EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L McDonnell	**v**	**City of London Corporation**

Heard at: London Central
On: 7 – 9 August 2017

Before: Employment Judge Hodgson

Representation

For the Claimant: in person
For the Respondents: Ms I Omambala, counsel

Judgment having been given to the parties orally at the hearing on 9 August 2017 and the reasons having been reserved to be given in writing. The reasons are set out below.

JUDGMENT

The claimant's request for reinstatement or re-engagement is refused.

REASONS (REMEDY 1)

Introduction

1.1 By a reserved judgment sent to the parties on 7 April 2017, the claimant succeeded in his claims of unfair dismissal and automatic unfair dismissal contrary to section 103A Employment Rights Act 1996. There were no other claims to be decided.

1.2 The respondent appealed the decision on or about 17 March 2017. No decision on the appeal had been communicated by the date of this hearing.

1.3 On 7 April 2017, I directed the parties to confirm their position on reinstatement and/or re-engagement. All proposals were to be dealt with by 25 April 2017. On 17 April 2017, the claimant confirmed he wished to be reinstated. On 19 April 2017, the respondent stated it was appealing the tribunal's judgment and requested a stay of the remedy hearing.

1.4 By letter of 25 April 2017, both parties were directed to give proposals for the remedy hearing. The request for a stay of the hearing was refused.

1.5 On 27 April 2017, the respondent gave some proposed directions requesting the following: the remedy be heard by a full tribunal; the claimant serve a further schedule of loss; the respondent serve a counter schedule; the respondent to "serve evidence regarding mitigation 28 days prior to the remedy hearing." There was no request to file evidence relating to contributory fault, or any breakdown in mutual trust and confidence. There was no provision for evidence from the claimant.

1.6 On 8 May 2017, I directed the remedy hearing would take place between 7 and 9 August 2017, and that the respondent should confirm its position on reinstatement and re-engagement by 19 May 2017.

1.7 On 9 May 2017, the respondent renewed its application to stay the remedies hearing "pending a determination by the Employment Appeal Tribunal of the respondent's appeal." The claimant objected to any stay by letter of 14 May 2017. On or about 17 May 2017, the notice of appeal was lodged.

1.8 On 14 June 2017, I again refused the application to stay the remedy hearing. I confirmed that the respondent should now comply with the order made.

1.9 On 21 June 2017, I directed that the respondent should set out the wording of any case management orders sought in a draft application. On 26 June 2017, a further application was made by the respondent. The respondent sought orders including the following: the remedy hearing be determined by a full tribunal; service of documents relevant to mitigation; service of the witness statement by the claimant by 23 July 2017; any counter schedule and the respondent's witness statements by 23 July 2017; the bundle to be agreed by 28 July 2017. The respondent asserted, without explanation, that the hearing "is one which should be listed for a full hearing before a full tribunal." It also referred to section 4(5) Employment Tribunals Act 1996, which gives an employment judge discretion to order a hearing be before a full tribunal.

1.10 On 29 June 2017, I refused the application for the remedy hearing to be before a full tribunal. I gave my reason as follows: "all claims to be heard fall within section 4(2) Employment Tribunals Act 1996 and the judge

declined to exercise any discretion under section 4(5) Employment Tribunals Act 1996." I gave directions for the exchange of statements and the preparation of a bundle. I specifically drew the parties' attention to rule 76(3) (a) and (b) Employment Tribunal Rules of Procedure 2013. I specifically confirmed that the respondent must produce all relevant evidence concerning the availability of the claimant's original job and any suitable alternatives. All statements were to be exchanged by 16:00, 7 July 2017.

1.11 Further notification of the hearing was sent on 30 June 2017.

1.12 On 7 July 2017, the claimant served his witness statement. The respondent sought to extend time for exchange of statements. On 7 July 2017, and in my absence, Regional Employment Judge Potter refused the application and she gave reasons.

1.13 Significant correspondence was generated at this stage of the proceedings. On 17 July 2017, I refused the respondent's further application to vary the directions, and I adopted the reasons already given by Regional Employment Judge Potter. I confirmed that the respondent would need leave to rely on any statement served late.

1.14 It is apparent there was difficulty preparing a bundle, and on 20 July 2017, I directed that the claimant should bring copies of his own bundle, if he felt it necessary to prepare a separate one.

1.15 On 18 July 2017, the respondent made an application to rely on the witness statements it had disclosed late. That application confirmed the statements had been served on 10 July 2017. The correspondence demonstrates a continuing difficulty with the preparation of the bundle and I do not need to record that in detail.

1.16 By order of 31 July 2017, Regional Employment Judge Potter confirmed that I was on annual leave and any further directions, including leave to rely on statements, would be dealt with at the hearing.

The Issues

2.1 This case has been listed for a remedy hearing to deal with re-engagement and reinstatement only.

2.2 At the commencement of the hearing, I sought to clarify the issues. The claimant confirmed that he wished to continue with his request for reinstatement or re-engagement. The respondent objected to both re-engagement and reinstatement. The respondent relied on three separate contentions: first, it was not reasonably practicable to reinstate, or re-engage because all available positions had been filled; second, the claimant had contributed to his dismissal; and third, there was a breakdown in mutual trust and confidence.

2.3 As regards the practicability point, Ms Omambala confirmed that the respondent had filed evidence from Ms M Afoakwa, senior HR manager. Ms Omambala confirmed that all evidence relevant to the claimant's previous employment and any other suitable employment was contained in the witness statement of Ms Afoakwa. She confirmed that no further evidence was needed on this matter.

2.4 I sought to clarify what specific factual matters were relied on as allegations of contributory fault. We agreed that the contributory fault must relate to the dismissal itself. Ms Omambala confirmed that the allegations were contained within the grounds of resistance at paragraph 16.8. However, it was agreed that paragraph 16.8 contained a bare allegation that the claimant's conduct had contributed to his dismissal, without identifying the conduct relied on.

2.5 Ms Omambala also referred to the statement of Mr Gill, which she confirmed was filed in relation to both contributory fault and the allegation that there was a breakdown of mutual trust and confidence. She identified paragraph 12 of his statement as setting out the evidence in relation to contributory fault. This paragraph referred to the claimant's conduct at both the internal disciplinary hearing and at the employment tribunal itself. It was conceded that conduct at the employment tribunal could not amount to contributory fault, it remained unclear to me to what extent it was said to be relevant to the question of mutual trust and confidence.

2.6 As regards the allegation of contributory fault, the statement referred to both the internal disciplinary hearings and the tribunal hearing and stated, "At both junctures the claimant admitted that allegations against the corporation were made as acts of retaliation." It then gave a number of general allegations without particulars.

2.7 Following discussion on the point, Ms Omambala accepted that the respondent should further particularise the alegations of contributory fault it relied on. She agreed that the particularisation of this point was unsatisfactory. Ms Omambala initially stated there were six or seven specific factual matters relied on as allegations of contributory fault and that it would take around two hours to set them out in detail. Ms Omambala then confirmed that the allegations relating to trust and confidence went further, although they were not identified. I enquired whether the relevant allegations were set out in the response and was referred to paragraphs 14 and 24 of the grounds of resistance. I noted that both of those paragraphs contained only general allegations and lacked particularisation. We agreed that the position was unsatisfactory and I adjourned to allow Ms L Omambala to take instructions as to how she would deal with the failure to adequately particularise the allegations of contributory fault, and those relevant to mutual trust and confidence.

2.8 Following the adjournment, Ms Omambala requested that I allow the respondent the opportunity to provide further information on the allegation of contributory fault and the facts relied on for the allegation of a loss of mutual trust and confidence. At the same time, Ms Omambala resiled

from her position that there were six or seven relevant allegations concerning contributory fault. She suggested that the figure was much higher.

2.9 Following further discussion, I clarified that the respondent wished to reserve its position on whether any of the further particulars would require an amendment.

2.10 I noted that it was for the respondent to make its position clear and to plead the facts on which it relied. This included the factual matters relevant to any alleged contributory fault loss of mutual trust and confidence. I also noted that the respondent was envisaging a two-stage process: first the identification of the relevant facts, and thereafter, at some future date, a consideration as to whether any such allegations would require amendment.

2.11 I confirmed that it was not possible to hear this case fairly until the respondent identified the factual matters relied on as allegations of contributory fault, and the factual circumstances said to constitute grounds for asserting there was fundamental damage to mutual trust and confidence. It was open to the respondent, at all times, to rely on the matters already pleaded. It appeared that the respondent may be seeking to include matters which were not in issue between the parties. In order to resolve the matter, I ordered the respondent to produce a schedule of the relevant allegations relied on by 09:00 the following day. The schedule should first identify those factual allegations advanced in support of the allegation of contributory fault, and second, those factual allegations advanced in support of the contention there was a breakdown of mutual trust and confidence. For each specific allegation relied on, the schedule should set out the specific finding of fact sought, to include the people involved, the date of the incident, and the alleged circumstances. In relation to each factual matter relied on, the schedule should identify if the fact was already pleaded, and if not whether the addition of the fact would require an amendment, and if not, why not.

2.12 I was also concerned that the respondent's position on reinstatement and re-engagement was not adequately set out. Ms Omambala confirmed that the case had been prepared and was ready to proceed. I confirmed that the respondent should now produce a skeleton argument setting out its position on reinstatement and re-engagement.

2.13 The respondent's failure to address adequately, or at, all the factual matters relied on by way of allegations of contributory fault and allegations of a breakdown of mutual trust and confidence, led to a significant part of the morning being wasted seeking clarification. This lack of preparation by the respondent had put the hearing in jeopardy and it was necessary to take remedial steps to minimise the time required for further clarification. There was no objection to the order to produce a skeleton argument.

2.14 I then considered the respondent's application to rely on witness evidence served late. The evidence was relevant. Any refusal to allow that

evidence to be heard would materially disadvantage the respondent. The claimant had had the evidence for a number of weeks. There was no disadvantage to him. I did not accept that the respondent gained any material advantage in having the claimant's statement, and I noted the solicitor's representation in correspondence that the statement would not be read until the respondent's statements had been served. The claimant did not want the matter to be adjourned. I therefore gave permission for the respondent to rely on the two statements served of Mr Gill and Ms Afoakwa.

2.15 The claimant wished to rely on his own bundle of documents. He had not served it on the respondent. Ms Omambala confirmed she had no objection to his relying on the statement contained therein. It was agreed that the respondent would let me know by 14:00, by email, if it objected to any documents. No objection was made and the bundle was admitted the next day.

2.16 Ms Omambala renewed the respondent's application for a full tribunal. I sought to clarify the nature of that application. Initially, Ms Omambala stated the application was a variation of my previous order and was made pursuant to rule 29 Employment Tribunal Rules of Procedure 2013.

2.17 An assertion was then made that the original hearing contained allegations of detriment on the ground of public interest disclosure, other than dismissal. This was a surprising submission. This allegation had not been made prior to the remedy hearing. It was not an allegation raised in the original hearing. Ms Omambala accepted that it was not a point of appeal and that it had not been raised specifically in any previous application. Although the application of 26 June referred generally to section 4 (1) Employment Tribunals Act 1996, it did not assert that the claimant had made an allegation of detriment other than dismissal.

2.18 If there had been allegations of detriment on the grounds of whistleblowing, other than dismissal, the case should have been heard before a three-person panel. An improperly constituted tribunal may be an error of law that would justify an appeal, or a reconsideration.

2.19 I ruled there was never any allegation before me of detriment, other than the dismissal. Therefore, it was appropriate for the original hearing to proceed before a judge alone.

2.20 I was not asked to exercise my discretion to appoint a three person panel at the original hearing. I have since been asked to exercise that discretion and refused. I confirmed that if the respondent wished to allege that the original tribunal was constituted inappropriately, the respondent must specifically allege that, and set out the grounds. Until that allegation was made in writing, I could take no action in relation to it. If it were made, I would consider whether it was a point of appeal or a matter which should be considered on reconsideration. In the meantime, I would consider the application under rule 29 Employment Tribunal Rules of Procedure 2013, as an application to vary my original order.

2.21 The respondent had identified no grounds for varying my refusal to appoint a three-person panel. A three-person panel was not required as there was only one whistleblowing detriment: dismissal. I had considered my general discretion to order a three-person panel. I had correctly asked whether it was necessary in the interests of justice. It was not and no new material argument had been identified. I therefore refused to vary my original order.

2.22 Finally, on the first day, Ms Omambala applied to adjourn the remedy hearing. I refused the adjournment and reserved the reasons. I can state my reasons briefly. Ms Omambala submitted that the respondent was not in a position to proceed substantively because I directed the respondent to provide particulars on a range of matters. Ms Omambala submitted that the respondent wished to provide those particulars and thereafter to review the case generally and, if the respondent deemed it appropriate, to provide further evidence to be put before the tribunal. She alleged that there was no prejudice to the claimant as the claimant's position would be preserved.

2.23 The claimant objected to the application to amend. He considered the respondent had been given sufficient time to prepare and that he was continuing to be prejudiced as he was in insecure and temporary employment.

2.24 This claimant was dismissed on 11 May 2016. There is a clear finding he was dismissed for making protected disclosures. The respondent has had an opportunity to set out its position in its original response filed on or about 21 September 2016. That is an extensive document running to some 27 paragraphs. There was direct reference to contributory fault. Supplementary grounds of resistance were filed on 17 November 2016 following the order of Employment Judge Auerbach of 4 November 2016; the supplementary grounds also refer specifically to contribution at paragraph 28. It was apparent to the respondent when the reserved judgment was sent that it must prepare for a remedy hearing. The respondent knew it would rely on allegations of contributory fault and loss of mutual trust and confidence. It is for the respondent to ensure those matters are adequately pleaded and supported by evidence. The respondent's own failure to prepare for the hearing does not justify an adjournment. The respondent's application to adjourn the remedy hearing was rejected. The respondent has had ample opportunity to prepare for the hearing.

2.25 It is not for the tribunal to dictate to a party the allegations and evidence that should be relied on. This respondent has chosen to rely on three principal matters. The first is that the availability of jobs means it is not practicable to reinstate. It was confirmed at the beginning of the hearing that the evidence relevant to this has been filed by the respondent and there is no suggestion that evidence is inadequate.

2.26 Second, the respondent alleges contributory fault. The question of contribution has been raised both in the original grounds of resistance and in the supplementary grounds, as ordered by Employment Judge Auerbach. Moreover, the respondent has had months to prepare for the remedy hearing and to consider its position on contributory fault. It has produced evidence in the form of a statement from Mr Gill.

2.27 My request for details of the specific factual matters relied on as allegations of contributory fault is a reasonable and appropriate request. It is necessary for the tribunal to understand what matters are advanced as contributory fault, as factual findings must be made before a view can be taken as to the relevance of those facts. Moreover, it is appropriate that the claimant should understand the matters relied on. The need for clarity does not depend upon the questions asked by an employment judge at a hearing. Raising allegations of contributory conduct is a matter for the respondent. A request for clarification may reveal a lack of preparation, but it tells me nothing about whether the respondent has had a reasonable opportunity to identify the factual matters relied on, set them out in a relevant pleading, and produce the relevant evidence.

2.28 Third, the respondent alleges a breakdown of mutual trust and confidence; the respondent can, and should, identify the particular factual circumstances, ensure that they are adequately pleaded, and that they are adequately dealt with in the evidence available.

2.29 There is no reason why the relevant factual allegations should not have been identified in the original response. They could have been addressed in any supplementary response. They could have been addressed at any time thereafter by way of amendment. This respondent has chosen not to address the matter in that way. Instead it seeks to suggest that in some manner it has been disadvantaged, or surprised, by a simple request to clarify the factual matters relied on. The suggestion that this respondent has, in any sense whatsoever, been taken by surprise is without merit.

2.30 The respondent asks for an opportunity to review the entirety of its case and to consider whether there are weaknesses which need to be addressed by further evidence. Parties are expected to prepare for hearings. A party cannot simply assume that the tribunal will adjourn the hearing when its preparation has been inadequate.

2.31 The respondent has been on notice of the need for a remedy hearing since May of this year. Specific directions have been given. All applications to stay have been refused. It is for the respondent to ensure that it has pleaded the relevant matters and provided the relevant evidence. There is substantial prejudice to the claimant in delaying matters. I had regard to the overriding objective: I should avoid delay. Adjourning this hearing would lead to months of delay. Any prejudice to the respondent is caused by its own approach to the preparation of this case. For all these reasons, I refused the application to adjourn made on the first day of the hearing.

2.32 On day two of the hearing, the respondent produced three documents: a skeleton argument; a particulars of factual allegations relied on; and a schedule of proposed amendments.

2.33 At the hearing, it was confirmed that no application for amendment was made or pursued.

2.34 The particulars of factual allegations relied on contained a section detailing allegations of contributory fault and a section concerning breakdown in trust and confidence. It was the respondent's position that there was no need to amend, albeit it was accepted that a number of contentions had not been specifically pleaded. The allegations identified are set out below:

> **Allegations of Contributory Fault**
> **3. The Respondent contends that the following are matters of contributory conduct on the part of the Claimant which caused and/or contributed to his dismissal: -**
>
> **(i) The Claimant's conduct in respect of the matters which formed the allegations considered at the disciplinary hearing on 6 April 2016 (which is summarised in a letter dated 22 March 2016 from the Respondent's Peter Bennett to the Claimant (p.2020-2022).**
> **(ii) The Claimant's unsubstantiated allegations that Mr Gill failed to manage the City Fund on a sound commercial basis, failed to appropriately advertise a post and had an inconsistent policy in relation to job titles which discriminated against the Claimant**
> **(iii) The Claimant's allegation made in his written submission to the disciplinary hearing that Mr Gill had "tried to deceive the Standards Committee and todays (sic) panel by stating that I only had one job not two from June 2015 as obviously it weakens his case otherwise." (p.1124)**
> **(iv) The Claimant's allegation at the Disciplinary hearing that for Mr Gill "to sign off [BW] without insurance and RAMS in place was highly irresponsible. Nick has put the City at grave risk by doing so." (p.1125)**
> **(v) The Claimant's allegation at the Disciplinary hearing in relation to CSFI that "It is obvious that Nick is simply bowing to political pressure with the asset manger (sic) being made the scapegoat."**
> **(vi) The Claimant's allegation at the Disciplinary hearing that "It is clear that Nick is a Director out of control." (p.1126)**
> **(vii) The Claimant's allegation at the Disciplinary hearing that in respect of the Monte Carlo matter Mr Gill waived insurance and risk assessments and waived a fee as a favour to John Chapman. (p.1156).**
> **(viii) The Claimant's allegation at the Disciplinary hearing, repeated on appeal that Mr Gill had agreed a compensation payment of £750,000 without appropriate authority, notwithstanding that he had been provided with evidence that appropriate approvals had been granted by the Finance Committee and the Property Investment Board**
> **(ix) The Claimant's allegation at the Disciplinary hearing that "his previous line managers were not fit to manage people." (p.2036)**
> **(x) The Claimant's witness statement for the disciplinary hearing made allegations against a senior officer who was not present at the hearing (p.2036)**
> **(xi) The Claimant's suggestion at the Disciplinary hearing that Tudor Markets conspired against him to send an email on Thursday evening at 6.30pm because he was not at work the following day (p.2039)**
> **(xii) The Claimant's closing statement at the Disciplinary Hearing which began with an unwarranted personal attack on Mr Lowman, the case presenter (p.2042)**

(xiii) The Claimant's allegation at the Disciplinary Hearing of alcoholism in the City Surveyor's Department which he alleged Mr Gill had failed to deal with (p.2053)
(xiv) The Claimant's allegation that the Respondent conspired to prevent Mr Nelson being interviewed during the course of its disciplinary investigation.

Breakdown in Trust and Confidence
4. The Respondent repeats the matters set out at paragraph 3 above. In addition, the Respondent relies on the following matters in relation to the alleged breakdown of trust and confidence between the Claimant and the Respondent :-
(i) The findings of the Disciplinary hearing Panel.
(ii) The findings of the Appeal Panel.
(iii) The Claimant's allegations to the Standards Committee against Mr Mark Boleat, Policy Committee Chair;
(iv) The allegation at paragraph 25 of the Claimant's witness statement that a "Senior Principal Surveyor acted in a way which was highly unusual and simply reinforces the high level of political interference."
(v) The allegation at paragraph 27(iv) of the Claimant's witness statement that Mr Gill was bowing to political pressure from Adrian Waddingham by waiving a fee of £10,000 without explanation.
(vi) The allegation at paragraph 32 of the Claimant's witness statement that CSFI was made a matter of gross misconduct by Mr Gill to appease the Lord Mayor.
(vii) The allegation at paragraph 37 of the Claimant's witness statement that Mr Gill was undertaking a political favour.
(viii) The Claimant's allegation at the Disciplinary hearing that a Mr H Lewis was suspended for sticking up for the Claimant when Mr Lewis was not suspended at all.
(ix) At the liability hearing the Claimant accused Mr Cross, a colleague in respect of whom he had obtained a witness order, of lying.
(x) In his closing submissions at the liability hearing the Claimant said that Mr Gill was the only person he had fallen out with and does not trust. Yesterday the Claimant said that it was only Mr Nelson that he did not get on with.
(ix) At the liability hearing and again yesterday the Claimant suggested that Mr Cogher was responsible for sending him a virus which had disabled his computer.
(x) At the liability hearing and again yesterday the Claimant suggested that the Respondent had caused his contract with a previous temporary employer to be terminated.

Evidence

3.1 I heard from the claimant, C1.

3.2 For the respondent, I heard from Mr Nicholas Gill, R2; and Ms Marion Afoakwa, R3.

3.3 I received a bundle from the respondent in a bundle, R1.

3.4 I received a bundle from the claimant, C2.

3.5 I received a skeleton argument from the respondent, R4 and some further particulars, R5.

The law

4.1 When there is a finding of unfair dismissal, pursuant to section 112 Employment Rights Act 1996, the tribunal must explain the potential for orders under section 113 and ask if the claimant wishes to be reinstated or re-engaged. The orders are set out at section 113 as follows:

> **An order under this section may be-**
>
> **(a) an order for reinstatement (in accordance with section 114), or**
>
> **(b) an order for re-engagement (in accordance with section 115),**
>
> **as the tribunal may decide.**

4.2 I do not need set out the detail of section 114 and section 115 Employment Rights Act 1996.

4.3 When considering whether to make an order for the reinstatement or engagement, I am obliged to take into account matters referred to in section 116 Employment Rights Act 1996:

> **Section 116 - Choice of order and its terms**
>
> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account--**
>
> **(*a*) whether the complainant wishes to be reinstated,**
>
> **(*b*) whether it is practicable for the employer to comply with an order for reinstatement, and**
>
> **(*c*) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
>
> **(3) In so doing the tribunal shall take into account--**
>
> **(*a*) any wish expressed by the complainant as to the nature of the order to be made,**
>
> **(*b*) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
>
> **(*c*) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(*c*) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.**
>
> **(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(*b*) or (3)(*b*), whether it is practicable to comply with an order for reinstatement or re-engagement.**
>
> **(6) Subsection (5) does not apply where the employer shows--**

> **(*a*) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or**
> **(*b*) that--**
> **(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and**
> **(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.**

4.4 Where a permanent replacement has been engaged, I should not take that matter into account (section 116(5)), unless section 116(6) is applicable.

4.5 It follows that there are number stages. First, does the claimant wish to be reinstated or re-engaged. Second, is it practicable for the employer to reinstate or re-engage the claimant. Third, if the complainant has caused or contributed to some extent to the dismissal, would it be just to reinstate or re-engage. Fourth, if a permanent employee has been engaged, I must consider the factors set out in section 116(6).

4.6 Whether it is practicable to reinstate, or re-engage, depends on all the relevant factors. No one specific factor is conclusive. The availability of work, and the engagement of a replacement individual, may be relevant.

4.7 Contributory fault, as well as being a matter to be taken into account itself, may be relevant to practicability. The mutual trust and confidence between the parties, which is necessary for a continuing employment relationship, may have been damaged. A breakdown of trust and confidence may be sufficient to leave re-employment impracticable.

4.8 In considering whether there has been a breakdown of mutual trust and confidence, I am not limited to considering matters which occurred leading up to dismissal. It may be appropriate to consider events which occur post dismissal. In appropriate cases, that may extend to the conduct of litigation itself. However, the tribunal should recognise that hard-fought litigation, or serious allegations made during the course of litigation, may not prevent a continuing working relationship.

Discussion

5.1 The respondent's defence contains three distinct elements: the availability of work; the allegation of contributory fault; the allegation there has been a loss of mutual trust and confidence. It is convenient to consider each of those in turn, and to identify any relevant facts at the same time.

5.2 These reason should be read in conjunction with the original liability reasons. I have received limited additional evidence from the respondent concerning the factual circumstances it now seeks to raise as allegations of contribution and matters said to be relevant to the question of mutual trust and confidence.

5.3 First, I consider the availability of work. I have received limited evidence from the respondent. The city surveyor's department employs approximately 250 people. It is split into four departments: the investment property group; the corporate property group; the operations team; and the property projects group. The claimant was a senior surveyor at grade F in the investment property group. That group had 13 surveyors at grade F. The evidence in chief failed to set out how many grade F surveyors' positions were available across the department and failed to identify which would, or would not, be suitable for the claimant.

5.4 Ms Afoakwa stated during her evidence that she had made some enquiries and that there were four grade F surveyors in corporate. However, the overall position remained unclear.

5.5 It is apparent the surveyors were employed under a variety of contracts. There are some permanent contracts, some fixed term contracts, and agency staff are also used. Ms Afoakwa's enquiries, made during the course of the hearing, suggested that there were no agency staff at present, but she had no direct knowledge.

5.6 It was the claimant's contention that there was a regular turnover of staff. The respondent gave no evidence as to how frequently staff are replaced, or how frequently jobs become available.

5.7 It is clear that recently a grade F surveyor in corporate has resigned. Ms Afoakwa believed his notice period expires in October or November.

5.8 The respondent failed to produce details of the position which has now become available in corporate. Mr Gill suggested the claimant was unsuitable, but based this view entirely on the claimant's alleged contributory fault and the alleged loss of mutual trust and confidence. There was no credible evidence that the claimant would not have been suitable, in terms of experience and qualification, for the position which has now become available following the resignation.

5.9 It would appear that possible vacancy has not specifically been advertised, but there is no credible evidence that any decision has been taken that it should not be filled. Mr Gill did make reference to financial constraints, but was unable to give details of the effect in relation to any specific job.

5.10 The evidence produced did refer to six specific posts which had been either permanently filled or subject to fixed term contracts for the period from January 2017 until June 2017. One contract concerning a senior surveyor for a six-month period had "closed" on 10 February 2017. Neither witness was able to give details about the current position in that post, albeit the dates would suggest that the contract must be coming to an end.

5.11 Mr Gill stated the claimant's role had been kept open until after his appeal against dimsissal. Thereafter it has been filled permanently. However, it is clear from his evidence that there is flexibility in the duties given to

senior surveyors within his own team. It is, therefore, unclear what, exactly, was kept open for the claimant. In his oral evidence, he stated that had the claimant been reinstated following appeal, he would have found a role for the claimant. It was clear from his evidence that there is significant flexibility in the surveyor's department.

5.12 There was no credible evidence before me that the claimant could not perform a role as surveyor in any one of the three departments which were not directly under the control of Mr Gill.

5.13 I have concluded that this respondent has a significant amount of flexibility in its surveyors' department. There is no reason to believe the claimant could not have worked as a surveyor within the city surveyors' department in a role other than investment. There is sufficient evidence to demonstrate that there is a continuing need to recruit individuals, both to fill temporary contracts and to fill permanent places. It is apparent from the recent resignation that opportunities arise on a regular basis.

5.14 In seeking to focus on the specific jobs available in the last six months, the respondent has taken a restricted view of its own opportunities and flexibility. The reality is that there is a continuing need to replace surveyors, whether on a permanent or temporary basis, and significant flexibility as to how that is achieved.

5.15 I have considered section 116(6) Employment Rights Act 1996. The respondent's evidence falls far short of demonstrating that it was no longer reasonable for the respondent to arrange for the claimant's work to be done, except by a permanent replacement. The reality is that there was considerable scope for delegation of his duties, employment of individuals on a fixed term basis, or employment of agency workers. There were many options available to the respondent, other than simple replacement on a permanent basis.

5.16 I have found that the exceptions envisaged by section 116(6) do not apply on the facts: it was practicable to arrange for the dismissed employee's work to be done without engaging a permanent replacement; and when any replacement was engaged it was still reasonable for the respondent to arrange for the dismissed employee's work to be done other than by a permanent replacement.

5.17 It follows section 116(5) applies and I should ignore the fact that it is alleged there is a permanent replacement. In any event, even if section 116(5) were not applicable, I conclude that it is entirely practicable for this respondent to comply with an order for reinstatement or re-engagement, even though permanent employees have been appointed. The degree of flexibility, the ability to assign duties, and the continuing need for replacements, make it practicable to reinstate or re-engage.

5.18 I next consider the allegation of contributory fault. I remind myself that I must ask whether the claimant caused or contributed to the dismissal. If the claimant did, it is then necessary to consider whether reinstatement or re-engagement would be just.

5.19 It is not appropriate for the respondent to re-litigate matters which have already been addressed. I have already considered the sole or principal reason for dismissal.

5.20 There are 14 separate allegations of contributory fault set out in the particulars. I do not need to consider them in detail. Many of the allegations are diffuse and unclear. For example, the first allegation refers generally to the claimant's conduct in respect of matters which form the allegations considered at the disciplinary hearing on 6 April 2016. It is clear from my liability judgment that the respondent never set out clearly or appropriately the specific allegations the claimant was to answer. These further particulars do nothing to address those points. It is not necessary to me to reopen these issues.

5.21 I have to consider the conduct which led to the dismissal. The reason for dismissal has already been identified and is set out in detail in the liability judgment. It is not necessary me to set out the full detail of that again. I summarised the reason for dismissal at paragraph 7.61 as follows:

> **7.61 The claimant was dismissed because it is alleged that there was a fundamental breakdown of mutual trust and confidence. That breakdown in mutual trust and confidence arises out of the alleged retaliation by the claimant and his previous protected disclosures. The alleged retaliation by the claimant is a shorthand reference to his protected disclosures. The causative link is made out. The sole or principal reason for his dismissal was the fact he made protected disclosures, which the respondent did not like.**

5.22 The claimant was dismissed for the alleged retaliation. The retaliation was a protected disclosure. Put simply, the claimant made allegations concerning the conduct of individuals, including Mr Gill, Mr Nelson, and Mr Chapman that suggested breach of their duties. In the case of Mr Chapman, it was his duties as a member. An independent investigation found that the claimant was right. As regards the officers, Mr Gill and Mr Nelson, the information the claimant relied on included assertions they had given inappropriate favours to Mr Chapman.

5.23 At paragraph 7.62 I said the following:

> **7.62 My findings are based predominantly on Mr Bennett's own evidence. It is clear that Mr Bennett believed that it was appropriate to dismiss the claimant because his allegations against the managers were in some manner unfounded. He ignores the fact that the claimant's allegations against Mr Chapman were well-founded and appropriate. He ignores the fact that the allegations against Mr Chapman and those against Mr Gill and Mr Nelson were irretrievably bound together.**

5.24 At paragraph 7.63 I noted that the respondent's case appeared to be based upon a misconception and expanded on those reasons at paragraph 7.64.

> **7.63 It appears to be the respondent's case that as Mr Bennett found that the claimant's allegations against Mr Gill and Mr Nelson were unfounded, it**

> **was reasonable and appropriate for him to dismiss. That is a fundamental misconception.**
>
> **7.64 A disclosure is either protected or it is not. If it is protected, and an employer dismisses because the disclosure was made, there will be a finding of unfair dismissal. The fact that the manager believes it is untrue is irrelevant. The fact that the manager believes it is untrue does not make the disclosure any less protected. Even if the disclosure were to be untrue, it may still be protected. The only possible defence in this case was that the disclosures were not protected, as they were not made in the public interest. In this case, disclosing the wrongdoing of Mr Chapman, and the potential complicity of the claimant's managers, was in the public interest: it is exactly the sort of situation that the legislation was designed to protect.**

5.25 It follows that the dismissal was on grounds of the claimant's protected disclosures. It is clear that was the sole reason. The relevant conduct in this case is the claimant's making of protected disclosures. It was the making of those disclosures that caused his dismissal. In that sense, it can be said that the claimant caused or contributed to his own dismissal. The question I have to consider is whether such contribution means it would be unjust to reinstate or re-engage.

5.26 The respondent's written submissions deal with the question of contribution very briefly at paragraph 10 and 11.

> **10. The Respondent further submits that the Claimant caused and/or contributed to his dismissal by his conduct during the disciplinary process, in particular by the unwarranted and unsubstantiated personal attacks he made against colleagues during the disciplinary and appeal hearings. The matters relied on are set out in the particulars provided pursuant to the employment tribunal's direction.**
>
> **11. The Respondent contends that the extent of the Claimant's contribution to his dismissal is such as to further render orders for reinstatement or re-engagement not practicable.**

5.27 During oral submissions, Ms Omambala accepted that the conduct I must consider is that which led to dismissal. That conduct is the making of protected disclosures. The respondent's sole argument in the liability hearing was based on the fact that the disclosures were not protected because they had not been made by the claimant in the public interest.

5.28 There was never a suggestion during the liability hearing that the claimant had failed to give information, or that there was any dispute as to what constituted the information. There was never a suggestion that the information did not tend to show a breach of legal obligations. It is clear that the allegations made by the claimant concerned the specific wrong doing of at least three people: Mr Gill, Mr Nelson, and Mr Chapman. The respondent treated the claimant's allegations as disclosures of information that were protected. The hearing proceeded on the basis of the respondent's concession. There was one point in issue which was whether the admitted disclosures of information were made in the public interest. This was disputed because of the claimant's reference to retaliation. I rejected that argument.

5.29 Ms Omambala accepted, in principle, that a disclosure of information made in the public interest (a protected disclosure) would not be conduct which in some sense is blameworthy or which would make it unjust to re-engage or reinstate.

5.30 The purpose of the whistleblowing legislation is to protect individuals who make disclosures in the public interest. If an individual is dismissed for making such disclosures, it is difficult to imagine circumstances when the making of the disclosure would itself make it unjust to re-engage or reinstate. There may be occasions when some ulterior motive, or the manner of the disclosure, would constitute conduct which would make it unjust to reinstate a re-engage. However, those circumstances are difficult to imagine, particularly when a disclosure made purely for a personal interest would not be protected. I explored these matters with Ms Omambala. The respondent does not identify any specific factual matters, over and above the allegation that the disclosures were by way of retaliation, which I am asked to consider.

5.31 I have rejected in my first judgment any suggestion that any element of retaliation prevented these disclosures being protected. The mere fact that the information was formally advanced at a particular time in order to defend himself against disciplinary proceedings is not conduct which would make it unjust to reinstate or re-engage him. The making of these disclosures is not conduct that would make it unjust to reinstate or re - engage

5.32 I next consider the allegation that there's been a breakdown of mutual trust and confidence. A breakdown of trust and confidence is relevant to the practicability of re-engagement and/or reinstatement.

5.33 Following the conclusion of the hearing, I received further submissions on the law from the respondent. I have particular regard to the case of **United Lincolnshire Hospitals NHS Foundation Trust v Farren** EAT 198/16.

5.34 Paragraph 25 of that decision reminds the me that at this stage the burden may be neutral, but the tribunal should still be satisfied that the employer genuinely believes the trust and confidence has broken down and that the belief is not irrational. Paragraph 40 goes on to state "the tribunal still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order this employer to re-engage the claimant. It thus was the respondent's view of trust and confidence – appropriately tested by the ET as to whether it was genuine and founded on a rational basis – that mattered, not the ET's." Thus, it is important that I do not simply substitute my view. I must have regard to the respondent's view

5.35 That said, I have serious reservations about the respondent's evidence in this case.

5.36 Litigation of this nature can be extremely contentious and bruising. Things may be said which are unkind, hurtful, and destructive. That does not necessarily mean that the mutual trust and confidence is destroyed. When all the evidence has been given, a decision has been made, and the reasons given, it is reasonable to expect that a respondent will reflect on its position and take full account of the tribunal's findings. When a respondent has lost the case, it may be difficult for that respondent to accept the findings of the tribunal. It is important in those situations that the matter is reviewed, where practicable, independently by individuals who were not directly involved in the litigation. Such a review may lead to some acceptance of the points presented by claimant, a review of the procedures adopted, and identification of lessons to be learned. That process itself may be healing, and could facilitate a way forward.

5.37 A tribunal's reasons may suggest that individual managers have approached matters inappropriately or unreasonably. Those managers may find it very difficult to accept what they may see as criticism. It is possible that views can become more entrenched. It is inevitable that such managers will find it difficult to move forward constructively.

5.38 Where an employer is small, it may be that the relationship is so damaged that there is no possibility of the parties working together in the future. However, when there is at least the possibility of a claimant taking up some new employment within the respondent's organisation, without being directly managed by those individuals with whom there have been difficulties, a reasonable employer may well be expected to explore those possibilities.

5.39 In a situation where managers have been found to have acted inappropriately, it may be undesirable for those managers to take primary responsibility for decisions about reinstatement and re-engagement.

5.40 The evidence I have had from Ms Afoakwa is not relevant to the question, of loss of mutual trust and confidence, nor does it purport to be.

5.41 Mr Gill has given the only new evidence relevant to mutual trust and confidence.

5.42 In the liability hearing, I heard from other managers. I do not know if they read the judgment. I do not know if they have changed their views. I should be cautious about assuming that their views remain unmodified now that the liability decision has been given.

5.43 The only direct new evidence I have from the respondent on mutual trust and confidence comes from Mr Gill. I have serious reservations about that evidence. It was Mr Gill who originally suspended the claimant. He was directly involved in the process which led to the claimant's dismissal. That process has been found to be unsound for the reasons given. Moreover, the judgment raises questions about Mr Gill's involvement with Mr Chapman and the adequacy of the investigation into his conduct. I need

not dwell on these matters. What is clear is that Mr Gill cannot be seen as a neutral or independent manager.

5.44 I accept that he asserts that serious consideration has been given by the respondent to the question of reinstatement. During his evidence he suggested that a number of senior individuals, including the city surveyor, and Mr Cogher had been consulted. However, I have heard from none of those individuals. In any event, Mr Cogher could not be seen as independent, and the adequacy of his approach was questioned in my previous reasons.

5.45 Despite the assertion that there has been serious consideration given to reinstatement, that process has produced no document, other than one email which is said to be subject to legal privilege. I have not been given any adequate evidence as to the nature of this alleged serious consideration. I have not been told the parameters of the discussion. Was the focus on finding ways to return a whistleblower to employment or to ensure reasons were found to justify a continuing desire to exclude him? The respondent has failed to address this at all. Moreover, it is clear the directors for the three areas not under Mr Gill's control were not consulted about whether they could accommodate the claimant.

5.46 It is apparent from Mr Gill's statement that his evidence is unbalanced and designed to persuade the tribunal to take a negative view of the claimant. He has selected evidence concerning the claimant's conduct which is designed to show him in a bad light. He makes references to a number of appraisals going back to 2007 and 2008 which he suggests demonstrate clear concerns about the claimant's conduct. As regards the appraisals, Mr Gill fails to set out that the rating given to the claimant in those appraisals was "good." That is hardly supportive of a breakdown of mutual trust and confidence. Mr Gill's deliberate attempt to paint the "good" appraisals as illustrations of series issue undermining mutual trust and confidence is such a clear distortion of the objective position that I conclude he has continued to approach the question of the claimant's possible re-engagement with a closed and negative mind.

5.47 He refers to "a number of serious concerns about the claimant's conduct over the tenure of his employment." He refers to two formal written disciplinary warnings in March 2010 and February 2014, without giving the detail of them. He alleges they concern matters which are said to mirror the disciplinary allegations which led to his dismissal in May 2016. The nature of these allegations is unclear. The matters which led to the claimant's dismissal concerned the claimant complaining about the conduct of his managers, including Mr Gill. Those disclosures were protected, albeit this remains disputed by the respondent and not acknowledged by Mr Gill. Taken on face value, it appears that Mr Gill is suggesting that the claimant must have made some previous disclosures for which he was disciplined. It is difficult to see how that would be appropriate conduct by the respondent. However, I simply do not have the detail. When I consider his evidence as a whole it is clear it is selective, unbalanced, and unfair.

5.48 I remind myself that I am considering whether the respondent believes that mutual trust and confidence has broken down, and whether that belief is irrational.

5.49 Mr Gill takes the view that there has been a breakdown in mutual trust and confidence. However, the extent to which any other manager has considered the point and reached a view on it is unclear.

5.50 Mr Gill does not accept the findings of the tribunal. He considers that the claimant's conduct was such that his dismissal was justified. He gives no indication in his written or oral evidence that he has accepted the claimant was dismissed for making a protected disclosure. Mr Gill has maintained his original view and it has not been modified at all by the evidence given in the tribunal or by my findings and conclusions. He is entitled to his view. However, it should be recognised that it is very difficult, and possibly impossible, for Mr Gill to be objective. I have no doubt that this lack of objectivity, as illustrated in his evidence, has permeated his approach to the question of reinstatement. A rationale approach requires a degree of objectivity; a fundamental rejection of a tribunal's decision concerning whistleblowing lacks objectivity, and undermines rationality. There is irrationality in his general view that the claimant by making protected disclosures damages mutual trust and confidence.

5.51 I accept that Mr Gill suggests that there are questions about the claimant's performance and/or competence. However, at no stage in the proceedings has the respondent sought to suggest that the claimant is incapable of doing his work. At the start of the liability hearing, the respondent confirmed capability was not advanced as a reason for dismissal. If the claimant was not capable of doing his job, it is reasonable to anticipate the respondent would have subjected him to a performance improvement plan of one form or another. To raise his general performance now, when it was not relied on in the original hearing, and when it was not dealt with at the material time, does suggest a degree of irrationality and opportunism.

5.52 If I were to decide this matter solely on the evidence presented by the respondent concerning mutual trust and confidence, I would take the view that I am satisfied that Mr Gill's evidence demonstrates such irrationality it cannot be relied on. I would go on to re-instate a re-engage the claimant; however, I am entitled to take into account the entirety of the evidence.

5.53 Mutual trust and confidence must exist on both sides. I accept that claimants who have been dismissed for whistleblowing may feel very strongly, and may harbour a degree of resentment. That is inevitable. However, if re-engagement or reinstatement is to take place, both parties must be in a position to move on such that the respondent can give legitimate instructions which the claimant can accept. That may involve a change of manager. I have no doubt the claimant could be given work in a different department not subject to Mr Gill's management. When considering whether it is practicable to re-engage, I must ask whether he

has sufficient confidence left in the respondent, and all its managers, to enable him to function appropriately as an employee.

5.54 During the course of his evidence, it became clear that the claimant has formed a number of irrational views about the respondent, its employees, and their conduct. One example will suffice. At paragraph 2.8 the claimant states he has not been able to access his email from 6 July 2017. He says that his email is obviously being hacked. He then refers to an incident from January 2016. He stated that following a meeting with Mr Cogher (the corporation's chief solicitor) in January 2016, he opened an email from Ms Sen Sutopa (HR to city surveyor). This led his computer to shut down for two hours and a message popped up from a virus called SONAR which he says related to the Lloyd's members club. The next day, when he returned home, he formed the view his front door had been tampered with.

5.55 I explored the relevance of this evidence with the claimant in some detail. The claimant's position is that someone from the respondent gained access to his house by picking the lock. He believes the lock was picked because there was a degree of grittiness when he placed his key in the lock. He says the purpose of the break-in was to tamper with his computer: in this case to repair it by removing the virus, and presumably removing all traces of any hacking.

5.56 The claimant has no evidence at all in support of these allegations, other than the bare fact of the virus that he believes he detected and the grittiness of his lock. When asked who he blamed, the claimant prevaricated. Eventually, he said it was Mr Bennett (who conducted the original disciplinary) who was responsible. He was unable to say whether it was Mr Bennett who personally broke into his house or whether he required somebody else to do it, and if so to what extent the respondent's employees were involved. It is clear from his written evidence that he does implicate senior members of the respondent's organisation: Mr Cogher and Ms Sutupa.

5.57 During the course of his evidence the claimant made a number of other allegations that individuals had been dismissed or tampered with but accepted that he had no evidence other than a general belief.

5.58 The suggestion that senior members of the respondent's organisation have conspired to first infect his computer with a virus, and thereafter to break into his home in order to access his computer to remove the evidence demonstrates that the claimant has developed an irrational view about the action of the respondent and its managers.

5.59 I am satisfied, from the claimant's responses during evidence, that his irrational view is not limited to a single individual. Individuals are identified and joined in as necessary to support his assumption of a general conspiracy. I find the belief that the respondent's employees have conspired to break into his home is without any foundation. I have no doubt that should the claimant be reinstated or re-engaged he would carry

that irrationality into his employment and his contact with all the respondent's employees. I am satisfied that his attitude would not be limited to those managers with whom the claimant has already had contact. His view about the respondent, its managers, and the way the respondent functions, has become so tainted by irrationality, there is no possibility that he could now function as an employee and accept legitimate instructions.

5.60 A breakdown of mutual trust and confidence can occur at any time. I am not confined to considering matters which arise out of or are connected directly with the dismissal. It is not necessary for me to determine the causation of particular attitudes. I must consider the situation as it presents to me now. It may be that the claimant's irrational views have been caused by the treatment he has received and the conduct of these proceedings. That is not a matter I need to resolve at this stage. What I need to do is to recognise that it exists and recognise that it will prevent any future working relationship. It follows that I will refuse to reinstate or re-engage.

Employment Judge Hodgson on 9 October 2017