EMPLOYMENT TRIBUNALS

Claimant: Mr K Traynor

Respondent: British Footwear Association Limited

HEARD AT: BEDFORD ET

ON: 12th – 14th June 2017 and 26th July 2017

BEFORE: Employment Judge Finlay

MEMBERS: Ms D Clarke and Ms J Evans

REPRESENTATION

For the Claimant: Mr J Crosfill, Counsel.

For the Respondent: Mr A Gloag, Counsel.

RESERVED JUDGMENT
(Liability Only)

The unanimous Judgment of the Tribunal is as follows:

1. The claimant's complaints that he suffered detriments on the grounds of having made protected disclosures, contrary to Section 47B of the Employment Rights Act 1996, succeed in part.

2. The complaint of (constructive) unfair dismissal fails and is dismissed.

3. The complaint of wrongful dismissal fails and is dismissed.

4. The complaint of unpaid holiday pay fails and is dismissed.

REASONS

Introduction

1. The hearing took place in Bedford Employment Tribunal on 12th to 14th June 2017 and 26th July 2017. The hearing dealt with liability only. The claimant was represented by Mr J Crosfill of Counsel and the respondent by Mr A Gloag of Counsel. The claimant gave evidence on his own behalf and he called evidence from Rachel Shelvey, a current employee of the respondent. The respondent called five witnesses, namely Mr John Saunders, the current chief executive of the respondent, and Messrs Daniel Rubin, Daniel Gyves, Mike Watson-Smith and Mike Kelly, all of whom are either current or former non-executive directors of the respondent. All the

witnesses had prepared and exchanged written statements of their evidence and an agreed bundle had been prepared running to some 450 pages. The Tribunal also had the benefit of an agreed list of issues which had been presented to the preliminary hearing February 2017. Both representatives prepared helpful written skeleton arguments which they amplified with oral submissions.

2. The claimant brought the following complaints:

2.1 A complaint under Section 48 of the Employment Rights Act 1996 (ERA) that he had suffered detriments (set out at paragraph 11 of the agreed list of issues), having made protected disclosures as set out in paragraph 8 of the agreed list of issues.

2.2 (Constructive) unfair dismissal, being either automatically unfair dismissal under Section 103A ERA or "ordinary" unfair dismissal in contravention of Section 94 ERA.

2.3 Breach of contract (wrongful dismissal).

2.4 Holiday pay in respect of accrued but untaken and unpaid holiday. This complaint was either for breach of contract (as per the claimant's skeleton argument) or under the Working Time Regulations 1998 (as per the list of issues).

Facts

3. The respondent is a not for profit trade organisation for the footwear industry, based in Wellingborough, Northamptonshire. One of its functions is to assist members to apply for government grants on behalf of its members, although it has a broad remit including managing overseas trade shows, promoting the UK footwear industry and providing support programmes to SMEs and start-up businesses.

4. The respondent is, however, a relatively small organisation, employing between five and six employees. It has a board of directors comprising an executive CEO and Finance Director and some eight non-executive directors (NEDs) drawn from the members of the organisation, including a non-executive Chair. The board meets approximately four times per year. The NEDs are not paid by the respondent for their time.

5. The claimant, an experienced auditor and accountant, began working for the respondent in November 2012 as General Manager, reporting to the then CEO, Richard Kottler. The claimant then became company secretary when the incumbent retired. At a board meeting in September 2014, Mr John Saunders, the previous Sales and Marketing Director, was appointed the new CEO, following the retirement of Mr Kottler. The part-time Finance Director had stood down some months previously and the claimant was promoted to FD with effect from 1 November 2014.

6. The claimant had a range of responsibilities, which had increased in 2014 as the previous FD prepared to retire. The Chairman, Mr Mike Kelly, noted that the claimant's volume of responsibilities was "huge" when conducting the claimant's first appraisal in January 2015.

7. The Department for International Trade, also known as UKTI, provides grants to companies attending overseas exhibitions. The respondent is an accredited "Trade Challenge Partner" which means that companies can apply through the respondent for UKTI grants to support them with their costs of attending such exhibitions. A company must fulfil set criteria to be eligible for a grant. It cannot receive more than six grants for exhibitions in Europe and six elsewhere and a company which applies for a grant must be the same entity which attends the exhibition and incurs the relevant cost.

8. Within the footwear industry, as in other industry sectors, a company may own several different brands, the name of which may or may not be the same as the name of the limited company. It is also common for there to be several companies under the same or similar ownership.

9. In October 2014, the respondent was selected by UKTI for a "post event audit" following an exhibition in Dusseldorf which had taken place between 30 July and 1 August 2014. It was discovered that in relation to one grant application, at least one error had been made. As identified by UKTI in an email of 1 December 2014, the paperwork provided by the respondent showed that an invoice for the event had been paid by a company called Esska Designs Limited, whereas it was a different company, Calceus Limited, which had received the grant. Both companies are part of the same group and Mr Dan Gyves, a non-executive director of the respondent, is a director and shareholder of both. UKTI challenged whether Calceus had paid the exhibition costs, based on the documentation submitted to it by the respondent.

10. This is only part of the story, however. When the discrepancy came to light in December 2014, Mr Saunders instructed a junior member of staff to change the details on an existing BFA invoice such that it read Calceus rather than Esska. The junior member of staff followed the instruction and the altered invoice was submitted to UKTI as evidence that Calceus had incurred the exhibition costs and was therefore entitled to the grant.

11. Upon discovering this in December 2014, the claimant confronted Mr Saunders. Mr Saunders had undergone heart surgery in August 2014 and been out of the business between 5 August and the beginning of November, although he had remained involved during that period. When confronted by the claimant, Mr Saunders accepted full responsibility for what had occurred and admitted that he had instructed the junior member of staff to change the invoice details and submit the altered evidence to UKTI. The claimant then advised Mr Saunders that this could have massive implications for the respondent, its members and its reputation in the industry.

12. Mr Saunders accepted this and emailed UKTI to say that there had been "an invoicing error on our part". In response, UKTI instructed the respondent to repay the grant monies which it duly did. UKTI appears to have accepted that this was a mistake and did not impose any sanction on the respondent. The claimant did not raise this incident direct with Mr Saunders again.

13. There are two interpretations of this incident and it is a feature of this case that the respective parties have retained their differing views throughout. Whilst Mr Saunders described his instruction to a junior member of staff to change an existing invoice as a "monumental error of judgment", he maintained that the rationale for what he did was to correct his own administrative error such that the company entitled to the grant (Calceus)

would not be deprived of that grant. Accordingly, in his view he was not trying to do anything which was "dishonest" or "fraudulent".

14. The claimant took a very different view of Mr Saunders' actions, however. There are set rules for the entitlement to and administration of these grants which are clearly set out in documentation which was before the Tribunal. In practice, however, those rules were not strictly adhered to by the respondent or some of its member organisations. The claimant believed that a group company structure was being used such that once a company within the group had used up its six grant applications, subsequent grant applications would be made by another company in the group, even though in reality, the first company was the one incurring the expenditure. In other words, one company in a group was applying for a grant as the nominee for another company, in order to circumvent the eligibility criteria. In the claimant's view, this was compounded by the fact that a non-executive of the respondent was an owner of the two companies involved on this occasion. Accordingly, what Mr Saunders saw as an error of judgment to correct his previous administrative error was perceived by the claimant as an illegal attempt to cover up a fraudulent transaction. This distinction is at the heart of this case.

15. In an email of 2 January 2015, the claimant wrote to Mr Saunders: "I think you should let Michael know of the Calceus/Esska issue and the paperwork trail. If this were to cause us a problem then you don't want Michael being unprepared". Mr Saunders did email Mr Kelly, warning that it was clear that UKTI would be checking all grant applications in future, stating: "From this season we will ensure that the rule is applied but we need to be aware that this may limit the number of grants we are able to apply as our attending companies run out of grant lives". Mr Saunders did not mention to Mr Kelly the instruction he had given to the junior member of staff to change the details on the Esska invoice.

16. A similar issue then arose in April 2015, which we will describe as the "April Incident". On 23 March, Mr Saunders had emailed Mr and Mrs Gyves to advise them of a potential problem with payment of another grant involving Calceus and Esska. The email, which was copied to the claimant, states: "*In the case of Esska Shoes we appear to have invoiced Esska for the stand and received payment from Esska Design Limited. On checking an application and claim was entered for a grant in the name of Calceus Limited. We will go ahead and pay you the grant under the name Calceus Ltd. However please be aware that if we are audited by UKTI, as we were for GDS in August 14 – they may demand the repayment of the full value of the grant if you are unable to prove the connection between these companies to their satisfaction. During the last audit for GDS – BFA was forced to repay the £1500 on your behalf – I am sure you will understand we will be unable to do this a second time should the problem arise again."*

17. The claimant responded to Mr Saunders some 14 days later expressing his unhappiness that the situation had arisen again and suggesting that Mr Saunders' email compounded the problem, implying that the respondent was knowingly prepared to turn a blind eye to a breach in the rules. He refused to sanction the grant payment to Calceus.

18. In September 2015, the Claimant arranged a confidential meeting with Mr Kelly which took place on 23 September at Mr Kelly's business offices, the day before a board meeting of the respondent. The Claimant gave Mr Kelly some

pre-prepared notes. Doubt has been case on whether the third page of the notes was included, but Mr Kelly accepted that it is consistent with his recollection of what he was told.

19. The first two pages set out complaints by the Claimant about Mr Saunders, including complaints that Mr Saunders undermined his authority, did not think ahead nor understand the implications of his actions, took over responsibilities which were the claimants as set out in his job description and that Mr Saunders did not communicate properly with him, keeping him "in the dark". The claimant elaborated on those complaints with several examples, including a reference to Mr Saunders interfering with the claimant's role of head of training.

20. The sole item on the third page is headed "grants" and refers to the discrepancy identified in December 2014 and the email exchange in April 2015. The note does not refer specifically to the falsification of the invoice documentation, but Mr Kelly does not dispute that he was told orally about it and we find that it was mentioned to Mr Kelly. This was the first disclosure relied upon by the claimant, which we will describe as the First Disclosure.

21. The claimant's next appraisal took place on 15 February 2016. It was Mr Kelly who had first introduced appraisals for the respondent's senior executives. The claimant gave Mr Kelly another three-page document entitled "Notes for 15 February 2016", most of which constitutes a series of complaints against Mr Saunders, in similar vein to the September 2015 notes, including a further complaint about Mr Saunders' interference in training. The note does not refer to Mr Saunders' actions in relation to the Esska/Calceus invoice in December 2014, nor to the email exchange in April 2015. On page 3, the notes state that in 2015, the claimant had been unable to fit in his full holiday allowance because of his workload. The claimant had told Mr Saunders and confirmed that he would try to take the seven outstanding days during January/February. He had taken time off but had done work on every one of those days to avoid falling further behind.

22. As with his previous appraisal in 2015, the claimant had not filled in all the appraisal forms, saying that he did not need to. Nevertheless, the appraisal meeting took place. There was a discussion about the areas on which the claimant was working and Mr Kelly produced appraisal notes which he gave to the claimant the following month.

23. The claimant has complained about the way in which Mr Kelly conducted this appraisal and alleged that it was one-sided and that Mr Kelly did not seem interested. We accept Mr Kelly's evidence, however, that he conducted it informally but professionally and we have no evidence that it was one-sided or that it was manifestly different to his previous appraisal. We also accept Mr Kelly's evidence that he gave Mr Saunders a far worse appraisal, with much more criticism levelled at Mr Saunders by Mr Kelly.

24. The March 2016 board meeting took place on 31 March. The minutes run to six pages. They record, at item 8 of 11, that Mr Kelly asked Mr Traynor to keep the general report brief "as a number of items had already been discussed". There is evidence within the board minutes of Mr Kelly challenging Mr Saunders about the claimant's involvement in a particular project. The minutes also record that Mr Traynor did not have the opportunity to discuss the training notes he had distributed previously.

25. Immediately following the board meeting, a meeting took place to discuss the respondent's annual salary review. The meeting was attended by the claimant, Mr Saunders and Mr Kelly. The financial situation of the respondent was not good. A cost of living rise had been proposed for all staff, although Mr Saunders chose not to accept his cost of living rise. There was a discussion about the claimant's salary. The background to this is that the claimant had complained on more than one occasion previously to Mr Kelly about his remuneration. On 23 April 2015, Mr Kelly had emailed the other NEDs stating "*cutting straight to the point, Kevin Traynor is still not happy with his salary. This has been going on for some time now and although John Saunders and I had thought it had been resolved at the appraisals in January Kevin is still throwing suggestions at me*". The claimant also raised his salary on occasions between April 2015 and March 2016 and we are satisfied on the evidence that at the meeting on 31 March 2016, the claimant again indicated that he should be paid considerably more. This led to an uncomfortable discussion between the claimant and Mr Kelly during which Mr Kelly became somewhat exasperated with the claimant and made a comment to him about him not hitting targets or not progressing projects to Mr Kelly's satisfaction. The conversation then became more difficult and Mr Kelly left, thereby bringing the meeting to an end.

26. Mr Kelly later texted his resignation as Chairman and board member. We are satisfied that he did so because he felt he could no longer work with the claimant, due to what he saw as the claimant's constant complaining and negative attitude. Mr Kelly felt at that time that every conversation he had with the claimant was negative and it had become draining.

27. As Mr Kelly conceded in evidence, one of the issues about which the claimant had been complaining was the actions of Mr Saunders in relation to the Esska/Calceus invoice in December 2014 and the email exchange in April 2015, amongst a plethora of other complaints brought to Mr Kelly by the claimant relating to Mr Saunders and the claimant's remuneration package. Mr Kelly believed that the claimant wanted to replace Mr Saunders as CEO, but although the claimant denied it, it is easy to see how Mr Kelly came to this view.

28. We accept that Mr Kelly made the statement regarding the claimant's failure to meet targets/progress projects satisfactorily. It was uncalled for, having not been discussed previously with the claimant. We are satisfied that it was a product of Mr Kelly's frustration with the claimant's repeated complaints about his remuneration package in the context of an organisation in a poor financial position.

29. In April or May of 2016, the respondent had cause to seek legal advice on an international intellectual property issue. At the instigation of the claimant, Franklins (a local firm of solicitors) had been appointed to be the respondent's lawyers. For this matter, however, Mr Saunders decided to us Briffa, a specialist IP law firm who had supported the respondent recently with Brexit advice. The claimant alleges that this was done deliberately, to reduce his influence in the respondent. However, it seems to us have been a perfectly sensible business decision by Mr Saunders, which was within his authority as CEO, and which was made in the best interests of the respondent.

30. One of the claimant's responsibilities as Finance Director was to produce and present the annual budget. He had produced a budget for the March 2016 board meeting indicating a significant loss and on 22 May 2016 he sent to Mr Saunders an updated copy of that budget with various amendments as itemised in his email of 22 May.

31. Following the resignation of Mr Kelly, Mr Gyves had been appointed Chairman in May 2016. The claimant was unhappy with this appointment, considering that Mr Gyves had conflicts of interest. As the new Chairman, Mr Gyves became involved in the budget process and Mr Gyves called a meeting with the claimant and Mr Saunders which took place at Mr Gyves' office in London shortly after 22 May.

32. At this meeting, there was a discussion about a revised budget which would not involve job losses and relied on an increase in revenue and profits from a new online training scheme. The claimant did not agree and there was a difference in opinion regarding the best means of tackling the organisation's difficult financial situation. The claimant preferred to concentrate on control of overheads whereas the new Chairman, supported by the CEO, wanted to increase revenue. However, we are satisfied from the evidence that we have heard that the claimant was given the opportunity at that meeting to express his point of view and was fully involved in the discussions.

33. On 24 June, the claimant emailed Mr Gyves (but not Mr Saunders) attaching his own proposed budget, focussing on control of overheads. This budget contained a proposal to move the CEO position to a part-time role based in London, thereby reducing costs by over £70,000 per year. In effect, the claimant was proposing the departure of Mr Saunders.

34. Mr Gyves responded by email of the same morning, advising the claimant not to circulate this new budget stating that as it would constitute a significant change to the BFA structure and organisation, it should be discussed with the NEDs and that he would raise it as part of a meeting he was due to have with the NEDs after the formal board meeting on 31 March.

35. In contravention of this specific instruction, the claimant then on 26 June circulated both the "Gyves/Saunders" budget and his own budget to all the directors including Mr Saunders. In his accompanying finance director report, the claimant stated that he had been informed by Mr Gyves that the claimant's budget would not be discussed at the board meeting.

36. At the board meeting, before any discussion of the finances, the claimant read out a prepared statement as follows, which is the second disclosure relied on by the claimant. It reads:

> "*Firstly, after this meeting is concluded, Dan intends to have a separate meeting of the NEDs. As your Company Secretary, I should make you aware that any meeting of the directors to conduct company business should include all the directors and that includes John and me. I am concerned that my role is being diminished and I am being side-lined.*
>
> *Secondly, I want to emphasise that as your Finance Director I have a fiduciary duty to the company. I am therefore confirming that I have begun an audit of grant applications to ensure they meet UKTI criteria. A year or so ago, I discovered that John had abused his position as CEO and made*

Lufuidy, a BFA apprentice, change some accounting documents which he then submitted to UKTI to cover up payments made to a company owned by Dan and/or his wife. The companies are Calceus and Esska. A few months later a second such incident arose, again involving the same companies. On both occasions I was able to intervene. I hope I was able to avoid any damage to the BFA's reputation and potential financial implications but I do not know if these incidents will come to UKTI's notice in the future. If they do, the ramifications for the BFA could be huge. I hope that my audit will not disclose anything untoward but I will report back to the board in due course."

We will refer to this statement as the Second Disclosure.

37. The claimant was asked by Daniel Rubin, one of the NEDs, why he had not mentioned this previously and why it had arisen now. The claimant replied that he had reported it to Mr Kelly and would have raised it with the new Chairman but had deemed it inappropriate to do so once Mr Gyves had been appointed. The board meeting was then suspended and the claimant, Mr Gyves and Mr Saunders left the room. The meeting resumed after a 30 minute break and Mr Rubin asked the claimant to prepare a clear statement of the events he had reported evidenced by emails.

38. Mr Saunders stated that he did not believe that what he had done was a criminal act but that he was resigning. Most of the directors asked him not to resign until after a full investigation had been concluded, to which Mr Saunders agreed. The NEDs then held a separate meeting with neither Mr Saunders nor the claimant in attendance.

39. Two of the other NEDs, Mr William Church and Mr Michael Watson-Smith, were appointed to carry out the investigation. They carried out interviews, in person or by telephone, with the claimant, Mr Saunders and Mr Gyves and sent an executive summary of their investigation to the Chairman and the NEDs on 20 July, proposing that their findings be discussed at a board meeting on 29 July. The summary did confirm that Mr Saunders had instructed an invoice to be changed and forwarded to UKTI. It also commented on the poor working relationship between the claimant and the CEO affecting the smooth running of the business, stating that the issues raised should have been dealt with earlier and a rigorous process introduced by Mr Saunders.

40. The respondent then received a letter from the claimant's solicitors dated 28 July referring to the First and Second Disclosures and suggesting that the executive summary omitted key information about payments to Calceus from BFA funds. The letter went on to say that any dismissal of the claimant because he had made protected disclosures would be automatically unfair and alleged that the claimant had been treated detrimentally since making the disclosures. The claimant was keen for the issues to be addressed at work, but feared that he would be forced out of the organisation. This is the Third Disclosure relied on by the claimant.

41. The board meeting duly took place on 29 July. Mr Watson-Smith summarised the report and it was agreed that the omissions identified in the solicitors' letter would be investigated with Mr Gyves, who agreed to stand down as Chairman during the investigation. The claimant stated how hard he had worked for the respondent for the last four years and he wanted to continue doing so.

42. Messrs Watson-Smith and Church then carried out further interviews with Mr Gyves, Mr Saunders, the claimant and Mr Kelly. Mr Kelly confirmed his view of Mr Saunders' behaviour in December 2014 that "it was mainly an administrative error but it had been straightened up" and that he had dealt with it by advising the claimant to discuss it with Mr Saunders who had confirmed that the claimant had done so.

43. Mr Kelly was referred to the three-page notes from September 2015 and queried the third page (which was the page dealing with the relevant allegations against Mr Saunders). The note of this telephone conversation, prepared by a note-taker not otherwise involved in this discussion, records that Mr Kelly stated: "*I can absolutely swear that I have never seen that paragraph*".

44. Messrs Watson-Smith and Church then sent an update to the NEDs reporting on their recent discussions as follows:

> *"At this point we believe there is no case to answer here. There was a litany of errors during the grant application process, the CEO was away having surgery and managing new staff remotely and the CFO not only knew everything about the mistakes but had plenty of opportunities to raise the decision not to ask for repayment to the attention of the Board on the 1st April or subsequently. We have found no evidence to suggest that GDS was raised with the Chairman prior to a meeting with KT on the 23rd September 2015"*

45. The update also comments on the respondent's appraisal system, stating: "*We consider the current Appraisal process not fit for purpose. There is no evidence that the Appraisee (KT or JS) ever agreed to the copy of the notes compiled by the Appraiser (MK) and the objectives are not SMART*".

46. The update then goes on to say that there are a few other points that the NEDs should be acquainted of that have turned up along the way. There are three things mentioned. The first deals with a reference to another company of Mr Gyves and the third deals with the third page of the September 2015 document, with Messrs Watson-Smith and Church saying that they had been unable to get to the bottom of whether it was included when first shown to Mr Kelly, but concluding that it made no material difference as Mr Kelly had confirmed that the content was discussed.

47. Of more significance is the second additional point which reads as follows:

> *"It is our understanding that KT is the owner of a company called K Traynor Limited. Company number 03381324 was put into liquidation earlier this year and is due to be dissolved on the 24th August 2016 with liabilities in excess of £800K.*
>
> *It may be worth establishing whether Richard Kottler/Michael Kelly were aware of this situation when KT was recruited".*

48. This information had been discovered by Mr Church through what Mr Watson-Smith described as a simple search. His evidence was that the information was peripheral but of background interest. There is no dispute that the information is factually correct, is publicly available and that the claimant

had in fact previously informed Mr Kottler, Mr Hawksworth (the former FD) and Mr Andrew Loake (a former NED).

49. Messrs Watson-Smith and Church then produced and circulated to the Board a final report dated 29 August 2016 which repeated just about all the content of the update and added four conclusions, as follows:

> *"1/ JS acted naively when he attempted to cover up the paper trail inconsistency and his management of the TAP grant application process was weak but we do not believe he acted criminally.*
> *2/ The fact that the grants were paid because there was doubt in JS' mind that the errors were not of BFA origin is entirely reasonable as he is CEO and responsible for representing the interests of the paying membership and the wider UK Industry at large in the TAP process.*
> *3/ KT had many and various opportunities to raise his disagreement to the payment of the grants at the time they were paid and at subsequent Board Meetings but chose not to until the 28th June 2016. This has caused much delay to the urgent need to address the future strategy of the board which is regrettable.*
> *4/ We recommend an overhaul to the appraisal system to create a more focussed set of priorities and a strengthening of the internal procedures by which future grants are administered."*

50. On 6 September, the claimant's solicitors wrote to the respondent's solicitors about this final report, suggesting that it failed properly to address the issues whilst calling into question the claimant's character and making unjustified comments about him which are seriously detrimental, out of context and unjustified. On 13 September, the claimant himself emailed Messrs Watson-Smith and Church asking the respondent to consider his email and his solicitors' letter as further grievance complaints and stating that "I appear to have been singled out as a target for undue criticism and scrutiny".

51. The respondent's solicitors then wrote to the claimant's solicitors on 15 September stating that the respondent had investigated thoroughly and had not concluded that there was any criminal wrongdoing as alleged, but hoping that the claimant and Mr Saunders could now work in a spirit of co-operation in the best interests of the BFA. They also refute any suggestion that the claimant had been treated detrimentally for making a disclosure and propose a meeting between Mr Saunders and the claimant with representatives of the board to agree a sensible and pragmatic way forward.

52. On 21 September, the claimant advised Mr Saunders and Mr Gyves that he had arranged to meet with the respondent's auditors "for good measure" and asked for copies of the relevant grant applications in 2014 and 2015 so that he could hand them to the auditors. On the same day, he wrote to the NEDs again stating that the investigation and report had failed properly to address the issues he had raised, stating that Messrs Watson-Smith and Church had been placed in a difficult position in having to undertake the investigation and saying that a more independent review would have been more appropriate. He again referred to the reference to the comments in the report regarding his financial circumstances and stated that: "this has affected my trust and confidence in the organisation" and that he feels harassed. The claimant referred to his appointment with the auditor and suggested that another board member join him at that meeting.

53. Mr Saunders replied to the claimant's first email of 21 September asking him to postpone his meeting with the auditors, on the basis that: "*the concerns you have raised in respect of grant applications have been thoroughly investigated and concluded. It is my understanding that the matter is now closed and that we are looking to the future as a board and executive team. If you have any further concerns regarding governance, these should be brought to the Board for discussion and that any required actions agreed, addressed and implemented*". He later clarified this by stating that he was not asking the claimant to cancel the meeting with the auditors but to postpone it until the Board had the chance to consider any details and information on his further concerns. The claimant did then cancel the meeting.

54. On 26 September, the claimant was working in his office when he overheard Mr Saunders say on the telephone "No, he's still here, he's still working". Although the claimant described this as "incredibly hurtful and damaging to his trust and confidence in the organisation" he did not know the context of this remark, nor did he know to whom it was spoken. There are many reasons why someone may have enquired about the claimant's whereabouts which are entirely innocent.

55. The claimant then carried on working as usual on 27 and 28 September sending and receiving normal work emails on 28 September.

56. On 29 September 2016, the claimant emailed to the board members his letter of resignation of the same date. The letter gives the following reasons for his resignation:
    - He had been pushed out without valid grounds or justification and left with no option but to leave. He believes this is due to disclosures he has made;
    - There had been a complete breakdown of the implied terms of trust and confidence with the "last straw" being recent treatment suffered and failure to address his concerns raised;
    - The respondent had failed to deal with his grievances, disclosures and complaints;
    - Since making his disclosures to the respondent he had been singled out and treated detrimentally, with comments about his personal affairs having been published;
    - The respondent had failed to deal with the references to his personal affairs in the investigation report despite his grievances and complaints and offered no apology; and
    - He had to suffer the humiliation of overhearing Mr Saunders speaking about him on the telephone to a third party.

The Law

Detriment Complaints

57. By Section 43A ERA a "protected disclosure" is a "qualifying disclosure" as defined by Section 43B, made by a worker in accordance with any of Sections 43C to 43C. The claimant relied upon Sections 43B(1) (a), (b) and/or (f). The relevant parts of 43B(1) are as follows:-

"43B(1) In this Part a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

a That a criminal offence has been committed, is being committed or is likely to be committed.
b That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

f That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

58. There was no dispute that the claimant was at all material times a "worker" and that the disclosures relied on were made to his employer.

59. It was further agreed that disclosures relied upon by the claimant were disclosures of "information".

60. The recent case of *Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979* confirms that the worker must establish that as a matter of fact he or she actually held the belief that the disclosure in question was in the public interest. Assuming that belief has been established, it is for the Tribunal to determine whether or not that belief was reasonable. Guidance was provided by Underhill LJ who declined to provide any general gloss on the phrase "in the public interest" but made four points about the nature of the exercise required, as set out in paragraphs 27-30:

"27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of Section 43B) as expounded Babula (see para 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest; and (b)whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a disclosure was in the public interest; and that is perhaps particularly so given that the question is of its nature so broad textured … all that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in

> *his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless found it to have been reasonable for different reasons which he had not articulated to himself at the time; all that matters is that his (subjective) belief was (objectively) reasonable.*
>
> *30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it."*

61. A worker may have "reasonable belief" even if the information disclosed is untrue (*Darnton v University of Surrey [2003] IRLR 133*). The case of *Babula v Waltham Forrest College [2007] EWCA Civ 174* confirmed that a whistleblower has to establish a "reasonable belief that the information being disclosed tends to show" one or more of the situations identified in Section 43B(1)(a) to (f).

62. Where a worker relies upon a disclosure that a criminal offence has been committed (or is being committed, or is likely to be committed) or that a person has failed (is failing, or is likely to fail) to comply with a legal obligation, it is for the Employment Tribunal to identify the source of the legal obligation and set out how it has, is or will be breached. There is a distinction between breach of a legal obligation and a criminal offence and actions which a worker believes are morally wrong (*Eigger Securities LLP v Korshunova [2017] IRLR 115*).

63. Assuming that the claimant has made one or more protected disclosures, the burden of proof in establishing that he has suffered a detriment is on the claimant, on the balance of probabilities.

64. There is no statutory definition of "detriment", but there will be a detriment "if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment" (*Blackbay Ventures Limited v Gahir [2014] IRLR 416*). In other words, the claimant will have been subjected to a detriment if the tribunal finds that "by reason of the act or acts complained of a reasonable worker would or might take the view that had therefore been disadvantaged in the circumstances in which he had thereafter to work" (*May LJ in De Souza v Automobile Association [1986] IRLR 10*3, endorsed in the Judgment of Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*. In the latter case, it was confirmed that an unjustified sense of grievance in itself does not amount to a detriment).

65. The effect of Section 48(2) ERA is that if the claimant has been able to establish a protected disclosure and a detriment, it is then for the respondent to demonstrate the grounds on which a relevant act (or deliberate failure to act) was done. In the case of *NHS Manchester v Fecitt and others [2012] IRLR 64*, the Court of Appeal held that in looking at this question, the tribunal should consider whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of

the whistleblower". It is therefore for the employer to show that the protected disclosure did not "materially influence" the detrimental treatment.

66. Where there are numerous allegations of detriment relied upon, it may be necessary to take a holistic approach to the allegations rather than simply looking at them in isolation. The EAT stated in the case of *Horloku v Liverpool City Council [2015] UKEAT/0020/15/DA*: "A claim of discrimination does not get stronger because there is a greater number of complaints. It is only if some of those complaints are justified or may be justified that they may be arrogated with others to present a rather different picture than if one had simply focussed on the events individually". This was a discrimination case but the principle is equally applicable to a whistleblowing case.

67. By Section 48(3) ERA:-

> *"(3) An Employment Tribunal shall not consider a complaint under this section unless it is presented –*
>
> *(a) before the end of the period of three months beginning with the date of the act or the failure to act to which the complaint relates or, where that act or failure is part of series of similar acts or failures, the last of them, or*
>
> *(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complainant to be presented before the end of that period of 3 months."*

Mr Crosfill confirmed in his submissions that if the Tribunal were to find that any of his complaints of detriment were not presented so as to comply with Section 48(3)(a), he was not relying upon Section 48(3)(b), and was not arguing that it was not reasonable practicable for him to have presented that complaint before the end of the relevant period of 3 months.

Unfair Dismissal

68. By Section 94 ERA, an employee has the right not to be unfairly dismissed by his employer. To make a complaint that this right has been contravened, the employee must first establish that he has been dismissed. In this case, the claimant asserted that he had been "constructively dismissed" in accordance with Section 95 ERA, in that he had terminated his contract of employment "in circumstances in which he (was) entitled to terminate it without notice by reason of the employer's conduct".

69. The case of *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* established that constructive dismissal involves the following three elements:

(1) There must be a breach of contract by the employer which is sufficiently serious to justify the employee resigning;

(2) The employee must have left in response to that breach; and

(3) The employee must not have affirmed the contract before leaving (for example, by delaying too long before resigning).

70. In determining whether the first element is present, there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment. It must be so serious that the employee is entitled to regard himself as entitled to leave immediately without notice.

71. The claimant relied upon a breach of the implied duty of trust and confidence. In the case of *Mahmood v BCCI [1997] ICR 607*, it was established that every contract of employment contains an implied term that the employer must not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee, without reasonable and proper cause. Any breach of this implied term will be sufficient to fulfil the second element above and will constitute a "repudiatory" breach of contact (*Morrow v Safeway Stores Ltd [2002] IRLR 9*).

72. In determining whether there has been a breach of the implied term, the impact of the employer's actions on the employee is more significant than the employer's intentions. This impact should be assessed objectively (Malik v BCCI [1998] AC 20 per Lord Steyn)

73. The breach of contact must be a contributor to the claimant's decision to resign, although it need not be the only reason for his resignation (*Nottinghamshire County Council v Meikle [2004] IRLR 703*).

74. If a claimant has been dismissed, then it is for the respondent to establish a potential fair reason for the dismissal within Sections 98(1) or (2) ERA. In this context, the reason for the dismissal will be a set of facts known or beliefs held by the person making the decision to dismiss (*Abernethy v Mott, Hay and Anderson [1974] IRLR 213*). Where a claimant has been constructively dismissed, it is still for the employer to prove the reason for that dismissal.

75. Where a respondent has established a potentially fair reason for dismissal, the Tribunal must then determine whether that dismissal is fair or unfair in accordance with Section 98(4) ERA. This question will depend on whether in all the circumstances, including the size and administrative resources of the employers undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and it must be determined in accordance with equity and substantial merits of the case.

76. Nevertheless, certain dismissals are automatically unfair. By Section 103A ERA: "an employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Conclusions

77. Applying the relevant law to the evidence we have heard and the documentation considered, we have reached the following conclusions:

Protected disclosures

Limitation

78. The first issue to consider is whether the Tribunal has jurisdiction to hear these complaints. The claimant relies on eight alleged detriments. In discussions during submissions, the parties agreed that relevant acts or omissions relating to the first five occurred before the date which is three months prior to the presentation of the claim (allowing for the extension of time which applies as a consequence of the Early Conciliation rules). Accordingly, the last three complaints of detriment are deemed to be "in time" without question. The first five can only be in time if they form part of a series of similar acts or failures concluding with one of the last three complaints.

79. We consider that those complaints as alleged do relate to acts or omissions which are part of a series of similar events. We say this even though the acts or omissions were undertaken by different people within the respondent and despite the relatively long period of time between some of them. As alleged by the claimant, however, they constitute a pattern of "retaliation" against the claimant which we consider to be sufficiently similar to come within the second part of Section 48(3)(a). On the claimant's case, they constitute a series of attempt to undermine him and belittle him. The Tribunal therefore has jurisdiction to hear the complaints.

80. We have then gone on to consider whether the claimant made one or more protected disclosures. When considering the issue of the claimant's reasonable belief, we have reminded ourselves not that there may be more than one reasonable view and that we must not to substitute our own view.

81. The claimant relied on three disclosures which we will deal with in turn.

First Disclosure - Paragraphs 10 and 11 of the Grounds of Complaint and Paragraph 8.1 of the List of Issues

82. On or around 23rd September 2015, the claimant disclosed information to the respondent and in particular to Michael Kelly, that it's CEO, John Saunders, had altered accounting documents for the purposes of concealing improper grant payments. We conclude that this was a protected disclosure within the meaning of Section 43A ERA, for the following reasons.

83. The respondent accepts that this disclosure was made and that it was a disclosure of information. Having heard the evidence of the claimant, we find that he genuinely believed that Mr Saunders, on behalf of the respondent, committed a criminal offence or at the very least was in breach of a legal obligation. Further, we find that the claimant genuinely believed that Mr Saunders' actions concealed, or were likely to conceal, a criminal offence or breach of a legal obligation.

84. From the time when the claimant was first notified of Mr Saunders' actions, he described those actions as dishonest and he considered the actions to be fraudulent. He believed that Calceus Ltd was not entitled to the grant monies question because it was not eligible to apply for a further grant and, or in the alternative, because it had not expended the costs covered by the grant. The claimant believed that the respondent had a legal obligation, evidenced by the terms and conditions relating to grant obligations, to administer the grant application and payment process in accordance with those terms and conditions and a legal obligation not to make payment, or facilitate payment to be made to a company which was not entitled to those monies. We also believe having heard the evidence of the claimant that not only did the

claimant believe that the changing of the invoice documentation was in itself a breach of a legal obligation but also a criminal offence, based upon his many years of accounting experience, in addition to believing that it was an action to conceal the breach of an illegal obligation or the breach of a criminal offence.

85. Furthermore, we find that the claimant's belief was reasonable. We have been referred by Mr Crosfill to Section 2 of the Fraud Act 2006 which states:

> *"2. Fraud by false representation*
> *(1) A person is in breach of this section if he—*
> *(a) dishonestly makes a false representation, and*
> *(b) intends, by making the representation—*
> *(i) to make a gain for himself or another, or*
> *(ii) to cause loss to another or to expose another to a risk of loss.*
> *(2) A representation is false if—*
> *(a) it is untrue or misleading, and*
> *(b) the person making it knows that it is, or might be, untrue or misleading."*

86. It is not necessary for us to decide whether a criminal offence had in fact been committed. We accept Mr Saunders' evidence that at the time, he believed that Calceus Ltd may well have been entitled to the money, according to the somewhat lackadaisical manner in which these applications had been administered in the past, and that Mr Saunders' error was an error of judgement in attempting to correct what he saw as a mistake. Nevertheless, looking at the matter objectively, we consider that it was entirely reasonable of the claimant to consider that a criminal offence had been committed or concealed. Even, if we are wrong about this, and again looking at it objectively, we consider it was equally reasonable for the claimant to conclude that Mr Saunders' actions constituted a breach of a legal obligation, or concealment of such a breach. Having been taken to and considered the relevant terms and conditions, it was reasonable for the claimant to conclude that the respondent had a legal obligation to administer the grant process in accordance with those terms and conditions.

87. Having heard the evidence of the claimant, we also have no hesitation in concluding that he believed that information disclosed was in the public interest. The information related to the use of public monies and the claimant believed that the way in which these public monies are applied or mis-applied is a matter of public interest. We also consider that this belief was entirely reasonable. The use to which public monies are put is a matter of public interest, particularly where there are set terms and condition which apply to that use.

Second Disclosure – paragraphs 20 and 22 of the grounds for resistance and paragraph 8.2 of the list of issues

88. This was a disclosure of two distinct pieces of information. First, the claimant repeated the substance of the First Disclosure at the Board meeting which took place on 28th June 2016. There is no dispute that this disclosure was made, nor what the claimant said, it being recorded in the Minutes of the meeting. On this occasion, the information was disclosed not simply to the

Chairman of the respondent but to the Chief Executive and all the Directors present. For the reasons outlined above in relation to the First Disclosure, we find that this disclosure of information was also a protected disclosure within the meaning of Section 43A.

89. The second piece of information disclosed, as recorded in the Minutes, was as follows:

> *"As your Company Secretary, I should make aware that any meeting of the Directors to discuss company business should include all the Directors and that includes John and me."*

The claimant asserts that this was information that he was being improperly excluded from Board Meetings.

90. We conclude that this element of the Second Disclosure is not protected, for the following reasons.

91. Having heard the evidence for the claimant, we find that he did genuinely believe that this was information tending to show that the respondent was in breach of a legal obligation to hold Directors' Meetings which involved all Directors. We do not consider, however, that this belief was reasonably held.

92. Firstly, this was not a Board Meeting. It was a meeting of the non-executive directors called by Mr Gyves as Chairman to discuss budget proposals. It was not intended to be a formal Board Meeting of the respondent and although we were advised that new articles of association had been adopted by the respondent, we were not taken to those articles and we have no evidence from which to conclude that Mr Gyves would have breached any legal obligation by holding a meeting of the non-executive directors for this purpose. Indeed, bearing in mind the content of the budget proposed by the claimant, it seemed to be an entirely sensible thing for him to do.

93. In the event, the meeting of the non-executive directors immediately following the Board Meeting actually discussed the disclosure of Mr Saunders actions rather than the proposed budget. Again, there is no reason to believe that the non-executive directors breached a legal obligation by discussing the claimant's revelations in the absence of both the claimant and Mr Saunders, in order to decide what process should be adopted by the respondent in the light of those revelations.

94. The claimant has also not satisfied us that he genuinely believed that the disclosure of this particular information was in the public interest. He did not convince us of this in his evidence and it is notable that in his solicitors' letter of 28th July 2016, the proposed exclusion from the meeting identified as a detriment rather than a protected disclosure.

95. Even if the claimant did genuinely believe that this disclosure was in the public interest, we conclude from an objective perspective that it was not reasonably held. In forming this conclusion, we have taken into account the guidance of Underhill LJ in the Chesterton case referred to above, but we cannot see that disclosure of the decision to hold a meeting of non-executive directors of this private company to discuss its budget proposals could be seen as being in the public interest.

Third Disclosure – paragraph 30 of the grounds for complaint and paragraph 8.3 of the list of issues

96. This was a disclosure in a letter dated 28 July 2016 from the claimant's solicitors to the respondent. It repeated the information referred to in the First Disclosure and gave some further details of that disclosure. For the reasons set out above regarding the First Disclosure, we consider the information disclosed in that letter was a protected disclosure within the meaning of Section 43A, insofar as it related to the actions of Mr Saunders in December 2014.

Detriments

97. Having concluded that the claimant did make protected disclosures, we have gone on to consider whether he was subjected to one or more detriments and if so, whether that detriment was on the ground that he had made the protected disclosure. We have determined the question of whether or not the claimant was subjected to detriments from the standpoint of a reasonable worker.

98. The claimant complains of 8 separate detriments, as set out in paragraph 11 of the list of issues. The first three relate to actions of Mr Kelly. The claimant alleges that:

(1) The claimant's appraisal was mis-managed by My Kelly;

(2) Mr Kelly dismissed the claimant's suggestions as to training out of hand; and

(3) Following the Board Meeting in March 2016, without any justification, the claimant was accused of not hitting targets.

99. We do not consider that any of these acts by Mr Kelly constitute section 47B detriments, for the following reasons.

100. Having heard the evidence of the claimant and Mr Kelly, we are satisfied that the claimant's appraisal in February 2016 was not mis-managed by Mr Kelly as alleged. The claimant complains that it was a "mostly a one side affair with little comment from Mr Kelly" and that he was made to feel that his appraisal did not matter. We consider that whilst this appraisal may not have followed all elements of best practice in appraisals generally, it was handled professionally by Mr Kelly who gave the claimant every opportunity to discuss his points of concern and prepared notes of the meeting. We note that the claimant himself had declined to complete all the appraisal forms, just as he had done so in the previous year. We also accept Mr Kelly's evidence that Mr Kelly's appraisal of Mr Saunders was considerably more critical. We conclude that a reasonable worker would not consider that the claimant had been disadvantaged by this appraisal, particularly when compared with Mr Kelly's appraisal of Mr Saunders and his appraisal of the claimant the previous year.

101. The second alleged detriment is that Mr Kelly dismissed the claimant's suggestions as to training "out of hand". This relates to the Board Meeting in March 2016. The Minutes record that within the general manager report:

> *"KT did not have the opportunity to discuss the training notes that he had distributed along with the other Board Reports."*

This accords with paragraph 92 of the claimant's witness statement in which the claimant states:

> *"The Board Meeting on 31st March 2016 proceeded as usual until just before I began my general report when the Chairman asked me to keep things brief. I did not have the chance to table my training report and TRAQ was not mentioned again."*

102. It is clear that the claimant's training report was not discussed at the March 2016 Board Meeting. This is not to say, however, that his suggestions were dismissed "out of hand" and the evidence has led us to the conclusion that there was simply not enough time to consider the training report at that Board Meeting. We note also within those Board meetings minutes, there is reference to Mr Kelly encouraging the claimant's involvement in other areas. An example of this is within the CEO report. For these reasons, we conclude that a reasonable worker would not consider that the claimant had been disadvantaged.

103. The third alleged detriment is that following a Board Meeting in March 2016, without any justification, the claimant was accused of not hitting targets.

104. We have found that Mr Kelly did make a statement of this nature and that it was uncalled for. We consider that a reasonable worker may well conclude that the claimant was thereby disadvantaged in the circumstances in which he worked. However, Mr Kelly has satisfied us that his comment was not made on the ground of the First Disclosure and that instead it was a manifestation of his frustration of the claimant's attitude to his remuneration. We acknowledge that Mr Kelly resigned as Chairman due to his frustrations with the claimant's continual complaining (including complaints which were "protected"), but this particular statement had nothing to do with his disclosures about Mr Saunders and everything to do with the claimant's attitude to his remuneration. The protected disclosure did not materially influence Mr Kelly to make the offending remark. Indeed, we do not believe that the protected First Disclosure had any significant influence on Mr Kelly's actions.

105. The fourth detriment complained of is that the claimant was prevented from giving instructions to the respondent's solicitors "thus reducing his influence". It is set out at paragraph 18 of the grounds of complaint. Our finding of fact is at paragraph 29 above. This was not a detriment and no reasonable worker would consider that the claimant was disadvantaged by it. It was a decision taken by Mr Saunders for sound business reasons which was within his authority to make.

106. The fifth alleged detriment is that the claimant's budget suggestions were dismissed "out of hand". In paragraph 19 of the grounds for complaint, he asserts that he was informed that his proposals would not be considered by the Board. We have dealt with this in paragraphs 30 to 36 above and our conclusions are that the claimant's proposals were not dismissed "out of hand". The claimant had a different view to Mr Gyves and Mr Saunders as to the best method for the respondent to extricate itself from its financial predicament. We have no doubt that both views were honestly held, but if

the claimant's suggestions had been accepted and implemented, then in all likelihood, Mr Saunders would have lost his job as Chief Executive. It was therefore entirely logical and sensible for Mr Gyves to wish to discuss those suggestions with the non-executive directors in the first instance in the absence of Mr Saunders and the claimant. We have not read or heard anything to suggest that those suggestions would not have been properly considered by the non-executive directors.

107. We would add for completeness that we do not consider that either of the actions of Mr Saunders which are complained of were influenced materially by the First Disclosure and that in both cases, Mr Saunders made decisions on business grounds in what he considered to be the best interests of the respondent. Throughout the events following the First Disclosure, the evidence we have heard and read is that Mr Saunders acted towards the claimant in an entirely professional manner, despite the claimant's complaints about his management generally and the claimant's budget proposals which were aimed at Mr Saunders. We would add that complaints against Mr Saunders which are relied on as detriments are not dissimilar to the complaints made by the claimant to Mr Kelly before the First Disclosure (referred to in paragraph 19 above).

108. The sixth alleged detriment related to an incident occurring after the Second Disclosure. The claimant complains that the respondent (in the guise of Mr Watson-Smith and Mr Church) circulated a report externally and internally in which the claimant's financial circumstances were disclosed (list of issues paragraph 11.5 and ET1 paragraph 19), although the claimant has conceded that the report was not disclosed externally but only to board members. The complaint in the claim form is that this report contained "unverified comments about the claimant's personal affairs and finances". We have set out the exact wording in paragraphs 47 and 48 above.

109. We consider this to be finely balanced. On the one hand, the information disseminated is factually accurate, in the public domain and freely available and had already been disclosed by the claimant to members of the board. It is information which an employer of a Finance Director is entitled to know (otherwise why would the claimant have disclosed it to a number of directors when he was recruited). On coming across the information for the first time, it is not unreasonable for the authors of the report to have questioned whether the organisation was aware of it at the time of recruitment. It was peripheral to the main conclusions and we accept that it had no bearing on the conclusions reached by Messrs Watson-Smith and Church. We also think that in investigating the allegations made by the claimant, it is reasonable for them to wonder why the matter was only brought to the board some 18 months after the event, when Mr Kelly believed it had been dealt with and resolved. Messrs Watson-Smith and Church also had been given reason to doubt whether a document produced in 2015 had been added to subsequently by the claimant.

110. On the other hand, Messrs Watson-Smith and Church went searching for the information. They then put that information in report to the Board even though it had no relevance to the issues they had determined. They did so without consulting the claimant first and asking him about the information the view that he had been disadvantaged in the circumstances in which he had to work.

111. On balance, it is our judgment that the insertion of the information into the report and the suggestion that the claimant may not have disclosed this information at the appropriate time would be considered by a reasonable worker as having the effect of impugning the claimant's reputation and casting doubt on his own behaviour. We consider that a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had to work.

112. We also consider that the respondent's circulation of the information was on the ground of the protected disclosure made by the claimant. The claimant argues that this and other acts or omissions relied on were "retaliatory" and that there was therefore a clear causal connection between the disclosure and the circulation of the inclusion of the information. We do not go as far as this and we accept that Messrs Watson-Smith and Church were questioning whether the claimant might have any other motive for raising matters in the way that they had been raised, particularly in the light of his many criticisms of Mr Saunders and the claimant's preparation of a budget which, if accepted, would probably have led to the departure of Mr Saunders. Nevertheless, the respondent has not persuaded us why there was a need to put this information in the report without at least speaking first to the claimant and has not shown that the protected disclosure did not materially influence the decision to do so. We therefore conclude that this detriment was on the ground of the claimant's protected disclosure.

113. The seventh and eight alleged detriments relate to incidents after the Third Disclosure. The seventh is a complaint about the manner in which the claimant's disclosures were investigated, although Mr Crosfill confirmed in his submission that the complaint was really about the conclusions in the report which he described as a "whitewash". Whilst we understand the claimant's frustration in his ability to persuade Mr Watson-Smith and Mr Church of what he saw as the seriousness of Mr Saunders actions, we do not consider this to have been a whitewash. The report does criticise Mr Saunders, albeit not to the extent desired by the claimant. We find that the matter was investigated extensively by Mr Watson-Smith and Mr Church and they came to their conclusions in good faith. It is a feature of this case that the claimant saw and continues to see Mr Saunders' actions very differently to the way in which the respondent's non-executive directors viewed them. We heard evidence that a number of those non-executive directors were prepared to turn a blind eye to the strict application of rules and terms and conditions. It may be that this lack of consideration could be criticised as misconceived, but it is our view that rightly or wrongly, the respondent's witnesses did not at any stage view the actions of Mr Saunders in the way that the claimant did. We do not consider that their conclusions constituted a detriment to the claimant. A reasonable worker would not consider that in carrying what was intended to be an independent review of an incident which had occurred some 18 months previously, Mr Watson-Smith and Mr Church were bound to come to the same conclusion as to the gravity of Mr Saunders as had the claimant.

114. Finally, the claimant complains about the conversation he overheard in September 2016. The remark made is set out at paragraph 54 above. Whilst it is correct that someone on the other side of a telephone conversation with Mr Saunders enquired about the claimant's whereabouts at the time, the claimant has provided no compelling evidence to suggest that this was anything but a perfectly innocuous enquiry. We accept that the

claimant was affected by this incident, but a reasonable worker would not consider it to be something to his disadvantage.

115. We have also looked at the allegations of detriment as a whole rather than in isolation. We are invited by Mr Crosfill to find that taken as whole, the respondent's conduct towards the claimant constituted retaliation for the disclosures and the repetition of that disclosure sometime later. For the reasons set out above, we simply do not believe that a reasonable worker would come to this view. The NEDs had a very different of view of the conduct of Mr Saunders to that of the claimant, but a reasonable worker would not consider that they treated him to his disadvantage save for the insertion of the financial information in their report. In his submissions, Mr Crosfill pointed out that in a list of potential detriments, not all would have the same gravity or effect upon the claimant. We agree with this. We have found that the claimant was subjected to one detriment as a result of his protected disclosures and we would add that in the light of the matters set out at paragraph 109 a reasonable worker would see this detriment as being at the lower end of the scale.

Unfair Dismissal

116. The first question to be determined is whether there was a dismissal. We accept that the claimant resigned for the reasons given by him in his resignation letter. He has been consistent throughout. The question is whether those reasons amount to a repudiatory breach of contract as a breach of the duty of trust and confidence. We have dealt with those reasons extensively above, insofar as they are relied on by the claimants as detriments.

117. We have found that looking at the individual allegations separately and as a whole, the claimant was subjected to one detriment. We do not consider that it automatically follows that the respondent thereby breached the duty of trust and confidence and we have considered whether the insertion of the offending words in the investigatory report is sufficient to have done so. On balance, we conclude that it is not. We accept that it constituted a disadvantage to the claimant but ultimately, we repeat that the information circulated was accurate, publicly available and had been notified to directors of the respondent by the claimant. It was not, in itself, so serious as to be calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It was not so serious that the claimant was entitled to regard himself as entitled to leave immediately without notice.

118. We have also considered the claimant's reasons for resignation as a whole as well as looking at the one detriment in isolation. We have taken into account the respondent's failure to respond to the claimant's grievances in September 2016 as well as the claimant's failure to respond to the offer of a meeting with the claimant to try and find a way forward.

119. We consider that the fundamental difference between the claimant and the respondent at the time of the claimants' resignation was their respective views on the culpability of Mr Saunders' behaviour. The claimant believed that Mr Saunders had acted fraudulently or criminally. The respondent took the view that he had been naïve, that he had been reprimanded and that the

matter was now resolved and closed. The claimant was not prepared to accept this.

120. We do not believe that the respondent had an obligation to look again into Mr Saunders' conduct nor do we believe it was obliged to instigate an independent inquiry, however much the claimant might have wanted it to. The claimant had the ability to refer the issue to the auditors and whilst Mr Saunders had asked him to postpone the meeting arranged in September 2016, he did not insist that the claimant could never meet them (and the claimant had shown himself prepared to ignore instructions which he disagreed with in the past, when he submitted his own budget to the March 2016 board meeting). The respondent had also demonstrated a willingness to work with the claimant in future.

121. Having made his disclosures, the claimant was entitled to the protection of the law as set out in sections 47 and 103A ERA. However, he was not entitled to insist that the respondent accepted his interpretation of Mr Saunders' behaviour. Taking into account the respondent's practices at the time, the respondent's interpretation in the investigatory report is not unarguable and we have found that it was arrived at following an extensive investigation carried out in a fair manner, the insertion of the information regarding the claimant's personal financial information notwithstanding. It may be that the claimant could no longer work in an organisation which, in his view, condoned Mr Saunders' behaviour, but that in itself does not lead to a conclusion that the respondent was guilty of a breach of the duty of trust and confidence.

122. For these reasons, we find that the claimant was not dismissed and the complaints of unfair and automatically unfair dismissal must therefore fail.

Breach of Contract (Wrongful Dismissal)

123. Our conclusion that the claimant was not dismissed means that the complaint of wrongful dismissal fails.

Holiday Pay

124. We have heard very little evidence regarding the complaint of unpaid but accrued holiday pay. It was originally presented as a complaint under the Working Time Regulations 1998, but as we now understand it, the claimant alleges that he carried over a certain amount of holiday from the 2015 holiday year into the 2016 holiday year and at the time of the termination of his employment, he had not taken that holiday.

125. We have seen that in his contract of employment, the claimant "shall not without the consent of Company Secretary carry forward any accrued but untaken holiday entitlement to a subsequent holiday year …" The claimant was of course the respondent's Company Secretary. We reject, however, his argument that this meant that he did not have to gain approval to carry over holiday. We consider there to have been an implied term in the contract of employment that authority be obtained from his line manager, the Chief Executive.

126. We are bolstered in this view by the fact that the claimant saw fit to advise Mr Saunders that he was going to be carrying over holiday into the

2016 holiday year. The claimant's secondary argument appears to be that Mr Saunders lack of response should be deemed to be his agreement. We see no reason why this should be so and we conclude that the claimant failed to obtain consent to carry over holiday into the 2016 holiday year.

127. However, even if we are wrong about this, the claimant has failed to prove his case. We have scant evidence about the holiday which the claimant did take in either 2015 or 2016. However, the evidence that we do have is that he did take holiday which had accrued and been carried over although he says that he did work on each of those days. He did not elaborate on how much work. Rightly or wrongly, it far from uncommon for senior executives to undertake some work during holidays, for example by checking emails. It is for the claimant to prove his case and he has failed to establish that he was entitled to carry over holiday or that he did not take his entire allocation during 2016. This complaint must therefore fail.

_____

Employment Judge Finlay, Bedford.
Date: 16 August 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS