



EMPLOYMENT TRIBUNALS

Claimant: Mr J Cowley

Respondent: Booker PLC

HELD AT: Liverpool

ON: 27-30 March 2017
3 and 6 April 2017
24-26 April 2017

BEFORE: Employment Judge T V Ryan
Mr P Gates
Ms F Crane

REPRESENTATION:

Claimant: Mr G Powell, Counsel
Respondent: Mr N Grundy, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's application made on the first day of the final hearing to amend his claim to include allegations that he made protected disclosures on 30 December 2015 and 8 January 2016 as a result of which he suffered detriment is disallowed in the interests of justice.
2. The claimant's application to make late submissions by written representation received by the Tribunal on 25 April 2017 is refused in the interests of justice.
3. The claimant made a protected disclosure on 18 December 2015 in a letter addressed to "Babita/Jason" and entitled "Re response to disciplinary investigation" (pages 216-217 of the trial bundle) ("the disclosure"); he did not make any other protected disclosures.

4. The respondent did not subject the claimant to any detriment on the grounds of his having made the disclosure.

5. The claimant's claims that he was subjected to detriment in respect of the disclosure and his claims that he was subjected to detriments on the grounds of other protected disclosures made by him to the respondent all fail and are dismissed.

REASONS

The parties agreed a List of Issues at the outset of the hearing, being one based upon a draft initially prepared by Mr Powell. That document was entitled C3, and in consequence of Mr. Grundy's and my clarifications now reads as follows:

1. The Issues

- 1.1 Has the claimant established that it is more likely than not that he made the following disclosures:
 - 1.1.1 Commencing on 27 November 2015 and over subsequent days including 3 and 11 December 2015 the claimant reported to several of the respondent's managers (including Graham McGregor, Jason Kelk, Jon Nixon), the details of his concerns that, inter alia, sales of alcohol had been made below the necessary duty. [Sale of alcohol at below duty plus VAT is or can be contrary to the legal obligations which some licensees in some circumstances are under pursuant to Article 2 of the schedule to the Licensing Act 2003 (Mandatory Conditions) Order 2014 and to sections 19, 19A of the Licensing Act 2003 and/or is or can be a criminal offence contrary to sections 136 and 137 of the Licensing Act 2003; mistakenly all concerned here believed for some time that these provisions applied in their circumstances as described below].
 - 1.1.2 By a letter dated 18 December 2015 addressed to Jason Kelk and Babita Sharma (and sent by email to Mr Nixon) of the respondent the claimant raised detailed and specific disclosures that alcohol had been sold by the respondent below the necessary duty. He attached supporting documentation. [This is referred to in the judgment at paragraph 3 above and subsequently as "the disclosure"].
 - 1.1.3 On 19 January 2016 the claimant complained that the respondent had not fulfilled its responsibilities to investigate the concerns he had raised that alcohol had been sold by the respondent below the necessary duty, nor addressed those matters by not responding to his whistle-blowing concerns.
 - 1.1.4 On 19 January 2016 the claimant complained that his disciplinary and performance sanction was a whistle-blowing detriment and in breach of the respondent's obligations under its policies.

- 1.1.5 By a letter dated 6 February 2016 the claimant complained to the respondent's chairman, outlining his whistle-blowing and the detriments suffered, including as to the effect on him and his health.
- 1.2 Were these protected disclosure(s) and when and to whom were they made? (The respondent concedes that the claimant's letter dated 18 December 2015 ("the disclosure") was a protected disclosure).
- 1.3 Were the disclosures (qualifying) disclosures in accordance with section 43B Employment Rights Act 1996 ("ERA")? Has the claimant established that it is more likely than not that he held a reasonable belief that the disclosure tended to show that the respondent was in breach of a legal requirement, and a reasonable belief that disclosure was made in the public interest?

Public Interest Disclosure Detriments

- 1.4 Has the claimant established that it is more likely than not that the respondent subjected him to a detriment (namely did it "do" an act or deliberately failed to do an act) as alleged in the claimant's ET1 claim form at pages 14 and 15 of the trial bundle, and the further and better particulars of 26 October 2016 which appears at page 29A of the trial bundle (to which all further page references refer unless otherwise stated)? Did the treatment result in detriment(s) to the claimant?
- 1.5 Was the act or deliberate failure to act or not done by the respondent "on the ground" that the claimant made a protected disclosure?
- 1.5.1 Was the reason for the act or deliberate failure to act the protected disclosure(s)? Has the respondent established that it is more likely than not that the act or deliberate failure to act was done on the grounds of a matter which was not a protected disclosure, namely that the claimant was reasonably suspected of a failure in performance or conduct?
- 1.5.2 Did the protected act materially influence, in the sense of being more than a trivial influence, the respondent's treatment of the claimant?
- 1.5.3 Which act or omission was on the ground of which disclosure?

Remedy for PIDA Detriment Claims

- 1.6 What amount should be awarded, if any, for injury to feelings and/or personal injury?
- 1.7 What amount should be awarded, if any, for financial and/or other losses? Can the claimant recover special losses in respect of legal advice received unconnected to advice received in respect of the proceedings?

- 1.8 Is the claimant entitled to aggravated and/or exemplary damages? If so, what amounts are appropriate?
- 1.9 Should there be a costs award?
- 1.10 The Tribunal determined and resolved all of the above issues with the exception of those in relation to remedy and costs appearing at paragraphs 1.6-1.9 above.

2. The Facts

2.1 Cast List:

Adams, Mark – Territory Manager

Critchley, Janet – Human Resources Officer

Cattrall, David – Regional Director

Davies, Christopher – Customs & Excise Duty Manager (“Duty Manager”)

Evans, Alan – Chester Area Manager

Kelk, Jason – Head of Sales at Classic – witness

MacGregor, Graham – Regional Sales Manager

McKee, Charlotte, Pricing Manager

Mallows, Rebecca – Head of HR – witness

Nixon, Jon – Director of Training Designate for Classic Drinks - witness

Price, Chris – Finance Manager/Grievance Officer – witness

Ridge, Mr. – Group Director/Grievance Appeal Officer

Read, Adam – Accounts

Sharma, Babita – HR Manager Classic – witness

Speakman, Sam – IT Manager

Turner, Ingram – IT Analyst

2.2 Abbreviations etc:

Duty – This is a reference to tax due to HMRC in respect of alcohol sales. Retailers are subject to a legal obligation not to sell alcohol at prices below duty, and this is a public policy matter. It is a criminal offence for retailers to sell products below duty. It is not a criminal offence for wholesalers to do so and at all material times it was not a criminal offence for the respondent at its Booker stores to do so, albeit in the early stages of the

chronology detailed below it was the understanding of both parties to these proceedings that any sales below duty on its part would be in breach of legal obligations and would amount to criminal activity. Mr Chris Davies was the Duty Manager and his responsibilities related to issues with HMRC as opposed to him being the “on duty” manager.

JDE – Classic’s former computer system

MIDAS – The respondent’s computer system

TPD – Third Part Distribution

SKUS – Stock Keeping Unit

SWP – Wholesale Selling Prices

The Project – Following the purchase of Classic Drinks Limited by the respondent in October 2010 there was a process of integration, including in respect of supply chains. In consequence of this and in an operation entitled “The Project” Classic Drinks Limited (“Classic”) was to sell off products that were no longer to form part of the integrated product line, including some 600-700 brands of wine/spirits/beers and soft drinks with an estimated value of £362,000. This Project commenced in February 2014 under the management of Mr Cattrall with the claimant being responsible for “product range and price tasks”. The anticipated completion date for The Project was 21 November 2014 but the target date was not met. The final stage of The Project was to sell the discontinued product lines at the Chester branch. This sale necessarily involved discounted pricing according to a budget such that items would be sold below cost but not at a loss, and in any event not below duty (see above).

- 2.3 The respondent is a large employer with some 13,000 employees and gross sales in 2016 of somewhere in the region of £5billion worth of products including alcohol. It operates from numerous Cash & Carry sites. It has directors, regional and area managers and professional HR staff. It has available a grievance procedure (page 30), disciplinary procedure (page 35) and an ethical policy (page 44). It issues written statement of terms (page 59) in respect of the key performance indicators are shown at page 66A.
- 2.4 The claimant commenced his employment with Classic in October 2012 and he was promoted subsequently to Sales Support Manager. He was based at Haydock. Classic was bought by the respondent in 2010 and the claimant’s employment transferred albeit during the material time he remained within the Classic business.
- 2.5 The claimant's line manager was Mr Kelk. Mr Kelk’s line manager was Mr Nixon. Mr Nixon’s line manager was Mr Roper. The Tribunal did not hear evidence from Mr Roper.

- 2.6 It was the claimant's responsibility to see The Project through successfully as part of Classic's integration into the respondent as delegated to him by Mr Cattrall. Throughout the duration of The Project emphasis was placed by the respondent on the importance of not selling alcohol products below duty. This message was repeatedly emphasised and reinforced. The discounted sale of Classic's alcoholic product ranges at Chester was towards the end of The Project.
- 2.7 Prior to the substantive events leading to this litigation the respondent's management, and particularly Mr Nixon, had some concerns over the claimant's performance, and particularly over perceived delays and errors. The potentially significant matter that caused Mr Nixon concern prior to the incidents immediately giving rise to these proceedings were errors and delays on the part of the claimant in the production of promotional brochures. The promotional brochures contained details of Classic's products for sale at advertised prices, but on occasions they would be produced with patent errors. They were produced monthly. The production of brochures formed part of the claimant's KPIs. Added significance was given by the respondent to the Classic brochure upon integration into the respondent's business because of the obvious risk of inconsistencies between the information contained in the Classic brochure and the information published by the respondent.
- 2.8 In November 2014 the brochure contained 62 pricing errors and similarly there were errors in the brochures for December 2014, April 2015 and October 2015, the latter including an advertisement for the sale of Jack Daniels whisky at £5.99 per case instead of that price per bottle. Production of the brochure was the ultimate responsibility of the claimant. Collectively I will refer to this as "the brochure issue".
- 2.9 On account of the brochure issue Mr Kelk looked into the claimant's performance with regard to brochure production and prepared an email to send to the claimant which appears at pages 131-132. The email identified some problems and the draft conclusion reached by Mr Kelk was to set out a number of recommendations and confirm that he did not intend to take the matter to a disciplinary procedure for underperformance, although a note would be kept on file in case there were any other major issues with the brochure in the future. Mr Kelk sent that draft to Miss Sharma (HR) for approval on 12 October 2015. Miss Sharma did not return to Mr Kelk in a timely manner and Mr Kelk did not chase up the issue with her; in the meantime Mr. Kelk did not send that or any similar missive to the claimant but let matters lie. The brochure issue and the claimant's performance in that regard were effectively deferred and unresolved. The brochure issue was a genuine concern to the claimant's line managers who resolved to tackle the claimant over it.
- 2.10 On 27 November 2015 the respondent had to deal with an issue concerning the delivery of Coors Beers to Amber Taverns, which was a customer of the claimant. Coors Brewery raised a concern with the respondent that it was being overcharged for each barrel delivered to Amber Taverns. On 4 December 2015 Coors said that it would not pay the

respondent for the services it had carried out over a two year period because it felt that it had been overcharged some £40,000. The arrangement had been that Coors and Amber Tavern would agree the price of each product and then the respondent would agree with Coors the price of the delivery of that product. Coors maintained that there were errors as a consequence of which it felt it was being charged £27 per barrel for delivery instead of £22 per barrel for delivery by the respondent. I will refer to this as the “Amber Taverns issue”. Mr Nixon believed that responsibility for this issue rested with the claimant. The Amber Taverns issue related to what was called third party distribution (“TPD”). During the investigation into the Amber Taverns issue Mr Nixon stated to Mr Kelk that he had delegated responsibility for TPD to the claimant. The Amber Taverns issue was a genuine concern to the claimant’s line managers who resolved to tackle the claimant over it.

- 2.11 The brochure and Amber Taverns issues arose around the time that Mr Nixon, who had originally been with Classic but then was redeployed to Booker, returned to work in Classic. Mr Nixon returned to a role in Classic on 21 October 2015. Until his return such issues would not have been his managerial concern; upon his return to Classic they were.
- 2.12 In the early evening of 27 November 2015 the claimant telephoned Mr Kelk to report a sale at “under duty” at the Chester branch as part of The Project. Such a report was in line with his managerial duty. He reported that he had relied upon figures provided to him by Ingram Turner in pricing products for sale and that sales had been affected and products advertised at prices he had authorised. On checking through the details he and Adam Read spotted that some products were being sold at prices below duty chargeable/payable. The claimant was under pressure to complete The Project. Sales at “under duty” had been flagged earlier as a potential concern because historically there had been some such errors, and indeed prior to 27 November 2015 Mr Nixon said to the claimant that if there were to be sales “below duty” within The Project, which was the responsibility of the claimant, then such an error would lead to him losing his job. This was an explicit warning to him; the claimant stated this in his evidence to the tribunal; he knew he was under pressure on this matter from an early stage of Mr. Nixon’s return to Classic and when he, the claimant, was seeing through the Project at Chester. In the event the claimant had made an error in reliance on information provided to him by a colleague named Ingram Turner. As it transpired the financial implication of the “under duty” sale was the sum of £38.08 albeit it was believed at the time that it could have led to a considerable fine and in theory imprisonment. It later transpired that the respondent was mistaken in believing that their sales at “below duty” could amount to a criminal offence; they were not considered retailers and therefore different rules applied. In any event that was not anyone’s understanding on 27 November 2015, and the claimant telephoned Mr Kelk in the belief that this was a significant and major problem. I will refer to this as the “below duty issue”.

- 2.13 The claimant and Mr. Read agreed that at the same time as the claimant was reporting the below duty issue to Mr Kelk, Mr Read would report the same issue to his line manager. Whilst the claimant alleges that as a consequence of his report to Mr Kelk he suffered various detriments, the Tribunal finds that no action was taken against Mr Read of a formal or informal disciplinary nature because of his report of the same information to his line manager, and neither was any action taken against Ingram Turner. In addition to Mr Read and the claimant reporting to their respective line managers, Mr Kelk then took it upon himself to report and disclose the below duty issue to his line manager, Mr Nixon, to Mr Roper, to Mr Price (the Financial Controller), and Mr Cattrall, (the Regional Director). He did all of that on the evening of the report that he received from the claimant. Mr Kelk also advised the claimant that he should contact Mr Cattrall directly as Mr Cattrall was the Regional Director in overall management control of the integration of Classic into Booker. In addition to all of that the claimant contacted Mr MacGregor and asked for the contact number for the Area Manager, Mr Alan Evans. As it transpired Mr Evans got back to the claimant first. The claimant also spoke to Mr Speakman, who was Ingram Turner's line manager, because he was unable to make contact directly with Mr Turner. There was a considerable amount of rather urgent communication between senior managers in the immediate aftermath of the claimant reporting the below duty issue to Mr Kelk on the evening of 27 November 2015. Mr. Kelk "escalated" the matter and made repeated reports of the information that he had received from the claimant in line with his managerial duty; he was never disciplined or sanctioned or performance managed for having done so.
- 2.14 When he reported the under duty issue to Mr Kelk the claimant was keen to establish what, if any, implications there were for him. He was anxious. He knew that he was responsible for not having checked the accuracy of information provided to him, and for relying on the erroneous unchecked information which resulted in "below duty" sales at Chester. He was wary not least because everybody believed the law had been broken and Mr Nixon had specifically warned him that he would lose his job if there was a "below duty" sales error. Mr Kelk took advice from a HR adviser, and having spoken to Messrs Roper and Nixon he confirmed to the claimant that there would be an investigation and that he, Mr Kelk, was to be the investigating officer.
- 2.15 On 1 December 2015 Mr Kelk summarised the events for Mr Roper, Mr Nixon and Ms Sharma, outlining the steps that he would take in investigating the below duty issue. He said he would be issuing invitations to involved parties to investigate underperformance. A sample of the draft invitation is at page 144 and in it Mr Kelk mistakenly identifies the below duty sale as being a breach of law and identifies potential implications as being an adverse effect on Bookers' alcohol license and negative publicity. Mr Kelk's intention and emphasis was to discover what had occurred with a view to making recommendations, and implementing actions that would prevent a recurrence. His plan was to interview a number of people, asking specific questions of several of them and also to meet with the claimant face to face to discuss the matter and his practice in checking

duties applicable to various products. Subject to a slight amendment Miss Sharma approved Mr Kelk's draft invitation, which the Tribunal finds reflects Mr Kelk's emphasis at this stage, namely to gain an understanding with a view to remedial action and prevention of recurrence. He sent an invitation in the same terms to all concerned other than the claimant, who received a less formal invitation which appears at page 146 showing details of a diary appointment that Mr Kelk entered in the claimant's diary, a query from the claimant as to what was required from him so he could come prepared to the meeting, and Mr Kelk's confirmation that he was just going to meet him face to face as he needed information to demonstrate back to the business what went wrong and what action could be taken to stop it happening again. This was Mr Kelk's intention and as he dealt closely with the claimant on a day to day basis, as friends and colleagues, he adopted an informal approach to the claimant befitting their relationship.

- 2.16 Whereas the claimant was invited to a relatively informal discussion by way of that diary entry and the email exchange, the other interested parties were told that their meetings, or telephone interviews, were part of a formal investigation. The Tribunal concludes that the difference in treatment at this stage between the claimant and the others involved was that Mr Kelk and the claimant had a close working and personal relationship, which involved them meeting frequently, and that the less formal approach was a consequence of this. Mr Kelk knew that he would have to address any discovered underperformance, and he was aware that this could have implications that would involve advice and assistance from the HR Department, and so he was aware that it was potentially serious. Mr Kelk was aware that those potentially serious implications could affect the claimant too. The claimant at this stage was in no doubt of that possibility, although he felt throughout that the principal fault lay with those who provided him with the incorrect data, and furthermore that such errors were not isolated or exclusive to Classic and therefore he ought not be held solely responsible on this occasion. His priority was exculpation. In any event it was agreed between Mr Kelk and Mr Nixon that Mr Kelk would report to Mr Nixon and keep him abreast of developments as it was a small management team at Classic. Neither Mr Kelk nor Mr. Nixon, nor indeed Ms Sharma, understood that the claimant's report of his error was a disclosure of information made in the public interest but rather that it was merely a report of a potentially serious error in The Project, the claimant telling his line manager what mistakes had been made in the course of his performance of his duties by him based on others' mistakes. They were not concerned that the mistake was made known but that it was made; they were satisfied that it was made known so that appropriate remedial action could be taken.
- 2.17 On 2 December 2015 Mr Nixon and Mr Kelk had a discussion regarding TPD and the Amber Taverns issue that had also arisen, albeit earlier, on 27 November 2015. This was a major issue of serious concern for the respondent. It was as a result of that conversation that Mr Nixon confirmed at page 146A that he was confident in his understanding that he had delegated TPD to the claimant; this effectively identified the claimant as

being implicated in the Amber Taverns issue. That was Mr Nixon's understanding as at 2 December 2015. This then led Mr Kelk to inform the claimant, Adam Read, Jon Nixon, Steve Roper, Wendy Houghton, Paul Green and Miss Sharma of the details of the Amber Taverns issue by an email dated 2 December 2015 (page 147). The potential seriousness of this matter was emphasised by Mr Kelk when he said that the business could not continue in this manner as TPD represented 20% of their turnover and all of their growth, whilst the appearance was given that Classic was incapable of managing TPD with a major brewer. This matter was viewed extremely seriously by the respondent.

- 2.18 In the light of the Amber Taverns issue Mr Kelk amended the proposed informal agenda for his meeting with the claimant on 11 December 2015. Mr Kelk's invitation to the claimant at page 149 dated 2 December 2015 emphasised to the claimant the potential seriousness of the situation when he said that whilst he hoped he was wrong he felt that it looked like "a serious miss that could have some HR implications"; he informed the claimant that he was going to ask a third party to take notes, and he explained that this was important because the initial impression he had obtained was that the claimant may have implied to a colleague that the Amber Taverns issue occurred because of instructions given by either Mr Nixon or Mr Kelk as opposed to those that had been given by the claimant. At this stage Mr Kelk was making the matter more formal than the way in which he had been dealing with the below duty issue at Chester. Mr Kelk was now undertaking a formal investigation into both issues, Amber Taverns and below duty sales.
- 2.19 On 3 December 2015 the claimant sought out Chris Davies, the Duty Manager, to request his assistance and make enquiries about information to assist him in preparing any required defences, mitigation, and also that he could look into "below duty" sales generally. He did not tell Mr Davies anything new but Mr Davies was not by that date aware of all that had transpired in The Project at Chester on 27 November 2015. The claimant told him what had occurred. The purpose of this was to support his request for assistance and for information.
- 2.20 On 4 December 2015 Mr Kelk confirmed to Mr Nixon that the two issues highlighted above were under investigation relating to potential poor performance on the part of the claimant. Mr Kelk wished to investigate what he thought may have been failures on the part of the claimant to check information and to check on his team in respect of work related matters where he believed the ultimate responsibility rested with the claimant. In response Mr Nixon reminded Mr Kelk that there were not only two performance issues that were "live" in respect of the claimant but three, namely there was an outstanding issue over the brochure production which he believed Mr Kelk was still investigating. Mr Nixon did not at this stage know that Mr Kelk was thinking of taking no further disciplinary action in respect of the brochure issue and did not know that he had got to the stage of drafting a concluding email, which draft was still with Miss Sharma for approval. Mr Nixon wanted Mr Kelk to deal with three issues of potential poor performance because he felt they were significant

and outstanding as at 4 December 2015. These actions of Mr. Nixon's were in line with his managerial responsibilities.

- 2.21 Mr Nixon had an issue with the claimant generally over his performance and perceived failures to check on data and to manage his team and martial data effectively. He wanted to apply pressure to the claimant because of this series of perceived errors and underperformance. Indeed on reflection by email dated 4 December 2015 (page 154) Mr Nixon instructed Mr Kelk to inform the claimant that if there was any repeat of similar issues with regard to brochure production in the coming months then he would receive a written disciplinary warning. He also instructed Mr Kelk to ensure that this conclusion was given to the claimant in respect of the brochure issue in advance of the meeting on 11 December 2015 which would then deal with the other two issues (Amber Tavern and "below duty" sales). Mr Nixon was building up pressure on the claimant to improve his performance and suspected that this could cause the claimant to resign. This is further illustrated by email correspondence between Mr Nixon and Mr Roper on 4 December 2015 at page 156 when he reported erroneously to Mr Roper that the claimant had received an oral disciplinary warning in respect of the brochure issue, and stated in advance of the conclusion of any investigation that he would be receiving a written warning in respect of the other two outstanding matters. In terms Mr Nixon said that if the claimant did not leave as a consequence of those steps then he and Mr Roper would need to discuss what would happen. The Tribunal finds that Mr Nixon would have been content for the claimant to resign, although he had no intention of dismissing him. He ideally would have wanted the claimant to improve his performance to a satisfactory level. If the claimant did not resign then senior management would have to devise another plan which the Tribunal believes would have included consideration of amongst other things the possibility of effective performance management and continued employment, and consideration of dismissal on agreed terms. Mr Nixon believed that the claimant was unhappy at work; the claimant had some time previously intimated that he was considering his position and might resign for reasons unrelated to any of the live issues described above.
- 2.22 On 6 February 2016, on Mr Nixon's instructions, Mr Kelk sent an informal warning to the claimant albeit it was not put in terms of confirmation of any formal disciplinary oral warning; nevertheless it does forewarn him that disciplinary action may ensue if there was any repeat of underperformance in respect of brochure production; this was to end the brochure issue. Mr Kelk had in fact reined back on Mr Nixon's instructions and been less punitive than either he had been instructed or Mr Nixon had reported to Mr Roper was to be the case. That said, Mr Kelk widened out the scope of the forewarning to any future misconduct or underperformance, not only in respect of the brochure. Mr Kelk's emphasis was on improvement in performance. His rationale was a wish to see the claimant continue in employment but performing better and to a satisfactory level, which was to the satisfaction of Mr Nixon.

- 2.23 On 8 December 2012 Mr Nixon wrote to Mr Roper discussing Classic Drinks' strategy and questioned whether in that strategy he ought to make particular mention of the claimant. The claimant has suggested that this reference relates to an organisational chart he found the following March written out in Mr Kelk's hand which makes no mention of him. That chart was little more than a doodle, and it contains significant errors such as the omission of Mr Roper as well as the claimant, and a duplicated reference to Mr Nixon. The Tribunal does not find the organisational chart to be relevant and we do not find that the email at page 160 from Mr Nixon to Mr Roper bears any relation to that chart. The email at page 160 relates to the document at 160A-F which is a strategy document and is an innocent reference as to whether or not the document would be improved by reference to Mr Cowley, although reference would not otherwise be necessary.
- 2.24 The claimant sought legal advice during the period between 27 November and 11 December 2015 and it is believed that the first formal advice that he received from the solicitors currently instructing Mr Powell was on 9 December 2015. He had made it known some time previously that he had friends in the legal profession, at least one of whom had given informal advice of various employment related matters over time. This confirmed the impression held by Messrs Nixon and Kelk that the claimant was unhappy at work and was considering his options.
- 2.25 On 11 December 2015 Mr Kelk met with Mr Cowley in his capacity as investigating officer in the presence of Miss Sharma as note taker. The initial minutes commence at page 164, and at page 193 and following there is a further set of minutes which incorporate the claimant's suggested amendments. This was to have been a relatively informal fact finding meeting over the "below duty" issue but by degrees the purpose of the meeting had become a formal investigation, including into underperformance by the claimant, the "below duty" issue and the Amber Taverns issue. Mr Nixon had anticipated (in fact pre-judged) that a formal warning would result from this meeting. The claimant prepared a chronologically sequenced statement of events explaining his and other people's errors in respect of the "below duty" issue and that appears at pages 207-209. This was for use at the meeting of 11 December 2015. During the course of the interview the claimant expressed his personal concerns at the potential for the imposition of penalties (fines) upon him. He explained to Mr Kelk his and other people's roles in the "below duty" sales situation and he blamed other people concerning the provision of incorrect data to him. He felt he was being criticised and was being unfairly held responsible for errors in the sales "below duty" and in the production of brochures when he felt the problems were caused by under-resourcing coupled with high workload in addition to the provision to him of inaccurate information. The claimant hoped that his line manager, Mr Kelk, would be as relaxed about the "below duty" issue as Mr Read's line manager appeared to have been when Mr Read told the claimant that he was not troubled by it. The claimant also indicated at this meeting to Mr Kelk that he had further information which he was not prepared to disclose at that time but which was of interest and relevant. He stated his belief that others

were implicated in errors regarding “below duty” sales and he wanted them to be dealt with by the relevant bodies if anyone was to be dealt with at all. Mr Kelk was genuinely concerned at how this appeared to reflect the claimant’s attitude and stance towards the issue, the information he held and the respondent. It surprised Mr. Kelk who had felt that he was a close colleague and friend of the claimant’s yet the claimant was now holding back on him and threatening the respondent.

- 2.26 On 11 December 2015 Mr Kelk reported on the above meeting to Mr Roper and Mr Nixon inviting comment from Miss Sharma. He reported in brief on his investigation and wondered whether the claimant had issued an implied threat against the business; this was his belief based on what the claimant had said. Mr Kelk asked Miss Sharma in that email what her view had been or what she had heard. He was disconcerted by the claimant’s reactions and during his oral evidence under cross examination listed twenty one factors that led him to be suspicious of the claimant’s position. Those twenty one factors can be summarised as being that he felt the claimant was overly defensive, he was challenging Mr Kelk, he cast blame on others, withheld information, and whilst Mr Kelk himself only wanted to know what had happened so he could prevent it happening again, the claimant seemed more intent on sharing responsibility for the error and avoiding blame. Significantly he alluded to having information of interest to the respondent which he was not then prepared to divulge. He gave the impression that he had undisclosed ammunition to use against the respondent in his defence or as retribution at a future date of his choosing.
- 2.27 Miss Sharma knew that the meeting of 11 December 2015 was an investigation into alleged underperformance by the claimant with specific reference to the “below duty” sales and the Amber Taverns issues, and that it could lead to disciplinary sanction eventually. She did not consider it, however, to be a formal disciplinary hearing but merely an investigatory interview. On that basis she did not consider it necessary to issue the claimant with a notice setting out allegations against him or to remind him of his right to be accompanied; she did not think that right applied. She did not consider that the claimant had reported malpractice or that the ethical policy was in effect. She considered neither possibility; that is neither that there was malpractice or that the ethical policy could apply. Miss Sharma’s established view was that this was simply about a number of errors that had been made by the claimant and which he had self-reported, that had to be investigated so that steps could be taken to prevent recurrence, and that remedial steps could be put in place. Ms Sharma’s actions and omissions were attributable to her occasional lack of acumen and naivety; she failed to analyse situations and events as might have been expected by a HR professional. Her oversights and her actions were not by reason of the claimant having made disclosures of information.
- 2.28 On 11 December 2015 Mr Nixon sent an email to the claimant and to Mr Kelk, subject matter “Cask”, in which he was critical of the claimant for the length of time it had taken him to deal with this subject. This was a new issue. He felt there had been undue delay by the claimant in a matter that

when he, Mr. Nixon, attended to it took him only half an hour; the claimant was accused of having delayed for several months. In response the claimant defended himself but made a reference to the apparent need for himself and Mr Nixon to improve lines of communication, and this was at least in part a reference to the claimant's perception that Mr Nixon was too busy to speak to him. It also emphasised that the claimant felt there were difficulties between himself and Mr Nixon generally, caused by or contributed to by this difficulty in communication generally.

- 2.29 Mr. Nixon was concerned as to whether these circumstances heralded the claimant's possible departure. Mr Nixon now thought that the claimant's commitment was questionable. On 15 December 2015 Mr Nixon took the opportunity to sound the claimant out as to whether he was content at work or was likely to leave his current employment. They discussed personal issues relevant to the claimant. Mr Nixon asked the claimant how the respondent could help him if he chose to remain at work. In that conversation Mr Nixon said that he was not involved in any of the above investigations but that he would chair any disciplinary hearing, and the Tribunal notes in fact that he had been involved and was behind stimulating areas of that investigation. Mr Nixon asked the claimant whether he was concerned about the risk of being dismissed for gross misconduct. The claimant said he was so concerned but it is evident that the meeting ended in a friendly way, the claimant having confirmed that he was not intending to leave his employment, which point was accepted by Mr Nixon. It was a relatively relaxed and informal discussion amongst colleagues albeit on sensitive matters including personal ones.
- 2.30 The claimant subsequently reflected on the conversation he had had with Mr Nixon on 15 December 2015. On 18 December 2015 the claimant wrote to Mr Nixon heading his letter "without prejudice", saying he had been reflecting, referring to a history of blame culture, and that having had an unblemished career the finger of blame was being pointed at him. He intimated that others could be made to answer disciplinary charges. The claimant stated he was reconsidering whether he wanted to remain in employment. He stated that if he was forced to defend his position he would do so but he would prefer that if anyone wanted him to leave his employment that it would be dealt with openly and as a business matter. At that point he invited Mr Nixon to put forward his proposals. This email is at pages 222-223. The Tribunal finds that at this stage the claimant was prepared to leave his employment on agreed financial, and maybe other, terms. The claimant refers in that email to an attached detailed letter, but no attachment was available to the Tribunal in the trial bundle. The claimant said that he was looking forward to hearing from Mr Nixon and concluded: "I invite any proposals you have to resolve matters promptly. Clearly any will have to be on suitable terms and conditions". In response Mr Nixon merely replied that they ought to discuss the matter and asked the claimant to telephone him. He pointed out that there was no attachment to the claimant's email.
- 2.31 On the same day as above, 18 December 2015, the claimant also wrote to Mr Kelk and Miss Sharma the letter at pages 216-217 raising a number of

issues relating to “below duty” sales and “widespread breaches”, and anticompetitive behaviour. The claimant queried the wider context of the matters that had been raised with him. He stated that the investigation as it was currently constituted was too narrow and he enquired why he was the only person under investigation. He denied responsibility for the Amber Taverns issue. In this correspondence the claimant specifically raised the respondent’s whistle-blowing and ethical policies. He complained about being warned and said he felt he was being singled out. The claimant copied in Mr Davies (Duty Manager) on this letter.

- 2.32 Also on 18 December 2015 at pages 232-233 Mr Kelk drafted out his proposed outcome to his investigation, recommending disciplinary action against the claimant in respect of the “below duty” issue but no further action in respect of the Amber Taverns issue, save for stating the respondent’s expectations henceforth. Mr Nixon received a copy of that draft report and was disappointed by it; he expected more than a recommendation from Mr Kelk bearing in mind the time he had spent on his investigation. Mr Nixon suspected that Miss Sharma had had some input in preparing Mr Kelk’s report effectively downplaying it, and he wanted a second opinion. On that account, between 18 and 21 December 2015, Mr Nixon spoke to and emailed Ms Mallows in her role in HR. Ms Mallows’ response to Mr Nixon is at page 227. She wished to discuss the matter with Mr Roper and her opinion was that Mr Kelk’s report appeared biased. She also explained on the telephone to Mr Nixon the procedure that ought properly to be followed and the preferred format of Mr Kelk’s report. The upshot of all of this involvement by Ms Mallows and Mr Nixon was that Mr Kelk redrafted his report. It follows from all of this that whilst Mr Kelk was the investigator, Mr Kelk, Miss Sharma, Ms Mallows, Mr Nixon and Mr Roper were all involved to some extent prior to any formal disciplinary hearing.
- 2.33 On 21 December 2015 Mr Nixon emailed Mr Roper at page 230 reporting back to him as to how matters were developing. Mr Nixon confirmed that he did not believe that the claimant was solely to blame for the Amber Taverns issue and whilst it was an example of underperformance, on its own it was not a disciplinary matter. With regard to the “below duty” issue, it was Mr Nixon’s view by this stage, having considered the matter further, that the claimant should be issued with a letter of concern as opposed to being subjected to any formal disciplinary sanction. This represented a softening of his view but it is consistent with the finding that Mr. Nixon primarily wanted to rectify errors and ensure improved performance by the claimant (whilst being open to the possibility that he might want to leave the respondent for his own reasons). His concern was over the claimant’s performance.
- 2.34 Outside the remit and context of Mr Kelk’s investigations Mr Nixon had formed a critical view of the claimant. He was critical of the claimant for being defensive, looking after himself as his main priority, blaming others and not accepting responsibility. Mr Nixon put on record in his email at pages 231-232 that the claimant was “not a cultural fit” with the respondent and that he lacked support amongst his team. Mr Nixon also

recommended that he, Mr Roper and Mr Kelk needed to discuss the situation with the help of HR. The Tribunal finds that pages 230 and 232 contain a genuine expression of Mr Nixon's views and all of his issues with the claimant. Whistle-blowing was not of concern to Mr Nixon or in his mind in those terms; he did not consider that the claimant had made disclosures that amounted to whistle-blowing prior to 18th December; his view was the same as Mr Kelk's and Ms Sharma's that the claimant had merely owned up to an error that had to be addressed with him and generally to improve the situation and that he had then sought to defend himself, mitigate and spread blame to protect himself. The disclosure on 18th December 2015 did not motivate Mr. Nixon in his criticism of the claimant or recommendations as to how to proceed with him at this stage.

- 2.35 On 21 December 2015 it was apparent that Mr Nixon was frustrated that the client had copied in Mr Davies, the Duty Manager, on correspondence regarding the "below duty" issue. He had sent Mr Davies information that had not been sent to Mr Nixon. Mr Nixon expected to receive that information in his line management capacity and to receive it directly from the client rather than hearing of it indirectly from Mr Davies. He was suspicious as to why the claimant would exclude him.
- 2.36 In the light of all of the above Mr Nixon instructed Mr Kelk to redraft his report, reflecting the guidance received from Ms Mallows. The report was to be more professional and in line with HR best practice. On 22 December 2015 Mr Nixon also instructed Miss Sharma (page 234) on the correct procedure to follow in the circumstances, including options for outcomes. He copied in Mr Kelk. This was an attempt by Mr Nixon to make it appear that disciplinary proceedings were back on track; in fact the decision had already been taken that the likely outcome would be a letter of concern addressed to the claimant. It appears to the Tribunal that Mr Nixon was merely awaiting Mr Roper's response to that recommendation before he would effect it.
- 2.37 On 23 December 2015 Mr Kelk produced his revised report in line with Ms Mallows' advice and Mr Nixon's instructions and without making any formal recommendation (pages 246-248).
- 2.38 On 22 December 2015 all Classic staff were briefed as how best to prevent or reduce the risk of "below duty" sales in the future. Reference was made to a duty checker document. The claimant spotted errors in it. Mr Nixon instructed the claimant and Mr Speakman to run reports and ensure that the problems with the checker were not repeated. The respondent involved the claimant in all of its investigations into the "below duty" matter throughout Classic and in respect of remedial steps to be taken. It took on board his suggestions. It referred his concerns to Booker for Booker to investigate further insofar as there was a risk to Booker of it being involved in "below duty" sales in matters that were not of direct concern to Classic. The claimant was instructed to investigate matters in Classic only (page 255P) on 31 December 2015. This instruction was because on 30 December 2015 the claimant had given Mr Kelk a much wider report on his investigations above and beyond his remit within

Classic and its preparation put such pressure on the computer system that it crashed. Furthermore, Booker had its own investigatory staff and methods. Mr Nixon wished the claimant to concentrate on matters within his remit within Classic; this was consistent with his approach to the claimant throughout. Mr Nixon's motivation was because of his concern over the perceived shortcomings of the claimant in fulfilling his duties within Classic, and he did not want him to be distracted by going beyond his remit. In so far as the claimant investigated matters within his remit in Classic his expertise and efforts were appreciated. The respondent instructed him to investigate internally, that is in respect of Classic, and kept him fully involved in its efforts at detection and remedying of any issues discovered.

- 2.39 On 7 January 2016 the claimant received by hand a letter dated 5 January 2016 inviting him to a disciplinary hearing (page 255). The disciplinary hearing was on 8 January 2016 and it was to be in respect of only one matter, namely the issue relating to the Chester sales "below duty". That said, however, at the disciplinary hearing on 8 January 2016 Mr Nixon also raised the Amber Taverns issue and he classified that as underperformance, albeit attracting no additional sanction. There are various versions of the notes of this meeting at pages 256-276. During the course of his meeting Mr Nixon brought up his view that there were more issues relating to the claimant's performance than in respect of "below duty" sales. He required the claimant to "start to deliver" and to work better with his team, expressing dissatisfaction at the way that the claimant was defending himself and expressing the wish that the claimant would move on positively. Mr Nixon wanted the claimant to improve his performance whilst he remained in employment. His actions were because of his perception of the claimant's performance and application to his duties.
- 2.40 The outcome of the disciplinary hearing is at page 278 and it is a letter of concern outside the respondent's disciplinary procedure. It was the outcome that Mr Nixon had recommended to Mr Roper previously and which presumably Mr Roper had approved. The letter of concern was not a formal disciplinary sanction. It included reference to performance management of the claimant by his line manager, Mr Kelk. This was confirmation of Mr Nixon's earlier decision when he had received Mr Kelk's initial report into the matters that Mr Nixon had instructed Mr Kelk to investigate.
- 2.41 Mr Kelk was to meet the claimant to arrange performance management. The respondent did not arrange this meeting until February 2016 and even then only after the claimant complained to Miss Sharma that nothing had been done. He had been lead to believe there would be formal performance management but it had not been implemented. Because of the prompting of the claimant with regard to his outstanding performance management, Miss Sharma reminded Mr Kelk to arrange the meeting. On 18 January 2016 and 25 January 2016 Mr Kelk sent to the claimant "key deliverables" and recommendations for areas in which the claimant was to focus his attention in those weeks (pages 287 and 293). Mr Kelk dealt with

the claimant routinely on the telephone and in person between the 12 January letter and the meeting in early February 2016 prompted by the claimant. Mr Kelk acted as he did in furtherance of his managerial responsibilities. His management of the claimant was not influenced by the fact of any disclosures made by the claimant.

- 2.42 On 19 January 2016 the claimant appealed against the letter of concern at pages 288-290. The primary purpose of his letter was to appeal against the letter of concern at page 278. At pages 288 and 289 in paragraphs 1, 2 and 3, the claimant set out matters that were personal to him concerning allegations of procedural unfairness with the investigation into allegations of poor performance and the outcome of it. Paragraph 5 contains allegations of detriment for whistle-blowing and is a request for further information. In response Miss Sharma said that the claimant was not entitled to appeal the letter of concern as it was not a disciplinary sanction and fell outside the disciplinary procedure. The claimant met with Miss Sharma on 28 January 2016 when she explained this to him. The claimant countered with some details and arguments based on the legal advice that he had received; Ms Sharma felt that the claimant had the wrong end of the stick and that the advice he was citing was wrong in that it was not appropriate to the situation as she understood it. She also confirmed that Mr Kelk would arrange a performance management meeting in the week commencing 1 February 2016. This was confirmed in her letter at page 296. The meeting on 28 January 2016 was on the advice of Mr S Peace (HR) (page 294A). The respondent was still unsure what the claimant believed were his allegations of whistle-blowing. It was apparent at this stage, however, that provided the claimant was seen to knuckle down to his work he could continue in employment if he wanted to but he was to be asked how much he was seeking by way of a financial settlement if he was to leave his employment.
- 2.43 In consequence the claimant emailed the Group Chair, Mr S Gilliland, at pages 309-311, on 6 February 2016 raising issues over whistle-blowing. This letter is a reference to earlier disclosures and is a set to allegations of detriment. This letter was treated as a grievance and was referred to Mr Chiltern.
- 2.44 On 24 February 2016 (page 327) Mr Chiltern confirmed the outcome of his meeting with the claimant where he, Mr Chiltern, as General Counsel for the respondent confirmed that the letter of concern would be removed from the claimant's record and that performance management would cease. In addition the claimant was offered a new role to address all "below duty" sales issues in the respondent's business (a role still being fulfilled by the claimant that is in a role not limited to Classic's business). The respondent had backtracked on any disciplinary sanction and had even, it thought, placated the claimant with regard to the letter of concern and performance management, absolving him, effectively, from any sanctions and steps regarding his underperformance.
- 2.45 On 26 February 2016 at pages 323-327 the claimant set out a history of events, his concerns and requirements, including his hope that agreement

could be reached on the respondent paying to him £5,000 legal costs (incurred by him in recent weeks) and it would provide him clarification of his position generally. Mr Chiltern then appointed Chris Price as the grievance officer in respect of the matters raised by the claimant; he gave a reassurance to the claimant that his bonus and pay were unaffected by the events that had unfolded to date, and he agreed that there should be a “without prejudice” meeting with him to negotiate settlement (pages 328-329).

- 2.46 Mr Price chaired the grievance hearing on 9 March 2016 (pages 243-245). The hearing continued on 19 April 2016 at pages 355-359. Following prolonged investigation the outcome was given on 10 May 2016 at pages 365-369. The conclusion of Mr Price’s deliberations was that he upheld the grievance in respect of due process (a lack on the part of the respondent to arrange a hearing) and he was critical of the respondent for several administrative errors. He did not, however, consider that the claimant was intentionally mistreated, treated unfairly or singled out.
- 2.47 At this time the respondent was still facing completion of the integration of Classic into Booker, and then the integration of Makro into Booker. The effect of the latter integration was that the former had to be accelerated. There was a small senior team in Classic. Redundancies were being made and there was a freeze on recruitment. Classic had a high workload with limited resources. Mr Kelk was personally friendly with the claimant and wanted him to remain in employment; he needed him. Mr Nixon was at times friendly with the claimant but had communication problems with him and he was openly critical of the claimant’s work performance. The relationship between them had not broken down and Mr Nixon wanted the claimant to improve his performance, but if he could not, would not or remained unhappy then he was content for the claimant to leave employment of his own volition. The Tribunal could detect the influence of Mr Roper throughout all of the history narrated above but heard no evidence from him and can make no specific findings as to his direct involvement. It is apparent that Mr Nixon was reporting to Mr Roper and that Ms Mallows was to discuss matters with him before any conclusions were reached with regard to the management of the claimant. The Tribunal concludes, however, that the respondent was not trying to get the claimant out of the company. The respondent’s management team was managing perceived underperformance in a pressurised situation. While it is possible to criticise the respondent’s management and lack of due process, failure to follow policies and procedures, its failings were not on the grounds of or by reason of the claimant having made protected disclosures.
- 2.48 The claimant appealed against Mr Price’s grievance outcome on 17 May 2016 at page 371.
- 2.49 On 18 June 2016 the claimant presented a claim to the Employment Tribunal and further particulars thereof on 29 June 2016 at page 380. These matters overtook the grievance appeal. The Tribunal considers that Mr Price’s consideration of the grievance, however, was thorough,

conscientious and in good faith. His outcome was in part supportive of the claimant and the Tribunal did not find that Mr Price's handling or outcome was improper, untoward or was in any sense affected by the fact of the claimant's having made a protected disclosure.

2.50 As part of the general restructuring in hand, office space was at a premium. Offices were re-allocated. It was decided; amongst other things that Mr Nixon and Mr Kelk ought to have offices of their own. The claimant's was moved and he and a colleague, Ms Wharton, were to share facilities. This was done for commercial reasons and for the best use of available working space. The claimant was not the only person affected, and that is obvious in that so too was his new "room mate" Ms Wharton.

2.51 The above events did not happen in a vacuum and they caused and contributed to stresses and strains amongst some of the claimant's colleagues. Mr Nixon had reason to believe, not least from them, that Ms Muirhead and Ms. Ward were concerned, albeit we accept that they did not inform the claimant directly. Management was dissatisfied about a number of issues as detailed above; there was a series of business re-organisations and mergers; day to day work had to be concluded and the respondent wished to establish and maintain high standards. In so far as there were deficiencies, for example in respect of brochure production, employees other than the claimant were bound to come under scrutiny and pressure too; they did. Some of the claimant's colleagues were upset at shortcomings, suggestions they were to be blamed, and management's requirement that, where relevant, remedial action was taken. Mr. Nixon made known to the claimant that some of his team, specifically Ms Ward and Ms Muirhead, were upset with and about him and/or work in which he was involved. That is what Mr Nixon had reason to believe from what he observed and was told. He was bound to inform the claimant of this. He did it in accordance with management practice and not influenced by any disclosure of information by the claimant. The claimant was told appropriately of matters within his purview.

3. The Law

3.1 Statutory protection to "whistle-blowers" is contained in the Employment Rights Act 1996 ("ERA"). Section 43A ERA defines a protected disclosure as a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C to 43H. In essence and by reference to those sections, a disclosure qualifies for protection where it is a disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show, for example, that a criminal offence has been committed or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (section 43B (1) (a) and (b)).

3.2 By virtue of section 47B ERA "a worker has a 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".

- 3.3 Both counsel expertly submitted to the Tribunal on the relevant legal principles and neither counsel took issue with their opposing counsel's analysis of the applicable case law. The authorities cited by respective counsel included:
- 3.3.1 **Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325 EAT:** A public interest disclosure should convey information and be more than a mere communication in circumstances where the information is more than merely an allegation or a statement of position; it must convey facts.
- 3.3.2 **Western Union Payment Services UK Limited v Anastasiou UKEAT/0135/13:** The assessment as to whether or not there has been a disclosure of information in a particular case will always be fact sensitive.
- 3.3.3 **Kilraine v London Borough of Wandsworth [2016] IRLR 422:** In cautioning against the principle arising in the **Cavendish Munro** case cited above, the Tribunal must be wary that very often information and allegations are intertwined and the question is simply whether it is a disclosure of information. If it is also an allegation "that is nothing to the point".
- 3.3.4 **Shaw v Norbrook Laboratories (GB) Limited [2014] ICR 540:** Even where one or more qualification on its or their own may not qualify for protection, a disclosure can arise from "an amalgamation" of several communications.
- 3.3.5 **Babula v Waltham Forest College [2007] EWCA Civ 174 (ICR 1026, CA):** The test as to whether there was a disclosure is a subjective one and relates to what an employee reasonably believed to be correct or not.
- 3.3.6 **Chesterton Global Limited v Nurmohamed [2015] ICR 920:** Provided an employee's belief that a disclosure is made in the public interest is objectively reasonable, it is not necessary to show that a disclosure is of interest to the public as a whole. The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a reasonable way genuine concerns about wrongdoing in the workplace; it is clear that the amendment to section 43B (1) by the addition of the words "in the public interest" were to prevent a worker from relying on a breach of his own contract of employment with the breaches of a personal nature and there are no wider public interest implications.
- 3.3.7 **Harrow London Borough v Knight [2003] IRLR 140 EAT:** The employer must prove on the balance of probabilities that the act or deliberate failure to act complained of was not on the grounds that the employee had done the protected act, and addressing this issue involves an analysis of the mental processes, whether

conscious or unconscious, which caused an employer so to act. The Tribunal was also reminded that it may draw an adverse inference.

- 3.3.8 **NHS Manchester v Fecitt & others [2012] ICR 64:** In terms of causation, the protected disclosure must materially influence the employer's decision to act or otherwise, and material influence must be one that is more than trivial.
- 3.3.9 **British Steel Corporation v Granada Television Limited [1981] AC 1096 HL:** There is a difference between what is interesting to the public and what is in the public interest. The matter of public interest on which everyone is entitled to make fair comment is one where a matter is such as to affect people at large so that they may be legitimately interested or concerned at what is going on or had happened (**London Artists v Littler [1969] 2 QB 375**).
- 3.3.10 **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285:** The test as to what amounts to a detriment in law is whether a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment or to their disadvantage. This is so in circumstances where merely showing mental distress does not establish that there was a detriment and that it would have to be objectively reasonable in all the circumstances for that to be the case (**St Helens MBC v Derbyshire [2007] IRLR 540**).
- 3.3.11 **Harrow London Borough v Knight [2003] IRLR 140:** A four step test was suggested for liability to be established, namely:-
- (1) That a worker had made a protected disclosure;
 - (2) That he/she had suffered from some identifiable detriment;
 - (3) That an employer had "done" an act or deliberate failure to act by which the worker had been subjected to that detriment; and
 - (4) That the act or omission done by the employer was on the ground that the worker had made the protected disclosure that had been identified at stage (1) above.

4. Application of Law to Facts

The Tribunal addressed the List of Issues in the document C3 as follows, mindful of the above cited law and authorities:

- 4.1 Has the claimant established that it is more likely that he made the following protected disclosures?
- 4.1.1 27 November 2015: The claimant told his line managers of an error that he had made in pricing of sale items at the Chester

store. He told them that he had relied on incorrect data provided to him and that in consequence there had been sales “below duty” which was believed at the time to be a breach of legal obligation and criminal offence. The claimant reasonably believed this to be true. The claimant reasonably believed that an offence and breach of legal obligation had occurred. The claimant was not making a disclosure in the public interest at the time, but he had a duty and responsibility to own up for his error, along with Mr Read, by each of them telling their respective line manager. This was against the background of a large project which the claimant was managing where he had been forewarned to avoid the error into which he had fallen in allowing the pricing of items at prices that were “below duty”. The claimant was concerned at what these circumstances would mean for him. He was not raising a concern in respect of a wrongdoing in the workplace, but his concern was about the implications of his personal involvement bearing in mind the sale of alcohol as part of the Project and the warning he had been given by Mr Nixon. Mr Read made a similar report relating to the same circumstances to his line manager and the respondent took no action, and there was no allegation or evidence of an omission such as to amount to a detriment either, in respect of Mr Read. His report of their error was treated as a routine report. We note that Mr Read had a different line manager to the claimant and have taken this into account. Mr Read’s actions and the respondent’s response are not determinative of the claimant’s issues but are illustrative of the reason, purpose and nature of both the claimant and Mr Read’s reports and the respondent’s reaction to them. The claimant did not make a protected disclosure on 27 November 2015. If we are wrong about that we find in any event that the respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion.

- 4.1.2 3 December 2015: The claimant repeated details of the above error to the Duty Manager, Mr Davies, in enquiring about further information and requesting assistance. The purpose of his communication with Mr Davies was not to raise a concern at wrongdoing in the workplace but it was to obtain Mr Davies’ assistance and information that was useful to the claimant in providing a defence and/or mitigation in respect of his own involvement and so that he could investigate matters. It was reasonable for him to believe that the information he told Mr Davies was true and that there had been a breach of legal obligation and an offence, but his conversation with Mr Davies in which he imparted certain information was not a disclosure of information made in the public interest. This was not a protected disclosure. If we are wrong about that we find in any event that the respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion.

- 4.1.3 11 December 2015: Investigation meeting (pages 164-169): At this meeting the claimant read out a statement which appears at pages 207-209 as part of the investigation into his alleged underperformance. By this stage the claimant was taking legal advice. Once again he explained what had happened on 27 November 2015 and he did so as part of an investigation into his alleged underperformance. This was a repetition by way of defence and mitigation where the claimant's mindset was that he was being blamed again for something that was wrong and he felt that he was being singled out. This was not a disclosure of wrongdoing in the workplace made in the public interest. If we are wrong about that we find in any event that the respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion. The claimant also refers at page 166 to other examples of below duty sales by the respondent, but he would not elaborate or provide information regarding that allegation. This amounts to an assertion or allegation and not the disclosure of information. The claimant deliberately withheld information that might have been made known then in the public interest. The claimant expressed his concern that if he was found liable he could face fines and imprisonment. Any disclosure of information in this occasion was to provide a personal defence and mitigation and with a view to implicating others so that they shared the blame and made his fault appear less serious. The claimant also said what he did so that he could assess whether his fears about the consequences for him personally were warranted and he was seeking reassurances that he would not be disciplined. Finally, what he said was an implied threat to the respondent's business to implicate others and it was an expression of his having a bargaining chip in the event that the respondent chose to take any action against him for perceived underperformance. It was at this stage that the respondent realised it was dealing with more than just sorting out an error by the claimant and others in respect of "below duty" sales at Chester. Until this stage Messrs Kelk and Nixon were only dealing with alleged underperformance by the claimant and how the Chester matter had happened and could be avoided in the future. There was no protected disclosure on 11 December 2015.
- 4.1.4 18 December 2015 (pages 216-217) letter to Babita Sharma and Jason Kelk: The claimant disclosed information in this letter tending to show breaches of legal obligation and criminal offences between January and September 2015 in 11 branches, and in 16 branches from 1 June 2014 onwards. The claimant suggested he also had evidence of anti-competitive practices (albeit he withheld this information and did not disclose it). The claimant had a reasonable and genuine belief that the information set out in this letter was true. The claimant reasonably and genuinely believed that the information disclosed would affect the respondent's licence and reputation and thereby potentially the livelihood of

fellow employees. This disclosure was made in the public interest. The claimant asked for the respondent to deal with the matter under its whistle-blowing procedure. He continued to receive legal advice. This letter amounts to a protected disclosure. We also find that it was part of the claimant's strategy following the 11 December investigation and the 15 December "without prejudice" conversation with Mr Nixon about a possible negotiated exit from the business. The claimant also made this disclosure as a defence, mitigation, and blame spreading exercise and to be read with his overtures for negotiations, that is his letter to Mr Nixon of the same date that appears at page 222. Whilst there was more than one purpose in the claimant writing the letter of 18 December 2015 the Tribunal concludes that it is nevertheless a protected disclosure. The respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion.

- 4.1.5 19 January 2016 – appeal letter (pages 288-290): The claimant alleges a failure to investigate "below duty" sales and a failure to respond to his whistle-blowing, and that he has suffered a detriment. The letter does not disclose information; it makes a series of allegations only. If we are wrong about that we find in any event that the respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion.
- 4.1.6 6 February 2016 – letter to Mr Gilliland (pages 309-311 "My whistle-blowing concerns"): In this letter the claimant disclosed to Mr Gilliland the Chester issues that arose on 27 November 2015 and the possibility of similar issues elsewhere. The claimant said it was relevant to show the extent of the problem that the respondent was encountering. He reiterated everything that had been said in earlier dealings with the respondent. He also set out his allegations of detriment and the context for potential legal action. The claimant disclosed information to Mr Gilliland, some of which we have already said amounted to a protected disclosure on 18 December 2015. This letter, however, is an allegation of detriment and sets out the context for potential legal action together with his defence as to what he considers was a disciplinary sanction. It is not a disclosure of information in the public interest. It is not a protected disclosure. If we are wrong about that we find in any event that the respondent did not subject the claimant to any detriment on the ground that the claimant made such a disclosure on this occasion.

4.2 The Tribunal's findings as to various witnesses:

- 4.2.1 Mr Nixon – Mr Nixon was initially defensive and the Tribunal found that on occasion in the initial stages of his evidence he was neither credible nor reliable by reference to documents, particularly where he said in evidence that above all else he

wanted to keep the claimant in employment “at all costs”. We find rather that Mr Nixon was critical of the claimant and was amenable to his resignation or to a negotiated exit, or alternatively to the respondent robustly performance managing the claimant. Over the course of cross examination, however, Mr Nixon became more comfortable and in doing so more credible and reliable. The Tribunal believed that he was critical of the claimant for underperformance in respect of perceived delays in performance and because of issues over matters such as brochure production, sales “below duty” and the fact that the claimant was not a good cultural fit in the organisation, including that he lacked the support of his colleagues. We find that Mr Nixon did not consider that the claimant had “blown the whistle” on 27 November, 3 December or 11 December 2015. As of 11 December 2015 Mr Kelk had raised the possibility that the claimant had made an implied threat to whistle-blow but Mr Nixon had not understood that the whistle had already been blown (as now alleged by the claimant) (see paragraph 4.4 below). On 15 December 2015 Mr Nixon sounded out the claimant as to his remaining or leaving the business and in consequence on 18 December 2015 the claimant invited terms for negotiation for his departure. At the same time on 18 December 2015 the claimant made a written disclosure which Mr Nixon thought was all part of the bargaining process. The claimant was prepared to consider leaving whilst defending himself, including by making an implied threat to disclose information. Mr Nixon considered this to be an example of the claimant failing to take responsibility. All of Mr Nixon’s actions and omissions were because of or on the grounds of his belief that the claimant was underperforming and not accepting managerial responsibility. He maintained the claimant’s role in investigating below duty sales in Classic as he valued the claimant’s input, investigation and recommendations. He appreciated the claimant’s endeavours in this regard.

- 4.2.2 Mr Kelk – The Tribunal finds that Mr Kelk valued the claimant’s knowledge, experience and contribution to the workload of a small team at Classic. They were also personal friends. Mr Kelk did not understand that the claimant had “blown the whistle” on 27 November or 3 December 2015. On 11 December 2015 Mr Kelk wondered whether the claimant was implying a threat to whistle-blow in his defence and to dissipate blame, but he did not consider that the claimant was whistle-blowing (but again see paragraph 4.4 below). Mr Kelk’s actions or omissions were because of or on the grounds of Mr Nixon’s instructions which were in turn based on Mr Nixon’s perception of the claimant’s poor performance. Furthermore Mr Kelk acted as he did owing to his concerns at the claimant’s apparent fault with regard to sales at “under duty”, in the context of other performance issues highlighted by Mr Nixon. These circumstances and the claimant’s reaction to being questioned about them disconcerted Mr Kelk. The investigation was, in Mr Kelk’s mind, into what had gone

wrong at Chester and how to stop it. Mr Kelk's rationale for acting or omitting to act with regard to the claimant was wholly down to the five bullet points set out at pages 232-233 where he explained the factors that led him to make recommendations in relation to the investigations into the "below duty" sales and Amber Tavern issues. Mr Kelk acted because those matters were within the claimant's remit and events were such that he expected the claimant to check matters more robustly, whereas in fact he did not appear to want to take responsibility and thereafter he knowingly withheld information as to what was considered to be a bargaining chip. Mr Kelk felt that the claimant was failing in his duties and responsibilities to communicate information and resolve errors. He did not act or omit to act by reason of, on the grounds of or in relation to any whistle-blowing.

- 4.2.3 Ms Sharma – Ms Sharma was not the agent or instigator of any acts or omissions on the part of the respondent. She did not connect the claimant's actions with whistle-blowing initially and it did not occur to her that this is what he had done. Mr Nixon did not have full confidence in Ms Sharma but instead sought guidance and reassurance from Ms Mallows. The respondent did not subject the claimant to any detriment by any act or omission by Ms Sharma.
- 4.2.4 Ms Mallows – Ms Mallows advised Mr Nixon appropriately in respect of the performance investigation and potential outcomes and did not take any other active part. In those circumstances her involvement was not detrimental and does not indicate a detriment on the grounds of, by reason of or in relation to any whistle-blowing.
- 4.2.5 Mr Roper – The Tribunal finds that Mr Roper was in the background behind much of what transpired during the relevant period. We heard no evidence from Mr Roper. We heard no evidence directly implicating Mr Roper in any untoward dealings. In those circumstances there is no evidence that Mr Roper decided anything or took any action on the grounds of, in relation to or by reason of whistle-blowing. Insofar as it appears Mr Roper may have been setting the pace or dictating it, it is evident from our findings of fact that Mr Nixon actually reduced or softened the effects of any actions to be taken in respect of the claimant. We did not draw any adverse inference from the appearance of influence exercised by Mr Roper. We accept the respondent's innocent explanations.
- 4.3 The Tribunal finds that the matters of which the claimant complains in his Scott Schedule, in his ET1 at pages 14 and 15, and his further and better particulars at page 29A and following do not amount to detriments, specifically:

- 4.3.1 Disciplinary investigation: The reason for the disciplinary investigation was that Mr Nixon believed the claimant was underperforming. The investigation commenced prior to the protected disclosure of 18 December 2015. Insofar as the investigation could be criticised for being inadequate, unfair or appearing biased, the Tribunal finds that Mr Nixon was inexperienced and lacked knowledge with regard to investigations, and at the same time he wanted to apply some pressure on the claimant to improve in his performance or to take the opportunity to leave the business if he wished to do so. There were deficiencies in the disciplinary investigation with regard to notice and disclosure which were both inadequate. Mr Kelk's initial report was incorrect and inappropriate but was then corrected and made appropriate. Mr Nixon showed that he had pre-judged the outcome; however this was based on his inexperience, lack of knowledge and desire to apply pressure on the claimant because of perceived deficiencies in his performance but not because he had made protected disclosures. In the same way Mr Kelk was inexperienced and lacked training and knowledge in the conduct of disciplinary investigations; at the same time he was being used by Mr Nixon to apply pressure on the claimant to improve his performance or to take the opportunity to leave if he so wished. Ms Sharma showed a lack of professional diligence and expertise with regard to the disciplinary investigation and in a failure to recognise the potential for the application of the ethical procedure.
- 4.3.2 Mr Nixon finding the claimant guilty of misconduct and pre-judging matters: This was in view of Mr Nixon's wish to apply pressure on the claimant to improve or leave if he wished to do so. It related solely to Mr Nixon's concerns about the claimant's performance in general and in respect of specific matters that were raised, but not whistle-blowing. Mr Nixon rowed back from any disciplinary sanction by recommending instead the issuing of a letter of concern. He genuinely felt that a letter of concern was appropriate to express the concerns he had about the claimant's performance, and none of those related to or were on the ground of or in respect of the claimant raising any matters of public interest by way of disclosure. Mr Nixon started out applying pressure on the claimant and rowed back from that merely to make his point that the claimant ought to improve his performance.
- 4.3.3 Imposition of a sanction: Mr Nixon wanted the claimant to improve or take the opportunity to leave the business if he so wished and he attempted to achieve that. The claimant was ultimately responsible for the production of a brochure and for the management of the Project, and Mr Nixon genuinely believed that the claimant was involved in the Amber Taverns issue. He decided to take action because of a combination of those matters and a general concern that the claimant was slow and/or late in the preparation of some of his work. His perception was that the claimant was then trying to avoid responsibility and was refusing

to take ownership of matters that were ultimately his responsibility. The reason there were no sanctions against any others who may have been involved is given at page 232 and this was genuine. The respondent was definitely concentrating the pressure on the claimant, but that was because he was in a pressured managerial role and was seen not to be performing to the best of his ability and in line with the requirements of the respondent business, quite apart from and wholly unrelated to his having made or alleging he had made any disclosures in the public interest.

- 4.3.4 Denial of appeal: The respondent saw neither the letter of concern nor proposed performance management as disciplinary sanctions, and they therefore considered that they fell outside the appeals process. The respondent's genuine reason for not allowing a formal disciplinary appeal to proceed was as summarised by Ms Sharma in her letter of 28 January 2016 at page 296. The respondent was careful not to impose a disciplinary sanction and deliberately chose the vehicle of a letter of concern to avoid one whilst still making its point about the claimant's perceived poor performance.
- 4.3.5 The claimant's allegation that his concerns were ignored until 6 February 2016 when he wrote to Mr Gilliland: In fact all of the respondent's senior managers were informed of the situation throughout, and the claimant's concerns about "below duty" sales were not ignored. Mr Kelk investigated the matter, conducting a number of interviews with all relevant people. The claimant was involved in the investigation at Classic. The Booker issues were referred to Booker to investigate apart from Classic, and all of that was put in hand prior to 6 February 2016. The claimant says that he suffered detriment and was singled out. He was not actually ignored and Messrs Nixon and Kelk considered action that was appropriate to take to address the claimant's underperformance.
- 4.3.6 Failure to investigate: The claimant was fully involved in all the investigations regarding "below duty" sales at Classic. When he attempted to investigate further into Booker generally the amount of data caused the system to crash and for that reason, and it lay outside his responsibility, he was instructed not to investigate wider Booker issues but to leave that to them. This was not a detriment as it was outside the claimant's remit. The respondent wanted the claimant to air the problems that he had discovered and not to withhold information of his concerns. It was not disadvantageous to the claimant or in any sense detrimental to him to be reminded that his primary responsibility was to investigate matters insofar as they affected Classic only and to avoid other action that was deleterious to the smooth running of the computer system for Booker.
- 4.3.7 Ridicule/disparagement: The claimant cites a number of examples as follows:

- 4.3.7.1 Office move 22 January 2016: There was a genuine reorganisation. Mr Nixon and Mr Kelk needed their own offices and Ms Wharton and the claimant were to share a room so as to free up room for telesales. The office move was solely by reason of reorganisation and to effect the freeing up of office space, and was not related to the claimant's whistle-blowing.
- 4.3.7.2 Mr Nixon querying the claimant's punctuality: Mr Nixon felt that the claimant was underperforming and he was concerned about delays and alleged poor standards in some regards in respect of the claimant's work. They are legitimate concerns of a line manager and Mr Nixon raised punctuality with the claimant when he thought it was relevant. This was wholly unrelated to the claimant's whistle-blowing.
- 4.3.7.3 Reference to the claimant being behind with his work: This is, as in the subparagraph above, a reflection of Mr Nixon's consistent concern about the claimant's perceived underperformance. Mr Nixon felt that there was pressure on the team with regard to the preparation of the brochure and that the team felt put upon, and so it was entirely reasonable of Mr Nixon in his managerial capacity to raise the issue with the claimant.
- 4.3.7.4 Informing the claimant of the reaction of his colleagues Ms Ward and Ms Muirhead: Mr Nixon in his managerial capacity informed the claimant of the reaction of two colleagues, Ms Ward and Ms Muirhead, to their respective concerns regarding the brochure. This was all part of the communication between a director and manager regarding normal day-to-day activities at work. It was appropriate for Mr Nixon to inform the claimant of these matters, which were not therefore detrimental and in any event were not related to the claimant's whistle-blowing.
- 4.3.7.5 Brochure issues generally: Mr Nixon's issues over perceived underperformance by the claimant in respect of the brochures which contained errors were raised by him with the claimant in June 2015 and September 2015 before any disclosure was made. This was an ongoing issue where the claimant was ultimately responsible for management of the brochure and there were errors with the brochure. There was no detriment in Mr Nixon raising these matters, which were appropriate and not detrimental. They were not raised for any reason related to whistle-blowing.

- 4.3.7.6 Mr Nixon's meeting with Ms McKee: Mr Nixon may well have met Ms McKee. Neither Mr Nixon nor the claimant gave evidence as to what was discussed at that meeting and Ms McKee was not a witness such that the Tribunal is unable to make a judgment as there were no findings of relevant fact.
- 4.3.7.7 The Tribunal considers it has already explained its judgment in respect of matters alleged by the claimant in respect of the disciplinary hearing on 8 January 2016 (pages 29C-29D paragraph 1.13, and paragraphs 1.14, 1.15, 1.16 and 1.17 on page 29D).
- 4.3.7.8 Mr Nixon's emails criticising the claimant were based on his view of the claimant's underperformance and not whistle-blowing, consistent with the Tribunal's findings above.
- 4.3.7.9 Handling of the claimant's grievance (page 15): The tribunal concludes that the grievance outcome letter at pages 365-369 prepared by Mr Price was a fair and reasonable conclusion to the grievance based on the evidence before him. It was not perverse. The conclusion is substantiated. The outcome is within the range of reasonable responses to a grievance such as that raised by the claimant and it is consistent with the Tribunal's own findings. The Tribunal finds it is neither malicious, unfair nor biased and there is no evidence of any failing by Mr Price to consider appropriate issues or to reach reasonable and reasoned conclusions, but in any event there is also no evidence that he was influenced at all by any disclosures made by the claimant. The Tribunal finds that the outcome was not on the grounds of, by reason of or in any sense related to the making of protected disclosures by the claimant.
- 4.3.7.10 Ms Sharma was dismissive of the advice that the claimant quoted to her because she believed that it was not correct or appropriate advice. She felt that the claimant had misunderstood that he had the right to appeal against a letter of concern because he thought it was a disciplinary sanction; she did not; the respondent specifically decided not to impose a sanction. Whatever it was it was as a result of the respondent's concerns at the claimant's performance; it was not on the grounds of the claimant having made a protected disclosure. Ms Sharma did not accept what the claimant was saying because she felt he had misunderstood the situation and that the advice was based on a false premise. They had a difference of opinion. Her expression of her opinion was not a detriment to the claimant, not least

because in effect the respondent dealt with the claimant's concerns in his appeal letter and revoked the letter of concern, cancelling the planned performance management.

- 4.3.7.11 The Tribunal finds that the claimant was not unfairly or unjustifiably treated by his managers or colleagues to pressurise him or punish him in any sense in relation to having made protected disclosures. The respondent's actions, as we have said throughout, were consistent with their concerns over the claimant's performance in the context of Mr Nixon wishing the claimant to improve on that performance but also being open to the possibility that the claimant may take the opportunity to resign if he so wished and was not prepared to improve.
- 4.4 Whether or not the respondent considered that the claimant had made protected disclosures is not the point. We have adjudged what protected disclosure was made. What matters is whether and how any protected disclosure influenced the respondent's decision making and acts or omissions in respect of the claimant. We find it did not, and neither did the other disclosures save in that having confirmed his error over below duty sales at Chester the respondent had to investigate and resolve the problems that became evident. Such appropriate and proportionate action did not constitute detrimental treatment.
- 4.5 Having found as we did in respect of individual allegations, and there were many, we also looked at the situation as a whole to consider whether the sequence of events were too much of a coincidence and whether an inference ought to be drawn that in fact taken together the respondent's actions and omissions are suspicious. Having considered this we discount it. The simpler and more accurate description of events is not one of conspiracy and punitive action or the imposition of detriments for whistle blowing but that the respondent believed it had to, and did, address the claimant's performance regardless of the fact of his disclosures. There may well have been some positioning, attack and defence building, with regard to each side covering the situation of the claimant leaving his employment one way or another. The claimant certainly incurred a sizeable legal bill and he sought to recover that from the respondent. The respondent backed off disciplinary action and did not dismiss the claimant. The claimant did not accept any terms for his resignation but instead accepted a new role. The bill remained to be paid. Its payment would have been central to the claimant's issues on remedy if he had succeeded with this claim but the tribunal makes no further findings in that regard.
- 4.6 In summary the claimant made one protected disclosure and was not subjected to detriment because of it. Even if the other disclosures relied on were protected disclosures, the respondent did not subject the claimant to any detriments because of them or for reasons related to them. The claimant was perceived as being unhappy at work and to be underperforming. The respondent attempted to manage that situation. The

claimant was known to be taking legal advice and positioned himself for possible claims against the respondent. The respondent factored that into its management of the claimant's performance. Its management of the claimant was not influenced or affected by the claimant raising wrongdoing in the workplace and doing so in the public interest.

- 4.7 On the first day of the final hearing the claimant applied to amend his claims to include allegations that he made further protected disclosures on 30th December 2015 and 8th January 2016 by reason of which he suffered further detriments or the same detriments as otherwise alleged. The respondent opposed the application. Bearing in mind the above chronology and the extent and quality of the legal advice, assistance and representation that the claimant had enjoyed for over twelve months, the “pleadings”, preliminary hearing minutes and case management orders we considered that this application was very and inexcusably late. On balance we felt that the respondent would be more prejudiced by allowing it than the claimant would be by our refusing it. In the interests of justice and by reference to the factors to be taken into account when we consider how to achieve the overriding objective of the tribunal as provided for in the tribunal’s rules, we refused the application.
- 4.8 Following oral submissions on the last day, judgment having been reserved, after the parties had left the tribunal and while we were deliberating in chambers, the claimant presented via administrative staff an additional documentary submission in support of his case. We asked that the respondent’s views be canvassed and whether it would wish to respond. The respondent objected to our consideration of the late submission. Taking into account the circumstances as described and the factors referred to above in paragraph 4.7 we rejected the late submission. In the interests of justice it was not considered.

Employment Judge T V Ryan

Date: 06.06.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 June 2017

FOR THE TRIBUNAL OFFICE