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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr O Coker **v International Rescue Committee UK**

London Central **On**: 18 – 21 December and in chambers on 22 December 2017

Before: Employment Judge Auerbach

Members: Miss J Killick
Mrs J Keene

Representation:
Claimant: In person
Respondent: Mr T Coghlin, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. All of the Claimant's complaints, that he was subject to a detriment by conduct done on the ground that he had made one or more protected disclosures, fail and are dismissed.

2. The Claimant's complaint, that he was unfairly dismissed for the reason or principal reason that he made one or more protected disclosures, fails and is dismissed.

3. All of the Claimant's complaints of breach of contract fail and are dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 1 December 2016 until he was dismissed on 6 April 2017 with one week's pay in lieu of notice.

2. The Claim Form was presented on 31 May 2017. The complaints are of detrimental treatment by conduct done on the ground that the Claimant had made one or more protected disclosures (PDs), unfair dismissal for the reason or principal reason of having made one or more PDs, and breach of contract. The Claimant has throughout been a litigant in person.

3. A Response was entered defending the claims on their merits.

4. At a case management preliminary hearing (CMPH) on 9 August 2017 the particular issues to which the complaints gave rise were identified. The Claimant was also ordered to comply with a request for further information, which he subsequently did. The matter had been listed for a three-day full merits hearing to take place in October 2017, but that was replaced with this five-day hearing.

5. At the start of the hearing the Tribunal spent time with the parties reviewing the claims and issues and discussing how the hearing would be conducted, bearing in mind in particular that the Claimant is a litigant in person.

6. In his original particulars of claim, the Claimant identified two occasions on which he said he made PDs, being on 24 January 2017 to Mick Dyson and on 6 March 2017 to Jane Waterman. In correspondence following the CMPH Judge Grewal accepted that the latter was intended to refer to a meeting with Ms Waterman which in fact took place on 8 March, following the Claimant having sent her an email on 6 March. At the start of the present hearing the Claimant indicated that the case he sought to advance was that there had been a PD in the email of 6 March followed by a further PD (or development of the 6 March PD) on 8 March. Mr Coghlin indicated that the Respondent did not object to the Tribunal considering the Claimant's case that he had made a disclosure or disclosures on both 6 and 8 March to Ms Waterman as well as on 24 February, to Mr Dyson.

7. The Claimant also, in the opening discussion, referred to it being his case that he had also made a PD in person to Mr Dyson on an earlier occasion, on 6 February 2017. Mr Coghlin objected that this had not been previously pleaded, and the Claimant did not press the point at that stage. However, it was accepted that the Tribunal would hear evidence, and might need to make findings of fact, about what did or did not happen on 6 February 2017, by way of background.

8. During the course of the Claimant's evidence he was cross-examined about the alleged events of 6 February 2017. In light of his evidence about that, and before Mr Dyson's evidence was completed, and bearing in mind the Claimant's status as a litigant in person, the Tribunal raised for further discussion whether the Claimant's assertion that he made a PD on that occasion should be considered. Mr Coghlin opposed this and the Tribunal heard argument. It was agreed that we would leave the matter for consideration as part of our overall decision, on the basis that the Claimant could also cross examine Mr Dyson about it (which he indeed did). The point was accordingly further addressed in closing submissions.

9. The hearing was as to liability only. The Claimant gave evidence on his own behalf. The witnesses for the Respondent were Mr Dyson, Ms Waterman, Sigrun Danielsson and Sanjayan Srikanthan. There was a five-volume bundle of documents prepared by the Respondent and a supplementary volume prepared by the Claimant. Both parties put in cast lists and chronologies. Some additions were made to the bundle during the course of the hearing. We had written submissions from both parties and allowed time for these to be read before hearing oral submissions. We reserved our decision, which we now provide.

The Facts

10. The Respondent is a company limited by guarantee and registered charity. It is part of the International Rescue Committee network, which is involved in global humanitarian aid and development work. As such it is affiliated to IRC US, an entity which is based in New York. However, it is not a subsidiary of IRC US.

11. The Respondent is required to prepare and file accounts which comply with the Companies Act 2006 and in particular section 393(1), which provides that: "The directors must not approve annual accounts unless they are satisfied that they give a true and fair view of the assets, liabilities financial position and profit or loss...". (Although a charity would produce an income and expenditure account, rather than a profit and loss account.)

12. The Respondent's accounts must also comply with the financial reporting standard known as FRS102 and applicable statements of recommended practice (SORPs). In respect of financial years beginning on or after 1 January 2015, the SORP which applied to charities of its size is SORP 2015. The Respondent's accounting year is 1 October – 30 September. Accordingly, the first set of accounts to which SORP 2015 applied were those for 1 October 2015 – 30 September 2016. There is no dispute that the Respondent was legally obliged to produce accounts which comply with FRS102, and, for that year, SORP 2015.

13. The provisions of SORP 2015 include the following paragraphs:

2.1 Accounting for the particular charitable funds held by a charity is a key feature of charity accounting. Each class of fund has unique characteristics in trust law. Fund accounting distinguishes between two primary classes of fund: those that are unrestricted

in their use, which can be spent for any charitable purposes of a charity, and those that are restricted in use, which can only be lawfully used for a specific charitable purpose.

2.28 This SORP requires that the notes to the accounts must provide information on material individual fund balances, movements in the reporting period and the purposes for which the funds are held. The notes must differentiate unrestricted funds (both general and designated), restricted income funds, permanently endowed funds and expendable endowments. Table 1 "outline summary of fund movements" gives an example of how the movements in material funds may be shown.

[Table 1 shows, for each fund, columns for entries under the headings: "Fund balances brought forward, Income, Expenditure, Transfers, Gains and losses, and Fund balances carried forward".]

5.8 Income is recognised in the statement of financial activities (SoFA) when a transaction or other event results in an increase in the charity's assets or a reduction in its liabilities. Income must only be recognised in the accounts of a charity when all of the following criteria are met

- Entitlement – control over the rights or other access to the economic benefit is passed to the charity

- Probable – it is more likely than not that the economic benefits associated with the transaction or gift will flow to the charity

- Measurement – the monetary value or amount of the income can be measured reliably and the costs incurred for the transaction and the cost to complete the transaction can be measured reliably.

5.21 Donor imposed conditions may also specify the time period over which the expenditure of resources on a service can take place. Specification of a time period may amount to a pre-condition for use that limits the charity's ability to spend a grant or donation until it has performed the activity related to the specified time period. For example, a condition might specify the provision of a number of training weeks or the completion of a number of work placements in a particular period.

14. Under the heading "Deferring income where conditions that limit recognition are not met" the SORP contains the following paragraphs:

5.23 Where terms and conditions have not been met or uncertainty exists as to whether the recipient charity can meet the terms or conditions otherwise within its control, the income should not be recognised but deferred as a liability until it is probable that the terms or conditions can be met.

5.24 A grant that is subject to performance related conditions received in advance of delivering the goods and services required by that condition, or is subject to unmet conditions wholly outside the control of the recipient charity, is accounted for as a liability and shown on the balance sheet as deferred income. Deferred income is released to income in the reporting period in which the performance related or other conditions that limit recognition are met.

5.25 When income from a grant or donation has not been recognised due to the conditions applying to the gift not being wholly within control of the recipient charity, it should be disclosed as a contingent asset if receipt of the grant or donation is probable once those conditions are met.

15. Also relevant to our concerns is FRS102 paragraph 30.10, which provides:

An entity shall recognise in profit or loss in the period in which they arise, exchange differences arising on the settlement of monetary items or on translating monetary items at rates different from those at which they were translated on initial recognition during the period or in previous periods, except as provided in paragraph 30.13.

16. In August 2016, the Respondent's Director of Finance and Operations, Mick Dyson, met with its auditors, Buzzacott LLP, to discuss the impending audit and preparation of accounts for 2015/16. In an email of 4 August to the Chair of the Audit & Governance Committee (A & GC), Ian Barry, points noted by Mr Dyson included the changes brought in by SORP 2015 in relation to income recognition for grants with time-implicit conditions. He commented that "we can recognise income based on what has been spent and put the balance on deferred income."

17. At a meeting of the A & GC on 5 October 2016 it was noted that this was the most significant change for the Respondent, which now had "the option of deferring income for grants with time-related conditions" and that "[i]f IRC adopts this approach unspent grant income would be recognised as deferred income rather than restricted reserves on the balance sheet. Income from prior year accounts would also have to be restated and treated as prior year adjustments." It was decided that the Respondent would adopt that approach.

18. The Claimant is an accountant. Having previously worked as Finance Director for another charity for ten years, he joined the Respondent as Head of Finance and IT from 1 December 2016. He reported to Mr Dyson, and had a small finance team reporting to him. His responsibilities included acting as the lead in the preparation of annual accounts.

19. The Claimant's contract provided at clause 2(b):

The first 6 months of your employment shall be a probationary period and your employment may be terminated during this period at any time on one week's notice or payment in lieu of notice. The Employer may, at its discretion, extend the probationary period for up to a further 3 months. During the probationary period your performance and suitability for continued employment will be monitored.

20. Buzzacott began their work in December 2016 and thereafter the Claimant began to work, in liaison with them, on the preparation of the 2015/16 accounts (which we will hereafter refer to as the 2016 accounts).

21. Mr Dyson, who had recently become a father, took some extended leave in patches from around 23 December 2016 until he returned to full-time working on 19 January 2017.

22. During January 2017, IRC US completed its own annual accounts. These included a figure for income received from IRC UK. The Claimant's case was that this was a significant event, on the footing that the figure supplied became part of what were group accounts finalised at this time, and so had implications for IRC UK's own accounts. However, we accepted as sound, the logic of Mr Dyson's evidence, that the Claimant was wrong about this, because IRC UK is *not* a subsidiary of IRC US, and IRC US did *not* produce group accounts incorporating the accounts of IRC UK. It was merely recording in its own accounts the figure for the relevant actual income received by it from IRC UK in the year in question.

23. The Claimant sent a draft of the Respondent's 2016 accounts to Mr Dyson on 25 January 2017, and Mr Dyson in turn forwarded a revised draft of these to Buzzacott later that day. This was plainly, on its face, an early draft which contained a number of gaps and matters that would require correction. Mr Dyson did not give these much detailed attention at this time, as the Claimant was primarily responsible for them, they were an early draft, he was recently returned to full-time working, and they would be discussed with Buzzacott.

24. The Claimant and Mr Dyson attending an audit clearance meeting with Buzzacott on 1 February 2017. They advised that all opening and closing restricted fund balances should be reduced to zero, on the basis that, pursuant to the approach adopted to the implementation of SORP 2015, all such balances should be either deferred, accrued or included in liabilities as a creditor. It was agreed that this would be taken on board in further work on the draft accounts. Following that meeting the Claimant had the primary hands on task of taking that work forward, in liaison with Buzzacott as necessary.

25. Once Mr Dyson was back working full time, he and the Claimant had weekly one to one meetings. The Claimant said in evidence that at their one to one on 6 February 2017 Mr Dyson suggested that, since the auditors expected the grant balances to be zero "we should simply change them to zero." However, he (the Claimant) considered that this would be in breach of SORP 2015 and the Companies Act, in particular in respect of grants which had come to the end of their life during the accounting year, or where unspent balances arose from foreign exchange gains. According to the Claimant's evidence he conveyed that view to Mr Dyson during that meeting.

26. Mr Dyson disputed that account. His evidence was that he and the Claimant had had a discussion, fairly shortly after the meeting on 1 February, about what work would need to be carried out in order to address the matter of restricted fund balances in the manner that the auditors had advised, and, hence, in accordance with SORP 2015. He could not initially recall whether there had been a one to one meeting on 6 February, but on being shown a reference to it, accepted that there was one, and that the topic may have been discussed on that occasion. But he was clear in rejecting the suggestion that the Claimant had,

whether at that meeting or otherwise, told him that the approach advised by the auditors, or proposed by Mr Dyson, was, in the Claimant's view, wrong.

27. We accepted Mr Dyson's account and rejected that of the Claimant. Mr Dyson's account was supported by the evidence of the unfolding email exchanges between the Claimant and Buzzacott in the period up to 21 February, and indeed by the events of 21 February 2017. This material showed that, during that period, the Claimant, in various communications with Buzzacott, indicated that he was working on adjusting the restricted fund balances to zero, but also that he began to suggest that a different approach would, in his view, be better. While Mr Dyson was copied in on these exchanges, he did not give particular attention to them, as it was the Claimant's primary task to liaise with Buzzacott to progress this work.

28. However, around 20 February 2017 Mr Dyson began to be more involved. In an email that day, Mr Finch of Buzzacott expressed concern that the approach being taken to the restricted fund balances was out of line with what had been agreed. Following that, on 21 February, Mr Dyson spoke to Mr Swainson of Buzzacott and then emailed Mr Finch that "we are agreed on how the balances need to be adjusted. I don't think Olu understood what was required, so I will have a go myself this afternoon." Mr Swainson also, to assist, emailed a table setting out a number of potential circumstances relating to restricted funds, and the approach to be taken to each. He commented that "[t]he upshot … is that we would expect the current and prior year balance sheets to only have a very small balance of restricted funds" (which would relate only to funding in advance unrelated to a specific budget agreed with the donor). Mr Dyson in turn cut and pasted that table into an email to the Claimant.

29. There was a growing time pressure, because of the need to present draft accounts to an impending further meeting of the A & GC. At this point, as his email to Mr Swainson reflected, Mr Dyson concluded that the only way the work was going to be completed correctly and in sufficient time was if he took this stage over, himself. In the event he then worked intensively on the draft accounts himself, including a succession of late nights, over the next three days.

30. It was Mr Dyson's evidence that, following his return to full-time working in the second half of January 2017, he soon began to develop concerns about the Claimant's performance, and in particular the accuracy and timeliness of his work and the level of supervision and oversight that was required from Mr Dyson himself. It was the Claimant's case not only that such concerns would not have been fair or justified, but that it was not true that Mr Dyson had any such concerns at the time. The Claimant observed that nothing was raised during their weekly one to ones during this period. Mr Dyson accepted that he had not, during late January or most of February, raised his concerns in any formal or highlighted way, as opposed to merely discussing matters as they arose during the course of the one to ones; but he said that his concerns had been real, and building up, during this period. It was his evidence that he began to voice these in his own regular one to one meetings with the Executive Director, Ms Waterman, and that he had become sufficiently troubled by the situation also to raise the matter in a one to one meeting with the Head of HR (who also reported to him) Sigrun Danielsson.

31. We accepted Mr Dyson's account. That he indeed raised his concerns with colleagues was corroborated by the evidence of both Ms Waterman and Ms Danielsson, and also by an email that Mr Dyson subsequently sent to Ms Danielsson on 22 February 2017, referring back to their earlier discussion on 10 February. Ms Waterman also referred in her evidence, to concerns that *she* was beginning to hear about the Claimant in January or early February. In particular, she said, the Director of Fundraising, Emma Bolton, was at one point in difficulties providing Ms Waterman with certain required data because (said Ms Bolton) she had not received adequate input from the Claimant. It was Ms Waterman's evidence that Mr Dyson was also passing on concerns raised by the New York office about *their* dealings with the Claimant. That concerns *were* harboured by both Ms Bolton and the New York office was corroborated by notes we had in our bundle of an interview later conducted with Ms Bolton (pursuant to the Claimant later raising a grievance) and later correspondence with the New York office.

32. The Tribunal also did not find it inconsistent with this picture that Mr Dyson had not, as of early February, raised his concerns explicitly with the Claimant. We accepted his evidence that he remained mindful that the Claimant had only relatively recently joined, he for a time hoped that matters might improve or settle down, and that it was only as the picture continued to build into February that he turned to Ms Danielsson for advice as to how to approach the situation.

33. Following their initial discussion on 10 February 2017, Mr Dyson did not immediately take further action. However, on 22 February he emailed her. He wrote that, as discussed at their last meeting "I currently don't think Olu has the skills or competences required to do his job. He started with IRC on 1 December so is approaching 3 months." He then listed some specific issues, noting that he could come up with more with more thought. These included: errors on payment documentation, work on annual financial statements of very poor quality and also late, which "wasted several weeks and required me to step in and work until midnight on both occasions to correct the errors", failure to meet deadlines on quarterly packs and balance sheet figures for an Audit Committee report, failure to take the initiative to solve problems, failure to solve basic IT issues, and not following up with New York regarding issues concerning the phone system.

34. Mr Dyson acknowledged that the Claimant was still new and the Finance and IT Teams were chronically understaffed, and that he had not given much time to training the Claimant or guiding him in one to one meetings. However, Mr Dyson concluded: "My inclination is to move quickly to dismiss Olu, but I would be willing to give him one or maximum two months to demonstrate that he does have the necessary skills and competencies. I plan to meet him soon to present the issues above and set some short-term objectives. Is there any advice you would give me on how best to handle this?"

35. In his evidence to the Tribunal, Mr Dyson gave a more detailed account of the concerns he had in relation to each of the matters covered in this email, and what had given rise to them, cross-referring to documents in our bundle. It is not necessary to set out all of that detail here.

36. Drawing on the picture painted by all the evidence, we were satisfied that Mr Dyson *did* genuinely have serious and growing concerns about the Claimant's performance, which had reached the point as of 10 February where he was strongly minded to dismiss the Claimant. The email of 22 February was sent the day after Mr Dyson had liaised with Buzzacott about progress on the annual accounts and then taken over that work from the Claimant. We were inclined to think that this probably prompted Mr Dyson to take forward his wider concerns on 22 February, but we were also satisfied that those concerns *had* been developing since late January, related to a whole range of matters to do with the Claimant's work and performance, and were not simply a reaction to the issues that had emerged regarding the Claimant's work on the annual accounts.

37. It was also clear that Mr Dyson wanted to be guided by Ms Danielsson as to the appropriate way to handle the matter. To that end, the two of them met on 24 February 2017. Ms Danielsson indicated that it was up to Mr Dyson whether or, if so, when, he wished to dismiss the Claimant. However, her recommendation was that he not do so immediately, but rather that he give the Claimant a period of four weeks to improve by reference to a specific set of tasks or objectives.

38. We accepted Ms Danielsson's evidence that she did not consider it appropriate or necessary for the Respondent's written performance improvement procedure (PIP) to be followed, given that the Claimant was still in his probation period, and the strength of Mr Dyson's concern that the matter needed to be resolved within a relatively short timescale. Ms Danielsson did not refer in evidence to the fact that, because of his short service, the Claimant would not be ordinarily qualified to claim unfair dismissal. However, it was clear that she considered that in principle the Respondent was entitled to dismiss the Claimant at any time on one week's notice or with payment in lieu, but also considered it advisable that the performance concerns be made a matter of record, and that he be given some opportunity to improve before any decision to dismiss was taken.

39. We found that Mr Dyson was prepared to follow that advice, and live with a four-week review period, although he was not at all optimistic that the Claimant's performance would in fact improve sufficiently.

40. The other matter which unfolded in February 2017, to which we need to refer, is this. Following the departure of a member of the accounts team at the end of January, it was decided that another longstanding member of the team, Lynette Opiyo, should be given increased responsibilities. On 6 February Mr Dyson asked the Claimant to finalise a new job description for her; they exchanged emails about this, including in relation to the title to be given to one of her direct reports. Then, on 14 February, Mr Dyson confirmed to the Claimant that Ms Waterman had authorised Ms Opiyo's promotion, when she took on management of two junior members of the team. He asked the Claimant to discuss this with her. The Claimant then progressed this.

41. We return to the matter of work on the annual accounts. As noted, having started on 21 February 2017, Mr Dyson worked intensively on these over the next few days. Working late into the night of 23/24 February, at 1.51 am on 24

February he emailed a revised draft to Mr Swainson. He commented: "I'm sorry it took us so long to make the changes to the presentation of restricted fund balances. It turned out to be a bigger task that I had expected". He added: "I'm not certain that I have allocated the foreign exchange revaluations and balances correctly in the notes. Please let me know if anything looks out of place."

42. At past 2am that night, Mr Dyson circulated some initial papers for the A & GC meeting the following Thursday. During the morning of 24 February Mr Swainson emailed Mr Dyson commenting that the draft sent to him in the early hours was "a far better set of accounts and I think well worth the effort this week." He returned a marked-up version and indicated what further actions needed to be taken immediately and then over the next week in order to complete the work.

43. On the evening of 24 February (at 19.23) Mr Dyson circulated further papers for the A & GC including the latest version of the draft 2016 accounts. He commented: "Due to the change in accounting policy to SORP 2015 (FRS102) there have significant restatements of prior year restricted fund balances and I am still working with Buzzacott to verify that these balances and differences arising from exchange movements are recorded correctly in the balance sheet and notes to the accounts. If there are any changes from the attached version, these will be identified at the meeting." Later he emailed Buzzacott that there were still some problems with the presentation of the cumulative reserves account (CUMRES) that he was working on, and that they needed to discuss.

44. In evidence the Claimant said that on that day Mr Dyson "told me he had decided that we should change all the grant balances to zero. I told him again that this would be wrong as it would give a misleading picture of the account and breach IRC's contract with donors. Mick was now visibly annoyed and said he was going to do it himself. He returned to his desk and started changing the numbers in the accounts. The account was thrown out of balance. I went over to his desk and helped him by pointing out some of the most glaring inconsistencies." When he left the office at about 6pm Mr Dyson was "still fiddling the accounts".

45. Mr Dyson disputed that entirely. His evidence was that, having concluded on 21 February 2017 that he needed to take over the work from the Claimant, and having been working on the accounts himself for the past three days, he did not require any further substantive input from the Claimant, and indeed was not confident that he would be able to give him any useful input on the particular areas relating to restricted funds and exchange rate balances that needed addressing. Mr Dyson recalled that, during the course of his further work on 24 February, he did need some further information, for which he approached Lynette, but neither did he seek further input from the Claimant, nor did the Claimant offer it.

46. Having considered the picture painted by the totality of the evidence available to us, we accepted Mr Dyson's account of the events of 24 February 2017 and rejected that of the Claimant. Mr Dyson's account hung together with the wider picture in which he had indeed taken the work away from the Claimant three days before and felt that, whilst there was more to do, he had largely broken the back of it by 24 February, as confirmed by Buzzacott's email to him. This was

also the same week in which Mr Dyson had emailed Ms Danielsson; and indeed 24 February was the very day on which he met and discussed with her the four-week plan. It was simply not plausible that in this context Mr Dyson would have sought the Claimant's substantive input on the accounts on Friday 24 February.

47. Further, as we have found, Mr Dyson had already come to the view, earlier in the week, that the Claimant did not fully understand the methodology that needed to be followed in relation to restricted fund balances, and had passed on to him the previous Tuesday, the table prepared by Buzzacott as a guide to this. It was implausible that, if the Claimant had nevertheless then, on the Friday, told Mr Dyson that what he was doing was wrong, Mr Dyson would not have referred him back to these earlier communications, and attempted, again, to set him right.

48. On 27 February 2017 Mr Dyson met the Claimant for a one to one. Mr Dyson indicated in terms that he had serious concerns about his performance, and went through a number of areas (being those he had previously highlighted to Ms Danielsson). The Claimant maintained that his performance was generally on track, but Mr Dyson did not agree. He indicated that there were a series of objectives or tasks that he expected the Claimant to complete over the next four weeks, to get back on track. He then exchanged emails with Ms Danielsson, who advised him to make it absolutely clear that the Claimant would be given notice if his performance did not improve.

49. At the end of that day Mr Dyson emailed the Claimant a list of the areas of concern and of the objectives for the next four weeks. He wrote: "I expect you to achieve or make significant progress on the objectives that we agreed on by 24 March or I will be serving you notice on your contract. I would like an update on progress at our weekly one to ones between now and 24 March and it is really important that you let me know as early as you can when you are having problems, need support or are missing information."

50. Mr Dyson had to go to New York for the next two days. He asked the Claimant to work with Buzzacott on the CUMRES balance while he was away, so that Mr Dyson could present further changes to the A & GC meeting on 2 March.

51. On 2 March 2017 the A & GC meeting took place. Mr Dyson noted that the draft accounts were close to completion, but specifically that further checks were needed on the restricted fund balances, which needed to be restated because of the new SORP.

52. The next one to one between the Claimant and Mr Dyson was on Monday 6 March. This was the first such meeting following the institution of the 4-week plan. The Claimant told Mr Dyson that he did not agree with Mr Dyson's decision to institute that plan, or the suggestion that he was at risk of dismissal. The Claimant also told Mr Dyson that in the Claimant's view the accounting treatment advised by Buzzacott was wrong, and that Mr Dyson had been wrong to follow it.

53. Immediately following that meeting the Claimant went to see Ms Waterman. However, her PA informed him that she was extremely busy. He then emailed Ms Waterman that he hoped she could find ten minutes for him at some point "to discuss an important issue concerning IRC's accounts". On seeing that email, Ms Waterman spoke to Mr Dyson to find out what if anything he knew about the matter.

54. Mr Dyson then emailed Ms Danielsson. We set out the main part of that email in full:

I met with Olu for our weekly one to one this morning and he does not agree with my decision to give him notice in 4 weeks if his performance doesn't improve. I will discuss that with you tomorrow, but for now there is one matter I need to talk to you about today.

He has told me that he disagrees with the changes I made to the accounts after the auditors proposed an adjustment that I agreed to. He says that the accounting treatment that the auditors proposed is wrong and that we should have negotiated this point rather than agreeing. For me this is one of many issues which is leading me to consider his suitability.

He has asked Jane by email for a meeting today to discuss "an important issue with the accounts". Jane has asked me how to respond. I said I would check with you. Should she:

1. Say that she is not available for a meeting today and put it off.

2. Say that she does not think it appropriate to meet with Olu about this as she knows that it relates to a performance related process that Mick is managing and that Jane is the last resort for appeals.

3. Agree to meet with Olu to hear his concerns about the accounts.

4. Something else.

55. Mr Dyson and Ms Danielsson spoke and he then emailed Ms Waterman that Ms Danielsson's advice was to agree to a short meeting "to listen to what Olu has to say but not to respond or debate about it." Mr Dyson should be there, given that the subject matter was the accounts. "The reason to have the meeting is to demonstrate that we are taking what he has to say seriously, and to ensure that he has a voice and can be heard on what he considers to be a sufficiently major issue to escalate it to you." Mr Dyson agreed that was a sensible approach.

56. However, Ms Waterman then received a further email from the Claimant, attaching a note of the issues he wanted to discuss. He wrote that he considered the change advised by Buzzacott on 1 February regarding restricted fund balances as "not appropriate in IRC's circumstances. On 16 February I discussed with Buzzacott what I believe is the correct approach. They promised to consider it and come back to us." In the meantime, Mr Dyson had called Buzzacott "to say

he was going to change the accounts". Mr Dyson had then proceeded to amend the accounts "which now shows a misleading picture of IRC's financial position (with the reserves significantly understated)." On 27 February Mr Dyson had "issued a notice to terminate my contract if I don't meet new sets of objectives that he had just written out different from those previously agreed."

57. The note continued that at their one to one the Claimant had told Mr Dyson:

> … that his threat to terminate my contract is because I didn't carry out the amendments suggested by the auditors. I reminded him that at our previous one to one meeting he had confirmed that I was doing well. I explained to him that the amendments were not the right thing to do and asked him to withdraw the termination notice. He made no commitment to withdraw it.
>
> I therefore want to request that you:-
>
> 1. Look into the circumstances surrounding the misstatement of the restricted reserve in the accounts sent to the A & G Committee.
>
> 2. Take steps to protect me from being unfairly dismissed.

58. Ms Waterman forwarded this to Mr Dyson, commenting: "Sorry I just read this and I think it may change the approach." She asked him to ask Ms Danielsson whether she still advised that they proceed as suggested. Mr Dyson indeed sought Ms Danielsson's further advice. He suggested that there were two separate matters, the first being the technical question about the preparation of the accounts, and the second being "about my management". Ms Danielsson agreed and Ms Waterman emailed the Claimant in line with her advice. She would be happy to meet with him to hear his concerns regarding the presentation of the accounts, and Mr Dyson would attend as the Director of Finance and responsible for their delivery. She continued: "The issues which you raise about Mick's management are separate and should be addressed to the organisation's grievance procedure. Should you wish to file a formal grievance, I suggest you speak to Sigrun in HR as a first step. She can advise and support you on this."

59. Pausing there, from this document trail, and having considered the witness evidence about these events, we drew the following further conclusions.

60. First, the Claimant's one to one with Mr Dyson on 6 March 2017, followed by his emails to Ms Waterman that day, marked the first occasions on which the Claimant asserted, to Mr Dyson or anyone else, that the approach being taken by the auditors and by Mr Dyson to the accounts was wrong and was misleading. In particular it was *that* assertion which prompted Mr Dyson immediately to seek the further assistance of Ms Danielsson.

61. Secondly, even on the Claimant's own account (in the note attached to his email to Ms Waterman) Mr Dyson had allegedly introduced the performance procedure with the possibility of dismissal at the end of it, not because the

Claimant had previously alleged that the accounts were being prepared in a manner that was wrong or misleading, but because the Claimant had failed to carry out the work in the manner required.

62. Thirdly, the picture that clearly emerged from these developments, building upon events in the last week of February, was not that Mr Dyson had instituted performance management because the Claimant had made allegations regarding the accounts, but rather the other way around. The Claimant was for the first time specifically making allegations that wrong and misleading accounts were being prepared, following his having a week before been notified of the performance plan and the possibility that he might be dismissed at the end of it. It was also the Claimant who was specifically linking the two together.

63. It was also apparent that, while Mr Dyson was confident that there was nothing in the Claimant's expressed concerns about the accounts, the Claimant's actions put him on the defensive. On the morning of 8 March he emailed Buzzacott: "I have been put in the position of having to defend my decision to agree to adjust the opening and closing fund balances to zero as you suggested in the audit clearance meeting. Would it be possible for you to send me a short explanation of why this is the correct treatment following the new SORP and your understanding of whether there was negotiation ongoing after the audit clearance meeting between Buzzacott and IRC UK (through Olu Coker) which could have resulted in a different outcome."

64. Later that day, 8 March 2017, Ms Waterman and Mr Dyson met with the Claimant. As well as the witness evidence, we had Mr Dyson's manuscript notes made during the meeting, an email he sent Ms Waterman later that day commenting on the arguments (although, as he explained in evidence, he developed some of his points beyond what had specifically been said in the meeting) and a further email he sent her a couple of days later as a note of the meeting. From all this material a clear picture of the discussion emerged.

65. The Claimant described the initial work he did on the accounts and which he had submitted to Buzzacott. He then described how, at the 1 February meeting, the auditors had commented that if the agreed recognition of income policy was applied in relation to restricted funds, then there should be zero opening and closing balances. Mr Dyson had agreed to go back and make the changes, but he, the Claimant, did not agree with that approach. It would involve a lot of talking to other people about the individual grants and a lot of work and changes. He believed there was a choice about how to present this aspect of the accounts, which he had proceeded to discuss with the auditors; and he had nearly convinced them. But Mr Dyson had then called the auditors and taken over the preparation of the accounts from him.

66. Mr Dyson responded that, following the logic of the income recognition policy adopted at the October meeting, there was no reason why any restricted fund balance should remain, if the grants were analysed and balances moved to other parts of the balance sheet; and that the auditors had been clear that this was the correct presentation. Although it was a lot of work to analyse the large number

of grants, it would have been possible to review the majority in the 3 weeks from the 1 February meeting to the date for submitting accounts to the A & GC. The Claimant responded that the restricted fund balance was showing as minus £207,000, which was incorrect, and that it should be more like plus £3m. Mr Dyson responded that this figure did appear to be incorrect and that he had expected the Claimant to review the CUMRES with the auditors while he was in New York; and that he would follow up with the auditors on this point.

67. Later that day, Mr Swainson replied to Mr Dyson's email of that morning. He wrote that "[t]he new SORP specifically clarified that income can be deferred where there are time-implicit conditions. This therefore provided charities that deliver grant funded programmes that have detailed donor-agreed activity budgets to have a choice as to how they recognise their income." He went on to refer to the A & GC decision to take the option of moving to the new accounting policy. He continued that this was not correctly applied in the draft accounts. He continued that the nil balances *were* in accordance with the accounting policy, on the basis that any funds received in advance are deferred, any funds received in arrears are accrued, any foreign exchange balances are deferred or accrued in line with the rest of the balance, any amounts repayable to funders need to be in creditors and any other donations received that are ring fenced and do not have any time-implicit conditions are not material. He believed that the expectation of nil restricted fund balances brought forward and carried forward remained valid.

68. Mr Swainson continued that, following the [1 February] meeting, they had been aware that the Respondent was becoming short of time to process the agreed changes in advance of the next A & GC meeting, but also that the accounts were not yet in a form that the Trustees could approve. They had therefore explored some practical solutions, but did not receive an updated draft that was in a form that they believed the Trustees, or Buzzacott, would have been able to approve until the version that was sent through late on 23 February.

69. Mr Dyson forwarded that email to Ms Waterman and set out his comments on the Claimant's concerns. He added some more detail concerning foreign exchange balances, commenting that the level of realised balances was not material and that it was clear "that foreign exchange was a minor cause of the restricted fund balances, not the dominant explanation that Olu had presented." Regarding the error of the negative restricted fund balance, he had asked the Claimant before he left for New York to address the matter with Buzzacott. "It became clear to me at today's meeting that he did not follow up on this point and is now bizarrely trying to claim that this piece of work that he himself has not done justifies his entire argument that I am responsible for the accounts being incorrect." He attached copies of emails from 23 and 24 February demonstrating that he was aware of this problem at that time.

70. On 13 March 2017 Ms Waterman emailed the Claimant. She wrote, in part: "After reviewing the facts presented by you and Mick I have concluded there isn't sufficient reason to change the current presentation of our accounts as you suggest. This would require significant effort and as it stands IRC UK does not have the capacity. Our Auditors support the current approach and I trust their

guidance and advice. I have asked Mick to follow up with the Auditors on your point that the restricted fund balance is showing as a negative figure and he will share with you their response."

71. Pausing there, we draw the following further conclusions.

72. Firstly, the Claimant suggested in evidence that he had asserted at the meeting on 8 March that the negative restricted fund balance was a "glaring tell-tale" from which the "fraud" being perpetrated in the accounts as presented to the Trustees by Mr Dyson could be easily detected. However, in light of all our findings, we concluded that the Claimant did *not*, at that meeting, assert that there had been a deliberate fraud, although he *did* assert that these accounts were incorrect and misleading, and he did rely on the restricted fund balance as evidence of this.

73. Secondly, the Claimant submitted that Mr Dyson had turned to Buzzacott on 6 March to help him defend what he knew was a wrong approach. However, we did not agree with that. Standing back, it was clear that Mr Dyson did himself go through a learning curve in relation to the detailed application of SORP 2015; but he was aided by the meeting of 1 February, his own detailed engagement with the work at the end of February, and the further feedback from Buzzacott at that time. He turned to Buzzacott on 6 March, not to help him defend what he knew was wrong, but to lend their written support to his contention that he was right.

74. Finally, we concluded that, while Ms Waterman essentially had confidence in Mr Dyson, and Buzzacott, she herself did actively consider the Claimant's points, Mr Dyson's response and the further input he got from Buzzacott. We accepted that, having done so, she was satisfied in her own mind that the approach being taken by Mr Dyson and by Buzzacott was correct, and that the outstanding issues were in the course of being addressed. The email that she sent to the Claimant on 13 March 2017 represented her genuine conclusion.

75. The Claimant's progress on the four-week plan was reviewed at meetings with Mr Dyson on 13 and 20 March. Progress on each of the objectives was specifically addressed. Mr Dyson acknowledged where some tasks had been completed and discussed with the Claimant next steps in relation to others. However, we accepted Mr Dyson's evidence that he remained concerned that, while the Claimant was ticking off some tasks as completed, there remained issues about the quality of his work and the degree of supervision and input that continued to be required from Mr Dyson himself.

76. At his regular meeting with Ms Danielsson on Friday 24 March, Mr Dyson sought her further advice in anticipation of the end-of-four-week review meeting that he was due to have with the Claimant the following Monday. We found that Mr Dyson's view, as of the Friday, was that, while a number of the tasks he had set the Claimant had formally been completed, there had not been any sufficient improvement in the quality of his work. Mr Dyson did not expect anything to emerge from his meeting with the Claimant the following Monday that was likely to

alter that view, and was minded to proceed to dismissal. However, Ms Danielsson advised that the next step would be to invite the Claimant to a further formal meeting, and formally to warn him that a possible outcome of that meeting could be his dismissal, and to afford him the right to be accompanied.

77. Once again Ms Danielsson, an HR specialist, was, notwithstanding the Claimant's short service, advocating the precautionary approach of ensuring that he was treated with absolute transparency and demonstrable fairness, before any decision to dismiss was actually taken. We also found that Mr Dyson accepted her advice, although he did not realistically expect the Claimant to be able to turn around the position at this point, and did not want the matter to drift. Accordingly, Ms Danielsson drafted a letter for Mr Dyson to give to the Claimant at the end of their meeting on 27 March, assuming that Mr Dyson did not become persuaded during that meeting that he ought not to do so. She sent Mr Dyson that draft letter on 24 March.

78. Mr Dyson met with the Claimant on 27 March 2017 and they discussed progress on the objectives that had been set four weeks before. At the end of the meeting he handed the Claimant the letter inviting him to a further meeting. It stated, in part: "I have been monitoring your performance closely for the last 4 weeks and I am concerned that you have failed to meet required improvements. Specifically, you have not met agreed deadlines and the quality of your work is not at the required standard." It informed the Claimant that a possible outcome of the next meeting was dismissal, and advised him of his right to be accompanied.

79. The Claimant relied on the fact that this letter had been prepared before the start of the 27 March meeting in support of his contention that this entire process had been a sham. As we have found, however, Mr Dyson did have genuine concerns about the Claimant's performance, serious enough to have been minded to dismiss him in February. However, he accepted the advice of Ms Danielsson to allow the Claimant the opportunity of the four-week process. Mr Dyson did not *expect* the Claimant to improve materially during that period, and, at the end of it, he concluded that he had not done so. But it was not true that Mr Dyson's original concerns were not genuine. We were also satisfied from Mr Dyson's evidence, that he did review how the Claimant had performed during the four weeks, but genuinely concluded that there remained serious issues with the standard and timeliness of his work and/or the degree of supervision that he still required.

80. On 29 March 2017 the Claimant emailed Ms Waterman. He wished to make a "formal complaint" as a follow up to the issues he had raised on 6 March "about the suggestions I made regarding the year end account and Mick's threat to terminate my contract." Mr Dyson had come to the meeting on 27 March with a "signed dismissal notice" even though he had achieved the set objectives. The Claimant attached a document headed: "Complaints: Threat of unfair dismissal and not based on a fair assessment of my work and achievements". This updated his 6 March note. At their meeting on 27 March "I told him that I understand that this treatment was because he is upset by the disagreement regarding the year end accounts and promised that we can make up and work together. But he said I have to leave." The Claimant continued: "I should not be dismissed because of

the issues I raised regarding the accounts. What I suggested is not out of place." He suggested that his approach was similar to that taken by charities such as Water Aid and Oxfam, and attached extracts from their accounts. The document continued that the Claimant was unfairly treated by Mr Dyson adding new targets to his pre-agreed objectives and setting one deadline for their achievement in the past, by Mr Dyson coming to the review meeting with a "signed letter of dismissal" and then refusing to withdraw the "dismissal notice" after evidence of achievement had been given. He requested that the "dismissal notice" be withdrawn, and that there be a fair review of his performance conducted by an independent person knowledgeable in finance. He suggested the chair of the A & GC for that role.

81. That same day the Claimant emailed Mr Barry a copy of his complaint and stating why he suggested that he be involved "in the objective assessment of my performance." Mr Barry sought guidance from Ms Waterman and Mr Dyson. Ms Dyson replied to Mr Barry, in part: "We have been handling this issue – and I am sorry that Olu has contacted you directly. Olu has made a complaint against Mick today that I am following up with HR. I had previously investigated his informal complaints and found them without basis. Olu is on probation and we are seeking to not confirm him in post, a move that has my support. I will be meeting with Sigrun tomorrow to consider how best to respond and any legal issues pertaining. This is a very difficult situation for all concerned. I will of course fully implement our policy around complaints." She copied in Ms Danielsson and Mr Dyson and asked Ms Danielsson to advise her and Mr Barry on the applicable procedures.

82. Ms Danielsson then emailed advising that the Respondent had the right to dismiss the Claimant with one week's notice during probation. She explained the process of the probationary review hearing and that there would be a right of appeal. She observed that with less than two years' service the Claimant would not be entitled to claim unfair dismissal and any Tribunal complaint would have to be of breach of contract or discrimination. She referred to the performance process that had taken place, which, she said, had been transparent.

83. In advance of the probationary review hearing, Mr Dyson prepared a note identifying the areas he intended to lay out where the Claimant had failed to make required improvements. These were summarised under four headings, the first three being: "failure to meet deadlines", "poor quality of work" and "disproportionate and inaccurate response to performance concerns raised". Under the fourth heading of "Breakdown of trust and confidence" he wrote:

> I am aware that Olu has approached a trustee about this and made further serious allegations. It is very difficult to have a continuing working relationship with Olu on this basis. If I am unable to set objectives as a manager and expect to have them followed, or if I take a decision that Olu disagrees with and that leads to Olu complaining to the Executive Director or a Trustee, how can I continue working with him? It is about mutual trust and confidence in his work. The way he is going to different people and accusing me or punishment or retaliation, it makes it impossible to work together on that basis.

84. Pausing once again, we make two further observations at this point. First it is clear from this note that Mr Dyson considered that the Claimant's most recent

actions reinforced his concern that there was an issue of trust and confidence and that the working relationship was no longer sustainable. Secondly, it is clear from Ms Waterman's observations to Mr Barry that she was fully aware that Mr Dyson was minded to dismiss (and why); and that she supported him in this.

85. On 31 March 2017 Mr Barry replied to the Claimant that he was sorry that his period "has not worked out in a satisfactory manner." He attached a copy of the grievance procedure and noted that there was no role that he, Mr Barry, should currently be playing in that and that he could not help the Claimant further.

86. That same day Grants Manager Melissa Mullan reported a query raised by DFID, who were seeking to reconcile the amounts reported on their grants and the figure shown in the annual audited accounts. The Claimant responded that it would be best to await a response from Mr Dyson. Mr Dyson replied that "due to our change in income recognition policy in FY16 we are recognising income as grants are spent. The amount in the table is the expenditure in FY16 on the grants." Ms Mullan replied that this should "clear it up".

87. The probation review hearing was put back to 6 April 2017 to enable the Claimant to be accompanied by a union representative.

88. Sanjayan Srikanthan, then Director of Policy and Practice, was nominated to hear the grievance against Mr Dyson, having regard to his seniority and lack of prior involvement. The soonest a meeting could be arranged was for 11 April 2017. Ms Danielsson advised Ms Waterman that there was no legal obligation to postpone the probation review hearing until after the grievance hearing. Ms Waterman took a view that the probation review hearing should go ahead as scheduled. We found that she considered it highly likely that the probation review hearing would result in dismissal, and unlikely that the grievance would be upheld. She also considered that, if the Claimant *was* dismissed and if, then, the grievance decision threw up something that called into question the dismissal, that could be taken on board when considering any appeal against dismissal.

89. The probationary review hearing took place on 6 April 2017. Mr Dyson was accompanied by Ms Danielsson and the Claimant by his lay union representative, Liam Morgan. The meeting lasted about an hour and a half. Ms Danielsson prepared a note which was subsequently amended by both the Claimant and Mr Dyson.

90. The meeting fell into two halves. During the first half there was discussion of the Claimant's performance against the objectives that had been set for the four-week review period. There was discussion of what Mr Dyson said were his concerns and the Claimant's case as to what he had achieved. Mr Morgan expressed surprise at the four-week timeframe and the lack of a probation review policy. After this discussion had run its course the Claimant and Mr Morgan were asked to step out and there was a break lasting about ten minutes.

91. When the meeting reconvened, Mr Dyson indicated that, although he agreed that the Claimant had met most of the objectives set for the four-week period, he still had significant concerns about his performance and the quality of his work. The Claimant was in a senior and autonomous role and Mr Dyson was spending too much time correcting and guiding him. They could continue with performance management, but this would involve continued micro-management which was not sustainable and too time consuming. He had therefore decided to serve the Claimant with notice. The Claimant asserted that he was given a pre-prepared letter on 27 March because Mr Dyson had already decided to dismiss him. Mr Dyson denied that. The Claimant also asserted that Mr Dyson had called him to a probationary review because he wanted to retaliate for their disagreement about the presentation of balances in the accounts on 24 February. Mr Dyson also denied that. Ms Danielsson confirmed Mr Morgan's understanding that there was a separate grievance procedure being followed in that regard. The Claimant was informed that he would receive a week's pay in lieu of notice, and therefore he was being asked to leave that day. He was also informed of his right to appeal.

92. Shortly following the meeting, the Claimant emailed Ms Waterman:

Dear Jane

I have met Sigrun regarding my complaint. Her conclusion was that the probation hearing should go ahead while my complaint is dealt with later. I have just finished the probation hearing with her and Mick. I came with all the documentary proofs that I have met the objectives set for me. Regardless Mick said I am dismissed with a week's notice and that I should leave now. They literally wanted to push me out the front door. I told Sigrun I am already halfway through the day and should be allowed to complete the day. They agreed. This is clearly a case of retaliation against me for the matters I raised concerning the accounts and which I brought to your attention. I have raised a grievance concerning this but it is yet to be heard. To appeal this decision Sigrun said I must leave now and wait for her letter before I can then appeal. It doesn't look right that a human being should be treated this way and I want to implore you to step in to ensure fairness.

93. Having sought guidance from Ms Danielsson, Ms Waterman replied that she understood this was a difficult situation but that it was "common practice and reasonable to let employees who have not passed their probation leave on the same day as the organisation's decision to do so is made. If you feel you are being pushed out of the door that is absolutely not the intention and is a misunderstanding of the meeting with Sigrun, Mick and the Union rep." A formal letter would follow confirming the decision and the right to appeal.

94. In email exchanges that afternoon Ms Danielsson asked the Claimant before leaving to "kindly leave the keys and your computer and any other equipment and documents that belong to IRC UK with me" and he chased her for the confirmatory letter of dismissal. She sent that letter at 5.39pm, although it contained an error regarding a date, which she corrected in a further copy sent the next day. The letter set out the Respondent's decision to terminate the Claimant's employment following the performance review procedure and on the grounds of unsatisfactory performance during probation. It stated that the dismissal was

immediately effective and that he would be paid one week in lieu of notice and for accrued but unused holidays. It addressed his right of appeal.

95. There were significant factual disputes in evidence before us about aspects of what occurred during the probation review meeting and during the remainder of that day. The witness evidence given before us, the exchanges that day, and later accounts given during the internal processes, contributed to an overall picture about which we were able to make the following further findings.

96. Firstly, it was the Claimant's case that, during the course of the probation review meeting, he tabled documents which showed that he had fully met all the objectives set during the performance review period; but Mr Dyson refused to consider them. Both Mr Dyson and Ms Danielsson gave evidence to the effect that the Claimant had not tabled any such documents at any point. We accepted that the Claimant did bring documents with him to the meeting, but we did not find that he actually tabled them. There was no suggestion in the minute of the meeting that he had done so, nor any correction made by him to that effect.

97. The Claimant also alleged that Mr Dyson's behaviour during the meeting had been overtly aggressive and intimidating. Mr Dyson denied that and Ms Danielsson told us that Mr Dyson had remained calm throughout. We had no doubt that the Claimant found the meeting very unpleasant. No doubt from the outset he feared that he was going to be dismissed, and was very upset when he actually was. We accepted that all of this would have made the meeting difficult and stressful for the Claimant, but we did not find that Mr Dyson was aggressive in any way, whether by his words, body language or other behaviour.

98. The Claimant was told that the decision to dismiss was immediately effective. It was conveyed to him, one way or another, that he was not required to stay to deal with anything, and therefore the expectation was that he could and would set out about packing up his things, and then leave, immediately following the meeting. However, the Claimant asked to be permitted to remain at his desk for the rest of the working day. We did not find that he was threatened with physical removal, nor indeed that he had to plead to be allowed to remain for the rest of the day. As soon as he requested this, it was agreed. We found, in fact, that Ms Danielsson's approach to both this request, and the business of organising for him to hand in items belonging to the Respondent, was relaxed.

99. The Claimant's case, at is highest, was that there had been some actual attempt *physically* to eject him from the building. However, pressed in cross examination, he considerably backed down from that account. We found that no such thing occurred. Nor did we think that the Claimant actually meant, in his email to Ms Waterman, to suggest that there had been a physical attempt to push him out. Nor did we find that Mr Waterman understood that to be what he meant. Although he used the word "literally", he was being metaphorical. What she understood was clear from her reply, namely that he was complaining of the initial suggestion that he should leave the office immediately following the meeting.

100. It was common ground that, when the meeting concluded, Mr Dyson and Ms Danielsson left the meeting room, leaving the Claimant and Mr Morgan in the room, as they wanted to have some further discussion between themselves.

101. The Claimant's evidence was that, after ten minutes or so, he stepped out of the meeting room with a view to going to get some documents to bring back to discuss with Mr Morgan. As he came out, Mr Dyson was standing outside the room and turned and made a move towards him, which made the Claimant fear that he was about to be physically attacked, and caused him to retreat for safety back into the room. Mr Dyson denied doing this. His evidence was that, to the best of his recollection, it was possible that he had stopped in the corridor to talk to a colleague, before returning to his desk; but he had absolutely no recollection of seeing the Claimant step out of the room, or retreat back within it.

102. We found that the Claimant was at this point in a very stressed condition. He had just been dismissed and told that this was his last day in employment. He was very upset about that. He regarded his dismissal as unjustified and unfair. Mr Dyson was the perpetrator. We found that Mr Dyson was in the corridor when the Claimant stepped out of the room, and that the Claimant had not been expecting to see him there. We found that the Claimant was startled by this. It alarmed him. However, we did not find that this was because of any gesture or intention or movement on the part of Mr Dyson towards him. We accepted that Mr Dyson for his part did not notice the Claimant come out of the room at all.

103. The Claimant and Mr Dyson both worked in an open plan office. The Claimant sat at a desk that was part of a bank of six desks in two rows of three facing each other. Mr Dyson sat at a separate desk off to one side. During the course of the afternoon, the Claimant was sometimes at his desk, but was also going back and forth to see Mr Morgan (whose desk was elsewhere), in particular to consult with him on the preparation of grounds of appeal. Mr Dyson worked at his own desk. There was no significant interaction between the two of them.

104. According to the Claimant, at one point when he was bending down to gather up some items, Mr Dyson made a lunge towards him. That caused the Claimant to fear that he was under attack and somehow to lose his footing, ending up with him hitting his face against the wall and damaging a tooth. Mr Dyson absolutely denied doing any such thing and denied having any awareness of the Claimant having injured his tooth. We heard both the Claimant and Mr Dyson cross examined about this alleged incident. The Claimant was not consistent in his account of how this was said to have occurred. Under cross examination he considerably backtracked on his account of what Mr Dyson was said to have done. It was also notable that this allegation was not raised until a very late stage in the internal process and an inconsistent account was given in a formal notice of claim subsequently served by personal injury lawyers on the Claimant's behalf.

105. We did not find it plausible that Mr Dyson would have intentionally lunged towards the Claimant or sought to threaten or intimidate him physically in any way. Rather, we accepted Mr Dyson's account that, although he felt obliged not to leave the office, until the Claimant had himself left (which he did at around 7pm),

because of the awkwardness of the situation, he kept to his own desk, working. If the Claimant had believed that he had been so dramatically physically threatened by Mr Dyson, such that his own avoidance action resulted in him injuring his tooth, he would surely have raised this very serious allegation much sooner. We accepted (the Claimant offered to show us during our hearing) that the Claimant does have a broken tooth; but, however or whenever that came about, there was no aggressive behaviour on the part of Mr Dyson which led to it.

106. A further factual dispute concerned what became of the laptop, owned by the Respondent and hitherto used by the Claimant, and in particular of a USB stick that the Claimant said was plugged in to that laptop, and contained the only copy of a book on which he had been working for many months.

107. What was common ground was that, at a point when the Claimant was not at his desk, the lap top was taken off his desk. The Claimant said that this happened in the middle of the afternoon. He also initially alleged that this had been done by Mr Dyson, or at his specific direction, although he accepted in cross examination that there was no basis for that specific allegation.

108. Ms Danielsson gave an account of what had happened which was specific, credible and consistent with the emails she sent the Claimant during the course of the afternoon. We accepted it as true. She left the office at around 5.30pm. By that time the Claimant had returned other items to her. However, he had not returned the laptop. As he had been allowed to remain in the office until the end of the day, she had not previously come to get it. Upon it being time for her to leave, however, she went to his desk. He was not there, and she assumed that he had by this time left. She picked up the laptop, handed it to the colleague who was sitting at the desk opposite to that of the Claimant, and asked her to put it securely away. Ms Danielsson then left for the day.

109. Ms Danielsson's evidence was that she did not see any USB stick either plugged into the PC or lying on the desk in its vicinity, and we accepted that was true. In submissions, Mr Coghlin did not dispute that the Claimant may have been using a USB stick that afternoon. Indeed, the Claimant's own evidence was that he was working on his appeal. The Claimant also flatly declined, in cross examination, to explain how he had obtained various documents that he later disclosed in the litigation, and Mr Coghlin invited us to infer that copies might have been taken away on such a stick. Be that as it may, we agreed that, if a USB stick containing the only copy of his book had been left plugged into the laptop, it was surprising that Ms Danielsson did not notice it, and that the Claimant did not, in the immediate aftermath, urgently enquire whether anyone had come across it.

110. On the balance of probabilities, we conclude that there was not any USB stick plugged into the laptop when it was picked up by Ms Danielsson and handed to her colleague for safekeeping. Further, and in any event, we did not find that the Claimant was deprived of a USB stick as a result of any deliberate act or decision on the part of the Respondent. We found that no such thing happened.

111. The Claimant also gave evidence that he was missing a bank card, but again we found no sufficient basis to conclude that he had mislaid a bank card because of any wrongful act on the part of the Respondent.

112. We move on from the events of 6 April 2017.

113. The next day the Claimant emailed Ms Waterman appealing against dismissal. The grounds of appeal, in summary, were that he should have been allowed to complete the probation period and be assessed against his original objectives; that the decision to summon him to a probation hearing was "potentially in response to the concerns I had previously raised about the accounts"; that the probation hearing should not have gone ahead before the grievance had been heard; that the new objectives were not set in line with the Respondent's performance improvement policy; that the decision to carry out the probation hearing was made by the Head of HR, but this was inappropriate as she was supervised by Mr Dyson; and that Mr Dyson had accepted that he had made good progress against the objectives but carried on with the dismissal regardless. The Claimant asked to be allowed a fair opportunity to meet his objectives by the end of the probation period.

114. On 11 April 2017 Mr Srikanthan met the Claimant to discuss his grievance. The Claimant was accompanied by a lay union representative, Mina Zingariello. Mr Srikanthan was accompanied by an HR Advisor, Penny Cornish and an HR Assistant, Sophie Jewell, who took a note. The Claimant asserted that when, in February, they had finished the accounts to go to the A & GC, he and Mr Dyson had had a disagreement on how to disclose balances. He had written to Ms Waterman that what he, the Claimant, had suggested was not wrong, and asking for the notice of termination (that is, Mr Dyson's letter of 27 February) to be withdrawn. Later in the discussion the Claimant gave an account of discovering on 6 April, that his computer had gone from his desk. He acknowledged that he did not know if Mr Dyson had personally removed it, but described this as unnecessarily aggressive and disproportionate behaviour. He said it was a bad practice for it to have been removed in front of other staff. At the conclusion of the meeting, Mr Srikanthan noted that, if the grievance was found to be justified, one possibility could be a recommendation to reinstate the Claimant.

115. On 13 April 2017 Mr Srikanthan interviewed Mr Dyson. He gave his account of how matters had unfolded during February in relation to the accounts. Mr Srikanthan conducted various further interviews, including with Ms Bolton, who set out the concerns she had had regarding the Claimant's performance. Her view was recorded as: "no improvement with Olu joining the team at all. If anything, it caused more tension as he was not understanding or not able to deliver on what we needed." She said that she had given feedback at the time.

116. On 21 April 2017 the Claimant's appeal against dismissal was heard by Ms Waterman. She had with her an external HR Consultant, Anna Stobart. The Claimant was accompanied by Ms Zingariello. They went through the Claimant's points of appeal and he set out his arguments on each of them. On 24 April 2017 Mr Dyson wrote to Ms Stobart summarising what his performance concerns had

been and attaching various supporting evidence. This included an email from Ms Beard in New York, commenting that the Claimant "clearly has no experience with IT" and one from Ms Bolton to Mr Dyson of 22 March, commenting that her team were getting increasingly frustrated with the challenges of their relationship with finance and specifically with the Claimant. Other emails identified concerns on the part of Nick Mansour in New York and Anitha Arya, an Accounting Manager.

117. On 24 April 2017 Mr Srikanthan wrote to the Claimant with the grievance outcome, and read the letter out to him at a meeting. He wrote that he was satisfied that the Claimant was not given an unreasonable set of tasks to help him get on track and that Mr Dyson's intent was not malicious. The reason for this was that the Claimant was not performing as a Head of Team. He concluded that the Claimant was well liked but that there had been a fundamental breakdown in trust and that he had not seen evidence of deliberate retaliatory behaviour to warrant substantiation of the grievance. However, he accepted that the Claimant had not been given accurate feedback on his wider performance as Head of Team between 20 February and 27 March, but only on the specific objectives set for that period. He would be recommending that it would have been reasonable to give the Claimant the opportunity to finish his probation and to receive more accurate feedback and therefore that he should be paid what he would have received up to the end of his probation period. (We interpose that that recommendation was implemented, by the Claimant receiving a further payment thereafter.)

118. On 26 April 2017 Ms Waterman wrote to the Claimant with her decision on his appeal. She considered it reasonable for him to be set deadlines within the probation period. It had been her decision to go ahead with the dismissal and not wait until the grievance had been heard, as she had wanted the two processes to be dealt with separately and swiftly. Ms Stobart had confirmed that this course of action was reasonable. She noted that the Claimant's contract stated that during his probationary period his performance and suitability for continued employment would be monitored. She considered that Mr Dyson had been right to deal with any performance issues during that period. Doubts had been raised about Ms Danielsson's impartiality, but the decision to dismiss "rests with the line manager and me." Further investigations had uncovered an email in which Mr Dyson had raised with the Claimant concerns about the quality of data and the accounts, and set out a list of areas which he covered during his meetings with the Claimant. She enclosed that material. She concluded that the dismissal should stand.

119. In subsequent correspondence, the Claimant indicated his intention to pursue a claim to the Tribunal, but asked for the matter to be taken first to the Board as a way of exhausting internal process. On 28 April he wrote to the Board Chair, Sir John Holmes, copying in Mr Barry. In his email to Mr Barry he asserted that he had blown the whistle on issues concerning disclosure in the 2016 accounts, and as a result had been dismissed. His letter to Sir John Holmes asserted that the main reason for his dismissal was because he made a protected disclosure, and that it was likely that the Trustees had been misled into signing an account that was not in agreement with the underlying books and records, in breach of the Companies Act. He referred to having been "literally pushed to the front door, had my computer seized and lost important personal documents." In a

reply of 24 May, Sir John Holmes offered for the Claimant's concerns to be considered by a member of the Board. In a reply the Claimant referred to having been "pushed and kicked out of the door because of simple advice given in good faith", and to his computer having been seized "my things scattered and I lost half of one front tooth while trying to retrieve them."

120. The Respondent approached Sarah Leonard, an ER consultant, to act as an independent investigator; but in further exchanges in June the Claimant indicated that he did not want to meet her or pursue her process further.

The Law

121. The relevant statutory provisions are as follows.

122. Part IVA **Employment Rights Act 1996** contains provisions defining the concept of a protected disclosure, including (omitting irrelevant provisions) the following.

43A Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

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

(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,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer, …

43L Other interpretative provisions.

(1) In this Part—

- "qualifying disclosure" has the meaning given by section 43B;
- "the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 43B(5).

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

123. Section 47B (omitting irrelevant parts) provides:

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

124. Section 48 contains provision that in respect of such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

125. Section 103A provides:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

126. Section 108 contains provision to the effect that, if section 103A applies, then the usual qualifying period of two years' continuous employment, to be entitled to claim unfair dismissal, does not apply.

127. The **Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994** gives Employment Tribunals, subject as there provided, jurisdiction to consider claims of breach of contract by employees, which are arising or outstanding on termination of employment.

128. Further relevant legal points are considered in the discussion that follows.

The Tribunal's Further Findings and Conclusions

Did the Claimant make Protected Disclosures?

129. We considered, first, whether we should treat the Claimant's claim as amended to include the specific complaint that during the course of the one to one on 6 February 2017 he made a PD, and that this was among the PDs to which his detrimental treatment and unfair dismissal claims related. Paragraphs 7 and 8 above explain the context in which this arose for consideration.

130. What the Claimant did or did not say on that date in any event arose as a background issue, and there was potential prejudice to the Claimant if we did not also consider this way of putting his substantive complaints. However, we accepted Mr Coghlin's submissions that there was also the potential for prejudice to the Respondent if we did allow the claim to be treated as amended in this way. In particular, had the Respondent been earlier on notice that the case was being put in this way, potentially further relevant witness or documentary evidence might have been assembled and placed before the Tribunal. Further, although Mr Coghlin did cross examine the Claimant about this factual allegation, he might have done so more thoroughly and in finer detail, in respect of the elements of a qualifying disclosure.

131. A further factor to go into the scales was the fact that the Claimant had sought to add this additional PD at this very late stage, notwithstanding that he had clearly identified the occasions of disclosure that he was alleging in the original particulars of claim, and the further exploration of this aspect at the PHCM. Mr Coghlin put it to the Claimant in cross examination that he had simply concocted this earlier alleged PD, having realised that his existing case was seriously undermined by the evidence produced in disclosure, that Mr Dyson had been communicating with Ms Danielsson about performance concerns prior to the date of the currently earliest alleged PD on 24 February 2017. The Claimant denied that, but did not put forward any particular explanation for why he had only sought to raise this additional disclosure at such a late stage.

132. Had the matter turned on it, we would, on balance, have concluded that the balance of prejudice favoured the Respondent, and declined the application to amend. But in any event, in light of all our findings of fact, we concluded that in fact there was nothing on 6 February 2017 by way of a communication that would amount in law to a protected disclosure. That is for the following reasons.

133. As we have found, at the meeting on 1 February the auditors identified that the current draft of the accounts did not conform to the October decision regarding the implementation of SORP 2015. In the discussions that followed over the next few days – including at the one to one on 6 February – the Claimant and Mr Dyson discussed what needed to be done to fix this. However, in light of our findings, we concluded that the Claimant did not at this point believe that anyone had done, or was doing, or was likely to do, anything in relation to the accounts that would involve anyone being in breach of a legal obligation or committing a

criminal offence. The discussion at this point was simply about what work needed to be done – and done primarily in the next phase by the Claimant himself in liaison with the auditors as necessary – in order to ensure that the accounts were prepared in all respects in the correct manner.

134. Further, while, during the first three weeks of February, the Claimant raised with Buzzacott what he, the Claimant put forward as an alternative approach, the premise of the Claimant's position at that stage was not that preparing the accounts in the way that Buzzacott (and Mr Dyson) had advised they should now be prepared would be *wrong*, but simply that the Claimant's proposed alternative way of preparing them would be a better and less onerous way to do it, and would not itself (in the Claimant's view) be in any way wrong.

135. There was, in summary, no belief on the Claimant's part during this period that the accounts had been prepared, were being prepared or were likely to be prepared in a manner that would be in breach of the SORP, FRS102 or the Companies Act. Nor was there any belief on his part that someone had been, was being or was likely to be engaged in dishonest or fraudulent conduct in this regard.

136. Further, even if, contrary to that, we had thought that the Claimant did hold some such belief, it would not in all the circumstances have been reasonable for him to do so. There was certainly no reasonable basis to suppose that Mr Dyson was intent on acting dishonestly or fraudulently. It was perfectly apparent that he was simply seeking to get it right in a difficult new technical area, and to be guided as necessary by the auditors in the implementation of a legitimate decision of the Trustees. Nor was there any reasonable basis for thinking that it was likely that accounts were being prepared, or would ultimately be submitted, that were non-compliant with SORP 2015, FRS 102 or the Companies Act. All the information available to the Claimant, particularly following the meeting on 1 February 2017, was that the auditors had a good understanding of what was required, had explained this clearly, and were able to give ongoing input and guidance on any further difficulties or uncertainties that might arise.

137. Accordingly we were satisfied that, although the Claimant and Mr Dyson no doubt exchanged information about these matters to do with the preparation of the accounts, in the wake of the meeting with the auditors on 1 February, including at their one to one on 6 February, the Claimant did not hold the requisite belief for there to have been a qualifying disclosure. Nor, if we were wrong about that, would any such belief have been reasonably held.

138. We turn to the question of whether the Claimant made a qualifying and protected disclosure to Mr Dyson on 24 February 2017. In light of all our findings we concluded that he did not. In particular, the Claimant did not, in fact, as he claimed to have done on that day, have a discussion with Mr Dyson in which he told Mr Dyson that the accounts that Mr Dyson was tabling to the auditors were wrong, misleading or fraudulent. As we have found, the two of them had had a discussion on 21 February in which Mr Dyson conveyed to the Claimant the shared view of the auditors and himself, that the current draft of the accounts, prepared by the Claimant, did not conform to the October decision.

139. We did not find the Claimant to have communicated to Mr Dyson on that occasion his view that the approach advocated by Mr Dyson and the auditors was wrong. But even if we had so found, that was a conversation on 21 February and not on 24 February, as alleged. Furthermore, even if (contrary to our findings of fact) we had concluded that the Claimant had communicated such a view to Mr Dyson on 24 February, we would not have found this to amount to a protected disclosure. That is for the following reasons.

140. First, in so far as the Claimant argued that the Respondent was set on an irreversible course because of the figures already included in the accounts of IRC Inc, that was misconceived, because the Claimant wrongly believed that IRC Inc was producing consolidated group accounts. Though same mistaken beliefs may nevertheless be reasonably held, that belief on the part of the Claimant was not reasonable: as an accountant, the position was easily ascertainable, and should have been readily understandable, by him.

141. Mr Coghlin submitted that, once this point was understood, there could be no possible reasonable basis for thinking that there was any wrong doing involved in the tabling of what were still, as of 24 February 2017, draft accounts for consideration by the A & GC, and the auditors, and further work as necessary. As a general proposition, we did not think that the fact that these were still draft accounts *necessarily* precluded the possibility that there might have been some reason to believe that matters were headed in a direction whereby some wrong was likely to be committed in the future. However, in light of all the specific facts and circumstances of this case, there was no reasonable basis for the Claimant to hold any such belief at this time. In particular, at the same time as he circulated the draft accounts on 24 February, Mr Dyson made it clear that he was aware that they still contained errors and that there were matters that still needed to be addressed; *and* he himself alerted the Claimant in particular to the fact that the CUMRES balance looked wrong and needed further work. Nor did the Claimant have any good reason to believe that Mr Dyson was not being open about what needed correction or further work.

142. But in any event there is a more fundamental issue about whether the Claimant believed, and if so, reasonably believed, that the methodology being followed by Mr Dyson, on the advice of Buzzacott, was wrong. It is helpful here to stand back and look at the bigger picture of how events unfolded. This was the first set of accounts to which SORP 2015 applied. The Claimant was not familiar with it from his previous work. He had also not yet joined the Respondent, when its auditors first advised on the implications of SORP 2015 and when the Trustees took their October decision about the option they wished to follow. From the evidence available to us, it appears that he may not perhaps have specifically been briefed about this aspect when he first joined.

143. However, the meeting on 1 February 2017 and subsequent discussions with Mr Dyson focussed specifically on the implications of SORP 2015, the October decision and the course that was required. We found that the Claimant did not, initially, believe, or suggest, that there was anything wrong about what he had been told was the way that the restricted fund balances needed to be

addressed. However, as he sought to get to grips with the necessary steps, he found them challenging and out of his usual zone of familiarity. He became concerned that they would be time consuming, in his view needlessly so, when the old method would in his view be simpler, better and (in his view) correct. He sought then to persuade the auditors of that, but unsuccessfully, because his proposed approach would not conform to the October decision of the Trustees.

144. The overall impression we had was that, as Buzzacott and Mr Dyson sought to explain to the Claimant, towards the end of February, the approach required to conform to the October decision on the implementation of SORP 2015, the Claimant struggled fully to understand it, and may also have come to believe that it was not in conformity with the SORP and/or FRS102 and/or the Companies Act. We concluded, although we could not be sure, that he may have come to believe this by 24 February 2017. But, if so, that belief was not reasonably held.

145. We add to the reasons we have already given, the following. Firstly, we were satisfied by the explanations set out in the correspondence from Buzzacott and in the evidence from Mr Dyson, as to why the approach advised by them, and taken by Mr Dyson, did in fact comply with SORP 2015 (and FRS102) and with the Companies Act. In particular, we highlight three points. Firstly SORP 2015 allows for income from restricted funds to be recognised only as and when the income is *spent*. Secondly, exchange rate gains must be divided into those which are realised and those which are unrealised. A realised gain occurs when an actual gain is made, upon funds actually held in one currency being exchanged for funds held in a different currency. An unrealised gain is simply a recognition that funds, which continue to be held in the same currency, may have a fluctuating value, if expressed in another currency, by application of a fluctuating exchange rate. But the latter is merely a paper and not an actual gain, unless or until the fund is actually converted, and will be balanced by an equal and opposite entry elsewhere in the accounts. Thirdly, we accepted Mr Dyson's evidence (supported by the contemporaneous emails) that the realised exchange rate gains in 2016 were so minimal as to be, in accounting terms, not material.

146. The authorities recognise that it is possible that a person may reasonably hold a belief, even though it is mistaken. However, reasonableness is to be judged objectively, and in all the circumstances of the case. As to that, though SORP 2015 was unfamiliar to the Claimant when he joined the Respondent, and the analysis is fairly sophisticated and technical (and perhaps, in some respects, to the lay person, counter-intuitive), the Claimant is and was at the time a qualified and experienced accountant; and it was not reasonable for him to take the stance that he did following the discussion at the 1 February 2017 meeting.

147. For all of the foregoing reasons we concluded that the Claimant did not make a PD on 24 February 2017, nor, indeed, on any date before that.

148. We turn, then, to the claimed PD made on 6 March 2017, in the note that the Claimant emailed to Ms Waterman that day. We considered that this note did convey information to Ms Waterman about the draft accounts and the work that Mr Dyson had been doing on them and about these having been sent to the auditors.

It also conveyed that the Claimant believed that Mr Dyson was set on a course to produce the accounts a particular way, and that he, the Claimant, believed that accounts produced in that way would be misleading. Overall, the email conveyed the Claimant's belief that the result would be that accounts would be filed which did not comply with the law.

149. Mr Coghlin referred to authorities that indicate that it is a necessary component of a qualifying disclosure, that it gives some indication of the nature or source of the legal wrong that the person making the disclosure has in mind, unless that is sufficiently obvious that it does not need to be spelled out.[1] But there was no identification in this note of the particular source of legal obligation which the Claimant may have had in mind, and, he submitted, it was not obvious. However, we do not think that the Claimant needed to spell out to Ms Waterman that the Respondent had a legal obligation under the Companies Act to produce and file accounts that gave a fair view and were not misleading. That said, we did not think that email conveyed the suggestion that Mr Dyson was deliberately acting dishonestly and fraudulently.

150. What of the requirement for a requisite reasonably held belief? As we have set out, we were prepared to accept that, by this time, the Claimant had come to believe in his own mind, not only that his own approach was better, but that the form of the draft accounts as revised by Mr Dyson was not compliant with SORP 2015 and/or the Companies Act. But, for the reasons we have already set out, we concluded that the Claimant did not have a reasonable basis, objectively, for holding that belief. Nor did we think that at this stage the Claimant did actually believe in his own mind that Mr Dyson was acting fraudulently or dishonestly (as opposed to misguidedly). In our judgment, had he thought that, he would have expressed himself differently either in this email or at the subsequent meeting on 8 March. But even if, contrary to our view, the Claimant did think that Mr Dyson was acting dishonestly, such a belief was certainly not reasonably held.

151. We reached essentially the same conclusions about the claimed PD on 8 March 2017. The case that the Claimant set out in the discussion that day was to the effect that his approach would have been correct, would have involved far less work, and that aspects of the approach being pursued by Mr Dyson were wrong and did not conform to SORP 2015, FRS102 and/or the Companies Act. However, he did not go so far as to assert that Mr Dyson was deliberately acting fraudulently or dishonestly. The belief that the Claimant did hold was not reasonably held, and, had he thought Mr Dyson was seeking to act fraudulently or dishonestly, there would have been no reasonable basis to think that either.

152. Pausing there, for all the foregoing reasons, there was no qualifying disclosure on any of the dates claimed (or that the Claimant sought to claim). On every occasion, one or more necessary ingredients were absent.

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[1] **Fincham v HM Prison Service** EAT/0925/01, **Bolton School v Evans** [2006] IRLR 500 (a point not affected by the further appeal in that case).

153. It is not, therefore, strictly necessary for us to consider whether, had all the other necessary ingredients been present, the additional necessary requirement that the maker of the disclosure reasonably believe that it was in the public interest, would have been fulfilled as well. However, the point was also canvassed in argument, and we can address it shortly. Mr Coghlin pointed out that the Claimant had not specifically addressed in his evidence, the question of whether he held such a belief and/or if so why that might have been a reasonable view. However, the Respondent is engaged in charitable humanitarian activity on an international scale, and is the recipient of significant funding from public sources. Against that background, had we found that the Claimant reasonably believed that there was a likelihood that the Respondent would adopt misleading or otherwise non-compliant accounts, we would have been prepared to infer that he reasonably believed the matter to be one of public interest as well.

154. Finally, on this topic, and again for completeness, had we found that the Claimant had made one or more qualifying disclosures, those would, in all cases, have been protected disclosures, given that they were allegedly made either to Mr Dyson or to Ms Waterman, who were both being communicated with in the capacity of his employer. However, for the reasons that we have found, there were no qualifying disclosures, and if there is no qualifying disclosure there cannot be a protected disclosure.

155. So, we concluded, there were no protected disclosures, whether as claimed or as sought to be claimed. That is plainly in and of itself fatal to all of the Claimant's complaints of detrimental treatment because of protected disclosures and the claim of unfair dismissal for the reason or principal reason of having made one or more protected disclosures. However, since we heard extensive evidence and argument and made findings of fact about the alleged actions of the Respondent in this regard, we set out our further conclusions in relation to them.

Detriments

156. We consider first the specific alleged detriments. The first was that on 27 February 2017 Mr Dyson set the Claimant nine new objectives and told him that if he did not meet them in four weeks he would be dismissed. As we have found, Mr Dyson took this action because of genuine performance concerns and in light of the advice from Ms Danielson as to how these should be handled. These had been developing since January and related to a range of matters that had nothing to do with the Claimant's work on the 2016 accounts. The discussion with Buzzacott on 21 February and the fact that Mr Dyson concluded that he now had to take over the work for the next few days did, we inferred, act as something of a catalyst for him to take forward the matters that he had already discussed with Ms Danielsson. This may therefore have been a contributor to this conduct. But in any event, the catalyst was Mr Dyson's conclusion that the Claimant had not done the work correctly, and that he would now have to do it himself, not any allegation of wrongdoing made by the Claimant.

157. The next alleged detriment was Mr Dyson, on 27 March 2017, coming to the final review meeting with a signed letter in hand inviting the Claimant to a

probation meeting that might lead to his dismissal. It was also complained of that Mr Dyson had refused to accept that the Claimant had achieved the objectives, even though the Claimant provided proof that he had.

158. As to this, we found that, as of 24 March, Mr Dyson considered that it was unlikely that anything would be said at the meeting on 27 March which would dissuade him from going ahead and convening the probation meeting. He also did not want the matter to be drawn out any longer than necessary. He therefore came to the meeting with the letter ready to be tabled, unless, against expectations, he was persuaded not to do so. He then went ahead and tabled it at the end of the meeting, because nothing that occurred during the course of the meeting had caused his view to change. The reasons for this conduct therefore owed nothing to any allegation of wrongdoing on the part of the Claimant.

159. As we have recorded, the Claimant's subsequent tabling of complaints about Mr Dyson, to Ms Waterman and to Mr Barry, did cause Mr Dyson to feel that the working relationship had become untenable because of the damage done to the necessary relationship of trust and confidence. However, that was a further contributing factor that came in to play at a late stage. It was not a factor behind the setting of the objectives for the performance review period, nor the conclusion reached by Mr Dyson at the end of that period.

160. The next alleged detriment was said to be that the Claimant's grievance of 29 March was referred to HR and that they insisted it should be dealt with after the dismissal (i.e. the probationary review hearing). Taking the first limb of this complaint, we found that the grievance was referred to Ms Danielsson of HR so that she could advise as to the appropriate and proper way for it to be considered and taken forward, which was precisely her job. It was clear, in light of all our findings, that it was clearly appreciated and accepted by Ms Waterman (as well as Ms Danielsson) that the grievance needed to be properly processed in accordance with the Respondent's grievance procedure. The approach taken to this owed nothing to the Claimant having raised issues regarding the accounts, which Ms Waterman considered had essentially been addressed, and concluded, as of her email to him of 13 March 2017.

161. As to the second limb of this complaint, from the Claimant's email to Ms Waterman of 6 April 2017, it appears that there was some discussion, at some point during the probationary review meeting that day, in which Ms Danielsson indicated that that meeting was going ahead, notwithstanding that the grievance hearing had yet to take place. From the fact that it was Ms Danielsson who spoke to him about it, the Claimant may perhaps have inferred that it was also she who had taken that decision. But, as we have found, although Ms Danielsson's advice was sought, the decision was in fact taken by Ms Waterman. We have already set out why she took that decision; and her mixture of reasons, we concluded, owed nothing to the Claimant having raised issues in relation to the accounts.

162. For completeness, as we also heard some argument about it, we also address the position in relation to the ACAS Code on Discipline and Grievance procedures. We were referred in our bundle to paragraph 44 of what was in fact

the 2009 version of that Code. The relevant current version was the 2015 iteration but the relevant paragraph, paragraph 46, is substantively the same. It provides: "Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

163. Both Ms Waterman and Ms Danielsson noted in evidence that the Code does not indicate that the disciplinary or performance process *must* be suspended to deal with the grievance. It is also of course correct that the Code itself does not have the force of law, although it shall be taken into account by a Tribunal in relation to any issue to which it appears relevant. However, we inferred that it must have been appreciated by Ms Danielsson, who is clearly an experienced HR Practitioner, that the point of this Code provision is that, where a disciplinary process and a grievance are in *overlapping territory*, it may be sensible to address the grievance first, to avoid potential unfairness, conflicting decisions or earlier decisions having to be revisited in light of later decisions. It seemed to us that Ms Waterman must have appreciated this too, given her evidence that she recognised that there could be a scenario in which a later grievance decision pointed to a need to reconsider an earlier decision to dismiss. However, we have found that she thought that unlikely in this case, considered that the possibility of an appeal against dismissal would provide a way to address this scenario if necessary, and, for other reasons, did not want the probation hearing to be delayed.

164. The premise of this detriment complaint, that the decision in question had been made by Ms Danielsson, was therefore not made out. But in any event, the decision actually taken by Ms Waterman was not because of the Claimant having raised matters to do with the accounts.

165. The next alleged detriment was that, on 6 April 2017, Mr Dyson tried to push the Claimant out of the building and Ms Waterman refused to step in and protect him. As we have found, Mr Dyson did not physically lay hands on the Claimant, nor attempt or threaten to do so. The decision *was* taken that the Claimant's dismissal would be effective that day, with payment in lieu. The Claimant plainly found that upsetting and objectionable. But it was not done because of any issue he had raised regarding the accounts, but simply because there was not thought to be any particular need or reason for him to remain, for example to complete a handover or essential work that only he could do.

166. As to the allegation that Ms Waterman had refused to step in to protect the Claimant, it was true that she did not, following his email to her on 6 April, attempt to intervene. But that was because she (correctly) did not understand the Claimant's email as conveying that he had been physically attacked or threatened, so did not see any cause to intervene. Her inaction was not because the Claimant had raised issues about the accounts.

167. The next alleged detriment was that the Claimant's computer was seized, and his papers and belongings "ravaged", and that in trying to retrieve them he lost half a tooth, a foreign bank card and the manuscript of his book. As we have

found, the Claimant's computer was taken from his desk, simply because it actually belonged to the Respondent, and at a time when it was thought that he had departed. That was not done for any other reason. We found no basis to conclude that the Claimant's belongings were "ravaged", or that there was any conduct on the part of the Respondent that caused him to lose half a tooth, a foreign bank card and/or the manuscript of his book; still less that there was any such conduct because of the raising of any issues to do with the accounts.

168. The next alleged detriment was Ms Waterman, on 27 April 2017, upholding the decision to dismiss the Claimant and telling him that he had no further right of appeal. Although the framing of this particular alleged detriment does not specifically address the point, it was also part of the Claimant's case that Ms Waterman ought not to have dealt with the appeal at all because of the prior view that she had expressed in her email to Mr Barry at the end of March.

169. Taking that last aspect first, the email to Mr Barry did, as we have found, reflect that Ms Waterman at that point supported Mr Dyson in seeking the Claimant's dismissal. Had we been concerned with the fairness of the dismissal process in all the circumstances of the case, this would have been highly pertinent to that. However, because he lacked qualifying service, we were not. The outcome of his unfair dismissal claim turned solely on the reason for dismissal.

170. That email might, however, potentially, be said to cast light also on Ms Watermans' reasons for, in due course, rejecting the appeal, which was the major strand of this particular complaint. As to that, in light of our findings, we were satisfied that Ms Waterman considered that Mr Dyson had genuinely dismissed the Claimant because of the performance and capability concerns that he held, and she had supported that decision, because she accepted that there were such concerns, and that this was necessary in the interests of the Respondent. Ms Waterman's letter of appeal outcome was not entirely candid as to why she had decided that the probation outcome hearing should not await the conclusion of the grievance process. But that again was essentially, because she accepted and supported Mr Dyson's approach. None of the Claimant's arguments at the appeal stage persuaded her that that had been wrong.

171. As to Ms Waterman informing the Claimant that there was no further right of appeal, she did so because under the Respondent's procedures that was in fact the correct position.

172. For all these reasons, we were satisfied that the treatment by Ms Waterman complained of was not because of the Claimant having raised issues about the accounts, but for a combination of other reasons.

Unfair Dismissal

173. We turn then to the complaint of unfair dismissal.

174. As noted, this turned simply on the reason or reasons for dismissal. If the Tribunal found that it was for the reason or principal reason that he made one or more protected disclosures, it would succeed. Otherwise, as he lacked qualifying service to complain of ordinary unfair dismissal, it would fail.

175. As we have found that there were no protected disclosures, this complaint failed for that reason alone. But in any event in light of all our findings of fact we found that either the whole, or certainly the principal, reason why the Claimant was dismissed by Mr Dyson, was because of serious and genuine concerns over his performance and capability. Those concerns began to build up before any issues or differences arose in relation to the preparation of the 2016 accounts. By the time that Mr Dyson came to the view that the Claimant could not be relied upon to complete that work correctly, and that he was going to have to do some intensive work on the accounts himself, he had already reached the point where he was minded to dismiss the Claimant in view of the range of his performance concerns, though he wished to be advised by Ms Danielsson.

176. It was the case that, by the time of the Claimant's dismissal, the way in which the Claimant was raising and pursuing his issues in relation to Mr Dyson's management of him, did contribute to, and reinforce, Mr Dyson's decision to dismiss. This in turn had a connection to the issues raised by the Claimant, which were connected to the accounts. But, on any view, this was, at best for the Claimant's case, a contributing strand, not the principal reason for dismissal.

177. Accordingly, even had we found the Claimant to have made protected disclosures on one or more of the occasions on which he claimed (or sought to claim) that he did, our conclusion would have been that these were not the reason or principal reason for his dismissal. So this complaint would still have failed.

178. For all the foregoing reasons the claims of detrimental treatment because of protected disclosures, and unfair dismissal for the reason or principal reason of having made protected disclosures, all failed and are dismissed.

Breach of Contract

179. There were three complaints that the Respondent was in breach of the contract of employment, namely by:

(a) Failing to follow its performance improvement policy;

(b) Not giving the Claimant a complete induction, or a chance to settle in the role, in breach of the ACAS Code on starting staff induction; and/or

(c) Not following its grievance policy in dealing with his grievances.

180. The Claimant confirmed in opening discussions that, in respect of all three alleged breaches, he relied on the implied duty of mutual trust and confidence. In

relation to complaint (b) he also relied on the Respondent's induction check list as forming an express term of his contract.

181. We address first some points of law raised by Mr Coghlin. First, he submitted that, insofar as the nub of a particular complaint was that the Respondent had dismissed the Claimant without following the proper procedure in respect of that dismissal, that could not be entertained as a breach of contract claim. As a proposition of law, we accepted that that was correct, as far as it went (see **Johnson v Unisys Limited** [2003] 1 AC 518 and **Edwards v Chesterfield** [2012] 2 AC 22).

182. Secondly, insofar as the Claimant asserted that one or more of the matters complained of involved a breach of the implied duty of trust and confidence, the threshold is a high one. Conduct in breach of this duty must be conduct which is calculated or likely to destroy or seriously damage the relationship, and for which there is no reasonable or proper cause. The duty is breached only if there is a fundamental breach. As the authorities confirm, the gravity of the conduct required to breach this duty is therefore severe. Conduct which merely causes *some* damage or disruption to the relationship will not be sufficient. Again, as propositions of law, those were all sound points.

183. Thirdly, noted Mr Coghlin, the Tribunal only has jurisdiction to consider a claim for breach of contract if the breach is one arising or outstanding on termination. This means that the cause of action must have accrued prior to the termination of the employment, or the termination must itself be the thing that causes it to accrue. Again, this legal submission was, we accepted, correct as such. (See e.g. **Miller Brothers v Johnston** [2002] ICR 744.)

184. We turn then to the specific complaints.

185. As to the complaint of failure to follow the performance improvement policy, it was factually correct that the performance management process instituted from 27 February 2017 was not one which followed the processes envisaged by the Respondent's formal Performance Improvement Policy (PIP). Although, insofar as this complaint related to the dismissal, it was excluded from consideration by the **Johnson** principle, we considered that this complaint could be seen as relating also, potentially, to the original adoption of the process itself.

186. However, the Claimant rightly did not argue that the PIP was something that the Respondent was required to follow by any express term of his contract. Further, we considered that it was reasonable for the Respondent (in particular in the person of Ms Danielsson) to take a view that it was not suited to a situation in which serious concerns had arisen about the Claimant's capability and performance during his probationary period. Whilst the contract envisaged that, if the Claimant remained in employment at the end of his probationary period, a decision would then be taken as to whether his employment should be continued, it also provided that *during* the probationary period his employment could be terminated at any time upon one week's notice. There was nothing expressly or

impliedly in the contract, or in the concept of a probationary period, to preclude the Respondent from pursuing performance issues sooner than the end of that probationary period. In light of all our findings, we also accepted that the Respondent acted reasonably in the approach that it took. There was, we concluded, no breach of the implied duty of trust and confidence in this regard.

187. We turn to the second complaint, and, first, to the aspect of the induction process. The Claimant was sent an induction checklist which indicated various matters that needed to be covered in that process. From the evidence we heard it was apparent that, in part because of his significant period of absence in late December 2016 and early January 2017, and because of his workload and other priorities, Mr Dyson largely left the Claimant to take the initiative in making sure that he contacted the necessary individuals concerned, to ensure that the elements of the induction checklist were addressed. Mr Dyson considered that the Claimant should be capable of doing this, given his senior position. Further, the Respondent periodically held general induction meetings designed to allow employees who had not covered all the elements of their induction to do so; and the Claimant in fact attended one of these towards the end of his employment.

188. Insofar as this complaint referred to the ACAS code on starting staff induction, what the Claimant was in fact referring to here was a guide issued by ACAS on this subject. This provides a general guide to good practice, but no more. We considered that, in terms of good and supportive practice, it would have been better had Mr Dyson been more proactive in relation to the Claimant's induction. But we did not find that there was any behaviour here, on the part of Mr Dyson or anyone else, by way of deliberately neglecting or obstructing the induction, or that was otherwise so serious in this regard, as would amount to a fundamental breach of the implied duty of trust and confidence.

189. The claim that the induction checklist formed an express term seemed to be founded purely on the footing that it had been sent to the Claimant at the same time as his contract of employment. But there was nothing in the contract or any other document to suggest that it was intended to form an express term. We did not think that could be inferred from it being provided to the Claimant at that time. It obviously made sense for it to be sent to him at the outset.

190. Insofar as this complaint referred to the Claimant not being given a chance to "settle in", there appear to have perhaps been two further strands to his case. One was that any appraisal of his performance should have taken account of the fact that he had not been fully inducted in all respects. However, Mr Dyson had wide ranging and detailed concerns regarding the Claimant's underlying capabilities and skills. It could not be said that these were matters which ought to have been attributed to the Claimant, for example, not having been inducted into some particular internal procedure of the Respondent.

191. Finally, there was a suggestion by the Claimant that the reference to not being given a chance to "settle in" embraced an argument, that when Ms Opiyo was promoted in February 2017, this had the effect of undermining him. The Respondent's short answer to this was that Ms Opiyo had not been promoted to

the Claimant's level, or above him. The Claimant nevertheless argued that her promotion had effectively undermined him, by taking some responsibilities and reporting lines away from him. The Respondent's case was that, to the extent that this was true, this should have been welcomed by the Claimant, as freeing him up, better to focus on his key responsibilities.

192. In the Tribunal's experience issues of this sort are very fact sensitive: one person's supportive freeing up is another person's deliberate undermining. In this case, crucially, the Claimant was fully involved in the dialogue about Ms Opiyo's promotion, which followed upon the departure of another member of staff. He was involved in working on her revised job description and the implementation of the change. Nor was there any sign of him voicing any complaint or concern about these matters at the time. We did not think there was sufficient here to constitute a fundamental breach of the implied duty of trust and confidence.

193. Finally, there was the complaint that the Respondent had not followed its grievance policy in dealing with the Claimant's grievances. In his further and better particulars, he identified that the specific paragraph relied upon was the one beginning as follows:

> The hearing will be held as soon as is reasonably practicable and, subject to any need to carry out prior investigations, usually within five working days of the receipt of your written complaint.

The Claimant's case was that the grievance hearing was not held within five working days nor as soon as was reasonably practicable. His cross examination of the Respondent's witnesses, and submissions, focused on this aspect.

194. Mr Coghlin submitted that, as the grievance hearing was held after the Claimant's employment had ended, the alleged breach was not arising or outstanding on termination, and therefore could not be considered by the Tribunal at all. We did not consider that to be a knockout blow. If the Tribunal had considered that it would have been reasonably practicable to hold the grievance hearing sooner than 6 April, and that it was a fundamental breach not to do so, the breach would have occurred before the date of dismissal.

195. However, as to the substance, given the need to involve another senior manager, and for the Claimant to have union representation, it was not surprising that a date for the grievance hearing could not be organised sooner than it was; and we found no basis to infer that the date of that hearing, as such, was deliberately put off.

196. As to the question of the probation hearing not being put off until after the grievance had been determined Mr Coghlin submitted that the pleaded complaint was not about that point, as such. But in any event, it also seemed to us that that particular point was essentially about the fairness of the dismissal process. So, even if it had been expressly pleaded as part of the complaint, would have been excluded from consideration by the **Johnson** principle.

197. Accordingly, all of the complaints of breach of contract ultimately failed.

Outcome

198. For all of the foregoing reasons all of the Claimant's complaints fail and are dismissed.

Employment Judge Auerbach on 2 February 2018