EMPLOYMENT TRIBUNALS

Claimant: Miss S Coleman

Respondent: Southwark Council

Heard at: **London South Employment Tribunal**

On: **15-19 July and 25 November 2019**
26-27 November 2019 (in chambers)

Before: **Employment Judge Ferguson**

Members: **Mrs S Dengate**
Ms N O'Hare

Representation
Claimant: Ms F Onslow (counsel)
Respondent: Ms N Ling (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's complaint of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 fails and is dismissed.

2. The Claimant's complaint of ordinary unfair dismissal succeeds.

3. There shall be no reduction to any basic or compensatory awards under the principles in Polkey or under sections 122-123 of the Employment Rights Act 1996.

4. The Claimant's complaint of detriments because of protected disclosures fails and is dismissed.

5. A remedy hearing will take place in due course.

REASONS

INTRODUCTION

1. By a claim form presented on 21 December 2017, following a period of early conciliation which began and ended on 20 December 2017, the Claimant brought complaints of automatic unfair dismissal because of making protected disclosures, ordinary unfair dismissal and detriments because of protected disclosures.

2. By the time of closing submissions the issues were agreed as follows:

   Ordinary unfair dismissal

   2.1. Did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? The Claimant relies on the following conduct:

      2.1.1. Bullying by Mr Costin from May 2015, in particular at meeting on 5 November 2015 when she was called a "grass" and accused of being "away with the fairies".

      2.1.2. Denial of project management training when a vacancy came up in September 2015.

      2.1.3. Removal of flexible working in early 2016.

      2.1.4. Pressurising the Claimant to resign in early 2016.

      2.1.5. Putting the Claimant on "garden leave" in August 2016.

      2.1.6. The commencement of disciplinary proceedings in June 2017 and pursuing the matter to a disciplinary hearing.

   2.2. If so, did the Claimant resign in response to the Respondent's conduct?

   2.3. If the Claimant was dismissed, what was the principal reason for dismissal? The Respondent relies on conduct.

   2.4. Was the dismissal fair or unfair in accordance with s.98(4) of the Employment Rights Act 1996 ("ERA")?

   2.5. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed?

   2.6. Should there be any reductions to the basic or compensatory awards pursuant to sections 122 or 123 ERA?

Whistleblowing

2.7. Did the Claimant make one or more protected disclosures? She relies on the disclosures set out in Appendix A to this judgment. They will be referred to as follows:

2.7.1. PD1, January 2012, to Mr McHenry

2.7.2. PD2, June/July 2013, to Mr Costin

2.7.3. [PD1 and PD2 repeated, 10 February 2015, to Ms Dudhia]

2.7.4. PD3, May 2015, to Mr McHenry and Mr Costin

2.7.5. PD4, 22 August 2016, to Mr Littleton

2.7.6. PD5, 29 August 2017, to Mr Campbell-Scott

2.8. What was the principal reason the Claimant was dismissed and was it that she had made a protected disclosure?

2.9. Did the Respondent subject the Claimant to any detriments, and if so was this on the ground that she had made one or more protected disclosure? The detriments relied upon are the matters set out in paragraph 2.1 above plus:

2.9.1. The Claimant's purported dismissal for gross misconduct.

2.9.2. Informing Islington Council, where the Claimant had an interview following her resignation, of the disciplinary proceedings.

Jurisdiction

2.10. In respect of the detriment complaints, does the Tribunal have jurisdiction to hear them in view of the applicable time limit?

3. We heard evidence from the Claimant and, on her behalf, from Hennie Pietersz. On behalf of the Respondent we heard from Nicky Costin, Joan Leary, Priya Clement, Stuart Robinson-Marshall, Mick Lucas, Lisa York, David Littleton and Hannah Lilley.

FACTS

4. The Claimant commenced employment with the Respondent on 5 December 2005 as a Service Support Officer in the Markets and Street Trading department ("Markets"). In October 2006 the Claimant reported fraudulent activity in Markets which led to the entire team being suspended in September 2007. The Claimant was moved to Parking Services. Most of the staff who were implicated resigned, one was dismissed and another was demoted. Management of Markets was outsourced to a company called Geraud. The department was taken back in-house in 2010.

5. On 1 August 2011 the Claimant was appointed Commercial and Administration Manager in Markets. Her line manager was John McHenry, the Business Unit Manager of Markets & Street Trading. In November 2011 Hannah Lilley joined the team as Senior Markets Officer. The Claimant and Hannah Lilley were at the same level of seniority.

6. The Markets Manager at the time was Matt Steele and there is evidence that the Claimant and Hannah Lilley, from December 2011 at the latest, had serious concerns about what they considered to be failings in management, and some concerns about failure to follow proper procedures relating to licences and dealing with payments from traders. They also suspected that Mr Steele had placed a listening device in the office. An email exchange entitled "this is a summary of all the inappropriate stuff that has happen in the last 8 weeks" took place between the Claimant and Ms Lilley throughout much of December 2011 and January 2012.

7. On 20 December 2011 Ms Lilley wrote to the Claimant:

> "I have listed several complaints that I have about the management style see below do you think this is worthy of whistle blowing? I have highlighted in red circumstances which I think were helped by eavesdropping. Can we get the office swept while he is away over xmas do you think?"

8. The Claimant wrote to Ms Lilley on 10 January 2012:

> "…
>
> 6) There has been a lot of issues surround I S at London Bridge. Firstly MS tried to give him a permanent licence, I spoke to AB and told that he was aware of the legislation and he could not just give a permanent licence. MS and AB went to London Bridge together and I believe took back the permanent licence. …
>
> 7) I have repeatedly asked about the containers. MS has confirmed that they are paid at £80 per week. I have checked we have not raised any £80 fees and there has not been any cash put into the safe for £80. I have e-emailed HS to find out if this is being paid, and apparently it isn't. I think it is L D and he is supposed to be paying us £80 per month to store the containers there.
>
> …"

9. In a further email on 11 January 2012 the Claimant wrote:

> "I have exhausted all avenues we are not invoicing or taking cash, (despite his claims that we are) for the containers, or the Chinese food wagon, which is parked every night in the car park. This is lost revenue."

10. On 13 January the Claimant wrote again to Ms Lilley:

> "Matt is fully aware that a temp cannot do a transfer to next of kin, it is quite clearly set out in the LLAA. Any transfers need to go through our

meeting. But as per usual he will get someone to do it, as he did with Adrian and he asked Adrian because Adrian is in my team, so it would be me that was answerable so we need to be careful with him…"

11. Ms Lilley said in her oral evidence that all of the concerns came exclusively from the Claimant and that, as a new member of the team, she had no reason to doubt what the Claimant was saying. We consider that Ms Lilley was seeking to downplay her role in raising these matters at the time. It is clear from the contemporaneous emails that she was identifying her own concerns, was keen to document them and anticipated a possible whistleblowing complaint. We note that she denied there was any real suspicion of eavesdropping via a listening device, saying again that this came only from the Claimant, but we did not find this credible given that her own emails included what she suspected to be instances of eavesdropping.

12. The Claimant says that she raised a number of concerns with Mr McHenry in a meeting in January 2012, including the following matters that are relied upon as part of PD1:

    12.1. Payment for containers and car parking was being taken but no receipts/invoices could be located and no cash payments could be located.

    12.2. Receipt books were not logged or handled as secure stationery and were lost or stolen.

    12.3. Proof of payment was taken from traders for daily trading fee and receipts were not given.

13. The Claimant says she reasonably believed that these matters tended to show that the criminal offence of fraud was happening or was likely to happen.

14. She also claims to have raised the following matters that she reasonably believed tended to show breach of a legal obligation:

    14.1. Traders not being registered pursuant to the London Local Authorities Act 1990 ("LLAA").

    14.2. Traders being given permanent licences and another trader having his licence revoked not in accordance with the LLAA.

15. The Respondent does not deny that this meeting took place or that the Claimant raised the above matters, but put the Claimant to proof on the issue. We accept that a meeting took place where the Clamant raised some concerns with Mr McHenry about the management of the department. There was no evidence from Mr McHenry and no other evidence to suggest the meeting did not take place.

16. In terms of what was disclosed during the meeting, the best evidence we have is the emails between the Claimant and Ms Lilley. They are a frank and open exchange of concerns about a large number of matters.

17. As for the containers and car parking, it is clear from the emails that the Claimant's concern was lost revenue because payments were not being taken.

There is no suggestion in any of the emails that payments were being taken as "back-handers", or any other type of fraudulent activity. We consider implausible that, if the Claimant was concerned that payment *was* being taken but not recorded, she would not have said so in the emails. We do not therefore accept that she made a disclosure in the January 2012 meeting that amounted to information about containers or car parking that tended to show fraud.

18. As for the receipt books, the Claimant does not actually say in her witness statement that she raised this issue in the meeting. Further, there is nothing in the contemporaneous emails about receipt books. Again, we consider that if it were a live concern of the Claimant's, and she mentioned it the meeting, it would have featured somewhere in the emails. The only evidence we heard about missing receipt books related to an incident in 2013 when a market officer was dismissed for stealing a receipt book. That cannot support the Claimant having raised a concern about it in January 2012. Her own evidence in her witness statement about receipt books not being properly logged relates to a much later period, from November 2014. We do not accept it was raised in the January 2012 meeting.

19. The issue relating to receipts allegedly not being given for the daily trading fee appears, from the Claimant's witness statement, to be that market officers were taking the only proof of payment, so traders themselves did not have any proof that they had paid. This is not an issue that is raised in the emails. For the same reason as above, we do not accept that she raised it in the meeting.

20. As for the LLAA issues, the only potentially relevant parts of the emails are the "London Bridge" and "next of kin" incidents referred to above. We accept the Claimant may well have raised the issue of Mr Steele trying to give the London Bridge trader a permanent licence, but according to her email she pointed out that it was contrary to the legislation and he took the licence back. There is nothing in any of the emails about licences being wrongly revoked so we do not accept that issue was raised.

21. According to the Claimant's witness statement there was an issue about a failure to register a trader, but this was much later. There is no evidence of her having raised this issue in January 2012 and we do not accept that she did so.

22. Later in 2012 there was a restructure. Nicky Costin was appointed Business Unit Manager, with the title "Parking and Road Network, Marina and Markets and Street Trading Manager". He therefore took on overall responsibility for Markets. Mr McHenry remained the Claimant's line manager.

23. The Claimant says that she made a second protected disclosure (PD2) to Mr Costin in June or July 2013. The Respondent denies that any such meeting took place. The Claimant relies principally on an email she wrote to Mr Costin on 6 September 2013 in which she said:

> "Hi Nick
>
> I have tried to contact you and I would rather do this face to face. As I mentioned a couple of months back I was at a point where I wanted out felt that we couldn't move the section forward. So I did go for a job, not really expecting to get it. But I did get it (project manager post in CGS).

> I did speak to John before I went for it and asked would he consider a secondment and at that time he said yes. I do really love markets and I do think we are getting things under control now, but I also think that the project manager position would be good experience which I could bring back to markets…"

24. On the basis of that email we accept that a meeting took place in June or July 2013 in which the Claimant mentioned problems with the department that were sufficiently serious she wanted to leave.

25. The Claimant claims under PD2 that during that meeting she disclosed a number of matters, which she reasonably believed tended to show breach of a legal obligation:

    25.1. Failure to record traders' accounts properly so they appeared to be in arrears, causing them to be referred to the Licencing Sub Committee to revoke their licences.

    25.2. The Respondent losing traders' files and invoices.

    25.3. Bye laws not having been signed off correctly.

26. The Claimant also says that she raised the following matters that she reasonably believed tended to show that the criminal offence of fraud was happening or was likely to happen:

    26.1. Invoices not being collected from traders at the time of trading.

    26.2. Proof of payment being taken without providing receipt (as for PD1).

    26.3. Traders being allowed to trade outside designated times/ days.

    26.4. Fees not being registered. (It was not entirely clear what "registered" means in this context. We understood this to be an alleged concern that payments were not being properly recorded.)

    26.5. The Markets and Street Trading Section had recently adopted Part III of the Food Act 1984. As a result, the markets building, which was an asset of the ring-fenced street trading account, had "knowingly" been put into the Council coffers as a Council asset rather than being sold to clear the deficit and stop increases for traders.

27. Except for the last issue above relating to the markets building, there is a straight dispute of fact as to whether any of these issues were raised with Mr Costin, and we have only the oral evidence of each of them to assist us. We note that there is no contemporaneous documentary evidence of the Claimant having had these concerns at the relevant time (mid 2013). The evidence that she felt there were problems – "couldn't move the section forward" – is not sufficient to support a finding of her having had, let alone raised, these specific concerns. The Claimant was well aware of her rights as a whistle-blower, and is the type of person to ensure that concerns are documented (see the email exchange with Ms Lilley). In the absence of any documentary evidence

suggesting these specific issues were of concern to the Claimant at the time we do not accept that she raised them in the meeting.

28. Mr Costin accepted that the Claimant had raised an issue about the markets building with him at some stage. We will proceed on the basis that the Claimant did disclose during the meeting in June or July 2013 the information on this issue set out in Appendix A at PD2.

29. In November 2013 the Claimant commenced a one-year secondment to the Environment and Leisure Department. On 31 July 2014 she commenced a period of sickness absence due to stress/ depression. There was very little evidence before us about the cause of these problems. The secondment formally ended on 31 October 2014, but the Claimant was still off sick at this point. She began a phased return to work on 1 December 2014.

30. An internal audit of Markets took place in or around January 2015. The report recorded the "level of assurance" as "amber/red". It made three medium level and seven low level recommendations to manage the risks identified. The executive summary lists the key findings of the review as follows:

> "- Pitch Plates are not always presented by traders or being checked by Market Officers to ensure only licenced traders are working and selling appropriate goods.
>
> - There is currently no way of substantiating weekly payments in proceeding days of that week if the trader makes a late payment. Payments via phone cannot be verified as there is no reference on SAP until after 2 days.
>
> - Actions against each debtor are not being fully recorded as evidence of recovery action taking place so consistent management of debts cannot be confirmed. The service has also not set a threshold to instigate suspension proceedings against traders who fail to pay outstanding debts.
>
> - Fraud Awareness training has not been given to staff for over 3 years and management were not aware of additional tools available within the council to assist them in validating identification documentation.
>
> - Supporting documentation supplied by traders to support their application was not always retained as evidence of validation of awarding licence.
>
> - Management do not organise the Market Officers rota and they chose their which markets to visit therefore it does offer the opportunity possibility of collusion and familiarity allowing for mistakes to go unnoticed.
>
> - Seniority is not being documented this is a key action in determining the granting of a permanent pitch and for supporting the decision taken if challenged."

31. The Claimant had a meeting with Kalpna Dudhia of HR on 10 February 2015. The Claimant claims to have repeated PD1 and PD2 to her at that meeting. Insofar as we have accepted that any of the claimed disclosures were made in the first place, we will proceed on the basis that they were repeated to Ms Dudhia.

32. The Claimant claims to have made further protected disclosures (PD3) to Mr Costin and Mr McHenry in a meeting on 5 May 2015. The Respondent accepts that there was a meeting, but denies the Claimant raised the matters she claims to have raised. The Claimant says she disclosed the following, which she reasonably believed tended to show the criminal offence of fraud was happening or was likely to happen:

    32.1. Trader lists were incorrect (including trader names).

    32.2. Receipt books were not treated as secure stationery and could not be accounted for.

    32.3. Traders were permitted to trade outside designated days/ hours.

    32.4. Payments for daily trading were not collected, in particular at Canada Water.

33. We accept there is evidence of the Claimant having criticised Mr McHenry in a meeting before he left the Respondent's employment in July 2015 (see the meeting with Mr Costin on 5 November 2015 below). The audit report is also evidence of there having been some problems with record-keeping (albeit not the specific issues relied upon for PD3). In view of our conclusions below, however, it is unnecessary for us to decide whether we accept that these specific issues were raised.

34. The Claimant had had a flexible working arrangement from an early stage in her employment. In June 2015 it was agreed with Mr McHenry that she would work compressed hours, namely four 9-hour days, one of which was to be worked at home, as well as one weekend in three.

35. Between 22 and 24 June 2015 there was an email exchange between the Claimant and Mr Costin about the Claimant's request to cancel a parking ticket she had been issued while using her car for work purposes. Mr Costin said the Claimant did not have grounds to challenge the ticket. The Claimant was unhappy with the response and pressed the issue with Mr Costin in two further emails. He maintained his position.

36. In July 2015 Mr McHenry left and Lisa York took over as the Claimant's line manager.

37. The Claimant's evidence was that she had been put on a waiting list, with the permission of Mr McHenry, for a project management training course called "Prince 2" in or around March 2015. This evidence was not challenged. A vacancy on the course came up in September 2015 and the Claimant requested Ms York's permission to attend. Ms York forwarded the Claimant's request to Mr Costin, saying "After our meeting this morning about the staff

budget please advise on the request below from Sharon". Mr Costin responded as follows:

> "I am not aware of anyone else who wanted to go on the PRINCE 2 course apart from Adrian. When I let Adrian go on the course John [McHenry] and I said that if anyone else would like to go on the course (depending on positive feedback from Adrian) then they would have to go on a list and be drawn out of a hat if there were more than one. Considering our present financial position no one else will be permitted to attend this course this financial year."

38. The evidence of Mr Costin and Ms York to the Tribunal as to the reason for not allowing the Claimant to attend the course was not entirely consistent. We note in particular that Ms York's witness statement contained an error in that she said part of the reason for denying the Claimant the training was the fact that another employee had also been refused, but in fact that happened later, and she could not explain the error. Having said that, we consider that the email exchange is the best evidence of the true reason for the funding being refused. There is nothing to suggest, even in the private email exchange between Ms York and Mr Costin, that there was any other reason or motivation in play. We accept that the reason the Claimant was not allowed to attend the course was because there was no funding available for it in that financial year.

39. On 4 and 5 November 2015 the Claimant and Mr Costin had an email exchange about her entitlement to Essential Car User Allowance. She claimed she was entitled to it; he said she was not. The dispute appears to have prompted a meeting between them on 5 November.

40. There is considerable dispute about how the meeting unfolded and the behaviour of both parties. In fact much of that dispute is not relevant to the issues we have to decide. Mr Costin produced a note of the meeting, which he sent to the Claimant on 10 November. She disputed its accuracy at the time and before the Tribunal, but she does not dispute that the various issues listed were discussed. The note may be summarised as follows.

    40.1. "Essential Car User Allowance". The Claimant maintained that she was entitled to it. Mr Costin disagreed because she was mainly office based.

    40.2. "Not supporting Lisa York". Mr Costin said he felt the Claimant did not support the new manager. The Claimant said she "regarded Lisa as a c**t and that she can't manage", but said despite that she was supporting her.

    40.3. "Your introduction back to work from illness". Mr Costin said when the Claimant returned on a phased basis he and John agreed not to give her all her duties back at once, so as not to overload her. "I mentioned at the meeting something along the lines that you were away with the fairies or words to that effect, I should have chosen my words more sympathetically and I apologise if this caused you any offence". The Claimant now had her full workload back.

    40.4. "Working from home and your compressed week". Mr Costin said he was concerned that the Claimant was not working from home effectively. The Claimant disagreed. Mr Costin said he would like to see her inbox for

the last two months where she had been working from home, and the Claimant agreed. Mr Costin also said that the arrangement was not as of right and could be removed.

40.5. "You needed to get away". The Claimant said she needed to get away as the service was getting worse and worse.

40.6. "John McHenry". Mr Costin said he was disappointed the Claimant had "turned on" Mr McHenry at one of their meetings.

40.7. "Paranoid". The Claimant said she was convinced she was being removed from markets. Mr Costin denied this and noted that he had simply made some decisions recently that had not gone in her favour.

40.8. "Going forward". "From my contact with your Sharon I know you are a capable person who can do a good job, and hopefully you have taken on board what we discussed and will move forward with the team and continue to be a valued member."

41. The Claimant alleges that during the discussion about the meeting with Mr McHenry Mr Costin "called me an effing grass, we don't need people like you here, you are a grass and that is not what Bermondsey people do." Mr Costin denies saying anything along those lines.

42. We accept that Mr Costin would be unlikely to record it in his note of the meeting if he had called the Claimant a "grass", but we would expect the Claimant to have made some reference to it when she replied to Mr Costin's email disputing the contents of the note. In fact her email said "I have unwittingly obviously done something to upset you", which suggests that Mr Costin did not give any reason in the meeting for taking against the Claimant. We also note that the Claimant emailed Mr McHenry on 8 November 2015 to apologise, following the discussion with Mr Costin about him in the meeting on 5 November. She said:

> "Nicky explained that you wanted me out of the section/ office because I caused an atmosphere. I know I caused an atmosphere sometimes because I wanted to make the office 'run like clockwork' and felt the officers weren't pulling their weight, it was no other reason. I am so sorry you felt that way."

43. We consider if Mr Costin had called the Claimant a "grass" she would have taken serious offence and mentioned it in her emails to Mr McHenry or Mr Costin. We therefore do not accept that the alleged comment was made.

44. From this point onwards it is clear that the relationship between the Claimant and Mr Costin became very acrimonious.

45. The Claimant says that Mr Costin's attitude towards her changed after the 5 May 2015 disclosure, but there is no indication in the documents of any personal problem between them until this meeting in November. On the contrary, in an email exchange on 12 May 2015 Mr Costin and the Claimant shared a joke about the dress code for the "count" on election night. It is not in dispute that they were on the same team for the count and the Claimant does not suggest that there were any problems.

46. The Claimant was due to take planned medical leave for an operation from 16 February 2016. A handover meeting took place on 11 February 2019, attended by the Claimant, Ms York, Kay Payne (Commercial and Administration Officer) and Ms Lilley. During the meeting Ms York said that she would be reviewing flexible working arrangements and that staff would need to apply by 1 April. The Claimant immediately said that she felt Ms York was picking on her, and objected to having to re-apply.

47. On 1 March Ms York emailed all staff in Markets saying that she was reviewing all flexible working "to ensure flexible working arrangements are in line with the Councils flexible working procedure". She said that all existing flexible working arrangements would cease on 31 March 2016 and applications would need to be submitted by 21 March. Ms York wrote a letter to the Claimant on the same day (presumably because she was on medical leave by then) in the same terms. She enclosed an application form.

48. On 14 March 2016 the Claimant emailed Ms York. She said that as she had just undergone major surgery, she felt it was unfair for her to have to deal with the flexible working issue during sickness absence. She considered the agreement with Mr McHenry to be a permanent adjustment to her working hours, and that this review was taking place less than 12 months after that agreement. Notwithstanding those objections, she said she would make a fresh application as requested. She explained she was unable to access a scanner, and said "Please accept this e-mail as my application in line with policy guidelines". The rest of the email set out a proposed flexible working arrangement and the reasons for the application.

49. Ms York did not acknowledge or respond to that email. In April 2016 the Claimant noticed her pay was reduced. She raised the matter with HR and on 28 April Ms Dudhia replied saying:

> "Payroll have advised that your compressed working week (9 hours per day over a 4 day week) arrangement came to an end at the beginning of the financial year, and this reduced your pay because you also do weekend working (working a 9 hour shift at the weekend) on a rota.
>
> However, after speaking to Lisa York Payroll have update your work pattern and weekend payments and April arrears will be paid to you in May."

50. The Claimant replied to that email pointing out that she had not had a response to her flexible working application.

51. Ms York's evidence to the Tribunal on this issue was unsatisfactory. She claimed that she did not deal with the Claimant's email of 14 March because it was not made on the official form, and the Claimant had said she was going to submit an application. She was therefore waiting to receive it. We do not accept that that adequately explains her inaction. The email made it clear that the Claimant wished the email itself to be treated as the flexible working application. That was an entirely reasonable request given that the Claimant was on sick leave at the time. There is no explanation for Ms York's failure even to acknowledge the Claimant's email. We also note that in a later grievance

hearing, on 14 September 2016, Ms York denied that the Claimant had submitted a flexible working request to her and claimed it went straight to HR.

52. We consider that Ms York has not been honest about this issue, either in the internal grievance meeting or in the Tribunal proceedings, and we infer that the decision to review flexible working arrangements was targeted at the Claimant. This is supported by Mr Costin's evidence that Ms York came to speak to him about reviewing the flexible working, having identified that the Claimant was the only person in the team with a flexible working arrangement, which she appeared to consider was unfair to the rest of the team. We also take account of the manner in which the issue was raised at the meeting on 11 February 2019. Contrary to Ms York's evidence, this was not a team meeting. Only four members of staff were present and the purpose was to discuss a handover of work before the Claimant's leave. Given that the Claimant was the only person in the meeting with a flexible working arrangement it was inappropriate to raise that issue at that meeting, in front of a more junior member of staff.

53. Although it appears that the removal of flexible working on 31 March was rectified once the Claimant raised the issue with HR, we find that Ms York requiring the Claimant to reapply during a period of sickness absence and then refusing to treat the email as a valid application and/or failing to reply to the email was done because of a personal animosity towards the Claimant. There is evidence from Mr Costin's note of the 5 November 2015 meeting that the relationship between the Claimant and Ms York was not good, even at that stage. We also note that Mr Costin expressed his own reservations about the Claimant's flexible working arrangement and said that it could be removed. We consider it likely that Mr Costin and Ms York had discussed the matter and decided to require the Claimant to re-apply.

54. The Claimant says that on or around 11 March 2016 she was told by a friend, Tina Smith, whose brother Robert Smith had done work for the Respondent and knew Nicky Costin, that if she wanted redundancy she would need to leave by 31 March 2016 and she would be given "double bubble", which meant double the contractual redundancy pay. The Claimant says this must have come from Mr Costin and amounted to pressure to accept voluntary redundancy. Mr Costin strongly refutes this.

55. We consider that the Claimant does not come close to establishing that any such pressure came from Mr Costin. It was speculation based on an assumed friendship between Mr Smith and Mr Costin, which Mr Costin denies. Although the Claimant and Ms Pietersz now say that Tina and/or Robert said the message had come from Mr Costin, there is evidence in the form Facebook Messenger messages between the Claimant and another family member of the Smiths that they refused to say where the information had come from. We also note that there was no voluntary redundancy scheme in place at the time. We consider it likely that this was nothing more than a rumour, and whatever the Smiths had heard was probably based on a misunderstanding.

56. On 22 August 2016, while still on medical leave, the Claimant submitted a formal grievance against Ms York and Mr Costin. One of the complaints was that Mr Costin had disclosed medical information about her to Robert Smith while they played golf together. The Claimant relies on this as a protected disclosure (PD4) on the basis that it was information that tended to show breach

of a legal obligation. The Respondent accepts that the disclosure was made and that it tended to show breach of a legal obligation, but contends that the Claimant had no reasonable belief in the truth of the allegations. The Claimant's evidence to the Tribunal did not include any information about what she had heard from Robert Smith, or via Robert Smith, about her medical issues, or why she believed any such information had come from Mr Costin. In those circumstances there is no basis on which we could find that she had a reasonable belief in the truth of the information she disclosed. Incidentally, we also doubt that this disclosure would meet the public interest requirement. It was not a disclosure about the Respondent's data protection procedures generally; it was about a single alleged breach concerning the Claimant alone.

57. Stuart Robinson-Marshall, Head of Sustainability & Business Development in the Environment and Leisure Department, was appointed to investigate the Claimant's grievance. In an undated letter, which must have been sent in late August 2016, he invited the Claimant to a meeting to discuss the matters she had complained about. In the same letter he noted that the Claimant's fit note from her GP was due to expire and that the Claimant had said she was ready to return to work on 1 September 2016. The Claimant's union representative had suggested she continue her normal duties in a different office and be managed by Ms York remotely, or that she be temporarily transferred to an alternative role. Mr Robinson-Marshall rejected both proposals. His evidence was that this decision was made by the Head of HR. The letter states that it was not appropriate for Ms York to continue to line manage the Claimant while she was the subject of an ongoing complaint, and he had been unable to find temporary duties elsewhere. He said it had been decided to place the Claimant on "garden leave" until the investigation was completed. In fact, on 10 October 2016 the Claimant was temporarily assigned to the noise team and returned to work there in November 2016.

58. In April 2017 the Claimant was notified that her grievance was not upheld. It is unnecessary to give any further detail about this as it is not relevant to any of the issues in dispute. One of the recommendations was that the Claimant should now return to her normal role.

59. Around the same time the Respondent was undertaking a reorganisation which involved the deletion of the Claimant's role. She was required to apply for roles in the new structure. She indicated at a meeting in June 2017 that she was interested in the role of Markets Team Leader, for which she would have been considered alongside one other person. Because of the events below, however, the process was not taken any further for the Claimant.

60. The Claimant sought to take her grievance to a "stage 2" hearing, but David Littleton, Head of Regulatory Services, Environment and Leisure, refused to progress the matter to stage 2 on the basis that the Claimant had not raised anything that had not already been considered.

61. On 14 June 2017 Priya Clement, HR Business Partner, emailed the Claimant saying that Mr Littleton wished to meet her to discuss the following:

> "1. The outcome of the investigation.
> 2. Issues that have come to light as a part of the investigation including
> a. Issues around working from home.

> b. That you have avoided paying a Southwark Parking fine which is against Council policy
> c. That you have sent confidential Council information to your home e-mail address."

62. On the same day the Claimant emailed her managers in the noise team to say that she could not access the secure system on her laptop or blackberry and wondered whether her account had been suspended. She said she would take annual leave that day, which was agreed.

63. Shortly after this the Claimant was absent for a few days due to stress and her mother's ill health. She returned on 26 June and found that her account was still suspended.

64. On 27 June 2017 the Claimant was sent a letter from Joan Leary, Senior Anti-Social Behaviour Officer, notifying her that a management investigation would be taking place into the following concerns:

> "1. Falsification on working from home. (You have claimed for days that you may have not worked for from home)
> 2. Failure to pay a Southwark Parking fine which is against Council policy
> 3. Sending confidential Council information to your home e-mail address which is a breach of the Council's confidentiality agreement and code of conduct. This may also be a breach of the Data Protection legislation."

65. Mr Costin's evidence was that he had decided to monitor the Claimant's emails in June 2017 because of concerns about falsifying working from home, and in the course of that monitoring he discovered that she had sent a substantial number of emails containing confidential information to her home email address.

66. One of the central disputes in the case is the reason why Mr Costin decided to check the Claimant's emails and report the concern.

67. Mr Costin's evidence was that in September 2016 he "had time to consider the question of Sharon working from home". He said that he was unaware of her complaint against him and Ms York at that time and, as far as he knew, she would be returning to Markets when she came back from leave. His witness statement continues:

> "27. … I contacted HR to get the necessary permission to access her emails. I was then made aware of her complaint about me and Stuart's investigation and so I didn't do anything further regarding her emails until I was informed that Stuart's investigation had concluded, and her subsequent appeal to David had been addressed. This was around June 2017.
>
> 28. Regulatory Services underwent a reorganisation in 2017 to create savings and my teams were involved…
>
> 29. In June 2017, I looked into Sharon's working from home data. The purpose of me going through her emails was to try and assess how often she actually worked when she was working from home. As I was going

> through the emails I noticed that she had sent a lot of emails to her personal email address on 11 February 2016. I saw some of these contained private and confidential information. I opened these emails and found that Sharon had sent herself private and confidential documents including information relating to market traders account numbers, names, addresses, and phone contact details, plus the amount of debt which they owed the Council. I even found an email with a photographs of the chair of Southwark Association Street Traders."

68. We consider it odd that Mr Costin would suddenly decide in September 2016 to look into the issue of the Claimant's home-working when he had raised it almost a year beforehand in November 2015, she was not in Markets at the time, and he was not in any event her line manager. The explanation that he believed she would be returning to Markets is not plausible given that her medical leave had in fact ended in August 2016. When HR informed him about the complaint against him they must have also made him aware the fact that the Claimant had been placed on garden leave. There was no imminent return to Markets that would explain him investigating the matter at that time.

69. We also note that it was later suggested, in the "case overview" prepared by Joan Leary in November 2017 for the disciplinary hearing, that the monitoring of the Claimant's emails had been prompted by a market trader contacting Mr Costin, saying that his bank account had been compromised and he only used that account for his business with the Council. She said that Mr Costin "on investigation became aware that Ms Coleman had sent over 200 emails to her personal email account, many of which related to her post in markets between 2 June and 19 June 2017".

70. This explanation is also very odd. First, it is entirely different to the explanation given by Mr Costin in his witness statement. When this document was put to him in cross-examination he maintained that it was his concerns about working from home that led to the monitoring. He said he believed there was an email from a market trader, but it was not produced in evidence. Secondly, it is not at all clear where Ms Leary got that information from. There is no reference to the complaint from the trader in the investigation report, nor is it referred to in any of the underlying documents included in the disciplinary pack. We return to this issue below.

71. The Claimant has always accepted that she sent a large number of emails containing confidential information about traders to her personal email address. As for the timing, the precise number and the content of the emails, there was very little evidence before the Tribunal. The Claimant does not have the emails any more because she was asked to delete them and did so. The documents disclosed by the Respondent included an email dated 11 February 2016, which the Claimant forwarded to her personal email on 13 June 2017. It attached a Excel document entitled "Trader Account Status Report – January 2016". There were also two emails which the Claimant forwarded to herself on 2 and 8 June 2017 attaching a number of documents. None of the attachments were disclosed or produced in evidence to the Tribunal. No other emails were produced. The Respondent said they had not been disclosed for data protection reasons. The Tribunal queried why they could not have been redacted and on the fifth day of the hearing the Respondent produced a blank copy of the "Trader Account Status Report" spreadsheet with headings only. It

was not in dispute that the Claimant had sent this document, populated with information about traders, to her personal email account. The headings included trader's name, address, contact number, account status, pitch number and date of birth. Although the headings also include national insurance number, Mr Costin accepted that that information was not in fact included.

72. The failure to disclose the other emails and attachments remains unexplained. In those circumstances, to the extent that there is any doubt about what was in the other emails or attachments we consider we should resolve the issue in the Claimant's favour.

73. Mr Costin reported a breach of data protection to Jennifer Chambers, Information Governance Manager, on 7 July 2017. The "initial incident form" that he completed and emailed to her has not been produced in evidence. Ms Chambers responded, saying, "As we discussed, I am very concerned, and I believe that there is a possible criminal breach here".

74. Ms Leary wrote to the Claimant on 18 July. By this stage the Claimant was again off sick and had been signed off by her GP for two weeks. Due to the "serious nature of the incident" and the fact that the Claimant was unable to attend an investigation interview, Ms Leary asked the Claimant to answer a number of questions:

> "1. Why did you forward emails to your home account?
>
> 2. What has been done with them subsequently?
>
> 3. What do you understand about your responsibilities under the Data Protection Act?
>
> 4. Have you completed the online training (mandatory).
>
> 5. What information were you (and the wider team) given about

75. The Claimant responded by email on 21 July. She said she sent emails to herself for the following reasons:

> "- To work on documents when working from home.
>
> - Evidence for whistle-blowing.
>
> - To report fraud.
>
> - A potential tribunal case
>
> - I was aware that I would be leaving the Council (as per my complaint) so was carrying out some housekeeping."

76. The Claimant said there was no malicious intent. She referred to her past complaints about processes not being followed which created the opportunity for staff to commit theft and fraud, and the fact that she had recently discovered "that management had actually committed fraud also". As to what had been done with the emails, the Claimant said she had not sent them to anyone. She

said there was a decline in her mental health and she began to feel that she had acted hastily, and it was not her job to stop corruption within the Council. The Claimant also claimed that management were aware she sometimes worked on certain documents on her personal email and she had never been approached about working on sensitive data on her home email, or told that she should not send documents to her home email address. She attached an email dated 3 June 2015 from her personal email address to Ms Lilley, Mr McHenry and Mr Costin which stated:

> "Good morning all
>
> I am working from home today. Unfortunately citrix [the secure remote system] isn't yet working. Its downloaded onto my laptop but for some reason I can't open it.
>
> I have left a message for Pam, so hopefully will be up and running soon.
>
> You can get me on here. I am just updating traders renewal documents."

77. On 31 July 2017 the Claimant emailed Jennifer Seeley, Director of Finance, to report a number of matters. Largely she was raising allegations of poor business practice in the Markets department, which she said created the opportunity for fraud. She said she had been victimised as a result of raising these matters in the past. She also raised a particular issue about a company being paid for services that had not been provided to the Council

78. The Claimant attended an investigation meeting with Ms Leary on 8 August 2017. The Claimant said that the only reason she sent the information was to put in a whistleblowing complaint. She also reiterated that she was unaware of any problems sending emails to her personal email address in order to work from home. She confirmed she had deleted all of the emails, but had printed off hard copies to provide to the fraud team in connection with her report of 31 July. The Claimant also suggested that her emails appeared to have been interfered with because "emails were shown read when I had not read them".

79. The Claimant provided a number of documents in support of her contention that she often used her personal email address when working from home, with the knowledge of management. In a group text message on 4 November 2015 that included Ms Lilley and Ms York the Claimant explained she was "working off line", and that any urgent emails should be sent to her personal email address.

80. On 9 August 2017 Ms Leary emailed Ms York asking for her response to a number of questions, including:

> "1. What information was Sharon (and the wider team) given about their responsibilities when working from home?
>
> 2. What were the arrangements in place when Sharon or any other member of staff worked from home?
>
> 3. Are you aware of instances when Sharon has mentioned about difficulty in login in from home?

> 4. Do you have emails to confirm this?
>
> …
>
> 6. Please could you confirm if you are aware of Sharon sending emails to her personal email address?"

81. Ms York responded the same day. She said that no information was given by her about the Claimant's responsibilities for home working and that the arrangement had been put in place by the previous manager. She could not recall any instances when Sharon had difficulty logging in from home. She said she had checked all emails from the Claimant in the period 13 July 2015 to 16 February 2016 and she did not receive any email saying she could not log in to citrix from home. She also said she was not aware of the Claimant sending emails to her personal email address.

82. Ms Leary sent a similar list of questions to Mr Costin. He replied on 10 August, saying that he could not recall or trace any emails from the Claimant about being unable to work from home. He also said he was not aware of the Claimant sending emails to her personal email address. He attached a record of the Claimant's attempts to log in to the secure system between June 2015 and March 2017. This showed 10 dates on which the Claimant made at least one failed attempt to log in. The reason given on most occasions was "incorrect password".

83. A further similar list of questions was sent to Ms Lilley and she responded on 11 August. She said she could not recall any specific instances of the Claimant mentioning difficulty logging in from home. She said she was not aware of the Claimant sending emails to her personal email address.

84. Ms Leary produced an investigation report on 22 August 2017. She said that on 13 June 2017 Mr Costin became aware that the Claimant "had sent over 200 emails to her personal email account between 2 June to 19 June 2017" and that "some of the emails sent contained traders' addresses, contact details and debts owed to the council". She said,

> "4.3 The main facts of the case are not disputed namely that Ms Coleman forwarded approximately 265 emails, containing the personal data of approximately 285 individuals from her council Outlook account to her personal email account.
>
> 4.4 Many of the emails related to the markets business unit which she left in October 2016.
>
> 4.5 The emails contained reports relating to the tendering of contracts for Bermondsey Market and a database of market traders. Contained within the data base were the names and addresses of market traders licensed in Southwark and details of the amounts of credit and arrears on their accounts."

85. It appeared from Ms Leary's evidence to the Tribunal that she had not actually seen the underlying material, other than possibly screenshots that she was shown.

86. Ms Leary noted the Claimant's defence that she sent the emails to herself because she intended to whistleblow, and also her claim that her managers were aware she forwarded work emails to her personal email address when she was working from home. She listed evidence that the Claimant had provided in support of the latter, but did not refer to the email of 3 June 2015 that the Claimant had enclosed with her original email response to Ms Leary's questions. She concluded that the Claimant had not been able to provide any evidence that "relates to actual IT issues", and "the emails/ text do not state managers were aware that she sent personal information to her private email account". The conclusion of the report states:

> "Based on the evidence Ms Coleman has presented, I am not satisfied that it was necessary for her to send personal identifiable data to her personal account in order to support a whistleblowing claim. I believe her actions constitute gross misconduct."

87. Ms Leary could not give any proper explanation in cross-examination for her failure to refer to the email of 3 June 2015 in her report. We consider that email was strong evidence that managers knew that the Claimant worked on documents containing trader information outside the secure system. We also note that Ms Leary did not address the Claimant's argument that she believed her work email had been compromised.

88. On 24 August the Claimant was informed that a formal disciplinary hearing would take place and a disciplinary hearing was initially scheduled for 12 September 2017.

89. In the meantime, however, the Claimant's whistleblowing complaint of 31 July had been referred to Kevin Campbell-Scott, Fraud Manager. The Claimant also sent a further email entitled "whistleblowing & fraud reporting" to the Chief Executive of the Council on 26 August 2017, reporting much the same concerns as her email of 31 July, which was included as part of the investigation. The disciplinary proceedings were put on hold pending the outcome of the fraud investigation. The Claimant met with Mr Campbell-Scott on 29 August 2017 and handed him a pack of documents. What she said in the meeting is relied upon as PD5, but there are no minutes of the meeting and the Claimant did not give evidence about what was discussed. We return to this below. It is not disputed that the documents the Claimant gave Mr Campbell-Scott were print-outs of the emails she had sent to herself and were the subject of the disciplinary investigation.

90. Mr Campbell-Scott produced a report on 1 September 2017. He noted that the Claimant's complaint had reported what she believed to be fraud, but also included a number of allegations against individuals and working practices within the Markets office. His review related to the fraud allegation only. He did note, however, that a previous investigation into a whistleblowing allegation from another former officer in Markets in November 2016 had found "bad management practices in the team". He also states that the Claimant's other allegations, which were not considered to be fraud based, "would appear to require further investigation by an appropriate officer".

91. The report refers to Mr Campbell-Scott's meeting with the Claimant and that she had "provided me with a large pack of papers which she claimed to help substantiate her allegations". He said that having reviewed those papers they "appear to relate to lack of controls and processes". The report focused on a payment of £954 made to a company called QSL, which operates an online tender portal, in February 2016. He concluded it was not clear why the council would have procured access to the portal and it "may have been for the personal use of John McHenry". He said:

> "29. While it would appear that the procuring officer may have been the victim of a scam, there is no evidence of any wider general payments for services for any private companies of council officers, based on the sample reviewed.
>
> 30. With the issues identified in the audit report of January 2015 and the investigation conducted following the previous whistle-blowing, in my view, it would be difficult to prove a criminal intent with the seeming apparent lack of controls and processes."

92. On 11 September 2017 the Claimant sent a further email to Mr Campbell-Scott raising another issue about Market byelaws not having been signed off correctly. The matter was referred to Doreen Forrester-Brown, Director of Law and Democracy, who said in a subsequent email to Ms Clement that she would ask her deputy to have a look at the allegations about byelaws.

93. On 18 September 2017 Ms Forrester-Brown emailed the Claimant confirming that the fraud allegation had been investigated and the team "found there was no information to support your allegation". She said that, now that the fraud investigation had been concluded, she had advised that the disciplinary proceedings should be progressed.

94. The disciplinary hearing was reconvened for 25 September, to be chaired by Mick Lucas, Head of Traded Services.

95. On 20 September 2017 the Claimant emailed Ms Forrester-Brown as well as the Chief Executive of the Council, complaining that only the fraud allegation appeared to have been investigated. She noted there had been no investigation into the "bad practices" allegations or the issue about the byelaws. She alleged that the working from home issue was a smokescreen to justify monitoring her email account, and that she did not expect to get a fair disciplinary hearing.

96. On 25 September 2017 the Claimant resigned by email to David Littleton. She alleged that she had been bullied and victimised for highlighting issues in Markets. She maintained that she was being disciplined for something that she had never been advised she was not allowed to do. She attached two emails, including one from Ms Lilley dated 3 June 2015, sent to both the Claimant's work email and her personal email. It is a work-related query and includes names of traders. The Claimant said she believed she had no option other than "to resign under what is to be constructive dismissal".

97. On 26 September the Claimant attended an interview at Islington Council. Her evidence is that they asked her if she had been the subject of any disciplinary proceedings.

98. Despite the Claimant's resignation in circumstances that she said amounted to constructive dismissal, the Respondent insisted that she remained employed and continued with the disciplinary proceedings in her absence. A disciplinary hearing took place on 7 November 2017.

99. A disciplinary pack was prepared by Ms Leary. This included a "case overview". Under the heading "Management Presentation" Ms Leary refers to her investigation report, but there are some significant differences between the information in that report and in the case overview. She includes in the case overview, for the first time, the information about a complaint from a market trader to Mr Costin relating to his bank account which is referred to above. As to the content of the information disclosed, the case overview states:

> "It was on 13 June 2017 notice that a significant amount of confidential information was sent to Ms Coleman's personal email address. These reports contained:
> - Market Traders' addresses
> - contact details
> - Date of Birth
> - National Insurance number
> - Bank account details
> - Debts owed to the Council."

100. This is the first reference to the information having included bank account details. The Respondent accepted during the hearing that the information did not, in fact, contain bank account details. That is consistent with a letter sent to all affected market traders which specifically stated that the "The information related to January 2016 and did **not** include any bank account details" (emphasis original).

101. There was no real explanation from the Respondent for the reference to bank account details in the case overview. In cross-examination Ms Leary accepted that Mr Costin must have told her that the information included bank details. She suggested that there might have been some confusion about it because of the spreadsheet referring to "account information", meaning the traders' accounts with the Council.

102. Given that the Respondent has not produced the initial incident form, which apparently led Jennifer Chambers to advise that there might have been a "criminal breach", and in view of our concerns about Mr Costin's credibility generally, we consider it likely that he also told Ms Chambers that the information included bank details.

103. Ms Leary rejected, again, the explanations given by the Claimant about management being aware of her using her personal email, and the information having been sent to support a whistleblowing complaint.

104. The Respondent purported to dismiss the Claimant on 20 November 2017, although it now accept that this was of no effect because she had already resigned with immediate effect on 25 September 2017.

THE LAW

105. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

106. Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

107. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

107.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

107.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

107.3. The employee must leave in response to the breach.

107.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

108. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

109. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason". Conduct is a fair reason within section 98(2) of the Act. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason

for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

110. As to whistleblowing, the ERA provides, so far as relevant:

> **43B Disclosures qualifying for protection**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> …
>
> **47B Protected disclosures**
>
> A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> …
>
> **103A Protected disclosure**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
>
> …

111. For the purposes of s.43B the employee must prove that he or she held a reasonable belief that the information disclosed tended to show a relevant failure. This involves a subjective assessment of what the employee believed at the time of the disclosure and an objective assessment of whether that belief could have been reasonably held, taking into account the position of the employee (Babula v Waltham Forest College [2007] ICR 1026).

112. As to the burden of proof under s.103A ERA, the Court of Appeal held as follows in Kuzel v Roche Products Ltd [2008] ICR 799:

> "57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
>
> 58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> 59. The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

113. In a constructive dismissal case, the requirement on the employer to show the reason for dismissal must be read as a requirement to show the reasons for their conduct which entitled the employee to terminate the contract (Berriman v Delabole Slate [1985] ICR 546).

114. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey v AE Dayton Services Ltd [1987] ICR 142).

115. Sections 122-123 ERA provide, so far as relevant:

> **122 Basic award: reductions**
>
> …
>
> (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

…

123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

CONCLUSIONS

Protected disclosures

116. In relation to most of what is relied upon as PD1 we have not accepted that the Claimant disclosed the information she claims to have disclosed. She may have mentioned the "London Bridge" issue, where Mr Steele wrongly issued a permanent licence, but we do not accept that this amounted to information tending to show breach of a legal obligation. The Claimant has not identified any relevant provisions of the LLAA. She seems to suggest in her email to Ms Lilley that there is a process for granting permanent licences so the Respondent cannot "just give a permanent licence", but we heard no evidence about what those procedures are.

117. As for PD2, the only matter that we have accepted was raised is the issue about the markets building. We found the Claimant's case on this difficult to understand. We do not accept that she held a reasonable belief that it was information that tended to show fraud. There was no information at all before the Tribunal about what "adopting the Food Act" meant or how that affected the building. The Claimant in later correspondence suggests that the markets building was built because a "ring fenced account" had a huge surplus. That meant that it could not be sold when the Council were selling buildings for a move of offices. Adopting the Food Act 1984, however, meant that it was effectively put into "council coffers" and was no longer ring-fenced for the traders. We cannot see how that could possibly amount to information that tends to show that fraud had taken place or was likely to take place. There may have been a question of fairness to the traders, but to the extent that the ownership or use of the building changed, according to the Claimant's account that appears to have happened by operation of primary legislation. There is no indication that anything was done dishonestly or for the financial benefit of any individual.

118. On PD3, the Claimant claims that the information disclosed tended to show fraud had been committed or was likely to be committed. She relies heavily on the fact that a market officer was dismissed for stealing receipt books, which she says shows that fraud was likely to be committed if they were not properly handled. We did not hear any evidence as to when this happened,

but the Claimant has never said that, at the time she raised the issue of receipt books with Mr Costin and Mr McHenry, she had in mind that a market officer had used them fraudulently. We consider that the Claimant has not proved that she subjectively believed that this information tended to show fraud was likely to take place. The gist of her evidence is that she believed the poor practices were creating the opportunity for fraud. There was a risk of fraud. That is not sufficient for the purposes of s.43B. Reviewing the authorities in Bablua, the Court of Appeal noted that "likely" in s.43B(1)(b) (therefore, necessarily, also in s.43B(1)(a)) means more than a possibility or risk (para 46).

119. Ms Onslow sought to put forward an alternative case in closing submissions that the matters disclosed under PD3 tended to show breach of legal obligation, namely the financial management obligations in the Accounts and Audit (England) Regulations 2011. She said this alternative case was implicit in the matters disclosed. We do not agree. This is an entirely different case and there has been no evidence or cross-examination on the legal obligation issue. Nor has the Respondent had a fair opportunity to examine the 2011 regulations, which were handed up on the last day. The Claimant could easily have put her case on PD3 in the alternative, but she did not do so.

120. The Respondent does not dispute that the disclosure in PD4 was made, but we have already found that the Claimant has failed to prove she had a reasonable belief in the truth of the information she disclosed.

121. There is a difficulty with PD5 in that there are no minutes of the Claimant's meeting with Mr Campbell-Scott, and while it is accepted that the Claimant handed over a large number of documents that she says supported the disclosures she made in the meeting, those documents have not been produced in evidence. Nor is there anything in the Claimant's witness statement about what was said during the meeting. Given that the Respondent's fraud team investigated the Claimant's complaint that gave rise to the meeting, and Mr Campbell-Scott's report demonstrates that there was, at least, an irregularity, we accept that the information about the disputed payment was mentioned in the meeting and amounted to a protected disclosure. There is no basis, however, for us to find that the other matters relied upon under PD5 were disclosed or that the Claimant reasonably believed they tended to show the relevant type of wrongdoing.

Unfair dismissal

122. We must first consider whether the matters relied upon by the Claimant, either individually or cumulatively, amounted to a breach of the implied term of trust and confidence.

123. We have not accepted that there was any "bullying" from Mr Costin. The only specific allegation relied upon is his conduct during the meeting on 5 November 2015. We have rejected the allegation about the "grass" comment. There is no dispute that he said the Claimant was "away with the fairies", but we do not consider that the comment could be said to be calculated or likely to destroy or seriously damage the relationship of confidence and trust, particularly given that he apologised for it quickly afterwards.

124. We have accepted that the explanation given for denying the Claimant project management training when a vacancy came up in September 2015 was the one given at the time, namely lack of available funds in that financial year. This happened before the relationship between Mr Costin and the Claimant deteriorated. The Claimant was not targeted and it cannot constitute conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust.

125. We have rejected, on the facts, the Claimant's contention that Mr Costin put pressure on her to resign by sending a message via Robert Smith.

126. We had some concerns about the decision to put the Claimant on "garden leave" pending the investigation of her grievance, and indeed the Respondent accepted that this was not "ideal". It risked being perceived as a suspension and/or isolating the Claimant as a result of her raising a grievance. In the unusual circumstances, however, we consider it was not unreasonable. The Respondent was in a difficult position because it had to consider the welfare of all parties. Given that the Respondent did, soon afterwards, find the Claimant an alternative role, we accept that Mr Robinson-Marshall approached the matter in good faith and there was no suitable role available at the time. The was not conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust.

127. We have found above that the relationship between the Claimant and Mr Costin deteriorated after the meeting on 5 November 2015. We have also found that Ms York's review of flexible working arrangements in early 2016 was, contrary to what she said at the time and to the Tribunal, targeted towards the Claimant. It is clear that Mr Costin and Ms York worked quite closely together and we conclude that they had both formed a very negative impression of the Claimant by early 2016. We conclude that Ms York instructed payroll that the Claimant's flexible working had been removed, despite the Claimant having submitted an application as requested. The explanation that it was not on the proper form was either a deliberately inflexible approach at the time, or an excuse relied upon now to try to justify her actions. In fact, we find that Ms York was motivated by personal animosity towards the Claimant and the removal of flexible working was conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust.

128. As to the commencement of disciplinary proceedings in June 2017, we accept that this was driven by Mr Costin. He chose to monitor the Claimant's emails, and he reported the alleged breach to HR and Ms Chambers. We have identified above a major inconsistency in the evidence as to the reason for monitoring the Claimant's emails, as well as logical flaws in both explanations. We do not accept Mr Costin's account that he had genuine concerns about the Claimant working from home and, despite the fact that he was not her line manager and there was no prospect at the time of her returning to Markets, he chose to investigate the matter in September 2016 because he "had time". In the absence of any legitimate explanation, we infer that he has sought to conceal the true reason, which is that he wanted to find a reason to dismiss the Claimant.

129. This conclusion is supported by our finding above that Mr Costin told Ms Leary during the disciplinary process that the information the Claimant had sent

to her personal email address included traders' bank account details. He must have known that that was wrong and we find that he gave that false information deliberately, in order to overstate the seriousness of the breach and increase the likelihood of the Claimant being dismissed. The Respondent having not disclosed the initial report that he submitted to Ms Chambers, and given her advice that this could be a criminal breach, we infer that he also told Ms Chambers that the information included bank account details, for the same reason.

130. We consider that Mr Costin's decision to instigate the disciplinary process and his later efforts to influence it by providing false information was conduct calculated or likely to destroy or seriously damage the relationship of confidence or trust.

131. It was Ms Leary's decision to pursue the matter to a disciplinary hearing, but it is evident that she was strongly influenced by Mr Costin, who commenced it and oversaw the investigation process. Further, it was wrong information from him that led to the matter being treated as seriously as it was. There were major failings in the process which suggest that Ms Leary did not exercise proper independent judgement. She failed to recognise the significance of the email provided by the Claimant showing that her managers must have been aware of her using her personal email address to work on Council documents. The email was not referred to in the investigation report or case overview, and none of the managers were asked about it. She also failed to give any proper consideration to the whistleblowing defence raised by the Claimant. It is not in dispute that the Claimant gave the emails to Mr Campbell-Scott. Ms Leary had not seen the content of the emails, let alone given proper consideration to whether they supported the Claimant's whistleblowing defence. Even if this did not provide the Claimant with a complete defence to the charges, Ms Leary dismissing it out of hand on the basis that the whistleblowing complaint was not upheld (which is not a fair summary of the outcome) suggests that she was not approaching the matter with an open mind. In fact, although Mr Campbell-Scott did not conclude that there had been fraud, his report suggests that the Claimant had good reason to be concerned about the invoice from QSL and she raised issues about bad practices that warranted investigation.

132. We infer from the failings in Ms Leary's handling of the disciplinary process that there was a consensus by this stage amongst a number of managers including Ms Leary that the Claimant had to go. The Claimant had been causing problems for management for some time, by making complaints and taking quite a lot of time off sick. Given that the Respondent has not established that the Claimant committed gross misconduct that justified dismissal, and we have found that the entire process was commenced in order to remove the Claimant from the Respondent's employment, we infer that Mr Costin's animosity towards the Claimant spread to other managers and it was effectively pre-determined that the Claimant would be dismissed. That was conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.

133. This conclusion is supported by the Respondent's approach to the whistleblowing complaints in July to September 2017. Despite Mr Campbell-Scott indicating that there were matters of bad practice that required investigation, and despite the Claimant having raised a potentially serious issue

about the sign-off of byelaws, the only investigation that took place was a narrow one relating to the invoice from QSL.

134. That is not to say that we consider any of the managers were motivated by the whistleblowing complaints. Rather that their dismissive approach is consistent with there being a general consensus that the Claimant should be dismissed for the data protection breach and the whistleblowing should not interfere with that.

135. Having found that the removal of flexible working and the decision to investigate and proceed to a disciplinary hearing in respect of the data breach amounted to conduct that breached the implied term, we must consider the reason for the Claimant's resignation. We do not accept that the removal of flexible working was a factor. It happened more than a year prior to the Claimant's resignation, it was resolved soon afterwards and the Claimant did not mention it in her resignation letter (although she did refer to an another issue about days in lieu).

136. The commencement and continuation of disciplinary proceedings were clearly the principal reason for the Claimant's resignation. The Respondent has not put forward any other reason for her resignation. She believed she was being "hounded" out of her job and that she had no choice but to resign.

137. We therefore find that the Claimant was constructively dismissed.

138. We must next determine the reason for the Claimant's dismissal, bearing in mind the guidance in Kuzel as to the burden of proof. As this is a constructive dismissal case, we must consider what motivated the Respondent's conduct that led the Claimant to resign.

139. Given our findings above, we do not accept that the Respondent had a potentially fair reason for the dismissal. Mr Costin was motivated by personal animosity and Ms Leary, even if she did not personally have a problem with the Claimant, went along with it.

140. The question is whether the Claimant has established that the sole or principal reason for the Respondent's conduct was the fact that she had made a protected disclosure. The only protected disclosure we have accepted is PD5, and only to a limited extent. This post-dated the deterioration of the relationship between Mr Costin and the Claimant and his decisions (a) to monitor her emails in order to look for a reason to dismiss her and (b) to instigate disciplinary proceedings. He cannot have been motivated by PD5. We consider the most likely motivation for Mr Costin's conduct, given the timing, was retaliation for the complaint that the Claimant had made about him in August 2016. It is obvious that the relationship between him and the Claimant was already fraught. The complaint was the straw the broke the camel's back. We have not accepted that this was a protected disclosure. As noted above, there followed a general consensus that the Claimant should go for other reasons; we do not accept that PD5 was the sole or principal reason for the Respondent's conduct.

141. In conclusion, therefore, we do not accept that the Claimant's dismissal was automatically unfair under s.103A ERA, but we do find that it was unfair under s.98.

Polkey

142. The Respondent argued in its closing written submissions that a Polkey deduction should be made to reflect the possibility that the Claimant would have been fairly dismissed on 20 November 2017, as the Respondent in fact purported to do. Given our findings above, we do not accept that any such dismissal would have been fair.

143. In oral submissions Ms Ling also argued that a Polkey deduction was appropriate because there was a chance the Claimant would have been made redundant. She relied on the evidence of Mr Littleton about the restructure, as a result of which the Claimant's post was deleted. His evidence was that the Claimant was given three options at a meeting in June 2017, voluntary redundancy and applying for two new roles one at grade 8 and one at grade 10. He said the Claimant was only interested in the grade 10 role and that she would have been considered for it alongside one other person. Ms Ling argued that the prospects of the Claimant being offered that role were slim.

144. Ms Onslow objected to this argument being pursued on the basis that it had not been pleaded. While we would not consider this a complete bar to the Tribunal making a deduction to the compensatory award if the evidence clearly showed that redundancy was likely, the argument was pursued as an afterthought and there is nowhere near enough evidence for us to make such a finding. The restructure and possible consequences of it were not explored in cross-examination by either party. Further, even if there were sufficient evidence to find that the Claimant was unlikely to secure the grade 10 role, it does not automatically follow that she would have been made redundant. She had experience in other departments and the Respondent would have been obliged to consider redeployment. We have no evidence as to vacancies elsewhere in the Council. Overall, we do not consider that any Polkey deduction is appropriate.

Contributory fault

145. The Respondent also argues that there should be deductions for contributory fault. We do not agree. Apart from a small number of emails the Respondent has not produced in evidence the information that the Claimant sent to her private email address. Mr Campbell-Scott appeared to accept, however, that it was potentially supportive of her complaint about poor practices in Markets, and that those matters merited investigation. Although there may have been a data breach, in circumstances where the Claimant was raising concerns that warranted investigation, and she had used her private email address in the past with the knowledge of her managers, we cannot conclude that this was blameworthy conduct that would justify a deduction under either s.122 or 123 ERA.

Detriments

146. The only protected disclosure the Claimant has established is PD5, and only to the limited extent found above. Most of the detriments relied upon pre-date PD5 and therefore cannot have been motivated by it. Those complaints are dismissed.

147. As to the alleged detriments that took place after PD5:

147.1. "Pursuing the matter to disciplinary hearing". We have found above that the reason for this was Mr Costin's personal animosity towards the Claimant, and the resulting consensus that she should be dismissed, not PD5.

147.2. The Claimant's purported dismissal for gross misconduct. We consider that this was for the same reason. The Respondent wrongly believed that the Claimant was still employed after her resignation and sought to pursue the disciplinary process to its conclusion. The entire process having been designed to result in the Claimant's dismissal, that was the inevitable outcome. It was not motivated by PD5.

147.3. Informing Islington Council of the disciplinary process. There is no evidence whatsoever that this happened. The Claimant says that she was asked in her interview whether she had been subject to any disciplinary proceedings, and she speculated that someone at the Respondent had told them about it. That is not the only possible explanation and in the absence of any other evidence we do not accept that it happened.

148. The detriments complaint is therefore dismissed.

Employment Judge Ferguson

Date: 15 January 2020