EMPLOYMENT TRIBUNALS

Claimant: Mr M Tolley

Respondent: Birmingham City Council

Heard at: Birmingham (by CVP) **On:** 19, 20, 21, 22, 23, 26, 27, 28 and 29 February 2024 and 1, 4 and 5 March 2024. In chambers 17, 18 and 19 April 2024 and 14 June 2024.

Before: Employment Judge Edmonds
Dr G Hammersley
Mr R Virdee

Representation
Claimant: Mr K Webster, counsel
Respondent: Mr C Ilangaratne, counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The complaint of unfair dismissal is well-founded and succeeds. The claimant was unfairly dismissed.

2. The complaint of automatic unfair dismissal is not well-founded and is dismissed.

3. The following complaints of being subjected to detriment for making protected disclosures are well-founded and succeed:

    a. Not being provided with access to his emails (insofar as this relates to Mr Sahota and/or Ms Dhillon);
    b. Not being provided with Terms of Reference (insofar as this relates to Mr Sahota);
    c. Not following the disciplinary procedure (insofar as this relates to Mr Sahota); and

d. Not providing witness statements to the claimant (insofar as this relates to Mr Sahota and/or Mr Farmer)

4. The remaining complaints of being subjected to detriment for making protected disclosures are not well-founded and are dismissed.

5. The claimant's complaint of direct sex discrimination is dismissed on withdrawal.

6. A remedy hearing will be listed at a later date.

REASONS

Introduction

1. The claimant was employed by the respondent between 8 January 1988 and 19 April 2023, when he was dismissed for gross misconduct. At the time of his dismissal he was Head of Capital Investment and Repairs. The claimant was dismissed following a lengthy investigation which the respondent says was prompted by two whistleblowing complaints which related to the claimant. Separately, the claimant had himself sought to raise a protected disclosure on 27 November 2020 about a different matter and he says that it was that disclosure which led to his dismissal. He also says that he was subjected to various detriments throughout the process on the ground of having made his disclosure.

2. The claimant commenced ACAS early conciliation on 20 December 2021 and this ended on 30 January 2022, with him presenting a claim to the Employment Tribunal on 28 February 2022. This claim alleged detriment for having made a protected disclosure, and sex discrimination. At that time the disciplinary investigation remained ongoing and he remained in employment. A preliminary hearing was held on 6 April 2023 before Employment Judge Mensah at which the issues in this claim were identified.

3. Following his later dismissal from the respondent's employment, the claimant commenced a second period of ACAS early conciliation on 28 June 2023, ending on 29 June 2023. He presented a second claim to the Tribunal, for automatic and ordinary unfair dismissal, on 17 July 2023. This was consolidated with his first claim on 12 September 2023 and a further preliminary hearing was held on 24 November 2023 before Employment Judge Choudry in relation to both claims, at which the additional issues arising from the second claim were clarified.

Claims and Issues

4. The issues in this claim were set out in two separate Orders, one following a Preliminary Hearing on 6 April 2023 (page 77, at page 84) and one following a second Preliminary Hearing on 24 November 2023 (page 1299, at page 1304). The issues which we had to determine are set out below

(using the exact wording from the List of Issues, which we acknowledge did contain some linguistic errors):

1. Time Limits (relating to detriment claim only)

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before the claim was presented may not have been brought in time.

1.2. Was the complaint of breach of 47B made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:

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

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

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

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

2. Protected Disclosure

2.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1. What did the claimant say or write? When? To whom? The claimant says s/he made disclosures on these occasions: 27 November 2020.

2.1.2. Did he disclose information?

2.1.3. Did he believe the disclosure of information was made in the public interest?

2.1.4. Was that belief reasonable?

2.1.5. Did he believe it tended to show that:

2.1.5.1. A criminal offence had been, was being or was likely to be committed;

2.1.5.2. A person had failed, was failing or was likely to fail to comply with any legal obligation;

2.1.5.3. Information tending to show any of these things had been, was being or was likely to be deliberately concealed

2.1.6. Was that belief reasonable?

2.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer (section 43C).

3. Detriment (Employment Rights Act 1996 section 48)

3.1. Did the respondent do the following things:

3.1.1. Suspension 09.04.2021 whilst on annual leave by assistant chief executive not line manager
3.1.2. Email deleted completely instead of out of office, which humiliated and degraded when colleagues were aware his email was deleted which highlighted issue with his employment to all, which was later rectified
3.1.3. Ignoring reasonable requests to defend himself
3.1.4. Request for access to emails denied
3.1.5. No terms of reference provided policy disciplinary despite repeated requests
3.1.6. Not following the respondent's disciplinary procedure such as the request for questions put to Claimant in advance of the meetings
3.1.7. Failure to give source materials / evidence such as witness statements to the Claimant and instead provided a draft report or extracts of the same
3.1.8. Dignity at work compliant and failed to act upon it within their prescribed policy and timeframe and a refusal to investigate core complaints meaning no reasonable progress made and lack of continuity and poor handling of the complaint
3.1.9. Instigation and continuation of form disciplinary procedure.

3.2. By doing so, did it subject the claimant to detriment?

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

4. Unfair dismissal

4.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

4.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources,

in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

4.2.1 There were reasonable ground for that belief;
4.2.2 At the time the belief was formed the respondent had carried out a reasonable investigation;
4.2.3 The respondent otherwise acted in a procedurally fair manner;
4.2.4 Dismissal was within the range of reasonable responses.

5 Automatic Unfair Dismissal

5.1 Was the reason or principal reason for the claimant's dismissal the fact that the claimant had made a protected disclosure?

5. We agreed only to address liability at this hearing, not remedy, and therefore we do not set out the issues relating to remedy at this stage.

6. The claimant's claim originally included a complaint of sex discrimination. This had remained part of the pleadings through the case management process, and the claimant had only withdrawn that complaint on 14 February 2024, the week prior to this hearing. Consequently, I was asked to dismiss that claim, which I have duly done. The respondent sought to criticise the claimant for having withdrawn those complaints at such a late stage. Whilst it was at a late stage and it would have been preferable if they had been withdrawn earlier, it was confirmed to me by the parties that the withdrawal of those complaints did not reduce the numbers of witnesses required to give evidence at the hearing and did not affect the length of the hearing. We find that it was better that the claimant withdrew once he realised that those complaints were not likely to succeed (assuming that is why he withdrew them), than to press ahead anyway, and that it is common for a final assessment of prospects to be made shortly prior to final hearing. We do not criticise him for this.

7. A further issue arose at the outset of the hearing as to whether the List of Issues was accurate. The Tribunal noted that the issues were set out across two separate Records of Preliminary Hearing, one in relation to the claimant's first claim and one in relation to the second claim. The Tribunal noted that the issues set out in relation to the second claim only related to unfair dismissal and not detriments, and wanted to verify that this was correct so asked the parties to confirm.

8. The claimant's representative asserted that the List of Issues was not correct, but on a different basis. The claimant's representative said that they did not assert that the detriments varied in the second claim (and so no

additional detriments needed to be added to the List of Issues), but said that there were three protected disclosures referred to in the second claim (as opposed to the one in the first claim). He said that this was not relevant to the detriment claim but that it was relevant to the automatic unfair dismissal claim as the Tribunal could find that there was an automatic unfair dismissal which related to the two later disclosures. He said that this was contained within the claimant's pleadings but that if he was wrong on that, he would apply to amend the claim to include that allegation. The respondent objected both to the assertion that it was already present in the pleadings and to any application to amend the claim.

9. Having heard from both parties' representatives, the Tribunal determined that this was not already within the claimant's pleadings. We noted that the second claim form did refer to the two additional disclosures but that it did not set out when those disclosures were made, to whom, or assert that he was dismissed because of those disclosures or link the disclosures to his dismissal in any way. At the Preliminary Hearing on 24 November 2023 it had been documented that the issues relating to his protected disclosure were in the previous Record of a Preliminary Hearing (which did not mention those two disclosures) and so clearly it was not understood at that time that the later two disclosures were considered relevant. The claimant had not raised the point at that hearing or at any point prior to the final hearing. We also noted that the claimant's witness statement did not even refer to the other two disclosures, and it was clear that the respondent had prepared its evidence on the basis of the first disclosure alone.

10. We therefore concluded on the basis of the above that the claimant's claim did not include any allegation that he was automatically unfairly dismissed because of the later two disclosures, nor would the claimant be given permission to amend his claim to add that allegation. The balance of hardship and injustice would be squarely in favour of not allowing the amendment: the nature of the amendment would be significant in that it would be more than re-labelling but instead arguing that a new factual set of circumstances led to his dismissal. As to the timing and manner of the application, it had not been raised prior to final hearing despite the list of issues clearly not referring to it, nor the witness statements. The claimant had not put forward anything in his witness statement to rely on these disclosures, and he would still have the 27 November 2020 disclosure to rely on which is the crux of his case. Were the amendment allowed, the hearing would need to be adjourned to allow the respondent to undertake a further disclosure exercise (as the bundle did not include all relevant documentation relating to those disclosures and what was done about them) and introduce new witness evidence to address the point. That would result in the postponement of the hearing.

Procedure, Documents and Evidence heard

Documents

11. We were presented with a main file amounting to 1310 pages ("the Bundle"). Page numbers set out in these Reasons are to the main bundle

unless otherwise stated. We explained to the parties that we would not read every document and that if the parties wished the Tribunal to consider any particular document, they should ensure that we were taken to it.

12. In advance of the hearing, the Tribunal was also presented with a supplementary bundle of 539 pages by the claimant. The respondent objected to the inclusion of this supplementary bundle (referred to as the supplementary, or additional, bundle in these Reasons).

13. Initially it was submitted by the claimant that this bundle contained the claimant's appeal pack and that the respondent had had the bundle since 10 January 2024. The respondent said that it had objected to the bundle's inclusion in evidence at that time and that the claimant had not provided sufficient information as to its relevance to the proceedings. The claimant's representative in response gave several examples of why the additional documents were relevant to the proceedings.

14. Following a short adjournment, the Tribunal decided to allow the additional bundle to be included in evidence as it was in the interests of justice to do so. We acknowledged that the claimant could and should have been clearer about what these documents were, but found that to the extent there was repetition with the main bundle that was because it was an appeal pack. We found that the documents would have been in the respondent's possession through the claimant's appeal process and therefore could and should have been disclosed by the respondent in any event. It appeared to the Tribunal that Mr Kitson, who was already planning to give evidence, would be able to give evidence as appropriate on having received those documents. The documents appeared to be, at least in part, relevant. The balance of prejudice weighed in favour of allowing the documents to be admitted as evidence and we ordered to that effect.

15. We should add that it later transpired that this additional bundle did contain some additional documents which were not in the appeal pack (as they postdated his appeal). Whilst it is unfortunate that this was not discovered at the outset, we conclude that this would not have affected our decision to allow the documentation in evidence. We consider that the additional documents comprised his appeal pack and some additional further documents, but that did not change the fact that it included relevant documentation which it was in the interests of justice for the Tribunal to consider and the documents had been in the respondent's possession for a number of weeks prior to the hearing. We would also note that this Bundle did in fact contain key documentation which had not been included in the main Bundle, for example the statement that the claimant provided at his meeting with Gowling.

16. In addition, on day 6 of the hearing the respondent requested to introduce additional evidence relating to an invoice at page 725, and on day 7 of the hearing the respondent requested to disclose a further email regarding the claimant's daughter's placement at Contractor 1. Both of these applications were refused. Both of these documents were documents which Gowling had had before them when concluding their report into the claimant's

conduct, and extracts from them were already in the file as part of that report and/or its appendices. In relation to the invoice, the respondent said that it had been raised that morning by one of the respondent's witnesses and that it was not in the respondent's domain beforehand but had been in Gowling's domain. The claimant objected to the late disclosure of these documents.

17. In relation to the invoice, the Tribunal was not persuaded that the document would add anything to the documentation and evidence already before the Tribunal. The respondent appeared to wish to use it to assert that the claimant was Budget Holder over these invoices, however that was not something that had been denied by the claimant in any case.

18. In relation to the email regarding the claimant's daughter, the respondent's representative was not able to confirm whether or not it was provided by Gowling to the claimant as part of the appendices to their report, although said that it may well have been. Nor could the respondent's representative confirm whether or not it was provided to Ms Kohli or Mr Kitson as part of their investigations. The Tribunal concluded that this was in fact relevant documentation – both because it was referred to in the Gowling report and also because it could illustrate what information was passed from Gowling to the respondent, and from the respondent to the claimant. However, the respondent was in breach of its disclosure obligations by not disclosing it earlier, and we considered that the extracts from it within the bundle already were sufficient to enable the respondent to question witnesses about the matter. We concluded that the prejudice to the claimant in allowing the late disclosure outweighed the prejudice to the respondent in not allowing it, particularly given that the claimant was already under oath and would not able to discuss the email with his representative.

Witnesses

19. We heard from eighteen witnesses during the course of the hearing, as follows:

20. For the claimant:

    a. The claimant;
    b. Ms Sarah Ager, who reported into the claimant at the material time;
    c. Mr Steve Coombs, a divisional director of Contractor 2, one of the respondent's Contractors;
    d. Mr Mazar Dad, who reported into the claimant at the material time;
    e. Mr Gary Nicholls, who reported into the claimant at the material time; and
    f. Miss Tracey Lakin, a union representative employed by the respondent who worked alongside the claimant's team.

21. For the respondent:

    a. Mr Patrick Arben, a partner at Gowling WLG (UK) LLP;

b. Mr Graeme Betts, a Strategic Director in Adult Social Care at the respondent;
c. Ms Lisa Cockburn, a People Service Advisory Lead at the respondent;
d. Mr Martin Chitty, who was at the material time a partner at Gowling WLG (UK) LLP;
e. Mr Anthony Farmer, Head of Professional Standards within the respondent's Finance and Governance Department;
f. Mrs Helen Joyce, a People Services Advisory Officer within the respondent;
g. Ms Kalvinder Kohli, an Assistant Director in the Early Intervention and Prevention, Adult Social Care department at the respondent;
h. Mr Paul Kitson, a Strategic Director in Place, Prosperity and Sustainability at the respondent;
i. Miss Tina Ohagwa, Interim People Partner at the respondent;
j. Mr Satinder Sahota, who was between mid-November 2020 and December 2021 an Assistant Director of Legal & Governance and Deputy Monitoring Officer, and who was then Interim Director, Monitoring Officer & City Solicitor until he left the respondent's employment in mid-September 2022;
k. Mr Jonathan Tew, who was an Assistant Chief Executive at the respondent until 8 August 2021 when he left the respondent's employment; and
l. Mrs Julie Guildford-Smith (previously known as Julie Griffin), who was the claimant's line manager until she left the respondent's employment in November 2022.

22. As can be seen from the above, a number of the claimant's team gave evidence on his behalf. This represented around half of his team, and we consider that the fact that so many of his team were prepared to give evidence in support of his claim demonstrates the high regard with which he was held within his team. From their evidence, it is clear that they consider him to have been wronged by the respondent and that he did not deserve to be dismissed. Whilst we do not consider their views to be determinative in any way given that they would not have had detailed insight into dismissing manager's rationale, we do conclude that this shows that the claimant was a well liked line manager and that his team, now knowing what it is he was alleged to have done, do not consider this to have justified his dismissal. It was suggested by the respondent that the claimant's witnesses were, in effect, his friends. However, we conclude having heard their evidence that even if he had some personal contact with these individuals, that was borne out of the strength of their professional relationships and the reason his witnesses gave evidence on his behalf was not because they were his friends, but because they felt passionately about what happened to him (to the extent that Ms Ager chose to dial into the hearing most days to listen).

23. As for the claimant himself, we found him to be honest and direct in his evidence. He spoke candidly, and unless we have specified otherwise in these Reasons, we generally accepted what he said to be accurate. It was clear that he felt passionately about what happened to him and had a

genuine sense of grievance about the way he was treated and about the way that the wider team was run by Mr James. We find that he was absolutely devoted to his work and did what he thought was necessary to "get the job done" in the most practical way. The respondent put forward a number of alleged "errors" in his documentation to suggest that his evidence was not credible, such as him saying on one occasion that he managed 130 employees and on another occasion 150, getting dates wrong on occasion and saying that he submitted a judicial review when he had not. Although we acknowledge that the claimant did make some errors in things that he had written down, we find none of those errors to be deliberate: they were occasional lapses in accuracy but nothing which undermines his case or affects his credibility overall. We also note that during some of the relevant period he was suffering from poor mental health and/or had the threat of potential dismissal hanging over him.

24. Turning to the respondent's witnesses, for the most part we also found them to be honest and forthcoming in their evidence. However, there were some errors in their evidence (for example several of them saying that they did not know that the claimant's had made a protected disclosure when the evidence suggests clearly that they did at least know that he considered himself to have done so, as set out later in these Reasons). We also found that on occasion they did not paint a clear picture of exactly what happened (for example, what documents had been provided to the claimant and to the hearing managers). Whilst memories do naturally fade over time and we do not doubt their honesty in the evidence they gave about this, we did find this frustrating and it impacted on the quality of their evidence. We also make some comments below in a separate section regarding Mrs Guildford-Smith's evidence.

25. During the proceedings, a large number of matters were discussed in evidence. We do not specifically refer to every comment made in our findings and conclusions below, only to those we consider pertinent to the issues in the case.

<u>The hearing timetable and submissions</u>

26. In relation to the timetabling of evidence, a number of matters arose during the hearing (notably dealing with applications to adduce documentation, amend the List of Issues and issues arising from Mrs Guildford-Smith's evidence, along with some IT issues of Mr Coombs). This meant that we could not adhere to the original proposed order of witnesses and the order of witnesses was therefore moved around during the course of the hearing following discussion with the parties. It was also determined appropriate to interpose certain witnesses due to issues regarding witness availability.

27. In addition, due to the time spent dealing with the various issues that arose during the hearing (as set out below), we fell behind time in the proposed timetable. In any event, the parties' proposed timetable had allocated one additional day to evidence (and one fewer day to deliberations) than had been proposed at the preliminary hearing on 24 November 2023 and therefore the Tribunal had insufficient time available to it to deliberate

and/or deliver Judgment at the hearing. Therefore, the parties were informed that they would receive a Reserved Judgment, with deliberations needing to take place before that Reserved Judgment could be produced.

28. The parties prepared written submissions, which they supplemented with oral submissions on 5 March 2024. The Tribunal decided to limit those submissions to 1.5 hours for each party (excluding the anonymisation application dealt with below). The claimant asked for slightly longer, however we decided that this was not necessary given that the parties also had written submissions and given that the parties had already taken longer than envisaged over their evidence meaning that if the Tribunal were to allow any longer, a further day would need to be listed for those submissions.

29. During the course of deliberations, the Tribunal noted that the decision of **Nicol v World Travel and Tourism Council and Others [2024] EAT 42** had been published since the parties' submissions , and that this was potentially relevant to proceedings. Accordingly, the Tribunal paused its deliberations and wrote to the parties inviting them to comment. The respondent did so (copying the claimant's representative) and also referring to another recent case of **William v Lewisham and Greenwich NHS Trust [2024] EAT 58.** The claimant did not submit any further comment. Due to having to list further deliberations after inviting comment, and due to the Tribunal's availability, it was not possible to promulgate this Reserved Judgment until the date at the bottom of these Reasons. However, the parties were notified that there would be a delay when inviting comments on the **Nicol** case.

Recusal application

30. At the start of the third day of the hearing the respondent made an application for recusal in relation to Mr Virdee. The basis for the application was that he had previously been employed by the respondent and the respondent understood that he had left in 2010. The respondent said that the fair minded and informed observer could consider there to be a real possibility of bias. The respondent said that it was not alleging actual bias, but apparent bias. In particular, the respondent submitted that Mr Virdee had also pursued an employment tribunal claim against the respondent. The respondent asked Mr Verde to recuse himself and for the hearing to continue with a panel of two not three.

31. Mr Virdee explained that his last actual day of work at the respondent was around 2004. He said that there had been a dispute and accepted that litigation had been commenced which had taken many years to resolve. He said that the litigation had ended amicably by way of COT3 agreement which from recollection he thought would have been in around 2009. He said that he had sat on other employment tribunal cases with this respondent (including finding in favour of the respondent), where the respondent was aware of his background but did not object to him sitting on the panel. It was also clarified before any decision was reached on the recusal application that the counsel who had acted for the respondent in Mr

Virdee's claim against the respondent had appeared as counsel for the respondent in a subsequent case where Mr Virdee sat as a panel member, and had raised no objection.

32. Although the claimant was at that point in the middle of his evidence and therefore under oath, the Tribunal gave permission for him to speak to his legal representatives for the purpose of determining whether the claimant also requested that Mr Virdee be recused from the proceedings, and what his position was on the request that the hearing continue with a panel of two. Following a short adjournment, the claimant's representative confirmed that the claimant did not see any risk of perceived bias and did not object to Mr Virdee remaining on the panel. He confirmed that the claimant had never met Mr Virdee despite them having worked at the respondent during the same period. He also clarified that he would not wish to continue with a panel of two and wished to have a traditionally constituted panel of three to determine the many disputes of fact.

33. Following an adjournment to consider the position, the Tribunal decided that Mr Virdee would not be recused and he would remain on the panel hearing this case. We noted that in accordance with **Porter v Magill [2002] 2 AC 357** the test was not whether we considered Mr Virdee to be biased but whether a fair-minded and informed observer would conclude that there was a real possibility of bias. We considered that they would not.

34. We were mindful that as held in **Locabail (UK) Ltd v Bayfield Properties Ltd and other cases 2000 IRLR 96, CA**, if there were real ground for doubt, that doubt should be resolved in favour of recusal, and that the fact that recusal would mean re-listing a case for a later date would not justify continuing if the fair-minded and informed observer would conclude that there was a real possibility of bias. We also recognised that in **Higgs v Farmor's School 2022 ICR 1489, EAT** The Honourable Mrs Justice Eady DBE said that

"In considering whether a judge or lay member who has been assigned to hear a particular case should be recused on the ground of apparent bias, the issue must be resolved by applying an objective test: it is the perspective of the fair-minded and informed observer that is relevant and thus neither the subjective view of the person alleging possible bias, not the assertions of the person of whom potential bias is alleged, are likely to be particularly helpful…..The threshold for recusal is, however, whether the fair-minded and informed observer would conclude there was a "real possibility", not whether they would conclude there was a "probability".

35. However, each case must be decided on the individual circumstances. We noted in particular that:

    a. Mr Virdee ceased actively working for the respondent in 2004 (although his employment did not end until 2009/2010), meaning that his active working period ended 20 years ago, and his actual employment ended over 13 years ago. This is a considerable period of time.

b. His employment ended by way of mutually agreed settlement around 13 years ago.
c. Mr Virdee has since sat as a panel member on Tribunal cases where the respondent was a party without objection, including where the counsel for the respondent was the same person who had been counsel for the respondent in the claim that Mr Virdee had presented to the Tribunal.
d. Mr Virdee worked in a different area of the respondent to the claimant, and the claimant had not come across Mr Virdee during his employment.
e. The respondent is a very large employer with a large number of departments and therefore working in one department would not mean working alongside those from other departments necessarily.
f. Mr Virdee had not had contact with the respondent's employees since he left employment.
g. Mr Virdee had taken the judicial oath and had sat as a member for almost 18 years, and was familiar with the need to recuse himself should that be appropriate.

36. We concluded that the fact that he was employed by the respondent such a long time ago in itself would not result in the fair-minded and informed observer concluding that there was a real possibility of bias, given the passage of time.

37. We considered that the fact that a person had pursued litigation against a party could certainly in certain circumstances cause a fair minded and informed observer to think there was a real possibility of bias. However that fair minded and informed observer would be appraised of the specific facts in this case which have been outlined above and that person would not conclude that there was a real possibility of bias given that such a long time had passed since those events, and given the other circumstances outlined above. We refused the application for recusal in respect of Mr Virdee.

38. The respondent then asked further clarification questions about the background to Mr Virdee's dispute with the respondent. Mr Virdee confirmed to the parties that, although the circumstances had been difficult at the time, the resolution was amicable. It was also noted that it appeared that Mr Virdee had two LinkedIn pages, one of which still referred to him working at the respondent, and Mr Virdee explained that he does not regularly use LinkedIn and thinks one page must be historic.

39. Mr Virdee also confirmed that, having gone through the list of witnesses in this case, there was one name that he did recognise, Kalvinder Kohli. He said that, from memory, he thought this was someone who worked in the unit he managed in social services around 22 years earlier. He said that he thought she was a junior officer whilst he was a senior officer, that she did not spend long in that unit and was not working with him when he stopped work in 2004, nor was she involved in his dispute with the respondent. He thought from memory that her line manager may have been one of his direct reports, within a team of around 15 to 20 people. We confirmed that

this would not change the Tribunal's position on recusal, taking into account the legal tests outlined above. Mr Virdee also confirmed that he had no contact with Ms Kohli or any other employees save for a couple who had nothing to do with social services (and who were not witnesses in this case). The respondent indicated that they considered this was another reason why they believed there could be an appearance of bias.

40. We invited the claimant to confirm if this additional information changed his position, given that what was now being suggested was that there might be an appearance of bias towards the respondent due to his past dealings with Ms Kohli (whereas the previous application for recusal had related to an alleged potential appearance of bias against the respondent, this therefore being an unusual situation where the same party was alleging potential appearance of bias before towards and against that party). The claimant confirmed that this did not change his position (he wished Mr Virdee to remain on the panel).

41. The Tribunal concluded that the additional information did not change the conclusions previously reached regarding the recusal application. We felt that Mr Virdee had oversight of a fairly large team at the time and it was over 20 years ago, and the relationship was purely professional with them not having stayed in touch. We concluded that the fair-minded and informed observer would not conclude that there was any real possibility of bias.

42. Later that day, the respondent's representative raised a new point and requested again that Mr Virdee be recused. He explained that he had learned from Ms Kohli that Ms Kohli was at the time of this hearing in a WhatsApp group which contained current and former employees of the respondent. This was a group where social messages were shared and get-togethers arranged however Ms Kohli had confirmed that she did not attend these for personal reasons.

43. Mr Virdee confirmed that this WhatsApp group existed, that it contained about 8 to 10 people, and said that it was created by someone else that he had known in the respondent. He said that he was invited to join the group and that he had been to two social gatherings organised on the group, at which three or four people attended each (the most recent having been four or five months before the hearing). He said that Ms Kohli was also on the group but that he had not had any personal conversations with her and they had not shared any work related issues on the group. He said that he did not even know some people on the group and had never met some of them (because the group was not set up by him). He said that the person who set it up worked in equalities rather than his business area. Mr Virdee explained that he was in a large number of WhatsApp groups and that this one did not have much activity on it. He said that it was generally comments such as "Happy Birthday" and "Have a nice holiday" type messages. The respondent submitted that this indicated a social connection which could cause a perception of bias.

44. Mr Virdee also said that Ms Kohli was not a regular contributor to the group. He checked the group and confirmed that the last message on the group was from the group organiser on 1 January 2024 saying “Happy New Year”.

45. Having considered this information, the Tribunal recognise that this does mean that Mr Virdee had some ongoing connection to employees of the respondent and that he had some indirect contact with Ms Kohli. However we concluded that there was not in reality any social connection between the two of them such that they had “stayed in touch” in any real sense, they just happened to be in the same WhatsApp group that had been set up by a third party and we determined that this did not change our position that that the fair-minded and informed observer would not conclude that there was any real possibility of bias. It was clear that, although he had this link to Ms Kohli, that link did not reflect any substantive personal or professional dealings and nothing which would suggest any real possibility that this would influence his findings in this case or his approach to it. It also did not change the Tribunal’s decision in relation to the original recusal application as his level of contact with the respondent’s employees was minor in nature and related to different departments to that in which he or the claimant worked.

46. For completeness, during the course of proceedings Employment Judge Edmonds also noted to the parties that there was a trainee solicitor at the claimant’s instructing solicitors who had appeared on the CVP link who Employment Judge Edmonds had previous dealings with. This was because that person had been a contractor at an organisation where Employment Judge Edmonds had previously worked. They were based in separate offices and they worked on separate matters, but would see each other at occasional team meetings. No application for recusal was made in respect of this and the Tribunal was confident that the fair-minded and informed observer would not conclude that there was any real possibility of bias.

<u>Julie Guildford-Smith</u>

Witness Order

47. Mrs Guildford-Smith, who had been named Julie Griffin during the period to which these proceedings relate, had been required to attend the hearing to give evidence by witness order which was issued at the respondent’s request prior to the hearing. At the outset of the hearing, she had not prepared a witness statement but did so in advance of her evidence. This was sent to the claimant and to the Tribunal on 27 February 2024.

48. At the start of the hearing, the claimant objected to her having been called by witness order, noting that the claimant had not been given the opportunity to object to this, the claimant was not clear as to why she was being called in this way and they had no witness statement for her. The Tribunal clarified that applications for witness orders were exempt from the usual requirements to notify the other party under Rule 92 of the Employment Tribunal Rules.

49. The respondent explained that it had tried to obtain a statement from Mrs Guildford-Smith but had been unable to do so and therefore had sought a witness order. The respondent noted that the claimant referenced her throughout his witness statement and that her evidence was clearly relevant.

50. The Tribunal confirmed that the witness order would remain in place, and that in the absence of a statement, the respondent's representative would be permitted to ask certain non-leading questions to her relevant to the issues in the claim, but not to ask anything that could be interpreted as cross-examination. The claimant's representative would be able to cross examine her.

Allegations about bundle contents from Mrs Guildford-Smith

51. As explained above, the Tribunal permitted an additional bundle from the claimant to be admitted into evidence. On 20 February 2024 Mrs Guildford-Smith contacted the Tribunal to say that she had just received a copy of this and objected to a particular text conversation between herself and the claimant appearing in that file. She said that she had not consented to this, they were on her personal mobile and she considered this to be a breach of the GDPR so they should be removed.

52. The claimant submitted that the conversation was relevant to the case and the Tribunal agreed that this was the case (and has indeed referred to it in our Reasons below). The relevance was that the claimant would suggest that Mrs Guildford-Smith was on the one hand giving the impression of supporting the claimant whilst apparently in the background taking steps against him, and it also contained information about Contractor 1.

53. The Tribunal considered Mrs Guildford-Smith's objection but concluded that the exchange was relevant to the proceedings and that its inclusion was therefore in accordance with the GDPR. We declined to order that this be removed from the additional file and wrote to Mrs Guildford-Smith on 21 February 2024 to confirm this. Mrs Guildford-Smith wrote again to the Tribunal several times raising concerns about the Tribunal's decision, and indicating that a complaint had been raised to the ICO, however nothing that she raised changed the Tribunal's position on the matter. The Tribunal did remind the parties that the document was disclosed solely for the purpose of these legal proceedings.

Mrs Guildford-Smith's evidence

54. Mrs Guildford-Smith gave evidence on 28 February 2024. As explained above, by this stage she had presented a witness statement and therefore her evidence was presented in the usual way (witness statement, cross examination and questions from the Tribunal). Unfortunately, during a break part-way through her evidence, Mrs Guildford-Smith sent messages to the respondent's instructing solicitor about her evidence despite having been reminded that she remained under oath in the break and should not discuss

her evidence with anyone. It was clarified that Mrs Guildford-Smith had not understood the restrictions to apply to discussions with solicitors, and the respondent's instructing solicitor had not responded to the messages that she had received. In the circumstances, and given that this was due to a misunderstanding and no actual discussions had in fact taken place as the solicitor had not responded, the Tribunal was content to proceed without taking any further action in this regard.

Recalling Mrs Guildford-Smith

55. Mr Farmer gave evidence after Mrs Guildford-Smith. During his evidence, questions were asked of him about the second whistleblower (to which we refer in our factual findings below), whose identity remained anonymous at that time. During the course of these questions, it became apparent that the second whistleblower was one of the witnesses in Project Stockholm (to which we refer in our factual findings below) and that it might be Mrs Guildford-Smith. Mr Farmer (reasonably) declined to reveal their identity without being ordered to do so, because he placed great importance on the principle of anonymity within the respondent's whistleblowing policy and procedure (page 177), but confirmed that this person was aware of these ongoing legal proceedings. The claimant submitted that the identity of this person was of direct relevance to the case, as if the second whistleblower had given evidence in these proceedings then this could impact the credibility of the evidence they had given. The respondent objected to this and said that their identity was not relevant.

56. Following a short adjournment for the Tribunal to consider its position, we clarified with Mr Farmer that the individual in question was indeed a witness in these Tribunal proceedings. On that basis, we ordered that their identity be disclosed, because this was relevant information for the Tribunal and for the claimant to have. We indicated however that if this person had already given evidence we would grant permission for them to be recalled to give further evidence on this specific matter should they wish to do so. We identified that this order was not made lightly given the confidential nature of whistleblowing complaints but noted that the respondent's policy and procedure does not guarantee confidentiality (pages 188 to 189). We also indicated that the Tribunal had ourselves wished to ask Mr Farmer about the identity of persons present at a particular meeting, and noted that the second whistleblower was one of those persons, which also demonstrated that the issues around this topic were relevant (even though the names of those at the meeting would not necessarily have identified the whistleblower specifically). We decided that the information was relevant in order to understand:

    a. Who had what information in or around January to March 2020;
    b. The credibility of the witnesses in these proceedings; and
    c. The team dynamic and inter-relationships between the claimant and the wider team.

    We indicated that these three points might impact the Tribunal's future deliberations on the core issues in the list of issues.

57. At the respondent's request, we granted an adjournment because the respondent said that they needed to take instructions on a "sensitive" matter arising out of this. Having done so, the respondent requested under Rule 50 of the Employment Tribunal Rules that the Tribunal hold a short discussion in private with the panel and representatives alone to understand this sensitive issue and see if that changed the Tribunal's position on the matter. Having considered the principle of open justice and the Convention right to freedom of expression, we decided that it was necessary in the interests of justice to convert the hearing to a private one for a very short period to understand what this matter was, on the basis that the individual would not feel able to raise it publicly.

58. Everyone else therefore dialled out of the CVP hearing room for a short period whilst the matter was discussed. As that was in private, we do not repeat what was said here, and in the end we adjourned our decision on the matter to enable that person to seek legal advice on the situation. The following morning, having had no further representations on the matter, we determined that this did not present sufficient grounds for the Tribunal to change its position that the identity of the second whistleblower should be disclosed. We did however remind those present at the hearing of the legal protection that applies to whistleblowers, including former employees. It was then explained to the Tribunal that the second whistleblower was Mrs Guildford-Smith.

59. She elected to give further evidence to the Tribunal which happened on 1 March 2024. In general, the Tribunal found Mrs Guildford-Smith to be a more credible witness on the second occasion. The Tribunal had found Mrs Guildford-Smith somewhat guarded in her initial evidence, and with hindsight the Tribunal consider that this was because she was nervous because she knew that she was the second whistleblower and was worried about this being revealed or being asked questions which were awkward to answer without addressing that fact. In her second period of evidence, we found her to be much more open and candid, because she was able to discuss matters without that underlying concern.

Anonymisation request

60. Another matter arising out of Mrs Guildford-Smith's identity being revealed was that the respondent requested an anonymisation order in respect of her, so that her name would be anonymised throughout the Judgment and Reasons (and any oral Judgment or Reasons) under Rule 50(3)(c) of the Employment Tribunal Rules. The Tribunal invited submissions from both parties on this application and agreed that it would be determined as part of the Tribunal's deliberations on the case. We therefore set out our conclusions on this application here.

61. The respondent's position was that, in raising a protected disclosure, Mrs Guildford-Smith had an expectation of anonymity and would not have contemplated that this might be waived during these proceedings. The respondent said that she had a reasonable expectation of privacy under

Article 8 of the European Convention on Human Rights and that, when balanced against competing rights, the reasons for not naming her overrode any other considerations. The respondent said that:

a. Proceedings could be disposed of fairly without naming her;
b. There was reputational risk where whistleblowers were named;
c. Mrs Guildford-Smith had not consented to being named as a whistleblower and it was important to protect her, including to ensure that future potential whistleblowers are not dissuaded from doing so; and
d. That, although she was a witness in these proceedings, she was not involved in the claimant's dismissal and therefore her evidence was not as significant as that of others.

62. The claimant objected to the respondent's application, citing the principle of open justice and that it was necessary to the determination of the issues in the case that her identity was known given that she was the claimant's manager and the role she had as the second whistleblower. He said that the Tribunal would use this information when considering what weight to place on her evidence. He said that there was no proper evidence to indicate that the right to privacy required that her identity not be revealed.

63. The Tribunal has determined that it is not necessary in the interests of justice to order that Mrs Guildford-Smith's name be anonymised from these proceedings. In considering this we have had regard to the principle of open justice and to the Article 6, 8 and 10 Convention Rights on the right to a fair and public hearing, right to respect for private and family life and the right to freedom of expression respectively. Whilst these three rights are in some respects competing, neither has precedence over the other and a balancing exercise is necessary.

64. From a practical perspective, we do not consider that what is requested would in any case achieve its intended purpose. If we redact Mrs Guildford-Smith's case, it will still be apparent that the redacted person was the claimant's line manager, and worked under Mr James. Her job roles within the respondent will be set out (as this is relevant to the issues regarding the wider team and the claimant's perception of favouritism) and therefore those who know Mrs Guildford-Smith and her work history would be able to establish very easily that she were the anonymised person. It would clearly not be proportionate to anonymise the claimant, Mr James, and others in the team, nor was that requested. We acknowledge that anonymisation would prevent Mrs Guildford-Smith's involvement in these proceedings from being revealed by way of generalised internet search against her name, however we do not consider that reason as being sufficient to render it in the interests of justice to anonymise her name for the reasons set out below.

65. The starting point when considering such applications is the principle of open justice, and this should only be departed from when it is necessary in the interests of justice to do so, taking into account the Convention rights and the circumstances set out in section 10A of the Employment Tribunals

Act 1996 (Confidential Information). This is not something that should be done lightly.

66. We take into account the potential reputational impact to her and the fact that the identity of whistleblowers should ordinarily not be disclosed except in exceptional circumstances, both for the protection of the individual and to avoid discouraging others from raising protected disclosures about other matters. We recognise that that the protected disclosure potentially amounts to information communicated in confidence within the meaning of section 10A of the Employment Tribunals Act 1996.

67. The fact that Mrs Guildford-Smith is not herself a party does not mean that she is automatically entitled to privacy, the starting position is that all witnesses (and relevant persons who are not witnesses) are set out by name.

68. The respondent is a public sector organisation. It is right and proper that it is subject to public scrutiny, and in this case the individuals involved are in relatively senior roles with large budgets. Mrs Guildford-Smith has not provided the Tribunal with any evidence to support any assertion that there are grounds on which it is important to grant her privacy and/or anonymity. As set out in **Frewer Google UK Ltd 2022 ICR D3, EAT**, there is a public interest in hearings being conducted so that names can be reported, even if revealing third party names was not necessary for the claim to be properly determined. Lack of relevance of the name of the individual is not sufficient grounds for anonymisation.

69. We are not persuaded that Article 8 rights are engaged in this case. The relevant matters that we have been made aware of which might engage Article 8 are:

    a. That Mrs Guildford-Smith was a whistleblower;
    b. That she exchanged what she considers to be personal messages with the claimant on a personal device; and
    c. That she considers there could be reputational damage if her identity is revealed.

70. However, whilst she was identified as a whistleblower by the respondent, this was very much in a work context and related to matters relating to her direct report which might otherwise have been addressed through normal line management. As is made clear later in these Reasons, she did not set out to be a second “whistleblower” and the suggestion that she be designated as such was made by others within the respondent.

71. The messages she exchanged with the claimant, whilst using on occasion crude language, were again about work matters and were exchanged with a member of her team.

72. Any reputational damage (which we do not accept would necessarily be the case) would arise out of these work matters and the evidence that she gave to the Tribunal, not her personal or private life.

73. However, even if Article 8 rights are engaged, we are not persuaded that there is anything particular about Mrs Guildford-Smith's case that is different to that of any other whistleblower whose identity might be revealed and we consider that the balancing act of the Convention rights referred to above favour not granting the order. We consider that at least part of the rationale for the respondent's application is that Mrs Guildford-Smith is concerned that the Tribunal may make critical comments about her (which could have a reputational impact). Whilst we recognise that this may be difficult for her, that does not justify withholding her identity. As set out in **Fallows and ors v News Group Newspapers Ltd 2016 ICR 801, EAT:**

    a. The burden of establishing that open justice should be departed from rests on the person making the application for that;
    b. Clear and cogent evidence is required of harm;
    c. The public should be credited with the ability to understand that unproven allegations are not proven; and
    d. The Tribunal can make clear that it has not adjudicated on the truth or otherwise of the damaging allegations.

74. We consider that the respondent has not discharged that burden, nor have they provided clear and cogent evidence of harm (including taking into account the matters discussed privately between the panel and representatives). We also hereby make clear that our findings set out below are made on the balance of probabilities and where we have set out an allegation without making a finding as to the truth or otherwise of it, no finding should be implied.

Facts

Background to the claimant's role

75. The claimant was employed by the respondent between 8 January 1988 and 19 April 2023. He was employed initially as a Clerical Officer and eventually as Head of Capital Investment and Repairs, which was a Grade 7 role within the respondent. In his role as Head of Capital Investment and Repairs, he was responsible for looking after the contracts for the provision of repairs, maintenance and capital investment, and setting the strategic direction for that area. He also had responsibility for the respondent's response to the Grenfell tragedy.

76. In his role he was responsible for an overall budget of around £120 million. During evidence it was noted that in some documentation he had referred to being responsible for 130 employees, and in others 150 employees. We accept the claimant's evidence that this is an approximate figure and that it fluctuated over time, and do not consider that this discrepancy means that his evidence is less credible in any way.

77. His role was an extremely busy one. During his later period of suspension (to which we turn below) there was a re-organisation and the duties that he did were split into four separate roles. This reflects the fact that the claimant

was very busy in his role and that there was insufficient time for him to be as involved in matters as he might otherwise like or ought to have been. He was, in effect, doing a role that encompassed what became four people's work. This is important because, in practice, it meant that in his role he was working at a high level only and he trusted his team to carry out a lot of the day to day tasks without his involvement, for example the day to day management of contracts. To others in other roles (such as those who later dealt with the disciplinary process and/or those at the external law firm that carried out the whistleblowing investigation which we address below), that might seem surprising. However, in the context of how much responsibility he had, we find this to be the only way in which he could have carried out his role effectively.

78. One of the key elements of the claimant's role was overall responsibility for the contracts governing building maintenance at the respondent's properties. This was primarily done through three main contractors, each of whom had a separate contract with the respondent: Contractor 1, Contractor 2 and Contractor 3. The contracts were entered into around 2016 and were due to run until around 2022. In these Reasons each of the three companies are referred to as "Contractors".

79. On a day to day basis the Contractors would liaise with the senior service managers at the respondent, who reported into the claimant. The claimant himself was not generally involved in the contract management on a day to day basis although he would see the Contractors at events such as corporate meetings and annual contract reviews. We heard from Ms Ager, and we accept, that the claimant would never try to influence his team on what contractors to use and would require his team to follow the correct processes for anything that was not available from the Contractors.

80. There were certain exceptions to this general position where the claimant did get more heavily involved with a Contractor:

    a. In relation to Contractor 2 there was a project known as Cascade which took place around 2020 – in this project an upfront payment was being made to the Contractor which is why the claimant became more involved. The key subcontractor involved in this project was Dodd Group Limited (which was not one of the companies alleged to have sponsored the claimant's racing car to which we turn below). This was the only instance that Mr Coombs of Contractor 2 could recall the claimant having significant involvement involved in a matter.

    b. In the event of a financial dispute with a Contractor the claimant would become more involved: if for example a Contractor pushed back when one of the senior service managers withheld a payment, then this might be flagged to the claimant to ensure it was on his radar. The claimant also became involved in a potential financial dispute with Contractor 1, to which we refer below.

81. Each Contractor used a number of subcontractors to carry out aspects of the work under the contract (referred to in these Reasons as the Subcontractors). The Contractors were generally responsible for sourcing their own Subcontractors and, although the contracts between the respondent and the Contractors technically permitted the respondent to get involved in the selection of Subcontractors, this was standard wording and was never actually used during the lifetime of the contract. Mr Coombs, a divisional director of Contractor 2, gave evidence that Contractor 2 would decide on Subcontractors themselves based on quality and price. The location of the Subcontractors was also relevant, as there was a preference to use local suppliers where possible: whilst this is something that the respondent also aspires to, we accept the evidence of Mr Coombs that this was independently important to Contractor 2 and not driven by the respondent.

82. The claimant did not have direct dealings with the Subcontractors, this was again something that the senior service managers would do, nor did the claimant require his team to use particular Subcontractors. It is also worth noting that some of the Subcontractors also had direct contracts with the respondent for the provision of other services, outside of the claimant's team, which the claimant would again not have been involved in.

83. The claimant was budget holder for around 100 separate budgets, including the spend on the contracts with the Contractors, which in turn made him indirectly budget holder for the spend with the Subcontractors – for example we saw an invoice approval sheet (page 719) which showed that Gary Nicholls, senior service manager, was the cost centre manager for a number of invoices from Office Furniture Warehouse (a Subcontractor), with the claimant being the budget holder. We accept the claimant's evidence, which was supported by Mr Nicholls' evidence, that although named as budget holder, the claimant did not get involved in the detail around invoice payments. We find that ideally he should have been more involved. However, as explained above he was extremely busy and responsible for far more than one person could oversee in any detail. Therefore, the exigencies of the situation meant that he sought the most practical route i.e. he delegated this to his team and left them to deal with such matters (notwithstanding that Mr James suggested during the later investigation that he must have been involved in such matters). He trusted his subordinates and we find that, in the circumstances, this was a reasonable position for him to have taken. However, as explained above, this is something that those investigating the whistleblowing complaints about him may not have appreciated.

84. In relation to how invoices were processed in relation to the Contractors and Subcontractors:

    a. Invoices from the Contractors would be reviewed and paid by the senior service managers on a monthly basis. The claimant did not review and approve the individual monthly invoices, he was focussed on oversight of the overall budget rather than the precise breakdown of payments.

b. In order to authorise payments under the contracts, there was a process involving "cost collection workbooks". These were reviewed by the contract team managers and Quantity Surveyors, who would present the cost collection workbooks to the senior service managers who would then authorise payment under the main contracts. In the main, Subcontractors would invoice the Contractors for their work but it appears that there were certain projects where the respondent would be invoiced for Subcontractor work rather than it going through the Contractors (for example, an invoice overview we saw at page 719 included invoices from Office Furniture Warehouse). It is also relevant to note that originally there was only one Quantity Surveyor but the claimant arranged for additional Quantity Surveyors to be engaged to assist with the financial management of the contracts. We find that this was to ensure that there was sufficient rigour in the payment of invoices, and that he wanted to ensure that things were done properly in the context where he would not be directly overseeing them himself. We find that this was an example of the claimant complying with the Nolan Principles (at page 749) which set out the seven principles of public life for public office-holders.

c. Some invoices which related to matters outside of the three core contracts, for example health and safety related matters, would be passed to Cheryl Hatcher to process under a separate budget. This might include invoices from Subcontractors, but that would be in connection with separate contracts and not the contracts which the claimant's team oversaw.

d. There was an ad hoc budget for work which did not fall within the procurement process (i.e. which was not specified in the three main contracts).

Policies, procedures and Nolan principles

85. The respondent operates a number of policies and procedures which are relevant to the issues in this case, notably:

a. Code of Conduct (page 140), although the version in the bundle may not have been the same version that was in place at the relevant time. We find it surprising that at this hearing the parties appeared to be unclear as to whether it was or was not the same version. Ms Ager explained in evidence that there was no separate training or awareness sessions on the Code of Conduct and we accept her evidence.

b. Disciplinary procedure (page 149) and policy (page 154)

c. Anti-fraud policy (page 158)

d. Gifts and Hospitality policy and procedure (page 168). This covers both offers of financial rewards and offers of an advantage which could be construed to have any financial value to employees, agency, interim staff or to members of their family, and said that such offers must be refused (page 170). All employees should declare any interests under this policy.

e. Whistleblowing and serious misconduct policy (page 177)

f. Dignity at work policy (page 203) and procedure (page 207)

g. Within certain of the policies and procedures, reference is made to the "Nolan principles" (page 749) which the respondent expects holders of public office (including the claimant) to abide by. These are selflessness, integrity, objectivity, accountability, openness, honesty and leadership.

<u>The claimant's relationships with his team and management</u>

His direct reports

86. The claimant managed a team of around 5 to 6 senior service managers. Three of that team gave evidence on his behalf to this Tribunal: Gary Nicholls, Sarah Ager and Mazar Dad. It is clear from the evidence we heard that the claimant was respected by his team and that they trusted him, and he trusted them, in their work.

Julie Guildford-Smith

87. At the relevant time the claimant's manager was Julie Guildford-Smith (then known as Julie Griffin). Mrs Guildford-Smith had been a peer of the claimant until June 2018. In June 2018 Mrs Guildford-Smith was asked to act up into a Service Director role, initially informally (and it is not clear that any process at all was followed for this) and then from September 2018 following a selection process on a more formal (albeit still technically temporary) basis. Although at this stage there was a selection process, we consider that Mrs Guildford-Smith had a natural advantage having already been doing the role. This continued until May 2021: whilst this was a long period of time, we heard in evidence that this was not exceptional within the respondent.

88. From May 2021 Mrs Guildford-Smith secured a permanent position as Strategic Director of Housing. This is a role which the claimant asserts that he should have been considered for but was not. At that time the claimant was suspended from work (to which we turn below). The respondent's position is that the role was given to Mrs Guildford-Smith because at that time she was still in a temporary position. Given that Mrs Guildford-Smith had been in a long term temporary role more senior to the claimant, we accept that she was the obvious person for this role.

89. There was some confusion during the Tribunal hearing, with the suggestion being given that this formed part of the restructure which the claimant took part in during 2022, however we find that this was a separate exercise and that it was only once Mrs Guildford-Smith was in post that she then considered the future structure of the wider team. What is clear however is that there was a general perception in the claimant's team that Mrs Guildford-Smith and Mr James had created roles for themselves in the team and that the timing (coming shortly after the claimant's suspension) could appear suspicious. Although we find that the respondent was entitled to place Mrs Guildford-Smith into the role in the circumstances, we do not know why she was first selected (informally) in 2018 before any selection process and this did ultimately place her in a better position to receive this appointment (because if she had not informally acted-up in June 2018, she may have been less likely to have been awarded the longer term acting up role in September 2018). This was all compounded by the fact that there was a general perception in the team that Mr James had a better relationship with Mrs Guildford-Smith than the claimant (although see below where we comment that in reality their own relationship was in fact not as appeared) and we can understand why the claimant (and some of his team) perceived that Mrs Guildford-Smith had an advantage due to that relationship.

90. During the course of her evidence Mrs Guildford-Smith made it clear that she had a number of issues with the claimant's performance and behaviour at work. In particular, she said that he did not cooperate with instructions, did not engage with her as his line manager, and failed to attend 121 meetings. She also referred to an audit report (to which we turn below) highlighting a number of issues in relation to the management of contracts within the claimant's team. In essence Mrs Guildford-Smith portrayed the claimant as someone who was both under-performing and who had a lack of respect for management.

91. Having said that, Mrs Guildford-Smith also accepted in evidence that she had not taken any action against the claimant in relation to either his performance or behaviour. We find this astonishing if the nature of his performance and conduct was as it has been portrayed. In addition we were referred to a number of WhatsApp messages (dating up to 3 July 2022) between Mrs Guildford-Smith and the claimant in which the tone was friendly and they both engaged in dialogue together criticising the respondent: the impression given from those messages was of two colleagues who felt the same about the respondent and who got along with each other. This does not accord at all with the perception Mrs Guildford-Smith gave of the claimant avoiding her and refusing to engage with her.

92. We do not accept that she had all the concerns she said she did. Having heard Mrs Guildford-Smith's evidence, we consider that she was not in any way intimidated by the claimant, nor would she have felt unable to raise concerns for any other reason. If she had the level of concern suggested, she would have raised it and addressed it. We find that the claimant was opinionated about his work but we also do not accept that Mrs Guildford-Smith had concerns about that (or about his opinions). We find that she in fact let him get on with his job. We consider that, with the benefit of

hindsight (and knowing that the compliance team did not agree with his working practices – given the nature of the later investigation into his conduct at work), she is now seeking to distance herself from his behaviours. We also find that, in reality, during their employment, Mrs Guildford-Smith was in some respects caught in the middle of Mr James and the claimant who clearly disliked one another (see below) and was trying to balance the two relationships without falling out with either.

Rob James

93. Rob James was Mrs Guildford-Smith's line manager. It is clear that the claimant had a somewhat strained relationship with him and that this went both ways: there was mutual animosity. On a day to day basis both would put on a front as if they got along but in reality neither respected the other. We heard in evidence from Tracey Lakin (one of the claimant's union representatives) that Mr James would "take the piss" out of the claimant behind his back and make sarcastic remarks about him because the claimant was not a "yes person" who would just do what Mr James wanted. We found Ms Lakin's evidence on this to be credible and it came from her direct experience, rather than just having been reported to her as a union representative. We find that Mr James' behaviour towards the claimant in this regard shows a lack of respect, particularly as his senior. This would also undermine the claimant's authority with his staff.

94. Mr Nicholls said in evidence that the "modus operandi" of Mr James was that, if someone challenged him, he would take retribution. We did not see any direct evidence of this, however based on what we did hear, we consider this to be entirely feasible.

95. During questioning, Mrs Guildford-Smith was asked repeatedly what her own relationship with Mr James was like, and initially she was very guarded in her responses, repeating simply that "he was my line manager". However, when pushed to give a specific answer about whether she got on well with him, she said that she did not and that she found him a difficult character. This does not align with the general perception in the team that she was friendly with Mr James and that they worked together to secure preferential treatment for themselves, however it does align to our finding that she was trying to balance the various relationships and personalities in the team. We consider that in reality Mrs Guildford-Smith did find Mr James to be difficult, but she gave the impression to him and others that she did not in order to preserve their relationship.

96. Overall, we find that Mr James was not well liked or respected with the wider team.

97. The claimant has also submitted that he believes that Mr James was the driving force trying to get him out of the respondent. We did not hear from Mr James and in fact heard very little detail about him during the hearing. We know that there was a separate whistleblower who raised issues which led to Project Stockholm (as detailed below), and we also know that Mrs Guildford-Smith was later designated as a second whistleblower in relation

to the claimant. Mr James was interviewed as part of the investigations by Gowling and clearly gave negative comments about the claimant, and we find that given their animosity Mr James would certainly not be disappointed if he had left the respondent. We also consider that the information that Mr James provided to that whistleblowing investigation is likely to have been influenced by his dislike of the claimant, although we accept that the investigator would not have known that.

98. However, in relation to how the claimant's dismissal came about, even if Mr James had been part of the original decision to launch Project Stockholm (which we are not clear about), he had nothing to do with the rest of the investigation save for being interviewed as one of a number of witnesses and had no involvement in the decision to dismiss. Although we consider that his evidence would have been overly-negative towards the claimant, we find given their history that this would have been the case regardless of the fact that the claimant had made a protected disclosure about him. We also find that he did not manipulate the investigators in such as way as to cause the claimant's dismissal. What we do find, however, is that Mr James would have criticised the claimant at any stage with which he was involved.

The wider team dynamic

99. It was also apparent from the evidence we heard that, whilst the claimant was respected by his immediate team, there were a number of issues within the wider team:

    a. There was an individual who worked with the team who had blown the whistle on a number of occasions (it was submitted to be around 130 times) with concerns about the team. As it was not (other than as set out below) directly relevant to the issues in the case, we make no comment as to the motivation of the whistleblower in question, however the result of these disclosures was that the team felt unsettled and as though they were being targeted. The claimant said in evidence that he felt that Mr James encouraged the whistleblower and that Mr Barber from the internal audit team "entertained" his complaints. It appears to have been widely known throughout the team who the whistleblower was, despite the respondent's policy on keeping the identity of whistleblowers confidential where possible.

    b. There was a perception within the claimant's team that the internal audit team were unsupportive in two respects: firstly that they carried out repetitive audits and in their audit findings they focussed on what the team saw as petty little details such as air fresheners in toilets. Secondly, secondly that when the team wanted the audit team's support to investigate an issue relating to Contractor 1 (to which we turn below), the audit team refused to get involved.

c. As highlighted above, the relationship between Mr James, Mrs Guildford-Smith and the wider team does not appear to have been a positive one.

d. We heard that at least two of the team had brought Employment Tribunal claims against the respondent, namely Mr Dad from the claimant's team and the whistleblower referred to above. Mr Dad said in evidence that the same people were involved in his case, including Mr James. A witness order was issued to the claimant in respect of the whistleblower's Tribunal claim, requiring the claimant to give evidence on behalf of the respondent. It was apparent that the claimant felt there was some conflict in the respondent wishing to use his evidence in defence of the claim from the whistleblower, whilst also investigating, suspending and ultimately dismissing the claimant based on complaints first raised by that same whistleblower.

   Mr Dad submitted that Mr James had been found to have lied during the Tribunal proceedings which he had brought. The Tribunal has seen the Reserved Judgment from those proceedings and notes that at paragraph 13 it is recorded that "*As a result of this and other unsatisfactory evidence from Mr James, to which we will refer later in this decision, we were driven to the conclusion that Mr James was not merely unreliable but in some respects was saying that which he did not genuinely believe to be true"*. We are mindful that this is a first instance decision and as such is not binding upon us, and we did not hear evidence from Mr James himself. Consequently we do not use this finding to draw any conclusion as to Mr James' honesty overall, however it is unfortunate that, despite other witnesses who had left the respondent's employment being called to give evidence on the respondent's behalf, Mr James was not.

e. Overall, we find that there was animosity within the wider team and it was perceived that the senior management (at the level above the claimant and above that) had formed a clique. We also find that the culture within the wider team was that senior management were seen as dismissive and there was little room to criticise senior management. From the evidence we heard from the claimant and his witnesses that the management style from Mr James to have been heavy handed and dictatorial in his management style, rather than collaborative and inclusive.

<u>The claimant's motor racing</u>

100. From around 2015, alongside his role at the respondent the claimant also operated a motor racing endeavour, called Go4It Racing. During the hearing we heard evidence as to whether this amounted to a hobby or a

commercial endeavour: the claimant described it as a "hobby out of control". He said that at that time it was not a commercial endeavour but accepted that, once he left the respondent, he did envisage it becoming a commercial enterprise and that there were commercial aspects to it. It was not on Companies House at the time but had appeared on Sky TV and Men and Motors TV. We find that this was not a bona fide business and he was not paid to do it. We consider that it was more than a normal hobby, however the claimant's description as a "hobby out of control" was an accurate one.

101. Go4It racing was sponsored by a number of companies during the claimant's time at the respondent. Importantly for the purposes of this claim, some of those sponsors were also Subcontractors, notably Office Furniture Warehouse, John Gallespie and Man Commercial Protection. Some sponsors provided funding to Go4It racing, in the region of £1,000 to £1,200. Others provided different types of sponsorship, such as paying for race entries in exchange for free track days. We consider that this is still a type of sponsorship.

102. The claimant did not seek to hide his involvement in Go4It racing in any way: he had photographs in his office which showed the car, with logos from sponsors on it. His involvement in Go4It racing also featured in an article within an internal magazine within the respondent. Mr Coombs of Contractor 2 also confirmed that he became aware of Go4It racing during his contract with the respondent because of a comment the claimant made about it. This shows that the claimant did not consider his actions to be improper in any way or he would not have been so vocal about it. The article also shows that the respondent endorsed the idea of his racing generally (although this would not address whether individual sponsors were approved or not).

103. Ms Ager said that, from 2015 onwards, the claimant would not get involved in certain matters to avoid any conflict and she said that there were some meetings with Contractors that the claimant delegated to Gary Nicholls. We find that this showed that the claimant was seeking to proactively avoid putting himself in a position which he felt could cause conflict, by putting boundaries in place on what he could and could not do with these third parties.

104. Another employee at the respondent also had involvement in Go4It racing, John Flaherty. He was in the wider team in which the claimant worked, reporting into Mr Nicholls and focusing on health and safety. We saw evidence that he was involved in dealing with sponsorship invoices (despite also receiving invoices for payment by the respondent for work done by the same company) (page 735, and 737-738). We find that the claimant remained in change of Go4It racing, but Mr Flaherty was clearly involved in it as well. It was suggested in the later investigation into the claimant's conduct that the claimant had in some way pressured Mr Flaherty to do what he did: this appeared to be positioned on the basis that the claimant was senior to Mr Flaherty and/or that he managed Mr Flaherty. We find that there is no evidence to support any assertion that Mr Flaherty was anything other than a willing participant, and nothing to suggest that the claimant did

place inappropriate pressure on him. We also consider that, if Mr Flaherty had breached his own obligations to the respondent by doing what he did, that is a matter for Mr Flaherty and it was for Mr Flaherty to make the appropriate declarations or seek the appropriate consent from the respondent.

105. During his employment at the respondent, the claimant made three declarations under the gifts and hospitality procedure (referred to at page 563). The first was in 2014 (page 224/225) and did not relate to Go4It racing. The second was in April 2016 and did relate to Go4It racing: he declared that he received sponsorship from Pollock Lifts and said that he did not have any direct contract management with that entity. The third was on 21 March 2019 (page 227), and declared that he was receiving sponsorship from Pollock Lifts, Office Furniture Warehouse, John Gillespie Contractors, ASJ Facilities Building Management Limited and MAN Commercial Protection. The claimant again said that he had no direct contract management relationships with these companies.

106. Mrs Guildford-Smith wrote on the declaration form in 2019 that the claimant had put in place measures to ensure that he did not have contract management responsibility for those companies. At this stage Mrs Guildford-Smith was clearly aware of the claimant's sponsorship activities and saw no issue with it, subject to that comment. Mrs Guildford-Smith said that she was in fact aware of it from, she thinks, a few months prior to that declaration being submitted, which we accept. We find that the claimant had made her aware of his activities and given her lack of objection to it, she had in effect therefore approved it. We find that:

    a. from the claimant's perspective, he considered that he had been open and made the necessary declarations (albeit he may have taken some time to fill the form in) and that his manager was comfortable with the arrangement; and

    b. from Mrs Guildford-Smith's perspective, we find that she was indeed comfortable with the arrangement and that it was only when the governance team later questioned the activity that she questioned it herself.

107. The Gifts and Hospitality policy does not require annual declarations of interests, rather than should be declared as and when they arise. Therefore we do not find that there was any breach by the claimant merely because he did not have any declarations in 2017 or 2018 for example. However we do consider that he should have completed the declaration form in 2019 earlier than he did, and that this was a breach of the policy which provides for a declaration to be made within fifteen working days (page 172). We find that this was not a deliberate intent to deceive on his part, but it was an error.

108. In around May 2020 (by which point the claimant's sponsorship activities were being investigated, although the claimant was not aware of that at the time: see below), Mrs Guildford-Smith asked the claimant to end his

sponsorship activities**.** The claimant confirmed to Mrs Guildford-Smith that he would end the arrangements. In the subsequent disciplinary process, it was alleged that the claimant did not in fact do so. The claimant on the other hand says that he did do so, but that he was already tied into sponsorship arrangements for that year and therefore the arrangement agreed with Mrs Guildford-Smith was that he would not renew those arrangements once that year had ended. We accept the claimant's explanation, which is entirely plausible and would make sense, otherwise the claimant might have been in a difficult position having to try to cease arrangements part way through a sponsorship year.

The claimant's daughter's placement at Contractor 1

109. The claimant has a daughter, Loren Tolley, who at the time of writing his witness statement was 26 years old. She is registered blind and has been since birth. In 2018 she undertook a university placement with one of the Contractors, Contractor 1, for a one year period. It was common knowledge within the claimant's team (both in terms of his managers and his direct reports) that his daughter undertook this placement at Contractor 1 however that does not mean that the recruitment process his daughter went through was common knowledge.

110. One of the issues in this case is the level of involvement that the claimant had in securing that role for his daughter. We find that the claimant contacted the Contractors to ask whether they ran student programmes. The claimant says that he made it clear that he expected no preferential treatment: we have not seen this email and we find that he did not expect preferential treatment in securing the role, but he did use his contacts to make the initial contact to find out if there was a scheme in operation that his daughter could apply for.

111. The claimant's position is that Director Y at Contractor 1 confirmed to the claimant that there was such a scheme and a copy of her CV was therefore sent across to him by the claimant's PA. Whilst this clearly did not form part of his PA's role, we consider it akin to other non-work tasks that senior individuals sometimes ask their PAs to do from time to time, such as going to the shop to fetch something for them.

112. Director Y had emailed the claimant stating (page 948) that "*That is one strong CV*" and "*I will send this on to ****** who deals with all trainee programmes and as previously agreed I will discuss matters further as we get nearer to the date Loren will joining us*." We did not see the original of this email although extracts from it were in the Gowling report (to which we turn below): this was an email exchange which we were invited to allow into evidence during the hearing but declined to do so for the reasons set out in the "Procedure, Documents and Evidence" section above. The respondent's position is that Director Y was in fact offering the claimant's daughter the role without any process, because of his connection to the claimant through the respondent.

113. We did not hear from Director Y and therefore it is difficult to know what his exact thought processes were. We agree with the respondent that this does convey an implication that Ms Tolley will be offered a role. However, if this was a certainty we would have expected Director Y to have been clearer about that. We also consider that his comment about her CV is a reasonable one and does not suggest that he is offering her a role. On the balance of probabilities, we find that Director Y is saying that the claimant's daughter appears to be a strong candidate based on her CV and he clearly believes that she is likely to be offered a role. We do not go as far as to say that he is offering a role, or committing to orchestrating a situation where she will be offered the role. We have seen no evidence to suggest that Director Y did anything other than pass on her CV to the recruitment / HR team and then step back (see below). The university would of course also have to approve the placement as it formed part of her course (although this is not relevant to whether or not Director Y sought to influence matters).

114. The claimant's position is that the CV was then passed to the appropriate HR personnel and his daughter attended an assessment day in the usual way before being offered the role. We were shown an email dated 14 May 2018 in the additional disclosure bundle showing his daughter being invited to that assessment day which would take place on 22 May 2018 from 9.30am to 4pm (page 453 of that additional bundle). We also saw (page 459 of the additional bundle) an email from the Head of Central Support at Contractor 1 at 12.25pm on 22 May 2018 saying "*We will arrange for you to undertake Operations, Commercial and Customer & Community in Birmingham. I will write to you shortly confirming all arrangements, salary and first day reporting instructions"*.

115. It was suggested to the Tribunal that the fact that the offer was made part way through the interview day suggests that the interview was, in effect, a sham and that the decision to offer the claimant's daughter the role (because of her father's influence) had already been taken, particularly in light of Director Y's email referred to above. The invitation to attend the interview had been sent by a Senior Recruitment Partner. Although we know that the claimant had sent the original email asking about his daughter, and we know that Director Y had sent the email referenced above, we consider that it is too far a leap to then say that there was some kind of conspiracy in which the HR team were involved to create a sham interview process. What we consider more likely is that although a full day was listed for the assessment day, that full day was not in fact ultimately required and a decision was taken, based on her CV and performance at the assessment morning, to offer her a post at that point. On the balance of probabilities, we find that there was a genuine assessment day, which Ms Tolley genuinely passed.

116. The claimant did not declare his daughter's appointment on the Gifts and Hospitality register, because he did not consider that policy to be relevant to this situation. We find that the policy is wider than simply financial gain and, if he had used his position to secure or improve his daughter's chances of getting that job, then should have filled in the form and refused it. We find that he did not use his position to secure the role, only to find out how to

send his daughter's CV to the relevant organisations. We consider that it would have been prudent for him to have discussed this with those responsible for the policy to see if a declaration ought to have been made in these circumstances, however we find that his failure to do so was because he genuinely did not consider it to apply, and also that in reality his daughter did not secure an advantage because she had to go through the assessment day before being offered the role. We do however also find that it was ill advised for him to have got involved at all, even if only to find out where to send the CV.

117. During her placement, Ms Tolley only had cause to contact the claimant once about a work related matter (page 969). Ms Tolley had contacted the claimant because she needed information from the respondent about key elected members and did not know where to find it, so the claimant put her in touch with the correct people. Although the respondent has suggested that this meant that the claimant worked directly with his daughter, we find that this was not the case: this was one isolated non-consequential instance which was not working together, but just asking where she could find certain individual's details (which we find were in fact in the public domain anyway). The claimant also explained in evidence that although the law later changed in relation to this kind of information (following an MP being killed at a constituency hearing), this was lawful processing at that time in accordance with a data sharing protocol already in place. We find nothing inappropriate about this interaction and accept the claimant's evidence.

<u>The 2019 investigation into Contractor 1</u>

118. In 2019 an investigation took place into Contractor 1. This was initiated by the claimant and arose because Ms Ager had identified some concerns about the performance indicators being provided by Contractor 1. Ms Ager started looking into the matter, however she left the respondent's employment in 2019 and the investigation was paused due to a delay in recruiting a replacement. In the end, Ms Ager rejoined the respondent's employment in late 2019 and at that point picked up the investigation fully on the claimant's instruction. We find that the reason for it not being fully investigated until later in 2019 was genuinely because of a lack of resource within the respondent (and was not as has been suggested that the claimant waited until his daughter's placement finished before taking it forward). Ms Ager contacted the internal audit team to seek support. However the internal audit team declined to support the investigation so the team had to do it by themselves, in stark contrast to their detailed involvement in other matters relating to the claimant's team. The investigation ultimately led the respondent to recover around £1million from Contractor 1.

<u>The 2019 audit report</u>

119. In around September 2019 a draft housing audit report was issued by the internal audit team, specifically Mr Barber. This report was part of a whistleblowing investigation relating to a disclosure made by the whistleblower referred to above who had made a large number of

disclosures. We were not shown a copy of the audit report, but understand that it identified a number of matters. The claimant and Mrs Guildford-Smith were responsible for implementing the recommendations of the report. Although we cannot comment on the detailed findings as we were not shown them, we consider it relevant here that the claimant was very stretched in his role given that his responsibilities were later split into four roles and therefore it was inevitable that there would be some issues within the team given how they were stretched.

120. In addition to the allegations which led to the audit report, allegations had also been made by the whistleblower that the claimant had allegedly assaulted him, and that the claimant had disclosed the whistleblower's identity to a third party. The allegation of assault was dropped before being taken forward formally due to a lack of evidence. However the allegation that the claimant had disclosed the whistleblower's identity to a third party, which related to an incident in 2017, was investigated further and no action against the claimant was found to be required. We refer to this later under the heading "The other disciplinary matter".

121. In around August 2019, Anthony Farmer, Head of Professional Standards within the respondent's Finance and Governance Department, took over the whistleblowing investigation from a predecessor. He wanted to take action to ensure that the whistleblower was protected from any potential detriment once the audit report was issued. It was not clear from the evidence we heard exactly when the audit report was proposed to be released, however it was not before January 2020 as that is when Mr Farmer was discussing appropriate arrangements. We heard from Mrs Guildford Smith that the report was in draft form for a considerable period of around a year.

122. As a result of the audit report, Project Stockholm was launched. At this point the claimant was not suspended from work, nor was he informed about Project Stockholm. We explain the detail relating to Project Stockholm later in these Reasons.

123. In early 2020, as part of the considerations around protection for the whistleblower, Mr Farmer attended a meeting with "senior leaders" to discuss that protection. HR were in attendance, and one of the senior leaders was Mrs Guildford-Smith. Mr Farmer could not recollect who else was present but recalled that Mr James was not. At this meeting, Mr Farmer said that Mrs Guildford-Smith raised a number of concerns about the claimant (relating to sponsorship and the claimant's daughter) which led Mr Farmer to consider that Mrs Guildford-Smith should also be treated as a whistleblower and those concerns taken forward under the respondent's whistleblowing policy and procedure. We find this unusual given that she was the claimant's manager and these were concerns that she does not appear to have raised directly with the claimant by way of performance management or disciplinary procedure (whether formal or informal). We consider that this would have been the most appropriate way to take forward those concerns, which appeared to centre around his behaviours in the workplace. We also consider that at this stage Mrs Guildford-Smith is now criticising the claimant for things that she had previously not objected

to, in order to try to distance herself from the claimant's actions. Mr Farmer described the meeting as "awkward" because he felt the level of the claimant's behaviour could not be ignored: we find that without Mr Farmer advising that the matter should be taken further, Mrs Guildford-Smith would not have done so herself. The investigation was driver by Mr Farmer and the wider governance team.

124. We also find that nothing urgent was done by Mrs Guildford-Smith between early 2020 and May 2020, when she asked the claimant to stop his sponsorship activities. This suggests that any concerns about his involvement were not considered to need addressing urgently.

Project Stockholm

125. As a result of the audit report, Project Stockholm was launched and an external law firm, Gowling WLG ("Gowling" – we note that the respondent refers to the law firm as "Gowlings" however as Mr Arben referred to it as "Gowling" we have adopted that terminology) was instructed to carry out an investigation into a number of allegations. These were later categorised into seven "workstreams" (of which workstreams 2 and 4 related to the points raised by Mrs Guildford-Smith). However, at the point of initial instruction, the scope was not yet defined.

126. Gowling were instructed on 17 February 2020 by Suzanne Dodd, the respondent's City Solicitor and Monitoring Officer. This was on the instruction of the s151 Chief Finance Officer Rebecca Hellard. On 3 March 2020 Gowling sent the respondent a client engagement letter (page 243). The Partner with overall responsibility for the matter was Patrick Arben. Day to day conduct of the matter was initially to be Kate Robards, however that later changed to Neelam Sharma.

127. The respondent's whistleblowing policy allows for external investigators and, whilst many investigations would be carried out internally, it is clear to the Tribunal from the evidence we heard that there are occasions on which the respondent would use external law firms for such investigations. This investigation was wider than just the matters relating to the claimant and we have no visibility of the complexity of the matter overall to comment as to whether it was necessary to instruct an external law firm. We find that in any case the decision to use an external law firm was made by the governance team not the claimant's managers, and that it was not targeted to upset or intimidate the claimant in any way. Where external solicitors are appointed, it would however be for the respondent to carry out any subsequent disciplinary action.

128. The claimant was not aware of the investigation by Gowling at this stage, and in fact not until his suspension in April 2021 (to which we turn below). Mrs Guildford-Smith said in her witness statement that she was also not aware of the Gowling investigation until April 2021 and when questioned on this in evidence she said that she did not recollect being aware of Project Stockholm but that she did recollect being advised about the claimant's pending suspension a day or so before it happened. However, the Gowling

client engagement letter (page 243) dated 3 March 2020 referred to a meeting having been scheduled with Mrs Guildford-Smith for 4 March 2020, which Mrs Guildford-Smith said that she could not recall. We find that, given that the letter was only dated one day before the meeting was scheduled for, it must have been in the diary at that stage and Mrs Guildford-Smith must have known that it was a meeting with Gowling. We find that she did know that Gowling were carrying out an investigation into Project Stockholm. Given that she attended the meeting with Mr Farmer about protecting the whistleblower and was then named as a whistleblower herself in matters relating to the claimant, we find that she must have known that at least one element of Project Stockholm involved the claimant.

The claimant's whistleblowing complaint

129. On 27 November 2020 the claimant made a whistleblowing complaint to the respondent (page 260). His complaint named Mr James and alleged that Mr James had "*actively sought to encourage a £4m contractual claim by [Contractor 1] against the respondent, and actively sought to interfere in the City Council's defence of this claim*". It went onto say that he had a track record for interfering in claims by Contractor 1 and submitted that this was in the public interest and raised concerns that a criminal offence had been committed in relation to corruption with significant financial risk for the respondent and the public purse. We find that this was a clear, coherent and cogent complaint, contrary to the respondent's suggestion that it was too brief and had not properly identified the legal obligation alleged to have been breached.

130. The claimant's concern had arisen following a discussion with Director Z, a director at Contractor 1, who he says had told him that Mr James had encouraged Contractor 1 to continue pursuing the respondent on the basis that at some point the matter would be taken out of the claimant's hands and passed to Mr James who would deal with it (i.e. who would deal with it on more favourable terms to Contractor 1). There was also a general underlying feeling within the claimant's team that Mr James would never do anything which went against Contractor 1. The claimant did not reference Director Z in his complaint, although he did include her in a list of names of people he felt should be interviewed in connection with the matter.

131. The complaint was received by Mr Farmer, who recognised that he might be conflicted given that he was already co-ordinating a separate investigation into the claimant. He passed the matter to Mr Satinder Sahota, who was at that time Deputy Monitoring Officer. Mr Sahota instructed Mr Martin Chitty of Gowling to deal with the complaint on 30 November 2020 (page 261), and this investigation became known as Project Bergen. We find that the respondent therefore acted promptly following receipt of the claimant's complaint. Mr James was not suspended whilst the investigation was ongoing.

132. Gowling put in place an ethical wall between Project Bergen and Project Stockholm. Each was aware of the existence of the other matter but not the detail behind it. At this stage of course the claimant was aware of Project

Bergen but not of Project Stockholm, so had no idea that the firm investigating his complaint was also investigating a complaint about him. We do not consider that there is anything wrong in itself with Gowling investigating both matters providing that an ethical wall was put in place (and Gowling would no doubt have refused the instruction pursuant to their professional obligations if there were a conflict). However we do consider that, once it came to the claimant's knowledge that both investigations existed, it should have been clearly explained to him that there was an ethical wall (and what that meant if he was not familiar with the concept).

133. On 3 December 2020 Mr Chitty contacted the claimant about his whistleblowing complaint (page 265), and on 4 December 2020 the claimant attended a meeting with Mr Chitty on Teams to discuss it further. The claimant and Mr Chitty had a detailed discussion about the allegations.

134. On 7 December 2020 Mr Chitty emailed the claimant about the matter listing the documents and correspondence that the claimant had referred to during his meeting on 4 December 2020, and Mr Chitty also contacted two of the respondent's employees that the claimant had indicated had relevant information to give.

135. As part of his investigation, Mr Chitty interviewed the claimant, Mrs Guildford-Smith (on 10 December 2020), Ms Ager (on 10 December 2020), Mr Michael Day (on 23 December 2020) and Mr James (on 2 March 2021 – Mr Chitty's statement referred to this being an interview with Robert Jones but as there has been no person named Robert Jones referenced in these proceedings and given the direct relevance of Mr James to the allegations we conclude that this was in fact Mr James). We note that Mrs Guidlford-Smith's witness statement said "*I confirm that at the time of my employment with the Respondent I had no knowledge of the Claimant making a protected disclosure in November 2020"*. Given that she was interviewed in relation to that protected disclosure by Gowling (as referred to by Mr Chitty in his witness statement), it would seem very strange if she were not aware of it at least to some extent.

136. He did not however interview everyone that the claimant had named as relevant personnel to be interviewed, specifically he did not interview Ben McCosker (solicitor), Michael O'Connor (senior service manager), Philip Ross (quantity surveyor), Alla-Uddin Islam (quantity surveyor), Anne-Marie Rochford (corporate procurement services), Director Z (Contractor 1) and Director X (Contractor 1). In respect of all of those other than Director Z and Director X, this was because he felt that they did not have relevant information to provide. In relation to Director Z and Director X, this was because Contractor 1's general counsel had instead provided written submissions to Mr Chitty.

137. The claimant has said that Gowling failed to interview relevant people. Given that the allegations came via Director Z herself, we consider that key relevant information was therefore missing from the investigation. Mr Chitty of course did not realise that, given that the claimant had not identified the relevance of Director Z's evidence in his complaint, however we consider

that there should have been a step whereby the claimant was informed that those witnesses would not be interviewed despite having been identified by the claimant as persons who should be interviewed, to ensure that either they did not have relevant information to give or that the information provided by the general counsel was sufficient to address those issues (which would have identified that the information that the general counsel had provided contradicted the information claimed to have been given to the claimant by Director Z and that could have been explored further).

The claimant's suspension

138. Project Stockholm had been continuing in parallel with Project Bergen. The investigations took a considerable period of time (over a year) because of the volume of material which was uncovered during IT searches carried out on the claimant and others' accounts (around 500,000 documents). We do not have the detail of the wider investigation so cannot say whether 500,000 documents were really required or whether it should have taken such a long time. What we do find however is that this is an extremely long period of time and if the allegations against the claimant were so serious as to justify his dismissal for gross misconduct, we consider that either the investigation should have been prioritised and carried out quicker, or the claimant should have been suspended pending investigation at an earlier stage. As it was, he was permitted to continue in role behaving in the same way (save for ending his sponsorships) with no idea that there was any suggestion of wrongdoing, for over a year. The fact that he was allowed to continue working for over a year with such large budgets suggests the respondent did not consider him a significant threat.

139. By the Spring of 2021, based on the evidence uncovered by Gowling, the respondent determined that it was now appropriate that the claimant be suspended. Jonathan Tew, who was at that time Assistant Chief Executive at the respondent (but who has since left the respondent), was appointed as a commissioning officer by Mr Sahota: Mr Tew's role was to review the evidence, consider whether there was potentially a case to answer, commission an investigation, and consider whether suspension was appropriate. Gowling were not consulted on the decision to suspend the claimant. In evidence Mr Sahota was asked "*Were you part of the decision to suspend, were you consulted on it*", to which he answered "*I was*". Later in his evidence, however, when asked specifically "*was it Mr Tew's or your decision*?" he said that it was Mr Tew's. We find that it was Mr Tew's decision but he would have been briefed on the case, most likely by Mr Farmer or Mr Sahota and we find it would have been apparent from that briefing that they viewed the matter as serious. Mr Arben of Gowling said in evidence that he was notified that a recommendation to suspend the claimant was going to be made in early April: this suggests that the briefing from Mr Sahota / Mr Farmer would have included a recommendation to suspend.

140. Mr Tew says that he felt that suspension was appropriate because of the claimant's access to the respondent's systems and the fact that he was working with Mr Flaherty, who was also under investigation, and that the

claimant could impede the investigation, interfere with witnesses or interfere with evidence. Although it was suggested to the Tribunal that because the investigation was carried out by remote IT search through Gowling, there was no risk in him remaining in the business, we do consider that there could still have been a risk and these were reasonable considerations for Mr Tew to have upon the claimant becoming aware of the investigation into him. They were in accordance with the manager guidance on when to consider suspension (page 1297).

141. However, we find that there was another, highly relevant reason for the decision to suspend being taken at the time it was, which was not disclosed to the claimant or referenced at all in any way until it was mentioned by Mr Arben during the course of his witness evidence during these proceedings. Mr Arben told the Tribunal that his understanding was that the suspension was driven by the respondent's concerns over the re-procurement of the contracts with the Contractors. Given that those contracts were due to end in around 2022, it does appear likely that any potential re-negotiations relating to those contracts would have been considered at around this time. This is a very specific memory for Mr Arben to have and we find that this was, at least in part, motivation for suspending the claimant at that particular time – which was not disclosed to him. We find that this was in fact a valid concern for the respondent to have given that the allegations related to the claimant's relationships with the Contractors and Subcontractors, what concerns us is that the respondent was not forthright about the full reasoning behind the suspension. Mr Tew had already completed his evidence by the time that Mr Arben disclosed this additional information, and therefore Mr Tew was not questioned as to whether he had knowledge of this or not. We find it possible that Mr Tew individually did not know, but that Mr Farmer and/or Mr Sahota's motivation for asking Mr Tew to consider suspension (on other grounds) at that time was influenced by this issue. We are unable to make a finding on that specific point. Either way however we find that one key reason the matter was referred to Mr Tew for suspension to be considered at that time was because of the re-procurement exercise.

142. There was also a conflict between the respondent's witnesses about what information was available to Mr Tew when taking the decision to suspend the claimant. Mr Tew said in evidence (to the surprise of both parties) that he read a draft report from Gowling, which in evidence he said looked similar to the format of the eventual full report, save that it did not include interviews with witnesses (as they had not happened yet). The clear evidence from Mr Arben of Gowling however was that there was no such draft report at that time. This conflict is highly surprising given that it is a conflict within the respondent's own evidence. We accept Mr Arben's position that there was no draft report at that time: the only person who has suggested there was is Mr Tew, and there is no reason for Mr Arben to say that there was not one if there was.

143. Equally however it is perplexing that Mr Tew had a very specific memory of seeing one when there was not one. We find that it is likely that he saw a document listing the seven workstreams, which may have had a table within

it as per the final report, but not a draft report as such. Mr Tew must have had something because he would have presumably been shown some information about what Gowling had uncovered before making the decision to suspend. We consider he was given a summary document setting this out, which used the same format as the eventual Gowling report. We do not have a copy of this document, whatever it was. However, we anticipate that it was in likelihood something akin to the table at page 553 of the file.

144. The claimant was suspended on 9 April 2021. The claimant had subsequently submitted in various documents as part of his Tribunal claim and internal processes (pages 1140 and 1249) that this was only 40 days after his disclosure on 27 November 2020: that was not correct. We find that this was an inadvertent mistake: although the information was wrong, the dates he quoted were correct and so there was no intent to mislead.

145. The claimant was actually on annual leave on the date of his suspension, but agreed to the meeting request which came into his diary because he mistakenly assumed that he was going to be informed that Mr James was being suspended because of his own whistleblowing complaint. Mr Tew did not realise that the claimant was on annual leave and had just asked his PA to book the appointment, and the claimant accepted the appointment. However, we also consider that once it became apparent at the start of the meeting that the claimant was on annual leave and was outside or "in transit" (these were the claimant's words during evidence), Mr Tew should have then postponed the meeting until his return: given that it had taken over a year to get to this stage, it could not have been so urgent as to require immediate action.

146. We understand that someone from the human resources team was present on the call but we have not seen any notes of the meeting, nor were any provided to the claimant, despite it being accepted by Mr Tew in evidence that notes were taken and that it would not be usual for them not to be distributed. At that time the claimant was the only person suspended, although we have been made aware that Mr Flaherty was suspended separately, on a date unknown but believed to be at a later date. During the meeting the claimant also provided his email and mobile details to Mr Tew: we find that the claimant was happy for the respondent to use those details to communicate with him at this stage (this becomes relevant later, as set out below).

147. During the suspension meeting, the claimant raised three matters:

    a. He asked where the allegation came from;
    b. He told Mr Tew that he had had declared his sponsorship; and
    c. He suggested that the action was linked to his own whistleblowing complaint. We find that this was the first time that Mr Tew learned of the whistleblowing complaint: Mr Farmer and Mr Sahota both understood the confidential nature of such allegations and would not have told him.

148. Following the meeting on 9 April 2021, Mr Tew emailed Mr Sahota to update him on how the meeting had gone (page 1275). He said that the claimant had taken the news relatively calmly and outlined the three matters that the claimant had raised. He said that he would now hand the matter over to "Becky" (Rebecca Hellard) to act as commissioning officer moving forward. However, when he wrote to the claimant a few weeks later to re-confirm his suspension, we note that he signed the letter as commissioning officer himself. He was therefore still commissioning officer at that stage.

The suspension letter

149. The suspension was confirmed in writing to the claimant by letter dated 12 April 2021 (page 269). The reason why suspension was necessary was stated to be because the allegations were potentially gross misconduct and because his presence in the workplace could impede or prejudice an investigation, interfere with or influence others involved in the investigation, and interfere with evidence. The allegations were set out as follows:

    a. "Your involvement in the procurement and management of services within the Housing Department at the Council;
    b. Sponsorship of your motor racing business; and
    c. Conflicts of interest".

150. We note the reference to "motor racing **business**" (our emphasis), suggesting that the respondent had already made an assumption at this stage that it was a business (not a hobby). This was all the detail provided.

151. Importantly the claimant was not at this stage provided with Terms of Reference. This is a document routinely used by the respondent at the outset of disciplinary (and other) investigations to summarise purpose and scope of the matters being investigated and provide other relevant information. It contains the background, details of the Commissioning and Investigation Officer, HR Support, Purpose and Scope of the Investigation Methodology and Reporting Arrangements. An example of one is at page 295 of the Bundle. Whilst the disciplinary policy does not specifically refer to Terms of Reference it is clear to the Tribunal (and was confirmed in evidence by Human Resources) that they are routinely provided and that the claimant would have had an expectation of one being provided to him. We also find that the failure to provide the Terms of Reference, both initially and once the claimant specifically requested this, paved the way for a significant part of what followed (in terms of the claimant's alleged refusal to engage in the investigation), because the claimant perceived (rightly) that processes were not being followed.

152. The claimant was informed in the letter that Gowling had been appointed to undertake "the investigation". Three points arise from this:

    a. What was meant by "the investigation" (i.e. disciplinary investigation or the wider whistleblowing investigation)? This was not made clear, however given that this was a suspension letter, the natural

assumption for the claimant to make was that this referred to a disciplinary investigation.

b. At this point, the claimant was now aware that Gowling were investigating both the allegations against him, and the allegations made by him in his own whistleblowing complaint. He was not however informed that an ethical wall had been put in place by Gowling, however he should have been as set out above. Mr Sahota pointed out in evidence that the claimant had not asked about this. The claimant was not however a legal expert and this would not necessarily have been something that he would have been aware of in order to ask about it.

c. It would have been obvious to the claimant that Gowling were being provided with his personal contact details because the letter said that Gowling would be in touch with him.

The claimant's email account following his suspension

153. Following the claimant's suspension, when colleagues sought to contact the claimant by email the following week, they received a notification saying "*This sender does not exist*". The respondent says that it suspended the claimant's account in accordance with normal practice, the claimant says that his account must have been actually deleted given the messages that colleagues received. We heard evidence from Mr Nicholls that usual practice in such circumstances would be for an Out of Office message to be put on the employee's account with another point of contact.

154. We find that whilst it is commonplace to suspend an employee's access to their email when they are suspended, ordinarily that would mean suspending the individual's access to it and placing an out of office message on it as Mr Nicholls suggested, rather than something that would generate a "this sender does not exist" automated message. Such a message would suggest that the individual had permanently left the respondent's employment and that their account had in fact been deleted. This however would not be to the respondent's advantage as it would cause confusion and upset (not just with the individual in question, but colleagues, suppliers, customers and other persons seeking to make contact). We therefore find that it was a mistake that led to this message being sent out.

155. It was suggested to the Tribunal that his account cannot have been terminated as the data in it was still accessible. However, data can be accessible even once an account is terminated if the information is preserved (either specifically or by way of a general retention arrangement). Although we cannot say for sure if the account was actually deleted, we do find that the wording of the automated response suggests that it was at the least de-activated.

156. The claimant's colleagues were told simply that the claimant was absent from work. However, Mr Nicholls was told in confidence by Mrs Guildford-

Smith that the claimant had been suspended (after he questioned the email bounce back saying that the sender no longer existed). We also accept more generally that, given the automated email bounce back, there was discussion around the team about the claimant's whereabouts. Ms Ager contacted the claimant herself to check on his welfare, although they did not discuss his suspension. Around the same time, the claimant's laptop was seized.

First correspondence from Gowling

157. On 26 April 2021 Neelam Sharma of Gowling sent the claimant a letter about the investigation (pages 278 to 280). This was the first contact that the claimant had with Gowling. There are a number of points to note about this correspondence:

    a. The letter said that Gowling had been instructed by the respondent to "*investigate certain allegations against you in accordance with its Disciplinary Policy and Procedure*". The letter was also headed "Re: Disciplinary Stage 2: Investigation Meeting". It also said that following completion of the investigation, if it is considered that there is a case to answer, he may be required to attend a disciplinary hearing. The respondent has argued that Gowling were in fact only undertaking the whistleblowing investigation and the claimant is mistaken in asserting that Gowling were instructed to carry out a stage 2 disciplinary investigation. We find that it could not be clearer that Gowling considered themselves to be taking on the stage 2 disciplinary investigation. It was specifically spelt out to him several times within the correspondence. There is no other logical interpretation that he could take from the wording and it is surprising that the respondent continued to argue even at final hearing that it was the claimant who had misunderstood. Even if the intention was for the respondent to hold the stage 2 disciplinary investigation after Gowling had produced their whistleblowing report, this is not what the claimant was told. Therefore, once it became apparent (as it clearly did for reasons we set out below) that the claimant believed that Gowling was carrying out the stage 2 investigation, this is something that could and should have been clarified to him urgently if he was wrong.

    b. Having found that Gowling considered themselves to be carrying out the investigation under the respondent's Disciplinary Policy and Procedure, it flows from that that Gowling should have been provided with a copy of that policy and procedure and should have followed it. We find that this did not happen.

    c. It was not usual practice (as accepted by the respondent) for an external law firm to handle a disciplinary procedure. We can therefore understand why learning that this was to be the case would have unsettled and concerned the claimant.

    d. The letter also said that the allegations were considered to be potential gross misconduct, and that should they change during the course of

the investigation he would be informed and given further opportunity to comment. Although the letter lists three overall allegations (which mirror those in his suspension letter), it also lists seven workstreams. The letter does say that the scope of the investigation is wider than the three overall allegations before listing those workstreams but it does not explain specifically which of those workstreams formed part of the disciplinary investigation and which did not. There is also nothing which explains how any of the seven specific workstreams specifically relate to the three overall allegations against him (and we find that this should have been clarified in a Terms of Reference document to which we have referred above). The claimant would have assumed that any or all of the seven may apply to his disciplinary investigation. By the time of the later disciplinary hearing only two of those workstreams were being pursued against him, and therefore at some point between this letter and the disciplinary hearing he should have been notified that the other allegations had been dropped. He was not.

e. He was invited to attend an interview with Gowling on 10 May 2021, was told that the meeting would be recorded and that he would receive a copy. It also said that notes would be taken and a copy sent to him to check for accuracy and to date, sign and return. He was given the right to be accompanied by a colleague or a trade union representative, which aligned to the respondent's standard practice in such situations.

f. Again, the claimant was not informed about the ethical wall in place at Gowling.

158. On 29 April 2021 the claimant asked for more time to arrange support (page 282). Gowling requested more information (page 282) about what the claimant needed, and then chased the claimant for an update on 4 May 2021 (page 284). The claimant replied on that date (page 285) to say that he was having difficulty obtaining representation but that the GMB union would deal with the matter.

159. On 5 May 2021, because Gowling had not received confirmation of attendance from the claimant (page 288), Gowling pushed the interview back to 17 May 2021. We find that the claimant should have been more proactive about responding to messages, however we take into account that this was only a short time before the claimant's sickness absence commenced (see below) and we find that he was not being deliberately obstructive but was trying to sort union representation, and was potentially starting to have mental health issues. He was faced with an disciplinary investigation by an external law firm which would have been intimidating for him. We find that he was effectively in a fragile state at this point. Therefore we can understand the frustration of Gowling due to his lack of response however we also find that whilst the claimant's failure to response was not justified, we understand why it happened. The claimant replied on 6 May 2021 to confirm he had asked his representative to represent him at the meeting on 17 May (page 290).

160. On 7 May 2021 the claimant received confirmation of his continuing suspension (pages 293-294).

The other disciplinary matter

161. Separate to the investigation being conducted by Gowling, the respondent had commissioned a different investigation into the claimant's conduct regarding an alleged breach of confidentiality back in 2017 (as explained earlier in these Reasons). This issue had in fact already been addressed in 2017, although we accept that Mr Farmer did not realise that at the time. We do not know when the claimant became aware that this was being re-investigated however we saw correspondence dated 10 May 2021 (page 297) which referred to a previous letter to the claimant dated 26 January 2021 so he must have known since at least then. On 10 May 2021 the claimant was informed that David Clawley had been appointed as investigating officer for a stage 2 disciplinary (page 297) and a revised Terms of Reference were sent to him (pages 295 to 296) (in stark contrast to the other disciplinary matter where no Terms of Reference were provided).

162. Therefore at this stage the claimant was subject to two separate disciplinary procedures. We can understand why the claimant would have felt targeted, given that two separate disciplinary investigations had been launched against him, one of which was about something that had already been addressed several years earlier and the other of which was being dealt with by an external law firm contrary to normal practice and in respect of which he had not been provided with any Terms of Reference and which also related to matters which had occurred years earlier.

163. This separate disciplinary matter about confidentiality ultimately led to an investigatory report dated 18 July 2021 (page 318). We find that this was a considerable period of time for what appears to be a relatively simple matter to investigate (given the earlier letter on 26 January 2021). The claimant said in evidence that he did not in fact see this report until it was included in the file for this hearing. We accept his evidence, which appeared honest and transparent. We do not know why this was as clearly he should have been sent a copy at the time: it could be for a number of reasons, such as it being sent to his work email address during his suspension, it not being sent or it being sent but him not reading it due to his ill health, we simply do not know.

164. As to why this matter was investigated, although the claimant understandably felt targeted, we find that this was dealt with by an independent investigator and there was no "witch hunt". Rather, we find that the decision to re-investigate the matter was because Mr Farmer simply did not realise that this matter had already been closed down when he referred the matter for investigation. It was clearly wrong to re-open it, but not directed at the claimant specifically. That said, the investigatory report refers to an interview between Mr Tolley and Mr Walls (Dignity at Work Investigating Officer): this was an interview that had taken place several years earlier albeit into a Dignity at Work complaint about the matter, and so

it would have been apparent to the investigator in 2021 that this was a historic matter that had already been dealt with.

Request for postponement and queries

165. On 11 May 2021 the claimant emailed Mr Tew and requested copies of all documents 15 working days before any meeting (page 298), along with read only access to his computer and email account. Although Mr Tew's email address had been spelt incorrectly, he clearly received the email in light of the fact that Mr Sahota later responded to it (page 300). The claimant requested that the interview be postponed. He also asked a number of questions about the process (page 298), including requesting confirmation that he could be accompanied by a solicitor, and a request for additional details about the allegations and his suspension. It was reasonable for him to ask for this information. In his email the claimant referred to the meeting as a disciplinary stage 2 investigation meeting. If it was not the intention for the Gowling meeting to constitute a stage 2 investigation meeting, this was the opportunity to clarify that to the claimant. No such clarification was given.

166. On 12 May 2021 Satinder Sahota emailed the claimant to explain that he would now be the claimant's point of contact officer in respect of his suspension and the investigation. (page 299). On 13 May 2021 Mr Sahota responded to the questions that the claimant had asked Mr Tew (page 300). He clarified that:

    a. The investigation had begun early the previous year and Gowling were retained because of their independence and expertise given the serious nature of the allegations. By "investigation" Mr Sahota would have been referring to the whistleblowing investigation but the claimant would have understood this as referring to the disciplinary investigation, given that his question was about what he had been told was a stage 2 disciplinary investigation meeting.

    b. He had no right to be accompanied by a solicitor, but could bring a trade union representative. The claimant has compared himself to another employee who was permitted to be accompanied by a solicitor however that individual had significant health issues and so this was provided as a reasonable adjustment. The claimant has also noted in Tribunal proceedings that others were permitted solicitors in the Gowling investigation meetings. We find that this was only the case in respect of third parties (i.e. interviewees from the Contractors/Subcontractors) and again is not a comparable situation. However, we do consider that the respondent should at least have considered whether it was appropriate to depart from their normal policy of not allowing employees to be accompanied by a solicitor in circumstances where their disciplinary investigation themselves was being conducted by a law firm (which is in itself highly unusual). Therefore, whilst we do not find that there was any obligation to allow legal representation, or that it was unreasonable to refuse to do so, we

do consider that the respondent should have done more to understand why he was seeking this and this might have led to it coming to light that the meeting had been erroneously titled as a disciplinary meeting being carried out by lawyers when the respondent did not intend that to be the case.

c. that he would be provided with details of the allegations at the meeting with Gowling. This is contrary to the disciplinary policy which says (page 150) that the employee should be informed in writing of the allegations, and contrary to normal practice whereby this would be by way of a Terms of Reference document.

d. that he could "*have "read only" access to any emails or files (on a designated device) you think would assist you with queries put to you"* after the meeting. It is not entirely clear to the Tribunal what format this would take (i.e. whether the claimant would have to identify to Mr Sahota what the emails or files are, or whether he would be permitted to carry out the search himself).

e. that it was considered appropriate to contact him on annual leave

f. that it was not considered appropriate for his line manager to carry out the suspension; and

g. that no details of his suspension had been shared within the respondent.

167. In his evidence, Mr Sahota said that he thought he recollected Gowling providing the claimant with a table in advance laying out specifics about the workstreams as they related to the claimant. We saw no evidence that any such document was provided to the claimant, nor were we shown any such document in the bundle, and we find that this did not happen.

168. In reality, whilst Mr Sahota did respond to the claimant, we find that he did not address a core element of the claimant's concerns, namely that he did not have sufficient details of the allegations against him, nor did he have a mechanism to seek his own evidence through access to his email account.

169. It is also worth noting at this stage that as the investigation progressed, it appears to have been coordinated by Mr Sahota and/or Mr Farmer, and not by HR. This no doubt relates to the fact that it stemmed from a whistleblowing investigation and they were the points of contact for Gowling, however we consider that it would have been prudent for the respondent to have utilised its HR resources to a fuller extent to ensure that the disciplinary policy and procedure was being followed appropriately.

<u>The claimant's sick leave</u>

170. The claimant reported that he was absent from work due to work related stress on 14 May 2021 (page 301). This sick leave in fact continued until December 2021 and Gowling did not contact the claimant during that time.

171. On 28 May 2021 the claimant was informed that Lisa Cockburn (HR Business Manager) had been appointed as welfare officer (page 304). They spoke on the phone in the subsequent weeks to arrange a welfare meeting in a neutral location (pages 309-314), and then met on 17th June 2021. The claimant says that he asked for notes of the meeting but did not receive these. Ms Cockburn says that she does not remember him asking for the notes. We accept her evidence that she did not realise that he wanted the notes, and note in particular that both the claimant and Ms Cockburn say that they had a good working relationship.

Outcome of investigation into the claimant's protected disclosure

172. On 25 May 2021 Mr Chitty concluded his investigation into the claimant's whistleblowing complaint but determined that there was no case for Rob James to answer. We were not provided with a copy of his outcome report however that document was sent to Mr Sahota by Mr Chitty on 28 May 2021. Mr Chitty said in evidence that it was 27,000 words long. A copy was not sent to the claimant. A purported summary of the outcome of the investigation was sent to the claimant. We were not referred to a copy of this report and could not find it in the Bundle however.

173. Mr Chitty set out the outcome of his investigation in his witness statement. However, having read that outcome, it omits the fundamental point about whether Mr James was influencing the litigation: Mr Chitty's summary focuses only on whether Mr James had accepted hospitality improperly (i.e. excessive hospitality). The main thrust of the claimant's complaint was however that Mr James had specifically encouraged a third party to continue to threaten litigation so that he could later settle it on more favourable terms. This is a much more serious allegation to make.

174. The respondent asserts that the fuller report contained information about the litigation issue. We cannot say if it did or not because we have not been provided with a copy of it. However even if it did, firstly the claimant would not have known that because we find that it was not referenced in the summary he was given (given that the respondent and Mr Chitty have not referenced it in their summary of what was found within their witness statements), and secondly the fact that the summary provided did not cover that point suggests that it was not considered material. We find that the investigation incorrectly focussed on hospitality issues. We do not make any finding of deliberate wrongdoing in the investigation as Mr Chitty was independent and had his own professional obligations to comply with, and we see no reason why he would conspire in any kind of cover up.

175. There was also a reference in the summary outcome to two occasions where the extent/nature of hospitality offered was understated. No action was however taken forward in relation to Rob James about that as far as the Tribunal is aware, in contrast to the claimant being pursued for his

alleged breach of the gifts and hospitality policy. Without the benefit of any detail about the nature of those breaches, we cannot say whether they were serious or not. However, we can understand that from the claimant's perspective he is being investigated for alleged breaches of that policy, but Mr James is not (alongside the main element of his complaint not being responded to). This would have appeared to him as though his concerns were not taken seriously.

June to July 2021

176. On 10 June 2021 Mr Tew wrote to the claimant confirming that his suspension would continue (page 307). Shortly afterwards Mr Tew left the respondent's employment, on 8 August 2021.

177. Also around this time, Mr Nicholls was asked to move to another business area in the respondent to undertake project work. This was referred to by the respondent as "action short of suspension": in essence it meant that there was a view within the respondent that him remaining in role during the Gowling investigation was not appropriate because of his level of involvement in the matters being investigated, however there were not sufficient grounds to justify full suspension. Mr Nicholls refused to move department and it is unclear to the Tribunal whether he then went off sick, or was suspended in light of his refusal to move voluntarily (and was then sick during that period of suspension). In either case, Mr Nicholls did not return to work and then left the respondent's employment by reason of retirement.

178. On 2 July 2021 the claimant submitted a dignity at work complaint (page 317). The complaint was about Rob James' treatment of him and about the claimant's suspension from work. The respondent accepts that no action was taken in relation to it but says that it did not see his complaint until the bundle was prepared for these Tribunal proceedings. We find that the claimant did submit this complaint and that it was missed by the respondent. It was addressed to Ms Cockburn who we know had a good relationship with the claimant, therefore we find that there was no malice in not progressing it. However, from the claimant's perspective he did raise a grievance which was ignored (although he did not chase it either).

The Gowling investigations

179. In the meantime, Gowling continued with their investigation into the allegations against the claimant (and others). As part of their investigation they interviewed a number of people, both within the respondent and within the Contractors and Subcontractors, and reviewed a large amount of documentation. However, it is not possible to say exactly who they interviewed and when those interviews took place because neither Gowling nor the respondent have provided copies of the notes of those meetings within the bundle (nor to the claimant at all).

180. All but 2 of the meetings were recorded (the claimant's and one of the third party interviewees) and transcripts would have been prepared. Mr Arben

said in evidence that extracts of transcripts would have been provided to the claimant in appendices (for example at page 646). We can see that the appendices included in the bundle for hearing did not include extracts from all of the interviews, only certain ones (and that was only in respect of a small number of the witnesses). During the hearing, the respondent was unable to say with any certainty whether the appendices in our bundle for hearing was identical to the one sent to the claimant during the investigation. We found this very unhelpful but on the balance of probabilities, we consider that if we were not given the notes, neither was the claimant.

181. We consider that copies of the meeting notes, insofar as they related to the claimant, should have been included in the bundle for hearing. In addition, and perhaps more importantly, they should have been provided to the claimant as part of his disciplinary process so that he could see exactly what was said about him and by who. This is particularly so given that the claimant had specifically requested to be provided with more information about the allegations. We recognise that the eventual Gowlings report included some summaries, extracts and quotations however that is not enough. The explanation that was given to the Tribunal for this was that Gowling had intended to send transcripts out to the interviewees but was told not to by the respondent because of the risk of interference with evidence. We have seen nothing to suggest that there were any valid concerns about tampering with evidence and we find the respondent's decision not to allow meeting notes to be sent out to the interviewees (or the claimant) to be entirely disproportionate. We were told that the intention had then been to send the notes once the interviews had been concluded, however due to the delays in meeting with the claimant (to which we turn below) this was nearly a year later. On that basis, the respondent told Gowling not to send the transcripts given the time elapsed and given that they were transcripts and therefore should be accurate. We find that this does not justify the fact that the end result was that the interviewees were never sent the notes.

182. We heard evidence from a number of witnesses about the interviews conducted by Gowling. In particular:

    a. Ms Ager was interviewed on 3 August 2021 and she described the questions she was asked as "bizarre". She said that she was told that she would be sent a transcript that she would be asked to confirm was correct, but that she was not. She gave evidence that she believes that their findings regarding ad hoc payments was incorrect (page 558), that the report was full of inaccuracies and that in her view it would be "shocking" if that report was used to determine anything.

    b. Mr Coombes at Contractor 2 says that he was interviewed by Gowling for 2 to 2.5 hours. He says that he asked for notes but never provided with them (despite having been provided with notes when he has assisted the respondent with other investigations in the past). In his witness statement he described being "bombarded" by lawyers asking

him questions, and said in evidence that it was not the most user friendly or pleasant experience. He did go on to clarify that it was a very thorough and professional interview, and that the issue was that he was not expecting such a professional interrogation. He said that there was a specific interest in Project Cascade.

c. Mazar Dad was not interviewed by Gowlings or contacted by them at all. We consider on the balance of probabilities that he was deliberately left out because of his known animosity towards the respondent.

d. Gary Nicholls says that he was contacted by Gowlings and after turning up whilst on sick leave the solicitor said that they had to reconvene as they had not had lunch, and that the interview finally happened months later. Even if he had not been sick at the time, being interviewed as part of a formal external investigation is quite a nerve-wracking experience and it must have been frustrating at the least for him to arrive and be told it was being postponed because the solicitor had not had lunch. We are not clear why the meeting could not have started late rather than being postponed entirely at that late stage. Mr Nicholls says that the eventual interview lasted 3.5 hours and also said that notes were never provided despite being promised. He says that the Gowling report quoted him out of context. He asserts that confirmation bias occurred during the meeting, and said that he felt pushed by Ms Sharma to agree with her interpretation of events (i.e. that the claimant had behaved improperly). For example, he said that Ms Sharma banged the table and screwed her face up at one point when he did not agree with her and instead supported the claimant. We accept that this happened and that there was a forceful tone to the questioning. We do not however find that Gowling made a comment, as Mr Nicholls suggested, that Gowling had a poisoned chalice or that the interviewer agreed with Mr Nicholls when he said that Mr Kemp and Mr James were the driving force behind it all. We find that the forceful tone was because Gowling considered Mr Nicholls to be in some way implicated (hence the action short of suspension).

e. Mrs Guildford-Smith was interviewed at some point in the summer of 2021. She said in evidence that notes were taken of the meeting but that she cannot recall if she ever received copies of the notes.

f. Although we did not hear evidence from Mr McCallister at Man Commercial Protection about his meeting with Gowling, we did see an email sent to Ms Sharma on 6 July 2021, after the meeting had taken place (page 648). In this email Mr McCallister says that he was not happy with the meeting, sets out his position on a number of matters, and said that Ms Sharma was mistaken if she believed anything untoward was going on in relation to the sponsorship of Go4It racing. He also referenced the insignificant size of any sponsorship compared

to the size of his relationship with the respondent (to suggest that it would not have any influence on the relationship). It is therefore clear that he felt the tone of the meeting was forceful and inappropriate, and he must have been significantly so as he said in the email that he had instructed his company solicitors. He was clearly concerned about what happened at the meeting. However we do find the size of his business does not necessarily mean that a small sponsorship cannot be inappropriate: it would still fall under the code of conduct and gifts and hospitality policy.

g. Although we did not hear evidence from anyone at Contractor 1, we also saw an email dated 23 July 2021 from Contractor 1's General Counsel about the matter (page 946), in which he declined to release personal data to Gowling but confirmed some general information about the way that the placement schemes operate at the respondent. In this he stated that all of the successful placements have been required to successfully complete an assessment centre prior to being offered a placement. At this stage therefore, Gowling now had information from Contractor 1 asserting that everyone has an assessment day (which is evidence pointing away from the claimant's daughter having been offered the role without any process).

183. Overall, we find based on the above accounts that there was generally an overly forceful tone to the interview, and that there was some confirmation bias. By this we do not suggest that Gowling were seeking to make any improper findings in any way or deliberately pursuing the claimant unfairly. However we do consider that the way in which the investigation was presented to Gowling by the respondent in the first place (and the way in which the claimant's alleged lack of cooperation with the process was later presented) was done in such a way so as to suggest significant concerns about the claimant's behaviour and would not have reflected the wider facts about the way in which the claimant's team operated in practice (with the claimant for example not having day to day control of the Contractors or Subcontractors). The way in which the interviews was conducted and the tone of those meetings suggests that, based on the initial investigations and the information provided by the respondent to Gowling, that it appeared to Gowling that it was apparent that the claimant had committed wrongdoing and the investigation was seeking to corroborate this, rather than to exonerate the claimant.

<u>The claimant's continued ill health</u>

184. On 30 July 2021 the claimant was due to attend a meeting with Occupational Health, however he failed to do so. When Ms Cockburn realised this on 24 August 2021, she asked him what had happened and he replied on the same day to say that he had just found a voicemail from occupational health amongst 13 voicemails on his phone (page 327). This suggests that the claimant had not listened to his voicemails for around three weeks rather than that he had deliberately failed to attend. We do accept that this must have been frustrating for the respondent however.

185. On 31 August 2021 Ms Cockburn emailed the claimant again (page 328), saying that she hoped that he was receiving counselling through his GP (as his reason for absence had progressed from stress to depression) and saying that she believed it would help for the claimant to see the investigator and put his side of events forward. The claimant did not reply.

186. The claimant attended an Occupational Health assessment on 3 September 2021. The report was sent to the claimant on 9 September 2021 (page 330) however he did not consent to it being provided to the respondent. On 2 December 2021 (page 342) Ms Cockburn asked the claimant if he could redact personal information from the Occupational Health report and send it to her, however he did not respond.

187. On 8 October 2021 Gowling asked if they should proceed with preparing the report on the basis of the claimant not being interviewed. The respondent informed Gowling on 28 October 2021 that the claimant had seen Occupational Health but that the claimant wished to see the report before it would be released, and that he was signed off work until 29 November 2021. On 9 November 2021 Gowling were requested to prepare their briefing note on the evidence against the claimant for continuing his suspension, which they provided on 11 November 2021.

The claimant's dignity at work complaint

188. On 3 November 2021 the claimant submitted a Dignity at Work complaint (pages 335-338) This is a wider complaint than his initial dignity at work complaint and is more detailed. This was sent to Ms Cockburn on 4 November 2021. One of the things he complained about is that he says his suspension was for a matter that had already been dealt with: by this he meant that his sponsorship arrangements had already been subject to discussion between himself and his line manager. He also referred to having submitted a whistleblowing complaint in December 2020 (we find that he meant November 2020) due to his concerns of a Senior Manager's interference in the contractual relationship. At around the same time Ms Cockburn also arranged a welfare meeting with the claimant which took place on 8 November 2021 (pages 339 to 340).

The claimant's return to work

189. On 30 November 2021 the claimant informed Ms Cockburn that he would be returning to work from 1 December 2021. However, he was only fit to work for a short period each day as part of a phased return to work (see for example reference at page 353). On 3 December 2021 Ms Cockburn emailed the claimant with a view to arranging a return to work meeting (page 347). She indicated that Gowling would be sending him an invitation to a meeting and would accommodate adjustments in light of his return from sick leave.

190. On 2 or 3 December 2021 Gowling wrote to the claimant, inviting him to number of short interviews for one hour per day commencing on 6

December 2021 (pages 343-345). The email bounced back for reasons unknown to the Tribunal so the letter was also sent by post. We consider that it was not inappropriate to require the claimant to attend a series of short meetings in light of his phased return to work, and given that he was by that time fit to attend work for a short period each day we find that the respondent was entitled to ask him to spend that working time at these meetings. However, we also find that even if he had received the invitation letter on 2 December 2021, there was insufficient notice given to him for a series of meetings to start on 6 December 2021 in the circumstances. Given the likely intensity of the questioning (based on how other interviews had been conducted) and his state of health, we find that more notice should have been provided to him. As it was not known that he would be returning to work until 30 November, then we consider that the meetings should not have started immediately upon his return but perhaps a week or so thereafter. We also consider that given the intensity of the meeting and his ongoing ill health, it would have been advisable to have timetabled some days without meetings throughout the period: 10 consecutive days of (what the claimant had been informed were) disciplinary investigation meetings would be daunting for him.

191. The letter from Gowling repeated the 7 workstreams and so at that point the reasonable assumption is that all 7 applied to him. The letter stated that the interview would be recorded so that notes could be made and a copy sent to him to ensure accuracy. He was also informed that he should bring details of any witness that he wanted Gowling to consider interviewing. At this stage the claimant had still not been provided with sufficient detail about the allegations: he knew what the workstreams were but not how each of them interrelated to the allegations against him specifically (i.e. he did not know what was part of the wider whistleblowing investigation and what was an allegation against him). This should have been set out in Terms of Reference along with the other information ordinarily contained therein.

192. On 8 December 2021 Ms Cockburn emailed the claimant, asking him for permission to pass his personal email address onto Gowling and legal services (page 349). The claimant replied on the same day (also page 349) refusing permission, on the basis that he was still struggling mentally and still building himself up to a point where he did not feel dread when opening emails. He said that he could just about cope with emails from Ms Cockburn because he respected her and did not believe she was part of “this witch hunt”. We find that at this stage the respondent was therefore on notice that the claimant was not yet fully recovered from his ill health.

193. On 15 December 2021 the claimant attended a return to work meeting with Ms Cockburn (referred to at page 353). He provided a fit note stating that he should work 25% of his hours (2 hours per day) and confirmed that he was still on medication although Ms Cockburn noted that he seemed much recovered. During this meeting the claimant and Ms Cockburn also discussed the invitation to meeting from Gowling: the claimant explained that he had received this but not until 3 days after the requested interview date. The claimant had failed to respond to that letter and although we accept that he did not receive it until after the first intended meeting date,

we find that he should have emailed to say he had only just received it and therefore could not have attended. He told Ms Cockburn that he would attend an investigation meeting in the week commencing 4 January 2022. Ms Cockburn told the claimant that if there were further delays it was likely that the investigation would conclude without him: the claimant told Ms Cockburn that he understood this.

194. Ms Cockburn emailed Mr Sahota and Mr Farmer (amongst others) to pass on three questions which the claimant had asked (page 353). The first related to whether he should take or be paid for his annual leave that had accrued during his absence: Ms Cockburn had informed him that he had 25 days left of that holiday year from 1 January 2022 and that he would need to book this leave but would require permission first. The second was to ask whether he could bring a solicitor to the meeting with Gowling. The third was to ask that the meeting be at a neutral location. Ms Cockburn also referred to the claimant's dignity at work complaint and asked to discuss that: this was because she felt that there were overlapping complaints with the ongoing investigation.

195. On 17 December 2021 Ms Cockburn confirmed to the claimant by email (page 354) that his leave was approved for the next two weeks, leaving 25 days to take before 31 March 2022, of which 5 days could be carried forward if necessary. She said she had asked about the solicitor. The claimant emailed Ms Cockburn on 20 December 2021 asking for an update on his dignity at work complaint and his Terms of Reference for the investigation (page 355). At that stage he also asked for leave on 4-7 January inclusive and asked to be permitted to respond to questions in the investigation in writing. He then sent a further email the next day (also page 355) asking to cancel his leave for that week due to issues relating to COVID. Ms Cockburn replied (page 356) to confirm that this was fine, and that she would hopefully be able to update him on his dignity at work on her return in January. She said that it was currently with the industrial relations unit. She also said that she had asked about the Terms of Reference and having the opportunity to respond to questions in writing.

196. On 4 January 2022 the claimant requested copies of his contract and policies, which were provided to him (page 357).

197. On 20 January 2022, the respondent decided to set up a bespoke email account for the claimant to access emails from the respondent and Gowling (page 359). This was because the claimant had refused permission for Gowling to use his personal email address. The details of it were also passed to Gowling (page 360). The claimant was unhappy about this because he felt that he would not have control over the account and what happened to the data stored within it (bearing in mind that at this stage he has lost access to his work emails and therefore reasonably feared the same thing happening to another non-personal account). We find that the respondent had a valid reason for setting up the account and that it was reasonable for it to try to find a way for Gowling to communicate with the claimant. However, we also find that his concern is understandable, although the respondent was not fully aware of the specific concern at this

stage and we find that the respondent thought that he was being intransigent. In reality, the issue is that the communications between the respondent and claimant by this stage are generally unsatisfactory and therefore neither party has fully or properly explained their reasoning to the other. Both therefore assume the other is being unreasonable, when neither is.

198. On 21 January 2022 the claimant was invited to an investigation meeting with Gowling which would take place on 15, 16, 17, 22, 23 or 24 February 2022 (with the claimant being asked to confirm his chosen date by 28 January 2024) (pages 361-363). This referenced again the 7 workstreams and said that a transcript of the meeting would be sent to him. It was sent by post and to the new email address. The claimant did not reply but should have done so.

199. On 26 January 2022 the claimant emailed Ms Cockburn (page 366) requesting to book 15 days leave from 14 February 2022 to 4 March 2022 (which would have meant him being on leave during the days of the Gowling interviews, although he did not tell Ms Cockburn that – as shown by her question about the interview dates in the email at page 367, and his email at page 368 which references the letter but not the meeting invitation within it). Ms Cockburn approved the holiday.

200. We find that the claimant did not feel ready for the interviews, and did not have the information he had requested yet, and that this was an attempt on his part to avoid them. We find that the claimant should have been honest and upfront about what he was doing with Ms Cockburn and why. We understand why he did not feel ready for the interview given the circumstances (of him not having been given the information he requested) but he went about it the wrong way and that fed into the respondent's perception of him as trying to avoid progressing the matter unreasonably.

201. On 31 January 2022 (page 368) the claimant informed Ms Cockburn that he was uncomfortable using anything other than email to herself, the implication being that he was not happy for Gowling to contact him directly. He also said that information had still not been provided that he had asked for. In relation to the Ms Cockburn's previous query as to whether he had now had a meeting with Gowling, he said "*I have recently received a letter from Gowlings at my home address which I am unable to respond to until my queries about representation and other issues have been answered".*

<u>Graeme Betts' involvement</u>

202. Around this time Graeme Betts of the respondent was appointed as Commissioning Officer for the Gowlings investigation. He wrote to the claimant on 17 February 2022 (page 370-371) setting out his concern that the claimant had not yet contributed to the investigation. We find that, from the outset of the relationship, Mr Betts had a pre-determined perception of the claimant as being obstructive, without trying to get to the bottom of the reasons for the claimant's behaviour. The letter is phrased in a very negative way: in its overall tone, it is designed to admonish the claimant and

would have caused him some distress. Whilst in some respects the claimant had not helped matters, by not releasing his Occupational Health report, by requesting annual leave which clashed with meetings, and not replying to the invitation to meeting, equally at this stage the claimant has been asking for information about the allegations and various other points and he has not been provided with that information despite him repeatedly saying that he needs this in order to participate in the investigation. The claimant's behaviour needs to be viewed in the wider context of the respondent's behaviour.

203. He set out a timeline of events, explained that the claimant was the last witness that Gowling wanted to speak with and that his evidence was important. He was told that the draft outcome would shortly be provided by Gowling and that he was being provided with one last opportunity to provide evidence as part of that investigation: he was told this was a reasonable management instruction and that if he did not the draft outcome would be finalised. Mr Betts did not however address the outstanding questions that the claimant had asked and which had still not been responded to, and there is no mention of any Terms of Reference being provided to him. In reality, Mr Betts is he is criticising the claimant for not following process when the respondent had not followed the right process.

204. On 28 February 2022 the claimant submitted his first claim to the Employment Tribunal.

205. On 1 March 2022 the claimant emailed Graeme Betts in response to his letter of 17 February 2022 (page 372). It was a detailed email defending his position. In this he expressed surprise at the letter of 17 February 2022 and asserted that he had been in regular contract with his welfare officer and sent numerous emails to engage in the process. He explained that many matters remained outstanding, that he was willing to meet Gowling but that a response to a number of points raised with the respondent was integral to that meeting taking place. He summarised the outstanding issues as:

    a. His repeated request for the Terms of Reference (noting that he had been told in December 2021 that the question would be asked about these but no response had been received (he was correct in this regard).

    b. His request to be permitted to attend the meeting with a solicitor and at a neutral venue, and to respond to questions in writing. Again he said that he had been told that the question would be asked about this before but no response had been provided (again he was correct in this regard).

    c. He requested an update on his dignity at work complaint, noting that he had been told he would have an update in early January 2022 but none had been provided (again he was correct and we would add that we find it inappropriate for a dignity at work complaint raised in early November 2021 still not to have been progressed by 1 March 2022).

d. He said he was awaiting copies of HR guidance, and his contract of employment (he had in fact been sent some of these but not all – pages 358 and 373).

e. He said that he had not had a response to a request for annual leave in February 2022, and therefore he still had 20 working days to take for the year ending March 2022, so would like to take those 20 days from 7 March 2022 to 1 April 2022. We find in fact that he was on annual leave during the requested dates in February 2022: if he did not consider himself on annual leave then he should have made contact with Gowling during that time about the meetings (which were due to take place during that period).

f. An explanation as to why Gowling were given his home address and personal email address and a copy of any policy or procedure supporting the creation of an external link to allow communication with the respondent.

g. He was aware that Mr Tew had left the respondent, but had not been informed who the replacement Commissioning Officer was.

206. He ended the email by saying "*As a matter of courtesy, I am informing you that I have made an Employment Tribunal claim on 28th February 2022 regarding the way that I have been treated, which I believe constitutes detrimental treatment caused by submitting a whistle blowing complaint…"* He therefore disclosed the fact of him having made a whistleblowing complaint, although no detailed in relation to it. We note that this contradicts the evidence given by Mr Betts to the Tribunal that he did not know that the claimant had made a protected disclosure. This sentence was not put to Mr Betts in cross-examination, however whilst we did find Mr Betts to be pre-disposed against the claimant and unreasonable in his tone towards him, on the balance of probabilities we also find that he has not lied to the Tribunal. Rather, on the balance of probabilities we find that because Mr Betts was already pre-disposed against the claimant he did not read the claimant's correspondence carefully to consider the points the claimant was making and did not register the allegation that the claimant was making here.

207. On 21 March 2022 Graeme Betts wrote to the claimant about the claimant's requests (pages 375 to 377). We consider that Mr Betts should have replied sooner in the circumstances (where the respondent was stressing the urgency of the matter). He explained that he was the commissioning officer, and went through the claimant's other queries as follows:

a. In relation to Terms of Reference, he said that the investigation was broader than the claimant and he had been provided with the scope of allegations that related to him on 26 April 2021 in the letter from Gowling. We consider that separate Terms of Reference should have been provided to the claimant. From the evidence he gave, we find

that Mr Betts did not have an understanding of what Terms of Reference were within the respondent and therefore he had fundamentally misunderstood the claimant's request. We find it surprising that Mr Betts presumably had not spoken to HR to enquire about this (as if he had done so no doubt HR would have explained to him what Terms of Reference were). We also find that by this stage the claimant still lacked fundamental information about how each workstream related to him individually.

b. In relation to his request for a solicitor to attend the meeting with Gowling, he was told that no other member of staff had been given that opportunity and that it was outside of policy. He was told that he could bring a colleague or trade union representative. We note that by this stage the claimant had had a considerable period of ill health but had returned to work and appeared to be recovering so his circumstances were still different to those of the other employee who had been permitted a solicitor in a different investigation. Whilst we understand the claimant's wish to be legally represented because he has no knowledge of the Terms of Reference, and given his recent ill health, that would go against the custom and practice of the respondent. That said, the respondent has departed from its own custom and practice by asking an external solicitor to conduct a stage 2 disciplinary investigation. We can entirely understand that it would be intimidating for an individual to attend a disciplinary investigation hearing with an external solicitor and that takes it outside the realm of a normal hearing. In these circumstances we feel that the respondent should at least have considered departing from its normal practice (but not that it should have granted his request). He was given the choice of attending Gowling offices or an online meeting, but was informed that written questions were not considered to be a reasonable adjustment that was required. We find that the decision not to allow written questions in advance was reasonable.

c. He was told that HR colleagues were looking into his dignity at work complaint. We find it completely unreasonable that, three weeks on from the claimant having chased an update, there is still no substantive update to be provided to him. The impression given to the claimant was that this was not being treated with any urgency or importance.

d. He was informed that relevant policies and procedures had been sent to him on 20 January 2022, along with the generic contract of employment. Further documents would be sent to him via Ms Cockburn. This was done on 21 March 2022.

e. He was told that his annual leave had been agreed and processed by Ms Cockburn for February 2022. He was also told that he was currently scheduled to be on leave until 25 March and would return to

work on 28 March, at which point Gowling needed to meet with him and would send an invitation to the new email account. He was requested to check that account immediately on his return from annual leave.

f. He was told that the new email account was created in response to the claimant's concerns about his private email address being provided to others, and because emails were being reported as "undeliverable" to his private email address from Gowling. He said that this was reasonable and proportionate.

g. He was told that Gowling were provided his home address and email so that they could engage with him about the investigation and that this was not unusual where the work email account had been frozen as part of an investigation.

208. Also on 21 March 2022, the claimant emailed Mr Betts a letter before action in respect of a potential judicial review (referred to at pages 374 and 386 although we do not have the letter itself which is unfortunate as this means we cannot say what its contents were). On the same date Ms Cockburn emailed Mr Clawley in the industrial relations team to find out about the claimant's dignity at work complaint. The following day Mr Clawley said that he was not aware of it. We heard in evidence that the issue was that the matter had been referred to the industrial relations team and a member of staff had left the respondent without handing it over. Even if that is the case, there is no good reason why it should have taken until now for that to be ascertained given his earlier chaser email.

<u>The restructure</u>

209. On 24 March 2022 Mrs Guildford-Smith emailed colleagues in the housing department advising them of a proposed service restructure and that it would be discussed at an upcoming away day (page 378). As the claimant was not receiving team emails and would not be at the away day, he therefore did not receive this information and Mrs Guildford-Smith did not take steps to inform him about it separately at that time. This was not formal consultation so there was no technical legal obligation to do so, however we do consider it inappropriate for the team to be briefed and no information be provided to the claimant about it. He was isolated and marginalised and as his line manager she should have taken steps to involve him.

210. The Tribunal was provided with the business case for restructure (pages 410 to 416) which had been written by Mrs Guildford-Smith in conjunction with HR. This followed on from an external company preparing a report on the team structure between October and December 2021. Insofar as it affected the claimant, the proposal was to turn his role into four Head of Service roles, and overall 4 Heads of Service would be assimilated into 14 posts? Although the claimant says that the restructure commenced 14 months before meaningful consultation, we find that the work from October

to December 2021 was merely the preparation of the report and did not amount to a proposal.

Re-arranging the interview with Gowling

211. On 25 March 2022 Gowling invited the claimant to a zoom interview on 30 March 2022 (page 380-382). The letter again set out the seven workstreams. The claimant did not reply. On 28 March 2022 the claimant was asked to confirm attendance at meeting by Mr Betts and told that if he did not attend the investigator would be asked to provide a draft outcome report. This email was sent to his new email account. (page 383). The claimant was due to be on annual leave on 30 March 2022 so could never have attended the meeting on that date and in fact the claimant did not see it until it was forwarded directly by Mr Betts on 1 April 2022 (page 386) as the claimant was not checking the bespoke email account due to his concerns about it.

212. On 1 April 2022 Mr Betts wrote to the claimant about his failure to respond to the interview request (page 385). As the invitation had been sent to his new email address, Mr Betts resent it to his personal email address and he was requested to check the new email address regularly.

213. On 4 April 2022 the claimant emailed Mr Betts (page 386), saying that he did not receive the letter inviting him to the meeting until Mr Betts attached it to his email on 1 April 2022. In his email he said that he had never agreed to use the email account that had been set up for him, and asked that the respondent communicate with him via his personal email address and/or home address. He said that the reason for his concern was because of the security of any data entered into the new address and because it was against the usual methods of communication. We find this to be a reasonable position for him to take given his concerns about data retention (although he could have made his personal position clearer to the respondent – and we find that the inability of both parties to get across to the other why they wanted to communicate in any particular way demonstrates how poor the relationship was between them by this stage). He said that he would meet with Gowlings, albeit under duress, but that he did not want the meeting to be recorded and he wanted it to be at a neutral location.

214. He also expressed concern that he had not received a reply to his email of 1 March 2022, other than an acknowledgement. This was not correct, however the 21 March 2022 email had only been sent to the bespoke email address so he would not have seen it. He said that the mistreatment he received had caused his mental health to deteriorate. He also said that he had applied for judicial review in light of the respondent's lack of response to his letter proposing to do so. In actual fact he did not in fact do so.

215. The claimant was invited again to a meeting with Gowling by letter dated 12 April 2022, with the meeting to take place on 29 April 2022 (pages 388-390). This was forwarded to the claimant by Mr Betts on 13 April 2022.

216. On 27 April 2022 Mr Betts wrote to the claimant to invite him to a rescheduled meeting invite for 3 or 4 May 2022 (page 392-394), and agreed for the meeting not to be recorded but said that a note would be taken by a third party. On 28 April 2022 the claimant emailed to confirm that he had intended to attend the meeting on 29 April 2022 and confirmed he would attend on 3 May 2022 (page 395).

The Gowling interview with the claimant

217. On 3 May 2022 the claimant met with Sarah Gray (who replaced Ms Sharma as managing fee earner under Patrick Arben's supervision in March 2022) and Patrick Arben at Gowling. A transcriber was also present. In Mr Arben's witness statement he comments that "*The transcript of that meeting speaks for itself…"*. We find this an interesting comment to make given that the transcript of the meeting has not been included in the hearing bundle or provided to the claimant and therefore it cannot speak for itself.

218. We do know that at the meeting the claimant said that he would not answer questions because he had not had responses to the issues he had raised, but he provided a pre-prepared statement (page 414 additional bundle). In this statement he said that he had raised concerns on numerous occasions which had not been resolved and that he was hoping that as a result of this meeting Gowling would be able to resolve issues more appropriately instead of the continued email exchanges. He then set out a number of concerns and requested that the hearing be adjourned until those issues had been properly answered.

219. It would have been clear to Gowling from this that he did want to participate in the process but felt that he needed these issues to be addressed. We find that Mr Arben informed the respondent (via Mr Sahota and/or Mr Farmer) what had happened and that the respondent then instructed Gowling not to offer another interview to the claimant (whereas the claimant had expected to be offered a further meeting once his queries were addressed and had made clear that he was willing to do so). The respondent also did not reply to the claimant's statement.

220. We find that at this stage the respondent is taking the view that they have already responded to the claimant and that the claimant is being intransigent and trying to avoid the interview, however the fundamental issue is that the claimant never received the Terms of Reference, or any equivalent document breaking down in clear terms how the workstreams applied to him as an individual. In addition, he has not had access to his emails to prepare for the meeting, and he has been told that this is a disciplinary investigation whereas the respondent thinks it is a whistleblowing investigation at this stage (and as outlined above, the claimant is correct).

221. On 4 May 2022 the claimant emailed Graeme Betts about the meeting on 3 May 2022 (page 396). In his email the claimant said that Gowling would be referring a number of points to him, and he set out a number of questions that he had for the respondent. He said that he was not permitted to speak

to colleagues but wished to speak to a number of potential witnesses, and that this also prevents him being accompanied at the meeting because he was not permitted to speak to colleagues during his suspension. The fact that he wanted to speak to potential witnesses would have demonstrated to Mr Betts that the claimant felt that there was relevant evidence for colleagues to provide to the investigation. We cannot see any evidence to suggest that Mr Betts asked the claimant to provide details of those witnesses.

222. He also queried the number of people present at the meeting. There had been an additional person present at the meeting compared to Gowling's other interviews to take a full note of what was said, and we find this was reasonable particularly given the claimant had asked that his meeting not be recorded. What of course was not reasonable was that the notes were never sent out. He also said that Mr Arben had said that he had no objection to the claimant being accompanied by a solicitor, and that Mr Arben had told him that others had been accompanied by a solicitor. Although we now know that it was third parties who were allowed a solicitor, the perception the claimant seems to have had from what he was told is that some of his colleagues were permitted to have a solicitor at the Gowling interviews, but not him. We can understand why, if he just knew that some others had solicitors, he felt he was being treated differently.

223. On 16 May 2022 the claimant chased for a reply to his email of 4 May 2022 (page 402). Given that the claimant had been told that the matter needed to be progressed without further delay, the delay in responding to his emails is excessive. He also chased for the notes and said they had been promised to him within 24 hours.

224. Mr Betts emailed the claimant 26 May 2022 (pages 405-406) which is another ten days later and by this point it is 22 days since the claimant's email. In this letter he alleged a lack of participation by the claimant at the meeting with Gowling and told him that he could not have a further meeting given he chose not to answer the questions. Despite the claimant having said in his statement to Gowling that email exchanges were not resolving the matter and he had wanted to try to resolve them with Gowling instead, Mr Betts went on to set out his response to certain of the claimant's concerns by email. He said that the claimant could have asked the respondent for permission to contact a work colleague to accompany him at the meeting, addressed why a note-taker was present at the meeting with Gowling, and confirmed that the claimant could not be accompanied by a solicitor. However he did not address the points that the claimant had raised in his pre-prepared statement (for example the lack of a Terms of Reference, the request to break the interview down into manageable segments, the request for his Dignity at Work complaint to be progressed and for copies of questions prior to the interview. We cannot say whether he has chosen not to do so or whether Gowling did not pass on that statement. Either way, the claimant's complaint that his points were unanswered remained unanswered.

225. On 30 May 2022 the claimant emailed Deborah Cadman, Chief Executive about the way his case was being dealt with and alleging whistleblowing detriment (pages 407).

The restructure consultation

226. On 14 June 2022 consultation with the union commenced on the proposed restructure of the claimant's business area and Mrs Guildford-Smith, who led the restructure, emailed the team the following day to let them know. We do not know whether the claimant would have received a copy of this. The claimant was given the choice of 2 roles to be assimilated into (Head of Service – Asset Management Repairs and Maintenance, and Head of Service – Asset Management and Compliance), with his overall role being proposed to be split into four Head of Service roles. During the consultation process there were consultation meetings with the union, including on 24 June 2022 (page 442) and on 1 July 2022 (page 446).

227. On 21 June 2022 the respondent wrote to the claimant about the consultation, inviting him to a one to one consultation meeting in the week commencing 27 June 2022 (page 1283-1284 and 434-435). It was suggested by the claimant's union representative that he was only permitted to have this meeting because the union pushed for it and that he had to agree not to discuss his other ongoing issues during the meeting. The respondent denied this. We find that Ms Lakin did push for the meeting: we found her to be a credible witness and she had a very specific recollection that conditions were put on the meeting.

228. On 27 June 2022 Tracey Lakin wrote to the respondent on the claimant's behalf about the restructure (page 1287 and 444), asking for a face to face meeting at a neutral venue, and explaining that his representative was not available that week. On 30 June 2022 Ms Lakin was sent an email explaining that a revised 121 consultation meeting date would be offered (page 1289).

229. The claimant's one to one consultation meeting took place on 19 July 2022. It was suggested that other employees were offered more than one one-to-one meeting but that the claimant was not. We find that others were not offered more individual meetings than the claimant, and in fact the claimant was informed during the consultation process that he could request a further meeting if he wished (page 471). However, what we find did happen is that because he was suspended, he was also out of the loop and others would have had informal discussion about the proposals (for example at the team meeting referenced earlier in these Reasons). Therefore others would have had more knowledge of what was happening in the wider union consultation sessions. He was not excluded but he was out of the loop. Also on the same date Ms Cockburn contacted the claimant to request permission to pass on his email address to a new People Partner as she had moved role, so that they could communicate with him about the restructure.

230. The proposal for the claimant's role was to assimilate him to one of the new Head of Service roles. The claimant believes that he should have been assimilated into the director role that would manage the Heads of Service. We can see why the claimant might say that, given that he previously had oversight for the areas covered by the four Head of Service roles. However, the Head of Service roles were the same grade as his role (grade 7), whereas the director role would presumably have been at a higher grade. He should not have had an automatic right to a promotion because of a restructure, and inviting him to apply for that director role was the correct approach (which is what happened). However, given that his own grade 7 role was being split into multiple grade 7 roles, we can understand why the claimant might feel it was a demotion as some of his duties must have been removed from him. That said, even if that were the case, the alternative approach would have been to offer the claimant a redundancy payment if he did not wish to take the revised role, not to give him the director role. It is not relevant for the purposes of this claim and so we make no finding as to whether that should have been done or not.

231. There was considerable discussion in evidence about whether an out of date job description had been used during the process (page 1133) and whether a skills match took place for the claimant against the director role. It is clear that a historic job title significantly out of date was used for the process (as there appeared to be no job description for the role he was actually doing), but that was recognised at the time and account taken of that fact.

232. On 1 August 2022 the claimant requested that recruitment for the Service Director role in the restructure be put on hold, asking about assimilation into the Director role, and referenced that he had not been part of consultation between October to December 2021 (page 473). As explained earlier in these Reasons, we find that the claimant erroneously thought that there had been consultation during that period, when there had not.

233. Around 18 August 2022 (page 499) Tina Ohagwa replied to the claimant about the restructure in Mrs Guildford-Smith's absence. By this time Mrs Guildford-Smith was absent from work (and in fact she did not return) – she answered the claimant's questions and explained that the role of Service Director was not identified as a match to his current role and therefore he would not be assimilated into it.

234. On 6 September 2022 Tracey Lakin sent an email on the claimant's behalf about the restructure (page 524). No reply was received as far as the Tribunal can establish (see for example page 1020) and therefore the claimant emailed Ms Cadman on 24 October 2022 stating that this was now a complaint (page 1020). Ms Ohagwa responded on 17 November 2022 (which was an excessively long delay in the circumstances) (page 1045), apologising for the delay in responding to the letter dated 6 September 2022 and addressing the points he had raised. It was explained to him that he had been properly consulted with although it was acknowledged that he might feel excluded due to his ongoing suspension. He was told that he was not assimilated into the City Housing Director post (and neither were his

peers) because the role was not of the same grade nor did it correlate to his existing post. He was also told in this email that Julie Guildford-Smith would be leaving the respondent at the end of that month.

235. As far as we can establish, the consultation does not appear to have concluded before the claimant's dismissal. Despite exploring this matter in evidence, we were not provided with a clear answer as to when the restructure ended and which role was the claimant put in (if any). We did see an email exchange dated 24 February 2023 (page 1133) suggesting that discussions were continuing at that point.

The Claimant's Dignity at Work Complaint

236. In July 2022 Helen Joyce was appointed as the HR support on the claimant's Dignity at Work complaint (by now approximately eight months after it was raised. On 5 August 2022 the claimant was sent Terms of Reference for that complaint (page 492) and Tim Savill was appointed as commissioning officer with Helen Joyce as HR support (page 477). The claimant was asked to confirm if he agreed to the scope of the investigation (page 492). Mrs Joyce chased the claimant on 23 August 2022 (page 501) and 31 August 2022.

237. Separately, on 16 August 2022 the claimant sent a whistleblowing complaint to Deborah Cadman about the repairs maintenance and capital division (page 496). We refer to this as the "Second Disclosure" (his complaint of 27 November 2020 being the first). As explained earlier in these Reasons, we found that this was not relied upon for the purposes of the claimant's claim. At the time of the Tribunal hearing, this was still ongoing, and Mr Farmer explained in evidence that the respondent was struggling to get former employees to engage with the process. We find it surprising that a year after the claimant has left employment, and over a year and a half since the complaint was raised, the respondent has not managed to complete its investigation and/or accept that it is not going to get the information sought and find a way to close the investigation down.

238. On 31 August 2022 the claimant sent Ms Joyce amendments to the terms of reference for his DAW complaint (page 505-509). In the meantime Ms Bowley was appointed as investigation officer. Although there were a number of amendments from the claimant, in reality the key point was that he had added an allegation that he had been "*undermined and/or discriminated against an*d/*or subject to detrimental treatment (following a whistleblowing complaint) by being suspended and investigated*)". In her witness evidence Mrs Joyce said *"I can confirm that at no point during my involvement was I aware that the Claimant had made a whistleblowing complaint in November 2020*". However, she must have been aware that the claimant at least asserted that a previous whistleblowing complaint had been made in light of his specific allegation. In addition, his Dignity at Work complaint (page 335) referred to him having made his whistleblowing complaint *"due to my concerns of a Senior Manager's interference in the contractual relationship"*. Whilst this is not a great amount of detail, we

consider it to be sufficient to impart Mrs Joyce with knowledge of the basis for his protected disclosure.

The disciplinary investigation

239. Also In August 2022 the claimant again requested access to his email account to carry out a search for relevant emails (page 495). Although this email appears to have been written in the context of his Employment Tribunal claim, he had of course requested this for the investigation into him and it was in effect a continuation of that request – noting also that Mr Sahota had previously indicated that the claimant would be given access to emails after his meeting with Gowling. It was put to the claimant during evidence that Ms Dhillon's response to this request (as referenced in our next paragraph) showed that he was given access to his emails following this request, and therefore it also appears to be the respondent's position that this email also related to the internal investigation.

240. Ms Daljinder Dhillon replied to the claimant on 19 August 2022 (page 500), explaining that emails could be extracted for him into a file if he provided search criteria and she provided examples of search criteria that could be used which we note were wide. However, she was not offering him what he actually wanted, which was to sit at a computer screen and have read only access to his full account so that he could look at one email, and if that triggered a thought or memory he would then be able to access other emails that he had then realised might be relevant. This is different to using an arbitrary search term and only having access to those documents which were returned in that search (which might not include relevant documents, and which might also return a large number of irrelevant documents to sift through), and also which would not be filed using the claimant's own pre-existing filing systems (which might make it easier for him to find things). We heard in evidence from Mr Sahota that allowing supervised access to emails would be something that can be offered to a suspended person, and Mr Farmer in his witness statement suggested that this opportunity was in fact provided to the claimant. However we find that this was not the case, the only opportunity he had was to provide arbitrary search terms in advance. We find that the mechanism offered to the claimant was insufficient to meet his reasonable request (in relation to his ongoing disciplinary matter: we do not comment on the disclosure process for the Tribunal proceedings as it is not necessary to do so).

The dignity at work terms of reference

241. On 2 September 2022 the claimant sent a further whistleblowing complaint to Deborah Cadman about alleged financial mismanagement in housing department budgets (pages 512-513). We refer to this as the Third Disclosure, and again it was not relied upon for the purposes of the claimant's claim. The claimant was requested to provide further information on 8 September 2022 (page 528) however ultimately this matter was not progressed.

242. On 7 September 2022 the claimant was informed by Mrs Joyce that one of his amendments to the Terms of Reference for his dignity at work complaint was not appropriate for a dignity at work complaint as it related to his ongoing disciplinary investigation (page 525). This was the allegation that he had been *undermined and/or discriminated against and/or subject to detrimental treatment (following a whistleblowing complaint) by being suspended and investigated* ". We find that this in itself was a reasonable position for the respondent to take: where a complaint relates to an ongoing disciplinary process (as this did) the appropriate forum for that issue to be addressed is through that process. Mrs Joyce did state that this matter can be heard by a Hearing Officer should the disciplinary case go to a Hearing.

243. However, the actual issue here is that this did not happen and so the allegation was left unheard. Mrs Joyce said candidly at the hearing that she believed that she would have made Ms Kohli aware of the allegation but that she cannot say for definite that she recalled having that specific conversation. We accept on the balance of probabilities that it was inadvertent on Mrs Joyce's part, but we find that she did not pass the matter onto Ms Kohli. Ms Kohli said in evidence that she did not know that the claimant had made a whistleblowing complaint in November 2020. For reasons we explain later, we do find that by the time of his dismissal she did have some limited knowledge, however if she had been briefed at this stage then we find that she would have had earlier and more detailed knowledge of the whistleblowing allegation. The respondent in fact defends the detriment and automatic unfair dismissal claims on the basis that Mr Kohli and Mr Kitson did not have that knowledge. We would also add that, had there been proper Terms of Reference for the disciplinary matter, it would have been very simple for the respondent to have moved the allegation from the Dignity at Work Terms of Reference into the Disciplinary one, avoiding the risk of the matter being omitted.

244. On 8 September 2022 the claimant was invited to a dignity at work investigation meeting on 21 September 2022 by Rebecca Bowley (page 530-531). The claimant objected to the removal of the allegation referenced above and also requested a copy of the Gowling report.

245. On 9 September 2022 Mrs Joyce reiterated that it would not be appropriate to address the disciplinary matter in the Dignity at Work investigation (page 533). The claimant replied on the same day to say that the terms of reference had not been finalised and asked to wait until that had been done before a meeting took place (page 534). On 15 September 2022 Mrs Joyce updated the terms of reference to remove some other typographical errors in it (page 541) however the claimant insisted on including the excluded allegation. Mrs Joyce chased the claimant again on 6 and 19 October 2022 for confirmation as to whether he would now proceed (page 552) and Mr Savill also did on 26 October 2022 (page 1022).

<u>The Gowling report</u>

246. Around August 2022 an "interim" report was prepared by Gowling and provided to Mr Farmer. We do not know the date of the report however we

did see a later complaint from the claimant (page 546) in which he asserted that it had been with the respondent for 26 days prior to sending to him for comment. This was described as an interim report because it was subject to a "Maxwellisation" process first which is where individuals are given the opportunity to comment on the content before it is finalised. The final report was then produced around December 2022. This was produced without any input from the claimant given that he did not answer questions in his May interview and was refused the opportunity to meet again.

247. One thing that the Tribunal were surprised by during this hearing was that it did not appear to be clear to the respondent's witnesses whether the version of the extract of the report in the Bundle for hearing came from the draft report or final report, and the index to the bundle referred to the report as being undated. In reality, given that the claimant did not provide any detailed comments following the draft report, we find that the content would have been materially, if not entirely, the same. However, it is an indication of the lack of rigour in the process that the respondent was not able to confirm the position with certainty. The report that the Tribunal were provided with appeared at pages 553 to 606 of the file. This was taken from a larger report which would have covered the whole investigation: the section provided to the Tribunal (and to the claimant) was only that section relating to the investigation into him.

248. There were a number of appendices alongside the report which were also sent to the claimant (page 544). Again, it was not clear from the evidence given to the Tribunal whether the appendices provided to the Tribunal (at pages 607 to 1012) were exactly the same appendices as provided to the claimant and later Ms Kohli and Mr Kitson (or whether the version provided to the claimant was the same as that provided to them). We consider it likely that they were, but again the fact that the respondent was unable to definitively confirm this was telling. It was submitted by Mr Arben in evidence that extracts from the notes of meetings with witnesses would have been provided to the claimant. Having reviewed the appendices we have (which on the balance of probabilities we find to be the same as provided to the claimant, despite the respondent not being able to confirm that), we can see that there are only very limited extracts of a limited number of meetings in the appendices. These are not sufficient to address the vast majority of the contents of the report and only extracts from a small percentage of the witness interviews have been included. This was wholly insufficient. Mr Arben said in evidence that Appendix 1 to the report included every transcript and contemporaneous note: if so we can only assume that the respondent therefore decided not to share these with the claimant.

249. The report commenced with a summary table in relation to each of the workstreams, although by now there appeared to be only 6 and not 7 workstreams with workstream 5 having become workstream 4 (no one had informed the claimant of this beforehand). It then had a section entitled "*Extracts from the draft report which relate to Mr Tolley"*. There was a table which followed with rows relating to workstreams 2, 3, 4 and 6. We therefore assume that Gowling did not consider workstreams 1 or 5 to be

relevant to the claimant: again that was not something that he had been told. There then followed a detailed analysis of the findings. The report was very detailed in nature and it was clear that Gowling had spent considerable time on the matter.

250. Given their length we do not go through these in detail however we would observe the following:

a. In the summary table, it stated that the claimant was not at fault in relation to workstream 6: this does show that there was some acknowledgement of where the evidence had pointed away from the claimant. However, as a general principle we find that there does appear to be a lack of balance overall: for example at paragraph 2.3 (page 557) it says that the claimant failed to engage sufficiently with the Housing Repairs Report but does not provide details of why that conclusion has been reached.

b. The report relied on a number of inferences. To some extent this was necessary and we make no criticism of Gowling for doing so, particularly where they had not had a detailed interview with the claimant. However, in our view the inferences were not balanced. The report draws negative inferences about the claimant's conduct, whilst missing key potential inferences or conclusions that could and should have been drawn which in fact would have supported the claimant. This gives the impression that the investigation was searching (albeit subconsciously) for findings to support the claimant's guilt, i.e. that confirmation bias was taking place. For example:

i. In paragraph 6.2(e) an inference is drawn that it is likely that the claimant engaged Mr Flaherty to procure and/or facilitate sponsorship with Go4It racing. However, the report goes onto say that Mr Flaherty had denied that the claimant had asked him to be involved, yet draws that inference because Mr Flaherty was involved in emails about payments. However, no consideration appears to have been given to the (very plausible) possibility that Mr Flaherty was simply interested in Go4It Racing (which we know was referenced in an in-house magazine within the respondent) and asked to be involved to pursue a hobby of his own. Mr Flaherty did not report directly to the claimant and it is not explained why the claimant would place any pressure on Mr Flaherty to get involved in any case other than a general assumption that because Mr Flaherty was junior and the claimant was senior, that this would be the case. That said, later in the report under Workstream 5 (page 604) it was stated that the claimant was Mr Flaherty's direct line manager. From the evidence we heard, this was not in fact the case (Ms Ager explained in her statement that he reported to Mr Nicholls, and it was confirmed in evidence that he did not work directly for the claimant but instead focussed on health and safety matters). It therefore appears that Gowling may have been working from

incorrect information and therefore made incorrect assumptions about this matter.

ii. In paragraph 6.2(i) an inference is drawn that, because some third party sponsors were reluctant to get involved in the Gowling investigation and/or refused to do so, this suggests that there was something "*not fully transparent"* about the nature of the sponsorship. However, we have heard that the nature of the interviews was particularly hostile in nature and in any case it would be natural for a company to be somewhat unsettled by being contacted by a law firm acting for the respondent, asking to interview them to assess whether wrongdoing has occurred. That is not to say that the respondent or Gowling were wrong in any way for investigating the matter (they were not) but it is taking it too far to say that an inference of guilt should be drawn from the reaction of those third parties to being told they were in effect under investigation themselves.

iii. In paragraph 6.2(h) an inference is drawn from the fact that the claimant appeared to have stopped promoting Go4It racing on Facebook since October 2021, and on his website since some point in 2022. The inference drawn by Gowling was that this was because his sponsorship activities were under investigation. First of all, we would note that, even if this is the case, this is not indicative of guilt, rather that he was (sensibly) waiting to see the respondent's position before taking any further steps, so as not to antagonise the situation further. Secondly, October 2021 was a period of ill health for the claimant and we know that he was distressed by the allegations being made against him. An equally valid inference would be that his attention was elsewhere during the investigation period.

iv. Similarly, at paragraph 6.2(m) it was found that because the most recent photographs of the racing cars do not show any of the entities connected to the respondent, it could be inferred that the entities ceased sponsorship given that the claimant had no active role in the respondent and there was therefore no benefit to those entities (i.e. the entities were only interested in sponsorship for as long as the claimant had influence within the respondent). That is a serious finding to make and we find that there were far more likely inferences that could and should have been made. The claimant was asked to cease his sponsorship activities with those entities by his manager in 2020 and had agreed to do so once the current period of sponsorship elapsed: therefore it would flow from this that the advertising would no longer appear on the cars from that point. Even if that hadn't been the case, it would be perfectly plausible (and again sensible) if the claimant had taken the view that, whilst the investigation was ongoing, it would not be advisable for him to continue to take sponsorship monies from those entities and had halted the arrangements pending the outcome of the investigation. We consider both of

those scenarios to be far more likely than that third parties (with considerable turnover) would cease sponsorship arrangements amounting to around £1,000 because the person in charge of the racing was not able to actively influence the respondent.

Sponsorship

251. In relation to the sponsorship issue, the report found that the fact that the claimant had made a declaration under the Gifts and Hospitality policy did not make the commercial interest legitimate in itself (paragraph 6.2(a) at page 579). We agree with that finding. Where a declaration is approved, the conduct is authorised only subject to the information provided being accurate and complete.

252. In the claimant's case he had declared that he had no direct contact with the entities named on the declaration. We find that in the claimant's mind this was indeed the case, as it was his team who had the direct contact and, if he did, it was so rare that it did not register in his mind as amounting to direct contact such that this would be relevant. We therefore find that the claimant was being truthful when he said this. However, he did line manage the people who did have that contact and we consider that he should have made that clear on the form. He also should have made his 2019 declaration earlier, as he was already engaged in the sponsorship activities by the time the declaration was made. Again, we find no malice on the claimant's part, however this was in breach of the policy.

253. It was found (paragraph 6.2(j) and (k), at page 582) that the claimant continued to have dealings with the sponsorship entities for a number of months after agreeing with Mrs Guildford-Smith to cease those activities. However, we find that he had in fact agreed that he would stop the sponsorship once the current sponsorship period had expired, and that this is not inconsistent with the claimant's position that he did so.

254. Overall it was found that his conduct *"falls short of that required for someone holding a senior management position in public office"*. We find that the claimant should have declared his interests earlier and more fully (to be clear regarding the role of his direct reports in relation to the sponsors) and therefore his conduct did fall short to some extent. However, overall, Mrs Guildford-Smith was aware of the nature of his sponsorship (and she would or should have known how the relationships with the Subcontractors operated within the claimant's team) and as far as he was concerned he did not believe there was any issue. To the extent that there was wrongdoing on the claimant's part, we find that this was due to naivety rather than deliberate wilful misconduct. In his mind, he took steps to avoid direct contact with the Subcontractors, had not hidden his involvement at all and his colleagues and manager knew about it and had effectively authorised it. We see this as a minor conduct issue.

255. There was also reference in the Gowling report to Office Furniture Warehouse offering "mates rates" to the claimant's wife's organisation. Whilst this does clearly appear in the Gowling report and is mentioned by

Ms Kohli in her report (page 1189) where she repeats Gowling's findings, little focus appears to have been placed on it by the respondent and it does not feature in the workstream headings, in the respondents' witness statements or in Mr Kitson's dismissal letter dated 20 April 2023 (page 1239). We therefore do not consider that this was viewed as a significant issue by the respondent.

The claimant's daughter

256. In relation to the claimant's daughter's placement, the report concluded (at pages 602 to 604) that it appeared that the claimant's daughter was given the role ahead of any formal recruitment procedures and it was inferred that this was as a result of the claimant's involvement in the procurement of his role and his position at the respondent. The report noted that no declaration had been made in the Gifts and Hospitality register. It concluded that the claimant's behaviour was a breach of the respondent's Code of Conduct and Nolan Principles.

257. In reaching those conclusions, Gowling did not interview the claimant's daughter, nor did they interview any of the Contractor 1 HR team (who could have clarified the recruitment process). We find that they should have sought to do so, particularly where they were in possession of an email from Contractor 1 asserting that all candidates would undertake an assessment day. Had they done so, they would have been provided with information about the recruitment process followed by Ms Tolley, and could have explored that further.

258. In the findings, Gowling had concluded that there was a contradiction between the assertion that the claimant would not be put in a conflicting situation with his daughter and the fact that she had contacted him on one occasion to find out details of certain roles. As explained earlier in our findings, this was public information and she was simply enquiring as to where she could find it. This was not a position of conflict, nor was the claimant having any meaningful involvement in the matter in passing on information about how she might get hold of the relevant information. However, the Gowling report concluded (at page 599, paragraph 4.5) that the sharing of this information between the claimant and his daughter was potentially concerning. We have set out our conclusions on this matter earlier in these Reasons, but repeat that we accept the claimant's position that the sharing of data was in accordance with the data sharing protocol in place and that this was not concerning. We also repeat our earlier findings about the fact that the claimant did not declare his daughter's internship on the Gifts and Hospitality register.

259. One other point made by Gowling in the report is that the 2019 dispute with Contractor 1 was only pursued by the respondent by way of a Rectification Notice (and specifically the claimant) once the claimant's daughter had completed her placement. Gowling said "*it remains a possibility that completion of Ms Tolley's work placement was a consideration for Mr Tolley when deciding whether and when to serve a Rectification Notice"*. As explained earlier in these Reasons, we have found that the timing of the

matter against Contractor 1 was dictated by resource levels in the claimant's team, following the departure of Ms Ager earlier in 2019. We consider that, by referencing the matter in this way, Gowling was in fact drawing an inference that the claimant had deliberately chosen not to pursue the matter earlier because of his daughter. Of course, key relevant information here is also that the claimant himself had raised a complaint about Mr James' involvement in this dispute, alleging that in fact Mr James had an inappropriate relationship with Contractor 1 and was influencing the litigation because of that. We appreciate that the ethical wall meant that those investigating Project Stockholm at Gowling were not aware of the detail of the claimant's whistleblowing complaint, however we must note that there does appear to be a contradiction between the assertion that the claimant had an inappropriate relationship in some way with Contractor 1 in 2019, when in 2020 he was raising a formal whistleblowing complaint alleging the same thing about someone else. We appreciate that time had passed by then since his daughter left, but his actions in raising concerns indicate that he cared about propriety, not that he supported the concept of undue influence within the respondent.

260. We would also comment that, if the Rectification Notice was sent in July 2019 (as set out in paragraph 4.28 of the Gowling report), then in reality there must have been a piece of work going on for some time before that in order to prepare to do so. That piece of work would have been running in parallel to the claimant's daughter's placement.

Other points arising from the Gowling report

261. We also set out here our findings on the workstreams more generally:

    a. Workstream 1: that the contractors for the Housing Department had been underperforming without effective intervention/sanction. Gowling found that there was no evidence of endemic and/or systemic underperformance, but that performance and/or supervision was insufficient. We find that this was a performance matter not a conduct matter in any case and should never have been part of a conduct investigation into the claimant. The respondent would say that it was not, because the Gowling investigation was in their submission simply a whistleblowing investigation, however this formed part of the correspondence to the claimant headed "Disciplinary Stage 2: Investigation Meeting" and therefore in reality and from the claimant's perspective this was being investigated as a conduct matter. In addition, prior to the Gowling report (when this allegation was removed from the table of matters which related to the claimant), he could not have known that the investigation into him specifically was not related to this matter.

    b. Workstream 2: this is the sponsorship matter addressed in detail above.

    c. Workstream 3: that the claimant had improperly moved work between the three main contractors (for example moving the contract for

sprinklers from Contractor 1 to Contractor 2 and Contractor 3). It was found that the movement of work was not in contravention of any contractual principles but that the delay in taking action against Contractor 1 was concerning. This relates to the Rectification Notice from July 2019. We find that there was a valid reason for the delay as set out above, and also find that there is conflict between the assertion that the claimant in some way delayed taking action, when in reality the claimant later himself raised a complaint that Mr James was improperly influencing the litigation, which demonstrates that the claimant wanted to pursue Contractor 1 appropriately and was being hampered in his attempts to do so.

d. Workstream 4: this was originally an allegation about a contract works officer wrongly declaring kitchens as write offs. This had disappeared from the Gowling report and so was no longer relevant at this stage. The claimant was not however named in this allegation despite it appearing in the list of workstreams sent to him in his disciplinary stage 2 investigation invitation letter by Gowling.

e. Workstream 5 (which became workstream 4 when the original workstream 4 was removed): this was the workstream relating to the claimant's daughter which we have addressed above.

f. Workstream 6 (which became workstream 5): this was an allegation about whether the claimant had effectively supervised Mr Flaherty's behaviour. The conclusions in respect of this workstream were redacted from the Gowling report that we were provided with, and in the table summarising the conclusions relating to the claimant this did not appear. In the detailed conclusions it said simply that there was no evidence as to whether Mr Flaherty was motivated by the fact that the claimant was his direct line manager (which he was not) or whether it was motivated by friendship. We note that it does not suggest a third option of being motivated by an interest in racing. In any case, we have in any case set out our findings on this matter above.

g. Workstream 7: this was an allegation that the "Barry Jackson Tower" expenditure was effectively authorised even though considerably over budget and whether there was a conflict of interest with the contractors. The conclusion here was that the claimant was not at fault for the issues with this project. We note that in evidence the claimant placed the blame at Mr James for the cost of this project: we heard no detailed evidence so draw no conclusion on that.

Additional comment on Gowling findings

262. We would also comment that the Gowling findings (and the subsequent conclusions of Ms Kohli and Mr Kitson) appear to the Tribunal to be based on what the author's expectations are of someone in the claimant's role. What we also find are relevant considerations but which were not taken into account by Gowling because the information was not provided to Gowling was:

a. If the line had been crossed into inappropriate gifts and hospitality with the sponsorship, this had been effectively authorised by his line manager. It appears that Mrs Guildford-Smith suggested otherwise during the investigation, however we find that she had.

b. There was an assumption that the claimant would have had day to day involvement with Subcontractors, both in relation to invoices and more generally. However, account was not taken of the fact that the claimant worked in an extremely busy environment (so busy his role was later split into several roles) and therefore, whilst in other teams that might well have been the case, in his team he did not get involved in such matters.

c. Given the issues in the wider team, in particular Mr James himself being alleged by the claimant to have engaged in inappropriate conduct with the Contractors and/or excessive hospitality (in respect of which it was found that there were two occasions where Mr James had understated the extent and nature of hospitality offered), the arena the claimant worked in was one where there does not appear to have been a great deal of rigour at a senior level in such matters.

d. In relation to the claimant's failure to engage with the investigation process, this was due to those leading that process (Mr Sahota, Mr Farmer and Mr Betts) not following appropriate procedures and not engaging properly with his requests, such as providing Terms of Reference to the claimant, and ensuring that Gowling only carried out the whistleblowing investigation and not the stage 2 disciplinary investigation.

Sending the claimant the draft Gowling report

263. On 13 September 2022 Gowling wrote to the claimant disclosing sections of the draft report, inviting the claimant to comment by 27 September 2022 (pages 538-540). As the claimant was not receiving communications directly from Gowling, on 16 September 2022 Mr Betts forwarded it onto the claimant (pages 543-544) and gave him until 28 September 2022. Mr Farmer also sent the claimant a link to the appendices (page 544). Assuming that the claimant was indeed provided with the same information that was in the Tribunal bundle, that would amount to around 450 pages. In those circumstances we do not consider that the time provided to him was sufficient to go through such detailed findings.

264. On 19 September 2022 the claimant requested an extension of time to provide comments until 12 October 2022 (page 546). Given our finding that the amount of time provided was insufficient, we find this to have been a reasonable request. He also raised his mental wellbeing as a reason for the extension and repeated his assertion that due process had not been followed. Mr Betts responded on 23 September 2022 allowing him until 6 October 2022 to respond (page 549 and 550). It is not clear why he was not

permitted to have until 12 October 2022 as requested and in evidence Mr Betts accepted that he did not know what the length of the appendices was, therefore it is difficult to see how Mr Betts could have formed a reasoned conclusion that the length of extension sought by the claimant was excessive. This aligns to our earlier finding that Mr Betts was pre-disposed to assuming the claimant was being unreasonable in his requests and actions.

265. In the end the claimant provided comments on 12 October 2022 (without having advised Mr Betts that they would be late) (page 1013). We find that the claimant should have sent an email to Mr Betts by 6 October 2022 explaining why it was not possible to send them by that date. His comments were set out in a one page email and we find that this was not very detailed considering the extensive points he could have made in his defence. His reply questioned whether there were earlier versions of the report, said that the conclusions were *"already negative and infer wrong doing on my part based on the opinion, conjecture of the report author, as well as evidence provided by Julie Griffin and Rob James at interview. The report is full of bias, inaccuracies, contradictions and demonstrates a lack of investigatory prowess".* He asserted that Julie Griffin and Rob James had lied and cannot be relied upon as credible witnesses. He said that he was unable to comment fully on the report until the respondent followed its own policies and procedures. Whilst he was correct that the respondent had not followed its own policies and procedures, we do find that this was the claimant's opportunity to set out in detail what his position was on everything. By now it would have been apparent to him that the respondent was not going to change its position on the various points he had raised about the process, and therefore we find that he should have put his points across fully to do his best to ensure that Gowling had the relevant information before finalising the report. This was a missed opportunity on his part.

266. During the later (second) stage 2 disciplinary investigation, Ms Kohli was not provided with a copy of this email. She has said that this would not have changed her decision, however there are two points arising from this. Firstly, it means that she was not fully aware that the claimant had accused Mrs Guildford-Smith and Mr James of being liars / unreliable witnesses (which could have warranted further investigation with them) along with the points he raised about the procedure followed by the respondent. Secondly, it means that Mr Betts did not consider this information to be sufficiently relevant to pass on, despite it being the claimant's clear response to the conclusions against him.

<u>Ongoing Dignity at Work and Disciplinary Investigation</u>

267. On 28 October 2022 the claimant was sent an invitation to attend a dignity at work meeting on 16 November 2022 (page 1024-1025). The claimant however replied on 2 November 2022 saying that the deleted item from the Terms of Reference was at the heart of his complaint and requested again that it be included (page 1028). Mr Savill confirmed they would not be changed for the reasons already given (i.e. that the additional point overlapped with his disciplinary matter) and the claimant replied again on 16

November 2022 to repeat his request, asserting that he wanted his complaint to be investigated in full and he also asked whether it was the same people in the legal team advising on the exclusion of the matter from his terms of reference that were also advising on the other issues in relation to himself (page 1042-1043). On 24 November 2022 Mr Savill wrote to the claimant to say that his complaint would no longer be investigated (page 1048). We find this to be a reasonable position to take, as the line had to be drawn somewhere and the parties were at an impasse without the ability to progress to a meeting.

268. Separately, 28 October 2022 Mr Betts wrote to the claimant (page 1027) saying that the claimant had had a reasonable opportunity to comment on the report and that matters would now move on. He also said that certain of the claimant's comments would be passed onto the investigator. on 3 November 2022 the claimant emailed Mr Betts alleging that Mr Betts had been selective in his response to the claimant's concerns (page 1032). Within this email he raised concerns about the procedure followed and requested a copy of the full Gowling report, not only the sections applicable to him. We find that he was only entitled to those sections relating to him as the rest of the report would have been confidential. On 15 November 2022 Mr Betts wrote to the claimant refusing his request for full terms of reference for the disciplinary investigation by Gowling, saying *"You are not entitled to the Terms of Reference for the Gowlings Investigation given the range of workstreams undertaken by them and because they relate to other individuals"* (page 1041). However, the point is that the claimant had not even been given the Terms of Reference for the points which did relate to him. We find that Mr Betts had a fundamental misunderstanding of what Terms of Reference in this context are.

269. In around November 2022 Gowling submitted its findings to the respondent on the investigation, recommending disciplinary action be taken.

270. On 14 December 2022 Mr Savill informed the claimant that the respondent was still prepared to investigate his dignity at work complaint but not the additional allegation that was not in the Terms of Reference (page 1067). The claimant refused to participate on that basis on 11 January 2023 (page 1087). On 18 January 2023 Mr Savill emailed the claimant to confirm that the position remained unchanged from the respondent's perspective and therefore, if the claimant would not progress without the terms of reference being amended, the investigation could not progress (pages 1105 to 1107).

<u>Stage 2 disciplinary investigation (the second one)</u>

271. During the course of January 2023 Ms Kohli was appointed as disciplinary investigation officer and Mrs Joyce as HR advisor. Mr Paul Langford was the commissioning officer. This was to investigate the matters raised in the Gowling report. Ms Kohli was instructed to undertake a stage 2 disciplinary investigation. Of course, by now the claimant had already had a stage 2 disciplinary investigation, even if that had not been the respondent's intention, because that is what Gowling said it had done. This was therefore, in effect, a second stage 2 of the process. Whilst on the face of it

that might sound advantageous to have the opportunity of a further stage, in this case the claimant had been so confused and disheartened by the process and the lack of clarity within it that it was not interpreted in that way (and reasonably so) by him. In addition, it had led him to believe that his disciplinary investigation was being conducted by an external law firm, which made him feel that he was being treated differently to normal practice and would have also intimidated him, given that he was not able to be accompanied by a solicitor himself.

272. Ms Kohli was provided with extracts of the investigation report and appendices from Gowlings. She did not know that there was a draft Gowlings report and a final version or which version she had: whilst the content would have been materially the same, we find that it is a further sign of a flawed process that she was not aware of the process that had been followed to date. Ms Kohli was also not aware that Mr Betts (who had recently become her line manager) was the previous commissioning officer. Had she been aware, then this might have presented a potential issue as to whether he might have been able to influence her findings. However, as she was not aware of his involvement, we find that he clearly did not do so. That said, what her lack of knowledge about his involvement as commissioning officer also means is that Ms Kohli could not have been fully aware of all of the complaints that the claimant had raised to Mr Betts, and his response to those complaints. This means that she was not presented with the complete picture of what happened.

273. Ms Kohli also said in evidence that she assumed that the claimant had already been provided with workstreams two and four as Terms of Reference (which was not the case). This again shows that she had not been given all of the relevant background to the case – not only had the claimant not been given Terms of Reference, but he had not even been told that the workstreams other than two and four were no longer being pursued against him.

274. Ms Kohli wrote to the claimant on 7 February 2023 to introduce herself (pages 1118 to 1119). In this letter she invited the claimant to a stage 2 investigation meeting and offered the choice of 15 or 24 February 2023 for that meeting. The letter said that the meeting could go ahead in his absence if he did not attend either date and requested a reply to confirm which date by 13 February. He was told that the allegations were of gross misconduct and that if it was considered there was a case to answer, he may be required to attend a disciplinary hearing. As the letter referred to workstreams two and four only, this is indirectly how the claimant might have understood that the other workstreams were not taken forward, but that still should have been spelt out. We find that this letter would have confused the claimant given his understanding that the stage 2 investigation had already been carried out.

275. On 13 February 2023 the claimant said that his union representative would be in touch (page 1122) however he did not confirm a preferred date. A chaser email was sent to him on 14 February 2023, reiterating that the deadline had been the previous date (page 1123 and 1124). The claimant

replied on the same date to say that he would chase Ms Francis but that he doubted it would be the 15th. On 15 February 2023, given the lack of response, Mrs Joyce noted that the meeting would not go ahead that day and therefore that it would be on 24 February 2023 (page 1125). We heard in evidence from Mrs Joyce, and we accept, that she felt that this was reasonable and in line with the respondent's custom and practice and normal process.

276. The claimant replied to explain that he was still trying to arrange representation via Ms Francis but had had no contact (page 1126). It is true that he had not confirmed attendance by the date specified, however it is clear from the interactions that he was trying to engage and the problems were due to lack of contact with his representative. The respondent would have been aware that he was trying to participate in the process from the nature of the emails.

277. When she emailed Ms Francis and the claimant, Mrs Joyce had received an out of office message from Ms Francis with no return to work date specified. Therefore she emailed the claimant to make him aware of that on 15 February 2023 (page 1127). She put forward the names of three of Ms Francis' colleagues who she suggested he could contact and offered to contact them on his behalf. We find that Mrs Joyce was trying to be helpful in doing so. That said, we agree with the claimant's submission that these individuals were not in fact suitable given the complexity of his case and the volume of documentation involved in it (and this was supported in evidence by Ms Lakin): had Ms Francis been unavailable for a protracted period then we find that the claimant would have needed to make alternative arrangements but that was not the case here (see below). She wrote again on 16 February 2023 to remind the claimant of the investigation meeting on 24 February 2023 (page 1128).

278. On 20 February 2023 Ms Francis emailed Mrs Joyce, copying Ms Kohli, to say that she had been ill and that she was unable to make 24 February 2023 (page 1131). She asked for the meeting to be rearranged. Although the legal right to be accompanied only allows for one postponement of up to five days, we find that in the context of this case the reasonable course of action would be to postpone the meeting. The representative had been ill on the first date and was unable to make the second date: the reasons for the request are therefore clearly out of the claimant's hands. In addition, this has to be seen in the context of an investigation which commenced in March 2020 with the claimant having been suspended since April 2021. Whilst we appreciate that the respondent would have wanted to close the matter down, when seen in that context a few additional weeks would not have impacted the overall timetable significantly. We find that at this stage the respondent has a pre-conceived notion that the claimant is continuously delaying the process unreasonably and therefore have decided not to allow any further postponements. They have however not considered the individual circumstances of this particular request properly.

279. The respondent refused to postpone the meeting and we find that this was an unreasonable position to take in light of the above. We also note that in

her email Ms Francis raised the point that the claimant had already had a stage 2 investigation meeting and that the Terms of Reference remained outstanding. Ms Kohli was copied into this email and therefore could have appreciated that there were outstanding matters to address.

The Stage 2 Investigation Meeting

280. The investigatory meeting took place on 24 February 2023 at 2pm (pages 1134-1136). The claimant did not attend. We find that, given the history of this matter and the fact that his requests throughout the process had been ignored, we can understand why he was reluctant to attend without his union representative. We find that by this stage the claimant felt that the writing was on the wall and that he would not receive a fair hearing. What he should however have done was contacted Mrs Joyce and/or Ms Kohli in advance to explain that he would not be attending and the reason why.

281. Ms Francis had emailed Mrs Joyce, copying Ms Kohli, at 12.58pm on 24 February 2023 saying that the claimant should be represented by her and no one else because she knew his case, and asking for the meeting not to go ahead (page 1137). This was a reasonable request. She also said that Terms of Reference should have been provided under the employee / managers guidance to the disciplinary process and also pointed out again that Gowling had said that they were working under stage 2 of the investigation process as well as Ms Kohli.

282. However Mrs Joyce and Ms Kohli did not see the email until after the disciplinary stage 2 meeting. We accept this was the case, however we do note that it is somewhat strange that they did not check their emails once the claimant did not arrive for the meeting, in case he had contacted them, before proceeding. Therefore, by the time they saw this email the hearing had already gone ahead in the claimant's absence. Mrs Joyce then wrote back to Ms Francis (page 1138) explaining that this was the case but in any event there was no right to be accompanied to investigation meetings.

283. We have considered whether the claimant should have sent a written statement for consideration if he did not plan to attend the meeting. We find that he still thought at that stage that there was a real chance of postponement given the email his representative had sent. He did not want the hearing to go ahead in his absence; he was still pushing for a new hearing date. Therefore he would not have sent a statement in his absence.

284. On 27 February 2023 Ms Francis challenged Mrs Joyce's reply regarding the investigation meeting (page 1144), pointing out that Unite had informed the respondent twice that she would not be available to attend the investigation meeting, that the claimant had not been treated fairly and again submitting that the claimant still hadn't been provided with Terms of Reference. She also asked for a copy of the Gowling report. Mrs Joyce replied on 3 March 2023, saying that the allegations had been made clear to the claimant. We do not understand why, at this point, the respondent did not just prepare a formal Terms of Reference document, given that the claimant clearly wanted one and felt it was central to being able to progress

with the investigation. Even if the respondent felt it was unnecessary (and we disagree with the respondent on this), it would have been an easy document to prepare and would have removed this central line of the claimant's objection. We find that the respondent thought that the claimant was just being difficult and was digging its heels in.

285. On 26 February 2023 the claimant sent a letter before action threatening judicial review to Ms Cadman (page 1139-1143), largely in relation to the restructure but also setting out complaints about being subjected to detriments (suspension) for having made a protected disclosure. On 15 March 2023 the respondent's legal and governance department sent the claimant a detailed reply to this letter (pages 1151-1159). On 21 March 2023 the claimant replied, saying that he had now submitted his judicial review, although in fact he had not done so and he did not submit this in the end. (page 1194). We find that he intended to submit it, but decided not to at the last minute.

286. On 21 March 2023 Ms Kohli produced her investigation report into the allegations against the claimant (pages 1184-1193). She did this without the benefit of evidence from the claimant, and so would not have been aware for example that the claimant's daughter had been invited to an assessment centre prior to an offer being made to her. Ms Kohli did not interview any other witnesses. We find that she should have done so, particularly if Gowling had not provided the full transcripts to her (Ms Kohli could not recall in evidence whether she had these or not however the claimant certainly did not have them). Had she been provided with full notes, and had the claimant not raised a submission that certain witnesses had not given truthful evidence, then this might well not have been necessary but in the circumstances we find some further interviews should have been conducted. Ms Kohli concluded that there was a case for the claimant to answer and sent her report to Mr Langford as Commissioning Officer, who decided to proceed to stage 3 under the disciplinary procedure.

287. We find generally that Ms Kohli followed the Gowling report in her findings. We understand why this was: Gowling is a large law firm that has carried out an extremely detailed investigation with extremely detailed conclusions. The problem here however is that Ms Kohli does not have an understanding of why the claimant failed to engage in that process, to then scrutinise whether the conclusions might have been missing things. Had there been no wider concerns then it would have been reasonable for Ms Kohli to take the report at face value however she did not understand the wider picture. Had she done so, she might have understood why the claimant had not participated and taken steps to resolve those issues, which would have then led to the claimant choosing to participate and the additional information to rebut the Gowling findings being discovered.

<u>Stage 3 disciplinary hearing</u>

288. On 23 March 2023 Mr Langford wrote to the claimant to inform him that the matter progressing to stage 3 disciplinary (page 1196 and 1197). The claimant was then sent a separate letter by Ms Kohli giving him the choice

of 19 April 2023 or 26 April 2023 or the meeting. We find that this was plenty of notice for the hearing. The claimant was told that if he did not confirm his attendance by 12 April 2023 then the hearing would potentially go ahead in his absence on the first date (19 April 2023) The claimant was advised that Mr Paul Kitson would chair the hearing and that Ms Kohli would be present to present the case.

289. Before the disciplinary hearing, Mr Kitson was provided with the suspension letter, extracts from the Gowlings report, investigation invitation (which one is unclear, but presumably for Ms Kohli's investigation), investigation meeting notes, investigation outcome, disciplinary hearing invitation letter, job description, Code of Conduct, Disciplinary Procedure, Gifts and Hospitality register declarations, Anti Fraud and Corruption Policy, Gifts and Hospitality Policy and Procedure, Declarations and the Whistleblowing and Serious Misconduct Policy. He did not have a copy of the claimant's letter dated 12 October 2022.

290. One issue that has been raised in relation to Mr Kitson is that he had not undertaken the respondent's "Power to Dismiss" training which the claimant says is a pre-requisite. This was not raised until after the dismissal, on 1 May 2023 (page 1244). We accept the respondent's evidence that, by the time of the claimant's dismissal, the requirement for that training had ceased and so there was no breach of policy in this regard. This had not been fully cascaded throughout the respondent so the claimant (and some other witnesses) did not appreciate that it was not required. We also find that there is no evidence that it would have affected the outcome of the hearing if he had had the training.

291. On 14 April 2023, having not heard from the claimant, Ms Kohli wrote to the claimant to confirm the hearing would go ahead on 19 April 2023 in the absence of the claimant confirming his preferred date by 12 April 2023 as requested. The claimant has said in evidence that he was waiting for his union representative to reply. We find that it remained the claimant's responsibility to do so and this was not something that he could delegate. He was told that the decision may be made in his absence, and that this may include dismissal (page 1202). He was given the option to provide a statement to be read out in his absence.

292. On 17 April 2023 Ms Francis wrote to Ms Cadman (page 1203), copying Ms Kohli, to complain that the claimant had not been given the right to due process, setting out a list of alleged failures to follow the disciplinary process, and alleging that the respondent only instigated the disciplinary procedure as a punitive measure after he raised a whistleblowing complaint. The letter ended by asking that Ms Cadman inquire into the concerns. Ms Kohli was copied into this email and so must have been aware of it. Mr Kitson confirmed in his later findings that he had considered it so the contents must have been passed to him. One thing we note from this correspondence is that it said (at page 1204) that the claimant was suspended after making a whistleblowing complaint. Therefore, at this stage, Ms Kohli (and subsequently Mr Kitson once the correspondence was passed to him) is now aware that the claimant says that he raised a

whistleblowing complaint prior to his suspension (and this cannot relate to the Second or Third Disclosures given that they post-dated his suspension).

293. We therefore find that at the time of the claimant's dismissal Ms Kohli and Mr Kitson did not have knowledge of the detailed complaint raised by the claimant, but did know that he had raised one. In determining that they did not know the detail of his whistleblowing complaint, we have taken into account that we find that the respondent does seek to protect the confidentiality of whistleblowers and therefore Mr Farmer and Mr Sahota would not have passed that information onto them.

294. Ms Francis also emailed Ms Kohli on 18 April 2023 (page 1211), asking that until a response was received to her email to Ms Cadman, that the hearing be postponed. She also said that there were unanswered questions and that if the hearing was to go ahead, they would need the requested information and to inform Ms Kohli of the witnesses the claimant wanted to call before the hearing. It is therefore clear that the claimant wants to call witnesses to support his case and intends to engage in the process (and we note that the claimant is not then contacted to request details of who this is so that they can be interviewed).

295. We find that the hearing should have postponed in light of the nature of the issues raised by the claimant. We appreciate that the claimant had not replied by 12 April 2023 and therefore the respondent was simply acting as it said it would in proceeding with the first hearing date, however the decision not to postpone given the issues raised was nevertheless unreasonable. We heard from Mr Kitson in evidence that there was no particular urgency to the matter at this stage, and that he was keen to proceed because he knew that the claimant had not attended previous meetings and had no certainty he would attend in future. We find that an assumption was made that this was a continued pattern of unreasonable behaviour on the claimant's part without considering in detail the specific reason for the claimant's request. We find on the balance of probabilities that when Mr Kitson was briefed on the matter when it was handed over to him, the briefing would have been done in such a way as to suggest that the claimant was a difficult person. Mr Kitson would also have been given the impression that the claimant's request for information was unreasonable, when in reality it was not.

296. The claimant also emailed Ms Cadman on 18 April 2023. In this email he set out his concerns about his situation, alleging failure to follow policy, constructive dismissal, alleging that a new section had been added to the Code of Conduct on sponsorship since his issues arose, and alleging a predetermined agenda to dismiss him (pages 1209-1210). He also criticised decisions that had been made regarding the work his team did during his absence and referred to "mismanagement of the public purse". Whilst this could be read as a reference to the contents of his whistleblowing complaint dated 27 November 2020 it could equally relate to the Second and Third Disclosure and therefore we find that this comment was not enough in itself to impart knowledge of any specific protected disclosure. Ms Cadman responded on 19 April 2023 at 9.30am to say that the hearing would go

ahead and that he would have the opportunity to put forward his concerns at the hearing (page 1235 and page 1238).

297. On 19 April 2023 at 9.59am Ms Francis emailed Ms Cadman, copying Ms Kohli, saying that she was disappointed that the hearing would go ahead that day when she was unable to represent the claimant. She said that the delay was caused not by the claimant, but by her being unwell and then on annual leave and reiterated that concerns had been raised previously. She said that neither of the offered dates were adequate in circumstances where there were no Terms of Reference, no witness statements and an incomplete Gowling report. She made one final request for the hearing to be adjourned for 10 days so that they could prepare with what they have and inform the chair of the witnesses they wish to call (page 1236). We find that 10 days was a reasonable request in the circumstances, although note that Ms Francis left it until the last minute to request the postponement given that the invitation to hearing was sent some weeks earlier. This was unfortunate and contact should have been made sooner. However, overall, we still find that postponement would have been the reasonable course of action not least because the claimant has not had a full response to the issues that he has raised.

298. The stage 3 disciplinary hearing therefore went ahead on 19 April 2023 between 1pm and 2.20pm (notes at pages 1212-1234). At the hearing Ms Kohli presented the case in respect of each of the allegations. We find that Mr Kitson should have undertaken further investigations, in the same way that we have found that Ms Kohli should have done so. It was also by now clear that the claimant wished to call witnesses so this should have been explored further. However, Mr Kitson decided to dismiss the claimant with immediate effect.

299. We find that, as with Ms Kohli, Mr Kitson relied on the findings of the Gowling report. He said that he spent two to three hours examining the evidence. In the context of a report extract amounting to about 50 pages with around 450 pages of appendices, that was insufficient.

300. On 20 April 2023 the claimant was informed in writing of dismissal which took effect from 19 April 2023 (pages 1239-1241). The allegations in respect of workstreams 2 and 4 were upheld. It was found that:

    a. He received sponsorship from organisations connected to the respondent;
    b. His declarations did not fully declare all sponsorship;
    c. He disregarded management instructions not to engage contractors who acted as sponsors;
    d. He was able to get sponsorship for his private interests due to his position at the respondent;
    e. On the balance of probabilities, he encouraged another employee to engage with contractors on his behalf (presumably Mr Flaherty), and there was no evidence as to why that employee would assist unless the claimant had requested this;

f. He did not accurately or wholly declare the extent of his daughter's employment with Contractor 1 to the respondent;
g. He used his position at the respondent to approach the Contractors for the work placement;
h. He failed to record her placement on the Gifts and Hospitality Register; and
i. He provided respondent information to her at Contractor 1.

Appeal

301. On 15 May 2023 the claimant submitted an appeal against dismissal (pages 1246-1256). There are two stages to filing an appeal at the respondent: first of all an appeal is registered and then later the individual completes more paperwork. Initially at the hearing we were led to believe that the contents of the Additional Disclosure Bundle was the claimant's appeal documentation. We have since seen that this cannot be entirely the case as some documents post date it. However, we find that the majority of that bundle was his appeal and the claimant's solicitors added certain documents to that for the purposes of these proceedings.

302. The claimant's appeal has not yet been concluded as at the date of this hearing. Mr Kitson said in evidence that there was a backlog of appeals within the respondent. However, we find that it is very surprising that the appeal was still ongoing almost a year after his dismissal, and this is quite clearly an unreasonable length of time. As part of the appeal process, Mr Kitson has reviewed his decision to dismiss the claimant and has affirmed that he considers it to have been the right decision (pages 1260-1274).

Law

Protected Disclosures

303. Section 47B of the Employment Rights Act 1996 ("ERA") states:
(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.

304. Section 103A of the ERA states:

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

305. As to what constitutes a protected disclosure, section 43A of the ERA provides:

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

306. Section 43B of the ERA sets out that definition of a qualifying disclosure as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*
>
> *a. that a criminal offence has been committed, is being committed or is likely to be committed;*
>
> *b. that a person has filed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
>
> *c. that a miscarriage of justice has occurred, is occurring or is likely to occur;*
>
> *d. that the health or safety of any individual has been, is being or is likely to be endangered;*
>
> *e. that the environment has been, is being or is likely to be damaged; and*
>
> *f. that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

307. A qualifying disclosure which is made to the employer is a protected disclosure.

308. For a disclosure to be a qualifying disclosure, it must disclose information, that is to say that it must convey facts (**Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT**). Merely making an allegation or expressing an opinion without context will be insufficient (although on some occasions allegations and opinions can also be properly characterised as information).

309. The worker must reasonably believe that the information disclosed tends to show one of the matters set out in section 43B of the ERA. This has both a subjective and objective element to it: did the worker believe that the information tended to show one of those matters and was that belief reasonable? (**Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA**).

310. The worker must have a reasonable belief that the disclosure is made in the public interest. Therefore, ordinarily, a disclosure relating to a private employment dispute will not constitute a qualifying disclosure. However, as in **Chesterton (above)**, the public interest test may be satisfied where only a small group of individuals are impacted by the matter that the disclosure relates to, including where that group are employees of the organisation in question, if the employee can show that they had in mind a section of the public when making the disclosure.

Detriment

311. Detriment is assessed from the worker's perspective (**Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**) and means putting a worker to a disadvantage (**Ministry of Defence v Jeremiah 1980 ICR13**).

312. Where a claim relates to an alleged detriment (as opposed to dismissal), for a claim to succeed the worker must have been subjected to the detriment on the ground they had made a protected disclosure. The protected disclosure must materially (i.e. more than trivially) influence the treatment (**Fecitt and ors v NHS Manchester (Public Concern at Work intervening 2012 ICR 372, CA***)*: this is a different test to that for dismissals. In **Fecitt**, Lord Justice Elias compared detriment claims to discrimination claims where "*unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions*" (**Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA**). He found that this principle is "*equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing*". He held that detriment claims under section 47B ERA will be made out if the protected disclosure "materially" (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

313. It is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA). Therefore, if the claimant has shown that there was a protected disclosure, and that the respondent subjected them to a particular detriment, it is for the respondent to show that the reason for the detriment was not on the ground that they had made the protected disclosure. The Tribunal may draw inferences in reaching its conclusion.

Automatic Unfair Dismissal

314. Where a claim relates to a dismissal under section 103A ERA, it is instead necessary to consider whether the reason, or principal reason, for the dismissal was the protected disclosure. If it was, the dismissal will be automatically unfair. The principal reason is the one that was in the employer's mind at the time of the dismissal (**Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA**), it cannot be a secondary reason. This is therefore a stricter test than that for detriment under section 47B of the ERA (as confirmed in **Fecitt, above**).

315. As to the burden of proof in automatic unfair dismissal claims, where the employer argues that the dismissal was for a potentially fair reason and the claimant asserts that it was for an automatically unfair reason, the employee has the evidential burden to show that there is an issue which could establish that automatically unfair reason. If that is done, the employer must prove on the balance of probabilities which of the two potential reasons for dismissal was the principal reason for dismissal (**Maund v Penwith District Council 1984 ICR 143, CA**, as confirmed in **Kuzel v Roche Products Ltd 2008 ICR 799, CA**).

Knowledge

316. In claims under both section 47B ERA (detriment) and section 103A ERA (automatic unfair dismissal), knowledge of the protected disclosure is required. As held in **Nicol v World Travel and Tourism Council and Others [2024] EAT 42**, that knowledge must be more than simply that a disclosure has been made: the decision-maker "*ought to know at least something about the substance of what has been made: that is, they ought to have some knowledge of what the employee is complaining or expressing concerns about*".

317. However, in an automatic unfair dismissal case, knowledge may be imputed to the decision-maker if someone at the respondent who is in the hierarchy of responsibility above the employee manipulates the decision-maker, leading the decision-maker to dismiss an employee for an apparently fair reason, not realising that there was a protected disclosure and that they have been manipulated (**Royal Mail Group Ltd v Jhuti [2019] UKSC 55**). In **Kong v Gulf International Bank (UK) Ltd EAT 0054/21** it was found to be "over-generous" for the tribunal to regarding an individual as being in the hierarchy of responsibility when, although part of the senior management team, that person had a distinct reporting line and there was no suggestion they had responsibility for the claimant.

318. In contrast, in a detriment claim, knowledge of one person cannot be imputed to another, even where they are in a position of hierarchy over the employee (**Malik v Cenkos Securities PLC EAT/0100/17**, as confirmed in **William v Lewisham and Greenwich NHS Trust [2024] EAT 58**.

Ordinary Unfair Dismissal

319. Section 94 of the Employment Rights Act 1996 ("ERA") sets out the right not to be unfairly dismissed. In order for a dismissal to be fair, it must be for a potentially fair reason under section 98(2) of the ERA. The burden is on the employer to show what the reason for dismissal was and that it was a potentially fair reason. Conduct is one of the potentially fair reasons.

320. Once a potentially fair reason has been established, section 98(2) goes on to provide that:

"…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

The burden of proof at this stage is neutral.

321. In cases relating to conduct the key case is **British Home Stores v Burchell [1980] ICR 303**. The employer must demonstrate that:

    a) It genuinely believed the employee to be guilty of misconduct;

    b) It had reasonable grounds for that belief; and

    c) It had carried out as much investigation as was reasonable in the circumstances.

322. The question is not whether the Tribunal would have taken the same action as the employer, but whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the decision itself and the procedure followed (**J Sainsbury plc v Hitt 2003 ICR 111, and Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**). The starting point should be section 98(4) of the ERA, and in applying that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair. Put simply, the Tribunal must not substitute its own decision about what the employer should have done, and in many cases there is a band of reasonable responses that the employer could reasonably take. It is for the Tribunal to decide whether, in the particular circumstances, the employer's actions fell within that band.

323. Applying all of these principles, the key questions the Tribunal must consider are (in each case having regard to the band of reasonable responses):

    a) Did the employer have a genuine belief that the employee was guilty of misconduct?

    b) If so, was that belief based on reasonable grounds?

    c) Had the employer carried out as much investigation as was reasonable?

    d) Did the employer follow a reasonably fair procedure?

    e) Was it within the band of reasonable responses to dismiss the employee as opposed to taking other action such as a lesser sanction? If the dismissal was for gross misconduct, did the employer act reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment: **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**

324. The employer's size and resources are a relevant factor, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures. The employee's length of service is also relevant (**Strouthos v London Underground Ltd 2004 IRLR 636**).

325. Where a dismissal for gross misconduct could impact the employee's future career, particular care must be taken in the investigation and disciplinary

process (**Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721**.

326. Disciplinary charges should be precisely framed, and considerations limited to those charges (**Strouthos, above**). Employees should know not only the case against them but the evidence being relied on, and should have the opportunity to dispute that evidence and bring forward their own evidence (**Spink v Express Foods Limited [1990] IRLR 320**). However a failure to make evidence available will not always amount to an unfair dismissal, where the employee is fully aware of the case against them and has had a proper opportunity to respond to it (**Hussain v Elonex plc 1999, IRLR 420**).

327. If the dismissal is found to be unfair due to (at least in part) the procedure followed by the employer, then in considering the appropriate award of compensation, regard should be had to the likelihood that the dismissal would have taken place in any event, and the compensatory award may be reduced accordingly. **Polkey v AE Dayton Services Ltd 1988 ICR 142.**

328. If the dismissal is found to be unfair but it is also found that the employee contributed to their dismissal through their conduct, then the basic and/or compensatory awards may be reduced to reflect this under section 122(2) and 123(6) of the ERA. Contribution should be assessed broadly and in the categories of wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%) (**Hollier v Plysu Limited [1983] IRLR 260**).

Time limits

329. Section 48 of the ERA states:

……

(3) An employment tribunal shall not consider a complaint under this section unless it is presented:

a. Before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

b. Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

a. where an act extends over a period, the "date of the act" means the last day of that period, and

b. a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

330. Section 111 of the ERA states:

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

a. Before the end of the period of three months beginning with the effective date of termination; or

b. Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

331. The Tribunal should identify the act or failure to act that is alleged to have caused the detriment when considering whether it extended over a period of time (**Flynn v Warrior Square Recoveries Ltd 2014 EWCA Civ 68, CA**). It is not about whether the detriment or consequences continued, but the act or failure to act.

332. A series of similar acts could relate to different acts by different people if there is a sufficient connection between them for them to amount to a series (**Arthur v London Eastern Railway Ltd (t/a One Stansted Express 2007 ICR 193, CA**). However, where the last alleged act is either unfounded or found not to have been done on the ground of the protected disclosure, it cannot extend time for earlier acts that are out of time (**Jhuti, above**).

333. In circumstances where a claim has not been brought within the usual three month time limit, the claimant's ill health can be a basis for concluding that it was not reasonably practicable for the claim to have been brought in time (**Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA**). The test is what could be done, not whether it was reasonable not to do what could be done. Stress is unlikely to be sufficient (**Asda Stores Ltd v Kauser EAT 0165/07**).

334. Whilst a Tribunal will usually wish to see medical evidence, this is not always essential (**Norbert Dentressangle Logistics Ltd v Hutton EATS 0011/13**).

335. If it is not reasonably practicable to have presented the claim within the ordinary time limits, the question is then whether it was presented within such further period as the Tribunal considers reasonable. This involves an objective consideration of the reason for the delay and what period is reasonable, bearing in mind the public interest in claims being made promptly and having regard to all the circumstances (**Cullinane v Balfour**

Beatty Engineering Services Ltd and anor EAT 0537/10, and **Nolan v Balfour Beatty Engineering Services EAT 0109/11**).

Conclusions

336. We deal first with the question of protected disclosure and detriment, as set out in the List of Issues from his first claim at page 84 of the Bundle. We address whether that claim was in time and, if not, whether time should be extended, after our conclusions on the question of detriment, as it is only once it is known which detriments (if any) the claimant has succeeded in relation to that the relevant dates can be assessed. We then turn to the unfair dismissal claim, following the structure of the list of issues in relation to the second claim at page 1304 of the bundle.

Protected Disclosure

Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

What did the claimant say or write? When? To whom? The claimant says he made disclosure on 27 November 2020.

Did he disclose information?

337. The claimant's disclosure on 27 November 2020 clearly disclosed information. It conveyed clear facts about Mr James allegedly encouraging a claim by Contractor 1 against the respondent and interfering in the defence of that claim.

Did he believe the disclosure of information was made in the public interest? Was that belief reasonable?

338. We deal with both of the above questions together. We conclude that he did have such a belief. The respondent is a public sector organization and he specifically referred in his email to the financial risk not only to the respondent but also the public purse. The way in which public funds are spent, or misspent, is clearly in the public interest. He also referred to corruption and we conclude that he believed that it was in the public interest (given that this was a public sector organisation) to highlight corruption. In our view that belief was clearly reasonable.

339. Although not part of this specific issue, we also conclude for the avoidance of doubt that the disclosure was made in good faith. The claimant genuinely believed that Mr James had committed wrongdoing that warranted investigation.

Did he believe it tended to show that:

(a) A criminal offence had been, was being or was likely to be committed?
(b) A person had failed, was failing or was likely to fail to comply with any legal obligation?
(c) Information tending to show any of these things had been, was being or was likely to be deliberately concealed?

Was that belief reasonable?

340. Again we deal with his belief and the reasonableness of it together. In his email of 27 November 2020 the claimant specifically asserted that there were concerns that a criminal offence had been committed and we accept that he believed that this was the case. Although he did not mention that there was a failure (or likely to be a failure) to comply with any legal obligation, we consider it implicit from what he said that he believed that there was also a breach of a legal obligation. He does not say that there is any suggestion of concealment, however in any event he has shown that he had a belief in (a) and (b) above which is sufficient for the purposes of establishing a protected disclosure. We also conclude that his belief was reasonable, in circumstances where he was raising misspending and corruption issues relating to public money.

341. The disclosure was made to his employer and therefore it was a protected disclosure. We would also note that, whilst the respondent did not concede as such that there was a protected disclosure, the respondent accepted in its submissions that it was likely to constitute a protected disclosure.

Detriment

342. We address each detriment in turn below, considering all of the issues for each detriment before moving onto the next. Before we explore the individual detriments, we would comment that the way in which the detriments were listed in the List of Issues was rather vague in nature, therefore we have gone into some detail below on the specific issues which make up each of the listed issues. In addition, there were some linguistic errors in the list of issues, which are replicated below to ensure that the issues we have considered reflected the agreed issues in this case.

Suspension 09.04.2021 whilst on annual leave by assistant chief executive not line manager

Did the respondent do this?

343. The claimant was indeed suspended by the assistant chief executive, Jonathan Tew, on 9 April 2021 and the respondent accepts that he was on annual leave at this time. This allegation therefore did occur as alleged.

By doing so, did it subject the claimant to detriment?

344. The result of his suspension was that the claimant was not able to work between that date and the end of his employment. Whilst suspension is said to be a neutral act, it does have negative consequences for the claimant. He was not able to contact his colleagues and his colleagues (and suppliers) would have been discussing his whereabouts in light of his absence. There would have been speculation about what it was he was alleged to have done. In addition, by suspending him whilst on annual leave, this would have caused distress during what should have been a

period of relaxation. In addition, he was not in a suitable environment when he was informed of his suspension. There was a clear detriment.

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

345. The timeline in so far as it is relevant to this matter is that there was an internal investigation which led to an audit report being prepared in 2019. Gowling were instructed in March 2020, and then in November 2020 the claimant raised his protected disclosure. In April 2021 he was suspended. It is therefore clear that the investigation which led to his suspension commenced substantially before his protected disclosure in November 2020. This investigation included elements relating to the claimant specifically. On the face of it there it would therefore appear that the suspension would not be on the ground that he made a protected disclosure.

346. However that is not the end of the matter. We also know that the investigation started a long time before the suspension, and something must have happened to trigger the respondent suspending the claimant after such a long period of allowing him to work in parallel to the investigation. The respondent says that the investigation took until Spring 2021 to reach a stage where suspension was warranted, and that delay was the time it took Gowling to obtain and review around 500,000 documents. We have also found that at least a part of the rationale for suspending him at that time was the re-procurement exercise that was about to take place.

347. At this stage the burden of proof is on the respondent to show the ground on which any act was done, i.e. that the protected disclosure did not materially influence the decision to suspend. Although the re-procurement exercise was not the ground originally put forward by the respondent, we are entitled to take account of all of the evidence in determining what the respondent has shown. We find that Mr Arben, as a witness for the respondent, has shown that a key reason was the re-procurement exercise. That may not be the reason originally put forward, but it is still not related to the fact that the claimant submitted a protected disclosure. We also note that when he did raise a protected disclosure in November 2020, this was reviewed and referred to Gowling very quickly and was taken seriously (as it would not have been referred to an external law firm if it had not been). We also conclude that Mr Farmer has shown that his team place importance on the confidential nature of whistleblowing complaints (for example, given his reluctance to disclose the identity of Mrs Guildford-Smith) and therefore that he would not have disclosed this to Mr Tew.

348. Had the decision to suspend been taken by other individuals, including Mr James, our view might have been different (not least because Mr James was interviewed by Mr Chitty in March 2021, shortly prior to the suspension). However it has not been submitted that Mr James was involved in the decision to suspend the claimant (directly or indirectly). We would also add that, although we conclude that the suspension was not on the ground of the protected disclosure, we can understand why the claimant might have mistakenly concluded that it was – as he was not made aware

of Project Stockholm and would not have appreciated that it had been ongoing for some time before his disclosure.

349. We conclude that the suspension was on the ground of the progression of the Gowling investigation combined with the re-procurement exercise, and was not influenced by the claimant's protected disclosure (materially or otherwise). The claimant's claim in this regard therefore fails.

Email deleted completely instead of out of office, which humiliated and degraded when colleagues were aware his email was deleted which highlighted issue with his employment to all, which was later rectified.

Did the respondent do this?

350. We have found that, at the least, the claimant's email was de-activated if not deleted completely. For the purposes of this claim, we consider that de-activation is akin to deletion (in the sense that the key point being made is that this was not a normal out of office message) and therefore that the facts as alleged did occur. We also conclude that this was humiliating and degrading for the claimant as it gave the impression to colleagues and suppliers that the claimant's employment had suddenly ended and, even once this was clarified not to be the case, the claimant's circumstances were naturally the subject of further discussion amongst colleagues.

By doing so, did it subject the claimant to detriment?

351. There were reputational issues associated with what happened given that it caused discussion about his sudden change in circumstances, and this caused clear detriment to him.

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

352. Having found that there was a disclosure, a detriment and that the respondent subjected the claimant to that detriment, the burden is on the respondent to show that the ground on which it was done was not his protected disclosure. However, the respondent continued to deny that this happened during the hearing, saying instead that their normal practice had been followed. Therefore, it could be argued that the respondent has not in fact put forward the ground for it happening at all. However, based on the information provided by the respondent, and their determination that the detriment did not occur as alleged, we conclude that those involved in the matter within the respondent intended merely to suspend the claimant's email account in the usual way, and not to de-activate it, and did not even realise that they had done so. Therefore, although it is not the argument put forward by the claimant directly, we do conclude that the respondent has shown that it was not motivated by the protected disclosure but rather by a mistaken belief that it was following usual practice. In short, the respondent has shown that an error occurred.

Ignoring reasonable requests to defend himself

Did the respondent do this?

353. We conclude that there are multiple elements to this, in relation to which multiple individuals within the respondent were involved. Some of these also overlap with later issue below regarding Terms of Reference, access to emails and the disciplinary procedure. The key points which we have identified which relate to this allegation are:

    a. Not providing Terms of Reference (and/or otherwise identifying clearly how the wider workstreams relating to him individually), which would have enabled the claimant to better understand the allegations and to respond to them. We deal with this separately under the specific issue relating to the Terms of Reference below.
    b. Not providing access to emails, so that he could locate emails which would help him to defend himself. We deal with this separately under the specific issue relating to access to emails below.
    c. Not allowing him to be accompanied by a solicitor.
    d. Not providing a further meeting with Gowling following the pre-prepared statement provided at the initial meeting on 3 May 2022;
    e. Not allowing him to see written questions in advance of the meetings;
    f. Not incorporating the allegation regarding his protected disclosure into his Dignity at Work complaint;
    g. Not allowing the disciplinary stage 2 hearing (the one held by Ms Kohli) to be postponed;
    h. Not allowing the disciplinary stage 3 hearing to be postponed; and
    i. Not interviewing additional witnesses as suggested by the claimant at stage 3

354. As to whether these happened, we find that they did.

By doing so, did it subject the claimant to detriment?

355. All of the above subjected the claimant to detriment, in that they meant that the claimant felt unable to participate in the disciplinary and investigation process.

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

356. We address allegations (c), (e) and (f) above first, separately to the others, because we consider that the respondent had reasonable grounds for putting the claimant to those detriments. In relation to the others, as we explain below and in our findings of fact above, we consider that the respondent's actions were unreasonable, and the question is then whether that conduct was materially influenced by the protected disclosure.

357. Turning first to the refusal to allow the claimant to be accompanied by a solicitor, and to allow him to see written questions in advance. We have found that there was no requirement on the respondent to allow a solicitor to accompany him, although we also found that the respondent should have engaged in a discussion with the claimant to understand why he wanted one, which might have revealed that Gowling were undertaking a disciplinary investigation that the respondent did not want Gowling to undertake. We conclude however that the refusal to allow a solicitor and/or

to allow written questions in advance was not on the ground that he had made a protected disclosure, rather the respondent has shown that it was because the respondent was following its usual practice and did not consider that there were grounds to make an exception to that usual practice. We conclude that there were reasonable grounds for refusing those requests.

358. Addressing next the failure to incorporate his protected disclosure into the Dignity at Work complaint. We conclude that the respondent has shown that the reason for this was because it overlapped with the ongoing disciplinary investigation, which was a reasonable position for it to take, and therefore that this was not on the ground that the claimant had made a protected disclosure. We deal later in relation to the disciplinary procedure itself on the failure to incorporate it into that.

359. In relation to the other matters, as explained above we consider that the respondent did not treat the claimant as it should have done. Before we turn to whether that was materially influenced by his protected disclosure, we turn to the question of knowledge of the relevant persons. It is only if they have knowledge not only of the protected disclosure, but of some substance of what has been said, that the person who placed the claimant at the detriment can have taken (or failed to take) that action on the ground of his protected disclosure.

360. There were various individuals involved in these matters and we have found their knowledge to be as follows:

    a. Mr Farmer: he clearly had full knowledge of the claimant's protected disclosure, including the detail of it. However, given the importance that he placed on confidentiality of such matters, we find that he would not have passed that knowledge onto others such as Ms Kohli, Mr Kitson and Mr Betts.

    b. Mr Sahota: again he had full knowledge of the claimant's protected disclosure, including the detail of it. Again, given his role and the importance that the respondent placed on confidentiality, we find that he would not have passed that knowledge onto others such as Ms Kohli, Mr Kitson and Mr Betts.

    c. Mr Betts: in his witness statement, he said that he was not aware that the claimant had made a protected disclosure. However, in the claimant's email to Mr Betts at page 372 on 1 March 2022 he referred to having made a whistleblowing complaint. This email pre-dated his Second and Third Disclosures so can only have related to his disclosure on 27 November 2020. The information in Mr Bett's witness statement is therefore wrong. We have considered whether we think that Mr Betts deliberately sought to mislead the Tribunal or whether he had forgotten / had not read that section of the claimant's letter. We consider on the balance of probabilities that Mr Betts did not deliberately mislead the Tribunal, but rather that he had such a pre-conceived negative impression of the claimant that he did not pay full

attention to the contents of the claimant's correspondence and approached it from the standpoint of assuming that the claimant was being unreasonable and not digesting its contents in full.

He therefore did not have sufficient knowledge of the claimant's disclosure to be imparted with knowledge under **Nicol, above**. For the avoidance of doubt, we are also aware that Mr Betts was included on an email on 21 March 2022 attaching a letter but we have not seen the contents of that letter (page 374). As we have not been provided with this letter, we cannot rule out that the letter might have contained information about the protected disclosure, however we saw no evidence to say that it did so and the claimant did not assert so in his evidence. Even if it did, by that time Mr Betts was already treating the claimant unreasonably, and therefore we would have found that the respondent has shown that the ground for Mr Betts' treatment of the claimant was not because of the protected disclosure.

d. Mrs Joyce: although she said that she was not aware that the claimant had made a whistleblowing complaint in November 2020 in her witness statement, she was aware that he asserted that he made a protected disclosure at some point in time from the discussions regarding his Dignity at Work complaint and the additional allegation he sought to have included in that. Although that did not provide much detail about the complaint raised, the Dignity at Work complaint itself included additional detail, making clear that the protected disclosure was about a senior manager's interference in a contractual relationship. Although he did not name Mr James or the Contractor 1 relationship by name, we conclude that this was sufficient to give Mrs Joyce knowledge of the level required for a decision-maker to be imparted with knowledge under **Nicol, above.**

e. Ms Kohli: she says in her witness statement that she was not aware that the claimant had made a protected disclosure in November 2020. However, she was copied in on the claimant's representative's email dated 17 April 2023 (shortly prior to the stage 3 meeting) which alleged that the claimant had been suspended after raising a whistleblowing complaint. Therefore she had information asserting that a protected disclosure had been made, and given that it was stated to be prior to suspension, it cannot have been the Second or Third Disclosure. However, she had no detail about the nature of the disclosure. She also did not have that information prior to 17 April 2023 and therefore did not have it during her stage 2 investigation process. We further find that she was not briefed about the disclosure, given the importance that Mr Farmer and his team placed on confidentiality of such matters. Therefore he did not have sufficient knowledge for any treatment to be on the ground of the protected disclosure.

f. Mr Kitson: Mr Kitson indicated that he had been passed details of the document dated 17 April 2023 in which reference was made to the whistleblowing complaint. Therefore, as with Ms Kohli, he had

knowledge that the claimant asserted that a disclosure had been made. Again, we find that he did not have any knowledge of the detail of that complaint. We further find that he was not briefed about the disclosure, given the importance that Mr Farmer and his team placed on confidentiality of such matters. Therefore, he did not have sufficient knowledge for any treatment to be on the ground of the protected disclosure.

g. Mrs Guildford-Smith: although in her witness statement she said that at the time of her employment with the respondent she had no knowledge of the claimant making a protected disclosure in November 2020, given that she was interviewed about it in December 2020 we consider that on the balance of probabilities she knew about it from that time. Even if it was not expressly confirmed to Mrs Guildford-Smith who had raised the whistleblowing complaint, we consider that it would have been obvious to her who this was.

h. Mr James: similarly, as he was interviewed about the claimant's protected disclosure in March 2021 we consider on the balance of probabilities that he knew about it from that time. Even if it was not expressly confirmed to Mr James who had raised the whistleblowing complaint, we consider that it would have been obvious to him who this was given the animosity that he and the claimant had for each other.

361. Therefore, for the claimant to succeed on this issue the detriment in question would need to have been carried out by Mr Sahota, Mr Farmer, Mrs Joyce, Mrs Guildford-Smith or Mr James as they were the individuals with the requisite level of knowledge. In relation to the treatment of the claimant by Mr Betts, Ms Kohli and Mr Kitson, his claim must fail.

362. It has not been submitted that Mrs Guildford-Smith or Mr James caused the detriments to which the claimant was subjected. Therefore, the question is whether the respondent has shown that the treatment which Mr Sahota, Mr Farmer or Mrs Joyce subjected the claimant to was not materially influenced by the protected disclosure.

363. We will address the Terms of Reference and access to his emails separately below as they are listed as separate issues in the List of Issues.

364. The other allegations we have identified which relate to whether the claimant's reasonable requests to defend himself were ignored are:

a. Not providing a further meeting with Gowling following the pre-prepared statement provided at the initial meeting on 3 May 2022;
b. Not allowing the disciplinary stage 2 hearing (the one held by Ms Kohli) to be postponed;
c. Not allowing the disciplinary stage 3 hearing to be postponed; and
d. Not interviewing additional witnesses as suggested by the claimant at stage 3

365. As a general point which relates to all of the above, we have found that the claimant's reasonable requests to defend himself were either ignored, or refused. As the claimant has shown that he made a protected disclosure, that there was a detriment, and that he was subjected to that detriment by the respondent, it is for the respondent to show on the balance of probabilities that he was not subjected to the detriment on the ground that he made a protected disclosure.

366. In relation to Mrs Joyce's involvement in the above matters, we conclude that she was not the person responsible for the decisions in relation to these points. As to the other matters, we consider that there were various individuals involved in those decisions at different stages.

367. In relation to not providing a further meeting with Gowling following the consideration of the pre-prepared statement, this occurred in May 2022, by which time Mr Sahota had moved into the Interim Director role and we conclude that on the balance of probabilities he was not involved in this decision. It was Mr Betts who communicated to the claimant that the claimant would not be permitted a further meeting with Gowling. However, the communication channel between the respondent and Gowling was through Mr Farmer and therefore it would have been Mr Farmer who would have liaised with Gowling to understand what had happened at that meeting.

368. As explained above Mr Betts did not have sufficient knowledge of the protected disclosure and therefore cannot have taken action on the grounds of it. However, Mr Farmer did have that knowledge. We note that the relevant test is not whether the reason, or even the principal reason, for subjecting the claimant to the detriment is the disclosure, but whether the action taken by the respondent was materially, in the sense of more than trivially, influenced by it.

369. We recognise that Mr Farmer had been involved in decisions relating to the process with Gowling back in December 2021 (for example he refused the claimant's request for a solicitor but agreed to a neutral venue). Mr Betts became involved in the investigation as commissioning officer around February 2022. Having reviewed the documents in the Bundle, we cannot see anything to suggest that Mr Farmer had an active involvement in decisions relating to the claimant after Mr Betts became involved other than to send on the appendices from the report to the claimant later in 2022.

370. On that basis we consider that the decision taken in May 2022 not to permit the claimant to meet with Gowling again was taken by Mr Betts, and therefore the claimant's claim fails in this regard.

371. Turning to the decisions not to allow the disciplinary stage 2 hearing (the one held by Ms Kohli) or the stage 3 meeting to be postponed, and not interviewing additional witnesses at stage 3. As disciplinary hearers, Ms Kohli and Mr Kitson were certainly involved in the decisions not to postpone those meetings. They lacked the requisite knowledge of the protected disclosure. Mrs Joyce was also involved in those decisions as the relevant

HR support, however we conclude that she has shown that her input into this matter was on the basis that she considered that she was complying with the respondent's procedure and custom and practice and it was not materially influenced by the protected disclosure.

372. As to not interviewing additional witnesses generally, we consider that the reason that this was not done was because Mr Kitson did not think about doing this. In any event, it was Mr Kitson who decided to dismiss the claimant without interviewing any further witnesses and he lacked the requisite level of knowledge of the protected disclosure as set out above.

373. Given that the list of issues did not specify the specific matters relied upon as "ignoring reasonable requests to defend himself", we would add that insofar as the claimant is referring to any failures to follow the respondent's policies and procedures which led him to feel that he could not defend himself, that is addressed separately below in relation to those policies and procedures.

374. The claimant's complaint relating to ignoring reasonable requests to defend himself fails.

Request for access to emails denied

Did the respondent do this?

375. The claimant's request for access to his email account was indeed denied, initially by Mr Sahota, later by Ms Dhillon and more generally by Mr Betts, Ms Kohli and Mr Kitson by them not engaging with the claimant's complaints that his previous requests had not been satisfactorily addressed (which included the request for access to emails). Instead he was initially told that he could have access to emails after his investigation meeting and not before by Mr Sahota on 13 May 2021 (page 300) (which in any case he then was not offered) and later Ms Dhillon offered the opportunity to specify search terms for an external search to be carried out on 19 August 2022 (page 500). Although that postdated his first claim, in his second claim he did make clear that the detriments he complained of were continuous and ongoing.

By doing so, did it subject the claimant to detriment?

376. The respondent has submitted that the claimant could have accessed the emails he wanted to see by submitting search terms as suggested by Ms Dhillon. However, we have found that to be insufficient. He was also not actually offered that until August 2022, after the meeting with Gowling and over a year after he initially requested access to his emails. In addition, he was not even offered that prior to the meeting with Gowling. In not giving the claimant personal (supervised) access to his email account, he was placed at a detriment.

If so, was it done on the ground that he made a protected disclosure

377. We address first Mr Sahota's refusal to permit the claimant to have access to his emails before the meeting with Gowling. This was communicated to the claimant on 13 May 2021. In evidence Mr Sahota suggested that the claimant could have given a list of the documents he wanted to the respondent. When it was put to him that this was not as good as being able to sit in front of your own email account to search for documents, he acknowledged this but suggested that there was an IT security issue to consider (which he did not explain to the claimant at the time) and that an approach whereby someone provides a broad list of documents was appropriate. As we have found, requiring the claimant to identify the documents (or search terms) without being able to sit as his computer and search for things himself, was insufficient.

378. We have considered what inferences can be drawn. Mr Sahota had told the claimant that he could have some kind of access after the meeting (when presumably the same IT security risks would be present), but not before. In any case he was not given satisfactory access after the meeting with Gowling in any case. No reason was provided at the time for why this could not be arranged before the meeting. Despite Mr Sahota suggesting in evidence that there is an IT security issue, Mr Farmer said in his witness statement said that the respondent has previously permitted individuals to use their office to browse and print hard copies of documents under supervision. This offer was not made to the claimant, despite him specifically requesting it and despite Mr Farmer saying in evidence that he thought that had been offered but that the claimant had not taken the offer up. Given Mr Farmer's evidence, we cannot accept Mr Sahota's submission that there was a security issue.

379. We also conclude that there was a general perception of the claimant as being a difficult person, and each time he raised an issue there was a presumption made that his request was unreasonable, without taking the time to properly explore what the request was exactly, or why he made it. There was no contact with him to ask "Why are these things important to you?" and instead his requests were repeatedly dismissed out of hand. The approach was heavy handed, dismissive and unsupportive. We consider that there were no reasonable grounds for drawing that conclusion about him, particularly back in May 2021 when he had only recently requested to postpone the meeting for the first time.

380. It is for the respondent to show the ground on which the failure to provide access to emails was done. We do not accept Mr Sahota's submission that what was offered was sufficient, or that there was an IT security risk in agreeing to what the claimant had requested. We do take into account that we have accepted that the respondent (and the governance team) does view the confidentiality of protected disclosures as important. We have also taken into account that Mr Sahota worked within a team where he would have been very familiar with the protection afforded to whistleblowers and the importance of not placing them at a detriment, and the fact that the claimant's whistleblowing complaint was referred for investigation promptly and appropriately (although the outcome was flawed). However, that does not necessarily mean that the respondent's actions are not (whether

consciously or subconsciously) materially influenced (in the sense of more than trivially influenced) by the disclosure.

381. In these circumstances, we conclude that the respondent has not shown on the balance of probabilities that the treatment was not materially influenced by the protected disclosure. For the avoidance of doubt, we are not concluding that Mr Sahota deliberately and consciously decided to treat the claimant in this way because he made a protected disclosure. However, firstly the respondent has not shown (as the burden of proof rests with the respondent) another ground on which the claimant was subjected to this detriment. Secondly, we note the general perception of the claimant as a difficult person and consider that his making a protected disclosure against his line manager's manager formed part of that overall picture, even if subconsciously. Therefore, the claimant's claim in this regard succeeds in relation to the treatment of him by Mr Sahota.

382. As explained, the claimant was not then provided with access to his emails even after the meeting with Gowling, and on 19 August 2022 Ms Dhillon (at page 500) only offered use of specified search terms in response to the claimant's further written request for access to his email account. Although this post dates his first claim, it pre-dates his second claim and given that the respondent raised it in proceedings to demonstrate (in its view) that the claimant had been given access, we consider that the parties both considered this to form part of the claimant's claim as presented in his second claim form.

383. We first consider whether Ms Dhillon knew of the claimant's protected disclosure, and of the detail of it. We did not hear evidence from Ms Dhillon during the hearing. As a member of the legal team involved in the claimant's case, we consider that on the balance of probabilities, she would have been informed of relevant matters relating to the claimant, including his protected disclosure and the detail relating to it. This is notwithstanding the respondent's general position on keeping such matters confidential, and is in light of Ms Dhillon's role and the need for her to be able to give legal advice in knowledge of all the facts (and we do not criticise the respondent for having communicated that to her).

384. Again, having found that the claimant was subjected to a detriment by the respondent, the burden is on the respondent to show the ground on which the failure to allow access to emails was done. We repeat the points made above that Mr Farmer indicated that supervised access could be given, and no reasonable basis has been provided for why it was not in this case. The respondent has not in our view discharged the burden of proof to show another ground for denying the claimant access to his email account, or demonstrated that the detriment was not materially influenced by the disclosure. The claimant's claim in this regard therefore succeeds.

385. More generally, we consider that there was an ongoing and continued refusal to engage with the claimant about his concerns about the process from May 2021 onwards. To the extent that this relates to Mr Sahota and Ms Dhillon, as explained above the claimant's claim succeeds. To the

extent it relates to Mr Betts, Ms Kohli and/or Mr Kitson, we have found that they did not have the requisite level of knowledge and the claim cannot succeed. We have seen nothing to suggest that Mrs Joyce (who is the other individual with knowledge of the protected disclosure) was involved in this matter.

No terms of reference provided policy disciplinary despite repeated requests

Did the respondent do this?

386. The respondent has sought to argue that the information provided to the claimant was sufficient to constitute terms of reference. We have found that it was not. Therefore this did occur as alleged.

By doing so, did it subject the claimant to detriment?

387. The respondent has also sought to argue that the claimant had sufficient knowledge about the allegations against him, and therefore that formal Terms of Reference were not required. Again, we have found that this was not the case and that Terms of Reference should have been provided. Although the policy did not specifically require this, it was clearly normal practice within the respondent. Apart from the fact that the Terms of Reference include details additional to simply what the allegations are, the claimant was not informed clearly at any stage how the various workstreams were applicable to him specifically. The respondent has themselves pointed out that the workstreams were wider than the investigation into the claimant. We consider that this materially impacted his ability to fully understand the allegations made against him and the severity of the allegations insofar as they related to him. This subjected him to detriment.

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

388. Again", there were multiple individuals within the respondent who denied the claimant Terms of Reference. This can only have been on the ground of his protected disclosure in respect of those individuals who knew of his protected disclosure, and who had knowledge of some detail of what the disclosure was about. We refer to our conclusions above as to who this was. We conclude however that the refusal to provide terms of reference (and/or a detailed explanations of the allegations specifically against the claimant) started at the time of the claimant's suspension (when they should have been provided without him needing to request them), and that the person responsible for this was Mr Sahota. We say this because, at that time, we conclude that Mr Sahota was liaising with Gowling about the investigation and that the process followed was being decided by him, and also because it is Mr Sahota who specifically told the claimant that he would not be given full details of the allegations before meeting with Gowling in his email on 13 May 2021 (page 300).

389. The respondent's submission as to the reason these were not provided is essentially that it was not necessary because the claimant had sufficient information from Gowling, and/or that it was not appropriate to provide

Terms of Reference as the investigation was wider than simply the claimant. We do not accept either of these arguments. The claimant did not have sufficient information from Gowling for reasons we have explained above, and in any case the fact that the claimant was asking for Terms of Reference shows clearly that he did not consider himself to have sufficient information. In relation to it not being appropriate because of the wider investigation, the fact that there is a wider investigation made it if anything more important to provide individual Terms of Reference, setting out how those wider allegations related to him specifically. We do not consider that the respondent reasonably believed these reasons to justify the refusal.

390. Having rejected the respondent's purported grounds for subjecting the claimant to the detriment, we conclude that the respondent has not, on the balance of probabilities, shown another ground which was not materially influenced by the disclosure for the detriment that the claimant was subjected to. We have considered whether the respondent has shown that they did not provide them because they mistakenly did not realise they ought to provide them (given that Mr Sahota was not in the HR team). However, Mr Sahota's evidence was not that he did not realise he ought to provide this, he instead argued that what was provided was sufficient (which it was not). Even if Mr Sahota did not realise that Gowling were doing the stage 2 disciplinary investigation, the claimant had by this time been suspended and there was an investigation into him specifically, so it would have been required regardless. We do again take into account that we have accepted that the respondent (and the governance team) does view the confidentiality of protected disclosures as important. We have also taken into account that Mr Sahota worked within a team where he would have been very familiar with the protection afforded to whistleblowers and the importance of not placing them at a detriment and the fact that the claimant's whistleblowing complaint was referred for investigation promptly and appropriately (although the outcome was flawed). However, we conclude that the respondent has not discharged their burden of proof to show another ground for subjecting the claimant to detriment and the claimant's claim in this regard succeeds.

391. For the avoidance of doubt, this claim succeeds in relation to Mr Sahota's refusal to provide Terms of Reference and not to the refusal of others (such as Mr Betts and Ms Kohli) as they did not have the requisite level of knowledge.

Not following the respondents' disciplinary procedure, such as the request for questions to be put to Claimant in advance of the meetings

Did the respondent do this?

392. Specifically in relation to having questions in advance, we do not consider that this was something that the respondent was required to do under the disciplinary procedure (nor was it reasonable for the respondent to have to do this). Therefore this did not occur as alleged.

393. More generally, however, the disciplinary procedure was not followed in a number of other respects. For example, it does require that the notification that there is a disciplinary case to answer should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare the case at a Disciplinary Hearing. There were also two stage 2 investigations, the claimant had indicated that he wished to call witnesses but this was not followed up, and the claimant was not provided with witness statements (as provided for in the policy). In addition, the allegation raised by the claimant in his Dignity at Work complaint that the process had subjected him to detriment because of a protected disclosure was not investigated, and so relevant issues were not addressed. There was therefore a failure to follow the disciplinary procedure. For the avoidance of doubt, in relation to failure to provide witness statements we address that separately below.

By doing so, did it subject the claimant to detriment?

394. The claimant was clearly subjected to detriment. The procedural failings resulted in him not fully understanding the case against him and feeling persecuted, and Ms Kohli/Mr Kitson not having full material available to ensure that they could complete full investigations before reaching their decision. This was in part because the claimant had not participated in the process due to the flaws in it, and in part because no one had told them the nature of the correspondence between the claimant and Mr Betts, or that he had specifically alleged that he was being put to a detriment because of a protected disclosure. As explained above, in the circumstances of this case having two stage two meetings was detrimental and not advantageous.

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

395. We first address the failure to incorporate the allegation that he had been subjected to detriment because of a protected disclosure. That was due to the failure of Mrs Joyce to pass this information on, which we have found above was due to inadvertent error. The respondent has therefore shown the ground on which this was not done, which was not materially influenced by the protected disclosure.

396. In relation to the other matters, the respondent's position is simply that it did follow the appropriate procedure. We have found that they did not. Furthermore, we consider that it should have been obvious to the respondent that they had not followed the disciplinary procedure appropriately in this case. Again, however, Mr Betts, Mr Kitson and Ms Kohli did not have the requisite level of knowledge and therefore cannot be said to have acted in this way on the ground of the claimant's protected disclosure. We consider that they acted this way because of their pre-conceived notion that the claimant was being difficult and/or because they were not passed sufficient information about the background and ongoing dispute over the process (the latter only in Ms Kohli and Mr Kitson's case, Mr Betts was fully aware of the dispute and involved in it). Whilst Mr Farmer was involved in the decision not to permit the claimant to bring a solicitor and regarding the arrangements for the meeting with Gowling (the neutral

venue, the claimant not wishing it to be recorded, and the decision not to provide witness statements as we find below), we have seen nothing to suggest that he had any substantive involvement in the decisions relating to the process other than the above (given, for example, that he thought the claimant had access to emails when he did not). We conclude that the process was driven initially by Mr Sahota, and then by Mr Betts.

397. However, specifically in relation to the fact that there were two stage 2 meetings, the respondent continued to argue at the hearing before the Tribunal that there was only one stage 2 hearing. We conclude that the respondent has actually shown that, although there were clearly two stage 2 hearings, the respondent genuinely did not intend that to be the case and that this was an error (albeit one that they have failed to accept occurred despite the clear evidence otherwise). We therefore conclude that the respondent has shown that the ground on which there were two stage 2 meetings was that an error occurred and Gowling framed their proposed meeting with the claimant as a stage 2 meeting, when in reality this was not intended by the respondent to be the case. The claimant's claim in relation to this specific point therefore fails.

398. Mr Sahota had the requisite level of knowledge of the claimant's protected disclosure. Having rejected the respondent's suggestion that it did follow the correct procedure, and the respondent having not shown another ground for subjecting the claimant to detriment, we conclude that this claim succeeds in relation to Mr Sahota, save in relation to having two stage two meetings. Again, in reaching that conclusion we took into account the role that the legal and governance team has in protecting whistleblowers however the respondent has nevertheless not shown that the protected disclosure did not materially influence the treatment of the claimant by Mr Sahota.

Failure to give source materials / evidence such as witness statements to the Claimant and instead provided a draft report or extracts of the same

Did the respondent do this?

399. The notes / transcripts from the interviews conducted by Gowling were not provided to the claimant and therefore this allegation occurred as alleged. In relation to the draft report, we find that it the draft report was initially provided to the claimant, because the final report was not to be produced until after the Maxwellisation process. We do also conclude however that there is no evidence to suggest that the claimant was then provided with a final version, or informed specifically that the final version remained the same as the draft version in respect of the matters pertaining to him. The claimant was not provided with the full report, because it related to other matters in addition to the disciplinary matters relating to himself.

By doing so, did it subject the claimant to detriment?

400. There was a clear detriment in not providing witness statements to the claimant, as he was unable to see what people had said about the matters

and the extracts from those interviews which were provided as appendices or quoted in the report itself were insufficient.

401. In relation to the use of the draft report during the disciplinary process (even once a final version was available to the respondent), we find that this in fact did not place the claimant at a detriment in itself, because the content would have been the same or extremely similar to the final report given the limited nature of the submissions he made during the Maxwellisation process.

402. He was not placed at a detriment by not being provided with the full report in so far as he is referring to not being provided with the rest of the report which related to other employees. This was not relevant to his case.

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

403. In relation to the witness statements, the burden is on the respondent to show the ground on which these were not provided to him. We consider that the decision not to provide the statements was made through either Mr Sahota or Mr Farmer (given that Gowling said that this came via instruction from the respondent and they were the key contact points), therefore there was knowledge of the claimant's protected disclosure.

404. The reason put forward by the respondent is that they asked Gowling not to disclose the statements because of the risk of witnesses collaborating before the claimant was interviewed. Once the claimant had been interviewed, they said that too much time had passed to send the notes to witnesses to check and therefore they did not send them to anyone. We have found that this was not a satisfactory reason. We bear in mind that we must not find that it was not the true reason simply because it was unsatisfactory, however we conclude in fact that the reasons given were not credible. We see no reason why the risks of collaboration were any higher in this case than in any other case in which multiple witnesses are interviewed and where there are competing accounts of events. We have not been provided with any credible reason why on this particular occasion a decision was made to withhold key evidence from the claimant, or why that was justified. We consider that this decision was taken by Mr Sahota and/or Mr Farmer (and by the time of the claimant's interview with Gowling and thereafter it must have been Mr Farmer as Mr Sahota had changed role and subsequently left the respondent's employment). On that basis the respondent has not shown another ground which was not materially influenced by the protected disclosure, the claimant's claim succeeds.

405. Again, in reaching that conclusion, we have taken into account that Mr Farmer and Mr Sahota's team would place on protecting whistleblowers, however the respondent has nevertheless not shown that this was not materially influenced (consciously or subconsciously) by the protected disclosure.

406. If we are wrong in saying that the claimant was at no detriment through the use of the draft, rather than final report, in relation to the provision of the

draft report rather than the final version, the respondent has shown that the reason why the original report was in draft version was because of the Maxwellisation process. The respondent has therefore shown that the ground on which the act was done, which was not influenced by the protected disclosure. This claim therefore fails.

407. However, the issue about the draft report also extends to the use of the draft report during the later disciplinary hearings with Ms Kohli and Mr Kitson, given that it is not clear whether everyone had the same version. However, we conclude on this point that the respondent has shown, albeit inadvertently, that there was a complete lack of clarity throughout the process regarding version control, even within the respondent's own witnesses. The same is true of the appendices and whether they were complete. We therefore find that the respondent has shown that the ground on which the failure to update the report with the final version was done was error and/or poor practice, rather than influenced by his protected disclosure. This claim again fails.

Dignity at work complaint and failed to act upon it within their prescribed policy and timeframe and a refusal to investigate core complaints meaning no reasonable progress made and lack of continuity and poor handling of the complaint

Did the respondent do this?

408. The respondent did refuse to act on one element of the dignity at work complaint, related to the claimant's whistleblowing complaint and his subsequent suspension and investigation, and failed to move it into the disciplinary process. The respondent also failed to act on it within the required timeframe, noting that it took from November 2021 until August 2022 for him to be sent Terms of Reference so that an investigation could commence. The complaint was, in relation to the timeframe, handled poorly. This therefore did occur.

By doing so, did it subject the claimant to detriment?

409. The time taken to commence the process placed the claimant at a detriment, in that first of all it meant that his complaint could not be resolved quickly and secondly it gave the impression that the respondent did not care about his complaint. The refusal to include the disputed allegation within his complaint led to the claimant not participating in the matter and to the Dignity at Work complaint being closed without being investigated. This again is a detriment.

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

410. In relation to the decision not to allow the disputed allegation to form part of his Dignity at Work complaint, we have found that this decision was, in itself, reasonable. The reason for this was because the allegation related to the ongoing disciplinary investigation and therefore it was more appropriate for it to be considered through that process. The respondent has shown the

ground for this decision and this was not influenced by his protected disclosure. This claim fails.

411. In relation to the decision not to take the claimant's Dignity at Work complaint forward because he was refusing to attend a meeting unless the disputed issue were added into the Terms of Reference, we have found that the parties had reached an impasse and that this was a reasonable decision in the circumstances. The ground on which the respondent reached that decision has been shown by the respondent to be because the claimant was refusing to participate in the process. This was not materially influenced by his protected disclosure and therefore this claim fails.

412. The issue was that it was not moved into the disciplinary investigation and therefore remained uninvestigated. It was Mrs Joyce who should have done so, and she had knowledge of the claimant's protected disclosure and some level of detail about it. However, we conclude that Mrs Joyce has shown that the reason that this did not happen was inadvertent error. We accept her evidence that she thought she would have done this at the time, although she could not recall it specifically and we have found that this did not happen. Therefore, the respondent has shown that the ground on which this detriment occurred was not influenced by the protected disclosure.

413. In relation to the delay in dealing with the Dignity At Work complaint, we have been advised that the delay was caused by the industrial relations team and by someone who had left that team not passing on the relevant information, and then it taking some time to then progress the matter once this was realised. We accept the respondent's explanation that it was the industrial relations team that caused this delay and not anyone who had involvement in the other matters in the claimant's claim. We conclude that the respondent has shown that the ground for the delay was errors in the industrial relations team and, whilst we repeat that the level of delay was wholly inappropriate, it was not on the grounds of the claimant's protected disclosure.

Instigation and continuation of form disciplinary procedure

Did the respondent do this?

414. The respondent accepts that it instigated and continued a disciplinary procedure into the claimant's conduct, which resulted in his dismissal for gross misconduct. This therefore occurred as alleged.

415. For the avoidance of doubt, this issue relates specifically to the decision to start, and continue, a disciplinary procedure, and not to the procedure actually followed, which we have addressed above.

By doing so, did it subject the claimant to detriment?

416. The process led ultimately to his dismissal, so clearly placed him at a detriment. In addition, the decision to instigate and continue his disciplinary procedure meant that he was suspended from work for a lengthy period,

and he was distressed throughout that period by the fact that he was subjected to the disciplinary procedure. Whilst the act of dismissal itself cannot amount to a detriment by the employer, the steps leading to that dismissal can.

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

417. The initial decision to instigate an investigation into the claimant's conduct was taken in March 2020 at the latest (when Gowling was instructed). This predated the claimant's protected disclosure by a number of months. In those circumstances the respondent has shown that the decision to investigate the claimant (with a view to potential subsequent disciplinary proceedings depending on the outcome of that investigation) was not on the ground of the protected disclosure. We would also note that we find that, given the allegations that had been made about the claimant, they were sufficiently serious to warrant formal investigation.

418. As to the decision to move from a wider investigation by Gowling into a specific disciplinary investigation into the claimant (accompanied by suspension), as we have found, the reason for suspension in April 2021 was not on the ground of the protected disclosure. We conclude that the respondent has shown that the decision to move to a disciplinary investigation was made based on the initial findings of the Gowling report, which were not made on the ground of the protected disclosure given the ethical wall in place (we note that the suspension decision was related to the timing of the re-procurement exercise, but we conclude that relates to suspension rather than the wider decision to investigate the claimant). There were genuine allegations which needed to be investigated. The claim therefore fails in this regard.

419. As for the continuation of that disciplinary procedure, it remained reasonable to continue to investigate the allegations until a decision was reached at stage 3 of the process. This took some time for various reasons as outlined in our findings of fact above, however we conclude that the respondent has shown that the underlying decision to continue to investigate the matters was on the ground that it believed that there remained a genuine conduct issue to investigate. The claim therefore fails in this regard.

Summary in relation to detriment

420. We have therefore found that the claimant was subjected to detriment by the respondent on the ground that he made a protected disclosure in relation to:
    a. Not being given access to his emails by Mr Sahota and/or Ms Dhillon;
    b. Not being given Terms of Resistance and/or documentation providing sufficient information about the allegations against him by Mr Sahota;
    c. The respondent not following its disciplinary procedure in relation to Mr Sahota; and
    d. Not being provided with witness statements by Mr Sahota and/or Mr Farmer.

Time limits

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before the claim was presented, may not have been brought in time.

Was the complaint of breach of 47B, made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:

1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of*
2. *If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*

421. ACAS early conciliation commenced in relation to the first claim on 20 December 2021 and in relation to the second claim on 28 June 2023. The relevant last date on which any act would be in time was 21 September 2021, and 29 March 2023 respectively.

422. The acts which have been found to be detriments on the ground of protected disclosure commenced at the time of his suspension on around 12 April 2021 when he received written communication of his suspension, as at that point the Terms of Reference should have been provided.

423. In order to consider whether there was a series of similar acts or failures, the last of which is in time, it is necessary to consider what the acts or failures to act were and when they took place (as opposed to any continuing consequence of those failures). In this case, the matter is further complicated by the fact that in some cases we have found that a number of people subjected the claimant to a particular detriment, but that only the acts of some individuals have been found to have been on the ground that the claimant made protected disclosures, and therefore we must disregard the acts of those other persons when considering whether the claim was presented in time.

424. We consider that the detriments that we have found are not confined to isolated dates on which decisions were communicated to the claimant. Rather, because the claimant continually refused to engage with the process until such time as his concerns were addressed, and the respondent continued not to address those concerns and/or to refuse his requests, we consider that these are acts which continued over a period of time (and separable from the continuing consequences of those acts). Therefore, the time limit begins to run at the end of that period.

425. In relation to Mr Sahota's involvement, he remained involved until December 2021, and therefore the claimant's claims in relation to him were presented in time, given that ACAS early conciliation started on 20 December 2021.

426. In relation to Mr Farmer's involvement, this relates to the decision not to provide witness statements to the claimant. This commenced around the summer of 2021 when others were first interviewed by Gowling (we cannot say the exact dates because we were not told the dates of the various interviews and of course no notes have been provided of them). That refusal continued all the way until the claimant's dismissal, because even as late as 17 April 2023 this was being raised as a concern in the letter to Ms Cadman. Although by that time Ms Kohli and/or Mr Kitson were holding the relevant disciplinary meetings, we consider that it remained Mr Farmer who decided not to share the notes. We conclude this on the basis that it was Mr Farmer who had the relationship with Gowling and the wider oversight of Project Stockholm. ACAS early conciliation in respect of the second claim commenced on 28 June 2023 which is within three months of the act complained of.

427. In relation to Ms Dhillon's involvement (specifically in relation to access to emails), we cannot see any evidence of making any decisions relating to his access to email after August 2022. Given that his first claim had already been submitted the relevant time limit must relate to his second claim, in respect of which ACAS early conciliation did not commence until 28 June 2023. However, we consider that, when viewed overall, the refusal to grant access to email, the failure to provide Terms of Reference, the failure to provide witness statements and not following the disciplinary procedure, are all part of an act extending over a period, namely not following appropriate processes, not following the disciplinary process and/or ignoring the claimant's requests, even though different people were involved at different stages (but discounting those who did not have the requisite knowledge of the protected disclosure). Therefore, the claimant's claims in this regard were all presented in time.

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

428. We do not need to determine this based on our findings above, however if we are wrong on any of the above, in relation to matters occurring prior to the commencement of ACAS early conciliation in respect of the first claim, we would also conclude that it was not reasonably practicable for the claimant to have presented his claim within the applicable time limit.

429. The claimant first reported sickness absence on 14 May 2021, very shortly after Mr Sahota had written to him refusing various requests made by the claimant (page 300). He remained absent until 1 December 2021. Whilst we do not have much medical evidence from his period of absence, the claimant has shown that his ill health was sufficiently severe that the respondent did not attempt to invite him to the investigation meeting until his return to work. The claimant had also explained to Ms Cockburn in July 2021 that he had not picked up voicemails for a number of days, and even in December 2021 he told her that he was mentally struggling and was building himself up to a position where he did not dread opening emails.

430. We conclude that, in these circumstances, it was not reasonably practicable for the claimant to present a claim (or undertake ACAS early conciliation) between 14 May 2021 and 1 December 2021.

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

431. The claimant returned to work on 1 December 2021 and commenced early conciliation on 20 December 2021. However it is also important to bear in mind that, although he returned to work at the start of December, he was only fit to work limited hours at that stage and was not fully recovered. In those circumstances, we conclude that a period of just under three weeks before commencing ACAS conciliation was entirely reasonable. On that basis, the claim was presented within such further period as the Tribunal considers reasonable and the relevant time limits are therefore extended such that the claim has been presented in time in respect of those matters set out in that first claim.

Unfair dismissal

Automatic Unfair Dismissal

Was the reason or principal reason for the claimant's dismissal the fact that the claimant had made a protected disclosure?

432. We address automatic unfair dismissal first, before ordinary unfair dismissal. The decision to dismiss the claimant was made by Mr Kitson. At the time of the claimant's dismissal, we have found that he had knowledge that the claimant had made a disclosure, but not the detail relating to it. On that basis, he did not have sufficient knowledge of the claimant's disclosure such that the dismissal could be by reason (or principal reason) of it, in line with **Nicol, above**.

433. We have also considered whether this could be a situation where someone within the hierarchy above the claimant, who did have the requisite level of knowledge, might have influenced Mr Kitson because of their knowledge of the protected disclosure so that Mr Kitson dismissed the claimant believing it was for another reason, when in fact the reason (or principal reason) was the disclosure. We find that this was not the case, nor did anyone else with the requisite knowledge that was involved in the investigation manipulate Mr Kitson in such a way. We conclude that Mr Kitson genuinely believed the claimant to be guilty of (gross) misconduct and this is the reason why he dismissed the claimant.

434. The claimant's claim in this regard therefore fails.

(Ordinary) Unfair Dismissal

1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to

decide whether the respondent genuinely believed the claimant had committed misconduct.

435. We conclude that the reason for the claimant's dismissal was conduct, which is a potentially fair reason for dismissal. We consider that Mr Kitson dismissed the claimant based on a genuine belief that the claimant had committed gross misconduct. As we explain further below, we do not consider that the claimant had committed misconduct of such a severity to justify his dismissal, however we accept Mr Kitson's evidence that he believed the claimant to have done so.

2. *If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.*

436. First of all, we note that the respondent is a large organisation, with internal HR, legal and governance functions, and around 1200 employees at the time that the respondent submitted their response to both claims. The respondent therefore has access to significant resources when dealing with matters relating to employee issues, including conduct, grievance and whistleblowing matters.

Whether there were reasonable grounds for that belief

437. Mr Kitson relied on a very detailed report from an external law firm which had concluded that there was a case to answer in relation to the claimant's conduct. We conclude that he relied on that report in good faith. However, we also conclude that he took the report at face value and did not examine its findings in any detail to satisfy himself that the conclusions reached were supported by the evidence. He only spent two to three hours reviewing the papers: bearing in mind that the report itself was around 50 pages with around 450 pages of appendices on top, he cannot truly have analysed all of the findings. He also relied on Ms Kohli's findings, however these were tainted in the same way as she had also relied on the report without questioning its contents.

438. Had Mr Kitson (or Ms Kohli) spent more time considering the report's findings in detail, we conclude that they would have spotted that some of the inferences drawn did not stand up to scrutiny. They would also have noted that Mr Flaherty was not the claimant's direct report, contrary to what the report says. In addition, they might have discovered other relevant information, such as that the claimant had in fact sought assistance from the audit team in the Contractor 1 dispute but the respondent had not provided that assistance.

439. We also conclude that the Gowling findings were not considered in the context of the claimant's particular role and the duties he had within that role. As explained above, there was an assumption made that, because he

was the overall budget holder, he had involvement in day to day invoices and would have had direct contact with the Subcontractors. However, due to the claimant's workload, this was not the case. We appreciate that the claimant failed to attend his investigation and disciplinary hearings and therefore that this information was not shared by the claimant, however it could have been obtained by interviewing the claimant's colleagues / direct reports about the nature of their roles and their specific duties. We know that Gowling interviewed some of his team, but as the transcripts were not released this was not something that would have been apparent. Information provided by Mr James was also taken at face value, when it could have become apparent from interviews with the claimant's colleagues that there was negative history between the claimant and Mr James and that Mr James might not have been impartial.

440. Overall, whilst we conclude that Mr Kitson had a genuine belief in the claimant's misconduct, we conclude that there were not reasonable grounds for that belief. We conclude that it was reasonable for Mr Kitson to have the belief that the claimant had acted in an ill-advised manner on occasion, for example being late in disclosing his sponsorship arrangements and not sense-checking his actions in relation to his daughter with the gifts and hospitality team, however there were no reasonable grounds for believing that he was guilty of serious or gross misconduct. We conclude that Mr Kitson, Ms Kohli and Gowling all undertook the matter with some subconscious confirmation bias: the claimant was portrayed to them as someone who was being difficult and they were also presented with an extremely detailed report from an external law firm. In those circumstances, we consider that they subconsciously assumed that (a) what was in the report must be correct and (b) that the claimant was simply being difficult in not presenting his case to them, and therefore that the claimant had committed the misconduct in the way alleged.

Whether the respondent had carried out a reasonable investigation at the time the belief was formed

441. We find that a reasonable investigation had not been carried out. On the face of it, there was an extensive and very lengthy report from an independent law firm. In addition, on the face of it, the claimant had failed to attend the relevant meetings and therefore the respondent had to make a decision in the absence of a detailed interview with the claimant.

442. However, whilst the report from Gowling was extremely detailed, there was a failure to investigate the claimant's allegation that the suspension and investigation into his conduct was detrimental treatment following a whistleblowing complaint. This was a key allegation made by the claimant and, whilst Mr Kitson cannot be blamed for not investigating something that he was not asked to investigate, nevertheless it cannot be said to be a reasonable investigation when a key relevant issue had not been investigated.

443. At the time of dismissal, the claimant's representative had indicated that they wished to call additional witnesses. No attempt was made to find out

who these were or what relevant information they might be able to provide before the decision to dismiss was taken. This should have been done. Both Mr Kitson and Ms Kohli took the Gowling report at face value and assumed no further investigations were required.

444. From the information that Gowling had uncovered during their investigation, it was clear that Contractor 1 had put forward that assessment days were required before an offer of a placement would be made. No attempt was made to investigate this further and find out from Contractor 1 whether the claimant's daughter herself had attended an assessment day (and had this been investigated the respondent would have learned that she had).

445. More generally, we conclude that the decision to dismiss the claimant was taken without the benefit of key evidence, which the claimant could have provided. Whilst the claimant did not attend / participate in the various meetings or provide comments on the draft Gowling report, we conclude that the reason for this stems from the respondent's mis-handling of the process throughout. Therefore, although this relates to the claimant's failure to attend, it nevertheless arises out of the failings of the respondent and constitutes a failure to carry out a reasonable investigation.

446. Therefore, the respondent had not carried out a reasonable investigation at the time the belief was formed.

Whether the respondent otherwise acted in a procedurally fair manner

447. We conclude that there were a significant number of procedural failings in the process followed by the respondent, as follows:

    a. The time taken by the respondent at each stage of the process, including the time taken particularly by Mr Betts to respond to correspondence received from the claimant about the process and the length of time taken for the initial investigation before deciding to suspend the claimant. Whilst we appreciate this was a very complex investigation with a large number of documents, we find that it was outside the range of reasonable responses for it to take over a year to even get to the stage of deciding to suspend the claimant. We would add that we also accept that the claimant caused a number of delays to the process, but that does not detract from the fact that the respondent caused a number of delays.

    b. The reasons provided to the claimant to justify his suspension did not include a key reason, the re-procurement exercise.

    c. His email account was de-activated during his suspension.

    d. There was an assumption from the outset that his motor racing was a business and not a hobby.

    e. The claimant was informed that Gowling were carrying out "an investigation" initially, but not what type of investigation. Then, in the

letter dated 26 April 2021 from Gowling, the claimant was specifically informed that Gowling were carrying out a Disciplinary Stage 2 Investigation Meeting. This was referenced multiple times and meant that the claimant was subjected to a disciplinary investigation by an external law firm, which was not normal practice and which caused him distress. It also meant that he was then subjected to a second Stage 2 process with Ms Kohli because the respondent did not accept that the Stage 2 process had already been carried out by Gowling.

f. He was not provided with Terms of Reference. In addition to not being provided with the specific template used by the respondent (and all the information that would ordinarily be contained within that template), he was also not provided more generally with sufficient detail to enable him to understand how the individual workstreams related to him specifically.

g. He was not informed that some of the workstreams were not being pursued against him individually during the course of the disciplinary process (when the scope of the investigation into the claimant was reduced to workstreams 2 and 4 alone), which should have been done under the respondent's Disciplinary Policy and Procedure.

h. Workstream 1 related to performance and not conduct in any event.

i. Despite his requests, he was not given access to his email account to search himself for specific emails and was only allowed to provide search terms for the respondent to carry out the search for him. It would have been reasonable to require him to be supervised during that access, but what was offered to him was insufficient.

j. He was not provided with notes from the various meetings that Gowling conducted, either in relation to the meeting with himself or with the other witnesses. In addition, the witnesses themselves were not provided with copies of their own notes, despite a number of them having been told that they would receive them.

k. At the meeting with Gowling, the claimant provided a pre-prepared statement and commented that email exchanges were not resolving the matter. Mr Betts dealt with that by sending an email back (which is what the claimant had said was not resolving things) to the claimant which did not in fact respond to the points within that statement. He was also denied the opportunity to have a further meeting (which the claimant had said he was happy to attend once his queries were resolved).

l. Only providing the claimant with 12 days initially to review the report and appendices, and then only extending the deadline by approximately one week and not the two requested without Mr Betts having any understanding of the length of the appendices requiring review.

m. Ms Kohli was not aware that Mr Betts was the commissioning officer, which means that Ms Kohli must not have been provided with the various correspondence between Mr Betts and the claimant. Had she been provided with that information, she would have had an understanding of the many procedural issues which the claimant had raised and which had not been satisfactorily addressed. She was also not aware that he had not been provided with Terms of Reference.

n. As explained above, there was a failure to move the element of his Dignity at Work complaint which related to the disciplinary process into that disciplinary process.

o. The general lack of clarity about documents / version control. It is astonishing that no one was able to confirm definitively whether the draft or final version of the report was used in the disciplinary process, or whether the appendices provided to the claimant were the same as those in our hearing file.

p. The stage 2 disciplinary hearing with Ms Kohli was not postponed despite the claimant's representative providing clear and reasonable grounds for requesting to do so.

q. The stage 3 disciplinary hearing was not postponed despite Mr Kitson accepting in evidence that there was no particular urgency to concluding the matter (other than the time that had passed since the investigation commenced) and despite the respondent having delayed various matters (as well as the claimant) throughout the process. Whilst the claimant's representative was at fault for not requesting (or advising the claimant to request) a postponement earlier than was the case, there was still a valid reason for the postponement request and at the time of the hearing, there were unanswered questions raised by the claimant and/or his representative.

r. Mr Kitson was aware of the complaint raised by Ms Francis to Ms Cadman on 17 April 2023. Ms Cadman had said that the claimant would have the opportunity to discuss these concerns at the hearing. Whilst the claimant did not attend and therefore that discussion could not happen, Mr Kitson could and should nevertheless have considered the points raised in that correspondence before reaching his decision. The fact that he reached his decision on the same day as the hearing, when that complaint letter was several pages long, suggests that he did not in fact consider these points.

s. Mr Kitson only spent two to three hours reviewing the evidence, which was insufficient time in the context of a 50 page report and 450 pages of appendices (or thereabouts).

t. Generally speaking, his requests for information or support were dismissed out of hand without being properly considered. For example, whilst he had no right to bring a solicitor to the meetings, had the respondent engaged in a discussion with the claimant about why

he wanted to do this it might have revealed his concern about being subjected to a disciplinary investigation by a third party solicitor, which could have brought to light some of the other procedural issues.

u. The tone of the correspondence which was sent to him, particularly by Mr Betts, was inappropriate. It was clear that the respondent had pre-formed a view of the claimant as being difficult and obstructive, without trying to get to the bottom of what his issues and concerns actually were.

v. We consider that there was an over-reliance on Mr Sahota and/or Mr Farmer to drive matters forward, rather than utilising the internal HR team. We conclude that this was because the matter commenced as a whistleblowing matter, however it had progressed to a disciplinary investigation and as such we consider additional HR advice could have avoided some of the issues which arose.

Was dismissal within the range of reasonable responses?

448. In considering this, we must not substitute our own views of what happened, or say what we would have done, but instead consider the range of reasonable responses available to the employer.

449. We conclude that it was not within the range of reasonable responses to dismiss the claimant. The dismissal was outside the range of reasonable responses, both in terms of the decision reached and the procedure followed. The procedure was extensively flawed throughout as outlined above.

450. In relation to the decision to dismiss the claimant, we conclude that the claimant's conduct was on occasion ill advised, but not to the extent that it would be within the range of reasonable responses to dismiss him. Specifically, we consider that it was ill advised to have sponsorship arrangements with Subcontractors that his direct reports were dealing with, although we acknowledge that these were Subcontractors rather than Contractors, and the claimant was rigorous in taking steps to ensure that he was not placed in a position of conflict, for example by making sure he did not attend certain meetings which Ms Ager conducted. He also made his manager aware of the arrangements. There was a breach of policy in that the claimant was late in disclosing his sponsorship arrangements on the Gifts and Hospitality register, however there was no attempt to hide anything and we heard that Mr James himself was found to be in breach of that policy in his own dealings with Contractor 1 (and we heard nothing to suggest that any formal action was taken against him for that breach). There was no intent to hide any of his conduct on the claimant's part, and to the contrary he had photos on the wall and appeared in the respondent's internal magazine regarding his motor racing, including photos of sponsors. In relation to his daughter, we conclude that she did follow a proper process, however it would have been prudent for him to have discussed the matter with the compliance team to ensure that he did not need to declare it. Again, we find that he was not trying to hide anything, it just did not occur to him.

451. In those circumstances, we find that the conduct issues were minor in nature and therefore the range of reasonable responses would not extend beyond, at most, a low level warning. Furthermore, the claimant's dismissal was tainted by the detriments he was placed at on the grounds of having raised a protected disclosure. Whilst the decision to investigate the claimant initially was a reasonable one, by the time of the claimant's dismissal sufficient information was available to the respondent such that it was unreasonable to have viewed the claimant's conduct as amounting to gross misconduct.

452. For the avoidance of doubt, the Tribunal also wishes to make clear that Ms Tolley had no part in causing the claimant's dismissal: we note this because it was clear to the Tribunal during the hearing that the claimant was concerned for his daughter's wellbeing and personal reputation.

453. The claimant's claim for unfair dismissal succeeds.

454. A remedy hearing will be listed in due course and separate correspondence will be sent to the parties regarding that.

Employment Judge EdmondsEdmonds

27 June 2024

This anonymised version approved on 20 March 2025