EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Pleming	**v**	**National Highways Ltd**

Heard at: Reading Employment Tribunal
On: 15 to 23 April 2024 and 14 May 2024 (in chambers)

Before: Employment Judge George, Ms H Edwards and Mr A Kapur

Appearances:
For the Claimant: Self represented
For the Respondent: Mr E Beever, counsel

RESERVED JUDGMENT

1. The complaint of failure to pay holiday pay is dismissed on withdrawal.
2. The complaint of detriment on grounds of protected disclosure is not well founded and is dismissed.
3. The claimant was not dismissed by the respondent.
4. The complaint of automatic unfair dismissal for the reason or principal reason of protected disclosure is not well founded and is dismissed.
5. The complaint of unfair dismissal is not well founded and is dismissed.
6. The complaint of wrongful dismissal is not well founded and is dismissed.
7. The remedy hearing of 9 September 2024 is no longer needed and is vacated.

REASONS

1. This case arises out of the claimant's employment by the respondent as a Business Case Adviser which started on 14 July 2019 and ended with his resignation on 25 February 2022. The respondent states that the resignation took effect on 4 March 2022.

2. The final hearing took place between 15 and 23 April 2024. A timetable for the giving of evidence was set by the tribunal and we are grateful to the parties for keeping to the time allocated to each of them for cross examination.

3. Case management and the need to determine some preliminary matters on day one (see paragraph 11 and following below) meant that it was not possible to start to hear the claimant's evidence until day two. Some time needed to be taken out of the hearing to accommodate other judicial duties of Judge George on Days 4, 5 and 6. Although the tribunal and the parties were flexible with earlier start times, those pressures on the timetable meant that the final witnesses gave evidence on Day 6 with Mr Beever speaking to previously prepared written submissions on the afternoon of Day 6. The claimant's closing submissions were delivered on the morning of Day 7 and judgment was reserved. The panel was unable to complete our deliberations on that day and a further day in chambers was scheduled. A provisional remedy hearing was scheduled for 9 September 2024. As a result of our decision, that is no longer needed and the hearing will be vacated.

4. The procedural history of the claim is set out in the Case Summary of Employment Judge J Lewis KC at a preliminary hearing on 3 February 2023 and that of Employment Judge Douse at a preliminary hearing on 2 June 2023. There are two ACAS certificates in the present case although, in the event, nothing turned upon that and it was not necessary for us to be addressed on the potential impact of two ACAS certificates on time limits (see para.7 of Judge J Lewis's Case Summary on page 2440). The claim form was presented on 23 May 2022.

5. As originally case managed, the claimant included complaints of constructive dismissal, automatically unfair constructive dismissal for the reason of a protected disclosure and a complaint of detriment on grounds of protected disclosure. There were also complaints of wrongful dismissal/notice pay. In closing submissions, the respondent accepted that the communication relied upon by the claimant at final hearing was a protected disclosure within s.43B Employment Rights Act 1996. This was the same communication included in Judge J Lewis KC's case summary.

6. Judge Douse refused permission to the claimant to amend his claim to rely upon an additional alleged protected disclosure. On 7 October 2020, the claimant provided information about the alleged wrongdoing which is central to the dispute between the parties to the Office of Rail and Road (hereafter referred to as the ORR). At the hearing before Judge J Lewis KC, he said that he did not rely upon that communication to the ORR as a protected disclosure within these proceedings. His subsequent application to amend the claim to rely upon it was rejected by Judge Douse for reasons she gave in her orders at page 2455 & 2456.

7. There was third preliminary hearing for case management on 30 November 2023 when a final list of issues was agreed; it is found at page 2460. In his

orders made on that occasion, Employment Judge Gumbiti-Zimuto directed that witness statement should be exchanged by 26 February 2024. Difficulty over this led to the respondent on 2 April 2024 unilaterally serving their witness statements and making an application for an unless order but, by the outset of the hearing before us, the claimant had provided his witness statement so the respondent's applications fell away.

8. The respondent had prepared six volume main hearing file and page numbers in that are referred to as page 1 to 2480. The claimant, by consent, introduced some additional documents in a claimant's bundle: these are referred to in this reserved judgment as CB page 1 to 73 as the case may be. He also relied on documents in a supplemental bundle: CSB page 1 to 41. We have the benefit of the claimant's skeleton argument at the start of the hearing. Mr Beever provided written closing submissions - which were drafted before evidence was given by two of the respondent's witnesses - and which he supplemented in oral remarks. The respondent's written submissions were provided to the claimant at 9 o'clock in the morning on Day 6 and he made his closing submissions on the morning of Day 7.

9. When the claimant gave oral evidence he adopted a 10-page witness statement with minor corrections noted in the Employment Judge's copy. We also heard oral evidence from six witnesses called by the respondent. They adopted and were cross-examined upon written statements that are in a file of witness statement. Page numbers in that file are referred to as WB page 1 to 81. The respondent's witnesses were:

    a. Nick Harris - Chief Executive Officer (CEO) for the respondent,

    b. Vanessa Howlison - Chief Financial Officer at the relevant time (CFO),

    c. Nick Sharman - Director of Strategic Finance at the relevant time until January 2022 and the claimant's line manager in the first part of the chronology,

    d. Scott Dale - now the Interim Chief Financial Officer but the claimant's interim line manager from 10 September 2021 and, subsequently Divisional Director of Strategic Finance in succession to Mr Sharman,

    e. Neil Mohan - Head of Corporate Counter Fraud, and

    f. Nicola Bell - Executive Director of Major Projects since July 2022 but, at the relevant time, a regional Director of Operations in the South East who was appointed to hear the claimant's grievance.

10. The holiday pay complaint was withdrawn at the start of Day 1 of the final hearing and is dismissed on withdrawal by this reserved judgement.

Preliminary matters – Day 1

11. On Day 1 we considered three preliminary case management matters. One was resolved by agreement. The claimant originally stated that he wished to adduce in evidence a list of the documents that were available at a particular meeting in April 2021. He was directed to provide a copy of any document he wished to put in evidence to the respondent's counsel so that Mr Beever could take instructions and comment on whether or not any additional documents could be added to the hearing file by consent. In the event, all bar one of the documents was located in the hearing bundle in any event and there was no objection to the additional document being added.

12. Secondly, the claimant had made an application for disclosure of unredacted versions of particular documents found at pages 278, 286 and 1184. Mr Beever explained that he had seen the unredacted versions of those documents. He told the tribunal that the redacted sections covered communications between his lay client and their legal representatives when the emails were forwarded to their advisers, were therefore covered by legal professional privilege and were, in his view, properly redacted. Mr Beever, as counsel, has an professional duty not to mislead the tribunal which can override any duty to his client. We accept that he has made proper enquiries and that, this having arisen at the start of the final hearing, it is not proportionate to investigate further. There is no basis on which to order disclosure of the unredacted versions of those pages. One of the emails appeared elsewhere in the file appended to a different, unredacted contemporaneous email.

13. We refused an application by the claimant to amend LOI 4.1 in order to substitute the Divisional Director for Corporate Assurance for Neil Mohan, Head of Counter Fraud – who reports to the Divisional Director, as the named individual said to have been responsible for a detriment on grounds of protected disclosure in relation to the report into the claimant's protected disclosure. The reasons for that decision were given orally at the time and are also recorded here.

14. This particular paragraph of the list of issues was first included in Judge J Lewis's Case Summary following the hearing on 3 February 2023. In round terms, the complaint is about response of the respondent's Counter Fraud team to the claimant's protected disclosure of 30 March 2021. That response is said to be an action of Mr Mohan. The amendment the claimant wishes to make is to replace Mr Mohan's name with that of the Director for Corporate Assurance, to whom Mr Mohan reports and who, in turn, reports to the CFO.

15. We start by considering the history of how the allegation came to be defined. The particulars of claim do not name individuals. It is in the further information about the claimant's claim that particular detailed acts are set out. This act is specified on page 52, where it is stated to be an act of Neil Mohan. It is also relevant that, when Judge J Lewis clarified which protected disclosures the claimant was relying on, the claimant stated he was not pursuing a claim that an earlier disclosure to the ORR was the reason for

the alleged detrimental treatment by the respondent's own staff (paras.16 to 18 – in particular para.17 - on page 2442).

16. As we have already explained, an application to amend the list of issues and to rely on that earlier disclosure was refused by Judge Dowse. We take into account section 1 of her reasons (page 2455-6).

17. The claimant stated before us that there was some discussion at the hearing before Judge Dowse to the effect that, if evidence emerged that it was the Divisional Director who was responsible for the decision, he could make a further application to amend. There is no explicit reference that we can see in the case management summary to a discussion of that kind. In paragraph 1.8 on page 2456, part of Judge Douse's reasoning for rejecting the application is that there was no prejudice to the claimant because the ORR disclosure could be referred to as relevant background, and the claim based on the ORR disclosure (not made directly to the respondent) had no reasonable prospects of success as there was no evidence of collusion. There may have been some discussion about what evidence was available about knowledge of the ORR disclosure. However, in any event, that does not mean that the claimant was given an indication that a subsequent application to amend would be successful.

18. The reason why the claimant has made the application now is said to be disclosure of the investigation report itself in the hearing file. It appears in more than one version and more than one place: as originally sent to the claimant at page 1904 (with contemporaneous redaction) and in unredacted form at page 1180. As it was originally sent to the claimant, the redaction obscured Mr Mohan's name and that of the more junior investigator; as originally sent it purported to be from the Divisional Director herself. The claimant has candidly explained that he was sent a copy of that report around the time of the grievance outcome in December 2021 as part of the documentation which had been considered by Ms Bell, the grievance investigator. He accepted that, as originally sent to him, the only name visible to him was that of the Divisional Director. He also accepted that he was probably sent it as part of the disclosure exercise within the litigation in November 2023. He explained that it was only when it was disclosed as part of the paginated hearing file that he found the document sufficiently accessible and noticed the relevance of the name on the report to the way he wishes to run this specific detriment argument.

19. Although put as an application to amend the list of issues, in reality this is and should be considered as an application to amend the claim. We have considered the usual principles set out in the Presidential Guidance on Case Management: Guidance Note 1 which is based upon well-established authorities on applications to amend.

20. The proposed amendment does not change the legal complaint that is made - it remains a complaint of protected disclosure detriment - but it is said that a different person is responsible for the act complained of. Mr Mohan was the point of contact with the claimant during the investigation. The

importance to the claimant is that he now believes that the Divisional Director was responsible for the response which he considers undermined HM Government and he, himself. He wants to argue a case that is consistent with his position on that. However, we infer his reasons to be that he thinks he is more likely to succeed if the report is said to be the act of the Divisional Director because, in her position, he argues that she was more likely than Mr Mohan to have been aware of his earlier disclosure to the ORR. As he put it, he considers that she was very aware of his earlier disclosure to the ORR. He stressed to us the importance of this particular detriment in the chain of events. The essence of the disadvantage said to have been caused to him is the allegation that the investigation was poorly carried out, was superficial and came to unsustainable conclusions, but those were then used as the basis for rejecting the claimant's concerns and subsequent grievances.

21. Although it appears to be on the face of it a small change, it would pivot this part of the case. If successful, the claimant would seek to bring into the foreground what he alleges to have been a protected disclosure to the ORR in a way that isn't presently necessary. This is an alleged disclosure which was expressly excluded from consideration following a contested application by Judge Douse at an earlier hearing.

22. We read the relevant witness statements before deciding this application. There is evidence in Mr Mohan's statement which the claimant may wish to explore about the extent to which the report represents his independent decision-making unaffected by influence from his Divisional Director, whose advice he appears to have sought on a number of occasions.

23. We think that the risk to the smooth running of the hearing of this change, at this late stage, is greater at than the potential importance to the claimant, given the broad scope of the other allegations in the case. In reaching this conclusion, we take into account the timing of the application. The claimant has had the information which caused him to ask for this change in his possession for a very long time – since before the proceedings were commenced. Perhaps he was not aware of that. He explains the difficulty of assimilating a mass of documentation disclosed as attachments. Even though it may be possible to accept that it was only late in the day that he realised the significance of the report's authorship, there is no satisfactory explanation for the timing of the application – it could have been made far sooner. There would be disruption form such a late change because it would inevitably mean that the respondent should be permitted to call the Divisional Director and, even though she may be available during the trial window, there is no statement from her about her involvement. There is a very real risk to the hearing fixture if this change were permitted.

24. The decision also has to be considered in the context of all the other allegations. The claimant is not prevented from criticising the sufficiency of the report or of the weight he claims was given to it by the grievance officer. Full consideration can be given to his argument that he was disadvantaged

by the report when others relied upon it, regardless of the individual said to be responsible for the original report.

The Issues

25. The issues to be decided by the tribunal were agreed to be those found at pages 2460 to 2470. We refer to that List of Issues as LOI in this reserved judgment but do not replicate the complaints and issues here. The following amendments were made which mean that we do not have to consider some of the issues set out on those pages.

26. As noted above, the holiday pay claim was withdrawn and we do not have to consider LOI 21 as a result.

27. In closing submissions the respondent formally conceded that the claimant had made a protected disclosure on 30 March 2021 to the Highways England Whistleblowing Helpline. We therefore did not have to consider allegations LOI 2 or 3.

28. Some specific allegations were withdrawn wholly or in part by Mr Pleming during the course of the hearing.

    a. At the outset of the final hearing we refused an application by the claimant to amend LOI 4.1 in order to substitute the Divisional Director for Corporate Assurance for Neil Mohan the Head of Counter Fraud as the named individual said to have been responsible for a detriment on grounds of protected disclosure in relation to the report into the claimant's protected disclosure. Reasons for that decision are set out above. The claimant also confirmed that he no longer alleged that Mr Harris was complicit in the response and that allegation was no longer made against him.

    b. LOI 4.2 was clarified by the claimant as no longer pursued as an allegation of protected disclosure detriment but was pursued as an act contributing to the alleged breach of the implied term of mutual trust and confidence for the purpose of his constructive dismissal claim.

    c. LOI 4.5 is no longer relied on by the claimant as a protected disclosure detriment. Although he appeared in cross examination to say that it was no longer an allegation for any purpose, he did in closing submissions referred to delay in dealing with his second grievance and therefore we address this point in connection with the constructive dismissal claim.

    d. LOI 4.7 (B) is no longer relied on by the claimant either as a protected disclosure detriment or as supporting his constructive dismissal claim and is deleted.

    e. The claimant accepted in cross examination that the factual basis of LOI 4.9 was the same as the factual basis of LOI 4.11 which meant

that LOI 4.9 was redundant the word “again” was removed from the first line of LOI 4.11 and the claimant was content that the wording of that issue encompassed the same allegation as was set out in LOI 4.9 which could be deleted.

f. LOI 4.13 and 4.14 are no longer pursued as alleged protected disclosure detriments but are relied on for the purposes of the constructive dismissal claim only.

g. LOI 11.2 is the issue which sets out the alleged specific instances of the general allegation that the respondent was “engaging in a high level of public money spending outside of authority without the required business case governments, thereby undermining the Claimant in his role”. The claimant withdrew the allegations specified in i., ii., and iii. on page 2466 saying that he was unable on the basis of the available documentary evidence to show that there had been public money spent outside of authority in relation to those instances and he was not relying upon them as cumulatively amounting to a breach of the implied term of mutual trust and confidence.

29. Where those specific allegations are withdrawn or are restricted to the constructive dismissal case we have only reached conclusions on those issues to the extent it is necessary to do so to decide the issues that remain in dispute.

Findings of Fact

30. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

31. we attempt where possible in these reasons to avoid the use of technical jargon or terms of art but the subject matter is a technical area and to some extent it is unavoidable. To improve reading flow we use the following abbreviations in the reserved judgement and they are also used in some quotations we have included from the evidence;

AO	Accounting Officer - a formal role held by the CEO
BC	Business Case - usually running to a few hundred pages of analysis
The BC issues	As explained by the claimant in his para.13 this is used to refer to the claimant’s case that decisions of the respondent’s Investment Decision Committee to authorise the spend of

	public money must, in all cases, be informed by a Business Case or BC
BIDC	Board Investment Decision Committee
CEO	Chief Executive Officer
CFO	Chief Financial Officer
DfT	Department for Transport
EFC	Executive Finance Committee
IDC	Investment Decision Committee
IPMO	Integrated Portfolio Management Office
IS	Investment Summary
MPDS	Major Projects Delivery Services
ORR	Office of Rail and Road
RIS	Road Investment Strategy (see Harris para.16 and para.35 below)
SRO	Senior Responsible Officer (responsible for completion of the Business Case on a project – see Sharman para.17)

The structure and purpose of the respondent company

32. The respondent is a government owned company which is responsible for delivering HM Government's long-term plan for the road network (Harris para 4). The sole shareholder is the Secretary of State at the Department for Transport (DfT). It was established in April 2015 and was originally known as Highways England, changing its name to National Highways in 2021. Some of the documentation in the present case uses Highways England (or HE) when it is referring to the respondent.

33. The respondent's performance is monitored by the ORR. The License contains requirements to work openly with the ORR in accordance with a Memorandum of Understanding (Harris para.14). The ORR reviews the respondent's performance and advises the Secretary of State on whether obligations have been met. It can impose sanctions. The Framework provides that the ORR will publish an annual report advising whether the respondent is following the assurance requirements set out in the foot Framework (para 7.7 page 2208). We note, however, that, in correspondence with the claimant, the ORR describe themselves as responsible for enforcing the License but not directly responsible for enforcing the Framework document.

34. The respondent is described by its management as being an "arm's-length" company, by which they mean that it is run by an executive team accountable to a board, the majority of whom are independent directors, although the company is ultimately accountable to the Secretary of State. Ms Howlison acknowledged that there is no other arms-length body in government set up in quite the same way as the respondent is, saying that it had some freedoms which were different to other wholly owned bodies.

35. She explained, and we accept, that it was set up in this way in order to be able to execute a big portfolio of projects with more autonomy. It is not

revenue generating and is funded by the taxpayer. It has received funding from the government in five year investment cycles; there have been two since inception in 2015. Each cycle has a separate road investment strategy, referred to as RIS. This allows government, in consultation with the respondent, to determine the priorities and funding available for a particular cycle. Mr Pleming started work towards the end of RIS1 and his employment ended during RIS2, which covered 2020 to 2025.

36. The executive team is led by the CEO, which was Mr Harris from January 2021 onwards. He was initially appointed on an interim basis and then was permanently appointed in August 2021. He also holds the position of Accounting Officer (otherwise referred to as the AO) and in that role is accountable for the day-to-day management of public funds allocated to the respondent. Mr Harris also told us and we accept (Harris para 21) that he is accountable directly to the Permanent Secretary at the DfT who is the Principal Accounting Officer.

37. The Permanent Secretary issues a letter to the AO setting out his duties and that is referred to as the AO Letter.

38. The executive and Board of the respondent are assisted in exercising their investment decision-making authority by the Investment Decision Committee (terms of reference for which are at page 2403). The IDC membership includes five members of the Executive: the CEO, the CFO, the Chief Highways Engineer/Safety Engineering & Standards Director, the Commercial Procurement Director and the Strategy and Planning Director. Other attendees such as the Major Project Director, General Counsel and Head of Capital Portfolio Management do not vote on investment decisions taken by the IDC (Howlison para 9).

39. The IDC meets once a month and considers and may approve investment decisions within the delegated threshold of £50 million to £250 million. Investment decisions with a projected budget above this threshold will also be considered by IDC but must be referred to the Board's Investment Committee for separate approval. The Board Investment Committee is referred to in the older documentation as the HEIC (presumably for Highways England Investment Committee) and subsequently as the BIDC (Board Investment Decision Committee) which is the title we shall use. Projects with a value of over £500 million require direct approval by the Secretary of State (Howlison para 10). The DfT's governance forum is the IPDC that is senior to both the IDC and the BIDC.

40. A committee was established that appears to have been more flexible than the IDC with its formal terms of reference and fixed monthly meetings. This is referred to as the Executive Finance Committee or EFC. There is considerable overlap in membership of the IDC and EFC respectively. We understand the purpose of the EFC to be that it provided a route for the various directors to take soundings from senior members of the executive on an advisory basis before putting a proposal to the formal IDC.

41. The IDC is chaired by the CEO and there is a secretary to the IDC which has been described as the "gatekeeper role". The holder of that position at the relevant time was the Assistant Company Secretary. In this role, the IDC secretariat had a role to ensure that the paperwork you would normally expect to see to support a decision was in place to be put before the IDC but was not responsible for quality control of that paperwork; he was not responsible for ensuring that the paperwork was adequate or fit for its purpose. We accept the description of that aspect of the role as being more administrative.

42. The respondent has a Corporate Assurance Division, headed by a Divisional Director who reports to the CFO (see organisational chart on page 1767). Mr Mohan, as Head of Corporate Counter Fraud, reported to the Divisional Director. They are responsible for the whistleblowing hotline and Mr Mohan was involved in developing the whistleblowing policy (page 2158 – Mohan para.7).

Good governance and the respondent's governance responsibilities

43. At the heart of this dispute is the importance of good governance, particularly when investing taxpayers money in projects which are intended to benefit the public.

44. There is no dispute between the parties about how governance is built into the respondent's constitution. An overview of the governance system from the 2019 Annual Report is found at page 2394. The dispute is about precisely what limits are placed on the respondent's decision making by its responsibility to follow principles of good governance.

45. The respondent has a large budget, is entirely funded by the taxpayer and has delegated authority to approve investment of up to £500 million in particular projects (see the Finance and Reporting Letter page 826 @ page 831). Unsurprisingly, it was constituted in a way which requires it to be governed in accordance with certain principles and the delegated authority is subject to conditions including that the respondent comply with the assurance process in the Framework document (Condition A.1 page 827).

46. Statutory directions from the Secretary of State to the respondent are set out in the Licence (page 2298) which conferred on the respondent the legislative functions of the strategic highways company under the Infrastructure Act 2015. The respondent must "comply with or have due regard to (as appropriate)" the conditions in the Licence (para 3.1 page 2305). The Framework document (page 2181) sets out the respondent's roles and accountabilities and defines the working relationship with the DfT and the Secretary of State.

47. The Framework is a lengthy document and we have only been taken to certain passages in it. In particular, financial control is covered by Part 7 (page 2207) and the respondent must comply with paras.7.2 to 7.8. At para.7.4 it states

> "For investments over £50m Highways England must follow the HM Treasury Green Book five-part business case model and any other relevant guidance from the Department for Government. The Company must maintain counterparts to the Department's centres of excellence, will ensure the individual components of any business case are assessed rigorously and consistently in the relevant areas and that assurance is carried out in line with the Department's standards and guidance."

48. The Framework also directs that the respondent will comply with conditions in the AO Letter. (para.2.15 of the Framework) The AO is responsible for

> "safeguarding the public funds held by the company and for ensuring propriety, regularity, value for money and efficiency in the handling and use of public funds."

They are also to ensure that the company is run following the principles set out in the Managing Public Money guidance produced by the Cabinet Office. One stipulation in the AO Letter is that the AO is responsible for the respondent carrying out its functions as set out in the Framework document and should ensure that the respondent delivers good value for HM Government as a whole (page 549).

49. The claimant's argument has focused upon the governance obligations imposed by the Licence and the Framework. When the List of Issues refers to the SoSg, the claimant means "SoS Governance" – Secretary of State Governance - the requirement that the respondent follow the governance obligations imposed by the Licence and the Framework (claimant para.11). We shall refer to this as the Framework governance requirements.

50. The respondent's witnesses emphasised the aims and objectives of the activities that the respondent is authorised to carry out on behalf of the nation. These are set out in part 4 of the Licence (page 2307) which emphasises that the highways network is a critical national asset. Ensuring efficiency and value for money is only one of the aims and objectives which also include operating, maintaining, replacing and improving the roads.

51. In practical terms this means that the respondent was set up to deliver a roadbuilding plan that HM Government had decided upon. No one could sensibly disagree with the proposition that the projects have to provide value for money and that, in order to assist that, there needs to be suitably rigorous evidence financial evidence. The Financial Control section of the Framework is a structure designed to require the respondent to follow an effective assurance regime. On the other hand, the projects which were selected to implement each five year RIS need to be completed in order to further the respondent's other objectives.

52. Part 4 of the Framework concerns remuneration. It is apparent that bonuses calculated on the basis of Key Performance Indicators are paid to some of the top executives. We have seen no evidence that any of the senior managers has been influenced in any way by a desire to maximise their

personal bonuses when taking decisions on investments. This was a mere insinuation by the claimant with no evidential basis and we reject it.

What does it mean for financial assurance to be carried out in line with DfT standards & guidance?

53. Ultimately the claimant did not challenge the evidence given by Ms Howlison in her para 13 about the different stages of a business case for significant spending proposals. Those are:
    a. the Strategic outline Case (SOC), developed at the initial scoping stage;
    b. the Outline Business Case (OBC), developed in the planning phase, and
    c. the Full Business Case (FBC), required prior to signature of procured contracts.

54. She explained that major projects (which here mean projects with a value of more than £50 million) come to the IDC for approval of investment decisions at each of these three stages and may return to IDC for a second decision within the same stage where something has changed.

55. The BC was described by Ms Howlison, in her para.12, to have five dimensions: the strategic case, the economic case, the commercial case, the financial case, and the management case. When cross-examined about this evidence, the claimant appeared to disagree with this description of the five case model but did not suggest a different version of what it amounts to when asking Ms Howlison questions in cross-examination. We accept her evidence on this point.

56. It was common ground that when a project went to IDC for a decision there would be an Investment Submission (IS) which was intended to be a manageable summary of the Business Case (BC). This is intended to contain material information of which IDC needs to be aware to inform the decision they have to make at a particular meeting.

57. We make more detailed findings about the claimant's job role below but an important aspect of it was to ensure that assurance standards were met, in particular in relation to the financial case for the project.

58. We accept that the claimant's position when carrying out his role was that, if the BC had not been completed and updated at every decision point, then that decision was not taken in accordance with HM Treasury five-part business case model; his stance was that the decision was therefore not in accordance with Para.7.4 of the Framework document. There are a number of occasions which we detail below where the claimant expected to be provided with the most up-to-date information in the BC itself and would not regard the IS as an updating document to be read alongside a BC which it did not exactly match.

59. The position taken by the other senior financial managers (and here we mean particularly Ms Howlison and Mr Sharman who were managing the claimant at the relevant time) was that a requirement to follow that BC model nevertheless provided some flexibility. In Ms Howlison's view an IS, which post-dated the BC and updated, it could be considered alongside it. The BC could be updated after a decision had been taken by the IDC provided that decision-making body had had the information provided to it at the relevant time. The decision might be subject to the condition that it be updated, according to Ms Howlison.

60. In his para.18, Mr Sharman produced the respondent's business case policy (pages 455 to 500). He described BCs as living documents

> "which are continually developed to improve and refresh them, as requirements change or the format for business cases is developed" (Sharman para.19 WB page 31)

61. Mr Sharman and Ms Howlison accepted that, as the respondent was a new organisation, the documents provided to IDC were improving over time and there was an ongoing process of improvement work towards a consistent practice across the organisation. Ultimately, their evidence was that the important thing was that clear information was communicated at the necessary time but they were, for example, relaxed about whether an OBC together with an updating IS provided appropriate evidence to carry out assurance checks in a specific instance. Furthermore, the specific requirements could be proportionate to the decision before the IDC at that meeting. The claimant fundamentally disagreed with this position and expected only to be reviewing complete and updated BCs.

62. The ORR carried out a review of the respondent's delegated expenditure controls for the DfT in May 2020 (Page 856). This was the final RIS1 review which concluded

> "the Board and Accounting Officer of [National Highways] are effective, with governance systems that allow it to promote value for public money and ensure that relevant standards are met".

63. The claimant may have been accustomed to a different interpretation when working in central government. We accept that the respondent's view as explained by Ms Howlison and Mr Sharman did not breach Para.7.4 of the Framework document to carry out assurance "in line with" DfT Standards and Guidance did not require an identical approach provided it could be said BC's and other financial information were assessed rigorously and consistently. Thie could be proportionate to the need to avoid delay in pursuit of the respondent's other objectives (see also para.74 below).

<u>What does or did the claimant's job involve? What was the claimant's view of his responsibilities?</u>

64. The claimant's job description is at page 83. The Job Purpose is stated to be,

"The Strategic Finance Manager is responsible for reviewing the financial cases for all business cases put forward for investment decision approval. In addition, the role exercises a quality control over documents to be taken forward for approval (both internally and externally).

The financial case helps to reassure an investment decision body that the project/service is affordable within the company's overall financial settlement and that all associated financial implications arising from the proposal have been fully considered and addressed."

65. This purpose of the role has been described to us as the quality assurance aspect of the role. It is an advisory role where responsibility for making the decisions sits with the IDC. More than one of the accountabilities reflects this responsibility on the part of the SMA. One which illustrates the point is the key accountability the financial case presented for investment decision to

"enable investment decision bodies to make informed decisions by clearly presenting the financial context of decision-making"

66. However there was an additional requirement of the role in respect of which a key accountability was a requirement that the claimant,

"Provide leadership across the stakeholder community by working closely with Finance Business Partners, the Capital Portfolio Management team and Senior Responsible Officers, to ensure clear understanding of the financial governance required over investment decisions and to help to embed and strengthen the Investment Decision Control process within the Company. The role also involves providing active input into developing a Community of Practice for the Strategic Finance function."

67. Any particular project would have an individual who was the project lead and who owned responsibility for that project; there would be an SRO responsible for completion of the BC. Doing so was not the claimant's role as SMA. However, the claimant accepted that part of his role was to provide leadership to embed good governance into the respondent's practices. This was referred to by Mr Beaver as the continuous improvement aspect of the SMA role but we prefer to think of it as being a leadership aspect of the role. The advisory nature of the role meant that the Finance SMA was internal but not close to the project itself and therefore able to provide an independent review. On the other hand he was able to influence rather than direct others since he was not in a direct management position. We accept Ms Howlison's evidence in her para.18 about her aspirations for the role of Finance SMA.

68. The way this was explained to Ms Bell by Mr Sharman during her grievance investigation (page 1817) was that,

"Within Strategic Finance, sits the role of Strategic Finance Manager (Subject Matter Advisor(SMA)). The SMA role reports to me and its key deliverable is to provide independent financial review of business cases and accompanying investment submissions being brought forward by projects to the investment decision committee (IDC) for approval. Where risks and issues are identified, the SMA should then provide advice and work with the relevant Senior Responsible Owners (SROs) and project managers to improve the quality of financial requirements of the business cases. For example, the Finance SMA would be expected to review business cases to make sure that the funding is available so that if the company decides we can do that project, we can afford it. Another example is the Finance SMA would review how the VAT would be accounted. The expectation is to then work with and liaise with the project manager and almost resolve these issues, if possible, before the decision- making point.

This is a leadership role and the Finance SMA would also be expected to take an active role in engaging with relevant stakeholders to improve the understanding of financial governance required over investment decisions."

69. The claimant describes the above as an incomplete description but we accept that the finance SMA role was intended to improve the understanding of project leads of the financial governance required over investment decisions. In practical terms this meant improving the consistency of the format and the content of the business cases and accompanying investment submissions. A corollary of this aspect of the role is an acceptance by the respondent of a need for improvement. Mr Sharman accepted in cross-examination that the leadership aspect was about making sure that the processes the respondent had were embedded and strengthened so that they were following good governance practice. He stated that Mr Pleming had done a number of initiatives to achieve that accountability.

70. This is consistent with recommendations in the ORR review (page 859) that centres of expertise responsible for supporting and quality assuring work to assess the strategic, financial, economic, commercial and management implications of proposed investments should be established or continued (page 859). The ORR concluded that,

"SMAs are designed to support the process of compiling a business case in line with HMT Green Book guidance, through being centres of expertise in particular areas."

71. Despite that, we accept the respondent's evidence that the claimant had a particular view of his role which was (in our words) somewhat puritanical about what it was reasonable to request of him when the respondent managers needed him to be pragmatic. There are a number of examples of this, a few of which are set out below, in particular in our findings onf LOI 11.2 and 11.3.

<u>The allegation of spending public money without authority</u>

72. There was an exchange between the claimant and Mr Sharman when the claimant stated that there were no or only one Business Case capable of

review in respect of a number of projects to be put before the IDC that month. Mr Sharman responded counselling the claimant to ask those responsible why this was the case and asking what the Investment Summary said. The claimant's response was that he had not read it.

73. We infer from this that the claimant expected in his role to be presented with a completely finished Business Case that he could comment on. It seems to us that the claimant did not consider it to be part of his role to chase for a completed BC or to investigate whether the missing information could be found elsewhere in the supporting documentation. This is at odds with his answers in cross examination about the final sentence in Ms Howlison's para.15. He agreed that it was the theoretical role "of the SMA and assurance community to review the business cases and ensure that the Investment Submission accurately reflects the relevant information."

74. We accept the respondent's evidence that the Framework is not prescriptive as to the precise format in which the information should be presented. That is consistent with its wording. It gives flexibility to enable progress to be made in achieving the outcomes of road improvement. Clearly that should not be at the expense of a proper analysis of the costs and benefits so that a judgement can be made about where to spend public money but an overzealous insistence on the form of supporting documentation could be an impediment to progress.

75. Ms Howlison set out occasions when she had reported to the IDC that the relevant Business Case was incomplete or still in draft form, leaving to them the judgement about whether any deficiencies were of sufficient moment, about whether a decision could or could not safely be made to approve the spending. During Ms Bell's investigations into the grievance Ms Howlison forwarded documentary evidence to support this point (page 1894).

76. There is no evidence to which we think it proper to attach weight that either Mr Sharman or Ms Howlison thought that a complete and rigorous BC was not needed or was unimportant. Nor is there evidence to which we think it proper to attach weight that they accepted that the respondent made decisions to approve the expenditure of public funds in a way that did not fully implement internal guidance.

77. What they did accept was that there might well not be an up to date BC before the IDC on every occasion; sometimes the BC – which could run to 100s of pages – might not itself be provided to the IDC. What was required on each occasion that the project came to IDC was an IS with the most up to date forecast for the proposal overall and the specific stage of approval being sought (see Howlison para.15).

78. The claimant's job description required him to review "the financial cases for all business cases put forward for investment decision approval". This, in our view, required him to review BCs and ISs.

79. An example of the tensions between the claimant's approach and the respondent's approach can be traced in the amendments to the SMA review

for seven projects (page 280 and following). Similar points can be made in respect of all seven but the request in relation to the A38 Derby junctions was described in the claimant's draft comment as having deficiencies in relation to the way the Cost by Year are scheduled and reconciled between the economic and financial cases "to evidence the funding in the context of [value for money]". Mr Pleming had then stated "Because investment decisions require a BC, approval without a reasonably complete BC will evidence failure to meet HE Framework obligations".

80. Mr Sharman proposed that being replaced with the following:

> "The Full Business Case is currently in draft form with some gaps, for example reconciliation of costs between the economic and financial cases. Approval should be subject to this being completed in line with [National Highway's] Framework obligations."

81. The reason for the changes was explained in Mr Sharman's email at page 278 to be that it would allow Ms Howlison to be clear in the IDC meeting that

> "we are still not where we need to be in terms of quality/completion of the underlying business cases, that we are pointing out business cases need to be completed."

82. Phrasing the information in this way left with the IDC the decision about whether the gaps in the BC was sufficiently material to mean that the project should be held up or whether conditional permission could be given for the investment. It underlines the difference in approach between all the senior managers, who agreed that conditional approval would not put them outside the respondent's Framework obligations, and Mr Planning for whom the position was stark.

83. We note that Mr Sharman does not, in his response to the claimant, dispute that the underlying business cases are not of the required quality and/or are incomplete. The exchange does not therefore provide evidence that Mr Sharman was ignoring the need for BCs. Ms Howison explained when asked about these annotations that Mr Sharman's phraseology told her precisely what the failures of the BC were, what was missing whereas the claimant's review did not enable her to understand "if there was an egregious or less material departure". She accepted in respect of the A38 Derby junctions that, without a separate economic and financial reconciliation of costs, the FSMA would find it a challenge to review it but her expectation was that, instead of simply stating that the BC did not comply with the Framework document, judgement should have been used at an earlier stage to raise the point with the project manager. She agreed that it was right to separate out that cost reconciliation but that it was not unrealistic to expect the SMA's relationship with the project manager/SRO to ensure that the document developed as it showed over the time of the project and remained relevant and sufficient for purpose.

84. We were not shown evidence of the decisions taken at the November 2020 IDC in respect of these specific projects. We have not seen minutes of any IDC meeting which were couched in conditional terms. The respondent has

not supplied documentary evidence of the process to go back to complete the BC if conditional approval given. There was no positive evidence that such decisions were followed up.

85. Nevertheless, without the granular detail on which decisions were taken that should have been subject to a caveat and instances where that caveat was not then progressed and the BC updated retrospectively, we are not satisfied that the respondent made investment decisions without a proper robust analysis of the information. We see nothing wrong in principle with the approach taken by Mr Sharman and Ms Howlison to find a pragmatic and proportionate way through where the documentation was not perfect by identifying the specific issues and leaving to the IDC, whose formal responsibility it was, to satisfy themselves about what was material with the benefit of independent advice about any deficiencies.

86. The claimant has not shown that the decision-making on any specific occasion was done on the basis of inadequate information (see the next section paras.88 to 144 – the detailed findings about LOI 11.2). It seems to be accepted that, on occasions, a project went forward to the IDC for some particular decision when the IS and/or BC were incomplete. However we find that when the claimant described there being no BC he might, depending on the circumstances, mean to convey that the BC had been superseded by events, was incomplete, or had not been updated to be consistent with the IS. This is not the same as there being no BC and we accept that, provided any limitations are identified so that their importance can be assessed, it does not follow that decisions were taken without adequate information. Neither does it mean that decisions to approve investment have been taken in breach of HMT's five case business model in the Framework document; much will depend upon the stage the project has reached and the specific approval being sought.

87. The specific allegations relied on the claim by the claimant before us of public spending outside of authority without the required business case governance are set out in LOI 11.2. The claimant's argument is that this undermined his position because his insistence on formal compliance was not shared by the respondent's managers and therefore there was no incentive on the project teams to be rigorous in the information provided to the claimant.

Specific allegations in the list of issues (hereafter LOI) 11.2 and 11.3)

88. We started our deliberations by considering the individual allegations of instances where public money was said to have been spent without authority. It is relatively unusual that we set out in our reasons what our approach to fact finding has been. In the present case, the factual allegations in LOI 11.2 and 11.3 are at the heart of the claimant's case and our findings on them were likely to and did inform our findings about other issues. We therefore referred back to them on a number of occasions and have already referenced some of them in these reasons. They were the

instances of the alleged abuse of good governance relied on by the claimant.

89. The first allegation in LOI 11.2 which needs to be considered is LOI 11.2 (a) because the claimant confirmed in evidence that he was withdrawing the allegations set out at LOI 11.2.i – iii.

90. Mr Pleming alleges (LOI 11.2 (a)) that an email trail ending with that on page 235 sought to undermine his authority by proposing ungoverned changes. The nub of his complaint was that the sum of money was to be drawn down from Central Risk Reserve which would not be the standard governance provisions. The claimant clearly regards this as undermining his authority because, from his perspective, he reviews business cases and seemed to suggest that spend out of the Central Risk Reserve would not be subject to the same safeguards.

91. The email in question at page 235 is from the Capital Portfolio Director. We accept Ms Howlison's evidence that the Central Risk Reserve is a pot of money which is the sum of a contingency provision in each project. Each project would have had that provision set out in their own Business Case so that the Central Risk Reserve was intended to be drawn down in case of need in respect of several different projects.

92. The wording of the final paragraph of the email on page 235 makes clear that the intention was to "draw a line" under a number of different schemes

> "with a paper that provides a final reckoning on the overs and unders which will crystallise a formal request for Central Risk reserve to balance the net position across RDP schemes".

93. We were also taken to the exchange of emails between the claimant and Mr Milburn the following month asking for the paper that was anticipated by the email at page 235 to be reviewed (page 296). The purpose of that paper is described as being to seek "approval to drawdown £254m of the £819M to be added to project baseline budgets and aligning with previous IDC approvals". We can see that this is proposed to be drawn down against a much larger sum allocated to the respondent to manage risks and uncertainties across the capital portfolio as part of RIS2. Mr Milburn explains to the claimant that there was no BC for the paper as such because it was a composite up of drawdown is contained in each of the individual project IDC submissions that had been approved sometime over the previous two years. He then asks for someone to send the claimant the CRR policy to provide a basis for the claimant's review. There was further correspondence about this (page 317 – 321) which includes the email from the claimant (page 321) which suggests that without a BC he has no reference point against which to review the paper. Ultimately, Mr Sharman had to provide the comment in order that the paper could progress to IDC (page 318).

94. We can see there are a number of things that are having to be taken on trust in relation to this - for example, the CRR policy is said to have been approved but has not been marked approved it is still marked as a draft. The claimant's criticism of the original email is in part that he was asked by Mr Couzens to reinforce the message through the SMA's. He considers this to have been impractical because of his case there wasn't an SMA community as such. However he seeks to cast this as undermining his authority and as an illustration of the respondent spending money without authorisation. We are quite satisfied it is neither.

95. The evidence relied on by the claimant tends to show that the request is for IDC to approve an aggregate of sums that had previously been approved and this falls short of an acceptance by the respondent that the claimant was being required to act outside the governance framework. The claimant was not told what to do, and was presented with information that is not as easy to access or tidily presented as would be most convenient. The evidence in fact supports the respondent's position that the claimant found it difficult to engage with the other parts of the organisation in a productive way.

96. It seems to us that the claimant did not think in this instance that he should just take at face value what he was being told. Up to a point, that was not unreasonable when part of the claimant's job was to provide an objective viewpoint. We do sympathise; the claimant, who is expected to exercise independent judgement, is nevertheless expected largely to accept an explanation that is provided to him. Nevertheless it is not unreasonable for Mr Couzens to have asked him, as he did at page 235, to reinforce the information with the SMA's if he agreed with the points up "if you agree with the points could Andrew reinforce through SMA's".

97. By this Mr Couzens was not asking the claimant to approve decisions that had in fact already been taken some two years previously. It is certainly not evidence that shows the respondents were engaging in a high level of spending public money without authorisation as alleged. It was not unreasonable for the claimant to expect to be shown the evidence before carrying out the review he was asked. However, the emails do not show the respondent's managers failing to engage with the claimant and the characterisation that this showed him being undermined or bullied is objectively not a reasonable one. He was not targeted at all and the specific allegation that Mr Sharman, in his email was bullying the claimant is not a fair characterisation. We consider Mr Sharman to have been respectful of the claimant's authority and autonomy – as were both Mr Couzens and Mr Milburn.

98. By contrast the claimant comes across as intransigent and highly sensitive. In summary, the respondents are not, by this, guilty of an inappropriate request to the claimant to engage with the SMAs. Nor are they guilty of an inappropriate request in the terms that they ask the claimant to address the CRR, given Mr Milburn's explanation on page 296 for the lack of a single BC. In fact, this is an illustration of the claimant's resistance to direct

engagement with the SMAs because of the challenges he perceived that to pose as a result of what he described as a lack of clear mechanism for doing so.

99. In relation to LOI 11.2(b), the claimant referred to pages 278 to 286. This is a run of emails which we have discussed in paras.79 to 85 above. Page 283 contains the original proposed comments by the claimant. His view was, clearly, that there was no reasonably complete BC in respect of each of the seven projects. He recommended a stark & accusatory rider to each request for approval which was not facilitative.

100. The project which is the focus of the specific allegation in LOI 11.2(b) is the A1 Morpeth to Ellingham. His allegation is that his advice had been that there was not the requisite business case to support the request for £125 million public funding but the CFO directed that this was inappropriate advice to give and that his advice must in the future always be reviewed by Mr Sharman. "She gave direction to the Claimant to never raise the lack of complete business cases: the [Secretary of State's governance] was nugatory as was the Claimant's role." (LOI 11.2(b)).

101. We accept the respondent's case that the claimant's advice did not inform IDC what specifically was missing so that they could make an informed decision about it and also that it was part of his job for him to do so. Mr Sharman (rather than Ms Howlison) – see page 278 - suggested an alternative formula which makes clear that the request included an element of a particular part of the budget which would normally require a FBC when there was only a OBC at the then present stage. That formulation makes clear the deficiency but leaves to the decision makers the responsibility to decide what to do.

102. Setting aside the fact that the direct communication put in evidence about this request shows a discussion between *Mr Sharman* and Mr Pleming rather than between the latter and *Ms Howlison*, we also note that Mr Sharman himself needed further information about two points made by the claimant (and did not therefore simply say that the lack of BC should not be mentioned). His formulation itself drew attention to the fact that the BC was insufficient. No one directed that the claimant should never raise the lack of BC.

103. However, Mr Sharman did direct that amendments be made and stated that "Going forward, I'd like to clear the final Finance SMA comments before they are submitted."

104. On 6 November 2020 (page 281), Mr Pleming agreed to make the amendments. When asked in cross-examination about Mr Sharman's amendments, the claimant agreed that Mr Sharman was highlighting shortcomings in a constructive way and displaying the attitude that BCs need to be completed. His point was that such a flexible approach was not one which would exist in central government and meant that, "90% of the time" the basics were being ignored by the projects which, over time, had an impact on him in his role. He ultimately was unable to point to Mr

Howlison saying that his advice was inappropriate or directing him not to raise the lack of BCs.

105. In fact, on 9 November 2020 Ms Howlison emailed the claimant (page 286) thanking him for raising the A1 issue in the way that he did "rather than it just landing baldly in an annex at the end of the report" because it had led to an email exchange "which should lead to a better conversation and outcome either at IDC or outside of it".

106. Our findings on the claimant's allegation are that the comments were those of Mr Sharman, and not Ms Howlison. We do not accept that Ms Howlison directed the claimant never to raise the lack of a complete BC; that would have been contrary to what he was there for and what the Finance Department were trying to achieve. The internal communications between the claimant and Mr Sharman amount to encouraging the claimant to raise the lack of BC in a different way by providing the information that would allow those tasked with making a decision to be informed in an open way. By this there was no undermining of the claimant's role and it did not make his role nugatory. Mr Sharman was telling the claimant how he wants the claimant to carry out his role. The evidence about this project certainly does not show any spending without authority; we have not been taken to the IDC minutes to show what was, in fact, authorised and whether any conditions were attached.

107. The claimant conceded that LOI 11.2(c) was, in effect, the same point as LOI 11.2(a) and it needs no separate consideration.

108. The allegation in LOI 11.2(d) is that the Framework governance requirements were nugatory, as was the claimant's role, when he was asked for comments in December 2020 on a review of the A19 New Tees Crossing.

109. We've reviewed pages 348 to 349 which are the relevant documents relied on in relation to this. We have seen nothing improper in the correspondence, nothing from which we could reasonably infer that the respondent's managers intended to side-step normal rigorous scrutiny of the business case. The initiating email from Mr Dale (then Divisional Director, Finance Business Partners) makes clear that the project is unusual, is not part of RIS2, and has already been progressed through the Options phase by the local Combined Authority. It is clearly a relatively large value project, he does say that it is coming to IDC but it is not clear what they are to be asked to approve and it has been pre-approved by a different authority prior to being moved to the respondent's portfolio.

110. Mr Sharman's communication of this to the claimant (page 348) is a reasonable email. He says that he presumes "anything coming to IDC will be for some form of early stage funding". Putting Mr Dale's email together with Ms Howlison's suggests that, at that point in time, the funding mechanism was not in place but the uncertainties and risk are noted.

111. We do not think that the claimant's response at 14.11 on 14 December 2020 (page 348) was a reasonable response to what Mr Sharman said. He is very critical of Mr Dale/the Finance Business Partners team for not providing a Business Case and notes that, of 4 projects going before the IDC that month, only one had a BC and says "Pending confirmation on CIP, that is the only one I will have to review."

112. Mr Sharman's response is to ask the claimant to go through the BC requirements for each project – given the stage they are at - with him at a scheduled meeting due to happen the following Wednesday. The exchange with Mr Sharman continues with the claimant saying he infers from the earlier emails from Mr Dale and Ms Howlison that the BC is not taken seriously or considered to be the Business Partners' (Finance BPs) responsibility. Mr Sharman refutes that and repeats his wish to understand what deficiencies the claimant sees in the information. It is a measured, respectful and collaborative response.

113. We infer that Mr Sharman was trying to see understand what reasonable point the claimant was making. That contrasts with the claimant, in effect, saying that he would not be able to review projects which do not have what he regards as a satisfactory BC. It is true that he has stated what level of BC he would require but Mr Sharman appears to us to have wanted a more detailed critique which the claimant does not appear to think is within his role. This is particularly obvious in his response at 15.47 on 15 December 2020 (page 347) where he states "It is not a reasonable use of my time to join the SMA Call in future for BCs of the standard of the first two."

114. The available emails also demonstrate uncertainty about whether in the forthcoming IDC meeting there is a request for approval of any funding at all. Overall, the emails referenced for this issue do not show that funding was authorised without the required BC, do not show that any of the managers involved regarded BCs as unnecessary and do not show that the respondent's respect for governance or the claimant's role was trifling, nugatory or insignificant. This is not evidence that the claimant's role was undermined – rather it is evidence that Mr Sharman expected the claimant's role to involve advice and guidance to the Finance BPs to improve the quality of what was produced as well as advice and guidance to the IDC. The claimant appears not to have thought that a reasonable use of his time.

115. We have been shown no information from which to make findings about the nature of the decision which IDC were being asked to make in this instance, when – if at all – this project was approved or what financial data supported the decision when it was made. The comments relied upon do not show a lack of respect for the principles of good governance. There is no primary evidence from which to draw the inferences urged upon us by the claimant.

116. The following month, comments were invited by Major Projects Delivery Service (MPDS) from the SMAs (including the claimant) about a number of projects to be put before the IDC February 2021 meeting (Page 393 – 394). As at 15 January, MPDS state that 3 sets of "papers and business cases" are on One Drive, that 4 others would shortly be added and that comments

are due by 29 January. On 18 January, MPDS confirm 3 further sets of papers have been added but "be aware that the M27 BC is still to be updated to reflect the ask in the IDC paper".

117. There is clearly to be an SMA call to discuss these papers. Two weeks' notice is provided and a deadline provided. This seems a collaborative approach.

118. The claimant replies all on 19 January 2021 saying "Hi MPDS. Only A12 has a reasonably reviewable BC, please update when the others arrive, thanks". We read the response to that (top of page 390) as MPDS saying that if the claimant has an issue with the content of the BCs or supporting papers he should take that up with the author of the paper and that an SMA call that day would be an opportunity to do so.

119. The claimant emails Mr Sharman (page 390 and page 386) and the latter's reply leads us to infer that Mr Sharman thought that MPDS were responsible for making sure that the

> "MP projects are 'ready' for relevant governance, ie facilitating production of Investment Submissions and supporting Business Cases from the individual project teams, making sure these are available for review at appropriate time".

He asks the claimant to pinpoint his concerns about each MP project coming to IDC.

120. By this he does not, as the claimant describes it in allegation LOI 11.2(e), "ignore[s] the SoSg issue". He asks the claimant to provide information to allow MPDS to understand what is needed. Papers for 6 of the projects were available. The claimant, in his reply at page 389, effectively says that it is not easy for him to understand what stage the project is at and what the project is seeking from IDC so not easy to say what BC is required; it is not a reasonable expectation of him in the SMA role to have to do this for so many projects. He refers to the absence of an IPMO (or Integrated Portfolio Management Office) and his work making up the resultant gap saying that that has not led to improved quality. He states his view that "it is pointless for time to be spent on a non-BC supported review since it only feeds a process that is flawed and fails to meet HE's obligations". He describes his role as a QC (quality control) role. He has (separately – page 386) said that he will only join the SMA call for the project which has what he regards as reviewable saying "I am not sure how I can, therefore perform the SMA Role?"

121. Putting that in less technical language, the claimant is effectively saying that what he has been asked to do by Mr Sharman is not within his role, he has previously done what is needed but it has not improved the quality of what is provided by Major Projects for review and what is now needed is to get tough with MP. This email at 11.54 on 20 January 2021 clearly records the claimant's position that his role is to perform a BC review and not an IS review. We infer that the problem was about what the claimant saw his role to be, and a difference between, on the one hand, what the claimant thought

the respondent's response should be to inconsistency, lack of progress in quality of reports and timeliness and, on the other, the respondent's view on that. Mr Sharman's expectations in relation to this specific exchange are in his para.40.4 where he states that he "expected Andrew to have reviewed the investment submissions and feedback to the SRO regarding any matters he identified."

122. We have been taken to some initiatives taken in 2019 – 2020 to improve consistency and rigour in BCs and other papers. There has been ample evidence that there had not been the expected progress within the company (and MP specifically) during the claimant's employment in the quality and timeliness of available BCs. Mr Sharman does not say otherwise in the contemporaneous emails.

123. Nevertheless, we do not see the respondent's approach as undermining the claimant. It is just a different expectation about how to get to a destination both parties see as not just desirable but necessary. The claimant's frustration is clear from his January 2020 email.

124. LOI 11.2(f) was removed from the list of allegations of spending public money without authority because it overlaps with the allegation about Mr Harris's responses to the communications about the AO Letter and is, therefore, a general point rather than a specific alleged unauthorised spend of public money.

125. The nub of LOI 11.2(g) concerns the use of IS as the basis of decision making. The way the allegation is framed is that the Assistant Company Secretary (see para.41 above for an explanation of his role) is alleged to have said in an email dated 18 December 2020 that where there is an IS, the obligation to use BCs does not apply. It is not a specific allegation that money was authorised to be spent without complying with the Framework governance obligations but is relied on by the claimant as illustrative of the attitude to governance.

126. The email in question is at page 420. The claimant had raised an issue about failure to use consistent IS templates on 11 December 2020. The background is that the claimant had notified Major Projects that, in future, they should use a particular template (page 422). They replied that the new template does not align with their requirements and they are unable to use the desired template without formal agreement from the MP Executive Director. The claimant explains that his only responsibility is to notify them of the change "rather than resolve MP's issue". MP suggests a format for discussion how to reach a resolution (page 421). Then the claimant raises this with the Assistant Company Secretary; he appears to consider that to meet the Framework obligations the IS must be 'consistent' and 'in line with the Department's standards and guidance' which he appears to think means no deviation from a particular template.

127. The Assistant Company Secretary's response does not say that the obligation to use a business case does not apply where the project completes an IS. What he says is that the templates are IS templates and

not BC templates so the extract from the Framework (which refers to "individual components of any business case") is not relevant to the question. In summary the Assistant Company Secretary says that a template can be adjusted if required, it's been agreed at a high level that MP can use their template and in nearly three years he's not been made aware about concerns about the template itself.

128. We consider that the Assistant Company Secretary's interpretation of para.7.4 of the Framework document is a reasonable one; the requirement for components of a BC to be assessed consistently with the DfT's centres of excellence and in line with the DfT's standards and guidance does not, it seems to us, prescribe a particular IS template. The claimant's interpretation is an excessively narrow one. The Assistant Company Secretary engaged with the claimant's issues and explained MPs perspective. This does not support an inference that he thought that BCs were not necessary.

129. The claimant forwarded the exchange on to Mr Sharman (page 419) and the latter was cross-examined about it when he gave evidence. He disagreed that lengthening the IS allowed the BC to be bypassed. It is fair to comment that if one only lengthened the IS and never updated the BC then there was a risk of failing to use the discipline of the BC and a risk of overlooking the broad analysis of all factors that discipline encouraged. The claimant was right to be exacting; his role required independence of thought and courage to challenge his peers and those higher up the chain of command. However, we are persuaded that, overall, the evidence supports a conclusion that he excluded consideration of the IS and showed inflexibility in his thinking and management of others which was unhelpful.

130. Otherwise, no specific allegation of exclusion or undermining was put to Mr Sharman. The factual allegation set out in LOI 11.2(g) is not made out.

131. The claimant alleges that he had requested governance clarification on public funding following the distribution of papers for the March 2021 IDC meeting (LOI 11.2(h)). Mr Pleming forwarded to Mr Sharman the agenda for the SMA Community Call scheduled for 24 February 2021 to discuss the March IDC (page 1652). That agenda with links to the supporting papers had been sent to Mr Pleming on 17 February 2021.

132. Mr Sharman asked the claimant what two of the projects were (page 1651 email of 23 February at 11.00). The claimant replied "I have not seen a BC within governance for any so do not have the basis for understanding any of them". His line manager asked him what the ISs say and the claimant replied "I have not read them".

133. That is the background to the allegation that, by his response on 1 March 2021 at 17.36 (page 1650), Mr Sharman

> "perpetuated a futile resolution via the "Executive Finance Committee" … which was incentivised to undermine the SoSg). This prompted a response from Mr Sharman to the Claimant: "**the process is not working**", ignore the lack of business

cases and **instead review the "investment submissions**" which are SoSg non-compliant: they have no standard to review against." (LOI 11.2(h))

134. This needs some unpicking to understand and we make no apologies for quoting at length from the 1 March 2021 email. What Mr Sharman actually said was:

> "From the round-up this morning, it sounds like there are still no business cases for you to review on the Major Project cases this month.
>
> Whilst we know the process is not working as it should, and hence the finance SMA role (in terms of reviewing business cases) is frequently not able to be performed, I need you to engage with the process as it is. Only by doing this can we make clear what is not happening that should be, influence people to do the right thing or to change the process, and make sure Vanessa is appropriately briefed.
>
> Therefore, could you please review investment submissions, even of (sic) there is no business case provided with the submission. Where you feel there should be a business case, please engage with the relevant stakeholder/s to find out why there isn't one, or if there is one (eg earlier version, not yet complete version) when this will be available. If you can then summarise the position as you see it so I can understand things, this will allow us to decide i) whether I need to escalate and ii) how we brief Vanessa.
>
> I appreciate that in a perfect world, PMs or SROs should be approaching the SMA to ensure they are fully briefed on the position on their project, and the request they are making to IDC. If MPDS are not able to clarify for you the status of the business case, I'd like you to be more proactive in contacting PMs or SROs directly, or engaging with the FBP community.
>
> …
>
> At the appropriate time, I'm keen to have a fully informed discussion at the Exec Finance Committee on what we are seeing in terms of investment submissions, the related business cases and any recommendations for improvement. This could be linked to some thinking on how an IPMO function might work; this may not be as a separate 'entity' but as a clear articulation of IPMO related tasks and who is responsible for each."

135. What the claimant was complaining about was that he was unable to do the quality assurance aspect of his job on an IS because he was unable to compare the IS with the HMT Green Book. He seemed to think that he was unable to measure it against anything. However, we think that he could reasonably review the IS and make recommendations as to whether the content of the IS provides the information needed. We think that he could reasonably have engaged with the substance of what is presented and not focus almost exclusively on the form in which it is presented. We are satisfied that that comes within his role and what the respondent could reasonably expect that of him. If nothing else, it was within the leadership

aspect of his role. It is clear that the claimant found that difficult and counter-intuitive but it was a reasonable expectation for the respondent to have of him.

136. Viewed objectively, Mr Sharman's email at page 1650:

    a. Engages with the claimant's concerns and does not dismiss them;
    b. Is supportively worded;
    c. Attempts to coach the claimant about the things he can do to influence the organisation.

137. The reference to EFC is mischaracterised by the claimant; Mr Sharman is proposing a mature discussion with those in positions of authority on the finance side about IPMO related tasks and who is responsible for each. Our understanding is that within this organisation there was no separate IPMO. This cannot fairly be characterised as futile – it sounds to us like a sensible avenue to raise questions about whether there are important functions which are not presently being covered.

138. The concession that "the process is not working" is subject to the important qualification "as it should". This is no more than an acknowledgement that there has not been the improvement in quality and timeliness of papers in the previous two years. As we set out above (para.52), the claimant's insinuation that members of the EFC are incentivised to undermine good governance has no sound evidential basis. The factual allegation set out in LOI 11.2(g) is not made out.

139. It is clear from page 1649 that this discussion continued. Overall, we accept Mr Sharman's description in his para.40.7(i) of this exchange as an example of him asking the claimant to clarify what the projects are asking for so that he could understand the context and be informed about how to respond as well as coaching the claimant to work proactively to achieve improvement.

140. The specific incident referred to in LOI 11.2(i) is the same as that referred to in LOI 11.4(a) – where it is relied upon (in effect) as evidence of undermining the authority of the claimant's role. It dates from discussions antecedent to the April 2021 IDC meeting. The claimant stated in oral evidence that it was indirect evidence of spending public money without authority.

141. An email from the claimant to a colleague after an SMA call questioned whether MPDS were correct that the SMA Review of BCs took place in the balance of the working week following the review call (as he understood to have been said in the call) or the following working week. What the claimant explained orally amounted to a complaint that his colleague was overly deferential to MPDS in the timings they were (apparently) seeking to impose on the review. He explained that his reply "The Framework is the reference not MPDS" was intended to be a brief response to exclude MPDS who were seeking to redefine the process.

142. That's as may be, but it was unhelpful because it could not reasonably be understood to mean that and the Framework itself did not define the timetable by which particular tasks should be carried out. When the claimant forwarded this to Mr Sharman simply saying "I am not able to review in this situation. Please resolve", he was escalating a question about the timetable for when things should be produced. As Mr Sharman says (his para.40.8(b)), of course the claimant should have a reasonable time to review but it is not unreasonable for Mr Sharman to say that he should not have to resolve the time by which an SMA Review has to take place. The claimant's comment that he is unable to review in this situation is unreasonable. His line manager's response that "this is something you need to work with MP colleagues on and come to an agreed position. … I don't expect this to require escalation to get resolved" is a perfectly reasonable stance.

143. In response to cross-examination on this topic, the claimant referred to pages 196 – 197 which was an exchange from November 2019 between himself and an Executive Director about a meeting to discuss an agreed approach to preparation of IDC papers and the timing of BCs. We can see that, certainly from the claimant's perspective, there had not been sufficient progress since then. However, he did not respond constructively – for example by saying that he had been trying to resolve this since 2019 and have got nowhere so I need to escalate this. Indeed we've been shown two snapshots – not a continual frustration of the claimant's requests for clarity and consistency by MPDS. There is evidence that Finance had to reiterate what good practice was but that did not mean that the claimant was targeted or that there was a deliberate stance of working against the principles of good governance. We accept that there were competing objectives. This must have been frustrating for the claimant, none-the-less.

144. The facts we have found do not reasonably lead to the inference that Mr Sharman represented that "this was not an issue for the Claimant to escalate SoSg issues". It was simply a question of when the review should be carried out. It shows tensions in working relationships but nothing which could reasonably be read as excluding the claimant from the governance required in his role – which is the allegation. The factual basis is not made out and the facts found do not support an inference that the respondent's managers ignore the obligation for good governance.

145. There is considerable overlap between the factual matters underpinning LOI 11.2 and those underpinning LOI 11.3 which are said to be particulars of occasions where the claimant was requested to breach governance under the Nolan Principles of public life. We have not been separately addressed by either party on what those are – to the extent relevant for the present dispute. There was no cross-examination about them save that Mr Sharman accepted that he was familiar with them. The claimant, in his para.16, refers to Integrity – citing also regularity and propriety. He roots this in the Values of the organisation (page 85) where Integrity is said to cover behaviours which are "open, honest and professional, respect and value the contribution others make, do what we say, always do the right thing."

146. As this issue has been explained to us, the question of whether the respondent required the claimant to act in a way which caused him to breach the ethical standard to behave with integrity in public life, has not involved a different argument to whether he was required to act in a way which caused the respondent to breach the Framework governance requirements. On the other hand, if the claimant's underlying factual allegation that there was a practice of authorising the spending of large sums of public money without complying with its obligations to practice good governance and that managers did so because they were incentivised by motives of personal gain were made out, the respondent has not argued that that would not contravene the Nolan principles.

147. Turning to the separate allegations, LOI 11.3(a), as worded in the LOI, was described by the claimant as something he was unable to evidence but relied upon the same factual allegation as LOI 11.2(b) which he described as similarly worded. Our findings are at para.100 to 106. What the respondent encouraged the claimant to do was to raise the lack of BC in a specific instances in a non-confrontational way providing the information which would allow those tasked with making a decision to be informed about the specific deficiencies in the supporting papers. He was not being required to act without integrity.

148. LOI 11.3(b) refers to the original 2019 exchange of emails with the Executive Director and overlaps with LOI.4.4(b) – see para.211 below. This may be a snapshot within a discussion which continued but the email in the middle of page 196, which is the source of the complaint, states a preference for EFC to agree the need for alignment (presumably of the standard format for ISs) before working through a plan with the individual departments. The dispute about when and how often a BC should be refreshed had clearly started relatively early in the claimant's employment but it comes back to the same point. A question about how to achieve a consistently used format is not the same as a failure to acknowledge governance requirements nor does it undermine the claimant's integrity or ability to carry out his role. The underpinning factual allegation is not made out.

149. The third paragraph under LOI 11.3 (LOI 11.3(c)) covers the same factual allegation as LOI 11.2(a) and LOI 11.2(c). For reasons explained in paras.90 to 98, we do not think that the respondent was proposing to use the CRR without appropriate governance. The CRR was drawn down based upon a paper which was a composite of individual project IDC submissions from the previous two years.

150. We do not see that Mr Sharman sought to remove the claimant from the role. This relates to the latter's email of 27 November 2020 (page 293) thanking the Capital Portfolio Director for a copy of the risk reserve guidance policies which are described as "approved by Exec" but awaiting communication and training. That is some evidence of at least an element of retrospective approval, subject to the point that this expenditure had been pre-approved as we explain in para.91 above. Indeed, the CPD appears to

have chosen to go down the route involving more transparency. Mr Sharman's approach is to invite a discussion with the claimant.

151. By later the same day, the latter accused Mr Sharman of undermining his role – which Mr Sharman refutes. Although we can see that the claimant is struggling with aspects of his role which involve cooperation with others, Mr Sharman does not seek, by his actions, to undermine the claimant. The claimant was not asked to cover up a large overspend of public funding as he alleges. The most you could say Mr Sharman did was invite a discussion about whether the SMA Review could be dealt with differently in the circumstances where (it appeared) there had been prior approval of the retentions. This did not require the claimant to breach the Nolan principles.

152. LOI 11.3(d) is the same factual situation as LOI 11.2(h). We have cited extensively from the relevant email in para.134 above. Mr Sharman's direction that the claimant should review ISs even if there is no BC should be seen in context. Overall, the email does not support a conclusion that Mr Sharman intended that the respondent should waive the requirement for BCs or that the claimant should act without integrity. He wanted the claimant to do all aspects of his job and work to improve the system even though it had imperfections at present. Based on the facts we have found, this does not invite the claimant to breach governance or act contrary to the Nolan Principles.

153. LOI 11.3(e) was withdrawn.

154. As mentioned in para.140 above, LOI 11.4 is the same specific incident as that referred to in LOI 11.2(i). As we explain in paras.140 to 144, the claimant appears to confuse Mr Sharman declining to be involved in resolving the date by which the SMA review should be submitted (on the one hand) with excluding the claimant from the governance required in his role (on the other). The facts as found are incapable of supporting the inference argued for by the claimant which is that he was, cumulatively, demoted and his authority to exercise quality assurance was removed. Where the respondent (specifically Mr Sharman) sought to influence how the claimant commented on governance matters, it was with a view to seeking a proportionate approach so that the objectives of the respondent should not be impeded without due cause while stating where conditions to the approval of public spending were necessary.

<u>The counter-fraud report: LOI 4.1</u>

155. On 30 March 2021 the claimant sent an email to Highways England whistleblowing hotline (page 820). In it, he set out particular obligations of the respondent including the need to meet criteria including that the respondent

> "is credible in its overall efforts to maintain and improve value for public money" and the requirement to follow HMT Green Book 5 part business case model. He quoted from the Framework document. He stated that "the [respondent's] assurance regime, over the last 12 months, has materially failed to confirm that decision-making at [the respondent] meets the Assurance Criteria: e.g. it does not implement quality

control on business cases put forward for investment decision approval: they are materially incomplete."

156. The claimant did not provide any specific examples in that email. The Corporate Fraud team responded by Mr Mohan emailing the claimant to arrange a discussion (page 825). There is a note in the first progress report (page 871) that the complaint to client was clarified to be that
"Business Cases often lack sufficient detail, specifically financial precision Which means investment decisions are being made without sufficient challenge. [The claimant] sent through documents evidencing where they believed this to be the case."

157. The procedure followed by the Corporate Fraud team is set out in Mr Mohan's statement. His evidence was that his Divisional Director for Corporate Assurance was not aware of the identity of the whistleblower, in the interests of confidentiality and he had only told her when he informed her that he had been asked to provide a witness statement in this litigation (Mohan para. 8). He had, however, consulted with her all possible avenues of investigation (Mohan para 14) and supplemented his statement evidence in cross examination to say that he had asked her who might be suitable individuals with knowledge of the issues to ask about the allegations. Apparently she had suggested the claimant himself, Mr Sharman and the Head of Programme Assurance in the CAD as expert in this field. Since the claimant himself was the whistleblower, and Mr Mohan was concerned about the risk of breach of confidentiality should he speak to Mr Sharman, he decided that the Head of Programme Assurance should be interviewed and this happened on 8 April 2021 (page 851).

158. A member of the Corporate Fraud team led on the investigation and reported to Mr Mohan (see Mohan paras 9 & 10). He confirmed orally that the progress reports (for example page 871) were written by the investigator and not himself. The four examples of projects provided by the claimant on 7 April 2021 are identified in Mohan para 19 (a), although one appears to have been provided as a contrasting example of good practice. The projects criticised are the A27, the A1 Morpeth to Ellingham and the A1 North of Ellingham.

159. The claimant did not regard the Head of Programme Assurance as being an appropriate person to talk to because he considered that the interview notes referred to someone as having an axe to grind "which can only be me" and he interpreted that as a negative not neutral statement. He inferred that someone had not maintained confidentiality about the 30 March 2021 disclosure but also believed that the Corporate Assurance team – and the Divisional Director in particular – would have been aware of his October 2020 disclosure to the ORR.

160. The information provided by the Head of Programme Assurance could be described as qualified support for the respondent's approach to governance. Where he is critical is by saying that the system isn't perfect and that the quality of project managers could be improved. He points out that the respondents process has been agreed with the DfT and the high level of

delegated spend he considers to imply some trust of those processes. He acknowledged that there may be a contrast with the flexibility of approach to the guidance in an arm's length company compared with a central department.

161. Mr Mohan spoke to the claimant on 16 April 2021 to discuss the initial findings. Those initial findings are in the progress report at page 871 but a copy of the report was not sent to the claimant. The specific allegation in the List of Issues (LOI 4.1) is that Mr Mohan responded to the claimant's disclosure "to the effect that the audit shows no issues". He alleges that Ms Howlison was complicit in this response. There was a phone conversation with Mr Mohan partway through April 2021 but the investigation continued beyond this point. The initial view at that date was there was no immediate concern that policy was not being followed so it is quite possible that the claimant was told that the investigation had revealed "no issues".

162. There are a number of progress reports by the investigator: page 871, page 970 (26 April 2021), page 984 (10 May 2021). The analysis of the documents provided by the claimant is that it is "not obvious where documents failed to follow the appropriate guidance" and that the claimant's "comments focused on details of project risk missing from analysis. This level of detail does not appear to be explicitly discussed in guidance and could be subjective".

163. Further points raised by the claimant were investigated and the scope of the ORR report was checked. The investigator's analysis of the three specific projects relied on is set out at page 987 - 988. Mr Mohan annotated the latest version of the progress report in blue and added comments following a conversation with the Head of Programme Assurance about their initial findings. There is quite a bit of detail in this annotated progress report but one matter that was the subject of oral evidence before us was Mr Mohan's addition in blue as follows (page 1020),

> "one of the key areas that isn't fantastic - projects don't always get their investment submissions in on time - doesn't allow time for sufficient scrutiny. If you can't time managed to get your governance sorted on time, doesn't bode well for project management. No drive to change this behaviour, no disincentive."

This apparently was a comment from the Head of Programme Assurance but it corroborates the problems the claimant was experiencing in his day to day job.

164. The first draft investigation report is at page 1062 and was authored by the investigator. That version talks about reviewing for business cases and sets out bullet points of findings in relation to them. The claimant did not challenge those conclusions which were that risk was quantified in some form in the documentation although not following a consistent structure. The draft also talks about three potential areas to focus on in any future review (page 1064 1065). Mr Mohan met with the Divisional Director to discuss the draft with her. The draft that was finally shared with the CFO (copied to the CEO) - page 1179 on 22 July 2021 - concluded that "we found no clear evidence that [the

respondent] are failing to meet the requirements as set out in section 7 of the Framework Document."

165. So far as we can see the only difference between that version, the one circulated to the CFO, the CEO and also to Mr Sharman, and that provided to the claimant with the supporting documentation following the grievance investigation (page 1904) is the redaction to remove Mr Mohan's name and that of the investigator. If one compares all the versions of the progress reports and supporting interviews with the versions of the internal report it is fair to describe the final version as highly condensed. It is quite clear that the final version (page 1180 – forwarded by email at page 1179) was the only information about the investigation sent to the CFO or Mr Sharman. The covering email reports that Counter Fraud found no evidence to support the allegation whereas the conclusion in the report states there was no *clear* evidence (our emphasis).

166. The claimant suggested that the correct test of whether risk was being correctly quantified would have been to see whether they were presented in the same way to the IDC. It is not unreasonable for Mr Mohan to say that Counter Fraud had looked at the evidence provided by the claimant and they appear to have come to a genuine and justifiable conclusion that concerns about the correct quantification of risk were not as compelling clear cut as the claimant had originally explained them to be.

167. The highly condensed final report is open to criticism when one looks at more of the detailed information uncovered. It does not seek to include a full description of the methodology. It excludes the acknowledgement that there was room for improvement. Although it does suggest particular areas of focus for any future review those suggestions are not made expressly because of the particular concern that has been uncovered and are not described as "Recommendations" as they are in the first draft. A clear illustration of the way in which the evidence uncovered was condensed is that the comment quoted in para.163 above is not referred to in any way.

168. The purpose of the streamlining of the report was we accept to make it manageable amount of information to read by busy people. The report was not provided to the claimant until it became part of the evidence in the grievance. It certainly appears that Mr Harris at least did not read the report. Mr Sharman stated (his para.39 AB page 35) when he heard about the allegation it crossed his mind that it may have been Mr Fleming who made them.

169. The difference that the lack of detailed information about the investigations in the report circulated to managers may have made to the claimant is that, if it becomes known that he is the author of the allegations, the report, and in particular the covering email, read as though his concerns are unsubstantiated. The full investigation does make clear that his specific allegations are unsubstantiated but that there is no basis for complacency and there are reasons to think that improvements in process are necessary in some areas. In particular, the comment we quote in para.163 above and

the assessment of risk in Tier 1 give a more balance picture. The latter is independent of the concerns raised by the claimant since he was not analysing Tier 1 schemes.

170. Nevertheless we are quite satisfied that Mr Mohan was not motivated by the fact that the claimant had made the disclosure of information in the way the outcome was presented or in his conversations with the claimant. He and the Counter Fraud team simply followed the process and streamlined the information provided to senior management to make it accessible. Although we accept that more information would have made the report more useful, overall the conclusion that the claimant's allegations were not substantiated was justified and made on the basis of evidence before the investigator.

171. A strong suspicion that the information about risk would not be read does not seem to us to be sufficient reason not to put enough reference of it in the report that those to whom the report is communicated are put on notice. The Counter Fraud team have no clear evidence of fraud or of the respondent following practices which put National Highways in breach of their obligations, but they did find evidence of slack practice where too much was taken on trust. We particularly notice the comment that, in effect, until someone makes it difficult for people to carry on doing what they are doing there is no incentive to change. We therefore think this was not as useful report as it could have then because of the missed opportunity to include some of the detail.

Was it reasonable for the respondent to rely upon the Counter Fraud report.

172. As can be seen above there are criticisms which can, objectively, be made about the Counter Fraud report and so we separately consider whether it was reasonable for the respondent to rely upon it. There is some overlap between this question and consideration of the investigation of the claimant's grievance.

173. There is some circular reasoning in the Counter Fraud report, in that comfort is drawn from the ORR report and from a clean bill of health for self-certification by the ORR. However, there was input to the investigation from outside the Strategic Finance department and analysis by experienced Counter Fraud investigators. This did provide some level of independent scrutiny of whether appropriate safeguards were in place in substance. Those investigators found, as we have done, that the specific allegations raised by the claimant were not substantiated. On balance, it was reasonable for Ms Bell to be able to rely upon the Counter Fraud report in the circumstances in which it was provided. This was particularly so, since she was looking into the question of whether the claimant could carry out his role.

174. The summary Counter Fraud report did not misrepresent the conclusions of the longer versions although it was not as useful as it might have been and the longer versions provide corroboration of the reasons why a Finance SMA might find their job challenging. Asking for the underlying evidence from Counter Fraud was not necessary for Ms Bell to do her task and would not have produced qualitatively different information.

The "no confidence" comment: LOI 4.2

175. On 30 March 2021 there was a team meeting at which Mr Sharman and the claimant were present. The claimant's allegation is that, during the meeting, Mr Sharman said that he was not confident in the claimant preparing and presenting a further paper to EFC. Although the respondent sought to explain this as being about the product, the paper, and not the claimant, the witness statement explanation by Mr Sharman is not consistent with that case. He says in his para 39.1(c)

> "my comment reflected the fact that I did not have confidence that Andrew could [present to the executive finance committee] given the complex weight which he presented information and his inability to engage with stakeholders in a constructive way".

176. This is entirely consistent with the contemporaneous concerns raised by the claimant in his email of 30 March 2021 (page 813). We accept that Mr Sharman immediately apologised. The claimant raised a grievance on 1 April 2021 (page 1195) following which there was a telephone conversation between him and Mr Sharman. The claimant agreed to resolve the grievance informally. The comment by Mr Sharman was not that he had no confidence in the claimant full stop but that he had no confidence in the claimant preparing and presenting a paper.

177. Mr Sharman was first spoken to about the claimant's protected disclosure by Mr Mohan (Sharman para.39) but it seems unlikely to have been before 31 March 2021 and, on the balance of probabilities, Mr Sharman did not know that the claimant had made a protected disclosure of the date that he made the "no confidence" comment. In the final hearing, the claimant confined this allegation to his 'ordinary' unfair dismissal claim only.

The claimant's grievances

178. As we say above, the claimant's first grievance - about the 'no confidence' comment - was resolved by an apology.

179. The claimant raised a second grievance on 30 July 2021 (page 1190). The timeline of steps taken within the grievance investigation is at page 1659. The claimant confirmed in oral evidence that this was an accurate timeline and appeared to withdraw his criticism of delay in conducting his grievance. However in his closing remarks he appeared again to rely upon it.

180. This was originally identified as LOI 4.5. The claimant was on annual leave for two weeks immediately after presenting the grievance and, on his return, HR discussed the option of mediation before appointing a decision officer. However that decision officer was only due to be in post for approximately six weeks and the nature and complexity of the grievance meant that the decision was taken to appoint an alternative decision officer. Some of the delay in the new decision officer, Ms Bell, meeting with the claimant was due to the

difficulty of agreeing dates with him and his representative. There were further periods of leave on the part of Ms Bell. The passage of time is entirely explained by the steps that were taken in investigating and handling this grievance and the passage of time does not amount to unreasonable delay.

181. The grievance investigated by Ms Bell is at page 1190. The three aspects of the grievance set out at the top of page 1191 are as follows:

    a. "HE recruited AP into an SMA Role when it could only reasonably have known that this Role cannot be reasonably performed";

    b. "HE has not responded reasonably to initiatives and proposals by AP to enable the role to be performed";

    c. "HE has persisted in setting AP unilateral objectives to "enable the SMA Role", most recently for 30/06 that are neither relevant nor achievable in the context of the above."

182. The claimant's criticisms of the handling of the grievance are in LOI 4.7: rejecting the grievance, deliberately failing to recognise or refute the issues raised in his protected disclosures; failure to resolve and relying on the false evidence of the Assistant Company Secretary.

183. The meeting with Ms Bell to discuss the grievance took place on 23 September 2021 (page 1431). The claimant was unwilling to continue the meeting beyond his normal working hours and so it was only scheduled to last an hour. In the meeting the three aspects of the grievance were discussed, albeit summarily (page 1433).

    a. The claimant states that he is unable to work Tier 1 because the respondent's structure for planning governance did not match with the description prescribed by the licence;

    b. He states that everyone should have known that the SMA role cannot be reasonably performed but does not explain why he says that;

    c. He alleges that none of his initiatives had been progressed;

    d. He alleges that the licence states what needs to be in place and argues that there should be a PMO but isn't. He alleges that the modified PMO does not enable a consistent presentation of business cases in across Major Project which is the area with the biggest budget.

    e. He alleges that he is not getting access to consistent BCs in line with Cabinet Office and HMT guidance

    f. He alleges that there is no incentive to provide the necessary levels of control.

184. Part of the discussion in the grievance meeting is about the limitations of the role and the difficulties of performing the role rather than about allegations of claimant the kind made in his whistleblowing report. On page 1434 the claimant talked about the attempts made by him in November 2019 to clarify what the lines in the investment submissions should be. He told Ms Bell about a March 2020 initiative where he created product descriptions and that they have not been progressed; that Major Projects refuse to complete business cases; that that Mr Colwill was dismissive to him and that Mr Couzens of Capital Portfolio Management had too autonomous a position compared with how it would be in Central Government and was dismissive of the claimant.

185. He also suggested that the last and current CEOs give the Capital Portfolio Management more control than they are allowed to and are negligent. There are references to the criticisms of the CEO's alleged failure to strictly adhere to DfT governance arrangements.

186. Taken as a whole, although what he said alludes to issues which are relied on in these proceedings as a protected disclosure, the focus of the discussion is on the impact on the claimant's ability to do his job and on a lack of incentive on those he is working with to adhere to the governance controls which he regards as non-negotiable.

"What I am going to say is, this is the job description, this is what is happening and this is the gap" (page 1435)

We understand him to tell Ms Bell that his lack of authority to control the business case means that he can't do his job as that role is described on his job description.

187. Ms Bell asked him what he needs (page 1436) and he asked to have business cases put forward in a consistent manner that are to HMT and Cabinet Office guidance. He set out in detail what he considers that he needs. Ms Bell challenged him on the basis of her own experience in the organisation at page 1437 and the claimant's assessment of the sufficiency of the documentation submitted is evidenced by this exchange:

> "NB: This is my observation. I complete business cases and I send to Ops IDC. I get challenged on my business cases and asked for further information if required. I am clear that I am doing what is being asked of me. Are you saying all business cases are completely wrong?
>
> AP: What I am saying is that the having reviewed approximately 120 business case (5 a month) to support an investment decision, less than 10 per cent are like a reasonable business case. This is based on my outside experience.
>
> NB: When I submit a business case I must include a value for money statement, chief analyst statements and commercial advice. I have had

business cases not signed off if they are not aligned. I have experienced some real scrutiny in this process.

AP: I can only speak for the evidence as it sits. Only 20% have produced anything like a business case. And 90% of investment decisions have no business cases."

188. His view of the futility of what he is asked to achieve is evidenced by this exchange (page 1439 – 1440):

"NB: Are you saying nobody can support you as a line manager? What are you looking for to resolve this particular issue?

AP: There is a duty for me to behave in an employee-like manner. In my obligation I would not be able to continue in a robot-like manner. This going to take months to resolve. Nick said the role can't be done for two years.

NB: Were you brought in to get it to that point. Is that what Nick was meaning?

AP: I put forward a plan in December 2020 and my plan would take two years. I have been given a set of objectives doing nugatory, pointless activities and the licence says I am not doing it correctly.

There appears to be a view that I can come in single handed to change this. There is an implied term of trust. I trusted HE and they repeatedly break the trust. It's contractual wrong and unmotivating."

189. Given the complaint NB was tasked with investigating, she reasonably does not make her own investigations into whether or not decisions have been taken to authorise expenditure without proper BCs. She is correctly focusing on the reasons which may be impeding claimant in carrying out his job.

190. Mr Pleming criticised the minutes (NB para.15) but didn't suggest amendments so all that Ms Bell had to go on was what she had recorded.

191. She explains how she carried out her investigation in her para.20.

192. When she interviewed Mr Sharman (page 1817), he explained his expectations of the claimant's role saying

"This is a leadership role and the Finance SMA would also be expected to take an active role in engaging with relevant stakeholders to improve the understanding of financial governance required over investment decisions."

193. He also discussed the job description but explained that he had asked Mr Pleming to focus on Major Projects rather than Tier 1. He agreed that there was a gap between what should happen in ideal world and what was happening;

> "In reality there are challenges in relation to time pressures on projects and completeness of business cases. If a business case is not substantially complete, I would expect the SMA to engage with the SRO/project manager to resolve. If it is not possible to resolve or populate any omissions, the SMA can highlighted any risks and issues and make recommendations for the IDC to consider" (see page 1820).

194. Ms Bell had a second meeting with Mr Sharman. In that we note the following, in particular,

    a. At page 1824 Mr Sharman accepted that timing and quality of BCs may be issues, stating again that his expectation was that claimant should resolve the issues by working with colleagues in Major Projects.

    b. The question of auditing comes up in page 1825 and, in the context of that, NS states that the results of the first self-assessment in RIS2 completed between April and May 2021 demonstrated that the respondent had a robust framework in place to ensure appropriate control of expenditure decisions. He also informed Ms Bell that a Counter Fraud investigation into an allegation that the business cases were materially incomplete concluded that there was no clear evidence that the company had failed to meeting its obligations. Following this, he sent Ms Bell the Counter Fraud report (page 1904).

195. Ms Bell's grievance outcome is page 1910 with a report at page 1912.

196. In his evidence to us, Mr Sharman, in effect, said that at the time it crossed his mind that Mr Pleming may have been the whistleblower whose disclosure led to the Counter Fraud investigation. Had Ms Bell thought about it, she must have thought it at least possible that the claimant was the whistleblower; there were a limited number of people it could be and the concerns the whistleblower expressed were those he was expressing. However, we think that she reached her conclusions genuinely on the evidence before her, unaffected by any conscious or subconscious thoughts about whether the claimant had made the report to Counter Fraud.

197. She could have showed more curiosity about the qualified bill of health in the counter fraud report – but the scope of her investigation was not the alleged misuse of public funds. She was entitled to reach the conclusion that she did on the evidence she had. She asked the right witnesses. The Assistant Company Secretary did not produce false evidence that BCs were being produced; that comes down to the difference of opinion about what is a BC worthy of the name.

198. The claimant had the right of appeal. HR had sent him 3 emails attaching all the evidence which Ms Bell had taken into account on 3 December 2021 (page 1894). He did not read the grievance report. He has alleged that he was given no rationale for the outcome but it was all there in the report; he didn't read it because he considered the length and documentation sent to him with the outcome made the task too onerous. Nevertheless, he appealed on 16 December 2021 – within the extended deadline (page 1985).

199. The respondent has also relied upon Ms Bell as the witness in relation to the appeal stage (NB para.31 and following). The minutes of the appeal meeting are at page 2019. The only grounds provided on appeal were that employer had not set out appropriate action to resolve the grievance (page 1985). To judge by page 2008, the claimant appears to have expected the appeal officer to make their own investigations because he challenged her to produce "six Business Cases presented to me for a Corporate Review since September 2019 on a reasonable basis". He also asks her to make a formal finding about whether it is accepted within HE that there is a requirements to follow HMT Guidelines. He agreed for the appeal meeting to go ahead before the deadline for responding to his DSAR. He asked specific questions about the meaning of his Year 20-21 objectives on 11 January 2022 (page 2017).

200. Ms Higgin sent her appeal outcome to the claimant on 22 January 2022 (page 2033). In it she explained that she was satisfied that the respondent was acting within the remit of the Highways England Framework document and meeting its obligations. Our view of Ms Higgin's work on the appeal is that the claimant may not like the outcome but she has engaged with his arguments despite the difficulties that that appeal meeting evidently posed. Her conclusion was that, despite issues with the quality and timeliness of some business cases and submissions which was challenging for the claimant, this did not mean he could not perform his role (page 2034). That conclusion was open to her on the evidence before her and there is no basis to infer that the evidence was not genuinely and entirely the reasons for her conclusion.

<u>Specific allegations made in LOI 4 not otherwise covered above</u>

201. We have found it helpful in this case to make findings of fact issue by issue rather than chronologically because findings on one issue inform the findings on another. There are some specific allegations which are not covered in our findings above as a result of following this approach and we turn to those now.

202. In LOI 4.3 the claimant alleges that,

> "By an email trail to 21 July 2021 from Mr Sharman, in the context of the Claimant seeking to agree contractual objectives with him, Mr Sharman seeking to given the Claimant objectives which:

(a) Admitted that the governed role would not be able to be performed for at least two years since the Respondent was spending public money without Accounting Officer governance in place; and
(b) In the interim sought to give Claimant harder and more mundane work."

203. The objectives document is at page 1170. In answer to questions in the grievance investigation, Mr Sharman said that the required improvement would take time (the first entry for Mr Sharman on page 1833 should be read in full). We do not understand him to mean that the job will be unachievable for two years; what he said about the tasks to effect continual improvement was "Collectively these tasks may take 2-3 years to implement but the fact that these are not in place at the moment does not prevent Andrew from doing his role" He gave oral evidence that the role was 'doable' as described and that there was an appetite in the organisation for improvement. The starting point for negotiating objectives with the claimant (and other members of the team) was the Strategic Finance Division Draft Delivery Plan for 2021 – 22 at pages 556-7 circulated on 15 March 2021. This is the description of tasks and objectives which the claimant argues shows that he was being asked to do harder and mundane tasks. We do not think these tasks are mundane or outside his job description. The job description has the quality assurance task and the leadership role. The latter requires him to work with others to ensure that standards are improved. Tasks such as "refreshing tables" (point i. page 556) and running masterclasses in drafting BCs (point iv. Page 557) support the leadership tole. We are satisfied that Mr Sharman was attempting to agree objectives for both aspects of the role under a. and b. against Mr Pleming's name on this draft Delivery Plan.

204. We see nothing wrong with these objectives as they stand; they do reflect his job description. Those at (a) suggest that Mr Sharman was trying to get the claimant to adopt objectives and carry out practical tasks which will close the gap between aspiration and real work performance.

205. The claimant appears to have interpreted the objectives in the (a) column as an acceptance that, despite the length of time the role has been in place, he was unable to do the quality assurance part of his job. In one sense it is but Mr Sharman's other suggested objectives cause us to think that he was not satisfied with that state of affairs and was attempting to support the claimant to work to improve things.

206. Overall, our findings are that the acts or failures alleged against Mr Sharman in LOI 4.3 are not proven.

207. The allegation at LOI 4.4(a) refers to the email at page 1159-1161. On 7 July 2021, Mr Sharman forwarded to the claimant an email from Mr Couzens (page 1159). The claimant asked whether there was a particular reason he had not been consulted and Mr Sharman said he thought not but part of the reason was that he should have passed emails on more quickly. Although this amounts to an acceptance by NS that information about developing a standard approach to presenting the financial section of PIDC submissions should have been forwarded sooner than 7 July 2021, we do not accept that

this is evidence that the claimant had been deliberately excluded before that date.

208. The case that Mr Pleming put to Mr Sharman was that Mr Couzen's original email was evidence of Major Projects setting out to change the way financial information was presented without consulting the SMA and evidence that Major Projects did not feel need to work with finance. NS's answer was that he believed that Major Projects was intending to change the format of the financial information they produced so that when it was sent to the DfT Board (IPDC) it didn't need to be further changed because it was already in the format they required. That, on the face of it, is a reasonable objective, but given that the claimant had apparently been working for some time on the financial tables and that the claimant had a professional interest that the financial information going to IDC should be complete, it is surprising that Mr Couzens had apparently not consulted the claimant sooner. Nevertheless, we do not infer that Mr Sharman or the respondent generally were excluding the claimant – not least because he was consulted in time to contribute.

209. The claimant specifically complained that Mr Couzens was named in the report as named responder to the action regarding continually improving investment submission. When asked about this, Mr Sharman said that he would probably expect his own name to be there as well as that of Mr Couzens. Again, this does not suggest that the claimant individually was deliberately excluded but that accountability was set at a more senior level.

210. A linked but different allegation of exclusion in the first part of LOI 4.4(a) refers to page 1161 where Ms Kumar on 15 July 2021 sent the claimant a link to the respondent's Draft 2020-21 DEC Self-Assessment report. This had been prepared for audit purposes and ORR had authorised it to be done in house because they were satisfied with the financial controls in the first period of monitoring. The self-assessment itself is at page1128. Page 1129 and page 1134 shows that self-assessment is authored by strategic finance and authorised at divisional director levels in CPM and strategic finance – this is appropriate and at the right level and shows no exclusion of the claimant or of the department. Responsibility for it appears to lie above the claimant's level. We also note that the self-assessment overview (page 1133) recognises that some improvements are required in committee submissions "to simplify the information provided to decision makers". We find that the claimant was not excluded by the way in which the self-assessment was carried out.

211. By LOI 4.4.(b), the claimant alleges that he had been excluded from continuing on Design & Build governance improvement. When this was explored in cross-examination, the complaint actually levelled at the respondent was different. It was that Mr Colwill of Major Projects had not progressed an activity for improving governance that the claimant had discussed with him a couple of years previously; then Mr Pleming felt excluded because there had been divisional director level meeting about that activity or something broadly similar in July 2021 (page 1407). The exchange of emails themselves seem wholly unremarkable. This was

simply a discussion happening at a level higher than him. He had been informed of those discussions by an email which includes Mr Sharman saying that,

"We are striving to up the quality and timeliness, and to make sure investment submissions are aligned to the underlying business case (which has been adequately assured before the IDC). Having MP Delivery Services helping us to do this for major projects would be extremely helpful." (see page 1407)

212. We accept that this is evidence that supports the claimant's concern about the quality of the documentation going to IDC, and also that Major Projects could do more to improve quality but it also supports the respondent's case that Mr Sharman did not accept that position. The correspondence does not show the claimant being excluded but rather the problem he has identified being discussed at a senior level to him.

213. The evidence relied upon in relation to LOI 4.4.(c) does not support a finding of exclusion. The emails relied on (page 811) show that another member of strategic finance team had been working on IDC process review and the claimant had been working financial tables which they wanted to put in the process review. The claimant's email of 29 March reads more to us as though the claimant was not cooperating with the IDC review process than that the claimant was being or had been excluded in relation to it. The email apparently relied on does not support the allegation.

214. LOI 4.4(d) refers to an email at page 814. The claimant was not being excluded just because Mr Sharman, his line manager, wanted to consult with EFC before amending or adding to finance table requirements (see para.40 above for a description of the role of EFC). It is plain from Mr Sharman's email that he wants to bring people on board with changes. The email at the bottom of page 814 shows his colleague in finance fully consulting with the claimant about the detail and asking for a follow-up meeting. His response does not acknowledge that there is an attempt here to improve the BC template.

215. The complaint at LOI 4.6 is that Mr Sharman announced changes to the line manager and team structure for all team members except the claimant without consultation. This dates from 14 October 2021 (page 1455). We accept that Mr Sharman was moving into a different role and therefore there were consequential changes in team/divisional structure. At the time the claimant was not being managed by Mr Sharman because he had been temporarily assigned to be managed by Mr Dale on 10 September 2021 on an interim basis because the claimant had raised a grievance against Mr Sharman and did not want to have one-to-ones with him (page 1379 is Ms Howlison's email).

216. It seems poor management to us that the claimant should have been excluded from the announcement about team structures when he was still part of that team and only managed for day-to-day work and wellbeing by another manager during a grievance investigation. It singled him out and our view is that it was unreasonable to exclude him from the announcement.

However, it is absolutely clear that he was not included because he was temporarily under a different line manager and therefore his line management was not affected by Mr Sharman's move. It was nothing to do with his protected disclosure. The point is that, had the interim arrangement come to an end with the grievance outcome, then he could or would have been affected and the official announcement should therefore have covered him.

Management by Scott Dale and correspondence with Nick Harris

217. There are a category of allegations made in respect of the management by Scott Dale. The interim allocation of Mr Dale as line manager was confirmed as permanent in early 2022 before Mr Dale was confirmed as Mr Sharman's replacement as Divisional Director of Stategic Finance in March 2022. Mr Dale accepted that he knew about the grievance.

218. Mr Dale and Mr Pleming had a catch up on 17 January (page 2031). On 18 January, the claimant sent an email to Mr Dale setting out his perspective on the areas that they had discussed (page 2030). In that email, the claimant complained that he thought that Mr Dale had delegated to a sub-contractor to Capital Portfolio Management a role which was a strategic finance function. Mr Dale replied by saying that the sub-contractor's role would be more administrative – i.e. compared with the claimant's own role.

219. The allegation made against Mr Dale (LOI 4.8) is that he ignored and did not address representations made by the claimant as to governance issues. He did not. He responded to the work related issue raised by the claimant – that there had been inappropriate involvement of a sub-contractor - and he addressed points 1 and 2 in the claimant's email. He did ignore some more confrontational statements made by the claimant in that email and matters which the claimant himself stated to be within scope of the grievance. This was not detriment to the claimant and, in some respects, Mr Dale was simply ignoring rudeness on the part of the claimant.

220. Mr Pleming and Mr Dale met on 1 February 2022 (page 2048 and SD para.17) following some unproductive attempts by Mr Dale to discuss and agree objectives which are described in his statement. Mr Dale tried unsuccessfully on 1 February 2022 to agree some objectives for the claimant in his role. On 7 February 2022, he set the areas discussed out in writing and repeated his desire that he and the claimant meet to make the objectives SMART. By his email (page 2048) he invited the claimant's input and continued,

> "When we met you were not willing to progress on this basis.
>
> Can I ask that you reconsider this course of action, if you are not able to agree to my request to both form some agreed objectives and start working against them we will need to start a process with HR to resolve this impasse."

221. The claimant's response at the top of the same page was, in effect, to say that the main issue preventing him from performing his role was that the

Accounting Officer was taking decisions to spend public money without an HMT business case and he though the better course of action was to contact Nick Harris directly.

222. LOI 4.11 and 4.14 concern the ensuing correspondence. On 8 February 2022 (page 546), the claimant forwarded to the CEO a copy of the interim Accounting Officer letter from 19 Jan 2021 which had been sent when Mr Harris was appointed interim CEO. He identifies himself and states that, since January 2021, there has rarely been an HMT business case to support Mr Harris's investment decisions. He asks for a copy of any side-agreement permitting Mr Harris to spend public money without an HMT business case. Mr Harris replied by asking the claimant to work this through with his line manager and Mr Dale is copied to that response.

223. On 10 February 2022 (page 545), Mr Dale wrote to the claimant and said "lets pick this up tomorrow in the meantime can you not write directly to Nick please". The claimant challenged the appropriateness of that reply, asking why he should not contact AO directly and said that he did not think it appropriate to meet until he had received a response from the CEO. Mr Dale replied that it was not an unreasonable management request to the claimant for him to discuss with his line manager any communication he was going to have with the CEO prior to him doing so. Mr Dale also pointed out that the claimant was writing to the CEO in terms which were inconsistent with the outcome to the grievance, the appeal and the internal audit. Page 2050 is the claimant's pithy reply to that email and the next thing in the chronology is an invite to a meeting the same day (page 2048). We have not been taken to any reply to that invitation from the claimant.

224. On 14 February 2022 (page 2053), Mr Dale emailed the claimant referring to recent correspondence and said "having objectives in place is a National Highways requirement and would form the basis for your work going forward. This is particularly important given that you are not actively currently performing your role."

225. This last comment is consistent with Mr Dale's evidence that, by this point, the claimant was doing very little work (SD para.24.1 (c)). The claimant had been claiming that he was not able to agree objectives because he was not reasonably able to perform the SMA Role. In the 14 February 2022 email, Mr Dale continued,

> "I had hoped that we could move forward but you remain unwilling to meet and to work with me to agree objectives going forward. I do see this as a conduct issue and will liaise with HR to progress a disciplinary process."

226. We refer to but do not repeat the exact wording of the LOI 4.11 allegation against Mr Harris. Mr Harris, the CEO, was asked, in effect, whether there was an agreement permitting him to spend money without a business case – despite it being clear from the grievance outcome and appeal that, to put it charitably, there was a fundamental difference of view about what

amounted to a business case and what did not. The first allegation in LOI 4.11.(a) & (b) suggested that Mr Harris did not accept his responsibilities but instead delegated Mr Dale to speak to the claimant.

227. On the one hand, there is no reason why the claimant, as Finance SMA should not write to the AO (who is the CEO) on the areas of work that he is responsible for. Had the first 5 paragraphs (up to "… has to be informed by an HMT business case") on page 2051 been written directly to the CEO the direct line of communication might have been unorthodox but not worthy of criticism. However, the claimant then effectively accused the AO of making decisions in breach of the licence agreement when he did not have evidence that that was happening. We do not agree that you can characterise Mr Harris's response – essentially referring the claimant to his own line manager – as a failure to accept non-delegable responsibilities which obstructed the claimant from carrying out his own role. The claimant had not accepted the outcome of the grievance and wrote in an accusatory tone to the CEO without evidence to support his allegations. It is hardly surprising that Mr Harris's first reaction was to see whether this was something the claimant's line manager could deal with.

228. On 16 February 2022 at 14.56 the claimant wrote again to Mr Harris (page 2109), in effect accusing him of approving investment decisions to spend public money without an HMT business case, almost without exception. The same day, a little earlier, the claimant (page 543 timed at 14.42) had written to Mr Dale effectively asking him to progress the disciplinary process and asking for a copy of the AO letter.

229. Mr Dale replied on 22 February 2022 (page 2100) saying that "there has not been an accounting officer letter issued since the one that is at the bottom of the email trail from Nick Sharman to yourself."

230. If by his first response on 10 February 2022 (page 223 above), Mr Dale meant that the claimant could not contact CEO directly without permission, that would interfere with the claimant's autonomous role. Addressing AO risks was one of his accountabilities and Mr Dale agreed with that. However, taken as a whole, Mr Dale did not do that, he asked the claimant to discuss it with him first, as he clarified in his second email.

231. In the circumstances of the accusatory challenge by the claimant which ignored the findings of the grievance, Mr Dale's response was measured and polite and did not obstruct the claimant from carrying out his role. Mr Dale needed to set objectives to get the claimant working and needed to move forward. This was clearly the specific and exclusive reason for the allegation by Mr Dale that there was a conduct issue. That allegation was not false.

232. The claimant's position is that the draft objectives were nugatory because they require him to protect the accounting officer (page 586 desired outcome of achieving objectives for the claimant and others) when, on the claimant's version of events, the AO was blatantly ignoring his governance responsibilities. This allegation by the claimant is not made out and the

respondent clearly had good grounds to try to set objectives which, in principle, were unobjectionable. There was evidence that the claimant wasn't effectively carrying out his role.

233. The claimant alleges as part of the 'ordinary' unfair dismissal claim that there was delay in starting the disciplinary action. No doubt it was stressful for the claimant to have to wait to see what would happen and when. Mr Dale's explanation for not having taken action following his email of 14 February 2022 by the time of the claimant's resignation was that he was waiting for advice from HR. His description of the way he was obliged to obtain access to employment advice seems cumbersome and inefficient. However there is no reason to think it was not accurately described or that it was not the reason for the delay.

234. As a comment, we note that there was at the time of the claimant's resignation on 25 February 2022, no current AO letter. After more than six months as the confirmed CEO, there should have been an updated one. The respondent considers that Mr Harris's duties as AO were identical to his interim duties and that is not disputed by the claimant. There was no disadvantage to the claimant in Mr Harris not having an update AO letter because he was bound by the terms of the previous one. We accept Mr Harris's evidence that he was responsible to the Secretary of State and reported through conversations about his responsibilities with the Permanent Secretary. This is consistent with the fact that the interim AO letter itself came from the Permanent Secretary.

235. There is an isolated specific allegation made at LOI 11.4(a) in relation to the email at page 548 which is in fact dated 18 February 2021. Prior to writing directly to Mr Harris, the claimant had asked Mr Sharman, when he met with Mr Harris, to establish whether he accepted the principle that investment decisions require a business case and then asked for a copy of the AO appointment letter. The short email from Mr Sharman on 18 February 2021 (page 548) encapsulates the problem and the difference of expectation between the claimant (who thought that the only BCs capable of review were complete ones) and the respondent (who thought that the claimant could and should work with colleagues to improve the quality of submissions). The claimant's job was not undermined by this.

Law applicable to the issues in dispute

236. A draft self-assessment on the law was circulated by the employment judge to the parties in order to inform them about the legal principles which appeared to the tribunal to be applicable to the claim, subject to any amendment or comments by them. The only comment or supplement was that the respondent relied upon respondent's submissions (RSUB) paras.3 & 4. Their comments are noted below.

Constructive Dismissal

237. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that they no longer intend to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat themselves as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether any repudiatory breach by the employer was an effective cause of the resignation. The crucial question on causation is whether the repudiatory breach played a part in the employee's resignation.

238. In the present case, the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

239. The tribunal has to decide whether the conduct in question in a particular case amounts to a breach of the term, by considering whether there was a 'reasonable and proper cause' for the conduct; and if not, whether the conduct was 'calculated or likely to destroy or seriously damage trust and confidence'. This requires the tribunal to consider the circumstances objectively, from the perspective of a reasonable person in the claimant's position:· Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420, CA.

240. There have been cases in which failings in handling a grievance have amounted or contributed to a breach of the implied term of mutual trust and confidence: WA Goold (Pearmak) Ltd v McConnell and anor 1995 IRLR 516, EAT. The question remains the same. It is for the tribunal to find the facts in relation to the handling of the grievance and ask whether that amounted to conduct which was calculated or likely to destroy or seriously damage trust and confidence and whether there was reasonable and proper cause for it.

241. One important question for the tribunal is, therefore, whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was

calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

242. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then they were constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

243. Once they have notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

244. The last straw doctrine is explained in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

245. The doctrine was considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ explained that

> "there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back[4] consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in *Addenbrooke* which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik*

threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so." (paragraph 45)

246. Before giving the following guidance,

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

247. Once the tribunal has decided that there was a dismissal we must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

"Section 98 Employment Rights Act 1996

(2) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
  (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(3) A reason falls within this subsection if it-
  (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  (b) Relates to the conduct of the employee,
  [(ba) …]
  (c) Is that the employee was redundant, or
  (d) ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-
  (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Protected disclosure claims

248. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and (for the purposes of the present case) is made by the employee in one of the circumstances provided for in s.43C ERA.

249. Section 43B(1), as amended with effect from 25 June 2013, so far as relevant, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
> (a)…,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
> (c) …,
> (e) that the environment has been, is being or is likely to be damaged,…."

250. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, Sales LJ rejected the view that there was a rigid dichotomy between communication of information and the making of an allegation, as had sometimes been thought; that was not what had been intended by the legislation. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [*Nurmohammed*], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

251. The structure of s.43B(1) therefore means that we have to ask ourselves whether the employee subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for them to hold that belief.

252. Similarly, we need to ask ourselves whether the employee genuinely believed that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

253. If the employee has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as material, s.47B provides,

> "47B.— Protected disclosures.
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
> (a) by another worker of W's employer in the course of that other worker's employment, or
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
> …
> (2) This section does not apply where—
> (a) the worker is an employee, and
> (b) the detriment in question amounts to dismissal (within the meaning of [Part X])."

254. By s.48(1A) of the ERA, a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of s.47B. As with Equality Act 2010 claims, there is a detriment if a reasonable employee might consider the relevant treatment to constituted a detriment: Jesudason v Alder Hey Childrens NHS Foundation Trust [2020] IRLR 374, CA.

255. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … 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"

256. As can be seen from the above quotations from the relevant sections of the ERA, the test of causation is different when one is considering unlawful detriment contrary to s.47B ERA to that applicable to automatically unfair dismissal contrary to s.103A ERA. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] I.R.L.R. 64 CA. The respondent

(RSUB para.4) cautioned against confusing the founds for the detriment with asking, in effect, whether 'but for' the disclosure the detriment would have occurred; we accept that the thought processes of the person responsible should be analysed.

257. A dismissal case where the respondent has terminated the contract of employment involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

> "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."

258. In a constructive dismissal case, the reason for the dismissal (if any) is therefore the employer's reason for the conduct in response to which the claimant resigned: Salisbury NHS Foundation Trust v Wyeth (UKEAT/0061/15: paras: 30 & 31). The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal. The tribunal is considering whether the protected disclosure was the principal reason the respondent committed any fundamental breach of the claimant's contract.

259. Where the claimant has the right not to be unfairly dismissed, the legal burden of proving the principal reason for the dismissal is on the employer although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

> "… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …
>
> 57
>
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
>
> 58
>
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59

The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

260. It is sufficient for a discriminatory constructive dismissal that discriminatory considerations materially influenced the conduct that amounted to the repudiatory breach of conduct. In principle, a 'last straw' constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination.

"Where there are a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. … it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory." De Lacey v Wechseln Ltd [2021] IRLR 547, EAT para.69.

261. In principle, the same approach applies to the question of whether the reason or principle for an alleged constructive dismissal was the making of more or more protected disclosures.

Conclusions on the Issues

262. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

263. Given our conclusions on the substantive issues, it has not been necessary to decide if particular complaints were presenting in time or not.

264. The respondent accepts that the claimant made a protected disclosure by his email on 30 March 2021 to Highways England Whistleblowing Helpline.

265. Our findings on LOI 4.1 start at para.155 above. As we say in para.161, it may well be that Mr Mohan told the claimant part way through April 2021 in a phone conversation that the Counter Fraud investigation had shown no issues. We are satisfied that Ms Howlison did not know about the investigation until 22 July 2021 so had nothing to do with anything Mr Mohan may or may not have said. The investigation continued for several months after that phone conversation between Mr Mohan and the claimant. Overall

the conclusion of the investigation that the claimant's allegations were not substantiated was justified and made on the basis of evidence before the investigator. The response did not undermine HM Government, the claimant or the principles of good governance.

266. The factual basis of LOI 4.1 is not made out. Furthermore, we are quite satisfied that the grounds for any comment Mr Mohan made were the evidence so far uncovered and nothing to do with the protected disclosure itself.

267. We have found that Mr Sharman, the claimant's line manager, on 30 March 2021 said that he was not confident in the claimant preparing and presenting a particular paper to EFC. This was not, as alleged by the respondent in the hearing, a lack of confidence in the paper, but in the claimant preparing and presenting the paper so it was a criticism of the claimant. Mr Pleming confirmed that this allegation (LOI 4.2) is not alleged to be a protected disclosure detriment but is relied on in support of the constructive dismissal claim and we have found it is more likely than not that Mr Sharman did not know about the 30 March 2021 protected disclosure on the date the comment was made. The issue was resolved by an apology shortly after the claimant's 1 April 2021 grievance.

268. As we explain in paras.202 to 206, we find that the acts or failures alleged against Mr Sharman in LOI 4.3 are not proven. The claimant has not shown that the act complained of occurred in the way alleged.

269. Our findings on LOI 4.4 are at paras 207 to 214. They are various allegations of incidents said to have the effect of excluding him from the governance required in his role. For reasons we explain in those paragraphs, we do not accept that the claimant was excluded as alleged. The various allegations of detriment on grounds of protected disclosure in LOI 4.4 fail because the claimant has not shown that the acts complained of occurred in the way alleged.

270. To the extent that LOI 4.5 was pursued, we have found that the passage of time between presentation of the grievance and the outcome delivered by Ms Bell was entirely explained by steps which were reasonably taken in investigating and handling the grievance (see para.180 above). There was no unreasonable delay.

271. We agree with the claimant, in respect of LOI 4.6, that he was excluded from the announcement about team structures and should not have been (see page 1455 and our findings in para.215 & 216 above). This dates from 14 October 2021. However, the reason why he had been excluded from the announcement was entirely that he was temporarily under a different line manager and therefore his line management was not immediately affected by the divisional structural change which was the subject of the announcement. This was not a detriment affected in any way by the protected disclosure to the Highways England Whistleblowing hotline.

272. As to LOI 4.7, the claimant's specific criticisms were that Ms Bell had rejected the grievance, deliberately failed to recognise or refute the issues raised in his protected disclosures; failed to resolve the grievance issues and relied on the false evidence of the Assistant Company Secretary.

273. The scope of the grievance did not include whether the protected disclosures issues were accurate so, at least until the appeal stage, it is not a valid criticism of Ms Bell's investigation that she was guilty of "deliberate failing to recognise/refuting the issues raised in his protected disclosure" . The three core aspects of the grievance are set out in para.181 above.

274. It was reasonable for Ms Bell to rely upon the ORR and the Counter Fraud report as evidence supporting her conclusion that, despite challenges for the claimant in carrying out his role, it was not fundamentally impossible to do – as he was alleging. Given the complaint Ms Bell was tasked with investigating, she reasonably did not make her own investigations into whether or not decisions had been taken to authorise expenditure without proper BCs. She correctly focussed on the reasons which may be impeding claimant in carrying out his job.

275. Although the claimant alleges that Ms Bell (and/or the appeal decision officer) failed to set out what she would do to resolve the grievance, that allegation is not made out. Ms Bell's rejection of the grievance (and that of the appeal decision officer) was genuinely because of the evidence before them. They also had an expectation that the claimant's seniority and role description meant that he could work with others. The rationale was comprehensively explained in the outcome.

276. The Assistant Company Secretary did not produce false evidence so the claimant's allegation here was not made out. The evidence in question is at page 1709, particularly point 3 where Mr Hart states that he did not recognise it to be true to say that IDC's custom is to authorise spending uninformed by a business case and also that he was not aware of any instances where that has happened. The claimant's description of this as false, points to the heart of the dispute about what a BC has to be. We have made findings accepting the respondent's position that it was possible for the claimant to engage with the process as it was and work to change it as well as providing analysis for the IDC of the practical importance of any shortcomings. (see paras134 & 135 among other places).

277. Taken as a whole, the allegations in relation to the grievance are not made out (LOI 4.7 and 4.10). The decisions both at the first instances grievance (Ms Bell) and appeal (Ms Higgin) were reasonable ones open to them on the evidence before them. There is no evidence from which an inference might be drawn that they were influenced by the protected disclosure – if they were aware of the claimant having been the whistleblower. We think that, had they turned their minds to it, they might have suspected that it was the claimant but there is no indication that they were influenced by the communication of information at all. These are not detrimental acts on grounds of protected disclosures.

278. LOI 4.8, 4.11, 4.12, 4.13 and 4.14, are the subject of findings of fact set out in paras. 219 to 234. They concern the allegations against Mr Dale and those against Mr Harris. In summary:

    a. Mr Dale did not ignore representations made by the claimant on 18 January 2022 (LOI 4.8). He responded to the work related issues that had been raised by the claimant about an alleged inappropriate involvement of a sub-contractor. He did ignore some more confrontational statements and there was no detriment to the claimant by reason of Mr Dale's response because no reasonable employee would consider themselves to disadvantaged in those circumstances.

    b. Mr Harris did not decline to accept non-delegable responsibilities as AO (LOI 4.11);

    c. Mr Dale's allegation of misconduct against the claimant was a reasonable one to make; it was justified by what he knew about the claimant's conduct (LOI 4.12). It was necessary for objectives to be set as it was the respondent's policy for all employees to have them and the claimant was, in some respects, not carrying out his role by this time.

    d. In LOI 4.13, as we set out above (paragraphs 233), Mr Dale was taking advice from HR before deciding to commence conduct proceedings. The process appears to have been cumbersome, but he was right to take advice. It must have been stressful for the claimant, but there were valid reasons for the delay.

    e. LOI 4.14 is the allegation that Mr Dale subjected the claimant to a detriment by confirming that there was no current AO letter. Mr Dale did provide the original AO letter and say that it was still current so the underlying facts are not made out. The claimant's issue is that the job description for his own role required him to be accountable in relation to addressing AO risks. That's as may be, but the substance of what the AO told him was an appropriate response (para.229 above).

279. None of the specific allegations in paras 4.1 to 4.14 amount to an unlawful detriment and there is no weighty evidence which gives rise to an inference that the different managers were motivated by the protected disclosure – not least because (with the exception of Mr Sharman) the senior leadership were not aware of it until 21 July 2021. Mr Harris did not read the report so probably was not conscious of the possibility that it was the claimant who was the whistleblower.

280. Other specific allegations of detriment are set out in section 7 of the List of issues. LOI 7.1 refers to the alleged breach of implied term of mutual trust and confidence. This is covered elsewhere. LOI 7.2 entirely overlaps with the general case up to and including disciplinary action; Mr Dale stated that he would have to consider whether a formal HR process was necessary

(para.225 above). However, he had a reasonable and proper cause for this action because he needed to cut through the impasse where the claimant was not back at work after his grievance appeal and refused to agree a set of objectives which was a very necessary first step to progress for the claimant within the organisation.

281. LOI 7.3 is another way of putting the same allegation about whether the claimant was required to act contrary to the requirements of governance and whether he was demoted with risk to his personal reputation. We explain in paras.71 and 82, for example, that the claimant had an excessively purist view of what was required and the respondent's expectations in no way caused risk to his personal reputation.

282. Similarly, the facts said to underpin LOI 7.4 are the same as those underpinning his complaint that decisions were taken at IRC without BC's. He has not made that complaint out. He was not required to act without honesty or integrity.

283. LOI 7.5 is also not made out. We have accepted the respondent's version of events both as to the obligations on the company in respect of governance and as to the appropriateness of their management of the claimant's concerns.

284. The core facts relied on in relation to LOI 7.6 are made out in that the statement was made (probably on 30 March 2021) that Mr Sharman had no confidence in the claimant to deliver a paper. Mr Sharman only received the Counter Fraud report in July 2021 but would have been aware the disclosure had been made during the investigation – it is improbable that he was contacted about it as early as 30 or 31 March 2021. We are satisfied that the no confidence statement cannot have been because of the protected disclosure. This is the same allegation as LOI 4.2 and is relied on there only in support of the constructive dismissal complaint.

285. Many of the allegations in LOI 7 are not made out because we've accepted the respondent's version of events, of their understanding of the governance principal, the BC Issues and of the dual leadership and quality assurance aspects to the claimant's role.

286. LOI 7.7 is the allegation about an alleged failure to complete the grievance. For reasons we set out in para.179 – 200 above, for the most part, the underlying factual allegations are not made out in relation to the grievance. This does not, we conclude, amount to a detriment and Ms Bell was not motivated by the claimant's disclosure.

287. For those reasons, the allegation of protected disclosure detriment fails.

Constructive dismissal

288. There are some points made by the claimant where one could reasonably criticise the actions of the respondent in relation to,

a. Omitting the claimant from the team reorganisation communication; in October 2021; and

b. The 'no confidence' comment; 1 April 2021.

289. We do accept that the claimant has a valid point of view in that, when reviewing BCs, he is attempting to measure information available against what he regarded as unnegotiable standards for BCs from the HMT Green Book. However, we have gone through each of the allegations in LOI 11.2 to 11.4 in paras.88 to 154 above where we consider the overarching allegations that financial decisions at IRC were not supported by BCs. The claimant has not shown that to be the case. Everything remaining in LOI 11.2 has a valid explanation. Anything else remaining in LOI 11.3 has either been withdrawn or duplicates previous matters and the respondent has shown valid explanation for their actions. Similarly, LOI 11.4 argues the same factual matters to be tantamount to demoting the claimant, and removing his authority to exercise quality assurance over whether public funding was authorised. The only additional point of detail is that of the email of 25 March 2021 and for reasons set out in para.235 above, that was unexceptional.

290. The question in LOI 13 requires us to consider whether the facts proved, individually or cumulatively, involved a breach of the duty of trust and confidence. The two things we've found proved are not, either individually or collectively, sufficiently serious to amount to a breach of that implied term. If they did, then given the dates, the latest the claimant could have argued the repudiatory breach arose would be October 2021. The claimant resigned on 25 February 2022. If there was a breach, we are satisfied that he'd affirmed the contract by then. He presented a grievance and appeal both of which we consider to have shown an intention to be bound by the contract of employment.

291. Given the line of cross-examination and argument, it is slightly surprising that none of the LOI actually articulate the question whether the respondent put the claimant in a position where the role he was recruited to do was in effect incapable of performance and would not be capable of performance within a reasonable period of time. Setting aside the formal question of whether the claimant could complain of this, we are satisfied that what the respondent expected by way of the leadership aspect of the role and the quality assurance aspect of the role was achievable if challenging. There is ample clear evidence of attempts by the respondent to work with the claimant to improve standards. Mr Sharman's expectation was that the quality assurance aspect would become easier over time. No doubt it was difficult that this was said as late as the grievance investigation. NO doubt there were things which would have made it easier but these do not amount to a breach of the trust and confidence term in relation to the expectations place on the claimant or the support provided to him in order to do his role.

292. The claimant has not shown that he was dismissed.

293. The claims of protected disclosure detriment are not made out and are dismissed for reasons set out above.

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Employment Judge George

Date: …18 July 2024 ……..

Sent to the parties on: .19 July 2024.

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For the Tribunal Office