



EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT

MR D MEENAN

V

RESPONDENT

TESCO PENSION INVESTMENT
LIMITED

HELD AT: LONDON CENTRAL

ON: 4-8 & 11-12 OCTOBER 2021

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS J CAMERON
MR D CARTER

REPRESENTATION:

For the claimant: Ms L Bone (Counsel)
For the respondent: Mr B Carr QC (Counsel)

JUDGMENT

1. All claims of direct race/religion discrimination fail and are dismissed.
2. All claims of indirect race/religion discrimination fail and are dismissed.
3. All claims of whistleblowing detriment fail and are dismissed.
4. The claim of automatic unfair dismissal (on grounds of whistleblowing) succeeds.
5. The claimant was unfairly dismissed.

RESERVED REASONS

The Issues

1. The claimant was dismissed on grounds of what the respondent contends was a reasonable belief in his poor performance and a lack of belief that it would improve. The claimant contends that his dismissal constitutes an act of direct race and/or religious discrimination, namely that he would not have been dismissed, and in fact he would have been promoted to a new role of Operations Director, had he been Jewish (the direct race/religion discrimination claim). He also argues that the respondent applied a practice of employing those known to the respondent's CEO in particular those from Pinner Synagogue, which disadvantaged the claimant and others who were not Jewish (the indirect race/religion discrimination claim). He also argues that he whistleblow on two occasions, firstly over the way that the respondent had engaged in an employment contract change process; secondly over a management fee issue involving the Tesco DC pension fund. He says that he failed to get the role of Operations Director and was unfairly dismissed because he had made public interest disclosures.

Direct Race/Religious Discrimination

2. The Claimant relies upon the following alleged acts of less favourable treatment.
 - a. The creation of the Operations Director role in late 2019;
 - b. The failure to appoint and/or afford the Claimant an opportunity to apply for the Operations Director role in late 2019. Alternatively, the failure to give the Claimant adequate consideration for the role;
 - c. Dismissal.
3. Was the Claimant subject to the alleged treatment? If so, was it because of race, ethnicity and/or religion? The Claimant relies upon the following:
 - a. The race/religion/ethnicity of Mr Daniels and/or Mr Green;
 - b. The association of Mr Daniels and/or Mr Green to Pinner Synagogue which is indissociable from Jewish race/ethnicity/religion;
 - c. The non-Jewish race, ethnicity and/or religion of the Claimant.

Indirect Discrimination (Race/Religion)

4. In late 2019 did the Respondent apply the following PCP which it had applied or would apply to others? Is this capable of being a valid PCP within the meaning of s.19(2) of the Equality Act 2010?

“Appointing, shortlisting and/or giving preference to in the recruitment and/or retention of senior professionals people within the social circle of

Mr Daniels and/or active members/regular attendees of Pinner Synagogue”

5. If so, did that PCP put the Claimant and those with whom he shared the characteristic of race/religion (non-Jewish) at a particular disadvantage when compared with Jewish people (whether in general, in the locality of Mr Daniels and/or active members/regular attendees of Pinner Synagogue).
6. If it is established that the PCP was applied, the Respondent does not advance an objective justification defence.
7. Is any aspect of the complaint time-barred?
 - a. Was there a continuing state of affairs?
 - b. If not, is it just and equitable to extend time?

PIDA Detriment

8. The Claimant relies upon the following communications:
 - a. The Claimant’s email of 28 November 2019 to Mr Green regarding new terms and conditions affecting the workforce;
 - b. The Claimant’s email to Mr Firth of 15 April 2020 regarding the application of DC Schemes whether read alone or in conjunction with the accompanying email of 21 May 2018.
9. Did either or both of these communications constitute protected disclosures pursuant to s43B ERA 1996? In particular:
 - a. Did they convey information as alleged at paragraphs 31 and 44-46 ET1 respectively?
 - b. Did the Claimant have a reasonable belief that the information tended to show that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation? The Claimant relies upon the obligations set out at paragraphs 32 and 47 respectively;
 - c. Did the Claimant have a reasonable belief that the disclosure was in the public interest?
10. Was the Claimant subject to the following treatment:
 - a. The creation of the Operations Director role in late 2019;
 - b. The failure to appoint and/or afford the Claimant an opportunity to apply for the Operations Director role in late 2019. Alternatively, the failure to give the Claimant adequate consideration for the role;
 - c. Dismissal on 1 May 2020 (the EDT being 31 July 2020).
11. If so, were these acts of detriment on the ground that the Claimant had made the First and/or Second Disclosure?
12. Is any aspect of the complaint time-barred?
 - a. Was there a continuing state of affairs?

- b. If not, has the Claimant established that it was not reasonably practicable to present the claims before the end of the 3 month period and that the period in which the claim was presented was reasonable?

Ordinary/Automatic Unfair Dismissal

13. What was the reason for dismissal? The Respondent relies upon the potentially fair reason of capability. The Claimant avers that the principal reason for dismissal was the making of protected disclosures contrary to s103A ERA 1996 and that the alleged EqA 2010 contraventions were a material factor in the decision to dismiss. Alternatively, he avers that there was no potentially fair reason for dismissal.
14. In the event that the Respondent can establish a potentially fair reason for dismissal, was the dismissal fair having regard inter alia to the following:
 - a. The size and resources of the Respondent;
 - b. Equity and the substantial merits of the case;
 - c. The procedure adopted which led to dismissal;
 - d. The absence of any or any adequate warning as to the alleged deficiencies in the Claimant's performance;
 - e. The availability of alternatives to dismissal?

Remedy

15. What is the appropriate remedy? The Claimant seeks the following:
 - a. Declarations that he has been unfairly dismissed, discriminated against and/or subjected to detriment by reason of making protected disclosures;
 - b. Basic and compensatory award for unfair dismissal;
 - c. Compensation for detriment including losses flowing from dismissal and/or the failure to appoint and/or afford any or any adequate opportunity to be considered for the COO/Operations Director posts;
 - d. An award for injury to feelings;
 - e. An award for aggravated damages;
 - f. An increase in compensation of 25% to reflect the complete failure to follow the ACAS Code (to the extent that the Code applies);
 - g. Interest.
16. What is the appropriate remedy having regard to the above and the following principles:
 - a. Polkey/Chagger;
 - b. Whether any compensation should be reduced because the Claimant caused or contributed to his own dismissal:
 - i. The Respondent alleges that the Claimant failed to act in accordance with feedback, accept responsibility and improve when asked. Is this allegation well- founded?
 - ii. If so, should compensation be reduced (and if so to what extent)?
 - c. iii. The duty to mitigate.

The Law

17. Equality Act 2010

s.13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s.19 Indirect discrimination

1. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

2. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- a. A applies, or would apply, it to persons with whom B does not share the characteristic,
- b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- c. it puts, or would put, B at that disadvantage, and
- d. A cannot show it to be a proportionate means of achieving a legitimate aim.

3. The relevant protected characteristics are—

- race;
- religion or belief

s.23 Comparison by reference to circumstances

1. On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.

s. 24 Irrelevance of alleged discriminator's characteristics

1. For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic.

s.136 Burden of proof

1. This section applies to any proceedings relating to a contravention of this Act

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

3. But subsection (2) does not apply if A shows that A did not contravene the provision.

18. Employment Rights Act 1996 – Pt.IVA Protected Disclosures & Pt.V Detriment

s.43A Meaning of “protected disclosure”.

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

s.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. ...
- 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. ...

2. ...

3. ...

4. ...

5. In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s.43C Disclosure to employer or other responsible person.

1. A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

- a. to his employer
- b. ...

s.47B Protected disclosures.

1. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

19. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

- a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

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

2. A reason falls within this subsection if it—

- a. ...
- b. ...
- c. is that the employee was redundant...

3.

4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

- a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

1. 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.

Relevant case law

20. We considered the general case-law principles set out below, along with cases referred to by the parties in their closing submissions.

21. Direct Discrimination

- a. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of her disability? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the age. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably (*Glasgow City Council v Zafar* [1998] IRLR 36)
- b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2013] ICR 337)
- c. The tribunal has to determine the “*reason why*” the claimant was treated as she was (*Nagarajan v London Regional Transport* [1999] IRLR 572) and it is not necessary in every case for the tribunal to go through the two stage procedure; if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial (*Igen v Wong* [2005] EWCA Civ 142). “Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.” (*Chondol v Liverpool CC* UKEAT/0298/08)
- d. *Law Society v Bhal*[2003] IRLR 640 - the fundamental question is why the discriminator acted as he did. Was the claimant (in this case) treated the way she was because of her disability? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment ... Was it on grounds of [the protected characteristic]? Or was it for some other reason..?’
- e. *Nagarajan v London Regional Transport* [1999] IRLR 572, HL. “What, out of the whole complex of facts ... is the effective and predominant cause” or the “real and efficient cause” of the act complained of?” (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1996] IRLR 372, [1997] ICR 33)
- f. *London Borough of Islington v Ladele*: [2009] EWCA Civ 1357 provides the following guidance:
 1. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan*

v London Regional Transport [1999] IRLR 572, 575—“this is the crucial question”. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

2. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 paragraph 37
 3. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*
 4. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.
 5. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC* [2007] EWCA Civ 32, [2007] IRLR 259 paragraphs 28–39.
 6. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.
 7. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan* [2008] IRLR 243, [2008] 1 All ER 869 ... paragraphs 36–37) ..."
- g. *Chondol v Liverpool CC* UKEAT/0298/08, [2009] All ER (D) 155 (Feb), EAT: A social worker was dismissed on charges which included

inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

16. Indirect Discrimination

- a. *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15, [2010] IRLR 136

"Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

- b. *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] IRLR 601:

"The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic ... The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified ..."

- c. *Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27:

"Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

"The first salient feature is that [... there ...] is no requirement in the EqA that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

"A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various [...]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire* [2012] IRLR 601, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a

height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age)

A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the “particular disadvantage” might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.'

d. **PCP:** *United First Partners Research v Carreras* [2018] EWCA Civ 323: in identifying a PCP, '*the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted*'.

e. **Justification:** *MacCulloch v ICI* [2008] IRLR 846, EAT, - four legal principles are:

1. The burden of proof is on the respondent to establish justification:
2. *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) [1984] IRLR 317. The ECJ said that the court or tribunal must be satisfied that the measures must “correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end” (36).
3. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it.
4. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no “range of reasonable response” test in this context: *Hardy & Hansons plc v Lax* [2005] IRLR 726, CA.

22. Public Interest Disclosure

- a. *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, EAT it is not sufficient that the claimant has simply made *allegations* about the wrongdoer: "... the ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.” Contrasted with that would be a statement that “You are not complying with Health and Safety requirements”. In our view this would be an allegation not information."
- b. *Smith v London Metropolitan University* [2011] IRLR 884, EAT: the raising of grievances about the claimant's workload is not a 'disclosure'.
- c. *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13: - applying *Cavendish* distinction between information on the one hand and the making of an allegation or statement of position on the other: 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.'
- d. *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] IRLR 846. Per *Cavendish*, what it decided was that whatever is claimed to be a protected disclosure must contain “*sufficient factual content and specificity*” to qualify under the ERA 1996 s 43B(1). The position is that in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (*Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. Moreover,

the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show ...'. Ultimately, this will be a question of fact for the ET, which must take into account the context and background.

e. *Darnton v University of Surrey* [2003] IRLR 133, EAT. The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

f. *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, [2017] ICR 731: In a case of mixed interests (personal contractual and public), it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. "The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion ... In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.... The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case..." The CA adopted as a "useful tool" the following submission: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest. Additionally, 3 points of guidance: (1) the very term 'public interest' is deliberately not defined by Parliament, leaving it to be applied by tribunals; (2) the mental element imposes a two stage test: (i) did the claimant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did

he or she have reasonable grounds for so believing - 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence'. (3) the necessary reasonable belief in that public interest may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure (though as an evidential matter, the longer any temporal gap, the more difficult it may be to show the reasonable belief).

g. *Parsons v Airplus International Ltd* UKEAT/0111/17 (13 October 2017, *unreported*) the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

h. *Bolton School v Evans* [2006] IRLR 500, EAT: "It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a *potential legal liability*.' (emphasis added)'

i. *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT, Judge Serota said that, outside that category, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'.

k. *Boulding v Land Securities Trillium (Media Services) Ltd* UKEAT/0023/06 (3 May 2006, *unreported*) "As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on. (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

l. *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] IRLR 346, "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

m. *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT "a. Each disclosure should be separately identified by reference to date and content. b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified. c. The basis upon which each disclosure is said to be protected and qualifying should be addressed. d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures. e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, ... whether it was made in the public interest. f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act. g. The Employment Tribunal ... should then determine ... whether the disclosure was made in the public interest."

n. *Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73, [2020] IRLR 374. "In order to bring a claim under section 47B, the

worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment.* The concept is well established in discrimination law and it has the same meaning in whistleblowing cases. The employer stated that *all* the claimant surgeon's allegations against the hospital had been dismissed by the relevant professional bodies, whereas in fact some had not been. The Court of Appeal held that this sort of half-truth is capable of qualifying as a detriment; but the motivation of the employer was to defend the hospital and had not been because of the whistleblowing: "In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

p. *Harrow London Borough v Knight [2003] IRLR 140, EAT*: The act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the act complained of.

q. *Fecitt v NHS Manchester [2012] ICR 372 CA*: the protected act must materially influence the employer's treatment of the whistleblower:

r. *Panayiotou v Kernaghan [2014] IRLR 500*: it is a defence that the reason for the detrimental treatment was not the doing of the protected act in question, but the unacceptable way in which it was made.

23. Automatic unfair dismissal

a. *Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT*: the protected disclosure must be the reason or the principle reason for dismissal; it was the wrong test to find that s.103A is satisfied when the whistleblowing had been 'on the Respondent's mind' when dismissing.

b. *El-Megrissi v Azad University (IR) in Oxford UKEAT/0448/08*: held that where an employee alleges that she has been dismissed because she made multiple public interest disclosures, s 103A does not require a tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. This is so even where (as in *El-Megrissi*) some of the disclosures have taken place

more than three months before the claimant's dismissal. Where a tribunal finds that they operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal.

c. *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401: It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. "I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if [counsel for the hospital] were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all.... In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal."

d. *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] IRLR 129. "In the present case ... the reason for the dismissal given in good faith by [the decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here ... Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

24. Unfair dismissal – capability

a. *Taylor v Alidair Ltd* [1978] IRLR 82, [1978] ICR 445: "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is

incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.”

- b. *Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132*: a depot manager was dismissed, after having been given warnings and advice, because the employer was not satisfied with the standard of his work. "A central theme in [counsel for the employee's] submission was that although there was plenty of contemporary evidence to show that the employers had lost confidence in the ability of the employee as a manager there was no hard factual evidence of a particular kind to support that judgment. Criticism and exhortation, he submitted, however strong, do not by themselves provide evidence of incapacity. It amounts to no more than the assertion of an opinion. It seems to us that this goes too far ... When responsible employers have genuinely come to the conclusion over a reasonable period of time that a manager is incompetent we think that it is some evidence that he is incompetent. ... At one extreme is the case where it can be demonstrated, perhaps by reason of some calamitous performance, that the manager is incompetent. The other extreme is the case where no more can be said than that in the opinion of the employer the manager is incompetent, that opinion being expressed for the first time shortly before his dismissal. In between will be cases such as the present where it can be established that throughout the period of employment concerned the employers had progressively growing doubts about the ability of the manager to perform his task satisfactorily. If that can be shown, it is in our judgment some evidence of his incapacity. It will then be necessary to look to see whether there is any other supporting evidence.”
- c. The ACAS Code of Practice on Disciplinary and Grievance procedures: 'Disciplinary situations include misconduct and/or poor performance. ...
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
 - Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
 - Employers should allow an employee to appeal against any formal decision made.'
- d. *James v Waltham Holy Cross UDC [1973] IRLR 202*: "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance. ... An employer is entitled to protect the interests of his business and it will be reasonable for him not to give a warning to an employee who is highly unlikely to improve and whose continued retention is damaging the company's interests. "... Cases can arise in which the inadequacy of the performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt

are, a warning and opportunity of improvement are of no benefit to the employee and may constitute an unfair burden on the business.”

- e. *Post Office v Mughal [1977] IRLR 178 EAT*: "The question for the [employment] tribunal is: have the employers shown that they took reasonable steps to maintain appraisal of the probationer throughout the period of probation, giving guidance by advice or warning when such was likely to be useful or fair; and that an appropriate officer made an honest effort to determine whether the probationer came up to the required standard, having informed himself of the appraisals made by supervising officers and any other facts recorded about the probationer? If this procedure is followed, it is only if the officer responsible for deciding upon the selection of probationers then arrives at a decision which no reasonable assessment could dictate, that an [employment] tribunal should hold the dismissal to be unfair'."
- f. *Cook v Thomas Linnell & Sons Ltd [1977] IRLR 132, [1977] EAT*: “ It is most important ... that the complaint has been brought to the attention of the employee concerned over a period of time. This remains a requirement even where the employee holds a position in which he can, within reason, be expected to monitor his own performance.”

Witnesses and Tribunal procedure

- 25. We heard evidence from the claimant and the following witness on his behalf, Mr Jonathan Cunliffe. We heard evidence from Mr Danny Firth, the respondent's then COO who lined managed the claimant for much of his employment, Mr Steven Daniels the then CEO, and Mr Ray Green, appointed in October 2019 as Operations Director and the claimants Line Manager.
- 26. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.
- 27. The trial bundle comprised over 1800 pages. We read documents we were referred to. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions

The relevant facts

- 28. The claimant's employment started in June 2012, his job title was Finance Manager. His performance in his early years of employment was good,

achieving what is described as a promotion in December 2013, and a “good performance” against operational objectives in 2013/4 (254).

29. There was significant disputed evidence about the claimant’s performance from 2014 onwards. For the respondent, the claimant’s performance was characterised by low performance scores, particularly at mid-year reviews. The respondent argued that some end-year appraisals were not completed because of disagreements between the claimant and Mr Firth over the claimant’s performance, and those which were completed showed mixed but often poor performance.
30. For example, the claimant’s end of year 2014 was “*Amber, with opportunity to improve*” (277); in 2014 some behaviours were “*not to the level expected*”. Other comments include: “*no progress since end-year warning*” (282); poor transparency, visibility (345); scoring “*Red*” on reporting to business heads (272); not proactive, unresponsive, difficult to work with, not the expected work rate. The November 2016 mid-year appraisal records Mr Firth saying he was “*very concerned*” that the claimant had missed his targets “*it is a conduct issue and I feel we have exhausted the more informal route*” (366).
31. The respondent also pointed to what were some poor relationships between the claimant and colleagues, evidenced in messages and emails. Examples include: “*[C] is a joke, every quarter ... nothing ... I sent a polite reminder ... you need to not let him get under your skin ... ignore his behaviours ... born out of his insecurities... he is the first to judge and escalate... such a hypocrite...*”; “*... I need some thoughts before I do something regrettable...*” (579); “*[C] responded to an email ... I almost fell off my chair... woosh... and he’s out the door ... Like clockwork ...*” (417).
32. The respondent also referred to numerous emails in the bundle which it said showed poor performance, the need for work to be checked and corrected. Just some of the examples include: Mr Firth raising criticisms about a financial plan in October 2016 (246-7); an argument about accounts (323-5); an issue with audit fees (410); issues with a Finance Pack (485); Mr Firth querying /challenging work on a meeting papers (590); in November 2018 an issue with an audit (707); filing accounts late (743).
33. Documents also showed the claimant being chased on work-related matters: a failure to approve a report by 8 then 11 December 2017 (506); a ‘nudge’ on 4 January 2018 following a request made 21 December 2017 (533); a request on 28 November, followed-up 13 December 2017, again on 9 January 2018 (535); 28 December 2017 request, chased on 9 January 2018, GC’s comment “*I do not think it is appropriate that we have to chase you*” (546). A first chase on 28 August 2018, a further chase on 4 September (652).
34. The claimant’s case is that some of the delays were not under his control; that at times he was taking on significant additional responsibilities, that his performance was often ‘met’ at end of year.

35. The Tribunal accepted that the claimant's performance to 2017 was patchy at times: at no time was he put under formal or informal capability process but there were periods when this could have happened. We concluded that these were accurate performance appraisals.
36. There was a dispute about the claimant's performance in 2017-8. The respondent's document says that the claimant had made "*higher than acceptable*" errors, there was a lack of planning. The claimant's self-assessment says he exceeded on all areas. The respondent's position is that this appraisal was not sent to HR, and the final performance rating was not agreed with the claimant.
37. We read Mr Firth's handwritten notes which were prepared in advance of the end of year meeting with the claimant: it refers to "*strong KPIs*"; that team changes had gone well, with colleagues "*strengthened*", and low errors. Areas of focus included a need for "*different approaches/perspectives ... wider COO engagement*" (609). The claimant then sent documents supporting the review to Mr Firth on 25 April 2018, saying "*we didn't discuss performance rating ... but we need to!*" (619).
38. The claimant also points to what he characterises as a promotion in April 2018, with a new job title of Head of Finance and Operations and a salary increase. The respondent characterised this as a benchmarking issue (520), effectively that this increase was given in spite of his poor performance at work.
39. We also noted that there was a delay in sending the review – as stated in Mr Firth's chasing email to the claimant in August 2019. The claimant responded "*Thanks for the reminder*".
40. We concluded from this evidence that the claimant's performance was a solid "met" in all categories at his end of year 2017/8 review; this is based on Mr Firth's note recording that he had met all KPIs and the claimant's quite upbeat email responses. We accepted the claimant's evidence; it was a "*... met / met / met – and I received a promotion shortly after this end of year review to Head of Finance and Operations. It was a very positive end of year review. ... I had hoped/expected that exceeded, but I was a strong met and happy with this.*" We concluded that the delay in formalising the 2017-8 appraisal was not because of a dispute about its outcome.
41. There was contested evidence in relation to many of the 'performance-related' emails in the bundle. For example, documents refer Mr Firth chasing a document on 1 October 2018, a Monday. Mr Firth accepted that he was unaware the claimant had been given this piece of work the previous Thursday, and he accepted that it was "*true in this instance*" that the claimant had been awaiting information from another team.
42. The claimant's 2018-9 mid-year review on 22 October 2018 acknowledged that the claimant (plus two colleagues in other departments, LM and GC) "*...are leading on the ... delivery beyond their day jobs, which is on its own*

a stretch in terms of learning and effort" (685). It was agreed that the claimant (and others) would have a new salary code *"to reflect increased responsibility ..."* (689). Mr Firth accepted in his evidence that this role was *"additional work"* on top of the claimant's usual role, that it was *"a stretch"* (i.e. exceptional performance under the respondent's performance rating system) for the three concerned.

43. By 2018 consideration was being given to succession planning for Mr Firth's move to CEO and Mr Daniels retirement. It was the claimant's view, that he was *"led to believe"* that he, GC and LM *"would replace all or much"* of Mr Firth's role – this was the rationale given to all three when they started taking on additional responsibilities 2017—8 onwards. He believed that GC and he would cover elements of the COO role, and LM would take on compliance and regulatory matters, *"... this is what we were testing out, to see whether it would work long term as sharing."*
44. We accepted that respondent's contention, that the claimant, GC and LM were being given an opportunity to see how they would cope with elements of the COO role. The claimant accepted that they were given *"the opportunity to demonstrate that we could cover the COO responsibilities."* He also accepted, *"Beyond this, what would happen, was not discussed."*
45. The Tribunal concluded that by November 2018 the respondent's SMT had decided that an external hire was needed for at least some elements of the COO role. An email from Mr Firth to Mr Stephens titled *"First pass at Governance and leadership note"* states *"... if the intention is that this role provides the equivalent "FD" contributions to CEO ... it is inevitable"* that the claimant and GC would report into this hire. *"We cannot therefore rule out fall-out if/when that happens"* (692).
46. The claimant's year-end review which took place in August 2019 states: *"You were given an opportunity to work with LM and GC .. this proved a challenge for all of you at times... the areas under your responsibility performed well, you did at time struggle to meet timelines. And we discussed ... the need to manage stakeholder expectations more closely. ... Need to continue to develop. Overall a strong year with a rating of Exceeds on 'What' and meets on 'How'".* For the year ahead the claimant was to *"continue to demonstrate continued leadership and contributions..."* (898).
47. Mr Firth's evidence was that this was a *"benefit of the doubt"* rating, that the claimant was *"very fortunate"* because others had worked *"incredibly hard"* to get this project done, that his performance score was a testament to the other staff members' performance at this time (statement paragraph 31). The Tribunal rejected this as an overly negative assessment of the claimant's actual performance. Mr Firth had accepted earlier in his evidence that the claimant's mid-year performance was very good, and there was no indication it had dropped off. We considered that while there had always been some concern about some aspects of the claimant's performance, his appraisal in 2018-9 accurately reflected an overall positive and hard-working performance.

48. Into 2019 there continued to be evidence of some issues raised with some aspects of the claimant's performance. An email dated 4 June 2019 states *"I do not know what else to say, yet again no comms..."* that this would be a KPI "miss" if it occurred again (855). The claimant's evidence was that this was *"an isolated incident ... it was not a continued performance concern"*, the context of which was a launch of a fund project, a daily update was requested, that while there had been an agreed set of procedures which had been designed and audited, this daily update request was not embedded into the process, *"... and we were reengineering. It required team members to be available at a particular time each day, and we had other obligations. So this is an example of this being followed up – it was best endeavours. So we were having to reengineer and cover this requirement..."*. Mr Firth's evidence was that this was about prioritisation of an important issue, and he failed to give it priority. *"It's Easy to get out of commitments, he did not take it seriously."*
49. Mr Firth's witness statement is critical of many aspects of the claimant's performance, including *"a lack of real business commitment to the firm ... he did the bare minimum in order to get by"*, although he did have *"a generally acceptable demeanour for work ..."*. An example of the bare minimum was the fact that the claimant often left work at 5.00pm (often starting work at 7.00am), which Mr Green and Mr Daniels characterised as evidence of the bare minimum. Mr Firth's statement sets out what he contends is the claimant's lack of suitability and experience for a more senior operations role.
50. One of the examples given by Mr Firth (paragraph 15) refers to page 861, relating to an incident report on 20 June 2019, where the claimant says *"but to ensure we don't blur lines as to who owns the incident ... I'm not holding the pen on changes..."*. The response: *"Understood, and I wasn't asking you to make the change..."*. Mr Firth accepted in his evidence that this was not a performance concern, that the ownership of what is a formal document is important; he accepted that the claimant was *"ensuring accuracy"* in his response.
51. On the evidence we heard and read, we did not accept Mr Firth's characterisation of overall poor performance by the claimant from April 2017 onwards. We concluded that to the date of Mr Green's hire it was the general view of the respondent's SMT that the claimant's performance was *"met"*, that there were some frustrations with some aspects of the claimant's performance and communication style, but that the claimant's performance was not poor enough as far as the respondent was concerned to warrant any formal or informal performance or dismissal process, and none was undertaken.
52. The motivation behind and the chronology of Mr Green's hire was the subject to significant contested evidence. The claimant's case is that Mr Green was hired because he was known to Mr Daniels via their family connections and their attendance at Pinner Synagogue; the claimant's case

is that connections via Pinner Synagogue was a primary way to gain entry into what he characterised as Mr Daniels inner circle.

53. The Tribunal concluded on the evidence as follows. A decision was taken to make an external hire into a role which would eventually replace Mr Firth's COO role as he stepped up to CEO. There was a recognition that internal hires, including the claimant and others sharing elements of the COO role would not work. It was therefore decided to look for external candidates for a new role, Operations Director, reporting into Mr Firth, with this post-holder taking on increasing elements of Mr Firth's role as he took on more of the CEO role.
54. In April 2019 an end of year review amongst the SMT discussed succession planning, hiring into the COO role and the implications for the Operations Team (810). The respondent's Directors meeting on 30 July 2019 states that there were discussions ongoing with certain candidates for the Operations Director role (878); the Minutes also noted there would be "*challenges for certain individuals*" (which was a reference to the claimant, and others) when this appointment was made (881).
55. Mr Firth's account of Mr Green's recruitment: before going to recruitment consultants he initially considered who out of his contacts in a 25 year career may be suitable. Mr Daniels did the same.
56. Mr Green submitted his cv to Mr Daniels on 2 April 2019 following a discussion between the two of them at an event connected to their membership of Pinner Synagogue. Mr Daniels introduced Mr Green to Mr Firth, his email saying "*It would be good for you to have a chat!*" (801-5).
57. Mr Firth knew that Mr Green was a family friend of Mr Daniels. Mr Firth's evidence is that when he considered Mr Green's cv "*he had a relevant set of skills ... and the breadth of experience that I was looking for.*"
58. Between April and August 2019, Mr Firth met with and had discussions with a potential candidate he had identified through his work-related contacts – the 2nd candidate (910-916). Mr Firth's statement describes the different strengths of the 2nd candidate and Mr Green. His statement refers to their different skills and experience, that it was a difficult choice. He says that on Mr Daniels suggestion he undertook a comparison matrix (908). He says that in the end the discussions with the 2nd candidate were inconclusive because of the respondent and the 2nd candidate's differing expectations.
59. The 2nd candidate is not Jewish. The claimant's evidence was that talking to the 2nd candidate could have been to create a paper-trail to cover for Mr Green's eventual hire, or that he was not hired because he is not Jewish.
60. There was no documentation in the bundle describing the interview process or how Mr Firth concluded that Mr Green was the best candidate for the role. The claimant also points to inaccuracies in the witness statement accounts of when cv's were received. He also argued that it appears Mr Green may

have been offered a contract with the respondent in May 2020 (Mr Green's evidence which we accepted was that a pro forma consultancy agreement was sent to him in September 2020, wrongly dated April 2020). The claimant argued that Mr Firth had not had training on equality and diversity in recruitment.

61. Mr Firth's evidence is that his discussions with Mr Green confirmed him as the right candidate, to be hired initially on a lower risk consultancy basis; he says that Mr Green has lots of "*directly applicable experience*" for the role and has in fact "*performed very well*" in the role. He argued that Mr Daniels had no involvement in the process, that he provided Mr Daniels with updates, but that Mr Daniels never "*pushed*" Mr Green onto him, that Mr Daniels had never interfered with senior hiring decisions made by Mr Firth. Mr Green's evidence was that a proforma consultancy contract was sent to him by the respondent in September 2020, dated in error in April 2020.
62. By 29 August 2019 Mr Green had been offered the role. It was agreed that there would be an internal announcement only when Mr Firth had been able to chance to discuss with his direct reports, including the claimant and GC, as this was "*a sensitive hire*" (921).
63. The claimant and other staff were told of Mr Green's hire as Operations Director just before he started his employment on 2 October 2020 (the draft announcement is at 960). His hire was a shock to the claimant, who believed until then that he was in line for a more senior role. Mr Green was hired on an initial fixed-term contract, self-employed via a personal service company, he reported to Mr Firth. The claimant now reported into Mr Green.
64. The claimant argued that another employee, DB, was given preferential treatment, both in being recruited and in his salary/bonus arrangements, because he was known to Mr Daniels via Pinner Synagogue; this evidence was introduced essentially as 'similar fact' evidence. He accepted that his case was that Mr Daniels interfered in the process to exclude non-Jewish candidates, who were "*turned down on budget reasons*", and instead ensured DB was appointed, that his religion and association at Pinner Synagogue, and that he had known DB from an early age had "*influenced his decision*" to hire him. Also "*he had heard*" that Mr Daniels had "*intervened*" in DB's remuneration package, which he said was similar to candidates previously turned down, that a senior employee had raised concerns that this was a significant issue which led to his conclusion "... *that built over time, a series of events which did not sit well but which you could give benefit of doubt to. The payment of the bonus in 2019 – COO and HR manager being complicit and not taking concern of [X] seriously was probably a real eye opening moment for me.*"
65. The claimant argued that, similarly, Mr Firth was "*influenced*" by Mr Daniels to recruit Mr Green "*in preference to me*". He argued that Mr Green "*fell short of the necessary qualifications ... he was not an appropriate candidate for the role*".

66. Mr Firth's evidence was that the claimant was not suitable – that his *“experience was narrow and limited on the buy side; he had no responsibilities across firm, or for strategic work. I was looking for a senior hire with direct/obvious senior experience. There is a gap across things I needed to do, which were relevant to what I needed – running teams implementing projects...”*.
67. In his evidence, the claimant accepted that others in what he contended was Mr Daniels inner circle at work were not Jewish, including Mr Firth. The claimant's evidence was that inner-circle employees (who included employees at a similar level to the claimant with whom he worked closely) in his inner circle were *“sycophants, those who would facilitate the wishes of [Mr Daniels] regardless of whether it is in the interests of the firm or not ... [Y] deferred to Mr Daniels on all occasions and rarely questioned him and was hugely deferential to him...”*.
68. Having considered the evidence, the Tribunal concluded that Mr Firth conducted an independent assessment of Mr Green's capabilities for the role. We concluded that Mr Green was considered by Mr Firth to be a good fit for the role. This was, we found, Mr Firth's genuine assessment, which he made in the best interests of the business. It was Mr Firth who would be working closely with the new hire, not Mr Daniels, and we accepted that it was important for Mr Firth that the best candidate was hired. We noted that Mr Firth played it safe by hiring Mr Green initially on a consultancy basis, effectively an informal trial period without the need for an employment relationship.
69. We concluded that while Mr Green was known to Mr Daniels, and that this facilitated an introduction to Mr Firth, that Mr Daniels would not have put forward Mr Green as a potential candidate unless he thought Mr Green to be a potential fit for the role. We concluded that Mr Firth did not perceive Mr Green as somehow Mr Daniels favoured candidate for the role. To put it another way, we concluded that if Mr Firth had believed Mr Green was not the right fit for the role, he would have said so to Mr Daniels. We concluded that while Mr Green's association with Pinner Synagogue and his personal connection with Mr Daniels secured him a direct introduction to Mr Firth, Mr Daniels would equally have introduced a potentially suitable non-Jewish acquaintance to Mr Firth.
70. We also considered that the claimant's alternative argument, that non-Jewish members of Mr Daniels professional inner circle were a *“sycophantic”* exception to Mr Daniels rule; we concluded that this was not an issue of sycophancy, but it demonstrated that Mr Daniels was motivated to hire the best candidate, it was not to hire a senior management team from his inner circle, from Pinner Synagogue. We concluded that Mr Daniels kept apart his private life and associations and his professional responsibilities when it came to senior management hires. We concluded that he did not interfere in this process, or present Mr Green as the shoe-in candidate for the role.

71. The claimant's half-year review in October 2019 was undertaken by Mr Firth and was positive; *"A productive H1 for Declan, with successful implementation and running of ... activities. Audit activity has been completed with no issues."* It referred to added value from other activities. There were some areas of development (1046). There was evidence on a different note produced for this appraisal (1001) which suggested issues of accuracy, timeliness, error rates, a lack of plan, absenteeism. The claimant's case, which we accepted, was that the comments made at the review completed by Mr Firth was the accurate appraisal document. Mr Firth's evidence was that there were *"good things"* about the claimant's performance, as well as issues which needed working on that his notes showed *"it is fundamental in making progress that there are issues to talk about"*.
72. There were no recorded issues of concern relating to the claimant in the first few weeks of Mr Green's appointment. We accepted the claimant's evidence that he quickly accepted Mr Green's hire and continued in his role. The concerns that the claimant would react badly to Mr Green's employment appear not to have been realised in these weeks. The claimant's evidence, which we accepted, was that he was disappointed and felt aggrieved at Mr Green's hire, but it did not affect his performance. He said that he had positive things to say about Mr Green, including his decisiveness. He says that prior to his protected disclosures, Mr Green's comments were normal constructive comments on specific areas of work.
73. A decision was taken by the respondent to introduce new contracts for all employees, in part because of regulatory requirements, and in part to gain consistency of terms for employees. The claimant and all other employees were given their new contracts in mid-November 2019, already signed by the respondent. Several employees expressed concern about the nature of some of the amendments and the lack of explanation for them, and as a consequence on 19 November 2019 team managers were asked to *"share the questions raised by your team so we can pull together a q&a... to start addressing concerns"*.
74. Questions on the new contracts were raised via managers concerning Malus, clawback, requirements during notice, and bonus calculations. Some of the claimant's reports raised detailed questions about the changes, one asked for a tracked-change version of the new contract to compare versions (1072-4, 1081). There was a discussion between Mr Green and the claimant about his contract, in which it was agreed that the claimant would provide comments on his contract by.
75. The claimant also sought a tracked-changed version of his new contract, and in a follow up email on 21 November 2019 to HR he referred to the potential significance of the changes, saying *"... I would insist on a tracked changes version. I believe this to be a reasonable request"* (1050). Later that day he emailed Mr Green, saying he felt *"uncomfortable"* about the contract changes, asking for a tracked changed version and for the changes

to be explained *“in sufficient detail in the covering letter, and there will be no unnecessary changes which are detrimental to me.”* (1051).

76. On 22 November 2019 Mr Firth criticised the claimant for his email relating to an internal audit of the Finance Team. Mr Firth was asked for his comments or approval of the draft audit, in his response he described one finding as *“disappointing”* and asks some questions to the claimant and Mr Green on three of the findings. The claimant’s response was a 1½ page email; the first page addresses one finding of the audit, and then answers Mr Firth’s questions. He says that he and Mr Green *“have confidence in closure”* of the audit, but they will readdress in light of Mr Firth’s feedback. His response to findings one and two is to describe what was agreed with the auditors to address the issues of concern; his response to the third finding says that Minutes were not shared relating to the financial plan, *“this incident is being remedied, and it is worth noting that this occurred at a particular time of stress But Finance can do more here”* (1058). The final ½ page references what the claimant considered were positive findings in the report and the audit feedback (1058-9).
77. Mr Firth responded *“I was asked to comment on the management responses which I have done. The only good audit is a good one, and this audit has some (minor) findings,... We have a culture of working openly ... and also of owning findings not arguing them away ... I am frankly surprised you have had the time to write such a long email...”* (1057). Mr Green forwarded this to Mr Firth saying *“... as to point 3 I’ll follow up with him about ownership and responsibility for actions rather than saying ‘it’s not me!’”* (1062).
78. There was a further critical email response by Mr Green on 27 November 2019, again forwarded to Mr Firth. This related to one of the issues picked up in the Finance audit. The claimant had emailed various including Mr Green and LM, saying the issue *“...is not for Finance”* as he did not see Board minutes to be able to track actions, and he suggested other managers should be responsible. Following a meeting with Mr Green, the claimant emailed saying *“Thank you for holding ground I did try to get this through previously ... I’m happy to take on the responsibility of getting confirmation...”*. Mr Green replies, *“... you were saying ‘nothing to do with Finance’ – I was saying Finance have a responsibility ... Collective responsibility rather than buck passing...”*. He then forwarded this chain to Mr Firth, *“Fyi 😊”* (1076-7).
79. For Mr Green, these issues were a *“fundamental issue with the claimant and working collegiately, and it was never his fault. He ... was saying nothing to do with us. We got to the right place in the meeting and he listened and he thanked me for ‘holding the ground’ and we solved the problem”*. On his emoji to Mr Firth, *“I was showing Danny that I was addressing these problems, highlighting the issues”* with the claimant.
80. For the claimant the concerns raised by Mr Firth and Mr Green were not legitimate, arguing that these criticisms arose immediately after he asked

for a marked-up contract. In his evidence he stated, *“this impacted [Mr Firth’s] approach to me”* including on positive issues. He argued that the audit was ‘satisfactory’, the highest rating, with 3 minor issues to improve on. *“So I wrote to [Mr Firth] highlighting the positive aspects of the audit ... my email was mischaracterised”* (1057-8).

81. The Tribunal accepted that a large part of the claimant’s email was responding to questions that Mr Firth had asked. We noted that this was a positive audit, and we noted that in our experience that it is rare that an audit will find no errors. On finding 3, we found that the claimant was entitled to give an explanation for what had gone wrong, and to respond with context, in particular given Mr Firth had used the word disappointing. We noted that the claimant also said that the issue is being remedied, that Finance could do more. We accepted also that the claimant had suggested that this was not the fault of Finance. We concluded that this was another example of the claimant being unnecessarily defensive in his response, and of the respondent pointing this out to him, but that this was not a significant performance issue.
82. There were other issues of alleged poor performance raised in evidence: one was an incident on 22 November 2019, when the claimant considered that LM had reported back at a meeting on a piece of work which was substantially his, this led to heated voices and the claimant emailing HR Manager; Mr Firth’s view in his evidence was that *“both were to blame”* for this incident.
83. The claimant provided a detailed 3 page email concerning his amended contract on 28 November 2019; he states that some of the changes *“appear unreasonable”* and the overall tone of engagement has been disappointing. He states that the *“values”* of the organisation, including treating people well, engaging properly, and *“being open and honest”* appeared to have been *“abandoned for this exercise”*. He states that this has *“immediately rung alarm bells”* for some employees. He refers to *“the main items I struggle with in the engagement”*, including an *“aggressive”* approach, and an *“inadequate”* covering letter. He states that the proposals were made in a *“manner which appears underhand”*. He raised a concern that some staff had been told that failing to sign would result in their dismissal, that staff members have voiced regret at how this was handled. He raised 19 points of concern on the revised terms of the contract (1085-8).
84. On the same day a manager of another team emailed MP setting out the feedback he had received in a meeting with staff; he said that it appears that staff will be *“satisfied”* with the explanation, and that those who have not signed will be prepared to do so. He stated that the pushback was *“not surprising”* given some colleagues contractual expertise. He reiterated that a faq *“would be very helpful for morale , would recognise that management have heard the concerns about the contract wording, and ... would provide clarity and the comfort that colleagues are seeking* (1092).

85. A spreadsheet containing dozens of questions from staff members in 8 contractual areas was compiled by the SMT (1042-9).
86. There was an internal email discussion following the claimant's email. Mr Green stated that *"...although he has the right to raise some concerns, I don't think his tone is akin to a senior manager and I worry the influence he has on the rest of the team..."* Mr Firth stated that there should be a "formal" meeting with him with a notetaker to discuss his concerns *"...and also to explain our explanations of Declan as a manager within the firm"* (1093-4).
87. The claimant's evidence was that the 'Values' section of the email was *"direct feedback on how this has been perceived by staff, in an open and honest way. These concerns are concerns of the staff at the time ... and using language that they had used ... I am outlining how I and others viewed the company's approach to changes in contract, and describing it in these terms."*
88. Mr Daniels evidence was that the situation with the contracts and the staff concerns raised was *"one of the most uncomfortable situations we have had"* as an organisation.
89. Given the significant concerns that had been raised by employees, we accepted that the claimant was putting into words what he and others felt about the amendments, and the manner in which they had been presented. Many employees' whose role involved critical analysis of contracts critically analysed their own contracts and some of the claimant's team provided feedback to him, with some strong feelings being expressed. We concluded that management was surprised by the level of and nature of the concerns raised. We noted that the claimant appears to have been the only employee who made such significant criticisms in writing.
90. A chain of mails between the claimant and LM was criticised by Mr Green on 2 December 2019 that the tone of the claimant's email was *"quite condescending and patronising ... I am happy to help ... but to continue to be successful in your role you need to mend the relationship with LM and her team"* (1155).
91. The Tribunal noted two points in this email: that there had been a conversation that morning about the claimant's interaction with staff, which was and continued to be of some concern to the respondent; that the email also suggests that the much of the claimant's performance was not in question *"... to continue to be successful in your role..."*. We concluded that notwithstanding the issues which arose, in particular around the claimant's interaction with senior colleagues and his defensive responses, that the claimant's performance of his day to day work was not being criticised.
92. An "explanatory note" on the contract changes was sent to staff members on 4 December 2019 (1168, 1173-76).

93. The claimant attended a meeting on 5 December 2019 with Mr Firth, Mr Green and another manager as notetaker; he was advised that the language, tone and terminology of his email about the contract changes was “*concerning*”, that he should first have discussed his concerns with Mr Green instead of putting in writing, in particular the “*Values*” section of the email. At the end of the meeting the claimant said he “*stood by what he said but regretted the language and putting it in an email*” (1179-81).
94. In his evidence the claimant said that the reaction in the meeting “*was off ... it was aggressive, combative and akin to a disciplinary – completely inappropriate.*” He stated that he was “*unprepared and hugely intimidated and I was coerced into expressing regret for tone of email.*” The claimant signed and returned the amended contract on 9 December 2019.
95. Mr Firth’s evidence was that the meeting was “*an appropriate response to the concerns*” of the claimant; he said that others who raised complaints “*did not say underhand and breach of trust. These were significant and I needed to understand why raised by the claimant.*” Mr Firth accepted in his evidence that the claimant was entitled to express these views if he felt them accurate; he said that the claimant’s discomfort at the meeting arose because of “*his inability to respond to general questions about why he felt trust was broken He never expected a formalised response I think; and when he did he was not able to substantiate them which made him uncomfortable*”. Mr Firth stood by his statement that the remarks were “*inflammatory*” even though he accepted that the claimant had the right to make them. He said that the remarks were inflammatory because he was alleging breach of trust and introducing the changes through the back door, “*... when in fact they were up-front, signposted and communicated. ... he is suggesting we are up to no good, and he is the only person suggesting this.*” Again, Mr Firth accepted that the claimant was entitled to raise these issues “*and we are entitled to respond*”. Mr Firth stated that this did not change his perception of the claimant, which he said predated this issue.
96. An issue arose with a Korean trade – there had been a trading error; the claimant was asked to write a serious incident report. The issue with the trade was not his area of expertise or responsibility, and we accepted that he wrote this not having written a similar report before. There was a difference of evidence on what occurred prior to the report – the claimant says he was told not to put anything in writing while discussions were had, Mr Green’s evidence was that “*we would try to understand and be clear about what happened and then write it up*”. In any event, the claimant commenced drafting the serious incident report in January 2020, he understood with a deadline of 20 January. Mr Green responded to the claimant’s “*narrative I have worked up*” on 15 January 2020 saying “*not the best written document in the world. I’ve made a load of amendments...*” (1280). Mr Green accepted that the trade was not the claimant’s responsibility. He accepts that he was “*upset*” with the claimant at an Incident Management Forum which took place on 16 January 2020 because the report “*was not put on the table and referenced in the conversation ... he did not have an understanding of the cause of the problem and he does*

not still understand what the issue was.” Mr Green accepted that the claimant “reminded” him that he had said that the issue should not be referenced in writing “until the internal narrative was worked out”, he says that he was upset that there was no conversation on the issue, “... What was wrong was that no one in compliance or the claimant brought this issue to the table. This is unacceptable. It was discussed once I raised why we had not talked about it.” He said the allegation that he had “berated” the claimant was too strong; when it was suggested that he had “chastised the claimant in front of colleagues” he argued that his comments were “directed at the meeting” including compliance. It was agreed at the meeting that the SIR would be filed in advance of the 20 January 2020 deadline.

97. A further criticism of the claimant relied on by the respondent was his failure to undertake regulatory training on time: an email relating to the claimant on 26 February 2020 said “*see below, usual suspect...*” (1339).
98. On 26 March 2020 Mr Green sent an email to senior management saying “*Since I joined in October 2019 I have been less than impressed with the work that Declan has produced. Pretty much every piece of work he has provided has been late, wrong, and in many cases both... Others I have had to constantly chase ... and when provided the work has to be redone - sometimes several times. ... It’s got to the point where I cannot rely on anything he produces with having to review it first..*”. He stated that he had pointed this out in a 1-1 with “*...no progress ...*” 1369.
99. In early April 2020 a significant issue arose with charges for management services made to the respondent’s DC pension scheme. We accepted the claimant’s basic characterisation of this issue – that the approximately 200,000 members of the DC scheme had been overcharged fund management costs. Total management charges had amounted to a Total Expenses Ratio (TER) of 31 basis points (or 0.31% of the total value of each employee’s pension) instead of a contractually agreed TER maximum of 29 basis points. This, says the claimant, amounted to an approximate total overcharge to the DC scheme of £200,000 per year.
100. The issue arose because no separate provision had been made for certain consultancy and management costs within the 29 basis points. A subsidiary of the respondent, TPFIM, responsible for asset management services was charging a 4 bps Annual Management Cost (AMC), and 3 basis points for the additional charges they incurred, the Fund Borne Costs (FBC). The issue was that the advice the claimant and Mr Firth received did not specify whether the 3 basis points FBC should be included in the AMC.
101. The claimant’s case is that he, Mr Firth and others discussed this issue at the time in 2018 – that it was Mr Firth’s position that Fund Borne Costs should not be included in the AMC, and could be paid separately from the 29 basis points.
102. In an email dated 21 May 2018 to Mr Firth ccing others, titled “*DC cost with accounts*”, the claimant made several points: [X] will not be expensing fund

costs – these will be paid for by the fund; no provision is currently made to subsidise fund costs; ... members will be charged fee and expenses *“in line with the charging mechanism currently employed for current passive funds – this is a crucial concept and we need to ensure it lines with DC stakeholders and L&G Governance; the fund costs, in the absence of any external subsidies will be paid for by assets in the ACS fund - these include all NT costs... Can you please review and let me know if you have any challenges”* (635).

103. The claimant’s case is that by this email he was stating that *“it was important that the charging structure aligned with the requirements of the stakeholders”* (paragraph 263 statement). The Tribunal accepted that the words *“crucial concept ... we need to ensure it lines with DC stakeholders and L&G governance”* was saying exactly this.
104. The claimant’s case is that Mr Firth did not discuss the issue with DC Stakeholders or L&G Governance; Mr Firth told him that 4 basis points would be allocated for AMC costs, and 3 basis points for the FBC. The rationale Mr Firth gave was that the AMC costs could be offset against performance of the DC fund and so would not be visible as charges, that this was a practice he has seen previously. While the claimant says he still had concerns, his statement records that Mr Firth’s explanation satisfied him, that he had no dealings on this issue thereafter, that there were Investment and Governance Committees on which Mr Firth sat who were responsible for this issue. He also says that there was at least one other concern raised about the level of fund costs by a senior pensions manager (paragraph 264 statement). We accepted that Mr Firth gave the claimant this explanation and that the claimant had little dealing with the issue thereafter.
105. The DB charges issue arose again in an email dated 9 April 2020 from the respondent’s Chairman, Mr Royston Smith, to Mr Firth and others titled *“Urgent – TRSP – charges paper – reconciling to 29 bps”*, saying: *“We have an issue that ... members costs have increased above 29bps for two reasons ... We can’t allow members charges to increase above 29bps ... As a priority can you help us understand: how this has happened; what this cost represents; and the reason it hasn’t been made visible”*.
106. Mr Firth forwarded to the claimant *“Can you please look at this urgently, can you explain where these costs are arising, what they are and why we have not been reporting or discussing them. ...”*
107. The claimant responded the same day, saying that the *“difference”* relates to the fact that there is the 4bps charge to TPFIM as AMC, and TER includes the other – 3bps *“... whereas the expectation per the paper is the TER would be 4bps ...”*. The email sets out where the *“additional expense”* of 3bps arose and says *“I believe that you [and others] have had a conversation around this previously in advance of the launch. If I remember correctly, the view at that point was that the Tesco Pensions Team had dropped the ball in relation to this.”* (1385-6).

108. There were further exchanges, in which the claimant set out the history (e.g. 1391-1399) of how the charges had come about.
109. Mr Firth provided an initial response to Mr Smith on 9 April 2020 stating that there “*seems to be a misunderstanding about the total costs ... we believe [the costs breakdown] was discussed in full ahead of the launch...*”. He stated that “*In addition to this there was always going to be explicit fund borne costs which are ... common practice. This is the 3bps. ... I do not recall discussing the TER as this is normally netted against performance....*” (1379-80).
110. The claimant says that the above is the context for his 2nd protected disclosure, an email dated 15 April 2020 – this is described in the claim as follows: that on 15 April 2020 the claimant disclosed in an email to Mr Firth that he had raised his concerns in May 2018 about the respondent charging more than 4bps but that Mr Firth had made the decision to apply the charges regardless (paragraph 46).
111. The 15 April 2020 email (1400) forwards the claimant’s 21 May 2018 email, saying “*FYI, this followed discussions we had internally with this group. We agreed on the charging structure, and there was no reaching out to Hymans or LGIM.*” (1400). In his response Mr Firth does not challenge this characterisation.
112. The claimant’s evidence was that read together, the 21 May 2018 and 15 April 2020 emails say: “*Mr Firth decided to charge more than 4 basis points and had therefore failed to meet the respondent’s legal obligations...*”. The 21 May 2018 email is “*highlighting serious issues...*”, that stakeholder approval was required before the charges were finalised. His 15 April 2020 is saying that approval had not been sought to the increased charges, there was “*no reaching out*”.
113. The claimant’s evidence was that when he identified in April 2020 that that the 4 basis points “*were to be inclusive of all costs ... [Mr Firth] then conveniently forgot [what had been agreed in May 2018]...*” He argued that Mr Firth was “*in breach of his obligations as a Director and on the DC scheme committee by charging 31 basis points to DC members...*”.
114. The respondent’s case is that the issue of the charges were raised by the Mr Smith, that the claimant was asked to have a look at the issue by Mr Firth to get to the bottom of what had occurred because he could not recollect. The claimant’s case is that Mr Firth was heavily invested in the launch of the DC fund including the issue of fund charges; he said he was “*not sure if Mr Firth was genuinely trying to understand the issue, or instead putting in place a paper trail*” to cover his tracks; he said that Mr Firth knew what the issue was, but was playing ignorant.
115. For the respondent, the claimant’s 15 April 2020 response was, as put to him, to “*deflect responsibility*” to the consultants Hymans, “*so you do not get*

criticisms for your costing model as Head of Finance". We accepted the claimant's answer that his email, *"as explicitly as I can was reminding him of his part in overcharging members..."*. He stated that Mr Firth was asking him what had happened to cover his tracks *"Had he not raised this question with me it would be an admission that he knew about this overcharging."*

116. It was put to the claimant that he was *"responsible for the model, which led to the overcharge"*. We accepted the claimant's answer, that the *"model was correct – it was fit for purpose. What went wrong is the inputs to the model, which [Mr Firth] was responsible for ... he is aware of the 4 basis point requirement, as he was on DC governance and Investment committees..."*
117. Further emails not involving the claimant show Mr Firth's attempts to resolve the issue; there *"is no appetite to increase member fees..."*; that the possible options each have *"pros and cons"*; these included bringing costs down elsewhere, look at whether all investments costs can be shared; that TPI covers the 3bps.
118. Mr Firth's evidence was more nuanced than the case put to the claimant. He said that no blame attached to the claimant for the basis point error; also the claimant's email of 21 May 2018 email was not suggesting any risk, instead it was setting out the conclusion that had been reached after *"conversations had with lots of people"*. Mr Firth denied that he had taken a decision to offset the 3 points against the performance of the fund; that this was *"not said, the conversation was to test whether the proposal would work, and we reached the conclusion it would do"*. Mr Firth denied that the claimant's 15 April 2020 email suggested he was warned in 2018 to make checks on these figures.
119. Mr Firth referred pages 631-5, the claimant was asked whether the figures align to the cost model and *"he said yes... no blame to claimant for this error but it was an error"*. He said that the issue was sorted, that *"no one was out of pocket and we put the money back into the fund."* He said that it was *"an unfortunate error, and it was in full visibility of all governance."*
120. The Tribunal reached the following conclusion on this evidence: that on 21 May 2018 the claimant informed Mr Firth that it was crucial he checked whether the costs model was acceptable to the pension fund stakeholders and governance; that Mr Firth decided not to do so; that the claimant's 15 April 2020 email was informing Mr Firth that he had failed to undertake this check.
121. The Tribunal also concluded that Mr Firth would have been fully aware when he received Mr Smith's email that the issue with the overcharging was as a consequence of his decision on/around 21 May 2018. We noted that the respondent's defence to these proceedings blamed the claimant for this error, as did, for example, Mr Daniels in his evidence. This was, we found, a factually wrong assertion.

122. We also noted that when Mr Firth gave his initial explanation for the overcharge to Mr Smith on 9 April 2020 he differentiated between what “*was discussed in full*” ahead of the launch, with what he says were “*in addition ... fund borne costs ... 3bps*”. We considered that Mr Firth was at this stage fully aware that he had been told to take advice on the fund borne costs, and that he had decided not to do so. We noted that the claimant made this connection explicit to Mr Firth in his email of 15 April 2020.
123. The claimant provided his comments on his end of year review to Mr Green on 19 April 2020. His comments include “*consistent green KPIs*” and states that he had taken on additional responsibilities, had supported change, and all external and internal audits had been positive. He said that an area of development was “*support of new COO...*”. In his objectives he considered he had delivered “*stretch*” (exceptional delivery in two areas), and was “*target*” on the other objective. In response, Mr Green emailed Mr Firth summarising the claimant’s review: “*Had an amazing year - all positive and good. Only real development area is to help me!*” (1435).
124. The Tribunal noted that the claimant’s mid-year review with Mr Firth in October 2019 had been positive. We saw no evidence of a significant deterioration in performance thereafter. We accepted that some aspects of the claimant’s performance remained of concern: some of the manner of his interactions with other employees at his grade, in particular those following the Finance Audit; his needing to be chased on several occasions; the issue relating to the Korean trade.
125. On 30 April 2020 Mr Firth wrote to the respondent’s chair stating that the claimant will “*have his contract terminated*” the next day and be put on garden leave. The reason – “*... poor performance which despite continued discussions with Line Manager has not improved.*”.
126. In his evidence Mr Firth said that the decision was made “*over time... a lot of things which it did not work – conversations had on a continuous basis and this was difficult to reconcile with [the claimant’s] expectations with becoming COO against this wall of noise...*”. He said that they had “*discussed a significant number of concerns about his performance*”.
127. The claimant was informed of his dismissal at a meeting on 1 May 2020. Mr Green told the claimant that they had conversations in which he had been told his “*performance was not good enough*”, and that a performance improvement plan “*would be very difficult*” for them both. He said that the claimant’s end of year appraisal had not acknowledged any of the issues they had discussed (1448).
128. Later that day the received his dismissal letter by email. This said his employment would terminate on 31 July 2020, and would be on garden leave for the three months’ notice period. He was not given a right of appeal (1456-7). In response the claimant emailed Ms Prentice, referring to his positive ½ year performance and that “*I have not had any form of performance management*” (1453).

129. Mr Daniels view of the claimant was that his *“work was not of consistent quality and his attitude was not appropriate, his work ethic was not appropriate and his communication style was not appropriate.”* He was competent at his role but he had *“very little understanding of communicating what the numbers meant”*. He said that he was aware of the contract issue and the issue with the DC pension, *“but what drove the reason to terminate was his quality of work and the workload of business and whether he is right person for this.”* He said that with adding more employees including Mr Green *“made it easier for us to say performance issues and now is the right time”*.
130. Mr Green’s evidence was that he had worked with many staff who have not performed, and had worked with many employees to improve *“... the common factor is that people accept there is a problem, and not blind-sighted by work deficiencies. But the claimant never accepted that there was a performance issue... I felt it would not have been successful ... I made clear his performance on many occasions – his performance was not up to standard”*. He said that the claimant’s appraisal form *“cemented the issue for me. ... can you believe after all my feedback, and he is so blind-sighted to say the only issue was to support me.”*
131. The claimant’s evidence was that had he been put on a performance management, *“I would not have taken it well, at ½ year review I was met/met. But had I been in this situation I would have engaged and worked through this.”*

Closing Submissions

132. The parties gave written closing submissions which we considered. Mr Carr and Ms Bone spoke to their written submissions. Their arguments are considered below.

Conclusions on the evidence and law.

Direct Race/Religion Discrimination

133. The Claimant relies upon the following alleged acts of less favourable treatment during his employment: the creation of the Operations Director role in late 2019 and the failure to appoint him, or consider him, or give him an opportunity to apply for this role.
134. The first question we asked was whether the decision to create the role of Operations Director was because of the claimant is not Jewish and/or is not associated with Pinner Synagogue.
135. Mr Carr argued that it was an *“extraordinary”* argument that Mr Daniels was *“trying to seek preferment for his Jewish friends”*. Mr Firth is a *“serious professional”* but on the claimant’s case there is *“an invisible ... staging”* in which Mr Firth is *“so cowed”* he cannot resist, that he then goes through a

false process with another candidate. There is no *“circle of sycophants, an absurd and offensive claim”*. Many of Mr Daniels inner circle are not Jewish, and the claimant received favourable appraisals, bonus and a promotion.

136. Mr Carr also accepted that the claimant’s performance could be good, and that the claimant worked on important projects.
137. The claimant’s case is that Mr Daniels created a work culture which gave, as he put it, *“preferential treatment”* to those in his *“inner circle”*. The claimant’s case is that many – but not all – of those in his inner circle are Jewish. As he put it in his evidence, *“I was not within his inner circle; and one of the main ways to be in his inner circle was to be Jewish and/or having membership of Pinner synagogue.”*
138. We noted that on the claimant’s own case he was potentially in line for at least some elements of a COO/Operations Director role, and had been undertaking elements of this role with two other managers. Neither he nor these managers are Jewish. On the evidence it was clear that giving the three of them additional responsibilities was a genuine attempt to see whether internal candidates could step up. It was decided that it was not going to work.
139. We concluded that this decision was purely on the ground that the arrangement had not worked as well as it could have, and we saw evidence to this effect. This had nothing to do with the claimant not being Jewish and/or not associated with Pinner Synagogue and/or not being in Mr Daniels inner circle.
140. We also considered the comparator test: a hypothetical comparator would be a Jewish employee with the same performance (sometimes mixed) and with the same communication style (sometimes overly defensive), with Mr Firth managing this comparator. The comparator would have been asked to step up to work on projects and in elements of a shared role; as with the claimant most of their work would have been of good quality, but some of their communication with other managers would have been criticised. The comparator would have received in the main *“Met”* in appraisals, with some concerns raised both during appraisals and during the year. When stepping up, some elements of performance would have been exceed/stretch.
141. We concluded that such a hypothetical comparator would have been considered in the same way as the claimant: some good elements of performance, some issue of concern/frustration, and not ready or able to step up to a more senior role. We concluded that neither the claimant nor the hypothetical comparator would ever have been genuine contenders for the Operations Director role.
142. It follows that the failure to appoint the claimant to the Operations Director role was not because he had no association with Pinner Synagogue, or is not Jewish, or because he does not have a personal association with Mr Daniels. It was because the respondent’s senior management team did not

consider him to have the appropriate skills for the role. This had been the case in 2018 when there was no candidate for the role and it was the case on Mr Green's appointment.

143. The claim of direct race and/or religion discrimination therefore fails and is dismissed.

Indirect race/religion discrimination

144. This claim fails because, for the reasons set out above, the respondent did not have a policy or practice of employing senior managers who are Jewish and/or associated with Pinner Synagogue and/or within Mr Daniels inner circle. Instead, we found that there was a policy or practice of the respondent, when considering senior hires, of considering potentially suitable candidates who were known to senior managers, including Mr Daniels and Mr Firth. We accepted that the respondent did appoint at least two employees known to Mr Daniels from Pinner Synagogue. One of these candidates was recruited via a recruitment consultant and we did not accept that Mr Daniels interfered in this hire or their remuneration.
145. We accepted that there can be equal opportunity implications, including potentially issues of indirect discrimination, arising from deciding to recruit what can often be narrow professional and social circles, leading to candidates with potentially similar 'protected characteristics'. But this does not amount to a practice of given preference to their recruitment if in fact candidates are included from outside of these narrow pools, and if in fact the decision to appoint is based on merit.
146. The tribunal was clear that the sole criteria for appointment was suitability for the role; that equally the 2nd candidate, known to Mr Firth, may have secured the role; that the merits of the candidates were considered carefully, that had Mr Firth decided Mr Green was not up to the role he would not have been appointed. This does not amount to a practice of hiring employees from Mr Daniels' inner circle.
147. The claim of indirect race/religion discrimination therefore fails and is dismissed.

Whistleblowing – qualifying disclosures`

148. We considered whether the claimant had made qualifying public interest disclosures on 28 November 2019 (APD1) and on 15 April 2020 (ADP2).
149. APD1 – November 2019: the claimant argues that his email contains information which tends to show his reasonable belief that the respondent was undermining the trust and confidence of himself and other employees in its approach to the amended contract; the belief was reasonable, and that it was in the public interest given the number of employees affected.

150. In closing discussions, Mr Carr accepted that the claimant's email may amount to an issue of public interest, as these contractual changes impacted on "*high double figures*" of employees – virtually the whole of the respondent's workforce. He accepted that the 'public interest' element may be satisfied by this email, as it was "*to an extent*" saying there was a breach of the implied contractual term of trust and confidence, "*if the characterisation of the employer's behaviour is that it is dealing in an underhand way, and hoodwinking employees*".
151. Mr Carr disputed that the claimant's belief was genuine, or was a reasonable belief. He argued that there was a reaction by the claimant to Mr Green's appointment, and "*... what the claimant said and the way he said it was substantially a reaction to the way he felt he had been treated*". Mr Carr argued that this belief was not one the claimant could reasonably come to on the facts; "*and these views are unreasonable because they are expressed by someone ... who regards himself a victim because of Mr Green's appointment*".
152. Mr Carr also argued that some of the examples in the statement cannot be public interest disclosures, for example no mark-ups of the changes, and no individual negotiations. This cannot be read as suggesting a breach of trust and confidence. The alleged legal obligation is a breach of trust by way of underhand behaviour. But it is accepted that regulatory rules required some contractual amendments to be made – "*the consultation process is operating against this deadline*". He argued that the issue was the tone of the claimant's email and not its content, that the claimant was impugning the SMTs integrity with this email (*Kong v Gulf International (EAT 0054/21)*).
153. Ms Bone argued that it was not just the claimant who complained, and it was "*unchallenged evidence*" that threats of dismissal had been made to employees if they refused to accept the new terms. The claimant's entire team refused to sign. She highlighted that Mr Firth was concerned that the claimant had not spoken to Mr Green and instead had put his concerns in writing (1179). She argued that Mr Green had effectively conceded that his concern was with the nature of the accusations – of being underhand, inappropriate. She also pointed out that the issue had been seen as a disaster internally.
154. Ms Bone argued that the "*overarching point*" the claimant makes in his email is the way the issue had been handled – inadequate explanation, others were concerned, along with the words he used. There is a clear reasonable belief, as other employees are making the same points.
155. On the issue of the dividing line between the manner of disclosure and fact of disclosure, Ms Bone argued that the respondent has not pleaded that the 'tone' of the email means it is not a protected disclosure; in any event it is not offensive language.
156. Mr Green's evidence means that the respondent has gone over the line into style – i.e. the temerity of the claimant to make the remarks he did. It has

been accepted internally that this should be handled differently, that there was a morale issue, but what has angered the respondent is the claimant saying “*directly said what he said, unmoderated*”.

157. The Tribunal considered whether the claimant’s email made allegations or provided information. We concluded that the three page email contained allegations which were then followed by information which, in the claimant’s mind, was the evidence behind the allegations. He stated that the changes were “*unreasonable*” and that the respondent was not being open and honest, was being underhand, causing alarm bells for employees
158. The claimant gave specific examples of what he considered not to be open/honest, unreasonable/underhand: he said asking for comments on a contract which is not going to be changed is “*lip service to an obligation to engage with staff*”. He said that “*... communication was lacking*”, that staff were threatened with “*immediate dismissal*”. He set out what he considered to be proposals to remedy this. He set out 19 paragraphs of specific objections to the contract.
159. We noted that the claimant has throughout his employment expressed himself in writing in a forthright and sometimes antagonistic and defensive manner – he says it as he sees it, even when he not always right. We considered *Kong v Gulf International*. We accepted that the tone or words used can be separated from the actual disclosure: in *Kong* the claimant’s PIDA claim did not succeed because the tribunal accepted there was a distinction between making legitimate disclosures while also casting aspersions on the professional competence of the recipient of the disclosure; the latter was the reason for dismissal in *Kong*. In the present case however, there was no individual who was targeted for criticism over and above the disclosure; it was the method adopted and the process utilised which was being criticised (albeit that there would have been decision-makers who did take it personally). We concluded that the claimant’s words were part and parcel of the actual disclosure – ‘underhand’ is squarely an allegation of breach of confidence.
160. We concluded that the claimant was, in this email, conveying facts about his and other staff members’ concerns with the contract. In terms his words were conveying explicitly the view that the respondent was seriously breaching employees’ trust and confidence in the manner in which the amended contract had been presented and the nature of the changes being made. We concluded that the email contained “*sufficient factual content and specificity*” that the respondent was in breach of its obligation of trust and evidence towards its employees to qualify as a protected disclosure.
161. We considered whether the nature of the disclosure – effectively about a contract of employment – satisfied the ‘public interest’ element of the test. Mr Carr conceded that this may be a disclosure which engaged the public interest. We agreed. The whole workforce outside of the senior

management team was affected by these changes, and some of the concerns raised about the changes were about significant amendments, including to bonus, clawback, and notice. There was serious concern that the amendments were being imposed without any process. The employer is a significant, large and reputable employer, and the claimant and other employees believed that it was acting in an untoward and unreasonable way. We took into account that this was still, in essence, a dispute about an employment contract, however we concluded that given the numbers of employees involved, the concerns being raised, the nature of the concerns, meant that this was a disclosure in the public interest.

162. The Tribunal considered whether the claimant had a reasonable belief at the time of making the allegations that they were true. We noted that the test is whether the belief is objectively reasonable, whether or not the belief is in fact correct. We accepted that whether or not his accusations are, in fact, true, is an important factor in assessing reasonable belief (*per Darnton*).
163. We accepted that colleagues had expressed their concerns in similar language to him. We noted that a concern of Mr Green was the claimant had too much influence over his colleagues – a recognition that Mr Green accepted such discussions had occurred. We accepted that it was in the claimant's nature to express these concerns, unmoderated. We accepted that the language may have been more diplomatic.
164. We concluded that the concerns raised by the claimant in his 28 November 2019 email were, in terms, that of a contractual breach of trust by the respondent towards its employees, that "*many staff*" had concerns that the respondent was abandoning its commitment to be "*open and honest*" and making what the claimant considered to be reasonable "*suggestions*" to change the respondent's stance and process. We concluded that the claimant did reasonably believe the respondent was significantly breaching employees' contracts of employment.
165. We also accepted that the email expressed the claimant's genuine belief. Other employees were expressing similar concerns in similar language to him, a relevant factor in assessing genuine belief. Stripping out some of the commentary, what the claimant was saying in this email was what had occurred in fact: the contract had been presented already signed with a clear statement that there was no negotiation on the terms; that the amended terms and their implications had not been made clear to employees; employees had to cross-reference against their old contracts, and employees were upset about this. He was adding that he considered that this was unreasonable conduct by his employer. We considered that it was not an unreasonable position to take on the facts even if the language in which it was expressed was uncompromising. Employees were upset, he was upset, and he was communicated why they were upset.
166. We therefore agreed APD1 was a qualifying public interest disclosure.

167. APD2: the claimant's case is that the 15 April 2020 showed that Mr Firth had breached legal obligations to the DC pension scheme because it disclosed: the claimant had made Mr Firth aware of his concerns in May 2018; that Mr Firth had been advised to seek advice or correct the model he had produced; Mr Firth had not corrected the charging model and the concerns had now materialised. The claimant argues that this was a reasonable belief and was in the public interest given the numbers of pensions fund members affected and the sums concerned.
168. Ms Bone argues that the respondent's case is built around the May 2018 error being the claimant's error – see the defence to the case; that in fact Mr Firth had conceded that it was his error in evidence.
169. Mr Carr's argument was that this was not a disclosure of information by the claimant; it's an issue raised by the DC trustees, the claimant is asked to look into it, and there followed "*a routine*" exchange on what was an exceptional issue, the way members had been charged. It is routine because a line manager is asking a subordinate to look into the issue, and he is doing so. This goes to the "*reliability of the claimant as a witness*", in particular he never disclosed a concern that DC members been overcharged during this process; he's not disclosing information suggesting a breach of a legal obligation, he's answering his manager's questions. It's a "*dishonest claim to suggest that Mr Firth is covering his tracks ... there was no disclosure by him*". In his written submission Mr Carr argues that the claimant's case is "*dishonest and manufactured*" on this point.
170. We carefully considered the factual issues. We concluded that in 2018 Mr Firth made a decision to exclude the FBC from the AMC, on the belief that fund value would cover these costs; the reason he did so was because he was aware that not including the additional 3 bps would have a significant effect on the returns generated by TPFIM. He did not seek the approval of stakeholders and governance, despite having been told the issue was "*a crucial concept*", and he must "*ensure*" approval was gained. He instead satisfied the claimant and others that the charges would work.
171. On 15 April 2020 in the context of what was a serious and difficult to resolve issue, the claimant forwarded his May 2018 email. The 15 April 2020 email in the context of the 21 May 2018 email was, we concluded, informing Mr Firth that a decision had been taken to exclude the FBC, he had been told by the claimant to seek approval to this, but this approval had not been sought "*... there was no reaching out*".
172. We concluded that the claimant was, by forwarding the 21 May 2018 email and by the wording of his 15 April 2020 email, saying in readily understandable terms that Mr Firth had failed to ensure that approval was secured to this crucial issue of fund charges as he had been told to do. Mr Firth already knew this. We concluded that the only logical conclusion which could be drawn from this statement was that this failure to seek approval

was the reason that the contractual legal obligation to the pension fund, to keep costs within 29 bps, had been breached and was only now coming to light.

173. Accordingly, we did not accept the respondent's contention that the claimant was repeating a disclosure already made by Mr Smith. Mr Smith was saying that there had been an apparent breach of the 29bps limit; the claimant was making another point, reminding Mr Firth of his culpability in failing to seek approval to the charging structure, which had caused this breach to occur.
174. We concluded that this was a disclosure in the public interest – it was an issue which affected a large number of pension holders, who were being overcharged; this was a significant number of Tesco employees. The claimant was stating that Mr Firth had not taken the vital step to seek approval to the charging structure. It was the reason why the overcharge had come about and it was an issue of potentially regulatory concern, as well as being an issue relating to the respondent's fiduciary obligations to the pension fund.
175. We noted Mr Carr's point, that the claimant did no more than send this email. We accepted that he was in a very difficult position at work. We accepted that he was effectively putting on the record what had happened. It was our view that if Mr Firth had needed reminding, it was now for him to take the issue forward and address this factual background with the DC fund trustees.
176. We concluded that the claimant had a genuine belief in what he said to be true; we concluded that what he said was, in fact, true.
177. We also considered that he reasonably believed that this was a statement made in the public interest: this was an issue which was of potentially regulatory concern, and the claimant considered that the respondent had failed in its legal obligation to the pension fund as a result of a decision taken by Mr Firth not to seek approval from stakeholders. The claimant considered Mr Firth to have some culpability in this failure. He considered that this needed to be put on the record and he did so, to the COO. We concluded that this was a statement in the public interest, and the claimant reasonably believed it to be so.

Whistleblowing – detriment

178. The claimant's case as made by Ms Bone is that the claimant's first disclosure ADP1 *"sparked a change in his treatment - the intensification of performance criticisms the respondent in January -February looked into the claimant's performance and reached a negative view..."*
179. However, the alleged detriment – failure to consider and/or appoint the claimant to the Operations Director role - occurred before both of his public interest disclosures. It follows that the claimant cannot have subjected to

any detriment in respect of this role on grounds of his public interest disclosures.

Whistleblowing - automatic unfair dismissal

180. We considered whether the claimant's protected disclosures were the reason or the principle reason for his dismissal – it is not enough for this to have been simply on the respondent's mind when dismissing. The respondent's case is that there is no connection, that the claimant's performance was poor, he showed no insight, and a managing performance process would be ineffective and counter-productive.
181. We considered whether the respondent genuinely believed that the claimant's performance was such to justify dismissing him. We concluded not. We concluded that there had been elements of the claimant's performance which caused concern, but even on Mr Daniels case the claimant was competent at the technical side of the role. We concluded that the respondent had some genuine frustrations with the claimant's performance, including his collegiality and some of his interactions with senior colleagues.
182. However these frustrations had not led to significant performance concerns, and dispute these issues the claimant's performance had been rated good/met in the previous years' appraisals. He had not been warned about poor performance; while he had been told that his interactions with colleagues needed to improve, we concluded that this was not seen as an issue putting him at risk of dismissal.
183. We noted the numerous examples given by the respondent to justify poor performance: however the two main examples in the pack after Mr Green's appointment were the Korean issue – where we considered that Mr Green had unfairly criticised the claimant (and this was after his first act of whistleblowing) and the Finance audit, when the claimant was criticised for a defensive stance after he had been criticised by Mr Firth. The claimant had also been chased for outstanding forms.
184. We noted the clear anger felt by the respondent after the 1st whistleblowing disclosure. While the claimant was criticised for the tone of this disclosure email, we considered that the criticism was also significantly because as a senior manager he had put bluntly into writing his and his colleagues concerns, and made unfiltered statements which he and other colleagues believed to be true. He also made suggestions, and he set out his detailed concerns on the contract. We concluded that the totality of this conduct was regarded by managers as unacceptable conduct.
185. We concluded that absent the more incendiary words in his email, in making such a detailed challenge to the contract the respondent's view of his conduct and its approach to the claimant thereafter would have been similar.

186. We concluded that the claimant's email led to a shift-change in approach towards the claimant, that he was seen thereafter as a significant problem within the workplace, who could not necessarily be trusted with junior members of the team because of his poor influence.
187. We also concluded that the claimant's second disclosure was a big issue for Mr Firth, as the claimant was prepared to put in writing his concerns about how the overcharge came about. We note that it does not appear that Mr Firth's statements (Minutes etc) acknowledge any failings by the respondent for the charges error. Instead, as set out in the defence and in witness statements, the blame appears to have been attached to the claimant.
188. For the respondent dismissal was said to be the culmination of significant and persistent poor performance. Ms Bone characterised the performance issues disclosed as not providing any evidence that his performance was seen as poor enough to justify his dismissal. She argued that the performance concerns raised from beginning of 2020 *"do not add up, this colours the reliability of the respondent..."*.
189. We accepted that there were some performance issues, but we considered that these were not the principle reason for dismissal. We accepted that the performance issues may well have become magnified in the respondent's viewpoint, but we considered that they became magnified because of the respondent's view that the claimant could no longer be trusted, which was because of his first protected disclosure. We concluded that the 28 November 2019 email was a significant reason for the decision to dismiss the claimant.
190. We concluded that the 15 April 2020 email was for Mr Firth an issue of concern for him as the claimant was prepared to commit to writing Mr Firth's failure to seek advice when told to do so. This, we concluded, cemented his view that the claimant should be dismissed. The fact that the decision was taken very shortly after to dismiss him was no coincidence.
191. We therefore concluded that the respondent's principle reason for dismissing the claimant was because of his two public interest disclosures. The claim of automatic unfair dismissal therefore succeeds.

Unfair dismissal

192. For the reasons set out above, we did not consider that the respondent had a genuine belief in the claimant's poor performance so as to justify dismissal. Accordingly the respondent has not proven the reason for dismissal, and the claim of unfair dismissal succeeds.
193. We also considered the process adopted – or the lack of one. We accepted that there may be cases where performance, or the critical nature of the role, or the attitude of the employee, is so poor that not having a process

can be fair. We noted that the respondent's position is that a managing attendance process would not have worked.

194. To the extent that the claimant's performance may have needed addressing, we concluded that there was no significant reason why a similarly sized and resourced employer would not have undergone a performance improvement process. Such a process is effectively the default position under the ACAS Code and it accordingly it is often within the range of reasonable responses for employers to adopt such a process. We considered that in these circumstances, and with these performance issues, it was outside of the range of responses to decide to dismiss without such a process being undertaken.
195. We concluded that the respondent gave no thought to a managing attendance process prior to the decision to dismiss. Even if it had been the respondent's belief that such a process would not have worked, we disagreed that this was a reasonable belief within the range of reasonable responses. We accepted the claimant's evidence that such a process would have been a significant issue for him, but we also accepted his evidence that he would have tried his best to improve. Some of his issues related to the more administrative functions of the role, for example appraisal documents, management issues, others related to interpersonal issues. We considered that these were issues which could have been fixed under a performance management process.
196. We came to this conclusion with a clear view that it is not for the Tribunal to substitute its views: we concluded however that a reasonable employer would have considered a performance process was necessary, and we concluded that the strong likelihood is that the claimant would have complied and cooperated with this process.

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197. We accepted that aspects of the claimant's attitude and performance at work did cause some concerns. However, for the reasons set out above we cannot say on the evidence that there was a significant prospect that the claimant would have been dismissed at some point under a fair process. The claimant's performance had been assessed as met, and there is no indication that a performance process would have been started at or around the time when the decision was made to dismiss.
198. That said, we did accept that there was a prospect the claimant would have been put under a managing attendance within 4 months of 1 May 2020; this is because Mr Green may have had increasing concerns about the claimant's interaction with colleagues and other aspects of his work, if he had not made disclosures. This would have led to informal discussions, and this may well have led to a performance process by, say 1 September 2020.
199. We concluded that likelihood was that the claimant would improve his performance during this process sufficient to avoid dismissal. We accepted also that there was a prospect the claimant may not improve, and that if this

was the case the respondent would move quickly towards dismissal, within 3 months of the process starting.

200. Taking this into account, we concluded that there was a 20% chance that the respondent would have dismissed the claimant under a fair process by 1 December 2020.

Contributory fault

201. The principle reason for dismissal was because the claimant whistleblow. To the extent that the claimant's words (as opposed to the meaning and implication behind the words) angered the respondent, we did not accept that this amounted to contributory fault by the claimant. The words used were part and parcel of his whistleblowing complaint. While the language was blunt to say the least, we did not consider it to be just and equitable to reduce compensation when the blunt words used were expressing a genuine view held by colleagues about the respondent's conduct.

EMPLOYMENT JUDGE EMERY

Dated: 11 March 2022

Judgment sent to the parties

On

...14th March 2022

For the staff of the Tribunal office