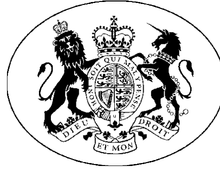

EMPLOYMENT TRIBUNALS

Claimant: Mr Nicholas Dancer

Respondent: Secretary of State for Business and Trade

Heard at: London Central **On:** 1,2,6,7,8 February 2024, 9 February 2024 (Chambers)

Before: Employment Judge Akhtar
Mr T Robinson

REPRESENTATION:

Claimant: Ms L Millin (Counsel)
Respondent: Mr M Paulin (Counsel)

RESERVED JUDGMENT ON LIABILITY

The unanimous Judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.

2. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

CLAIMS AND ISSUES

1. The claimant brings claims of constructive unfair dismissal and whistleblowing detriment. The issues were agreed as directed by Employment Judge Klimov, following a case management hearing on 12 June 2023.

2. The issues are set out below and were further clarified and confirmed at the start of this hearing. The claimant advised that he was no longer pursuing a claim of direct discrimination on the grounds of sexual orientation.

LIST OF ISSUES

Constructive unfair dismissal

1) Was the Claimant dismissed?

1.1 Did the Respondent do the following things:

1.1.1 From 4 January 2022, barred the Claimant from making applications for promotion;
1.1.2 From 4 January 2022, prevented the Claimant from going on foreign business trips;
1.1.3 From 4 January 2022, prevented the Claimant from being on interview panels;
1.1.4 From 4 January 2022, prevented the Claimant from acting as a process or decision manager;
1.1.5 On 24 February 2022, produced a factually inaccurate document, stating that the Claimant had not declared his sexuality;
1.1.6 On 28 February 2022, issued to the Claimant the first written warning;
1.1.7 Colluded with the Crown Prosecution Service to secure the Claimant's conviction;
1.1.8 Did not confirm to the Claimant what would happen to his employment if he were convicted of a criminal offence;
1.1.9 Did not confirm to the Claimant whether he would be suspended without pay following his conviction;
1.1.10 In June 2022, changed the disciplinary decision manager;
1.1.11 On 12 July 2022, at the disciplinary hearing did not tell the Claimant whether he was suspended; Did not tell the Claimant what would happen to his employment if he had not appealed his criminal conviction,
1.1.12 Did not deal with the Claimant's grievance in accordance with the Respondent's "whistleblowing" policy and the Civil Service Code;
1.1.13 Did not uphold the Claimant's appeal against the grievance outcome;
1.1.14 On 27 October 2022, issued the Claimant with the final written warning;

1.1.15 Gave the Claimant five days sickness before the trigger point for dismissal, counting the Claimant's sickness absence for a heart surgery towards the trigger point;
1.1.16 On 4 November 2022, refused to consider the Claimant's appeal against the final written warning;
1.1.17 On 21 December 2022, the Permanent Secretary of State refused to overrule the outcome of the grievance;
1.1.18 In mid-January 2023, refused the Claimant's request for a secondment.

1.2 If so, did that breach the implied term of trust and confidence and/or any other term of the Claimant's contract of employment?

1.3 If there was a breach of contract, was that breach a fundamental one?

1.4 If so, did the Claimant resign in response to the breach?

1.5 Did the Claimant affirm the contract before resigning?

1.6 If the Claimant was entitled to terminate the contract without notice by reason of the Respondent's conduct, was the dismissal fair having regard to section 98(4) of the Employment Rights Act 1996 ("ERA")?

Detriment for making a whistle-blowing disclosure

2. Did the Claimant make one or more qualifying disclosures as defined in section 43B ERA?

2.1 Did the Claimant do the following:

a) On 4 January 2022 told Zaineb Khalick that he had been arrested and charged with a criminal offence.
b) On 24 January 2022 told Zaineb Khalick that the police had refused to receive evidence of his head injury and bank charge fraud.

2.2 If so, did the Claimant disclose information?

2.3 Did the Claimant believe that the disclosure of information was in the public interest?

2.4 If so, was that belief reasonable?

2.5 Did the Claimant believe that the disclosure tended to show that a miscarriage of justice has occurred, was occurring or was likely to occur?

2.6 If so, was that belief reasonable?

3 Did the Respondent do the following things:

a) From 4 January 2022, barred the Claimant from making applications for promotion.

b) From 4 January 2022, prevented the Claimant from going on foreign business trips.

c) From 4 January 2022, prevented the Claimant from being on interview panels.

d) From 4 January 2022, prevented the Claimant from acting as a process or decision manager.

3.2 If so, by doing so did the Respondent subject the Claimant to a detriment?

3.3 If so, was it done on the ground that he made a qualifying and protected disclosure?

Time Limit

4 Was the protected disclosure detriment complaint brought within the time limit for bringing such a complaint under s48 ERA? Given the date the claim was presented and the dates of early conciliation, any complaint about something that happened before 9 November 2022 may not have been brought in time.

4.1 Was the claim made to the Tribunal within three months (plus early conciliation) of the act complained of?

4.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

4.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

4.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

3. The Tribunal heard evidence from the claimant. The Tribunal read and considered the written evidence of the following witnesses on the claimant's behalf:

   Mr Daniel Vandenburg, Senior Policy Officer;
   Mr Ian Jenkins, Clinical Psychotherapist and Counsellor.

4. The Tribunal also heard the evidence of the following witnesses on behalf of the respondent:

   Zaineb Khalick, Head of Regulatory Co-operation and Engagement;
   Kathy O'Dwyer, HR Shared Services Relationship Manager;
   Abbie Loyd, Deputy Director, office of Manpower Economics;
   Mark Holmes, Deputy Director, Corporate Governance, Audit Reform and Shareholder Rights;
   Duncan Johnson, Deputy Director, Construction Products;
   Emona Gjika, HR Business Partner.

   The Tribunal also read and considered the written evidence of Mr Miles French, Head of International, on behalf of the Respondent.

5. There was a tribunal bundle of approximately 1943 pages. We informed the parties that unless we were taken to a document in the bundle, we would not read it. Both parties provided written closing submissions as well as making oral submissions.

6. On Day 2 of the hearing, part way through the evidence, an issue arose with one of the members becoming unavailable for the remainder of the hearing. The parties' consent was sought for the Tribunal to continue as a panel of 2. The consent of both parties was recorded in the note of proceedings and the matter subsequently proceeded to be heard by the Employment Judge plus the remaining member.

<u>FINDINGS OF FACT</u>

7. Having considered all the evidence, both oral and documentary, we made the following findings of fact. These findings are not intended to cover every point of

evidence given but are a summary of the principal findings that we made from which we drew our conclusions.

8. Any reference to “the Department” in this judgment is reference to the respondent’s Department for Business and Trade.

Background

9. The claimant was employed by the respondent between 9 January 2019 and 26 February 2023. He was initially employed in the role of Higher Executive Officer ‘HEO’ grade, Policy Officer, then upon promotion to Senior Executive Officer ‘SEO’ grade, Policy and Project lead in the Better Regulation Executive’s ‘BRE’ digital team.

10. On 23 January 2023, the claimant issued a letter terminating his employment with notice. The claimant remained in the respondent’s employment until his resignation took effect on 26 February 2023. He brings claims of constructive unfair dismissal and whistleblowing detriment.

Sickness Absence (August-December 2021)

11. In August 2021, the claimant moved to the line management of Ms Zaineb Khalick, Head of Regulatory Co-operation and Engagement. Prior to moving to Ms Khalick’s team the claimant had been in another team in the same directorate. His previous line manager was Daniel Vandenberg, Senior Policy Officer.

12. In December 2021 the claimant had 4 days off sick, as a result of which, Ms Khalick started to contemplate taking formal action under the respondent's Attendance Management Policy ‘AMP’.

13. Under paragraph 44 of the AMP, attendance is considered unsatisfactory if an employee's sickness absence level reaches or exceeds 14 days or seven spells of absence in a rolling 12 month period. This is known as a trigger point and if an employee reaches a trigger point the manager should hold a Formal Attendance Meeting ‘FAM’ with an employee to consider whether formal unsatisfactory attendance action should be taken, paragraph 46 of the AMP.

14. The claimant had significantly exceeded the trigger point of 14 days in a rolling 12 month period, his absence at that point was noted as 75 days.

15. As some of this sickness fell into the time when Mr Vandenberg was managing the claimant, Ms Khalick contacted him to query whether he had issued any warnings in relation to sickness absence or whether there had already been any formal attendance management conversations. On 4 January 2022, Mr Vandenberg responded to Ms Khalick to say that the claimant had not had any warnings whilst he managed him, however attendance management measures were commenced whilst the claimant was off sick previously to support his return to work.

16. The claimant was absent due to sickness between 16 and 21 December 2021. As a result, Ms Khaliq had a return to work meeting with him planned under the AMP for 4 January 2022. At that time as staff were largely working from home due to the impact of COVID-19, the meeting took place via Microsoft Teams.

<u>Events following 4 January 2022/ Notification of criminal charge</u>

17. On 4 January 2022, Ms Khalick held a return to work meeting with the claimant, following his 4 day absence in December. The claimant informed Ms Khalick, that he was okay to return to work following his sickness absence, however he informed her of an incident that had taken place whilst he had been on leave. The claimant informed Ms Khalick that he had been out drinking with a friend and had been arrested and held in a cell overnight. He said that it had been alleged that he had damaged a vehicle and assaulted a woman. The charges related to the vehicle had been dropped but the charges in relation to the woman remained, as she had a scratch on her. The claimant advised he was due to appear in court on 3 February 2022. He informed Ms Khalick that his memory of the incident was blank but that he would not do something like that.

18. The claimant did not mention anything during the call about a miscarriage of justice occurring. He also did not mention anything about a head injury at that time and confirmed he was okay to remain at work. The claimant also confirmed he was content for Ms Khalick to inform her line manager, Miles French, Head of International, so that he could take over whilst Ms Khalick was on leave in the coming weeks.

19. Ms Khalick informed the claimant that as she had not come across this situation before, she would need to speak to HR. She informed him that in relation to the court hearing on 3 February 2022, he could take time off around that week and she would check whether that should be treated as unpaid leave or annual leave.

20. On 6 January 2022, the claimant emailed Ms Khalick stating that he had gone to hospital where a CT scan had indicated that he had a fractured skull and that he would need to stay in hospital for 48 hours to be monitored. The claimant then commenced a period of sickness absence from 7 January 2022. Around this time period, the claimant also informed Ms Khalick that the evidence around the case was from witnesses but that no nail swabs or DNA had been taken by the police.

21. On 7 January 2022, Ms Khalick spoke to Adele Keenan, HR case manager about the claimant's criminal charge and head injury sickness absence. Ms Keenan advised that the claimant's criminal charge could warrant a disciplinary investigation for alleged gross misconduct. Ms Keenan also advised that suspension could be considered as the criminal charge was assault and the respondent would need to consider whether there could be a risk to anyone else at work. Ms Khalick informed her that since everyone was working from home, she could see no real risk.

22. Miss Keenan advised Ms Khalick that it was a business decision as to whether to take disciplinary action and if disciplinary action was to be taken the matter would need to be investigated and this might involve liaising with the police regarding the criminal charge. Ms Keenan recommended discussing whether to progress disciplinary action at that stage with Mr French.

23. Ms Khalick subsequently discussed the matter with Mr French and it was agreed that the claimant would not be suspended and that no further action would be taken at that time in relation to the claimant's criminal charge and instead they would await further developments.

24. On 9 January 2022 the claimant emailed Ms Khalick to advise her that he had been discharged from hospital but had been instructed to take two weeks off from work; he subsequently provided a GP note signing him off sick until 24 January 2022.

25. Ms Khalick went on leave between 14 January and 4 February 2022. During this time Mr French managed the claimant who returned to work on 24 January 2022 by way

of a phased return. The claimant also agreed to an occupational health referral, which Mr French arranged.

26. On or around 12 January 2022, the claimant wrote to the CPS to provide additional evidence including evidence of his “traumatic brain injury” and enquiries he had made regarding his missing bank card. The claimant advised that the police have refused his request to add this further evidence to the file hence he was now writing to the CPS.

27. The claimant's court hearing took place on 3 February 2022 at which he entered a not guilty plea and a trial was set for 11 April 2022.

28. During the course of evidence, it was accepted by the claimant that his conversation with Ms Khalick did not take place on 24 January 2022 as she was on leave, however, a conversation did take place on 7 February 2022. There is some dispute as to the content of that conversation. The claimant’s evidence is that he told Ms Khalick that the police had refused to receive evidence of his head injury and bank card fraud whereas Ms Khalick stated that she could not be certain of the precise words used, however her recollection was that the claimant informed her that the police were not taking his head injury seriously and that he was looking into his bank card at some point.

29. There is no contemporaneous documentary evidence that details the conversation. However, we take the following matters into account in finding we prefer the claimant’s version of the conversation. Ms Khalick was uncertain in terms of her recollection. Up to this point, the claimant had been open and transparent with Ms Khalick informing her of his criminal charge and the resulting brain injury. We find the claimant’s account of events, is corroborated by the fact that he informed the CPS on or around 12 January 2022 that the police were refusing to add additional evidence to his file, there is no reason why he would then not confirm this position to Ms Khalick.

<u>Diversity data request</u>

30. On 4 February 2022, the claimant made a request to the Department for diversity information. The claimant stated that he was specifically interested in the earliest point that he had completed a record of his diversity information/protected characteristics. He also asked for the date when the Department had started

collecting this information, as well as a reference to confirm that there had been no disciplinary proceedings or complaints made against him. The claimant stated that the information was required in relation to a court matter, and he needed to prove his sexuality. He provided a deadline of 24 February 2022 by which time he needed to provide the information to his legal team. The claimant subsequently submitted a Subject Access Request 'SAR' for the same information.

31. Due to the various queries raised in the claimant's request, there appeared to be some confusion as to which Department would handle responses. The response to the claimant's various requests was subsequently co-ordinated centrally by Ms Kathy O'Dwyer, HR Shared Services Relations Manager.

32. On 24 February 2022, Ms O'Dwyer provided a response to the claimant's request for his diversity data and reference. Ms O'Dwyer attached a print of the current diversity data extract from the Oracle system as well as a printout of date runs taken from the system at the times indicated. Oracle is the respondent's internal system, where staff HR data is stored. We will set out further findings in relation to this below.

33. Ms O'Dwyer made a significant number of enquiries with colleagues in various teams in an effort to obtain the information that the claimant had requested, within the timescales that he had set out. With regard to data collated at recruitment stage, this was not held by the respondent and enquiries were made with the Cabinet Office, who Government Recruitment Services 'GRS' were part of. Enquiries established that the Cabinet Office no longer had access to any diversity information that the claimant may have shared at application stage, as the application was submitted on an old Application Tracking System 'ATS' platform, which it no longer had access to.

34. Ms O'Dwyer, also made enquiries with UK Shared Business Services Ltd 'UKSBS' who are a third party HR services provider for the respondent. UKSBS act as an initial point of contact for HR queries raised by employees. UKSBS advised they did not have access to the diversity data held on Oracle.

35. As a result, Ms O'Dwyer made contact with the Management Information 'MI' team to see if they could assist. Mr Steve Riddell from the MI team advised Ms O'Dwyer that the table in Oracle that contains the diversity data is only configured to record the last update. However, Mr Riddell advised that the MI team took snapshots of data that they extracted from Oracle periodically, and from looking through those he could see

that the last update in relation to the claimant's sexual orientation was made on 19 April 2021.

36. Mr Riddell also confirmed that the earliest identifiable extract which had "gay man" entered in the extract was from 2 December 2019. Further, in earlier extracts from 25 June 2019 and 1 October 2019 the diversity data including sexual orientation, was incomplete and marked as not declared, so the MI team were of the view that this information would have been updated sometime between 1 October 2019 and 2 December 2019. Mr Riddell provided these screenshot updates to Ms O'Dwyer and these were subsequently provided to the claimant.

37. It is an individual's responsibility to complete and update their diversity data on Oracle, however, the claimant's evidence was that he was unaware of this and it was noted that at the time he was recruited, the New Starter welcome pack would not have included information relating to this. No conclusive evidence was presented to the Tribunal as to who had completed the claimant's diversity data on Oracle, and when this was done. However, we accept the claimant's evidence that he provided this information to Government Recruitment Services at the point of recruitment. Equally we accept that the respondent itself did not hold this information from recruitment stage and also that it was no longer held by GRS.

38. In respect of the reference, Ms O'Dwyer attached a reference in line with the Department's Employment and Financial Reference Guidance 'EFRG' providing only employment dates and grades. The EFRG states *"It is BEIS policy and process that employment references include dates of employment; grade and reason for leaving. Standard references do not include additional information".*

39. Ms O'Dwyer concluded by stating that if the Court required anything further, then this would be provided upon receipt of a Court Order.

40. With regard to the factual accuracy of the information provided, we find that the data held was factually accurate. The only data held and available to the respondent was that on Oracle and the extract from Oracle dated 22 February 2022 was an accurate record of that. The respondent has been unable to identify when the claimant was first asked for his diversity data or when it was first entered onto the Oracle system so it would be factually incorrect for them to confirm this. The best that they could provide in an effort to assist the claimant were the screenshot of updates, one of which confirmed diversity data had been provided in December 2019, over 2 years

before the claimant was accused of committing the criminal offence for which he was requesting the data.

41. It is also of note that the screenshots from July and October 2019, showing diversity data not being declared was not solely in respect of sexual orientation but recorded all diversity data as not declared. This corroborates the respondent's evidence that the claimant's diversity data had not been completed on Oracle prior to December 2019.

42. On the same day, the claimant contacted Ms Khalick to say that HR had "fudged" his SAR and it was starting to feel like persecution. Ms Khalick queried whether the issue was with the SAR and whether it didn't have the right information or if he had been provided something inappropriate. Ms Khalick stated that she was happy to raise matters with Ms Emona Gjika, HR Business Partner if the claimant wanted her to do this.

43. The claimant advised the way in which the information had been presented seemed to show that he had delayed declaring his diversity data which was not helpful and would be ammunition for the prosecution in his criminal case.

44. The SAR information showed that the claimant had declared his sexuality 2 years before the incident that resulted in the criminal charge. Ms Khalick queried with the claimant whether he could highlight this and suggested that he should try explaining that he was not obliged to record his diversity data to the Department, in response to which the claimant stated that he was going to leave early as he was not getting anything done.

Sickness Absence/First written warning

45. On 7 February 2022, Ms Khalick contacted Ms Keenan in relation to the claimant's level of sickness absence as his attendance record at this point showed he had been absent for 101 days and 12 months. Ms Khalick asked whether she was able to push back a FAM conversation to allow the claimant to fully focus on his trial.

46. In a subsequent telephone conversation, Ms Keenan advised Ms Khalick that she would need to apply the AMP fairly and that she should avoid having one approach for the claimant and one approach for other people. She advised whilst the HR

advice was that Ms Khalick should hold the meeting, subsequently, it would be solely Ms Kalick's decision as to whether to issue a first written improvement warning.

47. Further to Ms Keenan's advice, on 10 February 2022, Ms Khalick sent the claimant a letter inviting him to a FAM. Ms Khalick subsequently realised that the total number of recorded absences was incorrect and on 11 February 2022, she emailed Ms Keenan to highlight this and re-calculated the total number of days at 75. This was still significantly over the trigger point of 14 days and Ms Khalick felt it was therefore appropriate for the FAM to go ahead.

48. On 14 February 2022 the claimant sent Ms Khalick notes of a continuous absence review meeting that he had had with Mr Vandenberg in July 2021. The claimant indicated that he felt that having another meeting relating to absences that had been considered during a previous meeting was unfair.

49. Ms Khalick discussed the matter with Ms Donna Pickering, HR caseworker, who had taken over from Ms Keenan, and it was agreed that the FAM would still continue. Ms Khalick would await the outcome of the claimant's Occupational Health 'OH' referral before making a final decision as to whether to issue a formal warning.

50. On 16 February 2022 an updated meeting invitation was sent to the claimant inviting him to a FAM on 21 February 2022.

51. On 16 February 2022, Ms Pickering responded to Ms Khalick, to say that she had reviewed the notes of the continuous absence meeting with Mr Vanderburg and there was no reference that the claimant had been informed that the absence would not be considered again in the future, if there were further absences. Those absences should therefore be included within the 12 month rolling period.

52. The OH report was received on 17 February 2022. The report indicated that the claimant was fit for work but highlighted there were clear workplace stressors and recommended that a conversation took place with the claimant to understand this. The report also recommended that a stress risk assessment be completed for the claimant and that he be provided with updated IT equipment.

53. Ms Khalick subsequently spoke to the claimant to discuss his workplace stressors. The claimant advised that this related to the difficulties he felt he had faced in reaching the next grade and how this affected his motivation. Ms Khalick agreed to

take steps to try and address this including more regular meetings, researching a coach, considering a mentor and focusing on interview training.

54. The FAM meeting took place on 21 February 2022 as arranged. At the meeting Ms Pickering and a notetaker were also in attendance. The claimant's sickness absence over the previous 12 months and the reasons for those absences in detail was discussed. It was agreed that the claimant had 76 days absence in total. It was discussed whether anything else could be done to support the claimant and reduce his level of absences.

55. With regard to the claimant's query as to why the meeting was taking place when similar discussions had taken place with Mr Vandenberg on the same issue Ms Khalick advised that Mr Vandenberg had been following the 28 days continuous absence process whereas she was now following the process that related to trigger points being exceeded and that she was allowed to take into account absences that had already been considered during the 28 day continuous absence process.

56. On 24 February 2022, Ms Khalick sent an email to Ms Pickering with notes of her meeting with the claimant and also a draft outcome and decision in which she had issued the claimant with a first written warning. Ms Khalick queried with Ms Pickering whether she could exercise discretion before making the final decision due to the issues that the claimant was already dealing with, his criminal charge on the disciplinary investigation. Ms Khalick stated that as the claimant's absence level were so high, she felt that the Department should proceed with a warning but if there were similar examples where a warning had not been issued that would be good to know.

57. After discussing with Ms Pickering, Ms Khalick decided not to apply discretion and issued the claimant with a first written improvement warning. In her evidence to the tribunal Ms Khalick stated that she had been mindful at the time of the issues affecting the claimant that had contributed to his absence, including what he felt was a hostile work environment that contributed to burnout in his previous team and the recent ongoing circumstances relating to his criminal charge. However, as the claimant had very high levels of absence during the preceding 12 months, Ms Khalick did not consider that this was sustainable. Her overall aim was to support the claimant in his ability to perform well and whilst she strongly considered exercising her discretion, she felt that if his attendance continued to go down then she would have missed the opportunity to support his improvement.

58. The claimant accepted in cross-examination that Ms Khalick was a supportive and considerate manager. We find, throughout the period of her line management of the claimant, she was supportive and considerate of his health and well-being. We heard no evidence to dispute Ms Khalick's reasons for issuing the first improvement warning and accept her evidence in this regard.

59. The claimant was issued with the FAM decision letter on 2 March 2022 which confirmed that the letter constituted a first written improvement warning. The claimant was informed that his attendance would be monitored during an initial improvement period of three months and if his attendance was unsatisfactory at any time during the period then he may be issued with a final written improvement warning. Ms Khalick explained, that if the claimant's attendance was satisfactory during the improvement period, then his attendance would be monitored for a further 12 months and if his attendance became unsatisfactory again during that period then he may also be given a final written improvement warning.

60. The claimant was informed of his right to appeal, which he did not pursue. Ms Khalick denies that she informed the claimant that an appeal wouldn't change the outcome or that she highlighted the optics of contesting the decision in light of other proceedings. We prefer the evidence of Ms Khalick in relation to this matter and accept that she did not make these comments either in respect of an appeal or a grievance. There is nothing in the documentary supporting the claimant's assertion and the FAM outcome letter clearly sets out the claimant's rights in respect of an Appeal.

<u>Disciplinary process</u>

61. With regard to the claimant's criminal charge progressing to trial, Ms Khalick sought further advice from Ms Keenan on 10 February 2022. During this telephone conversation Ms Khalick also sought advice about a potential business trip to Mauritius involving the claimant in view of the impending court case. Ms Khalick's evidence was that she wanted to be sure that this was appropriate as it was possible travel would involve other members of staff.

62. On 11 February 2022, Ms Keenan responded to Ms Khalick, highlighting that there was a strong possibility that the trial would be of media interest and this would bring a possible risk of reputational damage for the Department as well as potentially

bringing the Department into disrepute. The Department would therefore need to be able to have a robust rationale for not proceeding with a disciplinary investigation.

63. With regard to concerns about the claimant travelling to Mauritius, Ms Keenan said that if no formal proceedings were being followed, there would be no justification to stopping the claimant from taking part in this trip. Ms Keenan also advised Ms Khalick that she should make contact with the police to ascertain whether an internal investigation would impact the police investigation or court case.

64. Ms Khalick responded to Ms Keenan querying whether it was now appropriate to progress disciplinary action as the claimant was facing trial. Ms Keenan responded on 14 February 2022 to explain that as the criminal investigation had progressed and the claimant had a court date, her advice was to progress a disciplinary investigation based on this. Ms Keenan confirmed that the disciplinary case and the attendance management case would now be reallocated to another caseworker for consistency, Ms Donna Pickering, HR case manager, subsequently took over as the case manager.

65. Ms Khalick discussed the matter with Mr French and Ms Gjika as well as the HR casework team. It was decided again that suspension was not necessary.

66. On 18 February 2022, Ms Pickering advised Ms Khalick that she should now consider commissioning a formal investigation internally and that she could commission the investigation as the person to whom the claimant had disclosed the arrest, however an independent investigation officer and decision manager should be identified.

67. Ms Khalick then spoke to Mr French and it was agreed that they would follow Ms Pickering's advice. Next steps were then discussed with Mr Bob Carey, HR Business Partner. Mr Carey advised Ms Khalick should meet with the claimant and inform him that it was highly likely that a disciplinary investigation would be necessary now that the case was proceeding to trial rather than being dropped by the CPS. Mr Carey recommended Ms Khalick ask the claimant for his police contact and then contact the police to inform them of the plan to instigate an internal investigation and whether there was any information they were able to share.

68. Ms Khalick spoke to the claimant on 21 February 2022 to inform him of the likely disciplinary investigation. The claimant subsequently sent full details regarding his

criminal charge together with contact details for the police, CPS, court and his solicitor. The claimant explained to Ms Khalick that since he had been formally charged, the case was no longer with the police but with the CPS and therefore suggested that she contact CPS in the first instance. The claimant confirmed that he would be happy to cooperate with any investigation.

69. On 22 February 2022, Ms Khalick contacted Ms Pickering to confirm that she had spoken to the claimant about the likely disciplinary investigation and that she was working with the HR business partner to identify suitable investigation and decision managers. Ms Khalick also queried whether she was able to contact the CPS instead of the police in light of the claimant's comments.

70. Ms Pickering responded on 23 February 2022, to say that the HR business partner would be best informed to confirm who to seek information from. Ms Khalick contacted Ms Gjika who advised not to commence an internal investigation until reassurance had been received from the police that the internal investigation would not interfere with their process and confirmation as to whether there was anything relevant, they could share with those.

71. As the claimant had been unable to share direct contact details for the police officer with conduct, Ms Khalick completed an online form on the Metropolitan Police website and asked to be contacted to confirm whether the respondent could conduct an internal investigation and if there was any information that they could share with her regarding the case. Ms Khalick did not contact the CPS at any point.

72. On 2 March 2022, Ms Khalick received a call from PC McAleer stationed at Kentish Town police station, in response to the online request that she had submitted. PC McAleer confirmed that the criminal investigation into the claimant had concluded and it was fine for the respondent to go ahead with their internal investigation. PC McAleer advised the trial was due to take place the following month and the respondent may wish to start the investigation after that but that he had no issues with the respondent taking it forward now if they wanted to do so. Ms Khalick updated Ms Pickering and Ms Gjika in relation to her conversation with PC McAleer.

73. On 3 March 2022, Ms Pickering recommended that a disciplinary process is started and an investigation manager Jason Booth, Project Manager and a decision manager, Kathryn Preece, Head of Local Authority Unit, Engagement, were

identified. On 16 March 2022, Ms Preece formally notified the claimant of a disciplinary investigation commencing.

74. Ms Khalick subsequently sent the terms of reference to Mr Booth that afternoon. Mr Booth concluded the disciplinary investigation on 19 April 2022. His investigation report highlighted inconsistencies in the evidence and questions around the police investigation. In light of which, he recommended the respondent await the outcome of the criminal trial before considering any disciplinary action.

75. With regard to the trip to Mauritius, Ms Khalick's evidence was that the proposed trip did not go ahead for anyone for cost reasons and this had nothing to do with the claimant's criminal charge. Ms Khalick had discussed with Ms Sarah Montgomery, Deputy Director, Policy and Delivery, Better Regulation Executive, as to how they would break the news to the Foreign Commonwealth and Development Office who were keen for the team to attend. Ms Khalick's evidence to the Tribunal was, that if the Department had not wanted the claimant to go because of his criminal charge, there were a whole team of other people who could have gone instead, including her.

76. On 1 March 2022, the claimant had further discussions with Ms Khalick regarding his SAR, where the claimant stated that he felt that HR had done at least three things that weakened his case and this was a major stressor. Ms Khalick suggested the claimant reach out to Ms Gjika for a chat as it was a HR issue although he should think about a way to resolve the matter so he didn't feel stressed. Ms Khalick denies that she urged the claimant to consider the optics of him taking out a grievance against the Department when he had a criminal charge pending. We set out our finding in respect of this matter below.

77. On 5 May 2022 Ms Preece, sent an email to the claimant advising at that stage there was not enough evidence to consider a case at disciplinary hearing and no further action would be taken at that time. Ms Preece went on to state that should further evidence become available ahead of the court case or the claimant is convicted then disciplinary action may be reconsidered and the investigation report referred to.

78. In May 2022, discussions took place between the claimant, Mr French and Ms Khalick about someone from the team potentially attending a conference in Brussels. Ultimately, no one from the team attended the conference as it was not considered essential to the work that the team did and it was not cost effective to send anyone. It

was also not possible to attend the conference virtually. We accept Ms Khalick's evidence that none of her subordinates travelled abroad in the time that she was in the role.

79. The claimant's criminal trial was moved from 11 April 2022 to 7 June 2022 and on 8 June 2022, the claimant informed Ms Khalick that he had been convicted of a criminal offence the previous day. The claimant advised that he was unable to work and went off sick with stress.

80. Ms Khalick notified Ms Preece of the claimant's conviction. Ms Pickering was no longer available to provide HR support and as a result a new caseworker was appointed, Ms Manar Sabri.

81. On 9 June 2022, the claimant provided a GP note signing him off for one month with stress. On 10 June 2022 the claimant emailed Ms Khalick with full details of his criminal conviction and some documentation relating to it. He confirmed that he had been convicted of assault by beating and had been given a conditional discharge for a period of six months. The claimant advised that he was considering whether or not to appeal and he had 15 days from the date of conviction to lodge an appeal.

82. On 13 June 2022 the claimant provided Ms Khalick with a copy of his conditional discharge letter, which she forwarded to Ms Preece.

83. On 14 June 2022, Ms Gjika informed Ms Khalick that Mark Holmes, Deputy Director, Corporate Governance, had taken over as decision manager as Ms Preece no longer had capacity to continue to act as decision manager. As a result, Ms Khalick forwarded all relevant documentation to Mr Holmes on 17 June 2022.

84. On 29 June 2022, Mr Holmes wrote to the claimant inviting him to a disciplinary meeting. Mr Holmes explained that he would decide at the end of the meeting what further action to take. He warned the claimant that the allegations concerning aggressive conduct represented gross misconduct allegations and the meeting could therefore result in dismissal without notice or pay in lieu of notice.

85. On 12 July 2022, Mr Holmes held a disciplinary decision meeting with the claimant. The claimant was represented at this meeting by a work companion, Mr Chris Carr. At the start of the meeting, Mr Carr asked if the claimant had been suspended

pending the outcome of the disciplinary. The claimant responded to Mr Carr, confirming that he had not been suspended but restrictions had been placed on him and that he was currently on sick leave. With regards to suspension, the claimant did not ask Mr Holmes whether this was being considered and we accept Mr Holmes' evidence that had he been asked, he would have referred this matter to the claimant's line manager as this matter would not have been a decision within his remit. The claimant had not been suspended at any point previously in the disciplinary process.

86. During the course of the meeting, the claimant confirmed to Mr Holmes that he was going to appeal his conviction. Mr Holmes informed the claimant that if he were to conclude misconduct had taken place, he would not be looking at dismissal as a potential sanction as it would not be proportionate. Mr Holmes decided to adjourn the meeting so that he could consider matters and take advice from HR.

87. Mr Holmes sought advice from Ms Gjika and Ms Sabri around a potential finding of misconduct not being proven, which would be inconsistent with the decision of the criminal court. Mr Holmes was advised that ultimately the final decision rested with him as decision manager but that HR casework advice must be considered as part of the decision making process. HR advised that a finding that misconduct had not been proven, would be inconsistent not only with a criminal court finding but also with other cases across the Department where employees had been convicted of criminal offences. In the circumstances, HR concluded that Mr Holmes should consider either concluding that misconduct had occurred on the basis of the criminal conviction or not make any determination as to whether misconduct occurred pending conclusion of the appeal process.

88. On 19 July 2022, Mr Holmes sent a disciplinary outcome letter to the claimant advising that the disciplinary process would be adjourned until the appeal had been concluded. The claimant subsequently requested a provisional disciplinary decision from Mr Holmes. After seeking advice from HR, Mr Holmes advised that he was unable to provide this as there was no provision for such a step in the disciplinary procedure and in the interests of due process and fairness to everyone who is subject to disciplinary action, a consistent process must be followed. Mr Holmes did reiterate as he did at the disciplinary decision meeting that even if misconduct was proven he would not be looking at dismissal as a sanction, as he considered that would be disproportionate.

Grievance & Appeal in relation to SAR/ Right to rectification request/Reference

89. On 19 June 2022 the claimant submitted a grievance in relation to the handling of his SAR. Mr French was appointed as the grievance decision manager.

90. On 4 August 2022, Mr French informed the claimant that none of his grievance complaints had been upheld. In respect of the SAR request, he concluded that the data protection team had followed policy and complied with the Data Protection Act 2018. All information held was provided in the standard format in line with Departmental policy. Secondly, there was no evidence that a right to rectification or erasure request had been made. Thirdly, there was no evidence that the Civil Service Code had been breached. Fourthly, there was no evidence that the claimant had been asked for his diversity characteristics, in order to provide the SAR information. Finally, the grievance investigation could not comment on other HR procedures because they remained underway.

91. On 5 August 2022, the claimant made a right to rectification request in respect of the 2 documents that were provided to him in relation to his diversity data; he sought rectification by way of erasure. In response on 7 September 2022, John Deene, Deputy Data Protection Officer, sent an outcome letter informing the claimant that the documents will not be erased or amended as the information was considered factually accurate. Mr Deene advised that HR took screen shots of data held in Oracle and to the extent that this collective information was a mirror of a record in time at these points, the respondent was satisfied that the data was accurate.

92. On 11 August 2022, the claimant requested a renewed reference containing his diversity information with an added sentence explaining that diversity data is collated on recruitment. An email requesting approval to amend the reference template to include the claimant's diversity information was sent to Ms O'Dwyer for approval on 23 August 2022, however she was on leave at the time and despite a colleague informing UKSBS of the need to wait for Ms O'Dwyer approval, this did not take place. On 24 August 2022, Kathryn Hollingworth of UKSBS sent the claimant a reference, which included his diversity information; other than the date of the reference, no other date was referenced in terms of the when the diversity data was disclosed.

93. On 14 August 2022, the claimant submitted an appeal against the outcome of his grievance. Ms Abbie Lloyd was appointed as the appeal manager and on 14 September 2022, she wrote to the claimant advising that his appeal had not been upheld. In her outcome letter, Ms Lloyd stated that she agreed with the conclusion of the grievance investigation that the Department had fulfilled the claimant's SAR in compliance with Department policies and in line with the law. In relation to the Civil Service Code, Ms Lloyd stated that there was very little relevant to that issue in the evidence and her conclusion was that staff had worked diligently to fulfil the claimant's request.

94. The claimant did not mention any whistleblowing complaints in either the initial grievance or appeal apart from the suggestion that inaccurate data had been provided which affected the criminal court result. The complaint in relation to the breach of the Civil Service Code was clarified as being about the process in general rather than against any individual.

Sickness Absence process June 2022 onwards/
Police contact with Ms Khalick

95. As the claimant had commenced another period of sickness on 8 June 2022, Ms Khalick contacted HR to discuss next steps. Sarah McCool was allocated as a case manager.

96. On 1 July 2022, the claimant contacted Ms Khalick to inform her that the police were now looking into how he sustained his head injury on 3 January 2022. The claimant asked Ms Khalick if she would be willing to give the police officer who was dealing with the case brief confirmation that he had been trying to seek medical attention. Ms Khalick sought advice from Ms Gjika as to whether she was able to do this from a Departmental perspective.

97. On 4 July 2022, Ms Khalick contacted the claimant confirming that she could give an account up until the period she went on leave in January. Ms Khalick asked the claimant to put the police officer in touch with her directly.

98. On 5 July 2022, Ms Khalick was contacted by DC Forbes from the Metropolitan Police who asked if she could provide copies of any reports that she had made in relation to the claimant between 3 and 6 January 2022. Ms Khalick responded to DC Forbes with copies of the emails the claimant had sent to her around those dates to

confirm that he had been unwell and admitted to hospital. Ms Khalick had no further contact with the police regarding claimant.

99. On 6 July 2022, Ms Khalick invited the claimant to a continuous absence meeting on 20 July 2022. On the same date, she received an OH report for the claimant which confirmed he was unfit for work at that time but when he did return, he would benefit from a phased return. The report recommended that the claimant complete a stress risk assessment and a wellness recovery action plan.

100. On 7 July 2022, Ms Khalick contacted the claimant to advise that they could start the assessments when he was back in the office. The claimant responded with a copy of his GP note signing him off until 6 august 2022 with stress.

101. The continuous absence meeting took place on 20 July 2022, at the meeting the claimant said that it might be in the Department's interests to look at everything holistically. The claimant advised that if he was dismissed for attendance or conduct it would still mean a tribunal; he also mentioned constructive unfair dismissal. Ms Khalick in terms of facilitating a return to work, asked the claimant if he had a court date for his appeal hearing. The claimant confirmed he did not as of yet and he was in two minds about whether to continue with his appeal as he didn't think he could take the stress or the cost. The claimant confirmed he was hoping to come back to work on 8 August 2022.

102. On 4 August 2022, the claimant updated Ms Khalick following the hearing to confirm that his appeal date had been set for 3 October 2022.

103. The claimant subsequently provided further GP note signing him off sick with stress until 28 August 2022.

104. On 8 August 2022, Ms Khalick contacted Ms McCool, setting out the claimant’s absences over the previous year. Ms Khalick advised that it was her understanding that the claimant’s absence from 8 June 2022 would set him on course for the next stage of the attendance management process when he returned from his absence. Ms McCool responded to confirm that when the claimant returned from his absence a formal meeting should be held for consideration of a possible final written warning.

105. On 15 August 2022, the claimant emailed Ms Khalick to say that he was keen to return to work before the end of his current sick note, he also mentioned that he had a new concern regarding the outcome of his grievance. Ms Khalick agreed to contact the claimant on 17 August 2022.

106. On 17 August 2022, Ms Khalick held a Teams call with the claimant. The claimant was very unhappy about the outcome of the grievance he had raised where Mr French had been the decision manager. The claimant felt that Mr French had misrepresented information and he felt uncomfortable to return to work with him. He also expressed concern about the ongoing disciplinary process and again indicated that he may take the Department to a tribunal or make a report to the ICO. The claimant went on to state that he needed more money, he couldn't afford to stay on the SEO salary in London and needed to get on to the path to promotion or move out of London.

107. Ms Khalick suggested some ways to assist the claimant to return to work, such as mediation between him and Mr French, returning to a team with a different countersigning manager or the claimant moving to a different team but with Ms Khalick remaining as his line manager. The claimant stated the only way that he would feel comfortable coming back to work was if he flagged the issue with Ms Montgomery and asked her to intervene in the HR processes.

108. At the claimant's request Ms Khalick arranged for him to have a call with Ms Montgomery. Ms Khalick discussed options with Ms McCool and it was considered mediation may be the most appropriate option. However, the claimant subsequently informed Ms Khalick that he no longer had issues with Mr French and he did not require mediation.

109. The claimant returned to work on 30 August 2022 and his phased return was expected to last two weeks. The claimant subsequently informed Ms Khalick that he was having surgery on 20 September 2022 which would require him having a further week off work.

110. Ms Khalick asked Ms McCool if she could assist with advising him in respect of a formal meeting with the claimant. Ms Khalick subsequently received advice from Ms Hardeep Chana in the absence of Ms McCool and agreed that she would hold off inviting the claimant to a FAM until after his operation. Miss Chana also advised that the claimant’s operation would not be counted towards his sickness absence trigger

points, however anytime off sick as a result of the operation would count towards the trigger points.

111. On 9 September 2022, the claimant provided Ms Khalick with copy of a letter confirming his hospital admission on 20 September 2022. He said that he would provide a sick note following the operation.

112. On 10 October 2022, Ms Khalick emailed the claimant a letter inviting him to a FAM on 20 October 2022. In the letter, she explained that the claimant had been absent for 65 working days during the 12 month monitoring period for the first written improvement warning and this meant that he had not met the attendance improvements expected of him. Ms Khalick informed the claimant of his right to be accompanied at the meeting about a potential outcome of the meeting could be a final written improvement warning.

113. On 8 October 2022, the claimant's appeal against his conviction was allowed and on 17 October, Mr Holmes informed him that no further action would be taken in relation to the disciplinary process.

114. On 20 October 2022 the formal attendance meeting took place with the claimant. The claimant's absences were discussed including an absence on 26 and 27 May 2022 for stress, then an absence between 8 June and 28 August 2022 for stress, and then 5 days in September 2022 following an operation.

115. The claimant stated that with regards to the operation, he was in no way to blame for needing the operation and he had been given a general anaesthetic and was not fit for work. With regards to the absence for stress he said he had been convicted of a crime that he didn't commit, which he had since been cleared of. He stated that he had been treated as if he was guilty in the disciplinary process and had not been clear what the outcome would be. The claimant stated that the Department had actively damaged his defence by presenting data in a misleading way and in an inaccurate format which would have misled the court, he also stated that the Department misrepresented his arguments in the grievance process.

116. The claimant advised that his outgoings exceeded his income and he had no plan to solve it other than trying to recover money from the police or CPS. He stated that he was now £13,000 in debt and that he had previously had several near misses for

promotion and he did not see a path to get back. He said that the Department should reflect with hindsight and rescind the first written warning and give him a clear record.

117. The claimant advised that since everything had happened there had been an announcement that the number of civil servants would be cut by 90,000 and that this had a big impact on his motivation despite his best efforts. Ms Khalick asked whether he wanted to increase the number of one to one meetings that they had however the claimant said the current number was okay. He also stated his workload was okay and it was less the volume of work, more the quality and he was not sure what could be done about that.

118. Following the meeting Ms Khalick sought advice from Ms McCool and explained that whilst she was sympathetic to the claimant's situation, the number of absences was not sustainable and queried whether the best course of action was a warning letter with increased trigger points. Ms McCool responded to advise that it did not appear that the claimant had raised anything new which would necessarily change the appropriateness of a warning unless Ms Khalick felt that there was a particular reason for the use of discretion.

119. The claimant subsequently confirmed that he would like another OH referral and therefore Ms Khalick arranged this. Ms Khalick sought advice from HR and she was advised that if the OH referral would inform her decision making then it would be sensible to await the assessment. The alternative was to issue the warning but then rescind it if appropriate should the occupational health advice change her decision.

120. Ms Khalick decided that the OH report would not inform her decision as the assessment was more about supporting the claimant going forward. As a result, she issued an outcome letter to the claimant on 27 October 2022, with a final written improvement warning. She advised the claimant that she had chosen not to rescind the previous warning and that an appeal process had been available in respect of that warning and it would not be appropriate for her to revisit the original decision.

121. Ms Khalick informed the claimant that his attendance would be monitored over a three month improvement period and his attendance would be unsatisfactory if his absence reached 5 days or three spells of absence during the improvement period. Ms Khalick explained that in order to support the claimant, she had increased his

trigger points in the next 12 months from 12 to 20 days. The number of occurrences would remain at 7 spells.

122. As the claimant had stated that the Department processes were a key factor in causing his stress related absence Ms Khalick directed him to the civil service injury benefits scheme and explained that he had the right to appeal her decision and he should write to the appeal manager Duncan Johnson within 5 working days.

123. Ms Khalick's evidence to the tribunal was that the claimant's high level of absence simply wasn't sustainable and that she hoped by issuing a warning this would help the claimant to improve his attendance particularly as some external stressors, such as his court case had now come to an end.

124. On 4 November 2022, the claimant appealed the final written improvement warning. On 25 November, Mr Johnson informed the claimant that his appeal did not align with any of the permitted grounds of appeal under the AMP. Paragraph 110, of the AMP, states that there are 3 permitted grounds of appeal, these are; procedural error, decision not supported by the information evidence available or that new information has become available. Mr Johnson concluded that the appeal as acknowledged by the claimant was not that Ms Khalick had not followed policy but rather that the claimant was challenging the basis of the policy itself.

125. On 1 November 2022, the claimant sent an e-mail to Permanent Secretary Sarah Munby in which he made a number of requests, including for her to rescind all of his written warnings. On 21 December 2022, Ms Munby responded to the claimant expressing her sympathies with his challenging year but advised, she was not going to overrule his line management chain on the attendance approach. Ms Munby stated that she was satisfied that policy was being applied appropriately and that line management were closely involved in the matter and best placed to offer support and deal with such matters.

126. The bi-annual Regulatory Policy Committee 'RPC' took place on 5 and 6 December 2022 in Paris. Ms Montgomery held the official UK delegate seat and was attending the RPC on this basis. Mr French was on leave on the dates of the RPC, therefore the next in line in the management hierarchy to attend was Ms Khalick who did duly attend the conference. The respondent's evidence was that it was not necessary or cost effective for more than 2 people to attend the conference.

127. In December 2022 the claimant informed Ms Khalick that he will be undergoing an operation in relation to a heart issue. After seeking advice from Ms McCool, Ms Khalick emailed the claimant to confirm the operation could be recorded as disability leave, however any sickness absence connected to it would be managed in the usual way. The claimant responded that the Department's policy may force him to delay medical attention and this would be another example of actual harm being caused to him.

128. The claimants OH referral was arranged for 5 January 2023 and it was confirmed to him that any sickness absence related to his heart issue would not be counted towards any trigger points until Ms Khalick reviewed the new occupational health report. On 5 January 2023, Mss Khalick received a copy of the claimants OH report. The report did not suggest any amendments in relation to his heart condition as a diagnosis had not yet been made. To support the claimant's emotional well-being and stress levels, OH recommended regular supervision meetings, a stress risk assessment and regular micro breaks.

129. Ms Khalick forwarded the report to the claimant and encouraged him to fill out a stress risk assessment. She queried if he would prefer to have separate supervision conversations or continue to discuss well-being in their one to ones. The claimant responded to confirm that he would have another look at the stress risk assessment and that he was happy to stick with their current one to one arrangement.

130. The claimant subsequently took one day as disability leave for his operation on 6 January 2023. As this was recorded as disability leave it did not count toward his sickness absence trigger point, he did not have any sickness absence following his operation.

<u>Secondment request/claimant's resignation</u>

131. On 4 January 2023, the claimant approached Ms Khalick and said that he had been offered a role with an external company however he wanted to find out whether he could take up this position via external secondment rather than leaving the civil service completely. Ms Khalick sought advice from HR on whether the fact that the claimant was currently subject to a warning from the attendance management process would affect his eligibility to go on secondment.

132. Ms Gjika responded on 6 January 2023 to explain that approving external secondments was a business decision in accordance with the outward secondment policy and guidance. The respondent's outward secondment policy sets out that to be eligible for a secondment employees must meet eligibility criteria which includes demonstrating acceptable attendance levels. Therefore, in the claimant's case Ms Gjika advised that he would not meet the eligibility criteria given that he was undergoing a formal attendance management process.

133. Ms Khalick explained this to the claimant verbally, in turn he asked for something definitive so that he could refer back to it. He advised Ms Khalick, that if the Department "boxed him in" he would fight harder and bring action sooner and he also asked whether the Department would give positive or negative reference and whether they would refer to his attendance levels.

134. Ms Khalick contacted Ms Gjika once again for advice and she responded to reiterate the position regarding secondments. Ms Khalick also provided details of what a standard reference would include, which was essentially dates of employment and reason for leaving.

135. On 12 January 2023, Ms Khalick sent an email the claimant to explain the position regarding eligibility for secondments. The claimant responded on 13 January 2023, to say that the Department was blocking his route to promotion and his only career progression was outside the civil service. He said that his circumstances now meant that he was unable to sustain himself under his current situation he would therefore discuss a contract of employment with his prospective new employer. He said that this would be referenced in the upcoming case against the Crown which now included constructive unfair dismissal.

136. On 23 January 2023, the claimant resigned from his employment with notice. In his resignation letter, he predominantly refers to matters relating to his criminal prosecution and what he contends has been unreasonable treatment of him as a consequence. He confirms that he will be taking up a better paid role in the private sector with effect from 27 February 2023. The role was with the company that the claimant had been seeking an outward secondment to. Ms Khalick acknowledged the claimant's resignation and confirmed that his last day would be 26 February 2023 as he had requested.

137. As the claimant's attendance had been satisfactory during the improvement period. Ms Khalick wrote to him to confirm this on 31 January 2023.

Time Limits

138. The claimant contacted ACAS on 8 February 2023 and the Early Conciliation period ended on 14 February 2023. The claimant submitted his Claim Form to the Tribunal on 5 March 2023. The respondent therefore submits that any alleged act or omission occurring before 22 November 2022 is prima facie out of time.

139. Ms Millin submitted on behalf of the claimant that the detriments that flowed from the protected disclosures were continuing. We heard no evidence as to whether or not it was reasonably practicable for the claim to have been brought within the time limits.

Relevant Law

Constructive Dismissal

140. The Employment Rights Act 1996, Section 95 (1)(c) provides that an employee is to be regarded as dismissed if : "the employee terminates the contract under which he was employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employee's conduct."

141. The leading case on constructive unfair dismissal is Western Excavating (ECC) Limited v Sharp [1978] ICR 221 in which Lord Denning held that :-

''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 one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.''

142. While that reasoning has stood the test of time the law in this area has been altered by the emergence of the implied term of trust and confidence, which was approved by the House of Lords in ***Malik and another v Bank Of Credit & Commerce***

International SA (in compulsory liquidation) [1998] AC 20 when it held that this implied term means that:

"The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee" (Lord Steyn).

143. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal held that where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
• What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
• Has he or she affirmed the contract since that act?
• If not was that act (or omission) by itself a repudiatory breach of contract?
• If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004] EWCA Civ 1493)*** of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a previous affirmation, because the effect of the final act is to revive the right to resign.)
• Did the employee resign in response (or partly in response) to that breach?

144. In Waltham Forest the Court of Appeal held that the 'final straw' must contribute something to the breach, although what it adds might be relatively insignificant. The final straw must not be utterly trivial. The act does not have to be of the same character as earlier acts complained of. It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.

145. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

146. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from the perspective of a reasonable person, in the position of the innocent party, the contract

breaker has clearly shown an intention to abandon and to refuse to perform the contract. ***(Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420)***

147. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to ***section 98(4) of the Employment Rights Act 1996***, which provides:

‘’(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case’’.

148. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach ***(Berriman v Delabole Slate 1985 ICR 546)*** and whether it was within the range of reasonable responses for an employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

Public Interest Disclosure

149. *"Protected disclosure*" is defined in s43A Employment Rights Act 1996: In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

150. *"Qualifying disclosures"* are defined by s43B ERA 1996;

43B (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—

…………..

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur ……………"

151. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions and allegations), ***Cavendish Munro Professional Risk Management v Geldud*** **[2010] ICR [24] – [25];** ***Kilraine v LB Wandsworth*** **[2016] IRLR 422.** The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, ***Fincham v HM Prison Service EAT 19 December 2002, unrep; Western Union Payment Services UK Limited v Anastasiou EAT 21 February 2014, unrep.***

152. In ***Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*** the Court of Appeal considered the public interest element of the definition. It held that:

"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker."

153. The court said that the question of whether a disclosure about a personal interest is also made in the public interest is one to be decided by considering all the circumstances of the case, but these might include:

"(a) the numbers in the group whose interests the disclosure served;

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

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

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

154. A disclosure of information includes a disclosure of information of which the person receiving the information is already aware (section 43L(3)).

155. If a qualifying disclosure has been made, consideration needs to be given as to whether the method of disclosure makes it a protected disclosure. Section 43C says:
“(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.”

156. Section 47B of the Employment Rights Act says:

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

157. **Ibekwe v Sussex Partnership NHS Trust UKEAT/0072/14/MC** Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done ‘on the ground’ that the claimant made a protected disclosure.

158. The test for “reasonable belief” is a subjective test. The Tribunal should consider whether the belief was reasonable for the Claimant in her circumstances. What is reasonable for a lay person to believe may not be reasonable for a trained

professional ***(see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 at 62)***.

Time limits

159. ***Section 48(3), ERA)*** states:
A claim for detriment under section 47B of the ERA 1996 must be presented *"(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months ".*

160. ***Section 48(4), ERA*** sates:
"(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer [a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done".

161. In ***Dedman v British Building and Engineering Appliances Ltd 1974 1 All ER 520)*** Lord Denning stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?". S.111(2)(b) ERA [and other corresponding provisions in ERA such as s.48(3)] should be given a *'liberal construction in favour of the employee'.*

162. When a Claimant knows of the right to bring a claim, he/she is not obliged to seek legal advice on enforcing that right, but Ignorance of the law or time limits does not necessarily make a delay reasonably practicable.

163. In ***Flynn v Warrior Square Recoveries Ltd 2014 EWCA Civ 68, CA***, the Court of Appeal stressed the need for tribunals to identify with precision the act or deliberate failure to act that is alleged to have caused detriment when considering whether an

act/omission extended over a period of time for the purposes of s.48(4)(a). It is a mistake in law to focus on the detriment and whether the detriment continued.

164. In ***Royal Mail Group Ltd v Jhuti EAT 0020/16***, the EAT held that it was irrelevant for the purposes of extending time under S.48(3)(a) that the out-of-time proven acts may have had continuing consequences in terms of the detriment experienced by the Claimant. S.48(3)(a)was concerned with when the act or failure to act occurs, not with when the consequence of that act or failure to act is felt or suffered.

165. The concept of "a series of similar acts" for the purpose of S.48(3)(a) is distinct from that of an act extending over a period of time in the context of S.48(4)(a). ***In Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193, CA***, the Court of Appeal held that S.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another.

166. At paragraph 31 of the judgment LJ Mummery said (emphasis added):
"31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a "series" and (b) being acts which are "similar" to one another."

167. At para [45], LJ Lloyd stated that in deciding this question "*it must be sensible to consider the evidence as to each act relied on before deciding (a) whether they are part of a series at all and (b) whether they are sufficiently linked factually to be "similar" acts".* ***Oxfordshire County Council v Meade UKEAT/0410/14),*** in order to form part of a continuing act for the purposes of both the whistleblowing and

victimisation claims, the acts relied upon must be unlawful. What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide.

168. LJ Shaw said in ***Wall's Meat Co Ltd v Khan 1979 ICR 52, CA:*** "The test is empirical and involves no legal concept. Practical common sense is the keynote….". The onus of proving that presentation in time was not reasonably practicable rests on the Claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint" — ***Porter v Bandridge Ltd 1978 ICR 943, CA.*** Even if a Claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour.

169. The tribunal must then go on to decide whether the claim was presented *"within such further period as the tribunal considers reasonable".* Lady Smith in ***Asda Stores Ltd v Kauser EAT 0165/07*** explained it in the following words: *"the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".*

170. In ***Wall's Meat Co Ltd v Khan*** Brandon LJ explained it in the following terms:
"… The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical … or the impediment may be mental, namely, the state of mind of the complainant of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him." The focus is accordingly on the Claimant's state of mind viewed objectively.

DISCUSSION & CONCLUSIONS

171. In terms of approach, we started our discussions with the constructive unfair dismissal claim, as this includes the majority of complaints to which the facts relate.

The whistleblowing detriments claim also repeat complaints which are set out in the constructive unfair dismissal claim and we reference these individually where that arises. As the time limits issue only arises in respect of the whistleblowing detriments, we will deal with this in the final section of our conclusions.

172. This is a 'final straw' case and therefore applying the principles set out by the Court of Appeal in ***Kaur***, we start with the most recent act on the part of the respondent which the claimant states caused or triggered his resignation. The act which the claimant relies on is the rejection of his secondment request by Ms Khalick on 12 January 2023.

173. Ms Khalick informs the claimant he does not meet the eligibility criteria for external secondment under the respondent's secondment policy given that he is undergoing a formal attendance management process. There is no dispute that the claimant was subject to a formal attendance management process at the time of his secondment request. We find that the respondent's actions were reasonable and proper, in line with policy, and as with the majority of actions in this case supported by comprehensive HR advice. In the circumstances, we do not find this act in itself was a repudiatory breach of contract.

174. The claimant's case is that the final straw act was a part of a course of conduct comprising several acts and/or omissions, which viewed cumulatively amounted to a repudiatory breach of contract. We, therefore, went on to consider the course of conduct the claimant sought to rely on cumulatively as a repudiatory breach of contract. We considered each matter individually before moving on to consider whether any acts or omissions, that were unreasonable or unjustified, if viewed cumulatively amounted to a repudiatory breach of contract.

From 4 January 2022, barred the Claimant from making applications for promotion;
From 4 January 2022, prevented the Claimant from being on interview panels;
From 4 January 2022, prevented the Claimant from acting as a process or decision manager;

175. We deal with these 3 acts together as there is commonality in our conclusions as to why we conclude that the conduct of the respondent was not without reasonable or proper cause. These complaints are also repeated as whistleblowing detriments and we will provide further comment on this later.

176. With regard to the respondent barring the claimant from making applications for promotion or preventing him from being on interview panels, there is no evidence that the claimant applied for promotion or to be on interview panels, from 4 January 2022 to the end of his employment with the respondent.

177. We conclude that he was not barred from making promotion applications or prevented from being on interview panels. However, because he was subject to attendance management and disciplinary processes, whilst he was not barred from applying for promotion, he would have had to declare this in any promotion application and as accepted by the respondent this would more than likely have had a detrimental impact on any application. The same for being on interview panels; had the claimant requested to be on such panels, whilst being subject to disciplinary and attendance processes, the respondent accepts that this would have been refused as it would not have been appropriate for him to be part of an interview panel in such circumstances.

178. The respondent accepts that on one occasion, the claimant requested to act as Appeal manager in an attendance case, however, he was advised that it would not be appropriate for him to do so as he was subject to attendance and disciplinary processes. We conclude the respondent's position in respect of this was justified.

179. We conclude that the respondent's actions or position in respect of all these matters was reasonable and proper; as such it cannot be said that the conduct complained of was either calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence.

From 4 January 2022, prevented the Claimant from going on foreign business trips;

180. This complaint is also repeated as whistleblowing detriments and we will provide further comment on this later.

181. There was no evidence that the claimant was prevented from going on foreign business trips for any reason to do with the disclosures made about his criminal charges.

182. No one from the Department attended the business trips to Mauritius and Brussels for reasons related to cost. In fact, during Ms Khalick's tenure, no one from her subordinates attended any foreign business trips, this supports the respondent's assertions that the claimant's non-attendance was for reasons related to cost. Ms Khalick did attend the Paris business trip alongside Ms Montgomery who held the official UK delegate seat and as such was effectively obligated to attend. Again, it was not considered cost effective for more than 2 people to attend for costs reasons and Ms Khalick was next in line in terms of management to attend the conference.

183. We conclude that the respondent's actions in respect of foreign business trips was reasonable and proper; as such it cannot be said that the conduct complained of was either calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence.

On 24 February 2022, produced a factually inaccurate document, stating that the Claimant had not declared his sexuality;

184. We repeat our findings and conclusions in paragraphs 51-60 above, which in summary are that the documents produced by the respondent were factually accurate. It is the claimant's contention that the information in respect of declaring his sexuality was critical in overturning his conviction. We were not taken to any documentary evidence in relation to this being a crucial consideration in the appeal being successful.

185. If the claimant's position is accepted, that the information was critical, we struggled to understand why the information provided by the respondent confirming he had declared his sexuality almost 2 years before the offence was not used. A detailed explanation was provided in Ms O'Dwyer's letter accompanying the data as to why the respondent were unable to produce any earlier data and how data had been captured on the form. It appears to us almost illogical for the claimant not to have used this data for the purposes that he had stated.

186. The respondent's actions in respect of producing the diversity data was perfectly reasonable and proper and did not breach the implied term of trust and confidence. We conclude that the respondent went over and above what was required and Ms O'Dwyer made significant concerted efforts to try and assist the claimant within the

timescales he had stipulated. In those circumstances, this cannot be said to be the actions of an unreasonable employer who was acting improperly.

On 28 February 2022, issued to the Claimant the first written warning;

187. It is accepted that a first written improvement warning was issued to the claimant. Ms Khalick accepts that she had discretion available to her but on this occasions, she chose not to exercise it. At the time the warning was issued, the claimant was significantly over the trigger point for action under the AMP. Ms Khalick sought advice throughout the process from HR and the correct application of policy. The advice from HR to Ms Khalick was any application of discretion must be consistent with others in the Department.

188. Ms Khalick's rationale for issuing the first written warning outlines a careful and considerate approach. Ms Khalick sets out her concerns for the impact on the wider team in respect of the claimant's high absences. She weighs that up against the claimant's welfare and views attendance management action as supportive rather than punishment. The claimant accepted in evidence that Ms Khalick was a kind and supportive line manager and we conclude that her actions throughout in relation to the claimant were reflective of that.

189. Ms Khalick's actions in respect of issuing the first written warning were reasonable and justified; as such these actions did not breach the implied term of trust and confidence.

Colluded with the Crown Prosecution Service to secure the Claimant's conviction;

190. This is an extremely serious allegation, with absolutely no basis for such a complaint. Despite the seriousness of the allegation, there was no evidence presented which supported the claimant's contention of collusion. There was no evidence whatsoever that Ms Khalick or anyone from the respondent's organisation contacted or spoke with the CPS. Ms Khalick did have limited interaction with PC McAleer around the impact any disciplinary action may have on the criminal case. This interaction was in conjunction with HR advice and we conclude, it was perfectly reasonable and proper.

Did not confirm to the Claimant what would happen to his employment if he were convicted of a criminal offence;
Did not confirm to the Claimant whether he would be suspended without pay following his conviction;
On 12 July 2022, at the disciplinary hearing did not tell the Claimant whether he was suspended; Did not tell the Claimant what would happen to his employment if he had not appealed his criminal conviction,

191. The claimant was not suspended at any point during the disciplinary process. Whilst we did not hear any direct evidence of him being formally advised that he would not be suspended equally we did not hear any evidence that the claimant queried this position or that he sought such confirmation. At the disciplinary hearing on 12 July 2022, it was in fact the claimant who clarified that he had not been suspended.

192. With regard to notifying him what would happen post-conviction, the claimant was initially advised that there would be no further action at that stage, however, should further evidence become available ahead of the court case or if he was convicted then disciplinary action may be reconsidered. We conclude that this was a perfectly reasonable position to adopt.

193. The disciplinary investigating officer had highlighted inconsistencies in evidence and questions around the police investigation, as a result of which he recommended awaiting the outcome of the criminal trial before considering any further action. The claimant was promptly made aware of this and at that time he did not seek to challenge this or ask the question of what would happen if he was convicted. We conclude it would have been unfair to press ahead with the disciplinary process and consider action in advance of the criminal trial. If the case had been one where the evidence was not inconsistent or incomplete and the claimant was admitting to the offence it perhaps may have been reasonable to continue with the disciplinary process but this was not one of those cases.

194. With regard to the disciplinary hearing post-conviction, on 12 July 2023, Mr Holmes does inform the claimant that even if his appeal is unsuccessful, he would not be looking at dismissal as this would be disproportionate. Mr Holmes seeks advice from HR regarding a provisional decision at that stage but he is advised that the discipline policy does not cater for such a scenario and that any decision to do so would be outside of policy. Whilst Mr Holmes, declines to provide a provisional outcome at

that stage, he does confirm that he would not be seeking to dismiss for this offence. Mr Holmes was not obliged to provide this indication, however, this is yet again another example of a decision maker trying to alleviate the claimant's concerns, where possible.

195. At the disciplinary hearing, Mr Holmes seeks clarity from the claimant as to whether he had previously been suspended, in response to the claimant's representatives' question to him. The claimant clarifies that he has not been subject to suspension and does not seek any clarification about suspension moving forward. We accept Mr Holmes' evidence that any decision about suspension would have been outside of his remit and had he been asked he would have simply referred the claimant to Ms Khalick. In the circumstances, we conclude it was not reasonable to expect Mr Holmes to provide this information when it was not his decision. Had the claimant been uncertain about his position it was not unreasonable to expect him to seek clarification. Ultimately, the claimant was not subject of suspension at any point during the disciplinary process.

196. The respondent's actions in respect of notification of suspension and disciplinary outcomes were perfectly reasonable and in line with policy; as such, these actions, did not breach the implied term of trust and confidence.

In June 2022, changed the disciplinary decision manager;

197. It is accepted that the disciplinary decision manager was changed when Mr Holmes replaced Ms Preece. Ms Preece no longer had capacity to proceed with the disciplinary proceedings and there was no indication of when she was likely to become available. Ms Gjika's evidence was that she did not want to unduly delay the disciplinary proceedings and therefore Mr Holmes was appointed.

198. We conclude that this was an entirely reasonable action and ultimately the decision was based on considerations including the claimant's welfare which meant not being subject to prolonged disciplinary proceedings.

Did not deal with the Claimant's grievance in accordance with the Respondent's "whistleblowing" policy and the Civil Service Code;

199. The claimant did not mention whistleblowing to either Mr French or Ms Lloyd. There was no reference to the whistleblowing complaints as set out below, apart from the suggestion that inaccurate data had been provided which affected the criminal court result. When clarification was sought about the reference to the Civil Service Code, the claimant confirmed that his complaint was about the process in general rather than any individual breaching the Civil Service Code. Neither Mr French or Ms Lloyd found any breaches of the Civil Service Code or any evidence that any member of staff had explicitly requested disclosure of the claimant's diversity data. The grievance and appeal concluded that relevant policies had been followed, which were compliant with the law.

Did not uphold the Claimant's appeal against the grievance outcome;

200. The claimant's grievance in relation to the diversity data was considered in detail by Mr French and his findings were subsequently upheld by Ms Lloyd at appeal stage. We also concluded earlier that the diversity data that had been provided was factually accurate.

201. We conclude that the respondent's actions in respect of the grievance and appeal were reasonable and proper, as such it cannot be said that the conduct complained of was either calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence.

On 27 October 2022, issued the Claimant with the final written warning;
Gave the Claimant five days sickness before the trigger point for dismissal, counting the Claimant's sickness absence for a heart surgery towards the trigger point;

202. It is accepted that the claimant was issued with a final written warning on 27 October 2022. Ms Khalick concluded that the impact of the claimant's absences on the team were no longer sustainable. In addition, the claimant's performance and mental health were also being impacted and she concluded as she did with the first written warning that the issuing of the final warning was a supportive measure.

203. Ms Khalick exercised her discretion to extend the trigger point for dismissal from 14 days to 20 days in the rolling 12 month period. In respect of the claimant's absence for his heart operation, there is no discretion in the policy not to count these days and therefore Ms Khalick decided to exercise discretion by increasing the trigger point to the maximum level. As she had done throughout, Ms Khalick sought to support the claimant and took into account his mental health when deciding to exercise his discretion.

204. We conclude that Ms Khalick acted reasonably and proportionately in respect of issuing the final written warning; as such these actions did not breach the implied term of trust and confidence.

On 4 November 2022, refused to consider the Claimant's appeal against the final written warning;

205. The claimant's appeal was considered by Mr Johnson who determined that the appeal criteria was not met and therefore it would not be progressed. Mr Johnson's rationale was that the claimant's main case was challenge against the AMP rather than the application of it, which he accepted was followed by Ms Khalick.

206. In light of the claimant's appeal grounds, we conclude that this was a reasonable position for Mr Johnson to adopt. He sought HR advice and justified his decision in line with the criteria set out in policy. As such these actions did not breach the implied term of trust and confidence.

On 21 December 2022, the Permanent Secretary of State refused to overrule the outcome of the grievance;

207. It is accepted that Ms Munby declined to overrule the line management chain on the attendance approach. Her position is a perfectly reasonable and justified one in light of the fact that she is the most senior civil servant in the Department. Ms Munby satisfies herself that policy is being applied appropriately and that line management are closely involved in the matter and best placed to offer support and deal with such matters. We find there is nothing wrong or unreasonable with this approach.

Constructive Unfair Dismissal - Summary

208. We conclude that all of the actions and/or omissions of the respondent were reasonable and proper. As such neither the final straw or any of the acts set out above individually or cumulatively amounted to a repudiatory breach of the implied term of trust and confidence.

209. If we are wrong about that, we also conclude that the Claimant did not resign in response to any repudiatory breach. In his resignation letter, the claimant makes it clear that he is leaving as he has secured a better paid job. In a number of conversations with Ms Khalick prior to his resignation, the claimant refers to the cost of living in London and his salary not being sufficient to cover this. This supports our conclusion that the claimant's true reason for leaving was not because there had been a repudiatory breach of contract but because he had secured a higher salary in the private sector.

210. We also find the claimant affirmed his contract by continuing to work until 23 January 2023, this was over 11 days after the final act he complains of and almost 4 months after the main matters he complains of in his resignation letter relating to the SAR request and the resulting grievance and outcome. The claimant admitted in cross examination that he sought to keep alive his employment and contractual relationship with the respondent by seeking to obtain a secondment in the private sector for a period of 6 months or so before returning to the respondent or another Department of the civil service. We conclude, by doing so, he also affirmed his contract in respect of all of the earlier conduct he complains of.

Detriment for making a whistle-blowing disclosure

Qualifying disclosure

211. Did the Claimant do the following:

   a) On 4 January 2022 told Ms Khalick that he had been arrested and charged with a criminal offence;

   b) On 24 January 2022 told Ms Khalick that the police had refused to receive evidence of his head injury and bank charge fraud.

212. It is accepted that on 4 January 2022, the claimant told Ms Khalick that he had been arrested and charged with a criminal offence. We conclude that by informing Ms Khalick, the claimant was fulfilling his duty under the Civil Service Code. We conclude that whilst this was information, this was not a disclosure about any wrongdoing; at this stage there was no mention of miscarriage of justice. The claimant presented no evidence that he provided this information because he had in mind the public interest. As such, we conclude that this was not a qualifying disclosure.

213. With regard to the conversation on 24 January 2022 between Ms Khalick and the claimant, it was accepted in evidence that the correct date of was 7 February 2022. We repeat our findings in paragraphs 27 and 28, and conclude that the claimant did provide this information to Ms Khalick.

214. We note again as with the first alleged disclosure, there was no mention of miscarriage of justice and the content of the information was very personal to the claimant. The wrongdoing alleged had nothing to do with the respondent and it was not within its control to do anything about it. We were not presented with any evidence that the claimant had any wider concern or that he had in mind the public interest. As such we conclude that this was not a qualifying disclosure.

215. If we are wrong about our conclusion in respect of whether the claimant made a qualifying disclosure, we went on to consider whether the Respondent did the following things:

i) From 4 January 2022, barred the Claimant from making applications for promotion.
ii) From 4 January 2022, prevented the Claimant from going on foreign business trips.
iii) From 4 January 2022, prevented the Claimant from being on interview panels.
iv) From 4 January 2022, prevented the Claimant from acting as a process or decision manager.

216. We repeat paragraphs 178 to 179 of our conclusions in respect of whether the respondent did these things. We conclude the consequences of the claimant being subject to disciplinary and attendance processes meant it was not appropriate for him

to be on interview panels or act as a process or decision manager. Whilst he did not apply for promotion, we accept the fact that he was subject to these processes would have resulted in a negative impact on any application that he sought to make. None of these acts were done on the ground that that the claimant made a qualifying protected disclosure.

217. With regard to foreign business trips, we repat paragraphs 179 to 181 of our conclusions. Again, the reason why the claimant did not go on any business trips post 4 January 2022 was for reasons related to cost rather than on the ground that that the claimant made a qualifying protected disclosure.

218. In summary, the claimant's whistleblowing claims are dismissed in their entirety.

<u>Time Limits</u>

219. The Claimant lodged his claim with ACAS on 8 February 2023 and his claim with the Employment Tribunal on 5 March 2023, making any claims before 22 November 2022 potentially out of time.

220. We heard no evidence directly from the claimant in relation to time limits, however, Ms Millin submitted on behalf of the claimant that the detriments that flowed from the protected disclosures were continuing. We conclude that taking the claimant's case at its highest, this can only be the case up until 17 October 2022, when the claimant was informed that no further action would be taken in respect of the disciplinary process. This is on the basis that the claimant's case is that the detriments he was subject to were as a result of the qualifying disclosure and the disciplinary process rather than the attendance management process.

221. Whilst the claimant did not address the issue of whether it was reasonably practicable for the claim to be made to the Tribunal within the time limit, we note that during this period the claimant was suffering with stress and poor mental well-being. Conversely, whilst the claimant had some absences he was also at work at various points over this period. He was also well enough to pursue matters relating to his SAR request including a grievance and appeal as well as the appeal against his conviction.

222. We reminded ourselves that the burden is on the claimant to persuade the Tribunal that that it was not reasonably practicable for him to make the claim within the time limits. The claimant failed to discharge this burden and we conclude that it was reasonably practicable for the claim to have been made to the Tribunal within the time limits. Had we not dismissed the whistleblowing claims, we would have concluded that these complaints were out of time.

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EJ Akhtar

13 June 2024

Sent to the parties on:

13 June 2024

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For the Tribunal Office:

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Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.