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EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr N Chowdhury v **Marsh Farm Futures**

Heard at: Watford **On**: 12, 16 & 20-22 February
14 & 15 March 2018 (in chambers)

Before: Employment Judge R Lewis
Mr S Bury
Mr R White

Appearances

For the Claimant: In person
For the Respondent: Ms S Clarke, Counsel

RESERVED JUDGMENT

1. The claimant has made a protected disclosure.

2. The claimant was not subjected to any detriment because of having made a protected disclosure, and his claims under s.47B Employment Rights Act 1996 (ERA) fail and are dismissed.

3. The claimant's claim of automatic unfair dismissal under s.103A ERA fails and is dismissed.

4. The claimant was fairly dismissed by the respondent and his claim of unfair dismissal fails and is dismissed.

5. The remedy hearing provisionally listed in July 2018 is cancelled.

REASONS

Executive summary

1. In light of the length of these reasons, we open with an executive summary, which we hope will make the remainder easier to follow. The delay in sending these reasons has been explained to the parties in separate correspondence.

2. This was the hearing of a claim in which the claimant contended that he had made a large number of protected disclosures, as a result of which he had been subjected to detriments, and ultimately dismissed. He complained that his dismissal was also unfair on general principles. The respondent denied that the claimant had made any protected disclosures, or been subjected to any detriment as a result. It denied that he had been automatically unfairly dismissed or unfairly dismissed. It said that he had been fairly dismissed for a number of acts of gross misconduct, of which the common thread was a wilful refusal to carry out reasonable management instructions.

3. We find that although the claimant made many observations and criticisms about the respondent, he made only one of the 29 protected disclosures which he claimed he had made.

4. We do not find that he was subjected to any detriment as a result, and note that on the contrary the respondent was often responsive and positive about changing its systems in light of the claimant's criticisms and comments.

5. We do not find that any protected disclosure was the sole or principal reason for the claimant's dismissal.

6. We find that the reason for the claimant's dismissal was that stated in his dismissal letter, namely four acts of gross misconduct.

7. While we have reservations about aspects of the disciplinary and dismissal process, we do not uphold the claim of unfair dismissal.

8. As we have found the dismissal to be fair, we do not need to make any finding about (a) contribution (i.e. whether the claimant was to any extent to blame for his dismissal) or (b) a Polkey chance (i.e. whether any procedural unfairness if put right would have made a difference). On the evidence which we have heard, our provisional view is that we would on those points have found (a) that the claimant contributed to his dismissal to a substantial degree, and (b) that there would have been, at least, a substantial Polkey reduction of his compensation.

9. Although in some paperwork there had been reference to a claim for arrears of time off in lieu, that claim was not identified in the definitive list of issues or pursued before us, and in the absence of evidence or submission, it has failed.

10. This was a case where case management issues were exceptionally challenging.

Procedural history

11. The tribunal file shows that this was the hearing of a claim presented on 18 September 2016. Day A was 7 July and Day B was 19 August.

12. The first case management hearing took place before Employment Judge Heal on 8 December 2016. The claimant appeared in person and the respondent was represented by Mr Delafield, a consultant. Judge Heal sent out a lengthy order the same day. Judge Heal's order definitively set out a list of issues. She allocated six days to the hearing, of which the first three were Wednesday, Thursday, and Monday 5, 6 and 10 July 2017. She allocated 3.5 days for evidence on liability.

13. The case duly came on for hearing in July 2017. It came before Judge Heal sitting with Mr Bury and Mr White. The claimant was in person and the respondent was represented by Mrs Huggins, counsel. As a result of issues being raised about disclosure, the hearing was unable to proceed. The hearing was adjourned and the tribunal made a detailed order for disclosure. Judge Heal re-listed the hearing for seven days to start on Monday 12 February 2018.

14. At paragraphs 6 and 7 of her order, Judge Heal directed that the claimant was to have remote access to his former work email account and was to send the respondent any resulting documents in pdf form.

15. On 13 September the claimant emailed the tribunal to state that he considered that he had difficulty using the remote access. He attached an email from an IT provider, who was representing the respondent, who on 21 July (nearly eight weeks earlier) had explained to the claimant how to gain access to his email account, and alerted him to receipt of a warning message which he was told was normal and should not trouble him. The correspondence came before Judge Heal who dealt with matters of time and in her letter of 11 October concluded: "Can the respondent provide the claimant with access to his emails without the risk warning appearing?" She made no order for that to be done, as the claimant has subsequently written. The tribunal did not hear any more from either side about this access issue.

16. We were told that on 13 October 2017, and in accordance with Judge Heal's order of July, the claimant had given further disclosure. Ms Clarke told us that DAS Law (the respondent's solicitors) had been unable to open one item, and had asked him to supply the item in a different format or in hard copy. The claimant had not done so, and when the issue was raised told us that he did not believe that DAS Law had been unable to open his attachments.

17. On December 12, the respondent's solicitors wrote to the tribunal to express concern about preparation for this hearing, and about the extent of disclosure. They wrote that on December 7 the claimant had emailed them with additional disclosure but "unfortunately this email from the claimant could not be opened by our systems due to the size of the attachments and the way that they had been added as a link to his email".

18. There was no further correspondence from either side. On 17 January, the parties were notified that one of the seven days allocated by Judge Heal was not available and that the matter would be re-listed before a different judge sitting with the same members.

Chronology of the hearing

19. The tribunal convened on the morning of Monday 12 February. It had been the tribunal's hope that after a short discussion about case management, the tribunal could begin reading with a view to oral evidence commencing that day. However, case management took so long that it became apparent that that would not be a useful course, and the tribunal spent that day in case management until mid-afternoon.

20. Two matters in Judge Heal's order required clarification. She had stated that the reason for dismissal was incapability. Ms Clarke confirmed that that was wrong. The only reason stated in the invitation to disciplinary, dismissal letter and appeal rejection letter was misconduct or gross misconduct. We proceeded on that basis only.

21. Although Judge Heal definitively set out the list of issues, and did not include a claim in respect of TOIL, she referred under remedy to a question of arrears. We declined to interpret that word as encompassing a claim for TOIL. There was before us no coherent formulated claim for TOIL, beyond the claimant's generalised assertion, and grievances throughout his employment, of needing more hours work than he was paid for.

22. Ms Clarke had prepared a 'position paper' in which she set out the respondent's case on protected disclosures. Helpful and clear though this was, it was not evidence, and could not supplement the omission of such evidence from the respondent's witness statements. We told Ms Clarke that she could cross-examine on the documents which were referred to in the paper.

23. It was not clear on the first day which side should be heard first. It seemed to us on balance right to hear the respondent first because it was the represented party, its witness statements had been prepared in professional style, and it seemed to us that the focus of this claim was the claimant's dismissal.

24. The tribunal met without the parties on Tuesday 13 February for reading. Ms Clarke helpfully submitted a concise reading list. The claimant was asked to do likewise, but declined on health grounds.

25. The two days 14 and 15 February were taken up partly with further case management, and with the brief evidence (given with the help of an interpreter) of Mr Shahel, who had accompanied the claimant at his disciplinary hearing. The main matter on these two days was the evidence of Mr Mohammed Rafi, the respondent's CEO and the claimant's line manager.

Allowing for delays, breaks and case management, the claimant cross-examined him for about seven and a half hours.

26. The claimant did not attend the tribunal on Friday 16 February, as he had been taken to hospital overnight. He produced a discharge summary from the hospital as instructed. The tribunal was unavailable on Monday 19 February.

27. On Tuesday 20 February (which was the final scheduled day) Mr Roy Davis, chair of trustees and of the personnel committee, and the dismissing officer, gave evidence and was cross-examined for the whole day. Through sheer good fortune, the tribunal, parties and representatives were able to extend the listed hearing by the next two days. On the morning of Wednesday 21 February, Mrs Anna Pedersen, who had rejected the claimant's appeal against dismissal, gave evidence. As a result of a point which arose in evidence, Mr Rafi was re-called that afternoon to deal with a single matter. The claimant began evidence that afternoon and gave evidence for one hour that day.

28. The tribunal sat for slightly longer than usual on Thursday 22 February, when Ms Clarke completed her cross-examination of the claimant in the course of a whole working day. At the end of the day, the tribunal set a timetable (confirmed by letter of the same afternoon) for the sequential exchange of word limited closing submissions, set dates for the tribunal to meet in deliberation, and provisionally set dates in July for its remedy hearing. Ms Clarke's written submissions were a helpful and focussed discussion. The claimant's were at times incoherent, and set out a range of workplace grievances and allegations, many of them beyond the scope of the issues identified by Judge Heal.

The claimant's health

29. Before the hearing began, the tribunal was sent a Med 3 form dated 8 February, stating that the claimant was unfit for work for four weeks due to depression and anxiety. After the first week, we were sent a copy of a prescription dated 7 February for Sertraline for 28 days, and a later prescription for Diazepam. We were informed that the hospital attendance on the night of Thursday 15 February had been the result of chest pain, but other than that information, the discharge note had been redacted, and the tribunal (and respondent) made no further inquiry about the point.

30. The claimant's health was a concern throughout this hearing. On the first morning, when asking the claimant if he were well enough to do justice to himself and to his case (a form of words used on a number of occasions and on several days) the judge clarified to the claimant that the next available slot in the tribunal's timetable to start a case of this length would be just before Christmas; and therefore, effectively in January 2019. The claimant appeared visibly distressed by the risk of a year's delay. He expressed a concern that the tribunal might form its own view of his health: we assured him that we had no skill or ability to do so. He said that he wanted to proceed.

31. The judge explained to the claimant at a number of points that the question of whether he was well enough was an open question, in the sense that the answer might change or develop, and the claimant should tell the tribunal what the situation was. Although the claimant made many references to feeling unwell, asked for a number of breaks and at times appeared to us (as medical lay people) unwell, he did not ask for any adjournment or postponement, and was plainly concerned that the case should be brought to its conclusion.

Time allocation

32. It was fortunate that the tribunal was available (as was Ms Clarke) to add to the allocated days. Oral evidence took five days rather than the 3.5 allocated by Judge Heal.

33. Before, and throughout the evidence, the judge reminded the claimant of the allocation of time, and of the time left available at each step. At the end of two days' questioning of Mr Rafi, the claimant, who was proceeding sequentially through Mr Rafi's witness statement, had reached paragraph 11 out of 56 paragraphs. He asked for more time to be allocated. At the end of one day of Mr Davis' evidence, the claimant asked for another day. Before beginning cross-examination, Ms Clarke recorded that she considered that she had not been allocated sufficient time, but then concluded a professional cross-examination within the allocated time.

34. We noted our powers under rule 45 of the tribunal's rules of procedure to set limits on the time available for evidence, and to impose a time limit even where the evidence had not finished. We did not agree to allow additional time for the claimant's cross examination for reasons which are more fully explained below. His lack of preparation and focus, and his inability or failure to follow the repeated guidance of the tribunal, led to a poor use of time. We had no confidence in his ability to complete cross-examination within any further reasonable time allocation. We did not consider it proportionate or fair to allow the claimant simply to continue undisciplined cross-examination until he thought he was finished.

35. We were also concerned that the parties would suffer injustice if this hearing were to go part heard, because having seen the claimant's case presentation, we could not envisage how he could do justice to himself in the event of a gap in the hearing of weeks or even longer. It was, on the contrary, all too easy to envisage that if the case resumed part-heard after a gap of weeks or months, there would be uncertainty and dispute about what had been said at this stage.

Disclosure and bundles

36. At the hearing in July 2017, the bundles before Judge Heal ran up to page 1375. We had a third bundle, pages 1376-1810, consisting of additional documents which we understood to be provided to us at the request of the claimant.

37. A further issue arose about the bundles which had been before the tribunal in July. They appeared in identical format as pages 1-1375. Judge Heal's note confirmed that she had said that they would be destroyed. That meant, in the conventional understanding, that the tribunal's copies would be destroyed, no doubt because they had been marked by the tribunal members during the July hearing. She therefore alerted the respondent to the need to produce fresh copies. No direction about this was given to the parties. The claimant told us on the first day that he had discarded the bundles, understanding them to be destroyed and replaced, but they had not been replaced. It turned out that he had not discarded them but still had them. The position was therefore that the claimant had at all times had the full bundles. If he had thought that the July bundles were to be replaced, he had misunderstood a remark made by Judge Heal. He had not asked the tribunal for clarification. In the run up to this hearing he had not asked the respondent to provide fresh bundles, or the tribunal to direct them to be provided. On his own account, he had come to the tribunal unprepared, and (presumably) thinking that he would on the first morning be handed a fresh set of some 2,000 pages to work from.

38. On the first day, the claimant complained that the 30 or so categories of disclosure ordered by Judge Heal in July had not been disclosed. He had not brought this to the attention of the tribunal since July. If that were the case, it was not a matter which could be dealt with at the start of the re-listed hearing without a lengthy adjournment. At the tribunal's suggestion, Ms Clarke in reply produced a table, showing with reference to each category, which documents had been produced, as well as the categories for which nothing could be located.

39. The claimant asked for the assistance of the tribunal in relation to the emails which he had been unable to access the previous July to September. The tribunal had not heard from the claimant that this was a problem since its letter to the claimant of 11 October, sent in reply to his letter of the previous month. There was no more that this tribunal could practically do about the matter at this hearing, save to record that the respondent asserted that access had been perfectly feasible, but the claimant had not availed himself of it.

40. The claimant's disclosure of October 2017, which DAS Law had been unable to open, was opened by Ms Clarke, who produced five paginated sets. The bundle was about 200 pages of additional material, and was referred to at this hearing as the October bundle.

41. The claimant's disclosure of 7 December 2017, which DAS Law had also been unable to open, was also opened by Ms Clarke, who again produced copies of a bundle of approximately another 200 pages, referred to before us as the December bundle. We record our surprise that the task which DAS Law twice claimed was beyond them seemed well within Ms Clarke's capabilities, and we were grateful for her professionalism in dealing with the matter. Our documentation totalled in excess of 2,000 pages.

42. There were in addition items on the claimant's laptop, from which he worked, which plainly were disclosable in principle, but which the claimant appeared not to have disclosed, and to which he referred during the hearing. The tribunal and Ms Clarke were flexible in looking at this material to see if it were of assistance.

43. The bundles presented three major, general problems. The first was their presentation. The bundles were disproportionate in volume, and unwieldy in arrangement. The contents were often repetitive, disorganised and burdened with email trails in reverse chronology.

44. The second problem was that despite their volume, the claimant was convinced that the bundles were incomplete, in the sense that they lacked items which he thought were relevant. In a revealing question he asked Mr Davis whether before the disciplinary he (the claimant) had had enough time to go through the '25,000 to 30,000 emails' of his employment in preparation of his defence. We thought that revealing, because it captured the claimant's inability to focus and select the relevant, and his belief that litigation depends on every conceivable item being available.

45. In reply to the claimant's general complaint about omissions from the bundle, the tribunal told the claimant that it could not deal with a generalised assertion that there had been incomplete disclosure; if at any point he asked about a specific identifiable item, the tribunal would try to deal with the point: in the event, this did not happen.

46. The tribunal also told the claimant if in the course of evidence it was referred to a copy of an item which was relevant but was not in the bundle, it would cross the bridge of that item when it came to it. The claimant in the course of the hearing showed the tribunal a modest number of items from his laptop, which were of limited relevance or assistance, save for material relating to Mr Salim's presence in the office, on which Mr Rafi was recalled.

47. The third problem, arising from the previous two, was that the claimant repeatedly cross-examined about documents which he could not refer to the tribunal, either because they could not be found, or due to the shortcomings in his own preparation. Ms Clarke was able to be of some assistance in these respects, but not invariably: no criticism of her is to be read in those words. It was a frustrating use of the tribunal's time when six people (the tribunal, the claimant, the witness and Ms Clarke) thumbed through the bundle to find an item which the claimant (or occasionally a witness) were sure was there, but which was not identified in a witness statement, and could not be found.

48. In that context, the tribunal declined to print, copy or consider the additional documents which the claimant throughout the hearing emailed to the tribunal overnight.

Witness statements

49. As the case had been fully prepared for hearing in July, the parties were at liberty to rely on the witness statements available then. Each of the three

witnesses called by the respondent relied on those statements. It followed that the claimant had been in possession of the respondent's witness evidence for some eight months before the start of this hearing.

50. Judge Heal had given leave for amended statements in the light of any further disclosure to be served by 12 January 2018. Shortly after midnight on Sunday/Monday 11/12 February (i.e. the first day of the hearing) the claimant emailed the tribunal (but not the respondent) his new witness statement. It was brought to the attention of the judge, who noted that it was 205 pages long. The judge asked for a word count, which was 93,000 words, more than four times the length of this Judgment. The tribunal refused to direct it to be printed and copied, or to be relied upon. Had it been admitted, it would have led to a lengthy adjournment, and subverted the entire discipline of case management. At our request, the claimant emailed a copy to Ms Clarke. Both parties relied on the statements which were available the previous July.

51. The tribunal asked each of the respondent's witnesses for introductory and scene setting evidence. That was invaluable; Mr Rafi gave a concise history of the respondent and its work; he and the other witnesses gave a short introduction to their role in the work of the organisation and, in the case of Mr Davis and Mrs Pedersen, to their external work and activities. Our task was considerably hindered by the failure of DAS Law to comply with the tribunal's order, and basic good practice, of marking up each witness statement with the bundle page reference of every document referred to. In Mr Rafi's case, we estimated something in the region of 150 such omissions. The failure was particularly inexplicable, given the time available as a result of the unexpected adjournment of the hearing in July 2017.

52. Witness statements on both sides covered ground beyond the scope of the issues before the tribunal. We declined to allow cross examination on such material.

Covert recording / filming

53. It was common ground that at his disciplinary hearing the claimant had asked for permission to audio record the meeting and been refused it. He had made a secret audio recording nevertheless. It emerged at this hearing that he had also made secret video footage. The judge reminded the parties (and others present at the hearing) that recording in the tribunal room was forbidden, and asked the claimant to assure the tribunal, as he did, that he was not recording the proceedings.

The case management challenge

54. The tribunal is familiar with the difficulties faced by members of the public who represent themselves, particularly where the opposing party is legally represented. We do not expect a lay member of the public to have professional understanding of the law and procedures of the tribunal, but we do expect parties to come to a hearing reasonably well prepared. We endeavour to make every allowance which we fairly can, in accordance with the overriding objective, for the ignorance or inexperience of a party in person.

In this case, we were also called upon to make allowance for the claimant's ill health. The claimant showed the tribunal occasional signs of stress, but generally conducted himself with courtesy and addressed the tribunal appropriately. Although the claimant referred once or twice to language difficulties, his spoken and written English were, we were confident, not a barrier to his participation in the life of the workplace or the work of the tribunal.

55. That said, the claimant's preparation and presentation of the case fell far short of enabling him to do justice to the case which he wished to put.

56. The claimant lacked insight into the requirements of reasonable case preparation, and into the impact on the tribunal and the respondent of his defaults. The extreme example was his submission to the tribunal of the 205 page witness statement a matter of hours before the start of the hearing. He had not appreciated that if the statement were to be used, a number of plain logical consequences followed. The tribunal would need at least four hard copies, which it was his responsibility to provide. The respondent needed at least one hard copy, and sufficient time to read it, and prepare its defence in reply. The tribunal timetable would be severely eaten into by the time needed to read a document of that length.

57. The claimant's difficulties with using time effectively were conspicuous and recurrent. Repeatedly the tribunal advised and counselled him about the use of time, and about timetabling. We endeavoured to give him every opportunity to use time more effectively, without interfering with our judicial impartiality.

58. Repeatedly, the claimant squandered the finite time available to him to cross examine by lengthy and repetitive cross-examination on irrelevant points. It was repeatedly necessary to remind him that the legal issues were only those identified by Judge Heal, and that the factual issues for which he was dismissed, set out in the pre-disciplinary letter and in the dismissal letter, were the focus of the tribunal's work. It was repeatedly necessary to remind the claimant that his strength of feeling about an issue did not render that issue relevant, and that there might be many issues which the tribunal would not hear about, and had no power to resolve.

59. The claimant for example asked Mr Rafi about who had supervised the respondent's building works in 2011 (long before he took up his post); he asked Mr Davis about arrangements by which Luton Borough Council nominated Councillors to the respondent's board; he clearly wanted to cross-examine Mrs Pedersen about his personal disputes with Luton Borough Council, which, we were told, related to premises within the ward for which Mrs Pedersen is a Lib Dem councillor. He sought to introduce satellite attacks on the integrity of Board members who had little involvement, if any, in the events before us. These are no more than examples. In his closing submission, the claimant advanced a case based on a far-reaching conspiracy of managers and Board members, working together for corrupt motives: there was no evidence to support that case, which was in any event not before the tribunal.

60. While we understand the difficulty faced by a party in facing the discipline of cross-examination, the claimant appeared to us to have prepared little if at all. He seemed at this hearing to be reading through the respondent's witness statements sequentially for the first time, and asking any questions which came to mind. When, as was almost inevitable, the claimant was given an answer which was not what he wanted, he repeatedly (despite guidance) answered the answer with a lengthy exposition of his views on the point.

61. Repeatedly throughout cross-examination he referred to documents which were either not available at all, or to which he could not refer the tribunal. He plainly had not prepared to address this point.

62. Another unhelpful feature of this case was the proliferation of emails. The tribunal faces the problems caused by email very frequently. It is not a medium which encourages reflection or thoughtful expression. It provides for instantaneous response, to a multiple readership, and therefore for reiterations of the same thing. It encourages a tendency to insist on the last word. The tribunal treats evidence based on email with some general caution.

The claimant's approach

63. A recurrent feature of this hearing that when asked about a matter which plainly was not to his credit, whether in the course of his employment, or in case preparation or management, the claimant fell back on stating that he was not well at the time in question.

64. The claimant did not assist his case by embellishing and by extreme language. By the time of this hearing, Judge Heal's definition of the issues had been in possession of the parties for some 14 months. It did not assist the tribunal or the claimant that he attempted to add to it with allegations of racism and corruption. He used personalised language in attacking board members and former colleagues. He introduced for the first time allegations of inconsistency of treatment as a basis of unfairness. Our approach to all of these matters was that the claimant did not have permission to go beyond the confines of the list of issues of December 2016.

65. The claimant did not assist by adopting the artificial approach of painting the case in extremes, refusing to accept any positive action or language on the part of the respondent if it ran counter to the picture which he wished to paint of an unremittingly hostile work environment. He did not assist his case by consistently blaming everyone around him for any adverse event, while not accepting personal responsibility for any error or shortcoming.

The tribunal's general approach

66. We preface our findings with observations of general application. Evidence and argument in this case spread to a wide range of matters. Some of it explored some of the points in detail. Where we make no finding about a matter of which we heard, or where we do so, but not to the depth to which

the parties went, that is not oversight or omission. Our approach reflects our assessment of the extent to which the issue was relevant and of assistance to us. We depart from strict chronology where we think that will make our reasons easier to follow.

67. While the above is commonplace in the work of the tribunal, it was a particular issue in this case, given the indiscipline of the claimant's preparation (or lack of it) and presentation.

68. We record our appreciation to Ms Clarke, not only for her assistance to the tribunal, but for the extent to which she offered assistance to an unrepresented opponent, consistent with her duties to her own client. In that respect, she conducted the case markedly within the spirit of the overriding objective. She represented her client firmly, without ever permitting the strength of feeling on both sides to interfere with her professional obligations.

69. This was a case where inescapably, part of our judgment turns on credibility. The claimant placed before the tribunal the fundamental integrity of the respondent organisation, members of its board, its employees, and its external contractors. He challenged the accuracy and authenticity of documents, including some which he had signed. He invited us to find that the procedures to which he was subjected, and which led to his dismissal, were a sham, conducted in bad faith. Those were, taken together, allegations of the utmost gravity, which, to a huge extent, depended on the claimant's oral evidence and analysis. Our overarching finding is that where we were asked to rely upon the claimant's uncorroborated evidence or analysis, we do not consider him to be a reliable witness or narrator, and we do not accept his uncorroborated evidence. Our general approach has been that we prefer the evidence and accept the documentation of the respondent for the main reasons set out below, operating cumulatively.

70. We make every reasonable allowance in the claimant's favour for the problems which he encountered in the tribunal. He was on unfamiliar territory, with inadequate understanding of law and procedure. He had not prepared for this hearing, and, as stated separately, found the task of efficient management of time beyond him. We accept that he was certificated unwell throughout the proceedings. We make such allowance as is necessary for his working in a second or third language, noting that there were very few occasions when he asked for clarification, or when the tribunal or Ms Clarke asked for clarification of something he had said.

    70.1 The claimant's approach to events was unrealistic. The tribunal does not expect of any party or witness a standard of perfection at work. We proceed on the basis that human beings at work make mistakes, and say or do things which with hindsight, might have been better said or done. The claimant at no point accepted that an action by a colleague on behalf of the respondent with which he disagreed might have been, for example, a mistake in good faith. He likewise did not accept that any action of his might be legitimately criticised, either at the time, or in this tribunal.

70.2 The tribunal's view is that it is of the essence of professional work that individual judgment may lead different professional advisers to form legitimately different views of the same issue or different solutions to the same problem. The tribunal is not qualified to comment on the claimant's accountancy knowledge or skills. We note that he at no point accepted the legitimacy of the professional work or assessment of any other person. When it came to accountancy matters, his entrenched view was that he was right and nobody else was.

70.3 The claimant did not, in general, accept responsibility for problems or mistakes, and was on the contrary, quick and determined to shift blame to others. We refer to our findings in particular about the acts of gross misconduct for which he was dismissed.

70.4 The claimant presented a case which was not nuanced, in the sense that he showed little insight into the gravity of his allegations (for example of forms of corruption), and no insight into the proposition that an allegation of extreme gravity requires a high level of proof.

70.5 When taken in cross examination to matters or documents which showed that he was factually wrong in something that he said or did while in employment or in the tribunal, the claimant found it impossible to accept that he had been wrong. A striking instance is in relation to the procedures certificated in the Charity Commission return (see paragraphs 118-121 below). The claimant denied that there was no employee right to contractual sick pay, even in the face of his own contract of employment (66). He asserted firmly that he had attended the disciplinary meeting at which he was dismissed not knowing that he was accused of gross misconduct which could lead to his dismissal. The first sentence of the invitation letter of 16 March 2016 (1037) said exactly that.

70.6 The claimant did his case no credit by occasional descent into absurdity. Mr Shahel's evidence was one instance. Another was when the claimant alleged that a security company named Frazer was in a corrupt relationship with Mr Rafi because of an alleged family bond. When pressed, he stated that this allegation rested on the fact that a security guard, Mr Ali, called Mr Rafi "uncle." The tribunal accepts that that word may be used as an honorific or as a nickname, is not necessarily indicative of a blood relationship, and is not in isolation evidence of corruption. We add that if there were indeed a corrupt or covert family bond, Mr Ali appeared to have made no secret of it.

70.7 The tribunal found that a recurrent theme of the claimant's employment was his unwillingness and inability to accept the legitimacy of line management, and the direction of line management authority. The claimant showed little understanding of the distinction

in the relationships which he had with his line manager, Mr Rafi, and Mr Rafi's accountability to the Board. There were repeated instances in the bundle of email trails (e.g. 949- 951) when Mr Rafi gave the claimant a straightforward simple legitimate instruction or request, only to find that it elicited a disproportionate and unnecessary email trail of questions.

70.8 A striking example arose at the claimant's disciplinary meeting. We make no finding against the claimant solely on the basis that he recorded the disciplinary meeting. However distasteful the practice of covert recording, it has become increasing common, and the tribunal must take care not to allow its distaste for the practice to interfere with relevant fact finding. The point which struck us was that at the start of the disciplinary meeting, the claimant asked for permission to audio record and was refused. He then did exactly that which he had been instructed not to do, and for good measure took covert film footage as well.

70.9 The tribunal noted other instances of the claimant's difficulty in accepting the authority of others. We were in particular struck by an answer given by Mrs Pedersen, when the claimant insisted on an irrelevant line of cross examination about her responsibilities as Borough Councillor. She stated that the claimant had applied for planning permission to erect a fence at his property, the request had been refused by officers, after which the claimant had erected the fence. While the merits of the planning application had nothing to do with the tribunal, we noted an apparent instance of the claimant's refusal to accept an exercise of authority with which he disagreed.

70.10 The claimant left us unconvinced that he fully understood the nature of some of the documentation or his own allegations. He repeatedly used the term "conflict of interest" freely, without analysis of whether he was referring to true conflict, or to the existence of potentially separate interests. We do not fault the claimant for misunderstanding a technical term; he can be faulted for failing to be sure of the accuracy of his own use of language, and for basing serious allegations on a term which he did not properly understand.

70.11 The claimant seemed to us, as a matter of overview, to fall into the trap of identifying his experience on the footing of a bad faith factor being in play (detriment for protected disclosures) which remained for him to prove. He made the mistake of assuming that the foundations of his case had been laid, without full or proper analysis.

70.12 We noted the occasional emotion underpinning the claimant's presentation. We attach no weight to it as a factor for or against the claimant. We attach some weight to the calm and objectivity shown in evidence by the respondent's witnesses, and we were assisted by their analytical skills.

Setting the scene

71. At the start of his evidence, and in reply to a request from the tribunal, Mr Rafi gave the following summary, which the tribunal accepts. The respondent is a company limited by guarantee, and a registered charity. It is a legacy organisation, in the sense that it manages Futures House, Luton, a building completed in about 2011 as part of government funded regeneration programmes.

72. Futures House, according to Mr Rafi, currently houses three broad functions; a community function (play area, café, meeting hall); commercial units (offices, a fast food outlet, and about 15 SME business units); and large units let to public services. The organisation currently employs about seven full time and seven part-time staff and Mr Rafi has been its CEO since 2008. He had previously worked in urban regeneration in London. He is accountable to a board of about seven, who are from stakeholder organisations, some nominated by Luton Borough Council. (We declined to permit the claimant to cross examine about the nomination procedure for board members).

73. Mr Rafi said that the turnover in 2016/17 was about £550,000. The respondent has no public funding but generates income by lettings, grant funding and fund raising. All staff are based at Futures House. There have been, and continue to be, structural problems relating to the state of the building.

74. The claimant submitted an application for employment which indicated the ACCA qualification in accountancy (169), a BSc degree in Applied Accounting (168) and employment in a number of public service organisations in a finance and / or HR capacity. His employment with the respondent dated from 3 July 2013. His appointment (63) was to the post of "Finance and Admin Officer" and was for 35 hours per week on a salary of £18,000 per year, which the claimant understood to equate to £10.00 per hour. Before the claimant's appointment, accountancy services had been provided by a visiting member of staff with external audit support.

75. The claimant had a personal accountancy practice based at his home. He claimed to have up to 100 clients, but that the work of the practice took very little of his time, and was undertaken by his employees. He was also involved in community and public service organisations in his own right.

76. The claimant's appointment was to a relatively modest salary for a post with limited responsibilities in a modest organisation. The claimant's job description (157) set out key responsibilities which were primarily financial, but included a number of administrative matters, included staff personnel matters, and concluded "This list is not exhaustive or exclusive and you may be required to carry out any other reasonable duties." The appointment was, in the first instance, for nine months, i.e. until the end of the financial year 2013-14. We heard no evidence about the decision to extend the claimant's employment after that.

77. The claimant's contract of employment stated (64):

> "There is no entitlement to overtime in this position; however, you will be expected to work any additional hours necessary to meet the operational requirements of the business for which TOIL will be provided. Please refer to Schedule 2."

We were not referred to a written TOIL procedure.

78. The claimant's line manager was at all times Mr Rafi. They worked in adjacent spaces.

Working arrangements.

79. Shortly after taking up post, the claimant opened up a series of disagreements with the respondent about his working arrangements, some of which must have been apparent to him when he accepted the respondent's offer of employment. These issues were never resolved to the claimant's satisfaction. We find that they tainted working relations throughout his employment, and that the claimant, in our finding, became fixated by both the primary complaints which he had raised, and his sense of unresolved grievance about their outcome.

80. The main issues referred to in the previous paragraph were (1) the hours which the claimant worked, with the claimant from early on in his employment seeking to reduce his hours below 35 per week; (2) the system for taking and claiming TOIL; (3) the level of his pay: the claimant expressed his pay as an hourly equivalent, calculating his starting pay as about £10 per hour, and seeking to increase to £20 per hour; (4) the extent of the claimant's duties, and whether it was necessary to employ or retain another person or persons to support the claimant, particularly in light of the reduction in his hours; and (5) whether the claimant's job title should be, as the claimant wanted, Chief Finance Officer. Taking these issues together, it is not difficult to see that the claimant's fundamental wish was to enjoy better pay and higher status, while working fewer hours.

81. We were taken to trails of emails in which all of these issues were canvassed. We disregard events of autumn 2013, when the claimant required a period of short working because of family emergencies, and in relation to which the respondent reacted supportively and appropriately.

82. We accept that Mr Rafi, with whom the claimant discussed and sought to negotiate his terms, did not have unlimited authority in these matters, and needed to refer to the Personnel Committee, which was a sub-committee of the Board, and, like the Board, was chaired by Mr Roy Davis.

83. Our material findings are the following:

    83.1 By early 2014 it was decided that the claimant would work 25 hours per week, working between 10am and 3pm, Monday to Friday (262). We find that this was agreed, and we reject the claimant's assertion that it was imposed upon him. We accept that he tried, and failed, to negotiate for more hours, possibly up to 30.

83.2 By September 2014 the claimant's hourly rate was £16.15 per hour, backdated to 3 July 2014 (i.e. the first anniversary of the claimant joining) (316): the claimant had asked for £20 per hour, but this had been rejected.

83.3 The saving in budget which followed from reducing the claimant's hours from 35 to 25 enabled the recruitment of Ms Okole, an Administrative Officer (262) who was appointed in about May 2014. It became apparent that the claimant did not value or request her support, and we accept that her role in supporting the claimant in his work was limited in practice.

83.4 The claimant put to the respondent that he could be supported by Mr Salim, an employee of his accountancy practice, for up to 10 hours per week. By 28 March 2014, Mr Rafi agreed this in principle (262). We understand that Mr Salim was retained on an "as and when" basis, at an hourly rate of £10.

83.5 We find that the claimant was sometimes tasked with responsibilities which arose organically out of the needs of the organisation, and which may not have been referred to expressly in his job description. We accept that the tasks which he was asked to undertake fell within the broad general remit of his role, and that the claimant was an appropriate employee to be tasked with them. We were shown no evidence to indicate that the claimant was tasked with a responsibility which appeared beyond his capability, or excessive in volume of work, or subject to an unrealistic timetable. We also saw no evidence of the claimant refusing a task on grounds of inexperience or lack of knowledge, as opposed to raising concerns (as he did) about the availability of time and the level of remuneration.

83.6 The correspondence which we saw about this group of issues, certainly up to September 2014 (316), was largely courteous and professional on both sides, and contained no indication or suggestion of bad faith on the part of the respondent.

83.7 It is not our responsibility to make a finding as to whether the claimant was well managed or badly managed in relation to these issues. We make a number of specific findings.

83.8 First, the claimant was appointed to a full-time role, with a range of general responsibilities which on paper were plainly within the capabilities, experience, training and education set out in his application. To the extent that he was asked to undertake tasks which were not in the original job description, or which were developments of generic tasks in the original job description, we had no evidence that those requests were anything other than legitimate managerial judgment calls by Mr Rafi or, if appropriate, the Personnel Committee or the Board.

83.9 While we have noted that the claimant's starting pay was modest, we note also that with effect from his first anniversary, his hourly rate increased by over 60%, with a prospect of a review which could have led to a doubling of his original hourly rate by his second anniversary, if all had gone well (316).

83.10 Thirdly, we note that the respondent was flexible to the claimant's requests for variations in his hours, and sought only to impose structure by core hours.

83.11 Fourthly, the respondent was open-minded to proposals to create a subordinate role out of part of the claimant's responsibilities, and agreed in principle that this role could be undertaken through the claimant's accountancy practice. In light of the claimant's concerns about procurement standards and potential conflicts of interest, this was generous and pragmatic.

83.12 Finally, both parties appear to have agreed a blurring of lines of demarcation between the claimant's accountancy practice, and his responsibilities as an employee of the respondent, with an agreement in due course that the respondent would use the IT package which the claimant used in his practice, of which one consequence was that the claimant could work from his private office (i.e. his home) on the respondent's work. This seemed to us at odds with the claimant's assertion that from early on in his employment Mr Rafi deliberately subjected him to unfair and undue pressure and intimidation in bad faith, either as retaliation for his enquiry into alleged wrongdoing, or to fill his hours to prevent such enquiries.

83.13 Although the claimant's background was in the public sector, it may not have been in the voluntary sector, and the claimant may not have been prepared, when he came to the respondent, for the demands of working in the voluntary sector. He may in particular not have been sensitive to the demands placed on senior staff by the combination of limited resource, public expectations, the requirements of stakeholders, and transparency and public accountability. We accept that these factors, separately or in combination, are inherent in the sector, and we make no criticism of Mr Rafi or colleagues as to how they managed them.

84. The claimant had appraisals in August 2014 (287-303) and August 2015 (669- 693, 706-730). Mr Rafi was the appraiser. Those were important documents, particularly the 2014 appraisal, as a large part of the claimant's allegations of making protected disclosures was taken word for word from the appraisal documentation.

85. The structure of the appraisals was that the claimant completed a self-appraisal, and there were then meetings and discussions between the claimant and Mr Rafi about the contents of the documentation. The process did not necessarily demand agreement on all points on both sides, but could be definition lead to prolonged email exchanges. We do not criticise Mr Rafi,

after a protracted process in 2015, for instructing the claimant to sign the final version. We accept that the documents signed by the claimant were in a form which he had seen and agreed for those purposes. In evidence he stated that he had not seen or approved the outcome documents. We do not accept that evidence as negating what was written. We accept that Mr Rafi made an appropriate judgment call as manager in requiring the claimant to end the process; we do not accept that by doing so he overbore the claimant's free will or ability to express dissent.

The claimant's disclosures

86. We now turn to the issue of whether, in that setting, the claimant made protected disclosures as identified by Judge Heal at section 6 of her order of December 2016 (39-40). We follow her numbering. We refer to disclosures 6.2.1 to 6.2.27 in her order as disclosures 1 to 27 inclusive, and we call 6.3.1 and 6.3.2 disclosures 28 and 29.

87. We note that at section 6.4 of Judge Heal's order, she adopts the language of the Employment Rights Act section 43B (1)(a) and (b), which states as follows:

> "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."

88. In a helpful submission, Ms Clarke referred in particular to Cavendish Munro v Geduld 2011 IRLR 38; Eiger Securities v Korshunova 2017 IRLR 115; and Chesterton Global v Nurmohamed 2017 EWCA Civ 979. We accept the broad propositions that a qualifying disclosure must be of information, not mere allegations or advice on general principles. We agree that such information must tend to show breach of an identified legal obligation, which (as said by the EAT in Eiger) 'did not have to be detailed or precise but it had to be more than a belief that certain actions were wrong .. because they were immoral, undesirable or in breach of guidance without being in breach of legal obligation.' The EAT in that case went on to state that identification of the legal obligation was 'a necessary precursor to the decision as to the reasonableness of the claimant's belief.' While we accept Ms Clarke's helpful reference to the four considerations of public interest in Chesterton Global, in the event we only had to consider that point once, as set out in paragraph 91 below. However we accept in principle that where Ms Clarke put to us that many of the claimant's observations were matters of internal practice, and not of public interest, her point was well made.

89. We approach this portion of our judgment by considering the disclosures separately, and by making the findings of fact appropriate to each disclosure at this stage. If we had sought to approach the matter by setting out a full

chronology, and cross referring to each of the protected disclosures, this judgment would have been, in our view, inordinately long and a great deal more difficult to follow.

90. Disclosure 1, like a number which followed, was drawn from the claimant's completion of his 2014 self-appraisal form (287-288). In reply to the first question "Which of your objectives have you undertaken most effectively?" the claimant answered: "All." There then followed a long list of significant contributions, of which the recurrent feature is that the claimant wrote that he found that the annual accounts for 2011-2012 prepared by his predecessor were, in his view, inaccurate, required amendment which he undertook, which in turn identified systems errors, which he had been instrumental in correcting. He followed that account with a list of 17 items of "some of the findings which I have come across". Disclosure 1 was item 2: "Payments to self-employed must be done in accordance with HMRC guideline otherwise we will be liable for non-compliance and might result in penalties by HMRC etc, e.g. payments to S Ali, S Bari." In the previous sentence the claimant wrote "Staff payments should not be treated as invoice."

91. Taking these two paragraphs together, and giving the words used their ordinary and natural meaning, we find that the claimant has conveyed to the respondent information tending to show that employees, of whom two were named, have been erroneously assessed as self-employed, and paid on that basis, when the correct basis should have been that they were employees, and therefore liable to PAYE which the respondent had not paid. We accept that the claimant had a reasonable belief that the respondent was under a legal obligation to account properly for statutory deductions. We find although only two are named, the statement is a matter of public interest in relation to proper accounting by the respondent, proper governance of the respondent, and its liabilities towards the two named individuals.

92. On the above basis, we find that the claimant made a qualifying disclosure. He did so in or about the first week of August 2014. We go on to find that that is his only qualifying disclosure.

93. Disclosure 2 arose out of a general statement at the end of the same portion of the 2014 self-appraisal (289):

> "Although I have revised old accounts and submitted to relevant regulatory bodies on the basis of the information that was available at that time but I believe more corrections would be required on the basis of currently available information. MFF should act upon the latest available information and where necessary accounts should be adjusted and resubmitted to relevant authorities to avoid any future legal/compliance consequences. Any overcharges for services should be paid back to relevant individual or organisation to avoid legal/compliance consequences such as Money Laundering Act etc. Revised accounts should be filed as soon as possible to avoid charges of misleading donors, grant providers, Local Authority etc since if any third party has made a decision on the basis of published and filed accounts then that might have significant consequences."

94. It will be seen at a glance that that paragraph is long on generalisations, and that it fails to identify a single specific. It has two recurrent themes. One is

that the 'old' (i.e. 2011-12) accounts need to be revised, and re-submitted, more than once if necessary, in light of fresh information. The other is that if it is demonstrated by subsequent information that there has been an overcharge, then a repayment should be made. In that context, Ms Clarke rightly drew to our attention, and cross examined the claimant to the effect that, the accounts submitted by his predecessor for 2011-2012 (1204) were not materially different from the amended accounts for the same year which the claimant himself submitted (1217), and that the main difference revealed by comparing the two was the designation of a Rates item and a Projects item.

95. We find that Disclosure 2 was not a qualifying disclosure. The pleaded case is that "The claimant said that service charges were being overstated to tenants". The record is: "Any overcharges for services should be paid back." The claimant has made a statement of general principle. He has not given information and we note that when he revised the accounts, he did not change the total figure for income in 2011-2012 which included rent and service charges (£307,377, pages 1210 and 1227). There was no evidence that at any time the claimant advised the respondent that it was required to repay a specific sum to an identified person. We find that the claimant cannot have had a reasonable belief that overcharging actually took place.

96. Disclosure 3 is more problematical. The claimant alleged that the 2011-2012 accounts were not prepared on an accrual basis. On 31 July 2013 the claimant reported (187) that the software in use when he joined was non-compliant with accrual basis recording, but that the new software which he had introduced from his own practice was. However, the original accounts for 2011/2012 stated (1212) that they were prepared on an accrual basis, as was subsequently confirmed by the accountant who had prepared them (1203).

97. We are not convinced that it has been shown to us that there was a legal obligation to submit accrual basis accounts, nor has it been shown to us that the 2011/2012 accounts were prepared originally in error, even created by software. We do not accept the claimant's bare assertion to that effect. We have no other reason to doubt the report or assertion of the previous accountant. In so saying we attach some weight to the fact that the amended 2011/2012 accounts appear to us to be very similar to the original ones. We find that the claimant did not have a reasonable belief that there was a breach of a legal obligation, and therefore we find that disclosure 3 was not a qualifying disclosure.

98. Disclosure 4 is pleaded as "Mileage claims by employees were taxable and should be disclosed to HMRC" which follows item 17 on the claimant's self-appraisal (288), save for the addition of the words 'by employees.' In August 2015 the claimant recorded that the matter had been declared to HMRC (670). We agree with Ms Clarke's submission that the claimant simply provided advice without information in a statement of general principle, and that that was not a qualifying disclosure.

99. We take this opportunity to note in context that in relation to this alleged disclosure, like its predecessor, the chronology runs counter to the claimant's assertion that he was penalised for making protected disclosures. Both in relation to the 2011/2012 accounts, and mileage expenses, the claimant subsequently reported having remedied the error which he had identified, and we saw nothing in the evidence which indicated an attempt to prevent him from doing so, or any negative language in response. He was, on the contrary, allowed full scope for the exercise of his professional judgment, and there was ample evidence that the respondent accepted the claimant's professional advice without challenge.

100. Disclosure 5 related to the list of creditors in the 2011/2012 accounts. A fraction more flesh was placed on this at item 10 in the claimant's appraisal: "Creditors list does not contain specific names and also amounts are missing from the list e.g. Shell Gas Direct Limited." The creditors lists in both the original and the amended accounts (1216 and 1231) show the item "Building-Gas" repeated twice with sums of money.

101. It has not been shown to us there was a legal obligation to identify the gas provider. We say so in particular because gas usage and expenditure is a matter for which an invoice trail is available or obtainable, and it was open to the claimant, when revising the accounts, to do that which he claimed his predecessor had wrongly failed to do, namely obtain the invoices, check the supplier details, and insert the name of the supplier. His failure to do so indicates a lack of reasonable belief; we find that there was no qualifying disclosure.

102. Disclosure 6 related to VAT returns. It is not referred to in the appraisal. The pleaded issue was "The respondent did not do its VAT returns properly in that they did not pay the full amount and the disclosure was not correct: the amounts shown as income and expenses were not correct."

103. In November 2013, at the end of the claimant's first full quarter in employment, the respondent clearly over declared, and on 27 November 2013 received a refund of a fraction under £10,000 (1240). One quarter later, while the claimant was in post, the respondent was on 14 February 2014 informed of a VAT penalty of just over £4,500, which was fully suspended, as HMRC accepted that the penalty related to careless inaccuracy, as set out in the explanation given by the claimant (241), which appears to be summarised as errors by the claimant's predecessor (240-243).

104. It has not been shown to us that the claimant made the disclosure as pleaded. To the extent that the report given by the claimant to the respondent was that he considered that his predecessor had committed an inaccuracy which he had remedied, we do not accept that that was a matter of public interest: it was a matter of internal management, and reporting that the claimant had done that which he was employed to do. We do not accept that one quarter's careless inaccuracy constitutes a breach of legal obligation in relation to a monitored rolling system such as VAT assessment.

105. We accept Ms Clarke's submission that disclosure 7 has not been proved to have been made at all. It is rejected on that basis: we find that the claimant has not made good his assertion to have informed the respondent that 'Non-domestic rate relief was done using incorrect figures.'

106. We understood disclosure 8 to refer to the last sentence quoted at paragraph 93 above from the claimant's self-appraisal. The claimant's point was that if the respondent applied for grant funding, and attached the 2011/2012 accounts, which he asserted were inaccurate, the respondent was at fault in applying for grant funding on the basis of inaccurate information. That would be a generous clarification and reading of the words used in the appraisal, which are vague and general, and lack the specificity of the pleaded allegation.

107. We do not find that the words used in the appraisal document constitute a qualifying disclosure, because they seem to us no more than a bald general assertion. We are not convinced that the 2011/2012 accounts were submitted with incorrect figures, not least because the claimant made very little change to them when he amended the accounts. While we recognise that a general sense of probity requires a charity to apply for grant funding on the basis of accurate financial data, the respondent applied on the basis of audited accounts. The source of a relevant legal obligation has not been identified.

108. Disclosure 9 relates to sick pay. The claimant's contract of employment, which we accept was a template, stated as follows (all emphases added): "You <u>are entitled to Statutory</u> Sick Pay <u>strictly in accordance with statutory entitlements</u>. However, in addition, the company <u>may provide</u> further sick pay on the following terms.." (66). The language is abundantly clear. It means that SSP will be paid in every case; and that in the exercise of discretion, a greater sum may be paid in some instances.

109. On 31 March 2013 the claimant wrote to Mr Rafi: "We have paid sick pay to Ishaq but not to Yasmein, Lyndsey and others. Please let know whether we should pay them to keep our policy same for all." (513). That was stated to contain disclosure 9.

110. The context was Mr Rafi's email of 5 March, sent to a number of members of staff, including the three persons named in the previous paragraph, in which he wrote, "I am writing to give you notice that changes in relation to SSP will be implemented from 1st April 2015 for any absences occurring on or after that date. For the avoidance of doubt any further sick pay will only be paid at the Company's discretion and exercised in serious and specific cases." (537)

111. We were shown legal advice subsequently obtained by the respondent to the effect that the email of 5 March did not represent a change of policy, but confirmation of existing policy.

112. We do not agree that the claimant's email carries the interpretation that there might be breach of a legal obligation not to discriminate in accordance with the Equality Act. The claimant had an HR responsibility and background. He did not expressly or by implication adopt the language of the Equality Act. He

did not state or imply any relationship between any difference in treatment and a protected characteristic of any of those whom he named. He advised on the desirability in principle of consistency of treatment. We do not find that this was a qualifying disclosure.

113. Disclosure 10 was the proposition that if the respondent 'did not follow internal controls it might not apply its charitable funds properly.' We do not find disclosure 10 to have been made out as set out by Judge Heal. It was a general allegation about financial propriety and controls. We find that it was insufficiently clear as to what was said, to whom, when, and what precisely engaged the protected disclosure provisions. In cross examination the claimant embellished startlingly on this disclosure saying, "I told the CEO people were stealing money. The CEO was holding £500 petty cash." Despite the gravity of this allegation, the claimant failed to identify a single specific untoward event or perpetrator. We attach no weight whatsoever to the fact that the CEO, Mr Rafi, carried a petty cash float, if indeed he did.

114. We consider that disclosure 11 in effect replicates disclosure 2, and we repeat our above findings.

115. We take disclosures 12 and 13 together. They reiterate what was said in the 2014 appraisal, and particularly in the general overarching paragraph at the conclusion set out at paragraph 93 above.

116. We repeat our findings given at paragraphs 94 and 95 above. The material part of the appraisal is generalised statements of practice and principle. We do not accept, for reasons stated above in our discussions of the original accounts, and the near identical amended accounts submitted by the claimant, that it has been proved to us that the claimant provided information tending to show a breach of a legal obligation. At the very most, it seems to us that he informed the respondent that his predecessor's method was not his method, and that he wished to proceed on the basis of his method alone. As we observe above, we accept that two professional practitioners may legitimately form different views or have different methods, both of which may be right.

117. Disclosure 14 is strictly not a further or separate disclosure. When questioned about disclosure 14 the claimant said in evidence that he had reported the matters to Mr Davis. We accept that among a wealth of other issues, the claimant may well have told Mr Davis on occasion that he wished to revise the 2011/2012 accounts, and he may also have told him that he had found a flaw in the excel software used by his predecessor. We do not accept that he has made out having made any further protected disclosure in accordance with disclosure 14.

118. Disclosure 15 is better documented. The respondent was required to submit annual returns to the Charity Commission. One question in the January 2015 return (i.e. six months after the appraisal) asked whether the respondent "has the following written policies". There was then a list of six specific named policies (435), each with a "yes/no". The return did not require the signatory to certify the content or quality of any of the policies, or how recently they had

been reviewed. The return asked about two policies which the respondent did not have, on Investment and on Risk Management. The claimant correctly answered 'no' to each question. The form also asked about four policies, which the respondent did have as follows.

119. The bundle contained the respondent's policies on Complaints Handling (75, no date of issue or printing); Conflict of Interest (135, signed by Mr Davis and the claimant in October 2013); Volunteer Management (83, print date May 2010); and Vulnerable Beneficiaries (in relation to children, dated July 2012, 87; in relation to adults, 93, also dated July 2012). We accept that all of those documents were issued on or before the dates on our copies, and were in existence in January 2015.

120. When, in January 2015, the claimant was completing the Charity Commission return, he became convinced that the above policies, including the one he had signed, either did not exist, or were not satisfactory. Ms Okole emailed him on 29 January to state that they did (481). On the same day the claimant wrote that the respondent did not have "adequate policies in place". He also wrote to Mr Rafi that "I had asked Ms Okole to email me the policies and looking into those I have come to conclusion that these are not appropriate and have significant lack including Health and Safety document was not even signed by you" (859, both emphases added). When cross examined about this disclosure, the claimant said that the policies had not been shown to him in an audit trail.

121. In January 2015 the claimant had been in post 18 months. He had signed one of the policies in hard copy. He had ample opportunity to verify the existence of the policies. He had ample opportunity to ask Ms Okole or Mr Rafi to email them to him or to send links. That in turn was nearly two years before the preliminary hearing, at which he identified disclosure 15 as an assertion that "The respondent did not have … vulnerable people's policy and that false reports were made to the Charity Commission that the respondent did have those reports." There was no basis for those assertions. Our finding is that the respondent had a Vulnerable People's Policy and reported truthfully and accurately to the Charity Commission that it did. It did not have a Risk Management Policy and it reported truthfully and accurately to the Commission that it did not. There was no substance in this alleged disclosure whatsoever, and it was little to the claimant's credit that even at this hearing he sought to put forward a plainly unarguable point.

122. Disclosures 16 to 20 inclusive relate to the Futures Café. We deal with them together. Board minutes showed that the respondent in May 2013 rejected two unsuitable tenders for managing the cafe, and resolved to manage the café 'in-house' (179), and that in September 2013 it considered external management proposals (1791). In February 2014 the respondent granted to Mr Ian Johnsen of Bakers Dozen a contract to run the café for an initial period of six months (252). In October 2014 the job of Café Manager was advertised (332 and 345). Of four applicants, three were interviewed on 12 December 2014 (377). By the end of April 2015 Mr Johnsen had been appointed, and the respondent decided in principle to grant a three year lease of the café to Bakers Dozen.

123. The advertisement appears to have been for a manager with a three year lease. We noted one application (373), offering £17,000 in rent across the three years. The eventual agreed rental with Mr Johnsen was for £2,600 per quarter, the first two quarters being rent free (1342): a total therefore of £26,000 in rent.

124. Once there was agreement in principle, Mr Johnsen and the respondent placed the negotiation of a lease in the hands of solicitors. Correspondence between the solicitors began in May 2015 (801), with completion just before Christmas 2015. It appears that there were conventional negotiations about the terms of the agreement. Issues arose as to the condition of the premises and liability for maintenance and repair. The correspondence between solicitors (779-801) indicates delay, but nothing untoward in the negotiating process.

125. Disclosure 16 related to the tendering process leading to the appointment of Mr Johnsen. The respondent accepted that the claimant raised issues about the best method of tendering for the café. He had made suggestions for example on 25 March 2015 (503) and in his August 2015 appraisal (672). His suggestions seemed to us to be his opinions about better or different practice. We saw no expression of concern which contained information tending to show breach of a legal obligation. We are satisfied that the matter was tendered, through public advertisement. The claimant's suggestions that there might have been other or better methods of advertising, or methods which attracted a wider readership, may have been well made, but they did not constitute a qualifying disclosure. We do not find that disclosure 16 was a qualifying disclosure.

126. Disclosure 17 related in part to the financial controls within the café. It is common ground that the claimant raised concerns about this issue in the summer of 2014 (e.g. 273 in an email to Mr Rafi on 18 June, in which he reported till discrepancies) and again in his appraisal (287). We find that the claimant used the language of generalised advice, focusing on best practice. It has not been made out to us that the claimant disclosed information about a breach of legal obligation.

127. Two other parts of disclosure 17 were plainly unsustainable. It was not the case that the lease was granted without tendering as alleged. The claimant criticised the tendering process. The complaint that the tenant had not signed the lease was misplaced: the tenant was not under a legal obligation to sign until there had been agreement on terms, a matter being dealt with by solicitors at arm's length.

128. As to disclosure 18, the claimant wrote: "Café operator modified Head of Terms provided on 27 March 2015 but not sorted/followed up" (672). We had no evidence to indicate breach of a legal obligation. The respondent was represented by solicitors, negotiating terms at arm's length with the operator's solicitors before completion. Both parties were free to seek variations in the original draft terms in the course of negotiation.

129. Disclosure 19 is a similar point. It was an allegation that the café operator charged customers more for food than had been stipulated by the respondent. The price of food items was dealt with in the parties' negotiations through solicitors. There was uncertainty as to whether the initially stipulated prices included VAT. This was a matter of clarification and no more. We could see no evidence of breach of a legal obligation. In so saying, we add that so long as terms were under negotiation, and before completion, legal obligations had not yet crystallised.

130. We understood that disclosure 20 related to the identification of Mr Johnsen as the preferred bidder in March 2015, although the issue describes him as "friends of board members". The disclosure is however expressed to focus on 'Board members' and the alleged risk of a conflict of interest. In evidence the claimant said that board members knew Mr Johnsen. We accept that while at least some Board members knew Mr Johnsen through work, there was no evidence before us of a personal relationship which went beyond work, or which would have given Mr Johnsen an advantage in the tendering process, or which might have indicated a conflict between a personal relationship and a duty to the board. Ms Clarke correctly referred the claimant to a Board member's earlier declaration of interest and self-exclusion from discussion about the cafe (Mr Crean, 25 July 2013, 1511). The bare assertion of acquaintanceship or friendship was insufficient in our view to constitute information giving rise to breach of a legal obligation. There was no reasonable belief in the disclosure and we repeat our observation that the claimant may not have properly understood the meaning of the term conflict of interest. We add, for avoidance of doubt, that the findings in this paragraph relate to the single issue of the appointment of Mr Johnsen in March 2015, and go no further.

131. We turn to disclosures 21 to 23 inclusive which relate to the broad issue of relationships between members, family members, and obligations to the respondent.

132. It can be seen from Judge Heal's order in January 2016 that these allegations were framed in generalised language. As formulated, they were nearly incapable of fair trial, to the extent that the claimant had not identified any of: what he actually said; to whom; when, and in which context; about which board member or members; and/or about which family member or members. We have commented on his broad use of the term conflict of interest. The respondent had a conflict of interest policy, which the claimant had signed, in October 2013. It was not a policy dealing with conflict of interest in the true sense, but rather with non-solicitation and non-competition obligations (135).

133. The claimant's contract of employment, which we understand to be a template, had a section headed "Conflict of Interest" (69). The first short paragraph cross-referred to the non-solicitation and non-competition sections. The second stated, "The company requires you to inform the Chief Executive of any information that may directly or indirectly constitute a "Conflict of Interest." If you have any concern you must discuss this in confidence with the Chief Executive."

134. That formulation begs the question of what broadly is meant by Conflict of Interest, and muddies the waters by referring to confidentiality, which may not necessarily be appropriate. The disciplinary policy under the heading "Honesty" stated "The company expects a high standard of honesty and integrity from its employees. Employees must not abuse their positions to their own advantage. Employees supervising contracts and having close contact with contractors and suppliers to the company should be particularly careful."

135. If the respondent had any policy on the conduct and ethical standards of board members, we were not shown it.

136. Our observation that the claimant used the words "conflict of interest" without a true understanding is not changed or undermined by our further observation that the material which we have referred to does not adequately identify to an employee what a conflict of interest is or may be; or what an employee who identifies a potential conflict of interest should do.

137. In his witness statement, the claimant referred (page 11 of 76) to an email of 24 February 2014 about the wife of a board member. Although there was an email of that date about procurement policies within the papers (1409) it made no reference to a board member's wife. We were not referred to or could not identify in the bundle draft notes identified by the claimant in his statement as on 20 January 2015 indicating "working for Director's friend/Directors' interest for personal interest."

138. The claimant's statement asserted that on 2 February 2015 he had raised an issue about Mr Johnsen renting the café, but as set out above, we cannot find any reason to criticise the manner in which the café issue was dealt with, either as to the tendering, appointment process, or completion of the lease.

139. In the 2014 appraisal the claimant set out his own view of his own achievements at length, but we can find no reference to an issue of probity or conflict. The claimant's 2015 appraisal became overloaded with repeated iterations, and we were taken to no specific allegation about conflict.

140. It was common ground that the claimant spoke to Mr Davis and emailed him on 27 January 2016. The claimant's email (905) shows something of a fixation with Mr Rafi and his behaviour, speaking of his "inappropriate/biased decisions." In the same e-mail he also complained of hacking into his emails by a third party. Mr Davis replied on 4 February in measured terms to state that he should not be called upon to deal with working relationship issues, but would deal with probity issues in his capacity as Chair of the respondent. He then wrote "Your second and third paragraphs contain some specific allegations of wrong doing, which I can only pursue if you provide me with the direct evidence to support these. Please provide this evidence as soon as possible…"

141. Mr Davis' evidence, which we accept, was that the claimant did not reply to this request. On 9 February the claimant wrote again to Mr Davis (903-4).

He raised complaints about contractors and the terms on which they were appointed, and in something of a ragbag of allegations wrote "despite repeated warnings colleagues were offered businesses to Board Members which are causing conflict of interest and an impact in fairness, impartiality etc in the business." The email runs to two pages, and in certain respects, such as the security and gas provision, is quite specific. It says nothing more about the quoted sentence. The claimant offered in the email no identification of any business, Board Member, or analysis of the alleged conflict of interest. In particular, the claimant failed to identify the interests which might be in conflict.

142. Asked about the emails at 903-905 in evidence, Mr Davis said that at the time he found them to be, "A jumbled mixed up set of mixed up allegations, on a nudge nudge basis." He went on "I found it difficult because there was not enough information, there was an innuendo". He said, "I needed to know who was being accused" and continued that the claimant was "very careful not to name names." We find that Mr Davis' comments were well said.

143. It has not been made out to us that the claimant made any of qualifying disclosures 21-23. He made generalised allegations, but gave no information. The claimant did not at the time or to us specify the information in question. We cannot say with confidence that the claimant could have had a reasonable belief that there was a conflict of interest, without knowing the factual basis of the allegation. The one instance which he gave when pressed in evidence (the use of the word "uncle") was unsustainable.

144. Disclosure 24 was not on its face a disclosure which was capable of answer, and to the extent that it appears on its face to overlap with the complaints about the 2011/12 accounts, we repeat what has been stated above. We make the same observation in relation to disclosure 25, which appears to us to repeat disclosure 2.

145. We agree with Ms Clarke that disclosure 26 appears to relate to the same series of complaints in the claimant's email of 9 February 2016 about payments to suppliers. This email illustrates many of the difficulties of this case. The pleaded case identifies an issue relating to invoices from a supplier which were incorrect, and pressure being applied to the Facilities Manager. The claimant's email of 9 February likewise refers in general terms to a number of suppliers. Among those named are Silver Security, Frazer Security, T-Bag Productions, electricity and gas suppliers, building insurance, Bakers Dozen, and Board Members.

146. Some of the issues raised there by the claimant are about the procurement process, and failures, as he reported, to engage in procurement practices which might have led to more favourable charges. Those comments may well be matters of the claimant's advice on good and prudent practice, but it has not been shown to us that they are matters of legal obligation. The complaint about T-Bag appears to relate to division of responsibility and method of payment, which again are matters of procurement practice, but not matters of legal obligation. The complaint about Frazer Security is about high

charges and about whether Frazer had been given permission to use the respondent as their office address; again, we cannot discern in this information tending to show a breach of legal obligation.

147. The longest narrative relates to Silver Security, where the claimant's email seems to say that there had been issues about their charges and collection methods. Ms Clarke helpfully referred us to a dispute shortly before, during which Silver Security, whose services were essential to the respondent, placed the respondent's account on stop pending resolution of a billing dispute. We noted the email from Mr Lee, Silver Security Operations Manager of 27 January (854-855) which set out Silver Security's version of how the disagreement had arisen. While we cannot resolve the disagreement between the respondent and Silver Security, a reading of the latter's email suggests an everyday squabble between customer and supplier, involving unforeseen contingencies, unclear communication, and an underlying difference between the systems operated by the two companies. All that was no doubt time consuming and irritating, but we can see no trace of breach of a legal obligation.

148. Disclosure 27 was that the claimant made a complaint of discrimination on grounds of sexual orientation by a dismissed employee, Ms X.

149. The bundle contained brief evidence about Ms X, notably that after a return to work on 19 September 2015, her attendance had been unreliable. We noted review meetings on 17 November 2015 (759/833) and 19 January 2016 (832). On 19 January the claimant was told that she had been dismissed, and that he was to send her a letter of dismissal along with a P45 (832). He did not do so.

150. The bundle contained a modest amount of material from Ms X in reply (767 and in accounts of meetings) and although she referred to ill-health, we found no language in which she expressly or by implication engaged the vocabulary of discrimination, and no reference to her sexual orientation.

151. Ms Clarke rightly pointed out that the record of the claimant's disciplinary meeting, in which one of the allegations against him related to his failure to send the dismissal letter to Ms X, included the following, which was the only reference to Ms X and discrimination which we could find. The claimant admitted that he had not sent her the dismissal letter or P45 as instructed, and went on to say: "I notice that a significant amount of pressure was placed on X for shifts. She raised concerns regarding discrimination and was contacted on her father's funeral day. I did not receive any email from Rafi to issue a termination letter for X. I was trying to find out exactly what happened…. Nothing had been communicated with me that they were giving X a disciplinary meeting…"

152. We do not need to go into the procedural questions which were entangled there. We note that the claimant's remark post-dated the alleged detriments. We note that there was no evidence to suggest that the claimant had responded at the time to an allegation of discrimination. A protected

characteristic was not identified in the disciplinary meeting, and there was no analysis of the issue of pressure of work. There was no evidence from Ms X in which she complained of undue pressures or discrimination. There was no other evidence to corroborate the assertion that Ms X had complained of discrimination on grounds of sexual orientation or at all.

153. We do not find that the claimant had a reasonable belief that the respondent had committed a breach of its legal obligation not to discriminate against Ms X. We find on the contrary that the claimant's remark was no more than an opportunistic response to the disciplinary allegation against him.

154. Disclosures 28 (6.3.1) and 29 (6.3.2) refer to allegations that on 11 May 2015 and in about the last quarter of 2014 the claimant made reports of breaches of legal obligation to respectively the Charity Commission and HMRC. There is no reference to the latter in the last quarter of 2014 section of the claimant's witness statement, and no entry for May 2015 in the relevant section of the same statement. Ms Clarke pointed out that neither report, if in writing, had been made available by the claimant on disclosure. That was particularly surprising in light of the claimant's strong views about both record keeping at work, and about disclosure in these proceedings.

155. Mr Davis gave striking evidence on the point: "It emerged at the preliminary tribunal hearing in late 2016 that the claimant had made allegations to the Charity Commission and HMRC. This was the first time I or anyone had known that he had done this." In oral evidence Mr Davis confirmed that there had been in the past some inquiry from the Charity Commission about the respondent's practice, which Mr Davis had answered and which the Commission then reported was regarded as concluding the matter. Mr Davis did not know the source of any report to the Commission.

156. Mr Davis did accept that he had made a hostile remark to the claimant about reporting to external regulators, because he had a person in mind (whom he did not name, but candidly referred to as "a perennial pain in the butt") as the likely person to have made a report to an external regulator. He accepted that he called that behaviour 'a stab in the back' but his evidence was that he did not think that that was the action of the claimant or any employee.

157. We accept the respondent's evidence. We find that it has not been proved that the claimant made disclosures 28 or 29. We accept that the communications (whoever made them) were not known to the respondent until December 2016; and that they therefore were not in the knowledge of the respondent at the time of any alleged detriment or the dismissal.

158. In summary therefore, we find that the claimant made the disclosure discussed at paragraphs 90-92 above and no other. We find that the statutory protections available to a 'whistleblower' applied to the claimant from about early August 2014 onwards.

Detriment discussion

159. The claimant's case was that as a result of his disclosures he had suffered two diffuse generalised detriments. We find that the claimant made a protected disclosure by 5 August 2014 at the latest. It follows that any claim about a detriment before that date must fail. That said, we acknowledge that from early in his employment the claimant was assiduous in voicing complaints, grievances, and criticism of others.

160. We reject the complaint that as a detriment the claimant was overloaded with work, and potentially unsuitable work, with a view to hindering his pursuit of matters to be disclosed.

161. As a matter of general observation, the allegation lacked internal coherence and logic. We mean by this that while it is not a requirement in law to demonstrate that the respondent might have had an interest in subjecting a whistle blower to detriment, it is a matter of logical evidence. We accept that all three witnesses from whom we heard on behalf of the respondent had commitment to public service, and were aware of the demands of good governance and accountability. We accept that they saw the importance of a sound relationship with HMRC, and the risks (described most graphically and emotively by Mr Davis) of failing to create such a relationship. They had no interest in seeking to suppress or retaliate for protected disclosures.

162. The claimant asserted that he was overloaded with work, in part at least to prevent him from uncovering more wrongdoing. That objective was inherently illogical, as well as impossible to achieve, even had the respondent attempted to do so, for the simple reason that the claimant had access to the respondent's financial records, and was able to work on the respondent's finances from his home office base.

163. Secondly, we look at the overall context of how the respondent managed its communication with the claimant. There was a lengthy history, which began within weeks of the claimant taking up employment, (and therefore before the protected disclosure which we have found) of the claimant negotiating about terms and conditions of service, including hours, responsibilities and pay. While the claimant was disappointed not to achieve his objectives in terms of hours and pay, the course of negotiation indicates proper conduct on behalf of the respondent in addressing the claimant's issues, and helping him improve his terms of service. The negotiation led to a significant increase in the claimant's starting pay, a decrease in his working hours, and the provision of at least two named sources of support work (Ms Okole and Mr Salim).

164. There was no evidence of a deterioration in the claimant's working position after 5 August 2014; on the contrary, in late September 2014, as referred to above, his employment position was enhanced (316).

165. While we accept that in the event the claimant found himself unable to manage time effectively, it has not been proven that this was due to any action or omission of the respondent, as opposed to factors structural to the job, and the demands made upon the claimant by his other commitments, including his private practice. On that last point, we accept the evidence of Mr Rafi

(WS 36, and the 29 documents referred to there) as an indication that the claimant's difficulties with time management were at least in part attributable to the time which he spent on his private accountancy practice during the respondent's core working hours. We do not accept the claimant's assertion that private practice took up only a few hours per week of his time, which he undertook only outside the respondent's core hours.

166. The second alleged detriment was that the claimant was forbidden access to the Board. Our over-arching finding is that that did not happen, and where his wish to contact Board members was restricted, it was for objective organisational reasons, wholly unrelated to any disclosure.

167. We find that in general the claimant failed to understand the nature of his line management relationship with Mr Rafi, and the relationships which each (he and Mr Rafi) enjoyed with the Board in consequence. The claimant's appropriate channel for operational matters was wholly through Mr Rafi. The claimant wanted, but was denied (correctly we find) the opportunity to undermine or bypass Mr Rafi by taking operational line management issues direct to Mr Davis. This was nothing whatsoever to do with protected disclosure. It was an appropriate form of line management discipline within the structure of the respondent.

168. We note in this context the claimant's attempts in February 2016 to bypass Mr Rafi on two separate issues discussed in more detail below. He changed his computer password, telling Mr Davis but not Mr Rafi that he had done so. He received information about a new appointment, which he referred to obliquely in conversation with Mr Davis, but did not mention to Mr Rafi. On both occasions, Mr Davis was astute to the claimant's actions, and refused to be complicit in them. These events seemed to us significant evidence for three reasons: first, that they were forms of gross misconduct which the claimant never denied, and for which he was dismissed; secondly, in contradiction of the claimant's own case, they are instances of the claimant's ability to go over Mr Rafi's head to the Chair of the Board; and thirdly they show the claimant's disregard of line management.

169. The respondent simply could not prevent the claimant from contacting the Board by email, and the bundle showed abundant occasions when he did so. As Mr Davis pointed out to the claimant in an important document (4 February 2016, 905) "I .. am happy to repeat that it is proper for you to approach me directly on matters of probity in my capacity as Chair. However, some of the issues you raise are relationship matters between you and Rafi, which you will have to sort out between you, as I would not normally interfere." That statement of principle seems to us unimpeachable.

170. The claimant has not shown to us that there was an attempt to hinder his access to Mr Davis or any other Board Member. Where his ability to involve Mr Davis was curtailed, it was for sound reasons of organisational structure arising out of line management.

Unfair dismissal

171. This was at heart a claim of unfair dismissal. We approach that claim in a number of strands. We first set out the applicable legal framework; we then turn to our relevant findings of fact, applying the selective approach mentioned above, and focusing on the four discrete points which formed the reason for dismissal; and we set out thirdly the concerns and reservations of the tribunal about aspects of the dismissal procedure.

The legal framework

172. The claimant advanced a claim of unfair dismissal both in "ordinary" terms and of automatically unfair dismissal. The latter claim requires it to be found that a protected disclosure was the sole or principal reason for dismissal, and we must examine the respondent's stated reason for dismissal with care. We must, when considering the s 103A allegation, take care not to follow the claimant into the trap of confusing chronology for causation. In light of our finding that there was one protected disclosure in or about August 2014, the claimant's case would require the tribunal to accept that there was a time lapse of nearly two years between protected disclosure and dismissal; and to accept further that the disciplinary process was a sham.

173. When we deal with the ordinary unfair dismissal claim, the tribunal must find first what was the reason for dismissal, in the sense of the operative consideration in the mind of the person making the decision to dismiss. If we accept the respondent's case that the reason related to the claimant's conduct, that is a potentially fair reason for dismissal, and the tribunal must consider the matter through the spectrum of the guidance in British Home Stores v Burchell 1978 IRLR 379, bearing in mind that the burden of proof then was not the same as it is now. The tribunal must consider section 98(4) of the Employment Rights Act 1996, which states (emphasis added) "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

174. The tribunal must take care not to substitute its own view for that of the employer, and bear in mind when considering both the disciplinary enquiry, and the sanction applied, that the appropriate question is whether the respondent's actions fell within the range of reasonable responses of an employer which we find to be modest in size, with very limited administrative resources.

Unfair dismissal findings of fact

175. We repeat (see paragraph 66 above) that this judgment proceeds on a selective basis. The email traffic in January and February 2016 was voluminous, at times emotive, and, in light of the claimant's admissions of the four acts for which he was dismissed, of relatively little assistance to the

tribunal. We have deliberately stepped back from detail and approached the overview.

176. By late 2015 the claimant had been in post for over two years. Since shortly after joining the respondent, he had made demands of his employer about working arrangements which to a significant degree had been met. He nevertheless remained aggrieved about his employment, in a general sense, and about specific points. He had raised concerns about colleagues, systems, contractors and Board Members. He was an unrestrained user of email, drawing out email trails with a desire to have the last word. He was not an easy colleague or direct report, but as a senior employee with audit responsibilities, that could in isolation have been an indication of professional rigour, and was not necessarily a fault.

177. We find that by late 2015 his working relationship with Mr Rafi was strained. We find that the reason was that the claimant did not respect Mr Rafi as an individual, and therefore did not respect line management structures. The claimant came to convince himself that Mr Rafi was unsuitable for the post of Chief Executive. Having convinced himself of this, the claimant sought to bypass and undermine line management, a risk to which Mr Davis was alert, and in which Mr Davis declined to accommodate the claimant. The claimant's working relationship with Mr Davis was generally good and respectful, and, contrary to his own case on detriment, the claimant felt able to approach Mr Davis, and did so in practice.

178. In late 2015, Mr Rafi had a heart attack, as a result of which he was absent from the workplace for about three weeks, returning after the Christmas break.

179. Mr Davis took over as acting Head of the organisation. He gave evidence, which we accept, that his observation was that during Mr Rafi's absence, the two senior employees in the respondent, the claimant and Mr Ishaq Kazi, seemed to him to be jostling for position, such that there was a potential for conflict. In one of a number of striking phrases in his oral evidence, Mr Davis said that during Mr Rafi's illness, the claimant was "absent on manoeuvres", which we interpret to the same effect, i.e. that Mr Davis saw the claimant trying to use Mr Rafi's absence for potential career advancement.

180. Mr Rafi found his enforced absence to be a period of reflection. We accept that during his absence, and after his return, he voiced concerns to Mr Davis about the claimant, the difficulties of working with him, and his contribution to the organisation. We accept that Mr Rafi had spoken to Mr Davis in similar vein in the months before his illness. We also accept that Mr Davis had formed his own concerns about the claimant's role in the organisation.

181. After Mr Rafi's return, he and Mr Davis discussed the claimant. Mr Davis' advice to Mr Rafi was that as there appeared to be a number of every day issues concerning the claimant, the best course was to draw the issues together into a single analysis, which might in turn lead to formal action. We accept that neither necessarily formed the view then that the formal action

would lead to dismissal. We accept that they agreed that the purpose of investigation and analysis, and of any formal action which followed, was to impose structure and discipline on the claimant.

182. We were given scant evidence or documentation about the process which Mr Rafi followed to look into the claimant's work and conduct. We accept his evidence and that of Mr Davis that there came a point in about February 2016 when they took legal advice. We were not shown their request for advice or the response or any record of it. We understood their evidence to be that in light of advice, they understood that the claimant's live concerns about pay should be dealt with as a discrete matter and brought to closure before disciplinary action was initiated arising out of Mr Rafi's inquiry.

183. There had been a live issue since at least the summer of 2015 about the claimant's recurrent need (as he claimed) to work longer hours than the 25 paid hours per week allocated to his work; and his consequent accumulation of TOIL. Two emails of 24 June 2015 from Mr Rafi to the claimant (594) captured the problems. Mr Rafi regarded 25 hours per week as entirely adequate for the claimant to complete his duties. (He commented in evidence that that had seemed sufficient for the claimant's predecessor and successor). He had issued guidance to staff that TOIL should be taken within a short time of arising, and no more than two weeks after it was incurred. His email of 24 June 2015 recorded his surprise that the claimant had accumulated 135 hours of TOIL, the equivalent of over five weeks work. A further issue arose as to whether the claimant could convert TOIL into annual leave.

184. Mr Davis convened a meeting of the personnel committee (which was a sub-committee of the Board) to discuss with the claimant three items which the committee agreed to discuss, namely the arrangements for TOIL, annual leave substitution with TOIL, and future hours. There was a satellite disagreement as to whether the meeting was constituted as a grievance meeting or as an employee exercising a right of access to the personnel committee, but that does not assist us.

185. The claimant and Mr Rafi met the committee (Mr Davis, Mrs Pedersen, Mr Barry Patel) on 15 March (1034). The next day Mr Davis emailed the claimant to tell him that the committee's decision was, "That there are no reasons for allowing your accumulated TOIL to be dealt with other than in line with the determinations already made by Rafi" (1043). That, in effect, closed off the discussions about TOIL.

186. We had a major reservation about this procedure, which was that of the five people present at the meeting, all except the claimant knew that the respondent awaited only the committee decision to trigger the disciplinary process.

187. It did so by Mr Rafi giving the claimant a letter dated 16 March with attachments which should be read in full (1037-1041). We find that the letter had been prepared before the 15 March meeting. The claimant was informed of allegations which could constitute gross misconduct and lead to dismissal.

He was suspended with immediate effect, and invited to a disciplinary meeting. Annexed to the letter were three pages of supporting information, setting out details of 11 allegations.

188. We had a concern that the claimant was given no more information than the three page summary, and none of the raw information on which the summary was based. In cross-examination before us, the claimant confirmed that at each stage he fully understood the nature of the allegations against him, and therefore the case to be met.

189. While preparing for the disciplinary hearing, the claimant raised an issue about access to his inbox for the purposes of preparing his reply to the allegations. In evidence, he mentioned potentially tens of thousands of emails. We accept in general that the claimant had sufficient time, information and facilities to prepare to defend himself. We do not accept that fairness required him to have access to nearly three years of email traffic.

190. The disciplinary hearing took place on 7 April. It lasted over four hours. The disciplinary officer was Mr Davis, and Mr Rafi attended to present the case. A note taker was present. The bundle contained two versions of notes of the disciplinary meeting (1063), although we did not note any material differences between the versions. The notes record that at the start of the meeting, the claimant asked for permission to record and was refused it. He did so in any event, and also took covert video footage. The claimant showed the tribunal the receipt for the recording and video equipment which he had bought on Amazon shortly before the meeting. The claimant was accompanied by a companion, Mr Shahel. As Mr Shahel's English language was limited, (he gave evidence through the interpreter), and as the claimant was recording the meeting, the value of a companion was bound to be limited.

191. Mr Shahel's evidence was that during the disciplinary meeting Mr Rafi and Mr Davis engaged in covert communication, using their feet by nudging and kicking under the table. The time taken in tribunal to look at photographs of the meeting room, and a still of the claimant's video footage, to test whether that had been physically possible, was not well spent. Mr Davis disposed of the point swiftly. He said that he had a pre-diabetic condition, and would not agree to being kicked or nudged for that reason. We accept that evidence. The allegation was in any event so inherently bizarre that we reject it.

192. We accept the material parts of the transcript of the notes as accurately recording that in relation to each of the four acts for which he was dismissed, the claimant did not seek to deny the primary facts, but sought rather to justify his actions. By letter of 18 April (1105) Mr Davis dismissed the claimant with immediate effect. He set out his findings on each of the 11 allegations, which were that four of the allegations each constituted gross misconduct, six were misconduct, not gross misconduct, and one, he concluded, was "unprofessional and contrary to the organisation's contract of employment and did not constitute misconduct."

193. The claimant appealed, with a lengthy reply to the allegations against him (1112). It was a not a document which assisted the claimant: it was emotive,

at times abusive, and showed no acceptance of any fault or misjudgement, or of the need to repair a working relationship.

194. The claimant's appeal was heard by Mrs Pedersen and Mr Patel on 3 June. A note taker was present. A consultant whom the respondent asked to attend remained outside the meeting at the claimant's request. The meeting dismissed the claimant's appeal (1125, 1158). Mrs Pedersen thought that her powers were limited to revising any finding of gross misconduct, and, if so, remitting the matter to Mr Davis for final decision. We could find nothing in the written procedure which justified this unusual approach.

The gross misconduct findings

195. We now deal with the four counts found to be gross misconduct, approaching each separately through the Burchell formulation.

196. Item D in the 11 charges was an allegation of failure to disclose a warning letter from HMRC. The sting of this complaint was that HMRC had sent the respondent a warning about a late return; the claimant had received it; and had failed to notify Mr Rafi or any Board member that the warning had been received. The claimant agreed that he had received the letter, and that he had not told anyone else about it: he said, in short, that there was no need to do so.

197. The claimant was the respondent's named point of contact with HMRC. The document was a warning of a possible penalty surcharge for late or incomplete payment of PAYE and National Insurance. It was agreed that the claimant had not drawn this to the attention of Mr Rafi or otherwise treated it as a matter of priority or urgency, but had left it in the office, where Mr Rafi had chanced upon it.

198. The claimant agreed that he had told Mr Davis that he did not consider that it was necessary to regard the letter as urgent, or tell anyone more senior about it, as it was, in effect, no more than a chasing letter from an unpaid supplier.

199. Mr Rafi's view was that it was important that he as Chief Executive should know of any such matter, including the potential financial risk of a surcharge; Mr Davis took a view of HMRC which was that the respondent should go out of its way to avoid the risk of any conflict with HMRC, or of creating any record of incomplete disclosure or late payment. He took great exception to equating HMRC with any other supplier. In evidence, he mentioned the risks of a fall out with HMRC, and referred to the (then-topical) administration of Toys R Us.

200. We find that the respondent had a genuine belief that the claimant had withheld the HMRC document from Mr Rafi. That belief was based on reasonable evidence and enquiry, notably the claimant's admission. The respondent was reasonably entitled to form the view that this constituted gross misconduct. It was reasonably entitled to attach weight to the claimant's reaction to the allegation, which showed no insight into the

respondent's management perspective, and sought rather to justify his actions.

201. The second allegation was straightforward. The respondent had a rule that all individual IT passwords were to be disclosed to Mr Rafi, in case access was needed for working purposes in the absence of an individual. The claimant had no issue with this rule, as he shared his password with Mr Rafi in 2014. The claimant's terms and conditions of employment included a term (standard for all the respondent's employees) that all information stored on the respondent's systems was the property of the respondent. It followed that no employee had the right to withhold access to such information.

202. Early in January 2016 the claimant changed his password. We accept that he told Mr Davis that he had done so. Mr Davis may not have seen the information as important at the time. The claimant did not inform Mr Rafi that he had changed his password, and he did not tell anyone what his new password was.

203. When in February it became necessary to access the claimant's computer while the claimant was off sick, Mr Rafi instructed Ms Okole to telephone the claimant on his behalf and ask for the password on his behalf, which the claimant refused to release. Mr Rafi gave evidence that at the time, he realised that the claimant had focussed many of his stresses on him (Mr Rafi) personally, and that he thought that the claimant would find it less difficult to give the password to Ms Okole rather than direct to himself: that was thoughtful, and we do not criticise Mr Rafi for it in the slightest. If the claimant sought to maintain that Ms Okole was not a suitable person to whom to reveal his password, we find that that was an opportunistic, bogus objection.

204. The claimant maintained in both the disciplinary meeting and appeal that he had been justified in his actions, because he did not trust Mr Rafi, and he thought that persons sympathetic to Mr Rafi had hacked into his computer. The tribunal did not find it necessary to consider whether the claimant had good reasons to change his password, as the issue which arose for us was not the change of password as such, but his refusal to disclose his new password. At this hearing the claimant also advanced the argument that his non-disclosure of the new password did not matter anyway, because (as was the case) the respondent was able to gain access to his system through its IT support provider.

205. We find that Mr Davis had a genuine belief that contrary to the respondent's procedures the claimant barred the respondent from access to its data by withholding his password from Mr Rafi. He formed the belief after reasonable enquiry and on reasonable evidence, notably the claimant's admission, which was bolstered by his repeated purported justification of his actions. The conclusion that the claimant had committed gross misconduct, first by barring access to the data, and then by refusing to release it, was within Mr Davis' reasonable judgment to make. We attach weight, as did Mr Davis, to the underlying wrong, which was the claimant's entrenched rejection of Mr Rafi's management authority.

206. The third item was slightly more complex. Although Mr Salim, an employee of the claimant, had been approved as a person to work on the respondent's accounts under the claimant's supervision and assistance, there appeared a lack of discipline about what work he was to do, when, how it was to be authorised in advanced and how recorded and paid for afterwards. We agree with the respondent that the primary responsibility for creating this discipline rested on the claimant, as Mr Salim's line manager.

207. The allegation was that the respondent's records, notably signing in sheets, indicated to Mr Rafi that Mr Salim had worked in the office, alone, over weekends, without Mr Rafi's prior authority or knowledge, which gave rise to issues of, at least, responsibility and health and safety. The particular focus of the disciplinary case was the last weekend of January 2016, when payroll had to be run, and the claimant was off sick. The tribunal was taken in detail to the emails between the claimant and Mr Rafi which preceded this. The emails were a great deal less helpful than the claimant thought. They showed that Mr Rafi had authorised the allocation to Mr Salim of ten hours paid work, to be completed urgently. They did not bear out that the work was to be done at the weekend, or in the office. They did not contain express or implied authority from Mr Rafi for Mr Salim to work alone in the office.

208. This was the issue upon which we permitted Mr Rafi to be recalled (see paragraph 27 above). It seemed to us right to enable the claimant to put to Mr Rafi that he must have known of Mr Salim's presence in the office at weekends, because time sheets (notably 1596), showed Mr Rafi signing in on Monday mornings immediately below signatures which seemed to show Mr Salim working alone on the preceding Saturday or Sunday. Mr Rafi's evidence was that when he arrived at the office he scribbled his name on the signing in sheet, and gave it no more thought or attention, because he was in a rush to get to his office and begin work, and as soon as he came in there were demands for meetings, conversations or phone calls.

209. We were also taken to email trails relating to Mr Salim's previous work, to see whether they shed light on when he worked, on what basis, and with whose authority. One question which puzzled the tribunal, and which was unresolved, was whether Mr Salim needed to work in the office at all, or whether he could have recorded hours on the office timesheet, when he had in fact worked on the respondent's systems remotely from the claimant's home office, as the claimant did.

210. We accept Mr Rafi's evidence on two significant aspects of this point; first, that the respondent did not formally approve of anyone working alone at Futures House without the knowledge of management because of possible health and safety risks; and secondly, that he regarded his responsibility as no more than to authorise tasks or assignments to be completed by Mr Salim, and regarded the operational implementation, such as when he did the work, where, and how many hours were required, as in the hands of Mr Salim and his line manager (the claimant) to resolve. We also accept Mr Rafi's evidence that the routine of signing in every day was a purely mechanical task to which he gave no detailed thought, and that he did not read or take in the signatures of others.

211. We find that Mr Davis formed a genuine view that the claimant had facilitated Mr Salim's lone access to the office, at a time when he was working alone and unknown to any member of management. We find that he based the view on reasonable evidence: the claimant did not in fact dispute that there had been lone working, but argued that it had been authorised. We accept that faced with a conflict of evidence, Mr Davis was reasonably entitled to prefer Mr Rafi's evidence and find that the access had not been expressly authorised. We find that Mr Davis was reasonably entitled to form the view that this constituted gross misconduct, not because of any suggestion of dishonesty, or that Mr Salim was thought of as an individual who posed a risk to the organisation, but because of the straightforward health and safety implications of an individual working alone in a corporate office, at times when his presence was not known to any other person.

212. The final finding of gross misconduct was straightforward. In his HR capacity, the claimant was asked to follow up references obtained about the newly appointed Facilities Manager (who we understand remains in post). The claimant spoke by telephone to a reference giver, who made a comment to the effect that the appointee had had working relationship difficulties while in a previous employment. The claimant did not pass the specific information to any other person. He mentioned to Mr Davis that there was a problem, but gave him no details. The reason which he gave the tribunal for his actions was that he feared that the individual would be treated unfairly or possibly dismissed if the information was passed on. He said that he did not trust Mr Rafi to deal with the matter properly.

213. We find that the information about the new appointee was the property of the respondent, not the claimant. We accept that the final decision about the appointment rested with Mr Rafi and the Board, not the claimant. By withholding relevant information about a new starter, the claimant prevented the respondent from making a fully informed decision about an individual appointment to a major role within the organisation.

214. We find that Mr Davis genuinely believed, on reasonably enquiry and on reasonable evidence, notably the claimant's admission and purported justification of his actions, that the claimant had been in possession of information which belonged to the respondent and to which the respondent was entitled, and had for no sufficient reason withheld it from the respondent. In evidence on this point, Mr Davis called the claimant's actions 'unforgivable.'

215. We find in relation to each of the four points separately, that all aspects of the Burchell test are met up to the point at which penalty falls to be considered. When we turn to penalty, it seems to us right to consider the four findings cumulatively. We find that dismissal was firmly within the range of reasonable responses, not least, because of the recurrent common thread within the allegations, namely the claimant's systematic denial of the authority of management, his defiant insistence on the superiority of his own judgment over organisational requirements, his lack of insight into his actions and their impact on colleagues and the respondent, and his failure to offer the respondent any prospect of modifying his conduct in future.

216. The claim was also one of automatic unfair dismissal, brought under s.103A of the Employment Rights Act 1996. For that claim to succeed, it must be shown that the protected disclosure of about 5 August 2014 was the sole or principal reason for dismissal. There was absolutely no basis whatsoever upon which we could make such a finding.

Procedural concerns

217. We accept, subject to what is stated above, that the respondent put to the claimant a framework of the allegations against him, such that he understood the nature of the case he had to meet; and afforded him sufficient time to prepare. He had the right of accompaniment, and was provided with notes of the meetings, and with written outcomes. Subject to what is stated below, he had a right of appeal against dismissal.

218. The tribunal nevertheless had serious reservations about the disciplinary process overall. In so saying, we rely on the following. The disciplinary procedure was silent on the process to be followed. It is a remarkable omission. Mr Davis had been the person to whom Mr Rafi reported and shared working concerns, and had to a limited extent given a sympathetic ear to the claimant. Mr Davis had had some form of management role during Mr Rafi's sick leave in late 2015. He was a shrewd and experienced person, with a long established relationship of respect with Mr Rafi. The suggestion of drawing together the strands about the claimant's performance originated with him; and we find that he was responsible, with Mr Rafi, for commissioning the respondent's legal advice about the claimant's position. He accepted the advice, which was to conduct a grievance hearing (which he chaired) about the claimant's pay and then closed that issue off. In hearing that matter, Mr Davis knew, but the claimant did not, that a disciplinary letter had been prepared and was ready to be given to the claimant if his complaint failed. Mr Davis then chaired the disciplinary panel and dismissed the claimant.

219. Ms Pedersen's evidence was that her appeal remit was limited to deciding whether the four acts of gross misconduct for which the claimant had been dismissed had each been properly designated as gross misconduct. When asked by the tribunal what would have happened if she had reached that conclusion, she seemed surprised by the question, and answered that her course would have been to remit the decision to Mr Davis to make again, in light of the outcome of the appeal. That would be an exceptional and uncomfortable model for management. A full written disciplinary procedure, had it existed, would have told Ms Pedersen what her powers were.

220. The tribunal asked Mr Davis why so much of this procedure focussed on him individually, given the number of Board Members available, and he answered that not all Board Members were willing to give the commitment which this matter required. We understood that to refer both to the commitment of time involved in the disciplinary process, but also the commitment of energy and resource involved in managing this claimant. That was also an uncomfortable answer, because it suggested that responsibilities fell on the most willing; and

while we understand that this is inherent in the voluntary sector, the issue for us is one of fairness at work.

221. We must keep well in mind the respondent's limited size and administrative resources, and the reality that in voluntary sector activity, responsibilities fall on those volunteer for them. We must also have regard to the substantial merits, which were that the claimant was dismissed for four actions, all four of which he admitted having done, and then sought to justify. Our reservations in these respects, although serious, do not in the event lead us to the conclusion that the claimant's dismissal was on balance unfair.

Contribution and Polkey

222. The issues of contribution and Polkey were not before us. We have nevertheless heard evidence which would plainly be relevant to both. It seems to us right to set out our provisional views on the findings which we might have made, if we had found the claimant's dismissal to be unfair. On the basis of the above we would have found that the four actions for which the claimant was dismissed, and which he admitted at the time and to us, each and cumulatively constituted culpable contributory conduct such as to give rise to a significant reduction of both the basic and compensatory awards. If we had found the dismissal to be procedurally unfair we would have given serious consideration to a substantial Polkey reduction, or extinction, on the basis that a fair procedure would most probably have led to the same outcome. We make that observation for this reason: by the time of the claimant's dismissal, he had ceased to accept or respect the discipline of any form of line management from the respondent. He regarded the relationship of trust and confidence with his employer as broken. He had made clear that he rejected the authority of the CEO and the Chair of the Board. Given that mindset, it is in our view unlikely in the extreme that if not dismissed the claimant would have accepted the line management of the respondent such as to enable him to return to work.

223. It follows that all the claimant's claims fail.

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Employment Judge R Lewis

Date: 2 / 5 / 2018

Sent to the parties on: ....

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For the Tribunal Office