is no conflict in the instruction of CMS for Vauxhall Square
3) to make calls like these is unprofessional and unacceptable, it makes us look entirely unprofessional.

It is impossible to accept this Harry. If you need to, you must speak to a third-party lawyer, her explanations are simply not credible, and in entire defiance of legal good practice and the agreement for the division of work.
We must speak about this on Monday, it is not something that is acceptable.

142. A very odd feature of this case is that Mr Newton did not at this stage simply come out and say words to the effect of "*we considered the conflict issue in 2018, took advice from Eversheds and the senior management decision was [as described above]."* I asked Mr Newton why he had not done something like this at this point or at any other point in advance of the appeal against dismissal stage. His explanation was essentially that he thought it better for Mr Zhai simply to get a further independent view if he wanted to given that there had been a change of management since 2018.

143. Although I think this was an unhelpful position for Mr Newton to have taken, because it would have been helpful to bring to the attention of the current senior management team the consideration given to the matter by the previously senior management team, I accept his evidence is true. The fact that he was encouraging Mr Zhai to get a third party lawyer's opinion tends to corroborate his evidence in that it tends to show that he did not think he had done anything wrong and was confident of his position should the matter be independently assessed.

Investigation commenced

144. Mr Zhai was troubled by the Claimant's email to CMS. He took the view that she had instructed the Claimant to work collaboratively, explained the division of work but that she acted outside the chain of authority. Mr Newton's email of 30 October was treated as a formal complaint. Mr Zhai asked Ms Johnstone, Senior HR Manager, to carry out an investigation.

145. On 2 November 2020, Mr Newton was interviewed by Ms Johnston. In broad summary he:

145.1. Complained about C's email of 5 October 2020 stating that she was taking over all work on the parcel of land on VS;
145.2. Complained that the Claimant had sent an email to CMS on 29 October 2020 saying their work should stop. He said he had heard that the Claimant was threatening to report CMS to the law society and had told CMS that they would not be paid for the work they had been doing. He said Ms Eddings, Mr Khan and possibly Mr O'Driscoll had all told him about that threat (I find as a fact that they had done so.)
145.3. His understanding from CMS' email of 29 October was that the Claimant had told CMS only she could instruct lawyers;
145.4. Mr Newton thought the Claimant was completely wrong about the conflict issue. It had been known for well over two years and it has been decided that there is no conflict on VS.
145.5. The Claimant had signed the latest framework agreement with CMS six months previously (in fact it was 18 months previously);

145.6. He was concerned about the Claimant's competence in non-construction areas (these comments were redacted in the version of the notes initially sent to the Claimant).
145.7. The Claimant was rude and lacked respect and tried to take over his work;
145.8. The Claimant raised historical issues saying that in 2018 she had phoned a barrister's Chambers and misrepresented who she was. This was redacted in the version initially sent to the Claimant.
145.9. A question was asked why CMS were being used and Mr Newton responded it was legacy and CMS knew the projects (this was redcated in the version initially sent to the Claimant).
145.10. In terms of the resolution sought: that the Claimant should not use underhand methods to take his work and she should be properly managed so as not to put the company at risk (this was redacted in the version initially sent to the Claimant).
145.11. The notes recorded that Ms Edding should be asked who was on the call with CMS. this was redacted in the version initially sent to the Claimant).

Response to CMS

146. On 2 November, the Claimant drafted a proposed response to CMS and circulated it to Mr Newton, Mr Khan, Mr Guan, Ms Tu, Mr Zhai and others:

> *As mentioned on our calls, the reason why we are reviewing our instructions was because there exists a conflict of interest or a significant risk of one by your acting involving issues of confidentiality and disclosure, CMS has been acting for Multiplex against us on three major adjudications and one high court hearing last year and an adjudication to date tills year. Our internal discussion was therefore not concerned with your firm's ability to deliver an excellent service. Our intention of last Thursday's call was to draw a line in the sand on matters which were instructed and need to be completed by CMS and matters which can be dis-instructed.*
>
> *On planning work regarding One Nine Elms, James Cook will be in touch with Josh Risso-Gill on the work carried out by him and team.*
>
> *On real estate work regarding Vauxhall Square, I would like to clarify that at no point did I say on our call that CMS was invalidly instructed on "any' matters. I stated that all instructions to external lawyers must be managed and instructed by our legal department, as you represented that many were issued by Roxane. This is not new inner workings of R&F; as you may recall I informed you and team of this last year as we were struggling to clear certain outstanding invoices.*
>
> *We are in the process of working out your instructions to proceed so I will be in touch very soon.*

147. Mr Ajaz Khan responded cogently stating that did not think there was an issue instructing CMS in relation to the option agreement at VS as follows:

As such and, limiting myself strictly to CMS acting for us in the matter of the Option Agreement at Vauxhall Square, I would submit there is no conflict of interest if we proceed with CMS for the following two reasons: (a) Multiplex are not involved with, or have a legal interest in, the land subject to the Option; (b) Multiplex are not in any dispute with, or have any contractual obligations to, Vauxhall Square (Nominee 1) Ltd, our corporate entity that will enter into the Option agreement with Network Rail and ArchCo.

148. The Claimant responded as follows:

As I mentioned when we spoke earlier on, I spoke to the SRA on this issue and received confirmation before informing CMS, together with speaking with partners of major law firms. Both ONE and VS share the same parent companies, therefore according to the SRA this appears to be a related matter. It does not matter whether there is actual conflict, as long as there is potential risk of one.

There are also issues of confidentiality and disclosure, so it does not matter that this is a different site. When refinancing, we share confidential information with the law firm acting for us, this could potentially be in MPX's hands. If information barrier is to be set up between CMS and us (to allow CMS to act for us), SRA has stringent requirements and information barriers will need to be agreed between CMS and us. I do not believe that this has ever been raised.

149. Mr Khan further responded:

I do not wish to get into a protracted debate with you on this matter. I have made my point on the issue Conflict of Interest very clear and, in the matter of CMS acting for us on the Vauxhall Option Agreement, it is a position that I will not withdraw from. Your argument that the VS corporate entity and R&F One UK have the same parent company, in my opinion, is makeweight for the simple reason that in the UK a Limited Company Is legally separate from its owners (typically shareholders and directors). This is a legal feet.
As to what the SRA may or may not have told you I cannot comment, as again I was not privy to your conversions with them. However, simply put a 'related matter;' would not be if the beneficial owners of our two entities at ONE arid VS are the same, but rather the transaction at hand was one that Multiplex had an interest in—which of course they don't in the case of the Vauxhall Square Option matter where Vauxhall Square (Nominee 1) Ltd is obtaining a Deed of Easement over land owned by Network Rail.
Furthermore, CMS have already completed on the grant of Deed of easement to VSN over the upper part of the said Option land, again without any bearing on the build contract we have with Multiplex at ONE—the two issues are simply unrelated.

No external communications and holding email instructions

150. On 2 November 2020, Mr Newton wrote to Mr Zhai and said that he did not think any such message should be sent out and that it would make matters

worse. He suggested that an instruction be given that no external communications be sent.

151. On 2 November 2020, Mr Zhai wrote the Claimant and others. It said "*Nicole and I are investigating the issue. Meanwhile, please don't send further email externally. We will revert once we made a decision"*.

152. The Claimant had a telephone call with Mr Guan and his P.A. Lilian Wang. After the meeting Ms Wang messaged the Claimant with Mr Guan's instructions. This was in Mandarin and the third party translation is as follows "*not to issue any instructions externally in these two days. It can be fully discussed internally".* In her chronology of events (produced for the investigation hearing) the Claimant describes the instruction as "*not to send email to CMS regarding our instructions to CMS on how to proceed and to have a full internal discussion the next couple of days.*" The sentiment was that the Claimant was not to write to CMS until there had been a full internal discussion, which should take place within a couple of days.

153. On 3 November 2020, there was a meeting between the Claimant, Mr Newton, Mr Zhai and Ms Tu. In essence this was to repeat the delineation of work between the Claimant and Mr Newton and to manage how they reported their work up the chain. It was reiterated that VS was Mr Newton's project. However the Claimant also said that Mr Guan wanted her to work on something on VS. It was agreed that this would be further discussed.

154. There was a further call between, the Claimant, Mr Zhai and Ms Tu, later on 3 November 2020. The Claimant said CMS's email was inaccurate and that she thought a follow up email was required. She also repeated her view that CMS was conflicted. Ms Tu told her that she needed time to investigate and that she would not be in a position to authorise a follow-up with CMS until she had done so.

155. I find that by this time the Claimant had become very anxious about CMS's response to her calls with them. She had seriously underestimated the magnitude of accusing CMS of acting in conflict of interest and had failed to anticipate that there would be a significant fall out. She also believed that CMS's email of 29 October was not accurate in some ways and altogether was desperate to state her position to allay her anxiety. She therefore put Ms Tu under significant pressure to allow her to write to CMS.

156. In the meantime Ms Tu set about her inquiries. On 4 November 2020, the Claimant spoke to Ms Tu and said or implied that she wanted to send her email of 2 November 2020 to CMS. Ms Tu told her to hold fire, as she needed more time. On 5 November 2020, the Claimant contacted Ms Tu by WeChat, essentially trying to get permission to write to CMS:

> *C: Nicole, just to confirm, I will send my suggested email to CMS but I will take out my working on s.106 planning work?*
> *NT: 'I will take out my working on s.106 planning work? ' what does that mean?*

C: On planning work regarding One Nine Elms, James Cook will be in touch with Josh Risso-Gill on the work carried out by him and team.
NT: let me come back to you a little later.

157. On 6 November, the Claimant resumed the WeChat:

C: *Any update on the above?*
NT: sorry i am in a meeting
C: calling to check on CMS email - can I send?

158. The Claimant continued trying to call Ms Tu and eventually got through. The Claimant made the point that a week had passed since CMS's email and so some response was needed. Ms Tu agreed to the Claimant sending a "*holding email*". She did not say the Claimant could send the draft email she had circulated.

159. The Claimant then sent the following email to CMS (that day, 6 November 2020):

As mentioned on our calls, the reason why we are reviewing our instructions was because there exists a conflict of interest or a significant risk of one by your acting involving issues confidentiality and disclosure. CMS has been acting for Multiplex against us on three major adjudications and one high court hearing last year and one adjudication to date this year. Our internal discussion was therefore not concerned with your firm's ability to deliver an excellent service. Our intention of last Thursday's call was to draw a line in the sand on matters which were instructed and need to be completed by CMS and matters which can be dis-instructed.

On real estate work regarding Vauxhall Square, I would like to clarify that at no point did I say on our call that CMS was not validly instructed on "any" matters. I stated that all instructions to external lawyers must be managed and instructed by our legal department, as you represented that many were issued by Roxane. This is not new inner workings of R&F; as you may recall I informed you and team of this last year as we were struggling to clear certain outstanding invoices.

We are in the process of working out which instructions for you to proceed so will be in touch very soon.

160. In my view, this was not on any tenable view a holding email. Shorn of the paragraph that referred to Mr Cook, it was materially the same email as the draft of 2 November. The most fundamental point is that it repeated a serious allegation of professional misconduct against CMS. It stated that CMS had acted in circumstances in which it had a conflict of interest or significant risk of one. That would amount to a breach (among other things) of the SRA Code of Conduct. It also repeated the suggestion that CMS may be disintructed from work it was not necessary for them to complete. It also sought to correct the account of what the Claimant had said on the call and did so in an undiplomatic, borderline

confrontational, way. In reality, only the final paragraph of the email was about holding the position.

161. On 6 November, in response to this email Mr Newton emailed Ms Tu and Mr Zhai asking why the Claimant had sent it since he thought the matter was on hold. Ms Tu asked him to let her and Mr Zhai deal with it.

162. Ms Tu messaged the Claimant shortly afterward:
NT: Corinne, I said that it is ok to send a holding email, but not to keep on the point of conflict of interest. I am disappointed that you sent the email without telling me that you were going to continue on this line. This is not acceptable.
C: I sent a draft to you all
NT: I clearly said that it is ok to send a holding email as you were pressurising me to respond withou me being able to understand the full picture.
C: I said to you that I needed to clarify things that were being said on the call and the issue of what was instructed.
NT: I told you that only a holding email, that was very clear.
C: I did not give any instructions on what work to be retained by CMS and what is to be terminated; that was what we agreed.
NT: Corinne, I was pressurised by you to agree for you to send a holding email. I wanted more time to be able to assess the situation. I didn't agree with what you have written in that email. You did completely oppoiste as to a holding email by going on the point of conflict of interest. I did ask you not to touch upon on whehter we will or will not do. That is exactly how I wish the email to be - a holding email.

163. Ms Tu and Mr Zhai exchanged some messages about this on WeChat in Mandarin. WeChat has a function whereby it can provide an instant English translation. That function was switched on. The document in the bundle shows the original Mandarin and the WeChat translation. The Claimant is convinced that Ms Tu has manipulated the WeChat translation. Ms Tu was, in my view genuinely, baffled by that suggestion. The Claimant says that a friend of hers re-typed the message in Mandarin and used WeChat to translate it and came up with a different translation. (The Claimant read this out. I thought what she read out was incoherent and the Claimant agreed.) On that basis she believes Ms Tu manipulated the translation and added the word “hounded” to it, a word that also appears in her witness statement. I reject that suggestion. I am at a loss to see any cogent reason why Ms Tu would do this. I accept her evidence that she did not. I also accept her evidence that she felt ‘hounded’ by the Claimant. Certainly the Claimant was chasing her a lot.

164. There is also a third party translation of the Mandarin messages in the bundle. The translation is not identical but it is not all that different either. The essence of the message is that Ms Tu told Mr Zhai that the Claimant had been chasing her (the third party translation says chasing rather than hounding) to send a message and she had authorised a holding message and that the Claimant had completely disregarded the company, the situation and the instructions with the message she had then sent.

165. In the meantime on 5 November 2020, Ms Jiao had been interviewed by Ms Johnston. It is unnecessary to summarise what was said save that the meeting closed with Ms Jiao saying she did not mind working with the Claimant or Mr Khan but that she could not work with Mr Newton. She said he was rude and that she had been disastifed with his work on two occasions. This comment was redacted in the copy initially sent to the Claimant.

166. On 8 November 2020, Ms Tu contacted Ms Johnston, Senior HR Manager for advice. She was not aware that Ms Johnston was already investigating.

167. On 9 November 2020, Ms Tu was interviewed by Ms Johnston. In essence she told her that the Claimant had not been authorised to send anything beyond a holding email to CMS on 6 November 2020 but that she had sent an unauthorised email. She also said that her perception was that the Claimant may have overstepped her mark by accusing CMS without clear evidence and while there were differences of opinion internally.

168. On 11 November 2020, Mr Zhai and Ms Tu exchanged messages on WeChat:

168.1. Mr Zhai said he had spoken to Mr Guan and Mr Guan had said the Claimant's attitude could not be tolerated. Ms Tu could send the Claimant a warning in relation to the CMS matter.
168.2. Ms Tu responded that Ms Johnston was conducting an investigation to see if it was necessary to hold a hearing.

169. Although there are scant details, I accept Mr Zhai's evidence that he had a conversation with Mr Guan along the lines set out above in his WeChat message.

170. A chain of emails between Ms Johnston and CMS came to an end on 12 November 2020. Essentially Ms Johnston asked CMS if they would take part in a fact finding meeting. CMS politely declined. In the final email Ms Johnston apologised that CMS had "*received mixed message from R&F"*. The email was factually true and did not impugn the Claimant.

Formal investigation

171. On 18 November 2020, the Claimant was verbally told that she was under investigation for two incidents: (i) whether she had authority to engage in discussions with CMS on the CMS Conflict Issue and (ii) whether she had internal approval prior to send the email to CMS on 6 November 2020.

172. On 24 November 2020, the Claimant was invited to an investigation hearing with Ms Johnston. The hearing took place on 26 November 2020. The Claimant produced a 7 page chronology stating her case on how events had unfolded, produced a commentary upon the issues and produced and cross-referenced documentation.

173. On 25 November 2020, Ms Tu had a further interview with Ms Johnston. She said that relations with CMS had deteriorated and that CMS perceived that the

Respondent may use the conflict of interest issue to avoid paying them. She thought CMS may be considering terminating work with the Respondent and seeking immediate payment of outstanding invoices. She believed the Claimant's conduct contributed to this.

174. On 30 November 2020, Mr Zhai was interviewed by Ms Johnston:

174.1. He said he had not spoken to Mr Guan about the Claimant working on VS;
174.2. He said that the Claimant worked very hard but not collaboratively. She did not consider other opinions and the wider picture. She was difficult to work with;
174.3. Relations between her and Mr Newton were difficult and he tried to keep the balance between them.

175. On 1 December 2020, Ms Johnston produced her investigation report. In short she considered that the Claimant should be charged with gross misconduct.

Disciplinary stage

176. On 1 December 2020, the Claimant was notified by letter that the matter would proceed to a disciplinary hearing. The charges were expressed as follows:

1) Bringing the company into disrepute: the damage caused by informing CMS that there is likely to be a conflict of interest and separately that they are likely to be dis-instructed due to conflict of interest.

2) Wilfully disobeying reasonable management instruction resulting in breach of trust and confidence - sending the email to CMS when NT requested CT to only send a holding email. WeChat from LW also confirms that Mr Guan does not want CT to send out emails to external parties. HZ also advised not to send any other emails to CMS. Furthermore, going above HZ's head to Mr Guan to get approval for work that conflicts with instructions that HZ has already expressly given.

177. The letter invited the Claimant to a disciplinary hearing on 4 December 2020 and warned that a possible outcome could be termination. It enclosed a pack of documents.

178. The disciplinary hearing went ahead as scheduled, and was chaired by Mr Purefoy. The Claimant was accompanied by a colleague, Mr Tan. The Claimant produced a closely typed 13 page statement setting out her position.

179. I am satisfied that there was a full opportunity at this meeting for the Claimant to state her case and that she in fact did so. Very broadly:

179.1. The Claimant's position on the first charge was combative. She essentially said that she had done all she could to air the conflict issue internally, had authority to do what she did from Mr Guan and that she was professionally obliged to act as she had. Ultimately her position was that it was "absurd" that charge 1 had been brought.

179.2. In relation to charge 2, her position was that the email she had sent was in accordance with Ms Tu's instructions and that she had not gone above Mr Zhai's head to Mr Guan.
179.3. Asked whether the conflict existed when the framework agreement with CMS was entered in April 2019, the Claimant said it did. She said she did not raise the conflict issue at that time. The agreement needed to be signed in order to pay outstanding invoices to CMS. She did not raise concerns about CMS acting before because it was not her business to do so. It became her business when dealing with the October refinancing.
179.4. She did not think it was her place to tell Mr Newman because she did not want to give the impression of criticisng his work and because he could be stroppy and sharp.
179.5. In hindsight she should have spoken to Mr Zhai.

180. After the meeting, Mr Purefoy spoke to Ms Tu to ask her about the conversation she had with the Claimant on 6 November 2020. She said that she had told the Claimant she could send a holding email only.

181. Mr Purefoy set out his thoughts in writing in a memo form. The memo is addressed to R&F UK Senior Management and it contained a recommendation of dismissal.

181.1. In essence he considered that the Claimant had told CMS there was a conflict and that they would be disinstructed from at least certain work in circumstances where she should not have. Principally, that she did so without proper internal discussion including with the other in-house lawyers. The timing was odd because the Claimant had been aware that CMS were working for the Respondent all the while even if she had not been specifically aware that they were working on the April refinancing.
181.2. He did not think whistleblowing protection applied.
181.3. The Claimant had brought the Respondent into disrepute with CMS. She had impugned their professional integrity and implicitly at least threatened to report them to the SRA. Relations with CMS had soured and there was a concern that they may terminate all services and request settlement for all invoices. They had downed tools and it was clear they were unhappy.
181.4. Given that Mr Zhai had told the Claimant that VS was Mr Newton's project and not to interfere, it would have been advisable to get his instruction to do so prior to trying to take over VS legal agreements dealt with by CMS rather than to simply to rely on instructions from Mr Guan;
181.5. The Claimant's email of 6 November 2020 had not been a holding email and was sent in defiance of Ms Tu's instruction.
181.6. The Claimant had not expressed regret or concern. On the contrary, she had dug in.
181.7. There had been a significant erosion of trust between the Claimant and many senior colleagues. It would make ongoing working relationships extremely difficult.
181.8. He concluded thus: "*Therefore, although the sanction is understood to be harsh, in my opinion the only reasonable outcome is to recommend dismissal."*

182. Mr Purefoy passed the memo to Ms Johnston. She told him that he had the ultimate decision making power so a recommendation to management was not needed. His 'recommendation' was in fact the decision. Ms Johnston drafted a letter of dismissal based on his decision and that memo. Mr Purefoy reviewed and approved it.

183. On 11 December 2020, the Claimant was invited to attend a Teams meeting. She was dismissed with immediate effect at the meeting and PILON. She was told that Ms Tu and Mr Zhai had reviewed the paperwork. The Claimant was also given a letter of dismissal. The letter was brief and did not give a great deal of reasoning. The operative paragraphs said this:

> 1. *Unauthorized activities bringing the company into disrepute. As discussed in detail, your conduct, some of it in direct contravention of directions given by your senior managers, has caused significant harm to the Company, in terms of disruption of work progress and damage to client and external party relationships and our operational credibility.*
>
> 2. *Irreparable damage to trust and confidence in your judgment and fidelity: The results caused directly by you acting independently, and your ill-considered actions and disobedience of lawful instructions have resulted in the erosion of trust between both yourself and many senior colleagues with whom you must work with daily. This will make any ongoing working relationship effectively impossible, especially regarding management of your day-to-day activities.*

184. The letter went on to reject the Claimant's case that she was a protected whistleblower albeit it did so, with respect, in a rather garbled way.

185. The Claimant was devasted. She eventually managed to speak to Mr Zhai. The Claimant says that he told her that her dismissal had primarily been driven by Ms Tu. Mr Zhai has no recollection of saying that and does not believe he did. In my view, it is unlikely that he did say that. It would be an odd thing to say to an aggrieved employee who had just been dismissed purportedly pursuant to Mr Purefoy's decision. Equally I do not think the Claimant is completely making this matter up. I think it is more likely a misunderstanding. Ms Tu had been significantly involved in initiating what became a formal process and her evidence was critical to one of the charges. Discussion of that could easily have been misunderstood as a suggestion Ms Tu had driven the dismissal decision itself. I put this down to a misunderstanding.

186. The Claimant then spoke with Ms Tu. Surprisingly, the Claimant made a surreptitious recording of this conversation. Even more surprisingly the Claimant did not disclose the recording until day 3 of this hearing some years later. In essence, there was a very awkward conversation. Ms Tu encouraged the Claimant to use the appeal process if she wished to challenge her dismissal.

187. The Claimant asked whether in effect, the decision to dismiss her had been discussed internally. Ms Tu said that she had seen Mr Purefoy's notes but that

the decision to dismiss was purely Mr Purefoy's. The Claimant did not, on the call, allege that Ms Tu had driven the dismissal.

188. I find that Mr Zhai and Ms Tu did see Mr Purefoy's "notes", i.e., his memo written after the disciplinary hearing.

Appeal

189. On 22 December 2020, the claimant appealed her dismissal. She essentially stood her ground. She also suggested that the whole thing was a misunderstanding. She made various criticisms of the disciplinary procedure. The Claimant said that there should be a three person panel, and that it should include Mr Michael Lee. She also contacted Mr Guan and Mr Lee directly to try to get the latter on the panel.

190. The appeal hearing took place on 2 February 2021 before Dr Yang (alone). It was lengthy meeting. It is not clear exactly when, but by the date of this hearing the Claimant had been sent an unredacted version of the notes of Mr Newton's and Ms Jiao's investigation interviews.

191. The appeal hearing was recorded and I have read the transcript which I will not attempt a general summary of. At one stage Dr Yang asked the Claimant in relation to her disclosures:

> *DY: What is the public interest element?*
>
> *CT: Well the public interest element would, I mean, I, I don't think I, I, I'm not sure this are questions from lawyers and I know what your asking, but that, is very clear public interest element. I'm complying with the law, the legal obligation that I have. Your lawyers should know the answer to that. No me telling you what your lawyers should think. I mean,. I don't know what to say. They should know the answer.*

192. On 2 February 2021, Dr Yang interviewed Mr Newton. After the call Dr Yang asked Mr Newton to send him the documents that showed that the risk of CMS' conflict had been considered, fully discussed internally and a decision made a long time ago. This reflected what Mr Newton had told him.

193. On 4 February 2021, Mr Newton emailed Dr Yang.

193.1. The cover email set out Mr Newton's position on whether CMS had a conflict (he did not think they did and gave a cogent explanation as to why);
193.2. He attached some documents from 2018 which showed that the conflict issue had been considered at that time by him and senior management with outside help from Eversheds.

194. On 11 February 2021, the Claimant made further representations in relation to her appeal including in respect of disclosure. She provided further documentation.

195. On 15 February 2021, Dr Yang emailed Ms Johnston and posed questions to her. She responded in writing to these questions. On the same day he also emailed Mr Purefoy posing questions to him. Mr Purefoy answered those questions on 22 February 2021.

196. On 19 February 2021, Dr Yang emailed Ms Tu and posed questions to her. She responded in writing on 21 February 2021. On the same day he emailed the Claimant and posed questions to her. She responded on 22 February 2021.

197. On 25 February 2021, Dr Yang wrote to the Claimant with the appeal outcome dismissing the appeal giving detailed reasons.

197.1. The Claimant had believed herself to be authorised to disintruct CMS on 29 October 2020 but had gone about it inappropriately and in a way that damaged trust and confidence. The appropriate approach would have included:

197.1.1. Consulting properly internally before making an allegation to CMS;
197.1.2. Asking CMS if it had considered the conflict issue before making an allegations;
197.1.3. Asking whether the situation could be managed through information barriers;

197.2. The Claimant did not have authority to send the email of 6 November 2020. This was not a misunderstanding. This did cause harm;
197.3. The procedural concerns were ill-founded;
197.4. There was in reality no real remorse, regret or insight.

198. Notably he did not uphold Mr Purefoy's finding that the Claimant had dis-instructed CMS without authority.

199. It is also necessary to set out a particular passage from the appeal outcome letter given the way the Claimant puts her case (see below):

> *There are other aspects of your approach which came into focus in the context of the appeal process. While these do not feature in Michael Purefoy's original decision, they reflect and reinforce the concerns he expressed:*
>
> *i. When I asked about your email to the SRA on 22 October, you explained that you were not sure the business would have wanted you to contact a regulator (though you have not explained the basis for this belief). It is concerning that your solution to this was to email the regulator from your personal email address. You owed a duty to the business to be clear and transparent.*
>
> *ii. You have given conflicting accounts of the purpose of your call with CMS on 23 October. Your correspondence to Mr Guan on 23 October made clear that you would be dis-instructing CMS on your call with them that day. In*

subsequent accounts you said that you were not intending to dis-instruct CMS on the call and that this topic was forced upon you. At the appeal hearing you attempted to reconcile these two positions but I do not consider your explanation credible.

iii. I would have also expected you to share the SRA's letter of 10 November with the business, in order for this to feed into the ongoing discussions about how to proceed with CMS. This advice was obtained for R&F (and was requested from the SRA first on 29 October and then on 6 November on the basis that you required it to be able to advise the business on an important governance matter) and yet it was withheld by you until you submitted it as part of the investigation. I do not consider this to be appropriate behaviour from an in-house lawyer, particularly given the importance you yourself placed on the potential conflict of interest.

iv. Finally, you did not wish to disclose Reed Smith's name at the investigation hearing and have declined to explain why this was the case. As a solicitor, you will be aware that R&F is your client. It is therefore entitled to know which lawyers you speak to in the course of your role. Your reluctance to share this information feeds into broader concerns about your actions.

200. To properly understand the significance of these points it is necessary to set them in the context of the appeal outcome letter as a whole. I have done that in my own analysis but the appeal outcome letter is too long to set out in full.

Law

Public interest disclosures

201. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43B to 43H ERA.

202. A qualifying disclosure is defined by section 43B, as follows:

> *(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,*
> *[…]*
> *(d) that the health and safety of any individual has been or is likely to be endangered.*

203. In ***Williams v Michelle Brown AM*****,** UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

'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.'

204. Dealing with the first of those matters, as for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided guidance at [30 – 41].

205. The leading case on the public interest elements of the tests is ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. In ***Chesterton*** the court considered the purpose of the amendments to the ERA that introduced the public interest provisions to the definitioin of a qualifying disclosure.

206. Underhill LJ's judgment contains some important reflections on the purpose of the amendments to the ERA that introduced the public interest aspects to the definition of a PID:

13. It will be noted that the effect of Parkins v Sodexho which it was intended to reverse was repeatedly stated by the Minister as being the according of protection to disclosures made to pursue the worker's "private" or "personal" interest as opposed to the public interest. It was common ground that it was permissible for us to take note of those passages as confirming the mischief at which the amendment of section 43B was directed.

[…]

35… The essence of the "Parkins v Sodexho error" which the 2013 Act was intended to correct was that a worker could take advantage of "whistleblower protection" where the interest involved was personal in character. Such an interest does not change its character simply because it is shared by another person. The advantage of achieving a bright line cannot be obtained by distorting the natural meaning of the statutory language.

207. Underhill LJ made several important points about the nature of the exercise required by s.43B(1):

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to

"the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. *Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.*
30. *Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.*
31. *Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras. 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. This seems to have been essentially the approach taken by the Tribunal at para. 147 of its Reasons.*

208. In ***Dobbie v Felton (t/a Feltons Solicitors)*** **[2021] IRLR 679** the public interest aspects of a qualifying disclosure were considered at length. HHJ Taylor emphasised these points about Underhill LJ's reasoning in *Chesterton*:

> *(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence.*
> *(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation*
> *(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest*
> *(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith*
> *(5) there is not much value in trying to provide any general gloss on the phrase 'in the public interest'. Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression*
> *(6) the statutory criterion of what is 'in the public interest' does not lend itself to absolute rules*
> *(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest*
> *(8) the broad statutory intention of introducing the public interest requirement was that 'workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers'*
> *(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:*
> *i. the numbers in the group whose interests the disclosure served*
> *ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed*
> *iii. the nature of the wrongdoing disclosed*
> *iv. the identity of the alleged wrongdoer*
> *(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest.*

209. HHJ Tayler went on to set out further observations:

> *(1) a matter that is of 'public interest' is not necessarily the same as one that interests the public. As members of the public we are interested in many*

things, such as music or sport; information about which often raises no issue of public interest
(2) while 'the public' will generally be interested in disclosures that are made in the 'public interest', that does not necessarily follow. There may be subjects that most people would rather not know about, that are, nonetheless, matters of public interest
(3) a disclosure could be made in the public interest although the public will never know that the disclosure was made. Most disclosures are made initially to the employer, as the statute encourages. Hopefully, they will be acted on. So, for example, were a nurse to disclose a failure in the proper administration of drugs to a patient, and that disclosure is immediately acted on, with the consequence that he does not feel the need to take the matter any further, that would not prevent the disclosure from having been made in the public interest – the proper care of patients is a matter of obvious public interest
(4) a disclosure could be made in the public interest even if it is about a specific incident without any likelihood of repetition. If the nurse in the example above disclosed a one off error in administration of a drug to a specific patient, the fact that the mistake was unlikely to recur would not necessarily stop the disclosure being made in the public interest because proper patient care will generally be a matter of public interest
(5) while it is correct that as Underhill LJ held there is 'not much value in trying to provide any general gloss on the phrase 'in the public interest' – noting that 'Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression' – that does not mean that it is not to be determined by a principled analysis. This requires consideration of what it is about the particular information disclosed that does, or does not, make the disclosing of it, in the reasonable belief of the worker so doing, 'in the public interest'. The factors suggested by Mr Laddie in Chesterton may often be of assistance. While it certainly will not be an error of law not to refer to those factors specifically, where they have been referred to it will be easier to ascertain how the analysis was conducted. It will always be important that written reasons set out what factors were of importance in the analysis; which may include factors that were not suggested by Mr Laddie in Chesterton. As Underhill LJ held 'The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case'. It follows that if no account is taken of factors that are relevant; or relevant factors are ignored, there may be an error of law
(6) for the disclosure to be a qualifying disclosure it must in the reasonable belief of the employee making the disclosure tend to show one or more of the types of 'wrongdoing' set out in s 43B(a)–(f) ERA. Parliament must have considered that disclosures about these types of 'wrongdoing' will often be about matters of public interest. The importance of understanding the legislative history of the introduction of the requirement for the worker to hold a reasonable belief that the disclosure is 'made in the public interest' is that it explains that the purpose was to exclude only those disclosures about 'wrong doing' in circumstance such as where the making of the disclosure serves 'the private or personal interest of the worker making the disclosure' as opposed to those that 'serve a wider interest'

(7) while the specific legislative intent was to exclude disclosures made that serve the private or personal interest of the worker making the disclosure, that is not the only possible example of disclosures that do not serve a wider interest, and so are not 'made in the public interest'. There might be a disclosure about a matter that is only of private or personal interest to the person to whom the disclosure is made and does not raise anything of 'public interest'
(8) while motivation is not the issue so that a disclosure that is made with no wish to serve the public can still be a qualifying disclosure; the person making the disclosure must hold the reasonable belief that the disclosure is 'made' in the public interest. If the aim of making the disclosure is to damage the public interest, it is hard to see how it could be protected. Were a worker to disclose information to his employer, that demonstrates that it is discharging waste that is damaging the environment, with the aim of assisting in a coverup, or to recommend ways in which more waste could be discharged without being found out; while the disclosure would otherwise be a qualifying disclosure, it is hard to see how the disclosure could be 'made' in the public interest. The fact that a disclosure can be made in 'bad faith' does not alter this analysis. A worker might make public the fact that the employer is discharging waste because he dislikes the MD, and so is acting in bad faith, but nonetheless hold the reasonable belief that making the disclosure is in the public interest because the discharge of waste is likely to be halted. Generally, workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest.

29 *Disclosures about certain subjects are likely to be 'made in the public interest'. This point was made by HHJ Eady QC, as she then was, in Okwu v Rise Community Action (2019) UKEAT/0082/19, when considering a disclosure by a worker who raised 'concerns that the Respondent was acting in breach of the Data Protection Act by failing to provide the Claimant with her own mobile and with secure storage, when she was dealing with sensitive and confidential personal information', at para 47:*

> *'The ET apparently considered that the Claimant was primarily raising those matters as relevant to her assessment of her own performance. However, as is made clear in Chesterton Global, that would not necessarily mean that she did not reasonably believe that her disclosure was in the public interest. Indeed, considering the nature of the interest in question it would be hard to see how it would not – in the Claimant's reasonable belief – be a disclosure made in the public interest, even if (as the ET seems to suggest, see the penultimate sentence of para 31 and the reasoning at page 32) the Claimant also had in mind the impact upon her in terms of her work performance; after all, the public interest need not be her only motivation for making the disclosure (again, see Chesterton Global).' (emphasis added)*

30 *In Simpson Bean LJ, in rejecting an appeal against a decision that a banker primarily concerned with his own commission had not made protected disclosures, distinguished his situation from that of a person who made a disclosure that tended to show malpractice, held at para [63]:*

> *'The present case is a long way from one of a doctor complaining of excessively long working hours. The ET repeatedly found that Mr Simpson's real complaint was about being deprived of the commission which he thought was rightfully his. If they had accepted that the disclosures, or some of them, constituted information which in the actual and reasonable belief of the claimant tended to show malpractice, then the public interest test would no doubt have been quite easily satisfied. But that is not what happened.' (emphasis added)*
>
> ***31** However, the fact that a disclosure is about a subject that could be in the public interest does not necessarily lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: Parsons v Airplus International Ltd (2017) UKEAT/0111/17, [2017] All ER (D) 177 (Oct). It is the belief that the worker held when making the disclosure that must be determined.*

210. On my understanding of Mr Roberts' submissions, in order for a worker to believe that a disclosure is made in the public interest the worker needs to have had the specific thought when making the disclosure "*this disclosure is made in the public interest*".

211. I am sceptical that this can be right. An example to illustrate my scepticism: a nursery worker observes her manager being abusive towards children in the nursery's care. She reports the abuse to HR. When doing so she thinks "*this disclosure is in the interests of protecting the health and safety of children and preventing heinous crime, if I don't make the disclosure this abuse will carry on*". She has no specific thought about "the public interest" it being a concept unfamiliar to her. Surly that matters not. It would be absurd, and totally out of keeping with the legislative history of s.43B and the context of the public interest amendment top it, if this failed to qualify as a protected disclosure simply because the Claimant was not specifically aware of the concept of the 'public interest' and did to specifically turn her mind to that when making the disclosure.

212. I consider that the better view is that it is sufficient that the worker, when making the disclosure, to think "*this disclosure is made in the interest of X*" where X is not specifically "*the public interest*" but is a matter that it is objectively reasonable to consider to be in the public interest. In my example, the Claimant reasonably believed that the disclosure was made in the interests of protecting children from abuse/preventing crime. The disclosure served a wider interest beyond the worker's own interest and one that objectively reasonably had a public interest character. I think that must be sufficient for the disclosure to be a qualifying one.

213. A worker can make a qualifying disclosure even if the content of the disclosure is in fact wrong ***Darnton v University of Surrey*** [2003] I.C.R. 615.

214. Dealing with the fourth and the fifth matters identified in ***Williams*** a number of points need to be made.

214.1. The worker must subjectively hold the belief in question. This was described as a fairly low threshold in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** 2012 IRLR 4 at [61].

214.2. The belief in question must be objectively reasonable. In ***Korashi*** the EAT suggested that this requires "*requires consideration of the personal circumstances facing the relevant person at the time*" and thus that, e.g. in relation to a disclosure about a surgical matter, in assessing what is objectively reasonable it would be important to take into account whether the person making the disclosure was surgeon or a lay person. This approach was cited with approval in ***Phoenix House Ltd v Stockman*** [2017] ICR 84.

215. S.47B(1) ERA provides:

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

216. Care must be taken to establish the ground(s) on which the employer acted as it did. The ground(s) is/are a set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (***Fecitt v NHS Manchester*** [2012] IRLR 64 at [45]).

217. S.48 ERA provides:

> *(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.*
> *[…]*
> *(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

218. It is unlawful for another worker of the employer to subject the Claimant to a detriment during the course of their employment, on the ground that they made a protected disclosure (s.47B(1A) ERA). This may include deciding to dismiss an employee as well as steps prior to dismissal (***Timis v Osipov*** [2019] ICR 655 at [68 and 77]).

Unfair dismissal

219. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

220. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996). It is automatically unfair to dismiss an employee where the reason or principal reason for the dismissal is the making of a protected disclosure (s.103A).

221. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services NHS Trust v Beatt** [2017] ICR 1420). In some circumstances, the net could be cast wider such as where the facts known to, or beliefs held by, the decision-maker have been manipulated by another person (***Royal Mail Ltd v Jhuti*** [2019] UKSC 5).

222. In ***Kong v Gulf International Bank (UK) Limited***, EA-2020-000357-JOJ, HHJ Auerbach said this:

> *First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ [in Jhuti in the CA], which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in Jhuti. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer.*

223. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA. The burden of proof is neutral. Section 98 (4) says:

> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

224. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

225. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider considerations of procedural fairness and of course the severity of the sanction in light of factors such as the offence, the employee's record and mitigation.

226. In ***Strouthos v London Underground Ltd*** [2004] IRLR 636, Pill LJ said *"It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.*"

227. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

228. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

229. The fairness of a disciplinary process and a dismissal should be judged at its conclusion. It is possible for unfairness at an earlier part of the process to be corrected at a later stage of the process, for instance, at the appeal stage. In any event not every aspect of unfairness will make a dismissal unfair overall. See ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

230. By s.207 TULR(C)A the tribunal is required to have regard to *Acas Code of Practice on disciplinary and grievance procedures* in a case of this kind since many of its provisions are relevant. It sets out some well known basic principles of fairness in disciplinary and grievance processes.

Contract

231. When construing a written contract the principles of construction summarised by Lord Neuberger in ***Arnold (Respondent) v Britton*** **[2**015] UKSC 36 at paragraph 15 should be applied. Regard should be had to:

> *(i)…the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

Discussion and conclusions

Did the Claimant make any protected disclosure(s)?

232. There is no doubt that the Claimant made essentially the disclosures of information that are averred at paragraph 1 of the list of issues (see findings of fact).

233. However, they were not qualifying disclosures and thus were not protected disclosures.

When the Claimant made her disclosures did she have a belief that they were in the public interest?

234. It is important to emphasise that I am not asking myself whether I think the disclosures were in the public interest. I am asking whether the Claimant, when she made the disclosures (or any of them), herself believed that they (or any of them) were in the public interest. Ultimately I conclude that she did not.

235. I am sure that the Claimant did not, contemporaneously with the disclosures, have any specific thoughts about whether they were or were not in the public interest - in that she did not think to herself something along the lines of *"this disclosure is in the public interest"*.

235.1. The starting point is the Claimant's witness statement. It is notable that she does not, there, say when she made the disclosures she believed them to be in the public interest. Indeed she does not refer to the expression "public interest" at all. That is in the context of giving a *very* detailed account indeed of events and her thoughts about them. The statement is a closely typed, single-spaced document that is 38 pages long. Such is the detail, in my view, it is a matter that would naturally have come out in her evidence if at the time of making any disclosure she had thought "*this is made in the public interest*". It would naturally have formed part of the narrative. On balance I conclude that it was not a mere oversight that no reference was made to public interest in her statement. Rather it reflected the fact that the Claimant had no contemporaneous (with the disclosures) thoughts about the public interest.

235.2. At the appeal stage the Claimant had the exchange about public interest with Dr Yang, set out above. In my view the Claimant's answer to Dr Yang, shows that even by the appeal stage, long after the disclosures had been made, she really had not thought about "*public interest*" as such. The best she could muster, and only when directly asked, was an assertion that there was a clear public interest element that the Respondent's lawyers should explain. That was an extremely weak answer from which I infer what I have said – that she had not thought about "*public interest*" even by that stage.

235.3. I find it highly implausible that the Claimant would have signed off the 2019 CMS framework agreement if she believed that the conflict of interest she says she perceived with CMS acting for the Respondent was a matter of public interest. I appreciate that the disclosures were made at a different time (before and after the framework agreement sign off) and that in principle thoughts can vary and change. I take that into account but nonetheless find it highly implausible as stated. I say more about the significance of the Framework Agreement below.

235.4. Finally, the Claimant was recalled to give oral evidence on this matter. Of course the oral evidence must be set in the context that by this stage the Respondent had already taken the point that the claimant had failed to give witness evidence that she had believed, when making the disclosures, that they were made in the public interest. Ultimately, I did not find her oral evidence on this matter convincing on the question of whether she believed when making the disclosures that they were made in the public interest (to be clear, I did not find it convincing it all). In my view her answers were more in the way of an argument that the disclosures made were in fact in the public interest than evidence that at the time she made the disclosures she believed that they were made in the public interest (the points are related but distinct).

236. However, on my understanding of the law, my finding that the Claimant did not have the specific thought "*this disclosure is made in the public interest*" when making the disclosures or any of them is not conclusive against her case that she made PIDs. On my understanding of the law, it would be sufficient that she reasonably believed the disclosures were made in a wider interest beyond her own (provided that the wider interest she believed it served was objectively reasonably a public interest). Thus a deeper examination of the Claimant's beliefs when making the disclosures is needed.

237. The Claimant's evidence is that when making the disclosures she believed it was in her employer's interests to do so. She said this numerous times including:

237.1. "*Thinking only about the best interests of the company…*" [paragraph 8 of her statement]
237.2. "*I only ever had the best interests of the company in my mind*" [paragraph 37 of her statement]
237.3. "*I raised the CMS conflict of interest point to protect interests of our company*" [p536]
237.4. In her oral evidence when recalled to give evidence about public interest.

238. It is also essentially her evidence that she believed CMS were in breach of regulatory obligations and that Mr Newton was too, as well as in breach of his duties to his employer.

239. All those matters are interests beyond the Claimant's own. So the first question is, did the Claimant truly have a belief that the disclosures or any of them were made in any of those wider interests when she made the

disclosure(s)? This is a difficult question because there are factors going both ways.

240. In my view the strongest factors in the Claimant's favour are these:

240.1. Objectively speaking, I think there was a basis for concern that CMS may have been acting where they had a conflict of interest, particularly in relation to ONE. On the face of it, I think that tends to support the Claimant's case that she subjectively thought CMS had a conflict and believed that the disclosures were made in a wider interest beyond her own when she made them.

240.2. The Claimant went to the trouble of taking advice from the SRA and from third party solicitors. On the face of it that might also tend to support her case that she genuinely believed CMS had a conflict and that disclosing that served a wider interest beyond her own.

240.3. The Claimant raised the conflict issue multiple times, with multiple different people in a seemingly determined way.

241. However, on the other hand, there are many factors going the other way.

242. In my view the weightiest factor in all of the evidence in this case is that the Claimant signed off the CMS Framework Agreement at a time that she knew all of the facts that might give rise to a concern about conflict, the employer's interests, CMS' regulatory obligations and Mr Newton's regulatory obligations/obligations to his employer. I am ultimately unable to reconcile this with the Claimant's case that she did, when making the disclosures, have a belief that they were made in a wider interest beyond her own.

243. Signing off the CMS Framework Agreement was the Claimant carrying out an important act of corporate governance in the discharge of her professional/regulatory duties to her employer. This was a moment when any solicitor, who genuinely did have any concern about conflict, regulatory obligation, breach of duties owed to the employer or the like in relation to working with the law firm that was the subject of the proposed agreement, would have raised and dealt with the concern. Such a solicitor certainly would not have approved the Framework Agreement given what it was for: the provision of further legal services of many kinds on the Respondent's construction projects including VS and QS and ONE.

244. By signing the agreement the Claimant was giving her professional opinion that it was, as a matter of principle, all good and clear for the Respondent and its group companies to instruct CMS including on ONE and VS. This in my view provides the deepest and most reliable insight into the Claimant's mental processes when making the disclosures. In reality she did not in truth perceive any problem with CMS acting for the Respondent and its group companies in the work described in the Framework Agreement.

245. I note again that I fully appreciate that beliefs can change over time and that conceptually it is possible that that is what happened here between signing the Framework Agreement and the disclosures made on either side of it. However, I

do not think it is in fact what happened and indeed it is not the Claimant's case that that is what happened. She sought to explain her authorisation of the framework agreement by reference to paying unpaid invoices. An explanation which I rejected.

246. The Claimant also suggested that until she was asked to deal with the October refinancing it was not a matter for her whether the business used CMS or not. She just went about her work. However, I do not accept that *at all*. It was very directly a matter for her when she was considering the Framework Agreement and whether to sign it off for the business. Her professional judgment was critical to that task as were her professional duties as a solicitor owed to her employer to whom she provided legal services. That was undoubtedly obvious to her at the time of signing the Framework Agreement.

247. A further weighty factor is the way the Claimant represented and deployed the SRA advice. I have found that she transposed guarded advice from the SRA that there were matters relating to conflict/disclosure/confidentiality that needed careful thought to (now paraphrasing) *'the SRA say CMS are conflicted'* when relaying the SRA advice to the employer. I find it implausible that someone who believed wider interests beyond their own were in play would have done this.

248. Likewise a solicitor who thought wider interests were in play would have analysed the reasoning behind any third party solicitor advice rather than simply deploying it in the way the Claimant did. She did not analyse the reasoning behind the third party solicitor advice but simply deployed it to try and prove 'I am right' (i.e., in furtherance of her own interests which I explain more below).

249. A further important part of the analysis here is to pose the question, '*if the Claimant didn't believe that the disclosures served wider interests (e.g. the employer's interests and the interests in regulatory / legal duties being complied with and the like) why would she have made them*?' The answer, I find, is that the Claimant believed it would be in her own interests to do so. The discloses tended to maximise her apparent skills as a lawyer for the business and to undermine Mr Newton's. They enabled her to present a case to the business that she had spotted a threat to it that Mr Newton had not. They created opportunities to deal directly with senior management and raise ostensibly important and strategic matters. They also created opportunity, which the Claimant took, to increase the scope of her role in circumstances in which there was something of an ongoing struggle between her and Mr Newton. They created opportunity to go above him and make decisions about his work, like whether he could instruct the solicitors he wanted to. In short, they positioned her as the more senior, more skilful lawyer.

250. Overall, and on balance, I do not accept that the Claimant believed that any of the disclosures were made in a wider interest beyond her own interests when she made them. I thus find that she did not have a believe that the disclosures were made in the public interest even taking the very broad flexible approach to the public interest that I have.

251. I wish to make clear that in coming this conclusion I have been alive and sensitive to the distinction between the Claimant's belief or otherwise in the public interest/wider interest and her motivation for making the disclosures. I appreciate that they are distinct matters. I appreciate that it is perfectly possible to have a belief that something is in the public interest and yet for that to form little or no part of the motivation for raising it. I have also been alive and sensitive to the fact that it is also perfectly possible to make a disclosure in bad faith and yet to have a reasonable belief it is in the public interest. Even with those things in mind for the reasons I have given my conclusion is that the Claimant did not believe that the disclosures or any of them were made in the public interest.

252. It follows that the Claimant did not make any PID.

Did the Claimant believe that the disclosures tended to show the breach of a legal obligation?

253. For the same reasons I found that the Claimant did not believe that the disclosures were made in the public interest I find that she did not in fact really believe that they tended to show the breach of a legal obligation when she made the disclosures. In reality she was simply being opportunistic for her own self-interested purposes.

Conclusion on PID detriment and s.103A unfair dismissal

254. Since the Claimant did not make any PID these complaints must fail.

Ordinary unfair dismissal

Reason for dismissal

255. This is not a case in which it is necessary to impute to the employer the motivation and knowledge of anyone other than Mr Purefoy and Dr Yang in assessing the reason for the dismissal.

255.1. In my view this is not a case in which anyone was seeking to procure the Claimant's dismissal.

255.1.1. Of particular importance, I do not think Mr Zhai or Ms Tu, who were in the Claimant's line management chain, were doing so. Mr Zhai's WeChat message referenced above evidences his thinking: he thought an appropriate course may be a warning for the Claimant. Ms Tu's oral evidence was that it had never been her intention for the Claimant to be dismissed but that she had to respect the process and procedure that led to Mr Purefoy dismissing the Claimant. I accept that evidence which I found credible.

255.1.2. In his investigation interview Mr Newton was asked what resolution he sought. Essentially he wanted the Claimant to stop using "underhand methods" to take his work and for her to be properly managed. Although Mr Newton candidly said during his evidence that he

was not unhappy with the Claimant's dismissal, he did not seek to procure it. He simply gave account as saw it to investigator. The resolution he sought was captured, accurately, in the notes of his interview and it was not dismissal.

255.1.3. Likewise, Ms Eddings was not seeking to procure the Claimant's dismissal. She was unhappy with the way the Claimant had conducted herself, and she simply gave a candid account of that at the investigation hearing she attended.

255.2. This was not a case in which any hidden motivation was in play. For instance, everyone who gave evidence that was unhelpful to the Claimant in the disciplinary process was entirely up front and made plain that they were upset with the way the Claimant had handled matters with CMS. For that reason and more generally, the decision makers were not manipulated.

255.3. Further, the decision makers were not "peculiarly dependent" on any of the named respondents. The ostensible issues were indeed the real issues and the Claimant had a full opportunity herself to address them in the course of the internal process.

256. I am satisfied that the decision to dismiss was Mr Purefoy's decision rather than anyone else's. That was his evidence which I accept, not least because I did not think there was any cogent evidence to the contrary. The height of it was (a) the suggestion that Mr Zhai said the dismissal was driven by Ms Tu - but in my view that was a misunderstanding (see findings of fact) and (b) that Mr Purefoy produced a memo which was for senior management recommending dismissal. However, (see findings of fact) at that stage Mr Purefoy did not appreciate that he had the power to make the decision. He was corrected on that by Ms Johnston and his recommendation stood as his decision.

257. At the appeal stage the decision was Dr Yang's alone and there is no cogent evidence to the contrary. He plainly carried out a very detailed appeal process following which he reached his conclusions.

258. In terms of the reasons for the dismissal. The statutory reason is conduct. I find that Mr Purefoy believed that:

258.1. The Claimant had disobeyed management instructions by disinstructing CMS on 29 October 2020;
258.2. The claimant had disobeyed management instructions by sending the email to CMS of 6 November 2020;
258.3. These matters brought the Respondent into disrepute with CMS, harmed the business and led to a breakdown of trust and confidence with colleagues.

259. This is supported by his contemporaneous memo and then his correspondence with Dr Yang as well as his oral evidence to the tribunal.

260. At the appeal stage Dr Yang reached like findings but with one particularly important difference. He disagreed with the finding that the Clamant had disobeyed management instructions by disinstructing CMS. He found that she was nonetheless seriously culpable in that regard because of the way she had gone about disinstructing CMS. There had been a failure to properly consult internally prior to the disinstruction and a failure to make proper inquiries of CMS before doing so. Although he was not a witness, Dr Yang's decision and reasoning was very well evidenced in his written decision.

261. I draw no adverse inference from Dr Yang's failure to give evidence. I accept that the Respondent asked him to give evidence but he, now a former employee, declined to do so since he has moved on. I also accept that the Claimant contacted him and told him about this case and that he wished her well. That was simple politeness. Overall, there is no real basis to draw an adverse inference or otherwise conclude that Dr Yang's decision/reasons were other than as stated in the appeal outcome letter. The reasons given were detailed, plausible and indeed cogent.

Reasonable belief based on reasonable investigation

262. In relation to the 29 October 2020 call with CMS, there was a reasonable basis for Mr Purefoy to take the view that factually the Claimant had effectively told CMS to down tools on all matters. This is what was meant in this case by "dis-instructed" (though it may not have been strictly the most apt word to use). That is what CMS said in a contemporaneous email and that was broadly consistent with what the Claimant had said in her internal emails of 23 and 29 October 2020.

263. This conclusion was reached based on a reasonable investigation: the material internal people had been interviewed, the relevant documents were gathered and considered and effort had been made to speak to CMS (though they understandably declined to be interviewed).

264. Mr Purefoy's belief that the Claimant had moved to disinstruct CMS without authority on 29 October 2020 was not sustainable given the Claimant's conversations with Mr Guan (see findings of fact) and to reach that conclusion was unfair. However, Mr Purefoy's belief on that matter was not sustained in the appeal and, in my judgment, the unfairness was thereby corrected. That is just the sort of matter that an appeal is there for.

265. Dr Yang concluded that the Claimant had gone about the process of taking steps to disinstruct CMS in an unacceptable way. In turn, *that* belief was a reasonable belief based on a reasonable investigation.

265.1. Although the issue of whether or not CMS had a conflict was discussed between the Claimant, Mr Newton and Mr Zhai in early October, there was no resolution that CMS would be disinstructed. Subsequently Mr Guan gave the Claimant authority to deal with that matter in accordance with her professional judgment. However, that did not mean she had *carte blanche* to approach the matter however she liked however unreasonably.

265.2. The Claimant ultimately had the calls with CMS on 23 and then 29 October in which she effectively told CMS they had committed serious professional misconduct in breach of the SRA Code of Practice, were conflicted on VS and to down tools. In the meantime, despite all the sensitivity she had said almost nothing to Mr Zhai and had not further discussed the matter with Mr Newton despite him being the solicitor instructing CMS and despite them working on his projects.

265.3. Given that CMS had been acting for the Respondent and group companies for about 2 years since the Multiplex dispute was referred for adjudication, the only thing that was urgent was to decide whether or not to instruct them on the October financing. Despite that the Claimant told them to effectively down tools on everything while Mr Newton was away on holiday. Even if the Claimant had the authority to make the decision, to make it without further reference to the person instructing CMS when the matter was not urgent and could have awaited Mr Newton's return, was truly astonishing. His direct input was sorely, and very obviously, needed.

265.4. Clearly, any conversation with Mr Newton about this matter would have been difficult. However, the Claimant had gone far out of her way to take charge of this matter and one consequence of doing so was that the only sensible way of proceeding included having further conversations with Mr Newton about CMS before deciding what to do. Likewise given the involvement that Mr Zhai had had in managing the situation it was discourteous and disrespectful to him to cut him out of the loop which is effectively what the Claimant did in a critical part of the chronology. Being told by Mr Guan that she had the authority to deal with the matter and to use her professional judgment does not alter that analysis.

265.5. It is true, and should be acknowledged, that in other parts of the chronology the Claimant consulted with colleagues (e.g. in the early part with Mr Guan, Ms Jiao and Mr O'Driscoll and in the later part e.g. when sending the draft response to CMS of 2 November 2020 with a very wide range of people including Mr Newton and Mr Khan). That, however, is no answer to what happened in the period of the chronology described above.

266. In relation to the email of 6 November 2020 the analysis is straightforward. Quite simply the investigation showed that the Claimant had been instructed to only send a holding email. However, the email she sent was not a holding email on any remotely reasonable view. It was an outright defiance of that entirely reasonable instruction. The Claimant purported that this was a misunderstanding between her and Ms Tu. However, the Respondent was entitled to and did reject that analysis of what had happened (which I also found wholly implausible and untenable). The email she sent was obviously not a holding email and the circumstances were such that it was reasonably concluded that she simply went ahead with sending it because it is what she wanted to do despite the instruction.

267. This matter was properly investigated. Evidence was taken from both the Claimant and Ms Tu specifically on the matter and wider evidence was taken and considered on the general factual background.

268. There was also a reasonable belief based on a reasonable investigation to conclude that harm including reputational harm had been suffered:

268.1. CMS plainly thought ill of the Respondent. They considered that the matter had been handled extremely poorly, that they were the subject of unfounded allegations made with such bizarre timing and mixed with references to them not being instructed through the right channels, that an attempt was being made to avoid paying their fees. So much was plain from their emails.

268.2. CMS responded in an unsurprising fashion: they took a tougher line on their fees which in turn made matters more difficult for the Respondent and relations seriously soured.

269. The particulars of claim state "*A frank lawyer-to-lawyer discussion about potential conflicts of interest in these circumstances is not something which could bring the First Respondent into disrepute."* That is not a fair description of the Claimant's discussions with CMS. The Claimant did not invite a discussion with CMS about potential conflict, rather she asserted in an unqualified, undiplomatic and ill-thought through way that they had a conflict. She also did so with bizarre timing (2 years after the dispute with Multiplex had been referred for adjudication with CMS providing legal services to the Respondent all the while interim) and without properly involving Mr Newton who instructed CMS.

270. It was also reasonable to conclude that there was irreparable damage to trust and confidence in the Claimant's judgment and that the Claimant's relations with her colleagues, Mr Zhai, Ms Tu, Mr Newton and Ms Eddings in particular, had seriously been eroded (that being readily apparent from what they said in interview). Although it is true that these were the Claimant's first offences, a very significant factor here was her response to them. The decision makers took the view that there was a real lack of remorse or insight from the Claimant even after the event. She essentially did not think she had done anything really wrong and they therefore lacked any confidence that her conduct would improve going forwards.

271. In my view there was an entirely reasonable basis to consider that there was a lack of remorse, regret or insight on the Claimant's part. There was no more than the occasional hint of anything along those lines and essentially the Claimant did not think she had done anything significantly wrong. She regretted the consequences it had visited on her of course.

272. I may not myself have concluded that working relationships were likely to be "effectively impossible" – I might have been more optimistic. However, I must not substitute my own view and I think Mr Purefoy's view, and later Dr Yang's view, were within the band of reasonable responses in light of the nature of the misconduct and in light of the lack of regret, insight and remorse when challenged upon it.

Use of the word 'fidelity' in dismissal letter.

273. The letter said "*Irreparable damage to trust and confidence in your judgment and fidelity*". The use of the word fidelity is indeed odd. This is not a case in which a breach of the duty of fidelity as understood in employment /contract law (e.g., working for a competitor contrary to the employer's interests) is at all apposite.

274. I asked Mr Purefoy what he meant by the use of this word. His evidence was that he had meant that the Claimant had, essentially, given a partial account of matters in the disciplinary process. I do not think that 'fidelity' is an accurate choice of words to capture that but I do accept that is what was meant.

275. Ultimately, my conclusion is that the use of the word 'fidelity' is an ill-chosen makeweight in the dismissal letter. Mr Purefoy did not mean to suggest that the Claimant had been acting in competition with the Respondent or anything of that nature. The word should not have featured in the letter of dismissal but that it did does not begin to render the dismissal unfair.

Specific challenges to fairness the Claimant has made to the fairness of the dismissal

276. The list of issues raise a significant number of challenges to the fairness of the dismissal which I will consider in turn. The first, at paragraph 10(a) I have already dealt with in my analysis above. I now deal with the remainder at paragraph 10(b) and following.

Rushed, pre-determined and not conducted in good faith

277. I agree with the Claimant that the timescales of the investigation, disciplinary process and the dismissal were very short. However, they did not in fact generate unfairness. They did put the Claimant under pressure to work quickly but she did so and she mastered her defence and martialled all the material she needed to within the time she had. Likewise a reasonable investigation more generally was completed within the short timescales.

278. I do not accept that the outcome was pre-determined nor that there was a lack of good faith. I repeat my analysis above of the reasons for the dismissal and the basis of them.

Investigation partisan

279. I do not accept that the investigation was partisan. Ms Johnston carried out a reasonable investigation. The Claimant had a fair opportunity to state her case. Ms Johnston's email to CMS of 12 November 2020 was benign and not indicative of bias. The apology offered to CMS was not one that impugned the Claimant in any material way. It was an apology for mixed messages in respect of the business' instructions to CMS. There had undeniably been mixed messages.

Wider allegations without opportunity to respond and redactions

280. It is true that the investigation interviews strayed beyond the matters strictly under investigation and delved into other matters. Some of those interviewed did make negative comments about the Claimant. The Claimant was able to respond to these since she was provided with the investigation interview notes (subject to some redactions which I deal with below).

281. It would have been better if the interviews had not strayed beyond the key issues. However, I do not accept that this actually generated unfairness. The Claimant was not disciplined in respect of such matters and the decision makers focussed on relevant evidence. She was also able to respond. It is important also not to be too pernickety in picking apart an investigation. There is a fine line between a witness giving background information to an investigator and a witness raising unrelated allegations. The line is not always easy to draw. Ultimately, the more important thing is what the decision makers do with the investigation materials and what they decide. The decision makers here focussed on the relevant evidence and my analysis of what they decided is above and below.

282. Mr Newton's and Ms Jiao's interview notes were redacted when first provided to the Claimant and she did not receive unredacted versions until the appeal stage. However, she saw them then and had an opportunity to respond and did so. If there was any unfairness originally (and I do not think the matters redacted were sufficiently material/important for that to be so), this was corrected.

283. I also do not think that the redactions are indicative of Ms Johnston being partisan. The redactions related to tangential matters at best and were a mixture of things that were helpful and unhelpful to the Claimant.

Basis of dismissal unclear

284. The Claimant submits that the basis of her dismissal was unclear until Mr Purefoy's reasons were explained in the appeal outcome letter. She says this meant she did not have a fair opportunity to challenge it.

285. I accept that the dismissal letter did not give detailed reasons, but I do not accept that this meant the Claimant was unable to properly challenge her dismissal. The basis of her dismissal was sufficiently clear and the incredibly detailed appeal that she made in fact addressed, among many other things, the matters that caused Mr Purefoy to dismiss her. In reality, the decision to dismiss was thoroughly reconsidered at the appeal stage both as a result of the points the Claimant made in her appeal and Dr Yang's independent thought about, and inquiries into, the decision to dismiss.

Difference between disciplinary charges and reasons for dismissal

286. I do not agree that there is a material disparity between the disciplinary charges and the bases of the decision to dismiss/dismiss the appeal. The misconduct found at the disciplinary and appeal stages is, simply, covered by the

disciplinary charges. Naturally differences of emphasis and analysis arise over time and between decision makers. However, the Claimant always understood the essence of what she was impugned for and had a full and fair opportunity to mount a defence. And she did so.

287. In any event, I also note that this is ***not*** a case where something of a different order/magnitude to that which was charged became the reason for dismissal (e.g. in *Strouthos* dishonesty was found but had not been charged – there is no parallel here).

Criticism of the Claimant for not involving Mr Newton more extensively

288. The Claimant was indeed criticised for this but that was not unfair/unreasonable. The Claimant's point is that she should not have been expected as a whistleblower to speak to the person she was blowing the whistle on. I do not think that is a good point.

289. The Claimant was not a whistleblower in the sense of someone that had made a PID but the point merits further consideration in any event.

290. The disclosures the Claimant made had very little reference to Mr Newton. She said in disclosures (c) and (d) that he had been aware of the dispute with Multiplex. That is true, but so had everyone else including her. And she had signed off the Framework Agreement with CMS. Mr Newton had then continued to instruct CMS pursuant to an agreement she had signed off in relation to work that was covered by that agreement. It is very odd to suggest, then, that Mr Newton was the wrongdoer; that she was not and that she could not reasonably be expected to speak to him about the instruction of CMS.

291. In any event, the fact of the matter is that the Claimant took it upon herself, indeed went a long way out of her way, to take control of the issue. She went directly to the Respondent's chairman in order to do so. Having done that, she could not reasonably avoid speaking to Mr Newton about the matter since he was a, if not the, key person who's input was needed for her to properly manage the situation. He was the one instructing CMS and the projects they were instructed on were his. Mr Newton would in all probability have been spikey when she spoke to him as he had been before. But by dint of taking control of the issue that is exactly what was required and it was entirely fair to criticise the Claimant for not doing so more to speak to Mr Newton.

Double-counting of 6 November email

292. This point is hard to follow. The email of 6 November was relevant in more than one respect. It was relevant because it was disobedience of a reasonable management instruction. It was also relevant because it further harmed the relationship with CMS and, to a material extent, the Respondent's reputation with CMS. It was not unreasonable to have regard to the email at more than one juncture since it was relevant at more than one juncture. To the extent that it is suggested that undue weight was placed on the email in assessing the sanction, I reject that. The email was a very serious matter that properly weighed heavily. It

was relevant that it both amounted to the defiance of a reasonable management instruction and that it harmed the Respondent's relationship/reputation with CMS.

Ms Tu driving the dismissal

293. I have found that the Claimant was not told that Ms Tu drove the dismissal and that this and was based on a misunderstanding. More importantly whatever the Claimant was told, my finding is that Ms Tu did not drive the dismissal in any meaningful/untoward sense. She did contact Ms Johnston about the Claimant's email of 6 November and did give evidence about it in the investigation. She did not however go beyond that and try to influence the outcome of the process, for instance by leaning on Mr Purefoy to dismiss.

Dr Yang reversing elements of reason for dismissal and impact on sanction

294. As noted Dr Yang did not uphold all aspects of Mr Purefoy's reasons for dismissal. However, that increased rather than decreased the fairness of the dismissal. I do not accept that he failed to appreciate that the difference in his reasoning had a bearing on the sanction. I see no warrant for that. On the contrary it is clear that Dr Yang gave careful thought to what the correct sanction should be in light of his findings and reasoning.

Additional irrelevant matters referenced in appeal outcome letter

295. The appeal outcome letter does refer to four matters that were not referred to in Mr Purefoy's decision. However, they were all matters that had been ventilated at the appeal stage and the Claimant's evidence taken. Dr Yang simply said that these matters reflected and reinforced concerns Mr Purefoy had expressed. I do not think that a fair reading of the letter suggests that these matters had become the reason or part of the reason for dismissal. Rather, Dr Yang had taken the view that they corroborated the correctness of the dismissal. I do not accept that fairness required Dr Yang to put fresh charges to the Claimant or specifically put the Claimant on notice that he was troubled by those matters before he could fairly rely on matters such as these as corroborating the correctness of the decision to dismiss. That would be to impose too high a standard.

296. I also reject the submission that these matters were irrelevant. They were not. they were Dr Yang's analysis of some of the granular factual details of the matters under investigation. It was open to Dr Yang to attach some significance to them in the way that he did.

Sanction

297. In my view, the sanction of dismissal was on the harsh side but it was in the band of reasonable responses.

298. It is true that the Claimant had a clean disciplinary record so these were first offences. However, in my view they were serious offences that included direct disobedience of a reasonable management instruction on a business critical

matter – the relationship with a very important supplier of services to the business. Those matters combined with a further key factor.

299. The Claimant showed very little insight or remorse indeed. By and large she dug in and denied any real wrongdoing. That was the decision-makers' analysis of the Claimant's evidence/position through the disciplinary/appeal process and in my view it was well open to them.

300. It is true that there was the occasional emollient sentence here and there and that the Claimant was willing to mediate. However, on any reasonable overall assessment of her evidence and position in the investigation/disciplinary/appeal process, she made few concessions and quite simply did not appear to be sorry or have any real insight.

301. I also note for completeness that I accept that alternatives to dismissal, including a final warning, were considered but rejected as inadequate prior to deciding to dismiss. This was down to factors already discussed, essentially, the nature of the misconduct, the lack of insight/remorse/accountability in respect of it and the correlative lack of confidence in the Claimant going forwards.

Payment on termination

302. The Claimant made money claims alleging breach of contract and/or unauthorised deduction from wages. The Particulars of Claim state the claim in a very vague way. Her schedule of loss is not at all easy to follow. In her witness statement she dealt with these claims. The Claimant did not say anything at all about these claims in her closing submissions. I do my best to understand these claims and deal with them justly.

303. One of the claims is for pay in lieu of accrued holiday upon termination. The Respondent conceded that claim in closing submissions essentially through pragmatism after I pointed out just how many and how complex the legal issues that needed to be resolved were relative to the very small claim. It also conceded the pension contributions claimed upon them. I was grateful for the concessions, they were helpful and sensible. I have awarded the sums claimed.

304. The remaining claims so far as I can understand them are for what the Claimant contends to be the balance of her notice pay. I note that the Respondent defends these claims but *not* on the basis that it was entitled to dismiss the Claimant without notice. It does not make that submission.

305. In essence the Claimant contends that her notice pay was miscalculated in two respects:

305.1. She was entitled to a monthly allowance of £510 as an implied term of her contract;

305.2. She was entitled to 13 payments per annum of £6,200. Both the 12th and 13th payments were paid in December. Although she had been paid those payments in December 2020, her pay in lieu of notice should

have, but did not, include 1/12 of the 13th payment that would have been payable in 2021 had her employment continued.

306. There is no basis upon which I could find there was an implied term the Claimant was entitled to a monthly allowance of £510. No basis has been put forward or explained. Indeed the monthly allowance itself has not been explained in evidence.

307. In any event, even if the Claimant generally had such an entitlement, the contract of employment provides that the Respondent is entitled to make a payment of "salary" in lieu of notice. The contract treats salary and other remuneration differently and the reference to salary in clause 14.2 in my view properly construed means just that. Salary not other forms of remuneration such as an allowance.

308. The other element of this claim is much more difficult. The contract says that the Claimant is entitled to one month's notice (clause 14.1) and that the company can pay salary in lieu of notice (clause 14.2.) Clause 14.2 is no more specific than that.

309. The term stating the Claimant's entitlement to salary is drafted in a clunky way:

> *Salary: You will be entitled to a basic salary of £6,200 (SIX THOUSAND, TWO HUNDRED POUNDS STERLING) per month and a basic salary of 13 months within every 12-month period will be paid.*

310. I do not think there is any easy answer to the question of whether the Claimant's entitlement was to £6,200 or £6,716.67 [i.e., £6,200 + (1/12 x £6,200).]. Obviously it is a question of construing the contract; it's just that that is difficult in this instance.

311. Mr Roberts submits the Claimant was entitled only to £6,200 because if she had continued to be employed for a further month that is what she would have been paid. That may be factually true but if so the Claimant may nonetheless have made a like claim if her employment had ended on notice part way through the year – she may still have claimed entitlement to a pro-rated element of the 13th month payment. So I do not see this submission as an answer to the conundrum.

312. Ultimately, I take the view that the Claimant was entitled to £6,716.67. It is very common for contracts of employment to make elements of pay contingent upon employment at a particular time. This contract does not say or imply that in order to be entitled to 13 months payment within every 12 month period the Claimant needed to remain employed as at December when the 13 month payment was in practice actually made. It could easily have said that if that is what was intended. It did not. In my view, properly construed, the meaning of the contract was this:

312.1. The Claimant had an annual salary of £6,200 x 13 = £80,600;

312.2. The Claimant was entitled to be paid £6,200 of that per month;
312.3. The Claimant was entitled to a further £6,200 per annum. There was no term governing when this would be paid, save that it fell to be paid within the 12 month period to which it related;
312.4. In the event of the contract terminating part way through the 12 month period the entitlement to the additional £6,200 was pro-rated to the amount of the year that had passed.

313. A further or alternative analysis that leads to the same result is as follows:

313.1. The Claimant was entitled to the following pay annually: £6,200 x 13 = £80,600.
313.2. The provisions of s.2 Apportionment Act 1890 in respect of accrual apply since the contract does not provide to the contrary. A month's salary is therefore 1/12 of £6,200 x 13 = £80,600. Thus, £6,716.67.

314. I award the Claimant £516.67.

315. The contract provided for pension contributions to be paid upon salary (though not other elements of pay). Pension contributions were indeed made on the salary element of PILON but that was under calculated by £516.67. Thus pension contributions are payable on top at the rate of 6%. Thus I award a further £31.00.

_____

Employment Judge Dyal

_____

Date 27 October 2023