EMPLOYMENT TRIBUNALS

Claimant: Mr C Cheng

Respondent: Garic Limited

Heard at: Manchester **On:** 30 May to 1 June 2023
1-4 August 2023

Before: Employment Judge Eeley
Ms A Jackson
Mr I Taylor

REPRESENTATION:

Claimant: In person
Respondent: Miss L Kaye of Counsel

JUDGMENT having been sent to the parties on 17 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant brought his claims by way of a claim form presented to the Tribunal on 29 June 2021. A list of Issues was formulated following two preliminary hearings. The most up-to-date version of that list (through which the Tribunal worked) was that set out in Employment Judge Horne's Case Management Order at page 100 in the bundle.

2. The Tribunal received written witness statements from:

a. The claimant, Christian Cheng, former Business Development Co-Ordinator with the respondent;

b. Ian Gosney, the respondent's former Head of Sales for Rail and HS2;

c. Jennifer Wood, the respondent's former head of HR; and

d. Andrew Goody, the respondent's former Finance Director.

All of those witnesses attended the hearing to give oral evidence and be cross examined.

3. The Tribunal also had regard to the contents of the agreed final hearing bundle, which consisted of 673 pages. We read those pages in the hearing bundle to which we were referred by the parties and witnesses. We were also grateful for the written and oral closing submissions on behalf of both parties.

4. Numbers in square brackets below are references to page numbers within the agreed hearing bundle, unless otherwise indicated.

Findings of Fact

5. The claimant was employed by the respondent from 13 January 2020 to 30 May 2021. His job role was that of Business Development Coordinator ("BDC"). The job description for that role was at page 132. It was, in essence, a sales role and the job description included reference to targeting new customers via cold calling. The claimant indicated that this was something that he was happy to do and had actually asked to be able to do at the start of his employment, although it was not a real part of his job at the beginning of his time with the respondent. The claimant was paid by way of base salary plus commission.

6. During the earlier part of the relevant chronology the claimant's line manager was Glyn Morris. He was not a witness from whom we heard evidence during the hearing. Mr Morris was subsequently replaced by Ian Gosney as Head of Sales, Rail and HS2 from January 2021 until March 2023. Mr Gosney reported, in turn, to Mark Tyldesley, who was the Sales Director. Again, we did not hear evidence from Mr Tyldesley but we heard that he had considered the claimant's grievance at the first stage of the process.

7. The Employment Tribunal also heard evidence from Andrew Goody. He heard the claimant's grievance appeal and was employed as the Finance Director at the respondent. He was also the Data Protection Officer for the respondent. The last of the respondent's witnesses was Jennifer Wood. At the relevant time she was the Head of HR for the respondent (until December 2022.)

8. The Tribunal also heard that there was another Business Development Coordinator by the name of Joanna Owens. She was essentially doing the same job as the claimant. We heard that neither the claimant nor Ms Owens had particular client lists that they each 'owned.' There was no such clear dividing line between the clients to whom they provided services. As a matter of principle,

both of the Business Development Coordinators could work on any client account. The important point to focus on was the basis on which commission was paid. Commission became payable when a purchase was raised, or an invoice submitted. Up until that point the respondent viewed it as *potential* commission rather than something concrete or crystallised. At the point that commission became payable it would crystalise in the account, as it were, of one or other of the two Business Development Coordinators.

9. The respondent's business is plant and site equipment provision. It manufactures and supplies specialised plant site equipment and welfare facilities. We heard that it employs in the region of 230 people.

10. The role of the Business Development Coordinator (in which the claimant was engaged) requires the employee to generate new business in respect of equipment sales and to develop new and existing leads in that regard. As previously noted, although cold calling was an element of the role that had been included in the job description, it had been rather overlooked before Mr Gosney became the claimant's line manager. When he took over, he wanted to refocus the team and improve its performance. Until then the focus of the claimant and Ms Owens was on the existing incoming leads. These were easier to convert into income, as they were coming in direct to the respondent from potential customers. The employees would be dealing with incoming 'traffic' rather than doing outgoing calls in order to generate more business.

11. When Mr Gosney came into the department, he considered that it had not been hitting its target for around 20 months. I pause to note that this is a reference to the target of the department rather than a reference to the targets of individual employees. Therefore, the reference to the department not hitting target is in no way a criticism of individuals *within* that department. Those individuals might well have been hitting their personal targets in order to get commission. In short, it is not an allegation that the claimant was not performing. What the Tribunal is saying is that the respondent saw room for improvement within the department as an entity. The respondent (through Mr Gosney in particular) had to assess whether the team as a whole and the department as a whole was effectively a *cost* to the business or adding *profit* to the business.

12. In December 2020 (before Mr Gosney took over management of the claimant) the claimant raised issues regarding his Performance Development Review (that is to say his "PDR") [176-177]. The Tribunal reviewed the PDR document to see what we made of it [143]. It was completed by Glyn Morris and it noted a number of things about the claimant. It noted that he has reasonably good working relationships with production, purchasing, CAD, accounts and transport departments. It made the point that the claimant was always looking to better his sales revenue for both the business and for himself personally. It noted that new sales price was paramount, especially in-house manufactured products as well as the most popular externally sourced items, and it agreed with the claimant's point on this. Mr Morris stated that he would chase up with a colleague named "Beat" as to where he and his team were up to in terms of updating build costs. It was also noted that the claimant tried to be innovative throughout his working practice. The Tribunal notes that there were some elements of the document which were complimentary about the claimant.

13. Over the page (onto page 144) it was noted (in relation to the "Do the right thing" category) that this was an area in which Mr Morris felt the claimant needed to improve. It was noted that where there was anything that the claimant was unsure of (or needed to question) it should be taken direct to Mr Morris in the first instance rather than: *"going 'above my head' and approaching the directors, we have a procedure of escalation which is in place for a reason and needs to be adhered to".* Under the heading "Trust each other" it stated:

> *"This is another area where I believe there is room for improvement. Christian needs to start putting trust in to his colleague in the sales team with better lines of communication, especially with everyone not being in the office and homeworking, this is on a reciprocal basis. In addition, for asking for advice/ help/support that he trusts the answers he is given by senior staff/line managers and listens to their response and not doing what he thinks is best."*

14. The document also gave the claimant the opportunity to provide his own feedback to the manager, and he did that. He 'pushed back' on some of the more negative comments that had been set out in the earlier stages of the document. On page 146 he made specific comments about work that he had done (I will return to those in a moment.)

15. When the Tribunal looked at this document, and when we heard evidence from the claimant in the Tribunal hearing, the Tribunal was able to see that, in effect, the claimant objected to the qualifications put on the positive comments. He felt that these qualifications converted the positive comments into negative comments. By way of example, the document refers to "reasonably good working relationships." The claimant felt that that reflected upon him more negatively than positively. The Tribunal considered whether, in fact, it was a negative comment. Alternatively, was it a balanced comment pointing out both positives and areas for development/improvement? On balance we concluded that it was the latter. It contained recognition that the claimant was being innovative and had strong elements to his performance.

16. The reference to the claimant "going over the head of managers" is linked to two separate alleged issues. The issue on which we heard evidence was the matter relating to Mr Gosney. Obviously, this cannot be the subject of this particular PDR document as the PDR document predates Mr Gosney's involvement in the claimant's employment. However, it is a matter on which the Tribunal heard evidence and from which we were entitled to draw conclusions. In paragraph 38 of his witness statement Mr Gosney said this:

> *"Glyn refers to Mr Cheng going over his head to raise matters to the Exec. I experienced similar instances when working with Mr Cheng. For example, I recall an instance with a product known as wheel spinners. Due to health and safety concerns we decided not to sell the product any longer. Mr Cheng was not happy with that decision, as I understood he felt it would impact on his commission as he had some leads for the product. He went over my head to procurement to seek to change the company position on the product."*

We heard a degree of evidence in relation to this and we had no reason to disbelieve Mr Gosney's account, particularly when viewed in the context of the contemporaneous documentation. For example, we had access to documents and email chains surrounding them at [520-517] and we can see that, back in August 2020, Joe Griffiths had sent an email to the claimant at the bottom of which it stated [520]:

> *"From a garic perspective, there is to be no marketing material for this product or campaigns due to the potential HSE risks associated with the product. This is a solution which can be sold from the desk, but must have the associated risks provided at point of enquiry. Ross will be able to highlight all of these. Do you have any issues with any of the above, Christian? If not then please push Libra to start the contractual works and I'll review."*

That is the root of it. The Tribunal can then see (following the chain of communication through at [517]) that there is further communication the following year (in February) from Joe Griffiths to the claimant (with a copy to Mr Gosney) which states:

> *"We don't want anything to do with this product. There was one in Essex that nearly took someone's head off last month."*

The correspondence carries on in similar vein. Again, Mark Tyldesley was involved [515]:

> *"Ok Mark- thanks. Bottom line is we don't want to be trading with Libra, so suggest we pull out now. Katy- given points below, we should look to remove from the brochure if we are not too late."*

17. This chain of emails appears to have been forwarded by the claimant to the claimant's own email address with the comment (at the top of page 515) *"Had to take a chance to get a senior opinion. Customer will be looking to purchase 3 more wash in the following year but do* [sic?] *want to lose them to a rival supplier. Needed to go back to the customer asap, in Garic's best interests."* This seems to fit with the account given by Mr Gosney, that the claimant effectively pushed back when he was given a negative instruction and would go direct to higher levels of management in order to get an answer which *he* felt made more business sense. Based on the evidence that we have heard, this may have been something of a pattern in the claimant's approach to his work. It was certainly consistent with his presentation in the course of the Tribunal hearing. The claimant, perhaps for good reason in certain circumstances, was reluctant to accept the decisions of others if he disagreed with the substance of said decision. He had a tendency to push back even when the decision came from higher up the management hierarchy. This would perhaps (the Tribunal accepts) have made him more challenging to manage than some other employees. Indeed, the PDR document presents the claimant as a more challenging employee to manage than it does Joanna Owens. Of course, we cannot comment directly on Joanna Owens as we did not hear any evidence from her, but we can see the

basis for the respondent's evaluation of the claimant's style and approach to decisions with which he did not agree. The PDR that we have considered sits comfortably with the way the claimant presented his Tribunal evidence and the specific example given by Mr Gosney. Indeed, the claimant on his own account acknowledges (at paragraph 67 of his witness statement) going 'over the head' of some on certain occasions in order to speak direct to someone 'higher up the chain'. However, he says he had good reason to do so. Whether that is correct or not, it does suggest that the PDR document is a fair reflection of the situation.

18. The second aspect of the claimant going 'over the heads' of managers is during that earlier period and is reflected in the PDR. The Tribunal did not hear much direct evidence about this (it reflects the period when Mr Morris was the manager) but the surrounding evidence that we have heard is consistent with the contents of the PDR and would tend to suggest that the PDR is accurate in relation to this particular issue.

19. The claimant also made submissions around an incident involving Leon Massey. Again, we did not hear detailed evidence on this, although it was referred to by the claimant in closing submissions. Once again, this concerned pricing enquiries. The claimant says that he was asking a question, not getting an answer quickly enough (in time-critical circumstances when a customer was waiting for something) so he went to somebody else instead. The potential problem with this (if it is in fact an accurate reflection of the circumstances) is that the decision-making hierarchy may well be in place for good reason. The claimant may not have visibility of all the relevant considerations in order to make a well-judged decision to go over the head of his direct manager. His manager may well have access to relevant information which the claimant does not know about.

20. In the PDR, the claimant had the opportunity to comment and provide his feedback. He did so at page 145. He pushed back on some of the management's comments. Importantly, at the top of page 146 there is reference to a period where he was managing the sales inbox on his own and he says this:

> *"I feel inter team tensions are sometimes exacerbated by sporadic management, where intervention into work only comes at problems and not consistently, we (Sales Team) have been resolving issues quite well or recent weeks as a methodology for distributing work is created. Further to this I managed the sales inbox singularly for 1 full month, where I liaised with Tim C as needed, which I felt should have been highlighted in some capacity. My ideas are often asked for and sometime integrated into our working practices, I would consider myself determined but easy to work with, and I would like evidence of where I don't have values and where I don't listen to responses. I often discuss sales methodology, rationale or unavoidable constraints with managers of various departments and take on board there advice and experience. On one occasion I have been directed to not contact directly the directors regarding a scope of reasons (this was a promoted culture at the start of my employment here), I have not done this since, I feel my appraisal in this respect is a bit unbalanced. I have also raised counter grievances in this regard with lack of contactable managers."*

21. In considering the claimant's comment about managing the sales inbox on his own, we heard some further evidence about this in the Tribunal hearing. It referred to a period in September 2020 during the Covid crisis. During this period, the increase in demand for the respondent's services related to *hire* services (rather than sales), for understandable economic reasons given the fragility of the market at that time and the higher-than-average levels of uncertainty. As a consequence, there was more work in the hire section of the respondent's business and Joanna Owens was moved to work on hire business. This left the claimant as the BDC in the sales area of the business. His line manager (Glyn Morris) also partially redeployed to work on Hire too, although he did not relinquish his position with Sales per se. Naturally enough, this left more of the sales work for the claimant to do. He *did* have access to a manager during the course of this. He refers in the PDR to Tim C (possibly Tim Carroll). Taking all of the evidence into consideration, during this period of time the claimant was not actually 'acting up' at a higher level in the structure than his own job description. Rather, he was doing *more* work that was *within* the scope of his own job description but more likely working on his own to do it (where previously this would have been more of a shared responsibility with others.) The reasons for these changes were the changes to business demands caused by the Covid pandemic. during this period, the claimant was not undertaking the managerial role. He did not take on any of the managerial duties (such as attending or doing work for Board meetings). Thus he stayed in the job he was already doing whilst others focused on hire work. There was nothing in the evidence before us to suggest that, at the time, it was seen as a particular benefit to Joanna Owens to move her to Hire. Nor was there any suggestion that there was any particular perceived disadvantage to the claimant in staying in Sales at the relevant time. Thus there was no suggestion that Ms Owens was chosen in preference to the claimant or that this was the respondent favouring her over the claimant. At the time there was no reason to think that experience in Hire would be of any particular benefit or relevance to the employees in the future. It is important not to view these events with the benefit of hindsight or through the lens of the subsequent restructure.

22. On returning to the PDR document, the Tribunal notes that the overall grade at the bottom [146] is *"Medium/On target- Achieving expectations in role and against objectives and values."* In terms of *potential*, he is graded as "*Satisfactorily Placed/Limited- 'Good fit' or solid performer in current role. May have lateral potential."* There is no indication of underperformance. He is marked as performing adequately in the role with some positives.

23. The Tribunal also heard evidence that the claimant had applied for two, more senior roles within the respondent organisation but was, unfortunately, unsuccessful. He was disappointed that the respondent did not already appear to consider him 'promotion material' at this stage in his time with them. The respondent also highlighted the claimant's inability to trust and his communication style.

24. The Tribunal finds, on balance, that the report in the PDR seems to be in line with the Tribunal's own observations regarding the claimant's receptiveness to criticism. We compare that (so far as we are able to) with the PDR for Joanna Owens [136]. (The Tribunal did not hear from Ms Owens so cannot make its own

direct observations about whether the PDR is an accurate assessment of her.) The differences in the PDRs between the two employees may well be based on differences in performance. On reading the document, the Tribunal can see that it has a much more positive tone than the one relating to the claimant. We also note that Joanna Owens gives no individual feedback. Importantly, both of the PDRs (the claimant's and Ms Owens') refer to the *reciprocal* need to improve communications between the BDCs. In that regard the respondent is being even-handed in including that issue in the PDRs of both the employees. The Tribunal also notes that the comparator here (Joanna Owens) had the same overall score as the claimant and on the face of it there is no real evidence of unfairness or of a difference of treatment to the claimant's detriment. The Tribunal notes that the PDRs were carried out by Mr Morris and we have no evidence before us to suggest that he knew anything about the claimant's personal or philosophical beliefs at this time, or indeed at any time during his line management of the claimant.

25. The Tribunal heard evidence that there was a further instance of the claimant working on his own in February 2021. He had been left on his own to cover the BDC workload. It is a similar matter to that covered by the PDR but it was separate event that had its own particular circumstances. We heard evidence that this was a fortnight in February where there was an unexpected bereavement for Mr Gosney (so he was absent) and where Joanna Owens was absent on sick leave. Inevitably, (in a team of three with only two BDCs) from time to time one person may be left to 'hold the fort' alone. If the claimant had been absent from work for some reason, roles would have been reversed and it would have been Joanna Owens doing the claimant's work and manning the inbox.

26. In terms of Mr Gosney's return to work and Joanna Owens' return to work, the claimant's evidence to us was that there was no formal debrief or meeting once they returned to work. Rather, he updated them on what they needed to know about the various aspects of the clients that he had been dealing with in their absence. He did this by telephone. We note that a formal debrief meeting might well have been one way to do this, but there is nothing to suggest that separate phone calls did not do the same job adequately or effectively. The claimant refers manning the inbox on his own. Once again, the Tribunal notes that this work was part and parcel of his job description and would be equally applicable to Ms Owens. In a team of two, where both employees will have to take leave at certain times (thereby leaving the other employee to do the job single-handedly) it is not unreasonable to expect that the employee who remains at work will not be specifically complimented on that work once the absent employee returns to work. The employee remaining in work is, effectively, providing cover for the other employee's absence. There is no expectation that they will receive specific thanks or a compliment. The position would be the same for any employee in this job role who found themselves in comparable circumstances.

27. Overall, therefore, the Tribunal has concluded that it is a balanced PDR. There are good and bad areas, and some areas for improvement. We are not inclined to accept the claimant's suggestion that it is unfair and unduly negative.

28. The working relationship between the claimant and Mr Gosney got off on a poor footing. By 22 January [187] the claimant had taken offence at a comment made by Mr Gosney (the so-called "busy fool" reference). He took it as a personal criticism, whereas Mr Gosney subsequently clarified that it was directed to the team. What we know from the surrounding evidence is that Mr Gosney was trying to change the approach and focus of the team from inbound work to outbound work. The "busy fool" email chain starts at page 192. In the email chain Mr Gosney asks for lists of companies to engage, and a log of the calls made. Page 190 explains the task. Page 187 indicates that "busy fool" is a reference to efficiency and lack of productivity. It is way of describing the fact that there is a lot of movement, a lot of activity, but without an end product. In the email Mr Gosney explains the context and meaning of the comment, clarifies that it is not a direct comment about the claimant, confirms that it is a phrase which is meant to mean that the team's time could be spent on better activities. Mr Gosney apologises for any offence caused but still asks the claimant to make the requested changes to his working methods.

29. Unfortunately, Mr Gosney was unable to undo the damage caused by this comment despite apologising. The claimant found it difficult to put this behind him and the relationship seems to have got off to a bad start. Mr Gosney, for his part, felt that he was struggling to get the claimant to implement the necessary changes to the work of the department. At page 193 the Tribunal can see that, as of 25 January, the claimant wanted to raise a complaint to HR. We understand that this referred to the "busy fool" comment rather than to any wider issues. That certainly seems to be the context.

30. The emails at pages 195-199 provide a flavour of the working relationship between the claimant and Ms Owens. It is fair to say that there was no love lost between the two. The evidence also shows that the claimant guarded and protected his work from his colleague. He could be described as resenting someone else working on his work or getting involved in working with clients that he perceived as 'his' clients, because he was concerned and worried that he would not get due credit for his own work. That is perhaps an understandable human reaction. However, on occasions the two Business Development Coordinators would have to work together for the good of the business and for the benefit of customer experience. This lack of trust between the two BDCs had the potential to create problems for the team as a whole and for the manager involved in managing this area of the business.

31. Page 210 of the hearing bundle relates to an issue which arose regarding multiple points of contact with the same customer, United Utilities. This later turned out to be a particular problem in this case. In essence, the respondent had decided that there should only be one point of contact with this client and that it would make better sense for it to be Joanna Owens. The explanation and rationale for this is subsequently obtained from Jeanette Finch. It is to be found in the email at page 319, dated 13 April 2021. In that email (which is addressed to Mark Tyldesley and Jen Wood in the course of the grievance) she states:

> *"With regard to UU, I have been keen to understand the current enquiries and asked Joanna and Christian what sales enquiries we were dealing with as the customer came direct to me for a follow-up and a new enquiry. I dealt with*

Joanna and arranged a Teams meeting with the customer to scope out the new enquiry. Joanna was also dealing with the main Plant buyers. Christian with a separate enquiry. It made sense to then reduce the number of contacts and centralise the enquiries within the Sales Team which Ian agreed with. I've attached the email trail that was going on at the time. The aim was to offer the customer a consistent approach to their enquiries which they welcomed. I hope this answers your email."

The claimant and Joanna Owens had both worked on this client; it was given to Joanna Owens for customer care reasons and because of her contact with others within United Utilities. It is important to note that there is no evidence that this decision led to the claimant losing out on commission. At that point there was no commission payable and indeed there is no documentation showing that commission ever became payable on this particular account or this particular issue. The claimant cannot establish that he lost out financially as a result of this or that Joanna Owens gained from this relocation of the client.

32. In the interests of brevity, I do not propose to read the entirety of the email chain into the record. In the hearing bundle we have the emails at page 243 starting with the email from Mr Gosney at the bottom which gives the instruction to the claimant and Joanna Owens. Then the claimant pushes back on this and then there is a further email starting at the bottom of page 242-243 from Mr Gosney which, again, is consistent with the points and the findings we have already made and supports us in those findings.

33. When the claimant started working for the respondent he was due to carry out some cold calling. He was surprised that he was not required to do it from the start of his time with the respondent. Then Mr Gosney came in as manager and the situation changed. An onus was now put on the claimant to do outbound calls. The claimant was asked to compile a log to show the outbound calls. The Tribunal notes that there is no email complaint of a breach of GDPR around this period of time.

34. Moving on in time, on 19 March 2021 the sales inbox is relocated to another team. This is the email chain starting at page 253 on 19 March. The email from Ian Gosney to both BDCs states:

"There are going to be some changes going forward within the team. I appreciate that a lot of time is being taken by monitoring the sales inbox, so as a trial period, effective first thing Monday, the inbound sales will be picked up from a different part of the business allowing you to focus all of your time on business development and begin to grow revenues from different sectors and companies. I will call you both individually Monday morning to discuss in further detail."

35. The claimant chased up that call within ten minutes of the email being sent. Mr Gosney [252] reassured him that the meeting would take place, although there would be a necessary delay "until Jen comes back", and he made the following point:

> *"The below is a change which needs to happen as we are actually on the decline in terms of revenue month on month and have been for quite some time now. I am under the impression you think the change is in some way a negative thing, but I can assure you that the change is being made for the benefit of the business and that reason alone. As of Monday the changes will be made, and they are in line with the original job that you accepted."*

36. Again, the claimant pushed back (top of page 252) and the correspondence carried on backwards through the bundle (at page 251 etc.)

37. This email from Mr Gosney was received in the context of the claimant being unhappy on a number of fronts and wanting an HR meeting to discuss that. In the meantime Mr Gosney was saying that the trial needed to take place and the issue really seems to be kept live at that point.

38. Linked to this is what one might call the question: "whose client is it anyway?" Mr Gosney had to referee between the claimant and Ms Owens as to who got what commission. There is an example [178] which, for brevity will not be read into the record in detail here. The claimant is very protective of his work.

39. At the same time the claimant was seeking a review of the PDR that was done in December and he escalated it to Tim Carroll via the email chain at page 175. He did not drop the issue even though there had been a change of line manager since the PDR in question and even though there was no suggestion that he would be subject to any form of performance management or negative effects as a result of that previous PDR.

40. The Tribunal then heard evidence about the conversation between Mr Gosney and the claimant on 22 March. A phone call or Teams call took place. The claimant provided a 'transcript' of this [308-310]. Up to this point in the chronology there is no paper trail confirming that the claimant had raised issues about GDPR at all. The claimant relies on the transcript, and we have reviewed the evidence about this in its totality, including the cross examination during the course of the hearing.

41. The respondent's case is that this is not actually a transcript and is not accurate. The respondent's case is that the GDPR issue was raised once in the context of the respondent closing accounts and removing data, thereby making the claimant's job harder. The argument was that he was not able to use data previously available on the IT system to help with his BDC work, the so-called "tools to do the job." This must, by definition, be a reference to old customers who had previously had dealings with the respondent. Otherwise there would not be any prior data held on the system. According to the respondent, the claimant was alleging that this change made it harder for him to get the sales work because he had not got that data to work with and to use. Thus, the respondent says that the reference to GDPR at this point in the chronology is contextual. They allege that the claimant is saying that he has been told that the reason why the data was being wiped was because the respondent was complying with GDPR obligations. So, GDPR is the *context* for the comment that the claimant is making, but it is not the *substance* of the comment or the *reason* for the comment. The claimant, on the other hand, is saying that he repeatedly

challenged whether the new system was in breach of GDPR and whether there was legal compliance with GDPR by the respondent.

42. Having reviewed the evidence the Tribunal finds that the 'transcript' document is not a contemporaneous transcript. Indeed, the claimant accepted that it was written after the event. Even if the claimant was doing his best to remember what had been said, this does not mean that the document is accurate. At best it is selective. We can see, even from the face of the document, that it misses out various elements of detail. For example, if we look at page 308 there are elements in square brackets where there is an insertion, "*IG briefly runs through the first 4 or 5 points saying they/I haven't been achieved in the last 14 months."* That is evidently a summary of a much bigger conversation which is not recorded in detail in the 'transcript.' If we look at the top of page 309 we can see three immediately relevant entries. The first is from Mr Gosney, "*What is your problem with GDPR – do you understand it?"* The claimant is recorded as saying, *"Yes, I think so, your not meant to store peoples names and telephone number and personal data on IT systems without their permission. Can you explain whether it is legal what proposed?."* The response to that is stated to have been, *"What's your problem regarding it?"* On reading the document it looks like the entry attributed to the claimant is an insertion – it does not fit comfortably with the comments and questions on either side of it. Carrying on, there is a further gap in the record where the claimant says that he is moving on from the topic (in square brackets). Once again, that clearly shows this is not a complete and accurate record of the conversation even on the face of the document.

43. Taking all of that into account, the transcript does not read as a realistic and complete account of what was said. There were more than minor changes to terminology. It does not fit with the seriousness of the topic. It is not credible (in our view) that Mr Gosney would move on from the claimant's questions and comments without a proper note of the next steps that he would take, or that the claimant would let the conversation move on without some idea of what would happen next. The change from one topic to another happens quite abruptly- the parties go straight on to discuss something else. We contrast that with Mr Gosney's clear evidence on this point. On balance, we do not accept that this is a reliable document and we find the respondent's evidence on the point more cogent and persuasive. It fits better in the context of the surrounding evidence. On balance, we find that the claimant raised this issue (i.e. GDPR) once, verbally with Mr Gosney. We find that this happened in the context of the respondent allegedly taking away the tools that the claimant felt he needed in order to make sales, rather than in the context of the claimant disclosing information tending to show a breach of the legal obligations under GDPR.

44. There is an issue here in relation to subjective versus objective interpretation. The Tribunal can accept that the claimant genuinely thought that he had said enough to make his point during the course of this conversation. However, objectively, that is not how his comments would reasonably have been interpreted by the respondent. Put another way, a bystander would have come to the same conclusion as the respondent, that the claimant did not make the comments as set out in his transcript. Rather, the bystander would understand the claimant to have highlighted the difficulties that wiping data caused in terms of his ability to make sales. The claimant perhaps lacks insight as to how he

has been interpreted by others. On balance, we prefer the respondent's evidence, albeit the Tribunal is not saying that the claimant is deliberately lying, rather that he is mistaken in his recollection of the events.

45. On 23 March 2021, the claimant raised a formal grievance. There are particular points within that relating to GDPR, in particular at page 257. Under the heading "Do the right thing" there is a bullet point where he says, *"Requested clarity on GDPR laws in relation to 'conduct business development,' in light of multiple account removals from our system due to GDPR and with concerns of overall lack of attention in management. This is a legal framework that has already been implemented."* That is the only reference to GDPR within the grievance letter itself, and it is consistent with what we find has previously been said by the claimant about GDPR.

46. We pause to note what the grievance policy says about how grievances are to be dealt with. The relevant section is at page 130. Under the heading "Stage 1" it states:

> *"In the event of you having a formal grievance, in the first instance, you should write to HR addressing your concerns in full. The Grievance will be logged with HR and a Manager will be appointed to hold a Grievance Hearing with you. You have the right to be accompanied at this meeting by a trade union official or a fellow employee of your choice. You must make every effort to attend the grievance meeting. At the hearing it is your opportunity to discuss your concerns and provide any evidence and relating to the concerns raised. Following the meeting, the Company will endeavour to respond to your grievance as soon as possible and, in any case, within five working days of the grievance meeting. If it is not possible to respond within this time period, you will be given an explanation for the delay and be told when a response can be given. You will be informed in writing of the Company's decision on the grievance and notified of your right to appeal against that decision if you are not satisfied with it."*

47. On 24 March 2021, the next day, Jennifer Wood responded to the initial grievance in the document at page 261. The response is in line with the policy in terms of timeframe and content and holding a meeting before the full investigation. That is the standard order, in line with the terms of the policy. In essence, the respondent needs to understand the grievance and make sure it has not been misinterpreted before they then conduct an investigation into it. At this point, the respondent suggested that the claimant stay off work on paid leave pending the grievance hearing. The claimant agreed to this. The reason for this suggestion was that he would find it difficult to stay in work with the person he had raised the grievance about. We understand the rationale, it is a reasonable one.

48. The grievance hearing took place on 29 March 2021 [269.] The points that the Tribunal draws out from the notes are that at the outset of the hearing the respondent (Mr Tyldesley at this point, who was the Chair) checked if it was ok to go ahead with the meeting given that the claimant was not accompanied by a representative or a companion. There was also a reference to the need for Occupational Health support. This was flatly refused by the claimant. The

claimant asserted during the Tribunal case that he was limited to three particular areas in his grievance rather than the nine that he said were to be considered. However, a fair reading of the notes indicates that the respondent was just trying to pull out the main themes in the grievance so that it could organise the issues and understand the issues before investigating them. It is evident that there was no desire to limit the claimant but just to make sure that everything was properly addressed in a manageable way.

49. During the grievance hearing the claimant got to explain his point about customers and jobs being removed from him. He made the point that he was talking about the loss of *potential* commission. He did not say there had actually been an invoice on which commission was payable. The claimant stressed that it was about potential loss of commission, not lost commission per se. He could not show an actual loss as a result of the work moving to another employee.

50. At the bottom of page 271 there is a reference to GDPR. The claimant says in the course of a comment:

> *"The Accounts team had to remove accounts due to GDPR – one of the Credit Control team said it was due to GDPR. It was cold calling and research – account were being closed off."*

Again, that is consistent with our previous findings in relation to what the claimant had said up to this point, both verbally to Mr Gosney, and also in the grievance document itself. Even here he was referring to it in the context of removal of accounts. The notes also make it clear that the claimant did not wish to carry on working with Mr Gosney. He did not trust him and there is a passage in the notes dealing with whether Mr Gosney had effectively played a 'mind game' on the claimant by wrongly attributing his own comments to the claimant or vice versa. The claimant also emphasised again the lack of tools to do his job and at page 274 there is a further reference to GDPR where he says, *"I asked for GDPR clarity".* He disputes targets and the scope of the role. At page 275 he criticised strategy. He alleged (at page 275) that he was left to cover three people's work for a month. He also went on to refer to GDPR again and stated, *"I don't think there's a legal soundness for the GDPR. We don't have the tools. I don't think I should be getting grief- it's an overall target. Negative energy. He appears to be overly stressed.* "*If I get stripped down to the lowest thing which I regularly do. Market research- which I've done."* It carries on in similar terms.

51. There is further criticism of the management structure and then towards the end of the hearing Mr Tyldesley made two particular points that need to be pulled out of the record (page 276). First of all, he said:

> *"There's a lot of content to investigate – the policy says we'll come back to you in 5 days, but we'll need longer to thoroughly investigate. I want to be clear that I've not asked you to only raise 3 points. We will come back to you, but it might take a little while longer."*

Later, on the same page he said:

> *"I would suggest you remain on paid leave for now. One of the things, we mentioned at the start of the meeting was about Occupational Health. We talked about your mental health and you mentioning that you're feeling stressed. I strongly urge you to take the OH support/GP support."*

The claimant responds to that with a few comments.

52. After the hearing concluded the claimant sent in some further documentation. He alleged that he sent about 30 pages of extra documents to be considered as part of the investigation. Importantly, he also sent his transcript of the call with Mr Gosney (the document at pages 308-310 which we have previously referred to).

53. On 6 April Mr Tyldesley had a meeting with Mr Gosney regarding the grievance in order to investigate what had gone on (notes at page 313). He asked Mr Gosney about moving the work from one person to another, particularly the United Utilities issue. Mr Gosney confirmed that it had not been invoiced and had not impacted on earnings. Mr Gosney confirmed it was only payable on invoices and physical orders. He was asked for his version of events on the call where the claimant provided a transcript, although it is not clear that he actually saw the 'transcript' before or during this meeting. Mr Gosney talked about the claimant going beyond what he had been told and contradicting management directives. There is reference to "if it's a no, it's a no." Mr Gosney pointed out that the claimant had not completed his order tracker, not completed his target on outbound calls. He referred to impartiality as between the claimant and Ms Owens, saying that he had done the same with both of the BDCs. Mr Tyldesley referred to the accounts being removed due to GDPR but indicated that would be followed up with credit control.

54. Following on from that, two further documents merit consideration. At page 318 we have an email on 13 April showing that Mr Tyldesley followed up with Mr Goody on one of the points from the grievance. He states:

> *"Just a point that came up in Christian's grievance- he was claiming that accounts had been removed from the system due to GDPR reasons and he was told that by the finance team. Can you confirm if this is correct?"*

The response that he gets is:

> *"I think this is a red herring. The only accounts that were "removed" were in January 2019 when we upgraded the Sage system and removed any customers that hadn't had revenue in the 2 years prior (i.e. no revenue since December 2016), however, any ex-customers that have wanted hire since, we re-checked the account, got updated forms and reinstated on Sage. The recent refinement that Graham did (parent/child) involved some accounts being flagged as 'do not use' to make sure that contracts were processed on the right legal entity within the customer's hierarchy, but the details were not deleted and it was actually still possible to use them. Nothing has been removed or had access restricted due to GDPR reasons. Therefore I think the response to Christian is that this is not correct as far as we're aware but we are happy to look into anything specific he can reference."*

55. Page 319 is the email answer from Jeanette Finch that I have already quoted regarding United Utilities.

56. At page 324, on 14 April, the witness Jennifer Wood gave a further update. She says she wanted to update the claimant on a couple of things. Firstly, in terms of the grievance, that Mark had concluded his investigations and they were in the process of writing to the claimant with the outcome. She went on to deal with the second thing separately:

> *"In the meantime, please could I ask that you attend a team meeting today with Ian and Joe at 2.30pm, which will be held via Teams. If you could confirm your attendance at the meeting it would be much appreciated. I'll also give you a call on your mobile shortly, as I appreciate you may not be checking your emails."*

57. The Tribunal sees that the claimant was being asked, within two hours, to attend a meeting without any explanation as to what that meeting was about. It is fair to say that the claimant was not given much warning and he could not understand why he was not getting the grievance outcome first. Why was the respondent acting according to this timeline?

58. As a result, the claimant [323] did not attend the meeting. He was away from his computer at the time and had not had adequate notice. The Tribunal does have some sympathy with the claimant's predicament. The claimant did not trust the respondent by this stage, and this added fuel to the fire. The claimant was asking why the respondent could not wait to have this meeting. It was legitimate for the claimant to say what he did, and we understand his concerns. It is hard to understand why it was so crucial that this meeting had to take place so quickly and also in advance of delivery of the grievance outcome. The Tribunal can see the chain of correspondence surrounding this [321-322.] It is fair to say that the respondent did not handle this well. All that the respondent does is to say that the meeting on Friday is not linked to the ongoing grievance and is about a completely separate matter. In the course of an email Ms Wood states: *"We consider your attendance at the meeting on Friday to be a reasonable request and so I would request that you attend the meeting at 2pm. With regards to your outcome letter, I will be drafting something for Mark to review, but as I finish for annual leave today, it will be Monday before I can get anything over to you."* The claimant does not accept that the two matters are separate. He states: *"I struggle to see how a meeting concerning the management of my role in light of the grievance I laid out to you and Mark can be different in nature. On top of that you aren't advising me of the content of the meeting, and have informed that an external member of HR will be present? Do you not think keeping me in the dark is a bit unreasonable?."* Ms Wood responds: *"The meeting is separate to the grievance and is being held to discuss what the team will look like moving forward. I have made a reasonable request in asking you to attend the meeting, and whilst I can't force you to attend, I would strongly encourage you to dial in…I am now finishing for the day so if you require anything else, I will pick this up next week. If I could ask you to confirm to Lynne whether you will be attending on Friday, it would be appreciated."*

59. The Tribunal is concerned that if the respondent felt unable to tell the claimant the subject of the meeting, then it should have been left until later when the respondent *did* feel able to provide the claimant with that information. The Tribunal understands that the respondent would want to tell the claimant and his colleague (Jo) about a restructure at the same time but the respondent could either delay the announcement about the restructure until the grievance had been dealt with, or the respondent could tell the claimant what the proposed meeting was about. Deciding to handle things in this manner caused the respondent more difficulty and increased the claimant's suspicions and distrust.

60. There was an email on 16 April 2021 [325] from HR to the claimant confirming the purpose of the redundancy meeting and explaining the rationale. The business case for the redundancy was enclosed [311-312]. It also invited him to attend a further meeting on 19 April. The meeting on 16 April is the meeting that the claimant did not attend, whereas we understand from the letter that Joanna Owens *did* attend a meeting that day.

61. What *was* the restructuring proposal? In essence, the respondent wanted to outsource lead generation to a third-party specialist business in order to increase the number and quality of leads. The respondent would then use the existing hire-focussed RAMs and SPM teams to follow up the leads and convert them. Any administration done by the BDCs would be absorbed into existing support functions, and as a result of all of this, the Business Development Coordinator teams would be removed from the company structure altogether. The restructure was to remove the BDC team from the structure.

62. As previously stated, the timing of the invitation to the meeting was poor and we are struggling to see the need for the rush. That said, and acknowledging the claimant's concerns and feelings about the matter, the real question for this Tribunal is whether that proposal for a restructure was genuine or some form of sham. We cannot find that it was a sham, largely because it was followed through to its conclusion. Subsequent to this point in the timeline the respondent did go ahead and remove the BDC team from the organisation structure. That team no longer exists within the respondent business. It is not for us (in line with the guidance in the case law) to decide whether it was a *good* business decision. Was it a restructure/redundancy situation? We are satisfied that it was. The lack of any documentation over the long-term showing a longer build-up to this change could, in theory, raise questions about the authenticity of the proposal. But any such concerns are allayed by the fact that the respondent followed through and actually implemented the change.

63. In any event the respondent rearranged the consultation meeting. At this point in time the paid leave provisions applied both to Joanna Owens and the claimant because they were both under redundancy consultation and they were both treated the same and for the same reasons at this point.

64. The written grievance outcome is dated 19 April 2021 [page 334]. It carefully went through each of the concerns raised. It offered mediation to try and resolve the relationship issues. It clarified that the claimant had not lost commission but identified a learning point regarding clearer delineation between the Business

Development Coordinators' respective clients. It dealt with GDPR at page 336. What is says under the heading of "Accounts removed due to GDPR" is this:

> *"I discussed this point with Andy Goody, Finance Director and he confirmed that the only accounts that were 'removed' happened back in January 2019 when we upgraded the Sage system- any customers that hadn't had any revenue with us during the prior two years were removed. However, any ex-customers that have wanted hires since had been rechecked and added back onto the system. Andy confirmed that nothing has been removed or had access restricted due to GDPR reasons. If you have any specific customers you can reference, please let me know and I can look into this further."*

65. Again, this letter confirms that the issue of GDPR was as identified by the respondent and not as the claimant now presents it for the purposes of the Tribunal claim. The letter informed the claimant of his right of appeal and the notes of the hearing were included. The outcome was carefully set out and reasoned and the letter provided a reasoned conclusion. The document itself might not be lengthy but it did not need to be lengthier than this. It is not a document which just pays 'lip service' to the grievance. The Tribunal can see (from email chains and interview notes) that Mr Tyldesley had done active investigation into the points raised by the claimant.

66. On 20 April 2021, the claimant raised an appeal against the grievance outcome [337; and 338.] The language of the appeal is somewhat florid, overstated and hyperbolic. The appeal letter does not mention GDPR. The closest the claimant gets is a reference to the 'main portal' of the job being removed [338].

67. The respondent acknowledged the letter [340] and asked for further points of appeal. The respondent invited the claimant to an appeal hearing that was scheduled for 29 April and was to be chaired by Andrew Goody. The respondent asked the claimant for further details of the appeal points prior to the meeting. The respondent notified him that it was important that any paperwork or evidence was submitted to the respondent in advance. The claimant was pre-warned that there would not be a decision on the outcome of the appeal at the close of the meeting but that it would be sent out in writing thereafter. The letter also confirmed the claimant's right to be accompanied and made clear that this would be the final stage of the process and there would be no further right of appeal.

68. In between the stages of the grievance process, the second proposed meeting regarding redundancies took place (22 April) [347-349.] Vacancies were sent out to the claimant by email on the day of the meeting. They included job descriptions for Hire Desk Controller and Credit Control Manager plus the up-to-date list at pages 342-346 of the bundle. There was some dispute on the evidence as to whether the availability consisted of one job on the Hire Desk and one job on Credit Control, and some dispute as to whether the role in hire was a maternity leave role. The respondent's case was that there were two jobs in Hire plus one in Credit Control. Even though the email does talk about maternity leave, the person who took the job is (we understand) still in the job. The job role did not come to a conclusion after the period of maternity leave.

69. The notes of the consultation meeting were at page 347. Various points were made during the meeting but it is crucial to look at page 348. The claimant was notified that the next meeting may well be a potential dismissal meeting unless there were viable alternatives for consideration or unless the claimant wished to be considered for an alternative role. If that were the case and it was agreed that there was a suitable alternative position, the claimant would be given a four-week trial for both parties to review. The additional notes state:

> *"IG encouraged CC to review the proposal; and to put forward any additional suggestions the company may have overlooked. CC asked whether it was his place to put forward an alternative structure, he felt as he was not a senior manager/Director. He asked should he be doing this. LA discussed this was the purpose of the consultation process, no final decision would be made until both CC and the other employee at risk had opportunity to raise questions, put forward any alternative business cases that the company may have overlooked. IG discussed this was not personal, the priority for the company was to get the correct structure which is why he would actively encourage CC to review the proposal/ask questions. If CC felt the proposal would not work, he should put forward, his reasons why. CC confirmed he would go away and review. CC had no further questions. LA confirmed she would follow up with a letter inviting CC to a second consultation meeting."*

70. That is what the record shows. Viewed holistically and in context, the Tribunal finds that what the respondent was doing here was consulting the claimant and asking him to consider whether there was an alternative to the proposed restructure and, if so, what that alternative was. The respondent was asking the claimant whether he felt they had overlooked something and whether he had alternative suggestions. The claimant heard the reference to a 'business proposal' or a 'business plan' or a 'business case' in order to save his job. However, the substance of the meeting was a standard consultation process posing the question: what do you see as an alternative to dismissal? There is nothing unrealistic or unreasonable about this, indeed it goes to the heart of meaningful consultation which needs to take place in each and every redundancy process. The claimant interpreted it as the respondent asking him to research and provide a business plan in a way which would normally fall within the remit of management in determining the future of the business as a whole. It seems to the Tribunal that the claimant misunderstood what he was being asked to do. He was not being asked to provide a business plan for the respondent as a whole. He was being asked, as part of the consultation, whether he could see an alternative to dismissal which he was asking the respondent to consider.

71. The Tribunal heard evidence that Joanna Owens did apply for the Hire Desk job and got it. The claimant said to us that Ms Owens had prior experience in Hire which would have helped her to get the job or which meant that she was always going to get it. However, the Tribunal is unable to come to that conclusion because the claimant did not ask to be considered for the role. Thus, we do not know whether he would have got the job if he had asked for it or, indeed, if he would have got the job in preference to Ms Owens. The Tribunal also notes that it was not the only job on the list. The Tribunal cannot say whether the claimant

would have got one of the other jobs if he had shown interest in applying for/asking for one of them.

72. The consultation meeting letter at page 351 confirms our interpretation of the earlier records. It indicates that there had been discussion of the claimant raising questions or making suggestions. It confirmed that no final decision had been made. It made clear that the respondent wanted to explore all options and that the claimant had been made aware of vacancies and the possibility of being considered for suitable alternative roles. It referred to the further period of consultation to give the claimant opportunity to raise suggestions and discuss alternative job vacancies.

73. According to the claimant's evidence to the Tribunal, he did, in fact, draft a proposal for an alternative solution. Unfortunately, he never sent it to the respondent, largely because he was concerned that they would use it, take the benefit of his thoughts and expertise and yet still dismiss him on grounds of redundancy. He was therefore reluctant to share it with them given his perceptions and distrust of the respondent. In short, he did not want his knowledge and expertise to be exploited by the respondent, only for the claimant to lose his job anyway.

74. The claimant therefore changed position and resigned on 26 April 2021. His resignation letter is at pages 355-356. Looking at that document it is important to pull out any references to GDPR that it may contain, so that we can determine what the claimant was actually saying. At the top of page 357 he says (in the context of a wider paragraph):

> *"I also raised concerns over our GDPR compliance (following training that was given on my induction to the business) that have been dismissed as insignificant, where I have asked for direct clarity on the law citing we aren't complying and aren't being instructed to comply."*

The claimant notes that he might still work his notice.

75. At page 358 the claimant raised further grounds of appeal. There is no reference to GDPR in those.

76. Jennifer Wood was out of the business on leave between 22 and 27 April 2021.

77. We were then directed to a series of emails [360-361] where the claimant queried whether his appeal meeting would still be going ahead in light of his resignation letter, and Lynn Ashton (who was covering in Jennifer Wood's absence) provided a holding response, essentially saying that the claimant could expect a follow up from Jennifer Wood.

78. The next proposed consultation meeting was due to take place on 27 April 2021. On the same day, the claimant sent in his further/clarified grounds of appeal [358]. Also on 27 April, the claimant wrote to the respondent's CEO Nigel Quinn [362] indicating that, although he still felt ill treated by the respondent, he had had some second thoughts about his resignation.

79. On 28 April 2021, the claimant sent a further email to Jennifer Wood alleging that the GDPR had been broken [364]. The email stated:

> *"FYI the GDPR law was being broken, the grievance investigation outcome was false. Will the appeal hearing with Mr Andrew Goody still take place on Thursday?"*
>
> Copied into that is an email of the same date 28 April from the claimant to Mr Tyldesley:
>
> > *"Dear Mark Tyldesley*
> >
> > *As I worried and immediately highlighted to you, I had been guilty of breaking the law under instruction of my line manager. Your investigation was not conducted to any qualifying level and merited far more work."*
>
> The claimant included two hyperlinks to the PECR and a legislation link at gov.uk. He continued:
>
> > *"Section 21 and then section 26 of the law are enforceable on the actions I was instructed to carry out and in fact berated over not conducting multiple times more. My grievance clearly now has substantial grounds. And I was right to down tools under dangerous work conditions."*

80. The problem with this email is that it changes the tone and content of the allegations that the claimant was making to the respondent about GDPR. It was at this stage, at the appeal stage, that he started to make allegations that indicated that GDPR may have not been complied with by the respondent or that there had been some breach of a legal obligation. The tone and nature and substance of the allegation changed at this point from being about the claimant's ability to do his job without data which had been removed for GDPR reasons, to an allegation of breach of the GDPR.

81. At page 366 Jen Wood responded to indicate her disappointment at the resignation. The claimant then tried to retract the resignation. The contents of page 673 indicated that the respondent did not allow him to retract the resignation, it was still effective.

82. There was a grievance appeal meeting with Mr Goody on 29 April 2021. In the appeal hearings noted [568] the claimant is recorded as saying that he was worried about GDPR laws. He goes on to say [572], *"I blew the whistle on GDPR law".* Mr Goody says *"I do want to hear from you about GDPR. In what way have we broken the law?"* the claimant is recorded as replying thus:

> *"I've received training when I started.*
>
> *In relation to cold calling. General data is under a set of legislation. It is governed by law. When I was asked to cold call it's not as simple as collecting the information and going on google. I knew this was the case. I've asked for clarity on the law. I was put under pressure to phone. I was feeling agitated. It felt automatically wrong. Further down the line, accusations were made. A number of times I've asked for clarity and it has*

been dismissed by Director level. If you collect business information, you send it to a data processor and they check it on the CTPS. Section 21 and 26 on the email I sent to you."

There is a further exchange with Mr Goody where he is clarifying what the CTPS is and the claimant confirms it shows whether the individual has opted out and does not want any calls. He says:

"*On both levels, if you are contacting people, you'll be breaking the law. On the legal side I am breaking the law if they system isn't in place. I've received criticism and pressure without it being taken seriously. GDPR on the risk analysis is the highest risk. I received full training. It's a core action from our position. You'll have to have a knowledge of the law."*

83. Mr Goody responded that he would look into it. He said:

"Isn't it right though that calling a customer we've done business with before is ok provided they haven't opted out. If we were really cold calling a brand new company, targeted research, provided it is clear who is contacting them and they've not opted out, that's ok as well."

The claimant still maintained that it had to go through the CTPS system.

84. The claimant was asked about the extent to which he had to make outbound calls to previous customers and new customers. The claimant said he was told *"only new business. These are businesses which are unknown to Garic."* Mr Goody pursued this and said, "*And you made it clear to Ian you needed to go through the CTPS."* The claimant's response was *"No, but I asked for GDPR. I believe the legislation covered this and it was a concern."* The exchange continued:

AG: *So you asked for clarity and it was forthcoming. Have you made any calls to numbers you felt you shouldn't have done?*

CC: I've not felt comfortable- I have made calls. Maybe 3 calls a day. I have made calls and broke the law whilst waiting.

AG: Would it be more accurate to say that the calls were maybe illegal but we don't know because CTPS was not checked?."

The claimant does not accept that proposition.

Mr Goody later says, *"I'll look into this as it's an important point. Our policy is to comply with the law. Until that email came in yesterday, I hadn't understood the point you were making. It may be that Mark didn't either."*

85. The claimant reasserted that accounts had been removed and that credit control had said it was under GDPR. Mr Goody said that was not removed for that reason, that was based on his previous document on that point. The claimant said that things had disappeared in February. GDPR had not been paid attention to and that his line manager should have. Mr Goody continued, *"I want to look into the finer points. I am the GDPR officer- we've taken all the steps we believe necessary, but I would invite you to tell me your specific concerns."*

The claimant replied, *"I was not instructed to ask if we can store contact details. Inbound are consented. There's no sentence that we're being instructed to use."*

Here he seems to have been asking for a script to use. He said, *"There could be a more considerable breach. I've not been instructed."*

Mr Goody said, *"We can review the policy in the sales area. It's acceptable to retain data to do with customers, that we need to process the orders and enquiries. We can take another look."*

The claimant said, *"For myself, I've worked at different businesses. I'm the person who will be committing the crime. To not even have a statement to read out is failing. I requested clarity."*

Mr Goody said, *"I'll look into this. I'm not convinced you're right but I will look into it and check the register."*

The claimant considered it to be black and white whereas Mr Goody felt it needed investigating. He made the point it did not sound as though the claimant had made the specific point to Mr Gosney or to Mr Tyldesley in the grievance, and he continued:

> *"What I'm saying is that the email you sent yesterday, on Wednesday 28 April, was the first time you had raised the specific concern about the CTPS list. Today, with your email and explanation just now, is the first time I've understood the specific point you're making."*

86. The claimant said, *"I requested clarity"* and Mr Goody said, *"It's a valid point to raise. I'm not agreeing that we've broken the law. I think you're saying that you asked for clarity on GDPR, you didn't raise the specific concern about the CTPS list."* The claimant continued on in similar vein, and Mr Goody said, "*I'd like to clarify- in being asked to make cold calls, your view is that you were being asked to break the law, by making calls to customers without checking with the CTPS."* The claimant's response was: *"That was the only function of my job. There was no legal legislation."*

87. Mr Goody says, *"Ok, got it. The aspect of your role, becoming bigger- so what you think is not legal is calling companies who have done business with us without checking the CTPS."* The claimant's answer: *"To my best knowledge, yes."*

88. The conversation carried on. There was some repetition at page 577. The claimant was asked specific questions and again Mr Goody made the point about the lack of clarity in what the claimant was alleging prior to this point in the process. The claimant seems to have accepted that he did not explicitly refer to CTPS and that he did not raise this point with Mark Tyldesley and Ian Gosney.

89. The appeal outcome was sent to the claimant on 7 May 2021 [602]. The outcome was thirteen pages long. The particular conclusions about GDPR were set out at paragraphs 9-14 [583]. In that part of the letter the specific concern was clarified (i.e. the risk that if companies are on the CTPS list the respondent cannot cold call them unless there is written consent.) At paragraph 10 Mr Goody agreed

that the respondent would be breaking the law if they called companies on the CTPS list other than to respond to an in-bound enquiry. He accepted that it is important that the respondent has a process to ensure that they do not cold call such companies. He accepted that the claimant was right, that they did not have a robust process for this. He thanked the claimant for bringing this to his attention. He confirmed that he had raised it with Mark Tyldesley and he indicated that the respondent would therefore subscribe to the CTPS list as an urgent priority and communicate this to all salespeople – that they need to check the list before making outbound calls. He wrote about GDPR in the sales area. He wrote about asking an external legal firm to review GDPR compliance, and again thanked the claimant. He accepted that the claimant raised GDPR concerns with Ian Gosney in the context of discussions about making outbound calls, *"…and that you asked for clarity on the GDPR position. Ian confirmed that you did raise a concern with him. Ian told me that he responded to you by saying that he believed it was ok to call existing customers, which is what he was asking for in this instance. You agreed in our meeting that you did not make or explain the specific point about the need to check the CTPS list before sending your grievance appeal email on Wednesday 28 April 2021. As far as I can tell, this email of 28 April was the first time you had alluded to the specific concern about the CTPS list, and it was not until my meeting with you on 29 April that the specific concern you were raising became clear. This is consistent with Ian's recollection that you raised a general query, which he felt he had addressed."*

90. Having reviewed that letter, we conclude that the findings there are consistent with the rest of the evidence. The earlier communications with Mr Gosney raised the issue of GDPR *in the context* of conversations about outbound calls but not *about* outbound calls. The claimant was essentially saying, "I cannot do the outbound calls *because* the data has been removed" He was not saying that, in making outbound calls he was breaking GDPR/the law. There is a difference between subject matter of the communication and the context of the communication there.

91. In the appeal outcome letter there were some recommendations and points of learning for the respondent [593], especially paragraph 68(d) where it is said that clarification should be issued to all sales staff on outbound call protocols in light of GDPR and the growing focus on outbound calling. In paragraph 70 Mr Goody said that it is essential that the company complies with GDPR. It was not clear to him that they had actually broken the law or that the claimant was asked to break the law. He explained how he was going to take that forward, and again thanked the claimant.

92. There are also a number of observations at page 594 paragraphs (a)-(d) about the way the claimant's evidence had been presented to Mr Goody and why he concluded that the claimant's evidence was less reliable than some other evidential sources. We have to say that having reviewed those paragraphs, we can see the force in them. The relevant paragraphs state:

(a) In a number of instances your interpretation of emails seems to me to be negative to an extent that is not justified by the apparent tone and actual content of the emails. In particular, you appear to have interpreted comments that seem to me to be reasonable and normal for business life in a negative

light. This includes, but is not limited to, the email at Appendix 1, the emails listed in Appendix 2, the email titled FW Objectives Info and the email chain referenced above in the section headed "Allegation against Leon Massey."

(b) The email in Appendix 1 is closer in tone and content to Ian Gosney's recollection of the conversations between you than it is to your own recollection.

(c) On a number of occasions in your grievance letter, appeal letter and supporting comments you use language that I consider to be exaggerated and highly emotive. Indeed, you acknowledged in our meeting that your choice of language 'was designed for impact' in at least one place. This language has not helped demonstrate the reliability and credibility of your recollections.

(d) The recollection of your female colleague in respect of your allegation of inappropriate comments by Ian in the context of a trip to Ireland is closer to Ian's recollection of the conversation than it is to yours."

The Tribunal considered these to be valid observations by Mr Goody which chimed with our own experience of the claimant's evidence and the way that he presented himself both verbally and in writing.

93. Following this, on 8 May 2021, the claimant alleged that the notes had been doctored [602]. On 10 May 2021, the respondent responded to deny this. On 11 May 2021, the claimant emailed [600.] At page 604 Mr Goody tried to draw a line under the matter as the claimant's employment was due to end imminently. The claimant's response is at page 604, and it is important to read into the record because we did hear evidence about this:

> *"You will regret lying to me, you will regret denying me a fair appraisal and the truth, and most of all you will regret enabling and sanctifying the abuse of me. Having no legal knowledge whilst being the company's Data Protection Officer is also wildly irresponsible."*

94. Mr Goody pulled the claimant up on this and referred to the descent into personal abuse and personal threats. He asked the claimant to refrain from doing this and indicated that he would take legal advice otherwise. In response, the claimant effectively doubles down on his original position [top 603.] He says, *"I honestly believe you will regret the actions you've taken."* He maintains that he doesn't think it is a threat and continues, *"Maybe phoning the police wouldn't be such a bad idea, you wouldn't be able to avoid the way you have handled this investigation, and the laws you were liable to uphold."*

95. We heard that Mr Goody had to take steps to block further communications from the claimant.

96. There is further evidence regarding the claimant's notice arrangements [607] and that concludes the chronology in this case.

The law

Religion or philosophical belief

97. The protected characteristic of religion or belief, as set out in section 10 of the Equality Act 2010, gives effect to the requirement in the EU Equal Treatment Framework Directive for Member States to provide protection in national law to combat discrimination on the ground of, inter alia, religion or belief. The Recitals to the Directive assert that the EU 'respects fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' (ECHR) and state that 'the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the [ECHR], to which all Member States are signatories'. The Framework Directive needs to be interpreted consistently with relevant provisions of the ECHR. In turn, the UK's domestic legislation must be interpreted, so far as possible, consistently with both the mandatory provisions of EU law (in so far as preserved following the UK's departure from the EU) and, by virtue of section 3 of the Human Rights Act 1998, European Convention rights. The jurisprudence of the European Court of Human Rights provides an important framework for establishing what is meant by 'religion' and 'belief' for the purposes of the Equality Act 2010. (See also Explanatory Notes to the Equality Act 2010, para 51).

98. Article 9(1) of the ECHR provides that:

> 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'

Article 9(2), inserts a proviso in respect of the right to manifest the freedoms enshrined in Article 9(1) that:

> 'Freedom to manifest one's religion or beliefs shall be subject only to such limitation as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

99. The relationship between these two elements of Article 9 was considered by the European Court of Human Rights in *Eweida and ors v United Kingdom 2013 IRLR 231*: 'Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9(1), freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practise in community with others and in public… Since the manifestation by one person of his or her religious belief may have an impact on others, the

drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9(2). This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.'

100. Not every belief qualifies for protection. In Campbell and anor v United Kingdom 1982 4 EHRR 293 the European Court of Human Rights established that, to come within the scope of the Article, a person's belief must:

    (1) be worthy of respect in a democratic society;
    (2) concern a weighty and substantial aspect of human life and behaviour, and
    (3) attain a certain level of cogency, seriousness, cohesion and importance.

    Interpreting the term 'philosophical convictions' in this context, the Court held that this 'is not synonymous with the words "opinions" and "ideas," such as are utilised in Article 10 of the Convention guaranteeing freedom of expression; it is more akin to the term "beliefs" (in the French text: "*convictions*") appearing in Article 9'.

101. The European Court of Human Rights has accepted that value systems such as pacifism, atheism and veganism are covered by Article 9, as are political ideologies such as communism but the court hast stopped short of holding that affiliation with a political party is protected by Article 9. Non-belief and scepticism (i.e. atheism and agnosticism) are covered in the same way as positive belief.

102. In R (Williamson and ors) v Secretary of State for Education and Employment 2005 2 AC 246, HL) Lord Nicholls observed that Article 9(1) protects, *'the subjective belief of an individual… [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.'* Lord Nicholls also set out some basic criteria that any belief (religious or otherwise) must satisfy to be protected under Article 9. The belief must:

    (1) be consistent with basic standards of human dignity or integrity;
    (2) relate to matters more than merely trivial;
    (3) possess an adequate degree of seriousness and importance, and be concerned with a fundamental problem, and
    (4) be coherent in the sense of being intelligible and capable of being understood.

    He further warned against setting the bar too high when assessing whether a belief satisfies these criteria. Overall, it should not be set at a level that would deprive minority beliefs of the protection they are intended to have under the ECHR.

103. The right to 'freedom of thought, conscience and religion' in Article 9 includes a freedom to 'manifest' religion or belief. In *Kokkinakis v Greece* (1994 17 EHRR 397, ECtHR) the Court took the view that the right to adhere to a religion and hold religious beliefs embraces the freedom to bear witness in words and deeds. In *Kalac v Turkey 1999 27 EHRR 552*, the Court stated that, 'while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares but also alone and in private.'

104. In *Eweida and ors v United Kingdom 2013 IRLR 231* the European Court of Human Rights explained that, even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated, or influenced by it constitutes a 'manifestation' of the belief. For example, acts or omissions that do not directly express the belief concerned or which are only remotely connected to a precept of faith are to be regarded as falling outside the protection of Article 9(1). In order to count as a 'manifestation,' the act in question must be intimately linked to the religion or belief but there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.

105. According to case law the freedom to *manifest* one's religious or philosophical beliefs at work is considerably more limited than the basic freedom to *hold* such beliefs. A further filter is applied by requiring complainants who bring direct discrimination claims under the Equality Act 2010 to prove that the reason for any less favourable treatment was actually the protected characteristic in question.

106. Section 10 of the Equality Act 2010 defines the protected characteristic of religion or belief for the purposes of the Act. Pursuant to section 10(2), belief is defined as 'any religious or philosophical belief and a reference to belief includes a reference to a lack of belief'. Any reference in the Act to a person who has the protected characteristic of religion or belief 'is a reference to a person of a particular religion or belief,' while a reference to 'persons who share that characteristic' is a reference to persons of the same religion or belief (section 10(3)). The definition therefore encompasses two broad categories of protected belief, one religious and one secular.

107. Tribunals should not impose too high a hurdle when it comes to the need for proof of actual adherence. In *R (Williamson and ors) v Secretary of State for Education and Employment 2005 2 AC 246,* Lord Nicholls observed: *'When the genuineness of a claimant's professed belief is an issue in the proceedings, the court will enquire into and decide this issue as a question of fact. This is a limited enquiry. The court is concerned to ensure an assertion of religious belief is made in good faith… But, emphatically, it is not for the court to embark on an enquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.'* While the

tribunal can legitimately be concerned with whether or not the claim of religious belief is made *in good faith*, they should not concern themselves with judging the validity of that faith. A tribunal may inquire into whether the particular manifestation of a religious belief asserted by a claimant is genuine.

108. In relation to philosophical belief, the predecessor 2003 Regulations originally prohibited discriminatory treatment in the workplace on the ground of 'any religion, religious belief, or *similar* philosophical belief'. This definition limited the kinds of views and opinions for which an employee or worker could claim protection. The word 'similar' protected only those beliefs that could be equated with beliefs based upon a religious creed. There was concern that UK law was not fully compliant with the Directive, in that the inclusion of the word 'similar' implied a narrower approach. Consequently, regulation 2(1) was replaced with a version that dropped the word 'similar', thereby widening the reach of the Regulations to cover any philosophical belief without limitation or qualification. Substantially the same definition has been maintained in section 10(2) Equality Act 2010.

109. Philosophical beliefs attract the same level of protection as religions and religious beliefs (*General Municipal and Boilermakers Union v Henderson 2015 IRLR 451, EAT).* All qualifying beliefs are equally protected. Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as religious beliefs.

110. It is essential, before considering whether a belief amounts to a 'philosophical belief' protected under the Act, to define exactly what the belief is (*Gray v Mulberry Co (Design) Ltd 2020 ICR 715, CA)* However, in *Forstater v CGD Europe and ors 2022 ICR 1* the EAT noted that the *Gray* case was unusual, in that the belief relied on was capable of being summed up in a single sentence. Most philosophical beliefs will not be capable of being summed up in this way. It should not be necessary to set out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question will suffice. Tribunals may therefore seek to identify core elements of a belief to determine whether they fall within section 10.

111. The leading case on the definition of a 'philosophical belief' is *Grainger plc and ors v Nicholson 2010 ICR 360*. The EAT provided guidance of general application on the ambit of this category of protected belief. Mr Justice Burton expressed the view that there is nothing in the make-up of a philosophical belief that would disqualify beliefs based on political philosophies. Nor is there any reason to disqualify from the statutory protection a philosophical belief based on science, as opposed to religion. While it is necessary for the belief to have a similar status or cogency to a religious belief, it does not need to constitute or allude to a fully-fledged system of thought.

112. Grainger distilled from ECHR case law the basic criteria that must be met in order for a belief to be protected under section 10 of the Act. A belief can only qualify for protection if it:

    a. is genuinely held;

b. is not simply an opinion or viewpoint based on the present state of information available;
c. concerns a weighty and substantial aspect of human life and behaviour
d. attains a certain level of cogency, seriousness, cohesion and importance, and
e. is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others.

These criteria are now replicated in the EHRC Code of Practice as official guidance on what comprises a philosophical belief for the purposes of the protected characteristic of religion or belief (see paragraph 2.59).

113. A number of EAT decisions emphasize that the Grainger criteria are modest threshold requirements which should not set the bar too high or demand too much of those professing to have philosophical beliefs.

114. Forstater also made it clear that tribunals should not stray into the territory of adjudicating on the merits and validity of the belief itself. They must remain neutral and abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements. The interpretation of 'philosophical belief' indicated in Grainger accepted that a philosophical belief does not need to constitute or allude to a fully-fledged system of thought or be shared by others, and it can relate to a 'one-off' or single issue that does not necessarily govern the entirety of the believer's life.

115. The first criterion laid down in Grainger is that the belief must be genuinely held by the claimant. An employment tribunal should be satisfied that the claimant actually adheres to the belief and that that adherence forms something more than merely the assertion of a view or an opinion. The extent of the tribunal's inquiry may need to be more robust when it comes to establishing whether a claimant subscribes to a philosophical belief. In Grainger, Burton J thought that Lord Nicholls' remarks in Williamson did not apply to the same extent to philosophical beliefs. He observed: 'To establish a religious belief, the claimant may only need to show that he is an adherent to a particular religion. To establish a philosophical belief… it is plain that cross-examination is likely to be needed.'

116. The requirement that the belief must be more than an opinion or viewpoint stems from remarks made by Mr Justice Elias in *McClintock v Department of Constitutional Affairs 2008 IRLR 29, EAT.* In *Grainger* Mr Justice Burton rejected the contention that science or evidence-based beliefs are incapable of amounting to a philosophical belief. Burton J thought that nothing in McClintock actually precluded science-based beliefs, so long as they met the criteria set out in his judgment. An ethical stance based on a science-based belief in potentially catastrophic climate change was perfectly capable of amounting to a 'philosophical belief.' Whether or not it actually did so depended on the tribunal being satisfied that the claimant actually lived according to the precepts of such

a belief and that the employer's actions were attributable to the fact that the claimant held that belief.

117. In relation to the third Grainger criterion, in R (Williamson and ors) v Secretary of State for Education and Employment Lord Nicholls held that the belief must 'relate to matters more than merely trivial', must 'possess an adequate degree of seriousness and importance' and must be 'a belief on a fundamental problem'. This criterion potentially excludes beliefs that have a very narrow focus. The subject matter of the belief in question must be of some general importance. This criterion will also be satisfied by even rather esoteric views so long as they concern a topic of general public interest.

118. Regarding the fourth Grainger criterion, Burton J explained that, notwithstanding the removal of the requirement for a philosophical belief to be 'similar' to a religious belief, it remains necessary for the belief to have 'a similar status or cogency to a religious belief.' This seems to sum up the general quality of qualifying philosophical beliefs, namely, that they must possess consistent internal logic and structure (i.e. cogency), provide guiding principles for behaviour (i.e. status), and concern fundamental (as opposed to parochial) matters. Burton J stated that even beliefs that do not govern the entirety of a person's life, such as pacifism and vegetarianism, are potentially covered. As to coherence, Lord Nicholls in R (Williamson and ors) v Secretary of State for Education and Employment stated that, for the purposes of Article 9 ECHR, this means simply that the belief must be 'intelligible and capable of being understood' and that 'too much should not be demanded in this regard'.

119. The fifth criterion in Grainger, that the belief is worthy of respect in a democratic society, is not incompatible with human dignity and does not conflict with the fundamental rights of others, derives from two European Court of Human Rights cases, Campbell and anor v United Kingdom, and R (on the application of Williamson) v Secretary of State for Education and Employment, which both concerned support for corporal punishment. Lord Nicholls in Williamson stated that the belief 'must be consistent with basic standards of human dignity or integrity,' and indicated that, for example, a belief that involved subjecting others to torture or inhuman punishment would not qualify for protection. In Grainger, Mr Justice Burton suggested that 'a political philosophy which could be characterised as objectionable' (such as concerted racism or homophobia) would also be likely to be excluded from protection on this basis. The EHRC Employment Code states that 'a philosophy of racial superiority for a particular racial group' is an example of a philosophical belief that would be excluded from protection on the basis of the fifth Grainger criterion (see paragraph 2.59).

120. The EAT conducted a detailed consideration of the scope of the limitation imposed by the fifth Grainger criterion in Forstater. The EAT held that the types of beliefs that are excluded by the fifth Grainger criterion must be defined by reference to Article 17 ECHR, which prohibits the use of Convention rights to destroy or limit the Convention rights of others. Thus, the fifth Grainger criterion is apt only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence. Beliefs which are offensive, shocking or even

disturbing to others, including those that would fall into the less serious category of hate speech, can still qualify for protection. The EAT also noted that the fact that the fifth Grainger criterion only excludes the most extreme beliefs means that few cases will fall at this hurdle.

121. A lack of religion or belief falls within the ambit of the protected characteristic of religion or belief. In Forstater, the EAT clarified that a lack of belief does not necessarily denote holding a positive view that is opposed to the belief in question. It may arise from having no view at all on a matter, or from having some views falling short of a developed philosophical belief.

122. Sections 10 and 13 Equality Act read together, provide that a person (A) discriminates against another (B) if, because of religion or belief, A treats B less favourably than A treats or would treat others. This protection extends to treatment meted out because of a religion or belief that B holds, because of B's lack of religion or belief, because of the perception that B holds or does not hold a particular religion or belief, or because of the religion or belief of someone with whom B is associated. However, it does not cover the situation where A treats B less favourably because of A's religion or belief (*Gan Menachem Hendon Ltd v De Groen 2019 ICR 1023, EAT*.)

Direct discrimination

123. Section 13 Equality Act 2010 states:

    (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. Section 23 of the Equality Act 2010 provides:
(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

125. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

126. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: "*a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in*

the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."

127. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

128. The relevant comparator must not share the claimant's protected characteristic. There must be no material difference between the circumstances relating to each case. The circumstances of the claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (paragraph 3.23 EHRC Employment Code.) With the exception of the prohibited factor (the protected characteristic) all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. (Macdonald v Ministry of Defence, Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937). Whether the situations are comparable is a matter of fact and degree (Hewage v Grampian Health Board [2012] ICR 1054.)

Burden of Proof

128. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

129. The wording of section 136 of the Act should remain the touchstone.

130. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

131. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

132. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be

drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

133. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

134. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

135. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

136. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

137. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the

respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory.

138. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two-stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

Protected Disclosures

139. A protected disclosure is defined by section 43A Employment Rights Act 1996 as a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. In this case the alleged disclosures were made to the claimant's employer in line with section 43C.

131. Section 43B of the Employment Rights Act 1996 defines a qualifying disclosure thus:

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

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

….

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

132. As set out in Williams v Brown AM UKEAT/0024/19 there are five separate stages to applying the necessary tests: *"First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief it must be reasonably held."*

133. In order to make a disclosure an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

134. 'Information' in the context of section 43B is capable of covering statements which might also be characterised as allegations (*Kilraine v London Borough of Wandsworth [2018] ICR 1850)*. 'Information' and 'allegation' are not mutually exclusive categories of communication. Rather, a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a 'relevant failure.' The decision in *Kilraine* stressed that the word 'information' in section 43B(1) has to be read with the qualifying phrase 'tends to show'. The worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. In order for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)–(f).

135. The context of any disclosure may also be relevant in determining the content of the disclosure. Meaning can be derived from context. Disclosures may also have to be looked at cumulatively. Information previously communicated by a worker to an employer could be regarded as 'embedded' in a subsequent communication. Two or more communications taken together can amount to *a* qualifying disclosure even if, taken on their own, each communication would not (*Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540).* Whether two communications are to be read together is generally a question of fact *(Simpson v Cantor Fitzgerald Europe [2021] ICR 695).*

136. A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may relate to the relevant failure of a colleague, a client or other third party.

137. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker:

1. be made in the public interest, and

2. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.

168. The employee has to have a reasonable belief that that the information he or she disclosed tends to show one of the six relevant failures. This has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

169. The worker's reasonable belief must be that the *information disclosed tends to show* that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure *has* occurred, *is* occurring, or is *likely to occur*. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable. Rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

170. 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. This does not mean that the test is entirely subjective. Section 43B (1) requires a *reasonable* belief of the worker making the disclosure. This introduces a requirement that there should be some objective basis for the worker's belief. In *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT* it was held that reasonableness under section 43B (1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable (*Phoenix House Ltd v Stockman [2017] ICR 84).* The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board stated* that the focus on 'belief' in section 43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence. Unfounded suspicions, uncorroborated allegations etc will not be enough to establish a reasonable belief.

171. There can be a qualifying disclosure of information even if the worker is wrong (*Darnton v University of Surrey [2003] ICR 615).* Truth and accuracy are still relevant considerations in deciding whether a worker has a reasonable belief. Determination of the factual accuracy of the worker's allegations will often help to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. It may be difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he or she believes that the factual basis of the allegation is false.

172. The worker must reasonably believe that his disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely* to occur. Likely should be construed as requiring more than a possibility or a risk, that an employer or other person might fail to comply with a relevant legal obligation. The information disclosed should "in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation' (Kraus v Penna Plc and anor [2004] IRLR 260).

173. The public interest element of the test is also qualified by the requirement of 'reasonable belief.' In order for any disclosure to qualify for protection the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest.' There is no statutory definition of the public interest. The focus is on whether the worker reasonable believed that the disclosure was in the public interest rather than on the objective question of whether the public interest test was in fact satisfied.

174. In *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731* the Court of Appeal rejected the argument that for a disclosure to be in the public interest it must serve the interests of persons outside the workplace and that mere multiplicity of workers sharing the same interest was not enough. The essential point was that to be in the public interest the disclosure had to serve a wider interest than the private or personal interest of the worker making the disclosure. Even where the disclosure relates to a breach of the worker's own contract of employment there may still be features of the case that make it reasonable to regard disclosure as being in the public interest. The following factors might be relevant:

    (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
    (c) the nature of the wrongdoing disclosed, and
    (d) the identity of the alleged wrongdoer.

    The number of people sharing the interest is not determinative. The fact that at least one other person shared the interest was insufficient in itself to convert it into a matter of public interest. Conversely, it was wrong to say that the fact that it was a large number of people whose interests were served by the disclosure of a breach of the contract of employment could never, in itself, convert a personal interest into a public interest.

175. In Underwood v Wincanton Plc EAT/0163/15 the EAT held that it was arguable that the public interest test was satisfied by a group of employees raising a matter specific to their terms of employment. 'The public' can refer to a subset of the general public, even one composed solely of employees of the same employer. In Morgan v Royal Mencap Society [2016] IRLR 428 it was held that it was reasonably arguable that an employee could consider a health and safety

complaint, even one where the employee is the principal person affected, to be made in the wider interests of employees generally.

176. There may be a difference between a matter of public interest and a matter that is of interest to the public, and that there may be subjects that most people would rather not know about that may be matters of public interest (*Dobbie v Felton t/a Feltons Solicitors 2021 [IRLR] 679, EAT)*. A disclosure could be made in the public interest even though the public will never know that it has been made, and a disclosure could be made in the public interest even if it relates to a specific incident without any likelihood of repetition. The absence of a statutory definition of 'public interest' does not mean that it is not to be determined by a principled analysis. The four factors identified in *Nurmohamed* will often be of assistance. Some private employment disputes will more obviously raise public interest matters than others.

177. For a disclosure to qualify the worker need only have a *reasonable belief* that his or her disclosure is made in the public interest. The tribunal does not have to determine the objective question of what the public interest is, and whether a disclosure served it. The Tribunal has to consider what the worker considered to be in the public interest; whether the worker believed that the disclosure served that interest; and whether that belief was held reasonably. As reasonableness is judged to some extent objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time. Tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker *(Nurmohamed)*. That does not mean that it is illegitimate for the tribunal to form its own view on that question as part of its thinking but only that that view is not, as such, determinative. The necessary belief is simply that the disclosure is in the public interest and the particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time. A tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time: all that matters is that his or her (subjective) belief was (objectively) reasonable.

178. Belief in the public interest need not be the predominant motive for making the disclosure or even form part of the worker's motivation. The worker's motive might, however, be one of the individual circumstances taken into account by a tribunal when considering whether the worker reasonably believed the disclosure to be in the public interest. A worker may seek to justify an alleged qualifying disclosure by reference to matters that were not in his or her head at the time he or she made it, but if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or she really thought so at all. Belief in a public interest

element would not have to form any part of the worker's motivation so long as the worker has a genuine (and reasonable) belief that the disclosure is in the public interest.

Breach of a legal obligation

179. Section 43B(1)(b) is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law (e.g. negligence, nuisance and defamation), as well as contractual obligations and those derived from administrative law. It can include breaches of legal obligations arising under the employee's own contract of employment (subject to the public interest element of the test also being met.) It does not cover a breach of guidance or best practice, or something that is considered merely morally wrong. A worker will not be deprived of protection in relation to a disclosure simply because he or she is wrong about what the law requires.

180. A worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under section 43B(1)(b). In cases where it is 'obvious' that some legal obligation is engaged then the absence of specificity will be of little evidential relevance. In less obvious cases, a failure by the worker to at least set out the nature of the legal wrong he or she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation.

181. In order to be a protected disclosure, the qualifying disclosure must be made in the correct manner as set out in sections 43C-43H. A worker who makes a disclosure to their employer has fewer hurdles to get over than one who makes the disclosure to an outsider. A disclosure made to a worker's employer will be a protected disclosure s43C(1)(a).

Detriment

182. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by his or her employer, a colleague acting in the course of employment or an agent acting with the employer's authority on the ground that the worker made a protected disclosure. The requirements for a successful claim are that:
    (i) the claimant must have made a protected disclosure;
    (ii) he must have suffered some identifiable detriment;
    (iii) the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act; and
    (iv) the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

183. Section 47B (1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal. Any such complaint instead falls under section 103A which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure. The exclusion under section 47B (2) is only triggered if the claimant is an employee. Where a worker is 'dismissed' in that his contract for services or working relationship is terminated because he or she made a protected disclosure he or she can claim against the employer for that dismissal under section 47B.

184. A detriment is unlawful under section 47B if done 'on the ground' of a protected disclosure, whereas dismissal is unfair under section 103A only if the protected disclosure is the reason or principal reason for it. A section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.

185. Section 47B provides protection from any detriment. There is no test of seriousness or severity. It is not necessary for there to be physical or economic consequences for it to amount to a detriment. What matters is that the complainant is shown to have suffered a disadvantage of some kind. Would a reasonable employee consider that the relevant treatment was, in all the circumstances, to his detriment (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] IRLR 374.)

186. The protection is against acts and *deliberate* failures to act. A deliberate failure to act shall be treated as done when it was decided upon (section 48(4)(b)).

Causation (detriment cases)

187. Causation under section 47B has two elements:
    - was the worker subjected to the detriment by the employer, other worker or agent?
    - was the worker subjected to that detriment because he or she had made a protected disclosure?

188. The question of causation is to be applied to the employer's act or omission not the ensuing detriment. What was the reason for the respondent's act or omission? (Not, what was the reason for the detriment?)

189. In any detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)). This does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant (i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden will shift

to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

190. If the tribunal has rejected the reason advanced by the employer, the tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party (Kuzel v Roche Products Ltd 2008 ICR 799, Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

191. It may be appropriate to draw inferences as to the real reason for the employer's action on the basis of the tribunal's principal findings of fact.

192. In order for liability under section 47B to be established the worker must show that the detriment arises from the act or deliberate failure to act by the employer. Only then can the worker say that he or she has been 'subjected to' the detriment in question.

193. Section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistle-blower (*Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372)*. There is a different test in detriment cases from dismissal cases under section 103A. The 'material influence' test is to be applied in section 47B detriment cases whereas in a section 103A unfair dismissal case the test is still to ask what the *sole or principal reason* for the dismissal actually was. This is the consequence of the two causes of action being placed in different parts of the Employment Rights Act 1996 (Part V and Part X).

194. It is not necessary to consider how a real or hypothetical comparator who has not made a protected disclosure was or would have been treated when determining whether the protected disclosure was the 'ground' for the treatment complained of (even though it may be a useful exercise).

195. The motivation need not be malicious. It does not matter whether the employer intends to do the whistle-blower harm, so long as the whistle-blower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure.

196. In general, in a detriment claim, the starting point is that it is necessary to examine the thought processes of the alleged wrongdoer. Does the person who actually subjects the worker to the detriment know of the protected disclosure so that the protected disclosure can have materially influenced his decision to subject the claimant to the detriment? The tribunal must generally focus on the mental processes of the individual decisionmaker and so cannot find an unlawful detriment if the decisionmaker did not know about (and so could not have been influenced by) the protected disclosure.

197. The general rule has sometimes said to be displaced in cases where a manipulator with an unlawful motivation is in the 'hierarchy of responsibility' above the worker subjected to the detriment or is in some way formally involved in the process that leads to the decision, and thereby procures the detriment via the innocent decisionmaker (see section 103A in Jhuti v Royal Mail). However, in Malik v Cenkos Securities plc UKEAT/0100/17 it was considered impermissible to import the knowledge and motivation of another party to the decisionmaker for the purpose of establishing liability under section 47B. The Court of Appeal's decision in Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010 was referred to. Mr Justice Choudhury's view was that it is permissible to attribute the motivation of someone other than the dismissing officer to the employer in a *dismissal* case in some circumstances because the liability for the dismissal lies only with the employer. However, the same does not apply in a detriment case, where provision is made for individual liability of the workers. In effect, a whistleblowing detriment case has more in common with the mechanics of a discrimination case than an automatic unfair dismissal case under Part X of the Employment Rights Act. Section 47B now makes provision for individual liability of workers who subject colleagues to whistleblowing detriment and this distinction may rationalise the different approaches in the previous cases (Ahmed v City of Bradford Metropolitan District Council and ors UKEAT/0145/14/KN and Western Union Payment Services UK Ltd v Anastasiou) with Malik v Cenkos Securities plc. Only Malik was decided on the basis of the law after section 47B(1A) was introduced to provide for individual liability of workers and agents (and vicarious liability of the employer for the same acts). The fact that the decisionmaker can be personally liable for a detriment under the Equality Act 2010 led the Court in Reynolds v CLFIS (UK) Ltd and ors to conclude that it would be unjust to attribute the discriminatory motivation of another to that decisionmaker. That same consideration may be said to apply just as much to detriment under section 47B. The principles decided by Royal Mail Group Ltd v Jhuti, may not be transplanted wholesale into the unlawful detriment context because Jhuti was an unfair dismissal case and only employers (and not individual workers) can be liable for unfair dismissal.

198. Whilst there is currently no authoritative case law answer to the question whether knowledge of a protected disclosure can be imputed to an innocent decisionmaker who subjects the whistle-blower to a detriment, in the context of section 103A, the Supreme Court's decision in Jhuti has removed the gap in the protection from automatically unfair dismissal that is afforded to employees. In the context of detriments short of dismissal the introduction of sections 47B(1A) and 47B(1B) may have similarly plugged the gap in protection so that it still more appropriate to look at the knowledge of the decisionmaker in a detriment case rather than seeking to impute the knowledge of someone else in the organisation to that decisionmaker.

199. An employee's conduct in making a protected disclosure may, in certain circumstances, be separable from the disclosure itself (Bolton School v Evans [2007] ICR 641, Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941).

The employer can act lawfully if it relies only on the non-protected aspects of a whistle-blower's conduct even when that conduct is closely connected with the protected disclosures themselves. For example, in Panayiotou v Chief Constable of Hampshire Police and anor 2014 ICR D23 EAT the reason for the detriments and dismissal was not the fact that the claimant had made protected disclosures but rather the manner in which he pursued his complaints. The tribunal found that he would 'campaign relentlessly' if he was dissatisfied with the action taken by his employer following his disclosures and would strive to ensure that all complaints were dealt with in the way he considered appropriate. As a result the employer had to devote a great deal of management time to responding to his correspondence and complaints. However, in some cases it will be impossible to draw a line between the disclosure and the manner of that disclosure.

Causation in section 103A dismissal cases

200. In Royal Mail Group Ltd v Jhuti [2020] ICR 731 it was held that in a section 103A case of automatic unfair dismissal the tribunal need generally look no further than the reasons given by the decision maker in order to determine the reason for the dismissal. However, in a so-called 'Iago' case a person in the hierarchy of responsibility above the dismissal decisionmaker determines that for reason A (the protected disclosure) the employee should be dismissed but that this reason should be hidden from the actual dismissal decisionmaker behind another, invented reason (reason B). The decisionmaker then adopts reason B and dismisses for reason B with no personal knowledge of reason A. In such an 'Iago' case the tribunal should look behind the decisionmaker's reason (B) to determine that hidden reason A (the protected disclosure) was the reason for dismissal rather than the apparent, innocent reason B.

201. The line of reasoning in Jhuti only needs to be used where an innocent decisionmaker is manipulated into dismissing a whistle-blower for an apparently fair reason and is 'unaware of the machinations of those motivated by the prohibited reason.' It does not apply where the decisionmaker is aware of the protected disclosure and is thus not deceived into dismissing for an unrelated reason (University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20).

Constructive unfair dismissal for protected disclosure

202. All employees have the right not to be unfairly dismissed. Section 95 Employment Rights Act 1996 addresses the concept of dismissal. A dismissal includes where (section 95(1)(c):

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

203. The employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by on or more of the essential terms of the contract. The fundamental (or repudiatory) breach of contract may be based on an express or an implied term of the contract of employment.

204. One of the central implied terms of any contract of employment is the so-called 'implied term of mutual trust and confidence.' This is the implied term that the parties will not, without reasonable and proper cause, conduct themselves in a manner which is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee (see Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606).Any breach of the implied term of mutual trust and confidence will be considered to be a fundamental breach of contract given the central and fundamental nature of this implied term to the existence of the contract of employment.

205. If the employer does commit a fundamental or repudiatory breach of contract, the employer must resign in response to that breach. The breach of contract need not be the sole cause of the resignation but it must be an effective cause of the resignation.

206. The employee must not affirm the contract whether by prolonged delay before resigning or, by implication, by an equivocal election or by conduct that is consistent only with the continued existence of the contract.

207. In a constructive dismissal case which is said to be automatically unfair, the claimant must also establish that the reason or principal reason for the fundamental breach(es) of contract relied upon was because the claimant had made a protected disclosure.

208. In the context of a redundancy dismissal Williams v Compair Maxam Ltd [1982] IRLR 83 gives guidance as to the standards to be applied in determining whether a dismissal for redundancy is fair. (This may be relevant in the factual circumstances of this claimant's case.) Tribunals are to examine whether the employer has consulted the employee, whether the consultation is meaningful, whether the employee/trade union had sufficient warning to consider possible alternative solutions and, if necessary to find alternative employment in the undertaking or elsewhere.

CONCLUSIONS

140. The Tribunal will address the issues which are in the List of Issues at page 100.

Protected Disclosures

141. In relation to each of the alleged protected disclosures we have had to determine what was said and whether it constituted a protected disclosure. Did it disclose information? Did the claimant reasonably believe that it tended to show the relevant breach of a legal obligation? Did the claimant reasonably believe that it was in the public interest?

PID1: Between 23 January 2021 and 23 March 2021 to Mr Ian Gosney the claimant says he verbally told Mr Gosney that asking him to make phone calls to companies whose numbers he obtained from the internet whilst telemarketing for new business was a breach of GDPR and PECR

142. In light of our findings above the claimant has not proved this factual allegation. Our finding during this period is that there was one verbal reference where he referred to GDPR in the context of having data removed from the system which prevented him from doing his job. The content, particularly the specific content set out at PD1 in the list of issues, is not proven.

143. Looking at the facts that we *have* found proven, we cannot conclude that it is a protected disclosure because it does not disclose information tending to show the breach of a legal obligation. The point of the claimant's communication is that the claimant does not have the 'tools for the job.' He does not allege or disclose information showing a breach of the legal obligation. He mentions the GDPR as the reason *why* he has not got the data, information and tools to do his job. He does not disclose information tending to show that anyone at the respondent has breached, is breaching or is likely to breach the GDPR. He could not have the necessary associated 'reasonable belief' in relation to these communications either.

144. Further, whilst a GDPR related disclosure *may* potentially have a public interest element, it does not in this this context. There is no element of the claimant's 'disclosure' (according to our findings of fact) where it is seeking to protect the interests of the wider public, for example, by ensuring that their data is only retained and processed in compliance with the law. The claimant's disclosure is about the claimant's ability to do his own job or achieve commission. It is reasonably viewed as of personal or private interest to him.

145. As a result of the foregoing, the Tribunal concludes that the first alleged disclosure is not proven on the evidence and that such disclosure as is supported by the available evidence does not meet the applicable test and does not constitute a protected disclosure withing the meaning of the Act.

PID2: A telephone call to Jen Wood making the same representations. He was told by Jen Wood to put his complaint in writing.

146. The second public interest disclosure is the telephone call to Jen Wood making the same representations. We have referred to paragraphs 5 and 6 of Jen Wood's witness statement and what he said to her before the grievance. In her evidence she maintains that the first that she was aware of an allegation that the claimant was being asked to make calls to companies whose numbers he obtained from the internet whilst telemarketing for new business (which was said to be a breach of GDPR and PECR) was at the grievance appeal meeting on 29 April. She maintained that the claimant had referred to GDPR concerns in his grievance letter and during the grievance hearing but, as had been explained, she also understood that the claimant was complaining that data had been removed from the respondent's systems in order to comply with GDPR which was making the claimant's job more difficult as he did not have the client data.

147. The Tribunal has found that the evidence in Ms Wood's statement is correct. The claimant's phone call did not say what he alleges it did. Even his written grievance (which followed on from the call) did not make that allegation. Therefore, this verbal disclosure cannot be a protected disclosure for the same reasons as stated in relation to PID1 (see above.) It is essentially a repetition of PID1 but to a different person. That protected disclosure is not made out and the claims relating to this disclosure fail.

PID3: A grievance letter to the HR department on 23 March 2021 addressed to Jen Wood

148. The grievance was at page 257. We have already quoted the document and what it actually contained in our findings of fact. It is essentially a repetition, in a different format, of the same content as the prior alleged disclosures (i.e. removal of data made his job more difficult.) For the same reasons, the grievance letter cannot constitute a protected disclosure for the purposes of the Employment Rights Act 1996 (see above.)

PID4: A grievance hearing.

149. As we have already stated, the content of the grievance reflected the claimant's earlier concern about access to the relevant tools and information to be able to do his job properly and effectively. The claimant does raise questions about the clarity or soundness of the processes vis a vis the GDPR. However, in making his comments the claimant is making an allegation or asking a question or expressing an opinion. He *does not disclose any information*, however general. He does not state the factual basis for his opinion. If he had, that might have been a disclosure of information and that information may have tended to show a relevant breach etc. It might also have indicated that he had the necessary reasonable belief. The Tribunal concludes that the claimant did not make a disclosure of information and his comments do not fall within the parameters of a protected disclosure as defined by the Act. The requisite elements of a protected disclosure are not present.

PID5: The appeal following the outcome of the grievance hearing.

150. The Tribunal has concluded that the claimant did make a protected disclosure at this stage of the chronology. At the appeal stage the claimant says that he was being asked to break the law and he explains why and how he has come to that conclusion. The substance of his communication changed at this stage of the timeline. During the appeal, the claimant was saying that there was a need to have a proper system in place for outbound 'cold calls' in order to ensure that there was no breach of the obligations under the GDPR. He was saying that the respondent needed to look at and consult the CTPS in order to see who had 'opted out. He was communicating that if an employee (such as the claimant) or someone else within the respondent organisation calls someone who has opted out, then there is a breach of the law, as he understands it. If the caller does not check the CTPS they will be making a call in (avoidable) ignorance of the true state of affairs and there is a real risk that the caller will be breaching the law. The claimant was, further, asking for protocols to be in place when the caller is talking to people, such as a protective 'script' for the employee to follow in order to safeguard the employee and the respondent's legal position. He was also looking for recognition that he had broken the law and that responsibility for such a breach would rest with him as an individual. He referred to what he saw as the relevant legislation.

151. The Tribunal has concluded that the claimant had a reasonable belief at this point that the information he was disclosing tended to show a relevant breach of a legal obligation. At the relevant time the claimant thought that some of the companies included on his call log were entirely new to the respondent. During the course of the Tribunal hearing the respondent was able to assert that they were, in fact, old customers that had previously been on the respondent's system. However, this assertion was based on a timeline which dated back well before the claimant was employed by the respondent. There is no way that the claimant could have known this at the relevant time. At the time, given the available information, the claimant had a reasonable belief that when he was calling new companies he was either in breach of the GDPR or was, at the very least, risking a breach of the GDPR given that he had not checked the 'opt out' situation on the CTPS. Thus, the claimant's disclosure meets that element of the requirements for a protected disclosure.

152. The Tribunal is also satisfied that the claimant's disclosures at this stage of the chronology developed from being, potentially, an entirely personal and private issue to having the necessary public interest element. At the appeal stage the claimant was talking about the wider interests of the public and potential customers. He was, in effect, talking about procedures to ensure that those who do not want to be contacted are not contacted against their will. His comments were no longer about his ability to do his job and make commission. His comments had developed the necessary public interest element, in addition to his own private interests as an employee.

153. In those circumstances the Tribunal is satisfied that the fifth alleged disclosure *does* meet the legal test and does constitute a protected disclosure within the meaning of the Employment Rights Act 1996. It is the only one of the five alleged protected disclosures which is established on the evidence and facts of this case.

Detriments

154. We have examined the detriments pleaded and relied upon by the claimant. They are listed at D1 to D5 at page 101.

Detriment 1: Undertaking a grievance hearing without investigation beforehand.

155. We have concluded that this does not constitute a detriment in all the relevant circumstances of this case. Rather, it is normal procedure for an employer to get the employee's account of what their grievance is about before the employer proceeds to investigate it and come to a grievance conclusion or outcome. The employer has to understand the employee's grievance in order to be able to investigate it and treat it appropriately and seriously. This cannot reasonably be seen as a detriment to the employee.

156. In any event, the alleged detriment also predates the only established protected disclosure in the chronology of events in this case. Thus, the Tribunal is unable to conclude that the respondent subjected the claimant to the alleged detriment because of a protected disclosure which postdates the detriment complained of. Consequently, this allegation of protected disclosure detriment fails on two alternative bases: the alleged detriment does not constitute a detriment; and the respondent did not subject the claimant to the 'detriment' on the ground that he had made a relevant protected disclosure (i.e. the detriment fails the causation test.)

Detriment 2: Undertaking a grievance hearing without giving a result within five working days in breach of the claimant's contract.

157. The Tribunal finds that this was not a breach of the claimant's contract. If one examines the written terms of the policy in question (which we have quoted in full above) the respondent's actions fall squarely within the terms of the policy and its terms. Indeed, this would be an example of an employer taking more time in order to do the job of conducting a grievance properly rather than sticking to an arbitrary deadline. The claimant has sought to put an unnatural meaning on the wording of the relevant clause. The clause requires the respondent to 'endeavour' to 'respond' to the grievance 'as soon as possible' and 'in any case within five working days of the grievance meeting." A 'response' may not be the final grievance outcome and the respondent need only 'endeavour' to respond. It is not a cast iron guarantee. Furthermore, specific provision is made in the following sentence for those cases where it is not possible to respond within the stated time period.

158. Furthermore, the respondent forewarned the claimant that the respondent would not be able to provide an outcome to the grievance within five days. The time taken (we accept) is more than double the timeframe within the policy. However, that is double what can be classified as a very short time frame. Realistically, it is to the claimant's benefit that the respondent takes the extra time to examine the grievance properly. This cannot reasonably be seen as a detriment to him. Thirteen days is not a long time, either in relative or absolute terms. The fact it is more than double the stated time frame is really not the point in all the circumstances of the case.

159. The Tribunal is not satisfied that this delay constitutes a detriment. In any event, this predates the only protected disclosure in this case and so this complaint must fail the causation test within the Act.

Detriment 3: raising the prospect of the claimant being made redundant because he had made a public interest disclosure.

160. The respondent, through its employees/witnesses, says that it can understand that being put at risk of redundancy is a potential detriment to the claimant. They would be right about that. However, the chronology does not work in the claimant's favour in relation to causation. The claimant was put at risk of redundancy before he received his grievance outcome and before he made his appeal. The relevant protected disclosure only takes place at the appeal stage and therefore it cannot have the necessary causal relationship to the earlier act. The claimant cannot have been subjected to the detriment on the ground that he had made the protected disclosure at the appeal stage.

161. The Tribunal has also found that that the redundancy situation in this case was not a sham. Whilst the respondent can be criticised for the way it handled the redundancy situation and the timeframe that it implemented (and the fact that this understandably raised concerns in the claimant's mind) the restructure was genuine, and it actually took place. The team the claimant worked in is no longer in existence within the business. Indeed, the claimant was not the only person put at risk. Joanna Owens was also at risk of redundancy. The respondent's process gave the claimant the option of applying for alternative jobs. The claimant never tested the respondent by expressing an interest in an alternative role and seeing whether he was given an alternative job in order to avoid dismissal. He 'jumped' first by resigning from his employment. The claimant cannot realistically now argue that he was going to be dismissed and that Joanna Owens was going to be retained within the business. In that sense he and Ms Owens have been treated in the same way. This again lends force to the conclusion that the redundancy situation was nothing at all to do with a protected disclosure made by the claimant. The claim in relation to detriment number three therefore fails and is dismissed.

Detriment 4: Management colluded to produce false narrative i.e. that a manager did not instruct the claimant to cold call members on the internet.

162. The Tribunal has found no evidence of collusion. We have not found that the managers denied instructing cold calling. What the managers said was that the claimant should do outbound calls, should focus on new business and potentially entirely new customers. It is evident that there would be no CTPS check first. That is the basis on which the respondent conducted itself. By necessary implication, the respondent has not denied instructing cold calling.

163. The respondent did not understand the claimant's GDPR allegation until the appeal hearing. At that point they understood what he was saying about the breach and about the impact on his role. They did not deny that there *could* have been a breach of the GDPR. They clarified that, taken at its highest, there was no proof of an *actual* breach but that, in the absence of a CTPS check, there was a *risk* of an inadvertent breach of the GDPR by calling someone who had opted

out. They therefore agreed to look into changing the process in order to avoid this risk in future. That is not a false narrative and certainly not a false narrative of the sort alleged at page 101 (list of issues.) We are satisfied that the claimant has failed to prove the detriment as pleaded.

164. The claimant sought to further elaborate and amend the nature of the detriment in his written submissions. At page 6 of the written submission there was an implicit recognition by the claimant that he was, to some extent, moving the goalposts after the conclusion of the evidence. He indicates that what follows are the points he 'would have liked to have made' rather than the points he actually made during the hearing. He asserts that the respondent lied about the business strategy and asserts that the redundancy plan was not a genuine business initiative and that the delay in his grievance report was also not genuine. He asserts that the business had a strategy to frighten him away from the disclosures he had made and to scare him into doing what the respondent wanted in order to get his job back.

165. The Tribunal does not accept the claimant's assertion in this regard. We are satisfied that there was no 'cover up.' On the facts as we have found them, once the claimant had made a protected disclosure and the respondent's managers actually understood what it was, the respondent's management actually looked into it. They addressed the claimant's disclosure head on and thanked him for bringing it to their attention (i.e. the risks of cold calling and the protective measures and procedures needed to ensure GDPR compliance.) Contrary to the claimant's assertions there was no evidence of collusion between Mr Gosney, Mr Tyldesley, Ms Wood and Mr Goody.

166. In his written submissions the claimant further alleges that Mr Goody denied that he (the claimant) made illegal calls even though he knew this to be the truth. Again, on the facts as found by the Tribunal, this is not correct. Mr Goody accepted that it was possible, there was a risk that the claimant had made illegal calls because the CTPS safeguard was not in place. Thus the claimant and the respondent had not checked whether the recipients of the claimant's calls had opted out or not. Just as it is possible that some of the recipients would have been registered as 'opt outs' if the register had been checked, it is also possible that they would not have been opted out of the calls if the register had been checked. That is all Mr Goody was trying to point out. He was trying to point out the absence of proof in either direction. Hence, there was a risk or possibility that the claimant had made illegal calls which was not proved either way. Thus, the following passage from the appeal report [583] demonstrates that Mr Goody was not denying the possibility of a breach but rather that he did not accept that there was *proof* of an *actual* breach:

> *"I agree that we would be breaking the law if we called companies on the CTPS list, other than to respond to genuine enquiries and orders that they have brought to us. Therefore, it is important that we have a process to ensure that we do not cold call such companies. You are right that we do not have a robust process for this. Thank you for bringing this to my attention. Immediately after our meeting on Thursday 29 April I raised this with Mark Tyldesley. Mark and I will arrange for the company to subscribe to the CTPS list as an urgent priority and communicate to all sales people*

who may be involved in outbound calling that they need to check the list before making outbound calls.

167. Furthermore, the claimant asserted that Mr Goody was misrepresenting the new business strategy even though he knew the reality. The claimant asserts that the business strategy at this point was to gather evidence to use against the claimant if any future claim arose, but Mr Goody continued as though the business was conducting a genuine appeal hearing. The Tribunal does not accept this assertion. It does not fit the evidence which we have heard. Nor does it match the case as pleaded and clarified in the list of issues. The Tribunal must decide the claimant's case as pleaded and as prepared for and defended by the respondent during the hearing.

168. The Tribunal is satisfied that the only protected disclosure established by the claimant in this case takes place at the time that the respondent manager actually sought to clarify his understanding of what the claimant was alleging. It was at this point that the respondent understood the point that the claimant was making. The respondent confirms that it now understands the claimant's assertion and assures him that they will take steps to address the concern that he has raised. Far from ignoring it or covering it up they pick it up and actively address it.

169. In light of the above, this part of the claim fails, and this part of the claim must be dismissed. The claimant fails, there is no detriment proven, and therefore that aspect of the claim is dismissed.

Detriment 5: The claimant was constructively dismissed.

170. The respondent argued, correctly, that this should be dealt with as a constructive unfair dismissal claim and that that is what the legislation requires us to. We will therefore address this aspect of the case under the legal tests in section 103A Employment Rights Act 1996.

Unfair constructive dismissal

171. The claimant alleged that the respondent breached two terms of his contract. The first was the express term that the respondent would deal with his grievance within five working days. The second was the implied term of mutual trust and confidence.

172. The Tribunal has already concluded within these reasons that the express term of the contract relied upon was not breached by the respondent. Nor would we have been satisfied that a breach of such a timeframe would have been a fundamental breach of contract (even if established) given the factual circumstances of the case. Compliance took longer than five days but did take place within a relatively short time period overall. There were good reasons for the time that the respondent took.

173. The claimant also asserts a breach of the implied term of mutual trust and confidence. The conduct which was said to form part of the breach of the implied term of mutual trust and confidence was set out in the list of issues [102] The

claimant relied upon the detriments numbered 1 to 4 in the protected disclosure detriment case as part of the breach of mutual trust and confidence.

174. We repeat and rely on our findings and conclusions set out above in relation to detriments 1 to 4. In summary (as we have already stated above):

Detriment 1: The grievance hearing took place before the grievance investigation but this was not a detriment. Rather, the respondent sought to understand the grievance before it undertook the necessary investigations and reached its conclusions. Further, the respondent had reasonable and proper cause for having the hearing first. Indeed it was the proper way to handle the grievance in the circumstances. It did not act 'without reasonable and proper cause." It did not constitute or form part of a breach of the term of mutual trust and confidence and so does not assist the claimant's constructive dismissal claim.

Detriment 2: This is a repetition of the allegation that the respondent breached an express contractual term (but uses a different formulation.) For the reasons already stated, this did not form part of a breach of mutual trust and confidence. It was not detrimental for the respondent to take the appropriate time to address the matter properly. The respondent had reasonable and proper cause for its actions.

Detriment 3: The respondent did raise a risk of the claimant being made redundant but did not do so because the claimant had made a protected disclosure. It was not linked to a protected disclosure. The respondent acted in this way because of the restructure. The respondent was acting with reasonable and proper cause and its actions were not calculated or likely to destroy or seriously damage mutual trust and confidence. Other employees were also placed at risk of redundancy. If the Tribunal were to find that this formed part of a breach of mutual trust and confidence it would, unfortunately, mean that every time an employee is put at risk of redundancy (without anything more on the facts) there is a breach of mutual trust and confidence entitling a resignation. That would not be correct. Merely putting someone at risk of redundancy in a redundancy situation is not a breach of mutual trust and confidence without more, in terms of a significant aggravating feature. There are no such aggravating features here.

Detriment 4: This is the assertion that there was collusion relating to a false narrative. As already stated, this was not proven.

175. The list of issues also alleges that failure to deal with the grievance within five days also formed part of the breach of mutual trust and confidence. For the reasons already stated, we do not agree.

176. The list of issues also states (paragraph 16.3) that asking the claimant to prepare a business plan to avoid his role being made redundant was part of the breach of mutual trust and confidence. The claimant says that this made his work impossible. Once again, we find that this is a misinterpretation or mischaracterisation of what actually happened. In substance (and when properly viewed in context) the evidence shows that it was a normal and standard consultation about ways to avoid redundancy dismissals. An employer has to consider alternatives to redundancy as part of a fair redundancy consultation process. It is appropriate, as part of the consultation, for the employer to ask the affected employees whether they have any suggestions or alternatives to the proposed changes. In this case the respondent asked the claimant whether he had any alternative proposals which would help him to keep his job. We refer again to the notes of the consultation meeting. He was not being asked to provide some form of business plan or strategy for the business as a whole, it was specifically consultation to avoid the proposed redundancies. The claimant was not being asked to act as some form of business consultant in a wider sense, just to proffer any suggestions which might avoid the need to make the proposed redundancies. The Tribunal is satisfied that the respondent did not act without reasonable and proper cause in all the circumstances. This conduct cannot be said to have damaged mutual trust and confidence. Indeed, it was giving the claimant an opportunity to save his job if he could come up with an alternative.

177. In light of the foregoing we have concluded that there was no fundamental breach of contract in this case. There was no repudiatory breach, whether of an express or an implied term of the contract. Consequently, there can have been no constructive dismissal. Likewise, the necessary link to protected disclosures was absent in this case (for reasons stated in other parts of these reasons.) Therefore, any constructive dismissal could not have been found to be an automatically unfair dismissal. Due to the fact that the claimant had less than two years' service, in order for his constructive unfair dismissal claim to succeed he would have had to establish not only a constructive dismissal but also that the reason for the constructive dismissal was the protected disclosures. He has not been successful in either of those tasks.

178. The Tribunal also notes in passing that the fact that the claimant was prepared to appeal and might have been prepared to retract his resignation might also indicate that he did not actually consider the respondent's actions to be fundamental breaches of contract at the time. It suggests that he may well have harboured some hope that the matters could be repaired. However, we need not explore that further in light of our earlier findings.

179. In light of the above, the constructive unfair dismissal claim fails.

Discrimination because of philosophical belief

180. Before determining this claim it is important to properly identify the claimant's protected characteristic. What philosophical belief does he rely upon? This was set out at paragraph 24 of the list of issues [103]:

> "His belief is a philosophical belief. He asserts this as his personal accountability i.e. he is responsible for his own actions and the consequences of those actions."

The list of issues then goes on to summarise aspects of the applicable legal test.

181. The relevant evidence from the claimant on this issue was paragraphs 82 and 83 of his witness statement. He states:

"The Respondents behaviour has been inexplicable across all the issues, and I believe its because they wanted to exploit and leverage my natural philosophical belief and trait of being accountable. I would always answer a question or engage with any member of staff and look to better the situation and account for any failing.

The Respondent leveraged this by directly discriminating [section 10, Equality Act 2010] against me in terms of having to work a lot more and harder than my direct co-worker, and discriminating against me when the Redundancy Proposal offered a job that only my co-worker had been trained on. The latter showing the blatant consequences of the discrimination."

182. The Tribunal has been referred to the relevant case law in relation to the protected characteristic of philosophical belief, in particular the Grainger guidance. And we have sought to apply the relevant principles to the claimant's case.

183. Is the claimant's belief genuinely held? Yes, on balance, we think it is genuinely held. Is it simply an opinion or viewpoint? It is arguably an opinion or viewpoint. Or it could be a moral principle? It is perhaps a borderline case but for the purposes of this case we could be persuaded that it is more than an opinion or viewpoint. Does it concern a weighty and substantial part of aspect of human life and behaviour? We think it does. It could be applied to all areas of an individual's life experience. It could be seen as a principle to live one's life by- taking personal accountability and responsibility for one's own actions. Does it attain a certain level of cogency, seriousness, cohesion and importance? The Tribunal has more difficulty with this. There is more of a question mark here. It is one principle rather than a system of thought or belief. It has one component and does not address any of the other principles or beliefs that a person may abide by during the course of his life. In that sense it could be said to lack cogency or cohesion even though it is serious or important. It is perhaps questionable whether all of the adjectives in the guidance need to apply to a given belief in order for it to qualify for protection under section 10. Is it worthy of respect in a democratic society? Is it not incompatible with human dignity and not in conflict with fundamental rights of others? Clearly, we are satisfied that it is worthy of respect in a democratic society and not incompatible with human dignity etc.

184. During the course of our deliberations we noted the comments in the Forstater case also that tribunals should not stray into the territory of adjudicating on the merits and validity of the belief itself. We must remain neutral and abide by the cardinal principle that everyone is entitled to believe whatever they wish to, subject only to a few modest minimum requirements. We also noted that in Grainger it was accepted that a philosophical belief does not need to constitute or allude to a fully-fledged system of thought. Nor does it have to be shared by others. It can relate to a one-off or single issue that does not necessarily govern the entirety of a believer's life.

185. Having taken the case law guidance into consideration, this Tribunal is prepared to accept that the claimant's belief is a philosophical belief which qualifies for protection under the Equality Act 2010. That said, we consider that it is possibly pushing at the boundaries of the legal definition. The belief is of narrow scope but it is of sufficient seriousness. If we were to find that it is not a philosophical belief then we might well be trespassing into adjudicating on the weight and value of the philosophical belief, which Forstater urges us not to do. On balance, therefore, we conclude that the claimant's belief *does* constitute a philosophical belief within the meaning of the Equality Act. However, that is not the last question to address in the claimant's section 13 claim. We have to examine the detrimental treatment, causation and the other elements of the section 13 test.

186. The allegations of less favourable treatment are at page 104, paragraph 28.

187. The first allegation is:

> "*For four weeks in September 2020, he was required to run the sales team on his own whilst his co-worker was sent to train on another area of the business, and his manager worked in a different capacity within the Hire Team. There was an additional two-week period in February 2021 where he was left to manage the team's workload with his manager and co-worker out of the business- he was not debriefed or thanked."*

There are two parts to this: the September issue and the February issue. As already set out above, in the September there were reasons relating to the Covid 19 pandemic which meant that the work in the hire area of the business increased as opposed to the amount of work in the sales area of the business. Thus Joanna Owens went over to work on hire to support that area of the business where there was more need. The claimant's manager did some of that work too. However, during this period the claimant was not undertaking the managerial role. He did not take on any of the managerial duties (such as board meetings). Thus he stayed in the job he was already doing whilst others focused on hire work.

188. The Tribunal is satisfied, based on the evidence that we have heard, that the reason the respondent gave the claimant this work was the change in demand patterns across the hire and sales parts of the respondent's business. Furthermore, there is no evidence that anybody within the respondent's management structure actually knew of the claimant's philosophical belief at the time that this happened. Taking into account the relevant case law and noting that we must examine conscious and subconscious motivations (in a Nagarajan sense), we cannot conclude that the respondent made that decision (even partly)

on the basis of a philosophical belief of which it was wholly ignorant at the time. If the managers in question did not know that the claimant had a philosophical belief, or what it consisted of, how could it have a conscious or unconscious causative effect of their decision making?

189. We also heard that there were also good business reasons why the respondent would make the decision that it did. There was evidence to suggest that the claimant was a good salesman so it would be sensible for the business to keep him in that role. Indeed, at the time that this happened, there was no benefit to Joanna Owens in being moved to cover hire work. At the time she would be having to do a new job in a pressurised environment. In the circumstances the Tribunal is not satisfied that the claimant was actually treated *less* favourably than Joanna Owens. It is only through the benefit of hindsight that, after the event, the hire job comes up (more than six months later and in the context of a redundancy situation) that one might be able to see the benefit to Ms Owens of having this prior experience in hire. Nobody (the respondent included) would have known that at the time. We cannot say that she was actually treated more favourably than the claimant. Likewise, we cannot say that a hypothetical comparator would have been treated more favourably than the claimant.

190. Thus, this aspect of the section 13 claim fails both because the reason for the treatment was not the protected characteristic and also because it was not less favourable, detrimental treatment of the claimant. We are not satisfied that the claimant managed to shift the burden of proof to the respondent in this aspect of his claim. Even if he did, we are satisfied, on the evidence that we heard, that the treatment was, in no sense whatsoever, because of the philosophical belief.

191. The two weeks period in February is slightly different. Again the factual explanation for the claimant working on his own the team is simple: a bereavement and some sick leave. These sorts of issues regularly occur in all sorts of workplaces. This was a three-person department and two of the people were absent. In those circumstances someone has to cover the work of the department and that was the claimant. The claimant was not given additional duties or different duties. Further, there was another senior manager available that the claimant could refer to for advice or guidance. These circumstances could quite easily have arisen the other way around. It could easily have been the claimant who was on sick leave or who suffered a bereavement. His work would need to be covered in his absence. The claimant was required to do no more than 'hold the fort' until his colleagues returned to work. The evidence was that any required updates and debriefs took place in a reasonable way and were functional. There was no need for a specific meeting to do this. There was no need for, or expectation of (reasonable or otherwise) thanks or compliments to the claimant. It was part of his job to do this as part of a small team. There is no evidence to show that a hypothetical comparator would have been treated any differently. Nor is there any evidence to show that anyone knew of his philosophical belief. As nobody knew of the philosophical belief it can have had no causal impact on the treatment. It can't have been the 'reason why' he was treated in this way.

192. Thus, this aspect of the claimant's claim fails both because we are not satisfied that he was less favourably treated than a hypothetical comparator and because

we are satisfied that the treatment was, in no sense whatsoever, because of the claimant's belief.

193. Allegation number two is that the claimant raised this as a grievance and it was ignored between January 2021 and March 2021. We cannot find evidence of him raising this as a complaint or that it was ignored. The claimant has failed to establish the detrimental treatment complained of. We also (for reasons already stated) cannot find evidence that any of the respondent's employees or managers knew of the claimant's philosophical belief at the material point in time. Thus we cannot be satisfied on causation, that the treatment was because of the belief. That part of the section 13 discrimination must also fail.

194. The next allegation relates to two aspects of work being taken away from the claimant. The first piece of work is the United Utilities work referred to above. The Tribunal has already indicated that that was a decision made in order to reduce the number of contact points for the customer. It was simplified and kept with Ms Owens rather than the claimant. We also note that this decision was reversed even according to the claimant's own case. The reason for the decision was essentially customer care. The respondent wanted to safeguard the customer experience and ensure that the customer had one point of contact. Furthermore, there is no evidential basis to conclude that the people making that decision were even aware of the claimant's philosophical belief or that this had any part to play in what they did. Thus, the relevant causation is not established. Furthermore, there was no financial detriment to the claimant. He did not lose out on any commission as a result of this decision.

195. The second aspect of this allegation refers to the 'potential' sale with commission of £250-£350 at stake. There is no evidence before the Tribunal that an order was placed or invoiced. Thus, no commission became payable to either BDC. There was no financial detriment to the claimant. The highest that the claimant could put his case is that he had the *potential* to earn commission on this client and that it was removed from him without a compensatory client being given to him to make up for this. On the evidence available to the Tribunal there are a lot of unknowns in relation to this issue. The Tribunal has no way of knowing, in any granular way, whether the work of either of the BDCs was always going to 'pay off' and result in commission. Not all leads would necessarily prove fruitful in terms of commission for the BDC working on them.

196. If the Tribunal assumes for a moment that there was a real detriment rather than the 'loss of chance to earn commission,' what was the reason for it? Is there any evidence to suggest that it had anything to do with the claimant's philosophical belief? Again, the difficulty is that there is no evidence that anyone within the respondent business knew about the claimant's belief in advance of him bringing the claim to the Tribunal. The most that anyone at the respondent knew was that the claimant had asserted that if he had breached the GDPR he would be held liable for the breach. However, that is not the philosophical belief relied upon by the claimant for the purposes of the section 13 claim. It has no relevance to this allegation of discrimination. It is merely a statement that if someone commits a criminal offence, they will be held personally liable for it. That is a statement of the factual reality and not a statement of philosophical belief. Thus the claimant

cannot establish the necessary causation. He cannot show that he was treated less favourably because of the relevant philosophical belief.

197. The Tribunal also noted that there was a lack of clear delineation between clients across the board. The employees did not have lists of 'their' clients. The principle was that the right to commission crystalised at the time of an invoice or purchase order. This principle was applied across the board and there was no differential treatment of the claimant here. Thus, the respondent did not remove commission that was owed to the claimant under the terms of the respondent's system. The respondent has reallocated a client where more than one employee may previously have made a contribution to the client account but before the right to commission has crystallised. However, this could happen to either of the BDCs. There is no evidence that the claimant suffered more than others.

198. The fourth allegation was that the claimant's appraisal was biased, that none of the positive factors were taken into account, for instance that he was actually performing over his target. The Tribunal does not accept that the appraisal was biased or a detriment given our findings of fact above. Someone in the claimant's circumstances without his protected belief would have received the same comments. We also note that the philosophical belief cannot be the reason why the comments were made in the PDR because there is no evidence that the claimant communicated his philosophical belief to anyone, still less to Glyn Morris. If Glyn Morris did not know about the philosophical belief and it is not apparent to him on meeting and interacting with the claimant (because it is not a characteristic which is visible or apparent to the observer) it is hard to see how he could treat the claimant differently because of it. We are also not satisfied, on the facts, that the claimant was treated less favourably than Joanna Owens. They both received the same score and they were both told about the reciprocal need to improve communications in the team. There was a degree of similarity in that regard. Nor can we say that the claimant was less favourably treated than a hypothetical comparator would have been. This allegation fails and is dismissed. We are not satisfied that there is less favourable treatment than of the comparator and we are not satisfied that the treatment was because of the philosophical belief.

199. The final complaint of direct discrimination is that the public interest disclosures that he made were ignored. We have concluded there was only one protected disclosure and we have also concluded that it was not ignored. In fact, the respondent did not ignore any of the alleged 'disclosures' but responded to what the claimant said or did at each stage as we have set out in our findings of fact. The claimant has failed to establish the detrimental treatment for the purposes of this part of his section 13 claim.

200. In addition, there was no suggestion that the claimant communicated the substance of his philosophical belief at the time. Taken at its highest, the claimant only ever said, in effect, "if I breach the GDPR then I will be held legally responsible." That is not expressing a belief in personal accountability as a philosophical belief. Rather, it is a statement of fact in relation to legal liability. We cannot find that this aspect of the claim succeeds. There was no less favourable treatment of the claimant than of the comparator and the claimant's belief had nothing whatsoever to do with the respondent's treatment of him.

201. The claimant's claim of direct discrimination fails and is dismissed.

202. In light of our findings above the jurisdictional issues in relation to time limits do not arise for consideration and, thus we have not addressed them.

Note

203. The Tribunal delivered an oral decision and oral reasons at the conclusion of the hearing. The judgment was provided first, followed by the reasons. The claimant wished to leave part way through delivery of the reasons. He was free to do so but the Tribunal indicated that it would continue to provide its oral reasons in his absence as both parties had a right to hear them. The claimant indicated, prior to leaving, that written reasons were requested. He repeated that request in writing. Hence, the production of this document as soon as was reasonably practicable given our duties to all litigants that come before us and the competing demands on judicial resource and time. The claimant left after hearing our conclusions in relation to the first alleged protected disclosure (corresponds to paragraph 145 above.)

204. At the conclusion of the oral reasons, respondent's counsel indicated that the respondent may make an application for costs and she foreshadowed the likely basis of such an application. However, no formal application for costs was made at the conclusion of the hearing. We indicated that, in any event, we would not be in a position to determine any such application in the claimant's absence and without him having had the opportunity to make any relevant submissions and representations in relation to the issue of costs. Counsel indicated that instructions would be taken and, if appropriate, an application would be made in writing in due course.

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Employment Judge Eeley
Date: 7 December 2023

REASONS SENT TO THE PARTIES ON
7 December 2023

FOR THE TRIBUNAL OFFICE