EMPLOYMENT TRIBUNALS

Claimant: **Mr S Felce** **Respondent:** **Network Rail Infrastructure Ltd**

Heard in Leeds by CVP **On: 20, 21, 23, 26, 27, 28 September and 4, 5, 6 October 2022, 24 October 2022 (deliberations)**

Before **Employment Judge Davies**
Mr T Downes
Mr L Priestley

Appearances
For the Claimant: **Mr Wilkinson (counsel)**
For the Respondent: **Ms Barry (counsel)**

RESERVED JUDGMENT

1. The following complaints of being subjected to detriment for making protected disclosures are well-founded and succeed:
   1.1 Mr Foote and Mr Houlston not protecting the Claimant's confidentiality on 30 August 2018;
   1.2 The whole complaint about the Claimant's colleagues ostracising him after 20 August 2018 except the complaints about revoking his access card and Mr Fox escorting him from the York ROC;
   1.3 The whole complaint about removing the Claimant from his substantive SSM post and then not returning him to it;
   1.4 Mr Foote unreasonably instigating a disciplinary investigation;
   1.5 SSMs and signallers being pressured to make complaints about the Claimant;
   1.6 Mr Houlston submitting a grievance about the Claimant;
   1.7 Delaying the mediation process, impacting the Claimant's ability to return to his substantive post;
   1.8 Disregarding OH and psychologist recommendations about the Claimant's return to his substantive post;
   1.9 U-turns and delays putting return to work plans into action;
   1.10 Mr McIntosh failing to respond to the Claimant's letter of 15 October 2018; and
   1.11 Failure to prevent reprisals in respect of lack of engagement with mediation in a reasonable timeframe.

2. All the Claimant's remaining complaints are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of being subjected to detriment for making protected disclosures brought by the Claimant, Mr S Felce, against his employer, Network Rail Infrastructure Ltd. The Claimant was represented by Mr Wilkinson (counsel) and the Respondent was represented by Ms Barry (counsel).

2. The Tribunal was provided with a lengthy file of agreed documents. We considered those to which the parties drew our attention. A small number of additional documents were admitted in evidence during the hearing by agreement.

3. The Tribunal heard evidence from the Claimant on his own behalf. For the Respondent, we heard evidence from Mr N Blake (Shift Signalling Manager), Mr I Howell (Shift Signalling Manager), Mr J Miller (Shift Signalling Manager), Mr J Rogers (Signaller), Mr S Ray (Principal Operational Rules Manager), Mr C Gee ((Operations Director, formerly Head of Operations), Mr M Foote (Route Operations Manager, formerly Operations Manager), Mr C Thomas (Operations Manager, formerly Local Operations Manager), Mr R McCarthy (Project Operations Interface Specialist),Mr R McIntosh (Managing Director Eastern Region), Mr J Fox (Operations Manager), Mr A Jackson (Local Operations Manager), Mr M Wilson (Operations Manager) and Mr A Taylor (Local Operations Manager).

Issues

4. The claims and issues were identified at a preliminary hearing. The Respondent accepted that the Claimant made four protected disclosures, as follows:

Protected Disclosures

Nº	Date	What said	To whom
1	21/8/18	Concerns about a safety critical incident at Hambleton on 19 August 2018.	Mr Fox
2	16/8/18	Safety issues at York IECC, including poor safety critical communications; poor knowledge of rules; signaller falling asleep; incorrect forms being used for blocking the railway; not following procedures; staff watching TV whilst on duty.	Mr Ray Mr Raine Ms Peterson
3	21/8/18	As above. Plus concerns about the incident at Hambleton on 19 August 2018.	Mr Ray Mr Raine

4	30/8/18	Concerns about new signalling equipment and lack of Route Service Views; lack of competence of staff and need for training; the Hambleton incident, including Mr Rogers's identity; signalling staff watching TV on duty; a colleague watching football on duty and Mr Howell, SSM, being aware.	Mr Gee

5. The issues for the Tribunal to decide were therefore as follows.

Detriment for making protected disclosures

5.1 Did the Respondent subject the Claimant to the following detriments?

Nº	Date	Detriment
1	30/8/18	**Not protecting C's confidentiality.** Mr Gee telling Mr Foote about C's disclosures. Mr Foote telling Mr Houlston. Mr Houlston telling others that the Claimant had "grassed them up."
2		**Ostracising C**
	20/11/18	Mr Blake telling the Claimant not to call him and then not engaging with him.
	8/2/19	Mr Fox escorting C from York ROC.
	13/2/19 onwards	Mr Foote telling C only to attend York ROC with notice.
	9/18 to 21/7/20	No contact from work colleagues. Blanked or not acknowledged in passing. No pleasantries. Ignored when working in adjacent Sheffield ROC.
	Unknown	Revoking C's access card.
3	6/9/18 to 31/7/20	**Removing C from substantive SSM post at York ROC/Leeds Sub ROC**
4	5/9/18 to 4/1/19	**Subjected to unreasonable, lengthy and protracted disciplinary investigation** Mr Foote inviting C for unaccompanied informal chat, conducting it in stairwell, prejudging that there would be an outcome and recommendations. Mr Foote refusing copies of documents including statements against C.

		Mr Foote unreasonably instigating disciplinary investigation following protected disclosures. Following a lengthy and protracted procedure. Colleagues pressurised into making complaints about C. No response to concerns raised by union and colleagues about reprisals.
5		Withdrawn
6 	 6/9/18 to 31/7/20 29 July 2020	**Loss of earnings** Unable to work overtime and loss of annual leave payments, night shift premiums and Christmas enhancements because removed from substantive post. Detrimentally affected by overtime equalisation system.
7	16/8/19 to 21/4/20	**Subjected to unfounded grievance investigation re Houlston grievance** Mr Houlston submitting grievance, preventing C returning to substantive post and raising matters dealt with in disciplinary investigation. Mr Foote stating he wants the grievance pursuing after investigating officer says it should not be accepted. Protracted process
8	 29/5/20 to 23/7/20 1/6/20	**Subjected to adversarial grievance process re C grievance** Not allowing C to air his concerns at grievance investigation meeting. Asking C adversarial questions linked to previous disciplinary process. Referring to documents from that process. Not providing C with copies of documents referred to or relied on. Not investigating aspects of grievance. Referring to speaking to his “old mate” Mr Ray or Mr Raine. Not responding to concerns in C’s email.
9	 1/19 to date 1/19 to 3/6/20	**Delays, process failures, failure to comply with recommendations** Not doing Stress Risk Assessment recommended in disciplinary investigation. Not doing mental wellbeing toolkit with C.

	9/18 to 1/19	Delay in disciplinary investigation impacting C's ability to return to work.
	16/8/19 to 21/4/20	Delay in Houlston grievance impacting C's ability to return to work.
	21/2/20 to 29/10/20	Delay in C grievance impacting C's ability to return to work.
	15/1/19 to 24/7/20	Delay in mediation impacting C's ability to return to work.
	31/12/18, 3/2/19, 12/3/19	Disregarding OH and psychologist recommendations re C's return to substantive post.
	15/1/19, 8/5/19	U-turns and delays putting return to work plans into action.
10	6/9/18 to 30/7/20	**Given inappropriate work whilst removed from substantive post** Work below pay grade, capabilities, knowledge and experience. Sometimes degrading and humiliating. Generally no desk or computer. Eventually given a laptop but had to work from home. Control centre work involved unskilled and basic administrative tasks. Measuring railway platforms shortly after concerns C may present suicide risk. Preparing training plans. Contact for dwell times project ignored C and provided no tasks. Sheffield Sub-ROC work in a lower grade.
11		**Failure to respond to C's legitimate concerns in correspondence**
	25/10/18	Letter to Mr McIntosh about whistleblowing detriment.
	8/5/19, 6/8/19, 3/10/19	Correspondence to Mr Foote about lost overtime earnings. Failure to provide breakdown of £4,527 payment. No management responsibility.

	23/7/20 29/10/20	No breakdown of £4,527 payment despite recommendation of Mr Thomas Being told in grievance appeal outcome to repay the £4,527 despite no breakdown being provided.
12	 30/8/18 - 31/7/20 5/9/18 - 4/1/19 16/8/19 to 21/4/20	**Failure to prevent reprisals** Failure to prevent: Refusal to work with C 4 working days after disclosure. Not providing copy of allegations made against C, allowing disciplinary allegations to be pursued. Permitting grievance allegations, deterring C's return to substantive post. Lack of engagement with mediation in reasonable timeframes.
13		See detriment 6
14	6/9/18 to date	**Damage to career progression and reputation** Removal from substantive post in circumstances and for so long damage C's reputation and career progression.
15	29/10/20	**Requirement to repay overtime payment**

5.2 If so, was it done on the ground that the Claimant made a protected disclosure?

Time limits

5.3 When did each act or failure to act take place? In particular:
- 5.1.1 If there was an act extending over a period, what was the last day of the period?
- 5.1.2 If there was a deliberate failure to act, when was it decided upon?
- 5.1.3 If there is no evidence of that, on what date did an act inconsistent with doing the failed act take place?
- 5.1.4 If there was not such act, when might the Respondent reasonably have been expected to do the act?

5.4 For any act or failure to act that took place before 2 March 2020, was it part of a series of similar acts or failures that ended on or after 2 March 2020?

5.5 For any act or failure to act that was outside the primary limitation period, was it reasonably practicable for the complaint to be presented within the limitation period?

5.6 If not, was it presented within a reasonable period?

Legal principles

6. Under s 47B Employment Rights Act 1996 a worker has the right not to be subjected to a detriment by any act or deliberate failure to act done by his employer on the ground that he has made a protected disclosure. Something is done "on the ground" that the worker made a protected disclosure if it is a "material factor" in the decision to do the act. That requires an analysis of the mental processes (conscious or subconscious) of the decision maker. The decision must be in no sense whatsoever because of the protected disclosure: see e.g. *Fecitt and others v NHS Manchester* [2012] IRLR 64 CA.

7. Ms Barry invited the Tribunal to review the underlying facts and the decision in *Fecitt* carefully, and we did so. In *Fecitt*, the Court of Appeal recognised the difficulty that an employer may face in terms of workplace relations after a protected disclosure has been made. In that case, the Tribunal found that the employer had acted to deal with a dysfunctional workplace, and not because of the claimants' disclosures, and the Court of Appeal upheld its decision. It is important not to apply a "but for" test – that is "but for" the protected disclosure this would not have happened – but to analyse the reason why the employer (through the relevant decision makers) acted as it did.

8. Under s 48(2) Employment Rights Act 1996, once the worker has shown that there was a protected disclosure, it is for the employer to show the ground on which any act or failure to act was done. This means that the Tribunal *may* uphold the claim if the employer is unable to show the ground on which the act was done. It does not have to do so: see *Kuzel v Roche Products Ltd* [2008] ICR 799, *Serco Ltd v Dahou* [2016] EWCA Civ 832 and *Ibekwe v Sussex Partnership NHS Foundation Trust* [2014] EAT 0072/14. In *Ibekwe* the Employment Appeal Tribunal held that a failure by the Respondent in that case to show positively why no action was taken did not mean that the detriment complaint succeeded "by default." It was a question of fact for the Tribunal as to whether the failure was on the ground that the Claimant made a protected disclosure. The correct approach is that the burden of proof lies on a Claimant to show that a (more than trivial) ground for detrimental treatment is a protected disclosure the Claimant made. The Respondent must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them. However, the inferences must be justified by the facts as found: *Osipov v International Petroleum Ltd* (UKEAT/0058/17/DA, 2017).

9. A Tribunal may draw an inference from unexplained, gross unfairness, but it is not obliged to do so: *University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall* (UKEAT/0150/20/VP, 2021).

10. The approach to "tainted" decision makers that applies in unfair dismissal cases (*Jhuti*) does not apply in a complaint of being subjected to detriment for making a protected disclosure. It is the person who committed the act or failure to act who must do so on the ground of the protected disclosure: *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN, 2018).

11. The time limit for bringing a complaint is dealt with by s 48(3) and (4) as follows:

(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months.

(4) For the purposes of subsection (3) –

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and in the absence of evidence establishing the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

12. In the discrimination sphere, where the equivalent to s 48(4)(a) is a reference to "conduct extending over a period", a distinction is drawn between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, such a practice will amount to an act extending over a period. Where there is no such regime, rule, practice or principle, an act that affects an employee will not be treated as continuing, even though it has consequences that extend over a period of time: see Barclays Bank plc v *Kapur* [1991] ICR 208, HL. The concepts of policy, rule, practice, scheme and so on are examples of when an act extends over a period. However, they should not be treated as a complete and constricting statement of when there can be conduct extending over a period. The focus of the inquiry is not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA. The distinction is between an act extending over a period and a succession of unconnected or isolated specific acts. The Claimant must prove, either by direct evidence or by inference from primary facts, that the alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

13. This approach applies in determining whether "an act extends over a period" in s 48(4): see *Arthur v London Eastern Railway Ltd* [2007] ICR 193, CA.

14. As regards the separate question under s 48(3)(a) whether there is a series of acts or similar acts, the provision applies in a case where the complainant alleges a number of acts of detriment, some inside the primary time limit and some outside it. The acts occurring inside the period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able

to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the period and those outside it. The necessary connections are (a) being part of a "series" and (b) being acts which are "similar" to one another. Some evidence is needed to determine what link, if any, there is. The mere fact that they were all committed against the same complainant is not enough. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? Why did they act as they did? Depending on the facts a series of apparently disparate acts may be shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure: see *Arthur*.

Findings of fact and consideration of detriment complaints

15. In this case, for ease of comprehension, the Tribunal made its findings of fact and dealt with the relevant complaints of being subjected to detriment for making protected disclosures together, rather than separating out the findings of fact from the consideration of the detriment complaints.

Witnesses

16. We start with some observations about the witness evidence. The Claimant's evidence was generally clear, internally consistent, and consistent with the contemporaneous documents. He made appropriate concessions. Sometimes his recollection was not accurate, but the Tribunal had no doubt that he was an honest witness doing his best to give accurate evidence. For the Respondent, the same was true of Mr Ray, Mr Jackson and Mr Wilson. There were some discrepancies in the evidence of Mr Gee, Mr Taylor and Mr McCarthy, but the Tribunal found that they were for the most part genuine witnesses, sometimes struggling to recollect with the passage of time. There were discrepancies and difficulties with all of the remaining witnesses' evidence. As explained by reference to specific incidents below, very frequently a witness's evidence was wholly at odds with the documents from the time. In some cases, they repeatedly gave oral evidence that was inconsistent with their own witness statement, and sometimes their oral evidence kept changing too. Whether it was because witnesses were deliberately giving inaccurate evidence, or because they had convinced themselves that events happened differently, the result was that the Tribunal found much of the Respondent's witness evidence unreliable, unconvincing or implausible.

The Respondent and its policies

17. The Respondent is Network Rail Infrastructure Limited, which operates and maintains Britain's rail network and infrastructure.

18. The Respondent has a Whistleblowing or Speak Out policy. The Speak Out Policy does not cover raising concerns about health and safety matters. It explicitly states that it should not be used to raise such concerns and directs employees to make a Close Call report. It does cover raising concerns about wrongdoing. The Speak Out Policy emphasises the importance of speaking out if wrongdoing is suspected and says that the Respondent will protect those who

speak out from any reprisal or victimisation. The Speak Out Policy says that concerns raised under it will be treated in complete confidence. There is no required form or format for raising a concern under the Speak Out Policy. It can be done using the Speak Out reporting service, but it can also be done by raising concerns through a line manager or other senior manager.

19. Under the Respondent's Disciplinary policy, suspected misconduct is to be investigated "promptly" by the investigation manager, and a decision whether to disregard the matter or to proceed to a formal disciplinary procedure is also to be made promptly. There is no provision for the investigation outcome to be reviewed by somebody else. Where misconduct is revealed during any other procedure, the disciplinary procedure says that that procedure will be discontinued and the matter dealt with under the disciplinary procedure. The Disciplinary policy deals with suspension as follows:

2.5 Suspension
2.5.1 In certain circumstances, such as in cases where gross misconduct is suspected, or where it is considered that the employee's presence at work involves a risk to safety, the public, railway infrastructure, Network Rail, railway employees or themselves, consideration will be given to a brief period of suspension from duty, with pay, whilst an investigation is carried out. Where no disciplinary action is taken, the employee will be reimbursed any additional earnings they may have lost as a result of suspension.
…

20. The Respondent also has a Grievance policy. Under that policy, if the grievance is put in writing, a date must be agreed for the grievance hearing within 7 working days of its submission. At the hearing, the employee is to have the opportunity to fully outline the nature of their grievance and how it might be resolved. Witnesses can be called on either side. An investigation will be undertaken if the relevant manager considers it necessary. The employee will be provided with notes of the investigation, and copies of any witness statements.

The Claimant's employment history

21. The Claimant started work for the Respondent as a signaller in January 2010. He secured three promotions, rising ultimately from a Grade 3 signaller to a Grade 9 signaller (the highest grade). The Grade 9 post was based at York Integrated Electronic Control Centre ("York IECC") and the Claimant moved to York in September 2016 to take up the role.

22. The role of signaller involves the control of the movement of trains on the rail network. The signallers operate the signalling system from signalling control locations. They control train movements over sections of the rail network grouped within geographical areas. Signallers have a safety critical role, which includes keeping safe the travelling public, staff and personnel working on the track, and members of the public using stations and level crossings. The signallers are managed by Shift Signalling Managers ("SSMs"). They are managed by Local Operations Managers ("LOMs") who are managed, in turn, by Operations Managers ("OMs").

23. Around spring 2017 an additional (relief) SSM role was created at York IECC. The Claimant applied for it but was unsuccessful. Mr Houlston, then a LOM, was appointed. Although the SSM role was a step down in seniority from the LOM role, it tended to be better paid because of the availability of overtime. Not long afterwards, another (resident) SSM role became available at York. The Claimant applied and was appointed. However, Mr Houlston was then given the resident role and the Claimant was given the relief role. The resident role has set hours of work; the relief role does varying shifts. The Claimant started the SSM role in early 2018. He received positive feedback about his performance and his appraisals in 2017 and 2018 were of a high standard. The latter was carried out on 24 August 2018 by Mr Fox, LOM. At that time, Mr Fox was the Claimant's line manager. Mr Foote, OM, was his line manager, and Mr Gee line managed Mr Foote.

The protected disclosures

24. In August 2018, the Claimant was shortlisted for the role of Operational Rules Specialist. He was interviewed on 16 August 2018 by Mr Raine, Operations Principles and Standards Expert; Mr Ray, Operational Rules Specialist; and Ms Peterson, Standards Development Coordinator. During the interview, he was asked to give examples of working practices and behaviours that required improvement from a safety perspective. He gave a number of examples of signallers having poor knowledge of the rules; an incident when a signaller had fallen asleep; incorrect forms being used for blocking the line; failure to comply with basic requirements of the rules and regulations, for example in relation to record keeping; and watching television whilst undertaking safety critical duties. The Respondent accepts that the Claimant made a protected disclosure on this occasion. It is **Protected Disclosure 2**.

25. On 21 August 2018 the Claimant spoke to Mr Fox about a safety critical incident. A suspected track defect had been raised by a train driver and the Claimant did not think it had been correctly dealt with by the signaller. That signaller had been involved in another safety critical incident, which again the Claimant did not consider had been dealt with correctly. The Claimant told Mr Fox about this. He sent an email outlining the issues at 08:32hrs. In short, the Claimant believed that because of poor communication and understanding of the rules, the signaller had had the wrong section of track inspected, whilst trains were continuing to run at full speed over the area of track with the suspected defect. Mr Fox asked him to download the voice communication data and to start to document what had happened. The Respondent accepts that the Claimant made a protected disclosure on this occasion. It is **Protected Disclosure 1**.

26. The Claimant was not successful in his application for the role of Operational Rules Specialist. He had a feedback interview on 21 August 2018. During that interview, there was some discussion of the matters he had referred to in his interview. He also told Mr Ray and Mr Raine about the safety critical incident he had reported to Mr Fox. The Respondent accepts that the Claimant made a protected disclosure on this occasion. It is **Protected Disclosure 3**. Mr Ray and Mr Raine told the Claimant that they were going to pass on what he had told them to Mr Gee, Head of Operations for the North Region. They felt that the

concerns needed escalating, and the Claimant himself had said that he did not feel that concerns he had raised previously had been listened to. Mr Ray telephoned Mr Gee a couple of days later and told him about the Claimant's concerns.

27. The signaller involved in the safety critical incident was Mr Rogers. Although the precise circumstances are disputed, there is no doubt that the Claimant was investigating the incident, at Mr Fox's request, and that Mr Rogers and the Claimant had an altercation about it. The Claimant's evidence was that Mr Fox subsequently told him that he and Mr Foote did not consider that there were any issues with the incident. The Claimant disagreed and challenged this. Mr Fox told the Claimant that if he was unhappy, he should go over his head. In cross-examination, Mr Fox said, "No, I did not use those words." He was then asked about what he told Mr Hayles in a subsequent grievance investigation, namely, "I said if you're not happy then go and escalate it." He accepted that he had told the Claimant that.

28. The Claimant had a number of concerns about York IECC at that time, so he decided to bring them to the attention of Mr Gee. He emailed him on 24 August 2018 asking for a private chat in the next few days. They met on 30 August 2018. The date was fixed according to Mr Gee's availability, not because Mr Fox was on annual leave (see below). The Claimant says that a day or two before his meeting with Mr Gee, Mr Foote (OM) had spoken to him in the glass meeting room, known as the bubble. Mr Foote asked why the Claimant was having a meeting with Mr Gee and whether he should be worried. Mr Gee confirmed that Mr Foote knew in advance that the Claimant was going to meet him and Mr Foote accepted in cross-examination that he might have said that. The Tribunal found that he did. The Tribunal noted that the meeting was on Mr Foote's radar, and that he went to the effort of taking the Claimant into a private meeting space to ask what he was speaking to Mr Gee about. The nature of the question he asked indicated a realisation that the discussions might in some way reflect on or come back to Mr Foote.

29. During their meeting on 30 August 2018, the Claimant told Mr Gee about safety concerns relating to new signalling equipment, particularly given the lack of "Route Service Views" at York; lack of competence of staff and the need for further training, in particular in relation to the safety critical incident on 19 August 2018; and staff watching television when working as signallers. The Claimant played Mr Gee the voice recording of the safety critical incident on 19 August 2018. He identified Mr Rogers as the signaller involved. He gave Mr Gee a recent example of a colleague watching football whist working, and told him that the SSM, Mr Howell, would have seen this. He named other people specifically too. The Respondent accepts that the Claimant made a protected disclosure on this occasion. It is **Protected Disclosure 4**.

30. We note at this stage that the focus of the evidence before the Tribunal was on Protected Disclosure 4. There was no realistic suggestion that any witness or treatment was motivated by the fact that the Claimant had made any of the other three Protected Disclosures. The case was not explicitly put to the witnesses on that basis. The Tribunal found that none of the treatment complained of was done because of Protected Disclosures 1 to 3. In what

follows, we deal with whether the Claimant was subjected to detrimental treatment because of Protected Disclosure 4.

Detriment 1: breach of confidentiality

31. Gee was already aware of some of the matters the Claimant raised, because Mr Ray had spoken to him. Mr Ray had also raised a concern about whether the Claimant was being bullied, and Mr Gee asked him about that during their conversation. The Claimant reluctantly discussed it, but made clear that he did not want it pursued. At the end of the meeting, the Claimant agreed that Mr Gee could share what he had told him with "his senior team." He made some reference to matters discussed being "in confidence." Mr Gee said his understanding was that the discussion about bullying was in confidence; the discussion about safety and other concerns could be discussed with managers reporting to him, and that included identifying the Claimant. The Claimant said his understanding was that Mr Gee would not pursue the bullying aspect at all; he could discuss the other aspects with his own senior managers (i.e. those to whom he reported), but that was to be confidential in the sense that the Claimant's identity was not to be revealed. Mr Gee's evidence was that he did not consider the Claimant to be making protected disclosures because he did not "raise them formally through the Speak Out Policy." As we have noted, there is no requirement to raise disclosures formally in that way. The Speak Out Policy itself identifies "speaking to a senior manager" as one way of raising concerns under the Policy. It clearly did not occur to Mr Gee that the Claimant might be raising concerns that called for confidentiality and for him to be protected from reprisals, as required by the Speak Out Policy or as a matter of common sense. Mr Gee said in cross-examination that it did not occur to him that there was a risk that if the SSMs were told that the Claimant had reported that e.g. they had turned a blind eye when people watched TV instead of working, they might retaliate. The Claimant had agreed he could share the issues with his senior management team, and this included revealing the Claimant's identity.

32. Mr Gee spoke to Mr Foote about the Claimant's concerns on 30 August 2018, straight after meeting the Claimant. He told him what had been discussed and they agreed some actions. Mr Gee did not make any effort to keep from Mr Foote that the Claimant had raised concerns about his colleagues, nor did he ask Mr Foote to keep the Claimant's name confidential. The Tribunal had no doubt that Mr Gee ought to have realised that this was a potential whistleblowing situation and, in any event, that there was a risk of reprisals if the SSMs found out that the Claimant had reported them to him in the way he had. He should have taken steps to protect the Claimant and prevent his name from being disclosed. By failing to do so he subjected the Claimant to detriment. However, we accepted his evidence that this was not because the Claimant had made his disclosures. We accepted that Mr Gee welcomed the raising of concerns and wanted to see them addressed. It seemed to the Tribunal that his actions were caused by oversight or incompetence, rather than being deliberate.

33. Mr Foote spoke to Mr Houlston about the matters the Claimant had raised. Mr Fox was on annual leave at the time (from 29 August 2018 to 9 September

2018) and Mr Houlston had previously been LOM, so Mr Foote said he thought he would be an appropriate person to speak to. That was despite accepting in cross-examination that Mr Houlston had “a reputation”, was “known for not being the world’s best LOM” and was “fiery.” In his witness statement, Mr Foote said that, “importantly” he did not tell Mr Houlston who had raised the concerns and that he also asked Mr Houlston not to share the contents of his conversation with anybody else. The Tribunal did not accept that evidence. Mr Foote was interviewed by Mr Hayles in April 2019 (see below). He was asked, “Did you tell [Mr Houlston] that [the Claimant] had made the complaints?” and he answered, “Yes.” In cross-examination, anticipating that he was going to be asked about that, Mr Foote said that there had been another conversation with Mr Houlston a day or two after 5 September 2018, when Mr Houlston said to him that it must be the Claimant who had raised the concerns and Mr Foote did not confirm or deny that, but told Mr Houlston not to repeat what he had been told. Mr Foote was wholly unable to explain why this was the first time he had ever mentioned a second conversation, and why he did not say it to Mr Hayles in April 2019 or in his witness statement. His evidence about what he said to Mr Houlston, when, and why, was inconsistent, kept changing and was wholly unconvincing. He could not explain why he told Mr Hayles that one of the things he asked Mr Houlston was, “How [the Claimant] had fitted into the team since he joined” if he had not told Mr Houlston that it was the Claimant who had raised the concerns. The Tribunal had no doubt whatsoever that Mr Foote told Mr Houlston that it was the Claimant who had raised the concerns with Mr Gee, and that by doing so he subjected him to detriment.

34. It was put to Mr Foote that he had no need to speak to Mr Houlston. He knew that he was “fiery” and he knew that, when Mr Fox returned from leave, Mr Houlston would revert to being an SSM alongside the Claimant. It was suggested to him that he had deliberately told Mr Houlston because he wanted Mr Houlston to know that the Claimant had raised concerns with Mr Gee, knowing that there might be a reaction, because he was annoyed that the Claimant had gone above his head to Mr Gee. Mr Foote denied that. He said that it was of no concern to him that the Claimant had “escalated” matters. He had only joined the team in April 2018, so he had not had much time to “stamp his authority.” The Tribunal found that the reason Mr Foote told Mr Houlston was because he was unhappy about the Claimant going to Mr Gee with the concerns. It was for the Respondent to show the ground on which Mr Foote told Mr Houlston that the Claimant had been to Mr Gee. Mr Foote denied doing so at all. No explanation for doing so was given. That does not necessarily mean that the reason was that the Claimant had raised concerns with Mr Gee. However, the Tribunal concluded that it was. The disclosure to Mr Gee was about shortcomings in an Operations Floor for which Mr Foote was responsible. His conversation with the Claimant when he knew he was going to see Mr Gee shows that he was conscious that it might have implications for him. It must have been obvious to him that telling one of the Claimant’s fellow SSMs, and particularly one with Mr Houlston’s reputation, might lead to repercussions for the Claimant, but he did it anyway. Those factors, together with the wholly misleading nature of his evidence and lack of any explanation for telling Mr Houlston, meant that the Tribunal was satisfied that the reason was that the Claimant reported the concerns to Mr Gee.

35. On the afternoon of 30 August 2018, Mr Foote asked to speak to the Claimant and they spoke in the bubble. Mr Foote had a list of 4 bullet points with him, some related to bullying and harassment, one was about signallers watching TV, which Mr Foote said he would deal with. It was apparent to the Claimant that Mr Foote had spoken to Mr Gee.

36. The Claimant says that in the afternoon of 30 August 2018 Mr Houlston told him that his behaviour was "unbelievable" and that he was a "grass." He says that by 2 September 2018 it was apparent that all of his peers knew about his meeting with Mr Gee. The Tribunal noted that Mr Greaves told Mr Jackson (during the subsequent disciplinary investigation) that Mr Houlston had informed him that the Claimant had reported concerns about York IECC to Mr Gee. Mr Roose told Mr Hayles that he had overheard such a conversation. Mr Blake called Mr Howell, who was on holiday, and told him that the Claimant had reported the SSMs to Mr Gee. Both Mr Houlston and Mr Greaves told Mr Miller.

37. There was repeated reference in the documents and the witness statements to the assertion that it was the Claimant who had told his own colleagues that he had seen Mr Gee and raised concerns about them with him. Not one witness who gave evidence had heard him do so, they were all reporting hearsay. The Claimant agreed that he did speak about it, but only after it became widely apparent that his colleagues were aware of the matter. Mr Houlston did not give evidence although he still works for the Respondent. The Tribunal was not told why. The Tribunal found that Mr Houlston did go and tell the SSMs and signallers that the Claimant had raised concerns with Mr Gee, that he did call the Claimant "a grass" and tell him that his behaviour was "unbelievable" and that that is how it became known among the SSMs that the Claimant had raised concerns with Mr Gee. Mr Houlston did so because the Claimant had been to Mr Gee and raised concerns about the conduct of the SSMs. The Claimant only spoke about it after that had become apparent. As well as noting that the Claimant gave evidence and was cross-examined whereas Mr Houlston did not, the Tribunal placed weight on the corroborating evidence from Mr Greaves and Mr Roose, and on the coordinated actions of the SSMs that followed.

38. The Tribunal's determination in respect of detriment 1 is therefore:

Mr Gee telling Mr Foote about C's disclosures.	Dismissed: happened but not because of disclosures
Mr Foote telling Mr Houlston.	Upheld
Mr Houlston telling others that the Claimant had "grassed them up."	Upheld

Detriment 3: Removal from substantive post (part)
Detriment 4: Unreasonable and protracted disciplinary investigation (part)
Detriment 12: Failure to prevent reprisals (part)

39. On 5 September 2018 Mr Houlston, Mr Blake, Mr Douglas, Mr Howell and Mr Miller (all SSMs) emailed Mr Foote making allegations about the Claimant ("the SSM letter"). The allegations were wide-ranging. They included being unwilling

to learn the workstations when he was first appointed; being reluctant to take advice and insisting on doing things his way; being deliberately distracting and unprofessional after failing to secure the SSM post; using the GSMR handsets inappropriately to send random text messages to other workstations; disparaging behaviour about a transgender colleague and about female colleagues; threatening signallers with the sack to motivate them to learn a new procedure; producing disparaging posters about the LOM or signallers; sending Network Rail material to his home address; uploading signaller voice tapes to his personal mobile phone; working beyond his rostered hours or when not on shift; and telling people he had a drinking habit and regularly arriving at work in a dishevelled state then drinking energy drinks and coffee all shift. In the letter, the SSMs described the Claimant as "power-crazed, inappropriate, inconsiderate, manipulative, naïve, and devious" and "a very poor choice as an SSM". They wrote that they were aware that he had "recently decided to complain (out of course) to a senior manager" about their "alleged failings" and that they felt this was "an affront" to all who worked there and had welcomed him. They felt that this eroded the good will and team focus of the staff. They asked that Mr Foote either got the Claimant "back on side" or found him a role elsewhere. Mr Williams (SSM) subsequently added his name to the list of those raising concerns.

40. The Tribunal had no doubt that the writing of the SSM letter was motivated by the fact that the Claimant had raised concerns with Mr Gee. That much was clear on the face of the email and was readily apparent in the witnesses' evidence. Mr Miller drafted the email. He reiterated in his evidence that the matters raised in the letter dated back over many months and were about the safety of the railway. He was not able to explain why the SSMs had not raised their concerns formally before, if that were so. He described the Claimant's complaint to Mr Gee as "the tipping point." At one point he suggested that this was really a concern for the Claimant's wellbeing, but he accepted that the letter did not say anything of the sort. Indeed, the language we have quoted above was far from suggesting a concern for the Claimant's welfare. Mr Blake was at pains to explain that the concerns were long-standing. He said that the Claimant's complaint to Mr Gee brought it into focus and led to the letter of concern in "that narrow sense." Eventually he accepted that the email would not have gone "on that day" if the Claimant had not complained. He suggested that the SSMs "would or might" have complained at a later date. Mr Blake admitted that he had called Mr Howell at home to tell him that the Claimant had been to see Mr Gee and find out what he knew. He explained, "You don't shoot from the hip without getting the full facts." It was clear to the Tribunal that that was precisely what the SSMs were doing – "shooting from the hip" in retaliation for the Claimant going to Mr Gee. A number of the witnesses insisted that they were not retaliating, but were "defending themselves" or "defending their professionalism." Maybe they have now convinced themselves that that was what they were doing, but they clearly were not. Their letter does not contain any "defence" to the allegations, for example denying them or explaining the SSMs' version of events. It is simply an attack on the Claimant, listing a whole range of mainly unrelated criticisms of him. The SSMs had not felt the need to raise a formal complaint about these long-standing matters prior to 5

September 2018. The only thing that changed was the Claimant going to Mr Gee.

41. Mr Foote said that he considered that the concerns were serious. He passed them onto HR so that an investigation could start. He appointed Mr Jackson (LOM, Hull) to investigate.

42. Mr Foote called the Claimant. He asked him not to report for normal duties but to come in for a chat as some allegations had been raised about him. The Claimant came in on 6 September 2018. They spoke in the stairwell. Mr Foote said that this was because he forgot to book a meeting room and none were available. It was plainly inappropriate to hold such a conversation in the stairwell. This was a small but characteristic example of the mismatch between Mr Foote's repeated insistence that everything he did was with the Claimant's wellbeing in mind, and the reality of his actions. However, the Tribunal accepted that this was an oversight by Mr Foote and was not done because the Claimant had been to Mr Gee.

43. Mr Foote outlined the allegations to the Claimant and told him that Mr Jackson had been appointed to investigate. He refused to give him a copy of the SSM letter. His evidence was that it was not for him to do so; that was a matter for Mr Jackson. The Tribunal accepted that evidence. We would not necessarily expect a manager in Mr Foote's position to give an employee a copy of such a complaint in those circumstances. The Claimant tried to respond to some of the allegations there and then. Mr Foote told him that there would be an investigation, outcome and recommendations. The Tribunal found that that was simply a factual statement of the inevitable consequence now that a disciplinary investigation had been instigated. It was not detrimental treatment. The Claimant gave evidence that when he tried to respond to the allegations Mr Foote told him, "I've heard your excuses." Mr Foote said in his witness statement that the Claimant attempted to respond to some of the allegations but that he told him Mr Jackson was responsible for investigating them and the purpose of the meeting was just to make him aware of the allegations and to ensure he was ok. In cross-examination, Mr Foote was asked about the fact that he subsequently told Mr Hayles that he <u>was</u> interested in the Claimant's reaction to the allegations, and that his reaction was "acceptance and excuse, denial." It was suggested to him that this indicated that telling the Claimant he had "heard his excuses" was precisely what he had said. He denied it. Mr Foote was not able to give a rational explanation of why his evidence to the Tribunal was different from what he told Mr Hayles.

44. In cross-examination Mr Foote accepted that it was clear to him now, on the face of the SSM letter, that it was written as a direct result of the Claimant raising his disclosures with Mr Gee, but he said that was not clear to him at the time. He accepted that during the conversation on 6 September 2018, the Claimant may well have expressly made the point that his colleagues were trying to get him sacked days after he had spoken out about his concerns regarding the York IECC. Eventually Mr Foote accepted that he has never taken any steps to investigate whether colleagues were victimising the Claimant for raising concerns with Mr Gee. He denied that it was because he "thought the Claimant had it coming to him." The Tribunal found that it must have been

obvious to Mr Foote that the SSMs were retaliating for the Claimant going to Mr Gee. That was obvious on the face of the letter, and the Claimant was making the point too.

45. Instigating a disciplinary investigation (and conversely not pursuing the possibility that this was an act of retaliation by the SSMs) was detrimental treatment of the Claimant. The Tribunal considered whether Mr Foote did it because the Claimant went to Mr Gee. We concluded that part, at least, of his reasoning was his continuing unhappiness about the Claimant going to Mr Gee. The SSM letter did contain allegations that were, on the face of it, serious, and serious allegations could not be ignored. But there must at that stage have been the possibility that they were made up, exaggerated or historic. We would have expected that at least to be considered before a decision was made about whether to instigate a disciplinary investigation. The obvious explanation for Mr Foote's apparent indifference to that appeared to the Tribunal to be his unhappiness about the Claimant going to Mr Gee. Fundamentally, we found that Mr Foote shared the SSMs' unhappiness that the Claimant had been to Mr Gee rather than, as far as Mr Foote was concerned, coming to him and letting him deal with it. Consciously or sub-consciously he aligned himself with the SSMs for that reason. That is why he immediately instigated a disciplinary investigation and did not examine the possibility that the SSMs were making something out of nothing. The fact that Mr Jackson subsequently found that some of the conduct did take place is irrelevant. Mr Foote did not know that at the time.

46. Mr Foote told the Claimant to take the rest of the day and the next day off work. They arranged to meet on 10 September 2018 (subsequently changed to 11 September 2018 at the Claimant's request). Mr Foote told the Claimant that he was not suspended but would continue to receive his basic pay. Mr Foote took a decision to remove the Claimant from his duties. His evidence in his witness statement was that he discussed it with HR and with Mr Gee. He decided that the Claimant should be removed from the other SSMs "to protect future working relationships" and that because there were six of them and one of the Claimant, it was most appropriate and proportionate to move him. He needed to make sure there were enough people for the railway to operate safely.

47. In cross-examination, Mr Foote repeatedly said that the Claimant had been removed from his duties for safety reasons because the allegations made by the SSMs raised concerns about his ability to perform the SSM role safely. That was not what his witness statement said. Although there was a reference in his witness statement to "safety" concerns, that was in the context of the impact on working relationships, and that was the reason Mr Foote gave for removing the Claimant from his post. Indeed, he included some "concluding remarks" in his witness statement, stating that every decision he made was with the Claimant's best interests in mind, and that the Claimant was removed from his substantive role in September 2018 for that very reason – "to avoid the breakdown in working relationships." That is obviously inconsistent with his insistence in cross-examination that this was a decision made because there were concerns about the Claimant's ability to operate the railway safely.

48. Mr Foote was asked about whether he had spoken to the SSMs at the time to see whether they were willing and able to work with the Claimant while their allegations were investigated. He had not. It did not appear that at that stage the SSMs were refusing to work with the Claimant. Mr Foote was asked whether Mr Houlston was subsequently removed from his duties when allegations of bullying and harassment by him were the subject of a disciplinary investigation. He initially said that he could not remember. It was pointed out to him that that investigation had lasted a number of months, and that he must know whether or not he removed Mr Houlston from his substantive post. He accepted that he did not. He said that he could not remember why. It might have been because the Claimant was no longer in the environment. It was pointed out to him that the allegations against Mr Houlston involved people other than the Claimant. He then said that the investigation concluded after he had moved to a new role. His attention was drawn to the fact that that was incorrect. It was then put to him that the allegations about Mr Houlston were serious, involved people other than the Claimant, and might affect working relationships and therefore safety. He agreed. Mr Foote was not able to explain why Mr Houlston was not removed from his post for such concerns, but the Claimant was.

49. Removing the Claimant from his substantive post was plainly detrimental treatment. The Tribunal concluded that, in part, Mr Foote did it because of the Claimant raising concerns with Mr Gee. The Respondent did not show the ground on which it was done. For the reasons outlined above, Mr Foote's evidence about this was again wholly inconsistent and implausible. It does not follow that the reason was that the Claimant went to Mr Gee, but the Tribunal concluded that, at least in part, it was. In doing so, we drew inferences from the nature of Mr Foote's evidence, and we also took into account the different treatment of Mr Houlston subsequently. We concluded that this was part of the same unhappiness by Mr Foote about the Claimant going to Mr Gee and his response to that. Part of his motivation for getting the Claimant out of his role was that he had been to see Mr Gee and caused problems. That influenced his actions when the SSMs were raising criticisms of the Claimant.

50. The Tribunal's determination in respect of these parts of detriments 3, 4 and 12 was therefore:

Mr Foote removing the Claimant from his substantive post September 2018.	Upheld
Mr Foote inviting the Claimant for an informal chat, conducting it in the stairwell and prejudging that there would be an outcome and recommendations.	Dismissed: happened but not because of disclosure
Mr Foote instigating disciplinary investigation.	Upheld
Mr Foote failing to prevent reprisals, namely SSMs refusing to work with C 4 working days after disclosure.	Dismissed: SSMs did not refuse at that stage

Detriment 4: Unreasonable and protracted disciplinary investigation (part)
Detriment 9: Delays and process failures (part)
Detriment 11: Failure to respond to concerns (part)
Detriment 12: Failure to prevent reprisals (part)

51. The Claimant called Mr Gee on 7 September 2018. He complained that Mr Gee had broken his confidence. Mr Gee had by then heard rumours that the Claimant had been talking about their conversation in the operations room. He did not ask the Claimant if that was correct. He told him that the only possible source of the information was the Claimant. He did not mention that he had discussed the Claimant's disclosures with Mr Foote. He did tell him to let the investigation run its course. In cross-examination, Mr Gee accepted that he was not surprised when the Claimant's SSM colleagues raised concerns with him, because he understood that the Claimant had told people on the operations floor that he had been to see Mr Gee and Mr Gee was going to sort things out. Mr Gee accepted that his thought process was that the SSMs must have complained about the Claimant because he had complained about them. It was then put to him that he must therefore have realised that the SSMs letter might be by way of retaliation for the Claimant's complaint. He insisted that he did not think of it that way. He was asked whether he had taken any steps to find out whether this was an act of retaliation and he said that he did not think of it that way. It was repeatedly put to him that it must have been apparent to him when the Claimant spoke to him on 7 September 2018 that the Claimant was saying that the SSMs letter had been written because his colleagues had found out what he had said to Mr Gee. Mr Gee's answers were unconvincing. It seemed to the Tribunal that his focus was on whether he had breached the Claimant's confidence, not on whether, regardless of who breached it, the SSMs were retaliating. The Tribunal had no doubt that it was obvious to Mr Gee, and Mr Gee must have realised, that there was a possibility that the SSM letter was an act of retaliation for the Claimant raising concerns. Indeed, he had said as much in the earlier part of his evidence. However, the Tribunal found that the reason Mr Gee did not do anything about the possibility that the SSMs were retaliating against the Claimant was not because the Claimant had made protected disclosures. It was because his focus was not on the possibility that the SSMs were retaliating, it was on whether or not he had breached the Claimant's confidence. Further, Mr Gee told the Tribunal repeatedly that the Respondent has an open culture where the raising of concerns is welcomed. His belief that that was the case appeared to the Tribunal to have blinded him to the possibility that the reality was not always the same as the written policy.

52. Mr Fox returned from annual leave on 10 September 2018. Mr Foote told him about the Claimant going to Mr Gee and about the SSM letter. His evidence was that he found out about both things at the same time. In cross-examination, it was suggested to Mr Fox that he was unhappy that the Claimant had gone behind his back to Mr Gee. He said that he was not. He too asked about what he subsequently said to Mr Hayles. He told Mr Hayles, "You'll be aware that things escalated when [the Claimant] spoke to [Mr Gee] about a number of issues. … I felt like [the Claimant] waited until I went on holiday. We'd had a disagreement [about the handling of the Hambleton incident], I am the manager

so I thought as manager I am ok and feel free to escalate although [the Claimant] waited until I had gone on holiday." In cross-examination, Mr Fox denied thinking that the Claimant had "gone behind his back." He was asked what the concern was about the Claimant (in his view) waiting until he had gone on holiday. He said that there was no concern. He was unable to explain why he had told Mr Hayles his view that the Claimant had waited until he went on holiday, if that was the case. His only explanation was "that was how I felt." The Tribunal did not consider that to be an explanation of why Mr Fox thought it was relevant to make this point, more than once, to Mr Hayles. We found that the explanation was that Mr Fox was unhappy that the Claimant had "gone behind his back" to Mr Gee, escalating matters that he as a manager had dealt with.

53. On 11 September 2018 Mr Foote and Mr Fox met the Claimant, with his trade union representative, Mr Hall. There was discussion of the investigation process and the Claimant's welfare. It was confirmed that the Claimant was not suspended but that he should not return to the IECC because of "safety critical" and "authority" concerns. There was discussion about what work he should do. Three options were suggested. The Claimant was to tell Mr Fox the next day which he preferred. In the event, the Claimant agreed with Mr Fox on 4 October 2018 (after the Claimant returned from a period of annual leave) that he would work in the Control Team, and he started work there on 8 October 2018.

54. Mr Foote accepted in evidence that he refused to provide the Claimant with copies of the allegations against him (or the witness statements that were provided). He said that it was for Mr Jackson to provide copies to the Claimant as investigating officer. The Tribunal accepted that that was the reason. We would not expect a line manager to provide such material to an employee who was the subject of an investigation.

55. Mr Jackson was in place as investigator by 7 September 2018. Mr Foote told him at the time that the Claimant had raised concerns about staff and working practices at York IECC. Mr Jackson said that he did not share details with him.

56. Mr Jackson was added to the HR direct system on 7 September 2018. It appears that he received advice, which was recorded on the system, on 13 and 17 September 2018. On 17 September 2018, the file note recorded that the Claimant had two weeks' annual leave booked from 17 September 2018 to 1 October 2018, and was aware that the investigating manager would be in touch on his return. Mr Jackson did contact the Claimant on his return from annual leave. His evidence was that he needed to read the documents and take advice from HR before contacting the Claimant. Further, he did not want to contact the Claimant during his annual leave. The Claimant's protected disclosures had nothing to do with it. The Tribunal had no hesitation in accepting Mr Jackson's clear and straightforward evidence, which was consistent with his actions and the documents at the time. He was throughout the investigation doing his best to investigate the matters raised, as promptly as was reasonably possible.

57. Mr Jackson did begin his investigations before speaking to the Claimant. On or around 21 September 2018 he visited York IECC and met Mr Fox. He asked him for a statement. He also spoke to Mr Blake, whom he described as the "lead" for the SSMs. He followed up with an email, asking Mr Blake to liaise with

his SSM and signaller colleagues to provide him with "any evidence that supports" the allegations, including written or photographic evidence, voice recordings and signaller statements or names. Mr Jackson's evidence to the Tribunal was that he just wanted the underlying evidence to give the allegations "a bit of solidity." If they were putting forward these allegations, he expected them pretty much to be able to get the evidence, "off the shelf." He accepted that his email was poorly worded in asking for statements from people. Mr Miller emailed Mr Jackson on 29 September 2018, with a letter prepared by Mr Blake on behalf of the other complainants. The letter said that the SSMs had not raised concerns by way of retaliation, but out of concern for the Claimant's mental health, his ability to work in a safety critical environment and from a standpoint of countering allegations the Claimant had made against the team. Mr Miller gave two specific examples of minor incidents involving himself and the Claimant. Mr Miller said that, at Mr Jackson's request, he and the other SSMs had "canvassed" signallers as to whether they would be prepared to provide a witness statement for Mr Jackson. Twenty names were provided, another twenty were unwilling to give evidence and six were absent. Mr Miller said that most if not all staff had been contacted by the Claimant by text or phone, some "to the point of badgering." One further concrete allegation was made, that the Claimant had circulated a meme comparing Mr Houlston to Hitler. Mr Jackson accepted in cross-examination that he was frustrated and it caused him to raise his eyebrows when he discovered that the SSMs had been out on the operations floor canvassing in that way. It did occur to him that this might be retaliation for the Claimant going to Mr Gee. However, he considered that he was tasked with investigating the disciplinary allegations that had been raised and he stuck to that task. Again, the Tribunal accepted that Mr Jackson's actions had nothing to do with the Claimant's protected disclosures. Initially, he simply wanted the SSMs to provide any evidence about the allegations they had made, and he then set about investigating those allegations, as he had been tasked with doing.

58. Mr Jackson spoke to the Claimant by phone on 5 October 2018, to introduce himself and check whether the Claimant had any medical concerns. On 12 October 2018, Mr Jackson wrote to the Claimant inviting him to a disciplinary investigation meeting. The letter set out six allegations of potential misconduct, identified by Mr Jackson from the wide-ranging allegations, namely:

(1) Making inappropriate and disparaging remarks about colleagues, including producing posters and voice recordings;
(2) Threatening signallers with dismissal as a means of motivating them;
(3) Sending Network Rail material to his home email address;
(4) Attempting to discredit the new control system ("Scalable"), including printing off and disseminating potentially sensitive information;
(5) Telling several people he had a heavy drinking habit and regularly attending work looking tired and unwashed;
(6) Making a large library of voice tapes, in breach of confidentiality.

59. The Claimant was not provided with dates, times or specifics at that stage. The Claimant met Mr Jackson on 17 October 2018, with his trade union representative (Mr Hall) and a note-taker present. Mr Jackson asked him about a number of the allegations in the letter. The Claimant gave responses. He

admitted to participating in some "banter." He told Mr Jackson that he thought the allegations were retaliation for his raising concerns with Mr Gee.

60. The Claimant wrote directly to Mr McIntosh, Route Managing Director, on 25 October 2018, referring to his safety concerns and complaining that he was now facing disciplinary allegations by way of retaliation. He referred to himself as a whistleblower. He referred, among other things, to continued flagrant disregard of operational rules and regulations. He asked Mr McIntosh to review what had happened and provide an assurance that he would be protected as a whistleblower. Mr McIntosh replied by email on 26 October 2018. He thanked the Claimant, told him that he was not the only person raising concerns about York IECC and said that he would look into the specifics of the Claimant's situation and come back to him. He did not send the Claimant any further response, nor did he ask anybody else to do so. In cross-examination he accepted that it would have been "prudent" to do so. In answer to a question from the Tribunal about whether he wanted to reflect on that choice of word, he said that sending a response to the Claimant would have been "the right thing to do."

61. Mr McIntosh's evidence was that the Claimant's protected disclosures were not the reason he failed to send a substantive response. He said that he forwarded the Claimant's letter to Mr Greenwood (Head of Route HR) and they then spoke. He had already commissioned a piece of work to review working practices at York IECC and he agreed with Mr Greenwood that some of the Claimant's concerns would be picked up in that. Mr Greenwood also made him aware of "the difficulties [the Claimant] was having with his manager" and that this was already being looked into. Mr McIntosh said that he was satisfied that the wider issues would be covered in the review he had commissioned and that the personal concerns were already being investigated. He had a follow-up conversation with Mr Greenwood but did not keep notes. Mr Greenwood told him that he had informed Mr Hall, the Claimant's union representative, about the Claimant's letter to Mr McIntosh and their proposed response.

62. In cross-examination, Mr McIntosh was asked what investigation, ongoing in October 2018, was looking into whether the Claimant had been ostracised or victimised. He said again that there was an ongoing investigation into the relationship between the Claimant and his managers. The Tribunal noted that there was no such investigation. The only investigation was the disciplinary investigation into the allegations in the SSM letter. There was no investigation looking into whether the Claimant had been ostracised or victimised. Mr McIntosh was also asked in cross-examination about which part of the terms of reference for the IECC review covered the Claimant's allegations about disregard of rules and regulations. He said that it was covered by the third aspect, "overall culture within the IECC to determine that the environment is suitably diverse and inclusive and that individuals, managers or signallers, are able freely to express their views and concerns." It seemed to the Tribunal that this part of the terms of reference plainly did not include a review of whether there was compliance with rules and regulations at the York IECC. Unsurprisingly, the relevant part of the report that was produced in December 2018 did not consider whether or not there was disregard of rules or regulations. The Tribunal also noted that, according to the report itself, Mr

McIntosh did not commission it until 9 November 2018, two weeks after the Claimant contacted him. Mr McIntosh also confirmed in his oral evidence that he did not obtain the Claimant's permission to speak to Mr Hall about his letter and he did not know whether Mr Greenwood did so. Mr Greenwood did not give evidence to the Tribunal. The Tribunal was left with Mr McIntosh's evidence that the Claimant's wider concerns would be addressed by the existing review into the York IECC, when they manifestly would not be, and were not and that review had not yet been commissioned; and his evidence that he was told the Claimant's concerns about being ostracised and victimised for being a whistleblower would be dealt with by an ongoing investigation looking at the relationship between the Claimant and his managers, when there was no such investigation.

63. The Tribunal found that not responding substantively to the Claimant's letter was detrimental treatment of him. It is for the Respondent to prove the reason for that treatment. It has not done so. Mr McIntosh's explanation simply does not add up. It does not necessarily follow that the reason was the Claimant's protected disclosures. However, the Tribunal concluded that that was the reason. Mr McIntosh knew that the Claimant had made protected disclosures from his letter. He promised a substantive response but did not send one. In the interim, the Head of HR became involved, and was clearly asking questions behind the scenes, including going to the Claimant's trade union representative without involving the Claimant. The review, commissioned after the letter, did not ask the team to look at whether rules and regulations were being followed in York IECC. Nobody looked into whether the Claimant was being ostracised or victimised. All of that creates the impression that the Respondent did not want to deal openly with the concerns the Claimant had raised and that the reason he did not get a substantive response from Mr McIntosh was that he was a whistleblower asking difficult questions.

64. Two anonymous letters were sent to Mr Hall in early October. One said that the author was concerned about a miscarriage of justice in relation to the investigation of the Claimant's conduct. It suggested that SSMs and signallers were openly discussing it; the author had overheard a comment about one member of staff having another's back; lack of confidentiality about the investigation interview process; and comments from some staff that the Claimant would never be returning to the York IECC "guaranteed." The other letter described the investigation as a "witch hunt" and said that the Claimant had no chance of a fair investigation as the duty SSM had been seen asking signallers if they wanted to add any complaints. The author had been asked to complain of bullying and harassment by the Claimant, but had not witnessed such behaviour. There had been weeks of open discussion about the Claimant. Mr Hall shared the letters with "iEthics", the Respondent's Business Integrity Department. They told him to speak to local HR. When he asked if it would be investigated, he was simply told, "Please contact [Ms Pickup]." Mr Hall also shared the anonymous letters with Mr Jackson. Mr Jackson took the view that he could not take the letters into account because they were anonymous. He took HR advice about that, and also noted what the Respondent's disciplinary policy says about only using anonymous statements in exceptional circumstances. He did not himself look into whether people had been put under

pressure to make complaints about the Claimant. His evidence to the Tribunal was that his remit was to investigate the allegations that had been made, and that was what he focussed on and did.

65. The Tribunal found that not looking into the allegations made in the anonymous letters was potentially detrimental treatment of the Claimant. However, the burden is on the Claimant in the first instance to show that a ground for detrimental treatment is the making of a protected disclosure. We did not consider that he had discharged that burden in relation to the Business Integrity Department. All the Tribunal was told was that that Department referred Mr Hall to local HR. That was not enough. As regards Mr Jackson, the Tribunal accepted his evidence that he acted on HR advice that it was not for him to look into the allegations in the anonymous statements. His role was to investigate the disciplinary allegations and he did so. The Claimant's protected disclosures had nothing to do with it.

66. As noted above, the Claimant had started work in the Control Team on 8 October 2018. However, he was struggling with his mental health and was signed off sick with work related stress. He returned to work on 26 October 2018. In advance of that, he met Mr Fox, with Ms Pickup (HR) and Mr Hall.

67. On 26 October 2018 Mr Fox emailed Mr Foote. He reported to him that following a welfare meeting with the Claimant on 23 October 2018, Mr Hall had told him in private that the Claimant was being subjected to homophobic bullying by Mr Houlston. On 24 October 2018, Mr Fox had also conducted a return to work meeting with Mr Heaton. Mr Heaton told him that he had been under stress because he had been pressured to make a complaint about the Claimant. Mr Heaton also told Mr Fox that Mr Houlston had been subjecting the Claimant to homophobic bullying since he started at the IECC, and that it had been made worse by the Claimant defending Mr Fox from such abuse in his absence. Mr Heaton told Mr Fox that Mr Houlston had undermined the Claimant before he arrived, by telling staff that he had "appointed a canary who would tell him everything that was going on." In his email of 26 October 2018 to Mr Foote, Mr Fox wanted an HR Direct case to be raised and the matter to be investigated. In cross-examination, Mr Foote was unable to identify any action he had taken in response to Mr Fox's email and the suggestion that Mr Heaton had been pressured to make complaints about the Claimant. He said that he assumed it would be picked up by Mr Jackson, but accepted that he had not drawn it to Mr Jackson's attention. He was asked if he had spoken to Mr Heaton about it and he said that it would not be for him to do so. He was asked whose responsibility it was to follow his up, if not his or Mr Fox's, and he accepted that it was potentially his. Mr Hayles was subsequently appointed to investigate allegations into Mr Houlston, but that was the following February, and was in response to allegations made by the Claimant and Mr Hall during the disciplinary process.

68. The Claimant emailed Mr Jackson on 15 and 16 November 2018. He gave him a list of witnesses to speak to. He mentioned again that the allegations against him were retaliation for his speaking to Mr Gee, and said that, in particular, staff did not want to lose their chance to take "flyers" (i.e. to leave shift early), which Mr Houlston was known generously to permit. Ultimately, Mr Jackson

recommended that the allegations against Mr Houlston should be investigated separately.

69. Mr Jackson interviewed Mr Houlston (15 November 2018), Mr Douglas (15 November 2018), Mr Blake (30 November 2018) and Mr Miller (6 December 2018). He contacted Mr Greaves in writing. In the course of those interviews, Mr Douglas told Mr Jackson that in his view the SSM allegations were prompted because the Claimant went to see Mr Gee about signaller bad practices, including watching TV and sleeping on shift. Mr Blake told Mr Jackson that "of course" there was a connection between the Claimant speaking to Mr Gee and the SSMs' allegations. They felt that he raised things that he himself did. Mr Blake said that he did have concerns about the Claimant and, since issues were raised, they "might as well all be involved." The Claimant's seeing Mr Gee was "not the sole driver" behind the allegations. Mr Miller said that he had concerns about the Claimant's behaviour over a period. He became the "sole topic of conversation" when he wasn't in the room. It "came to a head" when he seemed to have "lost respect" for his own manager and Mr Foote and there was lots of information that he was speaking to others higher up. Allegations were being raised against others when the Claimant had done much worse himself, which seemed hypocritical. Many of those spoken to described the Claimant as "quirky" and expressed concerns about his mental wellbeing.

70. Mr Jackson produced a written investigation report on 21 December 2018. He did not uphold any of the allegations against the Claimant. In outline he found:

70.1 Claimant did use his mobile phone on duty but so did many other signallers. The Respondent's policy was not being adhered to within the York IECC.
70.2 There was no evidence that the Claimant had shown a pornographic image to a colleague.
70.3 There had been discussion about the transgender colleague, in her absence, some time ago. Mr Jackson found it hard to believe that the Claimant was the only one reported out of 58 staff.
70.4 Inappropriate remark(s) about a female colleague had been dealt with informally at the time.
70.5 The Claimant's threat of "the sack" had been taken out of context. He had the right intention wanting to get something across to staff.
70.6 The Claimant had produced posters about close calls for safety reasons. Some had been defaced. There was no hard evidence about that.
70.7 The Claimant had sent material to his home email address, but for work purposes. Mr Jackson had no concerns. He recommended seeing whether a laptop should be provided.
70.8 The Claimant had uploaded voice recordings to his mobile phone, but for work purposes to improve communications.
70.9 The Claimant had been disparaging about the new control system, but acted in the manner he thought was right. His quirkiness and the way he went about it were not what his colleagues expected.
70.10 There were no official reports of concerns about the Claimant having a drinking habit and no real concerns that he was under the influence. Most SSMs said that they would have reported it at the time if they had had such suspicions.

70.11 Mr Jackson recommended that help be offered to the Claimant, not discipline.

71. In summary, Mr Jackson had no doubt that the Claimant had done some of the things alleged, but not all in the manner alleged, and with many being dealt with informally at the time. He could see why people described the Claimant as quirky. He believed the Claimant had a passion for his role, had tried to fit in and had tried to change things. That had not been taken well by some staff, by what appeared to be a poor culture among them. Mr Jackson's main concern was the Claimant's state of mind. He recommended a full stress risk assessment for the Claimant, to be undertaken by a suitably qualified professional. He recommended a disciplinary investigation into allegations of bullying by Mr Houlston. He also recommended taking steps at York IECC relating to the audit trail for voice recordings; LOM workload (with the suggestion that an additional LOM would allow more quality and attention to detail and help to improve day to day management of signallers, change culture and raise standards); an independent review of culture and working practices at York IECC; and a review of the implementation of the Respondent's mobile phone policy in York. Mr Jackson called the Claimant on 24 December 2018, to let him know the outcome of the investigation before Christmas. He confirmed it in writing on 2 January 2019 and they met on 9 January 2019.

72. Mr Jackson gave evidence that he had progressed the investigation as quickly as he was able to. The investigation took longer than he would have liked, but it took time to complete these things properly. The Tribunal accepted that he found it difficult to get SSMs released from duty to attend interviews. We noted that the York IECC was moving to the York ROC at that time, and that the SSMs were required to deliver training on the new Scalable system. He pointed out that there was a large number of allegations, and that they were serious. Mr Jackson said that none of his actions was taken as a result of the Claimant's protected disclosures. The Tribunal accepted Mr Jackson's evidence. He gave a clear and consistent account of why it took around four months to conclude his investigation into these allegations and his explanation rang true. There was a large number of allegations, and it was plainly difficult to have SSMs made available for these types of interviews. We noted, too, that Mr Jackson took the trouble to call the Claimant before Christmas, rather than making him wait for an outcome in January. That is inconsistent with his deliberately delaying because of the Claimant's protected disclosures.

73. The Tribunal noted that in correspondence in 2020 with Mr Miller, who had raised concerns that the allegations raised by the SSM team in 2018 had not been properly investigated, Mr Fox told him that the disciplinary investigation carried out by Mr Jackson had been reviewed, both by a Mr Henry and then by a Mr Rutter. The original findings had been upheld. Mr Foote, who had commissioned the investigation and was responsible for implementing the outcome, was completely unable in cross-examination to explain how or why it had come to be reviewed by Mr Henry and Mr Rutter. He confirmed that they were senior people, at the level of Mr Gee or higher. Mr Jackson confirmed in cross-examination that Mr Henry had called him out of the blue, maybe 12 to 18 months after the investigation concluded, to ask him about how he had reached his conclusions and so on. He was not told why it was being reviewed. Mr

Jackson told the Tribunal that he had done numerous investigations, but this had never happened before. We return to this below.

74. The Tribunal's determination in respect of these parts of detriments 4, 9, 11 and 12 was therefore:

Mr Foote refusing copies of documents including statements against C. Not providing copy of allegations, allowing disciplinary to be pursued.	Dismissed: happened but not because of disclosure
Following a lengthy and protracted disciplinary procedure.	Dismissed: happened to an extent but not because of disclosure
No response to concerns raised by union about reprisals.	Dismissed: response given in part and not because of disclosure
Delay in disciplinary investigation impacting C's ability to return to work.	Dismissed: happened to an extent but not because of disclosure
Failure to respond to letter to Mr McIntosh about whistleblowing detriment	Upheld

Detriment 2: Ostracising C (part)
Detriment 3: Removing C from substantive SSM post (part)
Detriment 9: Delays, process failures, failure to comply with recommendations (part)
Detriment 10: Inappropriate work (part)

75. During the disciplinary investigation, Mr Fox had kept in touch with the Claimant. He referred him to Occupational Health ("OH"), and he was seen on 16 November 2018. On 28 November 2018 the OH advisor said that he was not fit for safety critical duties at that time. The OH report recommended clear communication about the investigation with set time-lines for outcomes. Mr Fox had concerns about the Claimant and whether he was feeling suicidal, prompted in part by comments or text messages sent by the Claimant. He encouraged him to access support through the Respondent's provider, Validium, or through his own GP. The Tribunal noted Mr Fox's evidence that he found managing the Claimant at this time very difficult, because the Claimant would contact him and tell him about how bad things were, but seemed reluctant to seek professional help. Mr Fox ended up worrying about him. In due course, a different Welfare Manager was appointed for the Claimant for that reason. It was Ms Pickup.

76. The Claimant started another period of sick leave on 3 December 2018 (when he was still awaiting the outcome of the disciplinary investigation). He was assessed again by OH on 31 December 2018. There was clear improvement. OH advised that he was not currently fit to work, but that it was hoped his symptoms would improve once there was a plan to help him return to work. The advisor recommended a phased return with a number of supportive measures. They were to review him in three weeks.

77. The Claimant's fit note was due to expire on 13 January 2019. He spoke to Mr Fox by telephone on 10 January 2019. Mr Fox's notes record that the Claimant was intending to return to work on 14 January 2019. They discussed the medical advice that a plan be in place for his return and agreed that he would come in for a welfare meeting on 15 January 2019 to discuss options and arrangements for his phased return. They agreed to discuss the OH report when they met in person.

78. The Claimant met Mr Fox, with Ms Smith (HR) and Mr Hall on 15 January 2019. Mr Fox's evidence was that they told the Claimant that he could not return to work until OH said that he was fit to do so. They told him that if he was deemed fit at his forthcoming OH review, he would be able to start a phased return to his SSM role. They then discussed what his phased return would involve, some of the training he would need, and the possibility of mediation to re-build relationships with colleagues. The Claimant's OH review was due to take place on 21 January 2019. The Claimant said that the meeting with Mr Fox went well. He made notes at the time recording a plan for his phased return to work, starting on 24 January 2019.

79. The Tribunal found that it was clearly agreed that, assuming OH signed the Claimant as fit to return when they reviewed him, he would immediately start a phased return to his SSM post in accordance with the plan outlined on 15 January 2019. That was consistent with the Claimant's notes; with Ms Smith's notes, setting out proposed activities for particular days or dates; and with the entries made in the HR records by Mr Fox on 14 and 17 January 2019. The Tribunal also found that mediation was discussed as something potentially helpful to repair relationships alongside the Claimant's return to work. It was not identified as a pre-condition of his return. That was clear from the typed notes of the meeting; Mr Fox's entry in the HR notes on 17 January 2019; and Ms Smith's email to Mr Fox on 16 January 2019, sending him a mediation referral form, in which she wrote, "It may be worth, when speaking to your staff about [the Claimant] returning to work, that we would like to support all staff and if they would like to attend mediation, we can add them to the form?" The Tribunal found Mr Fox's evidence in cross-examination, that it was his "gut feeling" that mediation was always intended to be concluded before the Claimant returned to his substantive post, unconvincing and implausible. That suggestion was inconsistent with the agreement at this meeting that he would return the following week if OH signed him as fit. It plainly was not intended that mediation would take place during that week.

80. At the meeting on 15 January 2019, there was discussion of Mr Jackson's recommendation for a stress risk assessment ("SRA"). Ms Smith said that she would speak to Ms Hannar about it. Mr Fox asked the Claimant to meet Mr Foote the next day to do an SRA. Again, it is clear that the SRA was to be done on 16 January 2019 – that plan is recorded in Mr Fox's entry in the HR notes on 14 January 2019.

81. At 10am on 16 January 2019 Mr Foote emailed Mr Fox with an "action tracker", setting out the actions arising from Mr Jackson's investigation and in relation to the Claimant's return to work. It identified that Mr Fox was to agree the phased

return to work and that an OH appointment was required to confirm fitness for duties.

82. The Claimant, Mr Hall and Mr Foote met around lunchtime on 16 January 2019. The Claimant says that Mr Foote commented that he understood there had been a successful meeting and plan with Mr Fox the previous day, apologised for the delays with the disciplinary investigation and shook the Claimant's hand, saying, "Welcome back to the team." Mr Foote accepted that. The Claimant had by that time heard that some of his colleagues were unhappy about his return and he mentioned that to Mr Foote. Mr Foote told him that any insubordination towards the Claimant would be dealt with. The Claimant mentioned his concerns that he had lost pay (overtime) during the disciplinary process and Mr Foote told him to let him have some figures. The Claimant made notes at the time, which are consistent with his account.

83. It was put to Mr Foote in cross-examination that as far as he was concerned on 16 January 2019, as things stood the Claimant would return to work on a phased return after the OH appointment on 21 January 2019, provided OH gave the all clear. He agreed, though he said that they did not know the specifics of the phased return. It was put to him that it was anticipated that the phased return would start the following week and he accepted "potentially, yes." The Tribunal had no doubt that the agreement and understanding at the conclusion of the meeting was that, provided OH confirmed the Claimant's fitness for work on 21 January 2019, the Claimant would start his phased return, as outlined on 15 January 2019, the following week.

84. At around 2pm on 16 January 2019 Ms Smith emailed Ms Hannar about an SRA. She said that Mr Foote had initiated a full in-depth SRA "today" and asked for Ms Hannar's expert advice and guidance. There were emails arranging for Ms Hannar to meet Mr Foote and Mr Fox the following week 22 January 2019. In an email of 17 January 2019, copied to Mr Foote, Mr Fox and Ms Pickup, Ms Hannar emphasised that an SRA was a collaboration between manager and employee to identify what support might be required and whether it could be provided. She also said that if they felt that more information was required to support the Claimant's state of mind, she would recommend a case conference with the OH clinician, to explore underlying issues and possible support. That might be provided by OH physician review or psychologist review. As regards the SRA, Mr Foote had not in fact instigated the SRA. It was never done. In his witness statement, Mr Foote sought to elide the SRA with a mental wellbeing toolkit that was used the following year. In cross-examination he accepted that he was responsible for doing the SRA as recommended by Mr Jackson. His only explanation for not doing so was that it "fell through the cracks". The Tribunal noted Mr Fox's evidence that the meeting with Ms Hannar never took place the following week because she was off sick. It seemed likely to the Tribunal that the SRA did indeed "fall through the cracks" because it was seen as part of the Claimant's return to work, and as we now explain, that return to work did not take place as planned. The Tribunal found that that was the reason why Mr Foote did not carry out the SRA, not the Claimant's protected disclosures.

85. At 18:59 on 16 January 2019 Mr Houlston texted Mr Fox

> *Rumours are circulating that Sam is starting back next week and is fully exonerated from any charges is this correct? And if so it will have far reaching consequences not just for the SSMs but signallers alike can you clarify please.*

86. Mr Fox forwarded the message to Mr Foote a few minutes later. He asked for views on how to respond. He said that he did not want to discuss items he shouldn't with other people and whether the "writers of the letter" should get some sort of response. Mr Foote replied, "possibly yeah that's how you close it out" and said that the text needed recording as it was unacceptable and possibly bullying. Mr Fox loaded the message onto the HR system at 1pm on 17 January 2019. He added that he had also been approached by Mr Rogers, who wanted to discuss the Claimant's return. He wrote that he had not replied to the text and had not discussed the Claimant's return with Mr Rogers. There is no note of any response from HR. Mr Fox was unable to identify any action he had taken to address this potential bullying with Mr Houlston, whom he managed. The Tribunal had no doubt that no action was taken.

87. On the evening of 17 January 2019 Mr Williams emailed Mr Fox to say that he had returned from some time off to find several rumours about the Claimant. He had spoken to Mr Douglas and Mr Howell, who were as much in the dark as him. He found it disconcerting as the SSMs had not been briefed on the outcome of the investigation or any expectations of them. He asked to be advised of the way forward for the Claimant and the SSM/signaller team. All the SSMs were copied in, at their request.

88. Mr Howell sent a further email to Mr Fox and Mr Foote on 18 January 2019 in the morning. He said that he was aware that several colleagues had also spoken to Mr Fox and Mr Foote about the matter. He said that he did not want to pre-judge but was extremely unhappy with the situation as it appeared to be, and the fact that they had not been briefed or forewarned about the Claimant's imminent return.

89. It is therefore clear that all the SSMs and some signaller colleagues were contacting Mr Fox and Mr Foote to express discontent about the Claimant's rumoured return to work. Strikingly, there was no evidence drawn to the Tribunal's attention of any discussion, HR advice or response to those messages and approaches. None of the Respondents' witnesses referred to them in their witness statements.

90. The Claimant's evidence is that Mr Hall called him on 18 January 2019 at 12:36pm and told him that he was not going to like it, but he was not returning to work on Thursday because they had reviewed his case notes and due to the "severe psychological symptoms" they needed something else. The Claimant said that he was aghast. His GP had confirmed he was fit to return, and they were waiting for confirmation from OH. At the time he thought there was some inexplicable reason why his return to work was unexpectedly halted. Now he had seen the communications from the SSMs and other colleagues, he believed it was clear that they were blocking his return to work by refusing to work with him because of his protected disclosures. The Tribunal accepted the

Claimant's evidence about the call from Mr Hall. It was consistent with what the Claimant told Mr Graham, a retired work colleague, that evening.

91. The Tribunal found that Mr Foote made a decision on 18 January 2019 to halt or pause the Claimant's return to work and that he telephoned Mr Hall to tell him so. Mr Foote made no mention whatsoever of a call to Mr Hall on 18 January 2019 in his witness statement. On the contrary, the account in Mr Foote's statement clearly implies that there was no change following the 16 January 2019 meeting until the call from Mr Graham. However, in cross-examination, Mr Foote said for the first time that he had called Mr Hall on 18 January 2019. His evidence about what he said and why was inconsistent and confused. At times he appeared to say that he was simply reiterating what had been agreed on 16 January 2019, because the Claimant had a habit of misconstruing what was said in meetings. At other times he said that he had "reflected" following the meeting on 16 January 2019 and decided that he needed to "enhance" the return to work plan. When he was asked what he meant by "enhancing" the plan, he said that they needed to sit down with the Claimant following the OH report. It was put to him that that was not what was agreed on 15 and 16 January 2019, when the Claimant was all set for a phased return the following week, if OH confirmed his fitness. Mr Foote then said that he had a period of reflection and realised that the references in the OH reports to "severe psychological symptoms" should not be taken lightly. Eventually he said that, regardless of what OH said, he now wanted to satisfy himself as to the Claimant's psychological fitness for work. It was entirely clear that Mr Foote did change the plan after 16 January 2019. The Claimant was no longer permitted to return to work the following week, provided OH assessed him as fit. That was what he told Mr Hall, and Mr Hall accurately conveyed it to the Claimant.

92. The Tribunal found that delaying the Claimant's return to work was detrimental treatment of him. He was keen to return to his role as soon as possible and had been assessed as fit to do so. The Claimant's case is that the reason for the U-turn was Mr Foote's own dissatisfaction with the Claimant for going above his head to Mr Gee and the fact that the SSMs and signallers were raising concerns with Mr Fox about the Claimant's return to work, because of his going to Mr Gee. The Tribunal had no hesitation in finding that these were the reasons Mr Foote changed his position. There was no change in the medical position between 16 January 2019 and Mr Foote's call to Mr Hall. The references to "severe psychological symptoms" were in the November and December OH reports that Mr Foote had seen and considered before the 16 January 2019 meeting. Ms Hannar had mentioned the possibility of seeking more input in her email of 17 January 2019, but Mr Foote did not give evidence that this had anything to do with his thought process, even when he was taken to the email in re-examination. Mr Fox's attempt to suggest that that email had some bearing during his cross-examination appeared to the Tribunal to be a reconstruction after the event. He made no mention of it in his witness statement and his initial evidence in cross-examination was that it was Mr Graham's email (see below) that changed things. He was convinced that email was sent on 17 January 2019. Only after his attention was drawn to the actual date on the email did he suggest that Ms Hannar's email had something to do with the change. The Tribunal did not accept Mr Fox's evidence. The thing that

had changed since 16 January 2019 was the representations by SSMs and signallers. Mr Foote's evidence was wholly lacking in credibility. He had made no reference to his call to Mr Hall on 18 January 2019 at any stage in these proceedings until he was cross-examined. Then he gave changing and unconvincing accounts of what he told Mr Hall. His suggestion that the quicker he could get the Claimant back to work the better it was for him rang hollow in view of the fact that his decision was to delay the Claimant's return in the face of clear OH advice. He eventually accepted that he had taken no steps in response to Mr Houlston's text, despite suggesting that it was potentially bullying. He accepted that he had not taken any steps to address the SSMs' and signallers' concerns (for example by briefing them about the Claimant's return) as he might have been expected to if he was concerned to manage the Claimant quickly and effectively back into his substantive post. His suggestion that taking steps with the SSMs and signallers needed to be part of the Claimant's phased return or that the opportunity to address it with the SSMs was "taken away from us" was nonsense. The SSMs had raised concerns. They had been properly investigated in accordance with the Respondent's disciplinary process and the investigator had found no case to answer. The SSMs concerns had been addressed. In all those circumstances, the Tribunal concluded that the reason Mr Foote changed his mind about the Claimant's return to work was a combination of the concerns being raised by the SSMs and signallers, and his own unhappiness about the Claimant's initial disclosure to Mr Gee. His initial displeasure had led to him siding with the SSMs and that continued to be the case. It culminated at this point in a decision to delay the Claimant's return.

93. After Mr Hall had told the Claimant on 18 January 2019 that his return to work was not now going ahead, the Claimant's state of mind plummeted. As we have noted, he saw Mr Graham that evening, and told him what had happened. The Claimant was very distressed. Mr Graham emailed Mr Gee at almost 11pm. He told him that after being told that he was going back to the EICC (now referred to as a sub-ROC) the Claimant had now been told by his union representative that this was not happening. Mr Graham said that the Claimant was threatening to end it all and had been talking to the Samaritans. Mr Gee replied the following morning, Saturday 19 January 2019. He thanked Mr Graham and told him that they were going to get the Claimant assessed if they could early next week.

94. For unconnected reasons, the planned OH review did not take place on 21 January 2019. It was re-scheduled and eventually took place on 1 February 2019 (see below).

95. On 22 January 2019, Mr Foote and Mr Fox completed a Dynamic Risk Assessment form relating to the Claimant. This was nothing to do with the SRA. It was part of a national operating procedure for identifying an incident of risk. Mr Foote identified the "incident or situation" as being his belief that the Claimant was currently unfit to return to work at the Leeds Sub-ROC. He referred to the December OH report, the disciplinary investigation outcome report, Mr Graham's email and Mr Fox's view dated 22 January 2019. The form noted that an OH appointment was booked for 26 January 2019 and that a

meeting was to be held with the Claimant, Mr Gee and Mr Foote to discuss options.

96. That meeting took place on 24 January 2019. Mr Greaves also attended, as a companion for the Claimant. Of course, by this stage, Mr Hall had told the Claimant on 18 January 2019 that he was not going to be permitted to return to work as planned, and this had led to his conversation with Mr Graham and Mr Graham's email to Mr Gee. The notes record that Mr Gee told the Claimant that he was not immediately appropriate to put him back in a signalling environment. Mr Foote or Mr Gee said that they wanted to make a "management referral report around medication/psychological symptoms/what we need to do to make the issue go away" and the Claimant agreed. Mr Gee asked the Claimant if he would be happy to return in a temporary project role if the advice came back that he was not ready for signalling work. The summary of the meeting was "Arrange OH Assessment (management referral – consent to share the report.)" The Claimant understood that the management referral that was discussed would be an OH referral. That appears to be consistent with the summary at the end of the meeting notes. It seemed to the Tribunal that there may have been a misunderstanding – the Claimant reasonably thought that the further referral was another review by OH but Mr Gee and Mr Foote intended to refer him for a more specialist psychological assessment. Of course, they knew that Ms Hannar had identified that as a possibility and the Claimant did not. That may have underpinned their different understandings about what was discussed and agreed.

97. The Claimant sent a positive follow up email on 25 January 2019, thanking Mr Gee and Mr Foote and looking forward to his return to work. There was no evidence of steps to initiate a referral to Validium for a psychological assessment prior to 22 February 2019, almost a month later.

98. The Claimant had an OH assessment on 1 February 2019. He understood that to be the assessment that had been discussed on 24 January 2019. On 3 February 2019 the OH advisor reported that the Claimant was fit to return to work. His previous psychological symptoms appeared to have resolved and he had a more positive outlook. A phased return was outlined. The OH advisor made clear that the Claimant was fit for "ALL" his duties.

99. The Claimant's evidence is that he met Mr Fox on 7 February 2019 to go through the OH report. They agreed a phased return for a second time. Mr Fox said that the Claimant could not go on the simulators because they were busy, but he could do some temporary work. He was asked to report the next day to the York sub-ROC. There was no discussion of any restrictions being placed on him. He reported for work the next day and started to catch up with emails. Mr Rogers entered the office, expressed surprise about seeing the Claimant and left. About 15-20 minutes later Mr Fox arrived and escorted the Claimant to the Delivery Unit offices. He told him that he was not allowed to be left in the York sub-ROC alone. When they arrived at the Delivery Unit, Mr Fox told him he was no longer allowed to do safety critical duties and dashed off.

100. The Tribunal noted that Mr Fox completed a return to work discussion form with the Claimant on 7 February 2019. In answer to "How can the company/manager

offer support" Mr Fox noted, "Getting back to work and support getting back to work. Validium and OH referrals. Phased return to build up hours and duties. Appropriate training."

101. The Claimant emailed Mr Fox in the evening of 8 February 2019. He said that he was perplexed. They had done his return to work on 7 February 2019 and discussed his return to his SSM role. Mr Fox had told him he could not go back on the SSM desk immediately because the simulator was being used for new secondments and he needed his Scalable training. He understood that. He had then been told on 8 February 2019 that he was not able to return to his role until a "referral" was done and that he was now not safety critical. He pointed out that OH had assessed him as fit for all duties. He said that he did not object to another appointment, but asked for details of why it was being requested and so on. Mr Fox did not reply. Instead, he forwarded the email to Mr Foote. They noted that the Claimant understood that he was not safety critical, and they discussed their understanding that he had previously agreed to a "referral."

102. Mr Fox's evidence was that when he met the Claimant for his return to work interview on 7 February 2019, they discussed the outstanding Validium report and Mr Fox reminded the Claimant that his return to work was conditional on that report confirming that he was fit to do so. Mr Fox said that he did not tell the Claimant that he could return on 7 February 2019, rather they agreed the hours and days he would do once he was able to return. On 8 February 2019 the Claimant "visited" York Sub-ROC.

103. The Tribunal did not accept Mr Fox's account. It was inconsistent with his completing a return to work form and he was unable to explain why the Claimant would be "visiting" work the next day. He did not say in his email to Mr Foote that the Claimant should not be at work at all. In cross-examination, his evidence was that he could not really remember what had happened. The Tribunal accepted the Claimant's clear recollection of what happened on 7 and 8 February 2019 in those circumstances. We found that Mr Fox did agree that the Claimant would start his phased return to his SSM role, although he could not go on the SSM desk immediately because he needed to complete training. The issue of whether he was fit to do safety critical duties and whether a psychological report was outstanding did not really arise in those circumstances and was not discussed. It was only after the Claimant attended work on 8 February 2019 and Mr Rogers went to speak to Mr Fox about it that Mr Fox's position changed and he escorted the Claimant to the Delivery Unit.

104. The Tribunal accepted that the work the Claimant was doing while he was not yet clear to return to his SSM duties did not require him to be on the operations floor. It appeared possible that Mr Fox had shared the Claimant's misunderstanding about the psychological assessment. Mr Fox told the Tribunal that Mr Rogers came to him most days he was working with some issue or other. The Tribunal found that in those circumstances, if the Claimant did not need to be on the operations floor, the easiest thing for Mr Fox to do was to base the Claimant in the Delivery Unit. He was acting to make life easier by removing a potential source of workplace conflict, not because the Claimant had complained to Mr Gee.

105. The Claimant also complains that somebody cancelled his access card, so he could no longer use it to access the workplace. The only evidence he has is that his access card stopped working. While Mr Blake and Mr Miller both had access to the system, they each denied cancelling the Claimant's card and there was no evidence that either of them did so. There was evidence – perhaps unsurprisingly – that cards did stop working sometimes for a variety of reasons. The Claimant had been away from work for around five months. His card could have stopped working for any number of reasons. He has the burden of showing, in the first instance, that his card was cancelled and that it was done because he made a protected disclosure. He has not done so.

106. The Claimant was asked to meet Mr Foote on 12 February 2019 and did so. Mr Foote allocated project work to the Claimant. Mr Foote wrote to the Claimant the next day. He acknowledged that the recent OH report advised that the Claimant was fit to work, but said that the Claimant had agreed on 24 January 2019 to a further medical through Validium/OH Assist, which would be to allow the Respondent to decide whether the Claimant could return to safety critical duties. He told the Claimant that he was restricted from safety critical duties until they received that report. He was to undertake identified project work and was only to visit the Leeds sub-ROC "with notice." The project work included assisting Mr Fox with LOM duties, a project measuring platform lengths and a project looking at dwell times.

107. The Claimant said that while the work sounded good in principle, the reality was different. Nobody engaged with him about the dwell times project. He was given menial work such as preparing training plans. People he was told to work with ignored him or did not respond because there was no proper plan for his working arrangements. By around April 2019 he was given a laptop and told to work from home. Neither Mr Foote nor Mr Gee had any knowledge of the day to day work the Claimant was carrying out. Mr Fox said that he thought the work in the control room was a good opportunity for the Claimant, but he did not know what, in practice, the Claimant ended up doing. There was no dispute that the Claimant was not able to do overtime when he did the project work.

108. The Claimant's case was also that there was an inconsistency in the Respondent's insistence that it was deeply concerned for his wellbeing and the risk that he might harm himself, but set him a project of walking along train platforms and measuring them. The obvious point was that if he was at risk of harming himself, this was creating an opportunity for him to do so. This did not appear to have occurred to Mr Gee or Mr Foote at the time. In cross-examination Mr Foote eventually accepted that it was not the right thing to ask him to do. Mr Gee did not. It was suggested that the reason they were happy for the Claimant to do the platform measuring work was that they were not really as concerned about his wellbeing as they said. The Tribunal found that Mr Gee and Mr Foote were genuinely concerned about the Claimant's wellbeing after Mr Graham had emailed. They just did not think when allocating this work to him. The Tribunal found that the reason was thoughtlessness, not the making of protected disclosures. In relation to the work more generally, it seemed to the Tribunal that the problem was with how the projects transpired. This was not what Mr Fox, Mr Gee and Mr Foote intended when identifying work the Claimant could do temporarily pending his return to his SSM role. The Claimant

was subjected to detriment by being removed from his SSM post and then prevented from returning to it because he made protected disclosures. The nature of the work that was given to him as a result was simply a case of identifying what work he could do, it was not a further step done because he had made protected disclosures.

109. The Claimant complains about Mr Foote's requirement that he only visit the Leeds sub-ROC with notice. Mr Foote said in his evidence that this was not a punishment, it was "considered to be in his best interest, as well as that of his colleagues." His colleagues were witnesses to the live investigation into Mr Houlston's conduct. The thought process at the time was that they needed to design a structured re-introduction or mediation plan before the individuals could work together effectively again. In any event, there was no need for the Claimant to visit the Leeds sub-ROC. Mr Foote's explanation in cross-examination was, again, completely different from his written evidence and appeared to change in answer to every successive question. His answers included: that this was "custom and practice" and that the Claimant needed to understand that; that it was no different from how anybody else who visited the Leeds sub-ROC would have to behave; that the Claimant had previously (before September 2018) attended work when not on roster and they could not have him arriving unannounced in this safety critical environment; and that some people working as signallers did not like unannounced visitors. Mr Foote accepted that the Claimant had not been given an instruction only to attend the Leeds sub-ROC with prior notice before he raised complaints with Mr Gee on 5 September 2018 and that nobody else had been given such an instruction. The Tribunal found that requiring the Claimant to give notice if he wanted to attend the sub-ROC was detrimental treatment of him. Further, the reason Mr Foote instructed the Claimant only to attend the sub-ROC with notice was, again, a combination of the fact that the SSMs and signallers did not want him there and the fact that Mr Foote was aligning himself with the SSMs because of his unhappiness about the Claimant going to Mr Gee.

110. Mr Foote completed the Validium referral with the Claimant on 22 February 2019 and it was sent off by Mr Fox on 25 February 2019, a month after the meeting at which the Respondent says it was agreed. Mr Foote told the Tribunal in his oral evidence that after the Claimant had returned to work, he was based in the Delivery Unit at a desk adjacent to Mr Foote. They worked alongside each other. Mr Foote was unable to provide any sensible explanation why it was not possible in those circumstances for them to complete the brief form together very shortly after 8 February 2019. He accepted that he was the manager and could have made it happen, and that his approach did not show any sense of urgency. That was one of numerous examples where what Mr Foote did in practice was wholly at odds with his repeated insistence in his oral evidence that he wanted the Claimant back at work as quickly as possible. That insistence lacked all credibility. Mr Foote wrote in the referral form that the reason for referral was the 28 November 2018 OH report. He did not refer to either of the subsequent OH reports. He was asked why not. He said that it was a "moment in time" assessment. He was therefore asked why he had chosen the OH report of 28 November 2018 as the moment in time and not that of 31 December 2018 or 3 February 2019, both of which were closer to the date of the referral. He said that it was because "that was the one that referred to

severe psychological symptoms." That suggested to the Tribunal that Mr Foote was not looking for an accurate, current assessment, but was seeking to steer the assessor to the conclusion that the Claimant was not fit for work. Mr Fox forwarded the referral to Validium on 25 February 2019. In his covering email he asked to speak to Validium in person so that he could "discuss the background" of the case.

111. The Claimant was seen by a Clinical Psychologist on 12 March 2019. She reported the same day. She reported that the Claimant's psychometric scores were all within the range of normal function and indicated no excessive anxiety. She did not recommend any treatment. The report was released to the Respondent on 18 March 2019.

112. Nobody contacted the Claimant to discuss the report or consider arrangements for returning him to his SSM post. Mr Fox suggested that the Claimant was on annual leave in late March and that because of his roster, he would in fact have been absent from work from 13 March 2019 to 4 April 2019. That does not explain why no email or other attempt to contact him appears to have been made. Mr Foote said that "plans were set in motion to return [the Claimant] to his substantive role." He did not say what those plans were, nor did he explain why he did not simply make immediate contact with the Claimant to discuss his return to his SSM role. In fact, plans were apparently made for a meeting between Mr Foote, Ms Pickup and Mr Hall to discuss arrangements for the Claimant to return to work, without the Claimant present.

113. That took place on 11 April 2019. There were no notes of the meeting. Mr Foote circulated a Development Action Plan ("DAP") on 16 April 2019 to Ms Pickup, Mr Gee, Mr Fox and Mr Hall. It was not copied to the Claimant. Mr Foote said that it had been agreed on 11 April 2019. Clearly the Claimant had not agreed it. The Plan listed three "options." One was "SSM return", one was "Simulator training, SSM return", and the third was "Mediation (SSMs, James Fox, John Rogers), Simulator training, Workstation training, Management courses, SSM return." The third was noted as "agreed preferred option." The Claimant pointed out in his evidence to the Tribunal that the other two were clearly not actual options, because he could not return to his post without workstation training as well as simulator training. The DAP estimated a return to duties after three months.

114. Mr Hall emailed Mr Foote agreeing that the DAP reflected what they discussed, but saying that he felt it would be worthwhile to have another meeting with the Claimant present. It was important to make the Claimant feel that the actions were intended to help him, otherwise a further three months away from his substantive role might have an impact on his wellbeing. In fact, the Claimant's evidence was that Mr Hall had called him after 11 April 2019 very concerned about this meeting taking place behind his back.

115. The Tribunal did not see any documents explaining how or why the 11 April 2019 meeting was planned without the Claimant's involvement. Mr Foote's evidence was that he wanted the Claimant to attend but the Claimant was in Poland so Mr Hall attended on his behalf. The Tribunal found this account wholly implausible. The psychological report was received on 18 March 2019.

The meeting with Mr Hall took place on 11 April 2019. It was simply incredible that if the Respondent actually wanted to discuss the report and a return to work with the Claimant, they would not have been able to contact him and arrange to do so. The Tribunal found that this was a deliberate attempt not to involve the Claimant. In early January, there had been agreement for the Claimant to start a phased return to work. That had been put on hold, apparently because of a concern about the Claimant's psychological wellbeing. It had taken a month to make the referral, which confirmed unequivocally that there was no concern about the Claimant's mental state. Another month later, there had been no attempt to contact the Claimant directly and the Respondent was seeking to put in place a return to work plan that would see a further three month delay before the Claimant returned to his substantive SSM post. The Tribunal had no hesitation in concluding that the Respondent was now dragging its heels about the Claimant's return to his SSM post and changing the goal posts. The Tribunal found that Mr Foote and Mr Fox were putting obstacles in the way of the Claimant's return to work and that this was, in part, because of his protected disclosures and, in part, because the SSMs were unwilling to work with him. In Mr Foote's case, it was a continuation of the approach that started in September 2018.

116. In respect of Mr Fox, the Tribunal also noted the following:

116.1 There was now a disciplinary investigation running into Mr Houlston's conduct. While Mr Fox had reported concerns about Mr Houlston's conduct from two separate sources and indicated on 24 October 2018 that should be investigated, there was no evidence of that happening. An investigation into Mr Houlston's conduct was only instigated after Mr Jackson recommended it in his report, three month later. Mr Hayles was appointed on 29 January 2019. Unlike the Claimant, Mr Houlston had not been moved to another role while the investigation was underway. At the very time of these discussions about the Claimant's return to his substantive post, his colleagues were being interviewed by Mr Hayles about the allegations relating to Mr Houlston.

116.2 On 2 April 2019 Mr Fox was interviewed. The Tribunal noted that this was meant to be an investigation into allegations about Mr Houlston's conduct but a large part of the discussion was about the Claimant. Further, Mr Fox made no reference whatsoever to the concerns he had raised in October 2018 about allegations of homophobic bullying by Mr Houlston, which had been raised by a second person as well as the Claimant. On the contrary, when Mr Hayles asked him about whether he had allegations of homophobic comments, he appeared to say that he had never seen anything like that and had no complaints. It appears that it was only after Mr Heaton told Mr Hayles what he had said to Mr Fox, that Mr Hayles asked Mr Fox about it in a second interview. Even then, Mr Fox did not tell Mr Hayles that Mr Heaton had alleged that Mr Houlston was carrying out homophobic bullying and that Mr Fox had wanted it investigated the previous October. Mr Fox was clearly not dealing fairly with the Claimant. He was giving an inaccurate account, which supported a picture that the Claimant was in the wrong and Mr Houlston was in the right, when Mr Fox was aware of evidence to the contrary.

116.3 It was during this interview that Mr Fox made his comments about the Claimant waiting until Mr Fox went on holiday to raise his concerns with Mr Gee (see above). He said that that was "when it started to get challenging because that happened whilst I'd been away." He returned to the point later in the interview, saying that the Claimant's conversation with Mr Gee "felt strange to me, the way he went about it, I felt it was deliberate whilst I was on leave, I also don't know why the steps had been jumped over and not taken to [Mr Foote] first …" It seemed to the Tribunal that the Claimant going to Mr Gee in the way he did was very much still a matter of concern for Mr Fox the following April. That was reflected in his comments to Mr Hayles.

116.4 During the first interview, Mr Fox also said that what concerned him going forward was the Claimant's reintegration into the team. There were a lot of people with "very strong views" and a "genuine atmosphere of retribution."

116.5 Furthermore, the Respondent was sending emails about arranging mediation between the Claimant and his colleagues before the meeting with Mr Hall – Ms Smith asked a provider for possible help with mediation on 10 April 2019, and Ms Pickup forwarded the email to Mr Gee and Mr Foote on 15 April 2019, referring to "the mediation package for [the Claimant] and the SSMs." On 17 April 2019 Ms Pickup asked Mr Fox for a list of "the SSMs who will be having mediation with the Claimant" and Mr Foote replied, identifying Mr Blake, Mr Houlston, Mr Miller, Mr Williams, Mr Howell, Mr Douglas, Mr Fox and Mr Rogers. The Tribunal noted that Mr Fox was on that list. His evidence in cross-examination that this was not his suggestion and he did not know why he was on the list was implausible.

117. The Tribunal's determination in respect of these parts of detriments 2, 3, 9 and 10 was therefore:

Mr Fox escorting C from York sub-ROC	Dismissed: happened but not because of disclosure
Mr Foote telling C only to attend York sub-ROC with notice.	Upheld
Revoking C's access card.	Dismissed: did not happen
Mr Foote removing C from substantive SSM post January/February 2019	Upheld
Mr Foote not doing SRA	Dismissed: happened but not because of disclosure
Given inappropriate work during removal from substantive post (up to secondment to Sheffield sub-ROC)	Dismissed: happened but not because of disclosure
Disregarding OH and psychologist recommendations about return to work, U-turn and delays putting return to work plans into action.	Upheld

Detriment 3: removing C from substantive SSM post (part)
Detriment 9: delay (part)
Detriment 12: failure to prevent reprisals (part)

118. The Respondent eventually met the Claimant to discuss the DAP on 8 May 2019. That was a meeting between Mr Foote, Mr Fox, the Claimant and Mr Hall. The Claimant agreed to the DAP. His evidence to the Tribunal was that he did not have much choice; he wanted to get back to his substantive post. Further, he agreed in principle that all the proposed steps were appropriate. However, he specifically raised a question about what would happen if somebody refused mediation and was told that they did not need to do mediation. That is reflected in Mr Hall's notes of the meeting and the revised version of the DAP ("mediation rejections discussed"). The Claimant's evidence was that he was willing to participate in mediation with anybody, provided that it did not unreasonably delay or hinder his return to work. He said that he was assured that mediation could run concurrently with his return to work, and was optional for all parties, so he was content that it would not unreasonably delay matters. The Tribunal found that this was the impression given at the meeting. Nobody said to the Claimant that his return to his SSM post was conditional on mediation first taking place. He would not have agreed to it if they had.

119. As will become clear, the fact that mediation had not concluded became the barrier that prevented the Claimant from returning to work for many months. What was identified in January 2019 as "good to have" alongside the Claimant's return to work at some point became a pre-condition that must be completed before his return. None of the Respondent's witnesses was able to explain who took that decision, when or why. Before we come to their evidence, we outline the chronology until the Claimant's return to work.

120. On 6 May 2019 Mr Houlston brought a grievance against the Claimant, alleging that he had told malicious lies about him in the disciplinary investigation.

121. Following the 8 May 2019 meeting, some 1-2-1 meetings between the mediator and individuals were arranged for 25 and 26 July 2019. Email correspondence between the mediator, Ms Pickup, Mr Fox, Mr Foote and Mr Gee started on 21 May 2019 with some suggested dates from the mediator. Mr Fox was evidently responsible for coordinating the SSMs' availability. It appears he did not do so prior to his annual leave (29 May to 16 June), so it was necessary to identify further dates. That eventually led to the dates in late July.

122. The disciplinary investigation into Mr Houlston concluded on 25 July 2019, with a conclusion that no further action was required.

123. In August 2019 Mr Wilson was the LOM for the Sheffield sub-ROC, which was physically located at York. He became aware that the Claimant was out of his substantive role. Mr Wilson was short of SSMs in the Sheffield sub-ROC and he suggested that the Claimant do a secondment as an SSM in the Sheffield sub-ROC. The Claimant and Mr Fox agreed and the Claimant started his secondment in September 2019. The seconded role was 2 grades lower than his substantive post. The Claimant had to be trained on the Sheffield specific

workstations and also needed to complete other training before being passed out to carry out the Sheffield SSM role. We return to this below.

124. After the initial 1-2-1 meetings on 25 and 26 July 2019, there was no evidence of any attempts to arrange the next mediation steps prior to 19 September 2019. On that date the mediator called Mr Fox and advised him that the mediation should be paused until the investigation of Mr Houlston’s grievance was complete. Mr Fox did not make any note of the conversation. He told the Tribunal that he assumed he must have discussed it with Mr Foote and Ms Pickup. Nobody gave any evidence about that. The mediation was paused. Mr Foote moved to a new role at about this time. Mr Hayles took over as OM.

125. There was evidence of the Claimant chasing Mr Fox by email in November 2019 to find out what was happening and reiterate his wish to return to his substantive post. Mr Fox told him that the mediator’s advice was that the ongoing HR matters should be brought to a conclusion before the mediation could happen, so that needed to take place first. That appears to be the first time the Claimant was told about this, almost two months after the mediator spoke to Mr Fox.

126. In both January and February 2020, the mediator chased Mr Fox for an update. His responses, to the effect that he understood the investigation into Mr Houlston’s grievance had fallen behind, and that he was not “really sighted” on how the grievance was going suggested a lack of any pro-active steps by him to find out what was happening with the grievance. That grievance was concluded on 13 March 2020.

127. Meanwhile, the Claimant had been off sick from his seconded role between 15 November 2019 and 7 January 2020. He was experiencing work-related stress. He started a further period of sickness absence because of stress on 17 January 2020.

128. On 23 February 2020 the Claimant raised a grievance. In essence, he complained that there had been a failure to protect him from retaliation by his work colleagues after he reported safety concerns arising from their behaviours; a failure to ensure a swift return to work in his normal role; a failure promptly to address his claim for lost overtime; and undue delay in disciplinary and grievance processes. Again, we return to the specifics of that grievance below.

129. The Claimant was signed fit to return to work by his GP on 8 April 2020. An OH referral was required, because of the length of his absence. Mr Fox made the referral, as the Claimant’s substantive line manager, but Mr Wilson was still closely involved in managing the Claimant. An interim report recommended an assessment by an OH physician. That took place on 23 April 2020 and the Claimant was confirmed fit for all duties.

130. During that period, Mr Wilson emailed Mr Fox on 15 April 2020, with a comprehensive update and proposals for the Claimant’s return to work. Ms Pickup was copied in. In this and in subsequent emails, Mr Wilson was demonstrating the kind of management the Tribunal would expect to see from a line manager taking proper steps both to bring the Claimant back to work and to

manage the situation with his colleagues. That was despite the fact Mr Wilson was no longer the Claimant's manager. Such input was strikingly absent from any other manager. In this email, Mr Wilson noted that the Claimant's secondment had ended and he was now back in his substantive post. Mr Wilson had evidently spoken to Mr Fox. He noted that Mr Fox was to speak to Mr Houlston to discuss mediation and obtain some dates for a session. Possible dates in May had been identified. Mr Wilson was going to speak to the Claimant to see if he was happy to do a session with Mr Houlston and finish the group sessions that started last year. Mr Wilson said that they could use "step ups" to cover the SSMs because this was "an essential task." Mr Wilson set out a proposed return to work plan for the Claimant, starting 4 May 2020. Mr Fox replied the following day:

> I just wanted to pause and ask have either of you discussed if now is the right time for mediation to go ahead? I absolutely agree that it is necessary prior to asking [the Claimant] to rejoin the team for his and the other SSMs benefit. I think however that this will be quite a stressful process for some of the people involved and we obviously already have people under stress from the Coronavirus situation and also this means we have a large proportion of SSMs already off work at the moment.
>
> The mediation didn't continue previously as the mediator gave her professional recommendation that it should not continue while the grievances and investigations were ongoing.

131. The mediation did re-start, but again there were delays in arranging some of the sessions. A session between the Claimant and Mr Houlston took place on 7 May 2020; and there were some further sessions in June and July 2020.

132. The Claimant returned to work on 4 May 2020. He completed training and other elements, before doing his first SSM shift in the Leeds sub-ROC on 31 July 2020.

133. It is clear that Mr Miller was in telephone and email correspondence with Mr Fox and Ms Pickup at the time of the Claimant's return to his substantive post in May 2020 and was extremely unhappy about it. He was of the view that the disciplinary investigation into the Claimant's conduct had not been properly carried out and he was essentially alleging a cover-up. He was threatening to resign. In an email about this to Mr Wilson on 15 May 2020 Mr Fox wrote that he had told Mr Miller that the issues had been investigated and "that investigation separately to be reviewed." In an email to Mr Miller on 20 May 2020, Mr Fox referred to the investigation being reviewed by Mr Henry and then Mr Rutter, and being upheld. It is clear that the review of Mr Jackson's investigation had been carried out by this stage, and that even that review had been looked at by somebody else. That was entirely outside the Respondent's processes. Nobody gave evidence to the Tribunal about it apart from Mr Jackson (see above). No explanation for the review was given. Mr Fox was clearly fully aware of it. The fact that even the review was itself reviewed suggested to the Tribunal, in the absence of any explanation from the Respondent, a wish to keep going until somebody concluded that the investigation into the Claimant's conduct should be re-opened.

134. Against that background, we consider the Respondent's approach to mediation. As explained above, the Tribunal found that in January 2019 mediation was seen as something complementary, to happen alongside the Claimant's return to his substantive post. It is the Claimant's case that after that the Respondent delayed the mediation and made it a pre-condition of his return to work. As a result his return to his substantive post was delayed. This was all because of his disclosure to Mr Gee. The Tribunal agreed. We found that the failure to progress mediation in a timely way between January and September 2019, and then putting it on hold between September 2019 and May 2020 was detrimental treatment of the Claimant and the reason for it was his protected disclosure. As noted above, there was no proper explanation for periods of inaction or delays between January and September 2019. In addition, nobody could tell the Tribunal who decided that the Claimant could not return to his substantive post until mediation was concluded, when, or why. In concluding that mediation was being delayed because of the Claimant's protected disclosure, the Tribunal noted in particular:

134.1 Mr Fox was asked in cross-examination about what steps he took to arrange mediation after the meeting on 15 January 2019. He said that Ms Smith was responsible. His attention was then drawn to an email she sent him the following day with a partially completed Workplace Mediation Referral form, in which she asked him to complete the rest and send it back to her to arrange the mediation. He could not tell the Tribunal when he had responded. He said that he had filled the form in and did not know why he "would have" delayed. There was no evidence that he took any steps, and the fact that arrangements started to be made in April 2019 suggests that he did not. The Tribunal found that Mr Fox did nothing to arrange mediation between 15 January 2019 and April 2019.

134.2 Mr Foote's evidence about mediation was vague and confusing. He said in cross-examination that he was "not sure" who had decided that mediation had to happen before the Claimant returned to his substantive post. He had not done mediation before but he thought it "sounded suitable." It was put to him that in January 2019 mediation had been discussed as something alongside the Claimant's return to work and he agreed that that "made sense." He agreed that at the meeting in May, he was the manager accountable for the Claimant's return to work. It was put to him that somebody had now decided that the Claimant could not return to work until mediation had taken place. He was asked who and when. He said that he could not remember. He remembered agreeing that mediation should take place but he could not remember whether it was to be "linear" or "at the same time." It was put to him that mediation as a condition of returning to his substantive role was another hurdle that was being put in the Claimant's way. He disagreed. He said that was why there were three options, and that they took the "most professional" one. It "might delay things but it would give us a better output." Mr Foote ceased to be involved in about September 2019.

134.3 Mr Fox's evidence was equally vague and confusing. We have dealt above with his evidence about the position in January 2019. In his evidence about the later periods, he said both that mediation was never compulsory and that he believed it was always intended that mediation

was a pre-condition of the Claimant's return to work. Those two things appear to be inconsistent. He said that he recalled discussions of mediation but he did not know when they took place. He repeatedly suggested that decisions about mediation were "collective". No evidence of any meetings or calls to discuss it after May 2019 was presented to the Tribunal.

134.4 It was clear that Mr Fox failed entirely to prioritise mediation or to actively push it forward. After the May 2019 meeting, it took two months before any initial mediation meetings took place. There was no evidence whatsoever of anything being done to progress the mediation in the two months prior to September 2019. Mr Fox does not appear then to have told the Claimant that the mediation was being paused until the Claimant chased him, two months later. It was the mediator who was chasing Mr Fox in early 2020. He was evidently not pressing to find out the timescale for the conclusion of Mr Houlston's grievance.

134.5 There was no evidence of any discussion about the mediator's advice between Mr Fox and anybody else. The Tribunal was not shown any entry made by him in HR Direct. Mr Foote had moved on. It appeared to the Tribunal that there was no collective discussion about what the mediator said. In his evidence, Mr Fox elided the mediator's advice that mediation should be paused until the conclusion of Mr Houlston's grievance, with the question whether the Claimant could return to work before mediation had concluded. Those were separate things. Eventually, he accepted that in cross-examination. He was asked who had decided that the Claimant could not return to work until mediation was concluded. He said again that it was "a collective discussion", he was "not sure", "It just became part of the conversation. At the time it felt appropriate." It was put to him that it was open to him as the Claimant's line manager to say that the Claimant's return to work should not be delayed any longer because of the mediation. He agreed that he could have done so at any time but that he did not. It was suggested to him that the reason was that he did not want the Claimant back. He denied it. The Tribunal did not accept that evidence. His whole approach to mediation was delay at every turn; it appears that he never turned his mind to the question whether the Claimant's return to work was dependent on the completion of mediation, or why, or whether the balance had shifted; he never considered pausing Mr Houlston's grievance for mediation to be completed (which was possible under the Grievance policy); and there was no evidence of any discussion or consultation with any other manager. Mr Fox was throughout this period himself still one of those with whom mediation was to take place - the Tribunal noted that in May 2020 he was suggesting that a lack of confidentiality in the process would be a barrier to his own participation in it.

134.6 Mr Fox's email of 16 May 2020 was also striking. It was put to him that he was trying to find reasons not to go ahead with mediation and to delay the Claimant's return. He disagreed. He said that he was "providing the balance." He clearly was not. His email did not provide any balance, for example by pointing out that the Claimant had now been out of his substantive post for more than 18 months and that it was a priority to get

him back in post. He said in cross-examination that he had been "tasked with managing the other SSMs." He appeared to have overlooked the fact that he was also tasked with managing the Claimant. The Tribunal had no hesitation in concluding that Mr Fox was trying to delay the Claimant's return in May 2020 by trying to push back the resumption of mediation.

134.7 That was a continuation of his approach all along, influenced from the outset by his unhappiness that the Claimant had been to Mr Gee and created these problems in the SSM team. That is why Mr Fox was content for mediation to take so long and why he did not consider getting the Claimant back to work in any event or try to do so.

135. The Tribunal's determination in respect of these parts of detriments 3, 9 and 12 was therefore:

Removing C from substantive SSM post	Upheld: mediation was used as a barrier to the Claimant's return to work because of protected disclosure.
Delay in mediation impacting C's ability to return to work.	Upheld
Failure to prevent reprisals in relation to lack of engagement with mediation in reasonable timeframe.	Upheld

Detriment 2: ostracising C (part)
Detriment 4: subjected to unreasonable disciplinary investigation (part)

136. We turn now to deal with discrete parts of the Claimant's complaints. We start with those relating to the actions of the SSMs. The Claimant said that he was completely ostracised by his colleagues over a long period of time, from when he first raised his concerns with Mr Gee, and that this was because he made his disclosure to Mr Gee. The Tribunal found that he was subjected to such detrimental treatment, and that it was because of his disclosure.

137. The SSM letter itself concluded with an ultimatum – get the Claimant back on side or find him another role. The Tribunal found that from the outset the SSMs were saying that if the Claimant could not be brought into line they were not prepared to work with him. The moment it became known that the Claimant had spoken to Mr Gee, the SSMs were in touch with each other and there was an organised response in the form of the 5 September 2018 SSM letter. There was reference in the documents to people being asked whose "side" they were on. That was a widespread attitude from the outset and it did not change. We considered that was reflected in a change of approach towards the Claimant. In their written witness statements Mr Howell, Mr Blake, Mr Miller and Mr Rogers all denied that there was a change in their interactions with the Claimant. They all denied blanking him, refusing to work with him and failing to acknowledge

him. However, when they were cross-examined by reference to the documents from the time, their witness statements did not withstand scrutiny. In particular:

137.1 Mr Blake's evidence was that there had been no change in his attitude towards the Claimant. That was wholly implausible. Mr Blake tried to support his position by reference to occasions when he had helped the Claimant with personal matters, but tellingly those occasions were all before the Claimant spoke to Mr Gee. There was no such occasion after he did so. The Claimant texted Mr Blake on 20 November 2018, suggesting they buy each other a beer. Mr Blake's response was, "Sam, let's get this shenanigans out the way, then perhaps we can and we can all move forward. Hope you're ok. Please don't call me until this is done and anyway I'm covered in brick mortar at the mo …". That was not simply declining an invitation for a beer, it was telling the Claimant not to call Mr Blake until matters were concluded and that they could not "move forward" until that happened. That marked a change and one that was directly linked to the Claimant's conversation with Mr Gee. The Tribunal found that Mr Blake essentially refused to engage with the Claimant at all after that until he returned to his substantive SSM role nearly two years later. We noted that on 4 June 2020, Mr Blake raised a concern about the fact that the Claimant was one of the invitees to the SSMs meeting. He said that mediation had not taken place and there had not been "an acceptable outcome agreed by all parties" and asked, "how can this possibly happen?" A week or so later, Mr Blake wrote some emails to Mr Wilson, explaining why he was withdrawing from the mediation process. In one, he expressed some sympathy for the Claimant given how long the investigation had taken, but concluded "… but at the end of the day he set those 'wheels in motion.'" The clear inference was that it was the Claimant's meeting with Mr Gee that caused all the events that followed. The tone of Mr Blake's emails about withdrawing from mediation is entirely different from the way he sought to portray his decision to the Tribunal. In his oral evidence he said that he decided not to go through with mediation with the Claimant because the Claimant was back at work and it did not seem fair on the Claimant to keep putting him through mediation meetings. His emails to Mr Wilson were completely different. He was aggrieved that the Claimant was back before the mediation process was concluded, considered that it was now pointless, and that there had been "loaded dice" and "foregone conclusions." That terminology suggested that he anticipated that a possible outcome of the mediation was that the Claimant would not return to his substantive post. Far from expressing sympathy for the Claimant, as well as his comment about "setting the wheels in motion", Mr Blake described the Claimant as "a self-serving, immature individual."

137.2 Mr Howell's evidence about when and how he found out about the allegations was inconsistent. He had told Mr Hayles that he found out after he got back from holiday, when Mr Blake told him that the Claimant had made allegations "about the lot of us" but his evidence to the Tribunal was that Mr Blake rang him when he was on holiday to tell him what the Claimant had done. That was the only purpose of the call. Mr Howell said in his witness statement that if the Claimant had contacted him he would have acknowledged and responded to him, regardless of whether he had raised concerns or not. In cross-examination, his attention was drawn to

the fact that he had told Mr Hayles on 10 June 2019 that he had blocked the Claimant's number "because of the investigation." He then gave oral evidence that he had blocked the number when Mr Blake initially rang him to tell him that the Claimant had spoken to Mr Gee. His explanation, that he was on holiday and did not want to speak to anybody about work, was implausible. He did not block anybody else's number. Far from responding to the Claimant if he had contacted him, Mr Howell's instant response was to take steps to ensure the Claimant could not contact him.

137.3 The Tribunal noted Mr Howell's email to Mr Fox and Mr Foote on 19 January 2019, saying that he was "extremely unhappy" with the situation regarding the Claimant's return to work. He said in cross-examination that he was unhappy because none of the issues had been resolved. It was pointed out to him that they had been resolved, because Mr Jackson had concluded that there was no disciplinary case to answer. He then referred to the Claimant "making allegations of the nature that were made" and suggested that it was unwise for the "air not to be cleared." Mr Howell was asked a series of questions about this, and his answers were inconsistent and unconvincing. On 24 September 2019, Mr Howell emailed Mr Fox and all the other SSMs, to say that he had been surprised to come "face to face" with the Claimant at work that evening. He understood "from the rumour mill" that the Claimant was now training to be an SSM in the Sheffield Sub-ROC. He wrote, "13 months ago Sam took it upon himself to criticise to Chris Gee, everyone involved in York IECC, from the signallers and SSMs up to yourself and Matt Foote." He said that the mediation process was ongoing and some concerns about the Claimant's past behaviour had not been addressed. He was concerned that the Claimant had been brought back to the same operating floor without them being told. The Tribunal considered that the email made absolutely clear that Mr Howell's primary concern was about the Claimant making complaints to Mr Gee. That was what made him object to the Claimant being back at work more than a year later. The reference in his email to "prejudging" the mediation outcome makes clear that Mr Howell, too, thought one purpose or outcome of the mediation was to agree that the Claimant would *not* return to his post. When he was interviewed by Mr Taylor, Mr Howell referred to the Claimant, "slagging everybody off." His evidence in cross-examination that he was not unhappy about the Claimant making the disclosures was wholly implausible.

137.4 Mr Miller said in his witness statement that he had not stopped contacting Sam, blanked him or stopped exchanging pleasantries. Sam raising concerns in August 2018 had "no bearing" on his approach. It was "not correct" to say that he had refused to work with the Claimant. He had raised concerns but not refused to work with him. In cross-examination his attention was drawn to the email he had written to Mr Fox in May 2020 stating that it was unfair of management to expect him to accept the Claimant back into the role knowing that the investigation into the claimant's conduct was not adequate, and threatening that if management did not redeploy the Claimant into a more appropriate role, they would be forcing Mr Miller to resign. He said that would be a constructive dismissal. That was plainly a refusal to work with the Claimant. Mr Miller was not able to explain in cross-examination why his witness statement said that he had

not refused to work with him. The Tribunal understood that Mr Miller was experiencing some mental health difficulties when he wrote the email, but that does not explain why his witness statement was materially inaccurate two years later.

137.5 Mr Rogers said in his witness statement that he had refused to allow Mr Greaves to give the Claimant his phone number. He said that he assumed the Claimant was trying to contact him because he was a trade union representative and he was aware that the Claimant was already receiving advice from Mr Hall, so he did not want to get involved or interfere. He said that he would not normally have contacted the Claimant. He said that he had seen the Claimant once in the car park, and the Claimant did not acknowledge him. He had seen him in the canteen with Mr Greaves. He went over to exchange pleasantries and asked the Claimant how he was. He did not refuse to work with the Claimant. In cross-examination, Mr Rogers agreed that he had gone to speak to Mr Greaves in the canteen, who was "a friend." He said that he "Asked Jim some stuff" and then "spoke to Sam politely." Mr Rogers denied ignoring the Claimant every other time he saw him. Mr Rogers was asked about a note from Mr Fox, indicating that Mr Rogers had approached him in January 2019 to discuss the Claimant's return to work. Mr Rogers said that there were signallers on the operating floor who had issues with the Claimant, and that as staff representative it was Mr Rogers's responsibility to raise those. Mr Rogers said in cross-examination that he could not recall whether he went to see Mr Fox on 8 February 2019 when he saw the Claimant at work on the operations floor. He said that he could not recall, although he did appear to recall that the Claimant had been away for some time, that he had not been warned about the Claimant's return. The Tribunal found that Mr Rogers did go to Mr Fox when he saw the Claimant on 8 February 2019 and that this is what led Mr Fox to escort the Claimant to the Delivery Unit.

137.6 When Mr Taylor delivered his grievance outcome to Mr Houlston on 12 March 2020, Mr Blake attended with Mr Houlston. Mr Blake told Mr Taylor that he had had signallers come to him that week and say they could never work with the Claimant again.

138. The Tribunal had no hesitation in finding that the SSMs closed ranks when the Claimant went to Mr Gee. They did not like him doing so. That was reflected afterwards in the writing of the SSM letter; repeated objections subsequently to his returning to his substantive post; and ostracising him in the meantime when they came across him. All of this was motivated by his protected disclosure.

139. That is the context in which the Tribunal considered the allegation that people were pressurised to make complaints about him, again because he had been to see Mr Gee and made his disclosure. The Tribunal found that that did happen. It was entirely consistent with the immediate reaction of the SSMs, in co-ordinating the letter of 5 September 2018. There was no doubt that, in response to Mr Jackson's suggestion, the SSMs then spoke to more than 40 members of staff. The letter of 29 September 2018 to Mr Jackson was at pains to emphasise that nobody had been coerced, badgered or threatened, but the Tribunal found it implausible that this was done in a neutral way, given what had already happened, and given the events that followed, as set out above. We

took into account, for example, the concerns raised by the SSMs in January 2019 about the Claimant returning to work and the references to “strong views” and “an atmosphere of retribution” made by Mr Fox many months later. The two anonymous letters add some support to the allegation, but of course only limited support given that they are anonymous. Fundamentally, given our finding that the SSMs wrote the SSM letter as retaliation for the Claimant going to Mr Gee, and ostracised him thereafter, the Tribunal found it inconceivable that when 40 or more staff were approached about giving evidence, that was done in a neutral way.

140. The Tribunal’s determination in respect of these parts of detriments 2 and 4 was therefore:

Mr Blake telling C not to call him and then not engaging with him. No contact from work colleagues. Blanked or not acknowledged in passing. No pleasantries. Ignored when working in Sheffield sub-ROC.	Upheld
Colleagues pressured into making complaints about C.	Upheld

Detriment 10: Given inappropriate work (part)

141. One part of the Claimant’s complaint about being given inappropriate work remains to be addressed. That is that the work at the Sheffield sub-ROC was a lower grade than his substantive SSM post. It is clear that the Claimant was given that role because of Mr Wilson’s involvement. He was trying to help the Claimant at the same time as addressing his own shortfall in SSMs. All of his actions in managing the Claimant, and after the Claimant’s secondment, were consistent with his trying to support the Claimant. The fact of the matter was that the Sheffield role was two grades lower than the Claimant’s substantive post. He was not put into a lower grade post deliberately because he had made protected disclosures. He was in the situation of needing alternative work because he had been removed from his substantive SSM post as a result of making protected disclosures, but that is not the same thing.

142. The Tribunal’s determination in respect of this part of detriment 10 was therefore:

Sheffield sub-ROC work in a lower grade.	Dismissed: happened but not because of protected disclosure.

Detriment 9: Delays and process failures (part)

143. One part of the Claimant’s complaint about delays, process failures and failures to comply with recommendations that remains to be considered is his complaint that the mental wellbeing toolkit was not done with him. That was quite separate

from the SRA, which should have been done in January 2019 after Mr Jackson recommended it, and which was never done.

144. The mental wellbeing toolkit appears to the Tribunal to have been identified as a means to support the Claimant by HR when they were advising Mr Wilson in January 2020. Mr Wilson sent the Claimant an unpopulated version of the form at the end of January 2020, when he was off sick, and asked to speak to him about it. The Claimant was not able to complete it at that time, but Mr Wilson followed it up in conversation.

145. Mr Wilson's evidence, which the Tribunal accepted, was that when the Claimant returned to work on 4 May 2020, Mr Fox was his line manager; his secondment had ended. However, Mr Wilson did still occasionally check on him as it was "not the kind of situation you could just walk away from." Mr Wilson considered that he still needed to chase the Claimant to complete a mental wellbeing toolkit. A Ms Lawson therefore asked the Claimant on 2 June 2020 to complete the document and send it to Mr Wilson. The Claimant emailed Mr Wilson screenshots of the completed form the next day. They were not legible. Mr Wilson did not respond immediately but he did speak to the Claimant on 23 July 2020, just before he was due to go back on the SSM roster. They completed the toolkit together and Mr Wilson sent it back to him the same day. On 10 August 2020, the Claimant emailed Mr Wilson and thanked him for going through the toolkit with him on 23 July 2020.

146. The Tribunal found that Mr Wilson did his best to complete the mental wellbeing toolkit with the Claimant once that was identified in January 2020. Initially it was put on hold because of the Claimant's sickness absence. After the Claimant returned to work Mr Wilson continued to take ownership and ensured that the document was completed before the Claimant started on the SSM roster. None of his actions were influenced by the fact that the Claimant had made protected disclosures.

147. The Tribunal's determination in respect of this part of detriment 9 was therefore:

Not doing mental wellbeing toolkit with C	Dismissed: completion of toolkit was delayed but not because of protected disclosure.

Detriment 6: loss of earnings
Detriment 11: failure to respond to correspondence (part)
Detriment 14: damage to career progression and reputation

148. The Claimant was concerned throughout his absence from his substantive SSM post that he was unable to earn overtime. As we have noted, that is a substantial part of the SSM take home pay. Any reduction in his overtime also obviously affected how much he was paid for his annual leave. There is no dispute that the Claimant did not have opportunities to earn overtime when he was doing project work. Once his secondment to Sheffield sub-ROC started he had limited opportunities to do overtime when he was doing the role of a signaller at Brough. He was once given an SSM overtime shift (when the

alternative was not to have an SSM) but otherwise could not do SSM overtime shifts because he had not passed out as a Sheffield SSM.

149. The Claimant says that he first raised his concern when he met Mr Fox and Mr Foote on 11 September 2018. Mr Foote did not give evidence about that. The Claimant says that he raised it again with Mr Foote on 16 January 2019. He says that Mr Foote asked him to let him have some figures. That was recorded in the Claimant's notes at the time. Obviously, the Claimant's health took a downturn shortly afterwards. It does not appear that he sent Mr Foote any figures. However, he raised the issue again at the meeting on 8 May 2019. That was recorded in Mr Hall's notes. The Claimant said that Mr Foote told him that he would look at the Claimant's average earnings, take advice and get back to him. He did not do so. There was certainly no evidence of anything being done about this following the meeting, despite the fact that it was clearly raised.

150. The Claimant wrote formally to Mr Foote on 6 August 2019. He referred to their previous conversations about it and to Mr Foote having undertaken to look into it some months ago. He explained that he was now raising it formally. His losses amounted to £3,690.20 *per four weekly pay period*, calculated using 2018 rates and his average earnings. Mr Foote acknowledged the letter and told the Claimant that he would pass it to HR. He did so. The Claimant heard nothing more.

151. The Claimant wrote again on 3 October 2019. He copied in Mr Hayles because Mr Foote had moved on. He said that other than a brief oral update from Mr Hall, he had not heard anything about his letter. He asked for a written response within 7 working days. Mr Foote forwarded the email to Ms Pickup, asking her to look at it, and copied the Claimant in.

152. Ms Pickup did not correspond with the Claimant. On 24 October 2019 she asked Mr Wilson to authorise an unexplained payment for the Claimant and he did so. On 15 November 2019, the Claimant received an unexplained payment of £4,527.14 in his pay out of the blue. He asked for an explanation. Payroll told him that they had no idea what it was for and referred him to his line manager. Mr Wilson referred him to Ms Pickup. Eventually, on 17 December 2019, Ms Pickup told him that this was for his loss of earnings claim. She provided no explanation of how the amount had been calculated. It was very substantially less than the Claimant was saying he had lost.

153. The Claimant raised this as part of the informal stage of his grievance on 3 March 2020 and Mr Hewlett refused payment on 16 March 2020 (see further below).

154. One part of the Claimant's claim is that he was unable to work overtime and that he lost income because of his removal from his substantive SSM post. The Tribunal considered that insofar as he was complaining that the detriment of removing him from his SSM post or preventing his return to that post caused him financial losses, that is a matter to be dealt with at the remedy stage. The same was true of the complaints that the Claimant lost out by the application of the overtime equalisation system and that his career progression and reputation were damaged by the circumstances of his removal from his substantive post.

155. At this stage we are concerned with the distinct complaint that Mr Foote failed to reply to his correspondence about the overtime issue, and that there was a subsequent failure to provide him with a breakdown of the payment he received and a failure to take management responsibility for this issue *because* of his protected disclosures.

156. Mr Foote's evidence was that when the Claimant wrote to him about it, he passed it on to Ms Pickup to deal with. He did not think it was within his remit and believed that HR would take any appropriate steps. He repeated that in cross-examination.

157. The Tribunal considered that the Respondent's approach to this issue was woeful. There was an obvious, substantial shortfall in the Claimant's income as a result of being moved from his substantive SSM post. From January 2019 the disciplinary investigation had concluded with no case to answer, but he was still unable to return to his post for another eighteen months. He raised his concern about losing money verbally in September 2018, January 2019 and May 2019 but nothing was done. He raised it in writing in August 2019. It was passed to HR but nothing was done. He raised it again in writing in October 2019. Some action was finally taken, but nobody communicated with the Claimant about it or told him what had been decided or why. He received a payment of far less than he said he had lost. He did not receive any explanation after that either.

158. While this was unacceptable, the Tribunal found that Mr Foote's failure to take action when the Claimant raised it verbally was not because the Claimant made protected disclosures. We concluded that it was most likely that it was because it was too difficult for Mr Foote to deal with, and he preferred to kick it into the long grass. When it was put in writing, some action had to be taken. Mr Foote simply forwarded it to HR immediately each time. Clearly, he was not taking any responsibility for it, and was not supporting the Claimant's claim, but again the Tribunal considered that this was just because he did not want anything to do with what appeared to him to be a difficult financial matter, not because of the Claimant's protected disclosures. He hoped that somebody else would resolve it.

159. The Tribunal's determination in respect of these parts of detriments 6, 11 and 14 was therefore:

Unable to work overtime and loss of income because of removal from substantive post	Matter for remedy hearing
Detrimentally affected by overtime equalisation system	Matter for remedy hearing
Mr Foote's failure to reply to correspondence about overtime, failure to provide breakdown of payment and lack of management responsibility.	Dismissed: happened but not because of protected disclosure
Damage to career progression and reputation	Matter for remedy hearing

Detriment 7: subjected to unfounded grievance investigation re Houlston grievance
Detriment 9: delays and process failures (part)
Detriment 12: failure to prevent reprisals (part)

160. As noted above, Mr Houlston submitted a grievance about the Claimant on 6 May 2019. He sent an email to Mr Foote saying that he wanted to raise a grievance due to malicious complaints made against him by the Claimant. He had been advised by his trade union representative to do so. He did not give any detail. He had previously indicated an intention to submit a grievance and Mr Foote had told him that it was "probably best" he did not influence Mr Houlston's decision.

161. One of the Claimant's complaints is that Mr Houlston submitted his grievance because of the Claimant's disclosure to Mr Gee. Mr Houlston did not give evidence to the Tribunal and nobody else gave evidence about why Mr Houlston submitted his grievance. The Tribunal noted that in due course Mr Hayles concluded that some of the Claimant's allegations appeared to malicious and that this should be investigated. That appears to have been done through the medium of Mr Houlston's grievance, rather than as a separate disciplinary investigation into the Claimant. Ultimately Mr Houlston's grievance was not upheld. In any event, Mr Houlston's grievance was raised long before Mr Hayles's outcome report. In his first investigation meeting with Mr Hayles, when the Claimant's allegations were put to him, Mr Houlston is recorded as saying that they were malicious lies. That was on 22 March 2019.

162. The Tribunal also noted that, as with Mr Jackson's investigation, Mr Hayles's report did not fully exonerate Mr Houlston. He rejected complaints of homophobic comments, but, for example, he found that Mr Houlston had defaced a document relating to an incident causing a delay with a penis and the Claimant's name. He found that Mr Houlston's behaviours had fallen below what would be expected of the Respondent's managers, that he admitted to being "immature" and "passionate which comes across as aggressive", that he had used "ill-judged language" and that he had made comments not conducive with professional Network Rail line management behaviours. There was also evidence from other people that appeared to support some of the Claimant's complaints, in particular about homophobic comments. It was not clear how Mr Hayles had taken that into account. That was the context against which Mr Houlston raised a grievance complaining that the Claimant's allegations about him were malicious.

163. It was for the Respondent to prove the reason Mr Houlston's grievance was submitted. It did not do so. That does not mean that the reason was necessarily the making of protected disclosures. However, the Tribunal concluded that that was the reason. We have found that on the day of the disclosures Mr Houlston accused the Claimant of being a "grass" and was instrumental in the sending of the SSM letter five days later. There was evident animosity on his part towards the Claimant from then, and attempts to prevent the Claimant's return to work. Mr Houlston must have known that his own conduct was in some respects

worthy of criticism. All of this leads the Tribunal to conclude that the Claimant's protected disclosure was at least part of the reason for his grievance.

164. Mr Taylor was appointed to investigate the grievance in July 2019. Mr Taylor said that Mr Foote attempted to resolve it informally between 6 May and 17 July 2019, but Mr Foote did not give any such evidence. In cross-examination he said that he did not know why Mr Taylor was not appointed until 17 July 2019. That two and a half month delay was therefore unexplained.

165. When Mr Taylor reviewed the grievance email, he emailed Mr Foote, Mr Hayles, Ms Pickup and others to say that he did not believe there was enough to go on. His thoughts were that it would be resolved when Mr Hayles concluded his investigation (the disciplinary investigation into Mr Houlston). Mr Taylor did not feel that Mr Houlston's grievance should have been accepted in its current form. Mr Foote replied on 23 July 2019. He said that he had discussed it with Ms Pickup and agreed that Mr Taylor should meet Mr Houlston. If Mr Houlston was not able to add further details, Mr Taylor should tell him that he did not have enough to go on. If were was further evidence or allegations, Mr Taylor should proceed with the grievance.

166. It was suggested to Mr Foote that he was deliberately trying to get the grievance investigated even after Mr Taylor had expressed his view that there was not enough to go on, because of the Claimant's disclosures. Mr Foote was unable to explain why he had not tried to resolve the grievance informally with Mr Houlston, particularly as they were discussing mediation at that very time in May 2019. He said that when Mr Taylor contacted him in July 2019 he felt it was important to follow the process and have somebody impartial sit down with Mr Houlston and find out about his grievance. Mr Foote had taken HR advice. The Tribunal found that his decision to ask Mr Taylor to speak to Mr Houlston was because he wanted someone external to York to look at the matter and resolve it, rather than himself, and because it would cause difficulties if Mr Houlston were told that his grievance could not be pursued. While the underlying context remained the Claimant's protected disclosure and Mr Foote's unhappiness about it, that was not the reason for his action in this instance.

167. Mr Taylor said in his witness statement that he met Mr Houlston on 20 August 2019. He said that he was then satisfied that the grievance was serious and merited investigation. He met the Claimant on 11 October 2019. He interviewed Mr Douglas, Mr Miller, Mr Greaves, Mr Howell, Mr Rogers and Mr Bown in October and November 2019. He said that it was difficult to co-ordinate diaries and that when he spoke to people, they suggested others to interview. Mr Taylor prepared an initial investigation report on 16 December 2019, concluding that no further action was required against the Claimant. He met Mr Houlston on 8 January 2020 to give him the outcome. At that meeting, Mr Houlston told him that his allegation about the Claimant telling malicious lies stemmed from comments the Claimant had made during the disciplinary investigation by Mr Jackson. Mr Taylor therefore needed to look at the documentation from Mr Jackson's investigation. He requested permission from the Claimant to do so, and the Claimant agreed. Mr Taylor reviewed the documents and then tried to arrange a meeting with the Claimant. As we have noted, the Claimant was off sick at this time. They agreed that he would provide written responses to Mr

Taylor's questions and he did so. Mr Taylor then produced a final investigation report. He again concluded that no further action was required against the Claimant. He told Mr Houlston on 12 March 2020.

168. In cross-examination, Mr Taylor was asked why he went and spoke to witnesses without having any detailed or specific allegations of malicious lies from Mr Houlston. He said that was what he needed to investigate. That was the point of interviewing people. It was so that he could come to the right conclusion for the Claimant and Mr Houlston and there could be some closure. The Tribunal accepted that Mr Taylor was not trying to find evidence against the Claimant, but was trying to get to the bottom of the allegation, one way or another. Mr Taylor was asked about the delays in his investigation. He explained that it was difficult to fit interviews in with his own job and on-call rota, which he still had to do. Mr Taylor also explained that it was not until his meeting with Mr Houlston in January 2020 that it became clear to him that Mr Houlston was saying that the malicious lies were to be found in Mr Jackson's investigation. That was why he did not ask for that documentation sooner. Mr Taylor denied that the Claimant's protected disclosures had anything to do with the delay in concluding his grievance investigation.

169. There were clearly flaws in Mr Taylor's approach. However, the Tribunal found that he was genuinely doing his best to investigate and resolve the grievance. He was more used to carrying out health and safety investigations. We accepted his evidence about why it took so long and why he approached it as he did. While criticisms could be made, we were quite satisfied that Mr Taylor's actions were not influenced by the Claimant's protected disclosures.

170. The Tribunal's determination in respect of these parts of detriments 7, 9 and 12 was therefore:

Mr Houlston submitting grievance.	Upheld.
Mr Foote wanting the grievance pursuing after Mr Taylor said it should not be accepted.	Dismissed: happened but not because of disclosure.
Delays in process, impacting C's ability to work.	Dismissed: happened but not because of disclosure.
Permitting grievance allegations	Dismissed: happened but not because of disclosure.

Detriment 8: subjected to adversarial grievance process re C grievance
Detriment 9: delays and process failures (part)
Detriment 11: failures to respond to concerns (part)
Detriment 15: requirement to repay overtime payment

171. As noted above, the Claimant submitted a grievance to Mr Wilson on 21 February 2020. He explained clearly that his concerns stemmed from his raising safety concerns at a meeting with Mr Gee on 30 August 2018 and this had been shared with Mr Foote and then Mr Houlston. He referred to allegations being made against him by the SSMs, leading to his removal from work and disciplinary investigation. He summarised the events since then, many of which

we have dealt with above. He pointed out that he had lost overtime throughout the period.

172. Mr Hewlett (Employee Relations Advisor) was apparently appointed to deal with the Claimant's grievance and he explored whether it could be resolved informally with the Claimant. On 16 March 2020 he told him that he could not agree to the outcomes the Claimant was seeking, in particular: a without prejudice acknowledgement that he had suffered detriment for speaking out; proper assessment and repayment of his lost earnings; and an undertaking that he would not suffer further detriment. In relation to his lost income, Mr Hewlett wrote that an amount of £4527.14 was paid to him representing his average earnings whilst undergoing a disciplinary process and that there was no further amount owed to him. On 27 March 2020 Mr Hewlett told the Claimant that it was his last day at the Respondent and somebody else would be in touch.

173. Mr Thomas was then appointed to deal with the grievance. He was a LOM in a different region. It is not clear when exactly he was appointed. Mr Thomas's process was flawed and unfair and his evidence to the Tribunal was inconsistent and contradictory. In particular:

173.1 Mr Thomas did not hold an initial meeting with the Claimant, to understand what his concerns were. Instead, he obtained information from Mr Gee, Mr Foote, Mr Greaves, Mr Ray, Mr Wilson, Mr Taylor and Mr Fox between 29 April 2020 and 12 May 2020. He also reviewed minutes of meetings, OH reports and other documents.

173.2 Only then did Mr Thomas conduct a grievance hearing with the Claimant, on 29 May 2020. The Claimant's evidence is that it was adversarial, he was not able to explain his concerns and he felt like he was the defendant. Based on the notes of the hearing, the Tribunal accepted that evidence. For example, the Claimant said that he had been reliably informed that it was Mr Houlston who told the SSMs he had been to Mr Gee. Mr Thomas told him that he had done some research and there were no statements saying this information was told. He said he had spoken to lots of people. He said repeatedly that he had been informed that the Claimant's name was "never mentioned" or "never came up." Not only was that plainly adversarial, but Mr Thomas accepted in cross-examination that he had only contacted to one person about this: Mr Foote. Furthermore, that was by email only; they had not spoken. Mr Thomas clearly was not trying to ascertain information from the Claimant, he was trying to shut down this avenue because he had concluded on the basis of an email from Mr Foote that Mr Houlston had not told the SSMs that the Claimant had been to Mr Gee. Mr Thomas never spoke to Mr Houlston at all.

173.3 During the meeting on 29 May 2020 Mr Thomas asked the Claimant about allegations that had been investigated by Mr Jackson. He accepted in cross-examination that they were not part of the Claimant's grievance. He said that he was "just trying to get a picture."

173.4 Following the meeting on 29 May 2020, the Claimant sent a detailed email to Mr Thomas on 1 June 2020. He expressed his concerns about how the meeting had been conducted and dealt with a number of matters that had been discussed in some depth. He also pointed out that under the grievance policy, he should have been provided with copies of the

evidence gathered by Mr Thomas in advance of their meeting. He asked why that had not been done and asked for copies to be provided.

173.5 Instead of doing so, Mr Thomas prepared a grievance outcome report. Only on 1 July 2020 did he write to the Claimant inviting him to a meeting on 7 July 2020, referred to as a reconvened hearing. He attached what he referred to in the letter as a copy of part 1 of the investigation report, together with its appendices. In the covering email, the attachment was labelled "Final Grievance Report". That was referred to in the subject of the email too. Mr Thomas had prepared a draft report without having properly asked the Claimant about his grievance, and without the Claimant having had the chance to comment on any of the evidence he had gathered. The Claimant prepared an annotated version of the report.

173.6 In his signed witness statement, Mr Thomas initially said that he did not provide the Claimant with copies of the statements he had taken as part of his investigation because as far as he was aware there was no requirement for that in the Respondent's Grievance Procedure. He corrected that at the start of his evidence. But he was still asked about how it had come to be in his statement in the first place, given that he accepted that he knew from the events of June and July 2020 that there was such a requirement. He could not explain why the original version of his statement, signed by him, said the opposite, beyond saying that it was "a mistake".

173.7 The meeting went ahead on 7 July 2020 and a "final" outcome report was produced on 23 July 2020.

173.8 Most of the grievance was not upheld. We do not need to review the findings in detail. It was quite clear from the evidence and cross-examination that Mr Thomas had not carried out a fair, balanced or adequate investigation to justify the making of the findings. To give one example, a central part of the Claimant's grievance was that the allegations made by the SSMs were retaliation for his going to Mr Gee. He referred to this in the grievance meeting on 29 May 2020. Mr Gee concluded in his outcome report that genuine concerns were raised against the Claimant and there was no evidence that at any stage the concerns were raised maliciously or with an ulterior motive. In cross-examination, it transpired that Mr Thomas had never looked at the SSM letter and had not spoken to any of the SSMs. It was difficult to see how he could have reached such a conclusion without doing so. There were other, similar examples.

174. The issue for the Tribunal was whether the reason or part of the reason for Mr Thomas's delayed and flawed approach was that the Claimant made protected disclosures. Despite the shortcomings and inconsistencies in his evidence, the Tribunal found that this was not the reason. Mr Thomas was from a different region. He was evidently influenced by, and deferential to, people like Mr Foote, whom he had known for years and who was senior to him. But that does not mean that Mr Thomas's own approach was influenced by the Claimant's protected disclosures. The Tribunal concluded that it was fundamentally ineptitude that lay behind the inadequacy of Mr Thomas's approach.

175. One discrete allegation against Mr Thomas is that he referred to Mr Ray or Mr Raine as his “old mate” at one of the grievance meetings with the Claimant. The Claimant said in his witness statement that he could not remember the exact context. Mr Thomas was not cross-examined about this. The Tribunal found that it did not happen. The Claimant mis-remembered.

176. One of Mr Thomas’s conclusions was in relation to the Claimant’s overtime claim. He concluded that he had received all pay he was contractually entitled to receive. He had received his basic pay throughout and had been treated no differently to anybody else in the same situation. He had found out that the payment of £4527 was for the period 11 September 2018 to 24 December 2018. He appreciated that the Claimant had not been told that, and that he had not received a breakdown of the payment and how it was calculated. Mr Thomas recommended that one be provided and said that he would contact Ms Pickup. Again, it is difficult to see how Mr Thomas could possibly have concluded that the Claimant had been paid everything he was entitled to when he had no idea how the payment of £4527 had been calculated.

177. There was no evidence before the Tribunal that the Claimant was ever provided with a breakdown of the calculation, despite Mr Thomas recommending it and asking Ms Pickup to provide one. We found that it did not happen. The Respondent did not prove the reason why. However, it was for the Claimant in the first instance to prove that the failure to act on Mr Thomas’s recommendation was that he made a protected disclosure. While the lack of communication and explanation was unacceptable, the Tribunal was not able to infer that it was because of the Claimant’s protected disclosure.

178. That brings us to the Claimant’s appeal against Mr Thomas’s decision on his grievance. That was dealt with by Mr McCarthy. We do not need to go into detail, but it was clear that Mr McCarthy’s approach was equally flawed. The mere fact that he did not uncover any of the obvious shortcomings in Mr Thomas’s investigation and procedure was a strong indication that he had not carried out an adequate investigation into the Claimant’s grounds of appeal himself.

179. To give one example, one of the Claimant’s grounds of appeal was that Mr Thomas had not given him copies of the statements he had obtained before the grievance hearing. Mr McCarthy’s conclusion was that this was not required. On the face of the Grievance Procedure it expressly was. Mr McCarthy said in cross-examination that he had checked the Grievance Procedure specifically in relation to this point. He could not account for how he had concluded that it said the opposite of what it in fact said. Worse still, his witness statement, too, originally said that the Grievance Procedure did not require the Claimant to be provided with copies of the statements, and had to be corrected at the start of his oral evidence. He could not explain why his “confident understanding” was that the Grievance Procedure did not require the statements to be shared, when it explicitly did, and when he was supposed to have dealt with a ground of appeal on this precise point. Another part of the Claimant’s appeal was about the delay in getting him back to his substantive post. Mr Thomas had concluded that management had tried to get the Claimant back to work but that it had been delayed because of his sickness absence and because “the mediation plan was

delayed." Mr McCarthy's conclusion was that, bearing in mind that the claimant had five instances of long-term sickness absence, he was returned to his substantive role in a reasonable time. He made no reference to mediation as part of the reason for delay. In cross-examination he accepted that he did not consider mediation and how long it took. His evidence was simply that he was satisfied that Mr Thomas had considered this part of the grievance thoroughly. Mr McCarthy was also asked about his conclusions in relation to the Claimant's point that Mr Gee had breached his confidentiality by telling Mr Foote about his disclosure, and Mr Foote in turn had told Mr Houlston. He understood that this was one of the Claimant's concerns. He was asked how he thought Mr Thomas had gone about investigating it. He said, "At the time I was satisfied with it." He was asked the question again. He said that he thought Mr Thomas had tried to get to the bottom of where the name had come from. He was asked whether he was concerned about the fact that Mr Thomas had not even spoken to Mr Houlston. He said that that did not cross his mind at the time. He was asked what evidence he understood Mr Thomas to have that there was no breach of confidentiality. He referred to "supporting documentation to say that no names were mentioned by Mr Foote." He did not think it was necessary for Mr Thomas to speak to Mr Houlston. It was put to him that he had not looked into any of these issues in any detail at all. He said, "I believed at the time that the information Mr Thomas had collated was sufficient." It seemed to the Tribunal that Mr McCarthy had simply failed to look at Mr Thomas's approach with a critical or enquiring eye. The whole impression of his consideration of the grievance appeal was that it was a rubber stamping exercise rather than a proper investigation into and consideration of the grounds of appeal.

180. The particular complaint in these proceedings about Mr McCarthy relates to his consideration of the appeal about the £4527 and lost overtime. Mr McCarthy decided to consider whether the Claimant should have been paid the £4527 at all. He decided that, because the Claimant had not been suspended, he was not entitled to be reimbursed for lost earnings. His reasoning was that the disciplinary policy specifically authorised payment for lost earnings during suspension; the Claimant was not suspended, therefore he was not entitled to be reimbursed for lost earnings. We pause to note that the fact that the Claimant did not fall within that particular policy did not mean that there was no other express or implied contractual or discretionary basis for payment. Returning to the grievance appeal outcome, Mr McCarthy also said that on advice from HR he had concluded that the payment should not have been made and that the Claimant would be required to pay the sum back. There was no note or record of any kind about this HR advice. Mr McCarthy did not speak to Ms Pickup, who authorised the payment, to find out why she did so. In his witness statement, Mr McCarthy said that he reviewed HM Treasury's Managing Public Money Guidance and concluded that the payment should not have been made without Treasury approval. In cross-examination, he was asked which part of the Guidance imposed that requirement. He identified a requirement relating to "unusual payments in kind." That was plainly irrelevant. A payment in kind is the use of a good or service as a payment, instead of cash. It was put to Mr McCarthy that the reason he decided that the Claimant should repay the £4527 was that the Claimant made a protected disclosure. He disagreed. The Tribunal accepted his evidence. There was nothing to suggest

that this formed any part of his consideration. Instead the Tribunal concluded that the explanation in his case, too, was ineptitude.

181. The Tribunal's determination in respect of these parts of detriments 8, 9, 11 and 15 was therefore:

Subjected to adversarial grievance process re C grievance.	Dismissed. Reference to Mr Ray or Mr Raine as "my old mate" did not happen. The rest happened but not because of disclosure.
Delay in grievance impacting C's ability to return to work.	Dismissed: happened but not because of disclosure.
No breakdown of £4527 despite Mr Thomas's recommendation.	Dismissed: happened but not because of disclosure.
Being told in grievance appeal outcome to repay the £4527 despite no breakdown being provided.	Dismissed: happened but not because of disclosure.
Requirement to repay overtime payment.	Dismissed: happened but not because of disclosure.

Time limits

182. The Tribunal gave careful consideration to the question of time limits.

183. We concluded that the Claimant's removal from his substantive post and ongoing failure to return him to it was an act extending over a period until July 2020. It was not just a one-off decision in September 2018 that had continuing consequences, but, as explained in detail above, a series of repeated acts, decisions and failures to act, all underpinned by a wish to keep the Claimant out of his substantive post, at least in part because of his protected disclosure. It only ended in May 2020 when proper steps were taken to return him to his substantive post. We also concluded that the ostracization of the Claimant was an act extending over a period. It started with Mr Houlston's comments on 30 August 2018 and only really ended with the conclusion of the mediation process and the Claimant's return to his substantive post. In both these respects, the Tribunal has found that there was a series of incidents of detrimental treatment, all linked to one another, and evidencing a continuing state of affairs in which the Claimant was treated detrimentally (by being kept out of his substantive role and by being ostracised) because of his protected disclosure.

184. We concluded that the remaining detrimental treatment was part of a series of similar acts or failures that ended on or after 2 March 2020. Underpinning the whole course of events was the Claimant's protected disclosure on 30 August 2018, the SSM letter in retaliation five days later, the Claimant's removal from his SSM post shortly after that, and the ongoing failure to return him to that post thereafter, all, as the Tribunal found, because he made a protected disclosure. Against that background, Mr Foote's and Mr Houlston's breaches of confidentiality on 30 August 2018; Mr Foote's unreasonable instigation of a disciplinary investigation in immediate response to the SSM letter; SSMs and

signallers being pressured to make complaints about the Claimant in September/October 2018; Mr McIntosh's failure to respond to the Claimant's letter on 25 October 2018; the disregard of OH and psychologist reports and U-turns in January to May 2019; Mr Foote's instruction to the Claimant only to attend the ROC with notice from February 2019 onwards; Mr Houlston's grievance in March 2019; and the repeated delays in arranging mediation, while setting it up as an obstacle to the Claimant's return to his substantive post, were all acts or failures done in response to and because of the same disclosure to Mr Gee and as part of an ongoing reaction to that. They amounted to a series of acts, and they were similar to one another. With the exception of Mr McIntosh's failure to provide a substantive response, the acts were all carried out by a small group of people – signallers, SSMs and managers associated with the York IECC/sub-ROC. Mr McIntosh's conduct was, however, linked to the rest because it was addressed by Mr Greenwood contacting Mr Hall and by Mr Greenwood looking into what was being done in relation to the Claimant. That must have entailed some sort of briefing or information being provided by the relevant managers.

185. The Tribunal therefore concluded that all of the complaints were presented within the Tribunal time limit, either because the conduct complained of was an act extending over a period, or because it was part of a series of similar acts.

Employment Judge Davies
24 October 2022