THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR T ROBINSON**
MS J WEBBER

BETWEEN:

Mr A Peschkoff

Claimant

AND

Tedipay (UK) Ltd

Respondent

ON: **22 January 2019**
Appearances:
For the Claimant: **Mr R Somerville, counsel**
For the Respondent: **No appearance**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1 The claims succeed.
2 The respondent shall pay to the claimant the sum of **£59,636.38** made up as to £34,107.66 for automatically unfair dismissal and £25,528.72 for holiday pay.

REASONS

1. This decision was given orally on 22 January 2019. Written reasons are given because the respondent was not in attendance.

2. By a claim form presented on 8 May 2018, the claimant Mr Alexander Peschkoff brings claims for unfair dismissal, both ordinary and automatically unfair, breach of contract for carry over of holiday pay and unlawful deductions from wages in relation to the holiday pay.

3. The claimant worked as the respondent's Chief Executive Officer (CEO) from 1 June 2012 to 15 December 2017. The respondent is in the business of the provision of smart ticketing services for public transport. The claimant reported to the CEO of the parent company, Global Travel Ventures Ltd. The respondent's case is that the claimant was dismissed for gross misconduct.

The issues

4. The issues were identified at a preliminary hearing before Employment Judge Hodgson on 23 August 2018 and were clarified with the parties at the outset of this hearing:

5. There are claims of ordinary unfair dismissal and automatically unfair dismissal because of a protected disclosure, and breach of contract not to notice pay but for carryover of holiday.

6. Although there was reference in the claim form to whistleblowing detriment, the claimant confirmed the preliminary hearing that the only detriment relied upon was his dismissal.

7. It is the respondent's case that the claimant was dismissed for gross misconduct; it is alleged that he abused his position, denying the respondent a business opportunity.

8. The two disclosures relied upon are as follows:

    a. Disclosure one: (paragraph 20 of the particulars of claim) this concerns an oral disclosure by the claimant into meetings, namely on 15 May 2017 and 5 June 2017 with Mr Alan Tomlin (the chairman of the board). The claimant told Mr Tomlin that there had been misrepresentation of the company's status in terms of technological development and operational readiness which amounted to a conspiracy to defraud the shareholders. He further said he would take legal advice concerning action against the company.
    b. Disclosure two: (paragraph 22 of the particulars of claim) on 23 November 2017 the claimant sent an email to Mischcon de Reya and the company board stating he would make disclosures of the letter from his own solicitors, MacFarlanes, dated on or about 20 November 2017.

9. There is a claim for holiday pay which is also brought as a breach of contract claim and a claim for unlawful deductions from wages.

The respondent's non-attendance

10. The respondent did not attend this hearing.

11. The tribunal was informed the day before the hearing, that the respondent was potentially in liquidation. We did not have this information in writing.

Mischon de Reya who had been acting for the respondent were no longer acting, as there were liquidators. This tribunal had no communication from the liquidators.

12. A representative from Mischon de Reya attended the tribunal before 10am to deliver one set of the bundles (2 lever arch files) and a bundle of the witness statements. There was to be no appearance for the respondent by Mischon de Reya. No person at all appeared on behalf of the respondent.

13. Mr Somerville for the claimant made an application under Rule 47 to proceed with the hearing. We granted this unanimously.

14. The respondent made an application in a letter dated 21 December 2017 to exclude certain correspondence marked without prejudice. Regional Judge Potter directed that this be heard on the first morning of the hearing.

15. The respondent was not present to pursue their application. The claimant said that the correspondence was not properly marked without prejudice because on their submission, at the time it was written in November 2017, there was no genuine dispute between the parties. The dispute arose, on the claimant's submission, at the point of dismissal on 15 December 2017. As the claimant was unopposed on this submission, we agreed and the respondent's application was dismissed.

16. The claimant wished the case to be heard in the respondent's absence and we took time to read the claimant's witness statement. We saw from the claimant's witness statement paragraph 9 that the respondent's parent company went into administration on 23 December 2018.

Witnesses and documents

17. As set out above, we had 2 lever arch files and a bundle of statements delivered by the respondent but no witnesses attended to give that evidence and we had no attendance by any person from the respondent.

18. We had a bundle from the claimant and his witness statement and a statement from Mr Sam Stephens, a Director of TBAT Innovations Ltd. We did not hear from Mr Stephens.

19. We had oral submissions from the claimant and no submissions from the respondent.

Findings of fact

20. The claimant's evidence was unchallenged which allowed us to make findings based on that unchallenged evidence.

21. The claimant was involved in the founding of the respondent company and on 1 June 2012 he was appointed as its CEO. In December 2014 the

business was acquired by Global Travel Ventures Ltd (GTV) although it continued to trade as a separate legal entity.

22. The respondent's business is that of providing smart ticketing services including mobile applications and online payment services for public transport services.

23. The claimant agrees that he received an amended contract of employment on 1 August 2016 and it is his case that he remained an employee of the respondent at all material times until the date of his dismissal on 15 December 2017.

24. The contract included a clause defining "restricted business" in which the claimant could not operate during his employment or for six months after termination of employment. It said:

> *"Those parts of the business of the Company and the Group Company which the [Claimant] was involved to a material extent in the 12 months prior to the termination of the appointment including but not limited to the business of technology-based (including online) solutions for the distribution of train tickets and other rail-related products."*

25. As the claimant's evidence was unopposed we find that the disclosures relied upon were made as set out in paragraphs 2.5.1 and 2.5.2 of Judge Hodgson's Order and as set out above. Disclosure 1 was made twice on 15 May and 5 June 2017 and disclosure 2 was made on 23 November 2017.

26. The respondent company has about 50 shareholders, including Stagecoach plc. The respondent was in receipt of Innovate UK Government funding. The claimant became concerned about the viability of the respondent business, on its technical ability to deliver on its core business and its financial viability. This was set out in a Board paper. This formed the basis of disclosure 1 which we find was made.

27. The claimant's concerns raised with the Board were not acted upon.

28. On 23 November 2017 the claimant said at a Board meeting, that he would assert his shareholder rights and he considered it his duty as an employee to tell all the shareholders about his concerns.

29. "Project Better" was a research grant for research into Artificial Intelligence for on-line journey planning. "Project Better" was a consortium led by three external companies. They submitted an application to Innovate UK. There was a conditional offer made but it was subsequently withdrawn. The respondent was not involved in Project Better and was not part of the consortium. The claimant was a consultant adviser to Project Better.

30. The claimant as CEO of the respondent made the decision that the respondent had no funds, insufficient human resource and no ability to engage with Project Better. He formed the view that it did not amount to a viable opportunity for the respondent. The claimant said he had no duty

to the respondent on this, because it was not an opportunity that the respondent was able to pursue. Thus, the claimant said no duty arose.

31. The claimant was not remunerated for anything he did with Project Better. He did it in order to explore future opportunities for himself should he lose his position with the respondent, because of its financial position which he considered was not viable. Project Better was not a business but an application for a research grant on the part of a consortium. It was not an opportunity that the claimant considered the respondent could become involved in and therefore he says that there was no breach of any duty. The claimant relies upon the current situation of the respondent company, understood to be insolvency, in support of this.

32. The claimant contends that the disciplinary investigation was a sham. It was carried out by the respondent's solicitors Mischon de Reya. We find that in the normal way the solicitors were acting on the respondent's instructions. The claimant's case is that he was deemed a troublemaker because of his disclosures and his intention to disclose matter to the shareholders and the investigation was part of a plan on the part of the respondent to dismiss him.

33. The disciplinary hearing was conducted by Mr Adrian Shooter, a Board Director. As a Board Director Mr Shooter had knowledge of the claimant's disclosures. We saw paragraph 32 of Mr Shooter's statement, put to us by the claimant, in which he said he was not sure that there was sufficient evidence to support any of the allegations against the claimant.

34. The claimant told the Chairman Mr Tomlin that he was going to present his disclosures at the Shareholders' Annual meeting on 28 November 2017 and the claimant's view is that the respondent considered that this would embarrass the company and cause investors to lose faith in the Board and the company. The claimant says Mr Tomlin told him in a threatening manner, not to do so and it would make him unemployable and un-investable as CEO.

35. Mr Shooter conducted further investigations within the disciplinary process without telling the claimant and allowing him to comment upon it. Mr Shooter did not see the investigation report (his statement paragraph 16). The claimant says that this resulted in a fatally flawed disciplinary process.

36. The disciplinary hearing took place on 14 December 2017. Mr Shooter made the decision to dismiss and the decision was given in writing (respondent's bundle page 540). He made the decision to dismiss saying that he found that Project Better was directly relevant to the respondent's business, there was no evidence that it was ever presented to the Group for consideration and it was incumbent upon the claimant to present it as a relevant opportunity, particularly as it was one that he was actively pursuing.

37. The claimant's case is that Mr Shooter made the decision to dismiss based

on the disclosures because the respondent's real concern was that they wanted him out because of his disclosures. The claimant's case was it was nothing to do with his involvement with Project Better.

38. On 22 December 2017 the claimant appealed against his dismissal. It was heard by Mr Marcus Ferguson-Jones who had previously been copied in on the claimant's disclosures and was also a Board member. The claimant says it was fatally flawed for the same reason as the disciplinary hearing.

39. The appeal hearing took place on 22 January 2018. The claimant was not told the outcome during the hearing. He received the decision on 24 January 2018 (letter at page 633 respondent's bundle). Mr Ferguson-Jones upheld the decision to dismiss.

40. Having heard submissions from the claimant's counsel we find that the reason for the dismissal was the reason contended for by the claimant, namely that he made the disclosures relied upon.

The holiday pay

41. The claimant had two contracts of employment, the first contract was dated 1 June 2012 and the second was dated 1 August 2016.

42. There was an absence of any clause in the first contract as to carry forward of holiday entitlement and no restriction on accrual of holiday entitlement. In respect of the second contract, from August 2016, at clause 9, the claimant was entitled to 33 days paid holiday including public holidays. Clause 9.2 provided for no carry over without the consent of the CEO of the Group, and that he could not carry forward more than 5 days accrued untaken leave to a subsequent holiday year.

43. The claimant admits that he did not have express consent from the CEO of the Group. It was conceded by the claimant that only 5 days can be carried forward. From 1 January 2016 to 1 August 2016 was under the old contract, 7/12ths of the year.

44. The claimant's oral evidence was that Mr Andreas Hajialexandrou, Head of Legal and Commercial at the respondent admitted to him that the respondent owed him holiday pay. He did not admit an amount; it was disputed. No amount was ever agreed.

45. The claimant's oral evidence was that the amount of holiday pay owed to him was as per his Schedule of Loss (respondent's bundle page 55). For 2014 he was owed 8.25 days, for 2015 he was owed 27 days, for 2016 also 27 days and 2017 was 25 days. The holiday year ran from January to December in any year. We find that the claimant had this amount of accrued holiday entitlement.

Remedy findings

46. The claimant's gross annual salary with the respondent from 1 June 2012 to 1 August 2016 was £75,000 and it then increased to £85,000.

47. The effective date of termination was 15 December 2017. The claimant was not paid notice pay.

48. The claimant is not in work. His restrictive covenants ended on 15 March 2018. The claimant did not look for work in that period. His last 10 years of work has been in the narrow field of the niche sector of public transport ticketing.

49. Since March 2018 he has approached several prospective employers and recruiters. He was told by recruiters and prospective employers it would be difficult to find work in his field, firstly because most of the companies in the sectors are large transport operators and secondly they would need a reference from the respondent. The claimant's evidence was that the Chairman Mr Tomlin and Mr Jeremy Acklam refused him a reference. He was told this between his dismissal and appeal hearings. This was verbal on the phone in separate conversations.

50. The claimant has not applied for any jobs. The claimant said he is living on savings. Since March 2018 the claimant has been working on a business proposition on block chain technology in public transport. It has not derived any income. The claimant is using the same process that he used when setting up the respondent company. It is a lengthy process. He expects to start making money in six months time.

51. The claimant is not in receipt of any State benefits.

The relevant law

52. Section 98(4) of the Employment Rights Act 1996 provides that 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.

53. The tests in ***British Home Stores Ltd v Burchell 1980 ICR 303*** as restated in ***Graham v Secretary of State for Work and Pensions (JobCentre Plus) 2012 IRLR 759 (CA)*** are first, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; second, did the employer believe that the employee was guilty of the misconduct complained of; and third, did the employer have reasonable grounds for that belief.

54. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

55. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

> *(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—*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."*

56. The claimant relied upon section 43B(1)(b) as set out above, in relation to the information the disclosures tended to show.

57. Section 43C ERA provides that a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer.

58. For the purposes of automatically unfair dismissal Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded…… 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.

59. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** the EAT said that in order for a communication to constitute a qualifying disclosure under section 43Bm, it must involve the disclosure of information as opposed to the mere making of an allegation or statement of position. Slade J at paragraph 24 said "*Further, the ordinary meaning of "information" is conveying facts…..Communicating "information" would be: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that: 'You are not complying with health and safety requirements.' In our view this would be an allegation not information".*

60. In ***Western Union Payment Services Ltd v Anastasiou EAT/0135/13*** the EAT reviewed the earlier authorities including ***Cavendish Munro.*** Eady J said that section 43B of the ERA required the disclosure to be one of "information", not merely the making of an allegation or a statement of position. The distinction can be a fine one to draw and will always be fact sensitive. The disclosure of information must further identify, albeit not in strict legal language, the breach of legal obligation relied on.

61. Doubt was cast on the decision in ***Cavendish Munro*** by the decision of the Court of Appeal in ***Kilraine v London Borough of Wandsworth 2018 IRLR 846 CA***. The CA, endorsing the decision of the EAT, said that section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other. Sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within s 43B(1), not every statement involving an allegation will do so. Whether a

particular allegation amounts to a qualifying disclosure under s 43B(1) will depend on whether it falls within the language used in that provision. Also, whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made.

62. The Court of Appeal in ***Chesterton Global Ltd v Nurmohamed (Public Concern at Work intervening) 2017 EWCA Civ 979*** deals with the public interest test. The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "in the public interest" were introduced prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

63. In ***Chesterton*** whilst the employee was most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. Mr Nurmohamed believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3 million.

64. The Court of Appeal held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

    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
    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 – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

65. The Court of Appeal also sounded a note of caution (judgment paragraph 36) stating that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

66. Section 13(1) of the ERA provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in

writing his agreement or consent to the making of the deduction.

Conclusions

67. Our finding of fact above is that the claimant made the disclosures relied upon. Having heard submissions from the claimant's counsel we find that these were qualifying and protected disclosures for the reasons set out below.

68. The burden was on the respondent to prove the reason for dismissal. The respondent did not appear and they have not therefore proved their reason for dismissal. Having taken evidence from the claimant and submissions from his counsel, we find that the reason for dismissal was that he made his protected disclosures and these operated in the minds of both the dismissing and appeal officers who as Board Directors had knowledge of the disclosures.

69. We have considered whether the disclosures were protected disclosures. We considered under section 43B(1)(b) ERA 1996, the information tended to show that there was a breach of a legal obligation. There is an obligation on company Directors and Board members under section 172 Companies Act 2006 that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the factors set out in the subsections to section 172. Under section 174 a director of a company must exercise reasonable care, skill and diligence.

70. The claimant submitted that knowing that the business could not deliver and the concerns about the financial viability, there was a breach of a legal obligation in not informing the shareholders about this. This on our finding satisfies the requirement of section 43B(1)(b).

71. On the public interest test, this was dealt with in paragraphs 7 and 8 of the claimant's witness statement. Stagecoach plc is a public limited company and a primary shareholder of the respondent. The research grant used to set up the respondent came from public funds. We find that the public interest test is satisfied.

72. Our finding above is that the respondent considered the claimant a troublemaker in that he said he would make his disclosures to the annual shareholders' meeting and that this would cause the respondent embarrassment and cause investors to lose faith in the Board and the company. As the respondent has not proven the reason for dismissal we accept the claimant's submission that the reason for his dismissal was that he made protected disclosures. As such the dismissal is automatically unfair.

73. On the question of holiday pay we heard submissions from the claimant's counsel. It was submitted that up until 1 August 2016 it the right had

crystallised under the old contract. From 1 August 2016 it is conceded that only 5 days can be carried forward.

74. It was conceded by the claimant that only 5 days can be carried forward. He admitted that he did not have the consent of the Group CEO to carry over. From 1 January 2016 to 1 August 2016 was under the old contract, thus for 7/12ths of the year.

75. For 2014 he was owed 8.25 days, for 2015 he was owed 27 days, for 2016 also 27 days and 2017 was owed 25 days

76. Under the 2012 contract we award the full amount of unpaid holiday pay. This is 8.25 days for 2014 and 27 days for 2015 at a daily rate of £288.46. We have calculated this on the basis of 260 working days per annum. £288.46 x 35.25 for 2014 and 2015 is **£10,168.26**.

77. For 2016 the old contract subsisted to 31 July which is 7/12ths of the year. A full year is 33 days, divided by 12 months is 2.75 days per month and 7 months at 2.75 days per month is 19.25 days. The salary to 1 August 2016 was the same, so the daily rate is £288.46 x 19.25 makes a total of **£5,552.86.**

78. The claimant was entitled to carry over 5 days into 2017. His entitlement to this was at an increased rate of £326.92 based on a salary of £85,000. Five days at this rate is **£1,634.60**.

79. The accrued untaken annual leave for 2017 was 25 days plus five days carry over. At the same daily rate is **£8,173.00.**

80. The award of holiday pay is **£25,528.72.**

81. On compensation for unfair dismissal the claimant's counsel was content to leave the amount in our hands and made no submissions.

82. We took the view that the claimant has not taken all reasonable steps to mitigate his loss. He clearly has not tested the job market, as on his own evidence he has not even applied for a single job. It would be disconcerting to hear that the respondent would not provide him with a reference, but he did not test this out by making a job application and finding out whether they meant what they said about this. The respondent had access to legal advice and this might have affected the respondent's position on a reference.

83. We accept that the claimant's interest is in setting up and running his own business and inevitably this would take some time, as it has. However, we find that he could reasonably have taken some steps to bring in an income from employment in the last 13 months.

84. We accept that it would have been difficult even to apply for work prior to the expiration of his covenants and this takes it to 15 March 2018. We

find in a buoyant IT market and on a balance of probabilities that by 30 June 2018 the claimant, whom we find is a skilled professional, ought reasonably to have been in a position to obtain a role at a comparable salary.

85. We therefore award the claimant a basic award at **£2,689.50** based on 5 complete years' service and a week's pay capped at £489. Loss of statutory rights at **£500**, and loss of earnings for 6.5 months (15.12.17 to 30.06.18) at £4,756.64 which is **£30,918.16.**

86. This makes a total award for unfair dismissal of **£34,107.66**.

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Employment Judge Elliott
Date: 22 January 2019

Judgment sent to the parties and entered in the Register on: 23:01:19 .
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