



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A. Davies

**Respondent:** Waystone Limited

**Heard at:**

Midlands East Employment Tribunal : Part attended and CVP (Hybrid)

**On:** 29 and 30 November, 1 and 2 December and written submissions filed on 17 December 2021.

**Before:** Employment Judge Rachel Broughton sitting with Members; Mr J.D Hill and Mr G. Edmondson

**Representatives**

**Claimant:** Mr J. Howlett - counsel

**Respondent:** Mr K. Chehal – counsel

## RESERVED JUDGMENT WITH REASONS

The unanimous judgment of the Tribunal is that:

1. The claim of automatic unfair dismissal under section 103A ERA is **not** well founded and is dismissed .
2. The claims of detrimental treatment pursuant to section 47B ERA are **not** well founded and are dismissed.
3. The claimant's claim of wrongful dismissal is well founded and succeeds and the claimant is aware notice pay of **£846.15 gross**
4. The claim for holiday pay is dismissed on withdrawal.

### Summary

1. The claimant was employed by the respondent from 12 August 2019 to the 13 May 2020 and therefore had less than 2 years continuous service as at the termination date. The Tribunal therefore has no jurisdiction pursuant to section 108 (1) Employment Rights Act 1996, to hear a claim of unfair dismissal brought under section 94 and 98 ERA, what is commonly referred to as 'ordinary' unfair dismissal. The claim is concerned only with a claim for automatic unfair dismissal and detrimental treatment for 'whistleblowing' under section 103A and 47B ERA.

2. The claimant resigned on **14 April 2020** giving 1 months' notice. The respondent however, proceeded with a disciplinary hearing and terminated her employment with immediate effect on **6 May 2020**.

### **The Issues**

3. The morning of the first day of the hearing was allocated as reading time for the Tribunal. The parties had not however agreed a list of issues and the rest of the day was spent attempting to clarify the issues. The claimant had been without legal representation until the hearing. Some progress was made by the afternoon, including the withdrawal of certain elements of the claim however it became clear that Mr Howlett would require further instructions from the claimant before the issues could be finalised and the evidence heard and the hearing was adjourned until the following day to allow him time to take instructions.
4. At the start of the second day of the hearing, a table was produced by Mr Howlett setting out the issues and confirmed withdrawal of alleged protected disclosures made to ACAS, the Police and the Information Commissioners Office.
5. The Tribunal Judge raised with Mr Howlett that the fourth detriment claim was for dismissal however there was no claim brought against any individuals, only against the employer. Having raised this legal issue with counsel, the matter was left for submissions however, at no point was an application made to join any of the individuals involved in the decision to dismiss as individual respondents.
6. The claimant confirmed that the holiday pay claim is withdrawn and the only claims being pursued were the 'whistleblowing' claims and wrongful dismissal.
7. The issues for the Tribunal to determine were agreed to be as follows;

### **Time limits**

- 1.1 *Were the complaints of detriment made within the time limit in section 48 of the Employment Rights Act 1996 ?*

*The Tribunal will decide:*

- 1.1.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or failure to act to which the complaints relates or whether that act or failure tis part of series of similar acts or failures the last of them to which the complaint relates?*
- 1.1.2 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
- 1.1.3 *If not, were the claims made within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months?*

### **8. Protected disclosure**

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

- 8.1.1 *What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:*

#### **8.1.1.1 PID 1: In October 2019**

- *To Mr McLoughlin (SM)*

- *That [D] had sexually touched her and another member of staff*
- *Verbally*
- *Section 43B (1) (a) (d) ( f)*

**8.1.1.2 PID 2: 13 March 2020**

- *To SM*
- *That [D] had sexually touched her and another member of staff*
- *By email (Page 164)*
- *Section 43B (1) (a) (d) ( f)*

**8.1.1.3 PID 3: 29 March 2020**

- *To SM and PH*
- *That respondent failed to implement virtual private network (VPN) on her mobile phone and failed to protect personal data.*
- *By email (Page 205/206)*
- *Section 43B(1)(a) (b)*

**8.1.1.4 PID 4:**

- *Same disclosure as above*
- **29 March 2020**
- *To SM and PH*
- *By email ( Page 205/6)*
- *That respondent had alleged claimant misused mobile ozone data while accepting refund from mobile phone provider because mobile phone provider had accepted full responsibility*
- *Section 43B(1)(a) (b)(f) : fraud*

**8.1.1.5 PID 5: 17 March 2020**

- *MS / respondent failed to implement VPN on claimant's mobile phone and failed to protect sensitive company data; and*
- *SM committed fraud and deception against O2 because he accepted a 50% credit from O2 because they had accepted full responsibility for the high data charges that SM alleged claimant had misused her Ohno's data, when SM had already resolved issue with O2 and liability was found to be with O2.*
- *By email timed at 14:03 ( page 182)*
- *Section 43 B(1)(a)(b)(f)*

**8.1.1.6 PID 6: 28 March 2020**

- *MS / respondent failed to implement VPN on claimant's mobile phone and failed to protect sensitive company data; and*
- *SM committed fraud and deception against O2 because he accepted a 50% credit from O2 because they had accepted full responsibility for the high data charges that SM alleged claimant had misused her Ohno's data, when SM had already resolved issue with O2 and liability was found to be with O2.*
- *By email (page 202 – 204)*
- *Section 43 B(1)(a)(b)(f)*

**8.1.1.7 PID 7 : 3 May 2020.**

- *MS / respondent failed to implement VPN on claimant's mobile phone and failed to protect sensitive company data; and*
- *SM committed fraud and deception against O2 because he accepted a 50% credit from O2 because they had accepted full responsibility for the high data charges that SM alleged claimant*

*had misused her phone data, when SM had already resolved issue with O2 and liability was found to be with O2.*

- *By email ( page 282- 294 with attachments)*
- *Section 43 B(1)(a)(b)(f)*

8.1.2 *Did she disclose information?*

8.1.3 *Did she believe the disclosure of information was made in the public interest?*

8.1.4 *Was that belief reasonable?*

8.1.5 *Did she believe it tended to show that:*

- 8.1.5.1 *a criminal offence had been, was being or was likely to be committed;*
- 8.1.5.2 *a person had failed, was failing or was likely to fail to comply with any legal obligation;*
- 8.1.5.3 *the health or safety of any individual had been, was being or was likely to be endangered;*
- 8.1.5.4 *information tending to show any of these things had been, was being or was likely to be deliberately concealed.*

8.1.6 *Was that belief reasonable?*

8.2 *If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.*

*If so, it was a protected disclosure.*

9. ***Detriment (Employment Rights Act 1996 section 48)***

9.1 *Did the respondent do the following things ( the detriment is cross referred to the above number protected disclosures*

9.1.1 ***PID 1: Detriments***

1. ***14 March 2020: suspended by SM : committed by SM***
2. ***27 March 2020: collusion by SM and Mr P Hoffbrand (PH), to prevent PH accompanying claimant at internal hearing on 27 .3. 2020 : committed by SM and PH***
3. ***March to May 2020: conducting investigation without disclosing allegation and evidence: committed by SM, PH, Filer, Ms Wood and McCabe.***
4. ***Dismissal of claimant on 6 May 2020: committed by SM***

*Committed by:*

9.1.2 ***PID 2: Same 4 detriments as above***

9.1.3 ***PID 3: Detriments 2 to 4 above***

9.1.4 ***PID 4: Detriments 3 and 4 above***

9.1.5 ***PID 5: Detriments 2 to 4***

9.1.6 ***PID 6: Detriments 3 and 4***

9.1.7 ***PID 7: Detriment 4***

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

9.3 *If so, was it done on the ground that she made a protected disclosure / other prohibited reason?*

**10. Unfair constructive dismissal: Automatic**

10.1 *What was the effective date of termination? The claimant resigned on 14 April 2020 although the disciplinary process was continued by the respondent.*

10.2 *Was there an actual or anticipatory fundamental breach of contract on the part of the employer?*

10.3 *The claimant says the respondent did the following things which breached the implied duty of mutual trust and confidence and the principal reason was the protected disclosures:*

1. *Suspended her on the purposed ground that she had misused her company mobile telephone as a reprisal for the whistleblowing of **13 March 2020***
2. *Accepting a credit of 50% of the disputed telephone bill from 02 while accusing the claimant of running up that bill by deliberate misconduct*
3. *MS and PH colluding to deprive the claimant of the benefit of PHas an accompanying person*
4. *Engaging in disciplinary investigation in which the claimant was not informed of the allegation against her i.e. what she was alleged to have done so as to run up the disputed bill without disclosing to her the evidence in the form of witness statement which was available to the investigation*

10.4 *The respondent says the reason for dismissal was conduct .*

**11. Wrongful dismissal / Notice pay**

11.1 *What was the claimant's notice period?*

**12. Holiday pay: the claim is withdrawn**

**The claim**

13. The ACAS early conciliation process started on 5 June 2020 and the certificate was issued on 8 June 2020. The claim was presented to the Employment Tribunal on 25 June 2020. The first detriment complained of took place on 14 March 2020.

**Evidence**

14. The claimant's evidence in chief was set out in a witness statement, she gave evidence under oath and was cross examined by counsel for the respondent.

15. Prior to the hearing, the respondent had made a request that its witnesses attend remotely via Cloud Video Platform (CVP), that application had been granted by Employment Judge Adkinson.

16. Mr Stuart McLoughlin, Managing Director of the respondent and Ms Helen McLoughlin Chartered Architect and Development Director of the respondent, daughter of Mr Stuart Mcloughlin both gave evidence, their evidence in chief was

set out in witness statements, they both gave evidence under oath via CVP and were cross examined by counsel for the claimant.

17. The Tribunal Judge raised with the parties whether there was an application under rule 50 in respect of Mr Cook, against whom allegations of sexual harassment had been made by the claimant. No application was made. The Tribunal considered whether such an order should be made nonetheless however determined that having regard right to the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) and the rights to open justice and freedom of expression in Article 10, it was not considered appropriate to restrict disclosure to the public of the identity of Mr Cook bearing in mind the stipulation in rule 50(2) that in considering whether to make an order under rule 50 'the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression'. The Tribunal consider that it any interference with the rights of Mr Cook can be protected by making it clear in his judgment that he has not given any evidence in this case and thus has had not opportunity to provide his account of events.
18. There was an agreed bundle of 412 pages, with some additional disclosure during the course of the hearing, the bundle numbered 429 pages

### **Public Interest**

19. The claimant had not addressed in her witness statement the issue of public interest. This was discussed with the representatives and counsel for the respondent had no objection to this being addressed either in questions from the Tribunal or in supplementals questions put by her counsel, Mr Howlett.

### **Findings of fact**

20. All findings of fact are based on a balance of probabilities. All the evidence has been considered however, this judgment sets out the evidence the Employment Tribunal considers relevant to the determination of the issues. References to numbers are to pages within the agreed bundle.
21. The claimant is an experienced finance manager with 30 years of experience, she has qualifications in AAT – Level 5 Management and Leadership. She is a qualified auditor and has supported companies in gaining ISO 9001 accreditation.
22. The claimant was employed by the respondent as Project Accountant and commenced the role on 12 August 2019. The claimant was provided with a mobile telephone by the respondent to assist her in the performance of her role.
23. The Statement of Main Terms and Conditions of Employment (hereafter referred to as the Contract of Employment for ease of reference, (p. 85 - 93) provides for a notice period of 1 week up to one years' service pursuant to clause 11.
24. The claimant reported directly to the respondent's Managing Director, Stuart McLoughlin. The claimant also had regular contact with Alistair McLoughlin, Deputy Managing Director and Helen McLoughlin. Mr Adrian Cox, was responsible for the respondent's Information Technology (IT) and mobile telephones.

### **September 2019**

25. It is not in dispute that in September 2019 the claimant complained that she was sexually harassed by a colleague, Mr Cook. Her evidence in chief is that this was

not one incident but during September 2019 over a few weeks, Mr Cook had stroked her arms, touched the side of her breast and tried to give her a message.

26. The Tribunal stresses that Mr Cook was not present at this hearing to give his account of events and there was no police investigation.
27. On the day of the last alleged act of unwanted touching by Mr Cook, at the latter part of September 2019, the claimant shared what had happened with a colleague, Ms Rhian, the daughter of Pauline Watson. Ms Watson is Stuart McLoughlin's long standing Personal Assistant and has a role as the company's HR liaison officer. The respondent normally use an external HR consultant to support them on HR matters with whom Ms Watson liaises . On being told by the claimant about what had happened, Ms Rhian disclosed to her that Mr Cook had done 'it' to her a few times in June 2019 and that she had told her mother who had spoken to Mr Cook but told no one else because Mrs Watson was concerned about her husband's reaction if he found out about what had happened to his daughter at work.
28. Another female colleague, Ms Boyes, came into work later that same day and on being told by the claimant about what had happened, told her that Mr Cook had done similar things to her. None of this is in dispute between the parties.

**First Alleged Protected Disclosure: 7 October 2019.**

29. The claimant asserts, which is not disputed, that she waited a few days before raising this with a director, because Ms Rhian had asked her not to report what happened, she was still concerned about her father finding out. The claimant ultimately decided to report it. The claimant mentioned to Mrs Watson her intention to report it and Mrs Watson went with her to see Ms McLoughlin on 7 October 2019. It is not in dispute that the claimant explained what had happened to her and Ms Watson explained what had happened to previously with her daughter.
30. The claimant's evidence about the reaction of Ms McLoughlin is that she shouted at Ms Watson for not reporting it before and made a comment about the strength of the claimant's personality in pushing people to tell what has happened. The claimant understood this to be a compliment.
31. Ms McLoughlin then contacted Stuart McLoughlin to inform him what had happened. Mr McLoughlin attended the office after a site meeting with Ms McLoughlin and spoke to Mrs Watson alone. The claimant confirmed in response to a question from the Tribunal that she never spoke to Mr McLoughlin at all, he only spoke to Ms Watson on his own.
32. Ms McLoughlin confirmed in cross examination that Ms Watson explained that her daughter had been sexually harassed in June 2019 and that the claimant and Ms Boyes had also been '*touched inappropriately*' and that Ms Watson told her that her daughter did not want to take the matter further because she did not want her husband to find out. Ms McLoughlin gave evidence which the Tribunal accept, that she was disappointed not to have been made aware before this. Ms McLoughlin and Mr McLoughlin gave evidence that neither of them informed Mr Hoffbrand during that site meeting with him that day about what had happened. Mr Hoffbrand if a director the Holding Company, CP Holdings which is a majority shareholder of the respondent and to whom the directors of the respondent report into.

33. Mr McLoughlin confirms in his evidence that what he was told by Ms McLoughlin “*constituted clear evidence of sexual harassment particularly in the case of her daughter Holly Rhain who probably suffered the most*”. (w/s para 57)
34. It is not in dispute that Mrs Watson was asked to collect statements and the claimant, Ms Watson and Ms Boyes each provided one. The statements are contained in the bundle (p.407 – 411) and the claimant relies on her statement as part of her alleged protected disclosure.
35. The claimant in her statement (p. 410) states;
- “ I am writing this letter to complain about numerous unfortunate incidents that recently happened to me at the Swanwick office, I believe that I have been sexually harassed by an employee, the employee’s name is David Cook.*
- The inappropriate touching took place over the month of September.*
- I commence work at 7:00am Monday to Friday and I am alone in the office until other members of staff arrive at 8:00am.*
- David began arriving to work at 7.20am on several days during September and would follow me to the office kitchen often concerning me, enquiring whether ‘ I was ok’ I would reply ‘ yes I’ m fine thank you just tired’, he would then take it upon himself to commence rubbing his hands on both of my arms rubbing them up and down for no reason at all.*
- After the first incident I thought maybe I was overreacting , but when David tried for a second time then third time in my office – I expressed that I wanted him to get off and stop touching me and told him it was unwanted physical contact!*
36. The claimant also refers to the impact on her emotional wellbeing: “*David’s behaviour compromised my dignity and made me feel offended humiliated, intimidated and threatened*”
37. The Tribunal find on a balance of probabilities, that what the claimant set out in this statement is what she had informed Ms Watson and Ms McLoughlin of at the time and that she had not therefore mentioned what she now refers to in her evidence in chief i.e. about the side of her breast being touched or Mr Cook attempting to massage her.
38. Mr McLaughlin’s evidence is that he spoke with Ms Mclaughlin and decided to dismiss Mr Cook. This the Tribunal find appears to be the conclusion Mr McLoughlin reached before meeting with Mr Cook. Mr McLaughlin’s confirms that Ms Rhian had asked that him not to involve the Police and he agreed not to do so. Mr Cook did not appeal the dismissal and the evidence of Mr McLaughlin is that Mr Cook apologised for his behaviour.
39. The letter of dismissal sent to Mr Cook (p. 412) is dated 8 October 2019 and confirms dismissal from 7 October 2019 for gross misconduct after Mr McLoughlin had ‘investigated’ various incidents of sexual harassment.
40. It was put to Mr McLoughlin in cross examination that he had not followed a fair process in terms of the treatment of Mr Cook and indeed the Tribunal find that on balance Mr McLoughlin on being told of the allegations, and trusting as he confirmed he did, the evidence of his longstanding PA Ms Watson, had made his mind up about the guilt of Mr Cook and there appears to have been no proper disciplinary hearing, certainly no minutes have been produced and it is not



asserted by the respondent that the statements taken from the claimant and her colleagues were ever disclosed to Mr Cook.

41. The claimant complains that she was never spoken to about what had happened again and neither was she told what action was being taken or whether Mr Cook had been dismissed. In cross examination the claimant accepted however that Ms Watsons had “*told everyone he had been sacked for gross misconduct*” and in response to a question from the Tribunal confirmed that she, Ms Rhian and Ms Boyes had been told this on the 8 or 9 October 2019 and told that a letter had been sent out to Mr Cook. While Mr McLoughlin may not have communicated the dismissal of Mr Cook, it is clear that Ms Watson who the claimant herself described as the HR coordinator, had communicated this outcome to her.

**Further mention of the assault : circa 15 October 2019**

42. The claimant complains in her evidence in chief that she went to see Mr McLoughlin in his office and ‘advised’ him that the Police should be informed because sexual harassment was a criminal offence and that Mr McLoughlin had a duty to inform the Police to protect others when Mr Cook works elsewhere. The claimant complains that Mr McLoughlin told her that it was being dealt with. In response to a question from the Tribunal she gave evidence that this happened on or around 15 October 2019. She alleged in cross examination that she had stated that Mr Cook should be; “*taken off the streets*”.
43. Mr McLoughlin could “*not recall*” this conversation. There is no email or other document confirming that this conversation took place.
44. The Tribunal is satisfied however, from the claimant’s oral evidence that she was profoundly upset by the incident with Mr Cook and that she was firmly of the opinion that the matter should be taken further and an official complaint made to the Police. The Tribunal also find that the claimant was aware from Ms Watson that Mr Cook had been dismissed but not whether any report had been made to the Police and she felt aggrieved, that Ms Watson’s concerns about her husband were being given such priority.
45. The Tribunal accept that it was reasonable for the claimant to feel that the way the respondent had managed this situation was not satisfactory, in particular that Mr McLoughlin had not himself communicated with the claimant and her colleagues affected, about the action the respondent had taken and the decision not to report the incident to the Police.

**Police**

46. The claimant decided to call the Police herself. She cannot recall when she did so. The claimant’s evidence which is not disputed however and which the Tribunal accept, is that she was told by the Police that if she was making a complaint the Police would need to take witness statements. The claimant decided that she could not lose her job if she proceeded with the complaint however, she also gave evidence that she believed that Mr McLoughlin was dealing with the situation and she decided therefore not to make a formal complaint to the Police herself.
47. The claimant does not allege that the Police advised her or inferred to her or that she inquire whether there was any legal obligation on the respondent to have reported this incident to them. The claimant does not in her evidence assert that she as the victim, believed that was under any obligation to report it either.
48. The claimant chose not to pursue a complaint and alleges that this was because Mr McLoughlin was covering the incident up at Ms Watson’s request, she was

concerned about losing her job and further because she did not know Mr Cook's address or his last name. However, she does not allege she asked what his last name was and that the respondent refused to provide it therefore this explanation is not the Tribunal find a credible one. The claimant also gave evidence under cross examination that she decided that it was being dealt with by Mr McLoughlin and left him to deal with at that stage but she does not allege that he told her he was reporting it to the Police but nonetheless she decided not to pursue the matter further.

49. The Tribunal do not find and the claimant does not allege, that during this conversation she stated that information about the incident or the risk to the health and safety of other women, was being deliberately concealed. Stating that she believed a report should be made to the Police is very different from such an allegation.
50. The Tribunal find on a balance of probabilities, given her unequivocal evidence about having a further conversation with Mr McLoughlin and clearly how strongly the Tribunal accept this incident upset her, and taking into account Mr McLoughlin's evidence that he could not recall a further conversation, that the claimant's account of their conversation is to be preferred.
51. The claimant relies on the discussion with Ms McLoughlin on 7 October 2019, the statement she provided on 7 October and the brief discussion with Mr McLoughlin on 15 October 2019, as giving rise to a protected disclosure. The claimant gave evidence in response to supplemental questions, that she believed the disclosures were in the public interest because there was a "*sexual predator on the loose*". The claimant referred to her being 49 or 50 years of age at the time, of Ms Rhian being 21 and Ms Boyes 32 and thus there was no discrimination in the age of those who had been 'assaulted'. The claimant gave evidence that she felt the public should know.

#### **Detriment**

52. The claimant does not allege that Mr McLoughlin reacted adversely to her or her colleagues, when reporting the alleged sexual harassment, or following the conversation with him on or around 15 October 2019.
53. The claimant makes no complaint that she suffered any adverse treatment until March 2020, some 5 months after these October 2019 events.

#### **Mobile Telephone**

54. It is not in dispute that in September 2019 the claimant smashed the screen of her company mobile telephone and reported this to Adrian Cox.
55. In November 2019 the phone was sent to be repaired and the claimant was given a replacement phone, swapping the SIM from her original phone.
56. The claimant in her evidence in chief (w/s para 1) states that she received a replacement phone on **18 December 2019** "*as per Adrian's email to dated [sic] 17.12.19*". There is a text message from Mr Cox to the claimant on 17 December 2019 referring to the claimant being in the office the following day when discussing arrangements to change over the Sim into the replacement phone (p.149).
57. The respondent's own records record the phone being issued on 9 December (p.264) and her evidence was that the phone had been; "***in Sue's desk for a week..***". That would mean that if the phone had been received by the respondent

on 9 December and kept in Ms Boyes desk for a week as the claimant alleges, it it would have been to her around a week later i.e. on 16<sup>th</sup>/17<sup>th</sup> December, which is consistent with the date given in her evidence in chief as the dare she personally received it.

58. The Tribunal find that on a balance of probabilities, the claimant was given the replacement phone on **18 December 2019**.

#### **Arrangements for the phone**

59. It is not in dispute that the data charges on the claimant's work mobile phone had, before she was given the replacement phone, been capped and never exceeded £31.00 per month.
60. The respondent use Vivio a telephone management company. The network provider is O2.
61. It is not in dispute that O2 were required to notify Mr Cox if there was a serious breach of the data usage on a company mobile telephone.
62. The Tribunal accept the claimant's evidence that the replacement telephone was handed to her by Ms Susan Boyes who she understood had set up whatever was necessary on the phone.
63. The claimant denies that there was any advice given to her on how to use the temporary phone and the Tribunal accept her evidence.
64. The claimant denies that she used the replacement phone for any purposes other than those which she had used the previous phone for and that she did not stream data on it. She used it for calls, emails and working on spreadsheets.

#### **January 2020**

65. The claimant's undisputed evidence is that her original telephone was returned to her on **27 January 2019** (w/s para 18). It had been returned to Ms Boyes the week before and kept by Ms Boyes in her drawer (page 152).

#### **Telephone Mobile Bill**

66. There is no dispute that the respondent received a phone bill for the phone allocated to the claimant, for the sum of £3,694.56 . The invoice is in the bundle (page 153).
67. The total Data volume is recorded as 153,873, 507 and the bill shows the "GPRS Calls " of £3,663.16 for the period **29 December 2019 to 29 January 2020**.
68. The claimant asserts that Mr Cox told her about the excessive bill, which is not disputed and that he told her he would investigate it and he mentioned that it had also happened to another member of staff before.
69. The claimant alleges that Mr Cox had told her not to inform Stuart McLoughlin until he had received more details and her undisputed evidence in cross examination is that she was told not to put it on WAP system (a billing system) until Mr Cox had sorted out a credit with O2.

#### **Credit from O2**

70. It is not in dispute that O2 agreed to provide the respondent with a credit of 50% following negotiations with Vivio on behalf of Mr Cox. O2 did not agree to a full credit and therefore there remained a charge of £1,831.58 for the respondent to pay.

71. Mathew Hayes the Client Services Team Leader at Vivio, who assisted the respondent try and resolve the issue with O2, sent an email to Mr Cox on 31 January 2020 in which he confirms what had been agreed ( p.162);

*“The number that this issue relates to is [x]and they racked up a bill of £3,663.16 in data charges...*

*O2 are happy to provide this credit on a one off basis and would not be able to do this if this was to happen again”*

72. There is an email from Mr Cox to Mr Hayes on the 31 January 2020, confirming his understanding of what had been offered and confirming that if the credit is £1,831. 58 the respondent can “live with it” and ; “ I will place a cap on the phone also”.

73. There is no evidence that O2 accepted full responsibility, they were offering a credit for 50% of the bill while making it clear that this was a ‘one off’.

74. The claimant’s evidence is that she did not stream data or even knew how to do it, she had not seen previous bills and therefore had not noticed whether there had been data charges before because the bills went to Mr Cox. Her evidence then and now, remains that she had no idea how the data had been used while she had the temporary phone.

**10 February 2020**

75. The claimant’s evidence is that she received an email from Mr Cox on the 10 February 2020 telling her that the phone had been used for streaming data . Her evidence is that Mr Cox told her that “ probably either side of Waystone had been streaming off it”.

76. Mr Cox who is longer employed by the respondent, was not called to give evidence and there was no witness statement from him for the purposes of this hearing.

77. The claimant asserts that she was then advised by Cox to inform Stuart McLoughlin but not to worry as Mr Cox had arranged a 50 % credit with O2 and would claim for the remainder through the company insurance. The claimant under cross examination when it was put to her that, after the O2 credit there had still been a bill for £1831.58 , she remarked that she did not know if there was any insurance to cover it .

78. Mr McLoughlin gave evidence that they did not have insurance to cover the charges and the Tribunal accept his evidence. The claimant produce no evidence to rebut this.

79. There is a copy of part of a text message exchange, disclosed by the claimant which is supportive of her account that she planned to speak with Mr Stuart on 10 or 11 February 2020 (page 159); “ I will let Stuart know either this afternoon or tomorrow. I’ve requested a meeting re some other issues too and he said he will see me earlier this afternoon or tomorrow”

80. Mr Cox also informs her in a text message sent on Monday 10 February 2020 of his intention to speak with Mr McLoughlin on Thursday 13 February when he is due to spend the day with him in Darlington (page 160).
81. There is a dispute over whether the claimant spoke to Mr McLoughlin herself about the telephone charges. There is no dispute that Mr McLoughlin was however informed about the phone charges by Mr Cox on 13 February 2020 and was aware of them therefore at the latest by this date.
82. The claimant's evidence in chief is that she spoke with Mr McLoughlin in his office on 11 February 2020 and explained what had happened and was told not to worry and that he would speak with Mr Cox that Thursday on the way to Darlington. This conversation is denied by Mr McLoughlin, whose evidence is that despite meeting with the claimant 2 or 3 times a week to discuss work matters, she never raised the phone bill with him and he alleges he was waiting for her to do so.
83. There is a text message from the claimant to Mr Cox on Tuesday 11 February 2020 at 1;48 pm where she states that she had not managed to have a meeting with Mr McLoughlin yet but that he had mentioned that if she does not see him that afternoon, it will be first thing in the morning.
84. The claimant in cross examination gave evidence that she spoke to Mr McLoughlin not on the 11 but on the 12 February 2020 but she did not mention the phone issue in any detail; *" I said there is another issue, the bill, he said don't worry about it, its happened to other people before"* and he did not ask her what the amount was. This date is consistent with what she would later set out in her email of the 19 March 2020, recounting the events to Mr McLoughlin (p. 191):  
  
*" I advised you Stuart regarding the bill on Wednesday 12 February 2020 3pm"*.
85. There is no response at the time to this email by Mr McLoughlin refuting her account of events and that this conversation had taken place and further he accepted in cross examination that she could have been in his office on 12 February but still denies she mentioned the phone bill.
86. However, during the disciplinary proceedings, the claimant stated that she had told Mr McLoughlin on the 16 February 2020 (p.401) which is obviously not consistent with the other dates she had given.
87. The claimant would later in cross examination state she was unsure whether it was 11 or 12 February 2020.
88. The claimant accepts however that if she spoke to him on the 11 or 12 February 2020, he would still not have known the amount of the bill at that stage. Her evidence is that she had told him that it was a ; *" bit excessive"* and that she had told him that they would get a 50 % credit so the respondent *" would not be out of pocket"* and the shortfall would be covered by insurance.
89. Mr Cox then sent the claimant a text on Friday **14 February 2020**, which ties in with his intended discussion with Mr McLoughlin the day before, in which he informs the claimant ;  
  
*"No, problem but I need to have a conversation and check the settings on your phone! Matter closed"*
90. That message would certainly seem to suggest that Mr Cox had spoken with Mr McLoughlin and that he considered that the situation was *closed"*.

91. Mr McLoughlin gave evidence under cross examination that the first time he was aware of the “*detail*” about the phone bill was during the drive with Mr Cox on 13 February 2020. His evidence is that Mr Cox told him how much the bill was, and that it could be due to streaming but he was not 100% sure but he had been advised by O2 and Vivio and it “*looked like misuse*”. He further alleges that Mr Cox said he would look into it and that he had told the claimant to speak to Mr McLoughlin to “*come clean*”. Mr McLoughlin could not recall whether he was told the credit was 50% but accepted that by the 31 January 2020 the negotiations over the credit had been completed, therefore the Tribunal find on a balance of probabilities that he was told how much the credit was. Mr McLoughlin’s evidence is that he was “*appalled*” that his new Project manager had run up such an unauthorised bill however, he accepted that he had not expressed that emotion to Mr Cox in their car journey.
92. Mr McLoughlin did not deny that he had already taken a view on that car journey that the claimant was *at fault* but gave evidence that he had asked Mr Cox to carry out further research, nonetheless.
93. Mr McLoughlin accepted under cross examination that there is no evidence of any further research or investigation by Mr Cox. He alleges that Mr Cox had reported back to him in a telephone call “*at some point*” but there had been no developments and the conclusion that Mr Cox and O2 had made was that the data was used by the claimant while she had the phone and “*in some way*”.
94. There is no record of any further investigation or follow up call with Mr Cox. He had told the claimant the matter was closed which was not consistent with him being tasked to carry out more investigation. Mr Cox was not called as a witness. We understand he has retired but that would not prevent him being asked by the respondent to attend or provide a statement and the Tribunal consider that it is reasonable to draw an adverse inference from the failure to call someone who is a key witness.
95. Mr McLoughlin gave evidence under cross examination, that he had formed the view at that stage, that it was potentially a gross misconduct issue but went on to give evidence that it was only when the claimant failed to come and explain what had happened to him that he decided it needed a formal investigation;  
  
“ *I wanted to give her every chance to come and explain what I saw as streaming*”
96. Mr McLoughlin gave evidence under cross examination that if the claimant had come to speak to him and explained, he would have issued a disciplinary warning .He treated it so seriously he alleged in cross examination, because she failed to speak to him about it. The claimant denies that she failed to do so.
97. In response to questions from the Tribunal Mr McLoughlin gave evidence that although the claimant came into his office he estimated 2 or 3 times per week , he had not himself took steps to raise the phone bill with her because he thought to raise it with her may be seen as “*aggressive*” because it may suggest that she had caused it. However, the Tribunal do not find that explanation credible.
98. The Tribunal is being asked to accept that an experienced Managing Director who has frequent contact with his Project Manager in one to one meetings every week , chose not to raise something which he alleges to be a serious conduct issue and which he alleged in cross examination gave rise to issues over her integrity but waited for her to raise it with him for a month; from 13 February to her suspension in 14 March. It is not credible.

99. Further, although he alleged he did not raise the issue with her because he felt it would be “aggressive” to do so, he then suspends her on a Saturday after receiving a complaint from her in which she complains about being stressed and bullied at work. That is clearly a more aggressive act than seeking to resolve the issue through direct dialogue with her during one of their one to one meetings in the office.
100. The Tribunal find Mr McLoughlin’s evidence on this issue to be devoid of credibility. The Tribunal therefore have to consider what is the real reason for the act of suspension.
101. The undisputed evidence of the claimant under cross examination was that the respondent had paid the phone bill on 1 March 2020 by direct debit.
102. Mr McLoughlin accepted under cross examination that he was asked to approve the bill on 2 March 2020 but that he already knew from Mr Cox what the bill was.

**Second Alleged Protected Disclosure : Grievance/Complaint : 13 March 2020**

103. The claimant sent an email setting out a number of complaints on 13 March 2020 timed at 06:56 (p. 164 -165)..
104. The claimant in her evidence in chief refers to continuing to feel affected by the sexual harassment and likens it to post traumatic stress. The letter refers to the claimant suffering with workplace stress and informs Mr McLoughlin that she will not be attending work;

*“The stress began in September/ October 2019 when you were advised of the continued sexual harassment I suffered at the hands of David – David was sacked immediately, but no further issues were addressed – we were asked to issue statements but **no conversation took place or in house counselling offered – we were made to feel it was our fault** and we were not to discuss it further, this did occur at your Swanwick office. This left **me** feeling degraded”*  
Tribunal stress

105. When asked by the Tribunal whose health and safety this first paragraph in her letter which deal with the sexual harassment, she was concerned with, her evidence was; “*ours, our health, us within the office, no one dealt with it*”
106. The letter refers to the previous alleged disclosure in October 2019 and goes on to complain about the way that was handled, in particular the claimant complains about how she personally suffered due to the treatment from Mr Cook and the way the process was managed and the impact that had on her personally i.e. “*feeling degraded*” and on the other colleagues “ *we were made to feel it was our fault*”. It complains about a lack of communication and counselling, it does **not** allege that there was a failure to report the incident to the Police and that there is an obligation to do so.
107. The letter then goes on to address other unrelated issues. It refers to harassment and bullying and complains of her working relationship with a member of staff ( Jayne) and complains that she cannot work with Jayne after an email in which she called the claimant a liar. The claimant also complains of the behaviour of another employee (Sue).
108. Further the claimant goes on in the email to complain about how she is managed by Mr McLoughlin;

*“ I am consistently being kept out of server emails/ reports which should assist me in my role – I am fed-up of being told that you have given me documents or reports that I have never received with no apology afterwards... the way you spoke to me yesterday was unacceptable Stuart shouting at me over the telephone when last week you requested I send you an example of a graph which you would look at over the weekend you forgot to take the paperwork with you...”*

109. The letter ends with the claimant making a complaint about Helen McLoughlin ;

*“ Helen has over the past few days relentlessly addressed me for taking a half a day off 3 weeks ago – Alistair was aware of this – I think the way she had addressed me on email is also unacceptable – it’s not good practice for a Director to address a staff member with capitals for her name ADELE not good morning or hi Adele – **this is also not acceptable to me but aggressive and shows lack of leadership skills – manners cost nothing** “. Tribunal stress*

110. The only part of the letter which the claimant alleges amounts to a protected disclosure is, according to the agreed list of issues, the first paragraph where she refers to the October 2019 incidents. All the other matters raised in this letter are not relied upon as protected disclosures. .

111. Mr McLoughlin replied by email at 10:33 on Friday 13 March 2020 which copies in Ms Watson it reads;

*“ Good morning Adele,*

*I have read your e-mail and am concerned at its contents, certainly my own recollections of events are very different. I suggest the best way forward is for us to sit down and discuss you views. I will be in Glasshoughton on Monday so the first available time for myself will be Tuesday PM or Wednesday am. Perhaps you can let me know which is most convenient, Regards Stuart.”*

112. The response is not aggressive and is constructive in tone. The claimant has no complaints about this response.

113. The claimant replies (p. 167) briefly, she does not identify a day which suits her as she explains she is trying to rest and not think of work. She suggests that Mr McLoughlin;

*“... I would suggest you read the emails I’ve ,mentioned and speak to your staff in Swanwick about the stress and the unwelcoming atmosphere we have had to endure for past months”.*

#### **Detriment 1 - Suspension : Saturday 14 March 2020**

114. On Saturday **14 March 2020** at 15: 26 the claimant is then sent an email from Mr McLoughlin with Ms Watson, Alistair and Helen McLoughlin all copied. The tone is now very different and informs her that she is suspended (p.168);

*“Dear Ms Davies*

*You may be aware that the O2 mobile telephone bills are paid by direct debit and formally approved through the WAP system, I was asked to authorise them during the first week in March and as a result of the large amount I took away all the supporting bills to understand the.. Subsequent scrutiny identified that you incurred mobile phone charges amounting to £3694.56 in the first month of the year, **I consider this abuse of the trust placed in you to use company***



**equipment wisely** constituted gross misconduct which in turn is a reason for instant dismissal.

*Accordingly I am left with no option but to suspend your employment with Waystone Ltd until we have completed due process. We need to hold a meeting at which you will be given the opportunity to explain yourself and you are entitled to have a representative present..” Tribunal stress*

115. The claimant gave evidence in cross examination that;
- “Stuart is a very nice man, he gave me the deposit for a rental property, Stuart McLoughlin lent the money to me, no doubt this had nothing to do with him, **it was Helen McLoughlin**”*
116. The Tribunal sought clarify from the claimant about what she was saying had nothing to do with Mr McLoughlin to which her evidence was; **“The suspension letter”**.
117. The claimant went on to give evidence that she had sent her 14 March letter only to Mr McLoughlin and that his response on 13 March had been in her words; “very basic” (p. 167) but that he had copied in Ms Watson.
118. On Sunday 15 March or perhaps 19 March, the claimant was not certain, she was copied into emails which Helen Mcloughlin sent to Ms Watson and Stuart McLoughlin.
119. Helen McLoughlin sent an email to Ms Watson on 15 March 2020 (p.424) in which she referred to being made aware of a recent email from the claimant;
- “ ...accusing me of being aggressive towards her which also criticised my leadership skills, both of which **I find offensive**”. Tribunal stress*
120. Ms McLoughlin then goes on to address the points while also stating that she would like to apologise for any offence caused. She refers to the claimant not having applied for a ½ holiday in the proper manner but of having resolved it and denies acting improperly. There is a similar email to Mr McLoughlin on 19 March 2020 (p. 426a) absent the apology.
121. It is not in dispute that the claimant had asked Alistair McLoughlin for ½ days holiday on 28 February 2020 and he had authorised it but he had not put it on the system and which had caused some confusion.
122. The claimant gave evidence that with respect to Ms McLoughlin;
- “ **I have no doubt that she had pushed the suspension.**” Tribunal stress*
123. In response to a question from the Tribunal, the claimant confirmed that her position is that it was Helen McLoughlin who sent the suspension letter to her. Later in cross examination she repeated that her position was that Helen McLoughlin was angry;
- “ Helen didn’t like me reporting what I said about her and other staff members”*
124. When asked by the Tribunal specifically what it is she believed had upset Ms McLoughlin in her email of the 13 March 2019 it was;
- “ **when I called her unprofessional**”. Tribunal stress*

125. The claimant described Ms McLoughlin in her evidence in chief (para 23) as *“like a dog with a bone”* over the ½ day holiday. She alleges in her evidence in chief that Ms Boyes and Ms Rhian had printed off Mr McLoughlin’s emails on 13 March 2020 including hers, they were then *“bombarded”* by Ms McLoughlin asking if they had read the claimant’s email and if they knew why she should not be in work and the claimant was informed by them both that Ms McLoughlin had been *“angry”* and that she had told them not to read the email and not to speak to the claimant.
126. Ms McLoughlin gave evidence that she was aware of the email because Mr McLoughlin asked her to collect the printed copy from work and she read it. She admitted that she was not happy because she felt it was *“unfair”*. She believes she had discussed it with Mr McLoughlin and said that she felt the criticism of her was unfair, she recalled that Mr McLoughlin spoke to her as a shareholder and director about his intention to suspend the claimant before the act of suspension but claims she was not part of the decision to suspend and has no idea why he went from proposing a meeting to discuss the claimant’s concerns to suspending her the next day.
127. Mr McLoughlin under cross examination gave evidence that after suggesting a meeting with the claimant on 13 March, he then considered all that had gone and had a *“sleepless night”* and that after 4 weeks she had not spoken to him about the phone and he needed to *“bring it to a head”* and that *“her attitude expressed in the grievance was that she would not come and discuss the phone with me”* and that he had already concluded she was probably at fault.
128. In response to questions from the Tribunal the claimant stated that she believed the October 2019 disclosures were linked to the suspension because the respondent wanted to cover up for Ms Watson’s benefit what had happened but however, the claimant was robust in her evidence that she believed Helen McLoughlin pushed for the suspension because she was humiliated by what the claimant has said about her being unprofessional and;
- “she influenced it [ suspension ] and he [ Stuart McLoughlin ] went with what she said”*
129. The claimant referred to the difference in the letter from Mr McLoughlin to her on 13 March 2020, in terms of how he addresses her and signs off the letter to the more formal address in the suspension letter.
130. The reference to Mr McLoughlin only being asked to authorise the phone bills in the first week of March and then scrutinising them, the Tribunal find is thinly veiled attempt to conceal a delay in taking action about the phone bill in circumstances where he knew what the bill was back on 13 February 2020.
131. The Tribunal conclude that the claimant’s belief that Helen McLoughlin was aggrieved about the criticisms the claimant made about her in the email of the 13 March 2020 are well founded and made out.
132. Ms McLoughlin herself admitted to being upset and feeling that the criticisms were unfair hence the emails she promptly sent out to Mr McLoughlin and Ms Watson. The Tribunal also do not accept as credible Ms McCloughan’s evidence that she had no input into the decision to suspend and this is not consistent with Mr McCloughan’s evidence that they were both checking with each other whether the claimant had approached either of them about the phone issue in the weeks leading up to this.

133. Further, the Tribunal take into account Mr McLoughlin's initial response to the email of the 13 March 2020 which was measured and the claimant does not have an issue with the tone or content of his response. Within the space of a day , however Mr McLoughlin had changed course and is now so upset that he decides to suspend her. Something the Tribunal find had changed in that short period of time.
134. The Tribunal conclude on a balance of probabilities, that Mr McLoughlin was influenced by Ms McLoughlin as the claimant alleges and how aggrieved she was about the remarks about her aggressive and unprofessional behaviour.
135. The Tribunal further, do not find as credible Mr McLoughlin's evidence that he was waiting for the claimant to come to speak to him about the phone for almost a month and during that time had considered her actions to potentially amount to gross misconduct. It simply makes no sense and there has to be another explanation
136. The Tribunal find on a balance of probabilities, that Mr McLoughlin may have considered that the respondent was being accommodating to the claimant in not taking action over the phone bill and her email of the 13 March 2020 and the critical comments about him and perhaps more importantly his daughter, infuriated them both.
137. The claimant was robust in her view that it was Ms McLoughlin who was behind the suspension to the extent that she felt that Ms McLoughlin had been the one to send the email herself in Mr McLoughlin's name. The Tribunal consider that it is more likely than not that Ms McLoughlin had a hand in drafting that email and given the difference in how the email is written and the formality of it (comparing it to not only his 13 March email to the claimant but how Mr McLoughlin structured is far less formal dismissal letter to Mr Cook ), the Tribunal find on a balance of probabilities, that Helen McLoughlin did produce the email . It was also put together at the weekend rather than midweek when Mr McLoughlin would have handed this task normally to Ms Watson.
138. Mr McLoughlin also referred in cross examination, to the claimant mentioning in the 13 March email, the previous harassment back in October 2019 and that he felt she was not raising this for genuine reasons, but to be "difficult" .
139. When asked by the Tribunal what Mr McLoughlin meant by the attitude the claimant had shown in her email of the 13 March he stated; " *I just got the impression she wanted to make life difficult for me – lead me to think that I would not get an answer and that she would not come and tell me what she had done* ". When asked what he meant by making his life difficult , his evidence was;
- "I believe reading tea leaves- my thinking was.. she knew it was serious , she knew what was coming" and "suddenly she raises a series of grievance some relevant to months prior, not raising a genuine immediate grievance "*
140. Mr McLoughlin in cross examination gave evidence that he did not know why the claimant was raising the sexual harassment issue again when she had been totally silent about that and that issues about Jayne were totally "out of order".
141. The Tribunal find however, that it was indeed principally the criticisms about Ms McLoughlin that lead to the decision to suspend because whatever he felt about the references to how the earlier harassment issues had been managed and the criticisms about Jayne, his initial response had been conciliatory and constructive. The Tribunal find on a balance of probabilities, that the claimant's belief is to be

preferred, namely that he was influenced by Ms McLoughlin who was upset about the critical remarks about her management style and that but for that he would have on a balance of probabilities, continued to deal with it as he had indicated in his initial response.

### Investigation

142. The claimant on receipt of the suspension letter contacted Mr Hoffbrand on 14 March 2020 and asked him to be her companion at the proposed meeting to discuss the suspension (p. 20). He replied on Monday 16 March 2020 and he agreed to be her companion informing her that he planned to be at the Weystone office on Thursday 19 March and suggested the meeting is arranged for then and that if she confirms her availability he will then inform Mr McLoughlin of the arrangements (p. 170). The claimant then emailed Mr McLoughlin to propose the 19 March 2020.
143. The claimant sent Mr Hoffbrand an email on the 14 March 2020 (p.170) which the Tribunal understands attached the claimant's email of the 13 March, it refers to receiving the suspension because of the "*various issues raised below*". Therefore the claimant avers that the latest Mr Hoffbrand would have known about the alleged disclosures she made in October 2019 was the 14 March but believes it would have been before because she assumes the respondent would have had to explain about the issue with Mr Cook to the board.
144. The claimant also alleges that on Sunday 15 March 2020 the claimant sent a text to Mr Cox to be her companion but that on Monday 16 March, he called her and said that Mr McLoughlin had said that no one was to speak to her and therefore he was not able to be her companion. It is denied that Mr Cox was told not to speak to the claimant. There is an email from the claimant (p.169) to Mr Cox on Sunday 15 March 2020 asking him to contact her "*desperately*". However, this does not appear to make much sense because at the time the claimant had asked Mr Hoffbrand to be her companion and further, she makes no mention of asking Mr Cox in her witness statement. On a balance of probabilities however in light of the claimant's evidence and the message of the 15 March 2020, the Tribunal find that Mr Cox was asked to be the claimant's companion and he declined. This is consistent with what Mr McLoughlin wrote to the claimant 18 March 2020 (p. 187) informing her not to contact or attempt to contact or influence anyone connected with the investigation. It may well have been appropriate however, for Mr Cox who was a witness to be told not to discuss the matters with the claimant.
145. On 17 March 2020 the claimant sent a follow up email to Mr McLoughlin asking a number of things; for a copy of the disciplinary policy, who the HR advisor is who will be assisting, that Adrian Cox attend the meeting as a witness and agreement to record the meeting.
146. The Contract of Employment signed by the claimant when she started work with the respondent identifies Ms Watson as the HR Co-ordinator hence the claimant was aware that this was her role (p. 421) however it was not made clear that she would be responsible for communicating with the claimant and indeed she did not communicate with her about the process but in a small business it would not the Tribunal consider, necessarily by the case that there is an HR person who is involved.
147. Mr McLoughlin replies on 17 March 2020 and sends a copy of the disciplinary policy, he does not comment on the other matters and states that both he and Mr Hoffbrand could not attend the meeting on Thursday because of coronavirus and will be in touch to make other arrangements (p.23)

148. The claimant complains on 17 March 2020 in response, that she wants to know what the allegations about her are. “ *What exactly is it I have done*”.
149. While the respondent’s case is that it had been made clear in the suspension letter that the offence related to the excessive phone bill, it remained unclear to this Tribunal what the claimant was alleged to have done i.e. was it being alleged that she had deliberately used the phone to stream data and if so whether it was alleged that she did so knowing that the cap was not in place and that she had exceeded the data cap? The suspension letter did not address what the claimant had failed to do, how she had acted “ *unwisely*” in the use of her phone and how that amounted to a breach of trust.
150. The respondent’s disciplinary policy ( p.240) states at paragraph 3.1 that in the event of a disciplinary hearing the company will tell the employee the purpose of the hearing and written details of the nature of his /her alleged misconduct . The suspension did not identify whether the meeting she was being called to attend was an investigation or disciplinary hearing.
151. The claimant was taking advice from an external HR advisor at the time and her evidence in cross examination was that she had been advised not to attend any meetings unless she knew what it was being alleged she had done, or not done.

**Alleged protected disclosure: 5 : 17 March 2020**

152. On 17 March 2020 the claimant sent an email timed at 14:03 which she alleges was a protected disclosure about Mr McLoughlin and/or the respondent not putting a virtual private network (VPN) on her mobile phone and in doing so had failed to protect personal data and that Mr McLoughlin had accepted a credit from O2 for the phone bill and that this was fraud;

*“... when you have accepted O2’s liability and taken the credit – tags fraud and deception ...”*

And

*“I have been advised that whilst being suspended – the employer has to advise the details for why they have been suspended and a high mobile Phone bill whilst **there is no security on it** and you have received the credit for half the bill is fraud.*

153. In answer to a question from the Tribunal, the claimant accepted that it was perfectly possible for the respondent to come to the conclusion that the claimant had misused the phone while at the same time raising with O2 their failure to stop the usage, “ *yes 100%* “ but she went on to question how she could be blamed if the charges had not been capped.
154. While the claimant refers to lack of security in this email, she does not identify that this is a failure to have a VPN or that she believes it to be a breach of GDPR.
155. The claimant under cross examination accepted that she could have put a password on her temporary phone. It was an old Nokia with no password required or facial recognition but accepted that she could have put a password on it if she had wanted to but she did not, although her original mobile phone had one.

**17 and 18 March 2020**

156. On 17 March 2020 the claimant sent an email to Mr McLoughlin (p.183) headed “*Without Prejudice*” in which she refers to wanting a response to her previous email or; “*I will make a complaint to O2 for fraud and deception on your behalf and defamation of character to the police - blaming me for your company not applying security on my temporary mobile phone whilst accepting O2’s liability*”
157. The claimant does not rely on this as a protected disclosure.
158. Mr McLoughlin sent an email in reply stating that;
- “You are instructed not to contact or attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of ours.”*
159. The claimant in cross examination, gave evidence that she had spoken to OFCOM, the Information Commissioners office and the Police but did not speak to the supplier O2 as she alleges Mr McCloughan had told her not to or she would be dismissed. However, not only is there no mention of her contacting the Police or OFCOM in her witness statement, the claimant had initially included an allegation within the list of issues (24.2.1.1) that she had made a disclosure to the Police however this cross referred to her further particulars of claim (p. 53) where the reference is to her contracting the Police is in November 2019 about the alleged sexual harassment, she refers only in March 2020 to contacting ACAS and the Information Commissioners Officer.
160. Further in an email on 28 March 2020 (p 413 ) she refers to; “*...If I advise the Police and O2 of the misdoings of the company relating to fraud and deception , I am well within my rights*”. Tribunal stress
161. The claimant does not assert within her evidence in chief or claim form that she contacted the Police after November 2019 and the Tribunal find on the evidence, that she did not do so at any stage about the alleged fraud and deception but had done so previously about the conduct of Mr Cook. Further, the Tribunal consider that on the evidence, the claimant was using this allegation of fraud as some form of leverage at a time when according to her evidence under cross examination, she now believed the decision to dismiss her from the business had already been made and thus the Tribunal find, she would not have been concerned about damaging the ongoing relationship with such threats.
162. The Tribunal find on a balance of probabilities, taking into account the claimant’s oral evidence under cross examination and that the further particulars of the claim (unlike the alleged referral to the Police), do refer to the claimant contacting The Information Commissioner (ICO) on **20 March 2020, 27 March and 1 April 2020 and in May 2020** , that she did however contact the ICO.
163. Her evidence is that the ICO ;
- “...emailed and held live chat regarding the Data Protection Act, General Data Protection Regulations and Subject Access Request (SAR’s) with the claimant”.*(p.53).
164. However, the emails and evidence of the Live Chats have not been disclosed by the claimant. Thus the claimant has not disclosed what she told them and what advise they had given her.
165. The claimant gave evidence that the evidence was not disclosed because she does not have a printer. However, that makes little sense because the Tribunal

finds that the claimant could have made arrangements to print off a few documents and taken screenshots of the live chat on her phone even.

166. The claimant had sent documents to her counsel in preparation for this hearing but did not explain why it did not include these documents. Nor had the claimant even set out on her statement a transcript or even summary of what the advice was. The claimant was also in receipt of advice from an HR Consultant at the time so would have had some advice about the importance of disclosure or otherwise preparing for a Tribunal hearing. She makes reference in emails to bringing a Tribunal claim.
167. The Tribunal has not been taken to any emails or other documents where the claimant made anything other than a very general allegation of a breach of the GDPR, despite the alleged emails and live chat on several occasions with the ICO.
168. There is no evidence and it is not alleged, that the "*major security breach of GDPR*" by not installing a VPN had been pursued by the ICO.
169. The Tribunal consider that given the failure by the claimant to disclose any of the information she obtained from the ICO, that it is reasonable to draw an inference adverse to the claimant about the content of the advice that she was given how material those allegations are to her claim. Indeed it had been her intention of the first day of the hearing to include a protected disclosure to the ICO, which was then withdrawn.

**Report from Adrian Cox : 23 March 2020**

170. It was not until after the suspension, on 23 March 2020 that there is an email from Mr Cox to Mr McLoughlin setting out his account of events. It is not a formal statement but comments in response to events set out in an email from the claimant to Mr McLoughlin on 19 March 2020 (p.190).
171. Mr Cox refers to the replacement phone arriving a week before Christmas and that as he was not in, Ms Nicklin set it up.
172. The claimant had stated within the email of the 19 March, that on 10 January 2020 Mr Cox had emailed her to advise that he had authorised the repair of her phone and "*over the next few weeks*" she kept receiving notices on the replacement phone regarding data usage, that she reported it to Sam Boyes who then reported it to Mr Cox. Mr Cox confirms that this is correct;  
  
*".. the system gives automatic messages, in the form of email and text if the ceiling should be breached. My response was if its been breached, do not use the data service. The phone has 18GB per month which is high and no one has ever breached before and resets at the end of each month. The only other person who has ever breached the data level was been Alison, which was marginal".*
173. Mr Cox referred to having asked the claimant if she had been streaming video or film or whether the phone had been used by anyone else because he had never seen a bill so high, which she denied.
174. Mr Cox in this email states that;

*" I advised the phone had obviously been used for streaming and the level of data usage indicated more than one user at times due to the high volumes"*

*“The phone account is based upon the Sim card and number not the physical handset – the only difference could be the effective settings relating to phone use and sharing, which is in most cases within the control of the user, as in theory you need to the [ sic] pass a link between the phones to allow usage. There are instances when this is compromised , but they are rare. It is not without the bounds that someone from an adjacent building has managed to hack into the connection, only data usage would indicate this possibility...”*

In terms of the possibility of the phone being used by others to stream;

*“ It is more likely that this is used either at home or while in work, there is the possibility that this has been accessed by others while at work on the Swanwick Campus , but this is difficult to prove either way.”*

175. Within this email Mr Cox also refers to the discount from O2 and states that the respondent are contractually obligated to pay and getting a discount was a “result” but does not absolve any user regarding fair usage.
176. Mr Cox also refers to warnings being sent to the claimant on her usage ; *“3 in all recorded on the O2 system, but not serious limit breach sent to me.”* (p.191)

**Detriment 2 : collusion between Mr McLoughlin and Mr Hoffbrand : 27 March 2020**

177. On **27 March 2020** Mr McLoughlin sent an email to Mr Hoffbrand , it is not denied that this related to the claimant;

*“ If she asks, you simply refuse on the grounds of the CP board meeting She then has to find someone else !”* (p. 74)

178. The response from Mr Hoffbrand is;

*“ Noted, although I suspect that will go down badly as she will presumably wonder why it was fixed for time I cannot do and then can't be moved”* (p.75)

179. The claimant alleges that this was collusion and a detriment for making the alleged protected disclosures in October 2019, 13 March and 17 March 2020 .

180. The meeting Mr Hoffbrand was to accompany her to was 1 April 2020 (p.215) .

181. Mr McLoughlin's evidence was that he did not collude with Mr Hoffbrand, he was surprised he had agreed to be her companion but Mr Hoffbrand realised he was conflicted and called Mr McLoughlin and said he would decline . The meeting was set by Face2Face and it coincided with the board meeting. His evidence is that Mr Hoffbrand had called him earlier in the day to say he felt conflicted and that Mr McLoughlin had suggested that if he wanted to decline he could use the board meeting as a reason. Mr McLoughlin accepted that it; *“may be imprudent but I did not collude”*.

182. Mr McLoughlin accepted however that he personally was of the view that it was inappropriate for Mr Hoffbrand to be her companion because he alleges the claimant did not know him as he worked out of the Watford office.

183. Mr McLoughlin's undisputed evidence is that he had raised the issues about Mr Cook's behaviour, he believes with the board but had spoken to Mr Hoffbrand about it at the time. There is no evidence of any email from Mr Hoffbrand expressing a lack of knowledge or surprise about the allegations and therefore the Tribunal find on a balance of probabilities, that he had been informed.



184. There is no evidence presented from Mr Hoffbrand and nor was there any explanation put forward for not calling him. The Tribunal consider that it is reasonable to draw an inference adverse to the respondent, for the failure to call him as a witness in light of the disclosure of these emails and the complaints the claimant raised about this behaviour.

185. The claimant, in answer to a question from the Tribunal gave evidence that despite the collusion, she believes that the respondents' minds had been made up to dismiss her and that this had been their intention from the date of suspension;

*“ oh yes – I was going anyway”*

**Alleged Protected Disclosure 6 : 28 March 2020**

186. On the 28 March 2020 the claimant sent an email to Mr McLoughlin, Mr Hoffbrand, and Mr McCabe of Face2Face consultants timed at 8:02 (p. 202) which is actually headed 'Without Prejudice' however the respondent did not seek to challenge its admissibility.

187. The alleged disclosure relates to the same alleged protected disclosure in relation to protected **disclosure 5**. The relevant passages concerning the alleged malpractice include the following;

*“ Why when you had been advised by Adrian of the extensive O2 bill in January 2020 did you decide to do an investigation on me relating to this in March ? especially when you have received and taken a credit for 50% admission of error by O2 for the data usage not being held on my temporary replacement phone or no security being placed on this phone by you ..”*

*And*

*“Sam and I were advised by Adrian after extensive research of the bill that because there was no security placed on the temporary phone – he had agreed with O2 that you would accept 50/50 liability for O2 not advising of the data usage being overused and Waystone not placing security on my temporary replacement mobile...”*

**Mr Hoffbrand**

188. On the 31 March 2020 the claimant emailed Mr Hoffbrand (p.222) and stated that as she had blown the 'whistle' to him and he was a higher management person, it was his obligation to investigate;

*“...surely you can see that Stuart has formed a conclusion of guilt prior to any investigation of my gross misconduct...”*

189. The claimant's undisputed evidence is that she also sent an email to Paul Filer another director at the Holding company to investigate Mr McLoughlin, about the O2 issue.

190. This belief that the outcome of the disciplinary was predetermined from the date of suspension remains the claimant's case.

**External consultants**

191. Mr McLoughlin contacted the claimant by email on 18 March 2020 explaining that the intention is to hold an investigation meeting and inviting the claimant to identify witnesses (p.187).
192. The respondent then instructed an external HR consultancy called Face2Face through Peninsula to support them in the process because their normal HR consultant was not available. The undisputed evidence of Mr McLoughlin is that he could not recall the respondent having to deal with a grievance before and did not feel they had the experience to deal with it.
193. Mr McLoughlin emailed the claimant on 27 March 2020 (p. 414) to inform her that there would be a grievance hearing on 1 April 2020. Within this email Mr McLoughlin set out his understanding of her complaints within the 13 March letter which included; “ *you state that no further issues were addressed in relation to the sexual harassment you suffered by David and this has left **you** to feel degraded*”.  
*Tribunal stress*
194. The claimant responded on 28 March 2020 (p. 413) and advised that she had not raised a grievance about the matters in the email of the 13 March 2019, that she had only sought to explain why she was stressed and not in work but she was raising a grievance about the suspension and the; “*only meeting I require is in relation to my suspension*”.
195. The claimant did not correct Mr McLoughlin’s understanding of the complaint about the sexual harassment being about the impact on her personally, although in cross examination her evidence was that she never read it, she forwarded it on to her HR advisor who did not tell her what the contents of the email were other than to simply tell her that it had not explained what the purpose of the suspension was. However, when the Tribunal directed the claimant to her reply and specifically the paragraph where she states “ *I have not raised a grievance relating to the items below*” , she conceded that this appears to relate to the 6 items set out by Mr McLoughlin in his email, and when asked again whether she was maintaining she had not read the contents, she gave evidence that; “*I could have done.*”
196. The Tribunal do not find it credible that the claimant did not read the email. The claimant’s response did not simply identify a failure to address the reason for the grievance but responded in robust terms to the suggestion that the claimant had raised a grievance and the proposal to have a grievance hearing and referred to the list of what Mr McLoughlin understood her complaints to be about. She did not however seek to correct his understanding .

**Alleged Protected Disclosure: 3 and 4 – 29 March 2020**

197. On the 29 March 2020 the claimant sent an email to Mr McLoughlin and Mr Hoffbrand (p.205- 206).
198. The claimant alleges that she was disclosing within the email that they had failed to implement a virtual private network (VPN) on her mobile phone and in doing so failed to protect personal data and that they had accepted a credit from O2 because they had accepted “ *full responsibility*” for the high charges while at the same time alleging that the claimant was responsible; the claimant alleges that the latter amounted to a disclosure about fraud ,both on the basis that this is a criminal offence and breach of a legal obligation.
199. The email includes the following relevant paragraphs;

..." I have blown the whistle on malpractice in your workplace and disclosed the fact that you are **defrauding** O2 by accepting their 50% credit and liability of misuse of data usage on my temporary mobile phone and then blaming me whilst you know you failed as a company to a VPN security on my temporary mobile phone. You had paid the bill less the credit on 3rd March via DDM weeks prior to suspending me and blaming me! You cannot take the credit its fraud and then blame me !

*This is a criminal offence / malpractice in the workplace, you are aware that you are defrauding O2 by accepting their 50% credit for failing to stop the data usage on my temporary mobile phone..."*

*" O2 also advised you that you had not placed VPN security on my phone so you would be liable for the further 50% .I have these emails on my phone" And;*

*" You are aware I have access to the companies bank statements, I email you and Sam these statements every morning – **it's a major security breach GDPR**, and for you not to place the VPN security on my temporary mobile phone because as you are aware all my private and confidential work emails are sent to my company mobile – are your customers, clients, banks aware that you are breaching their security too by not securing your own ?" Tribunal stress*

200. The Tribunal were not presented with any evidence about the function of a VPN by either party or the risks of using the employers email system without one.
201. The claimant in supplemental questions gave evidence that she was not provided with a laptop, she would access bank statements on her phone including those of its subsidiary companies but not the bank details of any other companies The bank statements are downloaded and emailed to Ms Boyes every morning and the claimant asserts that the bank details include details of 15 or 16 employees and about 15 to 20 supplier's banking information. The claimant also gave undisputed evidence that she may have to send NI numbers to payroll on her phone. Her evidence is that she could access by her phone whatever was on her computer allowing her to work on spreadsheets which had been emailed to her phone. If she was sent a request for payment with bank details, she would send it to Ms Boyes for payment. She asserts that her phone could have been hacked and this information accessed.
202. In answer to a question from the Tribunal member about her understanding of VPN the claimant stated that she understood VPN to be ;  
  
*"Virtual something network – I don't know about IT".*
203. The claimant did not appear to understand what VPN was or how it worked and what function it performed. She gave evidence that she would click on excel if she needed to go on a spreadsheet and that what she accessed was information sent to her via email.
204. The claimant admitted that she had no real understanding of VPN and did not give evidence about how likely she understood the risk of accessing this information on her phone to be.
205. When a member of the Tribunal sked the claimant what she would say about a description of VPN as a means to access the employer's network safety, she simply stated; *" Is it not for them to do it ? I expect them to put security on it".*
206. Given the claimant alleges that she had contacted ICO a number of times to discuss the respondent's compliance with GDPR, her vague and uncertain

responses or even basic understanding of what VPN is, was surprising particularly given her alleged reference to it being a "major breach".

207. The claimant in response to supplemental questions, gave evidence that she believed that there was a public interest in the alleged disclosure about fraud because; *"as far as I am concerned if they are blaming me then they should have told O2 we can not accept credit but taking action against our employees and we will get her to repay but they didn't, they cannot blame me, it is fraud and deception to O2."* And went on to assert that ; ..*"It is not business like, it is unprofessional, public should know"*..

### Investigation

208. Mr McLoughlin himself asked Susan Nicklin to provide a statement and his undisputed evidence is that she typed it up herself, he could not recall when he contacted her but she had left the company by that stage. That statement would form part of the case against the claimant at the disciplinary hearing.
209. Ms Nicklin had been employed as an Administrator and Ms Boyes was an Accounts Assistant, both were of the same level of seniority .
210. Mr McLoughlin accepted that he was aware that Ms Nicklin had left with a 'grudge' and that the claimant and Ms Nicklin did not get on. Ms Nicklin in her statement (p.147) alleges that when the claimant moved in to her new home there were no services available and it was suggested to her that she use her company mobile to access the internet so she could stream TV and she was happy to do that.
211. Ms Nicklin does not state who made this suggestion however the evidence of Mr McLoughlin was that he had asked her and she had informed him it was Sam Boyes and Holly Rhian, however Mr McLoughlin confirmed that he never asked Ms Boyes about this allegation.
212. Ms Nicklin goes on to allege in her statement that when the claimant returned to work after Christmas, Ms Boyes checked the phone which showed 92GB of data had been used and that the claimant replied that ; *"she wasn't bothered"* and that she said she had ignored the warnings on the screen. Ms Nicklin alleges that she and Ms Boyes established that the bill was over £2000 by that stage with 92gb of data used and Ms Boyes called the claimant to tell her to stop using the phone but the claimant ignored this and continued to stream from the phone. She does not seek to explain why she did not herself report this to Mr McLoughlin at the time. The Tribunal take into account that this witness by Mr McLoughlin's own admission, was not on good terms with the claimant and he was aware of that. He should therefore have applied caution to the weight he attached to her evidence and taken steps to check its veracity with other witnesses, to not do so the Tribunal consider, was outside the band of reasonable responses.
213. Mr McLoughlin accepted in response to a question from the Tribunal that he could have checked the date when 92gb of data had been used but he had not done so. He had also not checked with O2 what had been streamed to establish if this was work related although he accepted that would have been *"helpful"*.
214. Ms Boyes gave a statement before the disciplinary hearing, on 8 April 2020 (p.246) . Within this statement she states that she set up a 16gb data warning on the claimant's temporary phone and after a few weeks the claimant asked what the symbol was in the corner of the phone and Ms Boyes told her it was data usage warning. She was not sure but believed the usage was around 70 odd gb at

this stage over the allowance and Ms Nicklin looked it up and found out it was about £30 a gb ( which the Tribunal find would make it by that stage about £2100 in charges). Her evidence is that she called O2 on Monday and was advised to turn off the phone and that she called the claimant and advised her it turn it off. She does not clarify in her statement when she told her to do this i.e. how long after the claimant had reported the warning sign to her.

215. The Tribunal consider that in terms of the credibility of Ms Nicklin as a witness, to the extent her evidence is consistent with the evidence of Ms Boyes, namely that the data usage had reached a cost of about £2000 by the time the claimant raised the warning's on her phone, it is persuasive however the comments about the claimant's use of the phone in her own home and the comment about ignoring the warning, and what the claimant had said, is not reliable, not only because the witness had a reason potentially to give an adverse account of the claimant's behaviour but she fails to explain why she did not report this conduct herself. Mr McLoughlin took no steps to check her account of events with Ms Rhian or Ms Boyes.

216. The claimant emailed Carl Tudor of Face2Face on 1 April 2020 (p. 186) explaining that she would not attend a meeting until she received the reason for her suspension and the statements.

217. On the 1 April 2020 (p.244) the claimant then emails to state that once Mr Tudor has gathered all the information from Mr McLoughlin and she has taken instructions;

*" I will have no problem in speaking to you. As advised I am ready and willing to go back to work".*

218. Mr Tudor emails her on 2 April 2020 ( p.184) informing the claimant that a grievance hearing had been arranged to investigate the concerns in the 13 March 2020 email but that the grievance will be placed on hold whilst the conduct is investigated and concluded as requested by the claimant.

219. The claimant explained to the Tribunal that she was not willing to attend a grievance hearing and address the other matters she has raised because she considered the offer of a grievance hearing to be a " *smokescreen*" , to keep her quiet about the alleged sexual harassment reported in October 2019 not being reported to the Police and that;

*" I knew where going with it , they made it untenable from moment I sent the email on the 13 March and Helen saw it , it was private and confidential, it was only supposed to be seen by Stuart . What was the point, fighting a losing game" Tribunal stress*

#### **Resignation – 14 April 2022**

220. The claimant received a letter dated 9 April 2020 from Mr McLoughlin (p.247) advising her that the investigation would be finalised in the next coming days and should the outcome be to continue with the disciplinary hearing, she would be invited to a hearing.

221. The claimant wrote to Mr McLoughlin on **14 April 2020** (p.248) asking what exactly about her conduct was being investigated and asking him to forward all the statements which had been taken and asked why she had not been interviewed as part of the process. Later that day, the claimant sent in her letter of resignation.

222. Despite receiving advice from an HR & Employment Consultant ( who she refers to in the resignation letter itself), she gave more than her contractual notice period of 1 week, she tendered a month's notice;

*"Due to the fact that there is a fundamental breakdown of trust and confidence my role has become untenable and because I currently remain suspended I believe that I would not be expected to attend work for my notice period."*

223. When asked whether there was a 'last straw', the claimant stated that it was that she did not matter as a person, Ms Watson's issues came before her and people were able to say anything they wanted which was the things said about her, making out that she was a liar and suspending her but that there was no particular last straw.

224. The claimant did not dispute when taken to the Contract of Employment that her notice period was 1 week but that she believed as she was paid monthly she had to give 1 months' notice. She asserts that she left her copy of the Contract of Employment in the office but does not allege that she asked for it or enquired of the respondent what her notice period was.

225. The claimant followed up with a letter on 16 April 2020 (p.250) stating that she would not attend a disciplinary hearing."

226. The claimant's notice of 1 month, would therefore expire on **14 May 2020**, she gives the termination date of 13 May 2020 in her claim form to the Tribunal (p.12) however in answer to a question from the Tribunal. The claimant submitted a sickness certificate (p.429) dated from 24 April to 12 May 2020. .

### **Disciplinary hearing**

227. Mr McLoughlin replied on the 16 April 2020 informing the claimant that the respondent would be proceeding with the disciplinary hearing on 22 April 2020. Within the letter Mr McLoughlin also referred to the claimant as having given 4 weeks' notice rather than one month, which would expire on **13 April** if the notice was treated as served on the next working day i.e. Monday 16 March 2020 rather than Saturday 14 April 2020. .

228. Mr McLoughlin wrote to the claimant again on 18 April 2020 formally inviting her to the disciplinary hearing on 22 April 2020 ( P. 252 – 253). The allegations were;

1. *It is alleged that you have taken part in activities which cause the Company to lose faith in your integrity. Further particulars being;*

a) *It is alleged that between the period of 1 December 2019 and 21 January 2020 , **you inappropriately** used Company equipment, namely our work mobile phone, **by severely exceeding** the data cap of 16GB*

b) *It is alleged that **you failed to notify** Stuart McLoughlin that you had exceeded this data cap*

c) *It is alleged that as a result of your actions, the Company gave incurred mobile phone charges amounting to £3,694.56, which put the Company at a financial detriment of around £1,831.58" . Tribunal stress*

229. The letter enclosed the evidence from Adrian Cox, Stuart McLoughlin, Susan Nicklin and Samantha Boyes.

230. The Tribunal find that the claimant had been provided with the evidence in advance of the disciplinary hearing. However, it remained unclear to her what it was alleged she had actually done and the Tribunal find that it did remain unclear. How had she acted “ *inappropriately*”.
231. The complaint from the claimant about not having the evidence is not well founded however, the Tribunal accept that the evidence was deficient and the allegation remained unspecified.
232. The Tribunal do not accept that it was outside the band of reasonable responses to not obtain an IT experts report however there were simple steps the respondent could have taken to establish the facts more clearly including checking with O2 what material was being streamed and whether this was work related, it could also have checked the dates when the claimant had reached 70 or 92gb and the date she stopped using the phone. The failure to take such steps, given the seriousness of the allegations was the Tribunal consider outside the band of reasonable responses as was the failure to check Ms Nicklin’s account of events with Ms Boyes.
233. Mr McLoughlin sought in his own statement for the disciplinary hearing, to give weight to and validate the evidence of Ms Nicklin which the Tribunal considers, highlights his desire to influence the outcome in support of a recommendation of dismissal (see below).

**22 April 2020**

234. On the 22 April 2020 , Ms Wood at Face2Face, invited the claimant to respond to the allegations in writing or by making further submissions, the allegations are set out and with a number of accompanying questions. The claimant provides her response by return (p.399)

**End of April 2020**

235. A few days before the disciplinary hearing, Mr McLoughlin provided his own statement (p.146). It was brief and in bullet points. He alleges that he had no knowledge of the bill until raised by Mr Cox with him and that the claimant had told Mr Cox that she had raised it within him but had not. That Helen McLoughlin and he had checked with each other whether the claimant had “*come clean*” and decided to give her time to do so. During the first week in March he was required to approve the bill and scrutinised it and when the claimant raised her email on the 13 March, decided she was not going to report it. He also states that;

*“ ...my conclusion that she had been streaming data was confirmed to me by a member of staff who told me that Adele was streaming films and knew exactly what she was doing.*

*Apparently she was told of the 18gb limit at a point when she had already ignored the warning sign on her phone and she then carried on streaming commenting that she wasn’t ‘f...bothered’.*

**Recommendation : 1 May 2020**

236. Face2Face in their report dated 1 May 2020 recommended dismissal. The consultant Ms Wood (p. 270) made a finding of a fundamental breach and that the appropriate sanction is summary dismissal.

**Alleged Protected Disclosure 7 : 3 May 2020**

237. The claimant sent an email on 3 May 2020 to Mr McLoughlin, Mr Hoffbrand and Mr Filer. The alleged malpractice again related to the failure to implement a VPN and alleged disclosure about fraud against O2.

238. The email include a number of attachments (p.282 – 294). It included exchanges of text message with Mr Cox regarding the replacement phone and also the exchange of messages between Mr McLoughlin and Mr Hoffbrand on 27 March 2020 regarding Mr Hoffbrand not attending the hearing with the claimant.

239. The claimant refers in this email to Mr McLoughlin colluding with directors and a disgruntled ex-employee to damage the claimant's reputation. And ;

*" ..forced me to resign after I blew the whistle for several wrong misdoings on your part align with several breaches of employment.*

*You have negated your responsibility as an employer to safeguard/secure my temporary device and therefore ignoring its duty of care to me."*

*" exposed my work mobile to the data being used and abused by others"*

*" ...the only reason is because of O2 not calling m data you not placing security on my phone..."*

*"...you have a duty and[sic] care to me and other staff members/suppliers to safeguard our personal data – this is gross misconduct of GDPR, you have everyone's bank details and statements on my phone from my emails is massive GDPR breach..."*

240. The email goes on to allege that Mr McLoughlin colluded to obtain a statement from Ms Nicklin and goes on to state that the respondent had a duty of care to staff and suppliers to safeguard their personal data and that the respondent has everyone's bank details and statements on her phone and which is a "massive GDPR" breach and refers to having emails confirming no security support because of lack of funds.

241. The claimant states (p.285) that she had spoken to the ICO on " Friday" and refers to the advice they gave her;

*" ...under no circumstances should any data be kept from my SAR from me. They also confirmed that Peninsula have no right to keep this data from me and that they do NOT have the monopoly over the ICO" And;*

*" The ICO advised me to request this information be handed over to me within 2 days and if this is not received I am to inform the ICO and they will be at liberty to carry out and perform internal enquiries to both companies for breach of GDPR".*

242. The claimant was asked by the Tribunal why she was alleging this disclosure on 3 May influenced the decision to dismiss when Face2Face consultants had recommended dismissal on 1 May, to which she replied; that it was the "stuff before that."

### **Outcome of disciplinary process**

#### **Detriment 4 : Act of Dismissal**

243. Mr McLoughlin accepted the recommendation of Face2Face to dismiss the claimant.



244. Mr Loughlin gave evidence under cross examination that he decided to dismiss because the claimant had “ *Cleary utilised her business phone for streaming and data collection to a degree to excessive, .. she created a distrust of her integrity and for that reason she was dismissed*”.
245. By letter of the **6 May 2020**, Mr McLoughlin sent a letter drafted by Peninsula informing the claimant that her employment was being terminated with immediate effect. The claimant was offered a right of appeal. The letter was received according to the undisputed evidence of the claimant on **7 May 2020** in the post.

### **Appeal**

246. The claimant presented an appeal on 8 May 2020 (p. 297 – 298). The claimant however gave evidence in cross examination that she was not prepared to attend the appeal hearing.
247. The claimant does not allege that her appeal constituted a further protected disclosure.
248. The appeal was a recital of the claimant’s account of events and a denial of any wrongdoing. It also referred to the alleged collusion by Mr McLoughlin following her email of the 13 March 2020. It also complained of being denied the right to ask staff for statements to corroborate her account of events at the disciplinary stage.
249. The claimant was advised on 13 May 2020 (p.299) that a consultant from Face2Face would conduct the appeal at a hearing on 19 May 2020. The claimant was invited on 13 May to attend the appeal hearing by video conference on 19 May 2020. The claimant emailed on 18 May 2020 to inform the consultant, Ms Hart that she was unable to attend the call the following day because of unforeseen circumstances namely a death in the family and ask for it to be postponed. The claimant does not dispute that she was urged to forward written submissions by 5pm on 19 May but wrote on 19 May stating that she was unable to do so as she was at a funeral (p.305) and wrote stating; “ *As advise I will let the tribunal deal with the issues etc*”. In cross examination, the claimant stated that she did not intend to attend the appeal in any event; “ *I had resigned, I was not going to go ..*”
250. The report following the appeal (p.302) recommended upholding the dismissal and by letter of the 29 May 2020, Mr McLoughlin who was of course the person who made the decision to dismiss, a key witness and against whom allegations of collusion had been made, upheld the decision to dismiss (p.301) on the grounds that there was a lack of information and clarity substantial enough to overturn the original decision and the claimant had irrevocably destroyed trust and confidence.
251. Mr McLoughlin in response to a question from the Tribunal accepted that there was no reason why Helen or Alistair McLoughlin could not have heard the appeal.

### **Phone bill**

252. Only when asked by the Tribunal did Mr Chehal clarify that what the respondent had believed the claimant had done,. It was pointed out that the Tribunal have to consider the wrongful dismissal claim and it remained unclear what it was being alleged the claimant had actually done i.e. was it a deliberate use of her phone to stream data . It was confirmed that what it is alleged she had done, and the reason it is alleged she was dismissed was ; “ *she knowingly streamed off her phone to cause this bill*”. Further, it was put to the claimant that she had received warnings and ignored them.

253. The claimant gave evidence under cross examination that she does not dispute that the bill for the company phone she was allocated amounted to £3,663. 16 over the period 29 December 2019 to 29 January 2020, in GPRS calls which is not voice calls but data. The claimant under cross examination was not able to comment on whether to use another person's mobile data the password must be shared both to open the claimant's phone and connect the device but referred to Mr Cox having mentioned that it was possible that the phone had been hacked.
254. The claimant received the replacement phone on **18 December 2019** until the repaired phone was returned to her on **27 January 2020**.
255. The breakdown of data charges provided by the respondent was not challenged ( p.264) . The Tribunal note that during the period for example Monday 31 December 2019 to Sunday 5 January 2020 the amount of data usage is **51,068,987**, and for the 7 day period Monday 23 December to Sunday 29 December 2019 it is **10,250,522**. That compares to usage before the replacement phone to Monday 9 December to Sunday 15 December 2019 of **30,310** and Monday 2 December to Sunday 8 December 2019 of **20,553**. That is a drastic difference in usage before and after the change of phone.
256. The Tribunal consider that there are a number of possible explanations for such a difference in usage; a change in behaviour of the claimant, such that after receiving the new phone she used more data and either ignored data warning signs that the cap was being exceeded, or did not receive them or did not understand what they were or, that the phone was hacked and the data used or the claimant did not change her behaviour but the data had previously been capped/limited.
257. Prior to the change of phone the monthly charge was capped at £31.
258. The claimant was asked under cross examination about seeing a warning sign on her replacement phone that data usage was being exceeded. The claimant gave evidence that ;
- "There was a notice on the phone – I didn't know what it was – she checked on it [ **Sam Boyes** ] and said going over the data".*
259. In terms of how many messages the claimant received, she was vague, she mentioned that she took the phone into Ms Boyes after the first messages, and then said that if she had 3 messages they were all over a weekend and then stated that she could have had the messages "*for a week or week before that but I didn't know – I did not know what it was - if you go over with Vodaphone you get a message and the phone is blocked*"
260. The claimant gave evidence in response to questions from the Tribunal that she had not been told anything about the cap or how the temporary phone worked and the first thing she knew was when a sign came up in the corner of the phone, a red triangle with no words and she received a text which said something about data and that Ms Boyes had told her to turn the phone off as it had exceeded the data to which the claimant gave evidence that;
- "she said she would phone to see what had happened – I was not told not to use it – O2 blocked the data – she called then and said they blocked it so I couldn't use it anymore."*
261. The claimant denies using the phone to stream videos or allowing others to use it and maintains that it was hacked and possibility while at work. Mr Cox had raised

this as a possibility however, the Tribunal notes that there is a lot of usage at a weekend; on the 4 and 5 January alone it is **27,460,522** and on the weekend of 28 and 29 December it is **10,100,525**.

262. The Tribunal find on a balance of probabilities, that the claimant had used the data and had received the warnings on her phone that data had been exceeded.
263. It is not clear however when it was alleged that the claimant had been informed by Ms Boyes not to use the phone because of the alerts. The respondent's undisputed position is that a stop was put on the data on 21 January 2021 (p.265) and eventually after the Tribunal sought clarity from Mr Chehal about when the respondent alleges the claimant was told to stop using the phone, he confirmed that the respondent's position is that when the phone bill was "*about £3,000, when the claimant receive the first alert*". According to the phone bill breakdown (p.156) this would have been around 11 January 2020.
264. The respondent had not established the date the claimant had received the alerts, when she had raised with Ms Boyes or Mr Cox and whether she had continued to use the phone despite their instruction not to do so.

### **Submissions**

265. There was no time for submissions at the end of hearing the evidence. The parties were given the option to return to give oral submissions and have judgment delivered the week following the hearing, however neither counsel were available and therefore requested a reserved decision and time in which to deliver written submissions. Written submissions were provided on 17 December 2021. The Tribunal have considered the submissions fully and summarise them as follows;

### **Respondents submissions**

266. The respondent denies that the Claimant had made Protected Disclosures as alleged.

### **First Alleged Disclosure - 7<sup>th</sup> October 2019**

267. The respondent submits that the claimant raised a grievance of an alleged sexual harassment on 7<sup>th</sup> October 2019 to Helen Mcloughlin and not to Stuart Mcloughlin as set out in the list of issues and that the directors had previously been unaware of the allegations.
268. It is submitted that Helen Mcloughlin and Stuart Mcloughlin took immediate action.
269. The claimant relies on both her verbal complaint to Stuart Mcloughlin and her written statement.
270. With regards to the verbal disclosure, the respondent submits that the claimant . did not speak to Stuart Mcloughlin at all.
271. With regards to her written statement the respondent submits that (p 410) the Claimant was not making a disclosure for public interest but rather for her own interest and refers to the references to what she experienced and the impact on her.
272. There is nothing it is submitted, to suggest that at the material time the claimant was making it in the interest of public.

273. Further the respondent submits that the Claimant raised a grievance about sexual harassment i.e. an allegation that falls within Equality Act 2010 (workplace harassment) and not a sexual assault which is criminal offence.
274. Further, the respondent will say they acted swiftly upon being alerted to this incident. However, Respondent will say since it is workplace matter i.e. a civil matter, there is no legal obligation on the employer to report the matter to the police as alleged compared to a sexual assault. The respondent submits that the reference to Mr Cook as a 'predator' is misplaced.
275. The respondent submits that the act occurred some 5 months prior to the Claimant's resignation or disciplinary action therefore it is significantly out of time.

**Detriments**

276. The respondent submits that the act of suspension is 'too remote' and that no further matters or issues were raised between 7<sup>th</sup> October 2019 until the suspension on 14<sup>th</sup> March 2020.
277. With regards to the alleged collusion, between Stuart Mcloughlin and Phillip Hoffbrand, it is submitted that it unlikely as it is evident that Phillip Hoffbrand did not know about the 'whistleblowing' before 14<sup>th</sup> March 2020 and yet he still agreed to represent the claimant at the grievance hearing.
278. With respect to conducting an investigation without disclosing the allegation and evidence against the claimant the Respondent submits that the suspension letter clearly specifies the reasons for the suspension.
279. The dismissal; the respondent submits that it had a genuine reason to suspend and investigate the Claimant's usage of her mobile data which amounted to £3694.56 and had reasonable grounds to believe this because the SIM and phone number were the same and the usage runs from 29<sup>th</sup> November 2019 until 9<sup>th</sup> December 2019 (replacement phone was given to Claimant on 9<sup>th</sup> December 2019 to swap the SIM card) and from 10<sup>th</sup> December 2019 to 25<sup>th</sup> December 2019 when the replacement phone was returned and from 25<sup>th</sup> December 2019 until 20<sup>th</sup> January 2020 (the usage on the Claimant's old/repared phone). Furthermore, she was unable to offer explanations on the excessive usage especially on Saturday and Sunday.
280. Finally, the respondent submits that the claimant had not provided a satisfactory explanation for the link between this incident on 7<sup>th</sup> October 2019 to her suspension.

**Alleged Protected Disclosure : 13/03/2020 email**

281. The respondent submits that the claimant was not making a protected disclosure but raising a grievance and therefore was not making a disclosure in the public interest but rather in her personal interest.
282. The Respondent refers the tribunal to references to grievance (pages 214/413 – 415):
283. Face2Face Consultant, Carl Tudor (pages 184 – 185) placed the grievance on hold in light of the claimant stating the only grievance was about the suspension and therefore, the respondent denies that the claimant had suffered any of the detriments as alleged.

**On 29 March 2020 and 17.03.2020 and 28.03.2020 she disclosed to Mr S McLoughlin and Mr P Hoffbrand (director of CP Holdings Ltd) - VPN**

284. The respondent submits that these are mere allegations and refers to : **Kilraine v London Borough of Wandsworth, [2018] WLR(D) 382/**
285. The claimant it is submitted seems to be suggesting that the respondent ought to have put in place a security on her phone to ensure the data would not be hacked or exceeded and that whilst she received the warnings she did not know what they meant.
286. The respondent submits that as a project accountant, the claimant ought to have known what these messages meant and how to install a password on her mobile phone. The respondent further argues that the claimant had the physical possession of the phone, and she ought to have ensured that her phone was secured with passwords, and it is not the respondent's responsibility as alleged.
287. The respondent submits that the claimant did not raise this in the public interest but to cover up her own wrongdoings.
288. The suggestion of the phone is being hacked it is submitted plausible as O2 investigated and had said that usage was genuine.
289. It is submitted that Adrian Cox and O2 had carried out their investigation and the outcome was the phone had obviously been used for streaming and conclusions was that usage was genuine, there were warnings sent to the claimant on the usage, 3 in all recorded on the O2 system, but no serious limit breach sent to Mr Cox.
290. Therefore, the respondent it is submitted had reasonable grounds to believe the usage could be due to streaming which they considered an abuse of the trust placed in her to use company equipment wisely which constitutes gross misconduct.

**On 29 March 2020 and 17.03.2020 & 28.03.2020- Fraud with O2**

291. The respondent submits that this is not fraud and does not falls within the definition of whistleblowing as alleged and this is a mere allegation.
292. The respondent submits that the rebate was obtained genuinely (p.184 – 185)..

**03.05.2020 Protected Disclosure**

293. The respondent submits argues that Samantha Wood's disciplinary F2F report was concluded on 1<sup>st</sup> May 2020 i.e. before the alleged 3<sup>rd</sup> May PID and therefore it could not have been an alleged detriment in connection with alleged disclosures prior to that date..
294. It is submitted that the claimant is alleging Whistleblowing to clear her name and reputation which is self-interest and not for public interest : **Ibrahim v HCA International [2018] UKEAT /0185/18**. The EAT rejected the claim as not in the public interest: the claimant's intention was solely to restore his reputation.
295. Carl Tudor, Samantha Wood and Danielle McCabe are employees of the Peninsula Face2Face who provide a service. Vicky Hart on page 306 paragraph 19 of the report outlined F2F relationship with the Respondent as follows:

*I made it clear that whilst there is a commercial relationship between the company and Peninsula in terms of the provision of a Human Resources function nevertheless I am, at all times, acting impartially. I am not acting in a representative capacity on behalf of the company.*

296. Therefore, the respondent submits that any alleged disclosure to these consultants could not be constituted as PID as alleged. [ did not allege disclosure was to anyone outside of employer ? which section o they fit in ?]

#### **Stuart Mcloughlin and Phillip Hoffbrand colluded**

297. Stuart Mcloughlin had explained to the tribunal the working relationship between Phillip Hoffbrand and the Respondent Company.
298. On page 215 Phillip Hoffbrand writes to the Claimant on 30.03.2020 and to explain he cannot attend due to a board meeting but he nevertheless goes on to say ***“I note that you have requested that the meeting be postponed, and if that happens then please let me know the rescheduled time and date and I will endeavour to make myself available.”***
299. Mr Hoffbrand then subsequently writes to the Claimant on 31.03.2020 (page 221) to say ; *“On reflection, I now believe it was a mistake on my part to agree to be your representative - I should have said no immediately, and it has become much clearer with your subsequent emails, and in particular your request that I carry out an investigation myself, that it would be inappropriate for me to fulfil this role*

#### **Suspension**

300. Both Stuart Mcloughlin and Helen Mcloughlin deny that Helen Mcloughlin had influenced Stuart Mcloughlin to suspend the claimant as alleged.
301. The respondent will argue that at the time of suspension, there were uncertainty as to when the lockdown would have been implemented. it was only announced on 23rd March, and therefore to suggest that timing of the suspension was inappropriate is refuted.

#### **Claimant querying who was the HR**

302. The respondent will say the claimant was fully aware it was Pauline Watson

#### **Meeting with Stuart Mcloughlin on 11<sup>th</sup> or 12<sup>th</sup> February 2020**

303. Stuart Mcloughlin denies that claimant came to see him as alleged. The claimant gave inconsistent evidence on the dates she met Stuart Mcloughlin to discuss the phone bill. she had said 11<sup>th</sup> or 12<sup>th</sup> and suggested 16<sup>th</sup> February to Samantha Wood.

#### **Disciplinary Proceedings**

304. Allegations were put to the Claimant and she provided written submissions. The Claimant it is submitted was unable to offer a satisfactory explanation on the reason for the excessive usage and suggested she was at work. However, she was unable to offer explanations on the excessive usage on Saturday and Sunday.
305. The invite to the disciplinary hearing letter and ACAS code does provide that the employer can vary the procedure for short service dismissal.

306. The claimant did put an appeal but did not attend or did not it is submitted offer further evidence despite being asked to do so.
307. Whilst ideally Mr Mcloughlin should not have adopted the appeal outcome but left it to another director, it is submitted that it is family run business and Phil Hoffbrand was also implicated, therefore due to size and resources therefore was no one else that could have conducted the appeal, hence F2F was appointed to provide recommendations.
308. The respondent submits that the claimant resigned by giving one months' notice and she was dismissed during her notice period. Therefore, Respondent argues that the dismissal superseded the constructive dismissal.

#### **Constructive dismissal**

309. The claimant was questioned by the Judge as to what was the last straw that led to her resignation but she could not offer any satisfactory response to the tribunal.
310. Furthermore the respondent further argues that none of the matters raised were a fundamental breach and in any event the claimant was given the opportunity to put forward her case in a grievance hearing which she declined and said that she had not raised a grievance and only want to discuss my suspension “.
311. The Claimant resigned on 14<sup>th</sup> April 2020 with one months' notice whilst her contractual notice is 1 week. The respondent submits that she resigned giving one months' notice purely for financial reasons as when questioned why she did not resign following the alleged whistleblowing on 7<sup>th</sup> October 2019 when allegedly Mr McLoughlin ignored her request to inform the police , the Claimant had said she was afraid of losing her job and as she was a single parent and needed to pay bills.
312. The Respondent relies on : **Cockram v Air Products Plc Appeal No. UKEAT/0038/14/LA**
313. The respondent submits that by giving one months' notice, the claimant has affirmed any potential breach as alleged.
314. The respondent put forward no specific submissions on the application of Jhuti or on the wrongful dismissal claim.

#### **Claimant submissions**

315. Mr Howeltt set out the law in detail and directed the Tribunal to the authority of **Kilraine v London Borough of Wandsworth [2018] ICR 1850**: Information and allegation are not mutually exclusive.
316. **Korashi v Abertawe University Local Health Board [2012] IRLR 4** at paras 61, 62 and for assessment of reasonable belief in the public interest the guidance in **Dobbie v Felton (t/a Feltons Solicitors) [2021] IRLR 679** at paras 27 to 29 : the particular reasons why the worker believes that to be so are not of the essence.

#### **Detriment**

317. Counsel referred the Tribunal to **Blackbay Ventures Limited v Gahir [2014] IRLR 416 at para 98**. An employee who claims constructive unfair dismissal is entitled to rely on whistleblowing detriment up to the effective date of termination: **Melia v Magna Kansei Limited [2006] ICR 410 at paras 34 to 36**.

### **Detriment and the Burden of Proof**

318. **Serco Limited v Dahou [2017]** ICLR, headnote and paras 29 to 30, accepting that there is an initial burden of proof on the Claimant to establish detrimental acts or omissions which the employer must explain.
319. Counsel also relies on : **Fecitt v NHS Manchester** [2012] ICR 372, headnote (2) and per curiam, paras. 43 to 45.

### **Constructive Unfair Dismissal**

320. In the case of automatic unfair dismissal under s 103A, the burden of proving the reason or principal reason remains on the employer unless (as here) the claimant lacks the qualifying period of employment: **Kuzel v Roche Products Ltd [2008] ICR 799, at paras 47 to 61.**
321. Cumulative disclosures may be aggregated as the principal reason for the dismissal: see **EI-Megrisi v Oxford University UKEAT/0448/08 unrep.**

### **Submissions on the Evidence**

322. It is submitted that notwithstanding the purported investigation process, disciplinary proceedings and appeal, it is clear that the issue of phone streaming was not the real reason for the purported dismissal of the claimant on 06.05.2020.
323. The claimant drew the problem to the employer's attention by telling Ms Boyes, who told Mr Cox who in turn told Mr McLoughlin, therefore he knew about the matter in February 2020 and Mr Cox had told her of the discussion between them on the journey to Darlington. Mr Cox dealt with the matter and his last words on the subject to the claimant on 14.02.2020 were "Matter closed".
324. It is submitted that Mr McLoughlin's evidence that Mr Cox carried out a further investigation between 14.02.2020 and 14.03.2020 should be rejected.
325. No attempt was made to interrogate the temporary phone or to obtain expert advice about what had happened. The employer has chosen not to call Mr Cox as a witness. Since the documents show that he regarded the matter as closed in February, and in March still recognised that the claimant might not be at fault, the Tribunal is invited to draw adverse inferences from the failure to call him.
326. Whilst of course the Tribunal is not inquiring into the fairness of the purported dismissal in relation to the streaming allegation, it is worth noting that the period of streaming coincides with the period when the claimant had the temporary phone.
327. The disciplinary process was wholly unsatisfactory. Mr McLaughlin did no more than adopt wholesale the recommendations of the consultant. Indeed, despite her repeated requests, at no stage was the claimant told how it was alleged that she had run up the bill for streaming. Indeed, it was only during the tribunal hearing that it was first put to her that she had intentionally and knowingly streamed data.
328. It is submitted that it is reasonable to ask why it was that the phone allegation was revived on 23rd March 2020. Counsel refers to the 7th October 2019 alleged which he submits is obviously in the public interest. It is in the public interest to disclose the activities of a sexual predator who might commit further acts of assault if he remained in the employment of Waystone, or if employed elsewhere.



If his activities had been disclosed earlier, she would not have been assaulted. If she had not made a disclosure.

329. The employer acted properly in dismissing DC for gross misconduct, albeit in circumstances of remarkable procedural unfairness.
330. In cross examination Helen McLoughlin accepted that Ms Watson was very anxious to keep the matter quiet and in particular to keep it from her husband.
331. The Tribunal should accept the claimant's evidence that about a week after 7th October she told Mr McLaughlin that the matter should be referred to the police and that he told her that he was dealing with it.
332. On 07.03.2020 the claimant wrote the email which appears at [164], in which the sexual harassment was raised again. Mr McLoughlin's initial response was entirely appropriate. He sent the email at page [166] asking for a meeting to discuss the matters which the claimant had raised. Not only was this an entirely sensible thing to do, but it was broadly in accordance with the employer's grievance procedure.
333. However, the following day, a Saturday, the claimant was suspended in relation to the phone streaming [168]. Mr McLoughlin's evidence that he decided to suspend her because he had been waiting for her to come to him to discuss the phone matter is wholly unconvincing and completely at odds with his approach less than a day earlier to ask for a meeting. There had been no change of circumstances in relation to the phone matter whereby it suddenly became appropriate for the claimant to be suspended. There was no evidence of any reason why the matter had become so urgent that the claimant had to be suspended on a Saturday.
334. Whilst Mr McLoughlin adamantly maintained that he was the author of the suspension email, there is reason to doubt that it was all his own work. The formality of the greetings in that email is unique in all of the correspondence which Mr McLoughlin sent to the claimant.
335. It is submitted that the proper inference is that the claimant was suspended because she had revived the sexual harassment matter and that Mr McLoughlin suspended her under pressure from Helen, who was of course party to Ms Watson's desire that the matter remain secret.
336. In answer to a question from the Tribunal Judge Mr McLoughlin admitted that the sexual harassment disclosure was instrumental in his decision to suspend. He said *"anybody that suddenly raises a series of grievances including prior matters is not raising something which is a genuine immediate grievance and I did not understand why she wrote it. I didn't understand why she was raising sexual harassment again - I couldn't understand why she was raising it - she hadn't raised it since October. I thought her comments about Jane were totally out of order but the more I thought the more I thought that the phone was out of her mind and that she would not come and see me<sup>1</sup>".*
337. The phone streaming allegation was an excuse for suspending the claimant, a decision which was made for other reasons namely because the claimant was reviving the

**Sexual harassment allegation.**

338. On 17 March [182] and 29th March 2020 [205/206] the claimant made further disclosures in relation to the failure to implement a virtual private network on the temporary phone and the employer having accepted a substantial credit from O2 whilst at the same time blaming the claimant for what had happened. The Tribunal is again invited to accept the claimant's evidence on these points. She believed that she was acting in the public interest in disclosing matters which might compromise the security of the personal data of other employees and suppliers and other matters (the O2 credit) which in her reasonable belief amounted to criminal misconduct. It was suggested in cross examination that the claimant had misunderstood what a virtual private network is and how they work. Even if she had, that is irrelevant.
339. Counsel submits that the claimant reasonably believed that the employer had failed to take proper steps to protect data and that it was in breach of the GDPR. Similarly it would not matter if as a matter of law the employer's conduct in relation to the O2 credit did not amount to a criminal offence. The claimant reasonably believed that it did and made an appropriate disclosure of it.
340. The claimant was to make further disclosures of these matters on 28.03.2020 [202-204] and 03.05.2020 [282-294]. In doing so, her reasonable belief in the failures and that she was making disclosures in the public interest continued.
341. Plainly, it is submitted that the claimant suffered detriment in consequence of her disclosures. The detriment comprised: suspension with effect from 14.03.2020 on purported grounds which were not the real grounds for doing so, the collusion between Mr McLoughlin and the admittedly reluctant Mr Hoffbrand to ensure that Mr Hoffbrand did not act as the claimant's witness at the grievance meeting and counsel refers to the devious behaviour, the conduct of a disciplinary procedure and appeal and the purported dismissal of the claimant on 06.05.2020.
342. The claimant resigned, giving one month's notice, on 14.04.2020 [249]. It is submitted that she was constructively dismissed and that dismissal was automatically unfair under ERA s. 103A. Her disclosures may be aggregated in establishing the real reason for her constructive dismissal. However, the employer insisted on continuing to treat the claimant as employed and in pursuing a disciplinary process to its conclusion. The employer continued to pay the claimant who remained on the payroll, albeit suspended.
343. Purporting to dismiss the claimant for gross misconduct involving dishonesty, whilst not believing in the reason for dismissal. This is detriment of the most obvious kind. It is submitted that detriment may be suffered after the employment relationship has ended so, if the claimant's resignation was effective to terminate her employment when the notice expired, the purported dismissal was nonetheless still detriment referable to her protected disclosures.
344. **Counsel also made reference to the following case authorities: Korashi v Abertawe University Local Health Board [ 2012] IRLR 4, Melia v Magna Kansei Limited [ 2006] ICR 410, Woodward v Abbey national Plc [ 2006 ] ICR 1435. Serco Limited v Dahou [ 2017] ICLR .**
345. Counsel made no specific submissions on wrongful dismissal.

**Legal Principles**

**Ordinary Unfair dismissal – section 94 and 98 ERA**

346. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal.

### Conduct

347. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) of the Employment Rights Act 1996.
348. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**.
349. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23**.
350. House of Lords in **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL**, :the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.
351. The leading authority on this subject is **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, in which the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a *repudiatory breach of contract*. This requires the employee to establish there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment, the employer's breach *caused* the employee to resign, and the employee did not *delay* too long before resigning

### Resignation with notice.

352. S.95(1)(c) ERA provides that a dismissal will take place where an employee resigns *with or without notice* 'in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'. However, a notice period in excess of the employee's contractual obligation was held to have amounted to affirmation of the contract in **Cockram v Air Products plc 2014 ICR 1065, EAT**. Following his unsuccessful grievance, C resigned, giving seven months' notice rather than three months as required by the contract. The judge considered that the claimant had given longer notice 'for his own ends rather than any altruistic reason' and had therefore affirmed the contract. On appeal, the EAT held that S.95(1)(c) must be considered as a whole, taking account both of the fact that an employee is entitled to resign with notice and the words 'in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.
353. While an employee's conduct in giving notice may be taken as implied affirmation of the contract, each case will turn on its own facts. In **Bournemouth University Higher Education Corporation v 2010 ICR 908, CA**

### Automatic Unfair Dismissal : section 103A ERA

### Disclosures qualifying for protection

354. The term "protected disclosure" is defined in sections 43A-43H of the 1996 Act. The opening words of section 43B of ERA provide that:

*"(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 –.*”

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

(a) *that a criminal offence has been committed, is being committed or is likely to be committed*

(b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*

(d) *that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject”.*

#### **Disclosure of information: section 43B ERA**

355. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.
356. The word ‘disclosure’ does not require that the information was formerly unknown. Section 43L(3) provides that ‘any reference in this Part (i.e. the provisions of Part IVA) to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention’.
357. **Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540, EAT** explained that two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not.

#### **Reasonable belief**

358. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the ‘*reasonable belief*’ of the worker be made in the public interest, and tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is likely to take place.

#### **Public Interest**

359. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker’s predominant motive for making the disclosures; the Tribunal have reminded itself of Lord Justice Underhill’s comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR 731 CA** at paragraphs 27 to 30.
360. In **Chesterton** the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in **Babula v Waltham Forest College 2007 ICR 1026, CA**. The Tribunal has reminded itself of the guidance in Babula.

#### **Reasonable belief in the wrongdoing**

361. As the EAT put it in **Soh v Imperial College of Science, Technology and Medicine EAT 0350/14**, there is a distinction between saying, ‘I believe X is true’

and 'I believe that this information tends to show X is true'. The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

362. The EAT considered the meaning of 'likely' in this context in ***Kraus v Penna plc and anor 2004 IRLR 260, EAT***. In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation'.
363. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective section 43B (1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT***, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.
364. ***Darnton v University of Surrey 2003 ICR 615 EAT***; "33...*While, as we have said, determination of the accuracy of factual allegations may be a useful tool to determine whether the worker's belief is reasonable, reasonable belief must be based on facts as understood by the worker, not as actually found to be the case*".

#### **Criminal offence**

365. Lord Justice Morris's in ***Ellis v Home Office 1953 2 QB 135, CA***, commented on the public interest in justice being seen to be done.
366. Court of Appeal's decision in ***Babula v Waltham Forest College 2007 ICR 1026, CA*** made it clear a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based.

#### **Identifying legal obligation**

367. In ***Fincham v HM Prison Service EAT 0925/01*** : Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'.

#### **Likelihood of occurrence**

368. Under S.43B(1) the worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in ***Kraus v Penna plc and anor 2004 IRLR 260, EAT*** .

#### **Manner of Disclosure**

369. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

#### Dismissal

370. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.
371. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA***. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A will not be made out.
372. As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA***, a claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

#### Reason – causation

373. The Tribunal have considered the Court of Appeal decision in ***Co-Operative Group Ltd v Baddeley 2014 EWCA Civ 658, CA***, ***Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC*** and ***Orr v Milton Keynes Council 2011 ICR 704, CA***
374. The question for the Tribunal is why did the alleged discriminator act as he did and what, consciously or unconsciously, was his reason for doing so.'

#### Burden of Proof

375. Where the employee has less than the requisite continuous service to claim ordinary unfair dismissal, as in the case before us, he or she will acquire the burden of showing, that the reason for dismissal was an automatically unfair reason on the balance of probabilities: ***Smith v Hayle Town Council 1978 ICR 996, CA***. EAT in ***Ross v Eddie Stobart Ltd EAT 0068/13*** confirmed that the same approach applies in whistleblowing claims.

#### Drawing inferences.

376. Given the need to establish a sufficient causal link between the making of the protected disclosure and the act of dismissal, a Tribunal may draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In ***Kuzel v Roche Products Ltd*** Mummery LJ that a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.
377. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA***: '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.

#### Detrimental Treatment

378. **Ministry of Defence v Jeremiah 1980 ICR 13, CA**, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage'.
379. House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**. Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. It is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment.
380. **Agoreyo v London Borough of Lambeth [2017] EWHC 2019 QB**. Case **confirming** that suspension is not neutral in that it "*inevitably casts a shadow over the employee's competence*"
381. A worker or agent may be personally liable for the dismissal of an employee or worker as a detriment under S.47B(1A): **Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA**.
382. Section 47B ERA provides:
- (2) ...this section does not apply where-
- (a) the worker is an employee, and
- (b) the detriment in question amounts to a dismissal ( within the meaning of Part X)"

### Causation

383. In order for liability under S.47B to be established, the worker must show that the detriment **arises** from the act or deliberate failure to act by the employer: **Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT**.

### Burden of Proof

384. Section 48 (2) of the Act provides:
- "48. Complaints to employment tribunals
- ...
- (2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
385. **Court of Appeal in NHS Manchester v Fecitt [2012] IRLR 64**, the tribunal must determine whether the protected disclosure in question materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower

### Time Limits - detriments

386. S.48(3)(a) ERA provides that;(3)An employment tribunal shall not consider a complaint under this section unless it is presented(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

### Reason for dismissal

387. ***Waters v Stena Houlder Ltd EAT 145/94*** : and ***Williams v Leeds United Football Club 2015 IRLR 383, QBD***, employer changed reason for dismissal during the notice period.

### Wrongful Dismissal

388. The Tribunal has jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.
389. The test to be applied in such a claim is not whether the employer had a *reasonable belief* upon reasonable grounds that the employee had committed an act or acts of gross misconduct but, rather, it requires the Tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her.
390. The Tribunal is required to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place.
391. The Tribunal must then go on to consider, having reached conclusions as to what *in fact* took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice: ***Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15*** and ***Cameron v East Coast Mainline Company Ltd UKEAT/0301/17***.

### Conclusions and Analysis

#### First Alleged Protected Disclosure : 7 and circa 15 October 2019

##### Disclosure of information : 7 October 2019

392. The claimant on the 7 October 2019 did not make a bare allegation against Mr Cook. The claimant along with Ms Watson, disclosed to Ms McLoughlin facts. She set out factually what had happened to her personally and repeated this within the written statement which she then provided, at the request of Mr McLoughlin: ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT***.
393. The verbal communication and the written statement amount the Tribunal conclude, to a disclosure of *information*.

##### Disclosure : 15 October 2019

##### Disclosure of information

394. The claimant raised the issue over the alleged sexual harassment with Mr McLoughlin again, on or around 15 October 2019. The claimant was unhappy about what action the respondent had taken. The nature of this disclosure was different. The claimant was not, as the Tribunal have set out in its findings of fact, disclosing information about what had happened, she had already set that out in her written statement of the 7 October 2019. She he was now raising with Mr McLoughlin her belief that the incident should be reported to the Police, that the respondent had a duty to protect others and that sexual harassment was a crime.
395. The claimant the Tribunal conclude, was on this occasion expressing an opinion



namely that the failure to report the conduct of Mr Cook was serious and that the health and safety of future co-workers of his, were at risk. However, the Tribunal have gone on to consider whether the communication of this information on 15 October 2019, should be considered alongside what had been disclosed on the 7 October 2019 rather than viewed in isolation. On balance, considering the proximity in time of these disclosures, that they relate to the same incident and were made to the same person, the Tribunal conclude that it would be appropriate to do so, applying the guidance in **Norbrook Laboratories (GB) Ltd v Shaw 2014** (as above).

396. The Tribunal therefore conclude that considering the discussion of the 15 October 2019 alongside the information disclosed to and via Ms McLoughlin on 7 October, and the written statement of the same date, it was a disclosure of *information* for the purposes of section 43B ERA.

#### **Manner of disclosure**

397. Pursuant to section 43C (1)(a) ERA, the information was disclosed to the claimant's employer.
398. The respondent submits that the verbal disclosure on 7 October 2019 was not made to Mr McLoughlin and points out that the list of issues identifies that the alleged disclosure was made to him.
399. The claimant's own case is that she never spoke to Mr McLoughlin on 7 October 2019, he spoke with Ms Watson alone. There is no dispute however, that what was conveyed to Ms McLoughlin was in turn passed on to Mr McLoughlin and it is not alleged that there was any instruction by the claimant not to communicate to him the serious matter which she had raised with his co-director.
400. A 'whistle-blower' may communicate a disclosure via an intermediary, whether that is an HR advisor, through a solicitor or fellow member of the management team. It is not alleged that the claimant had indicated that she did not want the disclosure to be communicated to the Managing Director and it was in the event, disclosed to him the Tribunal conclude, on her behalf by Ms McLoughlin.
401. Further the claimant set out as directed by Mr McLoughlin, what had happened in her written statement and there is no dispute that the statements were collected for and handed over to Mr McLoughlin.

#### **Reasonable belief in the wrongdoing**

##### **Criminal offence**

402. What precisely word for word was said to Ms Helen McLoughlin on 7 October 2019 is not clear. However, as a minimum it is not in dispute that what she was told was that there had been inappropriate touching involving the claimant and two other staff, Ms Rhian and Ms Boyes by Mr Cook .
403. Further the witness statement the claimant provided on 7 October, while it dealt only with her personal experience, and makes no reference to the experiences of other staff , clearly refers to inappropriate touching and a belief that she had been sexually harassed.
404. The claimant had also expressly stated during the 15 October discussion, that she considered this to be a criminal matter.

405. The respondent submits that the grievance the claimant raised was about sexual harassment which is an allegation under the Equality Act 2010 but not a criminal offence. The Tribunal do not accept those submissions. The allegation concerned touching without consent which the claimant clearly considered to be sexual and which caused her distress.
406. Whether or not however, it would amount to a criminal offence and would be treated as such by the Police or CPS is not the issue. What is relevant is whether the claimant held a reasonable belief that her disclosure tended to show such malpractice, taking into account her individual personality and circumstances.
407. The Tribunal conclude that the claimant did genuinely believe that the information she disclosed amounted to a criminal act. That she believed this to be the case is also supported by the Tribunal's finding that she contacted the Police and spoke to them about it a few days afterwards and her comments to Mr McLoughlin on 15 October.
408. The Tribunal have gone on to consider whether that belief was *reasonable* and whether there was some objective basis for it: **Korashi v Abertawe Bro Morgannwg University Local Health Board 2012.**
409. The Tribunal conclude that there was some objective basis for this belief. Mr McLoughlin himself considered that the statements; "*constituted clear evidence of sexual harassment*". The Tribunal therefore conclude and that her belief that the information she disclosed, both to Mr and Ms McLoughlin on 7 and 15 October 2019 tended to show that a criminal offence had been committed, amounted to a reasonable belief.
410. The Tribunal has little difficulty in finding that a disclosure about sexual harassment would qualify as a disclosure about a criminal offence and that based on the evidence, the claimant held a genuine and reasonable belief that such an offence had been committed against her and her two colleagues by Mr Cook.

### **Health and Safety**

411. The Tribunal are satisfied that the claimant did believe that the information she disclosed on 7 October 2019 tended to show that the health and safety of an individual had been endangered, namely her own emotional wellbeing.
412. The claimant does not allege that she personally mentioned what had happened to Ms Boyes or to Ms Rhian in the meeting with Helen McLoughlin but had explained what had happened to her personally. That is consistent with her statement (p. 410) of the 7 October 2019 which does not deal with the conduct or impact on any of her colleagues and nor does that information suggest or "*tend to show*" anyone else is at risk.
413. Applying an objective test; it was reasonable the Tribunal conclude for the claimant to believe that the information that she disclosed to Mr McLoughlin via Helen McLoughlin and in the written statement she had prepared on 7 October 2019, tended to show that the health and safety of an individual, namely herself was endangered.
414. The Tribunal are satisfied that the claimant held a reasonable belief, that her discussion with Mr McLoughlin on or around 15 October 2019, when she spoke with him about the sexual harassment by Mr Cook and that she felt he should be taken "*off the streets*", was about her concerns for the health and safety of other women Mr Cook may work with in the future.

**Concealment of criminal offence and of health and safety issues**

415. The claimant alleges that the criminal offence and/or endangerment to the health and safety of other women, had been deliberately concealed because of the concerns expressed by Ms Watson.
416. As set out in the Tribunal's finding of fact, Pauline Watson spoke to Ms McLoughlin on 7 October 2019 and informed her that she had not mentioned what had happened to her daughter to the respondent, because she did not want her husband to find out. The claimant complains that this was disclosing information that tended to show a criminal offence and endangerment to health and safety had been deliberately concealed. However, the claimant does not allege that she personally disclosed this information to Ms McLoughlin. This was a disclosure made by Ms Watson.
417. In her statement provided to Mr McLoughlin on 7 October 2019, (p. 410) the claimant does not mention any failure to report Mr Cook's behaviour by Ms Watson, that statement is concerned only with a disclosure about the incidents she experienced.
418. When the claimant spoke with Mr McLoughlin on the 15 October, as set out in the Tribunal's findings of fact, while she expressed her view that the matter should be reported to the Police, she did not allege that the respondent was deliberately concealing the criminal offence or the risk to the health and safety of any individuals. She may have thought this, but she did not disclose this to Mr McLoughlin at the time, indeed she was content that he was dealing with it.
419. If the claimant believed that what she was saying did tend to show information about the deliberately concealing of information about such malpractice, the Tribunal do not find objectively that this was a reasonable belief for her to have. The claimant expressed a view that the offence should be reported, she did not allege a *deliberate* concealment by the respondent. There is a distinction between not reporting something especially where there is no requirement to do so, and the deliberately concealing or hiding of information.
420. The Tribunal do not find that the claimant by this stage, after speaking to the Police, believed that there was a legal obligation on the respondent (or indeed on her or her colleagues) to formally report the incident to the Police. The claimant did not pursue the matter herself with the Police, which indicates that she did not consider that she was legally obliged to do so. In any event, the Tribunal find that it would not have been objectively reasonable for her to believe that there was a legal obligation to report the incident, she does not allege that she had been told this when speaking with the Police and there is, the Tribunal conclude, in fact no such legal obligation. Neither counsel submits that such a legal obligation exists.
421. The word concealment is concerned with the action of hiding something or preventing it from being known. There is a difference between believing there is a moral obligation to report something and believing that information is being concealed or hidden. The Tribunal do not find that it was reasonable for the claimant to believe that the disclosures in October 2019 tended to show that the respondent was deliberately concealing information which tended to show malpractice in relation to health and safety or of a criminal offence.

**Public Interest**

**Criminal Offence**

422. The Tribunal conclude that the claimant did believe and that it was objectively reasonable for the claimant to believe, that the disclosures she made, taken as a whole in October 2019, were made not only in her own interests but in the public interest.
423. The incident may have only affected a small number of women in the respondent's workplace however, it is important to consider the nature of the wrongdoing and of the interests of those affected: *Dobbie v Felton*.
424. The Tribunal have reminded itself of the guidance of Lord Justice Morris's in *Ellis v Home Office 1953 2 QB 135, CA*, where he commented on the public interest in justice being seen to be done.
425. The potentially criminal nature of the offence is such that the Tribunal consider that it was objectively reasonable for the claimant to believe that there was a public interest in enforcing such laws to protect women in the workplace, otherwise there would be no public interest in disclosing any violent or sexually aggressive crime unless the individual could identify other victims in sufficient number. That would the Tribunal consider, be contrary to the intended purpose of the legislation. The nature of the wrongdoing is compelling when determining in this case, whether the belief in the public interest was reasonably held.

#### **Health and Safety**

426. The Tribunal are satisfied that the claimant held a reasonable belief, that her disclosures in 2019 about a breach of health and safety were made in the public interest, taking the October disclosures as a whole. She expressed an opinion that Mr Cook should be taken "*off the streets*", and that which must be considered in the context of and alongside, what she had disclosed earlier in October, that the health and safety of other women may be endangered by Mr Cook .

**The Tribunal conclude that the October disclosures taken together, qualified as a protected disclosure pursuant to section 43A ERA.**

#### **Alleged Protected Disclosure 2: 13 March 2020 letter**

##### **Disclosure of information**

427. The relevant part of the email of the 13 March 2020 sent to Mr McLoughlin, which the claimant relies upon is the first paragraph. It contains an allegation essentially about a failure to provide support to the claimant. It refers back to the alleged sexual harassment and the impact of that on her and the lack of support she alleges she received from the respondent. It sets out *facts* about the impact on her own emotional wellbeing.
428. The Tribunal do not consider that it is appropriate to consider the October 2019 disclosures as part of this disclosure. It is not only the length of time between the disclosures which the Tribunal considers relevant but what the claimant is disclosing. While this disclosure relates to the events of October 2019, it is of a different nature. The claimant is complaining about what has happened after the alleged harassment; the lack of support and how it has left her feeling, rather than disclosing facts about the actual incidents.
429. In terms of information however, while the Tribunal find that the email discloses information tending to show that the health and safety of any individual has been, is being or is likely to be endangered, the Tribunal conclude that it does not disclose information that a criminal offence has been committed. While it refers to

the past alleged sexual harassment, it does no more than refer to it in those broad terms. It does not set out any facts about what took place.

#### **Manner of disclosure**

430. It is not in dispute that the disclosures were made pursuant to the claimant's employer pursuant to section 43C (1)(a) ERA.

#### **Reasonable belief in the wrongdoing**

431. The claimant alleges that she had a reasonable belief that the disclosure tended to show that a criminal offence had been committed or that the health and safety of any individual had been, is being or is likely to be endangered and/or that information has been, is being or is likely to be concealed.

#### **Criminal offence**

432. The claimant refers back to the alleged sexual harassment in this email and treating this disclosure as the Tribunal considers it appropriate to do, as a separate disclosure, the Tribunal did not consider that it was objectively reasonable for the claimant to believe that what she was doing in this specific email was disclosing that a criminal offence had been committed. The reference to what had occurred within this email amounts to no more than an *allegation* of sexual harassment devoid of any detail or facts about what had happened.

#### **Health and Safety**

433. The Tribunal conclude that it is objectively reasonable for the claimant however to believe, and the Tribunal accepts she did believe, that the information disclosed tended to show that the health and safety of an individual was endangered or likely to be endangered, namely the claimant's own health and safety. The information includes reference to the stress she was suffering at that time and how she felt degraded by what had taken place.

#### **Concealment of criminal offence and of health and safety issues**

434. The claimant alleges in this email that, "we were not to discuss it further", in respect of the alleged sexual harassment which took place. However, while the information complains of a lack of support, the Tribunal do conclude that it was objectively reasonable for the claimant to believe at the time, that the information disclosed tended to show that the respondent was deliberately concealing information tending to show that a criminal offence had been committed or that the health and safety of any individual had been/was being /likely to be endangered. The claimant does not assert within this email that the respondent was aware of the alleged endangerment/impact on her health and was seeking to deliberately conceal it and neither does she assert in this email, that the respondent was deliberately concealing information tending to show criminal activity.
435. The Tribunal conclude that staff being told not to discuss something which has happened in the workplace in the past and which the respondent considers has been dealt with, is not the same as deliberately *concealing* or hiding information and further, the Tribunal do not consider that it was objectively reasonable for her to believe that the information she disclosed tended to show that was or was likely to happen. In any event, for the reasons set out below the Tribunal conclude that it was not objectively reasonable for the claimant to form a belief that this disclosure was in the public interest.

#### **Public interest**

### Health and Safety

436. The claimant accepted under cross examination that her belief about what she was disclosing in this email, did not extend beyond her two colleagues and that it was about: “..our health, us within the office, no one dealt with it”
437. The disclosure is however we conclude, concerned with the welfare predominantly of the claimant; “*This left me feeling degraded*”.
438. Unlike the October disclosures which were concerned with the wider impact on other women of the risks such behaviour posed, the nature of the alleged wrongdoing in this disclosure is very much about the impact on the claimant only. While she complains about the lack of counselling offered to her and to her colleagues and lack of communication, she does not allege that their health and safety has been “*endangered*” or is likely to be. The closest it gets to stating this is that they were made to feel that it was their “*fault*” but in terms of endangerment to emotional welfare, the only information is about the impact on her wellbeing.
439. This is a private interest which the claimant is concerned with and it is about how she feels unsupported and the stress which she has personally been experiencing since September/ October 2019.
440. ***Babula v Waltham Forest College***: “*where the interest involved was personal in character. Such an interest does not change its character simply because it is shared by another person*”. The interest here is very much about the impact on the claimant’s own emotional health. It is private in nature and while that is not to diminish its importance, ‘whistleblowing’ protection is concerned with what is in the public interest.
441. The paragraph in the claimant’s witness statement setting out her evidence in chief (para 22) which deals with this disclosure makes a reference only to herself , there is no expression of any belief held by her at the time that it concerned or was relevant to anyone else
- “ ***I began to get stressed at the slightest things***”, ***I believe I wasn’t given the time to digest what had happened***”, “***I found myself crying all the time***”.
442. The Tribunal has reminded itself that it is not for it to substitute its view of whether something is in the public interest and the claimant may be wrong about there being a public interest while still genuinely believing that it was, however, it must be *objectively* reasonable for her to form that belief. The Tribunal is not persuaded that the claimant actually held that belief and in any event, the Tribunal find that it was not objectively a reasonable belief to have about the information she was disclosing.

### Criminal Offence

443. If the Tribunal is wrong about whether this email includes a disclosure of information about a criminal offence having been committed, it has gone on to consider the public interest requirement. While there is reference to the past criminal offence, that occurred circa 5 months before this disclosure. The disclosure the Tribunal find is not being made in the public interest, it is not disclosing information which serves a public interest. While a disclosure does not have to raise matters which the employer was not previously aware of, what is relevant is what interests are served by the disclosure. The interest served the Tribunal find is very much as set out above, about the claimant’s own interests and the impact of the conduct she was subjected to since the harassment took

place, rather than the act of harassment itself. The interest served by this disclosure is very much about how the claimant has coped and the lack of support she had received.

444. The Tribunal has reminded itself that it is not for it to substitute its view of what is in the public interest but objectively the Tribunal find it was not reasonable for the claimant to believe that this disclosure was serving a public interest. The reference to the past alleged sexual harassment in this disclosure was only raised in the context of her own emotional wellbeing.

#### **Deliberately concealing malpractice**

445. The same issues apply with respect to the public interest element of the information disclosed about the claimant and her colleagues being told not to discuss the previous sexual harassment. The disclosure is concerned with a private interest, namely the claimant's and the impact on her personally of the alleged concealing of what had taken place. The Tribunal is not persuaded that the claimant believed that she was making this disclosure to serve any interest broader than her own and the impact the way this issue was dealt with on her own wellbeing.
446. Nowhere within her evidence in chief when commenting on this disclosure, does she express any view that it served any interests outside of her own.

**The Tribunal conclude that the 13 March 2020 disclosure was not a protected disclosure pursuant to section 43A ERA.**

#### **Detriment 1 – suspension – 14 March 2020**

##### **Detriment**

447. The respondent does not seek to argue in its submissions that the act of suspension is not a detriment. The Tribunal accept that it is a disadvantage: ***Ministry of Defence v Jeremiah 1980 ICR 13, CA***. It is not necessary for there to be physical or economic consequences to the employee for it to amount to a detriment.
448. The claimant complains about how upset she was about the act of suspension. The courts have recognised that suspension is not neutral in that it *"inevitably casts a shadow over the employee's competence"* **Agoreyo v London Borough of Lambeth [2017] EWHC 2019 QB**.

##### **Time Limit**

449. As a separate act of detriment, the claim in respect of the suspension on 14 March 2020, is brought within the time limits prescribed by section 48 (2) ERA.

##### **Knowledge**

450. There is no issue that Mr McLoughlin had knowledge of all the October 2019 disclosures when deciding to suspend.

##### **Causation**

451. It is alleged that the act of suspension was a result of the disclosures in October 2019 and the disclosure on the 13 March 2020, in that one or both materially influenced the decision to suspend.

**October 2019 disclosures**

452. When the disclosures were made in October 2019, the respondent invites the Tribunal to consider how the respondent reacted. The Tribunal accept that Helen McLoughlin was unhappy that the matters had not been brought to her attention before and that swift action was taken in dismissing Mr Cook. So swift indeed that the process of dismissing Mr Cook the claimant alleges, was carried out unfairly. Nonetheless, the respondent took the matter seriously and acted on it.
453. The claimant is critical of the respondent's failure to report the matter to the Police. The Tribunal do not accept that as a matter of law there was a legal obligation to do so, the respondent was not concealing information from a Police enquiry, it merely took no steps itself to report it. The Tribunal also take into consideration that there appeared to be genuine concern about the welfare of others, namely Ms Watson and her daughter and the ramifications for the family of this becoming known to Mr Watson. It was open to the claimant if she felt so strongly about it, to report it herself but she chose ultimately not to do so but does not allege that she was put under any pressure or coercion by the respondent.
454. The suspension itself arose almost 5 months later. The claimant herself in her evidence does not allege that the suspension was because she had raised the disclosures in October 2019 but because of the email of the 13 March 2020.
455. The Tribunal conclude that the disclosures in October 2019 did not materially influence the decision to suspend the claimant and in fact those specific disclosures, played no part in the decision.

**13 March 2020 disclosure**

456. The 13 March 2020 disclosure the Tribunal conclude did **not** amount to a protected disclosure but nonetheless the Tribunal have gone on to consider to what extent it influenced the suspension.
457. The claimant's own case is that the principal reason for the decision to suspend as set out in the above findings of fact, was the criticisms the claimant made about Ms McLoughlin in the 13 March email.
458. The Tribunal conclude that it was those criticisms of Ms McLoughlin that resulted in the suspension and were the principal reason for that decision.
459. However, Mr McCloughan's admitted that the reference to the allegation of sexual harassment was something he could not understand. He maintained that the main reason he decided to suspend and why he was so upset about the email was because the claimant had failed to speak to him about the telephone issue and he considered that the email of the 13 March indicated that she was not going to "come clean" about it. He was also clearly unhappy about the comments about another colleague Jayne in that same email.
460. The Tribunal conclude that the reference to the past alleged harassment in the email of the 13 March was, given Mr McLoughlin's comment that he believed that she had mentioned this to make things difficult for him, an influence on his decision to suspend her, in that it was more than trivial. However, it was not the Tribunal find the sole or principal reason. The Tribunal consider that the comments about Ms McLoughlin were the principal reason. The claimant gave evidence that she herself believed that Ms McLoughlin was so upset about what the claimant had written about her in that email, that Ms McLoughlin had written the letter of suspension herself and sent it out in Mr McLoughlin's name.



461. Other factors however played a part and were an influence, including her criticisms about other staff.
462. Mr McLoughlin was, the Tribunal conclude, likely to be additionally aggrieved because he had been prepared, the Tribunal conclude, to overlook the phone bill issue. He then received an email from the claimant containing highly critical comments, in particular about Ms McLoughlin's management style.

**The Tribunal conclude that as the 13 March 2020 email was not a protected disclosure, although its contents did materially influence the decision to suspend (although not the sole or principal reason), the claim under section 43B ERA is not well founded.**

**Alleged Protected Disclosure 3 and 4 : 29 March 2020**

**Disclosure of information**

463. The email of the 29 March (p205/206) contains allegations however, it also sets out facts. With regards to the fraud issue, it sets out the basis of the factual context behind the allegation. It is not therefore a bare allegation. Similarly, the claimant alleges a breach of GDPR but also explains the context, namely the failure to have VPN and the risk that information held on her phone may be accessed.
464. The Tribunal concludes that the content of the email of the 29 March 2020 amounts to a disclosure of *information*.

**Reasonable belief in the wrongdoing**

465. The claimant alleges that she had a reasonable belief that the disclosure tended to show the commission of a criminal offence and breach of a legal obligation in connection with fraud and the GDPR breach and we shall address each in turn;

**O2 Credit**

466. This disclosure was set out in the email of the 29 March 2020 which was marked '*without prejudice*'. No submissions were made by the respondent regarding the without prejudice nature of the email in terms of its admissibility or the relevance this may have to claims that it was made in the public interest.
467. It is alleged that the disclosure was about fraud, namely that the respondent while accepting a credit from O2, still maintained that the claimant was responsible for misusing her phone and thus the credit was obtained by fraudulent means.

***Criminal offence section 43 B(1)(a)***

468. The claimant refers in the email to the respondent defrauding O2 by accepting their 50% credit ;"*and then blaming me whilst you know you failed as a company to put VPN security on my temporary mobile phone...you cannot take the credit and then blame me !*"
469. The claimant makes express reference to the criminal offence of fraud and the Tribunal has reminded itself that to qualify for protection, it is not relevant whether or not the belief turns out to be wrong: ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14.***
470. The issue for this Tribunal is to consider whether the claimant not only believed that it amounted to fraud but reasonably believed that the information tended to

show that a criminal offence had been committed, was going to be or was likely to be, even if the information does not in the end stand up to scrutiny.

471. Not only is it relevant to take into account the worker's personality and individual circumstances, the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made. ***Darnton v University of Surrey 2003 ICR 615, EAT:***
472. The claimant knew that O2 had not accepted full responsibility, hence she refers in this email, to the credit for only 50 % of the bill. Nowhere within this email does she state that the claimant understands or otherwise asserts, that O2 had accepted full responsibility for the bill.
473. In answer to a question from the Tribunal, the claimant accepted that it was "*perfectly possible*" for the respondent to come to the conclusion that the claimant had misused the phone while at the same time raising with O2 their failure to stop the data usage.
474. The Tribunal do not accept therefore that the claimant failed to understand that even if O2 had agreed to some credit on the bill, that did not of itself exonerate her from any responsibility. The claimant is an intelligent, professional person, an experienced finance manager and a qualified auditor and Project Accountant, she must have appreciated that negotiating some credit with a supplier for some discount in these circumstances was not or was not likely to amount to fraud.
475. The claimant does not within the 29 March 2020 email allege that the respondent had at any point represented to O2 that they believed O2 were 100% responsible or that there was no culpability on the part of the phone user or that the data usage was not in some way genuine, that is not what the claimant in this email alleges the respondent had represented the position to O2 to be.
476. The Tribunal take into account the claimant's professional background and conclude that she would be aware that negotiations over credits with suppliers is not unusual and may in part be based on goodwill and maintaining the ongoing relationship and further, that the offer of a 50% credit does not mean that the respondent or O2 have done so on the understanding that the claimant was absolved from any responsibility.
477. While the claimant may have felt it was unfair to hold her responsible for the bill, the Tribunal conclude that she did not genuinely believe that to accept a credit in those circumstances amounted to a criminal offence.
478. The Tribunal has reminded itself of the low threshold for belief: ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** however, the reasonableness test clearly requires the belief to be based on some evidence. unfounded allegations are not enough to establish a reasonable belief.
479. The Tribunal do not accept that the claimant had a genuine belief in what she was alleging and thus it was not a reasonable belief.
480. Indeed the alleged deception is as against O2, which would mean that the claimant believed that O2 should not have provided any credit because it was not responsible. This is not what the Tribunal understands the claimant's position to be. However, the claimant does not in any event, set out in this email what it is she alleges was said by the respondent to O2 which amounts to deception which lead O2 to offer the 50% credit. She does not allege that the respondent had

misrepresented to O2 that it believed that the claimant had no responsibility for the data charges or that the charges bills were otherwise not genuine.

481. Indeed the claimant appears to be alleging that she believed that the mere acceptance of the credit was an act of deception, while also seeming to allege that she could not herself be culpable ( because the respondent had not put a VPN on her phone).
482. It is of course perfectly possible for there to be fault both by O2 and by the claimant, something which she accepted in response to a question from the Tribunal.
483. In terms of whether such action was 'likely' to amount to fraud, the Tribunal conclude that the claimant did not genuinely believe and even if she did, it was not reasonable for her objectively to believe that it was *probable or more probable than* not, that a criminal offence of fraud would be committed in these circumstances : ***Kraus v Penna plc and anor 2004.***
484. The claimant had contacted the Police about the alleged sexual harassment matter but she had not contacted the Police although she had threatened to do so. She did not do so the Tribunal conclude because she understood that what she was alleging was not fraud or deception and her threats to do so, the Tribunal consider were made when she was extremely upset and probably to gain some leverage in light of what she considered was her inevitable departure from the business.
485. The Tribunal conclude that the disclosure amounts to nothing more than an unfounded and indeed spurious allegation of a criminal act which she did not herself genuinely believe the information tended to show.
486. The Tribunal conclude that the claimant's anger at being suspended for the issue over the phone, led her to take an extreme and unjustifiable position when making allegations about the respondent committing a criminal offence.

***Legal obligation : section 43 B(1)(b)***

487. There is nothing in the claimant's witness statement or claim form or the disclosure itself which indicates that the claimant had a particular legal obligation in mind. It remains unclear and was not addressed in submissions, whether this is in fact the same allegation of a criminal offence or whether the claimant is alleging that the respondent owed a contractual obligation to O2 which it had breached outside of any criminal liability. The legal obligation, even in broad terms is not identified.
488. Section 43B (1)(b) is intended to cover something other than a criminal offence which is dealt with specifically within section 43B(1)(a) ERA.
489. The claimant did not identify within her evidence in chief what legal obligation she considered had been breached and indeed does not even use the term legal obligation (w/s para 30).
490. The list of issues prepared by counsel for the claimant did not identify what the legal obligation was that it alleges had been breached, whether this was contractual or if not, what other type of obligation is being relied upon.
491. It was not put to the respondent's witnesses that there was another legal obligation outside of the criminal offence of fraud, which they had breached by

securing the credit from O2 and pursuing disciplinary action against the claimant for the misuse of the phone.

492. Mr Howlett did not address this specific point in his submissions.
493. Therefore, the conclusion of the Tribunal is that the information did not disclose in the reasonable belief of the claimant, information tending to show a breach of a legal obligation outside of the alleged act of criminal activity i.e. fraud. If the claimant believed that there was some other legal obligation, she has failed to identify it to this Tribunal and the Tribunal find that objectively in any event, given that the email of the 29 March 2020 fails to refer to any other legal obligation, it would not objectively reasonable for her to hold that belief.
494. The Tribunal conclude that the claimant has not satisfied the requirement in S.43B(1) of establishing that she believed at the time of the disclosure that the information in it tended to show that someone had failed, was failing or was likely to fail to comply with a legal obligation.

***Information tending to show criminal offence or breach of legal obligation has been or is likely to be concealed: section 43 B(1)(b)***

495. This category of malpractice concerns cover-ups and suppression of evidence and so protects not only disclosures of substantive wrongdoing and malpractice but also information tending to show that there has been or is likely to be a cover-up or deliberate concealment of that information.
496. The claimant alleges in her email that she had been sent an email advising her to “*not advise O2 of this fraud*”.
497. The claimant does not identify in her evidence before this Tribunal or in her claim, the email she had been sent which included those terms i.e. “*not to advise O2 of this fraud*” which would be tantamount to an admission of criminal activity by the respondent.
498. The claimant does not identify in this disclosure or indeed at any stage in her evidence such an email.
499. No such allegation or document was put to the respondent’s witnesses.
500. There is an email which the Tribunal considers the claimant may be referring to on 18 March 2020 (p. 187) which was sent after the suspension and instructs her not to contact or attempt to “*contact or influence anyone connected with the investigation in any way*”.
501. The EAT has acknowledged that determination of the factual accuracy of the worker’s allegations based on the facts understood by the worker, will, in many cases, be an important tool in helping to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure: ***Darnton v University of Surrey***.
502. It is extremely difficult to see how a claimant can reasonably believe that an allegation tends to show that there has been a relevant failure if he or she believes that the factual basis of the allegation is false. The Tribunal conclude that at the time of sending the email the claimant knew that it was not true that she had been told “*not to advise O2 of this fraud*”. Nowhere has the claimant identified such an email. The Tribunal conclude that the claimant has misrepresented and embellished the

instruction about not contacting people during the investigation, by including within her allegation that there had been express reference to not contacting O2 “ *about this fraud*” to support her allegation of concealment.

503. The Tribunal has concluded that it was not reasonable for the claimant to have believed that the respondent was potentially in breach of a legal obligation or that it had committed or was likely to have committed a criminal offence (or breach of a legal obligation) and the Tribunal conclude that the claimant did not reasonably believe or otherwise it was not objectively reasonable for her to believe therefore that instructions not to contact those connected with the investigation while it was being investigated, was information tending to show that there has been or is likely to be a cover-up or deliberate concealment of information tending to show that type of malpractice.
504. The Tribunal conclude that the claimant did not have genuine or objectively reasonable belief that the information within her email tended to show *that a criminal offence or breach of legal obligation has been or is likely to be concealed: section 43 B(1)(b)*.

### **Public Interest**

505. Had the claimant reasonably believed that the information tended to show that a criminal offence had been or was likely to be committed and/or information tending to show that malpractice, was being deliberately concealed, the Tribunal would have concluded that it would be reasonable to believe that the disclosure of a crime was in the public interest, that justice must be seen to be done, regardless of the number of individuals impacted by it. This is despite the fact that the claimant was the Tribunal conclude, motivated principally by the impact on her personal situation and in particular what she saw as ‘defamation’ her own character.
506. However, the Tribunal have concluded that it was not reasonable for the claimant to believe and nor did she believe that a criminal offence had been committed or was likely to be and therefore the Tribunal conclude that she did not believe and in any event it was not objectively reasonable for her to believe, that a disclosure which only affected how she was being treated during this disciplinary process, was a matter which was in the public interest. The claimant does not seek to set out in her evidence nor is it dealt with in submissions, how outside of any criminal offence, she believed or why would objectively it would be reasonable to believe, there was any public interest in the disclosure.

### **Causation**

507. Issues of causation are dealt with below.

### **VPN**

#### **Reasonable belief in the wrongdoing**

#### ***Criminal offence section 43 B(1)(a)***

508. The claimant alleges that in her email of the 29 March 2020 she disclosed to Mr McLoughlin and Mr Hoffbrand that they failed to implement a VPN on her mobile phone and so failed to protect personal data.
509. The email itself alleges that; “ *...I have access to the companies bank statements, I email you and Sam these statements every morning – it’s like a major security*

*breach GDPR and for you not to place the VPN security on my temporary mobile phone Veasey as you are aware all my private and confidential work emails are sent to my company mobile – are your customers, clients, banks aware that you are breaching their security too by not securing your own?”*

510. The claimant's evidence is that she had contact with The Information Commissioner (ICO) and was told that not putting a VPN on her phone was a data breach. There is no evidence of any messages exchanged or detail about what she had been told by the ICO. It is not alleged that any action was taken by the ICO.
511. The Tribunal were referred to the General Data Protection Regulations and Data protection Act 2018 in the list of issues but not to any specific provision of the legislation. There was no attempt to set out which provision of the Regulations or Act had been breached either within the list of issues or at any stage during the evidence or in submissions.
512. The Tribunal were not provided with a copy of the relevant Act or Regulations and nor did the claimant in her evidence or counsel in submissions, refer to which provision it is alleged was in fact breached or the claimant had been advised or otherwise believed was breached by the failure to have a VPN set up on her phone.
513. Counsel for the claimant submits that it does not matter whether the claimant had not understood what a VPN is and how it works, that it is irrelevant because she reasonably believed that the employer had failed to take proper steps to protect data and that it was in breach of the GDPR. However, that it is ignore an important step in assessing belief and that is the reasonableness of it.
514. The Tribunal have again considered ***Darnton v University of Surrey 2003 ICR 615, EAT***: that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made.
515. The claimant the Tribunal accept had been in contact on 20 and 27 March 2020, prior to this disclosure with the ICO. What the Tribunal do not have is evidence of what the claimant had been told. She alleges she was told that the failure to have a VPN on her phone was a “*major security breach*” and given her admitted lack of understanding of what VPN is and what it is used for, her belief is based on what she alleges she was told by the ICO. It is relevant for the Tribunal to make a determination on whether she was genuinely told that not to have VPN constituted a breach therefore when assessing the facts as reasonably understood by the claimant at the time.
516. While the Tribunal take judicial notice that failure to secure personal data may amount to a breach of the GDPR and/or DPA, it does not have detailed knowledge of the legislation and nor did counsel for the claimant assist by taking the Tribunal to the legislation. Counsel does not in his submissions seek to establish by reference to the legislation that in fact such a failure amounts to a breach in law which may be a useful tool to assist the Tribunal in determining the genuineness of the belief the claimant held, whether or not it was correct.
517. The Tribunal can make no determination on the evidence and submissions as presented, whether her alleged belief was legally correct and the burden of proof rests with the claimant to establish that she made a protected disclosure.
518. Not only has the claimant for reasons which the Tribunal consider unsatisfactory, not disclosed the advice/ information on which she alleges she formed her belief, the Tribunal has not been taken to any provisions of the GDPR or any information

about VPN to assist it in forming a view about what the claimant may have been advised. The Tribunal are not Information Technology experts.

519. The claimant herself does not profess to have knowledge outside of what she was told by the ICO about VPN, indeed her evidence was that she did not know about IT and was not even sure what the initialisation of VPN represented .
520. The Tribunal as set out in its findings of fact consider it reasonable to draw an inference adverse to the claimant from her failure to disclose or even set out in any detail in her evidence, what she had been told by the ICO. If the ICO had for example mentioned that VPN is an example of a way to secure data on a phone but it unlikely to amount to a breach of the GDPR not to have it, a belief that it would amount to a breach and a criminal offence would be unreasonable.
521. The Tribunal conclude that the claimant did not have a reasonable belief at the time that she made this disclosure that the failure to have a VPN, amounted to a criminal offence or that it was likely to. The Tribunal do not find the claimant's evidence about having been informed of this by the ICO to be credible in light of the evidence presented to this Tribunal . The claimant relies not on her own understanding because she admits she does not know about IT, but on information she alleges was supplied but which she has not disclosed or even addressed in anything other than the most general of terms in her evidence.
522. The Tribunal conclude that the claimant did not hold the belief which she alleges she did and even if she did , on the evidence presented to this Tribunal it does not find that it was objectively a reasonable belief. This is not about whether the belief turned out to be wrong, it is about the reasonableness in the first place of her holding that belief on the evidence presented to this Tribunal.

***Legal obligation : section 43 B(1)(b)***

523. The claimant relies upon the same evidence and breach of GDPR in respect of the allegation that she believed the information tended to show a breach of a legal obligation and for the same reasons set out above, the Tribunal conclude on the evidence available to it, that the claimant has not satisfied the burden of proof and established that establishing that she had a reasonable belief at the time of making the disclosure that the information in it tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation. An unfounded allegation is not sufficient.

**Public Interest**

524. Had the claimant reasonably believed that the information tended to show that a criminal offence had been or was likely to be committed and/or information was being concealed to that effect, than the Tribunal would have concluded that it would be reasonable to believe that the disclosure of a crime was in the public interest, that justice must be seen to be done, regardless of the number of individuals impacted. In any event, the possibility of disclosure of data belonging to a number of suppliers, creditors and employees, would have created an interest which was sufficient in number and given the nature of it, public to satisfy this part of the test.
525. However, the Tribunal have concluded that on a balance of probabilities', that it was not reasonable for the claimant to believe and nor did she believe that a criminal offence or indeed breach of a legal obligation had been committed or was likely to be and therefore the Tribunal conclude that she did not believe and in any event it

was not objectively reasonable for her to believe, that the disclosure, was a matter which was in the public interest.

**The Tribunal conclude that the disclosures were not protected disclosures within the meaning of section 43A ERA.**

### **Causation**

526. The issue of causation is dealt with below

### **Alleged Protected Disclosure 5: 17 March 2020**

#### **Disclosure of information**

527. The email in which it is alleged the disclosure was made, is dated 17 March 2020 timed at 14:03 (p. 182) and predates the above email of the 29 March 2020 however, in setting out the Tribunal's conclusions the Tribunal have adopted the same numbering and ordering of disclosures, set out in the agreed list of issues.

528. This email of the 17 March is brief consisting of essentially two short paragraphs.

#### **VPN**

529. With respect to the VPN issue it states; “ *phone bill whilst **there is no security on it and you have received the credit for half the bill is fraud***”. That is the extent of what is stated. There is no mention of VPN, there is no mention of data being at risk or of the GDPR or DPA.

530. The security could refer to the failure to secure the data usage. This email is sent prior to the claimant contacting the ICO.

531. The Tribunal do not find that the mere reference to *no security* on the phone, amounts to a disclosure of information. It is at most an allegation but of what, it is not clear.

#### **Fraud**

532. The Tribunal conclude that the content of this email in respect of the allegation about fraud is a disclosure of information. The claimant refers to O2 accepting liability and the credit being given, questions what she has done and expressly refers to fraud and deception. It contains sufficient facts to qualify as a disclosure of information.

#### **Fraud**

**Reasonable belief in the wrongdoing : *Criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b) and Information tending to show criminal offence or breach of legal obligation has been or is likely to be deliberately concealed: section 43 B(1)(b)***

533. The claimant alleges that she had a reasonable belief that the disclosure tended to show the commission of a criminal offence, breach of a legal obligation or that information tending to show such malpractice is being or is likely to be deliberately concealed



534. The Tribunal conclude that the same issues and reasoning as set out in respect of disclosure 3 and 4 above equally apply to its analysis of this disclosure and do not consider it is necessary to repeat them again here.
535. There is less information within this email but it contains the same allegation of fraud namely that O2 have given credit for 50% of the bill while the claimant has been suspended. However within this email the claimant is asking what the allegations are about her and the Tribunal consider that her lack of understanding or possession of the facts at this time, about what is being alleged, is a further factor which the Tribunal consider undermines the reasonableness of her alleged belief, subjectively and objectively, both in terms of the alleged disclosure of information tending to show malpractice in relation to a criminal offence breach of a legal obligation and concealment of information tending to show such malpractice.
536. The Tribunal conclude that the claimant did not have a genuine or objectively reasonable belief that the information within her email tended to show *the alleged malpractice*.

### **Public Interest**

537. The same factors and reasoning are relevant to the analysis of the reasonableness of the claimant's belief in the public interest in making this disclosure as are set out in respect of disclosures 3 and 4 above and for those same reasons, the Tribunal find that the claimant did not have a reasonable belief that the disclosure was in the public interest.

### **VPN**

538. **Reasonableness of belief: *criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b)***
539. The Tribunal concludes that there was no disclosure of information in respect of the VPN issue in this email however, for completeness, if it had found that it was a disclosure of information, for the reasons set out in relation to disclosures 3 and 4 it concludes that the claimant did not have a reasonable belief that the information contained within this email tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation or that a criminal offence had been, was being or was likely to be committed by it.
540. Further, as at the 17 March 2020, the claimant on her own evidence had not contacted the ICO, and although she refers to "*security*" she makes no mention of data or of what information she holds or accesses on her phone. There is no clarification of what she means by 'security' which at this stage the Tribunal conclude would be reasonably understood to be a reference to the cap on the data usage in connection with which O2 had given the discount and that objectively it would not be reasonable to consider that the information disclosed, tended therefore to show a breach as alleged in connection with the installation of VPN.

**The Tribunal conclude that the disclosure is not a protected disclosure within the meaning of section 43A ERA.**

### **Alleged Protected Disclosure 6: 28 March 2020**

### **Disclosure of information**

541. The claimant relies upon an email sent on 28 March 2020 (p. 202 to 204). The claimant in the list of issues refers to this as the same type of disclosure that was made in disclosure 5 above.

### **Information**

#### **VPN**

542. With respect to the VPN issue the email it states;

*“... admission of error by O2 for the data usage no being held on my temporary replacement phone or no security being placed on this phone by you...” ; and*

*“he had agreed with O2 that you would accept 50/50 liability for O2 not advising of the data usage being overused and Waystone not placing security on my temporary replacement mobile..”*

543. There is no mention of VPN, there is no mention of data being at risk or of the GDPR or DPA.
544. The security issue which is being disclosed, on any reasonably objective view of the email, is security in connection with the data usage and not the securing of personal data.
545. The Tribunal do not find that the mere reference to ‘no security’ on the phone with no further explanation or facts about what the security concerns, amounts to a disclosure of information. It is at most an allegation but of what it is not clear.

#### **Fraud**

546. The Tribunal conclude the email contains an allegation of fraud but also includes facts about the allegation, namely that O2 have agreed a “50/50 liability” for not advising about data usage being overused and yet the respondent is investigating the claimant about the “*extensive bill*”.
547. The Tribunal conclude that is a disclosure of information and not a mere allegation.

#### **Fraud**

**Reasonable belief in the wrongdoing : *Criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b) and Information tending to show criminal offence or breach of legal obligation has been or is likely to be deliberately concealed: section 43 B(1)(b)***

548. The claimant alleges that she had a reasonable belief that the disclosure tended to show the commission of a criminal offence, breach of a legal obligation or information tending to show that a criminal offence or breach of a legal obligation has been or is likely to be deliberately concealed
549. The Tribunal conclude that the same issues and analysis as set out in respect of disclosure 3 and 4 and 5 relate equally to this disclosure and have applied the same reasoning.
550. The claimant refers again in this email to the respondent accepting a credit, it does not state that the claimant understands that O2 had accepted full responsibility but that there was a “50% admission of error by O2”. Further, in this email the claimant does not refer to any criminal offence or specifically fraud but

refers to “ *discrimination and victimisation*” and being treated “ *unfairly*”, this further supports the Tribunal’s conclusion that the claimant did not genuinely believe that accepting a 50% credit was fraud. There is a passing reference to “ *illegal*” but this appears to be in the context of the impact on her character; “ *You branding my name and character assisintion [ sic] is wrongful and illegal*” which appears to be a reference to defamation and not fraud.

551. The Tribunal conclude that the claimant did not have a genuine belief, and in any event it was not objectively reasonable, to have believed that the information in this email tended to disclose the malpractice as alleged.

### **Public Interest**

552. The same factors as set out above in disclosure 3, 4 and 5 are relevant to the determination of the reasonableness of the belief that this disclosure was in the public interest and are not repeated but for those same reasons the Tribunal find that the claimant did not have a reasonable belief that the disclosure was in the public interest.

### **VPN**

553. **Reasonableness of belief: *criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b)***
554. The Tribunal concludes that there was no disclosure of information in respect of the VPN issue in this email however, for completeness, if it had found that it was a disclosure of information, for the reasons set out in relation to disclosure 3 and 4 and 5 it concludes that the claimant did not have a reasonable belief that the information contained within this email tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation or commit a criminal offence.
555. The claimant refers to “*security*” on the phone but makes no mention of data, of information on her phone and there is no reference to the ICO, to GDPR or indeed to any information belonging to customers’ clients etc. There is no clarification of what she means by ‘security’ which at this stage but the Tribunal conclude that it would only be objectively reasonable to form a belief that the information in this email tends to show that there was a lack of security to prevent excessive data usage on the phone.
556. It was not reasonable objectively for the claimant to believe and nor does the Tribunal conclude that she did believe that the information disclosed tended to show the alleged malpractice.

**The Tribunal conclude that the disclosure is not a protected disclosure within the meaning of section 43A ERA.**

### **Alleged Protected Disclosure 7: 3 May 2020**

#### **Disclosure of information**

557. The email in which it is alleged the disclosure was made, is dated 3 May 2020 (p. 282 – 294).
558. The email includes a number of attachments.

### **VPN**

559. With respect to the VPN issue there is reference as set out above in the Tribunal's findings of fact to various references to the failure to safeguard personal data and to the GDPR and alleged failure to safeguard personal data.
560. The Tribunal conclude that the information includes factual context to the allegation and it is not merely an allegation. This email amounts to a disclosure of information.

### **Fraud**

561. The claimant refers in this email, in terms which are vaguer than the disclosures in 3,4 or 5, to "*fraud and deception*" albeit not in the same paragraph as references to O2 giving a 50 % credit. The Tribunal concludes that the information within this email is a mere allegation of fraud and not a disclosure of information, nonetheless the Tribunal have gone on to consider reasonable of the claimant's belief.

### **Reasonable belief in the wrongdoing**

### **Fraud**

**Reasonable belief in the wrongdoing : *Criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b) and Information tending to show criminal offence or breach of legal obligation has been or is likely to be concealed: section 43 B(1)(b)***

562. The claimant alleges that she had a reasonable belief that the disclosure tended to show the commission of a criminal offence, breach of a legal obligation or that information tending to show such malpractice has or is likely to be deliberately concealed.
563. The Tribunal conclude that the same issues and analysis as set out in respect of disclosure 3 and 4 relate to this disclosure and have applied the same reasoning which applies equally to this disclosure in concluding that the claimant did not believe and it was not in any event reasonable for her to believe that the information disclosed in this email tended to show that a criminal offence had been, was being or was likely to be committed.
564. The legal obligation remains unidentified outside the alleged criminal act of fraud and throughout the emphasis is on discrimination and victimisation and unfair treatment and therefore the Tribunal conclude that it was not reasonable for her to believe that the information disclosed in this email tended to show that a legal obligation had been, was being or was likely to be breached.
565. There is no repeated allegation that the claimant had been prevented from making a disclosure to O2 or to anyone else about the alleged fraud. It does however refer to collusion and specifically to damaging her reputation and forcing her to resign after blowing the whistle on "*several wrong misdoings on your part along with several breaches of employment*". It does not expressly identify what the alleged wrongdoing is, however taking into account the previous alleged protected disclosures, it would be reasonable to read into that allegation that it is referring again to the allegation of fraud or breach of the GDPR. However, the Tribunal do not conclude that the claimant held a genuine or objectively reasonable belief that the information within her email tended to show that a criminal offence or breach of legal obligation has been or is likely to be concealed in circumstances where the Tribunal conclude that it relates to disclosures which the claimant did not believe or objectively it was reasonable for her to believe, tended to show such malpractice.

566. The Tribunal conclude applying the same reasoning as applies to the disclosures 3,4 and 5, that the claimant did not believe and in any event did not have an objectively reasonable belief that the information disclosed in this email tended to show the alleged malpractice.

#### **VPN**

567. **Reasonableness of belief: *criminal offence section 43 B(1)(a) and breach of legal obligation 43 B 9(1 )(b)***
568. The same reasoning and analysis as set out in relation to disclosure 3 and 4 applies equally to this disclosure.
569. Further, within this email the claimant refers to having spoken to the ICO on “Friday” and in this email now sets out some detail around what she has been told. The claimant does not however set out any detail about the alleged breach of the GDPR because of the VPN issue. As set out in the findings of fact above, the detail she gives about what advice she has received, is concerned only with a subject access request she has made and how that has been dealt with. There is absolutely no reference to what advice, if any she has received about VPN.
570. The Tribunal concludes that the claimant did not have a reasonable belief that the information contained within this email tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation or had, was and was likely to commit a criminal offence in connection with the VPN issue.

#### **Public Interest**

571. The same factors are relevant to the determination of the reasonableness of the belief in the public interest in making this disclosure and are not repeated here but for those reasons the Tribunal find that the claimant did not have a reasonable belief that the disclosure was in the public interest with respect to either the fraud or VPN issue.

**The Tribunal conclude that the disclosure is not a protected disclosure within the meaning of section 43A ERA.**

#### **Detriments**

572. **Detriment 2: Collusion by Mr Mc Loughlin and Mr Hoffbrand – 27 March 2020**
573. The Tribunal have concluded that the behaviour of both Mr Hoffbrand and Mr McLoughlin was underhand and disrespectful to the claimant. Mr McLoughlin may well have considered it inappropriate for a board director to act as a companion and that it may give rise to a conflict of interest and while the Tribunal can appreciate why that may be a legitimate cause for concern, the way it was managed was inappropriate. It was understandable that the claimant was upset by it.
574. In terms of what disadvantage the claimant suffered; the claimant elected not to attend a grievance or disciplinary hearing and it is not alleged that this was because of the decision by Mr Hoffbrand not to attend as her companion. However, the Tribunal find that the claimant’s discovery of this ‘collusion’ did cause her distress and genuine upset and that this amounted therefore to a detriment.

## Causation

575. The Tribunal have considered the extent to which any of the disclosures 1, 2, 3, 5 may have influenced this behaviour by Mr Hoffbrand or Mr McLoughlin.

### Disclosures 3 and 4

576. The alleged protected disclosures 3 and 4 were not made until 29 March 2020 and cannot therefore have influenced the conduct of Mr McCloughan and/or Mr Hoffbrand. On the claimant's own case the detriment took place prior to these disclosures, with the communication and exchange of emails on the 27 March 2020. The claimant in answer to a question from the Tribunal, confirmed that this alleged detriment was due to earlier disclosures.

### Disclosures 1 and 2

577. The Tribunal find that Mr McLoughlin did seek to discourage Mr Hoffbrand from attending the hearing as the claimant's companion.
578. It was put to Mr McLoughlin that he influenced Mr Hoffbrand not to attend as the claimant's companion because he did not want a main board director of the majority shareholder finding out about the alleged sexual harassment.
579. The Tribunal have made a finding of fact that Mr Hoffbrand was aware of the incident of alleged sexual harassment at or around the time it happened. The Tribunal are not persuaded therefore that this had any material influence on the decision by Mr McLoughlin to dissuade Mr Hoffbrand from attending as a companion. Further, that would not appear to be a credible reason for why Mr Hoffbrand would himself not wish to act as her companion.
580. The Tribunal consider that it is appropriate to draw an adverse inference from the underhand manner in which Mr McLoughlin and Mr Hoffbrand behaved, but do not conclude that it is reasonable in the circumstances to find that it was related to the disclosures back in **October 2019**.
581. Turning to the **13 March 2020** email; the Tribunal as set out in its finding, accept that Mr McLoughlin was unhappy about the claimant raising again the alleged sexual harassment in her email of the 13 March 2020, as well as criticising other staff and in particular Ms McLoughlin.
582. The Tribunal have concluded, drawing an adverse inference from the manner in which Mr McLoughlin behaved in suggesting that Mr Hoffbrand use a board meeting as an excuse not to act as the claimant's companion, that the reference to the sexual harassment in October 2019 was also a more than trivial influence on his decision not only to suspend the claimant but to keep Mr Hoffman away from a process which Mr McLoughlin had already decided (for the same reasons as the suspension), would result in her dismissal.
583. However, the Tribunal have concluded that the 13 March 2020 was not a protected disclosure, and therefore the claim under section 43B ERA that this was a detriment for having made a protected disclosure, is not well founded.

**This claim under section 43B ERA is therefore not well founded and is dismissed.**

**Detriment 3 : Conducting an investigation without disclosing the allegation or evidence.**

### **Detriment**

584. The Tribunal as set out in its findings of fact, have found that not only was the claimant unaware of what precisely she was alleged to have done, the investigation process was flawed and conducted in a manner which was outside the band of reasonable responses.
585. Mr McLoughlin relied on a statement from Ms Nicklin with no proper consideration about the caution to be exercised toward someone whom he knew to hold a grudge against the claimant. Mr McLoughlin acted with a clear bias. In his own statement which he prepared for the disciplinary hearing, he commented on Ms Nicklin's evidence which was wholly unnecessary because Face2Face had been provided with a copy of Ms Nicklin's statement. The Tribunal have found that Mr McLoughlin's intention in showing his support for the veracity of Ms Nicklin's statement was clearly intended to influence the outcome of the investigation process and the recommendation from Face2Face.
586. The Tribunal have concluded that from the date of suspension, Mr McLoughlin had made up his mind to dismiss the claimant and there was no interest in carrying out any further investigation with O2 or Vivio into the data usage.

### **Causation**

#### Alleged protected disclosure 1

587. The Tribunal do not find that the first alleged disclosure materially influenced the decision to dismiss and how the investigation and disciplinary process was managed. The claimant's own evidence is that the decision to dismiss her was made as at the date of suspension.
588. The Tribunal take into account that Mr McLoughlin acted on the accusation against Mr Cook promptly and Ms McLoughlin was upset only that the alleged sexual harassment had not been disclosed earlier. The allegations involved not only the claimant but other female staff against whom there is no allegation of detrimental treatment.
589. The Tribunal conclude that the first alleged disclosure had no influence on the way the disciplinary and investigation process was conducted.

#### Alleged protected disclosure 2

590. As set out above, the Tribunal conclude that Mr McLoughlin was unhappy about the claimant making reference to the previous alleged sexual harassment in her email of the 13 March 2020 and that this formed part of the reason for suspension but only to a marginal extent, albeit amounting to more than a trivial influence.
591. The Tribunal do not conclude that disclosure 2 was the principal reason but it did have an influence on the decision by Mr McLoughlin to suspend because by his own admission he felt that the claimant was raising the previous alleged sexual harassment to be difficult and he did not consider her reasons to be genuine. This view of her being difficult the Tribunal conclude would have added to his sense of grievance on learning of the impact on his daughter of the criticisms the claimant had made about her in this email. His perception that she was being difficult may well have been heightened by his view that he had been generous in not taking any action about the phone bill.

592. The Tribunal have concluded however that the 13 March 2020 was not a protected disclosure, the claim under section 43B ERA that this was a detriment for having made a protected disclosure is therefore not well founded.

Further alleged protected disclosures.

593. The claimant has maintained throughout this case and the Tribunal have found, that Ms McLoughlin influenced her father to suspend the claimant because of the comments the claimant had made about Ms McLoughlin and in particular her alleged unprofessional conduct.

594. The Tribunal have taken into consideration how Mr McLoughlin had originally responded to the 13 March 2020 email only to take a completely different approach the following day after Ms McLoughlin had read the email and by her own admission was unhappy about what she perceived to be the claimant's unfair criticism of her.

595. It was also put to the respondent's witnesses that they were unhappy about the issue of the sexual harassment being raised again however, the claimant's own evidence was clear and robust in terms of what she believed to be the main reason for the action that was taken and who she believed was behind it, namely Ms McLoughlin.

596. The claimant's case throughout has been that the decision was made to dismiss her when the decision to suspend her was made and the Tribunal have reached that same conclusion on the evidence.

597. The Tribunal conclude that Mr McLoughlin may well have been upset about the allegations of fraud and breach of GDPR, however the Tribunal find that if this influenced the way the process was conducted it did not do so to a material extent. The 'dye was cast' when the 13 March email was received and read by Ms McLoughlin and when she then persuaded Mr McLoughlin to suspend the claimant and treat the phone bill as a pretext for her dismissal.

598. The claimant was suspended and her own evidence is that the outcome was from that point inevitable. There was no genuine desire to carry out any further investigation with O2 or Vivo and the process was then conducted in such a way that the outcome was inevitably going to result in her departure from the business.

599. The claimant's own case is that the outcome was pre-determined and while steps in the process may have been influenced to a degree by the further allegations, the claimant does not identify specific failings that are linked to each specific subsequent disclosure and in any event the Tribunal conclude that the further disclosures, after 13 March 2020, did not have a material influence on how the process was carried out.

600. The Tribunal conclude that the only disclosure which qualifies as a protected disclosure under section 43A ERA are the first disclosures in October 2019 and the Tribunal conclude that those disclosures did not influence the investigation or the failure to provide details of the allegation.

**This claim under section 43B ERA is therefore not well founded and is dismissed.**

**Diriment 4: claimant was dismissed**

**Detriment**



601. The decision to dismiss the claimant was clearly a disadvantage and the respondent does not assert otherwise.
602. A worker or agent may be personally liable for the dismissal of an employee or worker as a detriment under S.47B(1A): ***Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA***. The cause of action under S.103A is only available against the employer. In contrast, the cause of action for dismissal as a detriment is brought under S.47B.
603. The Court of Appeal in **Timis** concluded that it is open to an employee to bring a claim under S.47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal (for being a party to the decision to dismiss), and a claim of vicarious liability for that act against the employer under s.47B(1B). S.47B(2) only excludes a detriment claim against the employer in respect of its own act of dismissal.
604. The restriction on pursuing a detriment claim for dismissal against the employer, was raised by the Tribunal Judge at the outset of this hearing when the issues were discussed. No application however was made to add any individuals as respondents to the claim to enable a detriment claim for dismissal to be pursued.
605. Counsel submits that the claimant resigned, giving one month's notice, on 14 April 2020 and that this was a constructive dismissal and that dismissal was automatically unfair under ERA s.103A but that as the employer insisted on continuing to treat the claimant as employed and in pursuing a disciplinary process to its conclusion, that amounts to a detriment. It is submitted that detriment may be suffered after the employment relationship has ended so, *if the claimant's resignation was effective to terminate her employment when the notice expired*, the purported dismissal was nonetheless still a detriment referable to her protected disclosures.
606. The Tribunal accept that if the claimant's employment had ended, and if after the end of her employment the respondent had continued with the disciplinary hearing and made findings adverse to her, that may amount to a post-employment detriment claim.
607. The claim however is presented on the basis that the act of dismissal itself is a detriment, that is what is clearly set out in the list of issues and there was no application to amend. The claimant's employment was terminated summarily on the 6 May 2020 and the list of issues identifies the detriment as taking place in the **6 May 2020**. It is not alleged that the claimant's notice had expired by that date and that the termination of her employment had taken effect.
608. Section 47B(2) ERA is clear and as set out above in the legal principles section, a claim under section 47B does not apply to a dismissal under part X of the ERA.
609. The employer continued to pay the claimant who remained on the payroll until the act of dismissal. Her resignation was on notice and was not due to take effect until the expiry of that notice period which post-dated the 6 May 2020. The claimant could have resigned with immediate effect or elected to give her contractual notice of 1 week but she resigned giving 1 months' notice, and her employer proceeded with the disciplinary process as it was entitled to do, during her notice period.
610. This claim has no merit and cannot be pursued against the employer because of the restrictions imposed by the provisions of section 47B (2) ERA.

**This claim under section 43B ERA is therefore not well founded and is dismissed.**

**Automatic unfair dismissal : section 103A ERA claim**

611. The Tribunal has reminded itself that what it must determine is what was operating on the mind of the dismissing officer, what their motive or reason was for dismissing.
612. The question for the Tribunal is why did the alleged discriminator act as he did and what, consciously or unconsciously, was his reason for doing so.
613. The issue unlike a section 47B ERA claim, is not whether Mr McLoughlin who it is not in dispute made the decision to dismiss, was *materially influenced* by any of the protected disclosures, it is whether one or more of the protected disclosures was the *sole or principal* reason for dismissing.
614. The claimant's own case, as she set out clearly in her evidence, is that the decision to dismiss was made at the time of the suspension, that her dismissal was from that point inevitable, the decision was made. Therefore, it must be right that on the claimant's own case, the disclosures which postdate the suspension could not have been the sole or principal reason for the dismissal.
615. The claimant's case as robustly and repeatedly set out in her evidence, is that it was Helen McLoughlin who made the decision to suspend the claimant and that in fact she had prepared the suspension letter. The Tribunal have found that Ms McLoughlin's reasons for wanting to suspend and remove the claimant from the business, were because of what the claimant had said about her in the 13 March email. She was 'offended' by it. While she influenced Mr McLoughlin, an *lago* type situation, she did not the Tribunal find, disguise her reasons to him and therefore it is not appropriate to impute her motive, he was aware of it and took it into account and it formed the principal reason for acting as he did.
616. The claimant set out her case clearly in her evidence and under cross examination and clarified it in response to questions from the Tribunal, namely that Helen McLoughlin was upset about the comments made about her and in particular that she did not like being called '*unprofessional*'. That according to the claimant's own evidence is what was behind the reason for the suspension. The claimant does not allege that the comments about Helen McLoughlin's management style and attitude toward her over the holiday is a protected disclosure. The claimant's own case, as the Tribunal have set out in its findings of fact, is that Helen McLoughlin wrote the suspension letter which Mr McLoughlin then sent out.
617. The claimant's case is that the reference to the previous allegation of sexual harassment in her 13 March email was also a factor and indeed the Tribunal accept that it was. However, the disclosure relied upon in the 13 March 2020 email the Tribunal have found, was not of itself a protected disclosure but even if the Tribunal had concluded that it was, it was not the principal reason for the decision to dismiss. The principal reason, as the claimant herself believed and argued in her evidence, was Helen McLoughlin's reaction to the comments the claimant had about her.
618. The claimant had also given evidence that Ms McLoughlin did into want the sexual harassment issues to be revisited due to the concerns raised by Ms Watson, however the Tribunal are not persuaded that this was a material concern for Ms

McLoughlin and certainly did not form the principal reason for her reaction to the 13 March email.

619. The claimant was also adamant in her evidence before the Tribunal that the outcome of the disciplinary investigation was predetermined from the date the decision was made to suspend her and the Tribunal are persuaded that this was indeed the case. The disciplinary process was unfair and predetermined.
620. It must therefore follow that on the claimant's own case, the sole or principal reason for dismissing her was not any of the alleged protected disclosures after the 13 March 2020, and the Tribunal conclude that it was principally because of the criticisms made about Ms McLoughlin in that email.
621. The claim of automatic unfair dismissal therefore is not well founded.

#### **Constructive unfair dismissal**

622. The Tribunal have no jurisdiction to determine a claim for constructive unfair dismissal claim. The claimant's employment ended when the respondent terminated her employment on the grounds of gross misconduct on 6 May 2020, and that is the effective date of termination.
623. The claimant served more than her contractual notice period. She could have resigned with immediate effect or given her contractual notice of only 1 week however, she chose to remain employed for another month during which the employer continued with the disciplinary process.
624. The claimant gave more than her contractual notice and not for altruistic purposes, indeed she wrote assuming she would not be required to work her notice and then went on sick leave. She gave a period of notice much longer than she was contractually required to do because it suited her better financially to do so. That is not consistent with a claim that the conduct of the employer gave rise to a repudiation of the employment contract. However, the claimant had made it clear that she was unhappy about how she was being treated and was continuing to protest about it and therefore in the circumstances, the Tribunal would not have treated the decision to serve an additional 3 weeks' notice as affirmation of the contract of employment and a waiver of the alleged breaches of trust and confidence by her employer.
625. Nonetheless, the reason for dismissal on the 6 May 2020 was for gross misconduct and it is the reason for the termination of her employment on that date that the Tribunal are required to determine, rather than the reasons why the claimant had decided to tender her resignation.
626. The claimant does not have the qualifying service to pursue a claim for unfair dismissal but had she been employed for two years, the Tribunal would have found her dismissal to be unfair. It is not however, automatically unfair under section 103A ERA.

#### **Wrongful dismissal – repudiatory breach**

627. The respondent dismissed the claimant summarily and the remaining issue for this Tribunal is whether the claimant in fact committed, on a balance of probabilities, a repudiatory breach of the employment contract.
628. The Tribunal find on the evidence available to it, that the claimant had run up the data usage, possibly by streaming material whether videos or other material. The

claimant who described herself as not 'IT literate' we accept may not have appreciated that what she was doing would incur so much data usage and may not even have appreciated that when streaming material she was using data.

629. It may be possible that the phone was 'hacked' however, based on Mr Cox's evidence this is not the most likely explanation. While the respondent could have carried out more investigations with O2 to try and obtain their opinion as to the most likely cause, it failed to do so and therefore the information available to the Tribunal is limited. However, the Tribunal note that while the claimant asserts that her phone may have been intercepted or hacked by people working in other offices/buildings while she was at work, there was a significant amount of data usage over the weekends when she was away from work, as set out in the Tribunal's findings of fact.
630. The Tribunal conclude on the facts and on a balance of probabilities, that the claimant who had never exceeded the data usage before she had the temporary phone, was unfamiliar with the replacement phone. It had not been set up for her by the IT expert Mr Cox because he was on leave. The phone had not been explained to the claimant and Ms Boyes herself was unaware of what the symbols on the phone meant because she needed to look into it herself.
631. The Tribunal do not consider that Ms Nicklin's evidence is reliable in material respects with respect to the claimant's attitude in particular when the data warnings were pointed out to her. Ms Nicklin harboured ill feeling toward the claimant and her evidence is not supported by Ms Boyes. Further, she failed to explain why if the claimant had reacted as she alleged on learning of the amount of data usage, she did not report it at the time herself. The Tribunal do not consider that her evidence is either reliable or credible where it is not supported by the evidence of Ms Boyes.
632. The claimant may not the Tribunal conclude have been very diligent in reporting the messages she was receiving which along with the text messages did indicate that there was an issue with data usage. However, the respondent's evidence on when she would have known and when she reported it is not clear. The respondent had the means to investigate that more fully but did not do so.
633. The Tribunal do not find that the claimant had been told not to stream from her phone, and therefore had not contravened the terms of the Contract of Employment. The Tribunal was not taken to any phone use policy which set out what activity was permitted on company phones and it is not alleged that she had breached the terms of any policy.
634. If the claimant is guilty of anything, it is not checking sooner what the symbols were on her phone, which she could have established herself by carrying out a simple google search. The Tribunal take judicial notice from the panel's own experience, that it is often quite straight forward to google the meaning of mobile phone alerts however, the claimant did not do so. The Tribunal do not find however, that the claimant's failure to do so in circumstances where she understood that her phone had a data cap, where she had not been responsible for setting it up and she did report the signs, albeit not immediately, amounted to a fundamental breach of trust and confidence and a repudiation of the employment contract.
635. The claimant the Tribunal find was guided by the IT manager about how to handle the situation and was reassured that the matter was being dealt with. She had raised this with Mr McLoughlin albeit she had not detailed the amount of the bill was, but he was aware of this from Mr Cox by the 13 February 2020.

636. While the claimant may be guilty of a lack of diligence in reporting the warning signs, the Tribunal do not accept that she deliberately ran up data charges, she understood her phone was capped and was not doing something which she had been shown or advised not to do on her phone.
637. The claimant's conduct did not amount the Tribunal consider to a repudiatory breach of contract justifying summary dismissal. It was not action which the Tribunal consider was serious enough to justify summary dismissal.
638. The claimant was entitled to be paid her notice pay of 1 week and is therefore awarded **£846.15 gross** (based on the salary set out in the claimant's schedule of loss of £44,000 per annum).

**The claimant's claim for wrongful dismissal is well founded and succeeds.**

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Employment Judge Broughton

Date: 27 February 2022