IN THE EMPLOYMENT TRIBUNAL **Case Number: 1304659/2015**

SITTING AT HILL STREET, BIRMINGHAM

AT A FINAL MERITS HEARING

ON: 5-9, 12-16, 22, 23 & 26-28 FEBRUARY 2018

Before

EMPLOYMENT JUDGE PERRY

(siting alone)

Between

MR THEO MILLWARD

Claimant

and

(1) THE SWIMMING TEACHERS' ASSOCIATION LTD

(2) STA RESOLUTE TECHNOLOGY LTD

Respondents

Appearances:

For Mr Millward: **In person**
For the Respondent: **Mr R Powell** (counsel)

REASONS

(1) Oral reasons having been given on 28 February 2018 and the Judgment dated 1 March 2018 having been forwarded to the parties on 2 March 2018 these written reasons are provided following requests from the Respondent dated 6 and 7 March 2018.

(2) On the final day of hearing evidence, I canvassed with the parties if time did not permit me to give a full reasoned decision, if they were content for me to give a short oral decision with my rationale or full written reasons. They both indicated they preferred to receive the result as quickly as possible. Time did not allow me to provide a full reasoned decision and I therefore provided my rationale based on my notes. These reasons are provided from my rationale and notes.

(3) I note there was a computer error in the way my digital signature was affixed to the electronic judgment in this claim (but not the original generated by me). I understand that may have something to do with the different versions of Microsoft Word used by the judiciary and administration. I understand that error has not been transposed on to the internet version of the judgment. That being merely a formatting error I do not propose to remedy the same.

(4) I invited submissions on whether restricted reporting or other similar orders should be made during the hearing. Save it was agreed that the individual I will refer to below should be referred to as CWJ, none were.

(5) References in square brackets below are unless the context suggests otherwise to the page of the bundle or if they follow a case reference or a document reference, or a witness' initials, the paragraph number of that authority or document (e.g. [BP/36 or ET1/8.2]). References in round brackets are to the paragraph of these reasons.

THE COMPLAINTS & ISSUES

1 By a claim form presented on 15 December 2015 Mr Theo Millward brought complaints of:

1.1 Ordinary unfair dismissal (s.98(4) Employment Rights Act 1996 (ERA)),

1.2 Unfair Dismissal pursuant to s. 103A ERA,

1.3 Wrongful dismissal (breach of contract - notice), and

1.4 Wages.

2 This claim was previously joined with that of Mr Millward's father, Mr Roger Millward. It was 'unconsolidated' from this claim by an order of Employment Judge Harding with reasons [185-210] dated 5 April 2017 following a hearing on 13 March 2017. To distinguish between the Messrs Millward I will refer to the claimant herein as Mr Millward, and his father, as Mr Roger Millward. I will also refer to the Respondents using the abbreviations used during the hearing, namely the First Respondent as STA and the second Respondent as START.

3 Mr Roger Millward's claim was stayed some time ago; amongst other matters, a High Court claim was in process involving the same parties. The lifting of that stay is the subject of an application that is not for me to address given the order dated 5 April 2017.

4 The issues in this claim were identified over the course of a handful of Preliminary Hearings culminating in one conducted by Employment Judge Harding on 20 July 2017 [215-221].

5 In advance of this hearing I sought that the parties confirm that directions had been complied with (for instance I sought copies of witness statements), confirmation of certain matters ancillary to the evidence being heard within the trial window, to identify what pre-reading would be required and how long that was envisaged as taking.

6 I conducted a telephone case management hearing on 24 January 2018 and gave revised directions concerning the agreement of list of issues and facts agreed and those in dispute, a chronology and trial timetable.

7 On the first morning of the hearing I asked if the chronology and other documents I had ordered be disclosed were agreed Mr Millward told me they were not on the basis the respondent had raised an issue concerning his non-compliance with the ACAS code that had not been pleaded to. He told me that took him by surprise. Mr Powell pointed out as that was relevant to remedy it did not strictly need to be pleaded to but in any event only related to Mr Millward's failure to grieve in relation to the wages and notice complaints.

8 It was agreed at the outset the matters for determination would be limited to liability, but that the substantive aspects of the breach of contract claim, *Polkey* contribution and good faith issues would also be addressed alongside this.

9 Accordingly, I suggested that uplift/reduction issue in relation to the ACAS code could be addressed at the same time as remedy to give Mr Millward time to consider his position in relation to the same. That was agreeable to both parties.

10 I also reminded the parties of the need to lead evidence, to challenge matters that were disputed by asking questions of the witnesses whose evidence was disputed and to summarise. I suggested as Mr Millward was in person he might like to use the list of matters in dispute as the basis for his questions together with any issues concerning credibility.

11 I suggested that a number of matters should be agreeable such as the correct respondent in the list of issues. The STA having confirmed that if any determination was made against either respondent it accepted liability for any awards that were made, Mr Millward accepted that it was his employer. A revised list of issues (and a list of matters agreed/those in dispute) were lodged on 6 February 2018.

12 Finally, given 4 disclosures were referred to in his statement yet only two in the list of issues. I clarified with Mr Millward if the other two were relied upon; he confirmed they were included for completeness only and were not pursued as protected disclosures in their own right.

THE EVIDENCE

13 By the time I started to hear evidence I had before me:-

13.1 An indexed bundle of 8 lever arch files, containing nominally 3318 pages (nominally because additional pages had been inserted)

13.2 A chronology,

13.3 A list of Issues,

13.4 A list of factual matters agreed and those in dispute, and

13.5 A cast list.

14 Various documents were added to the bundle as the hearing proceeded. I do not propose to relay them all here.

15 The pre-reading I was to undertake was also agreed at the start of the hearing.

16 The statements of the following witnesses were read in advance:-

16.1 Mr Theo Millward [TM] (who also provided a supplementary statement [TM2]),

16.2 Miss Joan O'Sullivan [JOS], a former Trustee of STA, and a witness for Mr Millward

16.3 Mrs Zoe Cooper [ZC], STA's Head of Accounts

16.4 Mr Stuart Tanfield [ST], the Finance Director/Head of Finance of STA whose resignation (subsequently retracted) was one of the catalysts for the events that concern me,

16.5 Mr David Candler [DC], who at the time of matters that concern me was the President of the STA's Trustees,

16.6 Mrs Judith Hardy [JH], a HR consultant of Perlen Consulting Limited, who was appointed to assist with the investigation concerning Mr Millward and the subsequent disciplinary and appeal proceedings.

16.7 Mr Richard Timms [RT], a Trustee of STA, who chaired Mr Millward's disciplinary hearing

16.8 Mr Robbie Phillips [RP], a Trustee of STA, who chaired Mr Millward's appeal hearing

17 A MED3 sickness certificate was provided for Mr Timms mid trial and he was not called as a witness. I reminded the parties that given I had already read

his statement I would give such weight to it as I considered appropriate on the basis Mr Millward had not been able to cross examine him. I explained to Mr Millward that where possible, he should pose the questions he had for Mr Timms to other witnesses.

18 Both parties also lodged written opening submissions and elaborated on these orally in closing. Mr Powell also provided a closing submission that was broken down into several parts.

19 At the outset, Mr Millward sought regular breaks to allow him to regulate a medical condition from which he suffers; I indicated that I would be taking regular breaks in any event and I did so least once an hour or thereabouts throughout the hearing. No other adjustments were sought. After each break I checked with the witnesses and parties if any adjustments or additional breaks were required they should let me know. They did not

THE BACKGROUND AND MY FINDINGS

I make the following primary findings of fact on the balance of probabilities and from the information before me. It is not my role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are my findings relevant to the principal issues in the claim.

Background

20 STA was founded in 1932 and is a private company limited by guarantee without share capital and a registered charity. Its objectives include (as summarised by the Charity Commission in a press release of 28 July 2015) the promotion of effective teaching of swimming lifesaving and survival techniques.

21 STA is run by a board of Trustees (the Trustees) who were also directors of the company. The exact number of Trustees varied between 4 and 8. The composition of the Trustees now differs to that at the time of the events that concern me.

22 Mrs (Myra Catherine) Lee Robinson (first appointed on 4 November 1990, appointment terminated 23 October 2010; re-appointed 15 June 2012), Mr Richard Timms (appointed 15 June 2012) and Mr Robert Phillips (appointed 19 June 2014) were and are Trustees at the time of the events that concern me.

23 Mr Hugh Hall, Ms Joan O'Sullivan and Mr David Candler were Trustees at the time of the events that concern me but have since resigned as Trustees. Mr Hall was a trustee between 27 May 2002 and 12 June 2015, Ms O'Sullivan between 20 August 2010 and 28 November 2011 and Mr Candler between 28 June 2004 and 21 January 2016. Mr Candler was also the President of the Board of Trustees for approximately 10 years between 2006 and 2016. Since 1 April 2016 he has been the Chief Executive of STA.

24 The day to day running of STA was dealt with by a management team led by a Chief Executive who reported to the board of Trustees (see (38.1)).

25 Mr Roger Millward, the father of Mr Millward, was Chief Executive of STA from 1995 until 31 May 2015, when he retired and took up a consultative role. He is now aged 75 and I am informed has suffered ill health for some time [TM/211].

26 I was told that when Mr Roger Millward was appointed as Chief Executive because at the time prior to his appointment the STA was in financial difficulties and it was always understood by the Trustees he was an accountant. It is correct that he was admitted as an Associate of the Institute of Chartered Accountants on 6 October 1965 [245] but I also had before me a copy of the notice of 1 February 1990 in the London Gazette of the appointment of Mr Roger Millward's Trustee in Bankruptcy on 8 August 1989 was within the bundle [246]. Why Mr Roger Millward was appointed, and whether the Trustees were led to believe he was entitled to practice as a Chartered Accountant are not matters that are for determination before me. He is not a party to this claim.

27 Mr Millward is a graduate in Management. He trained but did not qualify as an accountant. Both are relevant to the matters that concern me. He started working as a consultant at the STA on a self-employed basis on 24 August 2010 [ST/62.5]. Mr Millward asserts his employment commenced on 1 August 2010 [ET1/3], the respondent on 1 September 2011 [ET3/19]. His contract of 26 September 2013 [1224-35] refers to the commencement of his continuous employment on 1 September 2009. It was agreed as those matters were only relevant to remedy, that dispute would be resolved at the same time as remedy.

28 Mr Millward told me [TM/64] that a succession plan that had been in place for Mr Roger Millward had to be reassessed following the departure of his intended successor, Mr Alan Siddons, in March 2012. Mr Roger Millward remained as CEO to enable a replacement candidate to be found [TM/74]. I will return to that in due course. At a Trustees meeting on 26 September 2013 a new succession plan was approved [424-426] the essence of which was that Mr Millward would succeed his father as Chief Executive on 1 June 2015, which he did. Mr Millward's contract of employment [1224-35] and a side letter detailing the succession plan [423] were before me. Both were dated 26 September 2013.

29 START was formed on 13 September 2011 to essentially to provide a software product called 'STAadmin' to the leisure industry. That assisted organisations with compliance and risk management. To protect STA as a charity, START was formed as a wholly owned subsidiary of the STA [86].

30 STA also wholly owned a further subsidiary, STA EXCEL Ltd (EXCEL). That was formed for the same reasons as START. It provided training and ancillary services to the leisure industry. Again, I will return to that in due course.

31 Mr Millward told me he had been heavily involved in the development of 'STAadmin' and was the only individual who understood it intimately. He stated it was also a key selling tool for STA as the pricing for the software was heavily reduced if customers agreed to exclusively use products and services from STA pursuant to medium to long term contracts and this resulted in substantial boosts to STA's revenue. He stated that the discounts, nor development costs were recharged between the companies, instead, a consolidated position was reported in the group financial statements and to the Charity Commission,

32 Mr Tanfield [ST/22 & 24] asserted that START was loss making, had been unofficially subsidised by STA and its set up costs and losses were hidden in the consolidated group accounts. STA suggested the benefits it derived from START were small and following the departure of Mr Millward there had been few sales. If so that of course may be accounted for by a change of direction of STA but that aside Mr Tanfield suggests those accumulated losses were eventually consolidated into an intercompany loan of 3 June 2015 of £310,000 [2969-2971].

33 I find that irrespective of the view the Charities Commission took of the treatment of those matters in the accounts that the loan capitalisation agreement was authorised by the Boards of the STA and START on 3 June 2015. It appears those minutes were at best back-dated as based on the evidence before me it was unlikely any such Board meetings took place on those dates and the re-organisation that gave rise to the loan capitalisation agreement was only approved following the Trustees' meetings on 10 and 11 June 2015. Any issue over back dating aside, I find those Companies House documents record the view of the advisors and signatories (including Mr Roger Millward) was that START was indebted to the STA in the sum of £310,000.

34 The finance manager of STA for many years had been Mr Patrick ("Paddy") Mooney. His departure in October 2013 led to the recruitment of Mr Stuart Tanfield as STA's Finance Director/Head of Finance with effect from 3 February 2014. I will return to Mr Mooney's departure in due course.

35 Mr Tanfield told me he was recruited via a recruitment agency, Michael Page, who suggested that he apply for the role with the STA. He told the need for his appointment was that the Chief Executive, Mr Roger Millward was a chartered accountant but was retiring soon, hence the need for another chartered accountant. Mr Tanfield stated that prior to his interview he did some research about the STA's finances by downloading their accounts from the Charity Commission's website. He states he noted Mr Roger Millward's salary in the 2013 accounts was stated to be in the bracket of £230,000 - £240,000 which he considered to be excessive given the size of the STA, its turnover and low profit levels. He states a Chief Executive's salary for the charitable sector should not exceed £100,000. He states he raised concerns with Michael Page was told that he was not the only potential candidate that had spotted this, and that a few had pulled out. Notwithstanding that he applied and was successful.

36 Mr Tanfield states that as a result of there being no one in post since Mr Mooney's departure his first few months were very busy but also the annual accounts had to be prepared [ST/11].

37 I heard that he was not responsible for approving the expenses claims of either Mr Millward, that role fell to the company Secretary, at the time, Tony Harvey.

38 As at the time of the events that principally concern me it was agreed that the STA:-

38.1 Had a senior management team comprising Mr Millward (Chief executive), Mr Tanfield, Zoe Cooper (Head of Accounts), Zoifa

Houlston (Head of Marketing), Brett Preston (Head of IT) and Claire Brisbourne (Head of Product Services);

38.2 had annual income of £2,421 000;

38.3 net assets were £912,000 (see accounts for y/e 31/5/2015) but later restated to £681,000;

38.4 employed about 45 people;

38.5 had 8,000 – 8,500 members; and

38.6 certificated about 40,000 people annually in swimming, lifesaving, pool plant, health & safety and first aid.

Events leading up to the re-organisation proposal

39 It was not in dispute that on 21 January 2015 Messrs Roger and Theo Millward and Mr Candler discussed over a dinner in London buying a company that managed facilities such as swimming pools, JC Leisure. I will refer to Facilities Management as "FM". Although Mr Candler accepts that it was mentioned that a new company would have to be set up as this could not be undertaken by the charity he believed it would be done in the same way as START and Excel. He disputes at that meeting there was any discussion of a reorganisation as was later proposed namely the assets of the STA would be transferred to a new company (I will refer to this as the "reorganisation") [TM/141-8 & DC/39]. Mr Millward told me he raised Mr Tanfield's capabilities at that meeting [TM/149]. Mr Candler made no mention of it in his statement and was not asked about the same by Mr Millward.

40 Mr Roger Millward then met with and engaged in correspondence with STA's solicitors DWF [564]. It was not suggested that the documents before me are the complete exchange but based on his email to Kathy Halliday of DWF dated 24 February 2015 [559-560] he sought their advice on a reorganisation of STA.

41 The effect of the proposed reorganisation was to form a new company (which I will refer to as "Holdings") in which STA would hold a minority shareholding with the majority being held by staff, management and new investors. STA's trading assets would be "lent" to Holdings (whilst it was intended this would be secured, the Charity Commission later raised issues concerning the nature of that security), Holdings would be issued a long-term contract to manage and develop all of STA's trading activities and in return Holdings would rent STA's premises and pay a monthly fee and a share of its profits (gift aided) to STA.

42 The shareholdings in Holdings post re-organisation based on the documents before me were to be allocated 51% shared between Messrs Roger and Theo Millward, 29% to staff and 20% to the STA.

43 DWF's manuscript annotations on Mr Roger Millward's email of 24 February 2015, an internal DWF email of the day before [558] and two file notes [561-563] identify several concerns on DWF's part. They included:-

"Who was instructing [DWF] ? Roger ? Trustees ?

…

6 Trustees – all agreed to go ahead. But not very bright!

An over dominant CEO/shadow trustee = risk

…

Report – options

…

Protect decision making process

Governance robustness + transparency

Address issues of public benefit and private benefit

Trustee decision

Transfer assets at market rate

Secured loan with commercial rate of interest

…"

44 Cathy Halliday of DWF responded to Mr Roger Millward's email of 24 February on 26 February [564-5] suggesting that the way forward was for DWF to identify the issues that required further consideration and how DWF could best assist STA in shaping the proposal or other options. Ms. Halliday went on to say that she and Catherine Rustomji, a charity law partner at DWF, shared concerns that the Trustees ***"… (whose ultimate decision this will be) must evidence that consideration has been given to the various options and be absolutely satisfied the best interests of the charity are being served".***

45 She went on to say that given the operational side of the business was driven by Mr Roger Millward ***"… in order to protect all parties that the Trustees are not just given your recommended proposal for a yes/no decision but understand the benefits or issues with other alternatives that you may have considered, and perhaps personally do not consider as the best option …".***

46 Ms Halliday went on to "… ***propose that in order to progress matters in a way that is transparent and complies with the necessary principles of good governance that [DWF] prepare a report for the Trustees addressing the following areas:-"*** and went on to list them as :-

- the effect of STA's position as a charity,
- the scope of charitable trading within the STA,
- the use of an existing or new subsidiary to carry out non-charitable (i.e. commercial) trading including a review of the proposal,
- issues relating to the disposal of charitable assets - loan finance and security against assets,
- compliance with public benefit principles, including permissible incidental private benefit,
- advising on the decision-making process and the legal duties and responsibilities of the trustees,
- good governance, robust decision making and transparency.

47 She advised that "… ***whether to proceed or not and the final structure of what is agreed was one for the Trustees and they need to be seen to be advised independently of the options available to them so they can make an informed decision"***. Ms Halliday suggested Ms Rustomji attend a meeting of the

Trustees to discuss the report in more detail [564-5]. That eventually took place on the 11 June 2015.

48 Mr Roger Millward replied by email 10 minutes later stating he was happy with the proposal but hoped that he could be consulted on the report [564].

49 As stated the operational side of the business and the reorganisation proposal was principally taken forward by Mr Roger Millward. He has not provided a witness statement (nor have any of the lawyers that had dealings at DWF) so there is little in the bundle to identify how and when that was taken forward.

50 On 3 March 2015, Mr Millward told me a due diligence process started in relation to JC Leisure [TM/158] [567(a)–e)]. That was before the informal dinner of Trustees on 4 March 2015, their discussion on 10 June, and the formal trustees' meetings on 5 March & 11 June 2015 the first of which I now turn to.

51 On the evening of 4 March 2015, the Trustees and both Messrs Millward met over dinner in a private room at the Fairlawn's Hotel in Aldridge to discuss the proposed reorganisation [TM/159]. Mr Roger Millward gave a PowerPoint presentation [621–3] and [577(a)-(k)]. Whilst Mr Millward told me other documents were shared with the Trustees he did not identify what these were [TM/160]. It was common ground that was the first mention to the Trustees (as a collective body as opposed to individual Trustees such as Mr Candler) of the reorganisation. That meeting was either not minuted or the minutes were not before me (given I was not taken to the minutes). However, the minutes (albeit these are marked draft in the footnote) of the Trustees Meeting the following day, 5 March, held at Anchor House Walsall, refer to a discussion of the reorganisation and it was recorded as an action point that the Trustees had in principle instructed the CEO to take legal advice upon [574 - §14.2].

52 It is not in issue that Ms Rustomji met with Mr Roger Millward on 12 March [TM/163] [580-2] and the final version of the report titled ***"Report on possible restructuring"*** was settled a week later on 19 March 2015. It was approved by Mr Roger Millward (see email 19 March 2015 at 11:56 [596] in which he also suggested the text for a covering letter to Ms Halliday). The version before me [597-609] included an appendix being the PowerPoint presentation given on 4 March 2015 (see (50)). The covering letter sent by email is at [618-9].

53 The version of the report on possible restructuring before me [597-609] included the PowerPoint presentation given to the Trustees on the 4 March 2015 as an appendix [TM/159 & 160]. Under the heading "Recommendations", having referred to the information provided, the ***report on the possible restructuring*** concluded:-

> *"7.3 ... the Trustees must be seen to be obtaining independent and complete advice which they can then consider when formulating their decision.*
>
> *7.4 The robustness of STA's governance and the transparency of its decision-making process and subsequent actions must be protected and evidenced."*

54 Under the heading "Next steps" amongst other matters the report said this:-

> *"8.2 The Trustees have had an initial briefing from their CEO … need to consider the information presented to date … whether they wish to pursue this proposal or not; and if they do, what additional information they require.*
>
> *8.5 … The Charity Commission will expect any loan to be secured where granting security is an option. …"*

55 I also need to refer to one other matter that was raised before me that was set out in an email from Mr Roger Millward of the 24 March 2015 [625 & 626] recording the Trustees having agreed to move forward with the proposal, that, Mr Candler was ***"… to be copied into all relevant emails so he can raise concerns with [the Trustees] or with the lawyers".*** That was to address the conflict point identified by DWF within their advice(s).

56 Mr Tanfield told me that in February or March 2015 Mr Millward gave him some documents about the proposed reorganisation. He states that on reading that documentation he immediately took the view that what actually was being proposed was a management buyout of the STA by the Messrs Millward. He went on to say that sometime between February and April 2015 that he and Mr Millward had an argument about the proposals. Mr Tanfield states he told Mr Millward that he could understand why he might wish to go into the FM business but that could be done via a private company, there were lots of issues with the Charity's status and Charity Commission, and conflicts of interest that would make it very difficult. Mr Tanfield told me he queried with Mr Millward why he needed to touch the rest of the STA – it could be left as it was and what was proposed was to buy a profitable company for next to nothing, as a result Mr Millward would receive an enormous private benefit and that was not allowed.

57 Mr Millward accepted that Mr Tanfield had expressed concerns to him regarding the reorganisation and that he believed it could not go ahead because the Messrs Millward would benefit more than STA. Mr Millward summarised Mr Tanfield's concerns as [TM/206]:

- *"That the value of assets would not be correct, (this was to be undertaken independently by a valuation firm recommended by DWF unknown to my father and I),*
- *That the private benefit my father and I stood to gain was greater than the benefit to STA,*
- *That the reorganisation was not commercially necessary."*

58 It is not in dispute that Mr Tanfield and Mr Millward discussed Mr Tanfield's concerns. Mr Millward states following their meeting, he called Mark Gibson at DWF to seek his views in the light of Mr Tanfield's concerns. He states that Mr Gibson allayed his concerns advising it was a matter for the Trustees. Mr Millward states he told Mr Tanfield of that by an email of 1 April 2015 at 09:33 [646]:-

> *"Stuart,*
>
> *Whilst I remember, I rang DWF the lawyers who have prepared the restructuring report last night.*

Following our conversation yesterday I wanted to double check my opinion that if consideration is paid for any assets belonging to STA, that does not constitute private benefit.

You may recall I gave the example of buying a company car market rate - would this be seen as benefit?

The author of the report, Mark Gibson confirmed to me, the private benefit test only applies if the charity gives assets to an individual. It does not apply if fair consideration is paid.

Naturally, the key point at that stage, if it is something the Trustees wish to proceed with, is ensuring the value of any asset(s) is accurate and secondly the consideration being paid is reasonable. That will be a matter for the Trustees to decide based on independent advice.

I share your view that it is imperative STA is protected and any change is in the best interests of STA. With this in mind, I will be arranging a meeting with Joe Bates for a few weeks times where we can both share these proposals with Joe and to discuss how we can tackle some of these more complex valuations and cross charges.

Once I have dates for this meeting I will let you know.

Theo" (Document 646)

59 On 1 April Mr Millward told me [TM/213] he met Mr Joe Bates of STA's auditors, Clement Keys. Around that time Mr Roger Millward was awaiting medical treatment (the details of which are not relevant to my decision) and Mr Millward told me he wanted to check that the reorganisation that had been devised by his father was in principle legitimate. He told me that so far as he can recall Mr Bates welcomed the proposal. Mr Millward told me he raised Mr Tanfield's concerns. He told me Mr Bates' view was that he was surprised a chartered accountant could not see the mathematics of the increased income and reduced risk to STA. Mr Millward told me he shared concerns he had about Mr Tanfield's technical work and that aged debtors were not being kept in check with Mr Bates and they agreed a more suitable candidate would be required going forward to provide the right support. A meeting was arranged between the two of them and Mr Tanfield on 9 April 2015.

60 As to the meeting on 9 April 2015 Mr Tanfield states it was a complete sham; Mr Millward purportedly presenting the reorganisation proposal for the first time to Mr Bates [ST/21]. Mr Tanfield states he asked Mr Bates if he felt there was anything that was a cause for concern in terms of ethics, conflict of interest or best interests of the Charity in the proposal and was told he had not. It was left that Mr Tanfield would think more on the proposal. Mr Millward told me following the meeting he discussed Mr Tanfield's concerns with Mr Tanfield some more and Mr Tanfield's response was to imply that Mr Bates was 'dodgy'. Mr Tanfield in his statement [ST/22-23] accepted he raised a number of issues concerning undeclared interests between Mr Bates and Mr Roger Millward and Mr Bates' failure to have raised the level of Mr Roger Millward's salary and pension. Mr Millward expressed concerns about the way Mr Tanfield expressed that view.

61 Mr Millward asserted throughout the hearing he relied on professional advice as the basis for continuing to pursue the reorganisation. The lack of a statement from Mr Bates relaying the content of his advice or those other

matters supporting Mr Millward's account is notable by its absence. I am not satisfied given what I say below as to the credibility to be attached to Mr Millward's evidence that the word 'dodgy' was used but I find Mr Tanfield did question the merits, impartiality and thus weight that should be attached to any view expressed by Mr Bates.

62 Mr Millward also told me that following discussions between Mr Tanfield and his father after the 9 April meeting, Mr Tanfield's concerns had been assuaged. He accepted when asked if he had specifically checked that with Mr Tanfield that he had not. I find that was inexplicable in the light of the advice given by DWF.

63 Mr Millward accepted that on 3 June 2015 he spoke to Raj Baden of Michael Page, to discuss a replacement for Mr Tanfield. His witness statement suggests that flowed on from a discussion with his father concerning amongst other matters, debtors being out of control. Further he states he alerted Mr Candler to concerns concerning Mr Tanfield and if Mr Tanfield were to be replaced that needed to be done quickly [225]. No date is given by Mr Millward in his witness statement but he stated that at that point Mr Tanfield had 15 months service. Mr Tanfield acknowledges there was a management meeting on the 3 June at which Mr Candler had skyped in on. He could not be sure if that was the meeting at which that was discussed.

64 Mr Millward's subsequent conduct adds doubt as to his account. Had he genuinely been as concerned about Mr Tanfield's behaviour at the 9 April meeting as he now suggests, irrespective of his not being Chief Executive of STA at the time, he would not have waited almost 2 months to do something. Further, good practice requires he address those issues with Mr Tanfield and he did not.

65 Mr Millward also referred by way as justifying his actions to a list of complaints sent by his father to Mr Candler about Mr Tanfield. That sequentially is awry being dated 30 June [955-56].

66 Those matters lead me to conclude Mr Millward either wanted to believe that Mr Tanfield's concerns had been assuaged and did so, or chose to ignore Mr Tanfield's view because it was not convenient. In my view it is more likely than not the latter was the reason. I reach that conclusion because Mr Millward's decision to replace Mr Tanfield without him raising his alleged concerns about Mr Tanfield's performance and behaviour on 9 April lead me to conclude the principal reason for him doing so was Mr Tanfield's objection to the reorganisation.

67 On 1 June 2015 Mr Millward became the Chief executive of STA. His salary was increased to £100,000 plus £20,000 discretionary bonus [423]. He was also entitled amongst other matters to a pension, car, 6 months' notice, critical illness and associated benefits.

68 Mr Tanfield states [ST/27] he was aware of Mr Millward's meeting with Michael Page on 3 June 2015 as he had seen a note of it in Mr Millward's calendar [504 & 777] and that after that meeting Mr Millward put two interview dates in his diary. Mr Tanfield alleges he was also aware that everyone who had historically challenged the Millwards and/or disagreed with their stance on matters or stood in their way such as Mr Mooney, Mr Siddons and SGH Martineau solicitors (Martineau) amongst others had been dismissed/had their

retainers terminated (see below). He telephoned Mr Baden and asked him to find him a new job because he appeared to be recruiting a replacement. Mr Tanfield told me Mr Baden asked him how he had found out, confirming Mr Tanfield's suspicions.

69 It was agreed that following the meeting on 3 June between Mr Millward and Michael Page that Mr Tanfield told he was aware that Mr Millward had contacted Michael Page to replace him. Mr Millward states he arranged a meeting with Kathy Halliday of DWF on 8 June to discuss a managed exit for Mr Tanfield [TM/231]. In the interim Mr Tanfield resigned as STA's Finance Director/Head of Finance via his email of Sunday 7 June 2015 [798 - 799]. Mr Tanfield by his resignation email stated he would discuss the reasons when he returned to the office the following Tuesday. His resignation was accepted by Mr Millward on 9 June [805].

70 Following Mr Tanfield's resignation Mr Millward asserts that he informed Mr Candler of this in a phone call, and in response to a question whether that changed anything from Mr Candler, informed him that it did not. Mr Millward states that Mr Candler suggested Mr Tanfield's resignation should be withheld from the Trustees but Mr Millward suggested that was unwise and Mr Candler agreed to reflect on that [TM/236]. That became somewhat academic on the for the reasons I relay at (72). Mr Millward told me that he was concerned about what Mr Candler was suggesting and so discussed this with Miss O'Sullivan and that he would tell the Trustees on 10 June. As a result, Miss O'Sullivan told me she had concerns that Mr Candler was manipulating information [JOS/36]. The sole basis she gave to me for this was what she had been told by Mr Millward.

Trustees Meetings 10 & 11 June 2015 concerning re-organisation

71 On 10 June 2015 the Trustees met at the Fairlawns Hotel, Aldridge. Present were Mr Roger Millward, Mr Millward, Mr Candler, Miss O'Sullivan, Ms Robinson, Mr Hall, Mr Phillips and Mr Timms. Mr Millward minuted the meeting [818-820].

72 Twenty minutes prior to the Trustees' meeting on 10 June Miss O'Sullivan states that Mr Candler announced Mr Tanfield had resigned to the other trustees [JOS/37]. Mr Candler made no mention of either discussion in his statement. I find if that had been his intention to withhold details of Mr Tanfield's resignation from the Trustees he did not follow it through.

73 It is common ground that Mr Roger Millward gave a presentation to the Trustees. Mr Millward told me [TM/244] his father stated a valuation had been provided of the assets by Hilco Global. That a valuation had been finalised of all the assets is at odds with what the Trustees viewed as the result of the meeting (see (79)).

74 It transpired that a VAT issue also arose at the last minute. It was proposed by Mr Roger Millward that a so called 'golden share' be created which Mr Millward states gave STA control of Holdings even though it did not have a majority shareholding. Miss O'Sullivan's annotation on the agenda [813-4] and Mr Millward's minute [818—820] indicate the 'golden share' was discussed but I find that what precisely was intended by this and whether that intention was achieved was not clear; the minutes do not record in detail what this entailed. The closest to this appears to be an email chain between 8 and

10 June 2015 [807-09] which allowed either party to redeem what was referred to as a 'D' class share. Whilst the documents show it was always the intention to issue that 'golden share', and an 'E' class share (the demarcation letter is irrelevant) was subsequently issued, based on the documents I was taken to the company's articles were not changed to reflect the intention.

75 Mr Millward's notes record a vote on a decision in principle was called for and was passed. Mr Candler told me it was usual that Mr Roger Millward called for a vote in such instances. Despite that I was told the Trustees discussed matters between themselves subsequently and after Messrs Millward left and identified a number of issues they felt need to be addressed.

76 Given Mr Roger Millward did not give evidence his rationale in giving the presentation and calling for the vote on 10 June in DWF's absence was not provided.

77 On 11 June 2015 the meeting of the Trustees of the STA was re-convened. Mr Candler, Ms O'Sullivan, Ms Robinson, Mr Hall, Mr Phillips and Mr Timms were present. At that meeting DWF solicitors were also in attendance.

78 The minutes of the board meetings are at [821-825]. They relay amongst other matters that Ms Rustomji of DWF presented summary of the duties of the Trustees as Charity trustees (§6) and DWF explained the nature and effect of the asset purchase, management agreement, lease, loan agreement and a debenture (§7.2). The minutes record both Messrs Millward were in attendance.

79 It is not in dispute the Trustees approved the reorganisation albeit the Trustees assert that contrary to what the minutes record this was subject to the finalisation of the STA's year end accounts and valuations (see (85)).

Subsequent events

80 On 15 June 2015 Mr Millward emailed Mr Tanfield at 13:19 instructing him not to pay Mr Roger Millward's salary because the money was to be reserved and paid at a later date. Mr Tanfield was specifically instructed not to remove it from the budget. Mr Millward also informed Mr Tanfield: "***I will not be taking my bonus for last year yet, again I will take it as a lump sum at a later date.***". Finally, Mr Tanfield was also instructed not to pay Mr Millward's salary ***"... for now, I will advise at what rate and when in due course".*** Again, Mr Tanfield was specifically instructed not to remove it from the budget. [835]. Noting the reference to the bonus having already been in the budget for the previous year I have not been taken to any approval by the Trustees of the payment of a bonus to Mr Millward for the preceding year by the date of that email.

81 A few hours before that email at 10:59 on 15 June 2015 Mr Tanfield emailed Mr Candler [838] stating, he felt he owed Mr Candler an explanation (for his resignation) and suggesting that the version of events given to Mr Candler (by others) might not have been accurate. Mr Tanfield gave his reason for resigning as being on professional ethical grounds, specifically that in his view the proposed reorganisation of the STA effectively culminated in ownership/control of the business passing in exchange for a fraction of what it was worth. He also offered to privately discuss the contents with Mr Candler if he so wished and gave his mobile phone number.

82 In a subsequent exchange of emails [837] Mr Candler initially responded stating he was tied up at work until late that evening but sought and was later granted permission by Mr Tanfield to share the contents of the 10:59 email with the other Trustees. Mr Candler only shared the concerns with Mr Timms and Mr Hall; Mr Phillips was in hospital at the time and he told me he was concerned Mrs Robinson would have told Mr Roger Millward straight away as she was close to him [DC/56]. Mr Hall was in Mr Candler's words incensed (see [906a]). He told me he did not report anything to the Charity Commission until he had the written agreement of both Mr Timms and Mr Hall.

83 The documents before me [870] indicate Messrs Candler and Tanfield spoke the following day, 16 June. Mr Candler also told me that he and Mr Hall did some research following a conversation they had with Mr Timms about reporting concerns to the Charity Commission [DC/58]. I was not clear if that was before or after he spoke to Mr Tanfield.

84 What is clear is that the day after that (17 June) Mr Candler wrote to Mr Tanfield asking Mr Tanfield to put into writing the issues he had mentioned to Mr Candler attaching the procedure for Trustees to report concerns to the Charity Commission. Mr Candler explained that whilst he understood it was asking a lot of Mr Tanfield the Trustees could not prove anything without Mr Tanfield's input [870]. Mr Tanfield did put into writing his concerns via an email of 17 June [885-87]. The email exchanges before me show there were further conversations and emails passing between them [884-85].

85 Also on 17 June the minutes of the Trustees' meetings of the week before were emailed by DWF to Mr Millward [871]. Mr Candler told me they were forwarded to him on 26 June 2015. Mr Timms had concerns about their contents [928-930] which he passed on to Mr Millward who in turn responded [927-28]. The emails show Mr Hall agreed not only with Mr Timms' concerns but had also concerns about Mr Millward's reply [926-27].

86 At 16:48 on Monday 22 June 2015 Mr Candler sent an email to the Charity Commission headed *"Concerns over possible fraudulent activity"* [913(b)–913(s)]. He also tried to call them, had to leave a message and thus sent a further email at 14:22 the following day [913(a)–(b)]. He received two calls from the Charity Commission the first of which was on 23 June in which he was told a more senior investigator would be in touch. The second call was from Mr Harvey Grenville who explained there would need to be an investigation.

87 On Thursday 25 June 2015 Mr Tanfield met two officers from the Charity Commission at the Village Hotel, Walsall and gave them all the information he had collated. The meeting lasted 2 or 3 hours. He had to cancel a meeting with Mr Roger Millward as a result.

Suspension

88 At lunchtime on Monday 29 June 2015 four of the Trustees, Mrs Robinson and Messrs Hall, Candler and Timms, met with Mr Millward to inform him that he was suspended on full pay with immediate effect required to hand over all STA equipment and escorted from the premises. His suspension was confirmed by letter the same day [934] which set out the matters that gave rise to the suspension, namely:- in role of chief executive of

STA he gave misleading and incorrect advice to the trustees with regard to the proposal to separate the business activities from the charitable aims and having sought advice from the Charity Commission the Trustees had been advised they could not pass over the charitable assets to a commercial organisation without potential future liabilities to themselves. Mr Millward made a note of the meeting [933]. I return to that below (218.1.2).

89 At 16:42 on 29 June Mr Millward sent by email what he asserts was the first of the two alleged Protected Disclosures [935-6] to Mr Candler and three other Trustees. Within it he refuted the allegations made that he had provided misleading or incorrect advice, expressing his concern that the future of the STA had been put in jeopardy, seeking the immediate lifting of the suspension on basis capital expenditure restrictions were put in place. Further he sought full details of grounds and a timetable for the completion of the investigation

90 On 1 July 2015 the Charity Commission opened a statutory inquiry pursuant to s.46 Charity Act 2011. The Charity Commission informed Mr Candler on 10 July 2015 that it was undertaking an investigation into the STA [962 - 969]. That notice was not forwarded to Mr Millward at the time but has since been provided as part of disclosure in this claim.

91 Having relayed a point that the public register of trustees did not appear to be up to date the Charity Commission went on to relay a number of regulatory concerns that included the STA ***"… was proposing to enter into a trading arrangement with, and transfer its staff, intellectual property and all of its assets except its freehold property to, a private commercial company under the majority control and ownership of the Charity's current CEO, Mr Theo Millward and former CEO, Mr Roger Millward who are son and father. The information provided to the Commission did not demonstrate that the proposal was in the best interests of the Charity or that adequate steps had been taken to avoid and manage any potential conflicts of interest in considering the proposal or that the trustees had gathered all the relevant information before taken a decision on this significant matter."***

92 Other concerns were expressed which included:-

92.1 That Mr Roger Millward continued to receive remuneration for consultancy work having stood down as CEO and it was unclear how the Trustees considered that to be reasonable,

92.2 that the aggregate emoluments for Mr Millward and Mr Roger Millward in the year to 31 May 2014 appeared to exceed £400,000 and represented 18% of the Charity's income

92.3 that adequate steps had not been taken to avoid potential conflicts in relation to the appointment of Mr Millward as operations director and then CEO,

92.4 how the Trustees considered the remuneration to be reasonable

92.5 if the controls for ensuring expenses claims were reasonable and legitimately incurred were adequate,

92.6 the charity may have made claims for rates relief whilst subletting part of the building it owned for commercial use, and

92.7 taken collectively whether the Trustees were in effective control of the charity and were adequately fulfilling their duties as trustees.

93 The Charity Commission went on to relay the factors that had led to the decision to open the statutory inquiry. These included amongst other matters a significant risk to the Charity's funds or other property and serious and/or deliberate abuse and/or wrongdoing by a trustee(s) or those otherwise involved in the control or management of the Charity.

94 By a letter of the 3 July 2015 Mr Millward was notified that an investigation was underway concerning ***"allegations of misconduct"*** and of the matters under investigation [943 - 945]. I relay these as they are relayed in [JH/7.1-7.6]:

- *"the advice and recommendations that he gave to the Trustees with regards to the corporate reorganisation and, in particular the accuracy and completeness of the information that he provided to the Trustees and the wider issue of Mr Millward to act faithfully and honestly and in the best interests of the STA at all times;*
- *running the STA in such a way so as to lead to a statutory investigation by the Charity Commission into the management and conduct of the STA;*
- *failing to manage the STA in an effective and competent manner without due process and contrary to the charitable objectives, prejudicing its interests and exposing the STA, its Trustees and members to damage and risk, including reputational damage;*
- *issues in respect of accuracy and completeness of financial and other management information provided to the Trustees generally;*
- *issues in respect of expenses claims; and*
- *issues relating to treatment of staff, including bullying and harassment in the workplace."*

95 On 15 July 2015 Mr Millward was forwarded an email enclosing a letter from Mr Candler inviting him to an investigatory meeting on 7 August 2015 [987 - 989]. The invitation indicated that Mr Millward would be asked questions concerning the matters raised in the letter of 3 July.

96 The following day (16 July 2015) Mr Millward emailed Messrs Candler, Hall, Timms and Mrs Robinson complaining that having been told when he was suspended the investigation would be expedited, six weeks had by then elapsed and he had not been provided with any evidence to support the decision to suspend him. He stated that caused him prejudice in that he did not have the opportunity to provide evidence to support any replies he gave to questions which was made worse by the generality of the allegations against him [990].

97 The Trustees (via Mr Candler) replied to Mr Millward on 17 July 2015 stating as the meeting was an investigatory one, the purpose of which was to put questions to Mr Millward. He would thus not be supplied evidence in advance (unless the investigating officer felt that it was appropriate to do so) but if an adjournment was required to allow him to provide answers to questions that could be granted [1003].

98 On 22 & 23 July 2015 Messrs Candler and Tanfield met with James Reddish and Harvey Grenville of the Charity Commission at Anchor House, Walsall [995-96 and 1022(a)-(f)] to respond to questions and requests for information from the Charity Commission.

99 On 28 July 2015 the Charity Commission published a Press Release concerning the statutory inquiry. That was reported in the press the following day [1028(l)-(n)]. Whilst the Press Release was not originally part of the bundle having been referred to it, I ensured a copy of it was before me.

100 The press release referred to the serious incident report made by the Trustees. The press release went on to say that through engagement with the charity the commission identified serious concerns with the charity's governance, aspects of its financial controls and the proposed organisational change posed a potential risk to the charity's assets since it was unclear if the changes were in the best interests of the charity. It indicated that the statutory inquiry was examining the administration, governance, and management of the charity by the Trustees, including their oversight and involvement in the recruitment, selection and remuneration of the charity's senior management, whether, and to what extent the charity may have improperly claim rates relief for property owned by the charity, the charity's financial controls and transactions, in particular in relation to expenses incurred and/or reimbursed from charity funds, and whether and to what extent there has been misconduct or mismanagement in the administration by the charity's trustees, officers, agents or employees.

101 The press release also stated that having submitted the serious incident report the Trustees had been co-operating with the Charity Commission and were taking steps to address the regulatory concerns.

Investigation

102 The respondent appointed a Trustee, Mrs Robinson to conduct the investigation. Given she had no previous experience in HR matters, Mrs Judith Hardy, a HR consultant was appointed to assist her. Mrs Hardy told me she has worked in HR for her entire career, working as a HR director at Arthur Anderson and Addleshaw Goddard (where she got to know Mr Rob Riley of DWF who recommended her to the STA) and at the time of the events that concern me she had been working as a HR consultant for approximately 6 years.

103 Mrs Hardy explained that she was first contacted by Mr Candler by email at the beginning of July 2015 and then was involved in various conversations with Mrs Robinson and Mr Riley which culminated in an email of 11 July 2015 [970] Mrs Hardy identified what she considered her role to be and the scope of the investigation in her statement [JH/4] as follows:-

> *"At the time the intention was that I support Lee Robinson in preparing for the investigatory interviews: planning the logistics and assistance in preparing questions; conducting the investigatory interviews: accompanying Lee Robinson in the meetings and listening/noting responses and contributing to questioning and thereafter preparing a report of the findings for one of the other Trustees, Richard Timms."*

104 By the time of her appointment the Trustees had already received notice of the statutory inquiry (see (90 & 0)), and Messrs Hall and Phillips had made

the statements referring to the claimant's dismissal I refer to at (261.11.2 & 263)

105 On 27 July 2015 Mesdames Hardy and Robinson interviewed:-

105.1 Claire Brisbourne;

105.2 Zoe Cooper;

105.3 Zofia Hulston;

105.4 Richard Lamburn, Technical Support Manager with the STA;

105.5 Daniel Passard, Customer Adviser with the STA;

105.6 Stuart Tanfield; and

105.7 Ryan Trumpeter, Technical Support Assistant with the STA.

106 On 7 August 2015, they interviewed

106.1 Rachel Dean, Head of Customer Services with the STA,

106.2 Gary Seghers, Qualifications Development Manager with the STA and

106.3 Julie Lynch, Personal Assistant to the Chief Executive.

107 Those meetings were minuted by Mrs Hardy [1155-1170]. She told me she typed up the interviews on the day they took place. Despite her being a HR advisor Mrs Hardy accepts she did not consider asking the interviewees to provide witness statements or for the witnesses to sign and approve her notes. Her notes of those meetings were attached to Mrs Hardy's investigation report of 14 August 2015.

108 Mr Millward was interviewed by Mrs Hardy and Mrs Robinson on Friday 7 August 2015. That interview was minuted [1041-49]. Mr Millward disputed Mrs Hardy's minute of that meeting (see (112)).

109 Mr Roger Millward was also interviewed. I was not told when this was.

110 Mrs Hardy told me that from the outset of the meetings with both Messrs Millward, she was of the view that Mrs Robinson *"… felt intimidated by both individuals and was very nervous about the process being undertaken".* She told me that in light of this Mrs Hardy ended up leading the investigation. The report that ensued was prepared by her although she told me that Mrs Robinson had the opportunity to read it and add to it if she wished [JH/25]. I can find no trace of Mrs Hardy change of role being formally sanctioned by the Trustees.

111 Following the various investigation meetings Mrs Hardy emailed Mr Candler and DWF at 19:12 on 9 August 2015 [1078] to update them. She copied in Mrs Robinson. Within that letter Mrs Hardy stated, ***"I think there will be grounds for disciplinary action".*** She referred to excesses on the claiming of expenses, inappropriate behaviour concerning dignity at work/bullying issues, alongside that reputational issues concerning contempt for external bodies and whilst she accepted that

> *"… Roger clearly had the greater involvement in developing the reorganisation proposals there is definitely an element of Theo supporting it and discussing it in a positive light with the Trustees. … it could be argued*

Theo's positive views on the reorganisation was taken to be a de facto recommendation".

The Second Alleged Protected Disclosure

112 The following Wednesday, 12 August 2015 Mr Millward wrote to dispute the content of Mrs Hardy's minute of his investigation meeting on 7 August and to make what he alleges was a second protected disclosure in relation to Mr Candler [1079-83]. Mr Millward made three principal complaints about Mr Candler, namely that he was manipulating staff who had participated in the investigation, he was disclosing incorrect information in relation to the investigation whilst it was in progress and that he was not acting truthfully when dealing with the Charity Commission. Mr Millward provided a number of pieces of evidence to support the same and made it clear that the key piece of evidence had only come to light on 8 August. Mr Millward subsequently told me that that related to him being contacted by a former colleague (whom I shall refer to only as CWJ) who he states disclosed to him that Mr Candler was directly influencing staff by disclosing to them the contents of the investigation during a conference call. Whilst the contract of CWJ had been terminated the day before (7 August) the same day as Mr Millward's investigation interview it was not suggested before me they were related.

113 With CWJ's permission Mr Millward told me he recorded a large part of their telephone call (the part following permission being granted). He has not disclosed the recording of that call because he states it includes personal information relation to CWJ. He has now provided a transcript [1075-77] that includes approximate timings that were not in the original [1772-1775] that was sought by and provided to Mr Phillips [RP/49] during the appeal. The respondent has thus not had an opportunity to verify the contents of the transcript against the recording. It has taken a commendably pragmatic approach to both. I address my determinations at (218.2).

114 Mr Millward also referred in his email to a considerable number of text messages that he asserted showed amongst other matters what he considered to be improper behaviour on the part of Mr Candler and the closeness of his friendship with Ms Cooper. He did not provide a copy of the transcript or text messages on 12 August.

115 I find that Mr Timms received a copy of Mr Millward's letter on the morning of 14 August [1088(d)]. He made some notes on it [1084-88] and whilst he made no reference to this in his witness statement he took advice that day from DWF (Ms Rustomji and Mr Riley) and as a result of that advice at 15:14 he sent a copy to Mr Candler and invited him to discuss the contents of it via a telephone conference with him, Mr Phillips and Mrs Robinson. Mr Candler replied just over 2 hours later setting out his reply and stating he was happy to discuss the contents with the trustees [1088(c)-(d)]. Mr Timms stated in his witness statement he spoke to Mr Candler, that he put all the allegations to Mr Candler and he was satisfied with Mr Candler's responses. At just after 6:00 pm he wrote to Mr Candler indicating that and that he felt the allegations made by Mr Millward had no merit or substance. He copied that to Mr Phillips, Mrs Robinson, Ms Rustomji and Mr Riley. Mr Phillips emailed Mr Candler copying all the other individuals in the circulation list for Mr Timm's email stating he fully accepted Mr Candler's response, interpreted it as a personal

attack on Mr Candler and he felt Mr Millward's letter was another part of a concerted effort to undermine the trustees.

Investigation Outcome

116 Mrs Hardy told me that on 14 August 2015 she was forwarded a copy of Mr Millward's letter of 12 August 2015 [1079-83] by Ms Rustomji. Mrs Hardy's investigation report [1123-1132 plus appendices 1133-1170] is dated the same day she received Mr Millward's letter of 12 August 2015 (14 August 2015). Whilst it was unclear if she received Mr Millward's letter of 12 August 2015 before her report was sent out, I find on balance she had reached her conclusions before she received it; she told me and I accept Mrs Robinson was sent a copy of the report to consider before it was sent out and I have already referred above (111) to Mrs Hardy's preliminary view as set out in her email of 9 August 2015.

117 The conclusion reached in the investigation report was there was a case to answer on a number of grounds. Mrs Hardy summarised this thus [JH/25.1-25.5]:

> *"25.1 A finding that Mr Millward advised and recommended to the Trustees that the proposal to separate the business activities from the charitable aims of the STA was in the best interests of the charity, when in fact it was not the case. Mr Millward had not fulfilled his contractual obligation to promote and protect the best interests of the STA and those of any group company. Mr Millward also failed his duty of good faith and diligence to serve and perform his duties as Chief Executive;*
>
> *25.2 A finding that Mr Millward's behaviour was dismissive and contemptuous of external bodies with which the STA has business relationships and that such behaviour risks damaging the STA's reputation externally;*
>
> *25.3 A finding that the STA was run in such a way that lead to a statutory investigation by the Charity Commission into the management and conduct of the STA;*
>
> *25.4 A finding that Mr Millward reclaimed personal expenses from the STA and incurred significant discretionary spend on behalf of the STA without prior authorisation;*
>
> *25.5 A finding that Mr Millward incurred expenses that were significantly out of policy and beyond what was appropriate for an organisation of the size and nature of the STA. On several occasions receipts were not provided for expenses that were claimed."*

118 Mrs Hardy also stated [JH/26]:-

> *"In relation to the allegations in respect of remuneration and benefits; credit cards and expenses; petty cash; rates relief; STA-RT; and the proposed reorganisation my findings were based on the JW Hinks report. I did not see all of the evidence on which the report was based, such as copies of receipts submitted for expense claims etc. but I did see some evidence, for example around the purchase of the eBay sofas [566-567], the payroll deduction of £100 per month [2506] from Mr Millward's pay which was intended to cover he alleged his expenses, documents in which he refers to Ofqual's 'wanky' rules on a public website [474-476] and evidence of the bonus for 2014/2015 being awarded and his pay being £120,000 and not £100,000 plus a £20,000 bonus as agreed [835]."*

Events up to and including the disciplinary meeting

119 On 21 August 2015 Mr Timms wrote to Mr Millward inviting him to a disciplinary hearing [1114-15]. The 'heads' to be addressed were essentially those identified at (94) above save for the fourth bullet; I say essentially, because they were not put in exactly the same terms and additional sub heads were listed. Mr Timms indicated the alleged protected disclosure would be addressed at the disciplinary hearing given there was an overlap and stated Mr Millward would be forwarded further information and documents in due course

120 In an email of 25 August 2015 to all the Trustees [1118-19] Mr Millward challenged the decision to consider the protected disclosure and allegations of wrongdoing at the disciplinary hearing and without a thorough investigation.

121 On 26 August 2015 Mr Timms wrote to Mr Millward stating that the allegations against Mr Candler had been investigated internally and carefully considered by the trustees. He stated having taken professional advice the Trustees had concluded that there was no evidence of wrongdoing by Mr Candler and no further action was required [1289]. Mr Timms gave no detail in his statement of the investigation that led to it his conclusion, or the evidence or rationale for how he came to that view.

122 The same day (26 August) Mr Timms wrote to Mr Millward [1121-1122] identifying two other matters that would be investigated :-

122.1 An unauthorised bonus for 2015/16 set up to be paid from June 2015 as part of Mr Millward's monthly salary, and

122.2 Mr Millward's actions arranging via the STA's motor vehicle policy and at the STA's cost insurance cover for a private Aston Martin motor car that Mr Millward had purchased.

123 He enclosed a number of documents including (and this is not intended to be an exhaustive list):

123.1 the Hinks report,

123.2 STA policies, and

123.3 Mrs Hardy's investigatory report.

124 On 27 August 2015, Mrs Julie Lynch, on behalf of the Trustees (see (106.3)), sent an updated version of the JW Hinks report to Mr Millward [1313-32]. There was originally an issue if Mr Millward was sent this; he now accepts he was.

125 On 1 September 2015 Mr Millward emailed Mr Timms [1334] appealing Mr Timms' determination in relation to his grievance (he did not refer to it at the time as a protected disclosure) without having heard evidence or meeting Mr Millward. Mr Millward stated he did not consider that it had been thoroughly investigated. He also sought a postponement based on having only 3 working days to review the information provided and that there appeared to be factual inaccuracies in the Hinks report. He sought permission to obtain his own report.

126 Mr Timms replied by email on 2 September 2015 [1333-34] stating that many of the allegations which were raised in the Protected Disclosure were in

relation to Mr Millward's alleged wrongdoing and that these issues would be dealt with at the disciplinary hearing. In relation to the allegations made against Mr Candler, he stated the Trustees were unanimous that no wrongdoing had been committed by Mr Candler and no further action was required or necessary and because Mr Millward had set out the allegations clearly, it was not necessary to meet with Mr Millward to gather any further information about the allegations as the Trustees were able to investigate them thoroughly. As I state above (121) Mr Timms gave no detail in his statement of the investigation that led to it his conclusion, or the evidence or rationale for how he came to that view.

127 Mr Timms went on to state that he saw no contradiction between that determination and his earlier assertion Mr Millward was entitled to raise any concerns about the investigation/disciplinary process at the disciplinary meeting that was scheduled for the following day. Mr Timms stated that Mr Millward had ample time to review the evidence in support of the allegations and if Mr Timms felt it was necessary to investigate any matters further, he would adjourn to do so but it was not for Mr Millward to decide what further evidence or advice was required. Finally, Mr Timms stated if there was any overlap between Mr Millward's letter of 12 August and the disciplinary process it should be dealt with following the disciplinary hearing to avoid duplication.

128 On 3 September 2015 the disciplinary meeting was conducted by Mr Timms with Mrs Hardy taking notes. It was a lengthy hearing (as can be seen from the Mr Millward's transcript [1335-1400]). I am asked to note that despite Mr Millward having been told he could not record the meeting he did so covertly.

129 Mr Millward handed in a pack of information that he wished to rely upon (this was referred to by Mrs Hardy subsequently as his "Dossier"). He subsequently emailed that to the STA on 4 September [1405-1579]. That included amongst other matters, his comments, annotations on JW Hinks' and Mrs Hardy's reports, a statement from Mr Roger Millward of 31 August 2015, minutes of trustee meetings on 2 March and 19 June 2014, the objects of the charity and a group structure chart.

130 After the meeting at 19:19 Mrs Hardy emailed Mr Timms [1401] suggesting amongst other matters, the next steps he might want to take, foremost amongst which were to consider the Dossier and clarify issues raised about the Hinks report. She suggested some questions he might wish to ask [1402-1404].

131 Mr Timms duly contacted Mr Smith of JW Hinks first by telephone and then emailed questions to Mr Smith in almost identical form to the questions posed by Mrs Hardy save that it appears to be he added a final question concerning a speeding fine. Mr Hinks replied by email on 4 September making his responses within the original email from Mr Timms [1601-1607].

132 The documents and Mrs Hardy's indicate that she and Mr Timms were in contact by telephone and email on 7 and 8 September 2015 [1609-1611]. Mr Timms confirmed in his witness statement what the emails indicate; that he was in contact with Mr Tanfield in relation to clarification of the bonus and salary payments and that Mr Tanfield had told him that Mr Millward had instructed him to place an amount into the payroll spreadsheet which included

a discretionary bonus and thus should not have been included as salary [RT/62].

133 Both Mr Timms and Mrs Hardy state Mr Timms prepared the disciplinary outcome but that Mrs Hardy added comments (the version before me shows the original track changed [1612-1615]) and she also prepared a covering letter for his approval [1617-1618]. Mrs Hardy told me she suggested that when Mr Timms was happy with the determination he should send it to Mr Riley at DWF for review. He states he did so.

134 Whilst I find that Mr Timms was assisted to a large part by Mrs Hardy, I find on balance the determination was created by him given the documents support that conclusion. Further, whilst Mrs Hardy made substantive changes they followed discussions with him. The evidence in the form of the texts and emails before me on balance suggests the final decision was his despite the input from her and I find as such.

135 I also find that Mr Millward was not given an opportunity to comment on that additional information Mr Timms had before him. Whilst Mr Timms states Mr Smith's comments added little other than mitigation, despite that mitigation he still considered that each of the allegations constituted gross misconduct and Mr Timms gave no rationale to me to suggest that he considered whether they should be sent to Mr Millward for comment or not, and if not why not.

136 Accordingly, I find Mr Timms sought and relied upon evidence to base his decision that Mr Millward had not had an opportunity to comment upon and that Mr Timms did not consider if fairness required that he assessed what that evidence added (if any) and if Mr Millward should comment upon the same.

Disciplinary Outcome

137 By a letter forwarded by email timed at 15:33 on 11 September 2015 the respondent forwarded its disciplinary outcome letter to Mr Millward [1616–18]; the result of which was that he was summarily dismissed. Mr Timms attached a note setting out the basis for his decision [1619-23] and notes of the meeting [1624-30]. Mr Timms found that Mr Millward:

137.1 had advised and recommend to the Trustees that a proposal to separate the business activities from the charitable aims of the STA was in the best interests of the charity, when in fact this was not the case, that was a breach of his contractual obligation to promote and protect the interests of the STA and he had failed to serve with good faith and diligence as Chief Executive. Whilst he took into account that Mr Roger Millward, was the primary person responsible for the plan to reorganisation the organisation, it was his belief that, as the Operations Director, deputy Chief Executive and then the Chief Executive, Mr Millward was substantially involved in this plan. It was also his belief that Mr Millward would have derived a personal benefit from this and the "golden share" would not have protected the interests of the STA. He therefore concluded those actions constituted gross misconduct;

137.2 was in part responsible for the statutory investigation by the Charity Commission into the management and conduct of the STA, the catalyst for the investigation being the corporate reorganisation. Again, whilst he accepted the plan had been formulated by Mr Millward's

father, Mr Millward had full knowledge of the plan and the seriousness of such an investigation impacted on the standing and reputation of the STA such that was a serious breach of Mr Millward's contract of employment and obligations to the STA, amounting to gross misconduct;

137.3 in relation to external bodies, Mr Millward had damaged the reputation of the STA, that was a serious breach of his contract of employment and of the STA's rules and standard of behaviour, amounting to gross misconduct;

137.4 had claimed personal expenses from the STA and incurred significant discretionary spend on behalf of the STA without prior authorisation. He did not accept the Mr Millward's assertion these were submitted in good faith by way of him being a Director of Holdings, that these had been submitted in exactly the same way as he claimed expenses from the STA and he concluded this amounted to gross misconduct;

137.5 incurred significant expenses that were well outside of the terms of the STA's expenses policy and well beyond what was appropriate for a charity the size of the STA, there were several failures to comply with the STA's expenses policy and provide receipts or evidence the expenditure, this was a serious breach of the STA's expenses policy, amounting to gross misconduct;

137.6 had used demeaning and inappropriate language and behaviour towards staff members based on the interviews that had been conducted with staff members. He did not accept that the interviews were made up or inaccurate as Mr Millward alleged and that too was a serious breach of the STA's policies relating to dignity at work, bullying and harassment, amounting to gross misconduct;

137.7 had given instructions for his salary payment for 2015/16 to include the payment of a discretionary bonus as part of his salary and that but for the instruction by Mr Millward to defer the payment to a later date he had every intention to pay himself a bonus for 2013/14. Both of those payments were not authorised but were set up to be processed with Mr Millward's full knowledge. Mr Timms found this to be a serious breach of trust and an act of gross misconduct; and

137.8 had made arrangements for insurance cover for a personal motor vehicle at the STA's cost and that he instructed the STA's broker to withhold this information form the STAs' general schedule of insurance to cover it up. He did not accept Mr Millward's assertion that he was acting as a Director of Holdings and found this to be a serious breach of contract and policy amounting to gross misconduct.

Appeal

138 On 17 September 2015 Mr Millward emailed Mr Timms appealing the disciplinary outcome [1594-95] stating that in his view :-

138.1 the evidence did not support the conclusion reached, and

138.2 new evidence had come to light (but did not specify what that was).

139 Mr Millward emailed Mrs Lynch on 21 September 2015 [1631-47] attaching amended disciplinary notes and raised two matters:-

139.1 An email of 30 June to Mr Candler which Mr Millward stated refuted the assertion he had authorised something other than the 'contractual rate' i.e. payments, to which he was entitled, and

139.2 That the evidence provided did not support the allegations, that was the result of a flawed and inaccurate investigation, the Hinks report, the staff interviews and Ms Hardy's report were shown by his evidence to be deeply flawed and his evidence had not been reviewed in sufficient detail or understood properly

140 Mr Millward also attached a revised note of the disciplinary hearing [1634-47] (it is common ground that despite having been told he could not do so Mr Millward covertly recorded the disciplinary hearing) and a letter setting out grounds for appeal/additional information [1648-51]. These included:-

140.1 the notes supplied by Judith Hardy were incomplete and did not reflect what was said;

140.2 he was not interviewed in respect of the Protected Disclosure;

140.3 he had raised concerns to the Board about incorrect information relayed to staff by Mr Candler and repeated this later under the "bullying and harassment" head as to the impact it had had;

140.4 in relation to the "bullying and harassment" allegations no one had formally complained about him; that witness statements were not provided; the notes were not signed;

140.5 seeking clarification on Mr Timms' disciplinary outcome and further evidence prior to the appeal;

140.6 his request to bring a friend to the disciplinary hearing had been denied despite him not belonging to a trade union and that it was not appropriate to bring a colleague; and

140.7 the provision of a revised version of the Hinks report that he now accepts he had received but overlooked.

141 By a letter emailed on 25 September 2015 at 15:24 Mr Millward was invited to an appeal hearing on 5 October 2015 [1660-61].

142 Mr Phillips also emailed Mr Timms on 27 September seeking clarification of several points. One of which related to the specific items of expenses which were in alleged to be breaches. Mr Timms replied the following day [1668-69] enclosing the replies he had received from Mr Smith [1601-07].

143 On 28 & 29 September there was an exchange of a number of emails between Mr Millward and the STA concerning pay, travel expenses for the appeal hearing and other matters [1707-09]. Mr Millward also sought to be accompanied by a friend [1690]. Having taken advice from DWF, Mr Phillips wrote to Mr Millward confirming that companions were essentially limited to employees [1689].

144 On 1 October 2015 Mr Phillips wrote to Mr Millward enclosing a letter from Martineau dated 5 June 2013 stating that would be taken into consideration when considering Mr Millward's appeal and whether he had acted in the best interest of the STA.

145 The letter of 5 June 2013 from Martineau was written to Mr Hall who was then, the STA's Chair of Trustees. Martineau relayed that they had been instructed by Mr Roger Millward concerning the formalisation of an employment contract for Mr Millward which included an income sharing arrangement and the right to purchase shares in the event of a sale of START. Martineau stated that they were unusual arrangements for a charity to make and whilst Mr Roger Millward was aware of the conflict of interest between his son and the STA, that conflict had become more apparent "of late". Thus, Martineau explained they had sought Mr Roger Millward's permission to speak to Mr Hall direct only to find their instructions had been withdrawn. That being so they were concerned to ensure the Trustees had properly been advised of their duties given Martineau did not feel they had had an opportunity to do that. [1693-98].

146 Mr Millward emailed all the Trustees on 2 October 2015 [1700-03]. He raised concerns about the process, bias, the quality of and omissions from the evidence, and that the process was not fair. He raised a number of issues concerning the Martineau letter and how that was relevant to the question whether he acted in the best interests of the STA. He suggested that what was being suggested was so far from reasonable that either the Trustees or their advisors did not have the required skill set to conduct the investigation robustly, fairly or that the outcome was predetermined. He then relayed a number of matters concerning amongst other matters the treatment of his protected disclosure, how his responses to the Hinks report had been disregarded and seeking clarity on what specific items he had been found guilty of.

147 Mr Phillips responded to Mr Millward's letter later that day (2 October) stating he would take the points into consideration at the appeal hearing [1706]. He told me and I accept he made notes on Mr Millward's letter [1711-14], by that time was in receipt of the exchange I refer to at (142) and an email from Mrs Hardy dated 27 September setting out her views on the appeal grounds [1662-64]. I also accept that Mrs Hardy helped him prepare for the appeal meeting in the way he describes [RP/39]; that included preparing a plan for and opening statement for the appeal hearing [1715-19,1720-24, 1727] and that also made some notes in advance of the appeal [1728-31].

Appeal Hearing

148 The appeal hearing took place on 5 October 2015. Again, Mr Millward covertly recorded the same having been expressly told he could not. His minutes were within the bundle [1732 - 1757].

149 Mr Phillips told me he found the appeal very stressful and that he found Mr Millward's attitude and conduct unacceptable at times in that he considered he was devaluing and trying to undermine Mrs Hardy amongst other matters [RP/46].

150 Mr Phillips sought to check a number of issues in the days following the appeal hearing with Mr Smith, Ms Hardy and Mrs Lynch principally concerning expenses claims and overseas trips [1758-71]. Mr Phillips accepts he did not

consider holding another hearing to put the results of his enquiries to Mr Millward – he considered the matters had already been raised and felt he had enough information to make his decision [RP/50].

151 Mrs Hardy told me she assisted Mr Philips with the initial draft of his determination in the same way she assisted Mr Timms [JH/61].

152 At 16:49 on 13 October 2015 Mr Millward was emailed a copy of the determination of the appeal hearing [1780-87]. It upheld the decision to dismiss. Mr Phillips told me he considered each of the findings amounted to gross misconduct but also that the STA no longer had trust and confidence in Mr Millward.

Subsequent Matters

153 On 15 October Mr Millward lodged his comments on the minute of the appeal hearing [1803-11].

154 On 23 November 2015, Mr Millward received a letter from DWF informing him of proposed civil proceedings against him for legal costs, investigation costs relating to his alleged wrongdoing; and the remainder for the alleged unauthorised expenses. I checked at the start of this hearing. Those proceedings have not yet been commenced. Accordingly, there was no reason not to proceed with this hearing and neither party sought that I do so.

155 Mr Millward conciliated via ACAS between 26 November and 3 December 2015 and presented this claim on 15 December 2015.

156 On 6 January 2016 the Charity Commission issued an Order pursuant to s. 84 Charity Act directing the STA to take certain measures, in which it gave its reasons for doing so [1907-14]. That Order indicated that the Commission's immediate concerns in respect of the proposed asset transfer were alleviated following it being stopped and it was thus unnecessary for the Commission to exercise any of its temporary protective powers.

157 I find having referred to its temporary protective powers in the Order it was more likely than not that the Commission's concerns about the re-organisation were such that it had given consideration to the exercise of those powers.

158 Amongst other matters the Order indicated that the Commission had been unable to identify written financial controls policies, that the processes and controls for paying expenses were inadequate, the financial management reports provided to the trustees did not provide sufficient information to allow the Trustees to properly exercise their legal duties, that there were weaknesses in the Trustees understanding of their roles and responsibilities and the Trustees had not demonstrated sufficient control over the charity's senior management (and therefore not fulfilled their duties as Trustees), that the Trustees had allowed charity funds to be invested in a trading company without sufficient safeguards; thus whilst START was a trading subsidiary of STA, it owed the STA £198,579 by way of group loans as at 31 May 2014 without a formal loan arrangement being in place and that the charity's record keeping was inadequate such that key Trustee decisions (and the considerations in such decisions) had not been adequately recorded.

THE LAW

I do not intend to refer to all the authorities to which I was referred to; they are relayed in the parties' submissions. What follows is an outline of the principles that apply.

159 To qualify for protection as a *"**whistleblower**"* the ***worker*** concerned (this includes employees) is required to make a *"**protected disclosure**"* [1]*.* In order to be protected firstly the disclosure must be a "***qualifying disclosure***", namely:-

> *"… 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 [what I will refer to for ease as "**states of affairs**"] …"* [2]

*In the present case the relevant **states of affairs** are those set out in s.43B(1) ERA:-*

> *"(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur, "*

160 **A** "***DISCLOSURE OF INFORMATION"*** requires facts to relayed, as opposed to merely making an allegation [3], an expression of opinion or a state of mind [4] or statement of position for the purpose of negotiation [5] . Thus, the words, ***"The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around,"*** relay information whereas ***"You are not complying with health and safety requirements"*** is the making of an allegation and is not relaying information [6].

161 The difference between "***information***" and "***allegation***" is not one that is made by the statute itself and an alleged disclosure does not have to be an allegation or information, reality and experience suggest that they are very often intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If is nothing to the point if it is also an allegation [7]. It is also irrelevant if the recipient was already aware of the information [8].

162 Separate communications can be read together to amount to a protected disclosure even if on their own they would not do so [9]. Whether they do is a question of fact [10].

163 If a breach of a legal obligation is asserted, save in obvious cases the source of the obligation the claimant believed the Respondent to be in breach of should be identified and capable of verification by reference for example to statute or regulation [11]. Each of the complaints should be looked at individually rather than collectively to see whether it identifies (not necessarily in strict legal language) the breach of obligation on which the employee relies. [12]

164 Mr Millward referred me to *Gillespie v Terrence Higgins Trust ET 22052535/2015* to support his contention that where a charity knew they were under an obligation to act in the best interests of the charity this reduced the obligation on the individual to spell out in precise terms the legal obligation. He also relied upon that case as a basis to infer that against the backdrop of unsatisfactory evidence for dismissal the tribunal could infer that on balance the protected disclosure was the most likely explanation for it.

165 *"**Public interest**"* is not defined but in a recent case [13] the Court of Appeal stated that where the disclosure relates to a breach of the worker's own

contract of employment (or some other where the interest in question is personal in character) there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The CA cited as an example of this, doctors' hours. The CA stated the question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but stated a list of relevant factors cited by Mr James Laddie QC as a useful tool.

166 Mr Millward refers me to *Watkinson v West Cornwall 1702168/2008 & 1702079/2009* in that regard.

167 As to any of the alleged failures, the burden is upon the claimant to establish upon the balance of probabilities the employer was in fact and as a matter of law, under a legal (or other relevant) obligation and the information disclosed tends to show that that a person has failed, is failing or is likely to fail to comply with that obligation [14].

168 A "***QUALIFYING DISCLOSURE"*** will be a "***PROTECTED DISCLOSURE"*** if it falls within various conditions set out in ss.43C to 43H ERA (as amended) [15]. It was agreed that if I determine a qualifying disclosure(s) was/were made that s.43C had been complied with and the disclosure would be protected.

169 **UNFAIR DISMISSAL.** S. 94 ERA gives the right to an employee not to be unfairly dismissed. In cases such as this where it is accepted the claimant was an employee and had been continuously employed for, in this case, 2 years, and a brought a claim for unfair dismissal within the relevant time limits it is for the employer to show the reason (or, if there was more than one, the principal reason) for dismissal and that it was a potentially fair reason. The reason relied upon here by the respondent is conduct.

170 If a potentially fair reason is shown by the employer the Tribunal must then go on to assess the fairness of the dismissal. The starting point for that determination are the words of s.98(4) ERA. The burden of doing so for s.98(4) is neutral:-

> *"…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."*

171 **S. 103A ERA.** Where the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure s. 103A ERA provides the employee *"shall be regarded for the purposes of this Part as unfairly dismissed".* Thus, if the employer does not persuade the tribunal the reason for dismissal was a potentially fair reason or the Tribunal finds the reason was the s. 103A reason the dismissal is automatically unfair and there is no need to assess the reasonableness of the dismissal, as would be required under s. 98(4) ERA.

172 For the purpose of determining "the reason for the dismissal" under s. 98(1) ERA classically that was assessed by reference to the set of facts known or

beliefs held by the employer which caused it to dismiss the employee [16] and that includes information coming to the respondent's knowledge on the hearing of the appeal [17]. Whilst that formulation as originally drawn was directed to a particular issue [18] and thus may not be perfectly apt in every case, the essential point remains a valid one; the "reason" for dismissal connotes the factor(s) operating on the mind of the decision-maker which cause him/her to take (or, as it is sometimes put, what "motivates") the decision [19]. The Court of Appeal has recently repeated that view; the tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss [20].

173 Where, as here, the claimant has qualifying service to bring a claim of unfair dismissal [21] but advances a different reason to that suggested by the employer such as making protected disclosures [22] the tribunal must consider the evidence of both sides as a whole and from that make findings of primary facts what the reason (or principal reason) for the dismissal was noting the burden is on the employer to do so. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. A mere assertion by the employee will not normally be sufficient to discharge the evidential burden on the employee; s/he must produce some evidence to support the assertion. It may be open to the tribunal to find that the true reason for dismissal was not that advanced by either side. Thus, the employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employee is dismissed for an automatically unfair reason [23]. Mr Millward refers me to *Gillespie* above (164) in that regard.

174 In the case of misconduct, the employer will normally not act reasonably unless ***"... he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation"*** unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been ***"utterly useless"*** or ***"futile"*** [24]. Thus, the employer must reasonable grounds upon which to sustain the belief in the misconduct having carried out in all the circumstances a reasonable investigation [25]. Thus, a sufficiently serious breach of procedure can be sufficient to render the decision to dismiss unreasonable.

175 The Tribunal must not carry out its assessment of the reasonableness of the employer's conduct using its own subjective views as to what was the right course to adopt for that of the employer [26]; in many, (though not all) cases there is a "***band*** [sometimes called the range] ***of reasonable responses***" within which one employer might take one view, and another might quite reasonably take another. The role of the tribunal is to decide in the circumstances of each case whether the decision to dismiss the employee fell within ***the band of reasonable responses*** which a reasonable employer might have adopted. If the dismissal falls within ***the band*** the dismissal is fair: if the dismissal falls outside ***the band,*** it is unfair [27].

176 The Tribunal must also have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 which contains amongst other matters the following provisions:-

> *"(2) Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These*

should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used…

(9) If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

(12) … At the [disciplinary] meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this…

(14) The statutory right s to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. …

(24) Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but include things such as theft or fraud, physical violence, gross negligence or serious insubordination."

177 The band of reasonable responses test is also how the Tribunal assesses all parts of the question of fairness in s.98(4) including whether the employer was entitled to form the view it did between competing versions of events [28] and if the sanction (dismissal) was appropriate [29]. However, the extent of the investigation ***"it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary"*** [30] but ***"… more will be expected of a reasonable employer where allegations of misconduct, and the consequence to the employee if they are proven, are particularly serious."*** [31]

178 **POLKEY**. Where an employer argues that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, this is the so called *"Polkey"* reduction [32]. In such cases it is the task of the Tribunal is to assess, using its common sense, experience and sense of justice how long the employee would have been employed but for the dismissal.

179 Thus, the assessment is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at either extreme but more usually will fall somewhere on a spectrum between the two extremes. Nor is the Tribunal required to answer the question what it would have done if it were the employer or a hypothetical fair employer; it is assessing the chances of what the actual employer would have done, on the assumption that the employer would this time have acted fairly though it did not do so beforehand [33].

180 The appellate courts have repeatedly referred to the distinction drawn by Lord Bridge in *Polkey* that the Tribunal is not called upon to decide the question on the balance of probabilities but instead to reduce compensation by a percentage representing the chance of losing employment. It is a hypothetical enquiry that may have to be undertaken, owing more to assessment and judgment than it does to hard fact [34].

181 The tribunal is entitled to take into account evidence of misconduct which came to light after the dismissal [35] but it is for the employer to bring forward relevant evidence. The Tribunal must however have regard to any material and reliable evidence which might assist when making that assessment, including any evidence from the employee [36].

182 It is acknowledged by the appellate courts that there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal no sensible prediction based on that evidence can properly be made.

183 A degree of uncertainty is an inevitable feature of this exercise and the Tribunal must recognise there are limits to the extent to which it can confidently predict what might have been. The mere fact that an element of speculation is involved however is not a reason for refusing to have regard to the evidence. The tribunal must however take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. It may also be that the evidence available to the Tribunal is so riddled with uncertainty and so unreliable that no sensible prediction can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal but a finding the employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored [37].

184 **CONTRIBUTORY CONDUCT.** For both ss. 122(2) and 123(6) the Tribunal also must consider what conduct/action (respectively) of the employee occurred before s/he was dismissed or notice was given. For the compensatory award (s.123(6)) the conduct must also have been culpable or blameworthy and caused or at least contributed to the decision to dismiss. It follows for s.123(6) that the action had occurred and the employer must have been aware of it [38].

185 For both ss. 122(2) and 123(6) reductions the function of the Employment Tribunal is to take a broad common-sense view of the situation, and it 'shall' reduce the basic and compensatory awards if it is just and equitable to do so in the light of its assessment [39]. The Tribunal's findings on contribution should be kept separate where possible to findings on liability [40].

186 Whilst the power to reduce for contributory conduct pursuant to s.122(2) (the Basic Award) is wider than s.123(6) and the Tribunal is entitled to take into account any reduction under s.123(1) in assessing what is just and equitable pursuant to s.123(6) normally the reduction will be the same for both ss. 122(2) and 123(6) [41].

187 **NON-COMPLIANCE WITH A CODE OF PRACTICE.** I address this for completeness given (9). For certain types of claim, of which this is one [42] and which concern a matter to which a relevant Code of Practice applies, if the Tribunal

determines an employer (or employee) has failed to comply with a relevant Code of Practice and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, respectively increase (or decrease) any award it makes to the employee by no more than 25% [43].

188 **WRONGFUL DISMISSAL.** Where this is alleged, the essential question, is whether the claimant was in breach to the extent that his/er conduct might be regarded as repudiatory, such as to justify the premature termination of the contract, not whether the Respondent, reasonably (the test in cases of unfair dismissal) or otherwise, believed that s/he was. The Respondent must be able to prove the due cause. I must be careful not to conflate the two [44]. The employer can also rely on information acquired after the dismissal [45]. Any award is limited to £25,000.00 [46].

189 **BAD FAITH.** If the reason (or principal reason) for the dismissal is that the worker made a protected disclosure on or after 25 June 2013 [47], and it appears to the tribunal that the disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes for detriment [48] and the compensatory award by no more than 25% [49]. The burden to show bad faith rests with the employer [50]. A disclosure will be in bad faith if the dominant or predominant purpose of making it was not directed to remedying the wrongs identified in section 43B but for some ulterior motive, unrelated to the statutory objectives [51]. The burden of proving bad faith is on the employer.

190 **FINANCIAL PENALTIES.** Where an employment tribunal concludes that the employer has breached any of the worker's rights to which the claim relates, and is of the opinion that the breach has one or more aggravating features, the tribunal ***may*** order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim) [52]. The tribunal shall have regard to an employer's ability to pay when deciding whether to order the employer to pay a penalty. The amount of the penalty is normally 50% of the amount of the award, subject to a minimum of £100 and maximum of £5,000.

~ ~ ~ ~ ~

[1] See Underhill LJ in *Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401 at [24] following*
[2] s. 43B(1) ERA – the underlined words relate only to disclosures made with effect from 25 June 2013
[3] *Cavendish Munro v Geduld [2010] IRLR 38 UKEAT/0195/09 [24*]
[4] *Goode v Marks and Spencer UKEAT/442/09 [36*]
[5] see *Cavendish Munro*. This approach was also applied in *Goode*, *Norbrook Laboratories v Shaw UKEAT/0150/13 and Millbank Financial Services v Crawford [2014] IRLR 18 EAT.*
[6] see Lady Slade in *Cavendish Munro* where she explains the rationale for this and contrasts the statutory words in Part IVA ERA and the provisions in the Sex Discrimination Act 1975 and Race Relations Act 1976
[7] Per Langstaff P *Kilraine v London Borough of Wandsworth UKEAT/0260/15* [30]
[8] *Cavendish Munro [27]*
[9] *Goode* [37]
[10] *Everett Financial Management v Murrell EAT/552-3/02 and 952/02* [46 & 47]) see also *Norbrook* at [22]
[11] *Blackbay Ventures v Gahir [2014] ICR 747 (EAT)* [98] & *Eiger Securities v Korshunova [2017] IRLR 115 (EAT)*
[12] *Fincham v HM Prison Service UKEAT/0991/01*
[13] *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 314 per Underhill LJ [37]*
[14] *Korashi* at [24]
[15] For disclosures made prior to 25 June 2013 it was a requirement of both s. 43C and 43G that the disclosure should have been made in *"**good faith**"*. That requirement was removed by s. 24(6) Enterprise and Regulatory Reform Act 2013, but the definition of "qualifying disclosure" in s. 43B was amended to include that the disclosure should be made *"in the public interest"*. The question of good faith remains relevant to remedy (see (189)).

[16] *Abernethy v Mott, Hay & Anderson [1974] ICR 323 CA* per Cairns LJ at 330B-C
[17] Browne-Wilkinson P in *Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91 (EAT) at [95]* approved by Lord Bridge in *West Midlands Co-Operative v Tipton [1986] IRLR 112 (HL)*
[18] *Hazel v Manchester College [2014] ICR 989* (CA) per Underhill LJ at [23]
[19] see also *The Co-Operative Group Ltd v Baddeley [2014] EWCA Civ 658* [41]
[20] Per Underhill LJ in *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632. That is subject only to the possible qualifications discussed at [62 & 63] therein.
[21] *Smith v Hayle [1978] IRLR 413 (CA)*
[22] The cap on the compensatory award does not apply if the dismissal was for s.103A reason (s. 124(1A) ERA)
[23] *Kuzel v Roche [2008] IRLR 530 (CA) [56-61]*
[24] Lord Bridge in *Polkey v AE Dayton Services Ltd* [*1988] ICR 142 HL*
[25] *British Home Stores v Burchell [1978] IRLR 379* decided before the amendments in s.6 Employment Act 1980
[26] *Orr v Milton Keynes [2011] ICR 704 CA*
[27] *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT*
[28] see for instance *Sainsburys Supermarkets v Hitt [2003] IRLR 23 CA*
[29] *Securicor v Smith [1989] IRLR 356 (CA)* applying the older authority of *British Leyland v Swift [1981] IRLR 91*
[30] *Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457 CA* per Elias LJ [13] & *A v B [2003] IRLR 405*
[31] *Turner v East Midlands Trains [2012] EWCA Civ 1470 [22]* referring to the approach taken in *A v B* and *Roldan Polkey*
[32] *Hill v Governing Body of Great Tey Primary School UKEAT 0237/12, [2013] IRLR 274* per Langstaff P
[34] *V. v Hertfordshire County Council UKEAT/0427/14 per Langstaff P at [1 & 21-25]*
[35] *Devis v Atkins [1977] IRLR 314* at [39] HL
[36] *Software 2000 Ltd v Andrews [2007] IRLR 568 at [54]*
[37] *Software 2000 as above*
[38] *Nelson v BBC No.2 [1979] IRLR 346 (CA)*
[39] *Hollier v Plysu [1983] IRLR 260 (CA)*
[40] *London Ambulance Service v Small [2009] IRLR 563* (CA)
[41] *Rao v CAA [1994] IRLR 240 (CA)*
[42] the jurisdictions listed in Schedule A2 Trade Union and Labour Relations (Consolidation) Act 1992
[43] Respectively s. 207A(2) & (3) Trade Union and Labour Relations (Consolidation) Act 1992
[44] HHJ Serota QC in *Shaw v B&W Group Ltd UKEAT/0583/11 at [26]*
[45] *Boston Deep Sea Fishing & Ice Company v Ansell (1888) 39 Ch.D. 339* approved by HL in *Devis* at [14]
[46] Art. 10 Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994
[47] s. 24(6) Enterprise and Regulatory Reform Act 2013
[48] s.49(6A) ERA
[49] s. 123(6A) ERA. There is no equivalent provision for the Basic Award (s.122 ERA).
[50] *Bachnak v Emerging Markets UKEAT/0288/05, Street v Derbyshire and Nese v Airbus Operations Ltd* UKEAT/0477/13 [26] HHJ Eady QC (following Street v Derbyshire) albeit all relate to the old ss.43C & 43G ERA
[51] Auld LJ in *Street v Derbyshire [2004] IRLR 687 (CA) specifically at [53-56]* and Wall LJ at *[73]*
[52] s. 12A Employment Tribunals Act 1996

MY FURTHER FINDINGS & CONCLUSIONS

What follows is the rationale I gave orally at the conclusion of the hearing setting out my conclusions and the facts that underlie the same.

191 The methodology that I adopt below is as follows. I will in turn consider:-

191.1 if the alleged disclosures were protected,

191.2 the reason for the dismissal,

191.3 the fairness of that dismissal, and

191.4 in this order,

191.4.1 contribution, considering first s. 123(6) then s. 122(2),

191.4.2 Polkey and

191.4.3 breach of contract.

192 There are other matters that need to be addressed; I have not made findings in relation to bad faith and I will need to address with the parties if I need to do so or if the provisional remedy dates are for whatever reason required.

Was the First Alleged Disclosure Protected?

193 The way this is pleaded to [ET1/54.1 [90]] is that Mr Millward raised concerns that *"… the information they were acting upon appeared to be false and therefore the respondent's assets were at risk. [Mr Millward] informed [the STA] that they held a misconceived view that the assets of [the STA] were to be given away to [Holdings] as opposed to fair consideration being paid."*

194 Mr Millward when asked what duty was being breached stated that the Trustees having received advice, it was grossly negligent for them to act in breach of that advice and thus prior to informing the Charity Commission the Trustees should have contacted DWF and/or Clement Keys, their professional advisors.

195 He accepted when asked that that was not the way the issue was relayed in his email of 29 June 2015.

196 When asked what information the disclosure relayed Mr Millward stated that:-

196.1 the respondent had received independent advice and

196.2 that assets were not as asserted being given away.

The issue arises whether they were statements of opinion, information or a combination of the two.

197 Mr Millward accepted orally the alleged disclosure had two purposes;

197.1 to seek the lifting of his suspension and

197.2 to relay his genuine concerns.

I return to both those issues below.

198 Whilst both Mr Millward's pleaded case and the way he now puts the content of the disclosure in my judgment could tend to show a breach of a legal obligation was likely to occur if assets were being put at risk by the Trustees neither tend to show how a miscarriage of justice was likely to occur nor does Mr Millward address satisfactorily how that could be so.

199 I thus next consider the two pieces of information Mr Millward relies upon.

199.1 As to the independent advice Mr Millward was taken to the letters of advice DWF and Clement Keys provided, and it was suggested they specifically stated they were not giving advice on the merits of the reorganisation. I address above (43 - 47) and below (199.3 & 289 following) the advice from DWF.

199.2 As to the advice from Clement Keys the issue is starkly addressed in Clement Keys' letter of 21 May 2015 [1001]. As I state below (271) Mr Phillips quotes from this in the appeal outcome letter [1783]. Clement Keys confirmed they had been asked to comment on the financial methodology and logic of the Report entitled 'STA Reorganisation – Financial information' but expressly stated they had ***"… not carried out any work to confirm or otherwise the accuracy of the information contained within the [Report] in terms of extraction of financial or other information …"*** and that Clement Keys were advising solely to ***"… the methodology and logic that had been applied to the information presented in the Report".*** Clement Keys also expressly

made clear that they had not considered the respective values of assets and thus the Trustees would ***"… need to consider the underlying substance of the reorganisation and they are satisfied the reorganisation is in the best interest of the [STA]"***. That is consistent with the agreed fact that valuations of most of the assets were to be carried out in due course.

199.3 DWF's advice was as I relay above (43 - 47); in essence that was that ultimately, any decision was a matter for the Trustees but the trustees were required to evidence what consideration had been given to the various options and be absolutely satisfied the best interests of the charity are being served.

200 As to whether the Trustees had received advice on the merits of the reorganisation from Clement Keys and/or from DWF, I find as fact, they had not. My rationale for that follows below (286 following).

201 Despite the contents of the documentation Mr Millward maintained repeatedly throughout the hearing his position, that he was relying on advice from the professional advisors.

202 Reasonable belief involves an objective standard, and its application to the personal circumstances of the discloser, which are likely to include his knowledge of the employer's organisation as a well-informed insider and having regard to his/her qualifications, thus the reasonable belief of an experienced surgeon may be entirely different view to that of a layperson [53]. Similarly, for the Chief Executive of a Charity.

203 Whether a worker actually believes that the information s/he was disclosing "tended to show" the relevant state of affairs and whether, objectively, that was a "reasonable belief" [54] are two separate questions and should be treated as such [55]. If those two questions are satisfied, it does not matter whether the worker was right in his belief; a mistaken belief can still be a reasonable belief. Whether the worker himself believes that the state of affairs existed may be an important tool for the Tribunal in deciding whether the worker had a reasonable belief that the disclosure tended to show a relevant failure. If and the extent that is so will depend on the circumstances of the case. However, it may be extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if the worker knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on the worker's part [56].

204 Whilst his belief could have thus been mistaken I find it was not. I find it was simply not credible for Mr Millward as the Chief Executive to maintain the Trustees had received both legal and accounting advice on the merits of the reorganisation when the documents expressly state otherwise. The following matters reinforce that view.

204.1 Mr Millward's failure when asked what Mr Tanfield's view was of the reorganisation at the Trustee's meeting on 10 June was to give what I find was a partial and misleading account, in his email to Mr Candler of 26 June 2015 [922-3] in response to the concerns expressed by Mr Timms about the Board minutes of 10/11 June 2015 (i.e. that it had been specifically agreed the reorganisation (and transfers) would not take place until the STA's end of year accounts had been finalised (and

an audit taken place) and the board minutes did not reflect that Mr Millward stated that he did not believe the transfer had been signed, only the lease and initial share splits, however, before me asserted the reason he had sought the Aston Martin be included on STA's insurance for a test drive and his subsequent purchase was because the reorganisation had been approved. I find his account changed depending on the questions posed and its effect.

204.2 At times there were detailed discussions before me over what the terms of the reorganisation were. On occasions Mr Millward stated that Mr Powell's understanding of some of the documents put was incorrect, yet at other times he indicated they were complex documents, his father had been responsible and he could not be expected to know the detail of them. Whilst Mr Millward had delegated authority to his father to liaise with the lawyers and accountants he was ultimately responsible. I find he was copied in by his father on some of the documentation (some of which was not copied to the Trustees) and was asked for and volunteered his views. Mr Millward was the Chief Executive of the STA, a director and fiduciary and stood to benefit from the reorganisation. He was aware of the conflict of interest.

204.3 I find for those reasons and for those I relay below (see (307)) Mr Millward was not a credible witness.

205 Mr Millward's assertion that underlay the first alleged disclosure; that the Trustees were acting in breach of advice and thus in breach of a legal obligation cannot in my judgment qualify as a disclosure; he did not hold a reasonable belief in its truth.

206 That determination in relation to Mr Millward's view is reinforced when we consider the second aspect; that the STA's assets were being handed over to a commercial entity for no/inadequate consideration was misleading. The issue for the Charity Commission was that the assets that were to pass to Holdings were to be the subject of an inter-company loan and the Charity Commission was not satisfied that the security/guarantees for that loan provided sufficient protection for those assets. Hence the Trustees referred in the suspension letter [934] to assets being "handed over".

207 I find the Charity Commission considered was that such a concern that it sought and received assurances direct from DWF that the transaction was not going ahead as early as 6 July 2015 [see [964] – the notice of Statutory Enquiry – dated 10 July 2015].

208 Whilst I accept a Chief Executive cannot be expected to understand the detail of every transaction, his/her role, in my judgment is at least to understand the transaction in sufficient detail to be able to ensure that appropriate checks and balances are put in place in relation to any transaction such that for example assets are protected. In this case Mr Millward accepted he had received the advice from DWF that I refer to at (199.3). The reorganisation provided that a large part of the STA's assets would be transferred to Holdings. It was his function as Chief Executive to oversee that transaction such that appropriate security/guarantees were in place. In my judgment the documents I have been referred to do not demonstrate that the Charity Commission's concerns

in the Trustee's words about the assets being "handed over" were ill founded or as Mr Millward put it misconceived.

209 I find Mr Millward refuted the inadequacy of the consideration without checking if the basis for the first alleged disclosure was correct (had he done so he would have identified the absence of the guarantees/security and thus the Trustees view that assets were being handed over was not misconceived) or did so notwithstanding that and made the alleged disclosure in any event.

210 I find taking into account the advice STA and Mr Millward had received from DWF and given his personal circumstances as a Chief Executive with a conflict of interest who stood to personally gain from the reorganisation, it is more likely than not that that assertion was not a mistaken one (that is to say it was deliberate). In any event I find a Chief Executive would not reasonably have made that statement. For those reasons I find the first alleged disclosure was a statement of his opinion and not information.

211 Given Mr Millward also accepted there were two purposes behind the disclosure namely to seek the lifting of his suspension and to relay his genuine concerns at best there were mixed motives. Considering in turn both pieces of information in turn:-

211.1 I find in context the alleged disclosure and its reference to independent advice I was a response to the charge relayed in the suspension meeting and letter [934] that he had given misleading and incorrect advice to the Trustees.

211.2 As to the assertion that assets were not being given away that is to say that no/inadequate consideration for them, I find Mr Millward's concerns were not reasonably held for the reasons I give above (206-208).

212 Further Mr Millward stood to benefit from the reorganisation but had not provided a full picture to the Trustees (see for instance (204.1)) despite having accepted he was aware of the advice that he needed to so. I find his concerns were not genuinely held.

213 I relay above the law on bad faith (see (189). I find that the dominant purpose of Mr Millward making the first alleged disclosure was to defend the charges laid against him and accordingly I find it was not made in the public interest. Accordingly, for those reasons the first alleged disclosure does not qualify for protection.

214 Whilst the issue of bad faith does not arise in relation to the first alleged disclosure. That may still be relevant in relation to the second and other matters.

215 Given my findings above I find that that the dominant purpose of Mr Millward making the first alleged disclosure was to defend the charges laid against him and not the statutory objectives. It follows the respondent has discharged the burden that is upon it to show it was made in bad faith.

Was the Second Alleged Disclosure Protected?

216 This is pleaded [ET1/54.2 & 54.3 [90]] as twofold. Namely that Mr Millward raised concerns of

216.1 inappropriate behaviour by Mr Candler relating to the investigation into Mr Millward's dealings and

216.2 that Mr Candler was wilfully misleading the Charity Commission.

217 In the letter of 12 August 2015 [1079-83] and specifically 1080] Mr Millward asserted Mr Candler was manipulating staff some of whom had been interviewed whilst the investigation was ongoing, that Mr Candler was disclosing incorrect information whilst the investigation was ongoing (and thus not acting in a fairly and honestly) and that Mr Candler was not acting truthfully in his dealings with the Charity Commission in order to deflect responsibility from himself and the Trustees.

218 Those assertions were supported by five items.

218.1 The first this was an assertion that Mr Timms had stated at Mr Millward's suspension meeting that the Charity Commission had asked for Mr Millward's dismissal and this was a deliberately false statement.

218.1.1 That at best is information about Mr Timms not Mr Candler. The alleged disclosure was asserted to concern Mr Candler and so cannot form part of a disclosure about him.

218.1.2 That statement derives from Mr Millward's note of his suspension meeting [933]. Mr Millward gave me conflicting evidence when that note was made. In his witness statement he stated that was when he arrived home [TM/333]. Before me he stated that he believed he stopped on the way home and made a note.

218.1.3 He accepted when asked about it, the note was inaccurate in a number of ways; there was no mention of "buy out" by the Trustees at the suspension meeting; whilst he states he was told the Trustees had taken legal advice they say they had not; when asked the basis for that assertion he accepted it was an assumption by him and must have been so given the chronology of events. Nor were his assertions that the "deal" was "illegal" or trustees had had to fight for his suspension to be on full pay asserted to be correct. Finally, it was suggested his note of what Mr Hall had said to him, namely that his integrity was not in question was directly with odds what the suspension letter stated [934] and that had been drafted by Mr Hall.

218.1.4 Given those inconsistencies with the suspension letter that was prepared in advance by Mr Hall and which Mr Millward accepted had been handed to Mr Millward during the meeting I find they cast doubt on Mr Millward's account of the suspension meeting and prefer the account given in the suspension letter and of Mr Candler [DC/70] to that of Mr Millward [TM/322-333 & [933]].

218.2 Point 2 of the second alleged disclosure relies upon a partial transcript [1075-77] of a conversation he had with a member of staff who I shall refer to as CWJ on 8 August whose contract had come to an end the

day before (7 August) and suggested as a result Mr Candler was attempting to influence the investigation.

218.2.1 Mr Millward did not provide the audio file from which that transcript derived, he states as it contained highly personal information to CWJ. I accept that was so.

218.2.2 Notwithstanding that the transcript is partial (it runs to only three pages yet the conversation was asserted to have lasted 39 minutes), started part way though the conversation and included a series of leading questions.

218.2.3 Mr Candler accepts that a discussion did take place between him CWJ, Ryan Brown and Richard Lambourn on 14 July. He states he was asked by them to allay concerns they had. He told me had had a feeling he was being set up; both CWJ and Mr Brown were friends of Mr Millward and one now works for him at one of his other businesses, Swimtime, and so he asked Mr Lambourn to attend the meeting with him. Mr Candler states he was careful what he said.

218.2.4 A transcript was only provided at the appeal stage and so as a result as part of the investigation the respondent did not interview two of the attendees of the discussion from which the allegations stemmed to verify if CWJ's version was a fair one.

218.2.5 Mr Millward's explanation why it was not provided was that it was not sought. That does not explain why he did not volunteer it within the substantial dossier of information he provided for the disciplinary hearing and him only providing it at the appeal stage

218.2.6 The two pieces of information relayed there they were that START was haemorrhaging money and that Mr Candler was alleged to have said that Mr Millward had withheld information from the Trustees concerning START.

218.3 As to the third point this concerned an allegation by Mrs Hardy that Mr Millward had been paid a bonus. Mr Millward responded to her in the investigation that he did not believe he had been paid such a bonus by STA but would check [1043-44]. Mrs Hardy's note indicates that she did likewise and later confirmed a bonus had not been, and that the issue was that the payment had been deferred on the instruction of Mr Millward.

218.3.1 It was not clear when the clarification given by Mrs Hardy in her minute of the meeting was forwarded to Mr Millward. It was not referred to in the index of statements annexed to Mrs Hardy's report or the covering letter sent on behalf of Mr Timms.

218.3.2 I find that it is extremely unlikely as that meeting did not take place until 7 August that that note would have been prepared, sent to and received by Mr Millward before he made his disclosure on 12 August such that he was aware she had clarified the issue.

218.4 As to items 4 (a)-(e) and 5 Mr Millward accepted orally these were not disclosures.

219 I find that none of the above matters relate to the criminal sphere such that a miscarriage of justice could occur nor was there a legal obligation on the respondent to internally investigate matters fairly or in a manner different to that identified by the STA. Mr Millward may have mistakenly believed that the information tended to show a miscarriage of justice or a breach of a legal obligation but in order to qualify for protection that belief must have been reasonable.

220 Whilst he asserted withholding information was in breach of the Trustee Act he accepted he had not read that Act. Given he was the Chief Executive of a Charity in my judgment it would be reasonable for him to have a cursory knowledge of the obligations the Trustee Act imposes and to be able to point to which duty was being breached. He did not. I find a Chief Executive of a Charity could reasonably be expected to have known or found out what those duties were before making that statement. I find that his belief was not reasonable.

221 Nor does the allegation specify which of the complaints related to his handling of the ongoing Charity Commission inquiry, those that related to his wider behaviour at STA and those that were a mixture of the two. Again, the burden falls to Mr Millward to identify the duty and he has failed to do so with sufficient precision.

222 Those matters aside Mr Millward was also required to hold a reasonable belief that the disclosure was in the public interest. He accepts points 4 & 5 were not disclosures, point 1 did not relate to Mr Candler and he relays no basis why in relation to point 3 he asserts that what Mrs Hardy subsequently accepted was a misunderstanding on her part, stemmed from Mr Candler. Those matters tend in my judgment to suggest that Mr Millward was attempting to identify any matters that would assist him defending the investigation that was ongoing.

223 That is reinforced by the second alleged disclosure having been made 5 days after Mr Millward's investigation meeting was held. His failure to supply the transcript at the time of the conversation concerning point 2, thus denying the STA the opportunity to include two individuals within the investigation (by interviewing Ryan Brown or Mr Candler), adds further weight for that view. I do not include CWJ in that because she had already left the business by that stage and I am referring now to an internal investigation. The fourth person present Mr Lambourn was interviewed on 27 July two weeks after this incident happened and thus this could have been put to him. It was not mentioned [1162-63]. Nor has Mr Millward provided a statement from CWJ or Ryan Brown in the absence of the audio recording to support her version of events.

224 For those reasons the second alleged disclosure in my judgment was not made not in the public interest but instead to support his defence of the internal disciplinary case against him and it too does not qualify for protection.

225 Again, Mr Millward accepted there were two purposes behind the disclosure namely to defend the disciplinary process against him and to relay his genuine concerns. Again, they were at best mixed motives. Like the first alleged disclosure I found that the second alleged disclosure was not made to

further the statutory objectives but to defend the disciplinary process. It follows for the reasons I give above that the respondent has discharged the burden that is upon it to show it that it too was made in bad faith.

The Reason for dismissal

226 Notwithstanding my determinations above concerning whether the alleged disclosures qualify for protection I considered the respondent's reasons for dismissal as if the disclosures did qualify for protection.

227 I have considered the evidence of both sides and the various alleged failings Mr Millward refers me to. I turn to them first. The ***"heads"*** I refer to below are the numbered items from the disciplinary and appeal outcome letters.

228 A number of the claimant's complaints about the way the respondent addressed the process are in my judgment without merit:-

228.1 Mr Millward was not entitled to a companion other than those identified.

228.2 As to his complaint he was given short notice of the hearing that was remedied by the time of the appeal by which time he had had ample opportunity to address the matters that he was charged with. Whilst he raised some additional matters on appeal for the most part his assertions were the same (an issue arises later in relation to new evidence used by the respondent of which the claimant had not had notice that I address below).

228.3 Whilst Mr Millward complains he was ***refused*** his own report, that was not actually so. There was no such refusal. Had he wished he could have instructed an expert. I accept in practical terms that may have been difficult but there was no ***refusal*** by the respondent

228.4 Whilst Mr Millward suggests his suspension was pending the Charity Commission inquiry, at that stage that had not been commenced – nor would that be appropriate. The respondent was entitled to undertake its own internal investigation and his suspension was to enable that to take place.

228.5 Mr Millward states there was contact between the disciplinary and appeals officers with other individuals and thus the investigation was influenced; the Phillips, the appeal officer, had sought the views of Mr Timms, the disciplinary officer prior to the appeal, Mr Timms had already dealt with the protected disclosure and furthermore Mr Timms had sought the comments of Mr Candler (who was the subject of the protected disclosure complaint). I find Mr Phillips was seeking clarification from Mr Timms, and that was in response to a direct request from Mr Millward for clarification of the charges against him.

228.6 As to other issues, where the Disciplinary or Appellate Officers were not clear on what was being alleged, or the information, reports or advice that had been provided to them. A fair process in my judgment required the relevant officer to obtain that clarification and it was within the bounds of the band of reasonable responses for that clarification to have been sought and obtained. As I say above, issues that stem from that clarification and the failure of the Respondent to provide

information that arose, are however another matter and I address them below.

229 As to the complaints about the investigation concerning what I will describe as **HEAD 6** of the appeal outcome, namely the use of demeaning and inappropriate language and behaviour in breach of the STA's policy concerning dignity at work, bullying and harassment, Mr Millward pointed out that no one had come forward previously in relation to those matters. The notes of Mrs Lynch's investigation meeting [1164] explained why this was so – there was a view within the STA that people who raised issues against Mr Roger Millward had their services dispensed with. When asked if there was a history of people who challenged either Messrs Millward if the staff member would be "got rid of" Mrs Lynch's reply was in no sense, equivocal - *"everyone felt it"* and she went on to refer to Paddy (Mooney) and Stuart (Tanfield) as well as former PAs who Mr Roger Millward had said were not up to the job.

230 Mr Tanfield told me that he was aware of that perception even though he was not employed at the time that Mr Siddons and Mr Mooney, had left.

231 The way the recruitment agency was contacted by Mr Millward in relation to seeking a replacement for Mr Tanfield, suggest that Mr Millward was acting in a similar way to that that his father had done.

232 Whilst Mr Millward relays problems with the investigation,

232.1 not all of STA's was spoken to and no rational was given why some individuals were spoken to and others not,

232.2 when issues were identified individuals, who could have potentially addressed those issues were not spoken to, for instance, why the investigation did not interview the individual concerned on the issue of how Mr Millward had behaved with an external body, Black Country Development Commission (BCDC). [a]

232.3 Witness Statements were not signed and notes were inaccurate. I remind myself there is no requirement that witness statements are signed nor was it suggested verbatim notes were taken. save where there is an issue as to the precise words being used notes of interviews are made to reflect the essence of what is relayed.

233 The appellate courts have affirmed on a number of occasions that an internal investigation does not require the same level of scrutiny as a criminal enquiry. What is necessary is what is reasonable in all the circumstances based on the band of reasonable responses test. Where, as here, there were serious allegations that could have led to Mr Millward's dismissal and reputational issues for him (and STA) the level of inquiry within the investigation should have been detailed.

---

[a] Mr Tanfield told me he had had to send an apology for Mr Millward's behaviour to BCDC [ST/56] [1168 &1169] Mr Millward having stated in an email chain to BCDC [551-557] *"I am far too busy to run this organisation to fill out pointless forms".* I accept having reviewed my notes that Mr Tanfield was spoken to but BCDC's view of how they perceived this was not canvassed and more importantly nor was an explanation given why this was not done.

234 Whilst a large number of witnesses essentially made the same complaints and STA was thus entitled to rely upon the evidence that they gave in that regard, notwithstanding that, issues were not identified and addressed as part of the investigation.

235 Mrs Cooper told me she had told Mrs Lynch what had happened after an incident where she alleges Mr Millward had told her having been aware of her pregnancy that that he would need to get someone in to cover her maternity leave in case her baby died at birth [1158]. She did not say that to Ms. Hardy as part of the investigation. I find that was because the investigation was inflexible in that it had failed to address matters as they arose.

236 Mrs Lynch had stated that within the business no one complained to her, she thought people saw her as conflicted given her role (as the PA to Mr Millward and his father before him) and thus no one came to her. That is at odds with what Mrs. Cooper told me, but then Mrs. Cooper's account was not actually put to Ms. Lynch.

237 Further Mrs Lynch was aware of comments concerning the use of language from Mr Millward about staff calling them "amoebas", "monkeys" etc… but she says she "zoned out". It was not explored with her either how she knew of those issues, if people saw her as conflicted or if she "zoned out" and if so, what the impact that those matters would have had on whether Mrs. Cooper's account was to be preferred to hers.

238 I find there was no detailed engagement within the investigation with the conflicts in evidence or the issues.

239 That however leads me on to the matters where I accept the criticisms Mr Millward makes of the investigation, disciplinary and appeals processes.

Ms. Hardy

240 In relation to the bonus issue that I relay above, Ms. Hardy put a charge to Mr Millward that was factually incorrect without checking it, or what she had been told.

241 She adopted an inflexible approach and thus failed to address matters as they arose. In addition to the points I make above, she did not review the Hinks Report to identify from a personnel perspective if there were matters that required further investigation, either substantively or procedurally.

242 Whilst she made amendments to Mr Timm's decision [1612-15] I find she had discussed those matters with him by telephone first and they reflected matters he had neglected to address that needed to be considered. and her having discussed them they were, I find, his findings.

243 When Ms. Hardy wrote to Mrs Robinson on the 11 July [970], she also referred to interviewing individuals who had been subjected to poor management rather than approaching who she would be speaking to as part of the investigation matters with an open mind.

244 Those matters in my judgment raise the question whether she investigated matters with an open mind or was merely looking to find a justification for a specific outcome.

Clarity of Findings

245 As to **HEAD 3** [1784] the finding of dismissive and contemptuous behaviour in relation to external bodies, Ms Hardy identified 4 specific examples of this at 3.2.1 to 3.2.3 (two examples are given under 3.2.3) in her report [1128-9]. Mr Timms found this head (albeit worded slightly differently to that by Mr Phillips) to be made out without stating which of those examples he found Mr Millward was guilty of.

246 Mr Phillips identified Mr Millward was guilty of negative behaviour again without identifying what that behaviour was, which incident(s) that finding related to or its/their degree such that he provided a rationale to explain his finding it constituted gross misconduct. Whilst Mr Phillips considered the examples given by Mr Millward of positive interactions (advanced by way of challenging the evidence brought forward of bad behaviour and mitigating any negative finding) Mr Phillips stated that the examples of negative behaviour were not one offs and thus it could not be argued these did not reflect Mr Millward's behaviour generally.

247 As to **HEADS 4** (reclaiming personal expenses from the STA and incurring significant discretionary expenses without prior authorisation) and **5** (incurring expenses beyond what was appropriate for an organisation of the size and nature of the STA, the use of petty cash and the failure to submit receipts/evidence they were legitimate business expenses) Mr Millward had asked for copies of the expenses claims he was charged with having made in breach of duty. He was not provided with them. No good reason was provided in my judgment. They could have been provided. There was a need for them; to allow Mr Millward to defend the charges against him. That is reinforced in that there was a failure by the respondent to adequately differentiate between those made by him and his father; essentially Mr Millward was tarred with same brush as his father. Whilst it was legitimate for the STA to seek to identify if by passing his credit card receipts to his father it was a claim he had made or one he had colluded in his father making I find it was unclear if the STA made that differentiation and if so how and why.

248 Nor did Mr Timms or Mr Phillips make specific findings on head 4 or Mr Timms on head 5 as to what Mr Millward was found guilty of and why (the matters Mr Phillips addressed as to head 5 being the new matters raised concerning petty cash and other business trips).

Fishing Expedition

249 Mr Millward complains that the charges he was dismissed for were different matters to those for which he was suspended and the appeal in turn addressed different issues to those for which he was dismissed.

250 Whilst the legal authorities recognise that as an investigation proceeds charges may be dropped and others added the STA does not in my view identify or adequately address how and why matters that were not identified within the investigation subsequently came to light and why they had not been picked up within the investigation. That is relevant to the thoroughness (and thus robustness) of the investigation.

251 At the appeal, **HEAD 2,** the SGC Martineau correspondence, petty cash **HEAD 5** [1782-7] and **HEADS 7 & 8** were addressed.

252 That shows a contrast in my judgment between that new information raised by the STA and its failure to respond to Mr Millward's reasonable requests for information to enable him to adequately defend himself from the charges he faced. It reinforces the view the respondent was approaching matters to support a decision it had come to rather than to investigate matters neutrally.

Other Procedural Failings

Disclosures

253 Given Mr Timms was named in the second alleged disclosure it is difficult to understand why he was asked to address it (see (218)). That yet again embodies the failure of the STA's officers and their advisors to engage adequately in the process.

254 On 25 August 2015 Mr Millward complained that he had been invited to a disciplinary hearing before his Protected Disclosure had been investigated. On 26 August 2015 Mr Timms wrote to Mr Millward relaying his outcome of the investigation into the alleged protected disclosure. He stated there was no evidence of wrongdoing by Mr Candler and no further action was required [1289]. Mr Timms states he took professional advice.

255 Mr Millward responded to complain that he had not been interviewed about his disclosure at that point and thus the STA was not entitled to have formed a view upon it.

256 Other than stating in his witness statement that he sought Mr Candler's responses, Mr Timms failed to identify how he came to the conclusions he did. That admits of the possibility, given the other matters I refer to, that he potentially dismissed it out of hand. That view is reinforced in that whilst Mr Timms indicated to Mr Millward on 2 September 2015 [1333 - 1334] that he would have an opportunity to raise those points at the disciplinary hearing following Mr Millward's appeal against the outcome of protected disclosure neither Mr Timms, nor Mr Phillips, in their respective outcome letters make clear what their findings were in relation to the Protected Disclosure(s).

257 Neither was Mr Millward given a copy of the Charity Commission Investigation Report, documents evidencing the view that the Charity Commission took or any other documents that were passed to the Respondent in that regard. I note Mr Millward has made subject access and other requests and Mr Millward was aware of the statutory notice, but for instance he was not provided with the meeting minutes between the Trustees, the Charity Commission and the STA's lawyers. They were asserted to be privileged. That may be so. But that may still impact on fairness.

Other

258 In addition to my observations above as to STA's failure to engage, I find the same is also true for:-

258.1 the failure of the respondent to engage with the rebuttal evidence provided by Mr Millward and to explain if and why it was not accepted

258.2 the respondent's use of responses to enquiries, further reports and information after the dismissal and appeal hearings that were not copied to Mr Millward and upon which he had had no opportunity to comment such as the advice received (see for instance [1751])

259 The failure of the Trustees to engage properly in the investigation, their failure to provide clarity to Mr Millward of the precise charges against him together with documents in support, and similarly their failures to relay the detail of the matters he was found guilty of, their failure to investigate lines of inquiry that were identified within the investigation, failure to engage with Mr Millward's rebuttal evidence, readiness in contrast to adopt new matters, readiness to accept explanations without testing the contrary evidence (as evidenced by their failure to investigate adequately Mr Millward's disclosures and instead accepting Mr Candler's responses), the comments of the individual Trustees merely reinforce that view as does their failure to identify they may had prejudged the issue or conflicts. Those matters lead me to conclude that the investigation, disciplinary and appeal procedure adopted by the STA show that it was not approaching the investigation from a neutral viewpoint and was instead searching for evidence to support a view it had already come to concerning Mr Millward's misconduct at the latest following the provision to the Trustees of the Charity Commission's initial view. The outcome of the disciplinary process was prejudged.

260 For those reasons I accept Mr Millward's assertions [ET1/51.1-5.4] that the decision was premeditated, the investigation was inadequate as to some of the Heads and that the evidence did not support the findings and as to general fairness in so far as they do not conflict with my other findings above.

261 Before I proceed further, I turn to the motivation of Messrs Tanfield and Candler:-

Mr Tanfield

261.1 Mr Millward suggests Mr Tanfield was engaged in a vendetta having discovered he was to be replaced yet Mr Millward also acknowledged that Mr Tanfield had already expressed his concerns to Mr Millward about the reorganisation prior to Mr Tanfield being aware his role was at risk. I find any issue concerning debtors was not due to Mr Tanfield but the long-term absence of a member of staff Gemma Bibby (an Accounts Assistant).

261.2 As I found at (229) following, it was recognised amongst the staff of STA that staff who challenged Mr Roger Millward did not have prospects of retaining their jobs for long. I heard the same was true for its legal advisors (SGC Martineau).

261.3 Further there was no mechanism for complaining about Mr Roger Millward to the Trustees the STA's whistleblowing policy [1210-13] did not provide for that and the evidence from staff and Trustees alike was that they were discouraged for the most part from contacting each other (although there were exceptions such as Miss O'Sullivan and Mr Phillips involvement in START).

261.4 Whilst Mr Millward suggests his contacting recruitment consultants concerning a replacement for Mr Tanfield was a response to the vehemence of Mr Tanfield's reaction to their discussions over the reorganisation and the meeting with Mr Bates of Clement Keys on 9 April (see (60)) I find that rather than taking what Mr Millward relays as an extreme reaction from Mr Tanfield as a trigger to reconsider his

approach, Mr Millward instead sought to dispense with Mr Tanfield's services.

261.5 Mr Millward had raised no issues with Mr Tanfield (direct) as to his work prior to that time. That does not accord with good industrial relations practice. Mr Millward's failure to raise those issues with Mr Tanfield casts doubt upon the explanation Mr Millward gives for acting in the way he did.

261.6 Give the alleged extreme reaction of Mr Tanfield was on 9 April and whilst I accept Mr Millward was away in May, Mr Millward provided no good explanation if those matters were as significant as he suggests why he did nothing in the interim by way of a disciplinary process, that again reinforces my concern as to the explanation Mr Millward gives.

261.7 Whilst Mr Tanfield thereafter embarked upon what I find was a search for evidence against Mr Millward and his father, in one sense that was just what he was asked to do by the Charity Commission as part of their investigation.

Mr Candler

261.8 The suggestion is that there was a benefit to Mr Candler in that he became the Chief Executive of the STA and that was the motivation for him acting in the way that he did. I find that prior to the 15 June when Mr Tanfield contacted him, Mr Candler in my view had been highly supportive of the reorganisation, I find that Mr Tanfield contacting him was a turning point and I find that Mr Candler and the other Trustees who provided Witness Statements came to the view that they had been misled at that point.

261.9 As to the assertion Mr Candler disclosed factually incorrect information to the Charity Commission, for the most part that was provided by Mr Tanfield. I find no evidence was advanced to show there was any collusion on their part to fabricate evidence, both of them in my judgment were acting, (as were the Trustees) to ensure that there was a full and frank disclosure to the Charity Commission of any matters, given the issues that had come to light; they considered there needed to be an entirely open process with the Charity Commission.

261.10 As to CWJ no statement has been provided by either her or Mr Brown, nor were their names given by Mr Millward or evidence provided during the investigation. In the absence of evidence from CWJ and Mr Brown, I accept Mr Candler's evidence that he was merely responding to questions and concerns they had raised and had to do so truthfully given what had passed before. I find he was not attempting in that respect to influence the investigation in their discussion.

261.11 Whilst Mr Millward suggests the investigation was commenced as a smoke-screen to deflect criticism away from Trustees, and Mr Candler in particular. I find that was not so by reason of the following matters:-

261.11.1 The investigation process and Mr Millward's suspension (Mr Millward complains his suspension was not a neutral act) was undertaken before the first disclosure.

261.11.2 Events were afoot even before that. In his email of the 28 June to Mr Candler [926-27], Mr Hall stated on the question of dismissal ***"do we have anyone who is up to speed on HR matters pertaining to this dismissal".*** Whilst Mr Hall resigned on ill-health grounds later and neither he nor Mr Candler played any part in the process thereafter, that indicates in my view at least a suggestion that Mr Hall had predetermined matters.

261.11.3 Whilst Mr Millward suggests the chronology was that the charges he faced were almost entirely new and notified to him only after the disclosure, those matters for the most part had already been identified by Mr Tanfield or elsewhere in other documents.

Conclusion - the reason or principal reason for his dismissal

262 By the time the notice of the Statutory Enquiry dated 10 July had been sent to the Trustees, they were aware the Charity Commission had considered the risk to STA's assets from the reorganisation was as such that (as early as the 6 July) it had sought and already received an assurance direct from DWF that the reorganisation was not going ahead [964].

263 In my judgment Mr Phillips' genuine view at the time of the appeal hearing was that the view reached by the Charity Commission was determinative, charitable funds had been exposed [1748]. Further he stated that he felt he had been misled [1749]. His decision reinforces that view [1783].

264 I find that contrary to Mr Millward's assertion that the reason or principal reason for his dismissal was because he had made protected disclosures, the evidence before me does not support that. I find that having looked at matters in the round, irrespective of the procedural errors that I set out above, for the reasons I summarise at (259 to 260) the disciplinary process was undertaken absent an open mind; the Trustees had formed a view at the latest following the relaying to them of the Charity Commission's initial view. (I did not hear from Mr Timms but for the reasons I give above he too was guilty of the failures I summarise at (259 to 260)).

265 That does not prevent misconduct being the genuine reason the respondent had for dismissing Mr Millward. Even where, as here the respondent does not embark upon the process with an open mind, one still has to look at the genuineness of the decision. By way of example where an employer sees an employee hit another without provocation or other mitigating circumstances and concludes from the outset the employee must go, the decision may or may not be fair if the employer undertakes the dismissal process him/herself but that does not prevent the decision being a genuine one.

266 I find the STA has discharged the burden that is upon it to show the reason it dismissed Mr Millward was because it believed him to have been guilty of misconduct; both Mr Phillips and Mr Timms were of that view.

267 Despite that finding, and for the reasons I give above, the STA did not in my judgment act in the way a reasonable employer would have done, its conduct of the investigation disciplinary and appeal process was outwith the band of reasonable responses and the dismissal was procedurally unfair.

Reductions and Uplifts

268 If the tribunal considers the dismissal was unfair it must first consider if the employee wishes to seek re-instatement or re-engagement [57]. If as here that is not sought the tribunal must then go on to consider what, if any, compensation it is just and equitable for it to award and if the employee by his/her conduct contributed to his/her dismissal.

269 I relay above the law relating to the various reductions and uplifts at play in this claim (178 to 189).

270 I approach the issues of conduct, *Polkey* and breach of contract with the warning about conflating the tests for unfair dismissal and wrongful dismissal at the front of my mind. That being so I noted that it would also be easy to conflate what conduct had occurred, the matters the respondent was (not) aware of and the causative links at the various times. In consequence I indicated to the parties that I intended to firstly address s.123(6) as not only the action needed to arise before the dismissal/appeal was decided upon but for which the respondent's knowledge and the causative link to also be addressed, then s.122(2) which requires the conduct to have occurred before the notice dismissal/appeal is concluded, followed by *Polkey* (s.123(1)), and wrongful dismissal.

Contribution - Compensatory Award - s.123(6)

271 As to **HEAD 1** contrary to Mr Millward's suggestion that the proposal was based on professional advice (a position Mr Millwood maintained throughout the hearing) Mr Phillips in the appeal outcome letter [1783] quoted from Clement Keys' letter of 21 May 2015 [1001] (see (199.2)) where they explicitly stated they were not advising. I find that he concluded that the Mr Millward had brought significant influence to bear on the Trustees, that Mr Millward was in a senior position, had not acted in the best interests of the charity and had pursued a reorganisation that was in the best interests of him and his father and him rather than the Charity.

272 Mr Millward was a chief executive and fiduciary and irrespective of the determinations of the Charity Commission he was obliged to act in the best interests of the Charity. In my judgment the respondent has shown on balance, the burden being on it to do so, that Mr Timms and Mr Phillips were entitled to conclude he had not acted in the charities' bests interest by failing to obtain advice, for instance from valuers, and given the potential conflict that I find he was aware of, Mr Timms and Mr Phillips were entitled to conclude he had done so for his own personal gain.

273 I find the respondent has discharged the burden that was upon it and he was guilty of blameworthy conduct and that caused or contributed to his dismissal.

274 As to **HEAD 2** by virtue of his actions (and those of his father) Mr Millward was jointly responsible for the statutory enquiry that flowed from the matters on which I made findings under Head 1.

275 As to **HEADS 3, 4, 5 & 6** I outline above my concerns about the nature of the investigation and the respondent's failures to identify which of those matters Mr Millward was guilty of. That being so I find that the respondent has not satisfied the evidential burden that is upon it in relation to those heads.

276 As to **HEAD 7** whilst the spreadsheet that was before me was also before Mr Phillips and that showed, that without recourse to the Trustees Mr Millward had allocated to himself a bonus for the previous year. Mr Phillips acknowledged that had not been actioned as a result of an instruction from Mr Millward. Mr Phillips concluded that the working document indicated Mr Millward had decided to allocate the bonus but he did not address what evidence supported that conclusion or his view of Mr Millward's version of events. Mr Phillips' failure to provide a rationale leads me to determine the respondent has failed to discharge the burden that was upon it.

277 As an aside neither Messrs Phillips nor Timms explicitly identify that Mr Millward's instruction demonstrated a change of stance; the bonus was previously paid at the end of the year and was thus potentially the subject of approval at the year-end by the Trustees. Henceforth, the bonus irrespective of the instruction not to action its payment, was to be allocated monthly. Neither Mr Phillips nor Mr Timms sought to address Mr Millward's rationale why that was so.

278 It follows for both reasons I am not satisfied that the respondent has shown on balance Mr Millward was guilty of misconduct in relation to head 7.

279 As to **HEAD 8** it was common ground Mr Millward had arranged insurance cover for a private vehicle. His explanation for this is in my judgment was untenable having given a conflicting statement to the Trustees concerning the reorganisation going ahead in response to a question from Mr Timms (see (85)). Mr Phillips concluded as much and was entitled in my judgment to do so. I find the respondent has discharged the burden that was upon it and Mr millward was guilty of blameworthy conduct and that caused or contributed to his dismissal.

280 Mr Phillips concluded given the nature of those matters that all were acts of gross misconduct that would independently entitle the respondent to dismiss irrespective of the procedural failings elsewhere. In my judgment Mr Phillips was entitled to reach that conclusion. Given they were acts of gross misconduct the reduction must be a high one. In my judgment given the seriousness of those issues, the statutory inquiry alone would justify a reduction of 100%, the conflict of interest, personal gain, position Mr Millward held and his duties to the STA merely reinforce that view.

Contribution - Basic Award - s.122(2)

281 The test in s.122(2) is wider than that in s.123 and does not require a causative link/knowledge. However, the reduction for the basic award will normally be for the same amount as for s.123(6). Given my findings in relation to s.123(6) I see no reason to depart from that principal here.

Just & Equitable Reduction - s.123(1) – *Polkey* element

282 I have relayed the law above. Whilst I acknowledge any assessment is predictive and a degree of uncertainty is an inevitable feature my task is to decide if the employer could fairly have dismissed and, if so, what were the chances that the employer would *have done* so? I am not called upon to decide the question on balance. I am not answering the question what I would have done if it were the employer

283 I must assess the chances of what the actual employer who is before the Tribunal, would have done, on the assumption that the employer would this time have acted fairly (though it did not do so beforehand) and not what a hypothetical fair employer would have done [58]. The enquiry may owe more to assessment and judgment than it does to hard fact [59].

284 In my judgment had the investigation, disciplinary process and appeal been conducted as it should have been the matters I address above as to heads 1 & 8 would have been present. The matters I identify below with regard to breach of contract would have also been brought forward. Given those matters and my conclusions at (280) as to the nature and seriousness of Mr Millward's conduct and my findings below that Mr Millward was in repudiatory breach, in my judgment the respondent would have dismissed at the same point; Mr Millward's continued employment was untenable given the same. Accordingly, (and in the alternative) I make a reduction of 100% from the same date.

Breach of Contract – Wrongful dismissal

285 Mr Millward argued that he was relying on advice given, the advisors had approved the transaction and thus he could not be criticised for that; it was thus not misconduct.

286 I have identified that advice from DWF above (44 & 46) namely it was for the Trustees ultimately to decide whether the reorganisation should go ahead, but that there had to be evidence and consideration of it, to support their view, that consideration had to be given to the various options and the Trustees must be absolutely satisfied it was the best interests of the Charity that were being served.

287 Mr Roger Millward was specifically advised given the operational side of the reorganisation was being managed by him that to protect all the parties, the Trustees should not just be given his recommended proposal for a yes/no decision but that they should understand the benefits and detriments of alternatives including those that Mr Roger Millward did not personally consider it to be the best option.

288 DWF had also advised that good governance, robust decision-making and transparency were required and the Trustees needed to be advised independently of the options available to them so they could make an informed decision.

289 There is a distinction between advice on the merits of the transaction and advice that leads up to it. DWF were not advising on the substance (merits) of the proposal merely what needed to be done to get to that point.

290 Mr Millward, as Chief Executive had delegated the operational side of the reorganisation to his father. Mr Millward was still intimately connected with the transaction that his father had day to day responsibility for, he and his father were going to take a 51% share and he had covered for his father whilst his father was ill. Thus, Mr Millward should or ought to have known of the contents of the advice from DWF. He accepted that he had seen that advice.

291 As to compliance with the advice given, as I say above, alternatives should have been identified, a full analysis provided, supported by robust evidence. The only alternative given that Mr Millward could take me to he accepted was

the Australian outsource model. Whilst expert valuations were referred to, as Mr Bates had specifically stated, he had not given advice. The valuations were yet to be finalised. As to the proposal, Mr Tanfield had expressed concerns. Despite having accepted what those concerns were threefold as set out in his statement, Mr Millward accepted he had not relayed them in full when asked by the Trustees for Mr Tanfield's view. Mr Millward's record he had stated that Mr Tanfield had expressed surprise and did not view the reorganisation as commercially necessary. When concern was expressed by the Trustees about that, instead of relaying in full what Mr Tanfield's concerns were, Mr Millward stated that a meeting had been held with the Auditor to discuss the plans. Mr Roger Millward stated that Mr Tanfield has been provided with all the lawyer's reports and calculations and Mr Millward then added that Mr Tanfield still did not understand it.

292 Mr Millward told me that he believed that Mr Tanfield's concerns had by that stage been allayed for the most part. He led no evidence to suggest that he had actually spoken to Mr Tanfield after the meeting with Mr Bates to confirm that position. Despite having failed to check if that was so, Mr Millward relayed to the Trustees only a part of Mr Tanfield's view. Mr Millward gave no explanation why he did not relay the other two points that he accepted he understood were part of Mr Tanfield's concerns; the valuations and the private benefits.

293 Given the latter was a complex issue; Mr Millward should in my judgment have made that clear. The advice from the Lawyers made it clear that he should have done so, he did not. I find in the absence of such an explanation, given the advice from the lawyers and the personal benefit, that that was deliberate.

294 Mr Millward and his Father may not have agreed with Mr Tanfield, Mr Tanfield may have been wrong in the view he held but irrespective of that Messrs Millward were duty-bound to relay alternative views, even if they disagreed with them to the Trustees. They did not.

295 There were potential conflicts implicit throughout this transaction, advice was being given via Mr Roger Millward who was to take a 51% shareholding (with his son) in Holdings. Whilst DWF were also acting for both Holdings and STA the reason they could act for both only became when I identified that Holdings on formation was wholly owned by STA. There were however other potential conflicts, Clement Keys were advising the "Buyers", yet they were the Auditors for the Respondent. There may well be explanations for those conflicts. The issue is those matters were not addressed at least in the documents that were before me.

296 Nor was the advice followed concerning all parties liaising with Mr Candler.

297 In addition to not providing a full picture of Mr Tanfield's view to the Trustees at the Trustees meeting, I find that Mr Millward also did not relay to the Trustees a proper picture with regards to the signing off of the deal. I refer to Mr Millward's response to Mr Timms's question of the 26 June 2015 [928] whether the reorganisation would be completed before the accounts had been signed off albeit relayed to Mr Millward via Mr Candler. I find that Mr Millward was prepared to make statements to the Trustees as were necessary to ensure that the deal proceeded.

298 That was also indicative of the way he treated the business as his own. Other examples of that are the way that he insured his private vehicle and his comment in Tribunal, my note of which was, "*its my company, I'll decide how I am paid my remuneration*."

299 His view of the Trustees he confirmed to me was not quite in terms relayed by DWF (see (43)), but it was his view that they were not very bright, yet he provided no training to them, despite having formed that view. That is not the action of a Chief Executive of a Charity and fiduciary who is acting in the best interest of that Charity and fiduciary. Irrespective of whatever the failings the Trustees may have had, it was his responsibility to ensure that the Trustees were trained adequately. That was something that was remedied after his suspension.

300 In addition, I heard there were other issues in relation to the way in which information was disseminated and a comment Mr Millward made to Mr Candler as to his ability to control the Trustees.

301 Mrs Cooper was called to support the breach of contract and contribution arguments raised by the respondent. I have been specifically asked to make determinations on the issues she raises.

302 Mrs Cooper became very upset whilst giving evidence – the reaction of a witness when a legal process has been ongoing for some time (and for that matter their demeanour or that of the parties) can be the culmination of the events that give rise to that process or a whole host of other factors. Judges are thus wary of taking any account of such responses or demeanour save that if the witness or parties behaviour is inconsistent with their alleged earlier behaviour and thus it requires that earlier conduct to be considered in the light of that disparity. I place no weight on her reaction as evidence the event occurred. Equally, I place no weight on the next question Mr Millward posed to her after she became upset.

303 I am left with weighing the supported evidence of Mrs Cooper with that of Mr Millward. Whilst Mrs Lynch indicated no complaints had been made to her I identify problems with that at (233) above. Mrs Lynch as the PA to the CEO and the person who was being trained to undertake HR matter had identified there was a problem within the STA. Further within the investigation a number of other witnesses made claims similar to that of Mrs Cooper against Mr Millward

304 I accept Mrs Cooper's evidence that she did not complain at the time because she knew she would lose her job and could not afford to lose it at that point. I found above that there was a culture of fear within the Respondent in that regard.

305 I also take into account Mr Millward's representations with regard to the text exchanges between him and Mrs Cooper that are in the bundle which demonstrated the closeness between them, and which is at odds with what Mrs Cooper asserts took place.

306 However, I also accept the point Mrs Cooper made that after October 2014 and the business trip to Las Vegas that preceded it, their relationship was not what it had been, but that she had felt obliged to continue as before. Her concern was that Mr Millward would find out that she did not think of him in

the same way as previously and that she would lose her job. The reduction in texts emphasises that point, something that Mr Millward orally accepted.

307 I have made findings elsewhere (204) that Mr Millward is not a credible witness, amongst other matters:-

307.1 he misled the trustees about Mr Tanfield's view on the reorganisation and whether the reorganisation would go ahead before the financial year end accounts had been prepared, a specific question having been asked of him,

307.2 He was prepared to allege the respondent had misled the High Court [TM/185] based on a document being disclosed in those proceedings that was an earlier version of one placed before the Trustees and was clearly such and which thus omitted certain information that was subsequently put before them. I make no finding on that matter; that is something for the High Court and in any event I am not appraised of all the relevant information. The issue for me is that Mr Millward was prepared to make such an allegation with little evidence to support the same.

307.3 Similarly, he maintained his stance that he was acting on advice when that was untenable the problems with it having been pointed out to him.

307.4 in other respects, his evidence before me changed to that he had given previously (for instance the note of the suspension meeting). His evidence regarding whether he thought the reorganisation had gone through in relation to insurance was at odds with what he told the trustees

308 I am conscious that each factual matter should be determined on its merits but where, as here, I find Mr Millward across the breadth and depth of his evidence was a witness upon whose evidence no weight should be applied and who was prepared in my judgment to say whatever he felt he needed to be said in the circumstances to suit his case it follows that faced with a conflict essentially between what he said and what Mrs Cooper said I prefer her evidence. That her evidence is consistent with the treatment others say they encountered at the hands of Mr Millward merely reinforces that view.

309 For all those reasons, I find that STA has discharged the burden that is upon it to show on balance that Mr Millward was in fundamental breach of contract, such that an objective observer was entitled to form the view that Mr Millward no longer intended to be bound by the fundamental terms of his contract and thus the Respondent was entitled to dismiss without notice.

~ ~ ~ ~ ~

[53] *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT*
[54] *Babula v Waltham Forest College* [2007] ICR 1026 CA see [75 to 82] approving *Darnton v University of Surrey* [2003] IRLR 133 EAT per HHJ Serota QC
[55] HHJ Richardson in *Soh v Imperial College UKEAT/0350/14* at [42]
[56] *Darnton [29]*
[57] *ss. 112-116 ERA*
[58] *Hill v Governing Body of Great Tey Primary School UKEAT/0237/12* per Langstaff P
[59] *V. v Hertfordshire County Council UKEAT/0427/14 per Langstaff P at [1 & 21-25]*

Findings above relating to bad faith and other matters

310 Neither party made any representations to me as to the reduction for bad faith. Given my determinations in relation to the Protected Disclosure claims I asked if either felt there was any purpose in doing so. Both agreed there was none.

311 I also clarified with the parties if there were any matters that required a determination that I had omitted from matters they had raised. They confirmed none were.

312 I thus went on to clarify if the provisional remedy listed for 1, 4 and 5 June could be vacated. Both parties were of the view that the Hearing should therefore be vacated.

313 Finally, I expressed my gratitude for the way in which matters were conducted.

Footnote

314 A number of issues raised by the respondents in the proceedings do not fall for determination by me; they will need to be addressed by the Charity Commission when it concludes its investigations. They include how based on the evidence I heard why there appear to be inadequate checks in place:-

314.1 to verify that training has been given to newly appointed trustees and how that was kept up to date,

314.2 to identify if Mr Roger Millward's bankruptcy had been discharged when he was appointed the chief executive of the STA (or if there were any other restrictions upon him at that point).

315 Finally, given the criticism raised by the Charity Commission as to the remuneration paid to Messrs Millward, its report will no doubt also address why those points had not been identified many years before by the Commission when those matters were capable of being identified from the accounts the STA lodged at Companies House and thus if they would have identified the governance and oversight issues that arose here.

Employment Judge Perry

6 June 2018