EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**AND**	**Respondent**
(1) Lisa O'Brien (2) Christopher O'Brien		TTT Moneycorp Ltd

Heard at: London Central Employment Tribunal

On: 25, 26, 27, 28 November, 2, 3, 4, 5, 9 December 2019
(and 10, 11, 13 December 2019 in chambers)

Before: Employment Judge Adkin
Mrs J Cameron
Ms S Plummer

Representations

For the Claimants: Mr S Gorton QC (Counsel)
For the Respondent: Ms E Misra (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Respondent did:

(a) Unfairly dismiss both the First and Second Claimants pursuant to section 98(4) Employment Rights Act 1996 ("ERA")
(b) Subject the First and Second Claimants to detriments because of a protected disclosure pursuant to section 47B ERA.

The following claims are not well founded and are dismissed:

(a) Claims of automatic unfair dismissal pursuant to section 103A ERA.
(b) Subject the First Claimant to direct sex discrimination pursuant to section 13 of the Equality Act 2010 ("EqA")

The following claims are dismissed on withdrawal by the Second Claimant:

(a) Claim of direct discrimination because of marital status pursuant to section 13 of the Equality Act 2010 ("EqA").

REASONS

1. By a claim presented on 6 December 2018 the Claimants bring claims of protected disclosure detriment and automatic unfair dismissal ("whistleblowing") and unfair dismissal.

2. The First Claimant Mrs O'Brien ("C1") brings a claim of direct sex discrimination.

3. The claims relate to events substantially in the period January – September 2018 arising from the acquisition of the O'Brien's business FRFX by the Respondent and the dismissal of the O'Briens.

The Issues

4. The list of issues originally agreed between the parties was rather skeletal, identifying largely generic legal questions. It did not fully set out the factual allegations relied upon in particular for the whistleblowing claims. This document is appended as appendix 1.

5. At the invitation of the Tribunal Counsel for the parties produced an agreed "Summary of Claims" document dated 27 November 2019 which articulated:

5.1. Six protected disclosures relied upon by C1 and 26 detriments;

5.2. The three protected disclosures relied upon by the Second Claimant Mr O'Brien ("C2") and 14 detriments.

This document is appended as appendix 2.

6. In closing submissions a number of concessions were made by the parties:

6.1. The Respondent conceded employee status and conceded that the Claimant had sufficient continuity of service by virtue of TUPE 2006 such that they were able to bring a claim of unfair dismissal which had previously been in dispute.

6.2. The Second Claimant Mr O'Brien withdrew his claim of direct discrimination based on marital status.

6.3. The Claimants did not pursue a number of allegations of detriment pursuant to the protected disclosure detriment claim, namely:

6.3.1. Being snubbed, disregarded and excluded from meetings of significance after making the first putative disclosure;

6.3.2. Ignoring or dismissing C1's complaints about the client migration project and request for a consultant to assist, and undermining her role within the business;

6.3.3. Being told not to challenge Andrew Harrison by Marianne Gilmore on 25 April 2018, Andrew Harrison complaining about her to Nick Haslehurst, and seeking to impose conditions on her attendance at a meeting with the Financial Conduct Authority ('FCA');

6.3.4. Putting the Claimant's on notice of legal action on 23 August 2018.

The Evidence

7. For the Claimants the Tribunal heard evidence from:

7.1. The First Claimant Mrs O'Brien;

7.2. The Second Claimant Mr O'Brien;

7.3. Mrs Maureen Samsudeen, Money Laundering Regulations Officer for FRFX; subsequently for a period an employee of the Respondent;

7.4. Mr John Horan, Head of Compliance at Maze Investigation, Compliance & Training Ltd, an external compliance contractor;

7.5. Ms Abby McPhillips, a Payments Executive based in Dubai.

8. For the Respondent the Tribunal heard evidence from:

8.1. Mr Mark Horgan, Chief Executive Officer;

8.2. Mr Colin Buchan, non-executive Deputy Chairman;

8.3. Mrs Debbie Doyle, Strategic & Operations Manager;

8.4. Mrs Marianne Gilmore, Group Sales Operations Director;

8.5. Mr Andrew Harrison, Head of Group Risk and Compliance;

8.6. Mr Nick Hazlehurst, Chief Finance & Operating Officer.

9. There was an agreed bundle of documents in excess of 1,600 pages to which various documents were added during the course of the hearing.

Procedural matters

10. It was agreed at the outset of the hearing that it would consider liability only.

11. It was also agreed that evidence and submissions relevant to any deduction to damages under the principle in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 or alternatively under *W Devis & Sons v Atkins* [1977] 3 WLR 214 would only be considered at remedy, given that there is an ongoing dispute relating to what the Respondent contends is a material and substantial discrepancy in client monies. It may be that there is a conclusion to an independent assessment of this alleged discrepancy by the time that remedy might fall to be considered.

12. The Tribunal received some evidence that the Respondent contends demonstrates that the Claimants were historically aware of a material discrepancy in client monies. We have not made findings on this evidence as part of our decision on liability. In respect of the claims relating to dismissal we have been careful to focus on information that was considered by the Respondent at the time.

The Facts

13. The Claimants are married. Together with some other investors they set up First Rate FX Limited ("FRFX") on 2 November 2005.

14. The principal activities of FRFX were the provision of foreign exchange services to businesses and private individuals. FRFX's clients were based all over the world, however, the majority of transactions emanated from EU based clients.

15. Mrs O'Brien was employed as CEO (Chief Executive Officer) from January 2008.

16. Mr O'Brien was Sales and Marketing Director and a Board director.

17. On 1 April 2011 FRFX Limited was granted authorisation by the Financial Conduct Authority ("FCA") to carry on payment services activities.

18. FRFX grew to be a successful business. In 2017 the Claimants investigated selling the business. One motivation was more stringent regulation of the foreign exchange business. The Claimants perceived that acquisition by a larger business would help them with this regulatory environment. They were only prepared to sell the business if they could carry on working in senior positions within an acquirer as they did not intend to retire.

19. In May 2017 Mr Horgan and Mr Haslehurst attended meeting with the Claimants at the offices of KPMG to discuss a potential sale of FRFX to the Respondent.

20. In 26 July 2017 the Respondent sent a letter to the Claimants outlining key commercial terms of purchase of FRFX and providing valuation of the company.

21. On 7 August 2017 KPMG, an advisor acting for the Respondent commenced fieldwork as part of a due diligence exercise prior to acquisition.

22. On 5 September 2017 FRFX received a letter from FCA regarding compliance with the new Payment Services Regulations 2017 which was due to come into effect from 13 January 2018. In order to be re-authorised as an API (Authorised Payment Institution) from 13 July 2018 an application needed to be made by a deadline of 13 April 2018.

Magna

23. FRFX received a significant amount of business referred by an affiliate called Magna Financial Ltd ("Magna"), based in Berkeley Street, London. This affiliate introduced business to FRFX, but was not itself an FCA authorised firm.

24. On 9 October 2017 Mrs O'Brien had a robust email exchange with Mr Saeed Abbassi of Magna. In it she raised her concerns that on Magna's website and in telephone conversations with clients, employees of Magna were failing to ensure that clients understood that Magna was an affiliate to FRFX which was the API. Historically the FCA had raised concerns about marketing material on Magna's website, with the result that changes were made to the website to make FRFX's role clear. According to Mrs O'Brien in the email exchange Magna's website had reverted to wording which did not make the role of FRFX clear.

25. In this email exchange Mrs O'Brien cited in terms that FRFX were an FCA authorised firm with an obligation to "treat customers fairly". She stated that in the context of a particular transaction, worth in the region of £36,000, an 8% spread charged by Magna was not fair and a breach of FCA principles. She stated:

> "Our firms authorisation is far more important to us than any revenue stream and we will not hesitate to terminate agreements (however lucrative) to retain our business and reputation."

26. Magna's methods of working were investigated by KPMG as part of the due diligence process.

Acquisition

27. In the period 1 December 2017 – 31 January 2018 Respondent completed the acquisition of FRFX by virtue of a Share Purchase Agreement ("the Agreement"). The consideration for this sale comprised various elements including £13m in cash and an Earn-Out which related to the performance of the FRFX business after integration. The Agreement contained various warranties, including that the accounts gave a fair view of the assets and liabilities of the company. The Agreement also provided a mechanism at Schedule 9 in the event that there was a dispute over the Draft Completion Accounts which were due to be produced 45 days after completion of the transaction.

28. It is in dispute between the parties the precise date on which the acquisition took effect and the date on which the Respondent took full control of FRFX. The completion date for the transaction is described in documentation as being 26 January 2018. To the extent that there may be a dispute about this date we do not consider for present purposes that we need to resolve this.

29. On 31 January 2018 the Claimants entered into Service Agreements with the Respondent with effect from 1 February 2018. They were both given the title "Managing Director". We find, as conceded by the Respondents, that the Claimants had continuity of employment by operation of TUPE.

Integration of the FRFX business

30. The integration of the FRFX business was project managed from the Respondent side by Mrs Debbie Doyle who had day-to-day responsibility for coordinating and implementing the integration. She apparently visited FRFX's office in late 2017 and in from January 2018 onward sent round regular project updates. At a more senior level responsibility fell within the remit of Mr Hazlehurst, since Mr Horgan was increasingly absent focusing on acquisitions in Brazil and USA.

31. On 12 February 2018 all former FRFX employees were physically relocated from their office at Canary Wharf to the Respondent's offices on Victoria Street.

32. Mrs O'Brien and other former FRFX employees were actively involved in the integration process. Mrs O'Brien attended meetings of the integration team. She was tasked, among others, with responsibilities relating to migrating FRFX clients across to the Respondent. The O'Briens were incentivised to ensure that the integration and client migration was a success.

Migration of FRFX's clients to the Respondent

33. On 1 February 2018 an email was sent out to FRFX's clients informing them that FRFX had been acquired by the Respondent on 31 January 2018, that clients would continue to benefit from the same personal service from their dedicated trader together with an online platform where they could exchange currencies, set up payments and add recipients. This communication contained a hyperlink to the Respondent's terms and conditions. It was explained that these terms and conditions would be in effect from the close of business on 6 April 2018 and would apply to any transactions entered into after this date. It said that as part of the transfer FRFX would be migrating the client's personal information to the Respondent. It said that the Respondent might contact them to facilitate this process unless the client informed FRFX otherwise.

34. Clients were informed that FRFX expected to be fully integrated into the Respondent no later than 9 April 2018 and from this date all FRFX clients would be transferred to the Respondent. Surprisingly for such an important communication, there is apparently no record of exactly who this was sent to. The Tribunal has been provided with a screen shot from an email account on a mobile phone.

35. It seems from subsequent developments that many of FRFX's clients either did not receive this communication or at least did not understand its significance.

36. In March 2018 Mrs O'Brien began to receive the first of what would eventually become a significant number of complaints from clients who were being migrated across from FRFX to the Respondent. Mrs O'Brien expressed a strong preference to members of the team responsible for the migration that clients should be communicated with first in writing, before being spoken to by telephone. On 8 March 2018 she raised a concern by email that a client had approached her about receiving a telephone call "out of the blue" from the Respondent requesting ID documentation. Perhaps understandably the customer was suspicious. Mrs O'Brien raised this matter as a situation that the Respondent should be trying to

avoid. Mr Hazlehurst responded within a few minutes to indicate his preference that this be discussed as a team face-to-face.

C1 First protected disclosure – 13.3.18

37. On 13 March 2018 there was a meeting to discuss the client transition at which Mrs O'Brien was present together with Debbie Doyle, Richard Clarke, Joao Matos, David Chandler, Matthew Cook, Andrew Harrison, Patrick Archer and Graham Neller who were all involved in the integration process.

38. During this meeting it was suggested that all client funds and transactions should be transferred from the FRFX system E2E to Moneycorp's Omni system. This would involve migrating all FRFX client money accounts and data fields into Moneycorp's client accounts and data fields. This would include "open deals" (i.e. 'forward' orders for foreign exchange booked by a client in advance but which had not actually taken supplied at the point of migration). It was proposed to "close out" all FRFX forward positions and unsettled trades and rebook them with the Respondent's own banks and on their systems.

39. We find that Mrs O'Brien was very strongly opposed to this course of action and said so. She said that she was raising a red flag to say that she was unhappy and she thought that this idea was a disaster. Her proposed course of action would be to simply leave open deals in FRFX's E2E system to be fulfilled without migrating them.

40. Mrs O'Brien contends in her witness statement that

> "I informed those present that the proposed transfers would be in breach of FRFX's obligations to clients and customers and would, if implemented, expose FRFX and Moneycorp to regulatory scrutiny, criticism and risk of extensive legal liabilities. Specifically, I informed those present that the transition arrangements needed to be implemented in a proper manner, with rights of obligations and customers being accommodated so as not to infringe contractual obligations or regulatory standards required by the Financial Conduct Authority."

41. Two days later on 15 March 2018 Mrs O'Brien chased up Debbie Doyle for the minutes of the meeting on 13 March 2018. Mrs Doyle responded that afternoon saying "It's a delicate one as no agreement made!". Later that afternoon 16:59 Mrs Doyle produced an email which captured what had been discussed in the email and some other matters arising and action points. She summarised that there had been a lot of discussion and a lot of debate about the question as to whether open deals could be kept in FRFX's system E2E. Mrs Doyle produced a summary of the arguments for and against migrating open deals:

> "Moving deals to Omni
>
> - All transactions post 6/4 should appear on clients statement
>
> - FRFX will not have the ability to make any payments from 19/4

- Banking will appear in Omni and E2E without a transaction to be lodged against

Key points for leaving in E2E

- Reduces the work load
- Cleaner to leave in E2E
- E2E and bank accounts will be moneycorp"

42. Further down in the email is a section headed legal/regulatory which contains four bullet points about regulatory matters. Notably this does not articulate or capture any of the regulatory concerns that Mrs O'Brien says she raised. It is also notable that Mrs O'Brien, who was plainly self-confident and quite forthright about her views did not respond to Mrs Doyle's email to point out that her alleged concerns about regulatory matters had not been articulated properly.

43. Notwithstanding Mrs O'Brien's concerns, at a meeting on 19 March 2018 it was decided that all open deals would be moved across to the Respondent's system on the migration weekend (7/8 April, following a migration date of 6 April 2018). She was not present at that meeting.

44. Mrs Doyle and others continued to work on detailed plans for the client migration. On 23 March 2018, in response to a specific request from Mrs O'Brien it was agreed that closing the E2E accounts was moved to later on in the process to avoid a situation where a client would be unable to trade because neither system was authorised. This does suggest that Mrs O'Brien was thinking about the question of whether FRFX or the Respondent was authorised to act on behalf of a particular client.

45. On 26 March 2018 Mrs Doyle wrote an email to Mr Hazelhurst highlighting that there was "clearly tension" with Mrs O'Brien. Mrs Doyle felt that Mrs O'Brien was trying to push for an extra month, i.e. a further month before the migration took effect. Mrs O'Brien was enquiring whether further communication should be sent to clients about the accounts. Mrs Doyle told Mrs O'Brien that it was the latter's decision. Mrs Doyle noted that she had just been provided with some detail and now understood that 683 of FRFX clients held a balance of funds which ranged from as little as $0.01 to over $330k. It is part of the Respondent's case that this was a breach of regulations on the part of FRFX. It is not necessary in these reasons to resolve this point.

46. On 27 March Mrs Doyle sent out an email to the transition team with a large number of "to dos". Mrs O'Brien was tasked with by obtaining documentation for clients with open deals.

47. In a note at the conclusion of the email on 27 March it is noted that FRFX's client and bank positions did not reconcile. Mrs Doyle said "this position needs to be harmonised asap – this won't result in additional profit erosion as it is just crystallising the erosion which has already been done by the client drawing down".

The Respondent contends that the profit erosion which thereby crystallised (denied by the Claimants) was the "hole" in client monies which subsequently led to the Claimants' dismissal.

48. Mrs O'Brien says that this period was so pressurised that she persuaded her niece to give up a job and come and work to try to help with the client migration.

Hedge conversation

49. In late March 2018 there was a discussion between Mrs O'Brien, Mr Horgan, Mr Hazelhurst and Mrs Samsudeen, who had been Risk Controller, Head of Compliance and Money Laundering Reporting Officer ("MLRO") for FRFX and who came across to Respondent as Financial Risk Controller.

50. Mrs O'Brien initially approached Mr Horgan suggesting that the Respondent might wish to "hedge" the FRFX client account against unexpected US rate increases. Mrs Samsudeen explained that the reason for this suggestion was that FRFX did not match client liabilities with like for client assets.

51. Mr Hazelhurst was very surprised at this practice. His interpretation was that FRFX were trading the FX market using one client's money for another's liability and buying/selling in the market when they decided. He considered this irregular and unacceptable. Neither he nor Mr Horgan would consider this approach.

52. The Respondent's position is that this went outside of the authorisation that FRFX had from the FCA. It is unnecessary for us to make a finding as to whether this was or was not some sort of breach of Regulation.

53. The Tribunal accepts however that these matters caused Mr Hazelhurst, a trained accountant, some genuine concern.

C2 first protected disclosures – 13.3.18 & "until June 2018"

54. Mr O'Brien says that during the course of repeated telephone conversations he had with Mr Horgan spanning March to April 2018, he repeated the concerns that he and Mrs O'Brien shared. He says in his witness statement at paragraph 57:

> "During these discussions I repeatedly explained to Mark [Mr Horgan] that by implementing the proposal to migrate all FRFX client money into Moneycorp's client accounts and closing out all FRFX forward positions before any of the Client had registered a Moneycorp clients would be in breach of FRFX's obligations to clients and customers and if implemented would expose both FRFX and Moneycorp to regulatory scrutiny, extensive legal liabilities and damage the reputation of the companies. I explained that the strategy would infringe the rights of customers including preventing them from being able to access funds to which they were entitled I specifically informed Mark that that the transition arrangements needed to be implemented in a proper manner, accommodating the rights of and obligations to customers so as

> not to infringe contractual obligations or regulatory standards required by the FCA."

55. There are no contemporaneous emails written by Mr O'Brien or received by him. He does not use email.

56. Mr O'Brien was principally a salesman. He is acknowledged by Mr Horgan to be creative and a good salesman. We find that he left matters of compliance to his wife, given that this fell within her remit, and that she had a better grasp of regulatory matters. We entirely accept that Mr O'Brien was concerned about the migration of clients in April 2018 and onward. He was on the "front line", having communications with clients. The regulatory and administrative requirements being applied by the Respondent were plainly causing difficulties, frustration and delay to clients. Former clients of FRFX might reasonably consider that they had already completed KYC compliance when commencing business with FRFX. The "new" KYC being required by the Respondent was time-consuming and no doubt unwelcome.

57. We have had the benefit of hearing Mr O'Brien give oral evidence. He is straight talking and commercially focused. In cross-examination he was quite animated and made plain that he was unhappy about his treatment by the Respondent from April 2018 onwards and the client migration. He used fairly blunt terms. Mr O'Brien did not in his oral evidence use the technical terminology of regulatory scrutiny, legal liabilities, infringement of rights or breaches of obligation.

58. Mr Horgan denies that Mr O'Brien ever called him by telephone for the purpose of discussing or raising issues of compliance or to express concerns about any regulatory breach. We accept Mr Horgan's evidence on this point and find that Mr O'Brien did not make disclosures or allegations of regulatory breach to Mr Horgan by telephone in the way alleged.

Suspicions over client money shortfall

59. On 6 April 2018 all FRFX clients were migrated from FRFX's E2E system onto the Respondent's Omni system. On the same day client monies were transferred from FRFX's client bank accounts to the Respondent's bank accounts.

60. On 10 April 2018 Mrs Doyle showed Mrs Samsudeen a spreadsheet with a shortfall of client monies of approximately £1 million. Mrs Samsudeen says that she was able to identify that transactions on the spreadsheet had been wrongly entered which indicated that this shortfall figure was not accurately calculated.

61. On 18 May 2018 Mrs Samsudeen sent a spreadsheet who Mrs Doyle (copying David Chandler in the Respondent's finance department) with a spreadsheet containing a reconciliation in respect of client money balances as at 6 April the date of the migration. The spreadsheet shows a discrepancy of £753,026. In the email Mrs Samsudeen describes various adjustments she has made before concluding "When take [sic] to consider all of these adjustment [sic] First rate [FRFX] has GBP 750,000 Minus balance."

KYC & Compliance

62. On 6 – 11 April 2018 various emails were sent in respect of complaints raised by former FRFX clients to Mrs O'Brien due to KYC (Know Your Client) compliance checks. These are checks to confirm the identity of a client and key details, to satisfy regulatory requirements to prevent money-laundering.

63. The view taken by the Respondent's Head of Compliance Andrew Harrison was that FRFX's KYC checks were inadequate. These are checks for the purposes of ensuring compliance with the Money Laundering Regulations 2017. In his assessment the information that had been stored by FRFX was incomplete and the ownership details of business customers retained were often inaccurate. He decided that fresh checks would need to be undertaken for any FRFX customer where the existing KYC check was insufficient.

64. The Claimants believes that Mr Harrison misunderstood the regulations and believed that 're-doing' KYC for migrating clients was a regulatory requirement following acquisition. Mr Harrison is clearly very well versed in the regulations. We accept his evidence that he believed he needed to exercise his discretion. The Numus Project Update [on integration] on 9 February 2018 clearly articulated a process of reviewing accounts for compliance to assess fail rate. This suggests a process of assessment. Following this assessment, the exercise of Mr Harrison's discretion was to decide that the incomplete and inaccurate information recorded meant that all of FRFX's KYC checks were to be treated as inadequate.

C1 second protected disclosure – 11.4.18

65. By 11 April 2018, five days after the migration it was already clear that the process of carrying out the Respondent's KYC checks was costing it a substantial amount of business from old FRFX client's and affiliates.

66. We do not have any exact data on the loss of business and can make no precise finding. It is clear however that the extent of the problem was large. Mrs O'Brien says that when she stopped working in the business in June 2018 two thirds of FRFX's clients had still not migrated across. Ms McPhillips in relation to Dubai clients estimated that 30 – 40% of the clients based there never migrated across.

67. There was a telephone conference on 10 April 2018 between both Claimant and Nick Hazlehurst. Mr Hazlehurst had a very limited recollection of this call. We find that the Claimant's complained in clear terms about the problems of transitioning clients and client complaints. We find that Mrs O'Brien raised a concern that withholding client funds and costing money was a breach of FCA regulation. We find that Mr O'Brien agreed with her on this call. We consider that this was a protected disclosure by both Claimants.

68. On 11 April 2018, Mr Abbassi of Magna, FRFX's largest affiliate wrote to complain that he had already lost out on £25,000 worth of profit in the previous 24 hours due to what he characterised as complete incompetence regarding the migration. He complained about losing buyers, both private and corporate.

69. Also on 11 April Mrs O'Brien raised with Mr Horgan and Mr Hazlehurst that she had had received three "serious" complaints from clients and that Magna were on the receiving end of many more. She wished to go back to the legal department to find a way to get client payments out quickly. By implication she was requesting a different approach to compliance to that adopted by Mr Harrison. Mr Horgan responded saying that he was hugely sympathetic but was firm that the Respondent needed to be compliant with regulations and if documents were required to clear funds then those needed to be sought.

70. Mrs O'Brien replied the same day:

> "It was clear from the call that everyone is so busy that they do not even know if we have the docs [documents]. That's the point we are not in a position to even holding these funds on that basis. This particular example had the docs in!
>
> We are breaching Regulation by with holding funds and costing clients money just because we are busy and in a mess."

71. Mr Hazelhurst replied "I disagree with you on many points, firstly it is not permissible from a regulatory perspective to send the funds without KYC, please refrain from suggesting we should do this, it's not appropriate." He goes on to answer some of the points.

72. Mrs O'Brien replied

> "the KYC was appropriate when the clients did these trades and there is no suggestion that FRFX didn't have relevant KYC. We have changed the requirements after the event and is not the clients issue it is our for not preparing adequately for the transition."

73. Also on 11 April 2018 Mrs O'Brien raised with Mr Horgan a specific example of a client that it had taken until 5pm to get a particular client funds sent. The nature of her email is highlighting delay and operational difficulty rather than expressed in terms of compliance:

> "We cannot manage all of these issues one by one we do not have time. We need a solution to clear the funds being held in one go"

74. The problems with compliance continued into the next week. There was some friction between the former FRFX team and their new colleagues. On 16 April 2018 one of the ex-FRFX traders was trying to arrange a transfer of €1,500. One of the operations team sought a TIF (Transfer of Information Form) from the client. The trader responded that Mrs O'Brien has told him that this is not necessary. Mrs O'Brien then emailed the team saying:

> "I want us to be applying sense and reason with our clients during this difficult period and if you feel we are not doing that when we making requests please let me know".

75. On the following day 17 April Mr Hazlehurst, who had been in receipt of this exchange, wrote to Mrs O'Brien, copying Mr Horgan:

> "We have standard control processes in place for all our business UK, Ireland and other markets.
>
> The opportunity to challenge and debate these processes exists at all times, but not the opportunity to reverse them by an individual business unit leader.
>
> Your customers are now part of the Moneycorp group and as such across Back Office, Finance, Credit and Compliance our standard procedures will apply."

C1 alleged fourth protected disclosure – 25.4.18

76. On 25 April 2018 Mrs O'Brien and Mr Andrew Harrison had a very public disagreement in relation to funds held by the Respondent for former FRFX clients. This was witnessed by traders who were previously FRFX employees, now employed by the Respondent. Both sides accept that this was not a happy exchange.

77. The context of the argument was a concern raised by Ms Abbie McPhillips, a sales and marketing representative of FRFX based in Dubai, who had become an employee of the Respondent on 9 April 2018. She had called into the Respondent's office distressed because clients based in Dubai had been unable to access their funds having not received compliance clearance from the Respondent's compliance department. She was apparently being threatened with imprisonment under local law.

78. The former FRFX traders were pressing Mr Harrison to explain why the client could not get access to their own funds when they had fully registered with FRFX and completed KYC (Know Your Client) compliance checks at that stage.

79. The Respondent's compliance checks required the following detail for anyone who ultimately owned more than 25% of a client company:

    79.1. Full ownership structure for the company, down to individual owners that hold on or over 25% shares in the company, signed by an accountant or solicitor.

    79.2. Photo identity (passport, or driving license) and a copy of proof of residential address (utility bill, personal bank statement or council tax bill), issue in the past three months for all ultimate beneficial owners which hold on or over 25% of the company shares.

    79.3. Photo identity (passport, or driving license) and a copy of proof of residential address (utility bill, personal bank statement or council tax bill), issue in the past three months for one director.

79.4. Recent, full transactional business bank statement for the company.

79.5. A recent invoice to evidence the nature of the business for the company.

79.6. Certificate of incorporation.

80. There were other and different compliance requirements for affiliates.

81. It is clear that individuals and businesses based in Dubai in some cases found these checks difficult to comply with. This was in part due to the system of using PO boxes rather than delivering post to physical addresses and also the number of silent partners in the ownership of businesses, many of whom are members of or connected to the Royal family and who would not ordinarily expect to provide this level of detail.

82. Mr Harrison's response to the traders queries about clients having no right to their own money was to state on 25 April that FRFX no longer existed and that funds held (now by the Respondent). Mrs O'Brien was very upset and publicly argued with Mr Harrison, saying that FRFX remained a separate company with a distinct API licence, that not transferring to clients funds held by FRFX on their behalf would cause adverse financial consequences for hundreds of customers placing Moneycorp and FRFX in breach of obligations, that Moneycorp had no legal rights to the funds in question or the currency which had been obtained on behalf of the relevant clients by reason of the transactions undertaken on their behalf and to continue to make statements of this kind was not only wrong but contrary to the ongoing legal obligations to which Moneycorp was subject. She also argued that to encourage members of staff to treat Andrew Harrison's declaration as accurate was to expose Moneycorp and FRFX to legal obligations and represented significant breaches of the legal obligations which Moneycorp and FRFX owed, infringing regulatory duties in the process.

83. Mr Harrison argued back in defence of his position on the basis that he did not consider that adequate compliance had been completed. He did not wish to be ordered to release funds in breach of compliance. Both participants in this argument were publicly arguing that the regulations favoured their position. The Tribunal recognises that there is a tension between the FCA principles.

84. After this argument Marianne Gilmore took Mrs O'Brien into Mr Horgan's empty office. Her evidence to the Tribunal was that she only heard the tail end of the argument.

85. Towards the end of April the O'Briens suggested to Mr Horgan that he meet their compliance consultant John Horan, in order that he would give a different perspective on compliance matters, Mr Harrison. Although Mr Horgan agreed in principle no meeting ever took place as he kept cancelling meetings. The Tribunal considers that he would have felt that he was undermining the Mr Harrison as Head of Compliance by meeting an external adviser in this area.

Recission of the API License

86. Later the same afternoon on 25 April 2018, Mr Hazlehurst instructed Nicholas Thomas to go round to Mrs O'Brien's desk and assist her with rescinding the FRFX licence via a website. She was the only person who could do this. She complied with this request.

87. It may be that this was of little practical consequence given that FRFX's clients had already transitioned onto the Respondent's Omni system and client funds were already in the Respondent's bank account. It appears to the Tribunal that this action was to some extent symbolic and was silencing Mrs O'Brien's argument that FRFX's licence was still valid until July and this was a way round the compliance difficulties.

C1's fifth protected disclosure – end of April 2018

88. Towards the end of April 2018 Mrs O'Brien raised with Mrs Gilmore, the Respondent's Group Sales Operations Director, a concern that certain sales referrals were being falsely logged as having been generated within the Respondent or alternatively to the Respondent's existing referral agents rather than being logged as having been generated by Magna.

89. The Tribunal finds that this did relate to concern at Magna were not going to recover monies which they were entitled to receive.

C1's alleged third protected disclosure (C2's third disclosure) – 1.5.18

90. On 1 May 2018 there was a meeting of the Respondent's International Payments Division Operating Committee including Colin Buchan (Moneycorp President), Lee McDarby (Head of Corporate Trading), Andrew Harrison (MLRO), Graham Cassell and Julie Kellett (Head of HR). Mrs O'Brien alleges to have made third disclosure in respect of earlier concerns allegedly previously raised. No notes of this meeting have been disclosed. The Respondent contends that they do not make notes at this meeting which is somewhat surprising.

91. By this stage we consider that it was obvious that the migration of clients had not gone as well as might be hoped. We find that Mr Colin Buchan, the Respondent's non-executive Deputy Chairman acknowledged this to the Claimants. It was said that there was going to be a review of what had gone wrong.

92. It is notable that, despite the difficulties in other relationships, the O'Briens and Mr Buchan had and have maintained cordial and respectful relations. The Tribunal accepted Mr Buchan's balanced evidence about the content of meeting. He told the Tribunal that temperatures running high, it was a sorry situation. His recollection that it was the process of migration that was the problem. This had been detrimental to the business. He said that there was not a significant discussion regarding regulatory breaches, the focus being more on the migration.

93. We find that there was discussion of regulatory breaches but that this was a minor part of the discussion, which was largely focused on the O'Brien's frustrations at Andrew Harrison's approach to compliance which they felt was unduly

bureaucratic and harming the migration of FRFX business. We find that Mr O'Brien voiced concerns about Mr Harrison, Head of Compliance.

C2's third protected disclosure – 10 May 2018

94. On 10 May 2018 Mr O'Brien alleges that he made a protected disclosure to Marianne Gilmore during a telephone conversation.

95. The Tribunal finds that Mr O'Brien did have a telephone conversation with Mrs Gilmore on or around 10 May 2018. We accept Mrs Gilmore's evidence that the content of her telephone calls with Mr O'Brien related to operational matters and concerns rather than regulatory matters.

C1's six protected disclosure – 11-12.5.18

96. On 11 May 2018 Mrs O'Brien wrote to Mr Hazlehurst requesting that he pay Magna commissions owed under the FRFX agreement which she believed was still in place. He refused, and responded saying that the agreement with FRFX was not relevant.

97. Mrs O'Brien forwarded this exchange to Matthew Cook, an in-house legal counsel who reported to Mr Hazlehurst, with these comments:

> "Please let me know your thoughts on this I am very uncomfortable with Nicks view on a number of points.
>
> From a legal stand point there is a current agreement in place with First Rate FX (which TTT MC now own) and this has not been terminated.
>
> MC have been happy to register and trade these deals and we have not given Magna a deadline to sign the new agreement, which they have been very accommodating in working with us on.
>
> I do not understand why the FRFX contract is now "not relevant". Surely cancelling our API license a week ago does not make the contract null and void and nor does just issuing a new unagreed contract.
>
> Regarding Magnas operation from a moral stand point if we are not happy with the way Magna operate surely we should stop receiving their business, pay them what is owed and move on. We cannot use that as an excuse not to pay them!"

98. This was forwarded to Mr Hazlehurst who replied:

> "let's not make a mountain out of this issue, Matt report directly to me and as such I have of course discussed it with him.
>
> We can all discuss on Wednesday in a considered way. The

> for clarity and the record reference your exclamation mark, I have not suggested we should not pay them or suggested using the unsigned contract as an excuse to pay them.
>
> All is for discussion"

99. Mrs O'Brien replied:

> "It is clear where you are going with this and I hope that in your discussions with Matt that he will point out to you that the contract in place is still very relevant and that Magna need to be paid in accordance with it.
>
> Discussion on Wednesday should be regarding future contract and the desire to keep Magna or not which, unlike the above, is actually at your will and discretion."

100. By May 2018 it is clear that the relationships between the O'Briens (particularly Mrs O'Brien on the one hand and Mr Hazlehurst and Mr Harrison on the other were poor. We find that Mr Horgan's relationship with the O'Briens deteriorated more slowly. There was a period when he clearly felt "caught in the middle" between the O'Briens and other members of his senior team.

Dispute over client money shortfall

101. On 18 May 2018 Mr Hazlehurst wrote to the O'Briens and also Mr Edward Lee and Mr Michael Docker who had been shareholders in FRFX.

102. In this letter he wrote that the post-completion diligence had established that there was a substantial shortfall within FRFX's client monies account. He contended that this was a breach of warranties of the Share Purchase Agreement that the accounts gave a true and fair view of the assets and liabilities of the company and that FRFX had carried on its business and compliance in all material respects with all laws and regulatory requirements applicable. He contends that FRFX, if they had been in compliance would have been forced to make up the shortfall in its client monies account which would have resulted in a deduction from profits and would have had a significant impact on the value of the company. Additionally he contended that Magna Financial Ltd had been operating in breach of the regulatory perimeter by carrying out payment services activities without authorisation. Finally he sets out a potential claim against all of the four former shareholders of FRFX on the basis that there is an indemnity in respect of liability arising out of non-compliance.

103. KPMG investigated the suspected client money shortfall on behalf of the Respondent. This was in accordance with a draft engagement letter dated 23 May 2018. It was a point of dispute between the parties when KPMG had commenced work on this client money reconciliation. We accept that KPMG had been working on the finances of the FRFX business from prior to the acquisition in 2017 and throughout 2018.

104. On 22 May 2018 Mr Harrison wrote an email to the FCA, the regulator in relation to historic issues that had come to light in respect of FRFX:

> - We believe that the Firm [FRFX] may have been operating in such a manner that Payment Account Permissions would have been required, which is not a PSD permission held by the Firm. We have resolved this by migrating clients to TTT Moneycorp Ltd which does hold Payment Account Permissions.
>
> - The integration work highlighted customers located in EEA jurisdictions other than the UK which may have required PSD passporting service permissions (which are not held by the Firm). We have migrated all customers to TTT Moneycorp Ltd which does have the necessary passport in place
>
> - We believe that the Firm was under holding customer funds under the safeguarding requirements of circa £1 million. We have resolved this by migrating clients to TTT Moneycorp Ltd and TTT Moneycorp applying it safeguarding processes to these customer funds and making good this shortfall.

105. On 4 June 2018 the Respondent received a draft for discussion KPMG Report that identified a client money shortfall of £1,058,071. This figure represented a shortfall between client and bank balances.

106. Mrs O'Brien met with Mr Horgan on 4 June 2018 in his office. In the meeting Mr Horgan confirmed that the client account issue had been reported to the FCA via email. He told Mrs O'Brien that the O'Briens would not need to take anyone else to the meeting scheduled the following day with Neil Austin, formerly of KPMG. He positioned Mr Austin as being independent and present to help them. He told her that that Moneycorp believed the true client money shortfall to be far smaller than the alleged figure that had been submitted on 4 June 2018. He said that he was helping her out by telling her that the crystallised loss was a few hundred thousand pounds and that she should request the actual detriment figure when negotiating with the company.

107. On 5 June 2018 a meeting was held between Mr Horgan, Mr Austin and the Claimants in respect of the client money shortfall and Magna issues. Mr Horgan suggested that this meeting was without prejudice. During the meeting Mr Horgan told the O'Briens that Bridgepoint (the private equity owner of the Respondent) were so unhappy with the Claimants that even if the client money was only a few thousand pounds short it would still be a problem. He stated that view was that the Respondent should only engage them as consultants now rather than employees. Mr Horgan informed the O'Briens that:

    107.1. The Respondent was going to dismiss them for 'bringing the company into disrepute' following the FCA report the company had submitted.

    107.2. Steps would be taken to remove the Claimants from their directorships of FRFX.

107.3. Mr Horgan said that the Magna issue was hugely complicated and the Respondent would either make a claim from the Claimants under the indemnity in the SPA or the closing accounts.

108. Also during the meeting Mr Austin expressed the view that if the O'Briens fought the case in respect of the earn out (under the SPA provisions) then they would win. Mr Horgan said that the Respondent would hold back as much money from the deferred purchase consideration as possible.

109. Finally, Mr Horgan said that the company would be prepared to enter into a consultancy arrangement with Mr O'Brien but not with Mrs O'Brien. Mrs O'Brien responded in clear terms to Mr Horgan that she considered this was unfair to her.

110. Mr Horgan reflected on Mrs O'Brien's comments for a couple of weeks. Ultimately, although he did not and does not accept that there was any discriminatory motive, he came to agree that it would be unfair to offer Mr O'Brien a consultancy arrangement with no role for Mrs O'Brien. For that reason no formal offer of a consultancy arrangement was ever put forward to Mr O'Brien.

111. On 11 June 2018 Mr Horgan wrote to Mrs O'Brien querying her decision to seek to verify the client balances without external assistance. There is a very strong implication in his short message that he considered that it would be prudent for Mrs O'Brien to engage external advisers. Mrs O'Brien replied the same day:

> "Hi Mark
>
> I honestly do not think it is possible to get an accurate position of the client account as at 31/1 given the time delay, E2E system capabilities and the radical close out and change process that has been followed since 6/4.
>
> Unfortunately we are in a situation where it is being asserted that Nicks Team and KPMG have been able to this and so we will have to comment on the work.
>
> In the first instance I would like to review the reconciliation with Maureen as she has the most knowledge of our positions and E2E."

112. In the meeting on 11 June 2019 Mr Horgan told Mrs O'Brien that Bridgepoint had "hard objectives" but were reasonable people and said that he was actually negotiating against himself by helping the O'Briens. He said that they should ask for not the closing positions but the actual detriment figure. Mark stated that he thought the figure was closer to £400,000 and promised that Maureen could help the O'Briens and that they would have relevant access to enable them to carry out the necessary reconciliation checks.

113. Mrs O'Brien told Mr Horgan that she was not happy with the negotiating he was supposedly doing on behalf of the O'Briens and that she would rather speak to Bridgepoint herself.

114. Also on 11 June Mrs Samsudeen was taken into a meeting room by HR and told that she would be leaving the office immediately and that she would not be given access to return. She had been previously placed at risk of redundancy with a termination date of 29 June.

115. On 11 June Mrs O'Brien was asked by Mrs Gilmore, without any prior notice, to join a meeting with Mr Horgan and Stephen Green, a Partner of Bridgepoint. At the meeting they informed her that they were aware that she was to meet with the FCA (arising from the rescission of the FRFX license) and suggested that she should take Nick Haslehurst or Andrew Harrison with her. Mrs O'Brien said that she did not need take anyone else with her but confirmed that she would not mention her allegation about the withholding of client funds.

116. On 13 June 2018 the O'Briens attended a meeting with Mr Horgan and Mr Hazlehurst. At this meeting the handed them a without prejudice proposal in a letter, in which he acknowledges that in respect of the client fund shortfall there was no reason to believe that there was any misappropriation. However he noted that there had been a referral to the FCA and considered that FRFX and the Respondent's reputation has been put at risk which he said was a very serious issue to both entities and to shareholders. He wrote:

> "We fully appreciate that you will need to verify the findings and test our analysis and indeed would welcome that interaction.
>
> In the event of a shortfall, we would expect the client funds to be made whole through the closing balance sheet mechanism as provided in the SPA. In addition we would make a warranty claim reflecting the impact of the value of the entity purchase.
>
> If we conclude a material shortfall does exist, we would terminate your employment, in line with advice around the expectations of the Regulator in relation to a client funds breach. Any future involvement by you in the business would need to take the form of a consultancy agreement and would be subject to Board approval."

117. He reiterated a concern that Magna had operated without a licence which was a criminal offence and that FRFX management knew about it. Again it was asserted that this affected the profit figures which have been used as the basis for the valuation of the business. The Earn-out element of the consideration for purchase of FRFX was in dispute. Mr Horgan signed off with the words:

> "I believe what I have outlined above is a fair and balanced solution that meets the objectives of everyone, including Bridgepoint, and means we can move forward to develop the business. There are a number of areas that require investigation and quantification but as a first step I need to know if you agree that we can presume the negotiated solution rather than resort to litigation. Can you let me know about this by 22nd June please?"

118. In the meeting Mr Horgan and Mr Hazlehurst suggested that they thought that the offer was fair and proposed to offer Mr O'Brien a consultancy with a commission percentage and a share deal. They asked the O'Briens not to attend the office.

119. Thereafter one to one meetings between the O'Briens and Mr Horgan as manager were cancelled.

120. On 18 June 2018 Neil Austin of KMPG wrote to Mrs O'Brien in relation to determining the client funds issue and the right methodology to achieve this. On 20 June she acknowledged this email saying that she was working on this.

121. On 25 June 2018 Mrs O'Brien wrote on behalf of both Claimants to Mr Horgan in response to letter of 13 June 2018. Their position was that the Respondent/KMPG should finalise its analysis before the O'Briens responded to it. In respect of Magna she pointed out that the Respondent had the opportunity to scrutinise this affiliate and the relationship between Magna and FRFX during the due diligence process. She wrote that they were not in a position to deal with the proposed mediated settlement until they understand more detail of what was being proposed.

122. By a letter of 6 July 2018 the Claimants issued a completion accounts disagreement notice in accordance with paragraph 4.1 of Part 2 of Schedule 9 of the Share Purchase Agreement. The O'Brien's position was that insufficient information had been provided.

123. On 16 July 2018 Mr Hazelhurst wrote in response. His position was that all requested additional information had been provided to KMPG and he did not consider that there was a valid reason for disputing the draft accounts. As such he did not consider that effective notice of the dispute had been provided. In respect of alleged client shorthold he said:

> "The Purchaser [Respondent] has already provided supporting schedules, bank statements and a KPMG report reviewing the methodology applied to the client money reconciliation. Please outline the additional information you require in order to contest or agree with the proposed liability."

124. On 17 July 2018 there was a discussion of some sort between Mr Horgan and the Claimants. This is not dealt with in the Claimants' witness evidence, but appears to have been a further discussion about the dispute between the parties. This discussion was not fruitful in resolving the dispute.

125. On 18 July 2018 the Respondent's solicitor DLA Piper wrote to the Claimant with a 'Notice of Warranty and Indemnity Claims' that was essentially a letter before action. This set out the background and focussed on the client monies issue and the Magna issue. In very round terms the quantum of the claim was £12m on the basis in very simple terms that the Respondent had very significantly overpaid for the FRFX business.

126. A conference call took place on 24 July. This was initially proposed to be a call with only Mr Horgan, Mr Austin and Mr O'Brien. The O'Briens were unhappy about Mrs O'Brien being excluded, and she so she was included in the call. The call was

brief. Mr Horgan asked the O'Briens about the Respondent's proposal. The O'Briens said that they had referred it to their lawyers. Mr Austin made a comment about this not fitting with their timeline. The call ended fairly abruptly thereafter.

Dismissal

127. Initially Mr Horgan considered dismissing the Claimants for gross misconduct. It was clearly the view of Mr Hazelhurst in his evidence to us that this should have been done. In the event however, Mr Horgan decided to dismiss the Claimants with notice, which he did by letter of 25 July 2018 with six months' pay in lieu of notice. The letter of dismissal reads:

> "Following our meetings on 13 June 2018, 17th July 2018 and our call on 24th July 2018 I have considered matters further.
>
> At these meetings and discussions we have raised with you the Company's concerns relating to your knowledge of and/or involvement in the matters relating to inaccurate reporting of client money. As the Company is not satisfied by your response to such concerns, and given that it believes that these actions expose Moneycorp to the possibility of Regulatory sanction, the Company has decided to exercise its right under the Service Agreement to terminate your employment, such dismissal to take effect from 31st July 2018"

128. On 30 July 2018 the Claimants were removed as directors of FRFX.

129. On 7 November 2018 an ACAS EC Certificate was issued for each of the Claimants.

130. On 5 December 2018 the Claimants made an application in the High Court for an injunction requiring the Respondent to provide certain documents and information and prohibiting the Respondent from taking steps in relation to the independent accountant procedure under the Agreement. There were other applications.

131. On 6 December 2018 the Claimants lodged claims in the Employment Tribunal against the Respondent.

132. Following a hearing on 20 – 21 March 2019, Christopher Hancock QC, sitting as a High Court Judge gave judgment on 21 June 2019, ruling in favour of the Claimants and granting a declaration terms sought by the Claimant that access to records and working papers was a condition precedent to a reference to an Independent Accountant under the scheme set out in Schedule 9 of the agreement.

133. As yet there is no report from an Independent Accountant, it is understood based on representations from Counsel that this assessment is ongoing.

The Law

134. We are very grateful to both Counsel who provided well structured written submissions and did not disagree with each other's analysis of the law.

135. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
>
> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (2) This section does not apply where—
>
> a. the worker is an employee, and
>
> b. the detriment in question amounts to dismissal (within the meaning of Part X.
>
> 103A Protected disclosure.
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

136. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other (per Sales LJ in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436 CA).

137. There is an initial burden of proof on a claimant to show (in effect) a prima facie case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no

mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

138. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in C's treatment (*Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA).

139. The Equality Act 2010 contains the following provisions:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

140. Considering the initial burden of proof on a Claimant, there must be 'something more' than merely different in treatment and difference in status (*Madarassy v Nomura International plc* [2007] IRLR 246 CA).

CONCLUSIONS

Protected disclosure detriment (section 47B)

C1 first protected disclosure – 13.3.18

141. While the Tribunal accepts that Mrs O'Brien raised concerns, we consider that at this stage the concerns were operational in nature. The process of clients voluntarily transitioning to the Respondent's terms and conditions had been very slow. We consider that Mrs O'Brien, who was plainly an astute operational manager, could foresee problems in the "hard cutover" approach being proposed by the Respondent whereby clients with open and as yet unfulfilled deals were being migrated in one go across to the Respondent's system. We do not accept that a reference to regulatory and contractual obligations was articulated at this stage using the language described at paragraph 60 of Mrs O'Brien's statement.

142. It follows that we did not find that a protected disclosure in the public interest was made by Mrs O'Brien in the meeting on 13 March 2018.

C2 first protected disclosures – 13.3.18 & "until June 2018"

143. Our finding above is that there were no disclosures or allegations of a regulatory breach made by Mr O'Brien to Mr Horgan. We are alive to the likelihood that Mr O'Brien's witness statement has been drafted in part by a solicitor and in more technical language that he might use. Even allowing for this we find that Mr O'Brien's concerns as articulated to Mr Horgan were commercial and operational rather than regulatory in nature at this stage.

144. It follows that there was no protected disclosure.

C1 second protected disclosure – 11.4.18

145. We find that the reference in Mrs O'Brien's email on 11 April 2018 at 19:45 [possibly Dubai time] in relation to breaching regulation was a reference to FCA principles to pay due regard to the interests of its customers and treat them fairly. We consider that Mrs O'Brien reasonably believed that the matters she raised amounted to a breach of legal obligation and that this was raised in the public interest. Our assessment was that she had a genuine concern for clients and affiliate that went beyond her own personal interest in the success of the migration.

146. We find that this email was a protected disclosure.

C1 alleged fourth protected disclosure – 25.4.18

147. Not all of what Mrs O'Brien was saying to Mr Harrison in the argument on 25 April 2018 was a protected disclosure. It contained her strongly held opinions.

148. We accept Respondent's submission that the cause of the Claimant's anger was the approach that Mr Harrison was taking to compliance.

149. Nevertheless we find at the core of it Mrs O'Brien was disclosing information about clients not being given access to their money. It was her reasonable belief that this was a breach of the requirement under the regulations to treat customers fairly. Given the number of customers we consider that the public interest element is satisfied.

150. We find that this was a protected disclosure.

C1 third disclosure (C2's second disclosure) – 1.5.18

151. We accept Mr Buchan's evidence that the focus of the meeting on 1 May 2018 was the problems in the process of migration. When he said that there was not a significant discussion regarding regulatory breaches, we interpret this to mean that regulatory breaches were discussed but this was very much a minor part of the discussion.

152. We find that regulatory breaches were mentioned by Mrs O'Brien, in similar terms to earlier disclosures i.e unfairness to clients who were being denied access to funds by the approach to KYC being insisted on by Mr Harrison. Mr O'Brien voiced concerns about Mr Harrison the head of compliance. We understand from the context this to be a collective complaint from both of the Claimants.

153. We find that these this discussion did contain protected disclosures being made by both Claimants.

C2's third protected disclosure – 10 May 2018

154. Mr O'Brien says he told Marianne that Moneycorp had been wrong in its interpretation of FCA regulations by declaring in April 2018 that all transactions for the benefit of FRFX clients would cease and directing Lisa that she should take steps to immediately rescind FRFX's Authorised Payment Institution ("API") licence. He says that he explained that the instruction to staff and the rescission of the API licence were contrary to the obligations that both Moneycorp and FRFX had to clients and customers would put at risk clients and customers' ability to access the proceeds of their transactions and would lead to complaints, a loss of reputation and the loss of clients.

155. This allegation was not put to Mrs Gilmore who denies that anything of a regulatory nature was complained of.

156. There is no contemporaneous evidence to support this telephone conversation. We are mindful of the fact that compliance fell within Mrs O'Brien's remit rather than Mr O'Brien who was focused on Sales and Marketing.

157. We find that there was no protected disclosure made.

C1 fifth protected disclosure – end of April 2018

158. The Tribunal finds that Mrs O'Brien disclosed information which she reasonably believed tended to show that the Respondent was planning not to pay commissions owed to Magna under its contract with FRFX. This was a likely breach of legal obligation. Given the low threshold for public interest set in the case of *Chesterton*, we consider that a failure to pay third party was wider than simply Mrs O'Brien's personal private interests and was in the public interest.

159. We find that this was a protected disclosure.

C1's sixth protected disclosure – 11-12.5.18

160. Again the Tribunal finds that Mrs O'Brien disclosed information which she reasonably believed tended to show that the Respondent was planning not to pay commissions owed to Magna under its contract with FRFX.

161. We find that this was a protected disclosure. It is evident from the tone of Mrs O'Brien's final communication on this topic that relations with Mr Hazlehurst and her opinion of him are by now at a low ebb.

Detriments

162. *Being snubbed, disregarded and excluded from meetings of significance after making the first putative disclosure* – this was withdrawn in submissions.

163. *Ignoring or dismissing C1's complaints about the client migration project and request for a consultant to assist, and undermining her role within the business* – this was withdrawn in submissions.

164. *Being told not to challenge Andrew Harrison by Marianne Gilmore on 25 April 2018, Andrew Harrison complaining about her to Nick Haslehurst, being asked by Nick Haslehurst to rescind FRFX's Authorised Payment Institution ('API') licence and seeking to impose conditions on her attendance at a meeting with the Financial Conduct Authority ('FCA')* – this was withdrawn in submissions.

165. *Being asked by NH to rescind FRFX's Authorised Payment Institution ('API') licence* [only applies to C1] –

166. The Tribunal finds that the timing of this request was not coincidental. While the Tribunal recognises that the API licence would have lapsed in any event in July, it was unnecessary for this request to be made on this day.

167. We consider that this was a detriment. Mrs O'Brien was being coerced into taking an action to rescind the licence for a business which the O'Briens plainly regarded as their "baby". The finding of the Tribunal is that there was a mixture of motivations for this action. The context was clearly the public dispute with Mr Harrison and crucially the fact that Mrs O'Brien was challenging his understanding and decision making within the area of regulation and compliance. While an element of this was about demonstrating who had control of the question of compliance, we consider that Mrs O'Brien's allegation that the Respondent was in breach of regulations was more than a trivial part (per *Fecitt*) of her treatment.

168. *Taking steps to remove the C's as statutory directors of FRFX* - these steps were integrally related to the conflict between the O'Briens and the Respondent's management team and the dismissal. Mrs O'Brien's raising of the allegation that she considered keeping client out of their money was a regulatory breach materially influenced this conflict and in particular the conflict between her and Mr Harrison and Mr Hazlehurst. Her raising of the concerns that Magna was not going to be paid plainly contributed to her poor relations with Mr Hazlehurst. There are other factors in the difficulties in the relationship which we will discuss more fully under the section 103A claim below.

169. We consider that the series of protected disclosures caused this this treatment in more than a trivial way.

170. *Threatening to report C1 to the FCA by reason of issues concerning client funds* – we are not satisfied that the Claimants have established the evidential basis for this allegation.

171. *Threatening to issue corporate proceedings against C1 qua shareholder* - for similar reasons to those given above under the removal of statutory directorship allegation we consider that the threat to issue corporate proceedings was caused in more than a trivial way by the making of protected disclosures.

172. *Issuing notice of a claim against C1 qua shareholder on 18 May 2018* - for similar reasons to those given above we consider that this treatment was caused in more

than a trivial way by the making of protected disclosures. We acknowledge that the O'Briens may have ended up in litigation with the Respondent in any event but we consider that the timing, manner and nature of the way that this matter was pursued was influenced by the making of protected disclosures more than a trivial way.

173. *Pre dismissal detriments 4 June 2018* (*C1 and report to FCA; C1 being implicated in alleged misconduct*) - we find that the timing of this treatment and the approach of the Respondent which were designed to exit the O'Briens from the business were caused in more than a trivial way by the making of the protected disclosures.

174. *Pre dismissal detriments 5 June 2018 (Declaring the meeting to be without prejudice; Intimating employment was to be terminated on ground of bringing the company into disrepute; Threat to withhold deferred purchase consideration; Only expressing willingness to have a Consultancy relationship with C2)* - we find that the timing of this treatment and the approach of the Respondent which were designed to exit the O'Briens from the business were caused in more than a trivial way by the making of the protected disclosures.

175. *Pre dismissal detriments on 11th June 2018 (Being summoned to a meeting without notice or having the purpose explained; Manner of the meeting; Application of a restriction to prevent dialogue with the FCA as regulator; Instruction precluding discussion of matters with FCA; Condition being advanced that another officer of the Respondent attend any meeting with the FCA; Seeking to fetter C1's interaction with the FCA by setting out conditions at a meeting on 11 June 2018)* - we find that the timing of this treatment and the approach of the Respondent which were designed to exit the O'Briens from the business were caused in more than a trivial way by the making of the protected disclosures.

176. *11 June 2018 removal of Maureen Samsudeen from work when Mark Rogan had promised her support in helping to assist with the alleged client money shortfall* - we find that this was a detriment and that the timing was not coincidental. Mrs Samsudeen was not due to be made redundant until 29 June 2018. This was done deliberately to make it more difficult for the O'Briens to respond to the allegations about client monies. We consider that this was caused in more than a trivial way by the detective disclosures.

177. *Exclusion from office on 13 June 2018* - we find that the timing of this treatment and the approach of the Respondent which were designed to exit the O'Briens from the business were caused in more than a trivial way by the making of the protected disclosures.

178. *Excluded from IPDOC meetings in May, June and July 2018* - we find that the exclusion from June and July meetings a consequence of the absence of the O'Briens from the business which was caused in more than a trivial way by the making of the protected disclosures.

179. *18 July 2018 being subjected to notice of litigation* – we find that that the timing of this treatment and the approach of the Respondent which were designed to exit the O'Briens from the business were caused in more than a trivial way by the making of the protected disclosures.

180. *25 July 2018 issuing of notice of dismissal without any form of procedure* – we have considered whether this falls outside of the definition of detriment by virtue of section 47B(2) on the basis that the Claimants work both workers and this reported detriment amounts to a dismissal. Is there sufficient distance between issuing a notice of dismissal without procedure and the dismissal itself?

181. We have considered this carefully and do not consider that the issuing of notice of dismissal without procedure is something that can be separated out from the dismissal itself. It is integral to the dismissal. It follows that this part of the claim fails.

182. *Putting C1 on notice of legal action on 23 August 2018* – this was withdrawn in submissions;

183. *Issuing resolutions requiring the forfeiture of shares allocated to C1 by way of share sale notice dated 30 August 2018 delivered on 4 September 2018* - we find that the approach of the Respondent in this respect was caused in more than a trivial way by the making of the protected disclosures.

'Ordinary' unfair dismissal (section 98 ERA)

184. The O'Briens were dismissed for what the Respondent saw as that of unsatisfactory engagement in a commercial negotiation in response to a demand that they repay the lion's share of the financial considerations they had received for the sale of FRFX. They were dismissed without any disciplinary process being followed, without a concluded investigation, without anything that resembled a disciplinary hearing and without an appeal right.

185. We find that the dismissals were procedurally unfair, being outside the range of reasonable responses open to an employer acting reasonably.

186. Given that the position of the Respondent is that there is no misappropriation of funds and the only report relied upon to show a discrepancy in funds is "draft" with the Claimants yet to complete their participation in the prescribed mechanism for challenging the draft accounts, it is difficult to see what the potentially fair reason for dismissal is. If it is conduct it is difficult to see that there are reasonable grounds.

187. Mr O'Brien had responsibility for Sales. The Respondent has not demonstrated reasonable grounds to believe that the concerns about client monies and Magna/compliance could possibly be laid at his door.

188. As to 'some other substantial reason' for dismissal we do not consider that the Respondent's unilateral desire for the O'Briens to leave the business could reasonably be treated as a breakdown in the relationship.

189. We find that both dismissals fall outside the range of reasonable responses substantively.

'Automatic' unfair dismissal because of making a protected disclosure (section 103A ERA)

190. The Tribunal finds that there were multiple reasons for dismissal in this case.

191. We accept that the protected disclosures, particularly on the part of Mrs O'Brien were a contributing factor to the situation reached by May and June 2018.

192. Mr Horgan's oral evidence to the Tribunal was that he had a management team that was not functioning. When asked by the Tribunal when in his mind the decision to dismiss 'crystallised', he contended that it was a meeting on 17 July 2018. This date is referred to in his witness statement but is not given any particular significance other than this being the last in a series of meetings designed to try to avoid dismissal and "resolve matters in a sensible and commercial way". We have had very little evidence about a meeting on 17 July, beyond references in letters dated 25 July and in Mr Horgan's witness statement but have found that there was a further discussion on or around this day about the commercial dispute which did not suggest a speedy resolution.

193. We find that there were two central reasons why the Claimants were dismissed.

194. First was the stalling negotiations. We find that the Respondents and their owner Bridgepoint had concluded by May 2018 that they had significantly overpaid for the FRFX business. We find that they believed that the "hole" in client monies meant that profit had been overstated. Given that the valuation was based on a multiple of EBITDA, the Respondent considered that they had paid too much. Whether the quantum of any historical discrepancy was as much as £1 million as in the KMPG draft report, and whether it justified the aggressive negotiating position adopted by the Respondent falls outside of the scope of this decision.

195. It was evident that the process of trying to migrate FRFX customers to the Respondent was problematic, with the result that far fewer clients were becoming Respondent clients than either side had anticipated. The relationship with Magna, a source of profitable work, historically, had broken down. Both of these factors meant that profits from the former FRFX business were going to be lower than anticipated. It was for all these reasons that the Respondent was trying to get the Claimants to the negotiating table to in effect renegotiate the price of the business. This negotiation was not fruitful which was plainly causing a strain on relationships.

196. Secondly, there was a dysfunctional management dynamic. Mr Harrison felt that FRFX's compliance was inadequate, so much so that he made a report to the FCA. The O'Briens felt that Mr Harrison was being inflexible in the crisis of the client migration. We find that each side genuinely felt that the other was at fault. There was a power struggle between O'Briens (both with the title 'Managing Director') and Mr Harrison and Mr Hazlehurst. The job titles and the structure may not have helped. Mr Horgan acknowledges in hindsight that he may have spent too much time focussed on international acquisitions, rather than ensuring the success of the integration of the FRFX business.

197. We find that the protected disclosures were merely a small element of this dysfunctional dynamic.

198. Considering the picture as a whole, we do not find that the protected disclosures were the sole or principal reason for dismissal.

Direct sex discrimination claim (section 13 EqA)

199. Mr Horgan accepted after reflection that his proposal to offer only Mr O'Brien a consultancy arrangement was unfair. Both Claimants had the title Managing Director. Considering the operation of the burden of proof under section 136 we do not find that there is 'something more' than the difference in status and the difference in treatment (per *Madarassy*) which would mean that a Tribunal acting reasonably could conclude that the reason for the difference in treatment was Mrs O'Brien's sex.

200. In any event the Tribunal accepts Mr Horgan's explanation for the disparity in treatment is that he considered the client money issue fell within the responsibility and operational remit of Mrs O'Brien whereas it did not fall within the remit of Mr O'Brien. Furthermore he considered that Mr O'Brien had a good book of contacts and potential new business which he wanted to retain. These were both reasons for the disparity which did not relate to sex.

201. The Tribunal finds in any event that the prospect of a successful consultancy arrangement being established with either of the O'Briens in the circumstances of the case and given what had gone before was fairly remote.

Remedy: Case Management Order

202. The parties are ordered to jointly send to the Tribunal proposed directions dealing with remedy, agreed as far as possible, within 21 days of the date that these written reasons are sent out.

_____

Employment Judge Adkin

Date 8 January 2020

WRITTEN REASONS SENT TO THE PARTIES ON

13 January 2020

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX 1

LIST OF ISSUES

FIRST CLAIMANT

Whistleblower detriment contrary to section 47B ERA.

1. Did the First Claimant raise protected disclosures as alleged in the Particulars of Claim and the Response to the Request for Further and Better Particulars of the Claims and specifically:

    a. Did the First Claimant disclose any information to the Respondent?

    b. If so, did the First Claimant believe that such information tended to show one of the prescribed matters under section 47B ERA?

    c. If so was that belief reasonable? And

    d. Did the First Claimant reasonably believe that such disclosure was in the public interest?

        i. Has the First Claimant been subjected to detriment (including being exposed to acts and omissions)? If so, has the Respondent established that the reason for such treatment was not the making of the alleged protected disclosures?

2. Did the alleged mistreatment constitute a series of conduct?

3. Are the First Claimant's complaints under section 47B ERA in time?

Automatically unfair dismissal contrary to section 103A ERA.

a. Was the reason, or principal reason, for the First Claimant's dismissal that she had made a protected disclosure?

Unfair dismissal contrary to section 98 ERA

4. Does the First Claimant have sufficient continuity of service to bring a claim of ordinary unfair dismissal? In considering this question:

    a. Was the First Claimant employed by First Rate FX Limited?

    b. If yes, did the First Claimant's employment transfer to the Respondent pursuant to the TUPE Regulations before the First Claimant entered into a service agreement with the Respondent?

    c. If the answer to 6b, is no, was the First Claimant employed by First Rate FX Limited when the First Claimant entered into a service agreement with the Respondent (it having been accepted by the Respondent that the Respondent was an associated employer of First Rate FX Limited within the meaning of section 218 ERA 1996 as at the date that the First Claimant entered into a service agreement with the Respondent).

5. What was the reason for the First Claimant's dismissal, and was it for a potentially fair reason as per section 98(1)(b) ERA?

6. Relevant to this case, was the real reason, or principal reason, for the First Claimant's dismissal that she had made a protected disclosure?

7. If the First Claimant's dismissal was for a potentially fair reason, did the Respondent act reasonably in dismissing the First Claimant for that reason in all of the circumstances, including the size and administrative resources of the Respondent organisation, as per section 98(4) ERA? In considering that question:

    a. What were the relevant circumstances of the First Claimant's dismissal? and

    b. Did the Respondent follow a fair procedure when dismissing the First Claimant??

Direct discrimination contrary to section 13 and 39 of the Equality Act 2010.

8. Did the Respondent subject the First Claimant to direct sex discrimination by indicating a preparedness to recruit the First Claimant's husband to an alternative worker arrangement, with no such communication being made for the benefit of the First Claimant?

9. Did the alleged mistreatment constitute a series of conduct?

Remedy

10. If the First Claimant is successful in any of the heads of claim, is she entitled to any remedy?

11. Is the First Claimant entitled to the remedies and compensation that she claims as set out in her Schedule of Loss?

SECOND CLAIMANT

Whistleblower detriment contrary to section 47B ERA.

1. Did the Second Claimant raise the protected disclosures as alleged in the Particulars of Claim and the Response to the Request for Further and Better Particulars of the Claims and specifically:

    a. Did the Second Claimant disclose any information to the Respondent?

    b. If so, did the Second Claimant believe that such information tended to show one of the prescribed matters under section 47B ERA?

    c. If so was that believe reasonable? And

    d. Did the Second Claimant reasonably believe that such disclosure was in the public interest?

2. Has the Second Claimant been subjected to detriment (including being exposed to acts and omissions)? If so, has the Respondent established that the reason for such treatment was not the making of protected disclosures.

3. Did the alleged mistreatment constitute a series of conduct?

4. Are the Second Claimant's complaints under section 47B ERA in time?

Automatically unfair dismissal contrary to section 103A ERA.

5. Was the reason, or principal reason, for the Second Claimant's dismissal that he had made a protected disclosure?

Unfair dismissal contrary to section 98 ERA.

6. Does the Second Claimant have sufficient continuity of service to bring a claim of ordinary unfair dismissal? In considering this question:

a. Was the Second Claimant employed by First Rate FX Limited?

b. If yes, did the Second Claimant's employment transfer to the Respondent pursuant to the TUPE Regulations before the Second Claimant entered into a service agreement with the Respondent?

c. If the answer to 6b is no, was the Second Claimant employed by First Rate FX Limited when the Second Claimant entered into a service agreement with the Respondent (it having been accepted by the Respondent that the Respondent was an associated employer of First rate FX Limited within the meaning of section 218 ERA 1996 as at the date that the Second Claimant entered into a service agreement with the Respondent)?

7. What was the reason for the Second Claimant's dismissal, and was it for a potentially fair reason as per section 98(1)(b) ERA?

8. Relevant to this case, was the real reason, or principal reason, for the Second Claimant's dismissal that he had made a protected disclosure?

9. If the Second Claimant's dismissal was for a potentially fair reason, did the Respondent act reasonably in dismissing the Second Claimant for that reason in all of the circumstances, including the size and administrative resources of the Respondent organisation, as per section 98(4) ERA? In considering that question:

a. What were the relevant circumstances of the Second Claimant's dismissal? and

b. Did the Respondent follow a fair procedure when dismissing the Second Claimant?

Direct discrimination contrary to section 13 and 39 of the Equality Act 2010

10. Did the Respondent treat the Second Claimant less favourably than the Respondent treats or would treat others because the Second Claimant is married and by:

a. Making the Second Claimant subject to unfounded and unsubstantiated allegations;

b. Subjecting the Second Claimant to unjustified disciplinary process and/or dismissal; and

c. Making the Second Claimant the subject of an offer of re-engagement on condition that his wife is excluded from the business which they founded?

11. Did the mistreatment constitute a series of conduct?

Remedy

12. If the Second Claimant is successful in any of the heads of claim, is he entitled to any remedy?

13. Is the Second Claimant entitled to the remedies and compensation that he claims as set out in his Schedule of Loss?

APPENDIX 2

Summary of Claims

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1. Each Claimant ('C1' and 'C'" or 'Cs') brings a number of claims against R as follows:

   i. Unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996 ('ERA');

   ii. Automatically unfair dismissal contrary to section 103A ERA;

   iii. Detriment contrary to section 47B ERA;

   iv. Direct discrimination by reference to sex in C1's case and marital status in C2's case contrary to sections 13 and 39 Equality Act 2010 ('EqA').

2. There are a number of jurisdictional issues which remain live at this stage of the proceedings to be determined at its conclusion which are as follows:

   i. Whether the Cs have sufficient continuity of service to bring a complaint of ordinary unfair dismissal having regard to whether they were employees of First Rate FX Limited ('FRFX') the business which they founded and which R purchased the entire share capital of, whether there was a relevant transfer of an undertaking within the meaning of Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), which operated so as to transfer their employment to R or whether continuity can be established by reference to R's status as an associated employer (it being accepted that FRFX and R were associated employers);

   ii. Whether the claims of detriment under section 47B ERA are in time.

3. In respect of the claims under section 47B ERA ('whistleblowing detriment') the disclosures are said to be as follows:

PUTATIVE DISCLOSURES

First Claimant

i. PD 1: ET1 p19 para 21+. At a meeting on 13 March 2018 when C1 raised issues with the attendees (including Andrew Harrison and Debbie Doyle) concerning the client migration project (transferring FRFX clients from its E2E platform to Moneycorp's

OMNI platform) which she avers were protected disclosures. See fbps for identified breach of legal obligations p109-112;

ii. PD 2: ET1 p21 para 23+. Emails between 6 and 11 April 2018 when C1 says she made protected disclosures to Mark Horgan and Nick Haslehurst in relation to the client migration project. See fbps for identified breach of legal obligations p109-112;

iii. PD 3: ET1 p22 para 27+. After the IPDOC or "Opco" meeting in April 2018 when C1 says that she repeated previous concerns around the client migration project to Colin Buchan. See fbps for identified breach of legal obligations p109-112;

iv. PD 4: ET1p22 para 30+. On 25 April 2018 when C1 avers that she made a protected disclosure to Andrew Harrison about the client migration project. See fbps for identified breach of legal obligations p109-112;

v. PD 5: ET1 p25 para 33+. End of April 2018 when C1 avers that she made a protected disclosure to Marianne Gilmore about the classification of clients for sales commission purposes (regarding an affiliate of FRFX called Magna). See fbps for identified breach of legal obligations p109-112;

vi. PD 6: ET1 p27 para 36+. Emails between 11 and 12 May 2018 from C1 to Nick Haslehurst, Mark Horgan and Matthew Cook in which she avers that she made protected disclosures about the FRFX affiliate Magna not being paid commission due. See fbps for identified breach of legal obligations p109-112.

Second Claimant

vii. PD 1: ET1 para 20+ . On 13 March 2018 and until June 2018 C2 avers that he made protected disclosures to Mark Horgan about the client transition and migration arrangements/project and repeated this in conversations from then until May 2018. See fbps for identified breach of legal obligations p135-140;

viii. PD 2: ET1 para 27+. On 10 May 2018 C2 avers that he made a protected disclosure to Marianne Gilmore about the client migration project which he "repeated" to Colin Buchan in April 2018. See fbps for identified breach of legal obligations p135-140;

ix. PD 3: ET1 para 31+. After the "IPDOC or "Opco" meeting in April 2018 when C2 says that he repeated previous concerns around the client migration project to Colin Buchan. See fbps for identified breach of legal obligations p135-140.

4. The detriments are said to be as follows:

ALLEGED DETRIMENTS

First Claimant

i. Being snubbed, disregarded and excluded from meetings of significance after making the first putative disclosure; (see FBPs at pp. 113 to 117)

ii. Ignoring or dismissing C1's complaints about the client migration project and request for a consultant to assist, and undermining her role within the business (FBPs at pp. 119 to 121);

iii. Being told not to challenge Andrew Harrison by Marianne Gilmore on 25 April 2018, Andrew Harrison complaining about her to Nick Haslehurst, being asked by Nick Haslehurst to rescind FRFX's Authorised Payment Institution ('API') licence and seeking to impose conditions on her attendance at a meeting with the Financial Conduct Authority ('FCA');

iv. Taking steps to remove C1 as a statutory director of FRFX;

v. Threatening to report C1 to the FCA by reason of issues concerning client funds;

vi. Threatening to issue corporate proceedings against C1 qua shareholder;

vii. Issuing notice of a claim against C1 qua shareholder on 18 May 2018;

viii. Pre dismissal detriments 4 June 2018:

   a. C1 and report to FCA;

   b. C1 being implicated in alleged misconduct;

ix. Pre dismissal detriments 5 June 2018:

   a. Declaring the meeting to be without prejudice

   b. Intimating employment was to be terminated on ground of bringing the company into disrepute

   c. Thereat to withhold deferred purchase consideration

   d. Only expressing willingness to have a Consultancy relationship with C2

x. Pre dismissal detriments on 11th June 2018:

   a. Being summoned to a meeting without notice or having the purpose explained

b. Manner of the meeting

c. Application of a restriction to prevent dialogue with the FCA as regulator

d. Instruction precluding discussion of matters with FCA

e. Condition being advanced that another officer of the Respondent attend any meeting with the FCA

xi. Seeking to fetter C1's interaction with the FCA by setting out conditions at a meeting on 11 June 2018;

xii. 11 June 2018 removal of Maureen Samsudeen from work when Mark Rogan had promised her support in helping to assist with the alleged client money shortfall;

xiii. Exclusion from office on 13 June 2018;

xiv. Excluded from IPDOC meetings in May, June and July 2018;

xv. 18 July 2018 being subjected to notice of litigation;

xvi. 25 July 2018 issuing of notice of dismissal without any form of procedure;

xvii. Putting C1 on notice of legal action on 23 August 2018;

xviii. Issuing resolutions requiring the forfeiture of shares allocated to C1 by way of share sale notice dated 30 August 2018 delivered on 4 September 2018.

Second Claimant

i. Being snubbed, disregarded and excluded from meetings of significance after making the first putative disclosure as identified in the fbps p140 from April 2018;

ii. Undermining C2's role in the business;

iii. Ignoring or dismissing C2's complaints about the client migration project and request for a consultant to assist, and undermining her role within the business;

iv. Threatening to report C2 to the FCA by reason of issues concerning client funds;

v. Threatening to issue corporate proceedings against C2 qua shareholder;

vi. Issuing notice of a claim against C2 qua shareholder on 18 May 2018;

vii. Intimating to C2 that he should resign her employment with Moneycorp / threatening to dismiss him without following due process at a meeting on 5 June 2018.

viii. 11 June 2018 removal of Maureen Samsudeen from work when Mark Rogan had promised her support in helping to assist with the alleged client money shortfall;

ix. Exclusion from office on 13 June 2018

x. Excluded from IPDOC meetings in May, June and July 2018

xi. 18 July 2018 being subjected to notice of litigation

xii. 25 July 2018 issuing of notice of dismissal without any form of procedure

xiii. Putting C1 on notice of legal action on 23 August 2018

xiv. Issuing resolutions requiring the forfeiture of shares allocated to C1 by way of share sale notice dated 30 August 2018 delivered on 4 September 2018