EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Thompson**

Respondent: **Onward Homes Ltd**

Heard at: **Manchester Employment Tribunal**

On: **2 to 9 January 2024, 29 April to 1 May 2024**
(2, 3, 7, 28 and 29 May 2024 in Chambers)

Before: **Employment Judge Eeley**
Mrs C Titherington
Mrs J Williamson

Representation

Claimant: In person
Respondent: Ms L Gould, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

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

2. The claim of unfair dismissal because of protected disclosures is not well-founded and is dismissed.

REASONS

BACKGROUND

1. The claimant's claim came before the Tribunal for a final hearing to determine her complaints of protected disclosure detriment and dismissal arising out of her employment with the respondent.

2. At the outset of the hearing the Tribunal agreed that the issues for determination were as set out in the List of Issues appended as an annex to the case management order of Employment Judge Aspinall (dated 24 April 2023.) They were to be found in the hearing bundle at pages 122-126.

3. In order to determine the issues in the case the Tribunal received written witness statements and heard oral evidence from the following witnesses:

    - The claimant, Elizabeth Thompson, formerly employed by the respondent as a Tree Specialist;
    - Ian Hulme, Environmental Services Manager for the respondent;
    - George Peters, former Arboriculture Manager for the respondent;
    - Andrew Brown, Director of Housing and Specialist Living for the respondent;
    - James Dean, Tree Specialist, formerly employed by the respondent;
    - Catherine Farrington, Corporate Services Director for the respondent.

4. In addition, the Tribunal was referred to selected documents within the agreed hearing bundle which contained 1162 pages. During the course of the hearing the claimant produced further documents which were adduced into evidence. We marked those as pages C1-C22. We also obtained larger, clearer copies of pages 390-396 and 1156. We read those documents within the hearing bundle to which we were referred by the parties.

5. The respondent provided a chronology, cast list and key reading list. The Tribunal also had the benefit of oral closing submissions on behalf of both parties, for which we were grateful.

Preliminary matters

6. At the outset of the final hearing the Tribunal was asked to consider some preliminary issues which had not been resolved at the previous four case management preliminary hearings in these proceedings.

Dr Slater's evidence

7. The Tribunal was asked to decide whether Dr Slater's witness evidence was admissible and whether he should give evidence and answer questions on it in cross examination. The claimant proposed to call Dr Slater to give evidence. He had previously been her tutor (and tutor to some of the other

witnesses in the case) when she was at college training to become an arboriculturist. The Tribunal first had to identify the type of evidence contained within the witness statement. Was the evidence properly classed as expert evidence, or not? Tribunal permission was required if a party wished to call expert evidence.

8. The Tribunal considered the witness statement. Page 1 of the copy that we had differed slightly from the rest of the document insofar as it was the introductory section. At paragraph 1.3 the witness explained how he became acquainted with the claimant. He commented (at paragraph 1.4) about how she behaved as a student when he was teaching on her course. Paragraph 1.5 made various predictions/suppositions about the claimant's experience since her studies and qualification but in essence there was nothing objectionable about paragraphs 1.1 to 1.5. If the witness statement had stopped there, there would have been no difficulty with it, albeit it probably would not have added a great deal to the claimant's case or assisted her particularly in these proceedings.

9. However, when the Tribunal considered paragraph 2 of the witness statement onwards, the evidence was, in substance, expert evidence. The witness was proffering his opinion. Whilst the word "expert" had been removed from the witness statement, we had to look at the substance of the evidence and not the label applied to it by the claimant. In the statement the witness proffered his opinion and the Tribunal was being asked to give particular weight to that opinion because of his expertise and his training. That is the essential feature of 'expert evidence': the witness gives evidence which is opinion evidence and which the Tribunal is asked to give particular weight to because of the expertise, qualifications or professional experience of the particular witness in question. The Tribunal is asked to conclude that this witness 'knows what he is talking about' and is able to offer a useful opinion on the matters which are in issue before the Tribunal.

10. This witness was <u>not</u> giving direct evidence of fact in relation to things that he had heard, seen, read or otherwise witnessed during the course of the relevant chronology of events in the case (i.e. the events about which the Tribunal had to make findings of fact.) On reading the statement, it was apparent that it contained expert evidence. It also contained paragraphs which reached conclusions which were properly within the decision making remit of the Tribunal. We make no criticism of Dr Slater for that. It is tempting for a witness to do this but it goes beyond the scope even of expert evidence. It addresses issues such as why the respondent did what it did, whether it was right to do so, and whether its actions had anything to do with 'protected disclosures.' This usurped the decision making function of the Employment Tribunal.

11. As the witness statement was expert evidence (if relied upon for anything other than paragraphs 1.1 to 1.5), the claimant would need Tribunal permission to rely on the evidence. Such permission had not been obtained prior to the first day of the final hearing. There had been no application for permission to rely on expert evidence in this case.

12. The Tribunal, for the sake of completeness, considered things as they stood at the start of the final hearing. If the Tribunal treated production of the witness statement as an application for permission to rely on the statement, how should such an application be decided? Expert evidence can be admitted into evidence where it is relevant to the issues in the case and necessary, in order for the Tribunal to fairly resolve the issues in dispute in the case. There was a lot of information in this case. Some of that information was relevant context and background. Some of it was crucial to the issues which the Tribunal had to determine. However, the evidence that Dr Slater provided in his statement was *not* evidence which was necessary for us to receive in order to resolve the matters within the agreed List of Issues. In hearing and determining the case, the Tribunal was going to have to focus on the alleged protected disclosures, consider whether they were in fact protected disclosures within the meaning of the Employment Rights Act 1996, and then decide whether the claimant was subjected to the various detriments and/or dismissal because those disclosures were made. Unfortunately, Dr Slater's evidence was not going to assist us in doing that. Indeed, had the Tribunal wanted or needed expert evidence in this case, there are procedural safeguards which would need to be followed to facilitate expert evidence from an impartial, independent witness. The claimant suggested that Dr Slater was well disposed towards all of his previous students (including the respondent's witnesses.) That is not the same as him being an independent and impartial witness. In a case with an expert witness, the expert report would be provided by an expert who had had no prior involvement in the case or with the people/witnesses involved in the case. Unfortunately, Dr Slater would not fall within the definition of an independent expert. Furthermore, the Tribunal would also have to adopt the sort of procedural safeguards provided for in the Civil Procedure Rules regarding disclosure of the instructions given to the expert and provision of written questions to the expert from the parties. These are all matters which respondent's counsel noted were absent in Dr Slater's case. She asserted that allowing such expert evidence to be admitted would not be fair to both parties. The respondent had not been given the proper opportunity to be involved in instructing the expert (e.g. as a joint expert) or in putting questions to him about the report. As none of those safeguards were present in this case and the witness could not be said to be an independent expert, the Tribunal was unable to allow this witness evidence into this case. The Tribunal would tend to require evidence from a single joint expert or, alternatively, each party would need the opportunity to instruct its own expert.

13. Thus, the Tribunal decided not to admit Dr Slater's evidence. It was expert evidence, there was no permission for expert evidence, it was not necessary for the Tribunal to have the evidence in order to resolve the relevant issues in the case, and the evidence had not been produced with adequate procedural safeguards in place.

14. During the course of preliminary submissions, the claimant referred the Tribunal to a number of documents in the bundle. She had sent an email to Dr Slater which had provoked some responses. We were told that those documents/email exchanges were provided to one or more of the respondent's witnesses during the latter stages of the grievance process in this case. The Tribunal concluded that the claimant was not precluded from

asking questions about the documents in the bundle. The claimant was free to put those questions (if relevant to the issues in the case) to the relevant witness during the hearing. The claimant would be able to ask the witnesses what they made of the documents if and when they saw them. However, the Tribunal did not need to admit Dr Slater's witness evidence or hear him give evidence in order to facilitate that sort of questioning of the other witnesses. The Tribunal would not be assisted by that sort of 'battle of the experts'. This would drag the Tribunal away from its core functions (given the contents of the List of Issues.)

15. In light of the Tribunal's decision, the claimant chose not to call Dr Slater to confirm those aspects of his witness statement which did not constitute expert evidence. Dr Slater, therefore, did not give witness evidence to the Tribunal for the purposes of the final hearing.

Privilege against self-incrimination

16. At the outset of the hearing, respondent's counsel raised the potential relevance of the 'privilege against self-incrimination' in this case. Given the contents of the covert recordings disclosed by the claimant in this case, counsel proposed to ask the claimant some questions about matters which might conceivably attract the privilege against self-incrimination. Given that the claimant was a litigant in person (and out of an abundance of caution) counsel raised this issue at the start of the hearing so that the Tribunal could address it, if necessary.

17. After hearing submissions from both parties the Tribunal reached a provisional view. (This might be subject to change given that the Tribunal had yet to hear any oral evidence so it was difficult to predict how matters were likely to develop.) The Tribunal was referred to the relevant legal principles and the guidance set out, in particular, in Phillips v Newsgroup Newspapers Ltd and others [2010] EWHC 2952(Ch). The question that the Tribunal needed to ask was whether there was a 'real and appreciable risk' or danger of criminal prosecution arising out of the claimant answering questions that were put to her about the matters in question. We had to consider whether it was a 'real and appreciable' risk or a remote/insubstantial risk. It is a matter of degree. As things stood at the start of the final hearing, there was nothing on the facts of the case that suggested to this Tribunal that there was such a real and appreciable risk of prosecution. We came to that conclusion because this issue arose back in 2021 and the hearing was taking place in 2024. The authorities had done nothing about this issue to date, no report had been made to the authorities about this, and there was no indication from anybody that they were aware of it or interested in it. Nor was there any suggestion that the issues in question were at the more serious end of the range of alleged offences (e.g. nature/classification of substance and whether possessed for personal use.) There was nothing about the gravity of any alleged offence which would, of itself, give rise to that real or appreciable risk of prosecution.

18. The Tribunal concluded that if something in the nature of the cross examination or the development of the evidence in the case changed the

position (so that the risk profile changed) then the Tribunal would pause at that point and re-address the issue. In such circumstances the Tribunal might decide to give the claimant a caution in relation to self-incrimination. In such circumstances the claimant would be able to make an informed decision as to how (and if) to answer any particular question(s). We did not think that the mere existence of an online Employment Tribunal Judgment would, of itself, increase the risk of prosecution. Having heard from Ms Gould as to the likely areas of cross examination, we considered that the claimant's answers to questions might turn out to be of less relevance and importance in this regard than the transcript which had already been disclosed. Furthermore, her answers to questions might be of less relevance in terms of credibility, than the fact that the claimant had made a covert recording in the first place. The Tribunal would hear what the parties had to say about such issues during the hearing and in closing submissions. Thus, at the start of the hearing we decided that there was no need for a 'blanket' caution. If matters changed we would pause at the relevant point and address the issue afresh.

Further preliminary matters

19. In the course of the hearing further issues arose. On 8 January (after the claimant had given her own evidence and when she was part way through cross examining Mr Peters) the claimant made a lengthy submission and appeared to suggest that she wanted to apply to strike out the respondent's response to her claim. As the nature and basis of the claimant's application was unclear, the Tribunal gave her some time to consider her position. Upon resuming the hearing, the claimant decided to withdraw any application and to continue cross examining the respondent's witnesses.

20. On resuming the hearing on day 6 (after a gap of some months) the claimant sought to introduce further documents into evidence. Having heard both parties' submissions on the matter, the Tribunal declined to admit the further documents for the reasons which were explained orally to the parties during the hearing (and which are not repeated here.)

FINDINGS OF FACT

Background of the claimant and the respondent

21. The respondent is a social housing provider. This case concerned the respondent's 'Tree Team.' At all material times the respondent had a portfolio of various properties across the North West of England. Some of those properties had trees present on them. In such cases the respondent was likely to be responsible for the care and maintenance of such trees and any resultant safety issues. As landlord for the portfolio of properties, the respondent needed to keep a log of the trees that were present on its properties and the state of those trees so that they could be properly and safely managed.

22. This case concerned the respondent's Tree Specialists. The claimant and her colleagues were trained Tree Specialists. Part of their expertise was in

visiting the trees on the properties and surveying their status in order to determine whether any remedial or maintenance works were required.

23. A Tree Specialist had a number of responsibilities which included: surveying trees to ensure that they were healthy and safe; ensuring that trees were compliant with various regulations and legislation; dealing with complaints and queries from the respondent's tenants regarding the respondent's trees; arranging for works to be carried out on trees as required; and adding trees to the respondent's record system which was (latterly) called "Treeplotter." Treeplotter was a system for mapping and managing trees, land mapping and grounds maintenance record-keeping. It was a 'live' system which provided notifications and updates continually.

24. The claimant initially worked for the respondent as a consultant for a number of years from 2013 until 2019. There was a break where she worked away from the respondent organisation and then she came back to work for the respondent, this time as an employee, on 28 September 2020. The claimant knew Ian Hulme from her studies for a foundation degree at Myerscough College. They had always had an amicable relationship. The respondent's other two main witnesses in this case (James Dean and George Peters) also studied at Myerscough College for the same qualification but were in the year below the claimant and Mr Hulme.

25. When the claimant started work for the respondent as an employee in 2020 her line manager was Ian Hulme. Mr Hulme was employed as the Arboriculture Manager (until the Summer of 2020) and he was an Environmental Inspector. He then became the respondent's Environmental Services Manager.

26. George Peters did not start working for the respondent until February 2021. When he joined the respondent he took over the post previously held by Mr Hulme (Arboriculture Manager.) He was Mr Hulme's successor in the post. The Tribunal was satisfied that there was a period of time when Mr Hulme was still managing the claimant but had gained additional responsibilities as part of his promotion. Mr Peters then started work and filled the post previously held by Mr Hulme. He became the claimant's line manager at that point (February 2021.) The Tribunal heard that the department was going through a period of transition and change during the period of time under consideration in these proceedings.

27. Mr Hulme's promotion meant that he was latterly located higher up the respondent's management structure. He was no longer responsible solely for trees. Mr Hulme was in charge of approximately 50 staff at the relevant time. Team leaders, supervisors and operational teams relating to grounds and cleaning reported to Mr Hulme. Mr Hulme reported to a Director at the company. Mr Hulme had responsibility for health and safety, specifications, scheduling, managing staff, working on complaints and providing support. Mr Hulme's promotion meant that he was working at a managerial level and his role was quite wide ranging. By contrast, in the role of Arboriculture Manager he was only responsible for the respondent's trees.

28. The essential part of Mr Peter's role as Arboriculture Manager was to oversee the management of risks associated with trees, from the perspective of landlord compliance. He managed six staff across two teams. He was directly responsible for the management of trees across Merseyside, Greater Manchester, and Lancashire. He reported to the Environmental Services Manager, Ian Hulme.

29. The claimant and James Dean were the Tree Specialists. Their role was more operational than managerial. As Tree Specialists the claimant and Mr Dean were responsible for inspecting the respondent's trees to ensure compliance with health and safety and various other regulations. As part of the role they had to complete a number of different tasks which included: arranging works that needed to be carried out to trees; making applications to local councils to carry out works where a tree was covered by a Tree Preservation Order or was in a Conservation Area; and ensuring that the respondent's land and trees were correctly mapped on the respondent's Treeplotter system. They also responded to customer queries and complaints, which were known within the business as "CRM" (Customer Resolution Management.)

30. This case involved a considerable amount of specific terminology. For clarity, we set out our understanding of that terminology in the paragraphs which follow.

31. Land mapping is the process of identifying and recording which property or parcels of land belong to the respondent. It involves physically inspecting a property and then marking on Treeplotter various data regarding the property, for example, plotting paths, bushes and trees. It is the process of ensuring that all the respondent's land is put onto the database so that the respondent knows the geographical scope of its ownership and responsibility. There was a considerable number of such sites that still needed to be mapped so when Mr Dean started work he was asked to work on this task because he was very familiar with Treeplotter, whereas the claimant had not used this particular system/database before she started working for the respondent again in September 2020.

32. 'Tree mapping' (or logging) is a different task to 'land mapping.' 'Tree mapping' is the process of identifying and locating the presence of a tree on the respondent's property and then recording it on whichever system the respondent operated at the relevant time.

33. 'Surveying' the trees is a more involved process than simply 'tree mapping.' It involves going out on site and looking at the tree(s) to assess their condition and evaluate whether they are safe, require remedial work, or should be removed. The results of a tree survey will also be recorded on the respondent's system, including details of the findings and observations of the person doing the survey and their recommendations as to what should happen next and when the tree in question should next be surveyed.

34. The respondent implemented a cycle of inspections at particular intervals. The intervals at which inspections were arranged have changed over time. Initially the respondent was working to a five-yearly inspection cycle, then it

was reduced to a three-yearly inspection cycle and the ideal is now for trees to be inspected every two years.

35. If the respondent is aware that it has a tree at one of its properties but that tree has not been inspected and surveyed in line with the applicable inspection cycle it is referred to as being 'out of compliance'. This essentially means that the respondent is behind schedule in carrying out its inspection of the tree(s) in question. It knows that the tree is there and part of the respondent's responsibilities but it does not know the current state of the tree.

36. The Tribunal heard evidence about so-called 'no access properties.' These are properties which have been identified as belonging to the respondent but which have never been visited by Tree Specialists. As they have not been visited, the respondent does not know whether there are any trees present on the property in question. There may or may not be. These were referred to as "No Access Properties" because the respondent had previously not been able to gain access to those properties to see if trees were present.

37. The Tribunal heard reference to so-called 'Missing Trees.' The claimant referred to 'missing trees' a lot. These were trees which had not been recorded as being present on the respondent's properties. This means that the respondent did not know that these trees actually existed and were present on its properties. A tree may be a 'Missing Tree' because the respondent has not had access to the property to check it or, for example, because a tenant has planted trees on the respondent's property since the last inspection and has not notified the respondent of this development. The respondent will, in such circumstances, have 'gained a tree' which it does not know about, a 'Missing Tree.' The respondent knows about the property (that is in its portfolio) but does not necessarily know about all the trees which are physically present at that location. In such circumstances it will not know that the tree(s) in question need to be added to the programme and cycle of inspections and surveys.

38. The Tribunal was satisfied, from the evidence before it, that 'mapping' the tree and 'surveying' the tree are different processes and they do not necessarily have to happen at the same time. The respondent's priority and preferred way of working was for a Tree Specialist who comes across an unknown tree in the course of their work (e.g. a copse of trees) to map/plot the trees onto the system so that they are known about and recorded as existing on the system. Those trees can then be added to the schedule of inspections and can be inspected/surveyed at a later date, in line with the prevailing business priorities at the time. There may be very good reasons why, once a tree is plotted, the Tree Specialist should leave the inspection/survey to a later date because there is other work which is more pressing. The Specialist would not necessarily do the survey at the same time as mapping/plotting the tree as it may take up too much time and divert the employee from more urgent or priority work. Mapping the tree is a relatively quick task whereas surveying the tree is, by its very nature, a more detailed and time consuming task in terms of what is observed, evaluated and recorded. By contrast, mapping or plotting a tree just requires the employee to log the location of the tree on a map or using a GPS reference (depending on the system in use at the period of time under consideration.)

39. The Tribunal was satisfied that, on average, a Tree Specialist could be expected to survey 60-100 trees per day (if they have been surveyed before.) If the trees in question have not been surveyed previously the employee could be expected to do 40-50 per day. Of course, there will be variations in the precise numbers done on any given day, this can only be an average. Much would depend on how many trees are grouped together, the how close together the locations being surveyed are, and how easy it is to gain access to the locations in question.

40. "CRM" refers to Customer Resolution Management. It is the reactive element of the work in that it involves responding to customer complaints and visiting and planning any work required (if it is the respondent's tree and if remedial work is required.)

41. TPOs are Tree Preservation Orders. They place restrictions on what can be done to the tree in question. The respondent will need to check whether a TPO is in place at a given location in order to make sure that it can do the work that it wants to do. If the tree is subject to a TPO then further steps will be required in order to facilitate work. A Tree Specialist will need to check for the presence of a TPO and not take the tenant or customer's word for it. Tree Specialists would also be responsible for making the relevant applications to Local Authorities in order to get the necessary permission for the proposed work.

42. The respondent operated three different record keeping systems during the relevant period of time. The earliest system was paper based with spreadsheets and maps with references to the trees on them. This was subsequently replaced by "Pear" which was a semi-automated electronic system. Then, the most recent system was "Treeplotter." Treeplotter used GPS to locate the trees. It was a computer database which contained 'layers' of information. The system could be interrogated to see the data on any given tree which had been recorded in earlier surveys. The template for the data recorded might change over time but information which had previously been recorded would still be present on the system. It could be called up and reviewed but would not necessarily be on the first screen presented to the viewer. All information recorded on Treeplotter would be retained within the database unless deliberate and active steps were taken to delete it. The claimant had not used Treeplotter when she worked for the respondent on a consultancy basis. It was a new system for her when she came back to work for the respondent as an employee.

43. The Tribunal is satisfied that the 'template' for recording data on trees was changed by Mr Dean at one stage. However, the changes were to include new data to be recorded or to remove unnecessary work specifications. However, such changes would only apply to the records for a tree going forwards, they would not be retrospective. The data previously collected about a tree would remain present on the system. That earlier information might not be shown on the initial screen but it could be easily located in the history tabs of the tree data and works data. Merely changing the template would not wipe the survey history of trees. The tree data could not be lost if the tree was still recorded on Treeplotter.

44. The only way to wipe the tree history would be to delete every tree on the system and then upload them one by one again. The Tribunal also heard that there was effectively a 'system reset' facility which could reset the whole system to a particular date in history. However, this would reset all of the records on the system, not just those for particular trees or locations. It would not select only the trees which had been inspected by a particular employee, for example. As this would reset all the records across the board rather than for just one set of trees, the respondent's employees did not tend to use this option. It was something of a 'sledgehammer to crack nut.' The unintended changes across the whole portfolio would mean that this would create as many (if not more) problems as it would solve. It changed all the data rather than only the piece which the employee wanted to amend. It would be preferable to find a 'work around' which related only to the specific tree in question, if this ever needed to be done at all. Furthermore, there was only so far back in time that it was possible for the 're-set' to go to, more likely a number of months than a number of years.

45. The Tribunal finds that Treeplotter is a 'live' system. If someone accesses the system they can see the information about the respondent's trees 'in real time.' It is possible to log on and see what information the respondent has about its trees at any given time. This feature of the system makes it hard for any employee within the Tree Department to 'cover things up.' Any information given by the employees or managers can be checked and verified. If the individual is attempting to mislead this can be checked.

46. The Tribunal heard evidence that audits of the information held about the trees are done by independent contractors such as Savills. Currently, the system is that there should be an audit on a two- yearly cycle. However, the first audit in the two yearly cycle was in 2020. It was not triggered by any disclosures made by the claimant during the course of her employment. We were also satisfied that Mr Hulme did not influence or organise audits. This was done by the Compliance Department. The Tribunal recognises that independence is at the heart of the concept of an audit. It is the whole point of auditing the information: to have it checked by an outside party. The Tribunal heard evidence that Carole Laing (Head of Health and Safety and Landlord Compliance) added the respondent's trees to the list of matters to be covered by the regular system of audits. (The audits covered more than just trees.) The Tribunal also understands that the audit by Savills was only completed in 2022 *after* the claimant had left the organisation. However, given that the scope of the audit was far wider than just the trees, we can understand that publication of the audit could well be delayed. It was a large piece of work.

47. The Tribunal was also informed that the respondent has a Tree Policy [p168]. We were referred to paragraph 3.6 which states: "*Tree surveys- Onward will undertake a tree survey programme on all trees within its ownership, within a 3 year timescale, to ensure that accurate tree records are maintained in order to meet legal, health and safety maintenance requirements."* We accept that the respondent was working towards achieving that. We also accept that one of the aims of the policy was to ensure that Onward discharged its

landlord's duty set out in the Health and Safety at Work Act and the Occupiers' Liability Acts (paragraph 1.1.3.)

48. The witnesses before the Tribunal also discussed the distinction between a tree being 'hazardous' as opposed to 'high risk.' A 'high risk' tree was often supposed to be felled within 24 hours. If a tree is categorised as 'high risk' it denotes the likelihood of the untoward event happening and/or injury being caused. A tree may be high risk if it is highly likely to cause damage or injury. The level of risk is related to the likelihood of an untoward event occurring. By contrast, 'hazard' relates to the degree of harm which would be sustained if the adverse event took place. How serious would the injury be? A tree may be 'hazardous' but not 'high risk' and vice versa.

Witnesses at the Tribunal hearing

49. During the course of the final hearing the Tribunal heard oral evidence from a number of witnesses and was referred to a significant amount of documentary evidence. The witness evidence helped to explain the documents and put the documentary evidence in its proper context.

50. There were a number of features of the evidence in the case which undermined the claimant's credibility as a witness. During the course of the disclosure process it had come to light that the claimant had covertly recorded some of the meetings she had with managers at the respondent organisation. The transcripts of those recordings were provided to the Tribunal within the hearing bundle. The claimant had initially denied that she was recording the meetings. It is a matter of record that she denied having made recordings. She then held disclosure of the recordings back during the Tribunal disclosure and preparation process. She subsequently realised that the content of the recordings would assist her in these proceedings and she then disclosed that she had made these recordings. Not all of the recordings were disclosed at the same time. Some recordings were disclosed later within the process than others. We heard from the respondent that the version of the recordings which was initially disclosed was clipped or edited by the claimant prior to disclosure. The respondent had to obtain a full length copy of the recordings.

51. The respondent suggests that the claimant is likely to have made further, additional recordings which have not yet been disclosed. It is perhaps unlikely that she would stop recording her meetings with the respondent once she had started doing this. However, she maintained that all of the recordings had been disclosed and that there were no further, undisclosed recordings. Latterly she suggested that she, in fact, had no choice in the matter because her partner made the recordings and this was outside her control. She then had to admit that she had lied at previous Tribunal preliminary hearings about the existence of the recordings.

52. It appears that when the meetings were recorded, the claimant (or her partner) forgot to turn the recording off at the end of the meeting. She was recorded conversing with her family. During that conversation there was reference to the claimant smoking a prohibited substance during working hours. At the relevant period of time (near the end of her employment) the

claimant had been restricted to working from home but she had not been formally suspended. There was at least a possibility that she could be asked to go into work when she was still under the influence of the prohibited substance. She subsequently admitted that she had been smoking illegal substances during work hours.

53. The claimant's willingness to make covert recordings and then deny it, her delays in disclosing the recordings and her failure to, initially, make full disclosure of the recordings, together her with her smoking prohibited substances, are all features of the case which significantly undermine the credibility of the claimant as a witness to the Tribunal. The Tribunal had to take account of this in reaching its conclusions in this case.

54. The Tribunal also observed the manner in which the claimant gave evidence during the course of the hearing. When reading from documents she was selective about what she read out. Alternatively, she sought to put a 'gloss' or interpretation on a document which the objective reader would be unable to see or accept. At the very least, the Tribunal concluded that the claimant was an unreliable historian.

55. By contrast, we considered that James Dean was clearly attempting to help the Tribunal to the best of his ability when he gave evidence. He made concessions where appropriate. He was not caught out telling untruths. His evidence was apparently honest. Where appropriate, he clarified the contents of his witness statement to ensure that it accurately reflected the evidence that he wished to give to the Tribunal. For example, he clarified paragraphs 10/11 of his witness statement to make it clear that his requests to work from home had not been refused. He accepted that he had only asked about working from home once so that he could look after his wife when she was unwell.

56. We heard oral evidence from Ian Hulme. He accepted that there were some gaps in his knowledge but he was able to give appropriate and necessary context (e.g. he explained that he was not engaged in doing 'data capture' tasks for the department.) The Tribunal did not get the impression that Mr Hulme was trying to hide anything from the Tribunal. It was important to view each witness's evidence in the context of their particular job role. Hence, Mr Hulme would be able to see the 'bigger picture' or overall situation within the respondent organisation but would not be aware of the detail of each individual Tree Specialist's work. In admitting the gaps in his knowledge or recollection he demonstrated his honesty. Mr Hulme was able to assist the Tribunal in explaining how the facts of this case and the work which the Tree Specialists did would fit within the bigger picture of the respondent's organisation. The claimant sought to show that Mr Hulme had 'missed' things, that there were gaps and that he was, at times, ignoring her. She suggested that he was deliberately ignoring her. However, Mr Hulme was able to demonstrate that managing the claimant was only one element of his job. There was a much bigger picture. In the absence of evidence to the contrary (i.e. evidence of a motive to target the claimant) the Tribunal is satisfied that Mr Hulme's attention may well have been diverted elsewhere at times. He had other employees to manage and other areas of the business to attend to. His was a managerial rather than an operational role. By contrast, the

claimant demonstrated little or no insight into matters which did not directly affect her or her own work.

57. We also heard oral evidence from Mr Peters, Ms Farrington and Mr Brown. They gave their evidence in a straightforward and credible fashion. When subjected to questioning their evidence remained, essentially, unchanged and consistent. The Tribunal found their evidence to be credible and helpful.

58. In any event, the Tribunal used the contemporaneous documents as a starting point for its deliberations. The respondent's witness evidence was generally more consistent with an objective reading of the contemporaneous documentation.

Chronological findings of fact

59. The claimant commenced her employment with the respondent on 28 September 2020. On 5 October 2020 the claimant received her initial instructions from Ian Hulme regarding "no access" properties [218-219].

60. On 5 October 2020 Mr Hulme emailed the claimant and James Dean with the subject heading "Re 1-1". In the email he wrote: *"Hi Liz, The 1-1's are target driven, I will launch today your annual appraisal that will set out your targets and actions.*

- *Heads up, keep a note on number of CRM's dealt with by you weekly.*
- *Number of compliance trees done weekly.*
- *Number of outstanding properties done weekly.*

This will be what and how we report on tree management moving forward, a[n] email either at the end of each week or the beginning will suffice and then a monthly overview at your 1-1. Any questions on the above give me a shout. P.S. James same from you please, both prioritise the outstanding 400 properties that haven't had a visit, end of November is the deadline for these to be completed."

61. The claimant knew that this was the priority, to get the 'no access' properties done by the end of November. As line manager, it was part of Ian Hulme's role to set these priorities. The claimant's evidence suggested that her main concern (basically from the beginning of her employment) was the issue of 'missing trees.' She was concerned as to whether anyone was reporting missing trees to Mr Hulme (or anyone else) as and when they were found and added to the system. However, the Tribunal is satisfied that this was not one of the reporting metrics that she was asked to comply with. The reality of the situation was that if a Tree Specialist found and then added missing trees to Treeplotter, then this could be seen by Mr Hulme, the Compliance Department, or indeed anyone else with access to Treeplotter. During the course of the hearing the claimant sought to suggest that various individuals were adding 'missing trees,' either behind her back or behind Ian Hulme's back or covering it up and hiding it from the Compliance Department. As a matter of fact, the nature of the live system meant that it was visible to all relevant parties. Thus, there was no requirement to separately report this to anyone (or to the claimant.) That was something that the claimant became

concerned about on her own initiative. This is also consistent with the fact that the claimant did not mention it in her first appraisal, even though she says that she had found missing trees by this stage.

First one-to-one meeting

62. On 26 October 2020 the claimant attended her first monthly performance discussion (or '1-1') [226-232]. In the manager's comments section Mr Hulme recorded that all work-related activities were to be performance driven to ensure that all targets and deadlines were met. He pointed out that weekly reports needed to be sent to show how many trees had been surveyed per week, how many properties had been visited per week, and how many CRM's had been dealt with. He reminded the claimant that it was really important that she demonstrate progress and ability to do the role requirements in her probation. He noted that she should ensure that James showed her all aspects of Orchard, raising jobs to contractors, and Treeplotter by the end of her probation period. He noted that if she required support she should let him know. In the claimant's section of the appraisal form she noted that there were various parts of her objectives that she had had little, or no, involvement in by the date of the appraisal.

63. The overall tone of the manager's comments was constructive. It offered guidance as to where information could be found and what aspects of the role should be prioritised. The claimant set out some ideas about what the team should do in the future. This included a suggestion that a survey of all ash trees across the three regions should be organised in the next year. Mr Hulme's response to this was to confirm that a lot of changes were taking place and that the whole of the 'EST' was going through a period of change and that there had [previously] been poor management, lack of responsibility, lack of care and pride. He continued, *"This is a good time in a lot of ways because you are at the beginning of the changes. Throughout this 1-1 I have mentioned performance and targets, this is not just for you but all of EST, I am confident that you will meet the above, but it's more essential for you on probation to ensure that it happens. I am here to support and advise you any time to ensure that you meet the necessary requirements. Once you are confident in this role I am sure you will bring lots of additional thoughts, ideas and experience to improve what we do."* In this way Mr Hulme was clearly setting priorities for the claimant from his perspective as a manager. The tone was helpful, positive and constructive.

64. The claimant alleged that these appraisal documents were not a good guide to what had been discussed during the one-to-one meetings. She suggested that she would fill in her portion of the form in advance of the meeting but that Mr Hulme would not discuss her comments during the meeting itself. She said that he only completed his comments after the meeting had taken place and they did not record or reflect the verbal discussions during the meeting. We heard evidence that the claimant had access to the HR system on which these records were maintained. She was, therefore, able to access her current appraisal documents and previous appraisal documents. She could go onto the system and read her manager's comments after the one-to-one meeting had taken place. Should she find that there was an inaccuracy in the records or that her manager's comments were misleading or an unfair

reflection of the discussion, she could have raised this with her manager or through an appropriate channel in HR. There could have been a contemporaneous challenge to the accuracy of these records. However, the claimant did not do this and so there is no contemporaneous record of the aspects of the notes which the claimant says were inaccurate or misleading. The claimant has only raised those challenges to the document at a much later stage and, in particular, during the course of these Tribunal proceedings. The Tribunal therefore approaches her allegations with caution. On the face of it, these documents appear to be relatively unremarkable one-to-one/appraisal records. It would be unusual if the manager's comments did not reflect either his views as expressed during the meeting or, at the very least, his genuine views of the claimant's performance as held at the time the appraisal took place. The Tribunal finds it hard to believe that these records are entirely divorced from the reality of the one-to-one meetings and the discussions which took place during such meetings.

65. During the course of the hearing Mr Hulme accepted that the claimant was likely to fill in her sections of the one-to-one forms in advance of the meeting. He did a mixture of filling in the managerial sections in advance, filling in the section during the meeting itself or completing the section after the meeting. However, to the extent that the claimant sought to allege that Mr Hulme had gone back after the event and tampered with the record to either add things that had not been discussed, or delete things from the record, we do not accept that this is likely to have happened. As both parties had access to the HR system on an ongoing basis, any untoward changes would be visible and could be complained about. Why would Mr Hulme do this if he knew that the claimant could see it, raise it and complain about it? The Tribunal was sceptical about the claimant's assertion that Ian Hulme used these documents as a way to lay a 'breadcrumb trail' in order to 'set her up to fail' at a later stage in her employment. We also noted the number of people that he was line managing and the breadth of his portfolio of responsibilities at this time. He is unlikely to have had either the time or the motivation to single her out in this way.

66. At various stages in her evidence, the claimant asserted that there were verbal conversations which were not captured in the written record of the one-to-one. However, if this is the case, then the claimant also had the opportunity to record her intended points to raise in the meeting in writing as part of her preparation, or to raise a query on a particular subject through the HR department, or otherwise to get any missing items added to the record. Indeed, at the subsequent month's discussion she could refer to the contents of the previous month's discussion in order to reintroduce previous discussions into the record.

67. At various points in her evidence the claimant sought to assert that she did not want to 'drop Mr Hulme in it' (e.g. paragraph 64 claimant's witness statement) by mentioning missing trees. She indicated that she wanted to give him every opportunity to 'fess up.' However, raising such issues would not be 'dropping him in it,' as there was nothing intrinsically problematic with previously unknown trees being discovered and added as the employees went along in their day to day work. It was a feature of the system that this would happen on occasion. The respondent would always be unaware how

many trees were 'unknown' and therefore completely missing from the system.

68. At various parts of her witness evidence the claimant said that when she was a consultant (rather than an employee) and prior to the implementation of Treeplotter, she had sent in whole spreadsheets of missing trees which she expected the respondent to add to its records. She suggested that her data had been lost or had not been processed. She suggested she had records of the missing data but she never actually sent her copies of the missing data to her managers at the respondent in order for them to capture it. The Tribunal could not understand why the claimant had failed to do this if she felt that this information was important for the respondent to have and be aware of. She did not need to be asked for this, it was in her gift to do it. The other option would have been for her to upload the information from her own records. She did not do either of these things. Instead, during the Tribunal hearing, she pointed to an example she sent to Rob Rainford (when she was a consultant in 2016 [138-147]) saying that her data had been lost. She later sought to suggest it was both Mr Rainford *and* Mr Hulme who had previously received the data and who had either lost it or not processed it. However, she did not take the Tribunal to an example of *Mr Hulme* having been sent this information in the years beforehand. The claimant was somewhat disingenuous in suggesting that Mr Hulme had received and lost data when the only concrete examples before the Tribunal actually related to Mr Rainford.

<u>First alleged disclosure</u>

69. The claimant alleged that she made her first protected disclosure on 3 November 2020 [236-238]. The claimant sent an email to Ian Hulme and James Dean responding to Mr Hulme's email of 3 November 2020 [at 9.33] where he asked whether trees at School House, 121 Jackson Crescent had been inspected [236]. She wrote:

> *"I have looked at these trees in the past and they were sound, just leaning. They are not plotted in treeplotter though so can't check when they were surveyed etc. but must be at least a couple of years ago. Shall I head over there and re-survey the site? Are there other sites that have been surveyed but not added to treeplotter? I think this needs checking because I used to send over my surveys in spreadsheets and there were a few times stuff didn't get added to pear when Rob was around. All my surveys are saved on my old laptop at home so could go through them all but it would take a while. It's not good if we have sites missing from treeplotter when that's what we are working from. Is there an easy way to check all our sites are covered James?" [236]*

70. The Tribunal considers that there is nothing in the disclosure which indicates any potential hazard or health and safety risk. We consider that paragraph 35 onwards in the claimant's witness statement is an attempt to flesh out her disclosure after the event and raise the health and safety risk issue. However, the correct issue for this Tribunal is what information the email at [236] conveys and what it indicates about the claimant's reasonable belief. A dispassionate reading of the email shows that the claimant would need to

add substantially to the text of the message in order to convey this sort of concern. In the email she indicates that the trees were previously sound but that she has not checked them for a while. She asks whether she should re-survey and queries whether there may be other sites missing off the records. She suggests that this should be checked. She indicates that it is 'not good' if sites are missing from Treeplotter but does not indicate that this is a potential health and safety risk or that there is a risk to the public. We draw our conclusions as to whether this constituted a qualifying disclosure in the conclusions section of this judgment, below.

71. In response to her email, James Dean confirmed that he would be inspecting the site on the Friday. The claimant's response to this message does not raise or reinforce any health and safety concerns. Rather, she queries why he is going to that site rather than her. She wants to co-ordinate which parts of the geographical 'patch' she and James Dean are driving to. She seeks to direct James Dean as to which properties he is to attend. This suggests that health and safety issues are not at the forefront of her mind when she is sending these emails. It appears that it is only after the event that she seeks to suggest that there was a health and safety concern element to this email chain. We can see from the documents that Mr Hulme triggered the claimant's first email by asking if the trees had been inspected. The claimant responded to that initial email but did not answer that specific question. James Dean picked it up.

72. Mr Hulme's evidence to the Tribunal was that he had not knowingly ignored the claimant's email. He could see that James Dean had responded to say he would investigate this further, which would explain why, at the time, he did not respond. However, he maintained that he was not ignoring the claimant. The Tribunal considers that this is a reasonable conclusion to draw. The issue which was raised was being dealt with. Mr Hulme did not need to respond directly to the claimant in such circumstances. He was not ignoring her. Appropriate resources had been allocated to the issue.

73. On 13 November 2020 the claimant sent an email to Mr Hulme and Mr Dean about a stump at 155 Queens Rd [246]. In the email the claimant informed her colleagues that she had raised a job for stump removal as the stump in question was right outside the front entrance and caused severe displacement of the flags. She noted that the customer at the address had been trying to get the problem resolved for over 18 months and had put in an official complaint because the repairs had had to be cancelled because the tree/stump was in the way. The claimant indicated that she came across the problem when calling at the property which had been on the no access list. She alleged that: *"This means that a member of our team knocked on this same door in 2019 and did not take action on an obvious hazard. Several of the properties on the no access list in Liverpool have trees readily accessible at the front that have not been surveyed. Going forward James, can we make sure that the trees at the front are surveyed regardless of whether the customer is at home or not as trees on property frontages are far more likely to have a target with more serious consequences if trees fail than those in gardens (i.e. the pavement and road.)"*

74. Part of the claimant's case is that this email was ignored by Mr Hulme. Mr Hulme's position is to accept that he did not respond to the email. However, he takes the view that the email did not require a response from him. The content of the email indicated that the claimant had noted a problem but had taken action to resolve it. The claimant had taken control of the issue and was actioning the matter. He did not see that a reply from him would have added value or been beneficial. He maintained that this was not an example of him ignoring the claimant in any way. Rather, the nature and content of an email communication would determine whether a response was required from Mr Hulme, or not. The Tribunal can see, on examination of the claimant's email, that it provides information to the claimant's line manager and to her colleague. The claimant directed her request for/suggestion of a change in approach to these sorts of issues to Mr Dean, by name. She does not ask anything of Mr Hulme or say anything which suggests that she expects a response from him. The Tribunal understands and accepts that Mr Hulme would not consider that a response from him was required in the context of his management role and in circumstances where the claimant was communicating directly with her colleague about how to handle such issues going forwards.

75. We also note that the particular property referred to in the claimant's email was outside Mr Hulme's remit insofar as it was already being handled by the Property Services team [1152-1162]. Those records refer to a period from May 2019 onwards and show various stages of the job being booked via a contractor, Axis. In addition, the claimant had raised this issue with Carol Laing (Head of Landlord Compliance and Assurance) [252] and she had said that this did not come within her remit. She did not suggest it should be reported to Mr Hulme but instead forwarded the matter to Simon Brown [251]. This indicates that Mr Hulme is correct when he says that there were also other parties in the company who were assisting in relation to this matter.

76. The Tribunal concluded that this email from the claimant did not require a response from Mr Hulme. The claimant had already put in place a solution. It is not clear what response Mr Hulme was expected to send. The claimant had the issue under control and she sent the relevant messages to other interested parties within the company. We also concluded that the absence of a message from Mr Hulme does not indicate that he was 'ignoring her.' We were unable to conclude that he was ignoring her. The only person who was called upon by the email to do something was James.

<u>Second one-to-one meeting.</u>

77. On 30 November 2020 the claimant had her second monthly performance discussion [257-259]. In this one-to-one record Mr Hulme is recorded as reminding the claimant to be fully involved, updated, proactive and understand all that the role requires and 'not be an understudy.' He noted that the claimant is very capable and that this is her role. He noted that the respondent/team needed to proactively identify suitable trees for removal. He reminded the claimant that understanding and relaying the tree policy, being proactive in surveys and keeping on top of CRMs would all help to reduce complaints. He continued that the respondent's role was to remove unsuitable trees. He reminded the claimant that they could not remove trees

from private gardens as the respondent did not own them or have any responsibility for them. Again, he reminded the claimant that the role required her to *"step up, be involved, make decisions, organise replacement trees, organise works, manage contractors."* Importantly, Mr Hulme did not confirm that the claimant had met all of her objectives during this performance discussion. In fact, he made a specific request for information and data from the claimant. He wanted to know how many trees had been surveyed in the last month, how many properties had been visited, that van sheets were up-to-date, confirmation that the lone working device was on at all times, how many audits on contractors had been carried out, whether all targets were met, and how many days per week the claimant was out on site.

78. The contents of the one-to-one performance document from 30 November constitute a continuation of the themes set out in the earlier one-to-one. There is no appreciable or obvious deterioration within the manager comments section of this appraisal. The comments are neither wholly negative nor wholly positive. As might be expected, they are a blend of the two, pointing out what the claimant is doing well and providing guidance for further improvement going forwards. It is relevant to note that the claimant was still in her probationary period at the time these documents were completed. A balance of positive and negative comments is to be expected, especially with a view to helping the claimant to pass her probationary period.

79. As part of her case the claimant alleges that Mr Hulme did not address the health and safety concerns raised by the claimant in her first alleged protected disclosure. She asserts that Mr Hulme made contradictory comments surrounding the claimant's performance, set unrealistic goals and targets and 'set the claimant up to fail.' On reviewing the evidence, the Tribunal does not accept that the claimant's allegations about this monthly appraisal reflect the document fairly or accurately. On a dispassionate reading, the appraisal document is wholly unremarkable for a document of this nature. The comments in the 'manager' section address the issues raised by the claimant in the course of her section of the appraisal document and add in the manager's own reflections on her performance, as would be expected.

80. In the claimant's witness statement (paragraph 58) she complains that she was given no instructions on how to deal with missing trees. However, it is apparent that the claimant did not raise the issue of 'missing trees' herself during this meeting. Thus there was no prompt for him to refer to it at all during the course of the appraisal. In fact there was nothing in what had happened so far to suggest to Mr Hulme that the claimant did not know how to deal with missing trees or that she needed further instructions on this. The accepted, standard practice within the respondent was that members of the team should plot the tree when it is found and it will then be added to the schedule of surveys for a later date.

81. Mr Hulme explained that if a tree is not mapped that, by itself, is not a health and safety issue. It is if the tree is dying, diseased, damaged, touching buildings, low branching or has become a trip hazard that it could potentially become a health and safety issue (depending on where it is located.)The absence of a record of a tree's existence does not <u>necessarily</u> mean that

there is a health and safety risk. The missing tree may or may not amount to a health and safety risk, depending on its condition and location. If unmapped, the respondent would not know of the tree's existence at all.

82. If the claimant identified trees that were unmapped all she would need to do would be to plot them on Treeplotter and then the tree would be surveyed to check whether it was healthy and safe. Ensuring that trees were plotted/mapped was part of the claimant's responsibilities. The Tribunal notes that the claimant never actually gave Mr Hulme a list of unmapped/unplotted trees.

83. The claimant had an opportunity to tell Mr Hulme of any health and safety concerns during the performance conversations/one-to-ones. The only issue which she actually flagged as a health and safety concern during such appraisals was in relation to a tree in Blackburn which had a branch overhanging a parking space. We accept Mr Hulme's evidence that whilst the claimant did sometimes mention unmapped trees in the appraisal conversations, she did not tell him that she was concerned about this from a health and safety perspective. If a tree was dangerous or works were urgent then the claimant had the responsibility to raise the necessary works and update Treeplotter with that information. We accept that Mr Hulme told her to map trees that she had identified so that they could be dealt with and surveyed in future but he did not dismiss or refuse to discuss any issue in this regard.

84. Nor do we accept that he was trying to cover up any issue in this regard. Given the 'live' system provided by Treeplotter, it would not be possible to cover up 'out of compliance' trees. If someone consulted the system they would be able to see what the respondent knew about its trees and what surveys had been carried out (if any). There would be no benefit to Mr Hulme from trying to cover things up. The system would show the information in any event.

85. The Tribunal notes that, even though the deadline for completion of the 'no access property' task was 30 November, Mr Hulme did not mention the fact that the claimant had not completed this task in the course of the appraisal. The claimant sought to suggest that this was in some way untoward. She sought to portray this as contradictory behaviour whereby Mr Hulme would keep quiet about something but then raise it against the claimant at a later date. An alternative interpretation is that the claimant was still relatively new to the role and there were lots of tasks for her to be getting on with. Mr Hulme understood that sometimes getting access to a property was not straightforward and that Mr Dean was also doing some of this work (but was more focused on the land mapping task.) In such circumstances, Mr Hulme did not pick the claimant up on her failure to meet the deadline straight away. Instead, he gave her some leeway. This does not mean that it was no longer a task which he expected her to focus on, rather that he did not 'jump on' her failure to meet the deadline at the first available opportunity in her appraisals. The Tribunal did not accept the claimant's characterisation of Mr Hulme's failure to mention the deadline on 30 November. We consider the alternative explanation to be more reflective of the true state of affairs at that time.

Third one-to-one meeting.

86. On 14 December 2020 the claimant had her third monthly performance discussion with Mr Hulme [269-272]. In the written record of this meeting Mr Hulme reminded the claimant that, although she had initially been tasked with the 'no access' properties, there were also other aspects of the role which had to be carried out in a consistent way. He thought that the claimant needed to have a proper plan in place to move her role forward and to fully understand the role that Mr Hulme wanted her to carry out. He suggested that a full year-long plan that encompassed all of her work tasks, projects, targets should be formulated. Collaborative working was vital but needed to be organised and planned seasonally. Mr Hulme also commented that the claimant had failed to fill in her sections and provide her comments on some parts of her objectives. In particular, he suggested that he would have expected the claimant to have commented on performance, tree numbers, property numbers, CRM's, and how she was doing against the target. He also remarked that he had tasked the claimant with prioritising 'no access' properties and that there was a deadline for the end of November for completion and that this had not happened. He recorded that the 'no access' surveys had still not been completed and that this was disappointing for two reasons. First, the reporting/updating aspect in that he would have expected the claimant to inform him if she was behind and give the reasons why. This had not happened. Second, the claimant did not appear to have realised how important this task was in terms of compliance. He continued that the claimant's performance was disappointing at that moment in time and that he needed to understand why. He wanted to discuss some of her comments. He concluded: "*I am concerned that your performance, direction, understanding of this role is not what it should be. The performance figures for this month are poor, your organisation and work priorities are not understood. You are capable and experienced to do this role, but I'm not seeing progress that I believe I should be seeing. I want to see you out on site 4 days per week. I want to see consistent tree survey figures. I want to see consistent performance and target figures. I want you to organise your calendar and be proactive in all aspects of this role."*

87. In the claimant's own comments she seemed to accept some of this as fair criticism. She said that her performance had been far less than she was capable of. This is in contrast with the corresponding portion of her Tribunal witness statement (e.g. paragraph 63 onwards). The claimant also referred to [555] (which is Catherine Farrington's file note of a later disclosure.) The Tribunal does not accept that she raised the issues in the December one-to-one that she later suggests she did when she talks to Ms Farrington. The paper trail does not support her in this and suggests that this reflects some 'reverse engineering' of events by the claimant..

88. As part of her case the claimant alleges that at the monthly appraisal the bullying escalated from the previous appraisal. She asserts that Mr Hulme was dismissive of further examples of health and safety concerns relating to her first protected disclosure. She asserts that Mr Hulme was negative and critical of the claimant's work but provided no evidence or examples to support his comments. She asserted that he provided lists of unrealistic demands and was contradictory, setting the claimant up to fail. She maintains

that there were no clear instructions regarding the claimant's health and safety concerns. Once again, the Tribunal concludes that the claimant's characterisation of this meeting does not fairly reflect what happened or what is recorded in the appraisal document. For example, what health and safety concerns did the claimant raise which Mr Hulme was dismissive of? There is no reliable indication that the claimant had raised anything during the course of the appraisal in terms of health and safety which required Mr Hulme to deal with it as part of the appraisal, to take action or to give the claimant further guidance. As the claimant did not raise such concerns, it would be wrong to criticise Mr Hulme for not addressing them. The claimant's characterisation of this appraisal does not accurately or fairly reflect the document or the verbal conversation which took place at the time.

Fourth one-to-one meeting.

89. The claimant had her fourth monthly performance discussion on 25 January 2021 [319-323]. In his comments Mr Hulme noted that it had been a bit of a catch up in terms of tree compliance, 'no access' properties and learning the new software. He stated: *"I agree there is lots of different aspects of this role that you should be getting involved with and I have met with you and outlined what they are. I think we need to have a consistent approach across the regions about our tree management and promoting what we do, link in with James, do joint PPP, keep me in the loop of updates. We do work closely with all neighbourhoods, I have meetings with the heads of neighbourhoods twice week, meet with neighbourhood managers monthly, so if you want me to plan and invite you into meetings then let me know."* This comes across as a constructive comment which seeks to positively engage the claimant in the job and work collaboratively with her. It is somewhat at odds with a relationship tainted by bullying. Mr Hulme continued, "*The STAR survey highlighted two main regions of Runcorn and Oldham for trees and hedges, I did mention this to you in a previous 1-1 and asked you to compile a list which I would like to see."*

90. Mr Hulme did note that the 'no access' properties had gone over the target timescale, which was disappointing. He questioned the claimant's decision making in relation to a school issue and queried why the respondent would pay for replacement trees which had been planted by a school and which were damaging the respondent's path. This comes across as a legitimate question. Why would the respondent expend money to replace someone else's trees which had damaged the respondent's property? As a manager, Mr Hulme is entitled to ask these sorts of questions and challenge the claimant's decision making. This is not bullying but rather legitimate management oversight. He also commented on communication and noted that the claimant did not seem comfortable in meetings and that her language appeared stressed. This would be a strange comment to make if Mr Hulme was bullying the claimant and making her stressed. Why would he record this in an appraisal document unless the source of the claimant's stress was something other than Mr Hulme? Mr Hulme commented that the organisational part of the claimant's performance needed to improve. He pointed out where follow up actions were outstanding and where the claimant needed to provide data. Importantly Mr Hulme continued, "*the tree numbers have improved and if you look at the numbers weekly since you started they do vary a lot, ranging from 4-516, we need this to be more consistent and*

understand the reasons why they vary." Again, this seems to be a pertinent question which is expressed in a balanced and reasonable manner. It does give the claimant credit where she has improved. He also expresses the view that the claimant is not working fully in the team (either admin or Mr Hulme) and he needed to understand this. This is a legitimate line of enquiry for a manager to seek to improve the integration of the employee into the workplace.

91. In relation to flexible working Mr Hulme pointed out that 37 hours per week were still required and that working from home still needed to be approved by him in advance.

92. The final comments from Mr Hulme in this appraisal read, "*I think your performance and organizational decision making are inconsistent. You seem to be doing things which are not run past me for advice and support. If your probation was up now I wouldn't be passing you, which is a worry. I need to set up weekly support meetings with you so we can get you on track and feel confident in your role. I will ask Steph from HR to attend. I know you are capable but the communication and confidence seems to be missing. You have told me that you are anxious and have had anxiety issues, I can support you with these."* Although this comment delivers bad news (i.e. regarding not passing probation) it is delivered in a measured way. Mr Hulme sets out his own obligations to try and support the claimant and improve her confidence. He expressly recognises her capabilities to do the job.

93. On reviewing the evidence the Tribunal is not satisfied that any of Mr Hulme's comments disclose elements of bullying. The claimant asserts that the comments are contradictory but the Tribunal views the comments as balanced. Mr Hulme makes positive and negative comments and seeks to plot the way forward for the claimant in her role. Furthermore, the Tribunal concludes that it is not unreasonable for Mr Hulme to mention, at this stage, that the claimant could fail her probationary period. Indeed, he would have been criticised if he had not given the claimant fair warning that her performance was not up to the required standard and then had subsequently failed her in her probation. By making this comment, Mr Hulme gives her fair warning and an opportunity to improve, with support.

94. The claimant indicated in her witness statement [paragraph 137-138] that she had stumbled across 148 missing trees. The Tribunal notes that the claimant did not include this information in her portion of the appraisal documentation. Indeed she does not seem to mention missing trees as a particular problem in her appraisal comments. She focuses more on unsuitable trees/trees in unsuitable locations, cyclical surveys and how frustrating it had been to try and get access to the no access properties.

95. The Tribunal reflected on the claimant's evidence at paragraph 141 of her witness statement. The claimant alleges that during the review Mr Hulme made a comment to the effect that she would have to sleep with him in order to pass her probation. This appears to be the first time that the claimant has made this assertion in the proceedings. The claimant says that there was no 'sexism claim' in her case but we rather wonder, if such a comment was made, why the claimant was not complaining of sexual harassment at some

point since the comment was made. If the comment was made, why was it not part of the Tribunal claim? The fact that this is put into the witness statement when it is not part of the claim goes some way towards undermining the credibility of the allegation.

96. On balance, the Tribunal is not satisfied that Mr Hulme did make the comments which the claimant now describes. We do not understand why the claimant would fail to refer to it in the more contemporaneous documents and did not include it as a harassment complaint in these proceedings. We also do not understand why she did not tell HR about it or report it to Occupational Health when she went for her consultation. If comments like this had truly been made, it seems odd that Mr Hulme would take the risk of shining a light of publicity on the working relationship by referring the claimant to Occupational Health. He would have no way of knowing that the claimant would not make a complaint of harassment via Occupational Health which would potentially create real problems for himself. Finally, the Tribunal saw Mr Hulme give his oral evidence about this allegation. We saw how upset he evidently was and how hurtful it was to him given his longstanding marriage and family circumstances. The Tribunal had no doubt that what we observed was a witness who was genuinely upset by the allegation that the claimant had made. It certainly did not appear to be a 'performance' for the Tribunal's benefit. The claimant appeared to take some satisfaction from his distress.

97. During the course of the probation review Mr Hulme picked up on the claimant's stress levels. Instead of ignoring it, he referred her to Occupational Health. During the Tribunal proceedings the claimant characterised this as him 'fishing for something to use against her.' However, we question why he would voluntarily relinquish control of the situation and send her to a third party who could actually subject him to scrutiny. How would he know that the claimant would not 'drop him in it' with Occupational Health?

98. We considered the contents of the referral to Occupational Health referral [314]. The terms of the referral show the purpose of it. We do not consider this to be consistent with the claimant's assertions to this Tribunal. Mr Hulme would not know in advance what Occupational Health would say and so it is a strange way for him to go about looking for 'ammunition' to use against the claimant.

99. A separate matter arose regarding the claimant working over the Christmas break [324-325]. The claimant had apparently come in to work between Christmas and New Year. She asserted that she had not known that she did not need to work during this period and therefore asked to claim these days back as annual leave or extra pay. HR agreed to credit the days back to the claimant but pointed out that working requirements were referred to in her offer letter. She should have known that the Tree Team did not work during this period. The business was effectively shut down. It seems unlikely that the claimant did not know this. The train of correspondence also shows that the claimant did not email her line manager about this or copy him in to her request for the extra holidays. It was left to HR to inform Mr Hulme about the claimant's request. This could be viewed as an example of the claimant

playing one area of the business/managers off against another and turning things to her advantage. Even prior to her employment with the respondent, the claimant had worked for them as a consultant for years. The Tribunal views it as highly unlikely that she would not have known about the Christmas shutdown in such circumstances.

Occupational Health

100. As previously stated, the claimant was referred to Occupational Health. She was asked to sign and return the referral form on 25 January. She was also told that there was an Employee Assistance Programme which she could make use of. In her evidence to the Tribunal, the claimant criticised Mr Hulme for both the Occupational Health referral and the weekly support meetings. She asserted that they were further opportunities for him to bully her. The Tribunal views this criticism as unjustified, for the reasons already stated.

101. An Occupational Health report was produced, dated 4 February 2021 [338]. In discussing the claimant's reported symptoms of stress and anxiety, there is no record of the claimant having made an allegation of bullying or harassment against Mr Hulme. The Occupational Health clinician also made reference to menopause and the fact that this was not helping her sleeping pattern. The report confirmed that the claimant was fit for work in her job role. It recorded that weekly meetings had already been arranged to assist the claimant. A workplace stress risk assessment was also recommended. The report confirmed that the claimant was aware that she could access counselling through the EAP. No routine Occupational Health review was deemed necessary.

102. The Tribunal considered the contents of the Occupational Health report as a contemporaneous document recording the difficulties that the claimant was said to be facing at that time. Whilst the document refers to the difficulties of work having an impact on the claimant's mental health, there is no suggestion within it that the claimant suffering bullying or other ill treatment. Rather, the requirements of the job seem to be causing the increased stress levels. There is no record of the claimant being particularly distressed or emotional during the consultation either. There is no suggestion that the claimant needs to see her doctor or that further health support is required. In short, the report is not consistent with the account the claimant now gives about how she was being treated by Mr Hulme.

Stress risk assessment.

103. As recommended, the respondent instigated a stress risk assessment [358]. The document was sent to the claimant on 10 February. She returned it, duly completed, on 12 February. The claimant's email of that date captures her communications with HR at that time. She says: *"When I started back at Onward in September last year I was shocked by how far behind we were on everything (due to being really short staffed for several months last year.) Serious accidents can occur with trees, and when trees are overdue for inspections or haven't been surveyed at all yet, I get nervous. It feels like a mammoth task to get everything back on track and up to date. I have always had issues with stress when I feel that I am behind and have 'too much to do'*

(even in my personal life). My manager was promoted last year to GM of environmental services, he has been exceptionally busy and especially during my first couple of months I felt I didn't have enough time with him and he often didn't return my calls or emails. My buddy was also hard to get hold of in the early days which was frustrating. These communication issues with my team have now been rectified and I have a weekly support meeting with my manager. There is also a new manager starting in the next couple of weeks which will undoubtedly alleviate some pressure." [emphasis added by Tribunal]. The contents of this email do not paint a picture of someone who is being bullied by her manager or who continues to suffer difficulties. On the contrary, she seems to suggest that any problems have now been resolved. This is at odds with the account the claimant gave to the Tribunal.

104. The answers which the claimant gave in the stress risk assessment are also worthy of note. In particular, her answers to questions 21 to 24 indicated that she was never subject to bullying at work and could always rely on her line manager to help her out with a work problem. She confirmed that she got help and support that she needed from colleagues. She also ticked 'disagree' in response to a statement that relationships at work were strained. She also agreed that she could talk to her line manager about something that had upset her or annoyed her about work.

105. Once again, the contemporaneous record of her feelings about her workplace experiences does not match her portrayal of the workplace and her workplace experiences in these Tribunal proceedings. When taken together, the Tribunal views the contemporaneous documentation as a more reliable reflection of how events had unfolded during the claimant's employment than the witness evidence she had produced for the purposes of these proceedings. None of this contemporaneous documentation is consistent with Mr Hulme 'setting her up to fail,' as she now alleges. At [362] she is unequivocal in confirming that she is never subject to bullying at work. The Tribunal is forced to conclude that the bullying allegation is something that the claimant has made after the event once Tribunal proceedings were on the horizon.

Fifth one-to-one meeting.

106. The claimant had her fifth monthly performance discussion on 22 February 2021 [386-389.] Given that it is towards the end of the claimant's probationary period she provides remarkably little information in her sections of the form. Her largest contribution [388] returns to what she characterises as the communication problems at the start of the probationary period (now resolved). Her comments are largely self-justificatory.

107. In his section of the appraisal form Mr Hulme is clearly trying to hold the claimant accountable for her performance to date and to set the record straight. He points out where she needs to prioritise her work. He did not consider communication to have been the issue. He noted that he did answer her emails and had met with the claimant and Mr Dean at least twice a month since the claimant started employment, in addition to her one-to-ones and other individual meetings/conversations. From Mr Hulme's perspective the issue has been the claimant's decision making, not following instructions and

her communication to the wider team admin. He noted that the targets regarding 'no access properties' had still not been completed. In relation to working from home he met with the claimant and James and reiterated the criteria and procedure for working from home. He notes that the requirement is to give adequate notice, explain what work is being doing above and beyond normal working duties and show the evidence of/results from working from home. He stated, "*You worked from home a few weeks back and when I asked you to show me what you had done you said it would be in this conversation, its not. You also said you were doing planning applications on that day, none were submitted. You have again asked on Friday tea time to work from home on Monday, no adequate notice, the reasons you gave to me are not reasons to work from home, you had 2 hrs from 8am till 10am to do these works prior to our 1-1. I have stressed at this moment that trees out of compliance have to be the priority. You can work flexibly and build time up by working over your time during the day. Letting me know the reasons why and then saving this time to have half days off or full days off."* Importantly, he concludes by saying, "*I feel that your comments regarding me being negative are wrong and we have had a number of conversations where I have discussed in detail the fact that I wouldn't of brought you back if I didn't feel you could do the job, that you have the potential to be in the future the ARB manager, these are not negative conversations."*

Mr Peters' arrival.

108. On 22 February 2021 George Peters joined the respondent and assumed line management responsibility for the claimant. When he started his employment he had a management handover with Mr Hulme. They discussed the current condition of the tree department, the challenges faced, and operationally where the team was as against goals and deadlines. They also discussed personnel management and he was given details about staff performance, such as strengths and weaknesses, in order to help him manage them going forwards. At that point in time it was only the claimant and Mr Dean in the Tree Team.

109. Mr Hulme did tell Mr Peters that there were concerns about the claimant's performance and that she was still in her probation period. We accept Mr Peter's evidence that, whilst he noted what Mr Hulme said, he was determined to reach his own judgment.

110. After his discussion with Mr Hulme, Mr Peters went back and looked at the records of the claimant's performance meetings or one-to-ones in order to get a better sense of what the issues were. He reviewed the equivalent documents for James Dean. We accept that he wanted to pick up the tone of the documents and any issues recorded to help him in managing them.

111. The day after he started he had a meeting with the team (claimant, Mr Dean and Katherine Dean (Environmental Services Assistant) to talk about the team's activities in greater depth. He sent a follow up email to the attendees in order to capture and summarise the discussion, priorities and plans [401-403]. On review this is a thorough email. It is a comprehensive 'state of the nation' snapshot of the situation when Mr Peters joined the team. It sets priorities and gives credit where it is due. Overall it is a positive document.

26 February.

112. On 26 February Mr Peters sent an email to the Tree Team setting up a regular weekly meeting that it would be mandatory for the claimant and Mr Dean to attend. This was part of Mr Peters setting expectations about how he would go about managing the team and how the structure would work.

113. On the same day Mr Peters sent an email direct to the claimant as he knew she wished to discuss some matters directly with him. He was available for a discussion that afternoon and the claimant called him for the discussion.

114. We accept Mr Peter's evidence that he did not lie to the claimant about this meeting by suggesting that he was alone in the office. Rather, due to the prevailing Covid 19 restrictions, the office had been extremely quiet all day and by that time in the afternoon Mr Peters thought he was the only one in the office. The office was across two floors and Mr Peters' floor was empty. Mr Peters thought that Lynne Coyle had already gone home by this time and so could not have waved at the claimant on the screen. Had anyone else been there we accept that Mr Peters would have relocated to a private room in order to maintain confidentiality. Mr Peters had no reason to lie about this and no reason to undermine the confidentiality of the conversation. In any event, Mr Peters was wearing headphones and so anything which the claimant said would not have been audible to anyone else who might have been in the vicinity.

115. During this call, the claimant revealed to Mr Peters that she had concerns about trees that had not been surveyed and that she was not satisfied with the way Mr Hulme had previously managed her. She explained to Mr Peters that she had information from when she had previously worked for the respondent as a contractor which suggested that the respondent was at risk on the basis that there were trees that the respondent knew about but which did not have a survey on file. She said that, in order to comply with the respondent's responsibility under the Occupiers' liability Act, they needed to ensure that their land was safe for people to visit and that there was a duty of care to ensure that the land is safe. She said that there was a duty of care to undertake a cyclical survey for trees. She indicated that once there was a demonstration that trees had been surveyed by a specialist, the respondent would have complied with its duty of care. She explained to him that her main concern was exposure to risk for the organisation as they did not know whether a tree was dangerous or not.

116. We accept that Mr Peters said that he was keen for her to share her concerns, particularly as he was new to the team. He wanted to go away and look into the issues raised.

117. We accept Mr Peter's evidence that during the call, the claimant alleged poor management by Mr Hulme. She said that there was clear favouritism for Mr Dean and she believed that she was being treated differently. They had a lengthy conversation about the issues and the claimant said that she was ignored by Mr Hulme when she raised serious exposure for the respondent in terms of landlord compliance. In response, Mr Peters said that he was

aware that there were HR processes that the claimant had access to if she wished (e.g. to raise a grievance.) He also pointed out that she was no longer managed by Mr Hulme as he felt this might reassure her.

118. Where there was a dispute between the accounts of the meeting given by Mr Peters and the claimant, we preferred the evidence of Mr Peters. He accepted in cross examination that the claimant has alleged that Mr Hulme had lied to Mr Peters and said that the team had surveyed all the trees. She referred to trees which were missing from Treeplotter. She alleged that the 'ownership layer' on Treeplotter was wrong and that 100s of trees were missing. She showed him examples of that.

119. Mr Peters accepted that the claimant was talking about a health and safety concern and a risk to the public. However, he said that, broadly speaking the risk had not even been quantified. Without more information it was not possible to say whether the trees in question were actually a danger or not. He accepted that not having data on trees *can* represent a risk but, as a matter of logic, the respondent would not be able to say whether the tree actually *did* present a danger without more information. In cross examination Mr Peters accepted that the claimant had a health and safety concern and that she brought this to him. He said that it was reasonable to have concerns when not got the information on all of the trees. When the claimant indicated that she had old survey information in paper format from her time as a consultant, Mr Peters did ask her to send this information in to him.

120. The claimant put it to Mr Peters that under Mr Hulme's direction he had no intention of investigating and resolving the issue. Mr Peters maintained that this was not true and that obviously this was a matter that he was going to look into. He would need to give an outcome either to the claimant or as an action plan to the team in order to rectify the situation. The claimant alleged that Mr Peters did not raise the issue with the claimant again until the probation review. Mr Peters' perspective was that he had only just met the claimant and that it would be irresponsible not to do due diligence before he decided how to proceed. He maintained that he was within his rights as a manger to take time to understand the extent of the problems and decide how to proceed, if necessary approaching his line manager too.

121. The claimant alleged that after she had made the disclosure to Mr Peters he had gone straight to Mr Hulme with it. He denied this. The Tribunal found him to be a truthful witness. He did accept that he would have asked James Dean's perspective on some of this given that he was the other Tree Specialist in the team but such a conversation would have taken place the following week, not over the weekend and outside of working time.

122. To Mr Peters' best recollection he would have raised the issue of missing trees with Mr Hulme the following week too. He maintained that he was entitled to speak to Mr Hulme about this as he was Mr Peters' predecessor in the role and Mr Peters had only just started his employment. Mr Peters' evidence to the Tribunal was that he did not recall the claimant making a link between the health and safety issue and the bullying when she talked to Mr Peters on 26 February. She did not assert that she was being bullied by Mr

Hulme because she had raised the health and safety issue. Again, we found Mr Peters to be a truthful witness in this regard and accepted his account.

123. As stated, we found Mr Peters' evidence in relation to this element of the chronology to be more reliable than the claimant's. In cross examination the claimant never got Mr Peters to admit that Mr Hulme had briefed him on the claimant and in some way set Mr Peters up to undermine the claimant or bring her down. As to whether Mr Peters was alone or not during the call with the claimant, we find that this is of limited relevance. If there was anyone else there, they will not have been able to overhear what the claimant was saying as Mr Peters was wearing headphones. We do not accept that Mr Peters lied about this. At worst he thought he was alone and then someone came in unexpectedly.

1 March

124. It is part of the claimant's case that on 1 March there was a telephone conversation between the claimant and Mr Peters when she rang him for an update. She asserts that Mr Peters advised the claimant to look for another job and raise a grievance against Mr Hulme. She asserts that Mr Peters took the wrong action according to the policy. She felt that his manner towards her had changed for the worse since she had previously spoken to him.

125. Differing accounts of this were given by the witnesses. Mr Peters maintained that the claimant called him at 7.30am and said she had reflected over the weekend and was not happy. She said that she was not happy in her job and she felt like she was being pushed out and was worried for her job and had started to look for other jobs (i.e. not at the respondent.) Mr Peters' evidence was that he said that he had never felt like that but that he could understand that if this was how she was feeling he could understand her looking for other jobs. He was essentially trying to empathise with the claimant and how she was feeling. He maintained that he was not actually telling or instructing her to get another job. Rather than a hostile comment, it was designed to be sympathetic.

126. It was also during the call on 1 March that the claimant first used the words 'bullying and harassment' to refer to Mr Hulme. It was certainly during the Monday call that she first added 'meat to the bones' of any allegation of bullying or harassment. She gave more information about what it was in substance. Mr Peters maintained that most of the conversation before the weekend had focused on surveys and trees. Mr Hulme's behaviour towards the claimant was only briefly referenced on 26 February whereas on 1 March the claimant discussed bullying and harassment further and Mr Peters asked for evidence of that bullying and harassment. He said to the claimant that these were serious allegations and, depending on what she wanted to do, there were HR processes in place. He flagged the grievance procedure and the bullying and harassment procedure. He says that he told her that she had his attention and he would help her and that he did not want her to feel like this. She said that she did want to raise a formal grievance as opposed to dealing with it informally and Mr Peters therefore said that he would speak to

HR and come back to her with next steps. The conversation ended with Mr Peters emphasizing his support for the claimant. He then spoke confidentiality to HR about a potential grievance and he was asked to get evidence from the claimant of this for consideration.

127. In her witness evidence to the Tribunal, the claimant maintained that she had actually asked Mr Peters what he would do in her situation and he had responded "I would look for another job if I were you." She elaborates on the issues of the grievance and asserts that Mr Peters said, "If I had all the information, I would take it all the way."

128. When considering what happened during this conversation the Tribunal compared all the various accounts given at various stages of the chronology, including during the respondent's internal procedures. We note that the record of subsequent interviews consists of notes taken by a third party and that such notes are not verbatim. There are therefore different accounts of the actual words used by Mr Peters during this conversation.

129. Taking all the available evidence in the round, the Tribunal concludes that Mr Peters did indeed say something to the claimant during this conversation about getting another job. However, the weight of the evidence suggests that Mr Peters was not intending to *tell* the claimant to look for another job. Something had been said, perhaps in a clumsy fashion, which has been taken and misinterpreted by the claimant. It has then been repeated and interpreted by others during the subsequent grievance process. We do not consider that the grievance documents are a particularly reliable guide to what Mr Peters actually said and we certainly do not consider that they amount to an admission by Mr Peters that he told the claimant to go and get another job. Clearly, Mr Peters wished that he had not said anything at all on the subject after the event because it has subsequently been taken out of context. The fact that he would not say the same thing again if he had his time over does not mean that he thinks he did anything wrong on 1 March. Rather, it is an indication that his comments have caused more trouble for him which could have been avoided if he had not said anything at all. This does not mean that he said anything which was objectively wrong. Rather that he wishes that he had not left himself open to criticism or misinterpretation in this way. He was also remorseful about the impact on the claimant that was reported back to him during the internal process. The fact remains, however, that he had no motivation to suggest that she look for another job. This was a point he returned to during the Tribunal hearing. He would have no reason to suggest it. He was adamant and maintained that he was not lying and did not say that she should look for another job.

130. Mr Peters was a credible and genuine witness who made appropriate concessions throughout his witness evidence to the Tribunal. He was sorry for the impact of his comment and had been naïve (with the benefit of hindsight) in making a comment to empathise and suggest that he could see why she would be looking for another job. The problem is that he did not know the claimant well at the time that this conversation took place. He would have no reason to think that she would misinterpret it and mischaracterise it in that way.

131. The claimant's own account of the exchange, as set out in her witness statement, does not appear particularly credible. For example, why would Mr Peters advise her to 'take it all the way' (i.e. the grievance)? At that stage he had only been in the job for a matter of days and this is referring to a grievance about his line manager. Also, the claimant's witness statement does not suggest that she voiced any objection to the comment at the time. If she was offended, why did she not say so? Why did she not ask him what he meant by that comment? It was only later that this comment seems to have become an issue from the claimant's perspective. We were not wholly convinced that she was actually upset by it at the time. She has perhaps looked back on the conversation and reinterpreted it in light of her changed view of the person in question (i.e. Mr Peters). At around this time she is noted as referring to Mr Peters as 'one of the good guys' (in the transcript of her conversation with her family.) The Tribunal is not sure when her attitude towards Mr Peters changed. If she only changed her view of him when she was dismissed, she may have looked afresh at this conversation to see if, with the benefit of hindsight, it indicated that Mr Peters was 'out to get her.' It is relatively easy to rephrase the comment to give it a different meaning or intention, with the benefit of such hindsight. This does not mean that these were the words used at the time or the interpretation attached to the comment at the time.

132. In light of the foregoing, we prefer Mr Peters' account. He said something to empathise with the claimant indicating that he "could see why she would look for another job" given how she said she was feeling about it. This comment was variously described as 'tongue in cheek', lighthearted etc. Only with the benefit of hindsight would he realise how it would be used against him and be remorseful that he had ever ventured so far as to make such an off the cuff comment.

133. During the conversation Mr Peters did say that she could raise a grievance if she wanted to and that it could be taken further. This was to her benefit rather than to her detriment. She alleges that he referred her to the wrong policy but this is not necessarily so. If she had written her concerns as a grievance and it became apparent that a different policy was relevant then this could have been signposted to her at a later date. Viewed properly in context, the Tribunal does not consider that this was a detriment.

134. We also note that Mr Peters accepted that the claimant had c*laimed* that she had been bullied but maintained (in subsequent meetings) that he had not himself seen any *evidence* of bullying. He therefore stood by his subsequent evidence to the grievance procedure on this issue.

<u>Working from home.</u>

135. The Tribunal heard a good deal of evidence about the requirements for working from home during the claimant's employment. This became of particular relevance, in the claimant's view, in relation to the work which was required at Canterbury Gardens.

136. In relation to working from home, the Tribunal finds that the default position is that the claimant and Mr Dean were supposed to be either out on site (working on trees) or working from the office on office or administrative tasks

(i.e. desk-based work.) Although the period under consideration was during the Covid pandemic, there were protocols in place at the respondent's office which meant that the Tree Team could work in the office throughout the pandemic. The office remained open and there was no work from home mandate during the period under consideration. However, if a member of the team wanted to work from home as a matter of preference, they needed to seek prior authorisation. (This working from home authorisation relates to working from home for an entire working day. It was accepted practice that some administrative or desk-based work would be completed from home at the beginning or end of a working day where the employee had been out on site, working on trees. The employee had flexibility to organise their working days to ensure that they were able to complete desk based work, as required, on the days that they went out to site.) The requirement to seek authorisation to work from home for a whole day (i.e. not to go out on site at all during the shift) was put in place so that Mr Hulme knew where his team were and so that he could do any necessary workforce planning. The Tribunal heard and accepted that Mr Dean tended to prefer to work in the office because he was doing land mapping. This was a desk-based task and in the office he had a second screen set up at his work station. This made this task easier to do in the office than it would have been at home.

137. We heard and accepted that a certain amount of the claimant's working time would be made up of administrative or desk-based work. On average it was anticipated that the equivalent of 4 out of the 5 working days in a week would be spent out in the field. This is not to suggest that the fifth day per week would be a 'working from home day.' Rather, the expectation was that the claimant would do her desk-based work at home at the end of the working day, having spent some of that working day out on site. These times spent working from home would effectively add up to the total equivalent of one working day per week.

138. The Tribunal heard that the claimant asked to work from home for about seven days during the course of her employment. None of those requests were actually refused. Mr Dean only asked to work from home on one occasion, when his wife was unwell and he wished to be at home to care for her.

139. The standard working hours in the team were 9am to 4.30pm with 9am to 3.30pm on Fridays.

140. The Tribunal was directed to consider a number of different items of correspondence associated with the claimant's requests to work from home. At [261] the claimant sent an email to Mr Hulme on 1 December 2020 at 16.53 (i.e. after close of business) asking for permission to work from home the next day. She set out the work she intended to do. Mr Hulme responded a few minutes later, granting the permission that she had requested.

141. On 27 January (at 16.15) [327] the claimant sent an email to Mr Hulme asking for permission to work from home the next day. It was a one sentence request with no explanation. Perhaps unsurprisingly, Mr Hulme requested a reason why the claimant wanted to work from home. The claimant responded listing general admin, making calls to customers, tree work applications for winter

works and Canterbury Gardens, TPO searches for Merseyside, to go through work items that she had told people would get done in this round of tree works, to complete an application to the Woodland Trust for trees to plant at a school and to go through a backlog of notes that she needed to send out. Mr Hulme responded to grant permission and to ask the claimant to keep a log of all the applications and works for 1-1 updates.

142. On 19 February 2021 at 17.44 (a Friday) the claimant sent an email to Mr Hulme asking for permission to work from home the following Monday. This email was sent over two hours after close of business on the Friday for the following Monday. The claimant indicated that she had lots to catch up on and had a 1-1. She wanted to go through her list of extra works and do TPO checks and applications. She also said that she needed to resubmit the Canterbury Gardens application as it had been sent back to her with notes. She also said that she had notes from several CRMS and email enquiries that required action. Mr Hulme's response to the request was sent at 0753 on Monday 22 February 2024. He said, *" I will discuss later in your 1-1, but not happy with this request given previous instructions on the criteria for working from home and prioritising works."* At 08:04 the claimant responded, *" I'm sorry, I should have asked about working from home the day before. I have been leaving myself an hour or so per day to answer emails and check CRMs but it isn't long enough to cover everything I need to do admin wise. Being at home for 1-1 today cuts into the day regarding getting out so I thought it would be best to get some admin completed whilst I'm already at home for part of the day anyway. Last week I surveyed 564 trees and did 5 CRMs. I didn't keep track of properties as mostly communal areas. I am just filling out the 1-1 form and it I will have it uploaded by around 8.30."*

143. The three paragraphs above set out examples of the claimant asking to work from home, the nature and timing of her request and the response she received.

144. The claimant sent an email regarding working from home following her one-to-one meeting (1 March 2021). She had reviewed the comments in the one-to-one form. She noted that he had mentioned that she had not included a list of items worked on from home on 28 January. She gave some details of the work she had done in the email. She continued, *"You also said that I told you last that last weeks last minute request to work from home on 22 February was to do TPO checks and applications, you pointed out that no applications were submitted that day. I did not have the time to complete everything I wanted to achieve on that day but I did re-submit my application for Canterbury Gardens via email direct to the council which I had told you was one of my main objectives for the day. The re-submission of this application took some time to compile as it was not clear which trees were which and there were a number of trees missing from the original application. My application has now been validated and Salford Council have kindly agreed to give me a decision before the 4th April so the work can be carried out at the same time as the work already approved. I have attached the confirmation letter received via email on 25th February. I have worked hard on this project and I have expressed to you that I have not been given the time to complete all the admin tasks that I need to. I do not feel that my requests to work from home to complete desktop exercises are excessive."*

145. Mr Hulme sent his response a few minutes later [418] and said, *"As discussed, when requests are made to work from home the protocol is, that sufficient notice should be given, a week would suffice, your last request came in on a Friday teatime for a Monday request to work from home. The works that are required should be above and beyond normal working duties, CRM's, catching up on enquiries and planning applications are normal working duties that can be planned in your calendar. Prioritising works should also be considered, when we have trees out of compliance a working from home request shouldn't in my opinion be made, by the very nature of the instruction. I did also speak about Canterbury Gardens application and stated to you that because of budgets we might not be able to do any extra works, so it wasn't a high priority. When we spoke about what you had done on your working from home day on the first request, you informed me that it would show on your last 1-1, it wasn't. Organising your working day, decision making, and following instructions, these are really something I hope that you would have taken on board after our meetings."*

146. This chain of emails had been copied to Mr Peters. The claimant sent a follow up message to Mr Peters suggesting (erroneously) that Mr Hulme had not copied his reply to Mr Peters. She expressed the opinion that the Canterbury Gardens application was urgent and necessary as it related to trees overhanging the railway, which she characterised as a health and safety issue. She says that she wants to meet Mr Peters at Canterbury Gardens to try and explain her position. She refers to the budgetary issues raised by Mr Peters and states her opinion that when it comes to issues of health and safety the cost is irrelevant and the budget must be found. She wants to hear Mr Peters' opinions on the site.

147. Having reviewed this correspondence we heard Mr Hulme's evidence on this point. He maintained that the claimant was not following his instructions regarding working from home. As the job was predominantly field based he had to be satisfied that the claimant had a good reason to be working from home. All he was seeking to do was to ask the claimant and Mr Dean to ask for permission first before working from home, give adequate notice and provide good reasons for needing to work from home. On one occasion when Mr Hulme asked the claimant to show him what work she had done at home, the claimant said it would be set out in her one-to-one. This did not happen. She said that she was doing planning applications on that day but none were submitted.

148. Having reviewed the available evidence, the Tribunal had concluded that Mr Hulme had to get more specific in his instructions over time because the claimant was not telling him what he needed to know and when he needed to know it. He starts to give the example of a week's notice because she was not giving adequate notice. It is not the case that different rules applied to the claimant than to Mr Dean. Rather, the claimant pushed the boundaries that had been set so Mr Hulme had to reiterate the rules. The reality is that he had no need to do this with the other employee because he did not make so many requests to work from home and he seemed to understand what was required of him when he made a request to work from home and complied with the requirements. The subsequent grievance found no evidence of the

claimant being treated differently in this regard [974]. It is important to note that Mr Hulme confirmed repeatedly that he had never actually refused anyone's working from home request. Mr Hulme maintained that he was not bullying the claimant or setting her up to fail. The Tribunal was satisfied that the claimant was not being treated differently. Rather she was being made to adhere to the required principles for working from home. This is part and parcel of Mr Hulme acting as her line manager. He was attempting to ensure that his staff prioritized work appropriately and performed the role up to the required standard. It is not accurate to say that Mr Hulme 'berated' the claimant over home working rules. He merely reminded her of the rules and required her to adhere to them.

Canterbury Gardens

149. The works at Canterbury Gardens are referred to in the email exchanges above. One of the reasons that the claimant wanted to work from home was because she wanted to make an urgent application about Canterbury Gardens. The claimant said that this was an urgent priority and it needed to be resolved as soon as possible. The Tribunal heard evidence that the property at Canterbury Gardens is located near a railway line. We accept that there was a pre-existing application in place to 'take possession' of the site in order to do some works overnight. (This concerned getting access to the railway and stopping railway traffic during the relevant period.) The claimant felt that some necessary works had been left off the pre-existing application schedule of works. She wanted to make an application to add these additional works so that they could all be done at the same time. Mr Hulme explained that the relevant safety issue at Canterbury Gardens was subsidence near two blocks of flats. The subsidence was caused by a combination of the type of tree in the area and the type of soil in the area. The soil and the trees combined to produce the subsidence. The pre-existing scheduled works were required in order to remove particular trees to avoid subsidence and the risk to the buildings. Apparently, different varieties of tree would not have had the same adverse effect to create subsidence with the local soil type.

150. The claimant's concern related to something else entirely (albeit in the same area). She was concerned about trees overhanging the railway line. The claimant maintained that Mr Hulme was ignoring a health and safety issue whereas Mr Hulme said that the overhanging branches were not a health and safety concern. The health and safety concern at this location was not dangerous trees and overhanging branches but rather the impact of trees on soil and subsidence. The trees with the overhanging branches were not scheduled to be removed or cut back. The claimant wanted to add them to the job in question. The Tribunal heard that the claimant submitted her application regarding the trees overhanging the line but it was rejected by the relevant authorities anyway because she had used different plotting references for her application compared to the pre-existing application. Thus, the local authority became confused about the trees in question. Mr Hulme further explained that, far from ignoring health and safety, the subsidence was taken very seriously. A number of sizeable insurance claims had been settled on the basis of the pre-existing schedule of works. There was a programme of works which was to take place over a period of approximately ten years to gradually remove a few trees at a time to make the area safe.

These trees would be replaced with 'less thirsty' trees which would not increase the risk of subsidence.

151. This evidence shows that Mr Hulme was in a position to consider the bigger picture and to help the Tribunal to understand the bigger picture and the context. By contrast, the claimant remained focused on her own small portion of the bigger picture. She concluded that the difficulties about Canterbury Gardens were personal to her and that Mr Hulme was being difficult with her. However, an understanding of the wider issues soon demonstrates that Mr Hulme, as a manager, was not targeting the claimant but rather coordinating her work with the wider work and priorities of the respondent.

<u>The ash tree.</u>

152. A large portion of the claimant's case related to one particular ash tree. In the week that Mr Peters started employment, he asked Mr Dean to give him a tour of one of the respondent's areas, the Runcorn Estates, where there was a high tree density and lots of complaints. The two men were driving past a small woodland (the Murdishaw woodland) and an ash tree caught Mr Peters' eye. He could immediately see that it had defects. It was also located on a high footfall path which was a commuter route to a school. There was decayed wood overhanging the path. The tree was of sufficient concern for him to ask to stop and look at it.

153. Mr Peters then looked at the previous survey for the tree in question. It had been carried out by the claimant and did not mention any of the defects that he could see. There was no mention of canker, cavity up stem or the deadwood overhanging the path. He therefore looked at a few more trees that the claimant had surveyed in the area and noted more un-recorded deadwood overhanging high footfall paths and creating heightened risk. Given what he had seen, he had concerns about the quality of the claimant's surveys.

154. The Tribunal is satisfied that Mr Peters genuinely noticed these problems on his own account. He was not 'fed the information' by a third party. It was not a 'set up' by Mr Hulme or anyone else within the respondent. Mr Peters had no reason to try and catch the claimant out but genuinely saw something which was sufficiently concerning that he needed to stop and look at it. We were satisfied that Mr Peters gave a truthful account of how he came to be in the vicinity and we do not accept that the route in question was a 'dead end' (as the claimant sought to suggest.) We note that this was so early in Mr Peters' employment with the respondent that he was unlikely to prioritise going out looking for problems which would enable him to catch the claimant out. He clearly had enough other priorities in settling into his new job.

155. Having noted the various problems in the vicinity Mr Peters asked Mr Dean to put the defects on to the system as he did not have full access to Treeplotter at this early stage of his employment.

156. The Tribunal accepts that the survey in question was the claimant's and not Mr Dean's. He may have been present with the claimant when she did the

survey but he was not part of the survey itself. He did not assess the tree or make any judgments in relation to it.

157. As he was new in his role, Mr Peters asked Mr Hulme for advice. Mr Hulme suggested holding a meeting with the claimant and asking her to explain what happened with the ash tree. Mr Peters decided to restrict the claimant to home working whilst looked into it (from 3 March). The Tribunal notes that Mr Peters was quite 'up front' about going to get advice from Mr Hulme. He did not try to hide it. We were satisfied that there was nothing unreasonable or unexpected about someone like Mr Peters (who was new to the job and new to the organisation) going to his line manager, Mr Hulme, and asking how the respondent would tend handle this sort of issue. The fact is that Mr Hulme had previously managed the claimant as well. At the time, Mr Peters would not have any reason to think that he should not ask for guidance from Mr Hulme on this issue. By contrast, the claimant suggested that this was the start of Mr Hulme controlling and directing Mr Peters in order to ensure the claimant's dismissal. However, the Tribunal is satisfied that there is no evidence to support this allegation. Mr Peters was straightforward and open about what he did and who he spoke to. He had good reason for seeking guidance. The Tribunal would require more concrete evidence in order to be able to find the claimant's allegation proven.

158. At some point Mr Peters went back to take photos to show the claimant (at some point between 24 February and the meeting with the claimant on 2 March.)

159. The ash tree in question was on a three yearly inspection cycle. The Tribunal can see [456] that the claimant inspected it on 21 January 2021. She put it down for three- yearly inspections in line with previous cycle. The same tree was looked at again on 24 February 2021 by Mr Peters and Mr Dean. At this point Mr Dean altered the inspection cycle to once a year instead of once every three years. Then, on 1 March, Mr Dean changed the inspection cycle to 'not required' [bottom 455] which means, we understand, that the tree would not need inspection because it was due to be felled. Then, Mr Peters (on 2 March) says that the tree is low priority, 12 months. There are no records of when the tree was actually felled/removed. The claimant gave evidence that she went back to the site and saw that the tree had been removed by 31 March. In her view, the tree had been removed quickly because the Mr Peters/the respondent wanted to cover it up so that she could not go back to site and prove them wrong in their assessment of the state of the tree. However, as noted below, by 2 March the claimant is recorded as agreeing with Mr Peters' assessment of the tree. In such circumstances, Mr Peters would not have reason to think that the claimant would want or need to revisit the site in order to get evidence to prove his assessment wrong.

160. On 2 March 2021 Mr Peters had a meeting with the claimant to discuss the ash tree [436-437]. Lynne Coyle acted as note taker. The Tribunal does not detect any particular significance in this. It is nothing other than a coincidence if Ms Coyle was previously walking past when the claimant and Mr Peters were talking online. There is nothing inherently untoward in Ms Coyle being present, she was just taking notes. We note that the claimant did not challenge her presence at the meetings as a notetaker at the time. We find

that she would have challenged this, if she was genuinely concerned about it, as she now says that she was.

161. The Tribunal considered the notes from the meeting [436]. Neither party has suggested that they are not an accurate summary of what was said, albeit not verbatim. The central point about this meeting is that the respondent showed the claimant the photos of the ash tree and talked through the defects in the claimant's survey. In the meeting the claimant accepted what Mr Peters said about the defects in her survey. She did not seek to suggest that Mr Peters was wrong in his assessment of the tree, its condition and defects or in relation to the correct recommendations for the tree as a result of the survey.

162. During the Tribunal hearing the claimant took Mr Peters to the records she had kept of her previous survey of the tree in 2017 (when she worked as a consultant.) In the 2017 survey she had noted various defects [No 79 on p153]. However, there were a number of problems with this line of questioning. First, the claimant did not show these 2017 records to Mr Peters at the time. The Tribunal hearing was the first time that he had been asked about them. Second, it was not possible to be sure that the 2017 records related to the same tree as the 2021 records. Third, the 2017 records are old data and could only ever reflect the state of the tree in 2017. It could not reflect the situation in the 2021 survey, for which the claimant was being criticised. This line of questioning regarding the old records from 2017 did not assist the Tribunal.

163. As a result of his observations of the tree, Mr Peters thought that it was not necessary to fell it immediately, hence it was on a 12 month review. The Tribunal can see that it was set for felling on 1 March by Mr Dean. On cross examination of Mr Peters it became apparent that Mr Peters was new to the respondent's business. He was unsure of this respondent's particular 'appetite for risk' in relation to such trees. Thus, he took the issue to Mr Hulme and it was Mr Hulme who decided to fell the tree. It was his decision to make. The Tribunal also accepted that Mr Peters did not get the opportunity to go back and do an aerial inspection because the tree was felled before he could go back to the site.

164. In considering the case, the Tribunal concluded that the issue of the appropriate priority level for felling the tree was something of a red herring. The conduct which the claimant was criticised for was failing to record appropriate details of defects in the tree in a survey. This was one example that had been found. The flavour of the evidence was that different tree experts might have a different opinion about how soon the tree should be felled and how much of a priority it was. This is what was referred to as 'appetite for risk.' As Mr Peters was new to the business he would not necessarily fell the tree as soon as possible, but he did not know what the respondent's attitude to risk was. Hence he took it to Mr Hulme who did know the respondent's 'appetite for risk' and he asked for it to be felled within days. None of this chronology has any impact on the conduct for which the claimant was criticised and which, latterly, formed part of the dismissal. Even if the tree had still been present and had not been felled, it would still have been the case that the claimant's survey was not of an adequate standard. Initially the claimant admitted and agreed that in the meeting on 2 March. It was only

later that she wanted to challenge the respondent's view of her survey. She went back to site in order to reopen the issue and found that the tree had already been felled. She then added this to the elements of her conspiracy theory (i.e. that they felled it in order to cover up the fact that there was nothing wrong with it and the claimant's survey was, in fact, adequate.) However, the claimant herself had accepted that there was a problem (and indeed referred to earlier surveys to suggest that she had previously reported a problem (2017). The claimant's positions are contradictory.

165. The meeting of 2 March ended with the understanding that the claimant should have done better in her survey of the ash tree. Mr Peters gave the claimant guidance as to how she should approach her survey notes in future. The hearing notes indicate that the claimant accepted that she had not, as required, updated the notes from her survey; she accepted that she had no excuse for missing issues with the tree which posed a health and safety risk; she accepted that the lean in the tree was not right; she confirmed that she agreed in full with everything that Mr Peters had detailed during the meeting about what she had missed and she should have noticed and actioned.

166. Following the meeting the claimant sent an email to Mr Peters [454] in which she said, *"I think it would be really useful if you went through the issues with that ash tree with James like you just did with me. We both looked at that tree so he knows exactly which one you mean. It would be a good lesson for him too. I'm so happy you're now at the helm to raise the standards and I will always take notice and learn and am looking positively towards the future for the first time here at Onward."* The positive tone of this email is somewhat at odds with what the claimant sought to say about Mr Peters (and her relationship with him) during the course of the Tribunal hearing.

167. Mr Peters noted in his evidence to the Tribunal that the claimant had raised all manner of allegations against Mr Peters arising from this meeting. She alleged that she had no opportunity to prepare for the meeting and was told that it was informal when it was used in formal proceedings. She asserted that he was contradictory and that the meeting notes were vague. She alleged that her professional ability and credibility were attacked, that she was wrongly accused of a poor tree survey and that Mr Peters had fabricated the defects in the tree in order to set her up to fail. In response, Mr Peters maintained that this meeting was not a formal meeting and that there was no need for preparation time. He maintained that he gave her full opportunity to state her views and that he listened to her during the meeting and at the subsequent probation review.

168. Having reviewed the available evidence, the Tribunal accepts Mr Peters' evidence on this point. We also accept that the ash tree issue was part of the decision making process when the decision to dismiss was taken, however we understand that this was appropriate given the performance concerns raised in relation to it.

169. The Tribunal finds that Mr Peters did not contradict himself. He referenced canker, which is a symptom of disease, and bacteria is the cause. He considered that the cause in this case could have been phytophthera. The claimant, as a tree specialist, would have understood this. We accept that the

issues were discussed in a consistent manner and that the meeting notes were not vague, they reflected the discussion points fairly and reasonably.

170. The Tribunal is satisfied that Mr Peters did not attack the claimant's professional ability and credibility. He simply took the claimant through something which was a matter of concern, where he felt there were shortcomings on her part. This is part and parcel of a line manager's responsibilities. The Tribunal does not consider that the claimant was wrongly accused, as is demonstrated by the fact that the claimant conceded that she had made mistakes (as well as the surrounding available evidence.) The Tribunal could not find a motive for Mr Peters to 'set the claimant up to fail.' He was new to the job and had enough matters to get to grips with without fabricating issues with the claimant's performance. The Tribunal does not accept the claimant's characterisation of this meeting, as set out and summarised in the List of Issues for the Tribunal.

171. On 3 March 2021 the claimant sent a written narrative to Mr Peters and Ms Coyle regarding the ash tree [460-464]. She subsequently referred to this as the 'crazy email.' It is notable that on the last page of the document she refers to the possibility of dismissal before anyone in management at the respondent has suggested this [464]. This may suggest that she realised that her performance to date put her at risk of dismissal.

172. Mr Peters replied by email later that day [481-482]. He flagged that he was concerned that her position had changed from what she had said the previous day. He wanted to be clear that her decision as to whether to proceed with a grievance would not have an impact on the stability of her employment, as she had suggested. He reiterated that bullying would be taken very seriously by the respondent and that she had his full support if she wanted to raise a grievance. When the claimant replied she acknowledged Mr Peters' support and confirmed that she would attend the probation meeting and provide further details.

173. The Tribunal found Mr Peters' email to be clear, reasonable and appropriate in tone. Indeed, in her subsequent email [480] the claimant notes that Mr Peters has been supportive. We are satisfied that there is nothing objectionable about any of Mr Peters' comments in his email.

174. We noted the contents of paragraph 341 of the claimant's witness statement. She refers to the part of the email where Mr Peters refers to employees raising 'legitimate grievances' and asserts that this suggests that her grievance was not viewed as legitimate. The Tribunal rejects that characterisation of the document. The claimant seeks to add an emphasis to the word 'legitimate' which is not supported by the surrounding evidence. There is no implication that the claimant's grievances are viewed as 'not legitimate.' Rather, this is a reference to the general position that the raising of legitimate grievances would never impact the stability of an employee's employment. He states this in response to the claimant's own implication/suggestion that her job is at risk because of her grievances.

175. In light of the above, the Tribunal was somewhat surprised by the claimant's characterisation of Mr Peters' actions at paragraph (xi) of the list of issues. The Tribunal does not accept that Mr Peters alleged that the claimant's email was malicious or was a further reason to support dismissal.

Probation review

176. On 3 March 2021 Mr Peters sent the claimant an email inviting her to attend a probationary review meeting [469-471]. The probationary period was due to end on 26 March and a review needed to take place before this. The letter summarised the concerns that had been identified with the claimant's performance based, in particular, on previous one-to-one meetings. The probation review meeting was scheduled to take place on 8 March and was to be chaired by Mr Peters, with Zoe Holt of HR in attendance as note taker. The letter made it clear that if the claimant's performance, attendance, behaviours or conduct were found to be unsatisfactory, the respondent would consider either extending probation or terminating the claimant's employment. The invitation made it clear that no decision would be taken until after the meeting. The claimant was informed of her right to be accompanied at the meeting.

177. Having reviewed the evidence, the Tribunal is satisfied that the invitation letter constituted a genuine summary of the respondent's concerns about the claimant at that stage in the chronology. It gave her fair opportunity to prepare for the meeting and attend with a companion, if she wished.

178. The claimant seemed to criticise the timing of the probationary review. On the other hand, by having the review before the end of the probation period, the claimant got the opportunity to argue for an extension of probation. It also forewarned the claimant and gave her an opportunity to work to avoid dismissal. The Tribunal questions what difference a couple of weeks' delay to the review would have made and how this would have benefitted the claimant. We noted that the claimant never asked for the meeting to be delayed. Whether the review took place on 8 March or a couple of weeks later it would not change the data on which the claimant was due to be assessed. We noted that the claimant did not ask for more time to prepare for the meeting. There was no suggestion at the time that the claimant needed more time to prepare for the meeting or that this would alter the way she presented herself at the meeting. We also noted that the meeting was conducted with the assistance of HR.

179. The claimant says that there was some form of collusion between Mr Hulme and Mr Peters in order to terminate her employment unfairly. We could identify no reason why HR would have been involved in such an enterprise. During the course of the Tribunal hearing the claimant also suggested that there should not have been a review meeting at all: she should just have been recorded as passing her probation. However, the Tribunal was satisfied that it is standard procedure in many workplaces to have a final review at the end of an initial probationary period of employment before a decision is made as to whether to confirm an employee's permanent employment. We could not see why the respondent should not have a final probationary review in this claimant's case. Indeed it appeared to be standard procedure within the organisation to have such a meeting. The HR department prompted Mr

Peters to have such a meeting before the end of the probation period, albeit they suggested it should take place the week before the end of the probation period [428.]

180. The Tribunal noted that the claimant's criticisms of the invitation letter apparently contradict what she had previously said about Mr Peters and her opinion of his managerial approach. She had previously thanked him for his supportive approach towards her. This would seem to stand in opposition to her allegation that he was making false claims and attacking her character and professional abilities.

181. In her email of 5 March the claimant informed Mr Peters that she had had a breakdown and had needed to visit the doctor as a result. She was feeling a bit better. The claimant confirmed that she was intending to attend the meeting and had discussed what to expect with HR. She was taking some time to prepare for the meeting. Mr Peters responded to confirm that this was standard process and that the claimant should take the time she needed in order to prepare for the meeting. He had no difficulty with the claimant having Mr Dean present at the meeting but he asked her to contact Mr Dean direct to make the necessary arrangements.

182. In light of our review of the available evidence, the Tribunal is unable to accept the claimant's characterisation of events at paragraph (xii) of the Tribunal list of issues. Nor do we accept that Mr Peters' response to the claimant's correspondence was inappropriate or that he should have ceased preparation for the probation review in light of the claimant's correspondence and health concerns. In particular, the claimant did not ask for a postponement and in fact confirmed her attendance. Whilst the claimant clearly did not want to have a probation review meeting, this does not mean that Mr Peters' action breached his duty of care to the claimant or eroded the relationship of trust and confidence between the claimant and the respondent. Mr Peters' email is a legitimate response to her earlier email. If the claimant did not seek a postponement, Mr Peters was not in a position to guess that this is what she wanted. His response to her emails is appropriate and reasonable.

183. The claimant sent a further email to Mr Peters asking for clarification of various points raised in the probation hearing letter. She wanted examples because she did not feel that the reasons for these points being raised was clear from the one-to-one forms. Having reviewed the information which was available to the claimant (including the one-to-one forms) the Tribunal is satisfied that the claimant would have understood what she was going to have to discuss at the probation meeting and would be in a fair position to prepare for that meeting. Indeed, she was able to prepare a lengthy probation hearing 'defence' document [556]. In that defence document she refers to specifics and the one-to-one discussions throughout. This demonstrates that she knew what she was going to be asked to comment on at the meeting.

184. It is also unclear what more Mr Peters could be expected to do. The claimant was an active participant at the one-to-one meetings and so would have her own recollections of what was said during this process, as well as the written one-to-one record. By contrast, Mr Peters was not at those meetings and only had the written record to go off. He was not in a position to supplement the

written record. At the probation meeting he could explain his personal observations of the claimant and get her response to the other issues which predated him starting in employment with the respondent.

185. Furthermore, although the process subsequently culminated in termination of the claimant's employment, it was not part of a conduct or capability procedure. It was a probationary review. Whilst an employee going through capability or disciplinary procedures might expect to receive an investigation report or a 'management statement of case' in advance so they know precisely what allegations they are facing, this was not a disciplinary/capability hearing, it was a probationary review. What the claimant is asking for is not only difficult for Mr Peters (as a new manager) to produce, it is also disproportionate and unrealistic given the nature of the meeting and the fact that it is a probation process not disciplinary process.

186. The Tribunal cannot see that anything material has been withheld from the claimant. What more could he have sent her that she did not already have access to? When she asked for examples she did not say that she would be unable to fairly prepare for the meeting without them or that she did not know what she was going to be discussing at the meeting. When she sent her probation defence document she clearly addressed all those issues and the headings in the document.

187. In the Tribunal list of issues the claimant asserts that Mr Dean changed the tree template within Treeplotter so that the history of all the respondent's trees was wiped. The claimant asserts that this destroyed the evidence that the claimant had surveyed many more trees than her colleague and removed accountability of other tree specialists for their own surveys. The precise nature of the allegation made by the claimant remained unclear even after she had given oral evidence to the Tribunal. It appeared that at one point she was saying that all the trees were wiped and at other stages that only 'her trees' had been wiped, and that the details of her recommendations and the history were missing from the system. She could not clarify exactly what it was that had been done to the system but she accused Mr Dean of doing this under instructions from Mr Hulme.

188. Given the lack of specifics in the claimant's allegation it is difficult for the Tribunal to find them proven. Furthermore, the Tribunal cannot understand what the purpose of removing the data would be as it would make the respondent's position worse. There would be more trees 'out of compliance' if records were deleted. Indeed, we saw tree data. Changing a template on the database would not remove pre-existing data, it would just store it in a different place. It would still be there to be reviewed if necessary, it might just not be on the first screen. There was certainly no evidence of a wholesale deletion of tree records of the sort referred to by the claimant.

189. Mr Dean explained that certain types of information were moved to a different location in the records but were not deleted. This was because some data was no longer considered relevant to health and safety records (as opposed to 'amenity') and so would not need to be present on the first screen. He certainly did not delete whole trees from the records. There would be no

benefit to doing so. This would be the only way of removing the data in the records- to delete the tree as a whole. He had no reason to do this.

8 March probation review meeting

190. The probation review meeting took place on 8 March. The Tribunal was referred to the notes of the hearing which had been updated to include the information contained in the claimant's audio recording of the meeting [489-553]. The Tribunal has reviewed the transcript to see what was said during the meeting.

191. The claimant and Mr Peters discussed the need to prioritise work and an example the claimant mentioned when she knew the tasks that she was supposed to be doing but had then seen trees that had not been surveyed. She diverted, on her own initiative, to survey those trees rather than focusing on the tasks that her manager had asked her to do. The claimant discussed the need to prioritise trees and what she did in response to instructions. Mr Peters noted that, *"You were told not to survey these trees and prioritize other trees yet you still went ahead and surveyed these trees anyway."* In short, the claimant did what she thought was right rather than following instructions. The claimant indicated that she felt she had done the right thing by going against instructions and that she was doing her 'duty' using her morals and ethics. She accepted that she had not followed instructions but was motivated by a desire to do a good job. She did not seem to accept that any improvement was really required in this area.

192. There were echoes of this through the course of the meeting. The claimant appeared reluctant to accept that her line manager might have the final say over work, which could overrule her own personal views and priorities in her work. She seems to have suggested that, in the event of a difference of opinion between her and her line manager: *"the tree specialists need to convince the arb manager that he's wrong and that we address this situation. I'm not deterring from that answer either however many different ways you put the question*." This indicated that the claimant did not recognise managerial authority and instructions. Mr Peters came to the conclusion that the claimant would do what she felt was right even if this was not in line with management instruction.

193. The claimant's ability in decision making processes was also examined. An example was discussed whereby squirrels had gained access to a property [501-503]. According to Mr Peters' evidence it is good practice to keep canopy clearance from buildings. This is done out of routine management. Squirrels accessing loft spaces would be attributable to building disrepair (which is not a matter for the Tree Team). He maintained that, regardless of trees being used as a means of access, the squirrels would be perfectly capable of accessing the loft space in any event. He took the view that pruning for a reason related only to the squirrels was inconsequential. He took the view that the claimant had not properly taken this into account. Rather, she had just agreed with a customer that tree work was necessary. The claimant did not agree with Mr Peters' assertion that the *reason* for pruning back the trees was relevant. Pest control was not the Tree Team's concern and so her decision to prune the tree to prevent squirrels gaining

access to the loft space was questioned by Mr Peters. By agreeing to the work, the claimant had got the Tree Team to take responsibility for something which was not really part of their remit (with the additional cost and time implications.) The team's concern was actually to protect trees in line with best practice, whereas the claimant seemed to be motivated by stopping the squirrels from getting access to the building, which was not the Tree Team's concern.

194. During the course of the meeting they discussed the perceived gaps in the claimant's technical knowledge and tried to pin down who actually surveyed the ash tree: the claimant or Mr Dean. There were apparent contradictions in the account that needed to be clarified. The claimant seemed to accept that she surveyed the tree at some points but then appeared to suggest that Mr Dean did some of the survey or was also responsible for the survey. She then said that they both did the survey together. The claimant also seems to have admitted some mistakes in relation to her handling of the ash tree survey [514] and that, with the benefit of hindsight her recommendations might have been different. That said, her final conclusions became less clear cut. She seemed to accept that she had missed points and her view at the meeting was that the tree should have been felled. She had to be pushed to accept that it was her survey and that she was responsible for the decision.

195. The claimant's professional conduct/communications were also discussed during the meeting [515]. She accepted that some of her emails were not acceptable. She commented, *"On that point I completely agree. My, my behaviour, my conduct over the last couple of weeks has been ridiculous. You know, everything that you say on the front of that letter, with regard to, you know, erratic behaviour, not taking prior thought before taking action. That's all true. You know, I regret sending that email that day, I regret writing it, I regret sitting up all night and losing a night's sleep over it. I didn't enjoy that process at all."*

196. The content of the discussion demonstrates the difficulties which would face any manager seeking to manage the claimant. She was willing to follow her own priorities, views and agenda even where they did not correspond with management's. Concerns to this effect remained at the conclusion of the meeting because of the varying responses that the claimant had given to questions on the issue. The claimant had not been consistent and reassuring that she would follow management instructions where they conflicted with her own views. The claimant still indicated that she would not follow her manager's instructions if she did not agree with their approach. She maintained that she agreed with Mr Peters' approach to trees but not with Mr Hulme's. The overall tone of the claimant's responses was that she would not always follow instructions if she personally disagreed with a manager's approach. This had significant implications for the respondent's ability to line manage her should she continue in employment.

197. The discussions also indicated that the claimant would be willing to ask members of the public to bypass Mr Hulme and send correspondence to the claimant instead. This would effectively cut Mr Hulme out of the chain of communications if the claimant thought this was preferable or appropriate.

198. Mr Peters also made it clear during the meeting that he had made his own assessment of the claimant's performance. His views were his own. He was not just repeating Mr Hulme's opinions.

199. During the course of the meeting they also discussed the claimant's decision making. For example, they discussed decisions regarding dead wood [503]. A discussion ensued about Gorse Wood where Mr Peters had noted a lot of deadwood but the claimant had recommended to wait for six months until winter works were completed. Mr Peters questioned the inconsistency of the claimant's approach as in this case she was prepared to wait, whereas in others she was recommending immediate serious work outside of policy (for example, in the case of the squirrels.) He took the view that Gorse Wood was an example of the claimant not flagging work which actually needed to be done sooner rather than later.

200. The claimant has alleged that Mr Peters behaved unreasonably in the meeting, that he did not provide evidence or examples, raised false performance concerns and was contradictory and asked leading questions. A thorough reading of the meeting transcript shows this not to be correct. It is not a fair or accurate characterisation of what happened during the meeting. Mr Peters did provide the claimant with the evidence and examples to be examined at the hearing. He asked specific questions and put the necessary points to her so that she had a fair opportunity to respond. There were no false performance concerns. He just asked for the claimant's response to the concerns. She had an opportunity to respond. He did not deploy leading questions but just tried to get a 'straight answer' to a 'straight question.' There are points in the transcript where the question heavily suggested the respondent's view on a given topic but, given that the claimant needed to know what they thought in order to respond, this is not problematic or unfair. The respondent was not telling the claimant the 'correct' or 'acceptable' answers to the questions. It is also notable that the claimant was not stopped from asking questions of Mr Peters either.

201. The Tribunal noted that Ms Holt spoke quite a lot during the meeting. She spoke more than was helpful at times but the Tribunal accepts that she was an HR manager trying to support and assist a new manager in a potentially difficult meeting. We felt that she tended to interrupt and take over the questioning at times and this might be seen to undermine Mr Peters' authority. However, she was clearly trying to keep things 'on track', make sure they stuck to the relevant topic and covered all the relevant issues. This is a long way from saying that Ms Holt was there to do Mr Hulme's bidding (as the claimant suggested.) Ms Holt was there as HR support for the parties. She was not present as Mr Hulme's 'insider.'

202. The Tribunal also reviewed the claimant's account of the meeting and concluded that it does not have the same character as the transcript and does not match the tone of the transcript. We did note that the claimant did not adamantly stick to the position that she would 'do what she thought was right regardless of what the manager said' all the way to the end of the meeting. After one of the breaks in the meeting she seemed to row back on this to some extent. However, given the overall content of the meeting, the Tribunal considers that the respondent was entitled to query the reliability of the claimant's representations and possible change of heart in this regard.

Overall, she showed a marked reluctance to follow management instructions that she did not agree with. This was the predominant message from the claimant during the meeting and the Tribunal finds that the respondent was entitled to heed it.

203. In light of the above, the Tribunal is not satisfied that the characterization of the meeting given at paragraph (xvi) of the list of issues is an accurate reflection of what took place. Mr Peters talked through the examples at the meeting. The claimant had written about them in her document too. The claimant never asked for a postponement and it is apparent that she had time to prepare. Repeated questioning is not, per se, a bad thing. Rather, we considered that it reflected the respondent being thorough in its approach the issues and making sure that the claimant had the chance to address the issues. The claimant had the opportunity to say what she wanted to during the meeting, and she did so. She was not suppressed. Any criticism by the claimant of the repeated questioning is not well founded. In the list of issues the claimant seeks to allege that Mr Peters used the documents that she had emailed to him (about the protected disclosure) against her. It remains unclear what the claimant actually means by this. It was not really addressed by the claimant in cross examination of the witnesses at the hearing. If the claimant is referring to the probation defence document at [556], then the Tribunal does not think that Mr Peters is to be criticised for addressing the issues that the claimant has written about. He would be criticised if he ignored the documents that she sent for the purposes of the probation review. He did not use the document 'against her.' Rather, he based his questions around the document and got her to discuss her defence document. He did not condemn her for it. Mr Peters' questions were not contradictory. Rather, he was trying to understand the contradictions in her evidence and understand her final position.

204. At paragraph (xvii) of the list of issues the claimant criticises Mr Peters for isolating her at home between 8 and 10 March 2021 whilst she waited for the meeting notes and the outcome of the meeting. In reality, the period under consideration is two days. The meeting took place on 8 March. In the intervening days the claimant was speaking to people in the business (e.g. Carol Laing and Catherine Farrington [595-607].) Indeed, HR attempted to phone the claimant three times and she did not respond [605]. The claimant spoke to Alison Murphy of HR for further guidance and reassurance [610-611]. She also entered into correspondence regarding the notes of the meetings.

205. On 9 March the claimant emailed Bronwen Rapley to see who she could speak to about the way that she felt she was being treated. Ms Rapley referred the claimant to Catherine Farrington for further discussion. The claimant and Catherine Farrington had spoken by 10 March and Ms Farrington consulted HR about the issues that the claimant had raised.

206. The claimant received the notes of the hearing at 5.17pm on 10 March. She felt that she had not had enough time to consider them in order to attend a meeting on the morning of 11 March. She ignored Zoe Holt's calls about this [597]. She was reassured that Alison Murphy (of HR) would be in touch to discuss matters further. The discussion with Ms Murphy apparently took

place later on 11 March and was summarised in an email of the same date [610].

207. The purpose of the outcome meeting was explained to the claimant. She was also told that she could raise any further queries about the minutes of the earlier meeting at the outcome meeting, if she felt unable to do so in advance.

208. In light of the activity which was taking place during this week it does not seem that the claimant was in fact isolated at home with no contact or support. Given that Mr Peters had a decision to make regarding probation it is not surprising that he did not discuss matters further with the claimant pending the outcome meeting. This does not mean that the claimant was without support during this period.

209. The claimant complains that the suggestion that she would be given time to go through the meeting notes was not honoured. The claimant says that the time of the meeting was pushed on her and she was told it would go ahead in her absence if she did not attend.

210. The original notes of the meeting (which were produced by the respondent and supplied to the claimant) are only 17 pages long. It would not take a significant amount of time for her to go through the notes and check that they were accurate. The respondent did not know (at the time) that the claimant had an audio recording of the meeting which she could compare the notes to.

211. The record shows that the respondent tried to contact her during this period. The Tribunal is satisfied that there was nothing unreasonable in the respondent trying to give the claimant the outcome on the Friday, particularly as the respondent originally intended to give the outcome on the same day as the initial meeting. We also bear in mind what type of meeting it was. It was a meeting to give the claimant an outcome, a decision. It was not a meeting for the claimant to put her case beyond the points she had made at the earlier three-hour-long meeting. In such circumstances, the claimant did not need to prepare for the meeting in the same way as she would if it had been a grievance meeting or a 'right of reply' type of meeting. The claimant needed to attend to hear the respondent's decision and the reasons for it, not to question the decision. The outcome meeting was rearranged twice to accommodate the claimant in any event. It is also relevant to bear in mind the timeframe. The period under consideration is a period of two days. It is unrealistic to say that she was isolated. She had the meeting on Monday 8 March and received the outcome on 12 March, the Friday of the same week. She had not been precluded from contacting the respondent in the intervening period.

Disclosure to Catherine Farrington.

212. The claimant made her third alleged protected disclosure to Catherine Farrington following her contact with Ms Rapley. This occurred during a video call on 9 March 2021. Mr Farrington made a thorough note of the conversation and the follow up discussions with others [554-555]. During the Tribunal proceedings the claimant accepted that Ms Farrington's note was a reasonable representation of the conversation that they had.

213. The claimant and Ms Farrington spoke for around an hour. During the conversation the claimant raised a number of different concerns and Ms Farrington took her attendance note. The claimant told Ms Farrington that she had noticed that some trees which she had surveyed were not marked on the system and that survey data was also missing from the system. She told Ms Farrington that she believed that Mr Hulme was covering this up and lying about it. She also said that Mr Hulme had been bullying her, although she was not specific about what Mr Hulme had said or done. The claimant told Ms Farrington that she was due to attend a probation review meeting and she was concerned that it would not be conducted fairly because Mr Peters and Ms Holt were also in their probation periods. She informed Ms Farrington that she was having sleepless nights and was feeling very anxious.

214. Ms Farrington felt that HR would be the best people for the claimant to speak to about her concerns. The claimant has alleged that she also disclosed to Ms Farrington that false performance concerns were being raised with her. Ms Farrington did not recall any such matters being mentioned to her. She maintained that if such matters had been raised, then they would have been recorded in the attendance note and would have been further investigated or raised with HR. Ms Farrington confirmed that she would investigate the issues that the claimant had raised regarding the tree and survey data not being recorded correctly on the system. She told the claimant to speak to HR regarding any bullying allegations and the health issues that she was experiencing.

215. The next day, Ms Farrington spoke to HR about the issues that the claimant had raised and then told the claimant that HR would be in touch to discuss the matter further with her.

216. Ms Farrington also spoke to Mr Hulme and Carol Laing and made a note of the conversation [555]. Mr Hulme pointed out that he had never seen the list of trees that the claimant alleged had not been captured within the system. He maintained that he had asked to see the list and that he had no reason to cover any of this up. He knew that the team was not in compliance but was trying hard to get there, within existing resources. Carol Laing was also aware of the gaps in the compliance data and that the various systems do not 'talk' to one another. The claimant had recently sent a list of trees to Ms Laing which were being reviewed by Savills as part of their external audit of the respondent.

217. The Tribunal is satisfied that Catherine Farrington had no involvement in the claimant's dismissal. Ms Farrington gave straightforward witness evidence to the Tribunal. She accepted that there was a protected disclosure and the contemporaneous written documents summarise what was reported. Ms Farrington accepted that it was her job to look into the protected disclosure and that she spoke to the relevant people. She then passed HR issues onto HR. She did not realise that there were some people within HR that the claimant did not want to have involved in her case because she did not trust them. The claimant had not suggested or explained this at the time. The remaining issues were passed onto an external independent audit (by Savills.) Ms Farrington denied being part of a conspiracy where Mr Hulme had the opportunity to manipulate events. She does not appear to be the

'missing link' between the protected disclosure and the dismissal/detriments. Nor does the allegation that she fell into a trap with HR stand up to scrutiny. The 'conspiracy' in HR that the claimant alleges is quite complex and not particularly credible. Ms Farrington was straightforward and credible. The Tribunal accepts that she did what she says she did and that she was not part of a wider web of intrigue or conspiracy.

218. As previously noted, on 11 March there were further communications between the claimant and Alison Murphy regarding the probation review meeting reconvening. Ms Murphy tried to arrange the probation outcome meeting. During the discussion, the claimant told Ms Murphy about Mr Hulme's alleged malign influence. Ms Murphy reassured the claimant that Mr Peters was impartial. Ms Murphy confirmed that if there was a bullying and harassment complaint then that would really be an issue to raise as a grievance rather than as part of the probation process. She checked that the claimant had a copy of the relevant policy in order to raise a grievance. She checked whether the claimant required further support in relation to her mental health. The claimant made further allegations of a 'cover up' by Mr Hulme [616]. Ms Murphy confirmed that, notwithstanding any grievance, the probation hearing had to take place the next day. She followed up the meeting with a written summary [624-625.]

219. On reviewing the available evidence, the Tribunal cannot see that Ms Murphy did anything above and beyond usual HR support. She was involved in running and organising the various separate processes. She was not involved in decision making. To the extent that the claimant alleged (during the Tribunal hearing) that Ms Murphy was involved behind the scenes in the alleged conspiracy, she has not provided any evidence of this to the Tribunal.

220. The Tribunal reflected on the contents of paragraph 451 of the claimant's witness statement and concluded that it was a mischaracterisation of the evidence. The one-to-ones did not contain references to missing trees but Ms Murphy's summary [624] refers to 'tree issues' being in the one-to-ones. She does not say that 'missing trees' were in the one-to-ones. The claimant had mischaracterised the document at [624] to suggest that Ms Murphy was lying. The Tribunal cannot identify any such lie. Ms Murphy was not available as a Tribunal witness to explain what she meant about her review of the claimant's one-to-ones. In common with many aspects of the case, the claimant sought to take the worst possible representation and interpretation of this document.

Probation outcome meeting

221. The probation outcome meeting took place on 12 March 2021 [626-631]. The claimant was informed that Mr Peters had looked into the allegation of a cover up and had spoken to Mr Hulme and Mr Dean. Mr Peters went through his considerations at the meeting. He concluded that there were two main areas of concern: technical competency and skills; and general professional conduct.

222. He concluded that, in relation to conduct, the claimant would follow instructions provided that they aligned with her own views. If instructions did not align with those views she would go against management instructions

and do what she felt was right. . For example, the claimant had gone against the agreed strategy regarding unmapped trees. The claimant had stood by this decision and would act in the same way again in the future. Whilst she had also said that if Mr Peters gave her an instruction that she disagreed with she would discuss it with him, he did not find this to be particularly reassuring. He felt that this approach was not reassuring and he could not have confidence that he could trust her to follow management instructions in the future.

223. In relation to professional competency, Mr Peters was worried about the claimant's failure to identify issues, particularly in relation to the ash tree. Even in the meeting, she had not identified the issues until they were pointed out to her and she then accepted that she should have picked them up. Mr Peters concluded that the claimant was so focused on her perception that there were unmapped trees that posed a risk, that she was not performing her role properly or effectively in surveying the trees that she was tasked to assess. He had further concerns about her performance in relation to the tree with the squirrels and the failure to identify dead wood at Gorse Wood. In his assessment, the claimant had repeatedly missed or ignored notable issues with the trees that she had surveyed. He did not have confidence in her ability to survey trees.

224. During the course of the Tribunal hearing Mr Peters gave clear evidence that he wanted the claimant to give him a reason to believe that she would do the right thing in future. He was almost 'willing her' to provide the necessary reassurance during the probation hearing and yet she did not do so.

225. In the meeting Mr Peters gave the claimant a final chance to add anything further she wished to say before he made a decision. He gave her an extra 10 minutes to consider this and she confirmed there was nothing to add. He adjourned again to make his final decision.

226. Mr Peters considered whether, with additional time or training, the claimant could address the issues. On balance, he felt that the time taken to provide additional training and support would be disproportionately high and he was mindful of the fact that the claimant was already fully qualified and experienced. By this stage these considerations had already been a matter of concern for several months. He concluded that further training would be unlikely to resolve the issues. He felt that the claimant would continue to do what she felt was right even if this meant going against instructions. He therefore took the decision to end the claimant's employment with the respondent.

227. Mr Peters maintained that his decision was not influenced by others or by the disclosures that the claimant had made about the unmapped trees or the alleged bullying by Mr Hulme. He was aware of some of those issues and had told the claimant that she could raise a grievance about this. He maintained that this was an entirely separate matter from the probation decision. His decision was, he says, solely based on the claimant's performance and conduct matters.

228. A decision letter was prepared on 19 March and was sent to the claimant on 22 March [657-665]. The letter set out the discussions that Mr Peters had had with the claimant and outlined the two broad categories of concern. He summarised what had been said. He explained why he had come to the conclusion that the claimant was unlikely to do as instructed if she disagreed with the substance of the management instruction. He set out the evidential basis for that conclusion. He made it clear that he believed that if the claimant had a legitimate concern regarding either health and safety issues or the conduct of managers or colleagues, there were clear and recognised procedures which the claimant could/should have followed. She was aware of the procedures but chose not to follow them. In relation to technical skills and competency, the letter summarised the issue with the Ash tree. He concluded that the claimant did not seem able to identify mistakes that had been made or to learn from them. Even at the meeting the key defects were missed. When they were pointed out, the claimant accepted that she should have spotted them. Mr Peters' recollection of the meeting of 2 March differed from the claimant's particularly in relation to the claimant's mental state during the meeting. The day after the meeting the claimant had sent a letter with a completely contradictory account of the discussions of 2 March. The claimant's asserted reasons for not spotting the defects a second time gave Mr Peters serious concerns about her technical capabilities. He concluded that he did not feel confident that the claimant was able to perform this function to a satisfactory level for the needs of the business. Mr Peters also summarised what conclusions he was able to draw from the records of the claimant's one-to-ones. Mr Peters summarised his concerns about the lack of consistency in the claimant's decision making and her categorisation and assessment of risks. Mr Peters was also concerned about the claimant's attempts to place responsibility for the ash tree survey with Mr Dean, who did not carry out the survey even though he was in the same location. He concluded that the time investment from management which would be required to raise the standard of the claimant's work to the required level would be disproportionately high, especially for someone who was so experienced and fully qualified. This raised serious sustainability concerns. This was also supported by the repetitiveness of the line manager's concerns as recorded in the one-to-ones over a period of months. He concluded that the claimant would continue to display the same lack of ability and conduct issues into the future. He went on to summarise the procedure which had been adopted at the meeting on 12 March.

229. The decision was to terminate employment with effect from 12 March and the respondent undertook to pay the claimant's notice pay entitlement of one week. The letter notified the claimant of her right to appeal against the decision to terminate her employment.

230. The contents of the termination letter are firmly based in the contents of the relevant meeting notes. Mr Peters did not ignore the claimant's concerns. He summarised the communications and behaviour issues as well as the competence issues and explained why both issues were a problem. The Tribunal notes that even in the meeting Mr Peters asked the claimant whether she would consider herself 'unmanageable' [530]. This was a clear indication that he felt, even during the course of the meeting, that there was a management problem.

Grievance

231. Following the dismissal, the claimant submitted a grievance on 19 March [649]. The grievance process was used to determine the grievances raised by the claimant (aside from the issue of the failure of her probationary period.) As this culminated in termination of her employment, it was dealt with using a separate appeals procedure.

232. A grievance hearing took place with the claimant on 26 March [681]. The investigating manager for the grievance was Lee Worsman. At the hearing the claimant was given a full opportunity to ventilate and explain her points of grievance.

233. In the course of investigating the grievance, Mr Worsman interviewed Mr Hulme on 31 March 2021 [692] and again on 11 May [958], Carol Laing on 13 April 2021 [919], Mr Dean on 16 April [927], Mr Peters on 21 April [943] and 12 May [965] and Elizabeth Chapman on 23 April [946].

234. At the conclusion of the grievance investigation, Mr Worsman produced a report [969]. The claimant had made two allegations. The first was an allegation of bullying behaviour by Mr Hulme. The second was an allegation of poor working standards within the Team including an allegation that Mr Hulme had not acted upon concerns raised by the claimant in relation to unmapped trees and other health and safety related matters. In that report he made a series of recommendations but did not uphold the claimant's allegations.

235. At the conclusion of the grievance process Mr Worsman held a grievance outcome meeting with the claimant on 14 May [982]. He held a further series of meetings with the other individuals involved in the grievance (Mr Hulme on 14 May [990], Mr Peters 24 May [999]).

236. Mr Worsman's grievance outcome letter was sent to the claimant and was dated 19 May [996].

Appeal regarding dismissal

237. The claimant also appealed against the decision to dismiss her (29 March) and alleged that the dismissal and detriments were because of protected disclosures [689].

238. The claimant attended a hearing in relation to her appeal against dismissal. This was conducted by Andrew Brown on 8 April 2021 [739]. Mr Brown was independent and had had no prior involvement with the claimant or her case. He was an appropriate person to deal with the appeal.

239. Mr Brown had received a copy of the claimant's appeal letter and reviewed it to identify the basis of the appeal. He noted that the claimant maintained that her dismissal was unfair because it was due to making a protected disclosure and not for the reasons stated in the dismissal letter. She also alleged that

there had been a sustained period of bullying and that the respondent had failed to protect her from victimisation following her protected disclosure. Mr Brown was sent a selection of documents to review, including the dismissal letter, notes from meetings and background documents. He met with his HR Advisor to plan the meetings and the questions he needed to ask.

240. By letter dated 1 April, the claimant was invited to the dismissal appeal meeting. The appeal meeting took place by Teams on 8 April and notes were taken [739]. At the start of the meeting the claimant confirmed that she was happy to proceed without a representative. Mr Brown confirmed that he would not be dealing with the claimant's grievance but would focus on the appeal against dismissal.

241. During the course of the meeting the claimant stated that she believed that she had been dismissed because she had raised issues about the running of the department. She did not accept that the performance issues raised by Mr Hulme and Mr Peters were valid. She maintained that her technical competence was good and that she had acted professionally at all times, save perhaps the email she sent about the Ash Tree [460]. The claimant's position was that she had raised concerns about the running of the department and two weeks later she had been sacked. The claimant indicated that she had a large amount of evidence but she had not brought it to the hearing or sent it to Mr Brown in advance of the hearing. Mr Brown could not, therefore, go through that documentation and ask questions about it at the appeal hearing. Mr Brown reiterated that the appeal hearing was her opportunity to put everything forward that she wished to in support of the appeal. Consequently, Mr Brown agreed a further time period for the claimant to submit her evidence for consideration.

242. As the claimant had not submitted her appeal evidence, the appeal meeting itself was relatively short. Mr Brown could gain a broad understanding of the appeal but could not go through the substance of the evidence as it had not been produced to him.

243. In any event Mr Brown invited Mr Hulme and Mr Peters to appeal meetings.

244. Some further correspondence about the appeal flowed between the claimant and the appeals HR adviser, Huss [745]. The claimant expressed dissatisfaction with Mr Brown's handling of the appeal meeting. She had expected him to ask more questions. She felt the meeting was too short and had an abrupt ending. The Tribunal heard that Mr Brown was disappointed that the claimant felt this way as he felt he had no other way of conducting the hearing in circumstances where the claimant had not submitted her evidence for discussion. Mr Brown accepted that he had found her approach somewhat frustrating as he felt she had not prepared for the meeting. However, the solution to this was to give the claimant further time to submit her evidence for consideration and this is what Mr Brown in fact did.

245. Mr Brown met Mr Hulme on 13 April [914]. He sought to understand the performance issues and test their validity. Mr Hulme explained the issues and that he had warned the claimant that she was not on track to pass probation

and what she needed to do to improve. He explained that line management for the claimant had then been passed over to Mr Peters.

246. Mr Brown interviewed Mr Peters on 14 April [923]. Mr Peters explained that Mr Hulme had told him that there were concerns about the claimant's performance. Mr Peters was able to see this once he reviewed the claimant's one-to-one documents. Mr Peters indicated that he wanted to form his own views of the claimant's performance. Even so, issues quickly became clear in relation to time management, prioritisation, understanding tasks and competency. He also felt that there were real issues in relation to the claimant's failure to follow reasonable management instructions. Mr Peters provided specific examples relating to areas of concern, such as the handling of the ash tree survey. Mr Peters indicated that if the claimant had attended the meeting and been willing to learn and improve, then he would have extended the probation period. However, this had not been the claimant's approach. Her attitude was more to maintain that things should happen 'her way' and that she was right, rather than her managers.

247. The claimant sent her appeal evidence to Mr Brown after his meeting with her [753]. It consisted of nearly 150 pages. On reading the documentation he noted that most of it related to her grievance rather than the specific subject matter of the appeal against dismissal. The claimant was contacted and asked to direct Mr Brown to the salient parts of the evidence for the purposes of her appeal so that he could focus his considerations appropriately. The claimant's response was to confirm that she felt he needed to know all of the information before making a decision. She also maintained that no evidence of her poor performance had been given to her. Mr Brown disagreed with this given the detailed letter produced by Mr Peters and the meetings Mr Peters had held with the claimant to discuss the issues, such as the ash tree. He also noted the range of monthly one-to-one documents which he felt clearly set out the claimant's performance issues.

248. After Mr Brown received the claimant's response he spent a considerable amount of time going through the available documents to reach a decision. He felt that he did not need to ask the claimant any follow up questions. He considered whether he needed to interview further witnesses but decided that this was not necessary as Mr Peters and Mr Hulme were the witnesses with the relevant information.

249. Mr Brown decided to refuse the appeal and uphold the decision to terminate the claimant's employment. He set out his reasoning in his appeal outcome letter dated 21 April [938]. He concluded that the evidence supported the fact that it was the claimant's performance which led to the dismissal and not the fact that she had made disclosures or raised matters about the running of the department. He found that there were two main issues: technical skills and competency; and her professional conduct.

250. Mr Brown did not believe that the dismissal was due to the claimant raising issues or making protected disclosures. He felt that performance issues arose early in the claimant's employment and were clearly raised in her one-to-ones. This happened before she raised any issues about the running of the department. He noted that Mr Peters had taken the opportunity to form

his own view of the claimant rather than relying solely on the views of others. Mr Peters quickly became concerned on his own account when he became aware that the claimant had deliberately ignored management instructions where she felt that this was the right thing to do. Mr Brown gave some examples in his letter. He accepted that Mr Peters had approached the probation meeting with an open mind but the claimant's own responses to questions had changed his mind because she was unable to see that there were issues and had said that she would not necessarily follow management instructions in future if she did not agree.

251. Mr Brown was satisfied that there were clear performance issues and these alone had led to the decision to fail the claimant's probation. He felt that the right decision had been made. Whilst he accepted that the claimant was entitled to raise issues and ask questions of her managers, he concluded that the fact she did so had no bearing on the dismissal decision.

252. The issue of trees and compliance was referred to external auditors to cover as part of their report. Savills had to undertake a wide ranging piece of work which went far beyond the issues raised in the Tree Team. Hence, it took time for this task to be completed and the report was produced in April 2022 [1007].

253. The claimant entered ACAS Early Conciliation between 23 April 2021 and 4 June 2021. She presented her ET1 claim form to the Tribunal on 16 July 2021.

THE LAW

Protected Disclosures

254. A protected disclosure is defined by section 43A Employment Rights Act 1996 as a 'qualifying disclosure' made by a worker in accordance with any of sections 43C to 43H. In this case, the alleged disclosures were made to the claimant's employer in line with section 43C.

255. Section 43B of the Employment Rights Act 1996 defines a qualifying disclosure thus:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) *that information tending to show any other matter falling within one of the preceding paragraphs has been, or is likely to be, deliberately concealed.*

….

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

In the instant case the claimant relies on her protected disclosures as being covered, variously, by subsections (b), (d), and (f) (legal obligation, health and safety and deliberate concealment.)

256. There are five separate stages to applying the necessary tests: *"First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief it must be reasonably held."* (Williams v Brown AM UKEAT/0024/19.)

Disclosure

257. An employee has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

258. 'Information' in the context of section 43B is capable of covering statements which might also be characterised as allegations *(Kilraine v London Borough of Wandsworth [2018] ICR 1850)*. 'Information' and 'allegation' are not mutually exclusive categories of communication. Rather, a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a 'relevant failure.' *Kilraine* shows that the word 'information' in section 43B(1) has to be read with the qualifying phrase 'tends to show'. The worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. In order for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)–(f).

259. The context of a disclosure may be relevant in determining the content of the disclosure, as meaning can be derived from context. Disclosures may also have to be looked at cumulatively. Information previously communicated by a worker to an employer could be regarded as 'embedded' in a subsequent communication. Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not (Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540). Whether two

communications are to be read together is generally a question of fact (Simpson v Cantor Fitzgerald Europe [2021] ICR 695).

Qualifying disclosures

260. A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may relate to the relevant failure of a colleague, a client or other third party.

261. Section 43B(1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker:
    1. be made in the public interest, and
    2. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.

262. The employee has to have a reasonable belief that that the information she disclosed tends to show one of the six relevant failures. This has both a subjective and an objective element. If the worker subjectively believes that the information she discloses does tend to show one of the listed matters, and the statement or disclosure she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that her belief will be a reasonable belief.

263. The worker's reasonable belief must be that the *information disclosed tends to show* that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure *has* occurred, *is* occurring, or is *likely to occur*. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable. Rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

264. 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. This does not mean that the test is entirely subjective. Section 43B(1) requires a *reasonable* belief of the worker making the disclosure. This introduces a requirement that there should be some objective basis for the worker's belief. *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT* indicates that reasonableness under section 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. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable (*Phoenix House Ltd v Stockman [2017] ICR 84).* The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board* stated that the focus on 'belief' in section 43B establishes a low threshold. However, the reasonableness test requires the belief to be based on some evidence.

Unfounded suspicions, uncorroborated allegations etc. will not be enough to establish a reasonable belief.

265. There can be a qualifying disclosure of information even if the worker is wrong (*Darnton v University of Surrey [2003] ICR 615).* Truth and accuracy are still relevant considerations in deciding whether a worker has a reasonable belief. Determination of the factual accuracy of the worker's allegations may help to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. It may be difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if she believes that the factual basis of the allegation is false.

266. The worker must reasonably believe that his disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely* to occur. Likely should be construed as requiring more than a possibility or a risk, that an employer or other person might fail to comply with a relevant legal obligation. 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' (Kraus v Penna Plc and anor [2004] IRLR 260).

Public interest

267. The public interest element of the test is also qualified by the requirement of 'reasonable belief.' In order for any disclosure to qualify for protection the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest.' There is no statutory definition of the public interest. The focus is on whether the worker reasonably believed that the disclosure was in the public interest rather than on the objective question of whether the public interest test was in fact satisfied.

268. In *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731* the Court of Appeal rejected the argument that for a disclosure to be in the public interest it must serve the interests of persons outside the workplace and that mere multiplicity of workers sharing the same interest was not enough. The essential point was that to be in the public interest the disclosure had to serve a wider interest than the private or personal interest of the worker making the disclosure. Even where the disclosure related to a breach of the worker's own contract of employment there may still be features of the case that make it reasonable to regard disclosure as being in the public interest. The following factors might be relevant:

    (a) the numbers in the group whose interests the disclosure served;
    (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
    (c) the nature of the wrongdoing disclosed; and
    (d) the identity of the alleged wrongdoer.

The number of people sharing the interest is not determinative. The fact that at least one other person shared the interest was insufficient in itself to convert it into a matter of public interest. Conversely, it was wrong to say that the fact that it was a large number of people whose interests were served by the disclosure of a breach of the contract of employment could never, in itself, convert a personal interest into a public interest.

269. In Underwood v Wincanton Plc EAT/0163/15 the EAT held that it was arguable that the public interest test was satisfied by a group of employees raising a matter specific to their terms of employment. 'The public' can refer to a subset of the general public, even one composed solely of employees of the same employer. In Morgan v Royal Mencap Society [2016] IRLR 428 it was held that it was reasonably arguable that an employee could consider a health and safety complaint, even one where the employee is the principal person affected, to be made in the wider interests of employees generally.

270. There may be a difference between a matter of public interest and a matter that is of interest to the public, and there may be subjects that most people would rather not know about that may be matters of public interest (*Dobbie v Felton t/a Feltons Solicitors 2021 [IRLR] 679, EAT)*. A disclosure could be made in the public interest even though the public will never know that it has been made, and a disclosure could be made in the public interest even if it relates to a specific incident without any likelihood of repetition. The four factors identified in *Nurmohamed* will often be of assistance. Some private employment disputes will more obviously raise public interest matters than others.

271. In order for a disclosure to qualify the worker need only have a *reasonable belief* that her disclosure is made in the public interest. The Tribunal does not have to determine the objective question of what the public interest is, and whether a disclosure served it. The Tribunal has to consider what the worker considered to be in the public interest; whether the worker believed that the disclosure served that interest; and whether that belief was held reasonably. As reasonableness is judged to some extent objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time. Tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker *(Nurmohamed)*. That does not mean that it is illegitimate for the Tribunal to form its own view on that question as part of its thinking but only that that view is not, as such, determinative. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the Tribunal finds were not in his or her head at the time. A tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time: all that matters is that his or her (subjective) belief was (objectively) reasonable.

272. Belief in the public interest need not be the predominant motive for making the disclosure or even form part of the worker's motivation. The worker's motive might, however, be one of the individual circumstances taken into account by a tribunal when considering whether the worker reasonably

believed the disclosure to be in the public interest. A worker may seek to justify an alleged qualifying disclosure by reference to matters that were not in her head at the time he or she made it, but if she cannot give credible reasons for why she thought at the time that the disclosure was in the public interest, that may cast doubt on whether she really thought so at all. Belief in a public interest element would not have to form any part of the worker's motivation so long as the worker has a genuine (and reasonable) belief that the disclosure is in the public interest.

Breach of a legal obligation

273. Section 43B(1)(b) is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law (e.g. negligence, nuisance and defamation), as well as contractual obligations and those derived from administrative law. It can include breaches of legal obligations arising under the employee's own contract of employment (subject to the public interest element of the test also being met.) It does not cover a breach of guidance or best practice, or something that is considered merely morally wrong. A worker will not be deprived of protection in relation to a disclosure simply because she is wrong about what the law requires.

274. "Likely" to breach a legal obligation means "probable or more probable than not." (Kraus v Penna Plc UKEAT/0360/03)

275. A worker need not always be precise about what legal obligation she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under section 43B(1)(b). In cases where it is 'obvious' that some legal obligation is engaged then the absence of specificity will be of little evidential relevance. In less obvious cases, a failure by the worker to at least set out the nature of the legal wrong she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation. Other than in obvious cases, where a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference, for example, to statute or regulation (Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12).

Danger to health and safety

276. A disclosure does not have to relate to a failure by the employer, it will be sufficient if the disclosure relates to wrongdoing by a third party. The health and safety matter in question need not necessarily fall under the control of the employer. Complaining about instances of harassment or bullying may constitute a qualifying disclosure under s43B(1)(d) e.g. Fincham v HM Prison Service UKEAT/0925/01

Deliberate concealment

277. This category 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. The word 'deliberate' in this context indicates that section 43B(1)(f) would not cover the inadvertent destruction or mislaying of documents or evidence.

Method of disclosure

278. In order to be a protected disclosure, the qualifying disclosure must be made in the correct manner as set out in sections 43C-43H. A disclosure made to a worker's employer will be a protected disclosure s43C(1)(a).

Detriment

279. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by her employer, a colleague acting in the course of employment or an agent acting with the employer's authority on the ground that the worker made a protected disclosure. The requirements for a successful claim are that:
    (a) the claimant must have made a protected disclosure;
    (b) she must have suffered some identifiable detriment;
    (c) the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act; and
    (d) the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

280. Section 47B(1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal. Any such complaint instead falls under section 103A which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure. The employee may still have a separate claim against the employer for detriment up to the date of dismissal.

281. A detriment is unlawful under section 47B if done 'on the ground' of a protected disclosure, whereas dismissal is unfair under section 103A only if the protected disclosure is the reason or principal reason for it. A section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, whereas section 103A requires the disclosure to be the primary reason for a dismissal.

282. Section 47B provides protection from any detriment. There is no test of seriousness or severity. It is not necessary for there to be physical or economic consequences for it to amount to a detriment. What matters is that the complainant is shown to have suffered a disadvantage of some kind.

283. The protection is against acts and *deliberate* failures to act. A deliberate failure to act shall be treated as done when it was decided upon (section 48(4)(b)).

Causation (detriment cases)

284. Causation under section 47B has two elements:

1. was the worker subjected to the detriment by the employer, other worker or agent?
2. was the worker subjected to that detriment because she had made a protected disclosure?

The question of causation is to be applied to the employer's act or omission not the ensuing detriment. What was the reason for the respondent's act or omission? (Not, what was the reason for the detriment?)

285. It is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)). This does not mean that, once a claimant asserts that she has been subjected to a detriment, the respondent must disprove the claim. It means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant (i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that she had made the protected disclosure.

286. If the Tribunal rejects the reason advanced by the employer, the Tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party (Kuzel v Roche Products Ltd 2008 ICR 799, Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

287. It may be appropriate to draw inferences as to the real reason for the employer's action on the basis of the Tribunal's principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:

    (a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made.
    (b) By virtue of section 48(2), the employer must be prepared to show why the detrimental treatment was done. If it does not do so, inferences may be drawn against the employer (see London Borough of Harrow v Knight 2003 IRLR 140, EAT)
    (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

288. In order for liability under section 47B to be established the worker must show that the detriment arises from the act or deliberate failure to act by the employer. Only then can the worker say that she has been 'subjected to' the detriment in question.

289. Section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistle-blower (*Fecitt and ors v NHS Manchester (Public Concern at Work*

intervening) [2012] ICR 372). There is a different test in detriment cases from dismissal cases under section 103A. The 'material influence' test is to be applied in section 47B detriment cases whereas in a section 103A unfair dismissal case the Tribunal identifies the *sole or principal reason* for the dismissal.

290. It is not necessary to consider how a real or hypothetical comparator who has not made a protected disclosure was or would have been treated when determining whether the protected disclosure was the 'ground' for the treatment complained of (even though it may be a useful exercise).

291. The motivation need not be malicious. It does not matter whether the employer intends to do the whistle-blower harm, so long as the whistle-blower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure.

292. In general, the starting point is that it is necessary to examine the thought processes of the alleged wrongdoer. Does the person who actually subjects the worker to the detriment know of the protected disclosure so that the protected disclosure can have materially influenced his decision to subject the claimant to the detriment? The tribunal must generally focus on the mental processes of the individual decisionmaker and so cannot find an unlawful detriment if the decisionmaker did not know about (and so could not have been influenced by) the protected disclosure. Following Nicol v World Travel and Tourism Council 2024 EAT (a dismissal case) the decision maker should know not just that there has been a disclosure but should also have at least some knowledge of *what* the claimant has disclosed (i.e. what the substance of the disclosure is.)

293. That general rule has sometimes said to be displaced in cases where a manipulator with an unlawful motivation is in the 'hierarchy of responsibility' above the worker subjected to the detriment, or is in some way formally involved in the process that leads to the decision, and thereby procures the detriment via the innocent decisionmaker (see parallels to section 103A in Jhuti v Royal Mail below). There are a number of appellate decisions which conflict with each other in considering whether liability for whistleblowing detriment can be established where the decision maker is himself innocent but has been manipulated by a third party into subjecting an employee to a detriment on the grounds of a protected disclosure (Ahmed v City of Bradford Metropolitan District Council and ors EAT 0145/14, Western Union Payment Services UK Ltd v Anastasiou EAT 0135/13, Malik v Cenkos Securities plc EAT 0100/17, William v Lewisham and Greenwich NHS Trust 2024 EAT 58, First Greater Western Ltd v Moussa 2024 EAT 82.) The fact that section 47B now includes provision for both direct liability of an employer and individual liability of workers who subject colleagues to whistleblowing detriment may rationalise the different approaches in whistleblowing detriment claims. Ahmed, Anastasiou and Moussa all concerned direct claims against the employer under section 47B(1); the former two cases were decided on the basis of the law as it stood before section 47B(1A) was introduced in 2013 to

provide for individual liability of workers and agents, and the latter case could only fall under section 47B(1) because an individual decision-maker was not held to be personally liable and so there could be no vicarious liability under section 47B(1B). Choudhury J (in *Malik)* was concerned with the potential injustice to innocent decision-makers, and specifically referenced section 47B(1A)–(1D) when adopting an analogous approach to that taken in the *Reynolds* case. Similarly, Choudhury J's comment when considering *Jhuti* (that it is permissible to attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case under section 103A in some circumstances because the liability for the dismissal lies only with the employer) fits with this distinction. A section 47B (1) claim, like a dismissal claim under S.103A, can only be brought against the employer.

294. There is, therefore, no clear answer to the question whether knowledge of a protected disclosure can be imputed to an innocent decision maker who subjects the whistle-blower to a ***detriment***. In the context of section 103A the Supreme Court decision in Jhuti has removed a gap in the protection from automatically unfair dismissal that is afforded to employees. Where a colleague of a worker who is motivated by a protected disclosure has manipulated a decision maker into subjecting the worker to a detriment, the worker can bring a claim directly against the wrongdoer under section 47B(1A). Under section 47B(1B), the employer will be vicariously liable for that detrimental act. Sections 47B(1A) and 47B(1B) may have plugged the gap in protection so that it is still more appropriate to look at the knowledge of the decisionmaker in a detriment case rather than seeking to impute the knowledge of someone else in the organisation to that decision maker.

295. An employee's conduct in making a protected disclosure may sometimes be separable from the disclosure itself (Bolton School v Evans [2007] ICR 641, Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941). The employer can act lawfully if it relies only on the non-protected aspects of a whistle-blower's conduct even when that conduct is closely connected with the protected disclosures themselves. For example, in Panayiotou v Chief Constable of Hampshire Police and anor 2014 ICR D23 EAT the reason for the detriments and dismissal was not the fact that the claimant had made protected disclosures but rather the manner in which he pursued his complaints. However, in some cases it will be impossible to draw a line between the disclosure and the manner of that disclosure.

296. Once the reasons for the treatment have been identified the Tribunal must evaluate whether those reasons are separate from the protected disclosure or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Is the protected disclosure the *context* for the treatment complained of but not the *reason* for the treatment? Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941.

Causation in section 103A dismissal cases

297. In Royal Mail Group Ltd v Jhuti [2020] ICR 731 it was held that in a section 103A case of automatic unfair dismissal the Tribunal need generally look no further than the reasons given by the decision maker in order to determine the reason for the dismissal. However, in a so-called 'Iago' case a person in the hierarchy of responsibility above the dismissal decisionmaker determines that for 'reason A' (the protected disclosure) the employee should be dismissed but that this reason should be hidden from the actual dismissal decisionmaker behind another, invented reason ('reason B'). The decisionmaker then adopts reason B and dismisses for reason B with no personal knowledge of reason A. In such an 'Iago' case the Tribunal should look behind the decisionmaker's reason B to determine that hidden reason A (the protected disclosure) was the reason for dismissal rather than the apparent, innocent reason B. The line of reasoning in Jhuti only needs to be used where an innocent decisionmaker is manipulated into dismissing a whistle-blower for an apparently fair reason and is 'unaware of the machinations of those motivated by the prohibited reason.' It does not apply where the decisionmaker is aware of the protected disclosure and is thus not deceived into dismissing for an unrelated reason (University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20).

298. The causation test in a section 103A claim is whether the making of the disclosure was the sole or principal reason for the dismissal. If it was, the fact that the employer erroneously thought that the disclosure was not a protected disclosure within the meaning of the Act is irrelevant, the dismissal will be found to be because of the protected disclosure, and therefore automatically unfair.

299. In a section 103A case it is for the employee to show that they have made a protected disclosure, that they have been dismissed and are, in other respects, entitled to bring an unfair dismissal claim. In relation to the burden of showing the reasons for the dismissal following the guidance given by the EAT on the burden of proof in Kuzel v Roche Products Ltd [2007] IRLR 309 (EAT), endorsed by the Court of Appeal in Kuzel v Roche Products Ltd [2008] IRLR 530, the answer depends on the employee's length of service:

- Where the employee does not have the qualifying service necessary to bring a claim for ordinary unfair dismissal, the burden is on the employee to show the reason for dismissal (following Smith v Hayle [1978] IRLR 413).
- Where the employee does have the requisite qualifying service, the burden remains on the employer (following Maund v Penwith [1984] IRLR 24).

300. Therefore, where an employee with qualifying service claims to have been automatically unfairly dismissed for having made a protected disclosure, the burden remains on the employer to show a potentially fair reason for

dismissal. The employee can put forward an alternative reason for dismissal, such as the making of a protected disclosure, provided there is some evidence to support it, but that does not mean that the employee has the burden of proof in that regard. It will be for the tribunal to decide on the evidence which, if any, reason to accept.

301. In *Kuzel*, the Court of Appeal endorsed the following principles (set out earlier by the EAT) relating to the burden of proof in whistleblowing cases:

- Failure by the employer to establish a potentially fair reason for dismissal does not automatically result in a finding of automatically unfair dismissal under section 103A of the ERA 1996.
- Where the tribunal rejects the employer's proffered reason, and the employee has raised a prima facie case that the reason is the protected disclosure, the tribunal is entitled (but not obliged) to infer that the protected disclosure is the true reason for dismissal.
- It remains open to the employer to satisfy the tribunal that the protected disclosure was not the reason (or principal reason) for dismissal, even if the real reason as found by the tribunal is not that advanced by the employer.
- An employee (with qualifying service) does not at any stage have the burden of proving that the protected disclosure was the reason for the dismissal.

CONCLUSIONS IN THIS CASE

302. Taking into account the findings of fact and the applicable law as set out above, the Tribunal's conclusions in relation to the issues set out in the agreed list of issues is set out in the following paragraphs.

The protected disclosures

Disclosure 1: paragraph 4.1

303. As set out above, the email which is said to constitute the disclosure conveys information about particular trees and the presence or absence of data on the respondent's systems about those trees. She also conveys information about her own paper survey records. She raises a query about the completeness of the respondent's data and suggests that the records need to be checked and, if necessary, updated. She says it is 'not good' if trees are missing. However, the Tribunal considers that there is nothing in the disclosure which tends to show that the health and safety of an individual has been, is being or is likely to be endangered. Incomplete records can be said to be 'not good' for any one of a number of reasons. The absence of records may make the claimant's job more difficult, for example, and may make it more difficult for the respondent to manage its trees and plan the maintenance work. Pointing

out an absence of information does not, on the face of it, suggest a likely health and safety risk to an individual, without more. The further comments in the email and the context of the communication do not add a health and safety flavour to it either. There is no indication of alarm or suggestion that the missing trees are dangerous. Indeed the comment, "it's not good if we have sites missing from treeplotter when that's what we're working from" tends to suggest that the claimant's main concern and belief at this stage is that she is trying to do a job with incomplete information and will perhaps find it difficult to complete her work properly if she is not provided with all the relevant data on the system that she has been told to use during the course of her work. This is not a concern about a health and safety risk to an individual. Rather, it is a concern that the claimant may not have the necessary tools and information to do her job.

304. Given that the email does not raise a health and safety concern, given the claimant's evident concern that she is working without all the relevant information, given that her concern is to check that the database is complete, and given that a 'missing tree' is not automatically a dangerous tree (as opposed to an unknown one), the Tribunal is not satisfied that the claimant had a subjective belief that her disclosure 'tended to show' the relevant health and safety danger. Furthermore, any such belief would not be objectively reasonable in all the circumstances. An objective reader would have no reason to suspect that the claimant was raising a risk to individual health and safety in this email. In addition, there is nothing in the surrounding circumstances of the disclosure which would alert the objective reader that the claimant was disclosing information about a health and safety danger either.

305. In light of the above, the Tribunal is not satisfied that the claimant had the necessary reasonable belief that the email tended to show a danger to health and safety within the meaning of s43B(1)(d). In addition, the public interest element is not met. There is nothing about the disclosure which indicates that the claimant had a reasonable belief that she was making the disclosure in the public interest. The disclosure relates to the respondent's internal data source and records. In the absence of the health and safety element there is nothing to suggest that the disclosure is in the public interest as it is really only if she were alerting the respondent to a risk of injury to the public or service users from dangerous trees that the public interest would come into play.

306. The Tribunal therefore finds that the first alleged disclosure was not a qualifying disclosure and therefore not a protected disclosure within the meaning of the Act.

<u>Disclosure 2: paragraph 4.2</u>

307. The claimant alleges that this disclosure qualifies pursuant to s43B(1)(b) and (d) on the 'breach of a legal obligation' and/or the 'health and safety' danger basis. The Tribunal's findings of fact in relation to this disclosure are set out at paragraphs 114 to 123 above. The conversation had two components: the safety of the trees and the alleged bullying by Mr Hulme.

308. The claimant's comments about the unsurveyed trees clearly conveyed information and the content and context of the conversation indicated that the claimant intended to highlight both a risk to members of the public (from the unsurveyed trees) and the fact that the respondent may be in breach of its legal obligations. In line with our findings of fact, we are satisfied that the claimant subjectively believed that the disclosure tended to show the relevant legal breach and health and safety danger. She went so far as to identify the piece of legislation which she thought was relevant. Furthermore, the claimant's belief was objectively reasonable. Additionally, we accept that the claimant had reasonable belief that the disclosure was made in the public interest given that dangerous trees could pose a risk to members of the public or residents of the respondents' properties. The information would potentially be of interest to a number of people and was not just of personal interest to the claimant. The legal obligations she referred to are obligations owed to passersby and various members of the public. They do not relate solely to the claimant's own personal legal interests (e.g. her own individual contract of employment or her own unique circumstances.) They relate to the safety of the public and the safety of the environment.

309. As set out above, the Tribunal accepts that during the call, the claimant alleged poor management by Mr Hulme. She said that there was clear favouritism for Mr Dean and she believed that she was being treated differently. To the extent that the claimant might have suggested that the allegation of bullying was a separate element of a protected disclosure, the Tribunal disagrees. The list of issues refers only to the disclosure of hazardous trees and the risk to health and safety of the public. In any event, whilst the claimant was critical of Mr Hulme, her comments did not go so far as to disclose information which tended to show a breach of a legal obligation or a danger to health and safety within the meaning of the Act. We do not accept that she had a reasonable belief that she was disclosing the relevant category of information. Furthermore, her concerns about Mr Hulme's management of her had no public interest element. They related solely to her experiences and her contract of employment. Objectively there was no public interest element to this and the claimant cannot have had a reasonable belief that this element of her disclosure was made in the public interest.

310. In light of the above, the Tribunal finds that the element of this conversation which related to the trees, the surveys and the possible related hazards <u>does</u> constitute a protected disclosure. Any comments regarding Mr Hulme's management of the claimant, any alleged favouritism or poor management, did <u>not</u> constitute protected disclosures.

<u>Disclosure 3: paragraph 4.3</u>

311. This alleged disclosure relates to the claimant's communications with Catherine Farrington (and to a lesser extent) Bronwen Rapley on 9 March 2021. The Tribunal's findings of fact in this regard are at paragraphs 212 to 217 above.

312. During the course of cross examination Ms Farrington accepted that, as far as she was concerned, the claimant was attempting to 'blow the whistle' during this conversation. In addition to her comments about missing trees, the claimant made allegations of bullying. Taken properly in context, and noting the comments about missing trees, the Tribunal is prepared to accept that the claimant had a reasonable belief that she was disclosing information which tended to show the relevant health and safety danger and that there was an element of deliberate concealment. She specifically said that Mr Hulme was lying to compliance about the number of trees surveyed. The content of the conversation itself, particularly when it is seen as building on her earlier conversations and disclosure, constituted a qualifying disclosure. The health and safety/risk to the public and the deliberate concealment elements of the conversation also meant that the claimant had a reasonable belief that the disclosure was made in the public interest.

313. In light of the above, the Tribunal finds that the claimant has proved that she made two protected disclosures in line with paragraphs 4.2 and 4.3 of the list of issues.

Automatic unfair dismissal: section 103A Employment Rights Act 1996

314. The claimant does not have two years' qualifying service and so the burden rests with her to show that the reason (or principal reason) for the dismissal was the protected disclosures.

315. Taking all of our findings of fact in the round, the Tribunal is *not* satisfied that the sole or principal reason for the dismissal was the two protected disclosures. Those protected disclosures are part of the factual matrix of the case but they are not the *reason* that Mr Peters chose to terminate the claimant's employment. Mr Peters' thought processes were scrutinized at length during the course of the Tribunal hearing and it was clear to the Tribunal that he genuinely terminated the employment for the reasons that he set out in his termination letter. Whilst he had been alerted to Mr Hulme's pre existing performance concerns, he had taken care to form his own view and to listen to what the claimant said to him as part of the process. He scrutinised the available documentation from one-to-ones which showed longstanding performance concerns. He discussed those examples with the claimant at the hearing. He gave her an opportunity to demonstrate her approach to her job going forwards. This was not a 'fig leaf' excuse for the dismissal.

316. The claimant's own responses during the meeting were to accept that she had made mistakes regarding the ash tree. (It was only later that she rowed back on that.) Mr Peters was entitled to conclude that the claimant had not demonstrated her competence in the role. Furthermore, he was entitled to conclude that it would be disproportionate to extend the probationary period and retrain the claimant up to the required standard given the claimant's previous experience in this type of work and the fact that she had been forewarned that she was not on track to pass probation. She had already had a six month period to prove her suitability for the post. As she was not newly qualified in this area of work, the respondent was entitled to conclude that

she should have been able to improve her performance within the probationary period and that any further extension was unlikely to result in the required improvements.

317. There were also concerns about management of the claimant going forward. Leaving aside the difficulties which the claimant said she had with Mr Hulme, Mr Peters had drawn his own conclusions about whether he would be able to manage the claimant in the future. He gave her every opportunity to reassure him that she would follow reasonable management instructions (even if she disagreed with them) but she did not do so. He had a legitimate concern that the claimant's attitude towards managerial instructions would not alter with the change of manager from Mr Hulme to Mr Peters. The claimant would still stick to her guns if she thought she knew best, even if her views were not based on health and safety concerns or concerns about illegality. The subject matter of the disagreement would not matter. If she felt her approach was better, she would be unlikely to follow management instructions. Such an ingrained reluctance to follow management instructions where she felt she knew better was a legitimate concern for Mr Peters. She was likely to continue to do what she thought was best regardless of management instructions. This approach and attitude would be present irrespective of any protected disclosures or health and safety concerns.

318. It is pertinent to note that the claimant's previous work for the respondent had been as a consultant rather than as a direct employee. Her relationship with others in the business would therefore have been of a different nature to the direct managerial relationships of her probationary employment. Where an independent contractor or consultant may have an increased level of autonomy, personal responsibility and self-reliance, the same is not as true of the employee. A manager will expect to be able to direct how the work is done by his direct employees. This is part of legitimate managerial direction. There would not be the same level of control or direction over the work of a consultant. The change in employment status necessitated a change in approach from the claimant in terms of doing as she was instructed. It is evident that the claimant was not fully able to make this change. One of the main functions of a probationary period is to check an employee's suitability for the role as an employee. There were enough remaining concerns at the end of the claimant's probation that Mr Peters was entitled to decide to terminate the employment. The protected disclosures were not a material consideration.

319. The disclosure to Catherine Farrington did not have any causal relevance to the decision to dismiss the claimant. Indeed, Ms Farrington did not speak to Mr Peters about the disclosures. She interviewed Mr Hulme and Carol Laing. There was no evidence to suggest that Mr Peters was made aware of that disclosure to Ms Farrington prior to terminating the claimant's employment. In such circumstances it cannot have formed part of the decision to dismiss. Furthermore, Ms Farrington referred the issues on to Savills to form part of the audit. This does not suggest any form of 'cover up' or that she wished to engineer the claimant's dismissal. She had no reason to do so.

320. The role of the external auditors is relevant in that it shows that the issue of the trees was not covered up by the respondent but handed over to an

external body to re-examine it. In such circumstances, the respondent had no reason to dismiss the claimant because of any protected disclosures as it had already invited an outsider to examine the issue. It would not be able to cover the issue up by dismissing the claimant. None of this links back to the dismissal decision maker to influence his decision in favour of termination. It is a separate thread which does not link back to Mr Peters. He is kept out of the discussions with Ms Farrington and has no input into the decision to appoint the external auditors. There is no overlap in personnel in this regard.

321. The claimant's evidence to the Tribunal largely sought to establish a conspiracy with Mr Hulme at its heart. The evidence was not present to substantiate this theory. In particular, the protected disclosures in this case were not made to Mr Hulme and he did not make the decision to dismiss the claimant. Nor is there any credible evidence that Mr Hulme exerted influence over Mr Peters to ensure that he dismissed the claimant. This is what the claimant suspects but there was no evidence to support the suspicion. In particular, we found Mr Peters to be an honest and credible witness and we accept his evidence that the decision was his and his alone and that he was not influenced, manipulated or 'fed' the 'desired outcome' of dismissal by Mr Hulme.

322. The Tribunal is satisfied that the sole or principal reason for dismissal was that the claimant had failed her probation and had not established her suitability for the role or that her performance was adequate. She had not reassured the respondent that any further extension of probation would result in the required improvements or change of approach. The claimant has not established that the protected disclosures were any part of the decision to dismiss, still less the sole or principal reason for dismissal. Even if the burden of proof of showing the reason for dismissal had lain with the respondent in this case, the Tribunal would have been entirely satisfied that the respondent had discharged that burden and proven that the protected disclosures were not the reason for the dismissal.

Detriments: paragraphs 7(i) to (xix) of the list of issues

Detriment (i)

323. In the list of issues the claimant alleges that Mr Hulme ignored the claimant's email of 3 November 2020 concerning a health and safety concern regarding the respondent's trees.

324. In line with our findings of fact above, we did not find this allegation proven (paragraphs 69 to 72). He did not ignore the email. It did not require a response and was being dealt with appropriately by other means. The Tribunal finds that, in all the circumstances, the claimant was not subjected to a detriment by Mr Hulme's lack of response to her email. Furthermore, this incident predates the protected disclosures which we have found established in this case. The claimant could not have been subjected to any detriment because of a protected disclosure which she had not yet made. The chronology does not assist the claimant's claim.

Detriment (ii)

325. The claimant alleges that Mr Hulme ignored her email regarding health and safety concerns (13 November 2020 55 Queens Road) and that he ignored customer complaints due to mistakes from colleagues. Our findings of fact in relation to this email are set out at paragraph 73 to 76 above.

326. In light of those findings we do not accept that Mr Hulme ignored the claimant but decided that a response was not required. The matter was already being dealt with appropriately. We do not consider that the claimant was subjected to a detriment as a result. The claimant has also failed to establish that customer complaints due to colleagues' mistakes were ignored. Indeed, she did not specify which complaints she was referring to.

327. The chronology of events undermines the claimant's case in this regard. The alleged detriment pre-dates the protected disclosures and so cannot have been caused by the protected disclosures.

328. In light of the foregoing this complaint of whistleblowing detriment must fail and be dismissed.

Detriment (iii)

329. The claimant alleges that on 30 November 2020 at her monthly appraisal Mr Hulme did not address health and safety concerns as per the first (alleged) protected disclosure. She alleges that he made contradictory comments about her performance, set unrealistic goals and targets and set her up to fail. She alleges that his comments were blunt, repetitive and generally negative in nature.

330. In line with the Tribunal's findings of fact (paragraphs 77-85) we do not accept that the claimant has proven this detriment, as alleged. Her allegation does not accurately reflect what took place. Furthermore, the first alleged protected disclosure has not been established and so this alleged detriment pre-dates the first of the proven protected disclosures in this case. In such circumstances it cannot have been caused by the protected disclosures.

331. This complaint of protected disclosure detriment must therefore fail and be dismissed.

Detriment (iv)

332. The claimant alleges that at her 14 December 2020 appraisal the bullying escalated from the previous appraisal. She alleges he was dismissive of health and safety concerns related to her first disclosure. She alleges that he was negative and critical of her work but supplied no evidence to support his comments. She says he supplied lists of unrealistic demands and was contradictory and set the claimant up to fail. She says there were no clear instructions regarding her health and safety concerns.

333. As with the previous alleged detriments, this incident pre-dates the first established protected disclosure. Causation cannot, therefore, be established and the complaint would have to fail for that reason alone.

334. We also refer to our findings of fact at paragraphs 86-88. The claimant's factual allegations are not proven on the evidence heard by this Tribunal. We do not accept that she was subjected to a detriment as she alleges. We also note that the claimant herself accepted in her one-to-one document that her performance had been less than she was capable of. This rather suggests that Mr Hulme's assessment of her performance was not unfair or unreasonable or that he made unrealistic or unreasonable demands of her.

335. This complaint of detriment therefore fails and is dismissed.

Detriment (v)

336. The claimant makes similar allegations about the way her appraisal on 25 January 2021 was handled (as set out in the list of issues). In particular, she alleges that he 'threatened her probation' and referred her to Occupational Health and questioned her skills etc. without reason or evidence.

337. The Tribunal's findings of fact in relation to this appraisal are set out at paragraph 89-98 above. We do not find that the allegation accurately reflects the content and tone of the appraisal meeting and the Tribunal does not accept that the claimant was subjected to a detriment as alleged. The claimant has not proven the factual allegation.

338. Furthermore, this appraisal pre-dated the first established protected disclosure and therefore any associated detriment could have been done on the ground of the subsequent protected disclosures. The chronology does not fit.

339. This aspect of the claimant's case fails and is dismissed.

Detriment (vi)

340. This alleged detriment relates to the monthly appraisal on 22 February 2021 as set out in the list of issues. It repeats and builds upon many of her criticisms of the earlier appraisals. The Tribunal's findings of fact in relation to this appraisal are set out at paragraphs 106-107 above. In light of those findings we do not accept that the claimant has proved her allegation at detriment (vi). The appraisal is relatively typical in that contains both compliments and criticism, as it should. It is a balanced reflection of the strengths and weaknesses of the claimant's performance and is based on the information available to Mr Hulme at that time.

341. This appraisal also pre-dates the first established protected disclosure. Consequently, it cannot have been done 'on the ground of' the protected disclosure.

342. This element of the claimant's claim fails and must be dismissed.

Detriment (vii)

343. Although this is labelled as a detriment in the list of issues, it is, in fact a description of the claimant's protected disclosure at paragraph 4.2 of the List of Issues. it does not make any allegation in relation to things which the respondent did or did not do. It does not allege an act or omission which could amount to subjecting the claimant to a detriment. Consequently this aspect of the claimant's case fails and is dismissed. There is no proof of a detriment at paragraph (vii).

Detriment (viii)

344. The claimant alleges that on 1 March Mr Peters advised the claimant to look for another job and raise a grievance against Mr Hulme. She asserts that Mr Peters took the wrong action according to policy. She also alleges that his attitude towards her had deteriorated since she made a protected disclosure to him.

345. The Tribunal refers to its findings of fact as set out above at paragraphs 124 to 134. For reasons already stated we do not accept that the respondent subjected the claimant to a detriment when Mr Peters said she could raise a grievance. Rather he attempted to signpost her towards the correct method of taking her complaints and grievances further. The claimant was not put at any disadvantage or prevented from pursuing her complaints as a result of Mr Peters' comments.

346. Likewise, we are not satisfied that the comment about looking for another job was said in the way that the claimant alleges. Her account of the event has not been accepted. When viewed in their proper context Mr Peters' comments were not subjecting the claimant to a detriment. They were not subjecting her to a detriment for the purposes of her protected disclosure claim.

347. Furthermore, the Tribunal does not find that the protected disclosure (as established) was a reason for the comments made by Mr Peters on 1 March. We are satisfied that the respondent has established that the reference to the grievance procedure was a response to the claimant indicating that she wanted to resolve matters formally rather than informally. It had nothing to do with the protected disclosure on 26 February regarding unmapped trees. The disclosure did not materially influence Mr Peters' decision to make those comments. Indeed his genuine intention to support the claimant in pursuing her grievances is reflected in his email of 1 March 2021 [426].

348. As for the comments regarding looking for another job, the Tribunal is not persuaded that this was said because the claimant had made a protected disclosure. Rather, Mr Peters was responding to the claimant's own description of her own state of mind or emotional state. It is the claimant's own initial comment during the conversation on 1 March that leads Mr Peters to respond in this way rather than any aspect of the protected disclosure the week before. Had the claimant not said that she was not happy in her job and felt like she was being pushed out, was worried for her job and had started to look for jobs elsewhere (at the start of the phone call), Mr Peters would never have made the comments about looking for another job. It is her

opening to the conversation which prompts and invites his response. The Tribunal is not persuaded that the disclosure on 26 February was even in Mr Peters' mind during the early morning phone call on 1 March. The respondent has discharged its burden of proof in showing the reason for his actions and that none of this was done on the ground of the protected disclosure.

349. In light of the above, the Tribunal is not satisfied that this constituted a detriment and is furthermore satisfied that the earlier protected disclosure was not a reason for his comments. We are satisfied that the respondent has shown that the reason for the comments was not, in any way, the protected disclosure. The protected disclosure was not a material factor.

350. This part of the claimant's case therefore fails and is dismissed.

Detriment (ix)

351. The Tribunal's findings of fact in relation to the incident at paragraph (ix) are set out at paragraphs 135 to 151 above. Once again, we do not accept the claimant's characterisation of these events. Mr Hulme did not berate her. There was no micromanaging or bullying. Instead, Mr Hulme was simply talking the issues through with the claimant and making a management decision. The email chain in question is standard management email. It is unremarkable. It passes requests and decisions between line manager and employee. It does not subject the claimant to a detriment. The claimant did not really accept that Mr Hulme had the right or the authority to make these sorts of decisions. She did not agree with his decision and thought that her approach was better. It is in this context that she describes it as micromanaging her and setting her up to fail. Viewed objectively and reasonably that is not what was going on. She disagreed with Mr Hulme's response and then sent an email to Mr Peters about it in an effort to get him to agree to her point of view [418].

352. The Tribunal finds that the respondent did not subject the claimant to a detriment as she alleges. Furthermore, these events were wholly unrelated to the claimant's protected disclosure of 26 February which was made to Mr Peters rather than Mr Hulme. Mr Hulme made the comments that he did in relation to home working and Canterbury Gardens solely as line management decisions. He was conveying the information he needed in order to authorize home working and when this should be provided because this reflected what he reasonably needed in order to organise the work of the Team. Likewise, his views on Canterbury Gardens reflected his genuine understanding of the issue and his management decisions in relation to the same. They did not have any connection to the protected disclosure.

353. The pleaded detriment is not established and the causal relationship between protected disclosure and alleged detriment is not present. This part of the claimant's claim fails and is dismissed.

Detriment (x)

354. This relates to the Ash tree meeting. In line with the Tribunal's findings above, this was an informal meeting. Mr Peters had been alerted to an issue that he

wanted to discuss with the claimant. It was not the sort of meeting which required time for the claimant to prepare. It was the sort of meeting any manager might have with a direct report about something arising in the course of their work. Nor does the Tribunal find that the meeting notes were vague or contradictory. The claimant was not attacked. She was asked what had happened in relation to the tree. As her line manager, he was reasonably entitled to make this enquiry. Indeed, the claimant was not wrongly accused as she accepted during this meeting that she had made a mistake in relation to the tree.

355. In light of the above and our findings of fact (see paragraphs 152-170 above) the Tribunal finds that the claimant was not subjected to a detriment in the Ash tree meeting. The pleaded detriment does not accurately reflect what happened. Furthermore, this was not related to her protected disclosure. The Tribunal is satisfied that the meeting was only called and only took place in the way that it did because Mr Peters had noted a problem with the Ash tree. He would have had a meeting of this nature regardless of any previous disclosures by the claimant as he considered that the problems with the ash tree needed to be investigated and addressed. The protected disclosure did not contribute to the Ash tree meeting at all. There is no causal connection.

356. This aspect of the claimant's claim therefore fails and is dismissed.

Detriment (xi)

357. The claimant's email is at [460]. Mr Peters' response to that email is at [481-482]. A fair reading of Mr Peters' email discloses that the claimant's assertion about it is unfounded. In his email he expresses concern for the claimant and surprise at the contents of her email. He sought to reassure her that the meeting had not been a formal one. Mr Peters' email was designed to put his motivations and his own account of the meeting 'on the record.' There was nothing wrong with him doing this. Indeed the claimant's subsequent email confirms that Mr Peters had been very supportive towards her.

358. The claimant has failed to prove her factual allegation as pleaded at detriment (xi) and the Tribunal does not find that she was subjected to a detriment as alleged.

359. Furthermore the events referred to at (xi) were not related to or caused by the claimant's protected disclosure. Rather they were a direct response to an email which the claimant herself had chosen to send. If she had not done this then Mr Peters would not have needed to respond as he did. The claimant's protected disclosure did not contribute at all to Mr Peters' actions in this regard.

360. This aspect of the claimant's claim fails and is dismissed.

Detriment (xii)

361. The letter at [470] should be viewed in its proper context. It is an invitation to a probation review that has to take place to decide what happens next with the claimant's employment. It gives the claimant fair warning of the issues to

be discussed so that she can prepare for the meeting. Indeed, she would have had a legitimate complaint if the letter did not contain this information. The invitation letter does not say whether the respondent still holds this view of her performance. That is what is to be discussed at the meeting.

362. The Tribunal finds that this sort of invitation letter does not subject the claimant to a detriment. It is sending her an invitation to a meeting which has to take place even if she is not dismissed and her employment with the respondent continues. The claimant may have misinterpreted the letter as she had not received a similar letter before. This is because she had not previously been on probation.

363. The claimant has not proved that she was subjected to a detriment as alleged at paragraph (xii).

364. In addition to concluding that the claimant was not subjected to a detriment by the sending of the letter, the Tribunal is also satisfied that the letter is not causally linked to the protected disclosure. The letter would still have been sent and would still have contained the same information and concerns even if the claimant had not made a protected disclosure. The form and content of the letter reflected the content of the monthly one-to- ones, Mr Peters' experience of managing the claimant and the longstanding concerns about the claimant's performance and her ability to pass probation. There is no link to the protected disclosure.

365. This part of the claimant's claim fails and is dismissed.

Detriment (xiii)

366. The allegation that Mr Peters was preparing for the claimant's dismissal at this time is not supported by the evidence in the case. Mr Peters was preparing for a probation review meeting at which he wanted to hear the claimant's side of the matter. The contents of the meeting and the fact that he does not give an outcome straight away suggest that, contrary to the claimant's assertion, he was not determined to dismiss her. It suggests that he was rather reluctant to do so. Indeed, during the meeting he gave the claimant numerous chances to reassure him that she would behave differently in future and would follow management instructions.

367. The factual assertion in this paragraph of the list of issues is based on a false premise. Mr Peters was not preparing for her dismissal. The probation meeting had to take place at around this time as the claimant was reaching the end of the probation period. If the claimant felt anxious as a result of the process this was because she perhaps recognized that she was unlikely to pass probation. This did not reflect a breach of the respondent's duty of care towards her but her growing recognition that she had not performed well enough to retain her job. In those circumstances the Tribunal is unable to find that the respondent subjected the claimant to a detriment as alleged. The respondent just took the claimant through the probation review process at the relevant time given the imminent end of the probation period. If she felt anxious that does not reflect the respondent subjecting her to a detriment by its actions or omissions.

368. Furthermore, even if this constituted a detriment, it was not in any way because of the protected disclosure. Rather, the timing of the meeting was set by reference to the expiry of the probation period and the need to have sufficient time and opportunity to review the claimant performance before coming to a just conclusion on the performance evidence available.

369. This aspect of the claimant's claim fails and is dismissed.

Detriment (xiv)

370. The claimant says that she was denied examples of performance concerns when she requested them [487]. It is not clear exactly what extra document the claimant was asking for or expecting to receive. What would be available that she did not already have? The claimant had already accessed her one-to-one records, which were the raw material for her probation review. We do not understand what more Mr Peters could send her.

371. In addition, none of this would have come as a surprise. The claimant had had five appraisals and knew what was being said at each of them in relation to her performance. Also, she still had access to online resources related to her employment. She would be able to access any evidence that she needed in her own defence, either during the hearing or shortly thereafter (and present it at the reconvened hearing.) She did not do this. This tends to suggest that there was no detriment to the claimant, contrary to her assertion, when she is not given more information in advance of the hearing. Nor does the Tribunal accept that the ACAS Code would apply to such a probation process. Even if it did, the Tribunal is unable to identify any breach of the code given the circumstances of the meeting.

372. The Tribunal reminds itself that this was a probation process rather than a full scale capability process in relation to an established employee. Within the probationary period an employer will use a simplified or more 'light touch' approach which reflects the fact that this is a probationary process. Probation is designed for both parties to discuss the suitability of the continued appointment from both parties' points of view based on a review of the probationary period. What the claimant seems to seek is the sort of 'management statement of case' and management 'pack' which might be prepared for a disciplinary or capability hearing. That is not to be expected in a probationary setting. In essence the claimant was applying the wrong standard of preparation for the type of process that she was going through.

373. In light of the above the Tribunal is not satisfied that the claimant has proved the alleged detriment. Mr Peters did not deny her examples and evidence of the performance concerns. Nor do we accept that there is any causal link between this and the protected disclosure. The respondent has acted in this way because it is commensurate with the nature of the process to be applied during probation, because it is unclear what further information the claimant wanted, and because the claimant already had access to all the information and resources that she needed in order to prepare for the probation review. Indeed, the claimant's evidence to before the Tribunal explained the steps that she was able to take to prepare for the meeting and demonstrated that she was not hampered in her preparations over the weekend.

374. This aspect of the complaint fails and is dismissed.

Detriment (xv)

375. In line with our findings of fact above the Tribunal did not find this allegation proven. The claimant did not prove that the alleged changes were made to Treeplotter by Mr Dean or that the survey history was wiped or that the respondent destroyed evidence relating to the claimant's surveys or that it removed accountability for individual Tree Specialists. Furthermore, the Tribunal was not satisfied that anyone within the respondent organisation had the time or motivation to seek out the claimant's tree records and delete or manipulate them. The only deletions would be where the site or the trees did not belong to the respondent and they should not have been on the respondent's system at all. This would apply to other employees in the same way as to the claimant.

376. The detriment at (xv) is not proved. Nor can a causal connection between protected disclosure and the alleged detriment be established in all the circumstances. This aspect of the claimant's case fails and is dismissed.

Detriment (xvi)

377. The claimant's allegation at paragraph (xvi) does not reflect our factual findings in relation to the probation meeting (see paragraphs 190-203). The Tribunal has already addressed the issue of preparation time and examples in earlier paragraphs. The meeting took as long as was necessary to properly ventilate the issues which were to be discussed and to give the claimant a fair and proper opportunity to persuade the respondent to confirm her employment. The meeting was of the length which was necessary to properly consider the claimant's case and her representations. Nor does the Tribunal accept that the respondent used evidence in support of the protected disclosure against the claimant. The claimant was never able to articulate during the Tribunal hearing what she meant by this allegation or to what she was referring in this regard.

378. The Tribunal does not find the alleged detriment proven. Furthermore, the way the meeting was conducted was not connected to the protected disclosure but rather to the evidence relating to the claimant's performance and capability. Causation between protected disclosure and alleged detriment is not established.

379. This part of the claimant's claim fails and is dismissed.

Detriment xvii

380. Further to our findings of fact as set out at paragraphs 204-211 above and taking into account the volume of correspondence during this relatively short period of time, the Tribunal does not accept that the claimant was isolated at home or left without support as alleged. The claimant had access to appropriate support and guidance during this time. The Tribunal finds this allegation not proven. The claimant was not subjected to a detriment in this

regard. Her concerns and correspondence were being addressed by the appropriate individuals within the organisation rather than solely by the person charged with making the probation decision. It also relates to a very short period of time which is relevant to whether it can be considered a detriment.

381. Furthermore, the Tribunal is unable to find any link between this and the protected disclosures, even the disclosure from paragraph 4.3 in the list of issues. That disclosure was made to Ms Farrington who only spoke to Mr Hulme and Carole Laing about it. She did not speak to Mr Peters about it and so there is no evidence to suggest that he even knew about this protected disclosure. It could not have had any material effect upon his actions.

382. The claimant has not proved that she was subjected to the alleged detriment and the necessary causation between the protected disclosure and the alleged detriment is not established. This part of the claimant's claim fails and is dismissed.

Detriment (xviii)

383. The meeting took place on 8 March and the claimant was sent the notes on the Wednesday. The outcome meeting was not due to happen until the Friday. She had ample time to go through the notes before the outcome meeting and correct them as necessary. This was not an unreasonable time scale. The claimant informed Alison Murphy that the notes were 'not as bad' as she thought they would be [624] Furthermore, the meeting was, in fact, postponed for the claimant.

384. Given the nature of the meeting and given the fact that the claimant had sufficient time to prepare to receive the outcome, it was not unreasonable for the respondent to explain that the meeting might have to go ahead in the claimant's absence if she did not attend (given that the respondent had already postponed the meeting at the claimant's request.) The respondent was merely indicating that there needed to be a good reason for any further delay given that the outcome had been pushed back from the original meeting on the Monday.

385. Again, the Tribunal is not satisfied that the claimant was subjected to a detriment as alleged. The allegation has not been proved. The claimant was given time to go through the meeting notes and the meeting was pushed back for the claimant. The indication that it could go ahead in her absence was reasonable in all the relevant circumstances. Furthermore, the Tribunal is not satisfied that this was in any way linked to the protected disclosures. Rather, it was the respondent trying to provide an outcome to the probation review meeting in a timely manner and in line with the probation review period. The necessary causal link to the protected disclosures is not established.

386. This part of the claim fails and is dismissed.

Detriment (ix)

387. This allegation relates to the dismissal and is properly dealt with, as a matter of law, as part of the unfair dismissal claim under section 103A rather than as an aspect of the detriment claim. The Tribunal's conclusions are set out in relation to the unfair dismissal claim and are not repeated here.

Time limits.

388. In light of the above, all of the claimant's claims fail and are dismissed on their substantive merits. In those circumstances it is not necessary for the Tribunal to consider time limit/limitation issues and so we have not done so.

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Employment Judge Eeley

Date: 28 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29 July 2024

FOR EMPLOYMENT TRIBUNALS