THE INDUSTRIAL TRIBUNALS

CASE REF: 5980/18

CLAIMANT: **Dr Tamara Bertha Johanna Bronckaers**

RESPONDENT: **Department of Agriculture, Environment and Rural Affairs**

JUDGMENT

The unanimous judgment of the tribunal is that:

(i) The claimant was subjected to detriment on grounds of having raised protected disclosures.

(ii) The claimant was dismissed and that dismissal was unfair.

(iii) The dismissal was automatically unfair as the reason or principal reason for it was the fact of her having raised protected disclosures.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Ó Murray**

Members: **Mr I Carroll**
Mrs F Cummins

APPEARANCES:

The claimant was represented by Mr P Lyttle QC and Ms R Best BL, instructed by Mr McShane of MTB Solicitors.

The respondent was represented by Mr A Sands BL, instructed by Mr C Mitchell of the Departmental Solicitor's Office.

THE CLAIM

1. This is a whistleblowing claim whereby the claimant claims she suffered detriment and was constructively dismissed due to her having raised protected disclosures. The claimant alleges that she resigned in response to a last straw event following a series of detriments which when viewed together amounted to a repudiatory breach of the implied contractual term of trust and confidence in her contract. She also claims unfair dismissal simpliciter in the form of constructive dismissal.

2. The respondent's case was that the claimant resigned and was not dismissed; that she was not unfairly dismissed; that any dismissal was not by reason of her having made protected disclosures. The respondent also denied that she suffered

detriment as alleged or at all and if she suffered detriment it was not on grounds of her having made protected disclosures.

THE ISSUES

3. An agreed issues document was provided by the parties and referred to a set of replies which set out the protected disclosures relied upon at A to M. The thirteen protected disclosures relied upon related to a series of emails sent by the claimant in the period 28 February 2017 to 21 February 2018.

4. Both sides agreed in the submissions hearing that the information conveyed in the protected disclosures is encapsulated in the following description:

   (a) Issues of concern about welfare of animals in livestock markets particularly in Ballymena Livestock Market; and

   (b) Issues about the deletion of cattle moves in the recording carried out by livestock markets and the effect of that on traceability of cattle and the risk of Tuberculosis (TB) in particular.

5. Both sides also agreed in the submissions hearing that the table set out in the claimant's written submissions read together with the dates set out in the first set of replies (as corrected orally in the submissions hearing where typographical errors had occurred) list the thirteen protected disclosures relied upon labelled A-M and in respect of which a concession was made by the respondent prior to the hearing as set out at paragraph 6 below. The protected disclosures and the relevant dates are set out in the table below together with the page number in the trial bundle:

Protected Disclosure	**Bundle Page Number and Date**
A	102-104 - 28/02/17
B	105-107 - 24/05/17
C	109 - 22/09/17
D	110-116 - 21/09/17 117-130 - 22/09/17 25/09/17 27/09/17 28/09/17
E	131,135-137 - 04/12/17 13/12/17 15/12/17 18/12/17
F	132-134 - 30/11/17 01/12/17
G	132-134 - 30/11/17 01/12/17
H	135-137 - 15/12/17
I	138-140 - 18/12/17 141-142 143-145
J	146 - 23/01/18
K	147-148 - 19/02/18

L	149-151	-	20/02/18
M	152-156	-	21/02/18

6. The respondent conceded that the disclosures relied upon as set out in the emails referred to above amounted to protected disclosures which were raised by the claimant with her employer in good faith and that she reasonably believed that they were in the public interest. The "*relevant failures*" engaged in the protected disclosures are health and safety, crime, breach of a legal obligation. The respondent's concession related to the disclosures as they applied to the activities of third parties i.e. livestock markets, farmers and dealers.

7. The issues of contention between the parties were as follows:

   (i) Whether or not the disclosures relied upon also amount to protected disclosures vis-à-vis officials of the Department. The key issue here was whether the claimant conveyed information to her employer which she reasonably believed at the time, tended to show a relevant failure on the part of the respondent Department's officials. In this regard, all three relevant failures referred to above were cited but especially the breach of a legal obligation category in relation to the statutory regime for the registration of movement of cattle. The claimant's focus in written submissions and at the submissions hearing was on the deletion of cattle moves and the allegation that officials from the Department were complicit in wrongdoing in that regard. This is referred to as "*the complicity point*" in this decision.

   (ii) Whether the claimant was treated detrimentally at all (in the form of a series of acts and deliberate failures to act) and if so whether any such treatment was on grounds of her having made protected disclosures;

   (iii) Whether any detriments constituted a course of adverse treatment of sufficient seriousness to amount to a breach of the implied term of trust and confidence which entitled the claimant to resign in response following a last straw event;

   (iv) If the claimant was dismissed whether any dismissal was for the principal reason of having raised any protected disclosures and was thus automatically unfair;

   (v) If the claimant was dismissed was that dismissal otherwise unfair.

8. The parties had agreed during the Case Management process that this hearing would deal with liability issues only and that a separate Remedy Hearing would be arranged if required.

SOURCES OF EVIDENCE

9. The tribunal had a written statement together with oral testimony from Dr Bronckaers on her own behalf.

10. The following witnesses give evidence for the respondent by witness statement and gave oral testimony:

(i) Dr Julian Henderson an SPVO Grade 6 in the Department who was the claimant's line manager at all times relevant to this case and whose areas of responsibility included enforcement in relation to animal welfare.

(ii) Dr David Cassells an SPVO Grade 6 in the Department who was in the Division responsible for IRM (Identification Registration and Movement of livestock).

(iii) Mr Robert Huey the Chief Veterinary Officer and a Grade 3 in the Department.

(iv) Mr Colin Harte the Deputy Chief Veterinary Officer Grade 5 (now retired) in the Department responsible for disease and welfare issues and tuberculosis (TB) strategy.

(v) Dr Perpetua McNamee a Deputy Chief Veterinary Officer Grade 5 in the Department responsible for IRM.

(vi) Mr David Kyle SPVO Grade 6 responsible for TB issues.

(vii) Mr Roland Harwood SPVO Grade 6 (now retired) responsible for TB policy.

11. The parties presented three lever-arch files of documents running to 1600 pages and further documents were presented during the hearing. The tribunal has taken account of all the relevant documentation to which it was referred during the hearing. The parties also presented written submissions and supplementary submissions (following a recording of the hearing having been given to them) and oral submissions were made at the hearing.

Key to Abbreviations and Acronyms

12. (i) APHIS – The computer database held by the Department

(ii) COGNOS – Reports which list specific information collected on the Department's APHIS computer system under one heading making it easier to assess information.

(iii) IRM – Identification, Registration and Movement

(iv) LM – Livestock Market – premises licensed by DAERA to sell livestock by auction.

(v) SPVO – Senior Principal Veterinary Officer

(vi) SVO – Supervisory Veterinary Officer

(vii) TB – Tuberculosis

(viii) TBSPG – TB Strategic Partnership Group

(ix) Three categories of TB status:

(a) OTF – Official TB-Free Status

(b) OTS – Official TB Status Suspended ie tested but no result

(c) OTW – Official TB-Free Status withdrawn

(x) WAEB – Welfare and Enforcement Branch

CASE MANAGEMENT

13. The tribunal heard evidence on liability on four days namely from 11-14 February 2020. Mr Lyttle applied for the evidence of each witness for the respondent to be given one by one ie in the absence of the other witnesses for the respondent. Mr Sands objected to this application. For reasons given orally at the hearing the tribunal acceded to Mr Lyttle's application. Each respondent witness therefore gave evidence separately in the absence of the other witnesses.

14. At the end of the evidence it was agreed by the parties that written submissions would be provided in advance of an oral submissions hearing and a submissions hearing was therefore fixed for March 2020. This had to be adjourned due to the Covid lockdown which meant that in-person hearings could not take place and the parties rejected in principle a remote hearing at that point. The submissions hearing ultimately took place as an in-person hearing on 4 June 2021. This was following a period during which the tribunal building was closed for Covid reasons; the Employment Judge was off ill for a period; appropriate facilities were, for a period, unavailable for a remote hearing; and there were difficulties arriving at agreed dates to suit all the parties and the panel.

15. At a CMPH on 11 February 2021 apparent gaps in the written submissions were outlined by the Employment Judge and the parties therefore agreed that supplementary written submissions would be provided in advance of the Submissions Hearing. Due to the extensive delay in having the submissions hearing (for the reasons set out above), a copy of the full recording of the hearing was provided to the legal representatives to ensure that the parties had recourse to the full oral evidence so that they would not be disadvantaged by the passage of time. That recording was provided in the exceptional circumstances pertaining to this case and on the legal representatives' undertakings not to disseminate the recording to anyone including their clients.

THE LAW

16. The parties provided bundles of authorities. The authorities referred to are listed below. Several authorities were of limited assistance to the tribunal in light of the evidence. The key authorities are referred to in the summary of the relevant legal principles set out below. The parties also referred to the leading textbook in this field namely ***Bowers on Whistleblowing*** (3rd Edition).

The Claimant's Authorities:

(i) ***London Borough of Harrow v Knight*** *[2003] IRLR 140 EAT*

The tribunal must analyse the mental processes to establish the reason why the claimant was subjected to detriment. It is not enough for a claimant to say that the detriment is related to a protected disclosure as a causative connection is necessary between the protected disclosure and the detriment alleged.

(ii) ***Pinnington v Swansea City Council*** *[2005] EWCA Civ 1135 [2005] ICR 685 CA*

Whether the claimant suffered detriment is a question of fact for the tribunal. Whether something is capable of constituting a detriment is a question of law. This case outlines four elements in relation to protected disclosures:

(a) that the worker suffered a detriment;

(b) that the detriment was by any act or deliberate failure to act;

(c) that this was by the employer;

(d) it was on the ground that the worker has made a protected disclosure.

(iii) ***Deer v University of Oxford*** [2015] IRLR 481 CA

This reaffirmed the definition of detriment as set out in ***Shamoon***.

(iv) ***Derbyshire and Others v St Helens Metropolitan Borough Council (Equal Opportunities Commission and Others intervening)*** *[2007] ICR 841 HL*

An unjustified sense of grievance cannot amount to a detriment.

(v) ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *[2003] ICR 337 HL*

This is the leading authority on the definition of detriment.

(vi) ***De Souza v Automobile Association*** *[1986] ICR 514, 522g CA*

(vii) ***Abertawe Bro Morgannwg University Health Board v Ferguson*** *[2013] ICR 1108 EAT*

Failure by a respondent to act where it has the power to act can amount to a detriment.

(viii) ***Chief Constable of West Yorkshire Police v B & C*** *(UKEAT)0306/15/RN EAT*

A tribunal may conclude that protected disclosures were a material influence on the detrimental acts or omissions without identifying which disclosure influenced which detriment.

(ix) ***Igen v Wong*** *[2005] EWCA Civ 142 CA*

This concerns the burden of proof in discrimination cases. In a detriment case a material influence is a more than trivial influence.

(x) ***Villallba v Merrill Lynch & Co Inc*** *[2007] ICR 469 EAT*

(xi) ***Nagarajan v London Regional Transport*** *[1999] IRLR 572 HL*

"*On grounds of"* does not need a conscious motivation as the question is why did the claimant receive the detrimental treatment.

(xii) ***El-Megrisi v Azad University in Oxford*** *(UKEAT) 0448/08 EAT*

The question is whether the cumulative impact of a series of protected disclosures is the principal reason for dismissal.

(xiii) ***Fecitt v NHS Manchester*** *[2011] ICR 476 EAT*

(xiv) ***Fecitt v NHS Manchester*** *[2011] EWCA Civ 1190 CA*

(xv) ***Local Government Yorkshire and Humber v Shah*** *(UKEAT) 0587/11*

(xvi) ***Salisbury NHS Foundation Trust v Wyeth*** *(UKEAT) 0061/15*

(xvii) ***Western Excavating (ECC) Ltd v Sharp*** *[1978] QB 761 CA*

(xviii) ***Malik v Bank of Credit and Commerce International SA*** *(In Liquidation) [1998] AC 20 HL*

(xix) ***British Aircraft Corporation Ltd v Austin*** *[1978] IRLR 332 EAT*

(xx) ***Palmanor Ltd t/a Chaplins Night Club v Cedron*** *[1978] IRLR 303 EAT*

(xxi) ***The Post Office v Roberts*** *[1980] IRLR 347 EAT*

(xxii) ***Wigan Borough Council v Davies*** *[1979] IRLR 127 EAT*

(xxiii) ***Bracebridge Engineering Ltd v Darby*** *[1990] IRLR 3 EAT*

(xxiv) ***Royal Mail Ltd v Jhuti*** *[2020] ICR 731 Supreme Court*

It is for the tribunal to look behind any inaccuracies or deceptions by managers to establish the real reason for detrimental treatment or the dismissal.

(xxv) ***Omilaju v Waltham Forest LBC*** *[2004] EWCA Civ 1493 CA*

In a constructive dismissal case the test of whether an employee's trust has been undermined is an objective one.

The Respondent's Authorities:

(i) ***Chesterton Global Ltd v Nurmohamed*** *[2017] IRLR 837*

This relates to the public interest test which was not relevant in this case as it was agreed by the respondent that the public interest was engaged in the issues raised by the claimant.

(ii) ***Pinnington v Swansea City Council*** *[2004] EWCA Civ 1180*

(iii) ***London Borough of Harrow v Knight*** *[2003] IRLR 140*

(iv) ***Shamoon v Chief Constable of the RUC*** *[2003] UKHL 11*

(v) ***St Helen's BC v Derbyshire*** *[2007] UKHL 16*

(vi) ***Nelson v Newry & Mourne DC*** *[2009] NICA 24*

This was not relevant in this case as it concerned the identification of the correct comparator in the sex discrimination case.

(vii) ***Nagarajan v London Regional Transport*** *[1999] ICR 877 HL*

(viii) ***Fecitt v NHS Manchester Trust*** *[2011] EWCA 1190*

(ix) ***Jesudason v Alder Hey Children's NHS Foundation Trust*** *[2020] IRLR 374 CA*

The tribunal must focus on the reason why a detrimental act or omission occurred to determine whether the detriment was suffered on grounds of the claimant's protected disclosures.

(x) ***Western Excavating v Sharp*** *[1978] QB 761 CA*

(xi) ***Malik v Bank of Credit and Commerce International*** *[1997] UKHL31*

(xii) ***Bolton School v Evans*** *[2006] EWCA Civ 1653 CA*

The focus is on the reason why the claimant had been dismissed. In this case the reason was the fact that he had hacked into the school computer system which was a disciplinary offence.

(xiii) ***Royal Mail Ltd v Jhuti*** *[2020] UKSC 55*

(xiv) ***Pedersen v London Borough of Camden*** *[1981] IRLR 173 CA.*

Protected Disclosures

17. The law on protected disclosures was changed with effect from October 2017. The period under scrutiny in this case is from February 2017 to February 2018 and thus the protected disclosures in this case fall under both the old and the new law. Both sides agreed that the change in the law which took place in October 2017 was of no material significance in this case.

18. The Public Interest Disclosure (Northern Ireland) Order 1998 amended the Employment Rights (Northern Ireland) Order 1996 ("*the ERO*") and introduced provisions protecting workers from suffering detriment on grounds of having made protected disclosures.

19. The ERO provisions engaged in this case are Articles 67B(1)(a) (b) and (d) which list (in an exhaustive list) the categories of what are termed *"relevant failures".* The provision states where relevant as follows:

> *"67B. (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
>
> *….*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered."*

Reasonable Belief

20. The claimant must hold reasonable belief at the time she raises issues of concerns that the information conveyed tends to show a relevant failure. This is relevant to the complicity point in this case.

21. Authorities relevant to the issue of reasonable belief generally are as follows:

    (i) ***Babula v Waltham Forest College [2007] EWCA Civ 174***

    (ii) ***Darnton v University of Surrey [2003] IRLR 133 EAT***

    (iii) ***Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 879***

    (iv) ***Korashi EAT/0424/09.***

22. The following principles derived from the ***Babula*** case are relevant to this case as follows:

(i) The test of reasonable belief involves both a subjective test of the worker's belief and an objective assessment of whether the belief could reasonably have been held. In other words what did the claimant believe at the time and was it reasonable of her to believe that.

(ii) The test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure including whether the relevant legal obligation in fact exists.

(iii) The burden is on the worker making the disclosure to establish the requisite reasonable belief.

Detriment

23. Article 70B of the ERO provides:

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

24. Detriment is determined using the ***Shamoon*** test which is whether a reasonable worker would or might take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged. It is not necessary to demonstrate some physical or economic consequence. The tribunal assesses this objectively from the claimant's point of view by assessing whether the claimant's opinion that she had suffered a detriment was a reasonable one to hold.

25. ***Bowers*** (3rd Edition) sets out the following in relation to the meaning of '*detriment*':

> *"7.15 In Moyhing v Barts and London NHS Trust [2006] IRLR 860 (EAT), Elias J set out a helpful synthesis of relevant principles, drawing on the guidance in two House of Lords decisions, Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] ICR 1065 and Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337, as follows:*
>
> > *"15. … In Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] ICR 1065, a case of victimisation discrimination, Lord Hoffmann observed (para 53):*
> >
> > > *'… bearing in mind that the employment tribunal has jurisdiction to award compensation for injured feelings, the courts have given the concept of the term "detriment" a wide meaning. In Ministry of Defence v Jeremiah [1980] ICR 13, 31 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view*

that the [treatment] was in all the circumstances to his detriment". Mr Khan plainly did take that view … and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable.'

16. *A similarly broad analysis was adopted in Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337. The Northern Ireland Court of Appeal in that case had held, following a decision of the EAT in Lord Chancellor v Coker [2001] ICR 507, that in order for there to be a detriment there had to be some physical or economic consequence arising as a result of the discrimination which was material and substantial. The House of Lords rejected that approach. Lord Hope said this (at paras 34-35):*

> *'… The word "detriment" draws this limitation on its broad and ordinary meaning from its context and from the words with which it is associated. Res noscitur a sociis. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.*
>
> *'But once this requirement is satisfied, the only limitation that can be read into the word is that indicated by Brightman LJ. As he put in in Ministry of Defence v Jeremiah [1980] ICR 13, 30 one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR87. But contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence.'*

17. *Lord Hutton (at para 91) and Lord Scott (at paras 103-105) both expressly approved this analysis. Lord Scott said that 'if the victim's opinion that the treatment was to his or her detriment was a reasonable one to hold, that ought … to suffice'.*

26. The detriment must be due to an act or deliberate failure to act and the detriment suffered must be on grounds of the Claimant having raised a protected disclosure.

27. The issue is one of causation. In this case the Tribunal must examine the reason why the adverse treatment occurred (ie the factual basis on which it was done) by assessing all the circumstances and any inferences it is appropriate to draw from the facts. This includes an assessment of both conscious and unconscious mental processes on the part of the individuals involved on behalf of the respondent. The claimant's case to this tribunal was that the mental processes of Mr Henderson and Mr Huey should be examined as regards any detrimental treatment suffered by the claimant.

28. The ***Simpson*** case is a victimisation case where the Northern Ireland Court of Appeal outlined the approach for the tribunal and stated at paragraph 18 as follows:

> *"The tribunal can ask the question "why did the respondent act as it did?" See for example,* ***Nagarajan v LRT [1999] IRLR 57*** *at paragraphs [13] and [18]. In Derbyshire Lord Neuberger put the matter thus:*
>
> > *"The words 'by reason that' require one to consider why the employer has done the particular act ... and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused a detriment, one must view the issue from the point of view of the alleged victim."*
>
> *Alternatively the tribunal may pose the question "Would the respondent have acted as it did but for the fact that the victimised party did what he or she did acting under Article 6(1)(a)-(d). (See for example Lady Hale in R v Governing Body of JFS [2010] IRLR 136 paragraph [58] and Lord Clarke (ibid.) at paragraphs [131]-[134]. Alternatively, it may pose the question, as Lord Mance did in JFS, whether the impugned act was inherently discriminatory".*

29. In the case of ***Fecitt*** the Court of Appeal in England found that, in detriment cases, the relevant provision is infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the employee.

30. The burden of proof in whistleblowing detriment cases is set out in Article71(2) of ERO and operates in the same way as it operates in Trade Union detriment cases and that differs from discrimination claims. The initial burden is on the claimant to prove that she made protected disclosures and that she suffered detriment due to an act and/or a deliberate failure to act on the part of the employer. If she proves those two elements the burden shifts to the employer to provide an explanation for the detrimental treatment which is not tainted by the fact of the claimant having made protected disclosures. It is therefore for the respondent at that point to prove that the treatment was in no sense whatsoever on grounds of the protected disclosures.

31. On the burden of proof and '*reason why'* question ***Bowers*** states as follows:

> *"Workers may face particular difficulties in establishing why an employer acted, or deliberately failed to act, in a manner alleged to have caused detriment. It will be the employer who is best placed to adduce evidence in relation to this and to explain its conduct. In recognition of this, ERA, section 48(2) provides that 'on [a complaint of victimisation to a tribunal by a worker] it is for the employer to show the ground on which any act, or deliberate failure to act, was done'." (Paragraph 7.191)*

Dismissal

32. The right not to be unfairly dismissed is contained at Article 126 of ERO. At Article 127(1)(c) is outlined the provision relating to constructive dismissal.

33. At Article 130 of ERO are outlined the potentially fair reasons for dismissal. It is for the employer to show the reason for dismissal and that it is one of the potentially fair reasons listed in ERO. If the employer discharges that burden there is then a neutral burden as to whether or not the dismissal was fair or unfair in all the circumstances. This is known as a claim of unfair dismissal simpliciter. It is open to an employer to rely on a potentially fair reason for dismissal in a constructive dismissal case. No such reason was relied upon in this case.

34. Article 134A of ERO provides that an employee is unfairly dismissed if the reason or the principal reason for the dismissal is that he made a protected disclosure. Any such dismissal is automatically unfair and there is no necessity therefore for the tribunal to look further at the fairness or otherwise of the decision to dismiss.

35. The claimant does not have to prove that whistleblowing was the reason for her dismissal as the burden in that regard is still on the employer. In a constructive dismissal case the burden is on the employee to show that she resigned in response to a repudiatory breach of contract and that her resignation therefore amounted to dismissal.

36. The tribunal's focus thereafter in a constructive dismissal claim is on the reason for the employer's conduct which the employee says amounted to a repudiatory breach of contract. The tribunal assesses whether that conduct was by reason of the claimant having raised a protected disclosure and then goes on to assess whether the employee resigned because of the conduct and did not delay too long before resigning.

37. In this case both sides agreed that the tribunal's assessment of the reasons for any detrimental treatment is key ie that it involves the same analysis for the constructive dismissal claim (albeit to a different standard) as that to be conducted by the tribunal in relation to the assessment of whether detriment on unlawful grounds occurred.

38. The case of ***Western Excavating v Sharp Limited [1978] IRLR 27*** outlines the four key elements of constructive dismissal which the claimant must prove. They may be summarised as follows: -

    (i) There must be a breach of contract by the employer;

(ii) The breach must be sufficiently serious to justify the employee resigning;

(iii) The claimant must leave in response to the breach and not for some other unconnected reason; and

(iv) The employee must not delay too long in terminating the contract in response to the employer's breach as otherwise she may be deemed to have waived the breach of contract.

39. As regards any delay point there is no fixed time within which an employee must make up her mind to resign in response to a breach of contract; the surrounding circumstances are key.

40. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor event if it is the last in a series of acts one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation amounting to dismissal. (***Omilaju***). The last straw does not have to amount to a breach of contract itself but it must contribute something to the events which cumulatively are alleged to amount to a breach of contract.

41. In the case of ***Malik*** the House of Lords confirmed that there is an implied term in the employment contract that the employer will not conduct itself in a manner calculated or likely to damage the relationship of trust and confidence between the employer and the employee. If the employer breaches that term, it can amount to repudiation of the contract.

42. In a claim of constructive dismissal in relation to whistleblowing the focus of the tribunal is on the reason or principal reason for the dismissal. The tribunal must analyse the respondent's reasons for its conduct by looking at the respondent's mental processes to establish the factual reason why the respondent behaved in the way that gave rise to the fundamental breach of contract.

43. The claimant's perception is irrelevant to the exercise of establishing the '*reason why'* the impugned conduct occurred but it is relevant to the issue of why she left, ie the acceptance of the respondent's repudiatory breach.

44. In this case our approach is as follows:

(i) To identify the detrimental acts and deliberate omissions that amounted to a breach of contract and decide what weight to give to each of them.

(ii) To identify the respondent's reasons for the detriments and whether those reasons are accepted or rejected by this tribunal.

(iii) Then to look at whether the fact of making the protected disclosures was the reason or principal reason for the dismissal ie the cause of it or merely the context of the dismissal.

Recording of Cattle Moves

45. As part of the interlocutory process an agreed statement of the legislative and regulatory framework was provided by the parties which cited several pieces of legislation relating to the welfare of animals and the registration of cattle moves.

46. During the hearing the case narrowed and the focus was on the legislation governing registration of cattle moves. In the written submissions the focus of the claimant's arguments was on one piece of legislation namely the Cattle Identification (Notification of Births, Deaths and Movements) Regulations (Northern Ireland) 1999 (referred to in this decision as *"the Regulations")*. Amendments were made to that legislation in 2011 which are not relevant to this case. The Regulations enforce an EU Council Regulation.

47. The claimant's focus until late in the oral submissions was on Regulation 7 and the respondent's focus was on the fact that powers of the inspectors are set out at Regulation 11 the point being that the Department had various powers but it had no obligations relevant to the case. During oral submissions Mr Lyttle made reference to Regulation 5 which details criminal offences applicable to "*keepers*". No replying submission was made in relation to this point.

48. Both sides agreed that the Regulations are silent on the deletion of moves.

49. The following provisions of the Regulations are relevant to this case.

(i) In the interpretation part of Article 2(2) the definition of "*keeper*" is as follows:

> "*"keeper" means any person responsible for animals, whether on a permanent or on a temporary basis, including during transportation or at a market."*

(ii) At Regulation 3 the Department is designated the "*competent authority*":

> *"Competent authority*
>
> *3. The Department shall be the competent authority to which reports shall be made in accordance with the second indent of Article 7.1 of the Council Regulation."*

(iii) Offences are outlined at Regulation 5 as follows:

> *"Offences*
>
> *5-(1) Any person who fails to comply with the requirement to notify the birth, movement or death of any animal in accordance with the second indent of Article 7.1 of the Council Regulation in the manner provided for in, and within the time limits specified by, these Regulations shall be guilty of an offence.*
>
> *(2) Any person who knowingly or recklessly provides information which he knows or believes to be false in any notification sent by him under these Regulations, shall be guilty of an offence."*

(iv) At Regulations 7(1), (2) and (5) are the following provisions in relation to the process of notification of cattle movements:

"Notification of cattle movement

7-(1) Subject to regulation 9, the notification of movement of cattle in accordance with the second indent of Article 7.1 of the Council Regulation shall be by the keeper either –

(a) correctly completing a notification document with the date of the movement to which it relates and indicating whether the movement was off or on to his holding; or

(b) where the keeper is a market operator, correctly completing a notification document with the date of the movement to which it relates and whether the movement was into or out of the market,

and delivering that document to the Department in accordance with paragraph (2).

(2) In accordance with Article 6.3 of the Commission Regulation a notification document shall be –

(a) sent to the Department on the day of the movement to which it relates; or

(b) where the keeper is a market operator, delivered by him to the Department on the day of the movement to which it relates, or, where this is not reasonably practicable, on the next following working day.

…

(5) Any person who fails to comply with any requirement imposed on him by or under paragraph (4) shall be guilty of an offence."

(v) Regulations 9(1) and (3) state as follows in relation to electronic records:

"Electronic notification

9-(1) The Department may authorise any person to notify movement of an animal for the purposes of regulation 7 by electronic means.

(3) Where a keeper is authorised under this regulation to notify movement of any animal by electronic means, any notification he gives pursuant to that authorisation shall contain the same information in relation to that movement and be delivered to the Department within the same time limits as would be required in the case of a notification by notification document under regulation 7."

(vi) The powers of Inspectors are outlined at Regulation 11:

"Powers of inspectors

11-(1) An inspector shall, on producing, if required to do so, some duly authenticated document showing his authority, have the right at all reasonable hours to enter any land or premises (other than domestic premises not being used in connection with any purpose to which these Regulations relate) for the purposes of ascertaining whether there is or has been any contravention of these Regulations."

(2) An inspector shall have powers to carry out all checks and examinations necessary for the enforcement of Title 1 of the Council Regulation, and in particular may –

(*a*) *collect, pen and inspect any cattle, and may require the keeper to arrange for the collection, penning and securing of cattle;*

(b) examine any records in whatever form, and take copies of those records;

(c) remove and retain any documents and records relating to matters covered by these Regulations;

(d) have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been used in connection with records, and may require any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material to afford him such assistance as he may reasonably require;

(e) where records are kept by means of a computer, may require the records to be produced in a form in which they may be taken away; and

(f) take with him a representative of the European Commission acting for the purposes of the Council Regulation or any other person he considers necessary for the enforcement of these Regulations."

50. In summary the points relevant to these proceedings are as follows:

(i) An obligation is put on keepers (ie Livestock Markets, dealers and farmers) to notify cattle movements by delivering the information to the Department in electronic form.

(ii) Failure to do so by keepers constitutes a criminal offence.

(iii) The Department is the competent authority to which reports of movements must be made in order to comply with the European Regulation.

(iv) Departmental Inspectors have powers to carry out checks (A11) and the power to restrict movement to or from a holding (A12).

(v) The legislation is silent on deletion of moves.

FINDINGS OF FACT AND CONCLUSIONS

51. The tribunal considered all the evidence both oral and documentary presented to it and reached the following findings of fact on a balance of probabilities. The tribunal applied the legal principles to the facts found in order to reach the following conclusions. It is important to note that this decision does not record all the competing evidence but records the principal findings of fact drawn from all the evidence presented to it.

The Claimant's Role

52. The claimant joined the Department of Agriculture in 1999 as a Veterinary Officer and is a qualified Veterinary Surgeon. She was appointed to the post in issue in this case in April 2016 as a Supervisory Veterinary Officer (SVO) following an internal trawl.

53. The claimant's uncontested outline of her duties as set out in her statement is as follows:

> *"Lead on Market Approvals, licensing, operations, biosecurity and associated enforcement activities. This means that the person successful in obtaining this post will be responsible for the Approval of Livestock Markets which happens when a new LM or a renovated LM wishes to operate livestock sales, their licensing which allows them to operate as a centre to hold livestock sales as long as they adhere to the governing legislation, their operations i.e. the actual running of the LM has to be in line with the governing legislation for example the welfare of livestock, the IRM (identification; registration and movements) of livestock offered for sale, biosecurity means the prevention of spread of infectious/notifiable diseases into, within and out of the LM and the associated enforcement activities which means the leading on the enforcement activities associated with non-compliance with governing legislations which were uncovered in the LM by DAERA inspectors."*

54. We accept, in summary, that the claimant was responsible for the approval of livestock markets and their licensing together with their operations and bio-security in relation to livestock markets and the associated enforcement activities. She was also responsible for zoonoses (ie diseases which jump from animals to humans); she had previously had a background in the Department in enforcement; and she had a familiarity with all the relevant legislation. Everyone in tribunal agreed that she was the expert in livestock markets and was the expert in the legislation applicable to them.

55. Mr Henderson became the claimant's line manager in or around July 2016 succeeding Mr Hatch (whose email is referred to below at paragraph 144).

56. The claimant resigned by completing a voluntary resignation form which was dated 27 February 2018 and in that form she cited as a reason for leaving *"personal reasons work related"*. Her resignation took effect on 6 April 2018. The claimant started her new job on 9 April 2018 as a vet within a private practice. Her salary has since then been much reduced, her hours of work are less convenient and her pension is less valuable than it was with the respondent.

Record of Cattle Moves

(i) The Computer System

57. The APHIS computer system is the Department's system which records the movement of cattle. It was common case that individual cattle must have their movements recorded on that system to comply with the legislation and relevant EU Regulation. When cattle arrive at a livestock market they are registered by the livestock market as being on their premises on the APHIS system. When the cattle are sold a move to the buyer is registered by the livestock market on the APHIS system. The livestock market must do this within one working day of the sale which might be several days if a sale was at a weekend.

58. The *"front end*" of the computer system was the term used in this case to refer to the information available on APHIS to Livestock Markets, buyers and abattoirs. The term *"back end"* of the system was used by witnesses to refer to the information held centrally and accessible only by the Department. It was common case that the information held on the front end could be less complete, due to the deletion of moves, than the information held on the back end of the system by the Department. The information held centrally by the Department included all moves (in the sense of changes of ownership whether that involved changes of residence or not) including those which may have been deleted on the front end.

59. A key point in this case relates to deletion of moves that had already been registered on APHIS where animals had moved residence i.e. out of the livestock market premises to one or more other locations. Deletion of moves is a separate concept to the registration of a move. The relevant legislation is silent as to the deletion of moves.

(ii) Deleted Moves Policy

60. The Department (as an administrative policy) permitted deletion of moves from the APHIS register on the front end if a change of owner occurred whilst the cattle were still on the livestock market's premises or en-route in a lorry to the initial buyer's premises. This policy was agreed in this case to be in line with the purpose of the legislation that purpose being to record actual moves in the sense of changes of residence. This policy did not affect the full record of all moves which the Department kept centrally on the back end of the system.

61. What the claimant uncovered was that this policy was being abused in that the initial buyer could bring cattle to his farm (i.e. the animals had changed residence) and then, up to 50 hours later, could sell to another buyer and then could contact

the Livestock Market to have the initial move deleted from the front end of the system. This scenario was outside the practice which was permitted by the Department. It was common case that the Department-approved practice related to where the cattle had not actually changed residence ie that the change of owner occurred whilst the animal was still on the Livestock Market premises.

(iii) Effect of Deleted Moves

62. It was common case that this deletion of moves occurred in practice both in accordance with and outside the scope of the Department's policy. It was also common case that the following were the key effects of the abuse of the policy, in practice, as reported on by the claimant.

63. Mr Kyle (whose responsibilities included TB) stated that removing the cattle from the Livestock Market to another location and then deleting the move to that location to replace it with a move to another location was "totally wrong". This accorded with the claimant's uncontested point which was that the facility to delete moves was intended to cover a situation where the record essentially had to be corrected whilst the animals were still in the livestock market. Her undisputed point was that there was not really any innocent explanation for deleting a move after the cattle had moved to a different location.

64. The claimant's report that 4,800 to 5,000 animals were annually having their moves deleted out of livestock markets was stated by the claimant to amount to approximately 1½% of all cattle moves out of livestock markets. This percentage was uncontested. It was the respondent's uncontested evidence that the TB programme costs approximately £40 million annually and in 2017 there had been a significant increase in TB levels in cattle in Northern Ireland.

65. It was agreed that subsequent buyers of the animals or an abattoir would be misled in relation to the number of moves an animal had had in its life time because individual cattle would apparently have had fewer moves in their lifetime. If individual animals had four or more moves in a lifetime then their value was adversely affected. Whilst this "*four moves principle*" was an industry-led practice rather than a legal obligation, there was no doubt that there was a difference in value between cattle with four or fewer moves and cattle with more moves in a lifetime. The motive for the deletion of moves was therefore relevant to the potential for fraud ie obtaining a higher value for animals than would otherwise be the case.

66. The back end of the system had a full record of all moves whether they resulted in a change in residence or not. The respondent's point was therefore that in the event of an outbreak of TB the Department could trace cattle movements by retrieving the records of all moves on the APHIS system including deleted moves by looking at the back end of the system ie the information held by the Department centrally.

67. It was agreed that the deletion of moves practice had an adverse effect on the traceability of cattle as the initial move of residence to the first farm would be invisible to those with access to the front end of the system ie subsequent buyers and abattoirs. There was also a related risk in relation to bio-security as the cattle might be moved into a herd that was not TB-free and then be moved to another herd which was TB-free with an obvious increase in the risk of the spread of TB.

68. The point raised by the claimant in her report in February 2018 (which was one year after her first detailed report) was that in the week that she studied she identified 30 out of 90 deleted moves where cattle were moved to a herd that was not TB-free (ie those moves were invisible at the front end of the record) and her point was that this was of great concern in relation to bio-security and in relation to record keeping as those cattle moved subsequently to a TB-free herd. Her point in this case was that what she uncovered was so serious that it warranted further investigation and action.

The Protected Disclosures

69. The period in issue in this case is from 28 February 2017, being the date of first disclosure, to 27 February 2018, being the date the claimant completed her resignation form.

The Agreed Protected Disclosures

70. As set out in paragraph 6 above it was agreed that the claimant made a series of protected disclosures in a series of emails between 28 February 2017 and 21 February 2018 as set out in the table at paragraph 5 above.

The Complicity Point

71. This point was not referred to in those terms in the first set of written submissions as the import of relevant emails was submitted to be the claimant's implicit criticism of the Department and its officials for their *"inertia of over a year"* and for their *"laissez faire"* approach. For this reason this was raised at the CMPH in February 2021 by the Employment Judge to elicit whether or not this was a point being pursued by the claimant. In the second set of submissions and during the oral submissions hearing this point was then argued in the broadest of terms by both sides.

72. It was agreed by both sides as follows:

    (i) The legislation is silent on deletion of moves.

    (ii) That the policy whereby the Department allowed the deletion of moves on the front end of the system on the basis that a change of residence had not occurred was in line with the purpose of the legislation ie it did not run counter to it.

    (iii) That what the claimant uncovered was an abuse of that policy by keepers ie that deletion of moves took place after a change of residence had occurred and this practice did run counter to the legislation.

    (iv) What the claimant uncovered and reported on was very concerning due to the adverse effect on traceability of cattle and the consequence likely effect on the spread of disease and TB in particular.

73. As set out above this part of the case related to the deletion of cattle moves and the Department's policy in that regard. The first issue for this tribunal is whether the

claimant made protected disclosures at all as regards Departmental officials. During the submissions hearing the Employment Judge explained to both sides that the authorities in ***Bowers*** on this point included the cases of ***Darnton, Babula and Koreshi*** and pointed out that neither side had referred to these authorities in the submissions. Both sides were therefore given the opportunity to make specific submissions in relation to the authorities on whether protected disclosures were made at all. In the event neither side referred to these nor any other authorities on this point.

74. The claimant's case was that the Department should not adopt a policy which runs counter to the legislation on registration of cattle moves. The claimant however did agree that the Departmental policy in relation to deletion of moves did not actually run counter to the legislation in that it applied where there was no move in the sense of a move of residence.

75. The height of the points therefore for the claimant were:

    (i) That the practice which was uncovered by the claimant whereby deletion of moves by Livestock Markets occurred when a change of residence had happened did run counter to the aim of the legislation.

    (ii) That in being charged by the legislation to keep the record it was implicit that the Department should keep accurate records. In this regard we pause to note that whilst the abuse of the policy occurred a full record of moves was kept by the Department in its central database.

    (iii) That in having a policy without specific power to do so the Department acted ultra vires in some unspecified way.

    (iv) That the Department failed to adhere to their responsibilities to enforce the relevant legislation.

76. The claimant's point was that, once these matters were brought to the Department's attention by her, inaction on the Department's part in the knowledge of an abuse of their policy amounted to complicity on the part of Departmental officials in the wrongdoing uncovered and thus the issues raised amounted to protected disclosures as regards the activities or inactivity of Departmental officials. When asked to identify the relevant failure/wrongdoing on the part of the Departmental officials Mr Lyttle submitted that it was *"self evident"*. The response of Mr Sands to this was the general point that the legislation imposed powers rather than duties on the Department.

77. It is for the claimant to show which of the categories of relevant failure in ERO this alleged complicity by the Department falls into. The question for this tribunal is whether the claimant conveyed information which she reasonably believed tended to show that the Department was acting in breach of a legal obligation at the time she raised the concern ie when she conveyed the information. On this point Mr Lyttle referred the tribunal to two emails of 15 December 2017 and 21 February 2018.

78. The email of 15 December 2017 is in relation to deleted moves in this regard. In that email the claimant states where relevant as follows:

"By deleting their initial move out of the market their traceability has been compromised. Additionally in the case of the animals below the deletion of their initial move from the market has potentially compromised biosecurity in relation to spread of TB as this widespread procedure allows for potential contact with TB effected animals/premises at the first buyer's premises (OTW or OTS) before these animals are moved to the second buyer which is of a lower TB status (often OTF).

…

The findings would indicate that these animals were all kept for at least one overnight stay in these markets. However as we know that this is not the case I suspect these animals were taken home by the initial buyer and then subsequently moved to next buyer at which stage the initial move is deleted by market staff and another movement directly from the market to the second buyer recorded on APHIS again by the market staff. The movement document is then sent to the second buyer by the market staff."

79. The second email referred to by Mr Lyttle as regards the complicity point was the claimant's report of 21 February 2018 where she refers to the deletion of moves as follows:

"Of course this is a ploy to reduce the number of moves an animals makes as more than four moves incurs a penalty at the abattoir. However this four move limit is an industry led requirement without any legal basis while keeping a record of every move made by an animal is a legal obligation governed by the competent authority. It also guarantees traceability from farm to fork which is an important pillar in our trade in animal products and live animals.

Currently we have on average 4,800 to 5,000 animals every year which have a move through the market deleted.

Whether you wish to accommodate the industry by not calculating a move which is changed within 28 hours of it taking place is up to the heads of the relevant programmes policy and more so the industry but I believe the initial move should remain on the animal's movement history on APHIS. Therefore for the sake of disease control and traceability we should remove the facility from markets to delete moves. We should strive to record every move a farm animal makes to ensure traceability and the effective implementation of DAERA disease control measures."

80. We find that the thrust of the criticism in these emails relates to the activities of keepers and to Livestock Markets in particular.

81. Fundamentally it is for the claimant to prove that the information she conveyed at the time, was raised by her in the reasonable belief that it tended to show that a relevant failure had occurred. The emails in our judgment do not amount to evidence that this was in the claimant's mind at the time she raised these issues. Nowhere is there an indication that the claimant was making the point that the existence of policy itself was unlawful or was put in place without the Department

having the power to bring it in. The import of the emails in our judgment in the context of all the evidence was that what the claimant uncovered was an abuse of the policy and she was urging contact with Livestock Markets to point this out to them with the threat of enforcement if they failed to comply. The emails show that the claimant did not say that the deletion policy was unlawful: it was the abuse of that system by Livestock Markets in particular that warranted a warning or enforcement in her view.

82. We therefore find that the claimant has not discharged the burden on her of proving either that a relevant failure was engaged or that she held reasonable belief at the time she raised the issues of concern that they involved complicity or wrongdoing by Departmental officials. The claimant has therefore failed to persuade us on the complicity point.

Credibility issues

83. We had concerns about the reliability and credibility of the evidence of Mr Henderson and of Mr Huey as outlined below. As a result where there was conflict between the claimant's evidence and the evidence of Mr Huey and Mr Henderson in particular, we preferred the claimant's evidence.

84. We found the claimant to be a clear, credible and convincing witness. It was also clear from the documents and from her demeanour in tribunal that she was deeply frustrated and distressed at her treatment. Mr Sands sought to portray the claimant as rude to her manager, and willing to accuse everyone of detriment meaning she was the "*odd one out*" in the organisation. We reject that picture. Whilst the claimant's frustration is evident in some emails it was clear that, as the year in issue went on, she felt more and more sidelined generally. In our estimation after careful analysis of the volumunious documents the claimant became very sensitive to exclusion and she clearly felt very isolated. However, we find that this did not detract from her veracity in this case in view of the evidence as a whole.

85. Several very strongly-worded statements were made about the claimant by Mr Henderson about her attitude to him and others in his tribunal statement which were not borne out in the contemporaneous documentation nor indeed in his oral evidence. The successful rise of the claimant in the organisation in the years prior to the year in issue in this case, also points strongly away from the adverse picture put forward by Mr Henderson of her.

86. Examples of Mr Henderson's unsatisfactory evidence are set out in detail below but in summary relate to the following:

    (i) His evidence in relation to the claimant's encounter with Mr Huey (and also the evidence of Mr Huey) in relation to that encounter were deeply unsatisfactory as set out in detail below. This encounter was a key event in this case.

    (ii) He averred that in the last month that the claimant worked for the Department when he had her emails directed to him he found that she had been looking for a job from November 2017 ie for some months before she resigned in February 2018. No documents were provided in this respect and no satisfactory explanation was given for the failure to print off such relevant

documentation. The only explanation was that emails were not kept in the system for more than three months. The claimant's claim form was lodged on 16 May 2018 that is within one month of the end of her period of employment. At that point it would have been clear what her claim was so these emails would have been clearly relevant to that point if Mr Henderson's point were true. We accept the claimant's evidence which was that she made two applications shortly before she tendered her resignation one of which was the job she was offered and accepted.

(iii) He changed his statement by diluting the criticism he initially had in it which indicated that the claimant was obsessed with enforcement of welfare issues.

(iv) He changed his evidence in relation to the applicability of the whistleblowing policy in relation to the heifers' complaint. Whilst at first he agreed that the policy applied to that complaint he then changed his evidence to say that he had been instructed that such complaints were "*business as usual*".

(v) In relation to the heifers' complaint he stated that the claimant had "*abdicated responsibility*" for it and this type of work and he had to deal with it. This was at odds with his evidence throughout that dealing with these matters was not really part of her duties as hers was essentially a strategic role.

(vi) His evidence about the delay in dealing with the WAEB form that the claimant had sent to him in October 2017 was unsatisfactory in that, on the one hand, he stated that the claimant had not used the correct form and it was inappropriate but on the other hand he signed the form and he referred it on for enforcement. This was a contradictory position to adopt.

The Detriments Alleged

87. The claimant's overarching allegation was that a result of her having raised issues of concern she was professionally ignored, undermined, and excluded by Mr Henderson in particular. The claimant also alleged that she was not copied in on a regular basis to emails at a senior level which were within her area of responsibility and that this was the responsibility of Mr Henderson and formed part of the pattern of excluding her.

88. We have analysed very carefully the numerous emails to which we were referred together with the oral evidence and the documentary evidence and we accept that the claimant's allegation is well-founded. The following specific key detrimental acts and/or deliberate omissions were alleged and our findings and conclusions are set out in relation to each allegation which on the claimant's case, are examples of the treatment to which she was subjected over the year in issue primarily by Mr Henderson her line manager but also by Mr Huey in the key encounter she had with him. We find the detrimental omissions to be deliberate. The pattern of detrimental acts and omissions constituted a course of adverse treatment and culminated in a last straw event which formed part of the pattern of detrimental treatment. As set out below we reject Mr Henderson's and Mr Huey's explanations for the detrimental acts and omissions.

(*i*) *Pattern of Ignoring the Claimant's Emails – Feb 2017 –Feb 2018*

89. The allegation was that throughout that period that Mr Henderson ignored her emails; ignored her suggestion that investigation was warranted about welfare at livestock markets and at Ballymena in particular; ignored her evidence in this regard and her suggestions for dealing with the concerns; and ignored the serious issues she raised about the deletion of cattle moves. The key allegation was that the effect of ignoring and excluding her was that it undermined her professional opinion as a vet, undermined her in the performance of her job and mischaracterised her as obsessed with enforcement and obsessed with Ballymena Livestock Market in particular.

90. The explanation given by Mr Henderson was that any emails that were not responded to were due to pressure of work or oversight and that this was not deliberate.

91. Having analysed the pattern of emails during this period and particularly over December 2017 and January 2018 we do not accept Mr Henderson's explanation. We find that a clear pattern emerged of him ignoring emails from the claimant in particular during that period when he continued to communicate with other staff and we therefore draw the inference that this behaviour was deliberate on his part. The matters which the claimant was raising in her emails were in line with her job and raised important issues of concern thus inviting a response. We find that the failure to respond to the claimant's reasonable issues amounted to detrimental treatment of her in that it was reasonable for the claimant to interpret this as undermining of her as it effectively was dismissive of her professional opinion, in relation to core parts of her job.

92. For example, in November/December 2017 Mr Henderson had asked the claimant to contact Mr F in IRM about the policy about sheep tagging and traceability. The claimant was effectively rebuffed by Mr F who worked in IRM and her subsequent email to Mr Henderson in this regard was, in evidence to this tribunal, accepted by Mr Henderson as "*a cry for help*" by the claimant to which he made no response.

93. In the documents and in tribunal, IRM Division said that they had in hand any traceability issues related to deletion of moves and tagging of sheep and that any enforcement issues (ie the claimant's point first raised in February 2017 about reminding Livestock Markets about their obligations and alluding to potential enforcement action) were for Mr Henderson's Division to consider. Mr Henderson's recurring point in tribunal was that IRM issues were for that Division and not for his. The claimant's point (which we accept) was that IRM and enforcement were both intertwined, the points she had raised were squarely within her responsibility and it was therefore reasonable to expect her manager to engage with her and respond to her on these matters as they were important parts of her job. We also accept the claimant's evidence that there were steps that could have been considered by her division if Mr Henderson had been willing to engage with her on them. It was therefore reasonable of her to persist in raising the issues with him.

(ii) *September 2017 Letter Drafting Issue*

94. Following a tip-off the claimant and a colleague conducted an inspection of Ballymena Livestock Market and identified serious failings relating to animal

welfare. The claimant rang Mr Henderson and stated that she wanted the livestock market operator brought in for an interview under caution given the seriousness of the matters that she had found on inspection and given that she said there had previously been repeated breaches of animal welfare requirements by that livestock market. Mr Henderson's immediate response was that this was not to happen and he told her instead to draft a letter for his perusal.

95. The claimant drafted a letter setting out what she had found in detail and how that amounted to breaches of the animal welfare provisions in relation to sheep and cattle. Mr Henderson then redrafted the letter by essentially removing every reference to the prolongation of adverse treatment of the animals and removed several references to the large number of animals affected. He also removed the reference to the allegation that someone had verbally threatened the claimant during the inspection.

96. Mr Henderson then sent that revised letter to the claimant for her to sign it and she protested that she could not do that because of the removal of key details. Mr Henderson ultimately reinstated some of the points that she had made in her original draft and sent the letter out with his signature without coming back to her to tell her that he had accepted that some of her detail should be restored to it.

97. The claimant's point (which we accept) was that the effect of the redraft was to dilute the seriousness of the matters, to underplay the issues and to make the letter more an advisory letter rather than a warning letter. We accept the claimant's evidence that this process of redrafting of her letter amounted to a detriment of her as it denigrated her professional opinion especially as Mr Henderson did not go back to her when he revised it further ie he left her believing that it had been largely neutralised and her recommendation of a warning ignored.

98. Mr Henderson agreed that it was rare for him to conduct this sort of exercise with a draft letter and his only explanation for intervening in this unusual way was that the claimant's draft was "*too wordy*" and was not clear. Having analysed the three drafts in this case we reject that explanation. We also do not accept his explanation for this act in the context of his evidence generally. We find that it undermined the claimant, was demeaning of her, and dismissed her professionalism and thus amounted to a detriment.

(iii) *Mr Henderson constrained the Claimant in visiting Livestock Markets*

99. On 4 October 2017 Mr Henderson admonished the claimant for not telling Ballymena Livestock Market in advance that she was inspecting following a complaint to him by the manager of that market about an unannounced inspection by her. We find that the claimant reasonably interpreted this as Mr Henderson constraining her and preventing her from doing something that she had done for years previously as part of her job. We thus find that this admonishment amounted to a detriment.

100. In the period before December 2017 Mr Henderson also told the claimant not to visit livestock markets. Whilst Mr Henderson denied in his evidence to the tribunal ever telling the claimant not to visit livestock markets, we accept her evidence which was supported by contemporaneous emails. The claimant's point was that she had no staff and had to be able to act herself when welfare issues were brought

to her attention as welfare and livestock markets were part of her responsibility. We do not accept that she was obsessed with Ballymena Livestock Market as was alleged by Mr Henderson and we find that it was reasonable of her to act in this way when issues of concern were raised with her. In these circumstances this prohibition amounted to a detriment.

(iv) *WAEB Form relating to Rathfriland Market – 23 October 2017*

101. An issue was raised with the claimant in October 2017 by a departmental employee following an anonymous complaint about inappropriate handling of cows in Rathfriland Livestock Market. The claimant filled in a WAEB form with the details and passed it to Mr Henderson for signature and onward transfer to the Enforcement Branch.

102. Due to a lack of any response from Mr Henderson the claimant had to send reminders to Mr Henderson about the WAEB form that she had completed which led to a delay of about six weeks before he would sign it. Whilst Mr Henderson's evidence was that the claimant had used the wrong form, that she should have telephoned him, and that in filling out that form she "*abdicated her responsibility*", he ultimately did sign the form and did not raise any of these queries with the claimant at the time; rather he simply ignored her for weeks.

103. We therefore accept the claimant's case which is that she was entitled to fill out a WAEB form, that it was appropriate, and that she had to send two reminders to Mr Henderson to sign off on it so that it could be progressed. We accept that it was reasonable of the claimant to interpret this as dismissive of her professional opinion. We reject Mr Henderson's explanation for the delay (an oversight) and find it to be deliberate in light of all the circumstances and in light of all allegations taken together. In short this was part of a pattern of ignoring the claimant from which we infer it was a deliberate omission.

(v) *Appraisals*

104. Mr Henderson dealt with the claimant's in-year appraisal on 5 October 2017 and in the appraisal documents there is absolutely no criticism of the claimant nor any suggestion that she was not doing her job or achieving objectives particularly as regards devising a Market Enforcement Policy (see below).

105. It was the claimant's case that Mr Henderson told her during the appraisal meeting that a complaint had been made about her by an unnamed member of staff that she was being disruptive and Mr Henderson told her that she should watch how she dealt with people in what she said.

106. In tribunal Mr Henderson reluctantly identified the alleged complainant as Mr G who was of a more junior grade than the claimant and was based in the same office but there was no line management connection between Mr G and the claimant. On Mr Henderson's account he took the complaint by Mr G at face value and decided to raise it with the claimant during her appraisal interview, whilst refusing to give the claimant details of the complaint nor the identity of the person who had raised it. No reference was made to this in the appraisal document.

107. We accept that the claimant reasonably took this as a warning that she had to watch herself and we find that it amounted to a detriment. By any measure it is an unusual matter to take at face value a complaint by a junior member of staff in another division and to use that to admonish a more senior member of staff without giving details of it to that more senior member of staff. Effectively the claimant was being told to modify how she dealt with people without knowing what she had done wrong nor who her accuser was.

108. The claimant alleged that during the same appraisal interview Mr Henderson said: *"Tamara if you continue visiting the livestock market yourself it will not be good for your career"*. Mr Henderson in tribunal stated he said something along those lines but that this was advice to the claimant to concentrate on higher core competences necessary for promotion rather than to engage in front line work. The claimant took this as a warning to her. We accept that the claimant reasonably took this as a warning against the background of the previous behaviour by Mr Henderson and his reaction to the issues of animal welfare that she had raised about Ballymena Market in particular. We accept that it was reasonable for the claimant to interpret this as a warning and it amounted to a detriment.

109. We find it noteworthy that the in-year appraisal took place on 5 October 2017 and the adverse encounter with Mr Huey took place weeks later on 1 November 2017. We regard this as more than a coincidence and we find it formed part of the background to that encounter and we find that this supports an adverse inference in relation to the factual reasons for the treatment of the claimant in that encounter as set out below.

(vi) <u>Market Enforcement Policy - April to December 2017</u>

110. A TB SPG report was produced in December 2016 but because the Assembly was suspended in January 2017 it could not be moved forward. Instead around March 2017 "*a pre-project group*" was set up by Mr Hart (the Grade 5 and Mr Henderson's line manager) and its aim was to tee-up the implementation of TB SPG for any incoming Minister as and when appointed. We were referred to the documents relevant to the strands identified in the pre-project group and the particular strand that the claimant was to be involved in with Mr Henderson.

111. Mr Henderson alleged that the claimant failed to devise a market enforcement policy from April 2017 despite repeated reminders from him. We do not accept that the claimant failed to devise a market enforcement policy for the following principal reasons:

(i) We were only referred to two emails in November 2017 which mention this. When the respondent was pressed about this, the tribunal was referred to a long email from November 2016 and the claimant's evidence (which we accept) was that in that email there was no reference to devising a market enforcement policy.

(ii) Devising a market enforcement policy (which was agreed to constitute a major piece of work) was not in the claimant's job appraisal objectives during that year so the first mention of it is in an email of 6 November 2017 and not before and a previous email did not amount to an instruction to conduct it.

(iii) The claimant's point, which we accept, was that she did all that was requested of her in that she was asked in October 2017 in her in-year appraisal to compile a procedure for enforcement rather than to produce a policy. It was common case that there was a substantial difference between compiling such a procedure and producing a policy.

112. We find from the emails that Mr Henderson misrepresented to Mr Hart that the claimant was not devising the market enforcement policy whilst at the same time assuring the claimant that she was doing a good job and telling her that Mr Hart agreed with that.

113. Mr Hart's evidence was as follows:

(i) That he had never been shown the relevant documents which (he agreed in tribunal), showed that the claimant was actually producing work relating to the strand of the project he was concerned about.

(ii) That he did not recall any conversation when he stated that the claimant was doing a good job in that regard because he was being given the opposite impression by repeated conversations with Mr Henderson from March 2017 on.

(iii) That he likely conveyed to Mr Huey his dissatisfaction that the claimant had not produced what was required of her in relation to the market enforcement policy as he kept Mr Huey apprised of progress in his TBSPG pre-project group given its importance.

114. In summary, Mr Henderson was telling Mr Hart who was telling Mr Huey that the claimant was not doing what she was tasked to do on the strand of this important project that was being led by Mr Hart. At the same time Mr Henderson told the claimant that she was doing very well and that Mr Hart thought so too. Nothing appeared in the claimant's objectives in her appraisal document so effectively the claimant was being criticised behind her back for failure to produce a policy when she did not know she had to produce that piece of work. An adverse picture of the claimant in this regard was thus given to Mr Hart and thence to Mr Huey. We find this to constitute a detriment and it was part of the background to the encounter with Mr Huey.

(*vii*) *1 November 2017 the encounter with Mr Huey*

115. We found the evidence relating to this encounter to be central to our findings on credibility. Having carefully assessed the evidence of the claimant, Mr Huey and Mr Henderson in relation to this encounter we accept the claimant's account of it. We do not find the account given by Mr Huey to be candid, reliable or full and we therefore draw an adverse inference in relation to the reason why this incident occurred.

116. The encounter between Mr Huey and the claimant occurred on 1 November 2017. The following are the noteworthy aspects relating to this encounter:

(i) It was common case that Mr Huey initiated the conversation in the corridor in Loughrey when he happened upon the claimant and he immediately asked the claimant how her work with livestock markets was going.

(ii) When the claimant said that Ballymena Livestock Market was a problem he brought her into an office to discuss with her in detail.

(iii) On Mr Huey's own account the entire conversation involved him being irritated and annoyed with her. His explanation for this was that she was going down an enforcement route rather than a compliance route which would involve working with the markets. The compliance approach was his preferred approach ie an approach that involved engaging with markets to improve animal welfare rather than enforcement in every case.

(iv) Mr Huey then detailed with the claimant how he used to deal with Ballymena Market, he knew the manager personally (he was the person the claimant had had specific problems with) and that he knew the owner of the market who was Chairman of the Markets Association. Mr Huey then went on to say that he wanted his staff to seek compliance rather than enforcement.

(v) We accept the claimant's evidence which was that when she tried to show Mr Huey photographs and documents that she had with her to show him the seriousness of welfare issues at Ballymena, he refused to look at them. We accept that he nevertheless then said to her that there was "no way" that Ballymena would keep sheep overnight without food or water – this was one of the serious findings of an inspection by the claimant.

(vi) We accept that Mr Huey said to her: "*In Belgium they may well do things like this and they probably do but here we do things differently we work with the industry*." We refer to this as "*the Belgium comment*" below. Mr Huey emphatically denied in tribunal that he made any such reference to Belgium. The claimant (who is from Belgium) made this specific reference when she reported the detail of the conversation to Mr Henderson the next day and (whilst Mr Henderson made no mention of this comment in his statement for this tribunal) Mr Henderson confirmed in oral evidence in tribunal that she had indeed told him that the Belgium comment had been made by Mr Huey to her. Mr Henderson also confirmed that the claimant was deeply upset when recounting to him what had happened.

(vii) The claimant had a telephone call with Mr Henderson on 7 November 2017 and followed that up with an email following his email to her. In her response she indicated that she had gone to her trade union and we find that this was an indicator that something very serious had happened in the encounter with Mr Huey. She also specifically asked him not to mention the matter to Mr Huey because it was her word against his and he was Chief Vet.

(viii) Despite Mr Henderson telling the claimant that he would keep the complaint confidential, it was clear from the evidence that he must have told at the very least Ms Clarke from HR and she passed that on to Mr Huey at a Governance Board meeting on 7 November 2017. On Mr Huey's own account the message that Mr Huey was given by Ms Clarke at that point was

that the claimant had made a complaint which was a serious complaint of a racist nature (which we find to be a reference to the Belgium comment). Mr Huey then stated Ms Clarke advised him to make a note of what had happened in the conversation with the claimant the previous week. We were provided with that handwritten note and nowhere in it is there mention of the allegation of racism nor reference to the Belgium comment. Mr Huey's evidence was that the reason for this was that his primary concern was the issue raised about Ballymena Livestock Market by the claimant.

(ix) These conversations between Mr Henderson, Ms Clarke and Mr Huey took place before Mr Henderson met the claimant in a coffee shop around 13 November 2017 to establish the details of the complaint. The claimant was adamant that at that point she told Mr Henderson in detail what happened in the conversation with Mr Huey. Despite this Mr Henderson states in his statement for the tribunal that the claimant "*refused*" to give him detail of the conversation with Mr Huey. He then changed that evidence in this tribunal hearing and confirmed the detail which the claimant said she had given to him when she first spoke on the telephone to him. In tribunal Mr Henderson also specifically recalled the claimant telling him about the Belgium comment by Mr Huey.

117. Our assessment of the evidence of these witnesses is that the account given by the claimant is the true account of what happened in the encounter with Mr Huey. Mr Henderson's evidence was deeply unsatisfactory and tainted his evidence generally in this tribunal. For this reason where there was a dispute between the claimant and Mr Henderson in relation to other aspects of the evidence we accepted the evidence of the claimant. Likewise Mr Huey's account of the conversation was deeply unsatisfactory. For this reason we drew adverse inferences in relation to the reasons for the treatment by Mr Huey of the claimant particularly as it followed so closely after the adverse encounter the claimant had with Mr Henderson at her in-year appraisal a few weeks before, when Mr Henderson warned her about visiting Livestock Markets.

118. We find that it was reasonable for the claimant's to interpret this encounter as Mr Huey's way of telling her to "*back-off*" Ballymena Livestock Market and to stop raising welfare and enforcement issues. An inference we draw from this is that there must have been conversations between Mr Huey and Mr Henderson about the claimant's activities in relation to Ballymena Livestock Market in particular. This would explain his annoyance and irritation at what she said to him in the conversation and it would also explain why he initiated the conversation and asked her about her work with livestock markets.

119. We find it to have been reasonable for the claimant to regard Mr Huey's actions as intimidating, patronising and belittling and dismissive of her as a professional. We therefore find Mr Huey's action to have been detrimental to the claimant.

120. As stated above Mr Hart's evidence was that he kept Mr Huey (as a member of TB SPG) abreast of the pre-project group work that Mr Hart was conducting. Mr Hart was clear that he (Mr Hart) would have told Mr Huey about the problems he believed there were with the claimant ie that she was not doing her job in that she had failed to devise a market enforcement policy. This would also have led to an adverse view being formed about the claimant by Mr Hart and in turn conveyed by

him to Mr Huey namely that she was neglecting important strategic work because of her unreasonable focus on enforcement activities.

121. In summary between April 2017 and November 2017 an adverse view of the claimant being inappropriately focussed on enforcement and on Ballymena Livestock Market was held by Mr Henderson, Mr Hart and Mr Huey. Mr Hart's view was based on the erroneous information given to him by Mr Henderson and it was passed on to Mr Huey and in our view contributed to the adverse encounter which took place between Mr Huey and the claimant. We also infer that contact took place between Mr Henderson and Mr Huey in relation to the issues the claimant had raised about welfare of animals at livestock markets and at Ballymena in particular and we find that this was one of the reasons for the encounter that Mr Huey initiated with the claimant. We therefore find that the behaviour in that encounter was on grounds of the claimant having raised protected disclosures ie the protected disclosures were a material influence on the detrimental treatment.

(viii) *November 2017 the Scorecard Issue and Threat in January 2018*

122. In November 2017 Mr Henderson pressed the claimant to draw up a "scorecard" marking system for enforcement ie by listing offences and according them weight related to their seriousness. The claimant explained why she could not do so given the content of the legislation as offences in the legislation (in respect of which she was the acknowledged expert) were not weighted in this way. Her response on this was interpreted unreasonably by Mr Henderson as both an unreasonable refusal by her and also that it showed her obsession with enforcement. This interpretation was an example of Mr Henderson's recurring negative response to the claimant. We draw an adverse inference from it as to his reasons for detrimental treatment as Mr WL (a senior manager in this area) entirely agreed with the claimant and her approach based on the legislation.

123. The claimant's statement links this adverse engagement with Mr Henderson to his reference to her at a team meeting in January 2018 that markets could be removed from her responsibility and given to a lower grade officer. We find in all the circumstances that this amounted to a threat and it too amounted to a detriment. This led to the claimant asking in an email if her job would become obsolete and elicited a less than reassuring response from Mr Henderson which also had the effect of undermining the claimant.

(ix) *Untagged Sheep*

124. The claimant raised an issue about sheep at livestock markets not having ear tags and being sold without ear tags with her consequent concern about traceability.

125. The untagged sheep issue was raised by the claimant with Mr Henderson several times and on 1 December 2017 when she raised it again with him he told her to contact IRM who told her that they did not think this issue was within their responsibility. Her subsequent email to Mr Henderson of 4 December was agreed by him to be a "*cry for help*" to which he made no response. He then proceeded to exclude her from the Traceability Forum meeting which related to this point (see below).

(x) WAEB form – 4 December 2017

126. The claimant completed a WAEB form in relation to untagged sheep at Ballymena Market and also in relation to issues about the disappearance of cattle and sheep from Livestock Markets (ie they disappeared from the record) and the likely effect on traceability and the potential for fraud. Mr Henderson's response was to dismiss her suggestion despite the seriousness of the issues. His explanation in tribunal was that the claimant had filled in the form incorrectly and that the data was *"intelligence not evidence"*.

127. The claimant responded to Mr Henderson in an email of 18 December 2017 which stated as follows:

> *"The reports attached to the WAEB 1 show that there is widespread alleged fraud related to IRM in markets (both sheep and cattle sales). Before I can decide whether there is a worst offender, further investigation is necessary. I thought that WAEB would be the ones who could look into the initial reports and gather further intelligence on each report for each individual market. This can then be used to justify any further action/status quo."*

128. Mr Henderson's immediate response was that the matter was primarily an IRM issue. This was despite the fact that the claimant had at the beginning of December been told by IRM that it was not within their responsibilities and Mr Henderson subsequently excluded the claimant from the IRM Traceability Forum meetings at the beginning of December 2017.

129. This refusal to engage on such a serious issue in the context of the evidence as a whole amounted to a detriment because this was a key part of her job and we accept her point that the WAEB form was appropriate for raising issues of potential fraud. The claimant's further point was that this should have engaged the whistleblowing policy but that Mr Henderson did not invoke that. This failure to act on the protected disclosure was further evidence of Mr Henderson's reluctance to respond appropriately to the claimant's legitimate concerns and constituted a detriment to her because she reasonably interpreted it as dismissive of her professional opinion and it undermined her.

(x) *IRM Meeting and Traceability Forum December 2017*

130. The Traceability Forum was to be a regular monthly meeting, the aim of which was to set up systems relating to key aspects of livestock markets. There were two meeting in issue namely an IRM meeting of 5 December 2017 and a Traceability Forum meeting on 12 December 2017. All at the meeting were either vets or senior staff. Mr G was sent to it by Mr Henderson and he was not a Vet and was a more junior member of staff to the claimant and to almost all others in attendance.

131. The claimant's allegation is that she was unreasonably not sent to the two meetings and Mr G was sent instead. The claimant only found out about the Traceability Forum because someone else contacted her because she was not on the list to attend and she then followed it up by asking Mr Henderson why she was not included.

132. Mr Henderson affected not to know about the meeting when the claimant asked him why she had not been told about it, and we draw an adverse inference from this in relation to his reasons for excluding her.

133. We do not accept Mr Henderson's explanation which was that Mr G was sent as he had to be familiar with enforcement matters. We accept the claimant's evidence which was that IRM and traceability were interlinked with bio-security and that she should have been sent to that meeting rather than Mr G as she was a Vet (in contrast to Mr G) and she had an extensive background in enforcement and biosecurity and was the acknowledged expert in the relevant regulation relating to LMs. Mr Henderson never even discussed it with the claimant despite it being related to important parts of her job.

134. Mr G was sent to the IRM meeting despite it having been the claimant who had raised sheep tagging issues at Ballymena Livestock Market namely that sheep were sold without ear tags. We therefore find that it was a deliberate omission on Mr Henderson's part to fail to send the claimant to the meetings. The claimant was the obvious person for Mr Henderson to send given her seniority and expertise. Given our concerns about Mr Henderson's veracity we do not accept his explanation that this was simply a management decision on his part. In tribunal Mr Sands explored in cross-examination some specific instances of where the claimant was "kept in the loop*"* generally. This makes it all the more curious as to why she was not in this instance included and we draw an adverse inference from this.

135. In summary we find that the claimant was deliberately excluded from these meetings and further that the reason the claimant was deliberately excluded was because she had raised protected disclosures.

(*xi)* *18 December 2017 the Heifers' complaint*

136. The claimant raised an issue following a complaint from a member of the public. The complaint was that two heifers were injured in Ballymena market because they were put in a pen with a bull. A letter of complaint was made by the owner of the injured animals which resulted in a visit by Departmental Officials who had photos and video footage of the animals and the conditions. The claimant then tried to obtain Mr Henderson's approval to act on this evidence given her view of the seriousness of the issue. The claimant was not the only Departmental official involved to regard this incident as serious warranting further action.

137. Mr Henderson's evidence in tribunal on this was that the whistleblowing policy applied to this complaint and he then changed his evidence entirely to state that this type of complaint was regarded as "*business as usual*" and did not engage the whistleblowing policy. The tribunal pauses at this point to note that on the face of the policy it appears that this type of complaint would be covered and is puzzled as to why, if the policy was not to be applied to this type of complaint, the policy was not formally amended at any point. Mr Henderson then in evidence downplayed the seriousness of the allegation by the owner and accused the claimant of "*abdicating responsibility*" for it saying that this was the only reason he had become involved.

138. The relevance of this aspect of the evidence is, firstly, related to the unreliability of the evidence of Mr Henderson. Secondly, it is relevant to the reluctance of

Mr Henderson to engage with the claimant about a serious animal welfare matter. Mr Henderson's reaction to the serious matters raised by the claimant on this occasion was to accept the explanation of the livestock market at face value despite the evidence of serious welfare issues and to ignore the claimant's emails and advice on the seriousness of the issue on the evidence which had been gathered. This reaction was in line with the pattern of Mr Henderson minimising issues with Ballymena Livestock Market in particular. It was also in line with his pattern of ignoring the claimant's professional advice and ignoring her emails. We find this latter action on his part (ie ignoring the claimant's advice and emails) to amount to a detriment to the claimant as it was part of a pattern.

139. We find it to have been deliberate in circumstances where Mr Henderson was able to respond to the inspector who was also involved in this matter. We thus do not accept that his failure to respond to the claimant was because he was overwhelmed with work. He accepted in evidence that the claimant would have felt frustrated belittled and annoyed when her good point on this was ignored by him. His explanation for failing to respond to several emails on this was that it was because of an oversight and it was Christmas time. We reject that explanation as he was clearly able to respond to others over the same period.

The Claimant's Report of Deleted Moves

140. The issue of deleted moves was first raised by the claimant in February 2017 in a lengthy email following an email from Mr Dodds to her dated 15 February 2017 which states as follows:

> *"I gather that you have some responsibility for markets so I want to highlight an issue that I have just become aware of. If this is not your responsibility then feel free to pass it on.*
>
> *…*
>
> *My concern is that this practice means that the APHIS trace does not reflect the movement of the animal but I wonder is this practice widespread and are the marts in any way complicit in the practice?"*

141. We accept the claimant's evidence that deleting moves on the scale she discovered was unlikely to have an innocent explanation. It was reasonable for her to suggest that this information tended to show potential fraud. We find that it is clear from the evidence that deleted moves were likely related to attempts to mislead buyers and abattoirs to ensure that the value of cattle were not diminished by having a record showing more than four moves in a lifetime.

142. It was also clear from the evidence that deletion of moves could compromise bio-security by increasing the risk of the spread of TB if the effect was that a farmer could delete a move to a herd that was not TB-free. Given the analysis by the claimant for the week that she looked at it is clear that deleting moves was likely to have had some contribution to an increase to the risk of the spread of TB as she found that 30 out of 90 deleted moves in one week were to a non TB-free herd. It was agreed that the issues the claimant raised were very serious.

143. There are two distinct concepts at play here: timing of recording of moves and the deletion of moves already recorded. The former requirement is set out in legislation with civil and criminal consequences, the latter was an administrative policy of the Department which did not run counter to the legislation so long as deletion of moves related to changes in ownership which occurred before cattle moved residence, and a full record of all moves was still held by the Department.

144. What is clear from an email from Mr Hatch (a recipient of the claimant's report) is that he regarded the point about deleted moves as raising serious issues including the Department's "*failure to police*". The email to Ms McNamee stated as follows:

> *"Perpetua*
>
> *This is worrying. My understanding is this allows one less move to be recorded (the one into the dealers herd). Worrying for several reasons: fraud, animal health risks, authenticity/traceability of cattle/beef and DAERA's failure to police. At the very least we are losing these animals for 24-48 hours but Tamara is suggesting that even the final destination herd may be bogus."*

145. The issues for us is whether the failure to follow up the claimant's suggestion (in her report in February 2017 and subsequently) constituted a detriment to the claimant on grounds of her having raised protected disclosures in that this was part of the whole process of not following up what she was suggesting and this amounted to ignoring her professional opinion and failing to involve her in key matters relating to her job.

146. The claimant's report was dated 26 February 2017 and in it she put forward three suggestions as follows:

> *"What can be done to put an end to this practice? Currently there is no easy way to establish this type of activity apart from the cognos report Mark developed. Some suggestions:*
>
> *(a) We reinstate all deleted moves for those cattle still alive?*
>
> *(b) We ensure Aphis does not allow these changes to take place? However, is it possible that the market operators will delay their upload to the very last minute, allowing them to make these changes without them being recorded anywhere on Aphis.*
>
> *(c) Should there be consideration given to issuing an official warning to all of the markets involved together with the reinstatement of all deleted moves? Then monitor it with view to prosecution if this practice continues?"*

147. Mr Cassells' evidence in relation to options (a) and (b) was that IRM Division did react appropriately to the claimant's report by effectively doing as much as they could to tee-up changes in two areas namely the computer system and the legislation. His clear evidence in tribunal was that option (c) was a matter for enforcement ie Mr Henderson's Division. It is important to note that this evidence from Mr Cassell's was contrary to the point made by Mr Sands in written

submissions which was that IRM Division was responsible for taking forward this proposal.

148. In summary the respondent's reasons for nothing in practice changing, from the Department's perspective, after the claimant's report about deleted moves during the period in issue in this case is as follows:

(i) That in the absence of an Executive the Department could not obtain Ministerial approval for the legislative changes needed to tighten up the registration and movement process.

(ii) That a system of licensing was proposed but would need legislation which likewise needed a functioning Executive.

(iii) That the issues with the computer system were recognised and they were changing to a new system and computer provider and this was very complicated and long drawn-out but was in hand.

(iv) That, following the TB SPG report, the Department wanted to move to a "*responsibility-sharing*" relationship with the industry and they were therefore reluctant to do anything that might undermine that objective which could only be progressed once an Executive was in place. The TB SPG report itself could only be implemented with Ministerial approval.

149. At this point we pause to note that in the relevant period the claimant's concerns did result in enforcement action being pursued against Pomeroy Livestock Market as in October 2017 its licence was suspended. It was thus clear from the evidence that, in appropriate cases enforcement could be pursued so it was not the case that issues related to the lack of an assembly and a Minister meant that no at all enforcement was possible. It also illustrates that compliance was not pursued in all cases. Mr Hart was clear that in appropriate cases enforcement was justified albeit that he was cautious about this.

150. We accept the respondent's argument on the first two of the claimant's proposals ie that the Department's action or inaction following the first two proposals did not constitute a detriment to her and that the proposals were connected to legislative change and computer system change both of which were in hand. Whether that process was deficient or too slow was not connected to the claimant having raised the issues so the claimant cannot say that that reaction by the Department's officials nor any delay constituted a detriment to her at all never mind on grounds of her having raised concerns. It was not reasonable for the claimant to regard inaction due to legislative issues, the lack of an Assembly, and delays in computer changes as to her personal detriment. As this tribunal made clear throughout these proceedings, it is not our task to critique the actions of the Department in general as our focus is firstly on whether any act or omission constituted a detriment to the claimant personally and, secondly whether that was on grounds of her having raised protected disclosures.

151. It is the third option set out at paragraph 146 at (c) that the claimant proposed which is the important one in this case. Key aspects of that proposal were that a warning letter be sent to all livestock markets and the threat of enforcement be made if they continued to operate that way with deleted moves. The inference which we draw

from this recommendation was that there was some basis for the Department proceeding in that way ie for pointing out that the practice was an abuse of the Department's policy which allowed the deletion of moves in certain circumstances.

152. As set out above the report of February 2017 was also sent to Mr Cassells whose evidence (which we accept) was that the enforcement proposal was the responsibility of Mr Henderson. This accorded with the claimant's evidence and her belief at the time which is evidenced by her insistence on asking Mr Henderson about this in subsequent emails. Mr Henderson received the claimant's report and did nothing about it. Crucially for this case, that included not getting back to the claimant to tell her that his Division would not do as she recommended.

153. In the circumstances it was reasonable for the claimant to continue to raise the issues with Mr Henderson. It was also reasonable, given that she was the expert in livestock markets and biosecurity, for her to regard it as detrimental to her that this suggestion was simply ignored. This is a finer point made by the claimant than the argument that the failure to act on her suggestion in itself was detrimental to her. The detriment was that Mr Henderson ignored it even though it was within his area of responsibility and it was reasonable of the claimant to repeatedly raise it as it was in her job area. This was part of a pattern of ignoring the claimant and any suggestions she made and thus constituted a detriment to her as she reasonably interpreted this as dismissive of her professional opinion. Given the pattern we have found we find this to be a deliberate omission on Mr Henderson's part. As set out above we reject Mr Henderson's explanation that his reason for doing nothing was because it was IRM's responsibility.

Was the Claimant Dismissed?

154. The key questions for this tribunal are:

(1) Was it reasonable for the claimant to regard the course of treatment as detrimental to her. We have found in the claimant's favour on this point as set out above and we find the detriments to form a pattern that were thus linked together.

(2) Did those detrimental acts taken together culminate in a last straw event and together amount to a repudiatory breach of contract? We accept the claimant's case on this as set out below.

(3) Did the claimant resign in response? We find in the claimant's favour on this as set out below.

155. The last straw was defined by the claimant's representative in a letter in 2019 as follows:

> *"The Claimant contends the "last straw" by the Respondent arose when the Claimant made representations via e-mail on 20th February 2018 to Senior Managers which contained Deleted Moves Cognos for week commencing 7th January 2018 which the reply the Claimant considered unsatisfactory. The Claimant highlighted to Senior Management that between 4,800 and 5,000 animals annually had their move out of the Livestock Market deleted, which consequently had a potential significant*

impact on TB control/eradication and which also jeopardized the traceability of 4,800 and 5,000 animals. Following the absence of any response to these concerns the Claimant subsequently e-mailed Neal Gartland (TB/BR Policy) and the response received on 2nd of March 2018 was an e-mail saying "Thank You".

The Claimant viewed this as the "final straw" of the Respondent continuing its lack of engagement of enforcement in respect of fraudulent practices and traceability of livestock together with the constant and continuous lack of acknowledgement by Senior Management of the seriousness of the evidence presented by the Claimant. As a consequence, the Claimant made the decision to resign."

156. In evidence the claimant was clear and consistent that the last straw related to her emails of 20 and 21 February 2018 (concerning her detailed report of deleted moves in January 2018) and the lack of response to them following an email of 19 February 2018 from Mr Henderson to several managers which contained an untrue statement where that email states:

> *"Responsibility for this rests with IRM programme. Tamara is aware that it will be discussed at our next WAEB/IRM priorisation meeting."*

157. The claimant alleged that she received no positive or reassuring response to her emails in February 2018. From an analysis of the emails our judgment is that she was reasonable to conclude this.

158. In this regard the claimant stated as follows in her statement:

> *"29. This resulted in Neal Gartland asking those managers whose programmes were affected by my concerns; for their advice. In response, JH insisted that I was aware that the issue of deleted moves would be discussed at the next IRM/enforcement meeting.*
>
> *30. I was at no time told that this issue would be discussed at a meeting nor had I ever before been invited to any of these meetings, including this future meeting. I then realised that JH was trying to discredit me and portrait me as a trouble maker to cover up the fact that my valid concerns had not been addressed in the past. Neal Gartland, the Grade 7 from policy with responsibility for TB (tuberculosis) has a lot of influence as he is the person responsible for the correct implementation of the TB legislation governed by DAERA and implemented by Veterinary Service(VS). The head of policy is the interface with the ministers/agricultural committee and therefore carries the responsibility if there are non compliances, incorrect implementation etc uncovered and reported to the minister/agriculture committee. As I had gone to Neal Gartland, VS senior managers would look upon that as betrayal of VS and my Line manager, J.Henderson knew that he would have to justify why no action was taken. Therefore, Mr Henderson chose to divert the responsibility to me by stating I was well aware and that the issue was to be discussed at a future meeting thus implying that I had another agenda by going over his head even though he clearly was dealing with it. It also*

explained why any comments I made regarding new work that I was asked to take on, were interpreted and dismissed by JH as reasons for prosecution even though I never hinted to nor mentioned prosecution.

…

44. When contacting policy for advice on the issues, my line manager lied to Neal Gartland to discredit me and to divert the blame from himself to me. This was subsequently followed by Neal Gartland failing to communicate with me regarding further reports of deleted market moves and the risk to the TB eradication/control plan. Their silence spoke volumes. They had closed ranks on me in a bid to silence me. The humiliation was overwhelming and I knew that my distinguished career of 19 years in VS DAERA had to come to an end if I wanted to hold on to my professional and personal integrity."

159. In summary, there was therefore an email to Mr Gartland (who was responsible for TB policy) on 19 February 2018 and Mr Henderson's response to him on 19 February 2018 (copying the claimant in) was that the claimant knew that this matter was being addressed at a forthcoming meeting. This was untrue as the claimant's evidence (which we accept) was that she had not been told about a meeting and this therefore represented an effort to portray her as obsessed with enforcement. Mr Henderson's email to Mr Gartland of 19 February 2018 amounted therefore to a detrimental act as this was his response to the valid issues she had raised.

160. The first question for this tribunal is whether there was a course of conduct amounting to a breach of contract in the form of a breach of the implied term of trust and confidence, culminating in a last straw event. The last straw event does not of itself have to be a breach of contract nor even necessarily blameworthy but has to contribute to the breach of contract.

161. The breach of contract which culminated in a last straw was the fact that for over a year she had been regularly excluded, ignored and undermined and her professional opinion ignored in relation to the welfare of animals at livestock markets and the traceability issues in relation to deletion of cattle moves. The detailed report set out in her email of 20 February 2018 and sent to several managers elicited no response after a further email of the 21 February 2018 and this together with the untrue statement in Mr Henderson's email was the claimant's last straw as it complied with his pattern of ignoring her. We have no doubt that the claimant actually resigned because of the lack of reaction to her report in February 2018 coming on the back of a course of conduct for a year together with the content of the email of 19 February 2018 referred to above which we accept the claimant reasonably believed was Mr Henderson's attempt to cover up his inaction and tarnish her with other managers. We find the breach of contract to be a repudiatory breach as it struck at the heart of the claimant's contract.

162. The encounter with Mr Huey was one of the key reasons why the claimant felt that she had no option but to resign (rather than for example to ask for a transfer) because she realised that the attitude to her "went all the way to the top". We find that this was a reasonable conclusion for the claimant to reach in all the

circumstances and it was a reasonable belief on her part that she had no future in the organisation. We thus find that the claimant was dismissed as she was justified in resigning in response to the breach of contract.

163. As set out above the lack of action by the Department in relation to the claimant's three proposals set out at (a) to (c) in her email in February 2017 did not amount to a detriment for the claimant. However the lack of any response by Mr Henderson whose responsibility it was to consider what the claimant was suggesting as regards enforcement amounted to his unreasonably ignoring her professional opinion. There then ensued a pattern of her being excluded, ignored and undermined by Mr Henderson and she was then treated adversely by Mr Huey in the encounter on 1 November 2017 and finally she was ignored again and an untrue statement was contained in the email referred to above.

164. We find that the claimant acquired the status of a nuisance for Mr Henderson because she raised serious issues about animal welfare, particularly in Ballymena market, and raised serious issues about deleted moves, and repeatedly suggested both investigation of these matters and a way forward as regards the deletion of moves abuses that she had uncovered. Mr Henderson reacted badly to her raising these issues and to what he perceived to be challenges to him. This permeated the dealings that Henderson had with her and led to Mr Huey's intervention due in part to Mr Henderson's act of presenting a false picture of her as obsessed with enforcement and of her failing to deliver the market strategy policy. Mr Hart also had an erroneous picture of her neglecting her strategic duties, which he conveyed to Mr Huey and in our judgment this also fed into the adverse encounter Mr Huey had with her.

165. We are therefore satisfied the detrimental acts and omissions outlined above did undermine the trust and confidence to such a serious extent that it amounted to a breach of the implied contractual term of trust and confidence. This is so, especially given the claimant's professional standing as a Vet, her exemplary performance and record prior to the year in issue in this case, and the fact that she was raising serious concerns squarely within her area of responsibility and expertise. We are further satisfied that the course of conduct culminated in a last straw which led the claimant to resign in response.

166. Whilst the issue of delay in response to any breach of contract was raised in preparation for the case it was not explored to any discernible extent in the cross-examination of the claimant. We find that she resigned in response to a repudiatory breach of contract and did not delay too long in doing so. She gave evidence, which we accept, that she could not resign immediately because she was the main breadwinner in her house and her two elder children were about to go to university so she had to find a job before she left the Department. The process of finding a job ultimately took a matter of weeks.

The Reason Why Detrimental Acts and Omissions Occurred

167. The next issue is the extent to which any protected disclosures contributed to the course of detrimental conduct which we have found constituted a dismissal. In relation to the dismissal the issue is whether the fact that the claimant had raised protected disclosures was the reason or principal reason for the dismissal. In the case of the detriments alleged the issue is whether the fact that the claimant raised

protected disclosures was a material influence on the detrimental acts. Both sides agreed in submissions that the factual analysis to be carried out to establish the reason why the impugned conduct occurred is the same in relation to each claim, albeit that the standard of proof is different.

168. The claimant has discharged the burden of proving that she was treated detrimentally by acts and deliberate omissions by the respondent in the form of Mr Henderson and Mr Huey in particular. Having provided those facts to our satisfaction the burden shifts to the respondent in the whistleblowing detriment claim to provide an untainted explanation. As set out above we reject the reasons given for the detrimental acts and omissions and we draw adverse inferences in relation to the reason why the detrimental acts occurred.

169. We therefore find that the claimant has shown that the fact that she raised protected disclosures was a material influence on the detrimental treatment of her by Mr Henderson in particular and by Mr Huey in the encounter she had with him. The detrimental treatment was thus on grounds of the claimant having raised protected disclosures.

170. The burden is on the claimant to prove that she was dismissed and we are satisfied that she has done so. Next we have looked at the reasons for the treatment which amounted to a breach of contract to establish the reason or principal reason for the dismissal.

171. We find from an analysis of all the evidence that the fact the claimant had raised protected disclosures was the cause of the detrimental treatment ie it was not simply the context for it. We are satisfied that the principal reason for the dismissal was the fact that she had raised protected disclosures and her dismissal was thus automatically unfair.

172. We also find that the dismissal was unfair in all the circumstances ie the claimant succeeds in her unfair dismissal simpliciter case. In this regard, no alternative potentially fair reason for dismissal was put forward by the respondent.

SUMMARY

173. For the respondent Mr Sands' main points were, firstly, that the conflict between the claimant and Mr Henderson in particular and the encounter with Mr Huey stemmed from their disagreement on whether to go down an enforcement route or a compliance route ie by encouraging compliance by Livestock Markets, dealers and farmers in particular. Secondly, Mr Sands' point was that the claimant resigned because her principles did not align with the validly held position of the Department to engage with the industry's strategically; in other words the issues were the context and not the cause of her resignation.

174. For the claimant Mr Lyttle's point was that the claimant understood the importance of what she was raising and the serious risks to animal welfare and biosecurity. His point was that this brought her into conflict with the respondent's *"laissez faire"* approach and led to her being regarded as a nuisance by Mr Henderson and Mr Huey and in addition Mr Henderson felt challenged by her.

175. Having reached the factual findings above we stepped back to see what picture emerged and whether there were inferences which the tribunal could draw and we looked carefully at the explanations for any conduct complained of in order to reach our findings and conclusions.

176. The claimant's circumstances and position are important in assessing whether the acts and omissions which constituted detrimental treatment amounted to a breach of contract. She was a highly qualified vet, was very experienced, and her job role meant that she was responsible for Livestock Markets, biosecurity and zoonoses. She was regarded as the expert in the legislation to do with Livestock Markets and biosecurity. These circumstances are relevant to her perception of the detrimental acts and whether those perceptions were objectively reasonable.

177. From an analysis of the emails our conclusion is that Mr Henderson regarded the claimant as inappropriately challenging of him and a nuisance because she kept raising serious issues that he did not want to engage with and as a result of her raising the issue he subjected her to the course of detrimental treatment outlined above.

178. We reject the explanation given by Mr Henderson for ignoring and side-lining the claimant. The inference we draw from the analysis of the emails and his evidence is that he deliberately tried to dissuade her from raising these issues or pursuing them and tarnished her name with other senior managers because she persisted in raising the issues of concern.

179. The issues she was raising were not ancillary to her job as alleged by the respondent in this case. It is clear from an analysis of the documents that issues of traceability and animal welfare are intertwined. These issues were at the heart of the claimant's job which gave her responsibility for livestock markets and biosecurity and these were very serious issues that she was raising. This is why we find that the detrimental treatment struck at the heart of the relationship especially as it amounted to repeatedly ignoring or dismissing her professional opinion as a vet on very serious issues within her sphere of responsibilities.

180. We conclude from that analysis of the evidence that Mr Huey was made aware of things that she was raising about Ballymena Market in particular and decided to "clip her wings" about that. We accept that the claimant reasonably concluded that, as the Chief Veterinary Officer was also involved in ignoring the valid concerns she was raising as regards welfare of animals at Ballymena Livestock Market, it meant that it was not a valid proposition for her to seek to be moved to another division as the adverse reaction to her concerns, in her words: *"went all the way to the top".* We can understand her very strong reaction after the conversation with Mr Huey when she ended up in tears in the office. Mr Huey had also previously been given an adverse view of the claimant from conversations with Mr Hart who had obtained incorrect information from Mr Henderson in the form of an allegation that the claimant was not producing a market enforcement strategy document because of her unreasonable focus on enforcement.

181. We reject the claimant's case on the complicity point as she has failed to prove that protected disclosures were made as regards the actions of Departmental officials.

182. We find that the claimant was treated detrimentally on grounds of protected disclosures in a course of detrimental conduct comprising acts and deliberate omissions in the period February 2017 to February 2018.

183. That course of detrimental conduct culminated in a last straw event and the acts and omissions taken together amounted to a breach of contract of sufficient seriousness that it justified the claimant's resignation in response. The claimant was thus constructively dismissed.

184. The principal reason for the dismissal was the fact that she had raised protected disclosures and it was thus automatically unfair.

185. The claimant's dismissal in these circumstances was also otherwise unfair.

REMEDY

186. This tribunal will reconvene on a date to be arranged for a remedy hearing.

Employment Judge:

Date and place of hearing: **11, 12, 13 and 14 February 2020 and 4 June 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: