Case No: 1801561/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr RM Lloyd**

Respondent: **Harpers Environmental Limited**

Heard at: **Leeds**

On: **26 February – 2 March and (deliberations only) 22 March 2018**

Before: **Employment Judge Maidment**
Members: **Mr N Pearse**
Mr GD Wareing

Representation
Claimant: In person
Respondent: Mr A Sugarman, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 fails and is dismissed.

2. On the respondent's concession it is hereby declared that the Claimant was unfairly dismissed pursuant to Section 98(4) of the 1996 Act ('ordinary unfair dismissal')

3. No reduction in the Claimant's compensation is made pursuant to the principles derived from the case of Polkey or on account of the Claimant's conduct prior to his dismissal.

4. The matter will be listed in due course for a remedy hearing with a time estimate of 1 day.

REASONS

The issues

1. The Claimant's sole complaint in these proceedings is of unfair dismissal. He maintains that indeed his dismissal was automatically unfair as the reason or principal reason for his dismissal was that he had made a protected qualifying disclosure. Whilst the Claimant had specified 4 separate disclosures upon which he wished to rely, during the hearing he confirmed that he no longer wished to rely on all but one of those disclosures as forming the reason for his dismissal. That was in the context of the other disclosures arising sometime after a disciplinary investigation had already been initiated into charges of misconduct, which the Respondent indeed relied upon as being the sole reason for the Claimant's dismissal.

2. The remaining protected disclosure relied upon by the Claimant was his raising a concern on 26 October 2016, when Mr Nick Harper requested the repayment of his directors loan, that this was in breach of the Insolvency Act 1986.

3. Alternatively, if his dismissal was not automatically unfair, the Claimant maintains that there was an ordinary unfair dismissal on the grounds of alleged misconduct. The Respondent's position had been that Mr Nick Harper formed a genuine belief in the misconduct on reasonable grounds and after reasonable investigation, conducted a fair procedure and that dismissal was within the band of reasonable responses open to an employer acting reasonably in all the circumstances.

4. After Mr Harper had given his evidence and after instructions had been able to be taken from him, prior to final submissions, Mr Sugarman notified the Tribunal that the Respondent now conceded that the Claimant had been unfairly dismissed. Whilst the Respondent continued to maintain that the reason for dismissal was conduct related (and nothing at all to do with any protected disclosure), it was admitted that dismissal was procedurally unfair. The Respondent's argument was then that if all the defects in procedure had been corrected, the Claimant would have been fairly dismissed at the same point in time in any event. Mr Sugarman stated the Respondent's position to be that too many individual allegations had been brought against the Claimant, the Respondent had been over reliant on advice received and that Mr Harper could not understand and explain to the Tribunal some of the reasons which had been given to the Claimant and were relied upon in his witness evidence as reasons for his dismissal. Nevertheless, if the Respondent could and would have fairly dismissed the Claimant for any one or more reasons put forward, even if reliance on any other number of reasons was flawed, a 100% reduction in compensation pursuant to the principles derived from the case of **Polkey** was justified.

5. The Respondent's concession was indeed understandable in circumstances where Mr Harper had effectively contracted out the decision-making process to the Respondent's solicitors. It was clear, from his evidence, that he had decided that the Claimant ought to be dismissed but had then handed over the Respondent's papers for its solicitors to formulate allegations against the Claimant and to ultimately formulate a set of conclusions on those allegations. Mr Harper did not understand the vast majority of those allegations and did not understand why and on what basis he had concluded in the dismissal letter sent out in his name that they amounted to conduct justifying the Claimant's dismissal. Clearly, the Respondent's legal advisers had not appreciated any need to check Mr Harper's informed agreement and understanding of their conclusions at the time of the dismissal nor indeed in the preparation of Mr Harper's witness statement. Mr Harper did not understand or believe in much of his own evidence before this Tribunal.

6. The Respondent's concession has significantly limited the scope of the Tribunal's necessary fact-finding in order to determine the issues now before it. The Tribunal does not need to address all of the allegations pursued against the Claimant and how the disciplinary and appeal processes were operated.

The evidence

7. The Tribunal had before it an agreed bundle of documents numbering in excess of 1069 pages together with a separate bundle containing documents relevant to aspects of remedy sought by the Claimant.

8. The Tribunal, having briefly identified the issues with the parties, spent the remainder of the first day of hearing privately reading the witness statement evidence exchanged between the parties and relevant documents. When each witness came to give their evidence, they could therefore do so by simply confirming their statements and, subject to any brief supplementary questions, then being open to be cross-examined.

9. The Tribunal heard firstly, on behalf of the Respondent, from Mr Nicholas Harper, majority shareholder and Chairman of the Respondent and then from Mr Andrew Pegg, an external HR and health and safety consultant, who had conducted the Claimant's appeal hearing. The Tribunal then heard from the Claimant himself. The Claimant had exchanged with the Respondent a witness statement of Mr Christopher Perry, former Managing Director of the Respondent, and had anticipated calling him to give evidence. The Tribunal had reserved a timeslot when he was able to appear to give evidence. However, at the conclusion of the Claimant's own evidence, he notified the Tribunal that he had come to a decision no longer to call Mr Perry and the Tribunal confirmed that no reliance therefore would be placed upon his witness statement evidence.

10. Having considered all of the relevant evidence the Tribunal makes the findings of fact as follows.

The facts

11. The Respondent's business involves the removal and disposal of waste and other industrial services. It was founded by Mr Nick Harper's father and Mr Nick Harper himself took over the business from around 1980. Mr Harper is the Respondent's Chairman and majority shareholder.

12. The Claimant joined the Respondent in July 2012, initially as financial controller but was appointed Company Secretary in November 2012 and promoted to the position of Finance Director on 28 November 2014. He was at no time a statutory director. The Claimant reported to Mr Chris Perry, Managing Director, who in turn reported directly to Mr Harper. The Tribunal has been shown a company structure chart which, whilst it may have been prepared in particular for third-party consumption and inclusion in tender documents, reflects the reality of the reporting structure. Two other directors, Kevin Maguire as Commercial Director and Mark Bristow as Health and Safety Director also reported to Mr Perry. The Claimant had an accounts team beneath him and Mr Maguire a commercial/sales and contract team. The Claimant, Mr Perry and Mr Maguire each held a 6% shareholding with the remaining and significant majority of the shares resting with or under the control of Mr Harper.

13. Mr Harper had, in his own words, always been *"fairly hands-on in the business*", usually attending the Monday morning management meetings. However, recently, he had been exploring a possible exit from the business and had taken steps indeed to put the Respondent company up for sale. He entrusted the other directors to manage the Respondent business on a day-to-day basis and gave them the necessary responsibility to do so, albeit he expected to be kept in the loop as to any major developments.

14. Whilst the Claimant's primary responsibilities were for the financial management and reporting of the Respondent, his role was wider than purely financial matters and he operated effectively as Mr Perry's number two. The Claimant was indeed nevertheless subordinate to Mr Perry as reflected in the formal reporting structure and a salary difference of more than £10,000 between them in Mr Perry's favour. The Claimant worked closely with Mr Perry and they were good friends regarding themselves as very much a team. They had put forward a proposal to Mr Harper for a management buyout by themselves, without the involvement of their fellow directors, in 2015 although such proposal had come to nothing.

15. The managing of contracts was part of the Claimant's responsibilities but tenders for work would typically start with Mr Maguire as CommercialDirector and he worked most closely with Mr Perry in terms of sourcing and concluding new business arrangements. The Claimant

attended most Monday morning management meetings but not separate sales meetings which took place within the Respondent.

16. Mr Maguire was viewed generally within the business and certainly by Mr Perry, Mr Harper and the Claimant as something of a loose cannon. Certainly, the Claimant and Mr Perry saw him as an individual with at times a bad attitude who could be erratic and "*a problem person*". There had been examples in the past where he had shown a lack of concern for and willingness to disregard health and safety issues and he had reacted to Mr Bristow in respect of one such issue with a disturbing threat of violence.

17. Mr Maguire, in late 2015, had been exploring a potential business opportunity whereby the Respondent would provide feedstock waste to AVG Imperial Limited ('AVG') for their use at an anaerobic digestion plant in Middlesbrough – for the production of renewable energy. The arrangement envisaged the supply by the Respondent of 108,701 tonnes per annum of feedstock to AVG in respect of which the Respondent would also pay AVG an amount for each tonne of feedstock waste taken by them. The Respondent would also contract to remove from the AVG plant the digestate i.e. the residue from the anaerobic digestion of the feedstock. The plant was being financed by SQN Asset Finance Income Fund Limited ('SQN') and the proposed arrangements also involved a collateral warranty by the Respondent to SQN in respect of its obligations owed to AVG.

18. Mr Maguire forwarded to Mr Perry the copies of the draft agreements to be entered into by email of 30 November 2015 asking if those could be "sorted" after a meeting they were to have. It is undisputed that the exact arrangements provided for within these agreements constituted a commercially disastrous deal from the Respondent's point of view in that the Respondent did not have guaranteed access to anything approaching the quantity of feedstock which it was promising to supply (Mr Harper said that supplying 30,000 tonnes would have been a challenge) and the price to be paid by it for the delivery of feedstock was outside normal commercial parameters so as to make the arrangement completely uneconomical. The usual rate for the disposal of feedstock was between £4 - £6 per tonne, whereas the agreements provided for a rate of £15..

19. Mr Perry emailed Mr Maguire on the afternoon of 30 November saying that he had read the agreements but noting that there was no limit of the Respondent's liability and "*in effect we are committing in full to deliver the full recipe it looks like at a glance*." He said that he had highlighted some changes to be made to the agreements to limit liability and to reduce the Respondent's commitment to one of *"reasonable best endeavours*". Indeed, the Tribunal has seen the forms of agreement with Mr Perry's suggested amendments marked up in yellow. It is noted that the

agreement at this stage were ones executable by the Respondent by one director alone.

20. The Claimant's evidence, which has not been contradicted, is that Mr Perry did not discuss those agreements with him at the time and simply in a routine catch up meeting at some point referred to making changes to some sort of agreement for Mr Maguire, but without any specifics.

21. As already referred to, the suite of draft documents emailed by Mr Maguire to Mr Perry included a collateral warranty. In January 2016 that particular agreement arrived in the post from SQN's solicitors signed already by Mr Maguire on behalf of the Respondent but by none of the other parties. At this point in time the Claimant was away in Thailand on a holiday. Mr Perry became aware of the signed agreement and emailed Mr Maguire on 13 January, copied into the Claimant, noting that he had signed the agreement and *"it has not reflected the changes I suggested. What you believe you have signed up for and where in the contract does it limit our commitment? It may be ok but at a glance again it looks like we have committed to quite a lot. Please can we discuss next week when Mark is back."*

22. The Claimant's first day back at work was on 18 January and before he had had an opportunity to read all of the emails he had received during his holiday absence, including those referring to the agreements with AVG and SQN, he went into the management meeting called by to Perry for that day to ask Mr Maguire questions about the agreements. At that meeting he saw a hardcopy collateral warranty agreement signed by Mr Maguire without any amendments. The Claimant's evidence was that Mr Perry asked Mr Maguire a number of questions to gain an understanding of the status of the arrangements and that Mr Maguire said that he had not signed any other agreements and it was highly unlikely that this project would get off the ground. This seemed to ring true with the Claimant who was aware of the possibility of a similar venture previously, but where the plant developer had gone bust. The Claimant was aware that any binding arrangement without the amendments Mr Perry had suggested would be financially disastrous, but was not aware of the precise financial impact. However, he did not himself get into or appreciate the detail of the agreements. For instance, he did not register that the agreement contained a price to be paid by the Respondent of £15 per tonne of feedstock, which was uneconomic. He did not appreciate the annual tonnage of waste which the Respondent might be committing to supply nor see or request any breakdown of where the Respondent might get those quantities from. He did not register that the agreements could be executed on behalf the Respondent by one director acted alone. Mr Maguire's assurances were false as all the agreements had been executed and dated as at 8 December 2015.

23. The Claimant regarded the meeting as more of a case of Mr Perry checking what the Respondent had or had not signed and accepted as a form of assurance that the other agreements had not been executed without giving much further fought to what the arrangements might mean. Whilst Mr Perry was questioning Mr Maguire he had flicked through the agreements printed out and on the table before him and couldn't see that the Respondent had any liability as the agreements bore no other signatures. He was not familiar with collateral warranty agreements but took Mr Maguire's account that no one had signed the other agreements as convincing and did not therefore think that they could be legally binding.

24. Mr Harper's own evidence was that Mr Maguire's projects did not always turn into anything. He said at one point in cross-examination that Mr Maguire had *"misled us all"* but qualified that answer by saying that he did not know what Mr Maguire had said to the Claimant. The Claimant's evidence was that it was his clear understanding that nothing at that point was legally binding and he couldn't imagine that Mr Perry's understanding was any different. He did not consider there to be a need to get the agreements checked over for instance by external lawyers because to his mind nothing might be happening, indeed for a number of years if ever.

25. The Claimant also said in his evidence before the Tribunal that he took some comfort from the notice provisions in the collateral warranty agreement which referred to a need to serve any notices under the agreement at the Respondent's head office address and to send notices to 2 separate email addresses. The Tribunal does not believe that the Claimant gave any such consideration to the notice provisions at that time. The provisions the Claimant refers to in any event are for notices to be given under the agreement on the basis that there is already a binding agreement in place. They do not effect or form any precondition to the formation of a binding agreement in the first place. The Tribunal also rejects the Claimant's protestations before the Tribunal that he saw what was being presented by Mr Maguire at the time as no more than a feasibility study or letter of intent. The agreements, certainly if entered into, were obviously far more than that.

26. The Tribunal concludes that the straightforward reality of the situation was that the Claimant and indeed Mr Perry had taken Mr Maguire's assurance that the agreements had not been executed by anyone else as meaning that they were not binding. He had not looked into the detail or the numbers within the agreements as he thought the arrangements all to be "*theoretical"* in the sense that they might have come to nothing. The Claimant now with the benefit of hindsight wished he had done more at the time.

27. The Tribunal notes that Mr Perry sought to telephone SQN's solicitors to enquire as to the status of the collateral warranty agreement but that he had not managed to get through to the lawyer dealing with the matter on

SQN's behalf and had not pursued the matter. The Tribunal accepts that the Claimant was unaware of Mr Maguire's attempted contact at the time as indeed was Mr Harper until October 2016.

28. Neither Mr Perry nor the Claimant mentioned the AVG/SQN arrangements to Mr Harper. They did not, for instance, reference them in the subsequent Monday management meetings.

29. Around June 2016 Mr Perry and the Claimant again attempted to put together a management buyout proposal acceptable to Mr Harper which he declined, preferring to look for a trade buyer. The Claimant accepted that they had been disappointed at the stance taken by Mr Harper.

30. It is undisputed that no one within the Respondent took any steps to make arrangements for performing any obligations owed to AVG, for instance, in terms of sourcing additional feedstock. When it was put to Mr Harper that Mr Perry and the Claimant took no such steps, his response was that Mr Maguire had been making arrangements with AVG off his own bat and not in collusion with Mr Perry and the Claimant. He described the Claimant and Mr Perry as being *"in denial*". When queried why, if they had known about any binding arrangements with AVG, they had not sought to get the Respondent out of them or to get the feedstock, he could not provide an explanation of his own nor understand why, against the background of a disastrous commercial arrangement, they were attempting a management buyout. He said: *"I think they switched off from Mr Maguire's harebrained scheme and thought it would go away."*

31. On 26 September 2016 Mr Perry became suspicious about the assurances Mr Maguire had given, having received a call from someone who had heard that the Respondent was involved in arrangements to supply an anaerobic digester. The Respondent had used DWF solicitors to advise in commercial matters and Mr Perry emailed one of their solicitors, Jason Blakey, asking him for a *"quick freebie read of the coll warranty to just say is it binding and a concern for us in terms of any liability?"* He referred in his email to the other document regarding the feedstock supply as not being signed but said: "*In summary we may want to cancel… Can we and how to*."

32. When suggested to Mr Harper that this email correspondence seem to indicate that Mr Perry was not aware that any of agreements had been signed by anyone (other than the collateral warranty signed by Mr Maguire) he described the email to DWF as "*camouflage*".

33. On 27 September 2016 Mr Perry emailed Mr Maguire referring to him having sent the documents to solicitors to check if there was any liability and what exit terms were available should the Respondent need them. The Claimant accepted that Mr Perry had discussed this correspondence

with him before sending it to Mr Maguire. The Claimant said that he understood from Mr Perry that the advice had been that there was a need for the other agreements to have been signed also, for the collateral warranty provisions to kick in.

34. Mr Perry emailed Mr Maguire (copied to the Claimant) later on 27 September saying that he had spoken to solicitors and that their informal view was that the collateral warranty was binding and committed the Respondent to perform the services in the feedstock agreement. He went on that the feedstock agreement *"is NOT signed (and should not be)… The good story I believe (in summary) is that you need both the FA and the CW signed to make the CW work. If the FA is not signed there is much less chance of the CW being enforced and so by default there is nothing to enforce. PLEASE DO NOT SIGN THE FA UNLESS IT IS AMENDED AND AGREED BY THE MGT TEAM AND MYSELF. AS A SAFEGUARD PLEASE CAN I BE ASKED TO REVIEW AND SIGN THESE OR SIMILAR DOCUMENTS WHICH HAVE LEGAL AND FINANCIAL LIABILITY IMPLICATIONS. Something this significant should have multiple eyes (i.e. ML, KM and myself as a minimum) and discussion to ensure we try and limit the risk both financially and legally. We have a good group to do this and professional experts to support us as required."*

35. Mr Maguire responded to this email by one of 5 October stating *"we only signed until Oct 2016 which is now so we can terminate if we wish, that was the whole thought on the tender we signed."*

36. At this point, the Claimant and Mr Perry became concerned, the Claimant believing that Mr Maguire was starting to panic as now it appeared from what he was saying was that the agreements had indeed been signed. Their concern was brought also to Mr Harper's attention on 6 October 2016.

37. Mr Perry obtained the contact details of the managing director of AVG, Mr Martyn Strong, from Mr Maguire and emailed him on 6 October. The Tribunal accepts that within the email Mr Perry was being deliberately disingenuous to try to flush out the facts and what status AVG thought the arrangements had. He said: "The purpose of this email is to introduce myself and also to pick up on some work regarding contracts that was started but not concluded about a year ago. It is probably easier to speak on the phone when you are available but my basic understanding is that there were various drafts of docs namely a feedstock agreement and a warranty of sorts (from memory) which were both intrinsically linked but the documents did not get completed to my knowledge."

38. Mr Strong responded on 6 October, attaching the signed feedstock agreement, feedstock collateral warranty, digestate agreement and digestate collateral warranty, that: "Your comments have thrown me a

little, because we have understood that the contracts are concluded. I can see no reason why you would not think this is also the case, based on the attached?" He expressed doubts in the circumstances as to whether or not the Respondent was going to be able to meet its obligations under the contracts.

39. It is clear then that Mr Perry sought more formal and detailed legal advice from DWF regarding the status of the agreements. This was obtained by an email from a Matthew Campbell dated 7 October which summarised the key provisions of all of the agreements. This included the comment that if the Respondent breached the feedstock agreement it was liable to SQN as well as to AVG for their losses. Mr Campbell, towards the end of the advice, referred to Mr Perry having mentioned that Mr Maguire *"may have entered these agreements without authority*." He said that given Mr Maguire was a director of the company the Respondent was likely to be unsuccessful in any assertion that the agreements were void due to his lack of authority.

40. Mr Perry and the Claimant quickly turn their minds to the removal of Mr Maguire as a result of his conduct, albeit Mr Perry also recognised that the best option might be retaining Mr Maguire in terms of navigating them through a dispute with AVG.

41. On 6 October Mr Perry made contact with an employment law solicitor used by the Respondent to advise regarding the potential for Mr Maguire's dismissal. Again, Mr Harper was aware of that approach and thought it to be appropriate.

42. Mr Perry, Mr Harper and the Claimant met with Maguire on 10 October to discuss how the Respondent might service the AVG contract. It was clear that there was no plan in place as to how that might ever be done and Mr Maguire's stance remained that the Respondent could exit the agreements. The Claimant located a PowerPoint presentation which appeared to have been Mr Maguire's pitch for the business and which included a statement that the Respondent had 380 regular farming customers whereas in reality they had a mere handful. The decision was unanimous to suspend Mr Maguire pending a disciplinary investigation. This investigation was undertaken by the Claimant and Mr Maguire was ultimately dismissed from his employment on 31 October 2016 following a hearing conducted by Mr Perry.

43. Mr Harper's evidence was that around this time he spoke to Mr Maguire on his own informally to try to find out what had been going on. Mr Maguire told him: *"I fucked up*" and that was all he said he could get out of him. In terms of the Claimant's and Mr Perry's involvement, Mr Harper told the Tribunal: *" My conclusion … they may not have been convinced that the agreements had been signed but certainly they should have*

flagged this lot up …. I do think Chris knew but I can't prove it … Chris was disingenuous with DWF to cover himself". He said that at his appeal against dismissal before Mr Harper, Mr Maguire had said that Mr Perry had known about the contracts. He accepted in cross examination that Mr Maguire did not say that the Claimant knew. When it was put to him what view he would have taken if Mr Perry and the Claimant had not known the contracts had been signed and just not told him about the contracts existing in some form in January, Mr Harper told the Tribunal: *"The word which would come into my mind would be 'incompetence'"*.

44. Mr Perry continued to take the advice of DWF who provided draft letters to consider sending to AVG. Mr Harper was fully briefed regarding these developments. In an email of 10 October Mr Campbell of DWF addressed the possible argument that the contract could be said to have been fraudulently entered into and expressing the need to have evidence regarding potential fraud before this was raised. Fundamentally, the Respondent's position was described as weak and that they were liable for a breach of contract claim unless it could be shown that AVG knew or was complicit in any fraud. The best option was described as to avoid litigation and to seek to negotiate a workable solution. The Claimant was clear that that was at that point in time absolutely and clearly the best way out and thought that he was concentrating himself on trying to avoid litigation.

45. A telephone conference took place on 11 October between the Claimant Mr Perry and Mr Strong of AVG. During this conversation Mr Perry sought to hold the position that the contracts were not binding. Evidence from Mr Strong provided subsequently in a witness statement as part of the disciplinary process against the Claimant, suggests a robust stance taken by the Respondent which caused him some disquiet. It is noted that Mr Harper sat in and listen to the telephone conference although he did not take part or announce his presence to Mr Strong. The evidence is that he passed Mr Perry notes of points he wished to get over. Subsequently, a form of letter was finalised in conjunction with DWF to go to AVG which, the Tribunal finds, Mr Harper approved.

46. During the telephone discussion it was revealed by Mr Strong that Mr Maguire had also committed the Respondent to supply a second powerplant. Enquiries were made and ultimately DWF's advice sought regarding this second contractual arrangement. Their advice was that it presented very similar difficulties to the AVG/SQN arrangement. By this stage, Mr Perry and the Claimant had also sought the advice of Ernst & Young, accountants and in particular one of its partners Mr Hunter Kelly. His specialism was in insolvency and business restructuring. By late October there were discussions between the Claimant, Mr Perry and professional advisers regarding setting up a new company to potentially acquire the assets of the Respondent in the event of the Respondent being forced into insolvency.

47. A further meeting took place on 13 October between Mr Perry and Mr Harper on one side and Mr Strong of AVG and his advisors on the other. The Claimant was not present. Mr Strong deals with this meeting in a statement which was produced to the Respondent by him and included in the documents forming the disciplinary case ultimately pursued against the Claimant. Mr Strong suggests that Mr Perry took a more contentious position maintaining that the contracts were invalid, whereas Mr Harper appeared more willing to seek to negotiate a way out. There is no evidence that Mr Harper took issue with Mr Perry's approach at the time.

48. Mr Harper was aware of the newco option and co-operated in providing, through Mr Perry, personal identification documents necessary for that company to be formed on the basis that he would be a director/shareholder of the new legal entity. Mr Harper understood the need to act quickly so that any necessary licences to operate could be obtained in the new company's name.

49. The Claimant spent some time investigating the circumstances in which the agreements with AVG/SQL had been executed and how it had come about that the execution clause for the Respondent had been changed to allow for execution by a sole director. He hoped this might strengthen the Respondent's position in any contention that the agreements were unenforceable as they had been arrived at fraudulently.

50. Mr Perry wished to arrange a meeting in London with AVG and SQN including their lawyers. He hoped to take Hunter Kelly along with him to that meeting but as at 20 October Mr Kelly was reluctant to go ahead with the meeting as he didn't think they would be sufficiently prepared for it. He sought more information including in terms of the Respondent's value and the options which might be offered to AVG/SQN. Ultimately further information was provided to Mr Kelly who agreed to attend the meeting in London on 26 October.

51. On 24 October Matthew Campbell emailed Mr Kelly with some thoughts regarding the approach which should be adopted at the meeting. His view was that there should be an attempt to negotiate a settlement to release the Respondent from the contract including in the light of insurance cover available and the potential costs of restructuring the company. Again, the Claimant's evidence before the Tribunal was that settlement was always his number one aim and his first priority was to retain his employment and the value of his existing shareholding within the Respondent. An email from Mr Perry to Mr Kelly of 25 October into which the Claimant was copied, but not Mr Harper, expressed the belief that the Respondent needed to go in *"firm and clear"* at the meeting the following day. A solution might be the cancelling of the contracts with AVG and agreeing on a best endeavours basis to supply whatever feedstock material they could.

52. Mr Harper's evidence of his engagement with the issues around this time is that whilst he attended some meetings involving Ernst & Young and DWF, *"I was not engaging … I was not offering a lot."* He portrayed himself as someone who could do the ground work with clients and talk the talk when it came to waste disposal, but was out of his depth if discussions concerned legal or accounting matters. He would follow advice but not necessarily seek to understand it.

53. The meeting in London took place on 26 October. The Claimant did not attend but was aware that it was taking place and both he and Mr Harper had discussed the meeting and what might be said. Mr Perry had advised Mr Harper that it might not be helpful if he attended. It was felt that Mr Harper might struggle to restrain his emotions. Mr Harper accepted Mr Perry's suggestion and did not insist on attending. He knew that Mr Kelly was attending. At the meeting at the offices of SQN's solicitors, the feeling of AVG and SQN was that Mr Perry's approach was extremely objectionable, the Respondent had no intention of renegotiating the contracts but rather was threatening SQN and AVG with putting the business into insolvency. That is clear from a statement also supplied to Mr Harper during the Claimant's disciplinary process by SQN's lead solicitor, Mr Vegoda. The meeting ended without any resolution. The following day, Mr Harper received a call from Donny Hughes, a director of AVG, saying that Mr Perry had lied to them, made the situation worse and that taking an insolvency man to the meeting had been a bad idea.

54. The Claimant, Mr Perry, Mr Harper and Hunter Kelly all met at DWF's offices in Leeds on 27 October. They discussed the options available to the Respondent including buying the business out of insolvency. The intention was for Mr Harper to still keep an open dialogue with AVG to achieve some form of negotiated solution. Mr Kelly presented a review of the Respondent's options by way of a detailed report which included as an option a restructuring of the business through or following an insolvency process. Advantages and disadvantages of each option were set out. His suggested way forward was to market the business and assets in parallel with continuing discussions with AVG/SQN to determine whether there was the potential of compromising any claims under the contracts. If insolvency was ultimately the option to be taken, administration was suggested to be the most beneficial route with a pre-pack purchase of the assets by a new corporate vehicle.

55. Mr Harper's evidence was that, when they were leaving the meeting, he shook Mr Kelly's hand *"and the look he gave me was his if my mother had died. It is difficult to explain but I was left with the clear impression that Chris and Mark were trying to engineer an insolvency in order to buy the business."*

56. Mr Harper met with Donny Hughes on 28 October to discuss the possibility of an agreed way forward.

57. Mr Harper maintains that on 3 November he discovered that Mr Perry and the Claimant had set up a new company, HPL Environmental Limited (the HPL referring to the three of them by name: Harper, Perry, Lloyd). Mr Harper decided to take over all future dealings with DWF and Ernst & Young as he no longer had any confidence that they were acting in the best interests of the Respondent. Mr Harper said that on 11 November he challenged Mr Perry directly about his intentions asking whether he was trying to put the Respondent into administration so he could buy it from the administrators. He said that Mr Perry answered in the affirmative. Whilst the Tribunal has heard no evidence from Mr Perry, it can not conclude it likely that Mr Perry made such express admission. This may, however, have been Mr Harper's interpretation given the impression he had already formed when shaking Mr Kelly's hand on 27 October. Mr Harper said that Mr Perry said to him that he had misunderstood his response. Mr Harper then appointed Watson Burton, Solicitors to act on behalf of the Respondent in relation to potential disciplinary proceedings against Mr Perry and the Claimant.

58. Indeed the Newco had been incorporated as from 3 November. This was on the basis of Mr Perry, Mr Harper and the Claimant each having a one third shareholding. Mr Harper said that the details of the shareholding was only shared with him by the Claimant on 14 November. He maintained that there had been no prior discussion of that percentage shareholding. The Claimant told him that this was just an administrative exercise.

59. Before the Tribunal, the Claimant said that Mr Harper was already aware of that arrangement. He explained that there had been a form of bust up/argument between Mr Harper and Mr Perry and to defuse that he had said that for now they should just proceed on the basis of a one third shareholding each. The Tribunal does not accept this account given by the Claimant in circumstances where it was not referred to in his witness statement, nor indeed in Mr Perry's witness statement and Mr Perry, when separately during a subsequent disciplinary process asked to explain how the Newco had been formed, did not allude to any such bust up or effective agreement regarding the allocation of shares. The Claimant did not put this account to Mr Harper when cross-examining him.

60. It appears, on the balance of evidence, that Mr Perry and the Claimant had come up with that initial share allocation independently. They were of the view that for the newco to survive they would need financial backing and any backers would want around 70% of the shares. This would be in circumstances where everyone was aware that Mr Harper had a plan to retire in the near future albeit they would want him to remain as part of the business for a period. They would also want to incentivise Mr Perry and the Claimant to make the business work such that they "*theorised"* is that an appropriate arrangement might be for the remaining 30% shareholding to be split equally.

61. Mr Harper's discovering of the share allocation on 14 November crystallised his suspicions into a firm view that Mr Perry and the Claimant were seeking to effectively take the Respondent company away from him. He suspended both the Claimant and Mr Perry on 12 December 2017. The Claimant was invited to a disciplinary hearing on 27 January 2017 in which in excess of 25 separate allegations were made. A first disciplinary hearing took place on 8 February which was reconvened on 16 February and then again on 3 April. On 5 May Mr Harper wrote to the Claimant with his decision to terminate his employment. Whilst the letter made detailed findings, his evidence to the Tribunal was that of fundamental importance to him was that firstly the Claimant knew about the AVG contracts in January 2016 and failed to take appropriate action and secondly that he then used the situation to attempt to exclude Mr Harper and his wife from the Respondent business which he himself had founded more than 30 years earlier. The Tribunal notes that Mr Perry's employment was also terminated after a disciplinary process.

62. On 26 October 2016 Mr Harper had asked the Claimant if his director's loan which stood at around £38,000, could be repaid. The Claimant responded that he did not think so as it would not be allowed. Mr Harper subsequently emailed the Claimant confirming his request. The Tribunal can not conclude whether this was an email sought by the Claimant or one which Mr Harper simply chose to send. The Claimant said that when he and Mr Harper spoke, Mr Harper said he would stand by the consequences and write an email of instruction thinking of a "good reason" for the repayment. The email sent on the afternoon of 26 October asked for the balance to be transferred to him and referred to his daughter being on the point of buying a house and being a little short on the deposit. Advice was taken from Hunter Kelly, who reverted to the Claimant saying that the ability to repay the loan would depend on the terms of the loan and its repayment profile. He warned, however, that any repayment could be challenged further down the line in an insolvency context. He subsequently advised that if Mr Harper was paid on a continuing basis £5000 every month in lieu of salary as was already the established practice in terms of Mr Harper's wages, then he would see that as "*business as usual*" with no desire to prefer Mr Harper as a creditor. He said that he thought the matter should be discussed further with DWF as there might be other legal considerations and "*it will benefit the board to play out these scenarios live as a discussion."*

Applicable law

63. Section 43A of the Employments Right Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is 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; ……"

64. It is clear that a disclosure must actually convey facts and those facts must tend to show one of the prescribed matters. The making of an allegation, the expression of opinion or state of mind is insufficient (see **Cavendish Munro Professional Risks Management Limited [2010] IRLR 38** and **Norbrook Laboratories v Shaw [2014] ICR 540**.)

65. Section 103A of the Employment Rights Act provides that:-

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

66. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. In establishing the reason for dismissal, this requires the Tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the Tribunal to consider the employer's conscious and unconscious reason for acting as it did.

67. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

68. In a claim of ordinary unfair dismissal it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct pursuant

to Section 98(2)(b). This is the reason relied upon by the respondent, albeit incompetence may be a potentially fair reason as one related to an employee's capability (see Section 98(2)(a)). If the respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) *depends upon 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".

69. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

70. The reason for dismissal is "*the totality of the reason which the employer gives*" (see **Robinson v Combat Stress UKEAT/0310/14**). The fact that upon analysis some parts of that reason do not stand up to scrutiny does not mean the dismissal is unfair if what is left means dismissal was still within the band of reasonable responses.

71. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

72. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award.

The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

73. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to her dismissal – ERA Section 123(6).

74. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

75. Having applied the facts to the relevant legal principles, the Tribunal reached the following conclusions.

Conclusions

76. The Tribunal considers firstly the Claimant's complaint that he was automatically unfairly dismissed by reason of his having made a qualifying protected disclosure (whistleblowing). The Tribunal's straightforward conclusion in this regard is that when the Claimant expressed the view to Mr Harper that the repayment of his loan account would be in breach of the Insolvency Act, there was no provision of information at all flowing from the Claimant to his employer. Mr Harper notified the Claimant of his desire to have his loan repaid and the Claimant simply stated his view that this might be an unlawful act. He then sought professional advice on the point. Without a provision of information there can be no qualifying disclosure at all. In any event, had the Claimant's assertion of illegality been capable of amounting to a protected disclosure, the Tribunal finds that the Claimant was not dismissed by reason of his having made that protected disclosure. The reason for his dismissal was Mr Harper's belief that he had actively conspired against him in not disclosing his knowledge of the signed contracts and then in trying to take away the Respondent's business from him. Alternatively, the Claimant was guilty of a form of gross incompetence, at the very least, in not alerting Mr Harper to the existence of the contracts. There is no causal connection between any disclosure and the decision to terminate employment. Indeed, the consideration of the Claimant being guilty of foul play arose distinctly and specifically out of the infamous handshake with Mr Hunter Kelly on 27 October 2016 after the alleged disclosure. Mr Perry was dismissed for similar reasons and in circumstances where the Tribunal has heard no suggestion that he was penalised for making any protected disclosure himself. Mr Harper did not use the Claimant's removal as an opportunity to receive the lump sum repayment of his loan. He continued to draw down the fixed sum of £5,000 each month in lieu of salary as was his established practice at the time. The Claimant's complaint of automatic unfair dismissal therefore must fail and is dismissed.

77. The Tribunal then turns to the admitted ordinary unfair dismissal. The first reason advanced on behalf of the Respondent as a reason, absent any defects in the process, for which the Claimant could and would have been fairly dismissed, was his involvement in terms of knowledge and then acquiescence in Mr Maguire having entered into the contracts with AVG/SQN.

78. However, Mr Harper's own evidence was wholly unconvincing as to him having formed a belief that the Claimant knew that the agreements had been entered into in November 2015 or January 2016. At its highest, this was a suspicion, still held by Mr Harper, albeit not his primary suspicion. Furthermore, it was his "feeling" in circumstances where he was unable to point the Tribunal to any evidence upon which he had come to any conclusion. Indeed, the Tribunal does not consider that any conclusion of the Claimant's knowledge of the signed agreements prior to October 2016 could have been formed by Mr Harper on reasonable grounds. The Tribunal notes again that Mr Perry rather than the Claimant, on the evidence, had the earliest knowledge of these agreements which appeared to Mr Perry to be draft agreements. He made some suggested amendments to the agreements without referring them to the Claimant and there is no evidence of any discussion at that time with the Claimant. The Claimant's involvement was no earlier than his return to work on 18 January 2016 when he attended a management meeting Mr Perry had called, without having time to consider what it was to be about, let alone to give anything more than a cursory consideration of the agreements. The Claimant's evidence was that he was assured by Mr Maguire's confirmation that, other than one signature on the collateral warranty by Mr Maguire, none of the other agreements had been signed by anyone and then by Mr Perry's own acceptance of that state of affairs. Mr Harper had no evidence of any further material discussion between the Claimant and anyone else about the agreements until October 2016 and his repeated comment that the Claimant and Mr Perry worked as a close team and must have discussed everything is insufficient to allow a reasonable belief to have been formed that the Claimant knew anything more about the agreements until October 2016.

79. Indeed, the evidence is of Mr Perry giving the firmest and most direct instruction to Mr Maguire to ensure that the agreements were not signed, an instruction unlikely to be given if he already knew them to have been signed. His correspondence then with the solicitors, DWF, in October is consistent with him having become concerned with the status of the agreements, but still believing them to be in unsigned form. Mr Harper describes such correspondence as "*camouflage*" and an example of Mr Perry trying to cover his tracks, but again this is a conclusion without any evidential basis. Furthermore, there is no evidence of a linkage between the Claimant and the actions now taken by Mr Perry.

80. How could Mr Harper have reasonably concluded that Mr Perry or the Claimant were aware of the agreements if they, firstly, took no steps whatsoever to source the amount of feedstock which would be required to satisfy known contractual obligations and secondly, if they were keen to conclude a management buyout of the Respondent in circumstances where they knew that by reason of the contractual arrangements with AVG/SQN, the Respondent business was in extreme peril? Mr Harper was unable to provide any explanation or rationale for Mr Perry and the Claimant's behaviour which does not suggest their knowledge of the existence of binding agreements.

81. Their behaviour only makes sense if from the outset, in late 2015/early 2016, it was their intention to drive the Respondent into insolvency, but again would they have wished to effectively destroy a company's business and reputation before acquiring it for themselves?

82. The evidence before Mr Harper, on balance, pointed to Mr Maguire having gone off on a frolic of his own and having personally "*fucked it up*" as he sought to explain his actions to Mr Harper. The evidence in fact ought reasonably to have suggested to Mr Harper that Mr Maguire took steps to hide what he was doing, as can be seen from his successful attempts, following discussion with AVG, to persuade all parties that the agreements should be executable on behalf the Respondent by one sole director.

83. On the evidence before him, there were no reasonable grounds upon which Mr Harper could reach a reasonable belief that the Claimant was from an early stage involved in a deliberate entering into of agreements which would weaken, if not destroy, the Respondent.

84. Had he been able to reach such a conclusion on reasonable grounds after reasonable investigation, then it almost goes without saying that the Claimant's dismissal would have been within the band of reasonable responses and Mr Harper certainly would have reasonably dismissed the Claimant on this ground. However, the charge against the Claimant lacked the necessary evidential basis for a conclusion of guilt to be reasonably arrived at.

85. The Tribunal then turns to the separate charge against the Claimant that he did not investigate further the status of the agreements on the knowledge which was reasonably concluded he did have as at 18 January 2016 (and thereafter) and did not act in accordance with his duties and responsibilities in failing to report the existence of the contracts and Mr Maguire's behaviour to Mr Harper at the time. Mr Harper's evidence is that this alone would have led him to a conclusion of incompetence on the Claimant's part and of a sufficient degree as would have resulted in him terminating the Claimant's employment.

86. The Tribunal again notes that Mr Harper could not have arrived at any reasonable belief other than that the Claimant was not aware of Mr Maguire's negotiations and the existence of draft, let alone signed, agreements between the Respondent and AVG/SQN on or shortly after 30 November 2016. All discussions and emails were between Mr Perry as Managing Director and Mr Maguire as the Commercial Director who reported directly to him, with no evidence that the Claimant had been appraised on them.

87. The Claimant, of course, was aware of the existence of the agreements on his return to work on 18 January 2016. He did not seek to dig any deeper at the meeting held that day and called by Mr Perry but the evidence was of Mr Perry, unsurprisingly, having run the meeting and of him asking questions of Mr Maguire. Mr Perry was prepared to accept Mr Maguire's assurances. Can it be said that the Claimant's willingness to accept his assurances and failure than to bring the matter to Mr Harper's attention could reasonably have allowed Mr Harper to conclude that the Claimant was guilty of misconduct or, as he now characterises it, gross incompetence.

88. Mr Maguire was a director of the company of similar status to the Claimant and with an identical shareholding within the Respondent company. The evidence before Mr Harper was of the Claimant having little opportunity before and at the 18 January meeting to consider the nature of the commercial arrangements and then of an acceptance by him that those agreements were unsigned and did not warrant his own detailed scrutiny in circumstances where the review taken by his Managing Director and apparent view of the Commercial Director was that any arrangement with AVG/SQN was at best a long way off in the future and was likely never to go ahead at all. The Tribunal views it as somewhat of a stretch for Mr Harper to be able to reasonably conclude that there was an onus in the circumstances at that time on the Claimant to effectively doubt and investigate the assurance he had been given by Mr Maguire. Whilst Mr Maguire was regarded as somewhat of a maverick and a loose cannon, it was, on an objective view of the evidence, very unlikely for it to have entered the Claimant's radar that the Commercial Director was actively misleading him and acting against the best interests of the Respondent. Indeed, the context here is of Mr Maguire concealing and seeking to conceal the truth from the Claimant and Mr Perry. Mr Maguire's subterfuge was not straightforwardly discoverable by the Claimant or anyone else. If he had sought to take the time to look more closely at the detail of the arrangements proposed to be entered into, he might have noted the uncommerciality in the arrangement but again, on further investigation, would have seen that Mr Perry had sought to water down the Respondent's obligations to an acceptable level. Crucially, the Claimant would not have known that the agreements might be binding and would have been operating reasonably under the assurance given by Mr Maguire that this particular project might never get off the ground. (The Claimant gaining comfort from the requirement in the agreements for the serving of

notices and his consideration that what Mr Maguire was presenting was merely a feasibility study were not, the Tribunal has found, in fact in the Claimant's mind at the time, nor part of Mr Harper's considerations in deciding to dismiss the Claimant).

89. In this context, why would he have reported a suspicion, he reasonably did not in fact have, to Mr Harper? It was not for the Claimant to highlight to Mr Harper the possibility of new work and contractual arrangements which neither he nor ostensibly anyone else within the business thought would ever happen. The Tribunal could understand Mr Harper coming to a conclusion that he ought to have been informed of the agreements before they were entered into if it had been thought or intended that they were going to be entered into. Would he reasonably have expected to be kept informed of negotiations which appeared not to have resulted in any agreement where this type of venture had a history within the Respondent of running aground before it started? He would not.

90. The fact that a collateral warranty agreement had been signed by Mr Maguire ought to have rung alarm bells but those alarm bells were rung and Mr Perry took it upon himself to interrogate Mr Maguire as to the status of the agreements. Again, could it be concluded that the Claimant was guilty of incompetence when Mr Perry accepted Mr Maguire's assurance that nothing else had been signed by any other party? Mr Perry clearly felt some residual unease and need to investigate, as the evidence before Mr Harper in October 2016 was that he had tried to call the solicitors who had sent through this agreement. Mr Harper was aware, however, that the Claimant's position, which he had no basis for disputing, was that he knew nothing of that call having been made. The overall context of the arrangements reached was of the most senior commercial employee in the Respondent having pursued a possible opportunity and, whilst a director himself, having run this past Mr Perry. Whilst the role of a Finance Director involved the management and overseeing of contractual arrangements and their impact on the business, the Claimant's role has to be seen against there being a Commercial Director in place who reported, as did the Claimant, to a Managing Director. The Tribunal rejects Mr Sugarman's submission that it was bizarre to take comfort from Mr Maguire's assurance, including in circumstances where a collateral warranty agreement existed signed, it appeared, by Mr Maguire. The situation may have been different had it been signed by other parties to the agreement.

91. In conclusion, the Tribunal does not consider that Mr Harper had or but for any defect could have had reasonable grounds for concluding that the Claimant was guilty of misconduct, incompetence or of a wilful dereliction of the duties he owed to the Respondent in failing to investigate these contractual arrangements further in January 2016 or to bring them to Mr Harper's attention. Had that conclusion been one reasonably open to Mr Harper on the evidence before him, the Tribunal further does not consider

that dismissal on this ground would have fallen within the band of reasonable responses given the Claimant's subsidiary invovement in the matter when compared to that of Mr Maguire and even Mr Perry and where the primary responsibility for any failure to act or notify him can only reasonably have been regarded as falling on Mr Maguire and/or Mr Perry. The Tribunal notes that the trigger for Mr Harper believing the Claimant ought to be put through a disciplinary process came around 3 weeks after the discovery of the existence of the agreements. The trigger was not the Claimant's role in allowing or acquiescing in those agreements coming into existence (or not reporting them to Mr Harper) but his belief that the Claimant (and Mr Perry) were seeking to take the Respondent company away from him. But for such belief, the likelihood is that Mr Maguire alone would have been held responsible. Mr Harper was very much on board with immediate disciplinary action being taken against Mr Maguire, who was dismissed by 31 October 2016 for his conduct in respect of the agreements.

92. The final ground relied upon, as an instance of misconduct for which the Claimant could and would have been fairly dismissed by the Respondent, relates to the conclusion of Mr Harper that the Claimant was acting against the Respondent's interests and effectively seeking to take the Respondent's business away from the Respondent company of which Mr Harper was the significant majority shareholder. Mr Harper's basis for that belief arose out of an impression received from Mr Hunter Kelly when he shook his hand at the end of a meeting to review the Respondent's options on 27 October 2016. Mr Harper's evidence was then of a conversation he had had with Mr Perry where he said that he asked Perry directly whether it was his intention to take the company from Mr Harper to which Mr Perry allegedly replied that it was. Even if such evidence of Mr Harper could be accepted, which on balance the Tribunal found it could not, the conversation was with Mr Perry, not in the Claimant's presence and Mr Harper's belief in the Claimant's involvement in such a plot arises again primarily from Mr Harper's belief that the Claimant and Mr Perry talked about everything with each other and worked in all respects as a close team – the Claimant therefore must have known and been involved in the plot.

93. However, the evidence was that there had been no secrecy in the creation of a new company. From very shortly after the discovery of the signed agreements, a relatively early stage it was foreseen by everyone, including Mr Harper, that there was a risk of the Respondent becoming insolvent and therefore a need to have the ability to rescue what they could in an insolvency situation through a new company which they would have to set up from scratch. Mr Harper indeed was fully appraised of the arrangements undertaken to set up a new company and provided personal identification documents so that he could be installed as an officer of the company. He was aware that there was a need to move quickly and the need for the new company to have in place, on a contingency basis, an operating licence to dispose of waste if the Respondent was suddenly no

longer in a position to continue trading. Against that background and the parallel negotiations with AVG, there was no basis for concluding that the Claimant was intent on driving the business into insolvency. That was only one of the foreseen options. Mr Harper was critical of the time spent by the Claimant in seeking to show that the agreements with AVG/SQN were unenforceable due to fraud – his purpose in so doing was to get the Respondent out of its obligations and to allow it to continue to trade, which it was unlikely to be able to do if AVG/SQN sought the strict performance of the agreements. The Claimant was not present at the London meeting to which Mr Vegoda took such objection on behalf of SQN. Mr Perry may have gone too far or been too unsubtle in holding out the threat of insolvency, but there was no basis for concluding that his intention was to compel an insolvency, let alone the Claimant's. The mere presence of Mr Kelly at the meeting indicated that this was an option the respondent had in mind and his presence was of course known about by Mr Harper in advance of the meeting without any objection on his part.

94. It must have been obvious to Mr Harper that in any new company there would have to be an issue of share capital to one or more shareholders. Mr Harper did not show any interest in this, but, on the balance of evidence, neither the Claimant nor Mr Perry kept Mr Harper up-to-date regarding any specific thoughts on an appropriate division of the equity in the new company.

95. It is also clear that, whilst Mr Harper had not been told of the formation of the new company with an equal share allocation as between himself, the Claimant and Mr Perry as at the point of its incorporation, he was always evidently to be (some) part of the new company. Furthermore, the name of the new company included a reference to his own name.

96. He did not discover that the Claimant and/or Mr Perry had formed a new company without/excluding him or that they were plotting to carry on the Respondent's business without his future involvement. The issue he faced when he became aware on 14 November 2016 of how the company had been formed and the allocated shareholdings, was whether or not that was an arrangement acceptable to him. He was not being tricked into disposing of the Respondent's business to a company in which he had only a one third shareholding. The company was formed on that basis but in circumstances where Mr Harper knew that on an insolvency he would not (and the Claimant cannot reasonably have been viewed as thinking he would) be powerless to prevent a transfer to that company happening.

97. At most he might reasonably have concluded that the Claimant and Mr Perry were seeking to put themselves in a better position in terms of their share of the equity in any new business albeit even this would not necessarily be an improved position in the sense that the company could not operate without external funding which would dilute all of their shareholdings in circumstances where the company would not necessarily

be worth much if anything at all. If there was an insolvency situation in the Respondent then any new company was effectively rising out of the ashes and not necessarily with the value built up over the years by the Respondent under the majority ownership of Mr Harper.

98. In conclusion, Mr Harper had no reasonable grounds for coming to a conclusion that the Claimant was acting against the Respondent's interest in seeking to drive the Respondent into an insolvency to/and take the Respondent business away from him. A dismissal on such ground would not therefore have been a fair dismissal.

99. Nor can the Respondent's alternative characterisation of the Claimant's believed misconduct as a breakdown of trust any confidence ('some other substantial reason' sufficient to justify dismissal) justify a reduction in compensation. Any loss of confidence in the Claimant by Mr Harper arose out of his belief in his misconduct. He cannot rely on the Claimant's adverse reaction to the disciplinary charges as creating an untenable future relationship when that reaction arose out of a number of baseless and/or ill thought out allegations of misconduct which the Respondent now concedes render dismissal unfair.

100. The effect of the Tribunal's conclusions is that the Tribunal cannot conclude, in accordance with the principles derived from the case of **Polkey**, that the Claimant would, if the defects in procedure had been remedied, have been fairly dismissed at all. Indeed, there would not have been reasonable grounds for Mr Harper's conclusion of the Claimant's guilt of misconduct. It is not therefore appropriate for the Claimant's compensation for unfair dismissal to be reduced by any factor at all on the basis that he would or with any degree of certainty have been fairly dismissed in any event.

101. The Tribunal further concludes that it would not be just and equitable to apply any reduction to the Claimant's compensation on the basis of his conduct prior to dismissal. The Tribunal has not, on the facts it has found, accepted that the Claimant knew about the binding arrangements entered into prior to October 2016 or acted incompetently in not reporting his awareness of contracts which, to his knowledge, had not been signed in respect of a project which was not going to proceed in the near future if at all. Further, the Claimant was simply acting with necessary speed in setting up a new corporate vehicle which might acquire the Respondent out of any potential insolvency. He might have discussed matters in advance in more detail with Mr Harper, but was concentrating on what he saw as an urgent task where he recognised that there would be a need for further discussion if an insolvency situation arose. The Claimant was not, on the evidence, actively seeking or preferring a solution whereby the Respondent entered into insolvency. This was only an option which even Mr Harper saw as necessary to provide for in advance if it turned out that the Respondent could not

survive the onerous obligations it now owed to AVG/SQN. The Tribunal does not conclude that he was seeking to act against the Respondent's interests so as to take Mr Harper's business away from him.

Employment Judge Maidment

Date: 9 April 2018