RESERVED JUDGMENT
WITH REASONS

Case No. 2400172/2017

EMPLOYMENT TRIBUNALS

Claimant: Ms R Smith

Respondents: 1. Scapa Group PLC
2. James Wallace
3. Heejae Chae

HELD AT: Manchester **ON:** 7, 8, 9, 12, 13, 14, 15 and in chambers on 16 March 2018

BEFORE: Employment Judge Franey
Ms F Crane
Mr B J McCaughey

REPRESENTATION:

Claimant: Mr A Robson, Counsel
Respondents: Miss J Connolly, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant did not make any disclosures protected by Part IVA Employment Rights Act 1996.

2. The complaint of detriment in employment because of a protected disclosure contrary to section 47B Employment Rights Act 1996 fails against all three respondents and is dismissed.

3. The complaint of "automatic" unfair dismissal contrary to section 103A Employment Rights Act 1996 fails and is dismissed.

4. The complaint of "ordinary" unfair dismissal contrary to section 98 Employment Rights Act 1996 is well founded**.** The claimant was unfairly dismissed by the first respondent.

5. In relation to the remedy for unfair dismissal:

   (a) There shall be no reduction to the basic or compensatory award by reason of contributory fault;

   (b) There shall be no increase or reduction because of an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, and

   (c) Applying **Polkey v AE Dayton Services Ltd [1988] ICR 142** the compensatory award in respect of the claimant's losses after a period of three months should be reduced by 20%.

REASONS

Introduction

1. These proceedings began with a claim form presented on 30 January 2017 in which the claimant complained that as a consequence of a series of protected disclosures made from June 2016 onwards she had been subjected to a number of detriments in employment and unfairly dismissed (on 12 months' notice) in November 2016. She also complained of "ordinary" unfair dismissal.

2. The claim was brought against three respondents. The first respondent "the company" employed the claimant as Group General Counsel and Company Secretary. The second respondent ("Mr Wallace") was the Chairman of the company's Board, and the third respondent ("Mr Chae") was the Chief Executive Officer. Mr Wallace and Mr Chae were said to be personally liable for detriment in employment because of a protected disclosure.

3. A single response form on behalf of all three respondents was lodged on 16 February 2017. It raised time limit issues relating to some of the detriments but denied all allegations of unlawful conduct on their merits. The respondents denied that the claimant had made any protected disclosures, but even if she had they were not the reason for any subsequent treatment or for her dismissal. Her dismissal was said to have been a fair dismissal by reason of an irretrievable breakdown in trust and confidence due to the state of the working relationship.

4. On 27 September 2017 Employment Judge Howard granted the claimant permission to amend the claim so as to rely on two further protected disclosures, and this resulted in an amended response of 3 October 2017 which denied that those matters amounted to protected disclosures. The result was that the claimant's case comprised four alleged protected disclosures, six alleged detriments, and the dismissal.

The Issues

5. A draft list of issues had been available during the case management process, and during the first part of the hearing the parties were able to refine this

into a final agreed list. It had been determined earlier that the hearing would deal with liability only, but some remedy issues were in principle suitable for determination at this hearing. The agreed list of issues for the Tribunal to determine was as follows:

A: Protected Disclosures – Factual Allegations

Does the Claimant prove that:

1. She had a conversation with the Mr Chae on 24 June 2016 (as pleaded in paragraph 7 of the Claimant's particulars of claim) during which, in respect of the proposed PSP awards, she informed the Mr Chae that:

a. His suggestion of putting the post-termination restrictions on "page 14" so that executives would sign them without realising what they were agreeing to was unreasonable;

b. It was not sensible to attempt unilaterally to change the contracts of the executives; and

c. He risked upsetting the senior executives as they had been granted awards year on year without having to agree to new restrictions.

The Claimant submits that the company was likely to breach the implied duty of trust and confidence owed to senior executives by introducing new post-termination restrictions in the manner suggested by Mr Chae.

2. She had a conversation with Martin Sawkins (Chairman of the Remuneration Committee) on 27 June 2016 (as pleaded in paragraph 8 of the Claimant's particulars of claim) during which she informed Mr Sawkins that:

a. the company would potentially be acting unlawfully if it unilaterally changed the terms and conditions of the senior executives in question; and

b. in her view, it would be unethical to attempt to hide the new restraints in order that people would sign without realising what they were agreeing to.

The Claimant submits that the company was likely to breach the implied duty of trust and confidence owed to senior executives by introducing new post-termination restrictions in the manner suggested by Mr Chae.

3. She had a conversation with Mr Wallace on 27 July 2016 (as pleaded in paragraph 17 of the Claimant's particulars of claim) during which she informed Mr Wallace that Mr Chae behaved in a domineering way which was likely to expose the company to legal risk as she feared that poorly treated executives would resign and sue the company.

The Claimant submits that the company was likely to breach the implied duty of trust and confidence owed to senior executives by reason of Mr Chae's domineering management style. Further, Mr Chae had breached and was likely to breach his duties under section 172 of the Companies Act 2006

4. She handed a document to Mr Wallace on 27 July 2016 (as referred to in paragraph 18 of the Claimant's particulars of claim) in which she set out numerous examples of Mr Chae behaving in a domineering, discriminatory and heavy-handed manner which she feared would expose the company to legal risk.

The Claimant submits that the examples described in the document referred to above show that the company had breached, and was likely to breach, the implied duty of trust and confidence owed to senior executives by reason of Mr Chae's domineering management style. It also shows that Mr Chae had breached and was likely to breach his duties under section 172 of the Companies Act 2006 and that the company and Mr Chae had breached duties owed under the Equality Act 2010.

B: Protected Disclosures – Legal issues – Section 43B ERA

5. For each of the alleged Protected Disclosures at paragraphs 1 and 2 above: did it constitute a qualifying protected disclosure pursuant to section 43B of the Employment Rights Act 1996 (ERA)? In particular:

a. did the Claimant make a disclosure of information?

b. if so, was it a disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings?

c. if so, was it made by a person to whom the information had been disclosed in the course of obtaining legal advice?

d. did the Claimant reasonably believe that any such disclosure was in the public interest?

e. did the Claimant reasonably believe that any such disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject?

6. For each of the alleged Protected Disclosures at paragraphs 3 and 4 above, did it constitute a qualifying protected disclosure pursuant to section 43B of ERA? In particular:

a. did the Claimant make a disclosure of information?

b. did the Claimant reasonably believe that any such disclosure was in the public interest?

c. did the Claimant reasonably believe that any such disclosure tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject?

C: Detrimental treatment – section 47B of ERA

7. If the Claimant makes out one or more of the protected disclosures, can she establish that:

a. On 15 July 2016, Mr Chae shouted at the Claimant and made threatening remarks to her (as pleaded in paragraph 10 of the Claimant's particulars of claim). He accused the Claimant of collusion and implicitly threatened her continued employment with the compnay. The Claimant submits that this detrimental act by Mr Chae was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 above.

b. On 18 July 2016, Mr Wallace told the Claimant that Mr Chaehad lost confidence in her, that the Board would back the CEO over her and he implied that the Claimant had been dishonest in her dealings with Mr Chae around the PSP award (as pleaded in paragraph 12 of the Claimant's particulars of claim). The Claimant submits that this

detrimental act by Mr Wallace was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 above.

c. On or around 19 July 2016, Mr Chae excluded the Claimant from matters falling within her remit as General Counsel which embarrassed her professionally and damaged her reputation with external counsel (as pleaded in paragraph 15 of the Claimant's particulars of claim). The Claimant submits that this detrimental act by Mr Chae was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 above.

d. On 25 July 2016, Mr Chae implied, in front of Graham Hardcastle, that the Claimant had lied to Mr Sawkins in order to get the PSP awards for two other executives and for herself. This was humiliating for the Claimant. The Claimant submits that this detrimental act by Mr Chae was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 above.

e. On 19 October 2016, the Claimant's grievance was unreasonably rejected. The Claimant submits that Mr Perry, ostensibly the person making the decision in relation to the Claimant's grievance, was influenced by the company's board of directors and/or Mr Wallace and/or Mr Chae in rejecting the grievance. The Claimant submits that this detrimental act by the company and/or Mr Wallace and/or Mr Chae was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 and/or 3 and/or 4 above.

f. On 3 November 2016, the Claimant's grievance appeal was unreasonably rejected. The Claimant submits that Mr Sawkins and Mr Blackwood, ostensibly the people making the decision in relation to the Claimant's grievance appeal, were influenced by the company's board of directors and/or Mr Wallace and/or Mr Chae in rejecting the appeal. The Claimant submits that this detrimental act by the company and/or Mr Wallace and/or Mr Chae was on the grounds that she made the protected disclosures referred to at paragraphs 1 and/or 2 and/or 3 and/or 4 above.

8. In respect of each of these alleged detriments, was the Claimant subjected to any detriment by any act, or any deliberate failure to act, by any of the Respondents on the ground that she had made a protected disclosure?

9. Insofar as any of the alleged acts or deliberate failures to act relied upon by the Claimant occurred more than 3 months prior to the presentation of the claim form (allowing for the effect of early conciliation), can the Claimant show that it formed part of a series of similar acts or failures to act of which the last occurred within time?

10. If not, can the Claimant show that it was not reasonably practicable for her to have presented her complaint within time and that it was presented within such further period as the Tribunal considers reasonable?

D: Automatic unfair dismissal – section 103A of ERA

11. Was the Claimant dismissed for the reason (or, if more than one, the principal reason) that she made a qualifying protected disclosure?

E: Unfair dismissal – section 98 of ERA

12. If not, was the reason (or, if more than one, the principal reason) for the Claimant's dismissal a potentially fair reason, namely some other substantial reason of

a kind such as to justify the dismissal of an employee holding the position which the employee held?

13. If so, did the company act reasonably in treating that reason as a sufficient reason for dismissing the Claimant (taking into account the size and administrative resources of the company's undertaking) and was the dismissal fair taking into account the equity and substantial merits of the case?

F: Remedy

14. If the Claimant's dismissal is found to be unfair, did the Claimant's conduct, as pleaded in the Grounds of Resistance, cause or substantially contribute to her dismissal? If so, by what proportion if any would it be just an equitable to reduce the compensatory award?

15. If the company failed to follow a fair procedure, can it show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion if any would it be just and equitable to reduce the compensatory award?

16. If the company failed to comply with the ACAS Code, was its failure reasonable? If any failure by the company to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant?

17. If the Claimant failed to comply with the ACAS Code, was her failure reasonable? If any failure by the Claimant to comply with the ACAS Code was unreasonable, should any compensatory award made to the Claimant be reduced to take into account the Claimant's unreasonable failure to comply with the ACAS Code?

Evidence

6. The Tribunal had a bundle of documents exceeding 400 pages to which a number of documents were added by agreement during the hearing. We refused an application by the respondents to add a further email to the bundle during submissions because the respondents' case had closed and none of the witnesses had had an opportunity to comment on it. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

7. The respondents called evidence from the following witnesses. Heejae Chae was the Chief Executive Officer. Martin Sawkins was a Non-Executive Director and Chairman of the Board Remuneration Committee ("REMCO") who heard the claimant's grievance appeal. Clare Taylor was the Group Human Resources ("HR") Director (known as Clare Douglas for part of the relevant period). Richard Perry was the Senior Independent Director (Non-Executive) on the Board who dealt with the claimant's grievance. Richard Lee was a partner in the company's solicitors, Addleshaw Goddard, who spoke to the claimant and Mr Chae about a takeover matter in July 2016. For three witnesses (Mr Chae, Mr Perry and Mrs Taylor) we were taken both to a version of their witness statements served in December 2017 and to amended versions served in March 2018.

8. The respondents also relied on a sworn affidavit from James Wallace. He was unable to attend the hearing in person because of ill health, which was supported by medical evidence provided to the Tribunal. The claimant did not challenge the medical evidence but we heard submissions about the weight to be attached to his written evidence.

9. The claimant gave evidence herself and also called the former HR Director, Tracy Sheedy.

Relevant Legal Principles

Part One: Protected Disclosures

10. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: In this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **(a) that a criminal offence has been committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**
>
> **(f) that information tending to show any matter falling within any one of the previous paragraphs has been, or is likely to be deliberately concealed…**
>
> **S43B(4): A disclosure of information in respect of which a claim to legal professional privilege …could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice."**

11. A qualifying disclosure is protected if it is made to the employer (section 43C). Where the information is already known to the recipient the reference to the disclosure of information is treated as a reference to bringing information to the attention of the recipient (section 43L(3)).

12. HHJ Eady QC summarised the law as follows in paragraphs 23 – 24 of **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of the Employment Appeal Tribunal ("EAT") of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is**

> **clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.**
>
> **24. As for the words "*in the public interest*", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld)."**

13. In **Chesterton** the Court of Appeal approved a suggestion from counsel that the following factors would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

Detriment in Employment

14. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

15. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

16. The time limit provision appears in Section 48(3) and is a period of three months beginning with the date of the act or the failure to act, not the detriment, although where the act is part of a series of similar acts or failures, time runs from the last act in the series. Time can also be extended in effect where the Tribunal considers it was not reasonably practicable for the complaint to be presented before the end of the three-month period and it is presented within a further reasonable period.

Unfair Dismissal - Reason

17. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

18. In **Beatt v Croydon Health Services NHS Trust [2017] IRLR 748** Underhill LJ put it as follows**:**

> **"As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so…"**

19. In some cases the decision maker is an identified individual, but commonly a decision may be that of a panel or board of individuals. In that situation the members of the board are the "joint human agents" of the employer and the Tribunal must consider the mental processes of the individual board members: see **Royal Mail Group Limited v Jhuti [2016] ICR 1043** EAT paragraph 32**,** and paragraph 57 of the Court of Appeal decision in the same case at **[2017] WLR(D) 697.**

Unfair Dismissal - Fairness

20. Where the employee has made a protected disclosure, dismissal can be automatically unfair under section 103A:

> **"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".**

21. If the reason or principal reason is not a protected disclosure, in a case where no other automatically unfair reason arises, the complaint falls to be considered under section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) ….**
>
> **(3) …**

> **(4) Where the employer has fulfilled the requirements of sub-section (1), 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".**

22. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

23. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in the misconduct case of **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" can be useful in cases other than conduct cases, albeit that the focus must always be on the statutory wording. With modifications to reflect the fact that the potentially fair reason relied on in this case was essentially an irretrievable breakdown in working relationships, the Tribunal can approach section 98(4) by considering these matters. Firstly, did the employer genuinely believe that there had been an irretrievable breakdown in working relationships? Secondly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case and did it follow a reasonably fair procedure? Thirdly, did the employer have reasonable grounds for that belief?

24. If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

25. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and any appeal. The band of reasonable responses test applies to all aspects of the dismissal process.

26. The seriousness of the effect on the employee of a decision to dismiss is relevant to the question of whether the employer has acted reasonably. In **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457** the Court of Appeal said in paragraph 13

> **"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."**

Trust and Confidence Dismissals

27. There have been a number of cases in which the EAT and Court of Appeal have considered situations where an employer claims to have dismissed an employee not for a reason related to his conduct or capability, but for what section 98 terms "some other substantial reason" ("SOSR") in the form of an irretrievable breakdown in working relationships or loss of trust and confidence in the employee.

28. In **Perkin v St George's Healthcare NHS Trust [2005] IRLR 934** the Court of Appeal recognised in paragraph 60 that if the terms of section 98(4) were satisfied, it could be fair to dismiss an employee because of a breakdown in confidence for which the employee was responsible and which rendered it impossible for senior executives to work together as a team.

29. **Ezsias v North Glamorgan NHS Trust [2011] IRLR 550** was a decision of the EAT (Keith J presiding) in an unfair dismissal complaint by a consultant surgeon who had repeatedly raised clinical concerns about colleagues, as well as other allegations against some of them, and who was the subject of a petition signed by nine colleagues saying they could not work with him. Following an inquiry panel, a review by a psychiatrist, and an investigation conducted by an external HR adviser, he was dismissed because the working relationships had irretrievably broken down. The Employment Tribunal characterised this as a dismissal for SOSR, whilst finding that the breakdown had been caused in the main by behaviour on the part of the claimant. The appeal to the EAT was for present purposes on a narrow question: whether, as a matter of contract, the employer's disciplinary procedures should have been applied. However, the EAT made some well known comments on the distinction between conduct and SOSR in cases of this kind. The Employment Tribunal had found that the reason for dismissal had been the breakdown of relationships; this had not been a situation where SOSR was used as a pretext to get rid of the employee without a lengthy disciplinary investigation in what was in truth a conduct case. In paragraph 53 the EAT recognised a "refined but important distinction" between dismissing the employee for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down. The Tribunal had found that the latter had been the reason, even though as a matter of history it was the employee's conduct which had in the main been responsible for that breakdown in working relationships. The EAT recognised that the question before it on the contractual point was a different question from that which arises under section 98, but suggested that the reasoning behind the jurisprudence under section 98 would apply in any event. The conclusion was that the reason for the action taken against the claimant in that case was not his conduct, and therefore that there was no contractual obligation to pursue disciplinary proceedings.

30. In the **Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11** (25 April 2012) the EAT chaired by Langstaff P considered an appeal in an unfair dismissal complaint where the Deputy Head of a Primary School had been dismissed due to a lack of trust and confidence in her because of her friendship with a colleague who had been arrested for possession of indecent images of children. The Employment Tribunal said that the dismissal was for SOSR but as a corollary to conduct on her part, and therefore that an equivalent standard of procedural fairness to that required in a misconduct case should have been

displayed. It found dismissal unfair because the relationship had been condoned at an early stage by the respondent and because there had been no warnings that the continuation of the relationship placed the claimant's employment in jeopardy. In dismissing the appeal the EAT rejected the argument that the Tribunal was precluded from looking at how the parties had reached the position they were in at the time of dismissal. It emphasised that **Ezsias** was concerned with identifying the reason for dismissal, not with the question of whether fairness requires the Tribunal to have regard to how the position has developed. The EAT said (paragraph 37):

> **"Where the substantial reason relied upon is a consequence of conduct…, there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as section 98 would require.**
>
> **We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed…The right [**not to be unfairly dismissed**] depends entirely on the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story in so far as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."**

31. In paragraph 40 the EAT went on to say this:

> **"We are not saying that in every case in which there is a dismissal for some other substantial reason, where that reason is a breakdown of trust and confidence, that a Tribunal *must* have regard to how that situation came about…"**

32. Finally, it is relevant to note that there have been warnings from the Employment Appeal Tribunal about the danger in employers being able to reply upon a loss of trust and confidence as a means of avoiding the obligations which arise when the real concern is misconduct. Comments to that effect were made by the President of the EAT, Underhill P, in **A v B [2010] ICR 849**, upheld on appeal under the name **Leach v Ofcom [2012] IRLR 839**.

33. The learned editor of *Harvey on Industrial Relations and Employment Law* makes the tentative suggestion that the position is as follows (division D1 paragraph [1915.02]):

> **"(1) Loss of trust should not be resorted to too readily as some form of panacea (A v B;…).**
>
> **(2) In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way (a point made strongly by the Court of Appeal in Perkins in the parallel area of awkward personality).**

> **(3) However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal (Ezsias, where arguably a vital factor was that the *patient* interest was suffering because of the dysfunctional nature of the hospital department).**
>
> **(4) Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because the Tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts (Sylvester).”**

34. The legal framework applicable to our remedy decisions will be set out in the Remedy section below.

Relevant Factual Background

35. This section of our reasons sets out the broad some number of disputes of primary fact central to the issues, and where appropriate these will be addressed and resolved in the Discussion and Conclusions section.

Background

36. The company is a global supplier of bonding solutions and a manufacturer of adhesive based products for the healthcare and industrial markets. It has production sites in Asia (including Korea), Europe and the USA. Its Head Office is in Manchester. The executive offices are on the same floor in that building. It has approximately 1,400 employees worldwide and a dedicated HR function. It is a public limited company whose shares are traded on the Alternative Investments Market.

37. This case concerned events between June and November 2016. The Board was chaired by Mr Wallace and included Mr Chae as Chief Executive Officer, Graham Hardcastle as Group Finance Director, and three Non-Executive Directors: Mr Perry (the Senior Independent Director), Mr Sawkins and Mr Blackwood.

38. The Senior Executive Team included Clare Taylor as Head of HR, the Chief Operating Officer, Mr Carter, and the claimant as Group General Counsel and Company Secretary. Julia Wilson was the Personal Assistant to the Executive team.

39. The claimant had been General Counsel and Company Secretary since September 2012. Her service agreement appeared at pages 68-71. She was entitled to 12 months’ notice of termination but there was a garden leave clause. After termination there were restrictive covenants lasting for 6 months. Clause 19.1 said she should refer any grievance to the Chairman of the Board. Clause 19.4 said

> **“There are no special disciplinary rules which apply to the Executive and any disciplinary matters affecting her will be dealt with by the Board.”**

40. As Company Secretary the Claimant attended Board meetings and meetings of Board committees such as REMCO. Because REMCO set executive pay it was composed of Non-Executive Directors: Mr Sawkins chaired it and Mr Perry, Mr Wallace and Mr Blackwood sat on it.

41. The company had a number of policies and procedures. The grievance procedure appeared at pages 82-86. The disciplinary procedure appeared at pages 114A-114K. The Code of Conduct appeared at pages 87-114. It began with a

message from Mr Chae committing to ensuring a supportive environment in which staff could raise issues of concern internally. His message also made clear that the Code of Conduct applied to the Board and Executive Team.

42. There was an "Open Door Policy" at page 114L which set out how employees should raise concerns about wrongdoing in the company.

Disclosure 1: 24 June 2016

43. In June 2016 the claimant was made aware by Mr Hardcastle that a whistle-blower in Korea had made a complaint about the General Manager of the South Korean business ("JC") who was alleged to be operating in competition with the company.

44. The claimant discussed this with Mr Chae on 24 June 2016. This was said to be the first occasion on which the claimant made a protected disclosure. No notes were kept by either party.

45. Broadly, the discussion concerned the possibility of making receipt of annual share option awards under the company's Long Term Incentive Plan ("LTIP") conditional upon signing a restrictive covenant agreeing not to compete with the company for 12 months after leaving. The Korean manager was a person eligible for an LTIP award, and Mr Chae wanted a restrictive covenant to be put to him for signature.

46. In dispute between the claimant and Mr Chae was whether the claimant raised concerns about the legality of the course of action proposed, and whether Mr Chae proposed "hiding" the restrictive covenant on "page 14" of the LTIP documentation in the hope that people might sign it without realising what they were agreeing to. We will return to this in our conclusions.

47. In an exchange of emails on 25 June 2016 (page 118) Mr Chae instructed the claimant that he had spoken to Mr Sawkins (as Chairman of REMCO) and the claimant was to liaise with Mr Sawkins to get the process started "next week". Mr Chae was going to be on leave in early July. There was some time pressure because of stock market reporting requirements.

Disclosure 2: 27 June 2016

48. The claimant and Mr Sawkins spoke on 27 June 2016. This was said to be the second protected disclosure.

49. Broadly the claimant's case was that she explained to Mr Sawkins the difficulties in proceeding as Mr Chae wanted (i.e. hiding the new covenant on page 14 of the documentation) and other concerns about the legality of the proposal. Mr Sawkins' evidence was that the claimant said that some executives might be disgruntled about the company changing the restrictive covenants but did not raise concerns about whether this course of action was lawful. We will return to that in our conclusions. There was no note of this discussion save for a one line handwritten note made by the claimant at page 119J which simply said "conditionality of awards".

29 June 2016 emails

50. On 29 June 2016 the claimant emailed Mr Sawkins (pages 127-128) a draft letter and restrictive covenants (pages 124-125) accompanied by draft minutes for a REMCO meeting approving this (pages 122-123). The restrictive covenants formed a one page document to which the covering letter drew attention. In her covering email she asked for comments; she did not raise any concerns about the legality of it. She forwarded her email to Mr Chae the same day (page 120), again expressing no concerns.

51. Mr Sawkins forwarded that email to his REMCO colleagues that evening (pages 126-127). He said that what was being proposed was "perfectly reasonable and appropriate" but he said that from experience some individuals with existing restrictions may challenge the need to tighten their restrictions and wish to retain their current arrangements as well as receiving the LTIP award. He said that the company could choose to stand firm or show some flexibility.

2 – 8 July 2016

52. REMCO discussed the matter by an exchange of emails. By 2 July 2016 all members of the committee had approved this course of action.

53. On 4 July 2016 on Mr Chae's instructions the claimant issued the LTIP award letters (in the name of Mr Wallace) to the eligible recipients with a package of other information (pages 134-140). The covering letter made clear that the conditions document had to be signed and returned to the Claimant (as Company Secretary) by 8 July 2016 for the share options to take effect. Someone declining to sign would receive no share options.

54. Amongst the 23 or so recipients of the LTIP awards were 8 members of the Senior Executive Team, including Mr Chae, the claimant, Mr Carter and Mrs Taylor. In the days that followed the claimant and Mrs Taylor discussed the matter and Mrs Taylor said she had decided not to sign the award. Mr Carter and the claimant formed the same view. The claimant and Mr Carter spoke about it on 8 July 2016.

55. That was the last day before Mr Chae went on leave. He and the claimant had a brief catch up about other matters that day but did not discuss this. She did not tell him that she had concerns about signing the covenants.

11 and 12 July 2016

56. On Monday 11 July 2016 Mr Carter and Mrs Taylor told the claimant they would not be signing the new restrictive covenants. The claimant spoke to Mr Sawkins as Chair of REMCO. She decided not to contact Mr Chae about this because he was on leave. Had he not been on leave she would have done so, but only out of courtesy. She believed it was a matter for REMCO not the Chief Executive.

57. Mr Sawkins and the Claimant discussed the matter on 11 July 2016. The Claimant's evidence was that she told Mr Sawkins that she had not made Mr Chae aware of the issue. Mr Sawkins disputed that. His evidence was that he assumed the Claimant would have done so.

58. Mr Sawkins was made aware of the identity of the three who had not signed. and he decided that the three individuals who were not willing to sign should still receive the LTIP awards, contrary to the letter which were issued. Mr Sawkins decided to proceed even though the claimant was one of the three refusing to sign. He felt under pressure to make a decision because of the need to make an announcement to the stock market about share transactions by company managers. His impression was that the announcement had to be made that afternoon.

59. The claimant sent an email on the afternoon of 11 July 2016 to Mr Sawkins confirming what had been discussed. In the email heading she used the initials "A.C.E", which she explained to us meant "Arse Covering Email". The text of the email recorded Mr Sawkins' decision that the LTIP awards would be made available even to the three individuals who had not signed.

60. Mr Sawkins responded on 12 July 2016 at page 161 confirming that he had agreed given the existing restrictions, the concerns about potential enforceability of the new restrictions and the nature of the roles in question.

Detriment 1: 15 July 2016

61. On Friday 15 July 2016 Mr Chae returned from annual leave and was informed by Julia Wilson that three individuals had not signed the new restrictive covenants but had still been granted the LTIP award. He believed he should have been informed about this even though he had been on leave. He went to speak to the claimant in her office. Their exchange formed the basis of the first allegation of detriment. Neither kept any notes. In broad terms the claimant alleged that Mr Chae shouted at her and threatened her employment, accusing her of collusion. Mr Chae accepted that there were raised voices on both sides but denied any shouting or threats. We will return to that in our conclusions.

62. After the meeting Mr Chae spoke to Mrs Taylor and to Mr Wallace. At 11.52am the claimant sent an email to Mr Sawkins (page 160) saying:

> **"It would appear that I am about to be fired on the back of this."**

She also spoke to Mrs Taylor about what had happened.

63. Over the weekend there were further discussions between the participants. The claimant spoke to her former colleague, Tracy Sheedy. Both Mr Chae and Mr Wallace spoke to Mr Sawkins about what had happened. Mr Sawkins told Mr Chae that he was not aware when he and the claimant discussed matters on 11 July that she had not spoken to Mr Chae about it.

Detriment 2: 18 July 2016

64. On Monday 18 July 2016 Mr Sawkins told the claimant he had spoken to Mr Chae, and informed her that he had offered to resign. His case was that he had done so because he realised in hindsight that the decision he had taken was a matter for executives, not for the non executive REMCO alone. In contrast the claimant's case was that he said he was going to resign because of Mr Chae's reaction. The claimant alleged that Mr Sawkins told her that Mr Chae had entered into a "tirade" against her but Mr Sawkins denied having used that word. He said that

Mr Chae had expressed his displeasure in a very strong manner over the weekend but it was not a tirade.

65. The second allegation of detrimental treatment related to a discussion at around lunchtime on 18 July 2016 between Mr Wallace and the Claimant. The Claimant's evidence was that Mr Wallace was uncharacteristically aggressive, and that he told her that Mr Chae had lost confidence in her and that the Board would back the Chief Executive over the Claimant. She said that he accused her of collusion with the other non-signatories. In his witness statement Mr Wallace accepted that he might have said something to the effect that Mr Chae's trust and confidence in her had been affected by her actions. He also accepted he said something to the claimant about that the Board would support the Chief Executive over the Company Secretary. His statement said he was seeking to encourage the claimant to work with Mr Chae to resolve the LTIP issue and the problems it caused in their working relationship. The claimant's handwritten note of this discussion appeared at page 166a. We will return to this discussion in our conclusions.

66. Late that afternoon there was to be a Board meeting followed by a REMCO meeting. Prior to the Board meeting the non executive directors had a discussion at which Mr Wallace said something to the effect that Mr Chae should be supported because he was the wealth creator[1] and the Company Secretary was an administrator.

67. The claimant was present at the Board meeting and REMCO meeting. There was no discussion of the issue.

68. She alleged that after those meetings Mr Wallace spoke to her again and said he thought that the Board would support Mr Chae. The claimant alleged Mr Wallace said he understood why Mr Chae had lost trust in her[2].

Detriment 3: 19 – 21 July 2016

69. On 19 July 2016 there arose an issue which gave rise to the third allegation of detriment. Mr Lee of Addleshaw Goddard rang the claimant to say that he had been approached by a lawyer acting on behalf of an unnamed South Korean company that wished to explore the possibility of a takeover offer for the company. The claimant referred this to Mr Chae by email (page 168).

70. Mr Chae and Mr Lee spoke, and on 20 July 2016 the claimant rang Mr Lee to discuss matters further. He told her that Mr Chae had asked him to draft a response to the approach and she asked him to copy the draft to her. The claimant alleged that Mr Lee told her that "with respect" Mr Chae had asked him to send the draft only to him, although she later said (timeline page 236) he did so "apologetically". She described herself as being stunned by this because it showed that Mr Chae had decided to cut her out of a matter in which she would ordinarily be involved. Mr Lee's evidence was that Mr Chae had asked for any contact about this matter to be

[1] We were told that under Mr Chae's tenure as Chief Executive the share price had increased from about £0.16 to over £4.50 per share.
[2] Mr Wallace's witness statement did not specifically address the alleged discussion after the meeting. Although it appeared in the claimant's grievance timeline at page 236, it was not mentioned in the claim form or further particulars.

only with him, but that he believed this was simply because of commercial sensitivity. Mr Chae's case was that he asked Mr Lee to deal with him only because he did not believe anything more would come of the matter, and it was potentially sensitive so that the fewer people that knew the better. We will return to this issue in our conclusions.

71. The claimant also had a sense around this time that she had been excluded from an investigation and litigation into a significant bad debt issue in Korea.

Detriment 4: 25 July 2016

72. On 25 July 2016 Mr Chae met the claimant and Mrs Taylor to discuss the restrictive covenants issue. Mr Carter was away at the time. Mr Hardcastle attended and took a note (page 172). The claimant's manuscript note appeared at page 172A; later that day she prepared a typed note which appeared at pages 178-179.

73. The fourth allegation of detriment was that during this meeting Mr Chae implied in front of colleagues that the claimant had lied to Mr Sawkins in order to get the LTIP awards for herself and the two others. This related to whether the claimant had made Mr Sawkins aware on 11 July that she had not spoken to Mr Chae about the possibility of allowing those who refused to sign the covenants to receive the LTIP awards.

74. That same day the claimant prepared a written note setting out allegations of bullying and whistle-blowing by Mr Chae, and failure to deal with inappropriate behaviour by other Board members, going back to March 2013.

26 July 2016

75. On the evening of 26 July 2016 the claimant showed her document to Mrs Taylor. Mrs Taylor became emotional. She saw a reference in the document to Mr Chae talking in February 2016 about getting rid of her.

Disclosures 3 and 4: 27 July 2016

76. On 27 July the claimant met Mr Wallace at a hotel off site to see if he had any advice about her relationship with Mr Chae. It is alleged that her third and fourth protected disclosures occurred during this meeting. Disclosure 3 was what was said verbally; disclosure 4 was contained in a document which the Claimant allowed Mr Wallace to see but not retain. The claimant's case was that she was providing information about Mr Chae's domineering behaviour during her employment and drawing attention to concerns about the company's legal exposure if that behaviour continued. The claimant alleged that during this meeting Mr Wallace said that it was clear that she wanted to leave the company and that it was "a matter of finances and elegance". She took that to mean that her employment was going to come to an end.

77. Mr Wallace said in his witness statement that the claimant raised issues about Mr Chae's management style, and that they discussed the LTIP issue. The Claimant told him that Mr Chae had called her a liar. We will return to that issue in our conclusions.

78. There was some uncertainty as to the document which the claimant prepared and showed to Mrs Taylor on 26 July and to Mr Wallace on 27 July. The claimant's full document appeared at pages 173-179, but a shorter version (printed in landscape format) appeared at pages 172B-172D. It seemed unlikely that this shorter version was shown to Mrs Taylor as it did not refer to an earlier suggestion by Mr Chae that she be fired, save in manuscript notes which Mrs Taylor said she had not seen.

79. At pages 172E – 172I was a version (only disclosed during the hearing although the claimant had passed it to her solicitors on 5 March 2018 – page 402) which had in handwriting at the top "*For James to read".* The last page of this document was missing. The claimant said she had shown this to Mr Wallace, but that document ran to 6 pages when Mr Wallace's witness statement said he had seen a 4 page document with a handwritten note saying it was to be returned to the claimant.

80. It was clear that the claimant's note went through a number of iterations. On the balance of probabilities - and notwithstanding the late disclosure - we concluded that the claimant had shown Mr Wallace the document at pages 172E – 172I. Mr Wallace was mistaken about its length and the precise handwritten note. The table of historic matters accounted for just over four pages; the last page and a half was an account of the meeting on 25 July 2016. Amongst the entries were allegations that Mr Chae had failed to challenge sexist remarks when made at Board meetings, had accused the claimant of being "aggressive and scary", and had dismissed a contribution from the claimant in a Board meeting by saying "We don't need comments from the peanut gallery." The thrust of the document was that he had a bullying and undermining management style and that he sought to create conflict between executive team members.

81. After the meeting Mr Wallace telephoned Mr Chae and told him that the claimant had showed him four pages of notes which he had skim read. He told Mr Chae it was about Mr Chae's management style. Mr Wallace told Mr Chae he wanted Mr Chae and the claimant to work together to resolve any issues. The claimant said in her witness statement that the same day Mr Chae contacted her and asked which other directors she had spoken to. Mr Wallace spoke to the other directors Mr Perry, Mr Blackwood and Mr Sawkins to keep them informed

28 July 2016

82. Mr Sawkins spoke to Mr Chae on 28 July 2016. Later that day he sent a text to the claimant (page 180) which said:

> **"Heejae rang, certainly trying to rebuild with you but he doesn't find it comes naturally. Have told him he just has to show a bit of humility!".**

83. The claimant replied saying she was concerned he had ruined her reputation with Addleshaws, a reference to the discussions earlier in the month with Mr Lee.

84. The claimant went to see Mr Chae that afternoon. Mr Chae said that the claimant was crying and shaking during that meeting and very emotional and distressed. He described her as "quite erratic and threatening". The claimant denied behaving that way when cross-examined. She said she had been upset but not

crying. She accepted she accused him of implying on 25 July that she was a liar, and that he had ruined her reputation with Addleshaws. It was a brief discussion as Mr Chae left to collect his children from school. The claimant regarded this as an excuse to cut short a difficult discussion.

August 2016

85. The claimant and Mr Chae had a meeting on 1 August 2016 to discuss the working relationship. Mr Chae accepted he said to the claimant there was a trust issue between them. He explained in our hearing that because she wrote everything down it was difficult not to be on guard. He denied having said that he had no trust and confidence in the claimant: his confidence in her ability to do her job remained. There was discussion at the meeting of three options: litigation, carrying on and rebuilding the relationships, and agreeing an exit package. The claimant prepared a note of the meeting at pages 181-182, based on a handwritten note at page 180A.

86. On 3 August 2016 the company withdrew the new restrictive covenants even from those executives who had signed them (page 183). This was said to be in order to ensure uniform application of the guidelines. Existing contractual restrictions would still apply.

87. On 8 August 2016 the claimant made a proposal to the company following her discussion with Mr Chae. It appeared at pages 186 and 187. In broad terms she suggested a six month period to try and rebuild the working relationship but with both sides to have the option during those 6 months to trigger the claimant leaving employment on terms which would have been agreed in advance.

88. Mr Chae spoke to Mr Perry about this and there were further "without prejudice" exchanges in the remainder of August. Following Mr Chae's leave there was a further discussion between the claimant and Mr Chae on 31 August 2016. Mr Chae's handwritten notes appeared at pages 191-193. The claimant's handwritten notes were at pages 193A-193B, and on 5 September she created a typed note at pages 194-195. No agreement was reached and it was left to the claimant to decide what to do next.

5 September 2016 Solicitor's Letter

89. On 5 September 2016 a solicitor instructed by the claimant wrote to Mr Perry making allegations that the claimant had been bullied, undermined, marginalised and threatened as a result of her protected disclosures. The letter appeared at pages 197-198. The "backlash" to the restrictive covenants issue was said to include an accusation she had colluded with other executives not to sign, that she had been accused of lying by Mr Chae and Mr Wallace, that she had been shouted at and threatened, that she had been told Mr Chae had lost confidence in her, and that she had been excluded from matters which were within her remit in a way that affected her reputation. Proposals to avoid litigation were invited.

90. The company's lawyers engaged with this and the outcome was that it was to be treated as a grievance. By email of 13 September 2016 (page 203) the company's solicitors informed the claimant's solicitor that Mr Perry would investigate as Senior Independent Director. A grievance meeting would be arranged.

91. Mr Perry asked Mr Chae and Mr Wallace to respond in writing to the allegations in the letter. On 13 September Mr Wallace prepared a note about his dealings with the Claimant (pages 245-246). Mr Chae's undated note was at pages 243-244.

Grievance Meeting 19 September 2016

92. The grievance meeting took place on 19 September 2016 in the USA. The Executive Team and the Board were there for a Board meeting later the same day. The notes of the grievance hearing appeared at pages 231-234. They were taken by Clare Taylor. Mr Hardcastle was also present.

93. The claimant provided a timeline of events (pages 235-237) summarising the key dates going back to 22 June 2016 when she learned of the issue in Korea.

94. The claimant was not given sight of the notes from Mr Chae and Mr Wallace.

95. After the meeting Mr Perry carried out some further investigations. He obtained a written note from Mr Chae responding to the timeline (pages 241-242). In addition Mr Perry spoke to Mr Sawkins, Mrs Taylor, Mr Carter, Mr Hardcastle, Mr Lee and to Julia Wilson. Mr Perry did not produce any notes of these discussions save for some handwritten notes on his copy of the claimant's timeline document (pages 238-240). According to an email of 28 September 2016 (page 247) he arranged to speak to Mr Chae and Mr Wallace about the notes of the grievance meeting too. No details about these investigations were provided to the claimant before he made his decision.

Detriment 5: Grievance Outcome 19 October 2016

96. Mr Perry made his decision and recorded it in a document of 19 October 2016 at pages 252-256. This was said to be the fifth detriment and we will return to it in our conclusions. Broadly, he found that there had been no collusion by the claimant with Mr Carter or Mrs Taylor about the restrictive covenants, that Mr Chae had not accused the claimant of lying in the meeting on 25 July 2016, that there had been no shouting by Mr Chae on 15 July 2016 even though there had been raised voices on both sides in a heated exchange, and that the claimant's reputation had not been damaged by the decision to restrict the takeover contact to Mr Chae alone. He also concluded that Mr Wallace had made a comment about the Board supporting the wealth creator, but concluded that it was clear to those who knew Mr Wallace that he was offering some "fatherly advice", and said it was unfortunate that this had been "thrown back as a governance issue". There had been comments about a loss of confidence in the claimant because of the restrictive covenants matter, but they had to be balanced by Mr Wallace speaking of the high regard in which he held the claimant. He concluded that the claimant should have told Mr Chae of the restrictive covenant issue during his vacation, that positions had become entrenched and phrases quoted out of context, and that although unhelpful comments had been made they were understandable. Any allegations substantiated were not significant.

97. The same day as the claimant received the grievance outcome she made a subject access request for emails about her exchanged between the senior executives and external lawyers since 20 June 2016 (pages 261-262).

20 October 2016: Taylor and Perry Discussion

98. On 20 October 2016 Mrs Taylor and Mr Perry had a discussion. Mrs Taylor said in her oral evidence to our hearing that they discussed the general feeling that the working relationship with the claimant was deteriorating, even though the claimant was still able to do her job. Mr Perry said in his witness statement that there had been a deterioration of the working relationship between the claimant and others, not just Mr Chae.

Grievance Appeal

99. The claimant had indicated her intention to appeal the grievance outcome and a grievance appeal hearing before Mr Sawkins and Mr Blackwood was arranged for 1 November 2016.

100. The claimant provided detailed grounds of appeal in a letter of 31 October 2016 at pages 267-271. She described Mr Perry's decision on her grievance as fundamentally flawed and set out in detail why that was so. She ended her letter by asking to have copies of all notes taken and emails sent and received in connection with the grievance investigation. She said it was important for her to have the evidence obtained available to her with time to consider it before the hearing.

101. That same day (page 263) Mrs Taylor sent the claimant the two documents from Mr Chae and the note prepared by Mr Wallace (pages 241-246). No notes of any other investigations conducted by Mr Perry were provided.

102. Arrangements were also made for the Board to meet on 1 November 2016 after the grievance appeal hearing to discuss succession planning. Mr Wallace was in declining health and there had been consideration of a possible replacement as Chairman. On 1 November all the Board members were going to be in Manchester.

103. On the morning of 31 October 2016 the Executive Assistant to the Board emailed Mrs Taylor to say that Mr Wallace had asked her to set up a meeting for the Board with the subject of succession planning at 1.00pm, and arrangements were confirmed to Board members by email at 10.10am at page 262B. The claimant was not aware of this meeting. She would ordinarily have some involvement in succession planning.

1 November 2016

104. The grievance appeal hearing before Mr Sawkins and Mr Blackwood took place on 1 November 2016. Notes kept by Mrs Taylor appeared at pages 274-283. They were handwritten notes; no typed version was ever produced. There was discussion of the points raised in the claimant's appeal. The claimant made clear she wanted the appeal panel to look at what went on and how Mr Perry's findings had been incorrect. The notes recorded that the claimant thought "too much water had passed under the bridge" for a solution (page 281) and that she had not spoken at all to Mr Chae since 15 July 2016 save for saying "good morning" to him (page 283). Mr Sawkins asked her where all this ends if they were not talking. According to Mrs Taylor's note at page 283, the claimant asked Mr Sawkins how he would suggest it was resolved and he made clear he was asking her. Her final answer was that any discussion about that should be "without prejudice".

105. After the grievance appeal hearing Mr Sawkins and Mr Blackwood joined the succession planning meeting. The claimant knew nothing about this meeting. In the course of the meeting it was decided that the claimant would be dismissed. There were no minutes kept but an account was given in different witness statements. We will return to that in our conclusions.

Detriment 6 – 3 November 2016

106. On 3 November 2016 two letters were issued to the claimant. The first was the outcome of her grievance appeal. It appeared at pages 284-285. This was said to be the sixth detriment during employment. The appeal was rejected. There were some questions of fact which Mr Perry had got wrong but these did not have any impact upon his conclusion. The appeal panel upheld Mr Perry's conclusion that any substantiated allegations against Mr Wallace and Mr Chae were not significant. We will return to this in our conclusions.

Dismissal Letter – 3 November 2016

107. The second letter was a letter of dismissal delivered by hand. It appeared at pages 286-287. It was signed by Mr Perry. It gave 12 months' notice of termination of employment.

108. After reciting the fact that the claimant had not consulted Mr Chae about the LTIP award, and recording that he was "understandably frustrated and felt that his authority had been undermined by her", steps had been taken in an attempt to repair the damage and loss of confidence. This resulted in the grievance process. The appeal had upheld Mr Perry's material findings. The letter went on as follows:

> **"During recent weeks, and despite our efforts, the working relationship between you and a number of key members of the Board and of the Executive Team has deteriorated further. We are now at a stage where the working relationship is so bad that they no longer feel that they can communicate openly with you – a position which, as I am sure you will agree, as Company Secretary and General Counsel, is untenable.**
>
> **Regrettably, I have come to the conclusion that the breakdown of trust and confidence between you and the Company is now irretrievable; hence writing to you in these most unfortunate terms.**
>
> **For the avoidance of doubt, I should add that I have discussed this at length with my fellow Board Directors and they are entirely in agreement with me.**
>
> **Your employment will, therefore, terminate on 3 November 2017."**

109. The letter did not offer the claimant any right of appeal. A third letter of the same day at pages 288-289 set out the arrangements and that the claimant would be on garden leave. Mr Hardcastle stepped in as Company Secretary. His appointment was confirmed by the Board on 3 November (page 290).

After Dismissal Decision

110. There was further communication between solicitors but on 16 November the claimant emailed Mr Perry (page 296) to say that she had no intention of filing an internal appeal as doing so would very obviously be futile. She made clear that she

did not accept the decision to dismiss her but that any appeal would not receive fair consideration. She reserved her legal rights.

111. The clamant began her garden leave. These proceedings began in January 2017. In August 2017, after share options in respect of the period 2014 - 2017 had vested, the company wrote to the claimant (pages 315-316) terminating her employment with effect from 31 August 2017. A payment in lieu of the remainder of her notice period was made.

Submissions

112. Prior to oral submissions each advocate helpfully prepared a written submission which the Tribunal read in chambers. What follows in this section is a summary of the broad thrust of each party's position, combining points made in writing and orally. Reference should be made to the written submissions for fuller details.

Claimant's Submission

113. Mr Robson began by raising issues about the reliability of the written evidence from Mr Wallace, particularly by reference to his involvement in arranging the meeting on 1 November 2016 at which the dismissal decision was taken. His written submission then addressed the protected disclosures, addressing the content of what the claimant said and the belief she held that the information tended to show a breach of a legal obligation. On the public interest issue he submitted that there was evidence before the Tribunal that the claimant had a subjective belief that her disclosures were in the public interest even though that phrase had not been used in her evidence. He relied on her reaffirmation of her pleaded case, on references in her written and oral evidence to governance issues, and to the third column of the note given to Mr Wallace on 27 July 2016. As to the objective element, he submitted that the belief was a reasonable one.

114. As to legal professional privilege. He suggested that the claimant was not disclosing information to Mr Chae on 24 June that had been provided to her by another person: she was simply providing him with information about the legal position. In any event, he submitted that even if information had been provided to her in the course of seeking legal advice, which was disputed, any privilege had been waived by the respondents' reliance on the factual content of this discussion in its pleaded case and the evidence before the Tribunal. His position was that if the privilege had been waived after the disclosure it meant that the disclosure could still be protected at the time it was made.

115. In section D of his written submission Mr Robinson set out with great care the claimant's case that the reason or principal reason for dismissal was that she had made the protected disclosures, and in section E he addressed each of the six detriment complaints and set out why the claimant said that her disclosures had a material influence on that treatment. It was an important part of the claimant's case that the grievance decision of Mr Perry, the grievance appeal decision of Mr Sawkins and Mr Blackwood, and the Board decision to dismiss on the recommendation of Mr Perry were all made under significant influence from Mr Chae and Mr Wallace. Mr

Robson set out with some care the evidential basis for the inference to that effect which he invited the Tribunal to draw.

116. In relation to "ordinary" unfair dismissal Mr Robson submitted that the process adopted by the company departed from any basic notion of fairness. Mr Perry was not impartial or independent, his grievance investigation was not fairly conducted, and there was no separate investigation at all of the suggestion of a breakdown in working relationships. He contrasted the lack of investigation undertaken by the company with the steps taken by the employer in **Ezsias**, in which there had been an enquiry panel, and two independent consultants looking at the position before a decision was taken. In this case there had been no investigation, no independence and no attempt to give the claimant a chance to have her say. He rejected any suggested the claimant herself viewed working relationships as untenable: her "exit package" was in fact an attempt to identify a mechanism by which she could stay in employment and repair relations. He therefore submitted that the dismissal was procedurally and substantively unfair even if the whistle-blowing complaint was unsuccessful.

117. Mr Robson addressed remedy issues. He denied any contributory fault in the way the claimant dealt with the LTIP issue. He said there was no basis for a **Polkey** conclusion that the claimant would have been fairly dismissed within a short period of time: a fair procedure would have involved some independent input taking matters outside the closely knit Board. He sought an uplift of 20% on the basis that the company had unreasonably failed to act in accordance with the ACAS Code of Practice on Grievance Procedures, and suggested that the disciplinary aspects of the Code might also apply based on **Lund**.

Respondents' Submission

118. After reviewing the law Miss Connolly began by addressing each of the alleged protected disclosures. On the first disclosure she drew attention to differences in the claimant's case as to whether Mr Chae had "suggested" something or "instructed" her to do something, and submitted that if all the claimant disclosed was her opinion, that would not amount to "information" in the sense required. On the question of whether there was a reasonable belief that the disclosure was in the public interest, she emphasised the wording of section 43B1 and submitted that the discussion in **Chesterton** was concerned with the phrase "public interest", but it was still necessary for there to be a belief that the act of making the disclosure was in the public interest. She submitted that the claimant had provided no evidence to justify a conclusion that she held such a belief.

119. As to legal professional privilege, Miss Connolly submitted that Mr Chae had been seeking advice from the claimant in her capacity as Group Counsel (and Company Secretary), and if the factual information she disclosed back to him was information he had given her, the provisions of section 43B(4) would apply. She denied that any subsequent waiver of privilege had occurred, but in any event submitted that the question of waiver needed to be addressed at the date of the disclosure not the date of the Tribunal hearing. Discussion of matters in the internal grievance would not amount to a waiver of privilege.

120. The public interest and legal professional privilege points were relied upon in relation to disclosure 2 to Mr Sawkins.

121. In relation to disclosures 3 and 4, Miss Connolly drew attention to uncertainty about what document had been handed to Mr Wallace, but the thrust of her submission was based on the public interest point.

122. Miss Connolly then moved to address the allegations of detriment and set out on each detriment the position of the respondents on the factual case and on whether there was any link between any protected disclosure and the treatment in question. On causation she submitted that the plain factor in Mr Chae's mind from 15 July 2016 onwards was not the discussion on 24 June, or the fact the claimant had spoken to Mr Sawkins, but rather her failure to tell him that she and two others were not going to sign the restrictive covenants. Even if there had been protected disclosures, therefore, they had no material influence on the first four alleged detriments.

123. In relation to the detriments arising at the conclusion of the grievance and the grievance appeal, the Tribunal was invited to find that Mr Perry made his decision for himself without influence from Mr Wallace or Mr Chae, and that the grievance was rejected on its merits. The same was true of the decision of Mr Sawkins and Mr Blackwood at the appeal stage.

124. In relation to the unfair dismissal complaint, Miss Connolly submitted that there was no basis for a finding that the reason was anything other than a belief that the working relationship was no longer tenable. There was no evidence from which the Tribunal could conclude that any protected disclosures were the reason or principal reason for that conclusion. She drew attention to statements from the claimant which she submitted supported a view that the claimant also believed the relationship was effectively at an end. The chronology would also demonstrate that any protected disclosures were not the principal reason.

125. As to fairness, Miss Connolly submitted that the conclusion that there was an irretrievable breakdown was a reasonable conclusion and that the procedure followed was reasonably fair as it was so closely connected with the grievance process. This was one of those exceptional cases envisaged in **Polkey** in which the employer could reasonably decide that any further meetings or discussions with the claimant would be pointless, as evidenced by the claimant's own view of a possible appeal.

126. In relation to remedy issues Miss Connolly argued for an extremely substantial **Polkey** reduction on the basis that even if a fair procedure had been followed, the result was inevitable and would have occurred within a couple of weeks. There should also be a reduction in respect of contributory fault for the failure to tell Mr Chae before 8 July 2016 or whilst he was on leave that she was not signing the restrictive covenants, and in failing to recuse herself from subsequent discussions with Mr Sawkins. Insofar as an award for unfair dismissal was concerned, there should be no uplift in relation to the grievance element of the ACAS Code. This had been followed in any event even if it were relevant. The disciplinary aspect did not apply to a dismissal for trust and confidence: **Phoenix House Ltd v Stockman and anor [2017] ICR 84**.

127. At the conclusion of the oral submissions the Tribunal reserved its decision.

Discussion and Conclusions

128. The first matter the Tribunal addressed was the question of whether protected disclosures had been made. We decided to address each disclosure in turn, dealing first with our findings of fact and then applying the relevant legal framework.

Protected Disclosure 1

129. This concerned a discussion on 24 June 2016 between the claimant and Mr Chae about the situation in Korea where it had come to light that the local manager, JC, was seeking to compete with the company. Mr Chae enquired of the claimant whether there were restrictive covenants in JC's existing contract and was told that no copy was available. He wanted to have JC signed up to a restrictive covenant to protect the company if indeed he tried to compete after leaving. We concluded that to that end he proposed to the claimant that the restrictive covenant should be linked to the LTIP award, and that (as had been done as his previous company) the covenant should form part of the LTIP terms rather than a separate document which the recipient should have to sign and return. The claimant interpreted this as a suggestion by Mr Chae that the new restriction should be "hidden" in the share scheme documentation rather than highlighted. She believed that the hope of Mr Chae was that JC would accept the award and therefore be taken to accept the new restrictive covenant even if he had not noticed it in the share scheme documentation.

130. The language in the claimant's witness statement was that this was "suggested" by Mr Chae, that he "asked" if this could be done, and that it was a "proposal". In re-examination at the end of her oral evidence the claimant said that from a Chief Executive like Mr Chae a "suggestion" was really an instruction. We rejected that on the facts. The first time the claimant used the word "instruction" was in her timeline document for the grievance hearing in September 2016 (page 235) but by that stage she was already looking back on events in an unfavourable light. The claimant was a senior and experienced General Counsel and Company Secretary. This was an idea which Mr Chae had shortly before or during their discussion on 24 June. We were satisfied that he was not instructing her how to proceed: he wanted to discuss it with her. That was evident from the fact that after their discussion the claimant proceeded with a different approach (putting the restrictive covenants in a separate document and highlighting them in the covering letter), and there was no trace of any objection by Mr Chae to that course of action. We were satisfied this was not an instruction but a proposal on which he wanted her professional view.

131. The Tribunal then turned to consider what the claimant said to Mr Chae in return. The List of Issues focussed on three elements, but in paragraph 5 of her witness statement the claimant identified five different elements. The Tribunal found as a fact that the claimant said it was unreasonable to seek to hide the restrictive covenants within the share scheme documentation, and that the new covenants would only be binding if the company was giving something in return. This was essentially the point that a unilateral change to the contracts would not be effective. We also concluded that the claimant had told Mr Chae that there was a risk (however this was done) that senior executives would be upset because there had

been no such requirement in share option awards in previous years. There was also a discussion about whether the new restrictive covenants would be enforceable in different jurisdictions in any event, but that was not a concern specific to Mr Chae's proposal. The claimant's response was a combination of common sense (that there might be dissent amongst senior executives) and of legal considerations (whether the change would be effective without giving something in return).

132. We were satisfied that the effect of this meeting was that Mr Chae was content to proceed in the way the claimant preferred: the restrictive covenant formed a separate document and was highlighted in the covering letter to the recipient.

133. Having made those findings of fact the Tribunal addressed the legal components of a protected disclosure.

134. The first issue was whether the claimant had made a disclosure of information. There can still be a disclosure even if the information is already known to the recipient. The Tribunal concluded that the claimant had disclosed factual information to Mr Chae on this occasion, namely that there was a proposal to include a new restrictive covenant in the share options documentation without drawing attention to it. She also offered her opinion on that information, but her opinion would not itself amount to "information" capable of showing a breach of a legal obligation: see paragraph 23.3 of HHJ Eady's judgment in **Parsons** (reproduced in paragraph 12 above) and **Goode v Marks & Spencer UKEAT/0442/09** paragraph 38 where the EAT said

> **"the Tribunal was entitled to conclude that an expression of opinion about** [a proposal to change redundancy terms] **could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."**

135. The next consideration was issue 5.b, namely whether the information disclosed was information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The Tribunal was satisfied that the existence of the proposal had been disclosed to her by Mr Chae in the course of obtaining legal advice from the claimant. She had dual roles of Group Counsel and Company Secretary but accepted in cross examination that during this discussion she had a "foot in both camps" between legal adviser and company secretary. The Tribunal was satisfied that Mr Chae approached the claimant for the purpose of seeking legal advice on how to get JC to sign up to restrictive covenants. To that extent the information subsequently disclosed back to him by the claimant was information in respect of which a claim to legal professional privilege could be maintained at that time.

136. However, there was an issue of principle about whether the applicability of section 43B(4) had to be assessed at the time the disclosure was made, as Miss Connolly contended, or at the date of the Tribunal hearing, which Mr Robson maintained. In the absence of authority the Tribunal was satisfied that the point at which the availability of legal professional privilege had to be ascertained was at the date the disclosure was made, not at the date of the Tribunal hearing. That seemed to us to be a matter of logic and principle. It would be difficult to see how the legislation could be workable if a waiver of privilege after detrimental treatment because of a disclosure unprotected at the time it was made could retrospectively

render that disclosure protected and the detrimental treatment therefore unlawful. The better interpretation, we concluded, was that the key moment was the moment at which the disclosure was made. At that time there had been no waiver by the company or Mr Chae in respect of the legal advice which the claimant was giving.

137. As to issue 5.c, the information was disclosed by a person (the claimant) to whom it had been disclosed in the course of Mr Chae obtaining legal advice.

138. Accordingly we concluded that this exchange did not amount to a protected disclosure because of section 43B(4).

139. Issues 5.d and 5.e fell away. Had they been live issues the Tribunal would have concluded as follows:

> (a) that applying **Chesterton** the claimant had a subjective and reasonable belief that her disclosure was in the public interest (she saw it as a governance issue; some 23 members of the executive team of a listed plc were affected; the LTIP was a transaction which had to be notified to the stock market; the issue of restrictive covenants affected their employment outside the company, and the proposal came from the Chief Executive), and
>
> (b) that the claimant had a reasonable belief that the information tended to show that the company was likely to fail to comply with its implied contractual obligation of trust and confidence by seeking to hide new covenants in the LTIP documentation.

Protected Disclosure 2

140. This was a verbal disclosure said to have been made to Mr Sawkins on 27 June 2016. In her witness statement the claimant said that she told Mr Sawkins she foresaw difficulties in asking executives to sign restrictions in order to receive an LTIP award when that had not been previously done. She said she explained that Mr Chae wanted to bury the new restrictions on page 14 and that it would be unethical. She claimed to have relayed to Mr Sawkins the five specific concerns set out in paragraph 5 of her witness statement.

141. In his witness statement Mr Sawkins accepted that the claimant raised a concern about executives being disgruntled about the change to restrictive covenants, and that she said something about being concerned about "hiding" the restrictive covenants. The claimant also raised issues about enforceability in certain jurisdictions. Mr Sawkins denied that the claimant had said that anything was unlawful save for the concern about enforceability.

142. Our conclusions on this were as for disclosure 1. The information was that there was a proposal from the Chief Executive to include the restrictive covenants in the LTIP documentation. That information was caught by section 43B(4): a claim to legal professional privilege could be maintained at that point because it was information which arose in the course of Mr Chae seeking advice, and the claimant was a person to whom the information about that proposal had been disclosed in the course of Mr Chae obtaining that legal advice. Accordingly we concluded unanimously that this disclosure was not protected either.

Detriments 1-4

143. Having found that neither the first nor second disclosures attracted protection, it followed that the first four complaints of detriment in employment (i.e. those which preceded disclosures 3 and 4) had to fail.

144. However, even if the claimant had made protected disclosures to Mr Chae on 24 June and/or to Mr Sawkins on 27 June, the Tribunal would have concluded unanimously that the disclosure of the proposed course of action (and her advice on its drawbacks) had no material influence on the detrimental treatment of which she subsequently complained. It was clear that Mr Chae was annoyed and angry on his return from leave on 15 July 2016 not by the claimant's objections to his initial proposal, but by the fact that he returned to find that the claimant and two colleagues in the Executive Team had declined to sign the covenants and yet still received the LTIP awards. He genuinely and strongly felt that the claimant should have informed him of the position either in their discussion on 8 July before he went on leave, or by email whilst he was on leave, rather than leaving him to find out about it on his first day back. These were the factors which materially influenced the heated discussion on 15 July, the comments made by Mr Wallace to the claimant about a loss of confidence in her by Mr Chae on 18 July, and the approach that Mr Chae took in the meeting on 25 July 2016.

145. Nor was either disclosure the reason for the claimant being excluded from communications between Mr Lee of Addleshaws and Mr Chae about the possible takeover in mid July. Mr Lee's account of how that instruction came from Mr Chae satisfied us that it was not influenced by any alleged disclosures but was a consequence of the unusual nature of the approach.

146. For those reasons, the first four complaints of detriment in employment contrary to section 47B Employment Rights Act 1996 failed and were dismissed.

Protected Disclosures 3 and 4

147. These alleged protected disclosures were said to have occurred in a meeting between the claimant and Mr Wallace on 27 July 2016. One was verbal and one in writing. In truth it seemed to us that they were better treated as one disclosure pursuant to **Norbrook Laboratories.**

148. Before making factual findings about that meeting, however, we reviewed the relevant events in the period between 15 and 27 July 2016.

149. It was common ground that on 15 July Mr Chae returned from leave, was informed by Ms Wilson that the claimant and two others had not signed the restrictive covenants but were still receiving the LTIP awards, and went into the claimant's office to confront her. The Tribunal was satisfied that on this occasion Mr Chae did shout at the claimant. Ms Douglas subsequently told the grievance hearing that members of her team had come to her to say that they had heard shouting. We accepted the claimant's evidence that although she did in the end raise her voice as well, that was following the period during which Mr Chae had shouted at her. It was also clear that he accused her of collusion in that meeting: he genuinely believed there had been some collusion between her and the other two non-signatories of the

restrictive covenants. Finally, we were satisfied that he had said something in that meeting which amounted to a threat to her employment, because shortly after the meeting (page 160) the claimant emailed Mr Sawkins to say she thought she was about to be fired over the matter. This marked the start of the deteriorating relationship between the claimant and Mr Chae, and the claimant accepted in cross examination that she contacted her lawyer during July 2016.

150. Further, it was evident that Mr Chae spoke to Mr Wallace about the claimant following the meeting: that appeared in Mr Chae's witness statement and in Mr Wallace's witness statement.

151. Following discussions involving Mr Sawkins over the weekend, in which he offered to resign because he felt with hindsight he had trespassed into an executive matter, the claimant spoke to Mr Wallace on two occasions on 18 July 2016. In those discussions he told her that Mr Chae had lost confidence in her and also made a comment about the Board supporting Mr Chae as the wealth creator rather than the claimant as Company Secretary. After the Board meeting late that afternoon he reiterated to the claimant that the Board would support Mr Chae.

152. The position between the claimant and Mr Chae was further worsened when the claimant learned that Mr Lee of Addleshaws had been asked to deal with Mr Chae not with her. She formed the view that this was a significant matter which potentially damaged her reputation externally.

153. The meeting on 25 July 2016 between Mr Chae, Mr Hardcastle, Ms Douglas and the claimant caused a further deterioration in the relationship. The main point of contention was that Mr Chae was concerned that the claimant had told him that she had made Mr Sawkins aware that she had not spoken to Mr Chae, yet Mr Sawkins had told him that the claimant had not done so. It is clear that the claimant took the view that Mr Chae was implying that she was a liar. The Tribunal found as a fact that the claimant's handwritten note at page 172A was accurate and that he had queried whether her discussions with Mr Sawkins had been "kosher". The note recorded Mr Chae saying that he was "miffed" at not being informed about the non-signatories to the restrictive covenants.

154. It was after this meeting that the claimant prepared her note of allegations of bullying and whistle-blowing. For reasons set out above the Tribunal concluded on the balance of probabilities that the document she showed to Mr Wallace was the document which appeared at pages 172E – 172I (with the missing last page).

155. The claimant claimed to have told Mr Wallace verbally that Mr Chae behaved in a domineering way which was likely to expose the company to legal risk as poorly treated executives would resign and sue the company. The Tribunal concluded that the claimant had indeed said this to Mr Wallace. His witness statement accepted that she had said Mr Chae had a history of wanting to get rid of people, and that she may have made some reference to dominant Chief Executives and that some senior executives may resign. He was unable to recall specific details when he prepared his witness statement.

156. We were satisfied that the claimant disclosed the information that Mr Chae had behaved as set out in her written note (issue 6.a).

157. The Tribunal was also satisfied that the claimant believed that this information tended to show that there was likely to be a breach of a legal obligation, being a breach of the implied duty of trust and confidence in contracts of employment. Was that a reasonable belief (issue 6.c)? This point was not challenged by Miss Connolly in cross examination or submissions, and rightly so. There was evidence before the Tribunal about Mr Chae's management style and its impact on staff. Mrs Sheedy gave unchallenged evidence that he had "an autocratic style of management and this created a pressurised working environment". The company's own HR Director, Mrs Taylor, said that people management was not necessarily one of his strengths. When this was put to Mr Chae in cross examination he candidly acknowledged that he had many weaknesses and there was always room for improvement. The claimant reasonably took the view that the information she was disclosing went beyond that and tended to show that there would be a breach of trust and confidence towards her or others if that behaviour continued unchecked by the Board.

158. Instead, the real issue on this disclosure was issue 6.b: whether the claimant believed that the disclosure was made in the public interest, and if so whether that was a reasonable belief. The first question was a subjective one: did the claimant actually believe that her disclosure was made in the public interest? Miss Connolly submitted that the claimant had adduced no evidence on that and therefore that she had failed to prove this key element of her complaint. Mr Robson invited us to conclude that there was evidence of the claimant's belief, even though the words "public interest" were not actually used. He cautioned the Tribunal against confusing the motivation for the disclosure with whether there was a belief that it was made in the public interest. It was possible for the motivation to be entirely private but for that belief still to be held.

159. There was no clear and direct evidence before us from the claimant that she had a belief that this disclosure was made in the public interest. Mr Robson was right to suggest, however, that there were strands to her evidence which showed a consistent theme of concerns about governance, as well as concerns about her own private position. As Group Counsel and Company Secretary the claimant could be expected to be concerned about governance issues, and those issues were mentioned in the third column of the table which she showed to Mr Wallace during this meeting.

160. However, Miss Connolly emphasised the precise wording of section 43B(1), which requires a reasonable belief that the disclosure is made in the public interest, not that the information disclosed is of interest to the public. That is a fine distinction but an important one. The section is not worded as clearly as it might be but the use of the words "made in the public interest" shows that the focus of that phrase is on the disclosure, which is "made" by the claimant; the phrase "tends to show" refers back to the information disclosed. Accordingly we concluded that the focus must be not on the content of the information disclosed, but on the disclosure itself.

161. This was a discussion which the claimant held in private with the Chairman. She prepared a written note to provide examples of her concerns about Mr Chae's domineering management style, but she did not allow Mr Wallace to keep a copy of that document. When asked in the grievance hearing what the claimant expected the outcome would be of her meeting with Mr Wallace, the notes of both Mrs Taylor (page 218) and of Mr Hardcastle (page 228) recorded the same answer from the

claimant: that she wanted Mr Wallace not to take everything Mr Chae said at face value. We construed that as the claimant wanting to have some support from Mr Wallace in her dispute with Mr Chae, rather than a disclosure which would enable Mr Wallace to do something about the governance issues. The claimant's witness statement at paragraph 27 said that she wanted to meet Mr Wallace to see if he had any useful advice for her. The Tribunal concluded unanimously that although the information provided by the claimant could have given rise to a public interest had it been disclosed in a different way, the circumstances of this disclosure meant that the claimant had not believed that the disclosure was made in the public interest. Had she believed that was so she would have allowed Mr Wallace to keep a copy of the document, would have been expecting him to have done something about it, and would not have been so clear in her grievance that the matters she had raised were not to be considered further. Alternatively she could have used the “”Open Door” policy to raise her concerns. Instead she disclosed to Mr Wallace information potentially of interest to the public in a way which ensured it was kept private.

162. Consequently the Tribunal concluded that there was no protected disclosure made by the claimant on 27 July 2016.

Detriments 5 and 6; “Automatic” Unfair Dismissal

163. It followed that the complaint of detriment in relation to allegations 5 and 6 failed, as did the complaint of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996.

“Ordinary” Unfair Dismissal

164. Having reached the conclusion that there were no protected disclosures and having therefore dismissed the detriment and section 103A complaints, the Tribunal moved to consider the question of “ordinary” unfair dismissal contrary to section 98 Employment Rights Act 1996.

(a) Reason

165. The first question for the Tribunal was the reason or principal reason for the dismissal. That raised a prior question as to who made the decision to dismiss.

166. The dismissal letter written by Mr Perry on 3 November 2016 at pages 286 and 287 ended by saying that he had come to the conclusion that the breakdown of trust and confidence was irretrievable but added:

> **“For the avoidance of doubt, I should add that I have discussed this at length with my fellow Board directors and they are entirely in agreement with me.”**

167. In his witness statement and oral evidence he explained the sequence of events. After speaking to Mrs Taylor on 20 October he had formed a provisional view that the employment of the claimant was no longer tenable because of working relationships between her and the Executive Team. He expressed that view to Mr Chae as they walked into the meeting on 1 November, and Mr Chae made no comment. He did not address the meeting until after Mr Sawkins and Mr Blackwood provided their feedback on the outcome of the grievance appeal, but then expressed his view as to the employment relationship. Other Board members expressed their

view. It was clear from the evidence that each member of the Board positively signified agreement with that proposition, including Mr Wallace. The exception was said to be Mr Chae, but we noted that in paragraph 65 of her witness statement Mrs Taylor recounted how Mr Chae said in the meeting he would "go with the consensus of the non-Executive Directors". We found that he had not entirely disassociated himself from the decision, as he could have done by leaving the meeting during it or by saying when asked that it would be wrong for him to express any view either way. We concluded that Mr Chae had to that extent been a party to the collective decision.

168. Mr Perry recognised in his witness statement that he could not have proceeded without Board approval, not least because the Board would be required to remove the claimant from her statutory office as Company Secretary. We decided that there was a decision of the entire Board (including Mr Chae and Mr Wallace) to dismiss the claimant by way of endorsing a recommendation made by Mr Perry.

169. What was the reason or principal reason the Board collectively took that decision? Broadly it seemed to us there were two different (if related) reasons potentially in play in the minds of different Board members:

- The first reason was Mr Chae's negative view of the claimant for the events of July 2016. She had not drawn to his attention that she and two others were not going to sign the restrictive covenants, and she had gone to Mr Wallace in late July complaining about Mr Chae's management style with a number of historic allegations which she refused to put forward in a formal way.

- The second reason was the strained relationship between the claimant and the Executive Team as observed by Mr Perry and as reported to him by Mrs Taylor in mid October. Mr Perry confirmed in cross examination that he had formed the view that Mr Chae thought the working relationship with the claimant as his General Counsel was untenable, and the lack of any comment to the contrary by Mr Chae in either the brief discussion with Mr Perry whilst walking in or during the meeting itself reinforced that perception and contributed to the collective decision of the Board to terminate the employment of the claimant. The way in which the working relationship was viewed was influenced by what had emerged in the course of the grievance and appeal.

170. The most influential members of the Board appeared to us to be Mr Chae as Chief Executive, Mr Wallace as Chairman and Mr Perry as Senior Independent Director. We were satisfied that Mr Chae's principal reason for acquiescing to the termination of the claimant's employment was the first reason identified above, but for the others the primary motivation was the second reason: the apparent breakdown in working relationships. Mr Perry had reached this provisional conclusion following his discussions with Mrs Taylor, and Mr Wallace explained in paragraph 22 of his witness statement that the working relationships were his concern. That concern was shared by the other non-executive directors too. Mr Sawkins and Mr Blackwood had come that very morning from the appeal meeting with the claimant where (according to the note at page 283) the meeting concluded with the claimant saying she had not spoken to Mr Chae since 15 July, and where a

discussion at the end of the meeting about how matters could be resolved resulted in her saying that such matters should be discussed on a "without prejudice" basis.

171. Putting these matters together the Tribunal was satisfied that the principal reason the claimant was dismissed by the Board in its decision of 1 November 2016 was because of a belief that the working relationship between the claimant, members of the Executive Team and the Board had become irretrievable[3]. Mr Chae's negative view of the claimant for the events of July 2016 was operating on his mind, but not the principal reason of the Board as a whole.

172. The Tribunal concluded that an irretrievable breakdown in working relationships was a potentially fair reason for dismissing the claimant.

(b) Fairness - General

173. We then turned to consider the question of fairness under section 98(4). It appeared to us appropriate to adopt the **Burchell** test with appropriate modifications even though this was not a misconduct case as a tool to the application of section 98(4). We reminded ourselves of the danger of substituting our own view for that of the employer. The band of reasonable responses was the appropriate test.

(c) Fairness – Genuine Belief

174. The first question we considered was whether the Board collectively had a genuine belief that the working relationship had irretrievably broken down. We were satisfied that was so. The evidence of Mr Perry was clear on that point and he was the person who made the recommendation which was endorsed by the rest of the Board.

(d) Fairness - Investigation

175. The second question was whether the company had carried out such investigation into that matter as was reasonable in all the circumstances.

176. We noted that the company was a publicly listed company with significant resources and a dedicated HR function. The claimant was in a senior position as General Counsel and Company Secretary. Dismissal from her role as General Counsel might impact adversely upon her reputation or ability to work in her chosen field. In accordance with **A v B** an employer acting reasonably would have seen it as particularly important to conduct a fair investigation. In any event the company placed great store in its Code of Conduct (pages 87-114) which included a personal introduction from Mr Chae emphasising that it was expected that 100% of employees would comply with it 100% of the time, and which included a commitment to fair employment practices (page 111).

177. Despite those matters, however, there was no proper consideration of steps that could be taken to investigate whether the tensions in the working relationship between the claimant and others were irretrievable or whether they could be repaired. Steps as simple as directly discussing that matter with the claimant or with

[3] It follows that even if the claimant's disclosures had been protected, the section 103A ERA complaint would have failed on causation.

Mr Chae were not taken. There was no real attempt to approach it in a considered way with the other members of the Executive Team. Indeed, we noted that Mr Chae told our hearing that he would have been able to carry on working with the claimant, a view which he never expressed at the time. Had there been an investigation that view might have been elicited from him before any decision were taken.

178. Importantly, no proper consideration was given to bringing in someone from outside the organisation to take an objective view of the situation and whether it could be resolved, whether by way of mediation or otherwise. There was no proper investigation of the causes of the tensions in the working relationship.

179. We recognised that such matters were considered to some extent in the grievance, yet the way in which the grievance was handled itself exacerbated those tensions. Mr Perry was not an impartial manager. He used his personal knowledge of Mr Wallace to reach the conclusion that the comment about the Board supporting Mr Chae not the claimant was simply "fatherly advice", and then went on to be critical of the claimant for having raised her concerns on this point as a governance issue (see paragraph 96 above). That was a conclusion which the Tribunal found most surprising and concerning. Mr Perry ignored evidence supplied during the grievance meeting by Mrs Taylor that at least one person had heard shouting in the claimant's office on 15 July, and his failure to follow a transparent procedure in his investigations (he did not give the claimant the outcome of those enquiries before making his decision) contributed to her concerns about the way she was being treated.

180. The failure to investigate the breakdown in working relationships in order to see whether it could be retrieved by mediation or other measures took the company outside the band of reasonable responses. An employer acting reasonably would have investigated such matters.

(e) Fairness - Procedure

181. Related to that was the question of whether the procedure followed fell within the band of reasonable responses. We noted that the meeting on 1 November had been arranged by Julia Wilson on the instructions of Mr Wallace (page 262A). The invitations excluded the claimant. Mr Wallace did not address this in his written witness statement. It was evident that the claimant must have been excluded because it was anticipated that she was going to be discussed. At best that might have been limited to feedback from Mr Sawkins and Mr Blackwood on her grievance appeal hearing that morning, but Mr Perry intended to raise at the meeting his concerns about the employment position of the claimant. It was apparent to Mr Perry at least, and possibly to others, that the claimant might be dismissed at that meeting.

182. Miss Connolly argued that this was one of those cases where the company could reasonably take the view that following any form of procedure would have been pointless. We rejected that. It was outside the band of reasonable responses to reach a conclusion on dismissing the claimant without offering her any opportunity to respond to the concerns about the continuation of her employment relationship. The bare minimum requirement of an employer acting reasonably would have been to have collated the evidence as to the state of the working relationship and to have presented that to the claimant and given her an opportunity to respond to it before

any decision was taken. In failing to follow that most basic of procedures the respondent acted unfairly.

(f) Fairness - Grounds

183. The next question was whether on 1 November 2016 the Board had reasonable grounds for the conclusion that the working relationship had broken down irretrievably. The matters on which Miss Connolly relied were set out in paragraph 17.2 of her written note. We considered each in turn.

184. The first matter was that it was common ground that there had been some damage to trust and confidence after 15 July 2016. That was correct. There was plainly an issue about the working relationship. However, that is not necessarily the same as saying that the working relationship has irretrievably broken down.

185. The second matter was that the claimant had failed to reflect on her conduct in not informing Mr Chae that she did not intend to sign the restrictive covenant, and in her involvement in the decision of Mr Sawkins that the LTIP awards should still be made to her and the other two. Again that point was well made. In our judgment the respondent could reasonably take the view that the claimant had failed to acknowledge her shortcomings in that respect. Indeed, the same was equally true of Mr Chae. His reaction on 15 July and thereafter had been out of proportion and it was evident that he was not willing to accept the effect on the claimant of his reaction. These points matter supported a view that their relationship had been seriously damaged.

186. The third matter was what the claimant said on 1 August 2016. It is unclear what information the Board had about this save insofar as it was in the mind of Mr Chae at the Board meeting on 1 November 2016. There was no note of the August meeting kept and placed before the Board. However, it must have been clear to the Board on 1 November that the claimant had been contemplating leaving employment at that stage because it was agreed that she would come back with a proposal.

187. The fourth matter was the proposal itself made by the claimant on 8 August 2016 (pages 186-187). It began with the term “exit package”. However, the proposal the claimant made was not for employment to end but rather for it to continue on a trial basis for up to six months to see whether the working relationship could be restored. We rejected Miss Connolly’s argument that this was inconsistent with the view that it could be salvaged. It was plainly not the claimant’s view by 8 August 2016 that the relationship had irretrievably broken down: she proposed a joint effort to retrieve it.

188. The fifth matter concerned the discussion on 31 August 2016. Again it was unclear how much the Board knew about this when it met on 1 November. There was no note or record of this meeting before the Board, and Mr Chae did not on that occasion explain what had happened. The effect of that meeting, however, was that the claimant instructed her solicitor to write to the company on 5 September. That letter appeared at pages 197-198. It ended by saying that the claimant had claims “for constructive unfair and wrongful dismissal and whistle-blowing”. That could only be taken as an indication that the claimant believed that her trust and confidence in the respondent had been at least seriously damaged if not destroyed. That letter

provided considerable support for the view that the claimant herself thought the working relationship was no longer retrievable.

189. The sixth matter was the claimant's reaction to the outcome of the grievance. The grievance was an opportunity to repair the damage to the relationship. It would have been open to the claimant to have declined to have her solicitor's letter treated as a grievance had she thought it was pointless. However, the way in which the grievance was handled unfortunately exacerbated matters and the appeal letter of 31 October 2016 to Mr Sawkins and Mr Blackwood supplied further support for the view that the claimant did not regard the working relationship as retrievable.

190. The seventh matter was Mrs Taylor's conversation with Mr Perry on 20 October 2016 about the atmosphere on the executive floor. Mrs Taylor told Mr Perry that the claimant was dragging her colleagues into the dispute by wanting to discuss matters and that the claimant would speak at length regarding Mr Chae's management style. Equally, however, Mrs Taylor said that Mr Chae was asking them what they had been talking to the claimant about, resulting in a situation where the Executive Team wanted neither to talk to the claimant nor to be seen talking to her in the office. Mrs Taylor's input provided reasonable grounds for concluding that both the claimant and Mr Chae were embroiling other members of the Executive Team into their working relationship issue.

191. The final factor relied upon by Miss Connolly was the discussion recorded at the end of the grievance appeal notes on page 283. Although the Board did not have those notes Mr Sawkins and Mr Blackwood fed back to the Board what had happened at the meeting that morning. When the way to resolve the matter was put to the claimant at the very end of the meeting she said that any discussion should be "without prejudice". There were reasonable grounds for considering that this meant she had reverted to the position she was in when her solicitor wrote to the company on 5 September 2016, namely that she regarded herself as having grounds for resignation and pursuing a claim.

192. Putting these matters together we were satisfied that there were reasonable grounds for the conclusion that the working relationship had irretrievably broken down. There was information which could reasonably be construed in that way both from the claimant (particularly her letter of 5 September 2016) and from the other members of the Executive Team.

(g) Fairness - Conclusion

193. For those reasons the Tribunal found that although the respondent had a genuine belief formed on reasonable grounds that the working relationship had irretrievably broken down, prior to reaching that view it had failed to carry out a reasonable investigation and to follow a reasonably fair procedure. That alone would be sufficient to lead to a finding of unfair dismissal. What would have happened had the matter been reasonably investigated and a fair procedure followed is to be considered when the question of remedy arises.

194. However, we noted that section 98(4) requires a Tribunal to decide fairness in accordance with equity and the substantial merits of the case. It seemed to us that this was one of those cases envisaged in **Governing Body of Tubbenden Primary**

School (see paragraph 30 above) in which equity and the substantial merits required the Tribunal to give consideration to how the breakdown in working relationships had arisen. It would not have been appropriate to have determined the fairness of this dismissal without consideration of those relevant circumstances.

195. Looked at in broad terms, the difficulties in the working relationship began with the LTIP matter in early July 2016. The claimant made an error of judgment in not telling Mr Chae that she and others were not going to sign the covenants, even though technically it was a matter for REMCO rather than the Chief Executive. She could have told Mr Chae about her own position on the afternoon of 8 July, and could have informed him of the decision of all three by email whilst he was on leave.

196. However, Mr Chae also contributed to the deteriorating relationship by his overreaction to that upon his return from leave on 15 July. It was clear that he did act in a way which caused the claimant to believe that she was about to be fired, and that he accused her of collusion and that there was some shouting on his part.

197. The position deteriorated further in the meeting between Mr Chae, the claimant and Mrs Taylor on 25 July 2016 about LTIP awards. From the claimant's perspective a significant point was the implication that she had lied about whether she told Mr Sawkins that Mr Chae had not been aware of the problem. It must be borne in mind, however, that Mr Sawkins had told Mr Chae that the claimant had not alerted him to that fact, and therefore understandable that Mr Chae was concerned, particularly given that he already suspected collusion. The claimant reacted badly to the implication she had lied, and that evening she prepared her note of historic bullying matters involving Mr Chae, thereby broadening the whole dispute from the LTIP issue to those historic matters. She did so because she felt that her job was at risk but it increased the tension when she spoke to Mr Wallace on 27 July 2016.

198. Speaking to the Chairman to seek advice about a difficult relationship with the Chief Executive was reasonable. However, we concluded that the claimant mishandled this in allowing Mr Wallace to read her note but not to retain a copy or do anything about it. She fell between two stools in the sense that matters were ratcheted up but in a way which could not properly be addressed by the company. For his part Mr Wallace too did not deal with that meeting well. To say that the Board was going to back Mr Chae as wealth creator rather than the claimant was most unhelpful. It gave the claimant the impression that she would not get a fair hearing from the Board in a dispute with the Chief Executive. It left her isolated.

199. At the start of August the claimant's proposal was for there to be a period of up to six months to see whether the relationship could be repaired, albeit with an acceptable safety net available should either side decide against that. However, Mr Chae's approach at the meeting on 31 August 2016 was flatly to rebuff the claimant's proposal, denying there was any fault on his part and saying that he wanted to make it work. Despite those words we were satisfied there was no hint of conciliation on his part and effectively the claimant was being invited either to back down or to resign. That resulted in her solicitor's letter of 5 September which made plain that she regarded trust and confidence as having been seriously damaged or destroyed.

200. Subsequently the claimant did agree to go through the grievance procedure, but regrettably that procedure was fundamentally mishandled. There was a lack of

objectivity and impartiality by Mr Perry and no transparency in the way he investigated what the claimant was raising. His investigation was not comprehensive, his conclusions were flawed and he was unnecessarily critical of the claimant. It was entirely reasonable for the claimant to view his conclusions as unsustainable and to regard trust and confidence as being further eroded. The grievance appeal did nothing to put matters right.

201. Taking account of these circumstances, and in particular the responsibility borne by the respondent for the deterioration in the working relationship, we concluded that it was outside the band of reasonable responses for the Board to decide to dismiss the claimant on 1 November 2016. Even though there were reasonable grounds for the conclusion that there was nothing the Board and the claimant themselves could do to restore the working relationship, given the respondent's own responsibility for this state of affairs it was unreasonable not to consider whether external objective input might enable the working relationship to be repaired. As a body the Board was insufficiently independent to give objective consideration to a dispute between the claimant and the Chief Executive who had been responsible for a significant increase in the company's share price during his tenure. It failed to give any proper consideration to the possibility of external input and/or mediation before a final decision was taken as to whether the relationship was genuinely irretrievable or not.

202. The dismissal was unfair. The complaint of unfair dismissal was well founded.

Remedy

203. Having concluded that the unfair dismissal complaint succeeded the Tribunal considered the remedy issues which were before us in evidence and submissions.

ACAS Code - Issues 16 and 17

204. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides in subsection (2) that:

> **"If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."**

205. The relevant Code of Practice is the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) which contains an introduction applying to all procedures and then a section for discipline and a section for grievance.

206. We considered that the disciplinary parts of the ACAS Code of Practice were not relevant. Unlike in **Lund**, this never started as a misconduct disciplinary process.

The Board only ever dealt with the matter as an issue of trust and confidence. In line with **Phoenix House,** no uplift would be appropriate.

207. As for the grievance procedure, the question was whether the claim to which these proceedings related concerned a matter to which a relevant Code of Practice applied. Ordinarily a failure to follow a fair procedure in relation to a grievance would not be relevant in an unfair dismissal complaint. In this case, however, the investigation of the grievance effectively took the place of any dismissal procedure. The conclusion of the Board that trust and confidence had been destroyed was made immediately after feedback from Mr Sawkins and Mr Blackwood of what had gone on at the grievance appeal. Mr Perry had formed his own provisional view at least in part as a result of having handled the first stage of the grievance. We therefore were satisfied that the dismissal decision was bound up with the grievance and therefore that the ACAS Code of Practice was relevant.

208. An uplift is appropriate only if there has been an unreasonable failure to act in accordance with the Code of Practice. However, Mr Robson did not identify any specific paragraphs of the ACAS Code of Practice in relation to grievances which had been breached. Paragraph 34 says that "consideration should be given to adjourning the meeting for any investigation that may be necessary", but Mr Perry did this. The procedural flaw was that he did not go back to the claimant with the results of those investigations before making his decision, but the ACAS Code does not prescribe that this should happen. The general introductory sections in paragraph 4 say that employers should carry out any necessary investigations to establish the facts of the case but contains no requirement that the grievance meeting then reconvene. We therefore concluded there had been no unreasonable breach of the ACAS Code of Practice by the respondent and no uplift to compensation will be appropriate.

209. Miss Connolly did not pursue a reduction in compensation: none would have been appropriate.

Contributory Fault – Issue 14

210. Compensation for unfair dismissal can include a basic award and a compensatory award. The basic award can be reduced under section 122(2) if the Tribunal considers that any conduct of the claimant before notice was given was such that it would be just and equitable to reduce the amount of the basic award. Section 123(6) is the equivalent provision for the compensatory award, save that it requires a finding that the dismissal was to any extent caused or contributed to by any action of the complainant.

211. The leading authority remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. The Tribunal must be satisfied that the relevant action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. Brandon LJ made it clear that culpable or blameworthy conduct can include conduct which is unreasonable in all the circumstances, depending on the degree of unreasonableness involved.

212. The respondent's argument that there should be a reduction for contributory conduct was based upon two matters. The first was the failure by the claimant to tell Mr Chae that she was not going to signing the restrictive covenants. The second was in not telling Mr Sawkins that she should have no involvement in the decision whether the non signatories should still receive the LTIP awards. Although the Tribunal considered (as explained above) that there was a shared responsibility for the deterioration of the working relationship, we concluded that this conduct did not meet the **Nelson** test of being culpable, blameworthy or otherwise sufficiently unreasonable to give rise to a reduction in compensation. It was an error of judgment on the part of the claimant which she failed to acknowledge, but had the reaction of Mr Chae been proportionate there would not have been any serious impact on trust and confidence between them. The subsequent events made a much greater contribution to the deteriorating relationship and it would be not be just and equitable for there to be any reduction to compensation on account of this error of judgment by the claimant.

Polkey Reduction – Issue 15

213. The primary provision governing the compensatory award is section 123(1) which provides that the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

214. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment. This inherently requires some degree of speculation, as recognised by the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568**, bearing in mind that the burden placed on the employer by the statutory dispute resolution procedures no longer applies. A **Polkey** reduction can encompass a finding that employment would have continued only for a limited fixed period as well as a percentage reduction.

215. The first matter we considered is how long it would have taken to have gone through a fair procedure by involving external input. There was no evidence before us as to the length of time that would have taken. Based on our industrial experience, therefore, the Tribunal had to do the best that it could. Sourcing and instructing an appropriate independent expert would have taken a little time and that person would then have had to have interviewed the main protagonists and report on steps that could be considered. If, for example, mediation were to have been recommended, there would be further time before the Board would be in a position to make a final fully informed decision. We concluded that such a process would have taken approximately three months. Accordingly there should be no reduction in compensation for a period of three months after employment ended (since at the end of that period, if fairly dismissed, the claimant would still have received contractual notice of termination).

216. What then would have been the likely outcome of that process? The Tribunal had to engage in speculation as to the likely outcome, albeit informed by the evidence we heard in this case. Speculation of that kind is ordinarily difficult in cases even where some consideration has been given to the matter, but in this case there was never any discussion between the parties as to what steps would be needed to rebuild the relationship. Looking at the matter broadly and with the benefit of our industrial experience the Tribunal concluded that there was a 20% likelihood that such efforts would have failed and that the claimant would have been leaving employment in any event at the end of that three month period. In our judgment it was much more likely that there would have been success in repairing the relationship, not least since Mr Chae told our hearing that he was able to carry on working with the claimant despite the tensions between them. This was a highly remunerated position of great importance to the claimant and she would not have been leaving lightly. She was also well regarded by the Board and the Chief Executive for her professional capabilities. If all parties had approached the externally driven exercise in the right spirit of looking for a way to rebuild relationships, the Tribunal considered there was an 80% chance that it would have been successful.

217. It follows that the compensation to be awarded to the claimant should be full compensation for a period of three months, and then 80% of her losses for the period that follows, subject of course to the statutory cap on the compensatory award.

218. A date for a further hearing to determine any outstanding matters as to remedy will be arranged. By 4pm on **Friday 20 April 2018 t**he parties should supply any dates to avoid in the period 14 May – 31 October 2018.

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Employment Judge Franey

3 April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 April 2018

FOR THE TRIBUNAL OFFICE