EMPLOYMENT TRIBUNALS

Claimant: **Mr P Birrell**

Respondents: **Bank of England**

A**t:** London Central Employment Tribunal

On: 11 - 12 January, 15 - 19 January, 22 - 25 January , 29 January, 31 January 2024
2 February, 5 - 7 February 2024 in Chambers

Before: Employment Judge Brown
Members: Ms N Sandler
Ms H Craik

Appearances
For the claimant: In Person
For the respondent: Mr G Graham, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The Respondent unfairly constructively dismissed the Claimant.**
2. **The Claimant did not make protected disclosures.**
3. **The Claimant's dismissal was not automatically unfair.**
4. **The Respondent did not subject the Claimant to age discrimination, nor did it victimise him, nor did it subject him to protected disclosure detriment.**

REASONS

1. The Claimant presented his claim to the Tribunal on 18 July 2022, following ACAS early conciliation from 10 May 2022 to 20 June 2022.

2. The issues in the claim had been agreed as follows:

(1) Factual allegations

4.1 The claimant relies on the following allegations of detriment and repudiatory conduct:

a. The setting of the claimant's starting salary and terms from September 2019.

b. The refusal to correct and adjust the claimant's salary when: his contract was extended (twice); when his contract was made permanent; and on each of occasion (four) when he had annual reviews. The claimant contends that these decisions were made by Rebecca Braidwood and Paul Rooney.

c. On 7 February 2020, the claimant's contract was extended by six months instead of being made permanent and his salary was not adjusted to that of his peers. The claimant contends that this decision was made by Ms Braidwood and Mr Rooney

d. Mr Rooney did not make the claimant permanent despite telling him he would do this, on 4 June 2020.

e. On 12 June 2020, the claimant was denied the right to apply for a training programme he was told by HR that this decision had been made because he was not currently a permanent employee). The claimant contends that this decision was made by Ms Braidwood and Mr Rooney.

f. In around September 2020, Mark Pawson and Mr Rooney were harassing the claimant to return to the UK.

g. In September 2020, after pressuring the claimant and his wife, for the claimant to return to work as early as possible, Mr Rooney made no attempt to refer the claimant to OH, nor provided sick leave, when he reported his health issues and recent hospitalisation.

h. On 17 December 2020, the claimant's contract was extended to 6 August 2021 which was five weeks before he was due to complete two years' service. The claimant contends that this decision was made by Ms Braidwood and Mr Rooney.

i. On 22 April 2021, Mr Rooney told the claimant was being made permanent, but on 4 May 2021, the claimant's fixed-term contract was extended on the HR system to 5 February 2022. On 5 May 2021, the claimant's contract was changed back to 5 August 2021. The claimant contends that this was done on the instructions of Mr Pawson and Mr Rooney.

j. On 1 July 2021, the claimant was forced to return to the UK and to spend Covid lockdown in isolation from his family having been threatened by Mr Rooney and Mark Pawson, in around April to May 2021, that his contract would not be made permanent if he failed to return to the UK by this date.

k. On 28 July 2021, the claimant was denied by Ms Braidwood the advertised salary of the new, permanent role in the Cyber Division, which he had

successfully applied for. It is the claimant's assertion that Ms Braidwood had contrived to hold down his salary in a continued act of victimisation

l. On 13 December 2021, Antonia Brown took more than two months to conclude the claimant's grievance dated 4 October 2021.

m. Ms Brown failed to conduct an adequate investigation into the claimant's grievance, in that she failed to interview the claimant's suggested list of witnesses and address all the grievance complaints.

n. The claimant was told by Pauline Szewczuk, on 28 October 2021, and Jenny Khosla, on 20 January 2022, that he could not send the grievance outcome and related documents to his private email address for the purpose of obtaining legal advice and was thereby denied the opportunity to obtain such advice.

o. On 13 December 2021, in the grievance outcome letter, Ms Brown misled the claimant to agree to her discussing the claimant's pay issue and grievance with his new manager, Sarah Burls, in order to prejudice him in his new role.

p. The appeal hearing on 20 January 2022 was managed by a lawyer and was adversarial.

q. On 11 February 2022, Elizabeth Johnson sent the record of the appeal hearing to the claimant, three weeks after the date of the hearing.

r. Ms Khosla failed to conduct an adequate investigation into the claimant's appeal, in that she failed to interview the claimant's suggested list of witnesses, ignored some of the grounds of appeal and overlooked evidence in the respondent's possession.

s. The appeal outcome was sent to the claimant on 19 April 2022, thereby taking 197 days to process the grievance and appeal.

t. In June 2022, Eloise Hindes denied the claimant an opportunity for training in technical skills in cybersecurity.

u. On 15 June 2022, Ms Hindes went back on a prior agreement for the claimant to complete a phased return to work from abroad. This meant that claimant had to work 15 hours on one day in the fifth week of his phased return.

v. On 21 June 2022, the claimant was unfairly denied his Working From Abroad Days allocated for 2022 by Ms Johnson and Ms Hindes.

w. The Working From Abroad Policy was applied to the claimant without consideration of his personal circumstances on 17 September 2020 by Mr Pawson, on 6 August 2021 by Mr Rooney, on 10 December 2021 by George Fisher, and on 24 January 2022 by Ms Khosla.

x. The respondent manipulated the Working From Abroad Policy, in respect of the maximum number of WFA days per annum, to make it impossible for the claimant to continue to work and enjoy family life.

(2) Equality Act 2010 ("EQA"), section 13: Direct discrimination because of age

2.1 The claimant relies on allegations (a) to (x).

2.2 If it is found that any of this conduct occurred, was this less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? In respect of the allegations relating to pay, the claimant compares himself with other 'Project Managers' on scale E in Projects and Programmes Division. The claimant otherwise relies on a hypothetical comparator of someone who was aged 45 or under.

2.3 If so, was this because of the claimant's age?

2.4 Was this treatment a proportionate means of achieving a legitimate aim? The respondent relies on the following a. Implementing appropriate arrangements in relation to pay including the nature of the role, skills and experience of employees and budgetary constraints (allegations (a), (b), (c) and (k)).

b. Appropriate use of budget and resources (allegations (a), (b), (c), (d), (e), (h), (i), (k) and (t)).

c. Implementing an appropriate policy in relation to working from abroad, given legal, tax and other constraints (allegations (f), (j), (v), (w) and (x)).

d. Managing absence, complaints and grievances in line with appropriate policies (allegations (g), (l), (m), n, o, p, q, r, s, u).

(3) EQA, section 27: Victimisation [added by amendment on 23 March 2023]

3.1 The claimant relies on allegations: (b) to (x).

3.2 It is accepted that the claimant did the following protected acts:

a. In his grievance dated 4 October 2021 the claimant complained about age discrimination.

b. In his appeal dated 24 December 2021 the claimant complained about age discrimination.

3.3 Did the claimant also do a protect act as follows?

c. In or around December 2019, during a discussion with Mr Rooney, the claimant complained that he was being paid less than his peers for reasons relating to his age.

3.4 Did the respondent do those things because the claimant did a protected act?

(4) Protected disclosures (ERA, sections 43A - C)

4.1 Did the claimant make a protected disclosure? The claimant relies on the following alleged disclosures:

a. That the respondent was not holding third party service providers to account (i.e. misuse of public funds). This was made verbally to Mr Rooney from October/November 2019 to December 2020; verbally to Mr Rooney and Mr Rawson at bi-weekly meetings from March/April 2020 to April 2021; by email to Mr Rooney between 20 December 2019 and 20 December 2020; and in the claimant's written grievance dated 4 October 2021.

b. That the respondent was not holding third party service providers to their contractual terms in respect of the supply of adequately skilled and experienced staff (i.e. misuse of public funds). This was made verbally to Mr Rooney verbally between April and July 2020; by email to Mr Rooney on 27 February, 2 March and 8 May 2020; and in the claimant's written grievance dated 4 October 2021.

c. That the respondent was not holding IBM Consultancy Services to account in relation to the delivery of the OBST Programme (i.e. misuse of public funds). This was made by email to Mr Rooney on 2 March 2020 and in the claimant's written grievance dated 4 October 2021.

d. That the respondent was not holding IBM Consultancy Services to account for having mis-sold software tools to the respondent which cost it £100,000s to resolve (i.e. misuse of public funds). This was made verbally to Mr Rooney on 1 April 2020.

e. That he had been asked to override security clearance for IBM contractors to access the respondent's network (i.e. breach of national security). This was made verbally to Mr Rooney in April 2020 and in the claimant's written grievance dated 4 October 2021.

f. About poor procurement and mismanagement of public funds in the tens of Emillions (i.e. misuse of public funds). This was made verbally to Andrew Bailey on 23 July 2020 and in the claimant's written grievance dated 4 October 2021.

g. That Mr Rawson had hired a contractor with whom he had a prior personal relationship (i.e. fair and just use of public money). This was made verbally to Mr Rooney throughout 2020 and in the claimant's written grievance dated 4 October 2021.

h. That the respondent had wasted over £100,000 because of a decision to change a software testing tool (i.e. misuse of public funds). This was made by email to Mr Rooney on 9 February 2021.

i. That the respondent was hiring contractors at £750 a day who lacked the experience required to perform their roles (i.e. misuse of public funds). This was made by email to Mr Rooney on 26 July 2021 and in the claimant's written grievance dated 4 October 2021.

j. That the respondent was limited to recruiting contractors from three agencies which were unable to supply the respondent with the resources required and caused delay

(i.e. misuse of public funds. This was made by email to Alex MacLachlan and Richard Morris on 27 August 2021 and in the claimant's written grievance dated 4 October 2021.

k. That the respondent had failed to comply with tax obligations to the Portuguese tax authorities in relation to the work he had undertaken from Portugal. This was made in the claimant's written grievance dated 4 October 2021.

I. That the respondent had infringed the claimant's article 8 rights. This was made by email to Ms Szewczuk on 16 November 2021.

m. That the respondent had concealed discrimination and a failure to investigate whistleblowing victimisation. This was made by email to Ms Szewczuk on 8 November 2021, in the claimant's written grievance appeal dated 24 December 2021 and verbally at the grievance appeal hearing on 20 January 2022.

n. That the respondent had treated employees on fixed-term contracts less than comparable permanent employees. This was made in the claimant's written grievance dated 4 October 2021, written grievance appeal dated 24 December 2021 and verbally at the grievance appeal hearing on 20 January 2022.

o. That the respondent had misused public funds in relation to the Returners Programme. This was made in the claimant's written grievance dated 4 October 2021, written grievance appeal dated 24 December 2021 and verbally at the grievance appeal hearing on 20 January 2022.

p. That the respondent had discriminated against the claimant. This was made in the claimant's written grievance dated 4 October 2021, written grievance appeal dated 24 December 2021 and verbally at the grievance appeal hearing on 20 January 2022.

4.2 In respect of each alleged disclosure:

a. Did the claimant disclose information (section 43B(1))? b. Did the claimant reasonably believe that the disclosure tended to show that the respondent had failed to comply with a legal obligation (section 43B(1)(b))?

c. Did the claimant reasonably believe that the disclosure was made in the public interest?

d. If so, was it was made to the employer (section 43C)?

(5) Detriment (ERA, section 47B)

5.1 The claimant relies on allegations (b) to (x).

5.2 If it is found that any of this conduct occurred, was this done on the ground that the claimant had made a protected disclosure?

(6) Constructive dismissal (ERA, section 95(1)(c))

6.1 Was the claimant dismissed? The claimant relies on allegations (a) to (x)

6.2 What was the final straw?

6.3 Did this conduct breach the implied term of trust and confidence? The tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between employer and employee; and whether it had reasonable and proper cause for doing so.

6.4 Did the claimant resign in response to this breach?

6.5 Did the claimant waive this breach or affirm his contract?

(7) Automatically unfair dismissal (ERA, section 103A)

7.1 If the claimant was dismissed, was the reason or principal reason for dismissal that he made a protected disclosure?

(8) Unfair dismissal (ERA, section 98)

8.1 If not, has the respondent shown that the reason or principal reason for dismissal was some other substantial reason i.e. the claimant was unwilling to work in accordance with the Working From Abroad Policy with his contractual location being London and/or unwillingness to accept his contractual pay terms.

8.2 If so, was this dismissal fair or unfair in accordance with ERA section98 and, in particular, did the first respondent in all respects act within the so-called band of reasonable responses?

9) Time limits (EQA, section 123; ERA, section 48)

9.1 Taking the dates of early conciliation (of 10 May to 20 June 2022) into account, anything that is alleged to have taken place before 11 February 2022 is prima facie out of time.

9.2 In respect of any of the complaints brought under the EQA which were presented outside the primary limitation period:

a. Was there conduct extending over a period?

b. If not, or this would not deem it to be in time, would it be just and equitable to extend time?

9.3 In respect of any of the complaints brought under ERA section 48 which were presented outside the primary limitation period:

a. Was it part of a series of similar acts or failure to act?

b. If not, or this would not deem it to be in time, was it reasonably practicable for the complaint to be presented in time, and if it was not, was the further period taken reasonable?

3. The Claimant alleged that he had made a number of protected disclosures. On 11 January 2024, at the start of the final hearing, the Tribunal made an order that the parties produce, before the end of the hearing, a schedule of agreed and disputed facts in relation to each of the protected disclosures.

4. Having done this, there was no agreement that the Claimant had made any protected disclosures. However, the Respondent conceded that, if the Tribunal found that the Claimant had disclosed information which, in his reasonable belief tended to show a breach of a legal obligation, then the Claimant would have had a reasonable belief that such a disclosure was made in the public interest, because of the nature of the Respondent institution.

5. This hearing was to determine the liability issues only.

6. The Tribunal had been given an electronic bundle, additional documents bundle, opening note by the Respondent, a witness statement bundle, a chronology and cast list.

7. The Tribunal heard evidence from the Claimant and from his wife, Dana Levy. For the Respondent, it heard evidence from Gemma Kirby, Senior Reward Manager in the Respondent's Reward Team; Georgina Fisher, Head of the Respondent's Employee Relations Team; Alec Mclachlan, Head of Commercial Delivery at the Bank; Paul Rooney, Senior Programme Manager and the Claimant's line manager from 2019 – 2021; Mark Pawson, Employee Relations Change Manager; Rebecca Braidwood, Head of Projects and Programmes and Mr Rooney's line manager; Antonia Brown, grievance hearing officer; Jenny Khosla, grievance appeal officer; and Eloise Hindes, Senior Cyber Manager and the Claimant's line manager from 2021 - 2022. It read the witness statements of Emma Wild, private secretary to the Governor of the Bank, and Lucy Chennells, Senior Adviser on Conflicts in the Bank's Secretary's Department, and attached appropriate weight to these.

8. The Tribunal was given a table of comparator data, containing details of the salary and pay rises awarded to 53 Grade E Project Managers, including the Claimant. It was not in dispute that the Respondent had provided data for some of these comparators very late in the Tribunal process.

9. Both the parties presented written closing submissions. They also addressed the Tribunal in closing arguments.

10. At the start of the hearing, the Claimant made an application to strike out the Respondent's response. The Tribunal did not strike out the Respondent's response, for reasons it gave at the time. It made clear that the Claimant would be able to draw the Tribunal's attention to any alleged failure by the Respondent to disclose relevant documents, and to ask the Tribunal to draw inferences from this, if appropriate.

The Facts

11. The Respondent ("the Bank") is the UK's Central Bank. It is independent, but is a public body for the purposes of its public functions.

12. The Claimant was employed by the Respondent from 16 September 2019 until 18 July 2022. He was aged 48 at the commencement of his employment and 51 at the end of his employment.

13. The Claimant had moved with his family to Portugal in 2018. The Claimant still owned a house in Twickenham, London, but he rented it out.

14. On 8 April 2019 he applied, through the "Bank of England Career Returners Programme - Technology", for a "6 month returnship" programme, p223. He indicated that his salary expectations were "£50,000+", p178.

15. The Programme offered, " a paid placement of six months, starting in September 2019, and the possibility of a permanent role at the end of the assignment". It also offered coaching, to help returners to transition back into the working environment, p223. It told candidates that, "The Programme is aimed at people who have had a career break of two or more years." P224. The Programme does not have any age requirements. The salary offered on the Programme was £48,000 - £52,000, p224.

16. Publicity materials for the Bank of England Career Returners Programme Launch Event explained for whom the Programme was designed, "You may have taken time out for childcare or eldercare, for relocation, or for other reasons. You may have been working on a small-scale basis to fit around your other commitments or have not done any paid work for a number of years." p159.

17. The "Personal Information" provided in the Claimant's application recorded his address as being in Twickenham, in the UK, p174. The CV attached to his application said that the Claimant was resident in Portugal, p188.

18. On the Bank's security vetting forms, the Claimant stated that his current residential address was in Portugal and that he had been living there since June 2018, p1279. The Respondent's Corporate Risk Advisers asked whether the Vetting team wanted overseas checks to be carried out, because the Claimant was currently resident in Portugal. The Vetting team replied, "He's likely to be living there for a little longer, so yes please." P1276.

19. On his application form, the Claimant gave examples of work experience up to and including March – August 2018, as Founder at Lizrd.com, giving his responsibilities and achievements as including, "Led the technological solution design on blockchain & Azure using 3rd party providers." P176. He explained his interest in the Returners Programme in the following terms, "I was made redundant in Oct 2016 and since then I tried a couple of startups which failed unfortunately. In the last two months I've been searching for roles, but almost every technology related role has the phrase "join a young team!...". p178.

20. The Claimant was interviewed under the Returners Programme, p185. An electronic record of his application recorded that his application status had been "changed to rejected in step 1st interview" on 10 July 2019.

21. Returners Programme contracts are offered at the Respondent's Salary Scale F. On 15 July 2019 the Respondent offered the Claimant, "… a fixed term contract for the position of Project Manager at Salary Scale F to work in the Technology

area of the Bank." The contract was for a fixed term of 6 months, at an annual salary of £52,275, p200. The offer letter was addressed to the Claimant at his Twickenham address. One of its terms was, "Place of Work. Your initial place of work would be Bank of England, Threadneedle Street, London, EC2R 8AH, or as the Bank may require you to work within the United Kingdom." P200.

22. The contract provided, "Your remuneration and performance award will be reviewed periodically at the absolute discretion of the Bank. The Bank is under no obligation to award an increase or performance award following such a review. P200.

23. The contract which the Claimant was offered was not a Returners contract, see further below.

24. The Respondent has a Pay Policy, "Salary on Appointment, Promotion and Demotion", p1187 – 1190. Its stated aim is "to ensure that salaries are determined consistently and fairly." P1187. However, the policy states, "This policy does not form part of any contract of employment or have contractual effect; the Bank therefore reserves the right to amend, replace or withdraw this policy from time to time."

25. The "Key Principles" of the policy provide, "The Bank evaluates all roles thoroughly before they are advertised and assigns a salary band that fairly rewards the role and its responsibilities in line with equal pay obligations." P1187.

26. Salaries at the Bank are generally lower than those available for equivalent roles in the market, due to the nature of the Bank as a public sector body.

27. Each role at the Bank is assigned a salary grade, or "Scale", from Scales K – A, with A being the highest. For each Scale, there is a 'reference point' salary, which is based on an annual benchmarking process which the Bank undertakes, looking at comparable salaries paid in the external market.

28. The "Scale" for each role at the Bank establishes the usual salary range for that role.

29. The Respondent's Pay Policy provides, in relation to newly recruited employees, "New Hires. Starting salaries for new hires must be targeted between the scale minimum and 90% of the reference point for the relevant role and scale… The value of the total reward package at the Bank is significant and this must be taken into account, along with the pay factors below, when deciding on the salary to offer." p1187.

30. Under the heading "Pay Factors", the policy provides,

    "The following factors should be taken into consideration when determining an employee's salary on appointment or in response to a promotion or demotion:

    - the employee's current remuneration and/or the current remuneration of those undertaking similar roles at the same scale which will be provided by the Reward Team;

- position against the market reference point;

- retention issues;

- time in role and pay increases during the year (for existing employees);

- skills or specialist knowledge/experience;

- affordability and keeping within the overall budget; and

- performance (for existing employees).

When determining an employee's salary on appointment or in response to a promotion or demotion, managers should be mindful not to take into account any factors which might be discriminatory (for example, but not limited to, the employee's age, gender or any other protected characteristic)." P1188

31. The Project Manager role offered to the Claimant was at Scale F, for which the reference point salary was £61,000 and the minimum salary was £45,900, p1263. The salary offered was £52,275, equivalent to 85% of the reference point salary.

32. The Claimant accepted the offer. He commenced employment on 16 September 2019. His line manager was Paul Rooney and he was allocated to the One Bank Service Transformation "OBST" programme. OBST was an ERP ("Enterprise Resource Planning") systems implementation, to replace existing HR and Finance back-office systems.

33. The Claimant, Mr Rooney and Rebecca Braidwood, Mr Rooney's line manager, all believed that the Claimant had been appointed through the Returners Programme. In fact, the Claimant had not, because it was felt that he did not meet the requirements – in that he had not been out of the workplace for 2 years or more. Nevertheless, because the Claimant had performed so impressively at interview, the Respondent offered him a 6 month contract anyway. The Claimant was not informed of the distinction – he was simply offered a 6 month contract, as he would have been, pursuant to the Returners Programme.

34. Gemma Kirby told the Tribunal, and the Tribunal accepted, that, in order to comply with the "Key Principle" of the Pay Policy - "The Bank evaluates all roles thoroughly before they are advertised and assigns a salary band that fairly rewards the role and its responsibilities in line with equal pay obligations" – then, either:

    34.1 Ms Kirby's team would evaluate a role centrally, or

    34.2 the local manager or team would identify the role and scale and where it fitted within the team.

35. Of this latter process, she said that there would be an, "… exchange between the local area and the recruitment team … and the business area should say why it should be a certain level, if they had made that assessment themselves. That could just be an email." Mr Kirby's evidence was that such an email would constitute the record of the evaluation of the role and its Scale, to comply with the

Bank's record keeping requirements. She said that, in such circumstances, she would expect that there would be a job specification for the role and objectives.

36. Ms Kirby also told the Tribunal, and the Tribunal accepted, that, if there had been no such conversation about the level of a role and how it compared to others in the area, that would be a concern. She agreed that, if this was then raised as an issue, then her team could look at the role and consider redressing the matter.

37. In relation to non-compliance with the Pay Policy, the policy itself provides, "If you realise you have breached - or suspect that you might have breached – a requirement in this policy please do not delay in reporting it to AskCompliance as quickly as possible, so that the issue can be redressed under the Breach Management policy." P1190.

38. There was no evidence that the F grade Project Manager role in the OBST programme, to which the Claimant had been appointed, had been centrally evaluated. There were no documents to show this. The grievance officer and grievance appeal officers, Mses Brown and Khosla, both told the Tribunal that the Claimant's grade F role must have existed on the Bank's systems and there must have been a job description and evaluation of it, for the Claimant to have been employed. However, those documents were not produced to the Tribunal. The only document which appeared to record the Claimant being allocated to the OBST programme at scale F was an email, p215. However, that same email erroneously recorded that the Claimant was a "permanent" employee, not a fixed term employee. The email did not appear to contain accurate information about the role. It did not record that any evaluation of the role had been carried out.

39. It was not explained to the Tribunal why the Claimant was offered a role at grade F on the OBST programme, when he was not, in fact, being appointed through the Returners Programme on a Grade F Returners contract. While Mses Khosla and Brown told the Tribunal that the Claimant had been interviewed for a grade F role alone, the interview notes recorded that the interviewers asked whether the Claimant would be able to transition from senior leader to Grade E, or grade F, additional documents p34. The Tribunal considered that that showed that the interviewers were considering the Claimant's suitability for both grade E and grade F roles.

40. Mr Rooney told the Tribunal, and the Tribunal accepted, that he was told that the Claimant was available as a Project Manager for his OBST programme. He very honestly told the Tribunal that he did not think about, or specify, the Claimant's grade, but just accepted him as he needed Project Managers. He gave evidence that, "The OBST programme had just started. I did a quick appraisal and I thought needed more Project Managers – we didn't have enough and needed more." Mr Rooney did not discuss what level of Project Manager was needed. Of the Claimant he said, "I saw he had experience with ERP and I said yes I will take him."

41. All the other Project Managers employed on the OBST programme were grade E. There were some employees at grade F on the OBST programme, but they were Project Management Officers. Other Project Managers at grade F existed at the Bank, but none on the OBST programme.

42. While Mr Rooney, Ms Braidwood and Ms Khosla suggested that the Claimant's starting objectives reflected a scale F role, Mr Rooney told the Tribunal that he did not treat the Claimant any differently, in terms of the objectives and tasks he gave the Claimant when he started, to how Mr Rooney would have treated a Grade E Project Manager. He told the Tribunal that the Claimant would have set his own objectives and that, from the start of the Claimant's employment, it was intended that the Claimant would share the workload of another Project Manager called Richard Unstead, p1301.

43. The Tribunal found that, like all other Project Managers, Mr Unstead would have been a Grade E Project Manager, so the Claimant would have been undertaking his Grade E workload.

44. Mr Rooney told the grievance appeal hearing, of the Claimant, "He was E calibre from day one – he came back under returners scheme. He was doing well and all peers would have assumed he was an E so I said we needed to move him if there was capacity. …". P618.

45. After a few months, and following discussions with fellow employees, the Claimant began to realise that he was being paid less than fellow Project Managers. He also realised that he had not received any coaching pursuant to the Returners Programme. In December 2019, he raised this with Mr Rooney. Mr Rooney believed the Claimant had been appointed as part of the Returners Programme, but that he was a strong performer and an experienced Project Manager and should not be employed at Scale F, p487. Mr Rooney assured the Claimant that he would try to address this after the Claimant completed his probation.

46. The Claimant relied on these discussions with Mr Rooney as a protected act. He told the Tribunal that he raised the issue of his salary being very low compared to his peers and expressed concern that this was because he had joined through the Returners programme. In evidence, the Claimant agreed that he had not expressly referred to his age during his conversation with Mr Rooney at this time.

47. The Tribunal accepted Mr Rooney's evidence that the Claimant never said to him that he was being treated unfavourably because of his age and that Mr Rooney never understood or deduced, from these conversations in late 2019, that the Claimant was complaining about age discrimination.

48. On 10 December 2019, Paul Rooney emailed Juliet Bryant, of Human Resources, saying, "I have Peter Birrell working on 6 months FTC. He was brought in on wrong grade etc. What would be next steps to move him to an FTC for 1 year at E Grade for duration of the OBST Programme – I have the budget in the Programme.?" p465.

49. The Tribunal noted that, in this contemporaneous email, Mr Rooney described the Claimant as having been brought in on the "wrong grade" and that he stated he already had the budget for grade E Project Manager.

50. Ms Bryant replied, copying in colleagues in the "hire team" for their advice, p464, asking, " … would we need GovCo approval for an extension to Peter Birrell's FTC due to the recruitment freeze? And what process would we need to follow to

change the Scale – could he apply for the Scale above? (we've advertised other Scale E PM roles internally and externally recently)…".

51. Eventually, on 8 January 2020, following discussion by email, in which HR said that the Claimant had not been appointed pursuant to the Returners Programme, because there had been debate about his eligibility (p 462 – 463), another HR team member confirmed, "For any FTC extension under 6 months DGCOO approval is fine. For anything over 6 months we will need to go through the GovCo approval process." p460.

52. On 13 February 2020, p 447, Mr Rooney told HR that his managers, Jonathan Curtiss and Rebecca Braidwood, Head of Projects & Programmes, had approved a 12 month extension to the Claimant's contract. He mistakenly stated that the Claimant's current contract was due to finish on 15 February 2020, p447. It was, in fact, due to finish on 15 March 2020.

53. On 4 February 2020 HR emailed Mr Rooney, saying that the Claimant's 12 month fixed term contract at Grade E had been approved, telling Mr Rooney that he may need to provide details of the Claimant's new salary to Payroll, and asking whether Mr Rooney needed, " … any peer salary info for benchmarking at the scale E level. " p752.

54. On 16 February 2020 the Claimant's fixed-term contract was extended to 12 February 2021 and he was promoted to Scale E. His salary was increased to the Scale E minimum of £59,400 per year.

55. Mr Rooney told the Tribunal, and the Tribunal accepted, that he decided the Claimant's new salary in accordance with the Promotion guidance in the Bank's Pay policy. He moved the Claimant to the scale minimum for salary Scale E, as this was a greater increase than the alternative 5% increase allowed, on promotion, in the policy. At the time, the Claimant was grateful for Mr Rooney's help and the increased salary.

56. The Bank's Pay Policy provides, regarding pay on promotion,

    "Promotional Pay Increases.

    When an employee is promoted to a higher scale, their salary should be increased to the scale minimum or by up to 5%; whichever is greater.

    Consideration should be given to the pay factors below when determining the appropriate size of an increase as it may not always be appropriate to award the standard 5% if an employee is already above the scale minimum." P1187.

57. Gemma Kirby acknowledged in evidence that, if an employee had been appointed at a lower grade than was appropriate for their role, in circumstances where their role had not been evaluated, then "promotion" to the correct grade would not necessarily rectify the issue, because promotion might only result in the employee being paid at the lowest point on the scale for the promoted grade. There would never have been consideration of the correct salary at that grade, taking into account all the pay factors, as is required under the policy when an employee is newly hired.

58. The notes of Mr Rooney's interview during the Claimant's grievance record Mr Rooney saying, " Obviously, even with a pay rise PB [Peter Birrell]'s number was quite low compared with his peers. PR [Paul Rooney] raised the issue with Rebecca Braidwood (RB) because PB was much lower than his peers." P487.

Exceptions

59. The Respondent has a process whereby employees can be given starting salaries, or salaries on promotion, which are higher than its Pay Policy would normally dictate. This is known as the "Exceptions Process". There is no written policy on Exceptions, but the Bank has a written form for managers, who propose to make Exceptions, to complete, p2227.

60. Some of the Respondent's witnesses told the Tribunal that, in their experience, exceptions were extremely rare. However, Gemma Kirby agreed that, across the cohort of the Claimant's comparators, there were 13 exceptions, representing about 25% of the cohort. She agreed that there were more exceptions in the group than would be expected. The Tribunal considered that 25% exceptions in a cohort did not accord with the description, "extremely rare".

61. During the grievance appeal, Jemmy Khosla asked Mark Pawson, "… do you know whether PB's managers considered giving him a larger pay increase via the exceptions process? P613. Mr Rooney was also asked during the grievance appeal process why he did not use the Exceptions Process. He replied, "No didn't consider an exception at that time." Page 618. In response to the further question, "Do you generally think about that in your area?" He replied, "Probably not enough if I'm honest". Page 618 para 23.

62. Earlier, Mr Rooney's Grievance interview notes recorded, "PR believed if PB had become a flight risk they might have addressed sooner". Page 491 and "He agreed that it was not necessarily fair for PB who, he felt, should perhaps have got more." Page 489.

63. Mr Rooney's notes also recorded that Mr Rooney had, " … told RB on several occasions that PB was good and that they should do something to address the issue but he was told it was not a top priority for the area." p489.

64. In about late 2021 or early 2022, Rebecca Braidwood supported an "Exception" in relation to a Promotional Increase above 5% for an employee who had been employed at Grade F through the Returners Scheme in April 2021. This was Employee 4 in the Comparator data. The written justification for the "Exception" included that it was quickly apparent that the employee was comfortably operating at a grade E project manager level, p2227. The narrative said that the individual had been promoted to scale E when the headcount was available to do so. The justification for the "Exception concluded, " As well as being a flight risk, which we can ill afford at this time, we also risk looking unfair and treating people inequitably / disadvantaged through joining on the returner scheme, should we place [the employee] on the bottom of the grade E scale. The proposal is to go mid-range … [the employee] would still be the lowest salaried E in my team." Page 2227-2228. The proposed salary for this Grade E employee was £70,000.

65. This employee was exactly the same age as the Claimant. They had not, however, brought a grievance against the Respondent.

66. During his employment, the Claimant did not know that the Exceptions process existed. Despite the Claimant asking for disclosure of the Exceptions process, the Respondent did not disclose the Exceptions form, or any Exceptions made, until very late in the Tribunal process – in December 2023. The Claimant asked the Tribunal to draw an adverse inference from the Respondent's failure to provide relevant disclosure in this regard.

Annual Salary Review 2020

67. The Claimant's salary was increased to £59,923 on 1 March 2020, following the Respondent's Annual Salary Review process, p466.

68. Under the Bank's Annual Salary Review Process, discussions in relation to salary increases take place in December/January each year. In the Claimant's Division, the Senior Leadership Team and Ms Braidwood discuss performance ratings of individuals across the team. Salary increases are then awarded from the budget given by the Bank, based partly on performance and partly on how close an individual's salary is to the reference point for the Grade.

69. The Respondent produces guidance each year for managers to apply in determining pay awards in their area. Each area is given a budget and all pay awards in that area must come from that allocated budget.

70. The 2019/2020 guide set out the following pay factors to be taken into account in determining the appropriate pay award for an employee: Salary and Total Reward; Performance; Internal Peer Relativities; Retention issues linked to key skills, knowledge and experience; Time in role and pay increases during the year; Significant role changes (within the same contractual grade); Affordability, p1307.

71. Gemma Kirby told the Tribunal that the main aim/starting point for the ASR each year is to target higher awards to those who are paid a lower salary compared to their reference point. In order to help achieve this, the Reward Team create a guideline pay award matrix which sets out a range of awards for employees whose salary is, for example, less than 80% of their reference point.

72. Rebecca Braidwood, however, was clear in her evidence that distance from reference point was only one factor to be taken into account.

73. The Claimant's performance was graded 3. The award matrix provided that, where salary was 80-100% of the reference point, the appropriate salary award was 0-4%. Rebecca Braidwood told the Claimant's grievance appeal that the award to the whole area, with a few exceptions, was 1%, p644.

74. Because the Claimant was still employed at grade F in December 2019 and January 2020, the award was assessed on the basis of his F grade salary. His F grade salary was 85% of the reference point.

75. The Claimant was 48 years of age in September 2019.

76. He drew the Tribunal's attention to comparators 10 (age 36 in September 2019), 21 (aged 47) and 33 (aged 55) who all received 7% pay awards that year.

77. Rebecca Braidwood told the Tribunal, and the Tribunal accepted, that those individuals were in a team which had been responsible for the Bank's Brexit programme, which was a very public programme, and that they had performed exceptionally well in it. The moderation of salary raises for this group was in relation to a group of E grades. At the time, the Claimant was being moderated as an F grade.

78. The Tribunal noted that, of these comparators, one was younger than the Claimant, one was almost the same age as the Claimant and one was older than the Claimant.

79. The Respondent agreed that it backdated a pay award by 6 months for an individual who was aged 51 when it was approved, p1912. That comparator was older than the Claimant.

80. Neither Ms Braidwood nor Mr Rooney proposed backdating the Claimant's pay to recognise that he had been performing at Grade E level, even before his promotion. Nor did they propose awarding him a higher pay rise to recognise that he had been performing and acting at a level higher than his nominal F grade.

Alleged Protected Disclosures – Issues with OBST Project Delivery

81. The Respondent has a "Speaking Up" policy, which sets out a procedure for raising concerns about malpractice and misconduct. It also has a Grievance procedure.

82. By December 2019 the Claimant was raising with Mr Rooney that he felt that IBM, who were the Respondent's third party contractor on the OBST programme, were not delivering as the Claimant expected.

83. On 20 December 2019 the Claimant emailed Mr Rooney about a Statement of Work [SOW] saying, "I still think there's a problem on ownership of delivery, esp. based on what we've seen from IBM so far. Anything they are not contractually resp. will not be given the required professional care by them. … This doesn't state who owns it / resp. for it. Without IBM owning it we are back to where we were previously… the project plan is the fundamental part of success," p238.

84. On 27 February 2020 the Claimant forwarded to Mr Rooney an email he had sent to IBM, saying that the Bank did not consider that it was its responsibility to undertake certain work and telling IBM that the Bank expected it to be creating a plan and arranging meetings. He commented to Mr Rooney, "I'm calling IBM out on this again as still no change. Still no sight of a PM from IBM, no change in behaviour from Colin, Talor not a PM as we know, they're still planning & operating in a bubble." He said that the situation had become untenable and had to be dealt with in the next Delivery Review Meeting, p241.

85. On 2 March 2020, another bank employee, Lee Millward, emailed the Claimant and Mr Rooney about his own growing concerns about IBM's inability to deliver

"security related artefacts" and IBM bypassing security requirements, without governance or approval. The Claimant commented to Mr Rooney that it was not right that the Bank's employees were expected to do IBM's work for them when IBM was charging £1,000 per day for its staff, p242.

Pandemic

86. In March 2020 the UK Government, along with other European governments, was introducing restrictions on gatherings and movement, in light of the developing covid19 pandemic.

87. On 16 March 2020 Mr Rooney emailed the Claimant in friendly fashion about IBM's delivery on their contract, "Good weekend ? At least you are with loved ones at home in Portugal - likely to stay there too !! … I am asking IBM to present the plan and their methodology to us this week. We should then all acknowledge where Gaps are and focus on closing. FYI – going to put an email about this and methodology out today to make it clear they are leading this with their methodology and responsible for this plan. We have challenged them to provide leadership and improve tech side of things …". p245.

88. On 23 March 2020 the UK government announced the first UK national covid19 lockdown. The Claimant remained in Portugal, working from home there.

Apprenticeship

89. On 26 May 2020 the Claimant applied for a place on a 2 year part-time sponsored apprenticeship programme in Data Science run by Exeter University. The application required approval from a Head of Department. On 26 May 2020 the Claimant emailed Paul Rooney, asking that Rebecca Braidwood approve the Claimant's application, p250.

90. Shortly afterwards, on 4 June 2020, the Claimant asked Mr Rooney to let HR know that he intended to make Claimant permanent, or extend his contract, as that would be useful for his application for the Data Science apprenticeship programme, p251. Mr Rooney replied, "I have already – intention to move permanent." P251. The Claimant was not, in fact, made permanent at this point.

91. Ms Braidwood declined to give approval for the Claimant's apprenticeship application. She later told the grievance investigator that she had, "assumed that, because the apprenticeship ran for a number of years, and as he was an FTC, he would not be able to apply… " and that she had made the decision, "… on the basis that the Bank would not make a long term investment on an FTC", p535.

92. It was not in dispute that the apprenticeship course would have lasted longer than the Claimant's existing fixed term contract.

93. The Tribunal accepted the Respondent's evidence that the budget for offering training in the Division was £20,000 per year for training for the entire team. The average training course cost around £2,000 per person, meaning that only about 10 people across the Division were able to undertake training in any year, in any event.

94. The reason given to the Claimant, at the time, for the Respondent declining his apprenticeship application was that he was "FTC (on a fixed term contract), p252-3. The Claimant accepted, in evidence, that that reason, on its own, was not discriminatory.

Continuing Issues with OBST Delivery

95. On 8 July 2020 the Claimant emailed Paul Rooney, with the subject, "FW:OBST Programme Plan, Change Log and Late Tasks 06.07, saying, p259, "They're getting over £12M now to deliver this and yet they made a dog's breakfast from the start and came up with an unachievable plan, whilst still not delivering, ... we're having to wipe their proverbial bottoms… to get them to do their work (even basic tasks) whilst compensating for their continued non-delivery and terrible performance. Anyway, if I'm to do this to the level they are requiring then I need to drop out of all the commercial stuff … Apparently MOD have halted payment and IBM are having to work at risk…".

96. On 23 July 2020 the Claimant attended a virtual coffee morning with Andrew Baily, the Governor of the Bank of England. At the meeting the Claimant told the Governor that there were problems with the supplier delivering on the OBST programme and suggested that procurement processes needed to be reviewed, p 264. Emma Wild, the Governor's private secretary, fed back to Jonathan Curtiss, the executive sponsor of the OBST project, that an employee had made comments about it at the virtual coffee morning. The Tribunal noted that she simply said that "an employee" had made comments.

97. Mr Rooney told the Tribunal, and the Tribunal accepted, that he saw Jonathan Curtiss and Rebecca Braidwood in the office every day and he never heard them speaking about the Claimant raising these concerns with Andrew Bailey.

98. The Respondent had agreements with 3 suppliers of technology personnel. The Claimant found that the suppliers were not providing details of required contractors, meaning that programmes were under resourced and therefore behind schedule. On 27 August 2020 the Claimant emailed Alex McLachlan and Richard Morris, saying, "Civica, or the other one, once sent a CV I think on the first ask many months ago, but subsequent times only NIIT sent CV's. The cost to the bank is enormous – lost time, programme put under pressure through missed deadlines, bank staff, p265. He suggested a different provider, which he believed was supplying to staff to another area, p265. Mr McLachlan offered to speak to the existing providers on the Claimant's behalf, p265. The Claimant said that he would try them again himself and did not take the matter further, p265.

99. On 15 September 2020 the Claimant emailed Mr Rooney again about the Claimant's concerns regarding IBM's performance on the OBST programme, saying, "IBM, collectively, are both ignorant and disinterested in knowing what needs to happen," p272. He repeated his concerns to Mr Rooney by email on 15 October 2020, saying, "Late resourcing - Insufficient resourcing - Inadequate resourcing - No detailed plan (still not completed) - No driving of the plan or anything (them driving the programme was the whole idea)" p290. Again, on 18 November 2020, he complained to Mr Rooney, saying, ""Clearly outcome from the inexperienced resources."p303.

100. Mr Rooney commended the Claimant for his oversight of the IBM contract in the Claimant's 2020 Performance Review, saying that the Claimant, "… has been particularly strong in holding IBM to account and ensuring their deliverables are acceptable." p1339.

101. The Claimant continued to raise concerns about the OBST programme in 2021. On 9 February 2021 he emailed Mr Rooney saying, "fyi… Despite the long protracted discussions with DAP at the time, where they recommended Broadcom, I've now been told that they've changed tack and Curiosity' VIP tool is the new strategic tool. Prob is, if we switch tack we've blown a ton of money… Broadcom TDM takes us down a dead end," p330.

102. On 23 July 2021 he emailed Mr Rooney again saying, "Paul, not too many options there… we call them out for not delivering on their contractual obligation... because they haven't delivered, and we take over delivery along with our contractual obligation to execute cutover." P381.

103. Mr Rooney told the Tribunal, and the Tribunal accepted, that holding IBM to account was part of the Claimant's role as a Project Manager; the Claimant was expected to raise issues with delivery to the Respondent and the Respondent would then negotiate with IBM to resolve them. He told the Tribunal, which the Tribunal again accepted, that there were so many issues with IBM's delivery that the Respondent eventually appointed a full time vendor management role in relation to the IBM contract.

104. Mr Rooney told the Tribunal that he never treated the Claimant detrimentally because he was raising concerns about IBM, as that was part of the Claimant's role. Mr Rooney gave evidence that, "I was getting concerns from other people and across technology. We met with Jonathan Curtiss and the Head of Technology we addressed the concerns and went live on the system which is still working today. Most of the people who raised concerns are still with the bank. I have coffee with them I was interested in the issues Lee Millward raised. I want to know the issues and to move forward."

105. Mr Rooney agreed that the OBST programme exceeded the budget which had originally been projected for it, but said that the notional overspend was recovered in savings from other areas of Jonathan Curtiss' budget. The Tribunal accepted his evidence on the OBST budget – he was a senior manager and had knowledge of these matters, which the Claimant did not have.

Working From Abroad

106. After the Claimant started work at the Bank, he discussed working at home in his house in Portugal at long weekends with Mr Rooney. Mr Rooney allowed the Claimant to work some days from home, in Portugal. The Claimant continued to work at least 4 days a week at the Respondent's Threadneedle Street offices. Mr Rooney and the Claimant's agreement about the Claimant working from home in Portugal was informal. It was not recorded in writing. The Claimant did not make a flexible working request.

107. After the Covid19 lockdown was introduced, the Claimant remained in Portugal and worked there from March 2020. There was no written agreement that the Claimant could work permanently from Portugal.

108. The Respondent's central management became aware that a number of employees had been working abroad, on an ad-hoc basis, during the pandemic. The Respondent considered that this presented a number of legal and practical risks to it. Before the pandemic, working from abroad was not a common practice at the Bank and there was no specific policy in respect of it.

109. The Respondent appointed a working group to draw up a formal 'Working from Abroad' policy, to set clearer boundaries and to manage the potential tax, immigration and security issues such arrangements presented.

110. A cover note from the working group was submitted to the Bank's Executive People Committee on 22 July 2020, p260. It set out the working group's proposals regarding working from abroad as follows, "Due to the complexity and risks, we do not propose permitting colleagues to work internationally apart from formal international secondments. In the early stages of Covid, some colleagues chose to base themselves abroad temporarily (in the main these were informal local arrangements). We will need these colleagues to agree a 'back to the UK' plan with their managers." P261. On 22 July 2020 the Executive People Committee agreed "… that permanent homeworking from overseas would not be permitted given it has potentially sizeable adverse tax/social security implications for the Bank and for individuals." P268.

111. A further cover note for the Executive People Committee on 7 September 2020 recorded that employees who were currently abroad had been asked to return, "We wrote to SMT on 21 August to explain the various risks in addition to tax/social security, which include right to work (visa) issues and employment law obligations for both the Bank and employees. We have asked all colleagues currently working abroad to make plans to return and share these with management by 4 September. We also set out that we expect the majority of these colleagues to return by 20 September, and sooner if they had been working from abroad for close to, or over, 183 days." P268 – 9.

112. That cover note contemplated a slightly more flexible approach to working from abroad in the future, giving 2 alternative proposals for consideration: Not permitting working from abroad at all, or; in exceptional cases, allowing individuals to work abroad for short periods up to a maximum of 4 weeks in total, where there was a significant wellbeing requirement or caring responsibility. P269 – 270.

113. On 12 October 2020, another cover note for the Executive People Committee reported that the working group now proposed that there would not be an absolute ban on working from abroad, but that employees would be permitted to do so, "in highly limited circumstances and subject to appropriate controls." P287. At that time, the proposal was to permit only short blocks of time for a maximum of 4 weeks in any 12 month rolling period, p287. The cover note reiterated that, "Employment and tax laws can vary hugely from jurisdiction to jurisdiction. Permitting colleagues to work from abroad (even temporarily) is therefore not

without risk to the Bank or the individual concerned. The key legal risks arise from tax, social security, visa, immigration and employment law requirements."

114. The development of the policy was discussed in the Respondent's internal Bank News. The Bank held meetings about the policy, at which employees were invited to attend and share their views.

115. The proposed limit to the number of days spent working from abroad evolved further by 24 November 2020, to 20 days per year plus a further 20 days for the financial year 2021 only, p309. An alternative, of 40 days per year, was mooted, and was described as being the most permissive approach which the working group had observed in other similar institutions, p311.

116. The Bank's Working From Abroad ("WFA") policy was eventually introduced from 1 July 2021, p1073. Under it, employees were allowed to work abroad for up to 40 working days in a rolling 12 month period, p1074. They were required to give one month's notice of travel.

117. However, employees were also required not to spend more than 90 days abroad per year, whether working or not, p1075.

118. Employees were also required not to spend more than 183 days abroad in any 12 month period for tax purposes.

119. The 90 day limit on days spent abroad, including non-working and leave periods, was new. It was suggested by the Bank's vetting department. Bank employees were required to have a sufficient UK "footprint" in order to be satisfactorily vetted.

120. The origins and justification for the choice of a 90 day limit were not clear to the Tribunal. There was a suggestion that it originated in Cabinet Office guidance, but there was no evidence of this. The Claimant told the Tribunal, and the Tribunal accepted, that, when enquiries were made of it, the Cabinet Office denied that it recommended such a limit on time spent abroad.

121. The 90 day limit was completely removed from the 2022 version of the Working From Abroad Policy, p1253, in force from 1 July 2022. Georgina Fisher told the Tribunal that this was because numerous queries had been raised during the first year of the WFA Policy from employees who had taken periods of long leave abroad. There were concerns that employees had already exhausted the 90 day threshold. The vetting team was giving permission for further time abroad in these circumstances, and the 90 day threshold was creating an administrative burden. As a result, it was agreed that the 90 day limit could be removed from the WFA Policy, without affecting the vetting team's ability to carry out appropriate checks.

122. The Working from Abroad policy was stated to be applicable to all Respondent employees. "This policy applies to all employees including those on fixed term contracts. It does not apply to contractors, who are not permitted to work from abroad." P1073.

123. Its rationale was stated to be, "Due to a combination of tax, social security, employment law, visa and security considerations, which may materially affect the Bank, the Bank does not allow permanent or prolonged WFA." P1073.

124. It was not in dispute that, in September 2020, the Respondent was telling staff that they needed to return immediately from abroad, to work at its offices in London. Mr Rooney discussed this with the Claimant on about 17 September 2020 and advised him to look at Bank News. He sent the Claimant a link to Bank News and gave him the details of another employee who lived in Portugal and was in a similar situation. Mr Rooney and the Claimant also discussed, by instant messenger, the Claimant speaking to Mark Pawson in Employee Relations. In one exchange, Mr Rooney said, "…but start thinking what u would do if asked to return to uk – options" and the Claimant replied, "yep. I have already". P275.

125. Mr Pawson spoke to the Claimant on about 22 September 2020 and told him that he would be expected to return to the UK imminently.

126. The Claimant felt very stressed by this instruction and collapsed at home on 22 September 2020. He was kept overnight in hospital for tests. His wife, Dana Levy, informed Mr Rooney that day that the Claimant had been taken to hospital in an ambulance, p278.

127. Mr Rooney replied, sending his, and the Claimant's colleagues', best wishes, and asking Ms Levy to let him know how the Claimant was next day, p278.

128. The following day, Ms Levy told Mr Rooney that the Claimant was still undergoing tests, but that, happily, he had not had a heart attack. Mr Rooney replied, expressing concern for the Claimant and saying, "I've cancelled his appointments / meetings and we will wait for an update from you or Peter." P279.

129. On 28 September 2020 the Claimant emailed Mr Rooney, asking to take annual leave for the week while medical tests were ongoing, p281. Mr Rooney replied, saying he was happy for the Claimant to take leave, "… as long as you are ok". He asked whether the Claimant intended to be back to work on Monday 5 October, P281. The Claimant replied further, saying that he would return earlier if a medical test, due on Wednesday that week, went well. He said that he would be treated in Portugal, or on the NHS in the UK, p281.

130. On 8 October 2020 Mr Pawson emailed Mr Rooney saying that the Claimant had already worked over 183 days in Portugal that year and asking for further information. Mr Rooney replied, saying that the Claimant had collapsed at home with a suspected stroke and was still undergoing tests. He said, 'So I have not pushed on the "get back to UK immediately" whilst tests ongoing.' p 847.

131. Mr Rooney did not refer the Claimant to Occupational Health. He did not record the Claimant's leave as sick leave, p279, 281. Mr Rooney told the Tribunal, and the Tribunal accepted, that he did not think that an Occupational Health referral was necessary, because the Claimant had not been off sick for an extended period, nor did he have a pattern of sickness absence, and the Claimant seemed keen to return to work and was content with the treatment he was receiving from his GP and hospital.

132. Mr Rooney told the Tribunal, and the Tribunal accepted, that he had told the Claimant to take as much time as he needed to recover. He told the Tribunal that the Claimant, "… said he was fine but wanted to take some time to recover and

said that he was not as concerned as [the Claimant's wife was] and that his brother had a similar condition… He wanted to manage the situation himself."

133. Mr Rooney agreed, in evidence, that, when he discussed the forthcoming Working from Abroad Policy with the Claimant in October 2020, he told him that he needed to start thinking about his options. In evidence, he told the Tribunal, and the Tribunal accepted, "The last thing I wanted to happen was for the Claimant to leave the Bank. He was doing an important job on a big contract and it would have been a nightmare if he left. He was doing a key job. My appraisal of him reflected this. There is no way I gave him any impression that I wanted to get rid of him."

Contract Extension

134. On 17 December 2020, the Claimant's fixed-term contract was further extended to 6 August 2021, p1325. His salary was not reviewed at this point. The Bank's practice was to undertake annual salary reviews, rather than salary reviews on extension of contracts.

Annual Salary Review 2021

135. The Claimant's salary was increased to £60,972 on 1 March 2021, following the Bank's Annual Salary Review.

136. The Bank's 2021 Salary Guidance, p1326, provided a matrix for performance awards, p1330. This provided that employees whose pay was less than 85% of the reference point should be awarded a 1.75% pay rise. The Claimant was given a 1.75% pay rise.

137. Comparator employee 50 was, both, promoted to Grade E in 2021 and awarded a 2% pay rise, which was above the maximum pay rise recommended in the Guidance. Employee 50 was aged 28. Employee 50 also received a 4.5% pay rise in 2022, taking his pay above the Claimant's at that point, and leaving the Claimant as the lowest paid Project Manager at grade E in the Bank.

138. Comparator employee 5 was given a 6% pay rise in 2021. That employee worked directly for Rebecca Braidwood that year. His line manager had left and Ms Braidwood had asked him to act up in role of senior programme manager. There was a budget allowed exceptional performance for that that year. He was scale E doing scale D role and was later promoted to scale D. This was outside guidance which needed agreement from CIO. Employee was aged 45 in 2019, 3 years younger than the Claimant.

139. Mr Rooney did not put the Claimant forward for an exceptional performance award that year and did not make a case for him in the moderation session with senior managers.

Claimant's 2021 Contract Extension - Changes

140. Between February and April 2021 the Claimant and Mr Rooney were discussing the Claimant's 2021 contract extension. The Claimant asked Mr Rooney to change the contract expiry date, correcting the error Mr Rooney had made in February

2020, so that the Claimant would have been employed for 2 years on the expiry of his next fixed term, p328.

141. On 5 February 2021 Mr Rooney told the Claimant that he was unable to access the Respondent's HR system that day, but would try again the following Monday, p328.

142. The Claimant chased Mr Rooney about the extension taking him over the 2 year period, on 9 April 2021. The same day, Mr Rooney reassured the Claimant, telling him had had asked to make the Claimant permanent, so that the Claimant would be employed for 2 years anyway, p347.

143. On 22 April 2021 Mr Rooney instructed the HR system to extend the Claimant's contract, due to expire on 6 August 2021, to 15 February 2022, taking the Claimant's employment beyond 2 years, p354. He told the Claimant that he had done this, p349. Mr Rooney's instruction triggered an alert on the HR system that the contract would be extended beyond 2 years, so that Mark Pawson became aware of Mr Rooney's proposal.

144. On 5 May 2021 Mr Pawson asked to speak to Mr Rooney about the Claimant, p353. Having done so, on 14 May 2021, Mr Rooney asked the Payroll Manager to change the Claimant's contract end date back to August 2021. He said, The plan is to move him to permanent in next 3 months, provided he returns to UK." P356.

145. The Claimant returned to the UK to work on 1 July 2021, when the Working From Abroad Policy came into effect.

146. The Respondent had divided their employees who had worked abroad before the covid pandemic into two groups. The first group comprised employees whose place of work was the Bank's offices in the UK, but were working from abroad because of Covid, and, in some cases had previous informal arrangements to work from home abroad from time to time. There were around 60 employees in that group. The second group comprised employees who had agreed with their manager, prior to the Covid-19 pandemic, that their primary place of work would be outside the UK. This second group comprised 8 employees who had permission to primarily work from abroad and only to return to the UK on occasion.

147. The new WFA Policy applied to both groups of employees. However, the first group was required to return to the UK within 40 days of the implementation of the WFA Policy on 1 July 2021. The second group was given 12 months to return to the UK on a permanent basis.

148. Ms Fisher told the Tribunal, and the Tribunal accepted, that the second group was afforded this additional time in recognition of the fact that their managers had authorised them to work from abroad on a permanent basis, and therefore were likely to take more time to relocate, including organising housing and schools for their families.

149. The Claimant was considered to be in the first group, because there had never been an agreement that his primary place of work would be abroad.

150. On 25 June 2021 Steve Blackman, at the Respondent's Payroll Department, asked Mr Rooney for an update on the Claimant's contract extension and whether the Claimant was being made permanent. Mr Rooney replied, saying that this was the intention. On 8 July 2021 Mr Rooney gave the instruction to move the Claimant to permanent on the HR system, p1347.

Cyber Security Role

151. In July 2021 the Claimant applied for a new, permanent, Cyber Delivery Lead role in the Respondent's Cyber Security team. It was a Band E role.

152. The Claimant told the Tribunal that the advertisement for the role mentioned £72,000 as a salary. The Tribunal found that the salary range for the role was up to £72,000, consistent with the Scale for a grade E employee.

153. On 20 July 2021, Sarah Burls, his new manager, emailed him, offering him the role, p1322. The Claimant replied, accepting. On 21 July he also mentioned that he was on a fixed term contract expiring on 6 August 2021 and that he would need a new contract.

154. Later on 21 July 2021 the Claimant emailed Ms Burls, saying, "Just spoken to Paul and he has spoken to HR – it was on their to do list and they're taking care of it i.e. making me permanent. Fyi…There is a legacy issue around my salary though – I was uplifted to Band E last year, but policy said my salary couldn't be uplifted etc , so I'm way below the advertised salary range and Band E in general. That's an issue with HR of course, and not your problem, which I will discuss with them. One thing that I guess you guys would need to state at some point is the salary you would be offer me based on my candidacy." P1320.

155. The Tribunal found that the Respondent had decided to make the Claimant a permanent employee, quite apart from him being offered the Cyber Delivery role, – and the Claimant knew this by 21 July 2022.

156. Ms Burls replied again, saying she had also contacted HR. She said she would check whether the Claimant's salary would be different when moving from FTC to permanent, p1320.

157. On 28 July 2021, Steve Blackman sent the Claimant a permanent contract of employment, p383, at scale E, on his existing salary of £60,972.

158. The contract stated that it would take effect from 7 August 2021, p384, and that the Claimant's place of work would be Threadneedle Street, p386. The Claimant agreed, in evidence, that he accepted the terms of the contract, that he was aware that the Working from Abroad policy had been implemented on 1 July 2021 and that, in accepting the terms of the contract, he was agreeing to a permanent job in London.

159. The Claimant transferred to his new Cyber Security role on 13 September 2021.

160. His Cyber Security role was at the same salary scale 'E' as the Claimant's previous role and the Claimant remained on the same salary. There was no review of his salary on his change of role.

161. Ms Braidwood told the Tribunal, “It is for the hiring manager to put an exceptions case for you for the department in which you will be; it is them doing that in the onward position. I have no remit on the relationship with the hiring manager into that area of the organisation.”

162. The Respondent’s Pay Policy does not provide for pay increases on “sideways” moves, from one role at a particular Scale, to another role at the same Scale.

Grievance

163. On 4 October 2021 the Claimant presented a grievance to Pauline Szewczuk, Employee Relations Adviser for Technology, p408 – 412. In it, he complained that, “ … my then manager frequently acknowledged that I was brought in at “the wrong level” and my salary is well below where it should be, and this needs to be corrected. He made endeavours to achieve this but was told the Bank has a policy which restricts salary increases allowed for ‘promotions’ or corrections. My salary is at the bottom of Scale E and apparently “significantly lower” than other people doing a similar role. This was before I achieved my new role of Cyber Security Delivery Lead, where my salary is significantly below the publicly advertised salary for this role.”

164. He complained of age discrimination, “My grievance pertains to the fact I came in under a returners programme aimed at older people trying to get back into the job market – something that is very difficult based purely on age perception. While I am grateful for the employment, and the opportunity to prove myself, it appears I am to be forever discriminated against and disadvantaged because of it by never being paid my true value to the organisation, neither at the rate my colleagues are being remunerated on for doing similar roles.”

165. The Claimant said that the Bank’s pay policy was apparently being strictly applied to him. However, he gave examples of where he alleged that the Respondent had used “judgement when applying policies” or had “tailored them to their needs”.

166. He said, “I have witnessed how the Bank spends money with scant regard for value for money and I can list countless examples from my own experiences. - I have even raised the Bank’s poor commercial practices we have with 3rd parties, which result in substantial losses / overspend, directly to the Governor during a Virtual Coffee with Staff session. He told his assistant on the call that this area should be revisited and was happy for me to be part of that review (at my request) given my observations on OBST. …”.

167. The Claimant said that his point, in giving these examples of policy breaches, was that, “There are many precedents for the bending of policies, whether justifiable or not to serve the purpose of management at will.” P410. He said that, for more than a year, he had been ‘promised’ being made permanent and was always being told it was in progress, but he had not been, p410. He said that he had not brought a grievance earlier as a result, p410 and that he felt that his “situation has been taken advantage of i.e. my age, to get an experienced contractor on the cheap.” P411.

168. The Claimant also complained about the application of the Respondent's Working from Abroad policy to him, saying that it was unfair as he lived with his family in Portugal. He said that he was seeking an alternative solution, and that "This would include signing an NDA should you choose to adjust policy as a one-off in what I consider very legitimate ('grandfathered') circumstances." P411.

169. He also said that he believed he had been denied training via the Respondent's apprenticeship programme to study an MSc Data Science as he was a fixed term employee.

170. The Claimant did not say that he had been treated detrimentally because he had previously raised breaches of policy.

171. The Tribunal decided that the proper construction of the Claimant's grievance was that he was giving examples of breaches of policy, of which he was aware, to persuade the Respondent to apply its pay policy to him in such a way as would result in him being given a pay rise.

172. The Claimant's grievance was investigated by Antonia Brown, Head of UKDT Supervision. She held a grievance meeting with him on 20 October 2021, p 510.

173. During his meeting, the Claimant said that he would previously have been able to work from abroad for up to 90 days and it would not matter how many days, in total, he spent abroad. He noted that the Security Vetting Policy made no mention of the number of days spent abroad, p515. He said that the policy should only apply to working days abroad, p515. Ms Brown said that she understood that working from abroad was one element, but that the total number of days abroad was another factor, p516.

174. The Claimant was sent notes of his grievance interview and asked Pauline Szewczuk, from HR, whether he could send the notes to his personal email address for his records, p442. Ms Szewczuk replied, saying that the Claimant could not, ".. because of the security classifications." P442. The Claimant did not tell Ms Szewczuk that he needed the notes for the purposes of obtaining legal advice.

175. Ms Brown then interviewed Rebecca Braidwood and Paul Rooney. She also sought information from the Respondent's Reward Team and the Working from Abroad Policy team, including George Fisher.

176. Mr Rooney told Ms Brown that, as far as he was aware, the Claimant had joined on the Career Returners Scheme, p486. He told Ms Brown that, by Christmas 2019 the Claimant had discovered that other Project Managers were being paid more than he was, "so the question was really around whether he should be a Scale F."

177. Ms Brown asked Mr Rooney whether he agreed that he had "frequently acknowledged that the Claimant had come in at "the wrong level" that his salary was "well below" where it should be, and that it "needs to be corrected". Mr Rooney said that he had not "frequently acknowledged" this, but confirmed that the Claimant had raised being underpaid and Mr Rooney had agreed that his salary was low, p487.

178. Mr Rooney told Ms Brown that, when the Claimant raised his low salary with Mr Rooney, “He had told PB that he thought it was because his starting salary had been lower and it would take a while for him to catch up” p489.

179. Ms Braidwood told Ms Brown that, regarding the Claimant’s salary, “She thought it had gone wrong for him from the start in the way that he had joined”. Ms Braidwood told the grievance hearing that she thought the Claimant had joined on the Returners Programme, p536.

180. On 13 December 2021, Ms Brown wrote to the Claimant, not upholding his grievance, p546.

181. She agreed that the Claimant’s salary was low, at 72% of the reference point for Scale E. She noted that there had been an area of confusion, in that the Claimant had applied to be part of the Career Returners programme and had been interviewed for that programme, but that he had not been employed as part of that, but on a Standard Fixed term contract. She said that all his annual pay awards, and his salary on promotion, were in line with Bank policy.

182. Ms Brown did not address the Claimant’s complaint, in his grievance, that, “ … my then manager frequently acknowledged that I was brought in at “the wrong level” and my salary is well below where it should be, and this needs to be corrected.”

183. She told the Tribunal that she had not ascertained whether the Claimant’s role on appointment had a job description. She had assumed that there would have to have been a job specification for the Claimant’s role at the start of his employment. She had assumed that a vacant Project Manager job had existed in the system and the Claimant’s application had been portered across to it.

184. She told the Tribunal, in evidence, that she had not considered applying the exceptions process to the Claimant herself because she had not found there to have been any breach of policy regarding pay.

185. The Bank analyses its annual pay awards with reference to sex/gender and race/ethnicity. It does not analyse its pay awards with reference to other protected characteristics, including age.

186. Ms Brown told the Tribunal that she was aware that part of the Claimant’s grievance regarding the Working from Abroad Policy related to the 90 days total time abroad, “I was aware that the Claimant was concerned about the 90 days and the total time abroad.” She said that he seemed exercised about the 90 day rule coming out of nowhere.

187. In relation to working from abroad, in the grievance outcome letter, Ms Brown said that the Claimant’s contractual place of work was the Respondent’s offices on Threadneedle Street and that all employees were required to comply with the Working from Abroad Policy. She said that the Claimant’s previous working arrangement was ad hoc and did not constitute a contractual change to his place of work.

188. Of the 90 day rule, she said,

> "… pre-Covid 1) you would have been able to work from abroad for more than 90 days, and 2) the Security Vetting Policy 2018 made no mention of a 90 day limit. The 90 day limit has been set in relation to National Security Vetting (NSV). This was introduced by the Chief Security Officer to work in conjunction with HMG's NSV policy, balanced with the Bank's judgement and risk appetite. The 90 day limit reflects the risk to the Bank, the requirements of vetting and the types of risk we face.
>
> While we understand your situation, I have established that there isn't any flexibility or exceptions that can be made because of the underlying reasons for the Policy (as noted above) and the need to ensure fairness and equity for all staff.
>
> In the absence of being able to change the limits, I recommend that you seek to establish a working pattern with your new area that manages your desires around place of work while continuing to comply with the Bank's Policy on Working From Abroad."

189. The Tribunal noted that, from Ms Brown's wording, that she did not appear to understand that the 90 day limit applied to days spent abroad, whether working or not. In relation to the 90 days, she advised the Claimant to establish "a working pattern" which suited both his wishes around "place of work" in this regard. Her comments therefore addressed his arrangements for "work" when the 90 days rule applied to all time abroad, not just working abroad. Ms Brown did not tell the Claimant that the 90 day total time abroad limit was being reviewed, or might be removed. Nor did she say that vetting had been making exceptions to the 90 day limit for people who sought them.

190. In relation to training, Ms Brown said that, in general, employees on fixed term contracts were not supported to undertake apprenticeships because the courses ran over multiple years, but were linked to the Respondent as an ongoing employer. Ms Brown found nothing to support that the Claimant's request to undertake an apprenticeship was rejected for any other reason, or that he was treated differently to other fixed-term employees.

191. Ms Brown noted that the Claimant had cited a number of examples of where he had allegedly observed non-compliance with Respondent's policies and practices. She said that she had looked into the allegations he had made and understood that the majority were known to the Respondent and were being reviewed by the Respondent's Risk Directorate, apart from 2 (an allegation that roles were being filled by people who used to work with certain senior staff at previous companies, and that specific contractors are brought in by management despite being disruptive). She said that these were outside the scope of her investigation and advised the Claimant to use the Bank's "Speaking Up Policy".

192. The Claimant did not raise any matters through the "Speaking Up" policy.

193. Ms Brown said that she could not support the Claimant's argument that there were grounds for flexibility regarding his salary and Working from Abroad arrangements because of the other policy matters he had raised. She said that it would not be

acceptable to use non-compliance with policies in some areas as a justification for not complying with other policies.

194. She did not separately address the Claimant's successive fixed term contracts. When asked about this at the Tribunal, she said that she had been focussed on the salary issue and had seen the fixed term contracts in that context.

195. Ms Brown informed the Claimant of his right to appeal her decision.

196. The grievance outcome took 70 days. Ms Brown told the Tribunal that it took time to schedule a meeting with the Claimant, Ms Brown herself had a period of leave at the end of October 2021 and that it took some time to arrange a meeting with Ms Braidwood, because of her commitments as a senior manager.

197. The Claimant did not wish his grievance to be discussed with his new business area. Ms Brown's outcome letter noted that annual salary review recommendations were being made in coming weeks, and said that she would recommend the Claimant's salary be "closely reviewed in the upcoming ASR round", if he was content for this aspect of his grievance to be disclosed to his new area.

198. The Claimant did then agree to Ms Brown speaking to his Cyber Security manager about his annual pay rise in 2022. Ms Brown told the grievance appeal, however, that, "I had a conversation with SB [Sarah Burls] who isn't very involved but could maybe influence the ASR. Where I ended with her was that she would have a conversation with PB, and that was an action. I don't know if that happened or if anything was actioned in the ASR."

199. Ms Brown obtained data showing the pay of all grade E project managers within the Bank's technology directorate, p430 - 431. Of the 40 Project managers, only one other Project Manager, as well as the Claimant, was receiving an annual salary of less than £60,000 and only 2 other Project Managers were receiving a salary between £60,000 - £70,000. 26 were receiving an annual salary of £70,000 - £80,000. 11 Project Managers were receiving a salary of £80,000 or more.

Ms Brown and Ms Braidwood's Comments about the Claimant During the Grievance

200. During Mr Rooney's grievance interview, Ms Brown asked Mr Rooney what was his "reaction had been to the tone of the grievance." Mr Rooney responded that he had not been surprised - he felt that the Claimant did have a point and that his grievance was relatively factual, p491.

201. Ms Brown was asked about this question during her Tribunal evidence – she was asked whether she was prompting a negative comment about the Claimant from Mr Rooney. She told the Tribunal that she had wanted to get a sense of the relationship between the Claimant and Mr Rooney.

202. During her grievance interview, Ms Braidwood said that was not out of the ordinary for a Fixed Term Contract to run up to almost two years. She was sorry if that had not been communicated to the Claimant, but it was not unusual for her to keep a Fixed Term Contract employee until the last minute, p532. Ms Braidwood

repeated this evidence at the Tribunal - she said that it was common practice to employ employees on fixed term contracts in her Division at that time, to improve performance and allow flexibility in resourcing projects and headcount.

203. Of the Claimant being made a permanent employee, she said that she " would have been on the fence". She said that the Claimant's performance was "average" and that, on a bell curve of Scale Es, the Claimant would have been bang in the middle. She said that she thought that Mr Rooney had rose tinted glasses in respect of the Claimant and that she had had different expectations.

204. Rebecca Braidwood also told the grievance meeting that the Claimant had sent her a "very aggressive email stating that he was about to be let go so it did not matter to her if he applied for another role." Ms Braidwood recalled that the recruiting manager wanted the Claimant to move to his Cyber role immediately, but Ms Braidwood had told them that she needed to obtain cover for the Claimant's OBST role, p535.

205. The Tribunal was shown the allegedly aggressive email which the Claimant sent to Ms Braidwood, p382. She agreed that it was not, in fact, aggressive. She told the Tribunal that she had, instead, met the Claimant in a coffee shop and he had told her that she could not stop him from moving to the Cyber role. She said that he was aggressive then.

206. In evidence, the Claimant denied ever having been aggressive or rude to Ms Braidwood.

207. Due to the passage of time, the Tribunal did not accept that Ms Braidwood's memory of the Claimant being aggressive during an encounter in a coffee shop, 2.5 years before the Tribunal hearing, was accurate.

Christmas 2021

208. On 8 December 2021 the Claimant wrote to HR, saying that he had been due to return to the UK after annual leave, to take possession of his UK house. He said that the tenants had, however, refused to leave (providing proof) and he could not now provide the 30 days' required notice of working from abroad in Portugal, even though he had a valid reason for doing so. He also complained that a requirement to be in the office at least one day a week had been suspended for Christmas, but that this would not benefit him because he was still subject to the 40 day total limit for working from abroad, p543.

209. Ms Fisher replied on 10 December, saying that the Bank would accept less than 30 days' notice of working from abroad, in the circumstances. Of the Claimant's complaint that the requirement to work from the office had been suspended, but that this did not benefit him in Portugal, she said, "The reason for limiting the amount of time spent abroad is to reduce the risk to the Bank of tax liability and other issues that may apply due to differing labour laws. The WFA policy was agreed by EXCO and we do expect all employees to adhere to it to reduce the risk to the Bank." P544.

210. On 16 December 2021 the Respondent announced a dispensation for contractors, who were not normally permitted to work from abroad at all under the Working

from Abroad Policy. The dispensation was to allow working from abroad until 10 January 2022 for Accenture contractors visiting family overseas at Christmas and whose return to the UK might be delayed. There were conditions: it applied only to Accenture staff working on the RTGS Programme; The return date was to be no later than 10 January 2022; Accenture was required to confirm that the relevant individuals were their direct employees and had the right to work in the relevant countries; Cyber-risk policies continued to apply, so there were jurisdictions from which people were not permitted to work, p558.

211. The Claimant worked in the UK until very shortly before Christmas 2021, which he found stressful and lonely.

After the Grievance – the Grievance Appeal

212. On 13 December 2021 the Claimant had emailed HR, p543, asking when his grievance would be responded to. He said,
"I'm concerned that the Bank is simply buying time whilst it tries to cover its position instead of actually dealing with my grievance i.e. since my grievance raised all my concerns I've noticed the following
-Token whistleblowing awareness email – no action taken though
- IR35 awareness email – no action taken though
- I now see the Bank hastily set up an "Age Network" in October 2021 on Bank Exchange
Yet I have seen no action or real discussion on the concerns I raised in my grievance."

213. The Claimant appealed against the outcome of his grievance, by letter dated 24 December 2021, p559.

214. In it, he said that the 90 day rule in the Working from Abroad policy was arbitrary, and that the Bank's 2018 security policy had made no mention of it, p560.

215. He said that it was widely known that he and his family lived abroad and commuted to the UK. He complained that a concession had been made for an RTGS programme worker to spend 2 weeks working from home at Christmas, but that Ms Fisher had denied him a dispensation to work at home for 2 weeks at Christmas.

216. Regarding his salary, he said he had joined the Respondent via the Career Returner's Scheme, which he said was aimed towards "older" people who could get into the market due to their age, and that the Respondent had taken advantage of that. He stated that contractors were being paid more than he was, and asked why he was not offered the same pay as contractors.

217. The Claimant said that the grievance process had been unfair because he had not been allowed to email the grievance outcome to his lawyer and that the process was delayed.

218. He said, in respect of his complaint that he was denied support for an apprenticeship, he said, "It also my understanding under law that FTC's are supposed to be treated as full time employees." P561.

219. With regard to Ms Brown's invitation to him to use the Speaking Up procedure, he said, "With respect to raising wrong doing, I feel I have met the legal threshold to inform my employer of wrong doing. You have done nothing about the items I have raised and based on your response it seems you do not plan to do anything; reminding people of policy is not correcting it." P562.

220. On 19 January 2022 Elizabeth Johnston from Employee Relations wrote to the Claimant, summarising his appeal. The Claimant replied, saying that her summary was inaccurate.

221. Jenny Khosla, Head of Legal – Financial Stability Division, heard the Claimant's grievance appeal. Ms Khosla met with the Claimant on 20 January 2022 to discuss his appeal, p571. She also interviewed Georgina Fisher on 25 January 2022, Ms Brown on 2 February 2022, Mr Pawson on 7 February 2022, Mr Rooney on 10 February 2022 and Ms Braidwood on 21 February 2022.

222. Ms Khosla did not interview Jonathan Curtiss. She told the Tribunal that she had had a discussion with Elizabeth Johnston about reporting lines and that her understanding was that Jonathan Curtiss had no direct involvement in whether the Claimant was made permanent or not. She said that, in her experience, a manager of his seniority would not be involved in decision making about the Claimant.

223. In his grievance appeal interview, the Claimant told her that the 90 day limit on total days abroad was "the real constraint". He explained that, if he spent every weekend at home, abroad, he would exceed the 90 day limit, p580.

224. In his grievance appeal meeting the Claimant also said, "I could demonstrate that I had ERP and I was then hired for my experience. There is only me and one other in the Bank with this experience. I was brought in and they took advantage of me, because I was old and desperate. Then the FTC issue, they dangled making me permanent when they (Rebecca (RB), Paul (PR) or Jonathan (JC)) had no intention of doing so. … Very early on maybe after 2/3 months, they said I had been brought in at the wrong scale and wrong pay but that they couldn't correct it… then I was promoted to a scale E, but they said they can't correct the salary because of the policy." P578.

225. The Claimant agreed that he was not brought in on the Returners programme He said, "… it's a whitewash… I interviewed for returners scheme, which is for old people who can't get a job. If you come in having been sponsored you can get a commercial job for a lot of money." … " I interviewed for the returners programme, but I was told here's a role for you on a lot less money." P582.

226. While the Claimant contended that, during this meeting, he complained about the operation of the Returners programme exploiting older people, in fact, the Tribunal found that he was complaining that he was <u>not</u> offered a Returners Programme sponsored role, but simply an alternative role with a low salary. He was not complaining about the operation of the Returners Programme itself.

227. The Claimant also discussed not having been permitted to send his grievance outcome letter outside the Bank in order to obtain legal advice, p577. Ms Khosla said, "To be clear, I am not sure who told you that you could not send it out. My

understanding is that you cannot send private/confidential information about the Bank to any personal email account. Contained within your grievance were issues outside of your own personal experience. Therefore it would not be appropriate to share this information outside of the Bank.

228. The Claimant questioned this and said that his understanding was that the grievance outcome would be legally privileged and only relevant to his legal case.

229. Ms Khosla responded, "As you know we have obligations under Our Code not to share such information. Therefore my understanding is that this was protecting you from breaching internal procedures. A redacted version could be a possibility so we can look into whether that's possible. I haven't seen the email, so it would be useful for you to share that with me."

230. Ms Khosla told the Tribunal that she was protecting the Claimant from breaches of the Bank's Code of Conduct because it is a criminal offence, in certain circumstances, to release information from the Bank. As a Head of Division, however, she could approve an employee taking specific hard copy documents out of the Bank. The Tribunal accepted her evidence.

231. On 16 February 2022 Ms Johnston wrote to the Claimant saying that, if he let her know which documents he wished to show to legal advisers, she would check whether that could be allowed, p636.

232. There was some delay in Ms Khosla being able to arrange an interview with Rebecca Braidwood, p648. By 26 February 2022 an interview with Ms Braidwood had still not been arranged.

233. On 16 February 2022 the Claimant sent Ms Johnston an email in which he made a Subject Access Request ("SAR") for documents relating to his grievance. He said that he would disclose his documents once there had been proper disclosure from both sides, p635.

234. The Claimant started a period of sickness absence on 18 February 2022. He was signed off work, with "Stress at work" from 23 February to 16 March 2022, p647. On 15 March 2022, he was signed off work for a further month with work related stress,p665.

235. In March 2022 the Claimant asked that all any communications regarding the grievance appeal be sent to his wife.

236. On 16 February 2022, Elizabeth Johnston emailed the Claimant asking whether he would like to pause the appeal process until he received a response to his SAR, or whether he would prefer Ms Khosla to conclude the appeal without additional information.

237. On 22 March 2022, the Claimant's wife, on his behalf, confirmed that he did not wish to wait for the SAR documents, p670.

238. Ms Khosla dismissed the Claimant's grievance appeal by letter of 19 April 2022. The letter was 11 pages long. Ms Khosla agreed with the conclusions Ms Brown had reached and did not agree with the Claimant's assertion that there had been

an insufficient or unfair grievance process. She said that all her additional enquiries and information supported the conclusions that Ms Brown had reached.

239. She said that, whilst it was known that the Claimant's wife lived in Portugal, there was no evidence to suggest that it had been agreed that the Claimant would work from Portugal on a regular, or prolonged basis, or that the terms of his employment envisaged him doing so. The Claimant had acknowledged, in his meeting, with Ms Khosla that, before the pandemic, he had worked in the Threadneedle Street office 4 -5 days a week. She said that it was reasonable for management to consider that, if the Claimant accepted a permanent role, it would be based in the UK and any working from abroad would have to comply with the Working from Abroad policy.

240. Ms Khosla did not address the Claimant's complaint about the 90 day limit on total days spent abroad. In evidence, Ms Khosla was asked what she understood about the 90 day limit and about what was happening at the Bank, at the time, to change it. She told the Tribunal that she did not understand that the 90 day total days abroad limit was an issue for the Claimant. She said she understood that other people were concerned about the 90 day rule.

241. The Tribunal observed that it did not appear that she had investigated the 90 day issue in the Claimant's appeal.

242. In her appeal outcome, Ms Khosla said that she did not agree that the Career Returner's scheme had any bearing on the Claimant's salary, given he was not recruited under the scheme. She said that the Career Returner's scheme was not aimed at older people, but was open to people of any age, who had been out of the workplace for some time. This could include individuals at an early stage of their career who had taken a break for any reason. She said that, after the Claimant was recruited, it became apparent that the Claimant's skills and experience justified a promotion to a higher scale and he was given a significant (13%) pay rise. She disagreed with the Claimant's position that the Respondent had taken advantage of him, due to his age, in paying him a reduced salary.

243. She said, "… whilst your salary is objectively low (73.2% against the reference point following the 2021 ASR), this is not as a result of misapplication of the Bank's Reward Policy and is not out of line with the experience of other colleagues." P683.

244. Ms Khosla did not address the Claimant's assertion, in his original grievance and in the appeal meeting, that he had been originally appointed at the wrong salary Scale.

245. The Claimant contended that Ms Khosla conducted the grievance appeal in an adversarial manner. He did not challenge Ms Khosla on this in evidence at the Tribunal, nor point out to her where she had been adversarial towards him. On the notes of the grievance appeal, the Tribunal found that Ms Khosla's questions of the Claimant sought information from him which was relevant to his grievance appeal.

246. Ms Khosla is a trained lawyer and is employed by the Bank as Head of its Legal, Financial Stability Division. She is not an employment lawyer, nor does she

conduct contentious litigation. She heard the Claimant's grievance appeal as Head of Division, not in her role as a lawyer.

247. Ms Khosla did not send the grievance appeal outcome to the Claimant's personal email address.

248. The Claimant's grievance appeal hearing notes were not sent to the Claimant until 11 February 2022, 3 weeks after his appeal hearing. The Claimant did not chase them in the meantime. The Tribunal did not find that his meeting notes were altered in any significant way in the meantime. There was no evidence that the Respondent had any practice of sending grievance notes within a particular period of time after grievances. Ms Khosla told the Tribunal that the 3 week period was caused by the note taker being new to the Bank and taking time to type up the notes and Ms Khosla herself taking time to review them. The Tribunal accepted her evidence.

249. Mses Brown and Khosla told the Tribunal that they were not aware of the time limits for bringing Employment Tribunal claims. The Tribunal accepted their evidence.

250. The total time from the start of the Claimant's grievance until the appeal outcome was 6.5 months. The Tribunal did not have evidence about how long it normally takes for the Respondent to conduct a grievance and grievance appeal process. The Respondent's grievance policy provides that it is intended to ensure that a grievance is dealt with "in a timely way" p1191. The policy provides that Human Resources will be in touch with the employee within 5 days of receiving a grievance and grievance appeal. It also provides , "You will be informed of the outcome of the appeal in writing as soon as reasonably practicable, p1197".

Salary Award 2022

251. The Respondent's ASR guidance for 2022, p2217, provided that employees whose salary was less than 80% of the reference point for their job should receive 0-4% salary rise. Those whose salary was 80-90% of the reference point were recommended to be given a 0-2.5% rise.

252. Eloise Hindes took over management of the Claimant's team in Cyber Security in about early 2022. There were 4 people in the team. Of these, 2 members, including the Claimant, received a 1.5% uplift and 2 received a 1% uplift, as their salaries were closer to the reference points.

253. Neither Eloise Hindes nor Sarah Burls considered that the Claimant should be given an exceptional pay increase. They were both aware that he had raised a grievance in respect of his salary. Eloise Hindes told the Tribunal that the ASR process had decided that the Claimant was not exceptional enough, or that there was not enough money, to pay the Claimant more.

Return from Sickness Absence

254. The Claimant started ACAS Early Conciliation on 10 May 2022.

255. On 23 May 2022 Eloise Hindes emailed the Claimant's wife, providing an update on various matters. She said that the 90 day limit on time abroad, working or otherwise, had been removed from the Working from Abroad Policy, p851.

256. On 8 June 2023 the Claimant instructed a barrister to draft a letter before action to the Bank, including a potential claim for constructive dismissal. The Claimant was cross-examined about this and it was put to him that he had decided to resign by that date. The Claimant denied that this was the case, he said that he was hoping that ACAS could resolve things and that his goal was still a career in Cyber Security at that point. The Tribunal accepted his evidence - he was clear that he was hoping that the ACAS EC process would resolve his grievances.

257. The Claimant remained off work, ill with stress. He was referred to Occupational Health. An Occupational Health Report was prepared on 9 June 2022, p1907. This advised that that Claimant was, "finding a combination of the workplace issues and being away from his family challenging to cope with", and that he was experiencing physical symptoms of anxiety. It reported that the Claimant had been seen in hospital and had been diagnosed with a condition where the heart suddenly beats faster than normal. The OH adviser stated that anxiety could trigger an episode of rapid heartbeat.

258. The OH report advised that the Claimant would be fit for a 6 week, gradual phased return to work, on the following pattern: Week 1 – Two days, three hours each; Week 2 – Three days, three hours each; Week 3 – Four days, four hours each; Week 4 – Five days, five hours each; Week 5 – Five days, six hours each; Week 6 – Resume normal working pattern.

259. The Claimant did not disclose the OH report to the Respondent.

260. On 12 June 2022 the Claimant's wife, Ms Levy, emailed the Claimant's manager, Eloise Hindes, p854, saying that OH had advised that the Claimant would work 3 hours the first week, 6 hours the second week, 9 hours the next, and so on. She asked whether the Claimant could work from home pro-rated, as he had 5 days working from abroad remaining for the July 2021 – June 2022 cycle, p854.

261. Ms Levy had misstated the hours specified in the OH report; the Claimant had, in fact, been due to work a total of 6 hours in the first week, 9 in the second week, 16 in the third week and 25 in the fourth week. The OH report had also specified that the hours be worked on a particular number of days each week.

262. Ms Hindes replied the next day, saying that she was comfortable with the Claimant working from home, but would check with Employee Relations, p853.

263. When Ms Hindes checked with Elizabeth Johnston in Employee Relations, Ms Johnston said that the Bank could not allow the Claimant to work from home during his phased return because the Bank needed to consider the total amount of time the Claimant had been abroad in the previous 12 months: if that exceeded 183 days, the Bank would be at risk due to tax and security issues.

264. She said that, if the Claimant's total amount of time did not exceed 183 days in the last 12 months, then she could reconsider, p1387.

265. On 15 June 2022 Ms Hindes emailed the Claimant, saying that, if the Claimant had been out of the UK for more than 183 days, he would not be able to work from abroad, regardless of the 40 day allowance, p861. The Claimant replied, querying the 183 day rule, p863, and asking whether the Bank was planning to prevent him taking his annual leave when he passed the 183 day mark. On 21 June 2022 Ms Hindes reiterated that the Claimant would only be able to work from abroad if he kept within the 183 days total time abroad.

266. However, on 23 June 2022, Ms Hindes obtained permission for the Claimant to work his 5 days from Portugal, despite him having reached the 183 day limit. She informed the Claimant that, once he had used the full 40 day allocation, this would prevent him from working any additional days abroad that year. She also said that this would not prevent the Claimant from taking holiday, p863.

267. The Claimant's wife also wrote to on 23 June, p860, complaining about the 183 day limit and saying it had been introduced after the Claimant had informed Ms Hindes about his grievance, discrimination and whistleblowing in their meeting on 14 June 2022.

268. Ms Johnston emailed the Claimant again on 24 June 2022, reiterating that he would be permitted to use his remaining 5 days working from abroad and that the 183 day limit would not prevent him from taking annual leave, p865.

269. ACAS issued an Early Conciliation Certificate on 20 June 2022.

270. On 28 June 2022 the Claimant received a call from a recruitment agency, attempting to sell contractors into the Bank of England. He told the Tribunal that he considered that he had been constructively dismissed and he told the agent that there were some organisational changes at the Bank and he was looking for work himself.

271. On 1 July 2022 the Claimant was invited to an interview for an HSBC contractor post as a delivery lead on security apps and log-in programme, in their Cyber Division. On 6 July 2022 the Claimant was offered a 6 month contractor role for HSBC. The role was available immediately.

272. He told the Tribunal that he had instructed his barrister to draft a constructive dismissal letter on 4 July 2022.

Training

273. The Claimant had met with Eloise Hindes on 14 June 2022 and she agreed to support and fund technical training for him in his role, p859.

274. Shortly afterwards, the Claimant was asked to undertake some duties instead of another employee, for which the Claimant considered he needed Agile training. He asked for Ms Hindes approval of the Agile training, p873.

275. Ms Hindes responded on 28 June 2022, saying that she was supportive of him doing relevant training, but needed notice to approve the training costs and to see if anyone else wanted to attend the course, for a group booking discount. She also told the Claimant she wanted to ensure the training did not conflict with

Occupational Health's recommendations on working hours during his phased return, p869.

276. The Claimant and Ms Hindes met again on 6 July 2022. She agreed to the Claimant attending 3 Agile training courses, but said this would be the only funded training which the Cyber Division could sponsor for him that year. She noted that the Claimant could still attend a NCSC Cyber Security Foundations course, because that would not involve any cost to the Bank. She said, "Let me know if you're keen to proceed with this and I can submit a request." P878.

277. The Respondent did not agree to condensing the Claimant's hours into his working from abroad days. The Respondent was never given the OH report setting out the hours which the Claimant needed to work during his phased return. On 15 July 2022 the Claimant told Ms Hindes that he had planned to work a 15 hour day, p877-878. Ms Hindes contacted HR, saying that she was concerned that the Claimant was condensing his phased hours into a single day. She observed that it seemed like an inappropriate way to handle his phased return and commented that he appeared to be doing so in order to minimise the days he was working from abroad, p877.

278. The Bank's 2022 Working from Abroad Policy, applicable from 1 July 2022, provided, "If you work part of any day, this will be counted towards your 40 day limit." P1254.

Resignation

279. The Claimant resigned from his employment on 18 July 2022, with immediate effect, p880. In his letter, he said that the Respondent had breached the implied term of trust and confidence, due to events over a period of time, most of which had been covered in his grievance.

280. He said, "These events include but are not limited to: the refusal to correct my pay situation resulting from age discrimination, the way the grievance and subsequent appeal were handled over a wholly excessive period of 6 months, the way in which my protected disclosures were ignored, the creation of my heart condition and the constant victimisation over a long period that resulted from my having made protected disclosures. This behaviour by the Bank has all caused my physical and mental health to deteriorate (including being booked off sick for 4 months) and have created an untenable working environment for me."

281. He said, "I had hoped that my Grievance would have been properly investigated and addressed my concerns, and that my return to work after ill-health would be sympathetically handled. Unfortunately, neither has proven to be the case and it is now clear to me that the Bank has no intention of attempting to maintain or restore the relationship of trust and confidence which has irretrievably broken down."

282. The Claimant said, in his letter, that ACAS had informed him on 6 July 2022 that the Bank had decided not to engage in further resolution.

283. In evidence, he denied that he had resigned because he had obtained another job.

284. The Claimant did not return to work in the UK from Portugal prior to his resignation. He had not been in the UK since going off work, sick, in February 2022.

Overall Salary and Comparator Data

285. The Claimant drew the Tribunal's attention to p466 of the Bundle, which showed that his salary deviation from his salary reference points had increased over time: On 16 February 2020, his salary was 74.5% of the £79,700; reference point for scale E roles; On 1 March 2020, it was 73% of the reference point of £79,700; on 1 March 2021, his salary was 72.1% of the refence point of £84,600.

286. The Claimant compared himself to Project Managers at Scale E . The Tribunal was shown comparator data for the 53 Scale E Project Managers, including the Claimant.

287. From the data, it was apparent that the Claimant was the lowest paid of the Scale E Project Managers as at 1 March 2022, receiving a salary of £61,887.

288. Employee 50, who was aged 29 at that date – when the Claimant was 51 – had been promoted from Scale F to Scale E in 2021, to the lowest point on the salary scale. Employee 50 had therefore received a lower salary than the Claimant in 2021. However, employee 50 had received a 2% pay rise in 2021 and a 4.5% pay rise in 2022, so that, from March 2022 Employee E received an annual salary of £63,314, taking him above the Claimant.

289. In 2022, the Claimant was not in the Project and Programme Division because he had moved to the Cyber Division. Ms Braidwood told the Tribunal that Employee 50 had been recruited on the graduate programme and had been employed for 7 years before being promoted to Grade E. She said that he received an increase which was higher even than the 4% maximum allowed in the 2022 ASR Guidance because he had made the Respondent aware that he intended to leave - so he was a "flight risk". Employee E did, in fact, leave before the 4.5% increase came into effect.

290. It was not in dispute that the Claimant never threatened to leave the Respondent unless he was paid more.

291. Of the Scale E Project Managers in the Project and Programmes Division who were paid more than the Claimant, around half were younger than the Claimant and half were older than the Claimant.

292. Other employees were hired at salary scales lower than Scale E and promoted to Scale E. Some of these were younger than the Claimant and some were older.

293. One employee, Employee 4, was given an increase in salary to £70,000 on promotion to Grade E, far beyond the minimum of Scale E as stipulated in the Reward Policy. Employee 4 was the same age as the Claimant. An Exceptions business case was presented for her being such an increase, which stated that she was a known flight-risk. Rebecca Braidwood countersigned the Exceptions business case.

294. Some employees received similar increases to the Claimant during Annual Salary Reviews. Some received less and some received more. There was no consistent pattern, in terms of age, to these awards.

295. A team of 3 - Employees 10, 21, and 33 – received a 7% pay rise in March 2020. Ms Braidwood's evidence was that they were in a team that had performed exceptional work following a two-year Brexit implementation programme. Employee 10 was younger than the Claimant, Employee 21 was 47 years old when the Claimant was 48, and Employee 33 was older than the Claimant.

296. One employee, Employee 5, received a 6% increase in the 2021 Annual Salary Review. Ms Braidwood's evidence was that this employee had acted up into a role, reporting to her, and had performed exceptionally well. Employee 5 was aged 45 when C was 48.

297. The Tribunal accepted Ms Braidwood's evidence regarding the facts of each of the individual pay rises.

Law

Protected Disclosures

298. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, because he has made such a protected disclosure.

299. "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."

300. "Qualifying disclosures" are defined by *s43B ERA 1996*,

301. "43B Disclosures qualifying for protection

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

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

302. The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations). Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, "You are not complying with health and safety requirements", will not constitute a valid protected disclosure, *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR 325 [24] – [25].

303. In order for a statement to be a qualifying disclosure for the purposes of s43B(1) ERA, it had to have sufficient factual content and specificity capable of tending to

show one of the matters listed in paragraphs (a) –(f) of that section*, Kilraine v LB Wandsworth* [2016] IRLR 422.

304. in *Simpson v Cantor Fitzgerald Europe*, both the EAT ([2020] ICR 252) and the CA ([2021] IRLR 238) held there is also no such rigid dichotomy between information and queries: EAT at [para 42] and CA at [para 53]. The key question is whether the statement carries information of sufficient factual content and specificity to satisfy the *Kilraine* threshold.

305. In *Kraus v Penna plc* [2004] IRLR 260, the EAT held [para 24] that where the word 'likely' is used, it means that the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation.

306. In *Fincham v HM Prison Service* [2002] (UKEAT/0925/01), the EAT held at [33] that, in a case reliant of a failure to comply with a legal obligation, there must be some disclosure 'which actually identifies, albeit not in strict legal language' the breach of legal obligation relied upon. In *Bolton School v Evans [*2006] IRLR 500, the EAT said that it is not fatal that the worker does not identify the breach of legal obligation but it would have been obvious to all what breach was being relied upon: see [41]. In *Twist*, however, the EAT considered the judgment in *Fincham* did not establish a generally applicable rule [para 91], relying on *Bolton School* to support that conclusion [paras 92-95]. Linden J did not consider *Bolton School* to provide an exception to the rule in *Fincham*, but rather that there was no such requirement [para 102].

307. A qualifying disclosure is a protected disclosure if it is made to the employee's employer, or other responsible person, *s43C ERA 1996.*

Automatically Unfair Dismissal

308. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*, "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

309. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee; Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, at [13]:

Detriment

310. Protection from being subjected to a detriment is afforded by s47B ERA 1996. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under *s48 ERA 1996.* On such a complaint, it is for the employer to show the ground upon which any act was done, *s48(2) ERA 1996.*

311. The term 'detriment has been explained by Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 34:“ .. [the] tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. …….. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment."

312. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

313. Simler J, in *Osipov v Timis* UKEAT/0058/17/DA agreed with counsel for the appellant that the “proper approach” to inference drawing and the burden of proof in section 47B ERA cases is as follows [115]:

> “(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
>
> (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v. Knight at* paragraph 20.
>
> However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.”

Constructive Dismissal

314. By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct. This form of dismissal is known as constructive dismissal.

315. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:
    - 315.1 The employer has committed a repudiatory breach of contract. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9;
    - 315.2 The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons* Ltd [1978] ICR 744;
    - 315.3 The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

316. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate

that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach. Lord Denning commented that the employee 'must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.'

317. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680, and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

318. The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

319. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

320. Where the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing *Wednesbury* unreasonableness/irrationality: *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4.

321. In that case, the Court of Appeal held that, in order to decide whether an employer's decision in a given case satisfies that rationality test, the court may need to know what the employer's reasons were and may also need to know more about the decision-making process, so as to assess whether all relevant matters, and no irrelevant matters, were taken into account. The legal burden of proof lies with the claimants throughout. If, however, the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case, if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality.

322. In *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 the EAT (Morison J presiding) accepted that there was an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

323. In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703 the Court of Appeal held that the employee must resign in response, at least in part, to the fundamental breach by the employer; per Keene LJ: "The proper approach, therefore, once a repudiation of the contract by the employer has been

established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.'

324. Where there is a breach, the employee may choose to give the employer the opportunity to remedy it. The employee will not generally be taken to have affirmed the contract if they delay resigning until the employer's response is known, *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443, [1981] ICR 823, *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13 (30 January 2015, unreported). An employee who uses an internal grievance procedure to challenge and resolve a fundamental breach of contract will not normally be considered to have thereby affirmed the contract, *Gordon v J & D Pierce (Contracts) Ltd* [2021] IRLR 266.

325. There is no fixed time within which the employee must resign to avoid being taken to have affirmed the contract. Delay alone does not amount to affirmation in law, although it is an important factor to be taken into account, *Chindove v William Morrison Supermarkets Ltd* UKEAT/0201/13 (26 June 2014, unreported). A reasonable period is allowed for the employee to make up their mind. The length of that period depends upon all the circumstances, including the employee's length of service, *G W Stephens & Son v Fish* [1989] ICR 324, EAT, the nature of the breach, and whether the employee has protested at the change.

326. Where the employee is faced with giving up his job and being unemployed or waiving the breach, he will not necessarily to taken to have lost the right to treat himself as discharged by the employer, merely by working at the job for a further period, *Chindove v William Morrison Supermarkets Ltd.*

327. If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so, whether the dismissal was in fact fair under *s98(4) ERA.* In considering *s98(4),* the ET applies a neutral burden of proof. It is not for the Employment Tribunal to substitute its own decision for that of the employer.

Age Discrimination

328. By *s13 Eq A 2010*, **"**(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

329. By *s5 EqA 2010*, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

330. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Victimisation

331. By *27 Eq A 2010,*

" (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—(a) bringing proceedings under this Act;(b) giving evidence or information in connection with proceedings under this A (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act."

332. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

333. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the *EqA 2010*.

Causation

334. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

335. If the Tribunal is satisfied that the protected act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Burden of Proof

336. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

337. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

338. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

339. The EAT restated in *London Borough Of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. “That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council* [1997] IRLR 229: 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Discussion and Decision

340. The Tribunal took into account all its findings and the law before coming to its decision.

341. For clarity, it has expressed its decisions separately under individual issues.

342. Regarding the Claimant’s age discrimination complaints, the Tribunal did not accept that the Respondent’s Returners Scheme was directed towards older workers.

343. As the Tribunal has set out in its findings of fact, there was no general pattern amongst the Claimant’s comparator Project Managers showing that younger Project Managers were paid more, or were given higher pay rises, than older Project Managers. There were individuals who, from time to time, were treated more favourably than the Claimant regarding salary and pay rises, but some of these were older than the Claimant, some were younger and some were the same age.

344. There was no other evidence showing that younger employees were, or would have been, treated more favourably than the Claimant, in respect of any of the alleged unfavourable acts.

345. The Claimant asked the Tribunal to draw inferences from the Bank’s failure to disclose documents, particularly relating to the Exceptions process, until very late in the Tribunal process. He also asked the Tribunal to draw inferences from the fact that the Bank changed the list of comparator Project Managers. However, the Exceptions Process documents, when disclosed, did not suggest any tendency on the part of the Bank to make exceptions for employees who were younger than 45, rather than older employees. Nor did the changes in the Project Manager data suggest age discrimination against those older than 45, or in favour of those younger than 45.

Alleged Protected Disclosures

346. The Tribunal decided, first, whether the Claimant had made protected disclosures.

347. The Claimant did not give evidence about alleged protected disclosure 4.1 (d). The Tribunal decided that it had not occurred.

"IBM Disclosures"

348. The Tribunal found that, on numerous occasions, the Claimant emailed Mr Rooney, reporting that IBM were not providing the service that he expected them to provide on the OBST contract.

349. The Tribunal found that some of these emails contained some information, and not simply allegations. Some of these emails reported some facts, as follows:

349.1 On 20 December 2019 the Claimant emailed Mr Rooney about a Statement of Work [SOW] saying, "I still think there's a problem on ownership of delivery, esp. based on what we've seen from IBM so far. Anything they are not contractually resp. will not be given the required professional care by them. … This doesn't state who owns it / resp. for it. Without IBM owning it we are back to where we were previously… the project plan is the fundamental part of success," p238. The Tribunal found that the email contained the following facts/information: "This doesn't state who owns it / resp for it"

349.2 On 27 February 2020 the Claimant forwarded to Mr Rooney an email he had sent to IBM, saying that the Bank did not consider that it was its responsibility to undertake certain work. He commented to Mr Rooney, "I'm calling IBM out on this again as still no change. Still no sight of a PM from IBM, no change in behaviour from Colin, Talor not a PM as we know, they're still planning & operating in a bubble.", p241. Facts/information contained in the email: 'Still no sight of a PM from IBM, no change in behaviour from Colin, Talor not a PM as we know'.

349.3 On 2 March 2020 the Claimant commented to Mr Rooney that it was not right that the Bank's employees were expected to do IBM's work for them when IBM was charging £1,000 per day for its staff, p241. Facts/information contained: the Bank's employees were expected to do IBM's work for them when IBM was charging £1,000 per day.

349.4 On 8 July 2020 the Claimant emailed Paul Rooney, with the subject, "FW:OBST Programme Plan, Change Log and Late Tasks 06.07, saying, p259, "They're getting over £12M now to deliver this and yet they made a dog's breakfast from the start and came up with an unachievable plan, whilst still not delivering, ... Anyway, if I'm to do this to the level they are requiring then I need to drop out of all the commercial stuff." Facts/information contained: "They're getting over £12M now to deliver this and … came up with an unachievable plan ... if I'm to do this to the level they are requiring then I need to drop out of all the commercial stuff".

349.5 On 15 September 2020 the Claimant emailed Mr Rooney saying, "IBM, collectively, are both ignorant and disinterested in knowing what needs to

happen," p272. The Tribunal found that this email contained allegations only.

349.6 By email on 15 October 2020, he said, "Late resourcing - Insufficient resourcing - Inadequate resourcing - No detailed plan (still not completed) - No driving of the plan or anything (them driving the programme was the whole idea)" p290. Facts/information: "No detailed plan (still not completed)."

349.7 On 18 November 2020, he complained to Mr Rooney, saying, ""Clearly outcome from the inexperienced resources."p303. The Tribunal found that this email contained allegations only.

349.8 On 9 February 2021 he emailed Paul Rooney saying, "fyi… Despite the long protracted discussions with DAP at the time, where they recommended Broadcom, I've now been told that they've changed tack and Curiosity' VIP tool is the new strategic tool. Prob is, if we switch tack we've blown a ton of money… Broadcom TDM takes us down a dead end," p330. Facts/ information: 'I've now been told that they've changed tack and Curiosity' VIP tool is the new strategic tool.'

349.9 On 23 July 2021 he emailed Mr Rooney again saying, "Paul, not too many options there… we call them out for not delivering on their contractual obligation... because they haven't delivered, and we take over delivery along with our contractual obligation to execute cutover." P381. The Tribunal found that this email contained allegations only.

350. The Claimant also raised concerns at a coffee morning with Andrew Bailey, the Governor of the Bank of England, on 23 July 2020. At the meeting the Claimant told the Governor that there were problems with the supplier delivering on the OBST programme and suggested that procurement processes needed to be reviewed, p 264.

351. The Tribunal however considered that the wording he used at the coffee morning was so vague and unspecific as to amount only to an allegation and not to contain information.

352. The above disclosures appeared to be alleged protected disclosures 4.1(a),(b), (c) (f), (h) and (i). In relation to these "IBM disclosures", the Claimant contended that, in his reasonable belief, he disclosed information which tended to show that the Respondent had failed to comply with a legal obligation.

353. He contended that the breach of the relevant legal obligation was "misuse of public funds".

354. The Tribunal accepted that there may be many legal obligations on public bodies, or individuals employed by public bodies, not to misuse public funds; for example fraudulently, or for their own personal benefit. Such obligations might arise under contract, or in an officer holder with fiduciary duties. They might arise under statute or be imposed by a Regulator.

355. However, the Claimant was unable to identify any specific legal obligation he had in his mind. He was unable to describe with any specificity in what circumstances the legal obligation arose, or on whom it rested, other than to say that the Bank was a public body and had a duty not to misuse public funds.

356. The Claimant's description of the legal obligation was so unspecific that the Tribunal was unable to identify what the legal obligation might have been. The Claimant was not alleging that anyone at the Bank, or the Bank itself, had breached a contractual obligation.

357. That being the case, the Tribunal found that the Claimant did not have a reasonable belief that the information he disclosed tended to show the breach of a legal obligation by the Bank. It found that his general belief that the information tended to show misuse of public funds amounted to a vague belief of wrongdoing, which did not satisfy the statutory test.

358. The Claimant may have raised legitimate concerns about IBM's performance, but they did not amount to protected disclosures.

McLachlan Disclosure - Providers of Contractors

359. The Tribunal found that on 27 August 2020, the Claimant emailed Alex McLachlan and Richard Morris, saying, "Civica, or the other one, once sent a CV I think on the first ask many months ago, but subsequent times only NIIT sent CV's. The cost to the bank is enormous – lost time, programme put under pressure through missed deadlines, bank staff, p265. This was alleged protected disclosure 4.1j. The Tribunal accepted that that email disclosed information, including "Civica, or the other one, once sent a CV I think on the first ask many months ago, but subsequent times only NIIT sent CV's".

360. However, the Claimant again contended that the breach of the relevant legal obligation was "misuse of public funds". Again, he did not give any further specifics of the legal obligation. Again, the Tribunal found that the Claimant did not reasonably believe that the information he disclosed tended to show that bank was in breach of any legal obligation.

Grievance Disclosures – Policy Breaches

361. The Claimant set out numerous alleged breaches of policy and procedure by the Bank in his grievance, relating to IBM and breaches of security protocols. These included alleged disclosures 4.1 (g), (e), (f), (a), (b).

362. However, the Tribunal decided that the proper construction of the Claimant's grievance was that he was giving examples of breaches of policy, of which he was aware, to persuade the Respondent to apply its Pay Policy to him in such a way as would result in him being given a pay rise.

363. The Tribunal therefore decided that the Claimant did not reasonably believe that the information he gave in his grievance about these breaches of policy was in the public interest, because he was disclosing these matters to persuade the bank to change his salary, even if this was outside policy, in his own personal interest. He did not have the public interest in mind.

Disclosure 4.1(l)

364. On 8 December 2021 the Claimant wrote to HR, saying that he could not provide the 30 days' required notice of working from abroad in Portugal, even though he had a valid reason for having to do so. He also complained that a requirement to be in the office at least one day a week had been suspended for Christmas, but that this would not benefit him because he was still subject to the 40 day total limit for working from abroad, p543.

365. The Tribunal accepted that he disclosed information in this email.

366. The Claimant contended that, in his reasonable belief, the information tended to show a breach of Article 8 European Convention on Human Rights, the right to respect for family life. The Tribunal did not consider that the Claimant had such a reasonable belief. He made no mention of a legal obligation or human right in his email. In addition, the Tribunal found that he did not have a reasonable belief that the information was disclosed in the public interest. He was addressing his own personal interests and, indeed, was complaining that others had been given a benefit, which he had not.

367. This was not a protected disclosure

Alleged Grievance Disclosures 4.1 (m)

368. On 13 December 2021 the Claimant had emailed HR, p543, asking when his grievance would be responded to. He said, "I'm concerned that the Bank is simply buying time whilst it tries to cover its position instead of actually dealing with my grievance i.e. since my grievance raised all my concerns I've noticed the following- Token whistleblowing awareness email – no action taken though - IR35 awareness email – no action taken though- I now see the Bank hastily set up an "Age Network" in October 2021 on Bank Exchange. Yet I have seen no action or real discussion on the concerns I raised in my grievance." The email contained information about communications from the Bank which the Claimant had noticed.

369. This email was sent in the context of the Claimant's grievance. The Tribunal found that the Claimant was still raising these matters to secure a favourable outcome to his own grievance. Accordingly, it decided that the Claimant did not have a reasonable belief that the information disclosed was in the public interest, rather than his own, personal interest.

370. In his grievance appeal letter on 24 December 2021, the Claimant said, "With respect to raising wrong doing, I feel I have met the legal threshold to inform my employer of wrong doing. You have done nothing about the items I have raised and based on your response it seems you do not plan to do anything; reminding people of policy is not correcting it." P562.

371. He did not use the Speaking Up procedure to ensure further action on the breaches of policy he had raised. Again, the Tribunal considered that this was because, in reality, he had raised these matters with the Respondent to persuade it to uphold his grievance and change his pay, not because he had the public interest in his mind.

Alleged Grievance Disclosures (n), (o)

372. In the Claimant's 24 December 2021 grievance appeal document, he said, "It also my understanding under law that FTC's are supposed to be treated as full time employees." P561.

373. While the Tribunal accepted that the Claimant had given facts and information in his original grievance about being denied funding for an apprenticeship and it accepted that he was alleging that the Respondent was in breach of a legal obligation to treat fixed term employees as permanent employees, the Tribunal again found that he did this with the intention of securing a favourable outcome for his personal grievance. He did not have any public interest in mind.

374. During the Claimant's grievance appeal, the Claimant agreed that he was not employed on the Returners programme. He said, "… it's a whitewash… I interviewed for returners scheme, which is for old people who can't get a job. If you come in having been sponsored you can get a commercial job for a lot of money." … " I interviewed for the returners programme, but I was told here's a role for you on a lot less money." P582.

375. The Claimant contended that, during this meeting, he complained about the operation of the Returners programme exploiting older people. In fact, the Tribunal found that he was complaining that he was not offered a Returners Programme sponsored role, but simply an alternative role with a low salary. He was not complaining about the operation of the Returners Programme itself.

376. The Claimant contended that he was disclosing information about the Respondent abusing the Returners programme, a government sponsored programme, by taking advantage of older candidates. He said that, in doing so, he believed the information showed a breach of a legal obligation in misuse of public funds.

377. The Tribunal found that the Claimant was not disclosing any information about the operation of the Returners programme at all. If anything, he was complaining that he had not been given the benefit of the Returners programme. He did not have any reasonable belief that the information tended to show a breach of any legal obligation in the operation of the Returners programme.

378. Even if the Tribunal was wrong in that, the Claimant again was unable to identify any legal obligation which might have been breached. The Tribunal found that the Claimant did not have a reasonable belief that the information tended to show the breach of a legal obligation.

The Respondent's Reaction to the Claimant's Concerns about IBM

379. In any event, even if the Tribunal was wrong and the Claimant had made protected disclosures in relation to the Bank's relationship with IBM, the Tribunal was satisfied that Mr Rooney considered that the Claimant was doing exactly what he was expected to do, in his role as Project Manager, by raising concerns about IBM and the Bank's OBST programme. It noted that Mr Rooney commended the Claimant for his oversight of the IBM contract in the Claimant's 2020 Performance

Review, saying that the Claimant, "… has been particularly strong in holding IBM to account and ensuring their deliverables are acceptable." p1339.

380. The Tribunal also found that issues with IBM and the OBST programme were raised by numerous people and were well known, as illustrated by the Lee Millward email, p242. The issues were so well known that the Bank appointed a full time vendor management role in relation to the IBM contract.

381. The Tribunal accepted Mr Rooney's evidence that he never treated the Claimant detrimentally because he was raising concerns about IBM, as that was part of the Claimant's job. There was absolutely no evidence that Mr Rooney held any negative view of the Claimant in relation to the alleged IBM disclosures.

382. The Tribunal also accepted Mr Rooney's evidence that he was in an office with Rebecca Braidwood and Jonathan Curtiss daily and they never mentioned the Claimant having raised issues with IBM and OBST at the Governor's breakfast.

Alleged Victimisation - Protected Act in 2019

383. The Claimant agreed that, when he raised concerns in late 2019 with Mr Rooney, about his low pay as a Project Manager, he had not expressly referred to his age. He made reference to the Returners Programme. As the Tribunal as found, the Returners Programme is open to individuals who have had a career break. This would include significantly younger people than the Claimant, for example parents who have taken a break to care for young children.

384. The Tribunal accepted Mr Rooney's evidence that the Claimant never said to him that he was being treated unfavourably because of his age and that Mr Rooney never understood or deduced, from these conversations in late 2019, that the Claimant was complaining about age discrimination.

385. The Tribunal found that the Claimant did not do a protected act in late 2019. He did not allege that he had been discriminated against because of age. Mr Rooney did not believe that the Claimant had done so, or might do so.

386. There was no protected act before the Claimant's grievance on 4 October 2021. The Claimant's allegations of victimisation before that date cannot succeed.

387. **The Tribunal now addresses the individual factual allegations, on which the Claimant relied as age discrimination, victimisation and protected disclosure detriment, as well as being, either individual breaches of fundamental term of trust and confidence, or part of a breach of the term of trust and confidence**

a. The setting of the claimant's starting salary and terms from September 2019.

388. The Claimant was offered and accepted a contract for a grade F Project manager role which started in September 2019, p200.

389. The Respondent did not offer the Claimant any benefits or features of the Returners Programme. The Claimant was not told he was not on the Returners

Programme. However, the Tribunal found that there was no implied term that he was on the Returners Programme when he accepted a written contract which did not include any benefits of the Returners Programme.

390. The Tribunal found that there was reasonable and proper cause for not offering the Claimant a Returners Programme contract because, on the basis of his CV and work history, the Claimant had not, in fact, had a career break for 2 years. Within the past 2 years, he had tried different employment in a different type of work – pursuing his own startup company - but he was nevertheless still in work when he did so.

391. There was no evidence that a younger person in the Claimant's position would have been offered a Returners Programme contract. The failure to do so was not a breach of the implied term of trust and confidence, nor age discrimination.

392. However, in order to comply with the "Key Principle" of the Bank's Pay Policy, "The Bank evaluates all roles thoroughly before they are advertised and assigns a salary band that fairly rewards the role and its responsibilities in line with equal pay obligations" – Gemma Kirby told the Tribunal that, then, either the Bank's Reward Team would evaluate a role centrally, or the local manager or team would identify the role and scale and where it fitted within the team. Of this latter process, there would be an, "… exchange between the local area and the recruitment team … and the business area should say why it should be a certain level, if they had made that assessment themselves."

393. Although the Claimant was offered and accepted an F grade Project Manager Role, there was no evidence that the F grade Project Manager role in the OBST programme, to which the Claimant had been appointed, had been centrally evaluated by the Reward Team. There were no documents to show this. The grievance officer and grievance appeal officers, Mses Brown and Khosla, both told the Tribunal that there must have already been a job description and evaluation of the Claimant's role, for him to have been employed. However, those documents were not produced to the Tribunal.

394. It was not explained to the Tribunal why the Claimant was offered a role at grade F on the OBST programme, when he was not, in fact, being appointed through the Returners Programme on a Grade F Returners contract. The Claimant's interview notes showed that the interviewers were considering the Claimant's suitability for both grade E and grade F roles.

395. Neither Ms Brown nor Ms Khosla investigated how the Claimant came to be offered an F grade role, despite Ms Brown identifying that there was confusion about the circumstances of his appointment.

396. The Respondent had had ample opportunity to identify and produce documents proving that the Claimant's role had been centrally evaluated. In the absence of evidence that the Claimant's F grade Project Manager role had been centrally evaluated, the Tribunal found that that it had not been.

397. Mr Rooney very honestly told the Tribunal that he did not think about, or specify, the Claimant's grade, but just accepted him because he needed Project Managers.

398. Accordingly, the Tribunal found that there was no local evaluation of the Claimant's OBST Project Manager role, either. The local manager or team did not identify the role and scale and where it fitted within the team. There was no, "… exchange between the local area and the recruitment team" where the business area said why the role should be a certain level, if they had made that assessment themselves."

399. All the other Project Managers employed on the OBST programme were grade E. There were some employees at grade F on the OBST programme, but they were Project Management Officers. Other Project Managers at grade F existed at the Bank, but none on the OBST programme.

400. Mr Rooney did not treat the Claimant any differently, in terms of the objectives and tasks he gave him when the Claimant started, to how Mr Rooney would have treated a Grade E Project Manager. From the start of the Claimant's employment, it was intended that the Claimant would share the workload of another Project Manager called Richard Unstead, p1301. Richard Unstead was a scale E Project Manager.

401. On all the evidence, the Tribunal found that, in fact, from the start of his employment, the Claimant was allocated to a Grade E Project Manager role in the OBST programme.

402. His supposed Grade F role was never assessed as the Respondent's Pay Policy required. As Mr Rooney said in a contemporaneous email on 10 December 2019, "He was brought in on wrong grade etc." p465.

403. The Tribunal therefore found that the Respondent failed to comply with its Pay Policy in relation to the Claimant's starting salary in September 2019. It did not comply with the "Key Principle" of the Pay Policy - "The Bank evaluates all roles thoroughly before they are advertised and assigns a salary band that fairly rewards the role and its responsibilities in line with equal pay obligations". The role was never evaluated, whether centrally or locally, and a salary band was never assigned to it on the basis of such an evaluation.

404. The Claimant relies on the setting of his starting salary in September 2019 as a breach of the duty of trust and confidence.

405. However, the Respondent's Pay Policy states, "This policy does not form part of any contract of employment or have contractual effect; the Bank therefore reserves the right to amend, replace or withdraw this policy from time to time."

406. Where an alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing Wednesbury unreasonableness/irrationality: *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4.

407. The Tribunal took into account the following guidance from the Court of Appeal in *IBM UK Holdings Ltd v Dalgleish* in deciding whether the Respondent's decision regarding the Claimant's salary and terms at the start of his contract in September 2019 was irrational: " … in order to decide whether an employer's decision in a

given case satisfies that rationality test, the court may need to know what the employer's reasons were and may also need to know more about the decision-making process, so as to assess whether all relevant matters, and no irrelevant matters, were taken into account. The legal burden of proof lies with the claimants throughout. If, however, the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case, if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality."

408. In the case of the Claimant's F scale role and salary, the Tribunal has found that there was never an evaluation of the role at all, before the salary band was assigned. There was no process where relevant matters were taken into account and irrelevant matters excluded. The Respondent has not shown the reason for the exercise of its discretion regarding the salary scale. The Tribunal has decided that it is proper to infer that the assignment of a salary scale F was irrational. That is particularly the case when the Claimant's role was, on the facts, a scale E role, from the start.

409. The Tribunal found that the Claimant had discharged the legal burden of proof in showing that the allocation of his F scale and salary were irrational.

410. The Tribunal also observed that it was fundamentally important that an employee's pay scale is correctly assessed on appointment, given how the Respondent's Pay Policy then operates. As Gemma Kirby acknowledged, if an employee is appointed at a lower grade than is appropriate for their role, in circumstances where their role had not been evaluated, then "promotion" to the correct grade will not necessarily rectify the issue, because promotion will only result in the employee being paid at the lowest point on the scale for the promoted grade. There will never have been consideration of the correct salary at that grade, taking into account all the pay factors, as is required under the policy when an employee is newly hired.

411. The Tribunal found that the Respondent breached the duty of trust and confidence in its setting of the Claimant's salary in September 2019.

412. However, the Tribunal did not find that there was any age discrimination in the setting of the Claimant's salary in September 2019. There was no evidence that a younger person, who applied, but was not appointed, through the Returners Scheme, would have been treated differently – there was simply a failure on behalf of the recruitment team, and the OBST project, to evaluate the Claimant's role and salary. There was nothing to link the oversight to age.

413. The Tribunal found that Returners Scheme was open to people of all ages who had had a career break. That logically applied to young people too, including those in their 20s and 30s who had taken a break because of illness, or to care for dependants. There was no association between older age and people applying through the Returners Scheme.

414. The burden of proof did not shift to the Respondent to show that age was not part of the failure to evaluate the Claimant's role and salary scale.

b. The refusal to correct and adjust the claimant's salary when: his contract was extended (twice); when his contract was made permanent; and on each of occasion (four) when he had annual reviews. The claimant contends that these decisions were made by Rebecca Braidwood and Paul Rooney (1.1(b))

415. The Claimant relies on the following instances:

415.1 The Claimant's initial 6-month fixed-term contract being extended from 16 February 2020 to 12 February 2021 and his promotion at that point, p1316;

415.2 The Claimant being given another FTC from 13 February 2021 to 6 August 2021, p1325;

415.3 The Claimant being given a permanent contract of employment on 28 July 2021, to take effect from 7 August 2021, p384; and

415.4 Each of his three Annual Salary Reviews in 2020, 2021 and 2022.

416. Mr Rooney and Ms Braidwood were the decision makers in the ASRs in 2020 and 2021 and Sarah Burls was the decision maker in the Cyber Division in 2022.

Extension and "Promotion" in February 2020

417. When the Claimant's fixed term contract was extended in February 2020, he was promoted to Scale E and his salary was increased to the scale E minimum, as provided for on "Promotion" in the Respondent's Pay Policy.

418. The Respondent did not correct the Claimant's grade to scale E from the start of his employment, but promoted him to scale E. The effect was that he was moved to the bottom of the scale E pay band. There was still not an assessment of his starting Grade E post, in accordance with the Pay Policy.

419. Gemma Kirby told the Tribunal that, if there had never been an evaluation of a role centrally or locally, that would be a concern. She agreed that, if this was then raised as an issue, then the Reward Team could look at the role and consider redressing the matter.

420. In relation to non-compliance with the Pay Policy, the policy itself provides, "If you realise you have breached - or suspect that you might have breached – a requirement in this policy please do not delay in reporting it to AskCompliance as quickly as possible, so that the issue can be redressed under the Breach Management policy." P1190.

421. However, even though Mr Rooney told HR that the Claimant had come in on the "wrong grade", rather than evaluating his grade, or backdating the Claimant's grade and salary, or giving the Claimant an acting up salary, the Respondent simply promoted him from February 2020.

422. There was never any remediation of the original breach as Ms Kirby or the Pay Policy suggested should happen.

423. Again, the Tribunal decided that there was a complete failure to address the fact that the Claimant had been brought in on the "wrong grade". The Respondent acted irrationally, in that it did not turn its mind to the matter at all.

424. The Respondent's failure to address the fact that the Claimant had been appointed at the wrong grade and its consequent appointment of him to the lowest salary at grade E on "promotion" in February 2020 was a further breach of the duty of trust and confidence, applying *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4.

425. Again, this was fundamentally important because all future pay awards were based on the irrational first Scale allocation, which remained uncorrected. The future pay awards themselves were not fundamental breaches of contract, as the Tribunal will explain below, but the unfairness to the Claimant continued. The future pay awards became "fruits of the poisoned tree."

426. Thus, for example, one implication of the failure to correct the original 2019 salary scale was that the Claimant's Annual Salary Review award for 2020 was made on the basis of his Grade F post, including the fact that his salary at Scale F was 85% of the reference point for a grade F post.

427. If the Scale had been corrected, from the start, his 2020 pay award would have been a percentage of a Scale E salary. Even if he had been appointed, in September 2019, at the bottom of the Scale E salary band, his pay award in 2020 would have reflected the fact that he was being paid less than 80% of the reference point, so his percentage pay rise would have been higher.

428. The Claimant was also given a low ASR increase in 2020 because he had been "promoted" in February 2020.

429. All that illustrated and compounded the fundamental unfairness and irrationality of the failure to correct his Scale from the start of his employment, by, instead, "promoting" him in February 2020.

430. The Tribunal observed that the Respondent's successive breaches of the duty of trust and confidence in setting Salary Scale and pay in September 2019 and on "promotion", rather than correction, in February 2020, were therefore likely to have been the reason that the Claimant's pay remained so low compared with other Project Managers.

431. The Tribunal considered that Mr Rooney's grievance interview notes were telling when he said, " Obviously, even with a pay rise PB [Peter Birrell]'s number was quite low compared with his peers. PR [Paul Rooney] raised the issue with Rebecca Braidwood (RB) because PB was much lower than his peers." P487.

432. However, the Tribunal did not find that the Claimant's promotion in February 2020, rather than correction of his Scale from the start, was age discrimination. The Respondent did not appear to have directed its mind to correcting the wrong grade at all. Superficially he was treated in accordance with the Policy on "promotion". There was no evidence that a younger comparator, in the same circumstances, would have been treated differently.

433. The Tribunal noted that Employee 4 was given a substantial pay rise when they were promoted to grade E from the Returners programme. The Claimant was clearly treated less favourably. However, Employee 4 was the same age as the Claimant, so that did not suggest that age was part of the reason the Respondent failed to correct the Claimant's salary on promotion. There was no less favourable treatment of the Claimant and the burden of proof did not shift to the Respondent to show that age was not the reason.

434. The Claimant did not do a protected act until his grievance on 4 October 2021, so the Respondent's decisions on pay and salary scale could not have amounted to victimisation. The Tribunal has also found that Mr Rooney was not motivated in any way by the Claimant's alleged IBM protected disclosures.

Contract Extension in February 2021

435. The Respondent's Pay Policy does not provide for salary increases on extensions of Fixed Term contracts. When the Claimant's FTC was extended on 13 February 2021 to 6 August 2021, he was not given a salary increase. There was no evidence that other employees received salary increases on extension of their fixed term contracts.

436. There was no breach of the duty of trust and confidence in this regard. The Respondent acted in accordance with its Pay Policy. There was no less favourable treatment of the Claimant because of age.

Permanent Contract August 2022

437. The Respondent's Pay Policy does not provide for salary increases on "sideways moves" from one role at a particular Scale, to another role at the same Scale. It does not provide for salary increases when employees are moved from fixed term contracts to permanent roles, in the same role. When the Claimant was provided with a permanent contract of employment and moved into a role in the Cyber Division at the same scale, he was not given an increase in salary. There was no evidence that other employees received salary increases on being made permanent, or on a "sideways move".

438. There was no breach of the duty of trust and confidence in this regard. The Respondent acted in accordance with its Pay Policy. There was no less favourable treatment of the Claimant because of age.

Annual Salary Reviews

439. During each of the Claimant's ASRs, the percentage increase awarded to him was in accordance with the relevant guidance for that year.

440. In 2020, his annual pay award was made on the basis of his "F grade" role. The annual pay award was made in accordance with the guidance. The award was therefore not, in itself, irrational. The low annual pay rise was a result of the Bank's earlier irrationality in failing to assess the role at the outset and failing to correct this on the Claimant's "promotion".

441. In 2021 and 2022 the Claimant received marginally higher salary increases (1.75% and 1.5% respectively) than other members of his own teams because his salary was further away from the reference point than theirs.

442. The Tribunal found that the Respondent has explained why other individuals, in other teams, were occasionally given pay increases which were greater than the guidance advised.

443. Comparator 50 was treated better than the Claimant following promotion, in that he received 2% and 4.5%. However, the Tribunal was satisfied that the 4.5% increase in 2022 was because employee 50 intended to leave (and did in fact leave, despite this increase). That was nothing to do with age.

444. The Claimant was given 1.75% pay rise when Comparator 50 received 2%. In that year, there were only 6 other comparators who were given the same, or greater, pay rise as the Claimant. Almost all the others were given a lower pay rise. Comparator 37 received a 3.5% pay rise that year and was aged 57, substantially older than the Claimant.

445. The fact that one person – Comparator 50 - was given a pay rise slightly greater than the claimant when the majority were given a pay rise in accordance with the policy, whatever their age, did not indicate that age was reason for the difference. The burden of proof did not shift to the Respondent to show that age was not the reason for the pay awards to the Claimant.

446. The Claimant's annual pay rises were all awarded in accordance with the guidance. There was no breach of the duty of trust and confidence in this regard. The Respondent acted in accordance with its Pay Policy. There was no less favourable treatment of the Claimant because of age.

c. On 7 February 2020, the claimant's contract was extended by six months instead of being made permanent and his salary was not adjusted to that of his peers. The claimant contends that this decision was made by Ms Braidwood and Mr Rooney (1.1(c))

447. This allegation was incorrect in that the Claimant's contract was not extended by six months on 7 February 2020, but by 12 months, p1316. The Claimant accepted the contract extension and his increased salary.

448. The Tribunal accepted Rebecca Braidwood's evidence to the grievance hearing - that it was not unusual for her to keep a Fixed Term Contract employee until the last minute. Ms Braidwood repeated this evidence at the Tribunal - she said that it was common practice to employ employees on fixed term contracts in the Division at that time, to improve performance and allow flexibility in resourcing projects and headcount.

449. This was consistent with the fact that an alert was triggered in the Respondent's HR system when a fixed term contract was extended beyond 2 years. The Respondent was clearly monitoring when fixed term contracts were extended for more than 2 years. It did not easily give fixed term employees employment rights, or make them permanent. That supported Ms Braidwood's evidence that the Bank

wanted to have flexibility in hiring employees by retaining fixed term contractors rather than offering permanent employment.

450. The Tribunal found that there was reasonable and proper cause for the Respondent not making the Claimant permanent in February 2020 – the Respondent wished to retain flexibility in its labour pool. From the Tribunal's industrial experience, it is not usual for employers to give employees fixed term contracts for less than 2 years because they wish to retain flexibility in their ability to end employment and they do not wish employees to gain the right to bring unfair dismissal claims after 2 years of employment, by default. Employers are legally entitled to do this. The Respondent did not breach the term of trust and confidence by doing this.

451. There was no evidence that other, younger, fixed term employees were given permanent contracts when the Claimant was not. The reason the Claimant was not given a permanent contact was nothing to do with age.

d. Mr Rooney did not make the claimant permanent despite telling him he would do this, on 4 June 2020 (1.1(d))
e. On 12 June 2020, the claimant was denied the right to apply for a training programme he was told by HR that this decision had been made because he was not currently a permanent employee). The claimant contends that this decision was made by Ms Braidwood and Mr Rooney. (1(1((e).

452. These 2 allegations related to the Claimant seeking approval to enrol on a two-year course through the University of Exeter. At the time, the Claimant was employed under a fixed term contract due to end on 12 February 2021.

453. In the context of his application, the Claimant emailed Mr Rooney on 4 June 2020, saying that it would be useful if Mr Rooney could confirm that he was planning to extend the Claimant's fixed term contract, or to offer a permanent contract, p251. Mr Rooney replied that he did intend to move the Claimant to a permanent contract.

454. On the evidence, Mr Rooney was giving confirmation to support the Claimant's application for his apprenticeship. Mr Rooney was doing was the Claimant asked him to do.

455. The Tribunal found that Mr Rooney always did intend to make the Claimant permanent and he did make the Claimant permanent the following year.

456. It therefore found that Mr Rooney was being truthful and that he was supporting the Claimant's application for the apprenticeship.

457. There was reasonable and proper cause for Mr Rooney's action in confirming he intended to make the Claimant permanent – it was the truth.

458. There was no evidence that Mr Rooney would have treated someone younger any differently. This was not age discrimination.

459. Further, the Tribunal was satisfied that the only reason Ms Braidwood did not support the Claimant's application for an apprenticeship was that he was

employed on a fixed term contract and the apprenticeship ran beyond the end of the fixed term contract. There was reasonable and proper cause for her decision. It was entirely rational for the Respondent not to spend its limited training budget on employees who would not necessarily stay in employment and offer the Respondent a return on its training investment.

460. As the Claimant acknowledged in evidence, given that the only reason Ms Braidwood did not support his apprenticeship was his status as a fixed term contractor, this was not age discrimination.

f. In around September 2020, Mark Pawson and Mr Rooney were harassing the claimant to return to the UK. (1.1(f))

461. The Claimant's contract of employment stated that his place of work was in London. Mr Rooney had allowed the Claimant some flexibility to work from home abroad, from time to time, before the pandemic. There was never any agreement that the Claimant could work permanently from abroad.

462. In about July 2020, the Respondent had appointed a working group to develop a Working From Abroad policy, to manage the Bank's exposure to tax, social security and labour law liabilities in different jurisdictions.

463. The working group's cover note for the Bank's Executive People Committee on 7 September 2020 recorded that employees who were currently abroad had been asked to return, "We wrote to SMT on 21 August to explain the various risks in addition to tax/social security, which include right to work (visa) issues and employment law obligations for both the Bank and employees. We have asked all colleagues currently working abroad to make plans to return … we expect the majority of these colleagues to return by 20 September, and sooner if they had been working from abroad for close to, or over, 183 days." P268 – 9.

464. On around 17 September 2020, the Claimant was forewarned by Mr Rooney that he would be asked to return. On about 22 September 2020, Mr Pawson told the Claimant that he was expected to return immediately.

465. On the evidence, all Bank employees who were working abroad were told in September 2020 that they were required to return to work in London immediately.

466. Mr Pawson had one conversation with the Claimant, on the Claimant's own evidence. The Claimant's primary means of contact was through Mr Rooney. Mr Rooney discussed the requirement to return to the UK with the Claimant. The Tribunal found that he was supportive, giving the Claimant the details of another employee who was in a similar situation and sending him a link to Bank News for more information. The Tribunal also found that the tone of Mr Rooney's message exchange with the Claimant on the subject was cordial, p275.

467. The Claimant became ill and was given time to recover by Mr Rooney, p847. Mr Rooney did not the repeat the "return to UK immediately" message. He specifically did not put pressure on the Claimant to return to the UK.

468. On all the evidence, there was reasonable and proper cause for the Claimant being told, in September 2020, he needed to return to the UK immediately. That

was the Bank's policy in relation to work location, adopted to avoid exposure to tax and employment law risks. The Claimant's contract also specified Threadneedle Street as his place of work.

469. The instruction to return to work in London was nothing to do with the Claimant's age. It was what everyone was being told at that time.

470. The Tribunal found that Mr Pawson and Mr Rooney did not harass the Claimant. Mr Pawson spoke to the Claimant once and told him what the Bank's requirement was. That was a matter of fact at the time. The Tribunal found that Mr Rooney was, in fact, sympathetic and supportive of the Claimant. The tone of their contemporaneous exchange was friendly, showing that the Claimant did not perceive Mr Rooney to be harassing him at the time.

g. In September 2020, pressuring the claimant and his wife, for the claimant to return to work as early as possible, Mr Rooney made no attempt to refer the claimant to OH, nor provided sick leave, when he reported his health issues and recent hospitalisation 1.1(g)

471. The Tribunal accepted Mr Rooney's evidence that he did not think that an Occupational Health referral was necessary, because the Claimant had not been off sick for an extended period, nor did he have a pattern of sickness absence, and the Claimant seemed keen to return to work and was content with the treatment he was receiving from his GP and hospital.

472. Mr Rooney told the Tribunal, and the Tribunal accepted, that he had told the Claimant to take as much time as he needed to recover. He told the Tribunal that the Claimant, "… said he was fine but wanted to take some time to recover and said that he was not as concerned as [the Claimant's wife was] and that his brother had a similar condition…. He wanted to manage the situation himself."

473. The Claimant did not request to take sick leave, but said he wanted annual leave.

474. The Tribunal found that it was reasonable and proper for Mr Rooney to grant the type of leave the Claimant requested, rather than imposing another type of leave upon him.

475. On all the evidence, there was reasonable and proper cause for not referring the Claimant to Occupational Health – there was no suggestion that there was a need to do so. The Claimant was returning to work, he had had an apparently one-off absence and the Claimant was happy with the medical treatment he was receiving elsewhere.

476. There was no evidence that Mr Rooney would have treated anyone else, whatever their age, any differently. Giving the Claimant the annual leave he requested and not sending him to OH was not age discrimination.

h. On 17 December 2020, the claimant's contract was extended to 6 August 2021 which was five weeks before he was due to complete two years' service. The claimant contends that this decision was made by Ms Braidwood and Mr Rooney. (1.1.(h))

g. On 22 April 2021, Mr Rooney told the claimant was being made permanent, but on 4 May 2021, the claimant's fixed term contract was extended on the HR system to 5 February 2022. On 5 May 2021, the claimant's contract was changed back to 5 August 2021. The claimant contends that this was done on the instruc4ons of Mr Pawson and Mr Rooney (1.1(i))

477. On 17 December 2020, the Claimant's fixed-term contract was extended from 13 February 2021 to 6 August 2021, p1325.

478. This further fixed term contract was therefore due to expire about 5 weeks before the Claimant completed 2 years' service because of the timing of the extension to Claimant's first fixed term contract in February 2020, a month before it was actually due to expire.

479. On 22 April 2021 Mr Rooney instructed the HR system to extend the Claimant's contract, due to expire on 6 August 2021, to 15 February 2022, taking the Claimant's employment beyond 2 years, p354.

480. However, on 5 May 2021, Mr Pawson asked to speak to Mr Rooney about the Claimant, p353. Having done so, on 14 May 2021, Mr Rooney asked the Payroll Manager to change the Claimant's contract end date back to August 2021. He said, The plan is to move him to permanent in next 3 months, provided he returns to UK." P356.

481. Mr Rooney changed the date back because he had spoken to Mr Pawson. On the evidence, the reason for the reversal was to ensure that the Claimant returned to work in the UK.

482. The Claimant returned to the UK to work on 1 July 2021, when the Working From Abroad Policy came into effect.

483. On 8 July 2021, very shortly after the Claimant had returned to work in the UK, Mr Rooney gave the instruction to Human Resources to make the Claimant a permanent employee, p1347.

484. The Tribunal decided that the reason Mr Rooney withdrew the contract extension beyond 2 years, but later did make the Claimant a permanent employee, was to ensure that the Claimant complied with Working from Abroad policy and returned to work in the UK, when the policy came into effect in July 2021.

485. It found that Mr Rooney had reasonable and proper cause for doing this – the Respondent was entitled to have a policy regarding the work location of its employees, because of the tax and legal risks involved in working from abroad. On the evidence gathered by the Bank's working group, the Policy's allowance of 40 days working abroad in any one year was generous, compared to other institutions. In addition, there would have been no sense in making the Claimant a permanent employee, or further extending his contract, if he was not going to return to work in the UK, in accordance with his contractual work location. There was no breach of the duty of trust and confidence.

486. The WFA policy was applied to all employees. The Claimant had not previously been allowed to work abroad permanently, so there was no reason to grant him

further time to comply with the policy. There was no evidence that younger employees were given more time to come back to the UK to work. Seeing that the Claimant was treated in the same way as other comparable employees, there was no age discrimination.

j. On 1 July 2021, the claimant was forced to return to the UK and to spend Covid lockdown in isolation from his family, having been threatened by Mr Rooney and Mark Pawson, in around April to May 2021, that his contract would not be made permanent if he failed to return to the UK by this date.

487. The Claimant gave no evidence in his witness statement to support the assertion that he was "threatened" by Mr Rooney or Mr Pawson that his contract of employment would not be made permanent if he failed to return to the UK by 1 July 2021. The Tribunal found that they did not "threaten" the Claimant.

488. The Respondent did require the Claimant to come back to the UK to work. His family lived in Portugal, so that did mean that he was living on his own in the UK when he returned to work.

489. While the Respondent did not specifically guide the Claimant that he could work all 40 days in Portugal in July, and not return to the UK until August 2021, the policy was there for him to read. The policy was clear – the Claimant could work from abroad for 40 days in total that year. However, if he had chosen to take all the 40 days abroad in one tranche, the effect of that would have been that the Claimant would not have been able to work from home abroad again until July 2022. The Claimant chose to return to work in the UK at the start of July 2021.

490. The requirement to work in the UK, save for 40 days each year, was reasonable and was stated to apply to all employees. The Claimant was told, at the latest in September 2020, that the Bank intended to introduce a Policy. The Policy was not implemented until 1 July 2021, more than 9 months later. The development of the policy was discussed in the Respondent's internal Bank News. The Bank held meetings about the policy, to which employees were invited to attend and share their views.

491. On all the evidence, the Respondent acted with reasonable and proper cause in applying the limit of 40 days' working abroad to the Claimant. He was not in a category of people who had worked permanently abroad. Given the long lead-in period, it was reasonable to expect him to comply with the policy when it came into effect. There was no breach of the term of trust and confidence in this regard.

492. The Tribunal found that the Claimant was treated consistently with how other employees were, and would have been treated. There was no age discrimination.

k. On 28 July 2021, the claimant was denied by Ms Braidwood the advertised salary of the new, permanent role in the Cyber Division, which he had successfully applied for. It is the claimant's assertion that Ms Braidwood had contrived to hold down his salary in a continued act of victimisation.

493. There was no evidence to support the Claimant's assertion that Ms Braidwood denied him any advertised salary for the role in the Cyber Division, or had any power to do so.

494. On the evidence, she was not involved in decision-making regarding his salary on appointment. It was Mr Rooney who gave the instruction to issue the Claimant with a new, permanent contract, p1347. The Claimant's communications about his salary on appointment were with Ms Burls, who said that she would speak to HR, p1320. From the contemporaneous emails, the Claimant believed that it would be for Ms Burls, not Ms Braidwood, to set the salary, p1320.

495. Ms Braidwood did ask for the Claimant to stay for a short while, to arrange cover for his existing role. That did not prevent the permanent contract being issued, to start in August 2021.

496. As the Tribunal has decided elsewhere, there Bank's Pay Policy does not provide for a salary review on appointment to a new post at the same Salary Scale. Ms Braidwood had no involvement in this

497. This allegation fails on the facts. In any event, as the Tribunal has already decided, there was no protected act before 4 October 2021, so there cannot have been any victimisation.

l. On 13 December 2021, Antonia Brown took more than two months to conclude the claimant's grievance dated 4 October 2021. (1.1(l))

498. The grievance outcome took 70 days.

499. Tribunal accepted Ms Brown's explanation of the time taken to conclude the Claimant's grievance; it took time to schedule a meeting with the Claimant, Ms Brown herself had a period of .leave at the end of October 2021 and that it took some time to arrange a meeting with Ms Braidwood, because of her commitments as a senior manager.

500. The Respondent's Grievance Procedure does not require grievance outcome to be delivered within a specific time frame.

501. There was no evidence that grievances at the Bank are generally dealt with more quickly. There was no evidence that a young person's grievance would have been dealt with more quickly. The length of time taken to produce a grievance outcome was not age discrimination.

502. The Tribunal also found that there was reasonable and proper cause for the time taken for the grievance. The delay was explained and was not outside policy. This was not a breach of trust and confidence.

m. Ms Brown failed to conduct an adequate investigation into the claimant's grievance, in that she failed to interview the claimant's suggested list of witnesses and address all the grievance complaints. (1.1(m))

503. The Claimant did not provide a suggested list of witnesses. The Tribunal found that Ms Brown spoke to the relevant individuals, including Mr Rooney and Ms Braidwood.

504. However, a major component of the Claimant's grievance was his complaint about his salary; and part of that grievance was, specifically, that Mr Rooney had told the Claimant that he had been brought in on the wrong grade.

505. During her investigations, when Ms Brown asked Mr Rooney, he did not contradict the Claimant's assertion that Mr Rooney had told the Claimant he had been brought in on the wrong grade. Mr Rooney merely questioned the frequency with which he might have done this.

506. Mr Rooney also confirmed to Ms Brown that he had told the Claimant that his low salary, "was because his starting salary had been lower and it would take a while for him to catch up", p489. Ms Braidwood told Ms Brown that, regarding the Claimant's salary, "She thought it had gone wrong for him from the start in the way that he had joined", p536.

507. Ms Brown gathered evidence from Mr Rooney and Ms Braidwood that they both thought that the Claimant had been appointed pursuant to the Returners Programme, when he had not.

508. However, in her outcome letter, while she acknowledged that there was confusion about the Claimant's appointment, she did not resolve that confusion in so far as it related to the Claimant's complaint that he had been appointed at the wrong grade.

509. From her evidence to the Tribunal, she simply made assumptions that there was a job description and evaluation for his F grade role. She did not try to obtain these documents.

510. In her grievance outcome letter, Ms Brown did not address the issue of whether the Claimant had been brought in at the wrong grade.

511. The Tribunal found that Ms Brown failed to address the Claimant's grievance complaint that he had been brought in on the wrong grade. This was a significant failure, because she acknowledged that the Claimant's salary was low and she had been told by both Mr Rooney and Ms Braidwood that the starting salary was the explanation for his continuing low salary.

512. The Tribunal found that Ms Brown did not have reasonable and proper cause for her failure. The 'wrong grade' issue was plainly raised by the Claimant on the face of the grievance letter and Ms Brown had gathered witness evidence which supported the Claimant's assertion that he had been brought in at the wrong grade. She acknowledged there was confusion regarding his appointment, but did not resolve it and made assumptions that correct processes had been followed.

513. The Claimant had a legitimate and continuing grievance in this regard. All subsequent pay awards had been the result of his original appointment at grade F, which had never been corrected.

514. The Tribunal found that, in this regard, the Respondent breached the implied term of trust and confidence, including the implied term that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'. *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516.

515. The other major element of the Claimant's grievance was the Working From Abroad Policy. During the grievance hearing, Ms Brown confirmed that she understood that the Claimant was raising 2 separate issues – working from abroad itself and the total number of days abroad, p516.

516. However, in her outcome letter, Ms Brown appeared to elide the 2 issues. She said "… pre-Covid 1) you would have been able to work from abroad for more than 90 days, and 2) the Security Vetting Policy 2018 made no mention of a 90 day limit. The 90 day limit has been set in relation to National Security Vetting (NSV). … In the absence of being able to change the limits, I recommend that you seek to establish a working pattern with your new area that manages your desires around place of work while continuing to comply with the Bank's Policy on Working From Abroad."

517. Ms Brown's discussion of the 90 days concerned <u>working</u> abroad – "pre-Covid 1) you would have been able *to work from abroad for more than 90 days*…… In the absence of being able to change the limits, I recommend that you seek to establish a *working pattern* with your new area that manages your desires around *place of work*. " (Emphasis supplied).

518. Ms Brown's outcome did not address the different issue of the total number of days spent abroad, not working. She neither addressed, nor provided an answer to it.

519. Ms Brown's outcome also told the Claimant that there were no exceptions being made to the Working From Abroad Policy: "While we understand your situation, I have established that there isn't any flexibility or exceptions that can be made because of the underlying reasons for the Policy (as noted above) and the need to ensure fairness and equity for all staff."

520. There were no notes of Ms Brown's discussions with Ms Fisher, nor any record of the information Ms Fisher gave Ms Brown regarding the Working from Abroad Policy. Specifically, there was no evidence that Ms Brown sought any information from Ms Fisher about the 90 total number of days abroad rule.

521. In fact, as Ms Fisher told the Tribunal, after the WFA Policy was implemented in July 2021, many exceptions were made for employees in respect of the 90 total days abroad rule. Indeed, so many were made and they became such an administrative burden, that the rule was completely removed from the 2022 version of the Policy.

522. Ms Brown's failure to distinguish between working from abroad and total number of days abroad meant that her outcome regarding exceptions to the WFA Policy was actively misleading, insofar as it applied to the 90 total days abroad rule.

523. The Tribunal decided that, regarding the 90 total days abroad rule also, Ms Brown failed to address the Claimant's grievance complaints.

524. The Claimant had a legitimate grievance in respect of the 90 total days abroad rule – it was a restriction on his ability to be at his home, quite separately from work. It was obvious that it was a significant interference, in that, even if the Claimant never worked abroad from home, but went home every weekend entirely outside his working hours, he would breach the rule. That was quite apart from statutory holiday rest time, to which he was also entitled. In addition, while his contract stated that his place of work was Threadneedle Street, there had not previously been such a restriction on the days spent abroad during rest periods.

525. Ms Brown's failure to address this aspect of the Claimant's grievance amounted to a breach of duty of trust and confidence, including the implied term that 'employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'. There was no reasonable and proper cause for it. Ms Brown appreciated that there were 2 separate issues regarding the WFA policy, but undertook no adequate investigation into the 90 day policy, and gave no answer to that specific issue. Insofar as she gave an answer to the Claimant's grievance, it was wrong and misleading regarding the 90 days, when she said that there was no flexibility allowed.

526. For the avoidance of doubt, the Tribunal found that Ms Brown did address the Claimant's other grievance complaints.

527. The Tribunal found that Ms Brown approached the whistleblowing issues on the basis that the Claimant was raising them to support his argument that the Respondent should make exceptions for him because it had made exceptions to policy elsewhere. The Tribunal has decided that that was the correct interpretation of the Claimant's grievance. Ms Brown certainly acted reasonably in understanding it that way.

528. She gave the Claimant the opportunity to raise those issues again, via the Speaking Up policy, should he wish to do so. She did not ignore those issues.

529. While Ms Brown did not specifically address the Claimant's successive fixed term contracts, the Tribunal found that, on a reasonable interpretation of the grievance, this was part of his contention that his salary was kept low because of his age, p410. It noted that Ms Brown asked questions about the Claimant's successive fixed term contracts of Ms Braidwood in this context. She did investigate the matter and addressed the Claimant's salary rises in her outcome letter. Ms Brown acted with reasonable and proper cause in considering the fixed term contracts as part of the Claimant's general complaint about age discrimination in relation to his low salary.

530. Ms Brown also gave a reasoned outcome to the Claimant's complaint regarding the 40 days maximum working from abroad. She was correct in saying that there were no exceptions to the 40 day rule. She reasonably explained that the Claimant's place of work was Threadneedle Street and that his previous working arrangement was ad-hoc and did not constitute any change to his contractual place of work.

Grievance – Breaches of the Duty of Trust and Confidence

531. In summary, the Tribunal decided that Ms Brown failed to address 2 important and clear aspects of the Claimant's grievance; his complaint about a 90 day maximum number of days abroad and his complaint that he had been appointed at the wrong grade. Both were legitimate grievances in respect of which Ms Brown failed to afford prompt and reasonable opportunity for redress. Her failure to address these complaints at all in her outcome letter, or to investigate them adequately or at all, were breaches of the implied duty of trust and confidence.

Grievance – No Age Discrimination

532. The Tribunal considered whether Ms Brown's failures in this regard also amounted to age discrimination. There was no evidence that Ms Brown would have treated a younger comparator more favourably. The fact that Ms Brown was unreasonable in her failure to address important allegations in the Claimant's grievance did not, in itself, shift the burden of proof to the Respondent in the age discrimination claim, *Zafar v Glasgow City Council* [1997] IRLR 229. There was no other evidence upon which the Tribunal could decide that Ms Brown's handling of the Claimant's grievance was related to age. Ms Brown's conduct of the grievance was not age discrimination.

Grievance – No Victimisation

533. The Tribunal also considered carefully whether Ms Brown's failures to address parts of the grievance was an act of victimisation.

534. The Tribunal noted that Ms Brown had asked Mr Rooney what his "reaction had been to the tone of the grievance." The Tribunal noted that the question was about the grievance, which was a protected act, and the nature of the question might suggest that Ms Brown was seeking a negative comment from Mr Rooney. The question appeared to be irrelevant, but potentially prejudicial to the Claimant.

535. Ms Brown told the Tribunal that she wanted to get a sense of the relationship between Mr Rooney and the Claimant.

536. The Tribunal also noted that Ms Braidwood was broadly unenthusiastic about the Claimant's value to the Bank, which appeared incongruous, given Mr Rooney's very positive view of the Claimant's performance. Ms Braidwood was not directly managing the Claimant and would have been receiving much of her information about the Claimant from Mr Rooney. She therefore appeared to have been expressing an unduly negative view of the Claimant in the context of the grievance investigation.

537. The Tribunal considered whether these matters indicated that Ms Brown and Ms Braidwood viewed the Claimant negatively in the context of his grievance and whether that might shift the burden of proof to the Respondent to show that Ms Brown's failure to investigate the grievance fully was not victimisation.

538. However, it noted that Ms Brown did not ask Mr Rooney about the tone of the Claimant's age discrimination allegations, but more broadly, about the grievance

itself. There was nothing in the outcome letter which suggested victimisation in the outcome and or the decisions in it. There was nothing to suggest that Ms Brown would have come to a different conclusion if the Claimant had not alleged age discrimination. As indicated above, unreasonableness on its own does not suggest discrimination or victimisation.

539. On all the evidence, the Tribunal did not consider that the Claimant had shown facts from which the Tribunal could conclude that Ms Brown's failure to investigate all his grievance complaints was victimisation. The burden of proof did not shift. Ms Brown did not victimise the Claimant in this regard.

n. The claimant was told by Pauline Szewczuk, on 28 October 2021, and Jenny Khosla, on 20 January 2022, that he could not send the grievance outcome and related documents to his private email address for the purpose of obtaining legal advice and was thereby denied the opportunity to obtain such advice. (1.1(n))

540. Ms Szewczuk's email to the Claimant on 28 October 2021 simply said that she was unable to send documents to his personal email address because of security classifications, p442. The Claimant had not told her that he needed the grievance outcome to be sent to his personal email address, so as to take legal advice.

541. It was not in dispute that the Respondent has strict security rules, meaning that documents cannot be sent externally.

542. Ms Szewczuk's answer was consistent with the Bank's security rules. There was therefore reasonable and proper cause for it. It did not amount to a breach of the duty of trust and confidence.

543. As her answer was in accordance with bank rules, she did not discriminate against the Claimant because of age, nor did she victimise him.

544. Ms Khosla discussed taking documents outside the Bank, to show to a legal adviser, with the Claimant during his appeal hearing on 20 January 2022, p577-578.

545. Ms Khosla offered to establish whether the Claimant could be given permission to show a redacted version. On 16 February 2022, following the grievance appeal, Ms Johnston wrote to the Claimant saying that, if he let her know which documents he wished to show to legal advisers, she would check whether that could be allowed, p636.

546. On the facts therefore, Ms Khosla, both herself and through Ms Johnston, offered to assist the Claimant in obtaining permission to show documents to legal advisers. They did not deny him the opportunity to get legal advice. The allegation against Ms Khosla is wrong on the facts.

o. On 13 December 2021, in the grievance outcome letter, Ms Brown misled the claimant to agree to her discussing the claimant's pay issue and grievance with his new manager, Sarah Burls, in order to prejudice him in his new role. (1.1(o))

547. The Tribunal found that Ms Brown's grievance outcome letter was not misleading. Ms Brown suggested that the Claimant could raise the issue of his salary with his new line manager as part of the ASR process. She made clear that any decision as to the ASR would still be at the discretion of the local business area. She gave the Claimant the choice as to whether he would speak to his new line manager himself, or Ms Brown would do so on his behalf.

548. As part of the Claimant's grievance appeal letter, the Claimant gave Ms Brown permission to speak to his new line manager, p561.

549. Ms Brown then did so, albeit without establishing whether her intervention had had any effect.

550. There was nothing misleading in the letter. Ms Brown spoke to the manager as she had offered to do. There was no evidence that she offered to speak to the line manager in order to prejudice the Claimant.

551. This allegation failed on the facts.

p. The appeal hearing on 20 January 2022 was managed by a lawyer and was adversarial. (1.1(p))

552. While Ms Khosla is a lawyer, that fact, in itself, is not inherently prejudicial to the Claimant. A lawyer may be well qualified to make a fair assessment of evidence and competing arguments.

553. On the facts, the Tribunal decided that Ms Khosla's questions of the Claimant sought information from him which was relevant to his grievance appeal. It did not find that she was adversarial in her questioning.

554. Ms Khosla being a lawyer and asking questions relevant to his appeal did not constitute unfavourable treatment, or less favourable treatment of the Claimant. It was not age discrimination, victimisation, or a breach of the duty of trust and confidence.

q. On 11 February 2022, Elizabeth Johnson sent the record of the appeal hearing to the claimant, three weeks after the date of the hearing. (1.1(q))

555. The Appeal hearing took place on 20 January 2022, p576, and the notes were sent to the Claimant on 11 February 2022, p621.

556. There is no requirement under the ACAS Code of Practice on disciplinary and grievance procedures to send out the minutes of a hearing. The Respondent's policy does not specify any time within which notes of meetings should be sent. There was no evidence that the Respondent had any practice of sending grievance notes within a particular period of time after grievances.

557. The Claimant has not explained in what way he was prejudiced by the time taken to send out the minutes.

558. The Tribunal accepted the Respondent's explanation for the time taken - the note taker was new to the Bank and took time to type up the notes and Ms Khosla herself took time to review them. .

559. This was a reasonable and proper cause for any delay. The explanation was nothing to go with the Claimant's age, or fact he had done a protected act.

r. Ms Khosla failed to conduct an adequate investigation into the claimant's appeal, in that she failed to interview the claimant's suggested list of witnesses, ignored some of the grounds of appeal and overlooked evidence in the respondent's possession. (1.1(r))

560. The Tribunal found that Ms Khosla interviewed relevant witnesses. She reasonably considered that Jonathan Curtiss was not a relevant witness.

561. However, the Claimant told her, in relation to the Working From Abroad Policy, that the 90 day limit on total days abroad was "the real constraint". He explained that, if he spent every weekend at home, abroad, he would exceed the 90 day limit, p580.

562. In his grievance appeal meeting the Claimant also explained his complaint about his salary, "I could demonstrate that I had ERP and I was then hired for my experience. There is only me and one other in the Bank with this experience. I was brought in and they took advantage of me, because I was old and desperate.. … Very early on maybe after 2/3 months, they said I had been brought in at the wrong scale and wrong pay but that they couldn't correct it… then I was promoted to a scale E, but they said they can't correct the salary because of the policy." P578.

563. Ms Khosla did not address the Claimant's complaint about the 90 day limit on total days spent abroad in her grievance appeal outcome. In evidence, Ms Khosla was asked what she understood about the 90 day limit and what might be changed in regard to it. She told the Tribunal that she did not understand that the 90 day total days abroad limit was an issue for the Claimant. She said that she understood that other people were concerned about the 90 day rule. It did not appear to the Tribunal that she had investigated this issue in the Claimant's appeal at all.

564. In Ms Khosla's grievance appeal outcome, she said that she did not agree that the Career Returner's scheme had any bearing on the Claimant's salary, given he was not recruited under the scheme. She disagreed that the Respondent took advantage of him due to his age in paying him a reduced salary. She said, "… whilst your salary is objectively low (73.2% against the reference point following the 2021 ASR), this is not as a result of misapplication of the Bank's Reward Policy and is not out of line with the experience of other colleagues." P683.

565. However, Ms Khosla did not address the Claimant's assertion, in his original grievance and in the appeal meeting, that he had been originally appointed at the wrong salary Scale.

566. Again, Ms Khosla failed to remedy the Claimant's legitimate grievance.

567. Further, there was no investigation by her into the 90 days rule, or any flexibility in relation to it.

568. The Tribunal found that Ms Khosla repeated Ms Brown's omissions, despite the Claimant specifically raising the issues with her again.

569. The Tribunal found that Ms Khosla's failure to address these fundamental parts of the Claimant's legitimate grievance was a breach of the duty of trust and confidence, including the duty reasonably and promptly to afford a reasonable opportunity to an employee to obtain redress of any grievance they may have. There was no reasonable and proper cause for this, the Claimant raised these issues and explained that their importance, but Ms Khosla ignored these grounds of the appeal.

570. However, the Tribunal did not find that Ms Khosla's failures were age discrimination or victimisation. There was nothing to suggest that she would have come to a different outcome in respect of a younger employee, or someone who had not alleged age discrimination.

s. The appeal outcome was sent to the claimant on 19 April 2022, thereby taking 197 days to process the grievance and appeal. (1.1(s))

571. The Claimant appealed against Ms Brown's decision on 24 December 2021, p559. Ms Khosla met with him on 20 January 2022, p576, and with Georgina Fisher on 25 January 2022. She met with Ms Brown, Mr Pawson, Mr Rooney and then Ms Braidwood in February 2022.

572. The Claimant made a Subject Access Request on 16 February 2022, p635. In that email, the Claimant said expressly that he would disclose his evidence once there has been proper and full disclosure. The Tribunal agreed with the Respondent that it was implicit that the Claimant would provide further evidence to Ms Khosla following receipt of the SAR. By return, Ms Johnston asked the Claimant whether he wanted Ms Khosla to consider that material before providing an outcome to the appeal. The Claimant did not initially respond, having gone off work, sick.

573. Ms Johnston sent a further email on 17 March 2022. On 22 March 2022, Ms Levy, the Claimant's wife, replied on his behalf, saying that the SAR was a separate process and asking for an appeal outcome, p670. Ms Khosla then proceeded with drafting the appeal outcome.

574. The appeal outcome therefore took 3 months, but a month of that period was explained by the delay in the Claimant's response to the Bank's reasonable question about the significance of the DSAR for the grievance appeal. The interviews with witnesses also took a month to complete. The Tribunal noted that Ms Khosla's decision letter was lengthy and would have taken some time to draft.

575. The Bank's policy simply says an appeal outcome will be provided as soon as practicable. There was no evidence that the timing of Ms Khosla's outcome letter departed from policy or standard practice at the Bank.

576. In all the circumstances, the delay was explained. There was reasonable and proper cause for it.

577. There was no evidence that a younger comparator, or a person who had not done a protected act, would have been treated differently.

t. In June 2022, Eloise Hindes denied the claimant an opportunity for training in technical skills in cybersecurity. (1.1(t))

578. The Claimant was not denied an opportunity for training in technical skills. The chronology of events is instructive.

579. The Claimant met with Eloise Hindes on 14 June 2022 and she agreed to support and fund technical training for him in his role, p859.

580. Shortly afterwards, the Claimant was asked to undertake some duties instead of another employee, for which the Claimant considered he needed Agile training. He asked for Ms Hindes approval of the Agile training, p873.

581. When the Claimant and Ms Hindes met on 6 July 2022, she agreed to the Claimant attending 3 Agile training courses, but said this would be the only funded training Cyber could sponsor for him that year. She noted that he could still attend a NCSC Cyber Security Foundations course, because that would not involve any cost to the Bank. She said, “Let me know if you’re keen to proceed with this and I can submit a request.” P878.

582. The Tribunal found that Ms Hindes gave the Claimant the choice whether to proceed with the Agile 3 training course– “let me know if you’re keen to proceed”. On the facts, she agreed to all his proposals for training and also offered him non-funded technical training.

583. The allegation failed on the facts - Ms Hindes did not impose any training on the Claimant, nor deny him any specific training he sought.

584. The Tribunal also decided that Ms Hindes acted perfectly reasonably in the circumstances; there was reasonable and proper cause for her actions on training. Equally, there was no evidence that she would have treated a younger comparator, or a person who had not done a protected act, any differently.

u. On 15 June 2022, Ms Hindes went back on a prior agreement for the claimant to complete a phased return to work from abroad. This meant that claimant had to work 15 hours on one day in the fifth week of his phased return. (1.1(u))

v. On 21 June 2022, the claimant was unfairly denied his Working From Abroad Days allocated for 2022 by Ms Johnson and Ms Hindes. (1.1(v))

585. In June 2022, the Claimant had 5 Working From Abroad days left of his 40-day allowance. He had also spent nearly the maximum allowable 183 days overseas.

586. On 12 June 2022 the Claimant’s wife emailed Ms Hindes, p854, asking whether the Claimant could work from home pro-rated, as he had 5 Working from Abroad days remaining for the July 2021 – June 2022 cycle, p854.

587. Ms Hindes replied the next day, saying that she was comfortable with the Claimant working from home, but would check with Employee Relations, p853. The Tribunal noted that her agreement was stated to be subject to advice – it was not unconditional.

588. Having obtained advice, on 15 June 2022 Ms Hindes initially informed the that, if he had been out of the UK for more than 183 days, he would not be able to work from abroad, regardless of the 40 day allowance, p861.

589. However, on 23 June 2022, Ms Hindes obtained permission for the Claimant to work his 5 days from Portugal, despite him having reached the 183 day limit. She also said that this would not prevent the Claimant from taking holiday, p863.

590. Ms Johnston emailed the Claimant again on 24 June 2022, reiterating that he would be permitted to use his remaining 5 days working from abroad and that the 183 day limit would not prevent him from taking annual leave, p865.

591. On the facts, Ms Hindes did not go back on any agreement she made with the Claimant that he could complete a phased return to work from abroad. Her statement that she was comfortable for the Claimant to work from home was always stated to be subject to advice. Having taken advice, on 23 June 2022 both she and Ms Johnson permitted the Claimant to work his remaining 5 days from abroad. They exercised their discretion to allow the Claimant to work those 5 days, even though it meant he might exceed the 183-day maximum days abroad limit.

592. The Claimant then attempted to squeeze his hours into those 5 remaining working from abroad days. Ms Hindes never specifically agreed that the Claimant could condense hours to be worked on separate days into single days. She therefore never “went back” on that agreement.

593. On the facts, Ms Levy had misrepresented, to Ms Hindes, the number of hours and days the Claimant was required to work, pursuant to the OH report. Even if Ms Hindes had agreed to the Claimant condensing his hours into single days, she would have done so on the basis of that misrepresentation of the OH advice. The Tribunal considered that she would have had reasonable and proper cause for not permitting the Claimant to condense his hours; that was contrary to OH advice on the phased return, as Ms Hindes suspected when she became aware of the Claimant’s intention, p877.

594. The Tribunal concluded that Ms Hindes and Ms Johnston’s actions regarding the Claimant working a phased return from abroad were nothing to do with his age or the fact that he had done a protected act. They actually exercised discretion in his favour and did not go back on agreements. Their decisions were also fair and sensible and they had reasonable and proper cause for them. There was no breach pf the duty of trust and confidence in this regard.

w. The Working From Abroad Policy was applied to the claimant without consideration of his personal circumstances on 17 September 2020 by Mr Pawson, on 6 August 2021 by Mr Rooney, on 10 December 2021 by George Fisher, and on 24 January 2022 by Ms Khosla. (1.1(w))

595. It was unclear as to the manner in which the Claimant suggested Mr Rooney applied the Working from Abroad Policy to the Claimant on 6 August 2021 and/or Ms Khosla did so on 24 January 2022, without consideration of his personal circumstances.

596. Insofar as the allegation against Mr Rooney relates to July 2021, the Tribunal has already made findings in this regard, at **j.** above.

597. The Tribunal has also made findings in relation to Mr Pawson and Mr Rooney's actions in September 2020, at **f.** and **g.** above. In fact, the Working from Abroad Policy was not applied to the Claimant until 2021; he was not required to come back to the UK until July 2021. Mr Rooney did not put him under pressure to return to the UK in 2020. He specifically refrained from doing so when the Claimant became ill. While Mr Pawson spoke to the Claimant once, Mr Rooney was the Claimant's main point of contact and Mr Rooney took into account of the Claimant's personal circumstances. The policy was not, on the facts, applied to the Claimant without consideration of his personal circumstances on 17 September 2020.

598. The Claimant had emailed George Fisher on 8 December 2021, saying, amongst other things, that he could not provide a month's notice of Working from Abroad. Ms Fisher replied on 10 December 2021, p543. Ms Fisher made an exception for the Claimant, by waiving the notice requirement. She did so because of the Claimant's personal circumstances. She also explained the application of the policy more generally, responding to his broader comments.

599. The Tribunal found that Ms Fisher's actions had nothing to do with his age. There was no evidence she would have treated a younger employee in the same circumstances any differently.

600. In respect of the 40 day rule and the existence of a working from abroad policy generally – save its 90 day limit on total number of days abroad - the Tribunal has found that the Bank had reasonable and proper cause for introducing a policy and applying it to the Claimant. He had not been working abroad permanently before and he was now allowed to work abroad 40 days. That was a benefit to him, as it was to other employees. The application of the policy to the Claimant, given that it was applied to other employees, was not discrimination or victimisation.

x. The respondent manipulated the Working From Abroad Policy, in respect of the maximum number of WFA days per annum, to make it impossible for the claimant to continue to work and enjoy family life. (1.1(x))

601. The chronology of the evolution of the WFA policy showed that, at no stage, was the maximum number of Working From Abroad days manipulated to make it impossible for him to continue to work and enjoy family life.

602. The Tribunal accepted that the rationale behind the 40 working days abroad limit, was to reduce the potential risk to the Bank in relation to tax, social security, immigration and employment law. The 40 days' limit on working abroad was introduced after consultation and research. There was reasonable and proper cause for it and it was applied to all. There was no discrimination.

603. The feature of the policy, for which there did not appear to be reasonable and proper cause - and which was removed from 1 July 2022 – was the limit of 90 total days abroad. That is not the allegation at **x.**, albeit that it is relevant to the Tribunal's findings on the inadequacy of the grievance and grievance appeal processes.

Summary – Findings on all the Allegations a. – x.

604. The Tribunal was satisfied that the Respondent did not subject the Claimant to age discrimination, victimisation or protected disclosure detriment in relation to any of the allegations **a. - x**. On all the evidence, the Tribunal accepted that the Respondent did not treat the Claimant less favourably than others, or had non-discriminatory reasons for all the acts complained of. On all the evidence, it accepted that the Respondent did not act because of any protected act or protected disclosure, in respect of any of the allegations.

605. However, it found that the Respondent breached the duty of trust and confidence between employer and employee as follows:

605.1 Its irrational allocation of a scale F band and salary to the Claimant's role in September 2019 (allegation a.);

605.2 Its irrational failure to address the fact that the Claimant had been appointed at the wrong grade and its consequent appointment of him to the lowest salary at grade E, on "promotion" in February 2020 (allegation b.);

605.3 In her 13 December 2021 grievance outcome, Ms Brown's failure to address the Claimant's legitimate grievance complaints regarding the application of the 90 total days abroad rule to him and his complaint that he had been appointed on the wrong grade/scale;

605.4 In her 19 April 2022 grievance appeal outcome, Ms Khosla's failures to address the Claimant's assertion, in his original grievance and in the appeal meeting, that he had been originally appointed at the wrong salary scale; and his complaint about the 90 days maximum days abroad rule, or any flexibility in relation to it.

606. The Tribunal has found that the Claimant legitimate grievances in respect of both these grievance complaints, but the Respondent failed to address them, never mind redress them.

607. Regarding the salary scale, the Claimant had a legitimate ongoing grievance in 2021 and 2022 because all pay awards were based on the irrational first Scale allocation, which remained uncorrected. The later pay awards themselves were not fundamental breaches of contract, but the unfairness to the Claimant continued. The later pay awards became "fruits of the poisoned tree."

608. The Tribunal found that each of the breaches at were, individually, breaches of the fundamental term of trust and confidence.

609. After 19 April 2022, the Respondent did not do any further act which breached the duty of trust and confidence, whether on its own, or taken together with other acts.

The Respondent had reasonable and proper cause for its actions after 19 April 2022 and there was no "last straw" after that date.

Resignation in Response to Breach

610. The Tribunal accepted the Claimant's evidence that he had not decided to resign by 8 June 2022 and that he remained hopeful that the ACAS EC process could resolve his grievances.

611. The Tribunal found that, as the Claimant stated in his letter of resignation, ACAS informed him on 6 July 2022 that the Bank had decided not to engage in further resolution. While that was a later date than shown on the ACAS EC certificate, the Claimant was resident in Portugal at the time and so there may have been a delay between the ACAS certificate being issued and the Claimant learning of the fact.

612. The Claimant was offered another job on 6 July 2022. He resigned on 18 July 2022. In his letter of resignation, he said that the Respondent had breached the implied term of trust and confidence, due to events over a period of time, most of which had been covered in his grievance.

613. The Tribunal accepted the Claimant's evidence that he had not resigned because he had obtained another job. It found that he resigned because of the matters set out in his letter of resignation. On the facts, the Claimant had pursued his grievance and grievance appeal because he had genuine grievances and sought redress in relation to his salary and the way in which the working from abroad policy affected him. The Tribunal found that those matters were still uppermost in his mind when he resigned. It found that the final confirmation, through ACAS, that the Bank would not redress his grievances, was what eventually prompted his resignation 12 days later.

614. In the Claimant's resignation letter, he set out what he believed were the Respondent's breaches of the implied term of trust and confidence. He said, "These events include but are not limited to: the refusal to correct my pay situation resulting from age discrimination, the way the grievance and subsequent appeal were handled over a wholly excessive period of 6 months, the way in which my protected disclosures were ignored, the creation of my heart condition and the constant victimisation over a long period that resulted from my having made protected disclosures. This behaviour by the Bank has all caused my physical and mental health to deteriorate (including being booked off sick for 4 months) and have created an untenable working environment for me." … "I had hoped that my Grievance would have been properly investigated and addressed my concerns, and that my return to work after ill-health would be sympathetically handled. Unfortunately, neither has proven to be the case and it is now clear to me that the Bank has no intention of attempting to maintain or restore the relationship of trust and confidence which has irretrievably broken down."

615. On the wording of his resignation, the Claimant resigned, at least in part, because he believed his grievance was not properly investigated and because of the Respondent's refusal to correct his pay. The Tribunal has found that those matters were breaches of the Respondent's duty of trust and confidence.

616. Applying *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703 the Claimant resigned in response to the repudiation. The fact that he also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation.

Affirmation?

617. The last of the Respondent's breaches of the implied term of trust and confidence was on 19 April 2022. That breach, on its own, was a fundamental breach of contract, entitling the Claimant to resign and claim constructive dismissal. However, the Claimant did not resign until 18 July 2022, some 3 months later. He received pay and commenced a phased return to work during this time. He engaged with Ms Hindes and asked for training. Those factors could indicate affirmation of the contract.

618. The Claimant was signed off work, sick with stress, from February 2022 to June 2022. During his period of sick leave, much of his communication with work was conducted through his wife, Ms Levy. That indicated that he felt unable to handle work matters during his period of sickness. He initiated ACAS Early Conciliation on 10 May 2022, relatively soon after the appeal outcome, even when he was significantly ill with stress. The Tribunal decided that the delay, while he was ill, between the grievance appeal outcome and contacting ACAS, did not indicate that the Claimant affirmed the contract.

619. The Tribunal accepted the Claimant's contention that his initiation of the ACAS EC process indicated that he did not accept the breaches of trust and confidence. The Tribunal considered that it would be contrary to public policy for the Claimant to be required to resign, before completing the ACAS EC process, in order to be entitled to claim constructive dismissal. Part of the intention of the ACAS EC process is to give the parties an opportunity to resolve their differences before a claim is issued. Requiring an employee to resign before the ACAS process is complete would pre-empt the process and frustrate its aim, by making a claim almost inevitable as the means of obtaining redress for the resignation.

620. It therefore decided that the Claimant did not affirm the breach by remaining in employment during the ACAS EC process.

621. As the Tribunal has decided, the Claimant did not make a final decision to resign until he learned, on 6 July 2022, that the ACAS process had been unsuccessful.

622. The Claimant then resigned 12 days later – that is, less than 2 weeks later. Even taking account of the date of issue of the EC certificate, on 20 June 2022, his resignation was reasonably prompt thereafter.

623. The Tribunal also noted that the Claimant was working significantly reduced hours in a phased return to work in June and July. He had not returned to full time work in June and July 2022.

624. On all the facts, including the Claimant's prolonged illness, his commitment to the ACAS EC process in an attempt to resolve his grievance, his reasonably prompt resignation when the ACAS process failed and the fact that he was not working

full time before his resignation, the Tribunal decided that the Claimant did not affirm the breach of contract.

Unfair Constructive Dismissal

625. The Claimant has shown that the Respondent has committed repudiatory breaches of contract, the last of which was on 19 April 2022, that he left because of the breach, and he did not waive the breach. He was therefore dismissed by the Respondent.

626. The Claimant did not make protected disclosures. The automatic unfair dismissal claim fails. Even if the Claimant had made the protected disclosures he contended, the Tribunal found that the reason for the Respondent's constructive dismissal was nothing to do with those. They did not operate on the Respondent's mind at all.

627. The Tribunal considered whether the Respondent had shown a fair reason for the dismissal.

628. The Respondent contended that its potentially fair reason was some other substantial reason; the Claimant was unwilling to work in accordance with the Working From Abroad Policy with his contractual location being London and/or unwillingness to accept his contractual pay terms.

629. The Tribunal did not accept that that was the reason for the Respondent's actions. It failed to act in accordance with its own pay policy and failed to address his grievances, quite apart from the Claimant's attitude to working from abroad, or his attitude to his pay. The Tribunal did not find that there was a fair reason for dismissal.

630. Even if there had been a fair reason, the Tribunal found that the Respondent acted procedurally unfairly in dismissing the Claimant. The Claimant gave the Respondent opportunity to act fairly by addressing his grievances and remedying breaches through the grievance and grievance appeal, but they did not do so. The failures even to address important aspects of the grievance were outside the reasonable responses of a reasonable employer.

631. The dismissal was unfair.

632. The Claimant brought his unfair dismissal claim in time.

Conclusion

633. Accordingly, the Tribunal concluded that the Respondent unfairly constructively dismissed the Claimant.

634. It decided, however, that the Respondent did not subject the Claimant to age discrimination, victimisation, or protected disclosure detriment.

635. There will therefore be a remedy hearing in the constructive dismissal complaint.

Remedy Hearing

636. The Tribunal makes the following directions in respect of the remedy hearing:

636.1 By 14 days from the date this judgment is sent to the parties, the Claimant shall send to the Respondent an updated schedule of loss in the unfair dismissal claim alone, including making clear whether he is claiming ongoing loss of any pension rights he enjoyed at the Bank, compared to pension rights in any new employment;

636.2 By 28 days from the date of this judgment being sent to the parties, the Respondent shall serve a counterschedule of loss, and a list of issues in the remedy hearing and, if the Claimant claims ongoing pension loss, the Respondent shall propose directions for valuing the pension loss;

636.3 If pension loss remains in issue, by 35 days from the date of the judgment being sent to the parties, the Claimant shall state whether he agrees to the Respondent's proposed directions on valuing pension loss;

636.4 By 35 days the parties shall agree a list of contested issues in the remedy hearing;

636.5 If pension loss remains an issue, by 42 days, the parties shall write to the Tribunal, setting out their proposed directions regarding valuing pension loss, or asking that a case management hearing is listed in this regard.

636.6 By 35 days from the date of the judgment being sent to the parties, the parties shall disclose to each other all documents they have, relevant to remedy;

636.7 By 49 days, the parties shall agree a bundle of documents for use at the remedy hearing and the Respondent shall prepare the bundle and send a copy to the Claimant;

636.8 Not less than 3 weeks before the remedy hearing, the parties shall exchange witness statements for use at the remedy hearing, containing their evidence addressing the schedule and counterschedule of loss and the list of issues in the remedy hearing.

636.9 The Respondent shall be responsible for ensuring that all bundles and statements for the remedy hearing are provided to the Tribunal at least 7 days before the remedy hearing.

Employment Judge Brown

28 February 2024

Sent to the parties on:

2 March 2024
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For the Tribunal Office:

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