# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms L Arafat**

**Respondent:** **Strike Limited**

**Heard at:** **Leeds**
**On:** **29 January – 2 February and (deliberations only) 6 February 2024**

**Before:** **Employment Judge Maidment**
**Members:** **Ms H Brown**
**Mr K Lannaman**

**Representation**
**Claimant:** **In person**
**Respondent:** **Miss L Price, Counsel**

# RESERVED JUDGMENT

1. The claimant's complaint of automatic unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 fails and is dismissed.

2. The claimant's complaints of pregnancy and sex discrimination fail and are dismissed.

3. The claimant's complaint seeking damages for breach of contract fails and is dismissed.

# REASONS

**Issues**

1. The claimant's complaints were identified at a preliminary hearing which took place on 26 September and 2 November 2023. Claims for a protective award and an unauthorised deduction from wages were struck out. The continuance of claims of race discrimination, disability discrimination, for holiday pay and some of the treatment alleged to be pregnancy/sex discrimination were made conditional on the payment by the claimant of

deposits. Those deposits were not paid and it was since confirmed that those claims stood as also dismissed.

2. The claims, therefore, which remain to be determined are of automatic unfair dismissal in respect of which the claimant relied on what were said to be protected qualifying disclosures made in an email at 09:57 on 6 October, at 09:24 on 7 October and 18:13 on 7 October 2022. The claimant did not have sufficient service to bring a claim of ordinary unfair dismissal.

3. The breach of contract claim is dependent on the claimant being entitled to one month's notice of termination rather than the 1 week applied by the respondent.

4. Two distinct complaints of pregnancy discrimination remain. The first unfavourable treatment is said to arise in an email of 10 October 2022 from Ms Willsmore sending a congratulatory message and referring to a risk assessment "as a goad". The second is in respect of the claimant being dismissed by letter of 7 December 2022 and how that affected her health. In the alternative, those complaints are brought as less favourable treatment because of sex.

5. The respondent is also maintaining that the claimant's complaints were out of time as they were reliant on a second period of ACAS early conciliation extending time. The tribunal was not clear that this was a straightforward issue, in circumstances where, at the time the first period of early conciliation, the claimant was not aware of the respondent's decision to terminate her employment. It was arguable therefore that any 'relevant matter' conciliated upon during the first period of early conciliation could not encompass a future dismissal in contrast to cases of constructive dismissal or where notice of termination had already been given during the first period of early conciliation. In such circumstances, the tribunal determined to hear all evidence on the substantive claims and consider any time issues in its decision-making, if then relevant.

**Evidence**

6. The tribunal heard firstly from the claimant and then from Jamie Kozak, her husband, who had previously worked at the respondent as a negotiator. On behalf of the respondent, the tribunal heard firstly from Taylor Oliver, previously a negotiations manager, Jack Malnick, the respondent's former operations director, Sam Cook, previously a negotiations manager, Marianne (Mel) Willsmore, former people director and Mr Dominic Mellonie, people director from 1 November 2022. Mr Malnick and Ms Willsmore gave their evidence remotely through a CVP video link. The respondent also relied on a written witness statement provided by Natasha Pilkington, negotiator, and Sam Mitchell, chief executive, the later of which was submitted during the course of the hearing. The tribunal accepted those written statements as evidence but with the caveat that only much reduced weight could be given to the evidence of individuals who were not present to be cross-examined.

7. Much of the evidence before the tribunal was not directly relevant to the issues it had to determine, partly as a result of statements having been prepared at a time when the claimant's complaints remained wider than those ultimately for the tribunal's determination. Some of the evidence was

largely contextual. Other evidence was said to go to credibility. The tribunal made it clear during the course of proceedings that there were a number of matters raised upon which it would not be making factual findings. Some of those matters are nevertheless referred to below, but by no means all of them. The tribunal has made its decision against and with proper consideration of the totality of the evidence before it.

8. It is also of note that the respondent had come to the tribunal expecting to have to explain a decision to dismiss the claimant taken by Mr Mellonie in circumstances where the claimant was saying that the reason or part of the reason for his decision was because of the claimant's protected disclosures and/or her being pregnant. Before the tribunal, the claimant has made it clear that she does not dispute Mr Mellonie's witness statement evidence where he says that he was unaware of the purported protected disclosures or that the claimant was pregnant. Her case relied on Ms Willsmore having engineered a situation whereby Mr Mellonie dismissed the claimant because of the protected disclosures. For the avoidance of doubt, the claimant clarified that she was not saying that Ms Willsmore had done so at the behest of Mr Mitchell (or anyone else).

9. The tribunal had before it an agreed bundle of documents numbering some 2597 pages. The claimant confirmed at the outset that she was not asking the tribunal to view any video or listen to any audio recordings referred to in the bundle. Further documentation was added and accepted in evidence during the course of the hearing including, from the claimant, a letter from a fertility clinic and 2 videos she had sent to the respondent (which the tribunal did view). The respondent submitted some further disclosure in respect of messages sent between Mr Malnick and Mr Mitchell and the report of the ICO in respect of a referral made by the respondent.

10. Having considered all relevant evidence, the tribunal makes the factual findings set out below.

**Facts**

11. The respondent (or at least the part in which the claimant was employed) is an online estate agency offering related services such as conveyancing referrals and mortgage advice. The claimant applied for a role as a property sales negotiator and was interviewed in October 2021 by Taylor Oliver, then assistant negotiations manager. The claimant performed well in her interview and had previous experience in the industry and with a solicitors' firm which the respondent dealt with. She was offered the role and commenced her employment on 17 January 2022. The claimant worked wholly remotely.

12. The claimant was provided with a contract of employment dated 15 November 2021 which she countersigned. Clause 15 provided that her employment would initially be conditional upon the satisfactory completion of a 3 month probationary period. If performance or conduct was not satisfactory, the respondent reserved the right to extend the probationary period or to terminate employment at any time during or at the end of the probationary period on 1 week's notice. It was stated that confirmation of permanent employment would be dependent upon the successful completion of this probationary period. Employees would be informed in

writing if they had successfully completed the probationary period and, until such time, the claimant would not be a permanent employee.

13. Clause 11 of the contract provided an acknowledgement that during employment, the claimant might have access to personal data relating to employees and customers held and controlled by the respondent. The claimant agreed to comply with the terms of the data protection legislation and any company policy on data protection. A provision regarding confidential information was included at Clause 13 which covered information relating to the business, its customers and employees as well as its misuse. The respondent's disciplinary policy provided that any breach of confidentiality requirements, other than minor breaches, might be regarded as gross misconduct.

14. The claimant was initially trained by Mr Oliver and Sam Cook, negotiations manager. The claimant worked hard and achieved good results. The claimant received very positive customer reviews posted on Trust Pilot. She took some pride in this and made her achievements known within her team, which was not entirely inconsistent with the culture within the respondent.

15. In late January/early February, the claimant told Mr Oliver that she had spoken to a customer who wished to raise a complaint. The customer was saying that the last person they had spoken to had been very rude. On checking call logs, the claimant was the only person who had spoken to the customer. This resulted in Mr Oliver having an informal conversation with her. The claimant subsequently spoke to Mr Cook and requested not to work with Mr Oliver.

16. Thereafter, the claimant worked more closely with Mr Cook, the other assistant manager in the team, Lee McNess and Mr Hussain, the teamleader in between them in the management structure.

17. The claimant alleges that in February 2022 Mr Oliver and Jack Malnick, operations director, said that the claimant wouldn't be promoted and that Mr Malnick referred to her sex as being a factor as well as suggesting that other women had been promoted, variously, because of a lack of competition or their sexual desirability. He is alleged to have referred to Jews hating Arabs, Mr Malnick being Jewish and the claimant having an Arabic surname. Those allegations are denied by Mr Oliver and Mr Malnick.

18. Mr McNess spoke to the claimant on 9 March and confirmed their discussion by email at 09:28 on the morning of 10 March in which he asked the claimant to come to him with any issue she had about the business or any staff rather than using the internal messaging site known as "Slack" or responding in a derogatory manner to staff. He referred to this as not promoting a healthy atmosphere within the team.

19. On 10 March 2022 the claimant told Mr Oliver during a zoom call that she was resigning. He accepted the resignation and asked her to confirm it in writing, which she did by email shortly thereafter at 09:50.

20. The claimant then spoke to Mr McNess and emailed him at 11:31 saying that she appreciated their discussion and that it was a particularly stressful day for her as it was close to the anniversary of her brother's death, she had

very recently learnt that she couldn't have children and her relationship with her long-term partner had ended about 8 weeks previously. She described herself as quite fragile emotionally. She said that she loved working with the respondent and everyone who worked there praising Mr McNess and another manager "H". She asked if she could take some time out that day and "restart a fresh chapter tomorrow, with a clear mind." The respondent agreed to allow the claimant to retract her resignation.

21. Mr Oliver and Mr McNess met with the claimant on 11 March to discuss her resignation. There was further discussion about putting inappropriate messages on Slack. The claimant was also told that there could be no further instances where she deleted emails due to GDPR requirements. That discussion was confirmed by email to the claimant, who replied thanking them for the clarification and reiterating that she had a lot going on in her life. As regards deleting emails, she said that she hadn't been aware this was a GDPR breach and that if there was a subject access request any emails could be recovered. It appears that the claimant had, at the very least, on her own admission, been managing her inbox and moving some of her emails to separate files within Outlook. The claimant also said that she was not aware that she had "entered into any disciplinary meeting previously", asking Sherele Crossfield of HR to clarify whether any disciplinary was noted on her file. The claimant told the tribunal that the respondent's reference to her needing to show a shift in attitude had not been previously discussed.

22. Ms Crossfield replied that the meeting had not been of a disciplinary nature. As regards the deletion of emails, she said that the respondent was required to retain any information that directly related to customers, as customers were able to request all of the information the respondent held about them.

23. During their discussions regarding the deleting of emails, the claimant had accused Mr Hussain, of deleting emails. She denied that she had deleted any emails. Emails were, the tribunal finds, missing from chains of correspondence, but the respondent felt unable to come to a definitive view when it learnt from its IT managers that when emails were deleted, there was no footprint left by whichever person was responsible. Mr Cook was concerned that the claimant had begun raising false allegations against members of management when met with her one-to-one, such that he ensured that any meetings with the claimant were attended by 2 members of management so that any conversation was witnessed.

24. Issues of concern then arose regarding the claimant's work on 2 particular properties. The vendor of 27 Raynville Road contacted the respondent saying that they had been shocked during a conversation with the claimant where she had said that she had spoken to all of the interested parties and one of them was difficult to communicate with. That had not been the vendor's impression of the potential buyer. On investigation, there was no evidence found of any calls when the claimant had spoken to the potential buyer.

25. The claimant had also been working on the sale of 12 Monmouth Close. The vendor complained that the claimant had not been truthful. The property was removed from the market on the claimant advising that the buyer had

refused to provide required documentation. However, no supporting evidence was found and it appeared that the claimant had deleted emails.

26. Whilst there has been some inconsistency in evidence as to how the claimant had communicated with the customers, the respondent's concerns were genuine. A customer had said that the claimant was rude in email correspondence. A buyer was saying that there had been no communication from the claimant. Mr McNess had had to ask the customer to forward him an email chain which was indicative of the respondent not having access to all relevant communications.

27. The claimant was sent an automatically generated notification from the respondent's HR system on 17 March saying that: "your end of probation will occur on 17 April 2022. Your line manager will be in contact with you to schedule your probation review meeting."

28. Whilst no longer part of the claimant's complaints in these proceedings, the claimant has referred to Mr Malnick instructing Mr Cook around 31 March to tell her to leave or be fired for gross misconduct after she had said that she was going through IVF treatment. A subsequent, much later, email of 10 October 2022 from the claimant to the FCA refers to that and various other allegations including that Mr Malnick, as a Jewish man, had an issue with her being Palestinian. The claimant confirmed in cross-examination that, since such claims were no longer being pursued, she had not sought to evidence them.

29. The claimant's probationary review was booked for 4 April. Mr Cook spoke to her on 1 April to alert her that they would be discussing the aforementioned properties as well as her performance as a whole. The claimant had been briefly suspended on 31 March pending further investigation into the Monmouth Close matter, but, on determining that the concerns of the respondent would be addressed at a probation meeting rather than at a disciplinary meeting, Mr Cook changed his mind. The claimant was somewhat confused.

30. The claimant responded on 1 April referring to telephone calls with Mr Cook that day when it was clarified that he was no longer holding a disciplinary meeting, but instead an "early" probation meeting. Amongst other things, she raised that Mr Hussain had access to her email inbox and she could no longer find any call recordings or emails.

31. Still on 1 April, the claimant emailed Mr Malnick forwarding the above correspondence with Mr Cook and expressing concerns saying that she was at a loss with the situation. She referred to her achievements within the business and that Mr Hussain was the root cause of her issues and of other negotiators who were considering leaving. She denied in cross-examination that the reason she raised complaints was to avoid being criticised and the probation meeting.

32. The claimant and Mr Malnick spoke on 4 April when the claimant expanded on her allegations about Mr Hussain. Mr Malnick replied on 4 April saying he would look into the allegations and in the meantime would postpone the probation meeting until later that week. Whilst this investigation was undertaken, the claimant was not required to carry out her duties. In fact,

the investigation Mr Malnick conducted took somewhat longer with a number of witnesses interviewed on 7 and 14 April. Mr Malnick emailed the claimant on 19 April stating that, whilst he appreciated that a lot of the issues could be down to perception, he had found no evidence to substantiate her claims aside from her own evidence and that of Jamie Kozak, who he noted was in a relationship with the claimant. She could raise the matter again more formally should she wish to. He said that he expected her to resume working the following morning. She was no longer to be managed by Mr Hussain. The claimant had remained on paid leave in this interim period. The claimant told the tribunal that she was disappointed with the outcome of her complaint.

33. The claimant's probation period ran to 17 April. However, by that date no probationary review meeting had taken place. Mr Cook sent an invitation at 11:55 on 20 April for the claimant to attend that review on 22 April. He said that during the meeting they would discuss her performance so far in relation to attendance and timekeeping, telephone manner, attitude, team working and general performance in the role. The claimant declined the invitation telling Mr Cook that her probationary period ended on 17 April and: "I've passed my probation already". He replied telling her that her probation review had not been held and her probation period had not been passed until that was communicated to her in writing.

34. The claimant then emailed Mr Cook saying that her probation had been confirmed as passed the previous week. She said that she would not be attending the meeting "because the information you are advising is grossly incorrect." Mr Cook emailed asking the claimant to refer to a provision in her contract of employment which stated that she would be informed in writing if she had successfully completed her probationary period. The claimant responded that this effectively supported her position and, aside from this, her probation was passed the previous week suggesting that he obtained HR or legal advice.

35. At 12:33 on 20 April the claimant forwarded a number of screenshots from her work email to her personal hotmail email account. She said in evidence that a friend within the respondent's HR department had told her that Mr Hussain was trying to destroy her reputation. The claimant said that she felt she needed evidence of what was happening and wanted to retain a paper trail in the information she had forwarded, although she did not know she was going to need it at the time. When put to her that she forwarded this information for her own purposes, she said that it was for the benefit of the respondent as well because at the end of each day messages on Slack became unretrievable. The tribunal has heard convincing evidence to the contrary that previous Slack messaging can be retrieved by a search of the individual name which will bring up direct messages to and from them and group messages in which they were a participant.

36. The claimant also blind copied subsequent correspondence with the respondent to her hotmail account. The claimant accepted that she was seeking to copy to her personal address emails about her probation meetings, but said that blind copying those to her was "probably a mistake rather than a deliberate concealment." The tribunal found the claimant's protestation, that she didn't know what the "BCC" function did when sending emails did, not to be credible. Some of the information blind copied to

herself included tables of information about employees within her team, the work they had done and their projected commission earnings. When put to the claimant that this was confidential, she disagreed. She referred to Mr McNess having posted such information in Slack. Whilst Slack was an internal communication system, she maintained also that all employees sent this type of information outside the business. The claimant has referred the tribunal to a screenshot of a WhatsApp group chat where a breakdown of estate agents together with their market share and growth was circulated. Mr Mellonie told the tribunal that this was shared at weekly trading meetings and was put together by an external body based on weekly sales and shared across all estate agencies. Mr Oliver's evidence was that commission league tables were not circulated outside of the team, nor outside the respondent. Certainly, the tribunal accepts that neither Ms Willsmore nor Mr Mellonie were ever aware of any wider disclosure.

37. The information sent by the claimant to her hotmail address also included information about properties, their address, the name of the vendors and the name of the potential buyer. Again, the claimant did not recognise that this information was confidential referring to people being able to see what houses were for sale by reference to for sale boards outside the houses and through land registry searches. That included the identity of the buyer once a sale had been completed. She said that she was forwarding this information to Mr Malnick to show that there was little active work on the system allocated to her because properties were being taken off her and also to show the level of her performance before that had happened. She said that she "needed a trail of my success". She said this information was sent to Mr Malnick and then to her personal account.

38. The claimant maintained that Mr Malnick was fully aware of her forwarding emails from her personal account, but the context was of Mr Malnick being sent a very large number of emails by the claimant over a short period. The evidence suggests that whilst she told Mr Malnick on 30 April that she was sending copies of work group WhatsApp chats from her personal email, there was no such clear disclosure to him in respect of the aforementioned type of screenshots which appeared (on their face to him) to have been sent from her work account.

39. Reverting to the chronology, Mr Cook took advice from HR which was to the effect that the claimant had not passed her probation and wouldn't until the probation review meeting took place and the outcome was confirmed in writing. He emailed her on 21 April telling her that HR had reaffirmed that the probationary review needed to take place and that her probation outcome would not be confirmed until they had held the review. He said he was keen to understand why she had declined "my reasonable requests" to attend saying that if she needed more time, he would be happy to reschedule it. On 22 April Mr Cook emailed the claimant saying that, as she had failed to attend the meeting that day, it had been rescheduled for 3 May once she had returned from a period of annual leave. He said that if she failed to attend, the review would be held in her absence. The tribunal has been referred to some messages he had sent to the claimant on Slack. In one he referred to a reference request which had been provided by HR for the claimant in respect of a rental property. He said that Ms Crossfield had spoken to the rental agency over the phone, no form had been completed and there was no direct question asked in relation to her probation period.

Ms Crossfield had simply confirmed in answer to a question that they did not envisage the claimant's pay changing within a 12 month period. He expressed that it was Ms Crossfield's view that her probation period had not been confirmed and that the claimant was free to speak to Ms Crossfield about this.

40. On 3 May, Mr Cook cancelled the probation meeting as the intention, on HR advice, was now to hold a disciplinary hearing rather than a probation meeting.

41. In fact, however, following a further change in approach, a probation review meeting was held attended by the claimant, who was accompanied by Mr Kozak, on 9 May 2022. It was identified that the respondent wished to see an improvement in the way the claimant communicated and interacted with team members, external vendors and management, for instance, when she was being provided with feedback. Her probation period was extended until 9 June when a further probation review meeting would be held. She was told that, if she had not then met the required level of performance, a further and final extension of the probationary period might result. This was confirmed by letter from Mr McNess of 11 May in which it was also stated that they had agreed that she would report directly to Mr Cook. The internal HR electronic records were updated to reflect an extension of the probation period to 9 June although this was not seen by the claimant until after her employment had ended.

42. On 10 May 2022, Mr Oliver wrote to the claimant inviting her to a disciplinary hearing on 12 May to be chaired by him. It was said that this would consider her conduct in respect of 27 Raynville Walk and 12 Monmouth Close and whether her actions demonstrated a lack of judgement which could bring the respondent's name into disrepute. The potential consequence was said to be no sanction being imposed or that she might receive a first or final written warning.

43. The claimant responded on 10 May asking for more information about the allegations. She also told the tribunal that prior to the earlier moves to hold a disciplinary meeting she had then receiving phone calls from Mr Cook stating that he had been advised by HR that it would be fairer, instead of having a disciplinary, to bring forward her probation by 3 weeks meaning that she would not have a disciplinary for gross misconduct and subsequent dismissal on her record. However, the probation meeting was cancelled by Mr Malnick she said. The claimant said that she was feeling extremely unwell and was unable to attend work.

44. Mr Oliver emailed the claimant on 11 May referring to access having been given to the claimant to information about the two properties and explaining further the concerns which the respondent said it had.

45. The disciplinary hearing on 12 May did not proceed due to the claimant's absence from work. She never then returned to work.

46. On 8 June an email was received by Mr Kozak at his personal email address from someone purporting to be "Paul Fisher". As later became apparent, Mr Malnick had created an email account under that alias and had sent the

email. The subject heading asked: “Are you aware of this?” A link was then pasted into the email to an article in the Sun newspaper.

47. The article from 12 May 2022 pictured the claimant who was identified as “an angry ex-employee” who had deleted hundreds of appointments. It was reported that the claimant had sabotaged bookings at a previous employer after she was dismissed on only her second day for “erratic” behaviour. The report described the former owner of the business, SP, as having been traumatised by the event in 2019. The article reported the claimant being sentenced at the Leeds Crown Court where the presiding judge was quoted as saying: “You chose to hide your identity and put suspicion on another and were clearly motivated by revenge. I get the feeling from the pre-sentence report that you are a relatively arrogant person who puts yourself and your self-importance rather too highly.” The claimant was reported as having been sentenced to a 2 year community order with a 5 year restraining order in respect of her former employer.

48. The claimant has told the tribunal that the report is inaccurate – “clunky” was her description. In particular, she maintains that she never worked for SP who she had only ever met for a couple of hours as part of a job interview process and who had been allegedly harassing her since. The claimant did, however, confirm that she had pleaded guilty to an offence under section 3 of the Computer Misuse Act 1990, a type of offence which she said involved intent to hinder or impair the operation of a computer. She said that she had pleaded guilty due to the cost involved in defending herself and her desire to concentrate on IVF treatment.

49. The claimant maintains also that the conviction has since been “revoked”. In support of this, the claimant has relied on a letter from the probation service to her dated 14 August 2023. The letter provided by the claimant in disclosure and in the tribunal bundle was short but heavily redacted, in particular as to exactly what had been revoked. The tribunal cannot, on this evidence, conclude that any criminal conviction, as opposed to potentially the conditions pertaining to the community order, had been revoked.

50. The claimant and Mr Kozak spent some time trying to identify who “Paul Fisher” was before tracing the sender of the email back, as will be described, to Mr Malnick

51. On 16 June, Mr Cook emailed the claimant saying that he was aware that she was absent due to work related stress and thought it would be helpful to let her know that he would not be rescheduling the disciplinary meeting which would instead be put on hold.

52. The claimant was in Europe during June until August on a road trip with Mr Kozak. She did not make the respondent aware of this.

53. On 16 September, the claimant made a subject access request which, together with chasing emails, were forwarded to Ms Willsmore on 21 September 2022. Ms Willsmore responded on 21 September stating that they had a month to respond and that she would respond after she had completed the monthly payroll. The claimant had referred to an email having been sent from a “Paul Fisher” to Mr Kozak’s personal email address. Ms Willsmore asked IT to conduct a search for this name and the email

address, but they advised that anything an employee sent from a personal email account would not be within the respondent's system.

54. At 14:44 on 27 September, the claimant emailed the respondent attaching screenshots in respect of which she wished to raise another grievance. At 14:46 in a further email she referred to having raised a grievance nearly 4 months ago and despite Mr Malnick's response saying it was received, no one had been in contact. As already referred to, Mr Malnick had provided an outcome on 19 April.

55. On 27 September 2022, Mr Malnick told Ms Willsmore that he had sent an email to Mr Kozak's personal email address which contained a link to an article about the claimant under a fake name, "Paul Fisher". This occurred, the tribunal accepts, at 3.20pm – Ms Willsmore made a note on a post it which she placed on her computer understanding that she would need to formally register a data breach arising out of Mr Malnick's conduct. Ms Willsmore's initial reaction was that she thought he was joking, but Mr Malnick said it was true.

56. At 15:52 on 27 September, the claimant emailed HR referring to emails sent from 21 September saying that she had now asked the same question with no response 9 times. She also referred to a lack of response as to when the respondent's chief executive, Mr Mitchell would be contacting her. At 16:49 on 27 September, Ms Willsmore and Mr Malnick were amongst those copied in on a further subject access request from the claimant where she mentioned that she was being harassed by a number of named individuals. She specifically asked HR to undertake a detailed search of Mr Malnick's data, including emailing third parties under fake email addresses to and from Paul Fisher. The claimant provided the relevant hotmail address to search for. She said that the matter might be referred to the police as a criminal matter as well as the ICO as a breach of GDPR.

57. At 20:00 on 27 September, Ms Willsmore completed a data breach form in respect of Mr Malnick. She referred to 15:20 as the time of Mr Malnick's admission. She noted, having taken legal advice, that whilst this was an unauthorised access and use of an email address which amounted to a data breach, the data was only used to send a single email with a link to a publicly available document. This was not considered to pose any likelihood of risk to the data subject, Mr Kozek. On that basis, she did not report it to the ICO. While she regarded it as serious, it did not meet the threshold for a report to be made to the ICO. She wrote up a statement of her conversation with Mr Malnick on 10 November, having not appreciated earlier that a note, separate to the data breach form, was required.

58. Ms Willsmore told the tribunal that she was very disappointed in Mr Malnick's lack of judgement and she realised that it was a very serious thing which he had done.

59. The claimant emailed Ms Willsmore on 29 September asking for confirmation of Mr Mitchell's email address saying she had emailed him over 107 times over the past 2 weeks and received no response. The claimant told the tribunal that the reference should have been to the number of emails sent over the last 12 months, but in any event, it is clear that a substantial number of emails were sent to Mr Mitchell around these September dates.

60. At 15:18 on 28 September the claimant had forwarded to Mr Mitchell a chain of correspondence she had had regarding the properties about which concerns had been raised from March. At 15:27 the claimant forwarded to Mr Mitchell a series of screenshots which she had emailed from her work to her hotmail account, as already described on 20 April. The email disclosed that the screenshots had then been sent to her hotmail account. A similar email was sent to Mr Mitchell at 15:30 with a customer review and commission details as well as a Slack conversation with Mr Cook. This included the aforementioned employee commission sheet, information about the company's performance, and a customer review. At 15:36 she had sent to him the Paul Fisher email of 8 June. Indeed, her emails to Mr Mitchell included one at 14:48 on 28 September attaching a video which she considered demonstrated how the claimant and Mr Kozak had investigated and discovered that Mr Malnick was behind the Paul Fisher email.

61. The claimant's position was that the respondent had no issue with what she had done in forwarding information to her personal email until after she subsequently became a whistleblower. Mr Mitchell has provided a witness statement saying that he had no recollection of a substantial number of emails sent by the claimant to his work email address on 28 September. He believed that they were not delivered to his inbox and either bounced back or went into his spam folder because they came from an unknown personal email address.

62. The claimant's position is that they were received and read by him as she was given to understand by Ms Willsmore. The tribunal believes it more likely than not that given his seniority and the volume of emails sent that Mr Mitchell would have paid little attention to what he was being sent. He would otherwise have had to spend a great deal of time trying to understand the claimant's concerns.

63. Mr Malnick had by the time of his admission already informed the respondent of his decision to resign on 7 September. It is clear from messages between Mr Malnick and Mr Mitchell at this time that Mr Malnick had being offered a position heading up the business of another online estate agency. There then been discussions to see whether Mr Malnick's mind was made up or whether he might remain with the respondent, but it was soon clear that he had made a decision to leave. Mr Malnick had corresponded with Ms Willsmore asking if Mr Mitchell had told her that he was leaving.

64. Mr Malnick confirmed his decision to resign in writing to Ms Willsmore on 28 September.

65. Ms Willsmore placed him on garden leave from 20 October. Ms Willsmore told the tribunal that the decision that he go on garden leave was a response to the claimant's email of 7 October, described below, disclosing that Mr Malnick's actions were being treated as a criminal matter. She understood from that that the allegations had escalated and that there was a risk to the business. She took outside legal advice and it was determined that it was best to see if she could get Mr Malnick to agree to go on garden leave which he did. She was clear that if he had not done so, she would have had to

have enforced it. She said that Mr Malnick would have been on garden leave sooner after 7 October, but she needed Mr Mitchell's approval and he was concerned that the main revenue generating part of the business needed to be managed. His ultimate leaving date of 7 December reflects aninitial resignation 3 months earlier on 7 September.

66. Ms Willsmore did not tell the claimant that Mr Malnick had admitted to sending the Paul Fisher email. She told the tribunal that this was because she had a duty of confidentiality towards him whilst an investigation was undertaken.

67. The claimant messaged Mr Cook on 28 September raising a grievance about being removed and blocked from the work WhatsApp group and further blocked by a colleague, Natasha Pilkington, when the claimant asked why. She then sent a follow up email very shortly afterwards saying that she had raised a grievance 4 months ago and despite Mr Malnick's acknowledgement of it, no one had been in contact. The tribunal has already referred to the outcome which Mr Malnick in fact provided. Ms Willsmore acknowledged receipt and said that another member of HR to whom it would be allocated would be in touch with her to discuss the next steps. Ms Irene Parish of HR emailed the claimant on 29 September asking if the claimant would be able to attend a meeting to discuss her grievance.

68. On 30 September, Ms Willsmore confirmed receipt of the most recent subject access request and explained that there were in excess of 19,000 potentially disclosable emails.

69. On 4 October she emailed the claimant to apologise for the delay in a response to her emails to Mr Mitchell and that if she had sent the number of emails she maintained, he would be unable to carry out his other duties whilst replying to these.

70. Also on 4 October, the claimant emailed Ms Willsmore with comments on her own previous email. Against the section where Ms Willsmore asked for further details of the claimant's complaints of discrimination, the claimant said that she would not engage in correspondence with the respondent as these had been raised with Mr Malnick previously noting that he was a person who had committed "a major breach of GDPR", a criminal offence with it, targeted others with this data under a fake email address and was discriminating against her due to her pregnancy, race, sex and disability. She continued that Mr Malnick being Jewish and her being of Palestinian heritage was the basis for her complaint of race discrimination. She said that she was confirming that she was pregnant, having previously disclosed that she was undergoing IVF treatment.

71. At 09:57 on 6 October, the claimant emailed Ms Willsmore saying that in the past 24 hours it had come to light that Mr Malnick had been sending the fake emails to a number of people as well as Mr Kozak. She asked her to carry out searches of those names as part of the subject access request she had made. At 09:24 on 7 October she emailed further saying that she had been advised by the police to inform Ms Willsmore that Mr Malnick was under investigation by the Met police and police advice was that the respondent should not advise him of this. She referred to the police believing it prudent for the respondent to be advised as Mr Malnick could

be "actively committing further offences until his arrest" whilst working at the respondent. She then listed a number of offences which were being investigated and had been committed by Mr Malnick under the heading of cybercrime including under the Computer Misuse Act 1990 and Protection from Harassment Act 1997. She said those were being investigated alongside hate crime based on the protected characteristics of race, pregnancy and sex. She said she was later advised that the police will also be looking to charge him under the Fraud Act 2006 and of fraud by abuse of position because of Mr Malnick's role in the respondent's organisational structure. On the advice of a solicitor, they would have to report the breach to the Property Ombudsman, the ICO and the FCA. She also alleged that Ms Pilkington had been using a fake online account to stalk and harass her with some 300 messages received from this account in the previous 24 hours alone and which made direct reference to the respondent. She was under investigation for malicious communication by the Suffolk police.

72. The claimant explained to the tribunal the nature of the stalking she believed was taking place from Ms Pilkington and indeed a number of others as evident from footprints they had left on the claimant's various social media accounts with the purpose of making the claimant aware that she was being effectively watched. The claimant noted that the number of footprints seemed to coincide with key events and discussions she had had with in the workplace and indeed they had continued during key moments in these tribunal proceedings. The tribunal has been shown a particular example of individuals names against one of the claimant's social media accounts and has been told by her that there are numerous further examples. Mr Malnick was said to have used his contacts to keep the stories about the claimant's criminal conviction alive and had called her on a withheld number telling her that she would be dismissed. There is no evidence before the tribunal of such conduct.

73. In a further email to Ms Willsmore at 18:13 on 7 October, the claimant named other employees of the respondent to whom accounts had been traced back to. She said that further reports would have to be made to the police as separate crimes. She confirmed that they had that day reported Mr Malnick to the FCA, the Property Ombudsman and the ICO.

74. When put to the claimant that she had sent these emails because she was upset and wanted to get Mr Malnick into trouble, she said that he should have been disciplined. She referred to his level of seniority and the access he had to bank details, where the claimant was living and the personal details of over 500 other employees. She believed that he was a registered person with the FCA. The evidence is that the respondent's activities were split into the estate agency division which Mr Malnick managed and a separate financial services arm. Only those within the financial services part of the business were FCA regulated.

75. The claimant told the tribunal that she knew a lot about the Computer Misuse Act and was clear that Mr Malnick had committed a criminal offence in using a fake name, gaining unauthorised access to Mr Kozak's data and using it for his own personal gain. The respondent's policies recognised that such behaviour would breach data protection requirements. She considered that this could not be said to be a purely private concern when the integrity of someone in such a senior position was in question.

76. Ms Willsmore told the tribunal that when she was advised by the claimant of Mr Malnick sending fake email she assumed that this related to the subject access request, but that the email of 7 October was of a more serious nature with the claimant referring to criminal investigations. However, the claimant was saying that Mr Malnick must not be made aware of these and she did not understand the claimant to be asking her to do anything about that email. She did not tell Mr Malnick about these emails, but, as referred to above, took steps for him to be placed on garden leave. Mr Malnick subsequently became aware of a number of allegations made by the claimant against him in the grievance investigated by Mr Parish. Mr Malnick's perception was that he had agreed to go on garden leave to save the respondent time in having to investigate the grievances when they were in his view leading nowhere. Ms Willsmore had led him to believe it was completely his choice, as was her preference, albeit his absence from the business would have been forced, had he not agreed not to work his period of notice. Ms Willsmore told the tribunal that putting Mr Malnick through a disciplinary would have served no purpose. She denied wishing to allow him to move to his new employment "disciplinary free".

77. Mr Malnick, the claimant says, took steps as illustrated in a video she produced to delink the Paul Fisher name from Mr Malnick's social media accounts on 24 October. Ms Willsmore had no knowledge of this and said that from her perspective it was nothing to do with his employment with the respondent. From her perspective, he had admitted what he had done, external bodies were aware and there was no reason for the respondent to seek to conceal anything.

78. In an email of 10 October, separate from any chain of emails regarding the claimant's aforementioned disclosures and subject access requests, Ms Willsmore wrote as follows: "Thank you for your email making me aware of the news that you are expecting. I appreciate that you are absent from work due to ill health at present, but wanted to ensure that you are provided with a copy of the company maternity policy. You will also need to complete a maternity risk assessment once you are back at work, and once we have a date for this, I will ask one of the managers in the People Team to schedule a meeting with you for your first day back. With kind regards and congratulations on your happy news."

79. Ms Willsmore told the tribunal that she was happy for the claimant and would have congratulated any pregnant employee in the same way. She said that she would arrange a risk assessment for any employee who said they were pregnant because it was important to make adjustments to ensure that the work environment is safe for pregnant employees and, the claimant being a remote worker, any assessment would have been different to the meeting she would have held for an office-based employee. She said that she certainly did not send this to "goad" the claimant as the claimant alleges. The claimant did not challenge Ms Willsmore in cross examination on this evidence. The claimant's own evidence had been that the letter amounted to a ridiculous response to someone who was blowing the whistle, it being not genuine and disingenuous. By sending the email she was just ignoring what had happened. She was being offered a pregnancy risk assessment, but the respondent was not undertaking any risk assessment about what she had told it about Mr Malnick.

80. Ms Willsmore told the tribunal that she did not respond to the reports about Mr Malnick and others because the claimant had made her reports to other third parties and she would not have done anything to prejudice those investigations. The claimant had not asked for any action. Ms Parish was separately looking into matters which were subject to the claimant's internal grievance.

81. On 10 October the claimant chased a response to the emails she had sent on a number of matters and said that the FCA and the Property Ombudsman had confirmed that they would also be investigating Mr Malnick. She said she had also raised a breach of GDPR with the ICO. She said that this was as much detail she was willing to share with Ms Willsmore to date on police advice. She was to have a conference with her barrister.

82. In seeking to satisfy the claimant's subject access request, Ms Willsmore was provided by the IT team with emails sent from the claimant's work email account to her personal hotmail email account. These included a list of employees showing their commission earnings, sales data of the respondent and information about property sales they were handling including, the name of the vendor and of the prospective buyer.

83. Ms Willsmore emailed the claimant on the morning of 18 October saying that whilst undertaking the searches required to respond to her 27 September subject access request she had come across a number of emails the claimant had forwarded to her personal hotmail account from her Strike email. She said that she had identified that the claimant appeared to have sent outside of the respondent's systems data, referring to screenshots of property address and vendor's name in an email of 22 April 2022 and a customer's email address in an email of 30 April 2022, company data relating to the performance of negotiators including average revenue per deal by employee on 20 April and employee data relating to named individual performance and potential commission, again of 20 April 2022. She asked the claimant to delete any and all emails which she had sent from her Strike email account to her personal email address that contained company data which included employee and customer data and to confirm to her when she had done so. She noted that the claimant would be aware that she was subject to a duty of confidentiality and sending any confidential information which relates to the respondent to her personal email address was in breach of that duty. As there appeared to be a breach of confidentiality, the respondent would be dealing with the incident under the disciplinary procedure. The claimant would be provided with redacted versions of the emails one she had deleted the confidential information she had sent to herself. She said that she looked forward to receiving confirmation once those emails have been deleted.

84. Ms Willsmore told the tribunal that she had no prior knowledge of the claimant sending information to her personal email address. She believed that she would never have been aware had it not been for the claimant's own subject access request. She described herself as "really disappointed" in the claimant. She felt that the claimant had sent multiple emails and on more than one date so that her conduct amounted to more than a momentary lapse of judgement. It was also clear that the information included data which the claimant was not entitled to remove from the

respondent's systems. When put to her that others shared such information on WhatsApp outside the respondent, Ms Willsmore was clear that she had no knowledge of that and if she had known she would have made it clear that that was not permitted. The matter would have been investigated and individuals would have been subject to disciplinary action. She noted that if this had been the claimant's defence for her own conduct, she could have raised it with Mr Mellonie during the disciplinary process.

85. In the circumstances of a lack of confirmation that the emails had been deleted, Ms Willsmore reported the claimant's actions to the ICO. Ms Willsmore said that the ICO advised that there had been a serious breach. The tribunal notes that she did not separately complete an internal data breach form.

86. Ms Willsmore chased a response from the claimant on 21 October. The claimant responded on your 24 October asking for a copy of the emails saying that she had previously been accused of similar actions and of deleting data. She said that she would be reporting this breach and it would form part of her complaint. She did not confirm whether or not she had deleted the emails. Ms Willsmore was unsure as to what additional information the claimant needed.

87. Ms Willsmore had informed Mr Mitchell of her own intention to resign for reasons unconnected with work in May 2022 and had formally tendered her resignation in September. She had hoped to leave the respondent in early December. Mr Mellonie joined the respondent on 1 November 2022 to head up its HR function as Chief People Officer. Ms Willsmore ultimately stayed on to complete an element of handover and some specific projects leaving the respondent's employment only then on 22 December 2022. Mr Mellonie's time was significantly taken up by an extensive redundancy exercise which involved 450 out of a total workforce of around 560 in the estate agency business being placed at risk on 28 November. Around 250 employees ultimately left the business.

88. Ms Parish provided the written outcome dated 30 November to the claimant's grievances as contained in emails from her of 1 April, 28 September, 4 October, 7 October and 10 October. She had been invited to a grievance hearing on 18 November but the claimant had been too unwell to attend. The claimant had been offered the opportunity to provide written representations, but had not done so. She referred to the claimant having been provided with key findings set out in an investigation report on 18 November 2022. Allegations investigated including being removed from a work What'sApp group by Ms Pilkington, images being circulated of herself and Mr Kozak with sarcastic/disparaging comments, not being informed that Mr McNess had left the respondent, being suspended immediately after the respondent found out that she was pregnant or undergoing IVF treatment, an allegation raised on 4 October 2022 about discrimination by Mr Malnick on the grounds of her being Palestinian, sex discrimination and sexist comments, discrimination on the grounds of disability by reason of the claimant's mental health, harassment by Mr Malnick, Ms Pilkington and two other employees and Mr Malnick's stealing of her and Mr Kozak's data in the generation of the Paul Fisher email. Only this latter complaint was partly upheld. Mr Malnick was found to have committed a minor breach of data protection it having been noted that the content of the email was a website

link to an article in the public domain and was therefore not a major breach that required notification to the ICO. It was noted that the respondent is not FCA regulated and that Mr Malnick was not an "approved person", hence the respondent had not notified the FCA. It was confirmed that Mr Malnick no longer had access to any employee's personal data. No further allegation relating to Mr Hussain's actions which formed part of the grievance of 1 April 2022 was upheld. The claimant had, amongst other things, alleged that Mr Hussain was under the influence of illegal drugs during working hours. The claimant was given the right of appeal which she did not exercise.

89. On or around 26 November 2022, Ms Willsmore asked Mr Mellonie to chair the claimant's disciplinary process. He agreed given his lack of prior involvement and appreciating that he would be viewed as impartial having had no prior knowledge of the claimant. He had and was given no information about her previous employment history, including prior disciplinary issues, her subject access requests and in particular the emails she had sent on 6 and 7 October.

90. Ms Willsmore provided relevant documentation to him: the emails which the claimant had sent to her hotmail address showing the screenshots forwarded and correspondence between her and Ms Willsmore in relation to requests to delete them. Mr Mellonie spoke to Ms Willsmore to understand the investigation which had been conducted.

91. He was also advised that there was still a disciplinary matter outstanding in relation to the properties at Raynville Walk and Monmouth Close. He was provided with evidence gathered by May 2022 in respect of allegations that, in her dealings with those properties, the claimant had provided misinformation to the vendors and shown a lack of judgement which could have brought the respondent into disrepute. He was told that the disciplinary process had been put on hold because the claimant had raised a grievance. He was informed that the investigation into the claimant's separate grievances had now concluded, but was not provided with the grievance outcome, rather just brief details of the nature of the grievance. He gave no consideration to it in conducting the disciplinary process.

92. Mr Mellonie emailed the claimant on 2 December inviting her to a disciplinary hearing on 6 December to be conducted remotely. This attached the bundle of documents he would be considering, including the information the claimant had forwarded to her personal account. He informed her that a final written warning or summary dismissal for gross misconduct were potential outcomes due to the seriousness of the allegations. He told the claimant that the respondent had reported her data breach to the ICO. He attached all relevant documentation and made the allegations clear. He was aware that the claimant had been absent due to sickness for some time, but not of the nature of her ill-health.

93. Ms Willsmore admitted that she had not thought to suspend the claimant's work email account and that this was not done until Mr Mellonie picked that up as a measure which ought to be taken. Mr Willsmore accepted that this was a sensible and justifiable step to take.

94. Ms Willsmore explained that the claimant's data breach had been reported to the ICO because what she did amounted to company data having been

sent outside of the secure work systems. She had done so after calling the ICO helpline on 18 October. She would not have made a report if the claimant had deleted that data, but the fact that she had it and wouldn't delete it meant that the data was susceptible to improper use.

95. The claimant replied to Mr Mellonie on 2 December saying: "You clearly don't know what is going on with my case – I suggest you catch up quickly! Do not contact me again otherwise I will add yourself to the police investigation." Mr Mellonie told the tribunal that he considered this response to be very rude and arrogant. He saw it as indicative of someone whose relationship with their employer had broken down. He agreed with the claimant in cross-examination that this might have been a sign of the stress she was suffering from, but noted that she did not take any personal responsibility or ask him for a chat about her health.

96. Mr Mellonie then wrote to the claimant on 5 December inviting her again to the disciplinary hearing, but offering her an opportunity to submit her version of events as a written statement or through a representative. She replied: "Again, you have absolutely no idea what you are talking about."

97. The claimant did not attend the disciplinary hearing. Mr Mellonie had prepared in advance a list of questions he wanted to ask her. Having given her a chance to attend, he went through the various allegations in her absence.

98. Mr Mellonie then wrote to her on 7 December 2022 advising her of his decision that the allegations were well-founded and that her employment was terminated by reason of serious misconduct and a serious breach of trust and confidence.

99. Mr Mellonie had concluded that the claimant had moved customer data to her personal email address which was a clear breach of internal and external regulations which the claimant would have been well aware of from the outset of her employment. The claimant had not acknowledged or sought to excuse her behaviour which he found alarming. As regards the company data forwarded, he believed that it was completely irrelevant to her as she wasn't a manager and he could not see why she needed it. She should not have had access to it let alone sent it to herself outside the company. As regards employee data, there was no reason for her to want it or to share it and therefore no excuse for doing so.

100. As regards the outstanding allegations in respect of the two properties, he considered the previous disciplinary issues as demonstrating a pattern of behaviour in her attitude towards her employment. He concluded that she had lied to her manager and did not carry out her duties in failing to provide her managers with the required information, intentionally rather than through any error.

101. He reached his decision to terminate her employment he said because he concluded that she had been intentionally dishonest by causing a serious data breach in forwarding confidential information to herself and in failing to adhere to reasonable management instructions to delete the emails. He was concerned with her unwillingness to accept fault and did not believe she would learn from her mistakes. She was trusted with

confidential data and breached that trust showing no “repentance” for her actions. He viewed the claimant’s lack of response to the allegations unfavourably and concluded that the relationship between the respondent and her was broken. There was no trust and confidence in her and she appeared to have no trust in the respondent or its employees. The claimant was given a right of appeal to the respondent’s chief financial officer which she did not exercise.

102. The claimant says that she woke up early on the morning of 7 December believing she was suffering a heart attack due to the stress of the disciplinary process. The claimant attended hospital discharging herself at around 11:00 that morning. She received Mr Mellonie’s outcome terminating her employment by email at 18;23 on 7 December. The claimant had alleged that the dismissal letter resulted in a heart attack and hospitalisation from 7 December which does not fit that timeline. She clarified now that she believed she was in that state because of the position Mr Mellonie had put her in. It was the stress of the disciplinary process which had caused her chest pain. The medical evidence before the tribunal is of the claimant being admitted into hospital at 08:53 on 7 December with chest pain.

103. The claimant did not challenge Mr Mellonie in cross-examination as regards the reason for his decision to terminate her employment. Nor did she challenge his evidence that he was unaware of the emails she relies upon as protected disclosures. Nor did she challenge his evidence that he was never aware that she was pregnant. She accepted that the only information he had seen were the documents relating to her data breach and a pack of evidence put together previously in relation to the concerns regarding the claimant’s dealings with the two particular properties. She said that she did genuinely think that Mr Mellonie thought he was doing the right thing. Ms Willsmore had however cherry picked what he had been provided so that Mr Mellonie had no idea about her subject access requests in September or the disclosure emails. Mr Mellonie, she said, was caught up in this as an innocent person.

104. The claimant maintains that the emails in the disciplinary pack from her work to her personal email address were not those unearthed by her subject access request, there being no reference to IT at the top, but were in fact those emails she had forwarded to Mr Mitchell but formatted in a way which meant that Mr Mellonie was unaware of that fact. The claimant maintains that this was an engineering of the evidence by Ms Willsmore. This was not, however, put to Ms Willsmore in cross-examination and the tribunal cannot reach a conclusion that this is what occurred or the reason why the disciplinary bundle was formatted in a particular way simply on the face of the format of the emails provided to Mr Mellonie. Ms Willsmore’s evidence was that she did not herself produce the bundle for the disciplinary hearing. She did not know who had put everything in that format. She had not passed on the claimant’s subject access requests to Mr Mellonie as she felt the relevant documents were ones which showed the claimant’s data breach.

105. She rejected the proposition that Mr Mellonie was effectively brought in to dismiss the claimant or that the respondent’s actions were in any way connected with commercial negotiations for any merger of the respondent

with Purple Bricks or any other company. Mr Mellonie's evidence was that, when he joined the respondent, the focus was on a significant redundancy exercise and it was only in February 2023 that there emerged an opportunity for an asset purchased by the respondent of the Purple Bricks estate agency, which was then completed, in rapid time, on 5 June 2023. As the purchaser, the respondent did not have to disclose any employee information, including information about any potential claims.

106. After Mr Mellonie's email terminating the claimant's employment, she was sent a letter by Ms Crossfield about payment arrangements. She referred to the claimant's contract and that no further payment was due to the claimant up to her termination date because she had exhausted her entitlement to statutory sick pay. She noted that the respondent had the right to terminate immediately by making a payment in lieu of her notice period and that the contract of employment provided for entitlement to one month's notice. She stated that as this was more than a week in excess of the statutory minimum notice to which the claimant was entitled, any notice pay would be based on the amount of sick pay entitlement. Again, therefore no further payment would be made to the claimant in respect of her period of notice. The claimant responded on 13 December referencing that she had been told that she would not be paid "1 weeks full notice as required (one month does not apply as Strike seek to maintain the position throughout that I did not pass probation)…" The claimant was ultimately paid a week's wages for a one week period of notice.

107. The claimant was asked to make arrangements to return company property. The claimant has attended this hearing with a computer stack which the respondent has not retrieved from her. The claimant notes that another employee's name and address is attached on a piece of paper to this computer stack, so that the respondent has again breached data protection requirements in mis-addressing a computer stack and, by doing so, disclosed the personal details of another employee in circumstances where it has then not been proactive in retrieving the computer and personal data. Ms Willsmore described what the claimant had as a dead shell of a computer.

108. Mr Malnick raised a grievance about the claimant on 5 December. Ms. Willsmore said that this was saved on Mr Malnick's file, but that otherwise the respondent did nothing with the grievance as that was Mr Malnick's choice. Mr Malnick himself was clear before the tribunal that he was not expecting any action to be taken on it. Mr Malnicks employment ended on 7 December which is corroborative of a 3 month notice period from a resignation on 7 September.

**Applicable Law**

109. Section 43A of the Employment Rights Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides 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 in the public interest and tends to show one or more of the following:-*

*(a) that a criminal offence has been 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; ………"*

110. It is clear that a disclosure must actually convey facts and those facts must tend to show one of the prescribed matters – see **Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR**. The making of an allegation or the expression of opinion or state of mind is insufficient. Langstaff J noted, however, in **Kilraine v London Borough of Wandsworth 2018 ICR 1850** (as endorsed by the Court of Appeal in that case) that "the dichotomy between "information" and "allegation" is not one that is made by the statute itself" and that "it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined". Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not – see **Norbrook Laboratories (GB) Ltd v Shaw ICR 540**.

111. In terms of a reasonable belief, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. There must, however, be some objective basis for the worker's belief. The exercise involves applying an objective standard to the personal circumstances of the person making the disclosure. It has been said that the focus on belief establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence beyond rumours, unfounded suspicions or uncorroborated allegations.

112. As regards the public interest requirement, the tribunal refers to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited the following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:

*(a) "the numbers in the group whose interests the disclosure served…..;*
*(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
*(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the*

*disclosure of inadvertent wrongdoing affecting the same number of people;*

*(d) the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"*

113. Disclosing a criminal offence will perhaps more obviously than some disclosures be in the public interest. A worker will still be protected if they were in fact mistaken as to the existence of any criminal offence.

114. Workers can have mixed motives for making disclosures and it was observed in **Chesterton** that the tribunal's power to reduce compensation where a disclosure was not made in good faith demonstrates an intention that some disclosures would qualify for protection though they were predominantly motivated by grudges or self-interest. Nevertheless, motive is likely to be one of the individual circumstances to taken into account by the tribunal when considering whether there was a reasonable belief that the disclosure was in the public interest. An employee who cannot give credible reasons why they thought at the time that the disclosure was made that it was in the public interest, may cast doubt on whether they really thought so at all.

115. Section 103A of the Employment Rights Act provides that:

*"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

116. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. In establishing the reason for dismissal, this requires the tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the Tribunal to consider the employer's conscious and unconscious reason for acting as it did.

117. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. However, there is an important qualification to this which applies, as in the

current case, where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal. In such a case the claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason.

118. Nevertheless, it is appreciated that often there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss an employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal, it may be appropriate for a tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. The tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination.

119. The Supreme Court in **Royal Mail Group Ltd v Jhuti 2020 ICR 731** determined that Parliament clearly intended that where the real reason for dismissal was whistleblowing, there would be a finding of unfair dismissal. In searching for the reason for dismissal, the tribunal generally looks no further than at the reasons given by the appointed decision-maker. However, if a person in a position of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the tribunal's duty to penetrate through the invention rather than to allow it also to infect its own determination. The principal would extend to a manipulator who had some responsibility for the investigation which led to dismissal by another.

120. Section 18 of the Equality Act 2010 sets out the following:

> *"(2) A person (A) discriminates against a woman if, in or after the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it."*

121. No comparator is required for a claim under this provision of the Equality Act. The test is whether the claimant has been treated unfavourably.

122. The claimant's complaints of pregnancy discrimination require the claimant to show primary facts from which the tribunal could reasonably conclude that her treatment was because of her exercising her being pregnant. The burden of proof then shifts to the respondent to show that the treatment was in no sense whatsoever because of the proscribed reason. The tribunal does not however have to confine itself to a consecutive two stage process but can jump straight to "the reason why". Indeed, for the claimant to succeed an analysis of the "reason why" is necessary. To fall within s.18, a woman's pregnancy or maternity leave does not have to be the only or even the main reason for her unfavourable treatment; pregnancy

or maternity leave only needs to materially influence the employer's conscious or subconscious decision-making for the unfavourable treatment to be discriminatory.

123. The Claimant complains of direct sex discrimination in the alternative. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*

124. Applying the applicable law to the facts as found, the tribunal reaches the conclusions set out below.

**Conclusions**

125. The tribunal considers firstly whether the claimant made a protected qualifying disclosure. The email of 6 October 2022 on which she relies certainly provides information that Mr Malnick has been sending fake emails. The earlier of the 2 emails relied upon then on 7 October states that Mr Malnick is now under investigation by the police. It goes on to list a number of criminal offences being investigated. Certainly, when read with the earlier email there is a disclosure of what Mr Malnick is said to have done and what it might amount to in terms of a criminal offence.

126. The tribunal concludes that the claimant reasonably believed that what she was disclosing tended to show that Mr Malnick, in his position as a senior employee of the respondent, had committed a number of criminal offences as well as a data protection breach. The claimant had some knowledge of, in particular, the Computer Misuse Act 1990 and had applied the definitions within it which included unauthorised access to computer material and unauthorised access with intent to commit further offences as applying to Mr Malnick’s actions – his sending of the email directly to Mr Kozak’s personal account following Mr Malnick accessing the respondent’s systems to obtain his address. The question is not whether the claimant was right. Certainly, what Mr Malnick had done appeared wrong to her and unsurprisingly so. She considered there also to be a data breach, which was indeed a reasonable conclusion.

127. Ms Wilsmore, when she completed her data breach form, referred to legal advice she had taken which confirmed that Mr Malnick’s actions amounted to a personal data breach and, whilst not reportable, that he might have committed an offence under the Data Protection Act, an offence subject to investigation and prosecution by the CPS or ICO. The claimant made disclosures to the FCA, ICO and Property Ombudsman in a belief that those regulatory bodies would have an interest (for the benefit of the public) in assessing the fitness of Mr Malnick to carry out his role. It cannot be said that the types of offences she was reporting were insignificant or of no wider interest beyond her personal situation in the context of an individual of such seniority in a business which administered the data of its individual customers and sold financial products. She had that in her mind at the time

of the disclosures. Her personal motives for making the disclosure do not negate her public interest belief in all of the circumstances. The disclosure in respect of Mr Malnick's email was a protected qualifying disclosure when made to the respondent as employer.

128. The tribunal notes that the first 7 October email refers to Ms Pilkington and to suspicions of her involvement in fake online accounts and messaging the claimant to an extent which might amount to stalking and harassment. The claimant discloses here suspicions rather than beliefs and there is no evidence on which the tribunal could conclude that the claimant had a reasonable belief in what she was disclosing. The second email of 7 October includes more in terms of allegations against other individuals, but again with no evidence before the tribunal upon which it could conclude that the claimant had a reasonable belief that, for instance, anyone else was sending fake emails to her. The protected qualifying disclosure is therefore limited to the information about Mr Malnick's actions.

129. The key question in the complaint of automatic unfair dismissal is then of causation. Mr Mellonie, on his own, took the decision to terminate the claimant's employment. His evidence is that he was unaware of the claimant's protected disclosures or, indeed, her pregnancy. The claimant accepts that his evidence is truthful. The tribunal has seen nothing which suggests anything to the contrary. He could, therefore, not have had in his mind, at the time he reached the decision, the claimant's protected disclosures. They cannot have exerted any influence on him whatsoever.

130. Instead, the claimant maintains that Ms Willsmore purposely manipulated the situation to give Mr Mellonie incomplete information so that he would arrive at a decision to dismiss the claimant and that Ms Willsmore was motivated to do so by the protected disclosures.

131. This is certainly not a case where Ms Willsmore can be said to have dishonestly constructed an issue of conduct in respect of which the claimant might then be disciplined. The claimant accepts that she forwarded information about the respondent, its employees and its customers from her work email to her personal email account. There is and can be no dispute that she sent company and other people's personal data outside of the respondent's IT systems to a location where the security of that data was beyond the respondent's control.

132. Again, some of that data was of a commercially and personally sensitive nature. It showed the names of employees, their performance and their commission earnings. It included information about the respondent's sales performance. It included data about vendors' properties, including the names and the identity of potential buyers. This information was not in the public domain or, at least, not readily accessible. There was, within the information forwarded, data which might be useful to a competitor.

133. There is no evidence that this type of information was routinely shared with others outside the respondent's systems such that the respondent ordinarily had no interest in such conduct. The type of information forwarded by the claimant was quite different in character from the widely published information about the number of property sales by individual estate agencies and their market share. The tribunal has seen

that information of this sort was included within a work WhatsApp forum. Regardless of whether more sensitive data was disclosed by employees outside of the respondent, neither Mr Mellonie nor Ms Willsmore were aware of that. Ms Willsmore was clear that, if she had been so aware, then further investigation would have resulted. The tribunal accepts that to be the case. The claimant might have sought to justify her own actions with reference to alleged commonly accepted practices amongst the respondent's employees during the disciplinary process, but she never did.

134. The respondent had reinforced the claimant's duties in terms of confidential information in her contract of employment and it was clear that a breach of confidentiality might be regarded as gross misconduct.

135. The claimant had no legitimate reason for taking the data outside the respondent's systems into a less secure environment which the respondent could not control and where it was not aware of the breach. It is clear from the timing of the forwarding of information on 20 April 2022 that the claimant wanted to have evidence which she might deploy in any forthcoming challenge to her performance or conduct whether through a probation or disciplinary process. That has been accepted by her. If the claimant considered such information to be important, she could have easily flagged that up to the respondent if she had been genuinely concerned that the information might be wiped from the respondent's systems and be no longer retrievable. Instead, the claimant had surreptitiously ensured that she had that data within her own control to retain and deploy it if and when she felt necessary.

136. None of these acts were created by Ms Willsmore who had no reason the tribunal can discern to have sought to target the claimant. Ms Willsmore was in the process of leaving the respondent's employment. Nor can she be considered to have been covering up Mr Malnick's wrongdoing. When the claimant made her disclosure. Ms Willsmore was clear that Mr Malnick was being reported to a number of third-party regulators. Ms Willsmore was aware that there had been a wider disclosure of Mr Malnick's conduct. Pursuing disciplinary allegations against the claimant would not alter that or somehow reduce any culpability on Mr Malnick's part or any damage which might pertain to the respondent as a result of Mr Malnick's own data breach.

137. Mr Malnick's breach required no further substantive investigation on Ms Willsmore's part because he had admitted exactly what he had done which coincided with the conclusions which the claimant ultimately reached and disclosed to Ms Willsmore. The substance of what the claimant was disclosing came as no surprise to Ms Willsmore. Ms Willsmore was then concerned not to do anything which might prejudice a purported police investigation on, indeed, the claimant's own request.

138. Furthermore, Mr Malnick was already in the process of exiting the respondent. Whilst after he had initially indicated his resignation on 7 September there had been discussions about whether he might be retained within the respondent, it was clear before his admission that Mr Malnick had decided to leave in any event. Whilst his written resignation came later and coincides with his admission, he had already decided to take up a more senior position at a competitor.

139. Ms Willsmore did consider nevertheless that Mr Malnick's conduct fell short of expectations and that he was guilty of a serious data breach, albeit, on advice, not one that was reportable externally. That was particularly brought home to her by the claimant's disclosures and her reference to an ongoing police investigation. In that context, Ms Willsmore ensured that Mr Malnick commenced a period of garden leave until his employment ended. The delay in this being actioned was due only to the need to obtain Mr Mitchell's agreement and for consideration to be given as to how Mr Malnick's responsibilities could be undertaken in his absence.

140. Ms Willsmore did understand from the claimant's disclosures that there was a reputational risk to the respondent (due to Mr Malnick), but her response to that was to ensure that Mr Malnick was not active within the business rather than to take any steps to remove the claimant. In terms of reputational risk, the horse had bolted and dismissing the claimant would not hide anything.

141. Ms Willsmore did not have any reason to concoct allegations to remove the claimant from the business (and indeed there is no evidence that this was her plan). The claimant was absent on long-term sick leave with no return to work in sight, the respondent was in the process of commencing a substantial redundancy exercise, the claimant had not yet satisfied her probation period and, in the respondent's view, there were outstanding disciplinary charges already against the claimant which had been put on hold until she was fit to return to work. Ms Willsmore was not influenced by any desire for revenge – the claimant's disclosures did not affect her personally, she was leaving the respondent and Mr Malnick accepted, as he inevitably had to, that he his actions were blameworthy.

142. The tribunal has accepted that Ms Willsmore did only become aware of the claimant forwarding data outside the company from the results of the claimant's own subject access request. She thought that the evidence showed that they claimant was guilty of misconduct in breaching data protection principles. There was no other conclusion she could have reached on the evidence and she was fortified in that by advice taken from the ICO. In her mind the claimant's actions became of even greater concern once the request had been made of the claimant to delete data to which the claimant made a somewhat disingenuous response in seeking disclosure from Ms Willsmore of the emails which the claimant had sent to her personal account. Whilst the claimant maintains that she had literally thousands of emails within her inbox, those sent to her from her work account on particular dates would have been easily obtainable. Ms Willsmore's request was a reasonable one which would have been easy for the claimant to comply with.

143. Whilst the claimant will not understand this, her own data breach was in an entirely different category to that of Mr Malnick. It was indeed a type of breach which would be very likely to be treated much more seriously by an employer. Regardless of how their respective breaches might be viewed in the context of criminal wrongdoing, the claimant had acted in a way as to put personal data of employees and customers as well as commercially sensitive information outside the respondent systems and control. Mr Malnick had simply accessed the personal email address of an employee and had used this to communicate with the individual outside of the

respondent's systems and disclosing only information which was in the public domain and which had nothing at all to do with the respondent or its business.

144. No adverse inference could reasonably be drawn from the respondent treating the claimant's conduct as more serious misconduct (up to the point of justifying dismissal) than that of Mr Malnick. Such conclusion by the respondent was entirely reasonable and understandable.

145. There is no basis upon which the tribunal could conclude that any evidence presented by Ms Willsmore to Mr Mellonie was selective or engineered to achieve a particular desired result. The tribunal cannot conclude that Ms Willsmore sought to deliberately conceal that the claimant had already contacted Mr Mitchell in a way which disclosed her data breach. The tribunal has found that it is unlikely that Mr Mitchell would have realised within all communications from the claimant that she had been sending data outside of the respondent. In any event, Ms Willsmore independently discovered (for the first time) the claimant's data breach and came to her own conclusions that this was a disciplinary matter with no evidence whatsoever that she was influenced by anyone else let alone the claimant's disclosures. Even if it could have been concluded that Mr Mitchell did not regard the claimant's actions as serious and the seriousness was only appreciated at a point of time after the claimant's protected disclosures, there is no causal link between Ms Willsmore deciding to pursue a disciplinary case against the claimant and those protected disclosures. Mr Mellonie was coming to his own conclusion as to the seriousness of what the claimant had done and someone else having come to a different view (albeit the tribunal does not accept that anyone had) would have been immaterial to him.

146. Ms Willsmore did not thereafter seek to influence Mr Mellonie to arrive at any particular conclusion. The claimant had made the situation worse for herself by not acknowledging any wrongdoing or confirming that the data had been deleted. That could not have been anticipated or designed by Ms Willsmore at the time she raised with the claimant the issue of the data breach. Nor can she have anticipated that the claimant would behave during the disciplinary process in a manner (including in declining to engage with the hearing arranged) which gave Mr Mellonie no confidence whatsoever that trust could be retained in her.

147. Had Mr Mellonie been provided with wider information regarding the claimant's employment history, he would have been more likely to arrive at a decision to terminate her employment. The reason or principal reason for the claimant's dismissal was not her protected disclosures. Her claim of unfair dismissal must therefore fail.

148. The claimant also claims that her dismissal was related to her pregnancy. She, however, again accepts that Mr Mellonie was not influenced in his decision-making to any extent whatsoever by her being pregnant. She accepts that he was not even aware that she was pregnant. Whilst any act of manipulation by Ms Willsmore, as potentially alleged by the claimant to have occurred, would have been a wholly separate act of unlawful discrimination from the dismissal, Ms Willsmore's evidence, which the tribunal accepts, is that the claimant's pregnancy played no part

whatsoever in her decision that a disciplinary case ought to be pursued against the claimant in respect of the data breach. The claimant's pregnancy was not part of any reason why Ms Willsmore considered that the claimant ought to be disciplined let alone any dismissal. The claimant did not suggest to Ms Willsmore that her pregnancy was any part of Ms Willsmore's reason, when she cross-examined her. Assertions that the respondent might have been concerned about the cost of a period of maternity leave have no evidential basis.

149. There are no facts upon which the tribunal could reasonably conclude that pregnancy was an influence on the claimant's dismissal and the tribunal has accepted the respondent's explanation that that the dismissal (by Mr Mellonie) was because of the claimant's data breach uninfluenced (including by anyone else) by her pregnancy.

150. The only remaining complaint of pregnancy-related discrimination is in respect of the congratulatory email sent by Ms Willsmore to the claimant in which she also indicated an intention to conduct a maternity risk assessment. The claimant again failed to put to Ms Willsmore when she was being cross-examined how this communication might be an act of unfavourable treatment. On its face, it was nothing of the sort, but rather a communication of a pleasant nature which ought reasonably to have been welcomed by the claimant. The claimant, in her own evidence, has suggested something disturbing in this message being detached from the chain of communications about her subject access request and protected disclosures. It is wholly unsurprising and indeed quite sensible that Ms Willsmore sought to communicate separately on this very separate matter. The claimant's case appeared to be indeed that the way in which Ms Willsmore dealt with her pregnancy was indicative of a contrasting lack of care in addressing the claimant's protected disclosures rather than, in itself, any unfavourable treatment because of pregnancy.

151. The claimant's complaints in the alternative of direct sex discrimination add nothing. For the avoidance of doubt, the claimant's dismissal and the sending of the aforementioned message cannot be concluded to be in any sense whatsoever less favourable actions taken because of the claimant's sex.

152. The final issue for the tribunal to determine is the claimant notice pay entitlement. The tribunal's conclusion is that the claimant's entitlement was to one week's notice and that no payment beyond that was due to the claimant. The claimant's contract of employment was conditional upon the completion by her satisfactory performance of a probationary period, with the respondent having discretion to extend the probationary period. The confirmation of permanent employment was conditional upon the satisfaction of the period of probation. Whilst the claimant has argued that her probation period ended in April, that is untenable in circumstances where she subsequently attended a probation review meeting in May at which the period of probation was extended to 9 June 2022. At that point, however, the claimant was absent from work due to long term sickness and therefore not in a position to show satisfactory performance which might have satisfied the respondent that the probation could be regarded as having been passed. A lack of communication can not lead to an inference to the contrary. The claimant has also placed reliance on correspondence

received after the termination of her employment indicating an entitlement to one month's notice. That was straightforwardly a communication sent in error. It is clear from the tribunal's findings and the claimant subsequent correspondence that she did not herself understand that she was entitled to receive a month's notice.

153. Had the claimant's notice entitlement been to a month, then the claimant still would have no entitlement to damages in that then the notice period applicable under her contract would have exceeded by more than one week the statutory minimum period of notice of one week. In such circumstances, statutory minimum notice rights which would otherwise have entitled the claimant to full pay during a period of notice when sick do not apply and, in circumstances where the claimant was absent and had exhausted all sick pay entitlement, nothing further would have been due to her.

154. The claimant's submissions in fact suggest an alternative argument whereby there had perhaps in the last communication from the respondent been a variation of contract or an independent collateral promise to honour a period of notice of one month. Leaving aside issues regarding the tribunal's jurisdiction to hear such a complaint in circumstances where any amount may not have been owing as at the date of the termination of her employment, the tribunal was clear that there was no collateral agreement that the claimant be paid for one month's notice. Again, the reference to one month's notice by the respondent mistaken, but also made in circumstances where no consideration was provided in return by the claimant such as to create any new legally binding obligation.

155. The claim seeking damages for breach of contract fails.

Employment Judge Maidment

Date 8 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS

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