EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4107800/2017 and S/4107801/2017

Held in Glasgow on 1, 2, 3, 4, 5 and 30 October 2018

Employment Judge: Mr G Woolfson (sitting alone)

Mr Mark Finlayson	**Claimant** **Represented by:** **Mr David Hay** **Counsel**
Mr David Brown	**Claimant** **Represented by:** **Mr David Hay** **Counsel**
Integra Energy (UK) Ltd	**Respondent** **Represented by:** **Mr Ian MacLean** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal finds that Mark Finlayson was not constructively dismissed. His claim for unfair dismissal is unsuccessful and is dismissed.

2. The claim brought by Mark Finlayson for unauthorised deductions from wages is also dismissed.

3. The Tribunal finds that David Brown was constructively and unfairly dismissed. The respondent is Ordered to pay Mr Brown Seventeen Thousand, One Hundred and Twenty Eight Pounds (£17,128).

REASONS

Introduction

1. The claimants are Mark Finlayson and David Brown. They have each brought claims of unfair constructive dismissal. In Mr Finlayson's case, it is claimed that his dismissal is to be treated as unfair (or is automatically unfair) on the basis that the reason or principal reason for his (constructive) dismissal is that he had made a protected disclosure. The claims arise from almost the same facts, and further to a Case Management Order dated 15 March 2018 the claims are being considered together.

2. Mr Finlayson and Mr Brown were represented by Mr David Hay (counsel). They each gave evidence both in their capacity as claimants and also as witnesses in each other's case. Neither of them called any other witnesses. The respondent was represented by Mr Ian MacLean (consultant). For the respondent, evidence was led from Mr George Kolasinski and Mr Brian Ferguson. The Tribunal was referred to a joint bundle of documents.

3. At the start of the hearing it was agreed that Mr Finlayson would give evidence first. Mr MacLean asked that Mr Brown be excused from the room when Mr Finlayson was giving his evidence. Witnesses are not normally allowed to be in the room until they have given evidence. However, in this case the claimants themselves are also witnesses for each other. I expressed my reluctance to agree to Mr MacLean's request, as I was not happy with the prospect of Mr Brown not being in the room for a significant portion of his own case. Mr Hay suggested that if there was any chapter of

evidence which raised a particular concern, then he could take a view at that time.

4. After further discussion, and in line with the overriding objective to deal with cases flexibly, I decided that Mr Brown should remain in the room but with the opportunity for Mr MacLean to ask for a pause in the proceedings if there was a particular chapter of evidence which caused him concern. In the event, there were two occasions in the course of Mr Finlayson's evidence (which took place over three days) where it was agreed that Mr Brown would leave the room. This was in relation to two parts of the evidence: (1) a discussion or meeting which took place at the apartment of Mr Finlayson, and (2) the setting up by the claimants of a new venture. When the time came for Mr Hay to ask questions of Mr Finlayson on these matters, he explained that he would take a pragmatic view and did not have a difficulty in Mr Brown being absent for those chapters of evidence. This was confirmed by Mr Hay after he had taken instructions. As there was no objection by Mr Hay, I agreed that Mr Brown could leave the room during that portion of evidence. This was for approximately one hour. The same issue arose during cross-examination of Mr Finlayson, and Mr Brown left the room for approximately 15 minutes.

5. At an earlier point in the proceedings, during a preliminary hearing, discussion had taken place regarding what was said to be related criminal proceedings. The purpose of the preliminary hearing was to determine the respondent's application for a sist of the tribunal proceedings. The respondent's request was refused with reasons being given in a Note following the preliminary hearing, dated 14 August 2018. I made reference to this at the start of the final hearing. I sought confirmation that the claimants were content to proceed, and that they would take advice regarding the possibility of self-incrimination. Mr Hay explained his understanding that a police investigation was not being pursued and that there are no criminal proceedings. Mr MacLean asked for a brief adjournment, after which he explained that he understood there is still a police investigation but that there

is nothing to prevent this hearing going ahead. Mr Hay then stated that as a matter of record both claimants had been interviewed and had been told the police do not intend to pursue matters. Mr Hay confirmed that the claimants wished to proceed. Given that both parties wished to proceed with the hearing, we therefore continued.

6. At the start of the second day of the hearing, new documents were introduced for the claimants. Mr MacLean expressed his concern regarding the introduction of certain documents relating to Companies House. He asked for the parties to be excused, in order for his concerns to be discussed. I agreed the parties could be excused. We had a detailed discussion regarding whether the documents should be allowed, with Mr Hay expressing his reasons as to why they should be allowed and Mr MacLean putting forward his objections. Having heard the arguments, we agreed that Mr Finlayson would continue his evidence as the possibility of these documents being introduced did not impact on that evidence. At the start of the afternoon session, I informed Mr Hay and Mr MacLean of my decision not to allow the documents in question to be introduced, with reasons being given orally at the time.

7. Although schedules of loss were included in the bundle, it was agreed that updated schedules would be provided after the hearing had concluded. These were provided by the claimants' solicitor in an email of 13 November 2018. The Tribunal asked Mr MacLean to provide any comments, and by email dated 5 December 2018 it was confirmed that he had no comments.

8. Mr Finlayson also brought a claim for unauthorised deductions from wages. However, in the course of submissions I was informed that this claim is no longer being pursued. Therefore, this claim is dismissed and is not considered in the course of the reasons below.

9. I will quote from various pieces of correspondence between the parties. I have endeavoured to replicate exactly what was written, and this includes various typographical and grammatical errors.

The issues to be determined

Mr Finlayson

10. The issues to be determined in the case of Mr Finlayson are the following (as discussed and agreed prior to the hearing on submissions):

10.1. Was the claimant constructively dismissed, in that:

a) did the respondent without just and proper cause conduct itself in a manner calculated or likely to destroy the relationship of mutual trust and confidence between it and the claimant, thus committing a material breach of contract; and

b) if so, did the respondent's breach play a part in the claimant's resignation?

10.2. Did the claimant make a protected disclosure, in that did the claimant disclose to the respondent information which, in the reasonable belief of the claimant, tended to show that:

a) a person had failed, was failing or was likely to fail to comply with a legal obligation; and/or

b) a person had committed, was committing or was likely to commit a criminal offence.

and, if so, was any such disclosure made in the public interest?

10.3. If the claimant was constructively dismissed, is that dismissal unfair in terms of section 103A of the ERA, in that if the claimant did make a protected disclosure, was the protected disclosure the reason or principal reason that the respondent committed its material breach of the claimant's contract?

10.4. If the protected disclosure was not the reason or principal reason that the respondent committed its material breach of the claimant's contract, or if there was no protected disclosure, has the respondent established a potentially fair reason for the claimant's dismissal?

10.5. If the respondent has established a potentially fair reason for the claimant's dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in terms of section 98(4) of the Employment Rights Act 1996?

10.6. If the claimant has been unfairly dismissed, to what compensation is he entitled?

Mr Brown

11. The issues to be determined in the case of Mr Brown are the following (as discussed and agreed prior to the hearing on submissions):

11.1. Was the claimant constructively dismissed, in that:

a) did the respondent without just and proper cause conduct itself in a manner calculated or likely to destroy the relationship of mutual trust and confidence between it and the claimant, thus committing a material breach of contract; and

b) if so, did the respondent's breach play a part in the claimant's resignation?

11.2. If the claimant was constructively dismissed, has the respondent established a potentially fair reason for the claimant's dismissal?

11.3. If the respondent has established a potentially fair reason for the claimant's dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in terms of section 98(4) of the Employment Rights Act 1996?

11.4. If the claimant has been unfairly dismissed, to what compensation is he entitled?

The facts

The Tribunal makes the following findings in fact, relevant specifically to Mr Finlayson. Given the issue of reasonable belief in relation to making a protected disclosure, this includes findings with regard to what Mr Finlayson understood or believed to be the case at the relevant time.

12. The respondent was incorporated on 18 April 2013. The respondent is in the business of utility brokering. The respondent brokers energy contracts (gas, electricity and water) between its customers and energy suppliers. When contracts are concluded, commission is paid to the relevant sales people.

13. When the respondent was incorporated, Mr George Kolasinski was its sole director and shareholder. Mr Finlayson became an employee of the respondent as at 18 April 2013. Mr Finlayson and Mr Kolasinski had previously worked together in other businesses.

14. Mr Kolasinski and Mr Finlayson were the most senior people in the respondent's business. From the outset, Mr Finlayson had oversight of the day-to-day operation of the respondent. He was responsible for the sales people; he was involved in recruitment; he negotiated and met with partners and suppliers; he had responsibility for preparing contracts. Mr Finlayson

considered himself to be the Managing Director. However, he did not have anything in writing to confirm his job title. He did not receive any contract of employment in writing or any statement of terms and conditions of employment. During a meeting with Mr Kolasinski in December 2016, Mr Finlayson stated that it should be made clear he was the Managing Director. Mr Kolasinski did not agree with this and the matter was unresolved. Mr Finlayson was never confirmed as Managing Director. In correspondence, Mr Kolasinski referred to himself as Managing Director.

15. For a number of years Mr Finlayson was considering the possibility of being sequestrated. Mr Kolasinski was aware of this. Mr Finlayson understood that after his sequestration he would become a 50% shareholder in the respondent. However, there was no formal agreement to this effect. There was nothing in writing. There were discussions around the possibility of Mr Finlayson becoming an equal shareholder, and Mr Finlayson trusted that Mr Kolasinski would facilitate this. However, Mr Kolasinski never did so and was under no obligation to do so. Mr Finlayson never became a shareholder in the respondent.

16. Mr Finlayson was discharged from sequestration in September 2015. He became a director of the respondent in September 2016.

17. Agnieska Salamucha is Head of Administration and Finance for the respondent. Ms Salamucha commenced employment with the respondent in around February 2014. By the summer of 2017 she was responsible for contracts with suppliers, commission, finance, HR and administrative matters. She also had access to information regarding payments made by the respondent and sums received into the respondent's bank account.

18. Mr Finlayson did not oversee payments made by the respondent. Mr Kolasinski was responsible for such payments. Mr Finlayson also did not have access to the bank accounts of the respondent. He was initially provided with copies of bank statements on a weekly basis. This was at a

time when the respondent used Sage as its accounting system. The respondent moved to a cloud-based system called Xero, to which Mr Finlayson had access. Xero provides information regarding sums received into and sums paid from the respondent's bank account, similar to that which is included within the bank statements.

19. In order to keep track of money being paid into the business, Mr Finlayson worked closely with Ms Salamucha. Ms Salamucha provided Mr Finlayson with reports on a daily basis.

20. The respondent had arrangements with Celtic and Rangers Football Clubs whereby the respondent would purchase hospitality packages. Mr Finlayson understood that around £35,000 to £40,000 was to be paid to Celtic in instalments, with one instalment of around £11,000 being due around the beginning of August 2017. He understood that large sums of money were being paid into the business around that time from the respondent's main supplier. He therefore believed the respondent was in a position to make the payment to Celtic. He had been assured by Mr Kolasinski that Celtic would be paid.

21. In August 2017, Ms Salamucha informed Mr Finlayson that Celtic had been on the phone requesting payment. Mr Kolasinski was abroad in Canada. Mr Finlayson called Mr Kolasinski to ask about the payment. Mr Kolasinski informed Mr Finlayson that an employee who was responsible for finance, Jowita Kardasz-Choinska, would arrange payment. Mr Finlayson was satisfied with this. Some days later, Mr Finlayson became aware that Celtic had still not been paid and he understood that further sums had been paid into the respondent's account. This aroused suspicion in Mr Finlayson. Mr Finlayson called Mr Kolasinski for a second time in order to ask about the payment to Celtic. Mr Kolasinski again assured Mr Finlayson the payment would be made, and shortly after this call the payment was made.

22. Due to his suspicions being aroused, Mr Finlayson worked with Ms Salamucha to go through bank statements in order to establish which payments had been made, and to whom. This was in mid to late August 2017. They started by looking at the bank statements for June, July and August 2017. Together they identified the following payments, which were written by Mr Finlayson by hand at the top of each of the bank statements for June and July 2017[1]:

Month and Name	Money in	Money out
June 2017		
Roris		1k
Steve		2,716
GK		14,250
Freddie		2k
GDS		11k
Taggarts (car?)		10k
Boost cap	54.4k	2.6k
July 2017		
Zahra		32k
George		7.5k
Freddie		4k
Steve		1,358
Jowita?		
Iwoca		£5,519

23. On the bank statement for June 2017, the following was written next to the reference to Taggarts: *"26.7k + GK".* On the bank statement for July 2017 the sum referred to as money out against Iwoca was mistakenly written by Mr Finlayson as £5,519, when it should have stated £3,519.

[1] Other than the table format and the headings, the information within the table represents exactly what was written by Mr Finlayson at the top of each bank statement for the relevant month (pages 522 and 529 of the bundle).

24. Mr Finlayson was concerned that the sums set out above were unaccounted for. He was concerned about the number of transactions involved and the frequency of the payments. He was concerned around the possibility of funds being misappropriated, as he was not aware of the respondent having any formal relationship with the people or organisations involved. He was not aware of there being any audit trail in relation to the identified payments. He was not aware of any goods or services having been received, or any invoices or other such documentation, which would have accounted for such payments.

25. Mr Kolasinski was still abroad when Mr Finlayson obtained the bank statements and made the handwritten notes as set out above. Mr Finlayson had further telephone calls with Mr Kolasinski in order to ask about certain payments. In particular, he referred to payments involving GDS, Steve, Roris and Zahra. Mr Finlayson was seeking an explanation for the payments, and at this point was willing to give Mr Kolasinski the benefit of the doubt. Mr Finlayson was not, however, satisfied with what Mr Kolasinski said to him on the phone, and he wanted to meet with Mr Kolasinski in order for matters to be discussed. They agreed to meet on Monday 4 September 2017.

26. Prior to the meeting on 4 September 2017 Mr Finlayson and Ms Salamucha looked at earlier bank statements. They identified the following payments, which were written by Mr Finlayson by hand at the top of each of the bank statements for January, February, March, April and May 2017[2]:

Month and Name	**Money in**	**Money out**
January 2017		
GK		5,550
Freddy		2k
Roris		3k

[2] Other than the table format and the headings, the information within the table represents exactly what was written by Mr Finlayson at the top of each bank statement for the relevant month (pages 494, 500, 505, 511 and 516 of the bundle).

Steve		2,711
Zahra	20k	
GDS	5k	
February 2017		
Roris		2k
GK		7,050
Freddy		2k
March 2017		
Steve		2,711
Zahra		10k
GK		4.5k
Freddy		2k
GDS	1,475	
April 2017		
GK		5.4k
Zahra		7.5k
Fred		2k
Roris		5k
Zahra	30k	
May 2017		
Steve		1,358
GDS		7k
Fred		2k
GK		£11,930
Roris		900
Iwoca – Ded fund	27k	
GDS	£400	

27. Mr Finlayson also asked Ms Salamucha to provide details in relation to sums received and sums paid out by the respondent during 2015 and 2016.

Ms Salamucha prepared a document identifying the following sums for the period April to December 2015[3]:

2015		
	In	Out
George	£16,000.00	£65,293.62
GDS	£38,035.00	£64,305.00
Steven	£24,000.00	£12,000.00
Dolce Vita	£5,000.00	£5,000.00
Freddie	£20,000.00	
Jowita		£200
	£103,035.00	£146,798.62

28. Ms Salamucha also prepared a document identifying the following sums for the whole of the calendar year 2016[4]:

2016		
	In	Out
George		£71,609.87
GDS	£90,720.00	£88,355.00
Jowita	£20.00	
Roris		£4,000.00
Hamilton		£1,385.00
Zahara		£27,500.00
Freddie		£8,000.00
	£90,740.00	£200,849.87

29. On 30 August 2017, Ms Salamucha sent a document to Mr Finlayson by email showing the 2016 figures set out above. Around this time, Mr Finlayson was also shown the document with the 2015 figures set out above.

[3] This represents exactly what was produced by Ms Salamucha (page 297 of the bundle).
[4] This represents exactly what was produced by Ms Salamucha (page 103 of the bundle).

30. Mr Finlayson's understanding at the time of the names in the left-hand columns listed above (from the bank statements and information provided by Ms Salamucha) was as follows:

a) George / GK: Mr Finlayson understood this represented Mr Kolasinski;

b) GDS: Mr Finlayson understood this represented another company of Mr Kolasinski's;

c) Steven / Steve: Mr Finlayson understood this to be Mr Kolasinski's stepson, who was not an employee of the respondent. Mr Finlayson thought that the payments looked like they might be salary;

d) Dolce Vita: Mr Finlayson was not aware who or what this represented;

e) Freddie / Fred: Mr Finlayson presumed this was a friend of Mr Kolasinski, though he was not certain about this;

f) Jowita: Mr Finlayson understood this represented Jowita Kardasz-Choinska, an employee of the respondent;

g) Roris: Mr Finlayson was not aware who or what this represented;

h) Hamilton: Mr Finlayson was not aware who or what this represented in relation to the respondent, though he was aware of a relationship with a business called Hamilton Electrical in relation to a previous company run by Mr Kolasinski;

i) Zahara / Zhara: Mr Finlayson was not aware who or what this represented;

j) Boost cap: Mr Finlayson understood this to be a loan provided by Boost Capital, though this had not been discussed with him;

k) Taggarts: Mr Finlayson thought that this referred to a car garage, and that the payment of £10,000 appeared to be a deposit on a vehicle.

31. Mr Finlayson was suspicious about the various payments identified from April 2015 onwards, and he was concerned about the possibility of fraudulent activity having taken place. Again, this was due to Mr Finlayson not being aware of any audit trail in relation to the payments. He was concerned that transactions were being created deliberately in order to take money out of the business, and that as such the respondent was being defrauded.

32. On 4 September 2017, Mr Kolasinski and Mr Finlayson met with each other at Mr Finlayson's apartment. Although Mr Finlayson had the bank statements and the other two documents provided by Ms Salamucha, he did not show them to Mr Kolasinski. They had a relatively light-hearted conversation, during which Mr Finlayson again asked for clarification around the payments to which he had referred in the earlier telephone conversations when Mr Kolasinski had been abroad and which related to the bank statements from June and July 2017. With regard to the information in the documents provided by Ms Salamucha, showing payments for 2015 and 2016, Mr Finlayson did not go into specifics, but referred to payments in general terms. Mr Finlayson wanted the conversation to be amicable. He did not say anything to Mr Kolasinski regarding his concerns about the possibility of fraudulent activity. He asked where certain payments had come from and what they were for. Mr Kolasinski explained, in relation to certain payments, that they represented money owed by the respondent which was being repaid.

33. Mr Kolasinski brought the meeting to a close, earlier than Mr Finlayson had expected. There was discussion around reconvening the meeting on Wednesday 6 September 2017. However, that meeting did not go ahead as

Mr Kolasinski cancelled the meeting. The meeting was instead arranged for Friday 8 September 2017.

34. On the morning of 6 September 2017 Mr Kolasinski sent an email to Ms Salamucha in the following terms:

"Hi Agnieszka

Please be advised that I am going to be at Integra on the 8th of September @ 10:30 am.

I would like to discuss with you the following:

1. *Integra's fixed costs - prepare a list for me please*
2. *Report of all clawbacks for the last 12 months*
3. *Report of commission for the last 12 months (I would like you to highlight on the commission report all clawbacks for that period)*
4. *Forecast report for next 24 months*
5. *Payment forecast for next 6 months*
6. *Processes from sale to payment*

Also I would like to let you know that with next few months we will perform an audit actions at Integra. This will be done by Haines and Watts Accounting Firm. The purpose and scope of this audit is to examine and review company's capability and conformance.

Regards,
George"

35. Mr Finlayson was made aware of the above email by Ms Salamucha and Mr Kolasinski's wish to meet with her on 8 September 2017, and to do so at around the same time that Mr Finlayson was also due to meet Mr Kolasinski.

Ms Salamucha informed Mr Finlayson that the Head of Sales, Mr Brian Ferguson, had been asked to attend the meeting.

36. Mr Finlayson believed that an attempt was being made to have him removed from the business, and that the concerns he had regarding payments would be covered up. He believed that he was going to be prevented from raising his concerns formally. Around this time, Mr Finlayson looked into his obligations as a director and understood that he had a responsibility to disclose and report his concerns.

37. During the evening of 7 September 2017, the respondent's Account Manager, Mr Mark Miller, met with Mr Finlayson at Mr Finlayson's apartment. Mr Brown was also at the apartment, having arrived earlier. Mr Miller was aware of Mr Finlayson's concerns regarding certain payments made by the respondent. Mr Miller expressed his concerns regarding this issue and his future with the respondent. Mr Miller was provided with an amended version of his terms and conditions of employment, with the post-employment restrictive covenants having been removed. Mr Finlayson approved the removal of the covenants. Mr Miller signed the amended terms and conditions whilst he was in Mr Finlayson's apartment, and Mr Finlayson signed the amended terms and conditions on behalf of the respondent. Mr Finlayson also endeavoured to alleviate Mr Miller's concerns by explaining that matters needed to be formalised and that there may be a simple explanation for the payments in question. Mr Finlayson then emailed the amended terms and conditions to Mr Miller at 11:45pm on 7 September 2017. Mr Kolasinski was not made aware of this, even though the final decision on whether to release an employee from covenants is his.

38. On 7 September 2017, at 11:28pm, Mr Finlayson sent an email to the respondent's accountant, Mr Richard Gibson of Haines Watts. Mr Finlayson copied the email to the following people: (i) Mr Kolasinski, (ii) another contact at Haines Watts, (iii) his uncle, Mark O'Dowd, who is a lawyer, and (iv) Paul Martin, from a different firm of accountants, McLay, McCallister and

McGibbon, being a firm with whom Mr Finlayson had previously been in touch.

39. The email of 7 September 2017 is in the following terms:

"Dear Mr Richard Gibson,

My name is Mark Finlayson and I am at present a Director of Integra Energy (UK) Limited together with my fellow Director Mr George Kolasinski. It is in my capacity as a Director of the said company, that I write to you in connection with the following.

I understand that you currently act on our behalf in the preparation of our annual accounts and in providing our audits.

During routine compliance checks, it has been brought to my attention that there are several entries in our accounts and bank statements that I am unable to reconcile against legitimate expenditure. Further, I note that the current audited accounts submitted to Companies House appear to have been approved by the board of directors. Together Mr Kolasinski and I make up the board of directors and I was not aware of any board meeting approving these accounts.

As a result of these errors, I have instructed another firm of accountants McLay, McCallister and McGibbon (Paul Martin) who I have copied into this email, to act on behalf of the company to review all of the financial records and statements with a view to resolving any errors in our accounts.

With this in mind, I would be grateful of your full cooperation ask that you treat this as a matter of some urgency.

I have been advised by my solicitor of my own fiduciary duties as a Director and based on the outcome of this review, I may be bound to report this matter to the police.

I would be grateful if you could acknowledge this email and speak directly with Mr Paul Martin to kick off this process.

I will of course send a copy of this letter by post.

Yours sincerely,

Mark Finlayson

Director
Integra Energy (UK) Limited"

40. On 8 September 2017 at 8:47am, Mr Gibson replied to Mr Finlayson, and copied in the others who had been copied into Mr Finlayson's original email. Mr Gibson's email is in the following terms:

"Mark

Thank you for your email.

I note the contents and would be happy to assist in any way.

Could I also suggest you contact Jowita? She has most if not all of the information you may require and would also be able to provide Paul or ourself with access to Xero, your accounts package.

Richard"

41. On 8 September 2017 at 8:54am, Mr Kolasinski replied to Mr Finlayson's email of 7 September 2017. Mr Kolasinski's reply was sent only to Mr Finlayson and was not copied to anyone else. The reply is in the following terms:

"Hi Mark,

Got your email this morning, so I assume that the meeting that we had planned this morning is off. Planned in the meeting this morning they were relevant points to be discussed:

1. *That point was that the director loan logged in company account is the director loan for approx 27K. I was looking to a payment plan to get rid of the director loan account.*
2. *As you know the lease for the flat at Albion Street is under the name of GDS Security. By the end of this month will be totally dissolved so I assume Mark that you be in the position to take over the lease? I will get in touch with Spiers Gummley and I arrange this.*
3. *The point you made in the email reference to having no visibility of accounts I totally disagree with you as a director you have access to Agnieszka, Jowita and the system that we put in to give you total financial visibility was Xero and every transaction is visible.*
4. *One of the major issue I wanted to talk to you was your lack of your time at Integra which has caused problem within the company e.g. process control and control of staff.*
5. *I was going to discuss today your consistency of employing friends and family which does not work for Integra.*
6. *Your comment to bring in the Police Mark has now totally devastated our relationship, as the managing director and 100% of shareholder I am*

suspending you until further notice. Please do not contact any member of the staff or be present in the office.

7. *I spoke with Richard Gibson this morning and hi is going to replay on your email.*

Regards

George Kolasinski
Managing Director of Integra Energy (UK) ltd"

42. Mr Finlayson was therefore suspended from work in the morning of 8 September 2017. The suspension was a reaction by Mr Kolasinski to Mr Finlayson's email and was designed to prevent Mr Finlayson from talking with other members of staff.

43. On 8 September 2017, at around 11:00am, Mr Kolasinski met with Ms Salamucha and Mr Ferguson. Mr Kolasinski had a separate meeting with Mr Brown. He wanted to establish why Mr Finlayson had sent the email of 7 September 2017, and asked Mr Brown whether Mr Finlayson had a drink or drug problem. Mr Kolasinski also asked Mr Brown if Mr Brown knew that Mr Finlayson had asked for 50% of the company.

44. In the afternoon of 8 September 2017, Mr Brown approached Mr Finlayson in relation to his terms and conditions of employment. Mr Brown was concerned about having post-employment restrictive covenants within his terms and conditions. The terms and conditions of employment of Mr Brown were then amended such that the post-employment restrictive covenants were removed. Mr Finlayson approved this and Mr Brown signed the amended terms and conditions late in the afternoon of 8 September 2017. They were signed by Mr Finlayson on behalf of the respondent. Mr Kolasinski was not aware of this amendment having taken place.

45. On 8 September 2017, at 1:33pm and 4:28pm, Mr Ferguson (Head of Sales) sent emails to one of the respondent's partner companies and one of its suppliers, copying in Mr Kolasinski and Ms Salamucha, stating that: *"Mark Finlayson has left the business…" and "Mark Finlayson has left Integra Energy".* Mr Ferguson knew that Mr Finlayson had not in fact left the business. Although Mr Finlayson did not see these emails, he was made aware in the days that followed that others had been told he had left the business.

46. On 10 September 2017, Mr Finlayson sent an email to Mr Kolasinski in the following terms:

"Dear George,

I thought I would take this opportunity to try to reach out to you by email in the first instance and hopefully we could meet on Monday or Tuesday to discuss how we got into this situation and what, with your agreement, we might do to get us through this.

Let me start by saying, and I know you will feel he same, that it's sad that we have allowed things to deteriorate to the level where I honestly believe that you were working to get me out of our business.

I have had several chats with my Uncle Mark who has been trying his best to council me at this time and I know how highly he thinks of you too.

As I mentioned last Monday and again on Friday, as a result of all this I can honestly say that the last few months have been severely stressful and I do think I need to take a few days off this week and resolve these anxieties. I will of course put my doctors line in and would be happy to sit down and discuss this.

I am not entirely sure where all this takes us or indeed what we should to to try and find some common ground or understanding, but I think I can say without doubt that it is with regret that I felt forced to behave in the manner I have recently.

I hope you can at least see that and perhaps we can sit down and have a coffee and talk our way through this. I am more than happy to do this ourselves or if you think my uncle Mark might assist us both to see some sense, I would be ok with that too.

Kind regards,
Mark"

47. This was an attempt by Mr Finlayson to see whether a resolution was possible. He was still seeking an explanation in relation to the transactions he had raised with Mr Kolasinski.

48. On 12 September 2017 Mr Kolasinski sent a letter to Mr Finlayson which confirmed his suspension from work. This letter was prepared by Peninsula. By this time, Mr Kolasinski had been made aware by Ms Salamucha that the terms and conditions of employment of Mr Miller and Mr Brown had been amended. The letter of 12 September 2017 includes the following passages:

"I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of taking part in activities which cause the company to lose faith in your integrity and breach of company rules and procedures namely poaching of employees. As your employer we have the duty to fully and properly investigate this matter.

Suspension from duty on contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigation where it is undesirable for an individual to remain on duty."

49. In a Statement of Fitness for Work, it was explained that Mr Finlayson would be unfit for work until 6 October 2017 due to stress related illness. By letter dated 15 September 2017, Mr Kolasinski confirmed receipt of the Statement of Fitness for Work and stated that the sickness superseded the suspension and that arrangements would be made for statutory sick pay to be paid. Mr Kolasinski also stated that if Mr Finlayson's sickness continued for a prolonged period, then it was likely a medical report would be requested.

50. In a further letter dated 15 September 2017, Mr Kolasinski wrote to Mr Finlayson stating that Mr Finlayson was required to attend an investigation meeting on 22 September 2017. This letter was prepared by Peninsula. The letter stated that the purpose of the investigation was to allow Mr Finlayson the opportunity to provide an explanation in relation to the following matter of concern:

"Allegations of taking part in activities which cause the company to lose faith in your integrity and breach of company rules and procedures namely poaching of employees."

51. The letter of 15 September 2017 stated that the meeting would be conducted by an HR consultant from Peninsula, and that it would be audio recorded with a copy of the transcript being made available to Mr Finlayson. The letter stated that the requirement to attend the investigation meeting was deemed to be a reasonable management instruction and that if Mr Finlayson failed to attend the meeting, or failed to notify the company of a good reason for non-attendance in advance of the meeting, the HR consultant would proceed with the investigation in his absence.

52. By letters dated 15 September 2017, Mr Kolasinski also wrote to Mr Miller and Ms Salamucha requesting their attendance at a fact-finding meeting on 22 September 2017. The letters stated that the meetings would be conducted by an impartial HR consultant from Peninsula, and that the

meetings were being held in an attempt to establish certain facts in relation to an ongoing investigation.

53. On 20 September 2017, Mr Finlayson sent an email to Mr Kolasinski, copying in the following people: (i) Paul Martin from McLay, McCallister and McGibbon, (ii) Richard Gibson from Haines Watts, (iii) his uncle Mark O'Dowd, (iv) Mr Ferguson, (v) Ms Salamucha, and (vi) four individuals from Peninsula. The email is in the following terms:

"Dear George

As you might imagine, I am sincerely disappointed and surprised by your actions since I circulated my email dated Thu 7th September 2017 (attached) in which I raised concerns about your handling of the financial accounting of our business. It is apparent that in light of the concerns I raised about the possibility of you committing fraud, I have now been made homeless and all my company benefits have been withdrawn.

Despite me being a whistle blower and despite me being off sick as a result of stress related illness, you have continued to disregard the law and your responsibilities as a fellow Director, and employer.

To summarise your actions since my allegations on the 7th of September 2017, so far you have:

1. *On the 8th of September, you informed me that you had cancelled the lease on my home, which is held in the name of GDS Radios Ltd, but paid by Integra Energy (uk) Ltd, and I will be made homeless on the 9/10/17.*
2. *The same email on Friday the 8th of September 2017 at 08:54am you Informed me I was Suspended. No reasons were given (see email attached) other than your disapproval of my Hiring policy.*

3. *On Friday the 8th of September 2017 my company phone and email were cancelled.*

4. *On Monday the 11th of September I received an email and several calls from members of staff seeking to relieve me of 'company property', namely the football tickets.*

5. *Between Friday the 8th of September and Tuesday the 12th of September I received calls from my colleagues informing me that you stated that you believed I had a alcohol and or drug problem and did they have any knowledge of it.*

6. *Those same members of staff also informed me that you made it clear to everyone that I would no longer be working in Integra Energy and I would not be back.*

7. *Between Friday the 8th of September and Friday the 15th September various suppliers contacted me and informed me that they had been told that were that I am no longer with the company.*

8. *Letter received Friday the 15th of September suspending me with pay and informing me I was being investigated for poaching employees and I would be informed of a investigation meeting.*

9. *On Monday the 18th of September I received a letter inviting me to attend an investigation meeting, to be held on Friday the 22nd of September at 1:30pm.*

10. *On the 19 September 2017, I received a letter informing me that you had decided to call upon a Directors Loan in the sum of £32,572.84 and that I had to prepare a payment plan as a matter of urgency.*

It is clear to me that I am being persecuted for blowing the whistle on you, having dared raise concerns about your financial conduct in raising money, managing money and paying money between the group of companies owned by you and your associates. The coincidence in timing of your actions

in response to my allegations, is a serious matter and will be properly investigated by the authorities (including HMRC, VAT & Tax) regardless of your attempts to distort employment law.

Further, regardless of your disregard for the law the more you attempt to coerce and manipulate people in your charge, I am confident that law will finally catch up with you.

For the avoidance of doubt, I utterly reject your insinuation that I have behaved in anyway that was against the interests of the business and will respond to these suggestions in due course once I have taken legal advice.

I am still a Director of Integra Energy and you have no authority to subvert the law or my legal rights simply because you feel you can or to distract from the allegations made against you. As a Director, I will continue to act in the best interests of the company and discharge my responsibilities accordingly.

As I mentioned to you in my initial email (7/9/17) raising my fears about your financial misconduct, as a Director I intend to get to the bottom of this and require you and our accountant to provide me and my advisers with detailed evidence of how capital was introduced into the Integra companies.

Despite the seductive nature of your presumed predicament, I would caution all staff member(s) found to be acting on your instructions, to be engaged in any unlawful conduct whether knowingly or not, that they could also face legal proceedings.

Clearly, I will now need to instruct a lawyer and take legal advice with regards to my belief that you have been misappropriating company funds in breach of your legal fiduciary duties as a director, disregarded your duties as an employer and your failure to deliver my shares in the company despite several years of promises.

Once I have taken legal advice, I will be happy to respond to your latest letter in detail.

Finally, as you know, you are in receipt of my medical certificate which covers me for another 3 weeks. Therefore, it is with regret that I can not attend any of these meetings you are inviting me to or indeed any meetings and discussions you are having with the staff in this regard.

I remain a committed to Integra Energy and would be happy to attend any future investigation meetings once I have been given the all clear by my doctor. In the meantime, please make arrangements to have all the financial information sent to me as a matter of urgency so that we can get to the bottom of this.

You will also be aware that I lodged my expenses and the company currently owes me £600. Can you please make good this payment ASAP.

Regards
Mark Finlayson

Director
Integra Energy (UK) Ltd"

54. Mr Kolasinski replied to the above email by letter dated 21 September 2017. This letter was prepared by Peninsula. The letter, which was sent by email and by post on 21 September 2017, states the following:

"Dear Mark

I am writing further to receipt of your email dated 20th September 2017.

The scheduled meeting for Friday, 22nd September 2017 is an investigation meeting. The purpose of the investigation is to get your initial responses to

the allegations as and when they are put to you during the meeting. This is not itself a disciplinary - it is an informal investigation. Failure to attend the meeting will be classed as failure to follow a reasonable management instruction.

I appreciate you are unwell at present, however, as the issues related to the incident that occurred on Thursday, 7th September 2017. This appears to be directly related to the reasons you are absent from work I feel it will be in your best interest to attend the scheduled investigations meeting to alleviate any stress. However, if you feel you are unable to attend then you may take one of the following options:

Send written submissions
Send a representative to the meeting to read a prepared submission from you and to speak on your behalf with your responses
Be prepared to participate in the meeting by being available on the telephone

Any written submissions he wished to make should be sent to me by 5:00pm on Tuesday, 26th September 2017.

If you fail to take one of the above options or provide written submissions, the Consultant will proceed with the investigations in your absence with information available at the time.

If you have any queries regarding the contents of this letter please contact me.

Yours sincerely

George Kolasinski
Managing Director"

55. On 21 September 2017, Mr Finlayson replied by email to Mr Kolasinski. His email was also sent to Ms Salamucha and Mr Ferguson, and was copied to Peninsula and Mr Finlayson's solicitor. The email is in the following terms:

"Hi George,

Thank you for your email today.

For the avoidance of doubt, and to repeat what I said in my email to you dated Wednesday 20th September 2017, I have submitted a medical certificate and can't attend any investigation meetings until I am signed off as fit to work again by my doctor.

Furthermore, I indicated in the same email that I would seek legal representation, and as you can appreciate, you haven't allowed me a reasonable amount of time to do this. I do plan, however, to meet with my lawyer on Friday or Monday to discuss this matter.

Best Regards,

Mark Finlayson
Director
Integral Energy (UK) Ltd"

56. By letter dated 26 September 2017, Mr Kolasinski sent a further reply to Mr Finlayson's email of 20 September 2017. The letter of 26 September 2017 is in the following terms:

"Dear Mark

I acknowledge receipt of your email letter dated 20th September 2017 in which you outlined several grievances and I feel it would be appropriate to address this matter through the Company's formal grievance procedure.

I am therefore writing to inform you that an impartial HRFace2Face Consultant from Peninsula will hear your grievance on ***9th October 2017 at 11:00am at the following location:***

Peninsula
Skypark 5
Unit 4c, 45 Finnieston Street
Glasgow
G3 8JU

The hearing will be audio-recorded and a copy of the transcript will be made available to you.

For ease of reference, I have briefly summarised your issues/concerns below:

1. *You have concerns with me handling of the financial accounting of the business which you raised by email on 7th September 2017.*

2. *You believe as a result of raising these concerns you have been prosecuted for blowing the whistle and made homeless and all company benefits have been withdrawn.*

A copy of your email will be provided to the Consultant and will be discussed and considered with the above matters at the meeting. It is important that you contact me 24 hours in advance of the hearing if you deem the above information to be incorrect, or if you wish to add anything further to the above points.

I enclose for your information a copy of the Company's grievance procedure to which the HRFace2Face Consultant will be making reference.

During this meeting the HRFace2Face Consultant will listen carefully to what you have to say and ensure that if any further investigations seem necessary, a note is made for these to be undertaken afterwards. It is therefore important that you bring with you any paperwork or other evidence you would like the HRFace2Face Consultant to consider as they will only be able to base their recommendations on the information available to them.

You are entitled, if you so wish, to be accompanied by a colleague. If you wish to exercise this right then it is your responsibility to make the arrangements.

As this is your grievance you are expected to make every effort to attend this meeting because if you fail to attend the hearing without good reason, or fail to notify us of the good reason for your non-attendance in advance of the meeting, the HRFace2Face Consultant will proceed with the investigation of your grievance in your absence. In such circumstances, the HRFace2Face Consultant will make their recommendations based upon the information available to them at the time of the meeting. However, in this event, you will be given 2 working days after the scheduled date of the hearing to provide written submissions regarding your concerns to the HrFace2Face Consultant should you wish to do so.

We urge you to attend the hearing in person to avoid the HrFace2Face Consultant having to make findings without having had the benefit of speaking with you.

Please contact me if you have any queries regarding the contents of this letter.

Yours sincerely

George Kolasinski
Managing Director"

57. By email dated 29 September 2017 to Mr Kolasinski, Mr Finlayson resigned from his employment with the respondent. His email starts with the following paragraph:

"Further to recent events, you have left me no choice but to resign and proceed with swift and direct Legal action against Integra Energy (UK) Limited. This decision has not been easy for me however, you have demonstrated to me for a long time now, that you are not a man I can trust and certainly not a man fit and able to work alongside in business. You have destroyed all trust and confidence and so an employment relationship between me and Integra is no longer possible."

58. The email then goes on to address the following points:

(a) Mr Finlayson refers to having been in business with Mr Kolasinski in a previous company in which they were both shareholders. Mr Finlayson states that he had delivered on promises which he had made, and that all he asked in return was that Mr Kolasinski honour the verbal agreement to sign over 50% of the equity of the business.

(b) Mr Finlayson refers to what he described as an agreement in December 2016 regarding the level of their salaries and bonus payments. He states that it was specifically agreed he and Mr Kolasinski would each take salary and bonus as follows:

December 2016:	salary £30,000 each; bonus £5,000 - £10,000 each, after tax
June 2017:	salary £40,000 each; bonus £10,000 - £15,000 each, after tax

The email goes on to state that the next increase was planned for December 2017 with an increase to £60,000 each in respect of salary and additional bonuses of £20,000 each after tax.

(c) Mr Finlayson refers to the occasion in which they met in December 2016 to discuss Mr Finlayson's suggestion that he should be officially recognised as Managing Director, being the role which Mr Finlayson says is the one he has always performed. Mr Finlayson states that Mr Kolasinski *"bizarrely suggested"* that he (Mr Kolasinski) should be named Managing Director. Mr Finlayson states he was puzzled by this largely because Mr Kolasinski knew very little about the business and spent little time there.

(d) Mr Finlayson states that during 2017 Mr Kolasinski delayed and avoided discussions regarding the shareholding and the Managing Director position. He refers to Mr Kolasinski then referring to himself as Managing Director, even though Mr Finlayson says no further conversations had taken place regarding this. Mr Finlayson states that Mr Kolasinski's behaviour became *"unreasonable and childish"*. Mr Finlayson refers to what he says was Mr Kolasinski's *"generally irrational behaviour"* and *"lack of consistency"* which raised questions in the mind of Mr Finlayson about trusting Mr Kolasinski and his ability to act competently and professionally as a director of the respondent.

(e) Mr Finlayson refers to the conversations which he had with Mr Kolasinski in August 2017, when Mr Kolasinski was abroad and Mr Finlayson was asking about why Celtic had not been paid. He states that Mr Kolasinski *"appeared to be hiding something"*. Mr Finlayson states that he then began to look in depth at the accounts and that Ms Salamucha highlighted various expenditure and payments which she did not recognise as relating to the business of the respondent. Mr Finlayson states that he realised Mr Kolasinski had lied to him. He refers to various payments which had not been discussed.

Mr Finlayson states that he *"knew something was badly wrong"* and was wondering how long Mr Kolasinski had been *"stripping money out of the business"*.

(f) Mr Finlayson refers to the meeting which took place on 4 September 2017, and states that it appeared Mr Kolasinski did not intend to stick to what Mr Finlayson says had been a plan of spending the whole week together in order to resolve his concerns. Mr Finlayson refers to the further meeting which was scheduled for 8 September 2017, and Mr Kolasinski contacting Ms Salamucha on 6 September 2017 to arrange a meeting with her and Mr Ferguson on 8 September 2017. Mr Finlayson states that it was clear to him that Mr Kolasinski had no intention of resuming their discussions around shares and finances. Mr Finlayson stated that he therefore decided to notify the accountants and auditors of his concerns and instruct an investigation into the company accounts.

(g) Mr Finlayson states that Mr Kolasinski then manufactured his suspension and began a disciplinary investigation *"without any genuine basis with a view to exiting me from the business before I can discover any more wrongdoing on your part"*. He refers to members of staff making him aware that Mr Kolasinski may be attempting to set up a new *"phoenix business"* to try to *"dodge liabilities and creditors"* and ultimately deprive Mr Finlayson of his 50% shareholding. Mr Finlayson refers to his concern that Mr Kolasinski may be trying to persuade the respondent's biggest debtor allow the debt to be assigned to the *"phoenix company"*. Mr Finlayson states that if this is what Mr Kolasinski is doing then it is illegal and that Mr Finlayson will be *"monitoring any movement you make in this area"*.

(h) Mr Finlayson goes on to say the following:

"Looking back my fate was sealed when I told you that I wanted my 50% of Integra and the title of MD. After that your behaviour towards me changed. The path of my exit was accelerated when told you that I had discovered large sums of money leaving the business to you, your friends and associates for no business related reason. This disclosure was a protected disclosure and your treatment of me since is because I disclosed these matters to you. I have been constructively dismissed as a direct response to having made a protected disclosure. I intend to lodge a tribunal claim for constructive dismissal and whistleblowing. The tribunal is obliged to ask if I want these matters disclosed to a regulator or other body. I will advise the tribunal that I wish HMRC notified in relation to possible tax evasion and matters should also be reported to the Insolvency Service, the Serious Fraud Office and Companies House.

Your latest tactic is to refuse to pay my expenses and to underpay my salary with the deliberate intention of inflicting financial hardship on me. That is of course a breach of my contract of employment."

59. Mr Finlayson's employment terminated with immediate effect from 29 September 2017.

60. At the point when Mr Finlayson's employment terminated, he was on a gross annual salary of £40,000. Mr Finlayson did not receive commission. He received bonus payments on an ad hoc basis, though typically in June and December each year. The amounts were agreed in advance with Mr Kolasinski. He received a bonus payment in June 2017 for the agreed amount. No agreement had been finalised with regard to any bonus for December 2017 or for 2018, or for any increase in salary for 2018.

The Tribunal makes the following findings in fact, relevant specifically to Mr Brown.

61. Mr Brown commenced employment with the respondent on 31 March 2014. Initially, he worked out of the office "in the field" before becoming more office-based from around January 2015. He became involved in developing a training programme for staff. He was involved in meetings with suppliers. and in specific projects such as developing a new website. He was subsequently given the role of Partnerships Manager. In this role Mr Brown dealt directly with his own customer base and also had management responsibility for certain staff members.

62. For a number of years Mr Brown has suffered from periods of anxiety and depression. On at least one occasion, this has been severe. In 2015, on an occasion when Mr Brown and Mr Kolasinski were playing five aside football, Mr Brown mentioned to Mr Kolasinski that he had in the past suffered from mental health issues.

63. On 30 March 2017, Mr Kolasinski sent an email to Ms Salamucha which included the following:

"Employees - I would like to get a monthly report for each employee which shows me the progress of their sales, the report should contains the employee name, how many contracts signed, live date, net profit, employee commission. This should be sent to me no later by 25th of each month."

64. From around April 2017, Mr Brown became aware of tension between Mr Finlayson and Mr Kolasinski. However, he was not party to any discussions between Mr Finlayson and Mr Kolasinski.

65. On 5 April 2017, Mr Kolasinski sent an email to Miss Salamucha asking for a full sales report to be produced for Mr Brown and one other employee, who is Mr Finlayson's cousin. Mr Brown was aware that Mr Kolasinski had requested this of Ms Salamucha, though he did not raise this with Mr Kolasinski. Ms Salamucha informed Mr Brown that there was nothing to worry about.

66. In around July 2017, Mr Ferguson informed Mr Brown that he (Mr Ferguson) was thinking of leaving the respondent in order to start his own competitive business. Mr Ferguson asked Mr Brown not to say anything to Mr Finlayson or Mr Kolasinski about this. Mr Brown nevertheless did inform Mr Finlayson.

67. Towards the beginning of September 2017, Mr Brown became aware of Mr Finlayson's concerns regarding certain payments made by the respondent. On 7 September 2017, Mr Brown went to Mr Finlayson's apartment at around 6:00pm. Mr Brown and Mr Finlayson had a discussion around Mr Finlayson's concerns regarding certain payments made by the respondent. Mr Brown was also concerned about this issue and he understood that Mr Finlayson would formalise his concerns.

68. Later in the evening of 7 September 2017, Mr Miller arrived at Mr Finlayson's apartment. Mr Brown was present during the discussions around Mr Miller's concerns. Mr Brown was present when Mr Miller was issued with and signed an amended statement of terms and conditions of employment.

69. On the morning of 8 September 2017, at around 11:00am, Mr Brown was in the office when Mr Kolasinski met with Ms Salamucha and Mr Ferguson. Mr Kolasinski asked Mr Brown to go into a different office, and then asked Mr Brown whether Mr Finlayson had a drink or drug problem. Mr Kolasinski also asked Mr Brown if Mr Brown knew that Mr Finlayson had asked for 50% of the company.

70. For some time prior to this conversation on 8 September 2017, Mr Brown recognised that he was suffering from the symptoms of anxiety. He had feelings of dread and was seeing the worst possible outcome in every situation. He had not been eating or sleeping properly. He was aware of Mr Finlayson's concerns regarding certain financial matters, and believed the workplace to be a hostile environment. Mr Brown was concerned for his own future at the respondent. He was in a heightened state of anxiety at the

point when Mr Kolasinski spoke with him on 8 September 2017. Particularly given the questions which Mr Kolasinski had asked him about Mr Finlayson, Mr Brown did not consider the working environment to be a healthy one for him.

71. On 8 September 2017, after being asked the above questions by Mr Kolasinski regarding Mr Finlayson, Mr Brown informed Mr Kolasinski that if he had any such questions then he should put them in writing. Following the conversation with Mr Kolasinski, Mr Brown left the office. From that point on, he was on sick leave.

72. Mr Brown was concerned about his future. Having built up good relationships with suppliers, he wanted his options to be open if he was to try to secure alternative employment. He was concerned about having restrictive covenants in place and how this might impact on his ability to secure alternative employment. Therefore, during the afternoon of 8 September 2017 Mr Brown raised with Mr Finlayson his concerns around having restrictive covenants in place. Following this, and late in the afternoon of 8 September 2017, the terms and conditions of employment of Mr Brown were amended such that the post-employment restrictive covenants were removed. Mr Brown signed the amended terms and conditions on 8 September 2017. They were also signed by Mr Finlayson on behalf of the respondent. Mr Kolasinski was not made aware of this, even though the final decision on whether to release an employee from covenants is his.

73. On 8 September 2017, at 1:33pm, Mr Ferguson (Head of Sales) sent an email to one of the respondent's partner companies, copying in Mr Kolasinski and Ms Salamucha, stating that Mr Brown had been suspended. However, Mr Brown had not been suspended and Mr Ferguson was aware of that. Mr Brown did not know that this email had been sent. At 4:28pm on 8 September 2017, Mr Ferguson sent an email to one of the

respondent's suppliers, copying in Mr Kolasinski and Ms Salamucha, stating that Mr Brown was off sick.

74. On 9 September 2017 Mr Brown sent an email to Mr Ferguson, which was copied to Ms Salamucha. This email stated that Mr Brown had made an appointment to see his doctor on 14 September 2017 regarding stress and anxiety which Mr Brown said had been caused by the working environment. Mr Brown also stated in the email that he would call on Monday, 11 September 2017 to confirm that he would not be attending work. He also informed Mr Ferguson and Ms Salamucha in the email that his doctor had treated him for severe anxiety and depression in the past.

75. On 11 September 2017, a letter was prepared (but not sent) from Mr Kolasinski to Mr Brown. The letter states that Mr Brown's employment is being terminated by reason of gross misconduct, as a result of what was said to be the actions of Mr Brown on 7 September 2017 and his *"involvement in an interview process with Mark Finlayson and two others with the view to interview staff for the new company that you are starting"*. This letter was not sent and Mr Brown was unaware of the letter.

76. On 14 September 2017, Mr Brown was signed as being unfit for work by his doctor. The reason given was work related stress and anxiety. Mr Brown sent the Statement of Fitness for Work by email to the respondent.

77. By letter dated 15 September 2017, Mr Kolasinski wrote to Mr Brown stating that Mr Brown was required to attend an investigation meeting on 22 September 2017. This letter was prepared by Peninsula. The letter states the following:

"You are required to attend an investigation because we have had some concerns about your conduct."

78. The letter provided no information regarding the nature of the concerns, and Mr Brown did not know what was being referred to.

79. The letter also stated that the meeting would be conducted by an HR consultant from Peninsula, and that the meeting would be audio recorded with a copy of the transcript being made available to Mr Brown. The letter stated that the requirement to attend the investigation meeting was deemed to be a reasonable management instruction and that if Mr Brown failed to attend the meeting, or failed to notify the company of a good reason for non-attendance in advance of the meeting, the HR consultant would proceed with the investigation in his absence.

80. Although this letter was signed by Mr Kolasinski, it had been prepared by Peninsula and Mr Kolasinski was unaware why the decision was taken to start this disciplinary investigation.

81. Given that he was absent from work on sick leave, Mr Brown did not intend to go to the meeting on 22 September 2017. He was concerned that the meeting would be some sort of ambush.

82. On 19 September 2007 Mr Brown sent an email to Mr Kolasinski, which was copied to Mr Ferguson, Ms Salamucha, Mr Finlayson and four representatives of Peninsula. In this email Mr Brown explained to Mr Kolasinski that, as a result of what he described as *"the continuous management conflict/tensions between yourself, my line manager Mark Finlayson and Brian Ferguson"*, his medical condition (which he explained was depression and anxiety) had resurfaced. He confirmed that he was absent from work on sick leave due to work related stress and anxiety, which had been explained by his doctor on 14 September 2017, and that he had been prescribed Citalopram. He referred to the letter of 15 September 2017 inviting him to attend an investigation meeting. His email continues as follows:

"The letter does not appear to outline any reasonable concerns, and simply suggests that the business now has some concerns about my conduct.

Firstly, I would like to stress how much I love my job, and how much I am looking forward to returning to work, once my doctor considers me fit to do so. As you would expect, I will of course keep you informed and should you require to discuss these matters with my doctor, I would be happy to make an introduction.

I am sure you can appreciate under the circumstances that I will be unable to attend the proposed meeting, provisionally set for Friday the 22nd September 2017.

As I hope you can imagine, your letter and implied concerns, have exacerbated my condition and will unfortunately need to revisit my doctor to discuss matters.

I will also seek to find a legal advisor who may be able to help me understand the implications of your letter and the distressing environment that has been created in Integra by the Management.

I just want to stress, as I said to Brian Ferguson and Agnieszka Salamucha, I am committed to getting myself well and returning to work ASAP where upon I will of course attend any meeting I am required to attend."

83. Mr Kolasinski replied to the above email by letter dated 19 September 2017, which was sent by email (on 19 September 2017) and by post. This letter was prepared by Peninsula. The letter states the following:

"Dear David

I am writing further to receipt of your email dated 19th September 2017.

The scheduled meeting for Friday, 22nd September 2017 is an investigation meeting. The purpose of the investigation is to get your initial responses to the allegations as and when they are put to you during the meeting. This is not itself a disciplinary - it is an informal investigation. Failure to attend the meeting will be classed as failure to follow a reasonable management instruction.

I appreciate you are unwell at present, however, as the issues related to the incident that occurred on Thursday, 7th September 2017 whereby you were present at the meeting involving Mark Finlayson and Mark Miller. This appears to be directly related to the reasons you are absent from work I feel it will be in your best interest to attend the scheduled investigations meeting to alleviate any stress. However, if you feel you are unable to attend then you may take one of the following options:

Send written submissions
Send a representative to the meeting to read a prepared submission from you and to speak on your behalf with your responses
Be prepared to participate in the meeting by being available on the telephone.

Any written submissions you wish to make should be sent to me by 12:00pm on Friday 22nd September 2017.

Please also note that you will be paid Statutory Sick Pay as per your contract. Also a cheque for your expenses in the sum of £39.64 has been issued.

If you have any queries regarding the contents of this letter please contact me.

Yours sincerely

George Kolasinski
Managing Director"

84. By email dated 29 September 2017 to Mr Kolasinski, Mr Brown resigned. His email starts with the following:

"It saddens me that I have been put in a position by events which have taken place, over a number of months, which result in me being forced to leave my job. These events mean I have no trust or confidence in you as a person nor as an employer."

85. Mr Brown's email goes on to address the following points:

(a) Mr Brown states that in March 2017 he had discovered that Mr Kolasinski had instructed a report on his performance. He states that the only other person subject to that scrutiny was another employee, being Mr Finlayson's cousin. Mr Brown states that he felt he was being targeted because of his relationship with Mr Finlayson.

(b) Mr Brown states that a few months later Mr Ferguson had informed him that he (Mr Ferguson) had been contacting other brokers with a view to taking up employment with them. He explained that Mr Ferguson told him not to tell anyone else, and in particular Mr Finlayson. Mr Brown explained that he did tell Mr Finlayson, and that after that he was sure that Mr Ferguson *"plotted to have some kind of revenge on Mark and myself for this"*. Mr Brown refers to what he describes as Mr Ferguson's *"combative nature and bullying manner"* with other employees.

(c) Mr Brown states that he was uncertain of the future, and gradually fell into a state of ill health. He states that Mr Kolasinski has failed to acknowledge that he is ill.

(d) Mr Brown's email concludes with the following

"Your response instead has been an arbitory and generalised HR process inviting me to come in and discuss shadowy, undefined accusations and informing me that it would benefit my health to do so in a completely patronising fashion which lacks any empathy or understanding of anxiety related ill health. I have asked for clarification on what issues regarding conduct you wish to discuss and have been provided no detail or evidence. I appear to be collateral damage on your attack on Mark and you have shown a blatant disregard for my health and well-being. I have no confidence in you or Integra to carry out a fair, transparent process either in this so called investigation or under the grievance process.

You have forced me into resigning from work both by your disregard for my health and by destroying my trust in confidence in you and the management team."

86. Mr Brown's employment terminated with immediate effect from 29 September 2017.

87. At the point when Mr Brown's employment terminated, he was on a gross annual salary of £21,000. He also received commission payments, which were dependant on sales. The amount of commission varied from month to month, though on average would be around £200 to £300 per month.

The Tribunal makes the following findings in fact, relevant to both Mr Finlayson and Mr Brown.

88. By letters dated 3 October 2017, Mr Kolasinski wrote to Mr Finlayson and Mr Brown in response to their resignations. The letters begin by confirming that the respondent had been investigating the following issue:

"Allegations of taking part in activities which cause the company to lose faith in your integrity and breach of company rules and procedures namely poaching of employees."

89. Although the above had been put as an allegation to Mr Finlayson, it had not been put to Mr Brown.

90. The letters state that the intention had been to follow proper disciplinary procedures and that the outcomes had not been pre-judged.

91. The letters refer to Mr Finlayson and Mr Brown having tendered their resignations on 29 September 2017, prior to any potential disciplinary action taking place.

92. The letters state that if Mr Finlayson or Mr Brown wish to withdraw their resignations, they should contact Mr Kolasinski by 9 October 2017 so that the investigation process can be continued.

93. In the letter to Mr Finlayson, Mr Kolasinski asks for confirmation whether Mr Finlayson will be attending the grievance hearing which had been scheduled for 9 October 2017 (as per Mr Kolasinski's letter of 26 September 2017).

94. In the letter to Mr Brown, Mr Kolasinski states that if Mr Brown wishes to raise a formal grievance then he should confirm this in writing by 9 October 2017 and arrangements can be made for a formal meeting to take place.

95. By email dated 4 October 2017, the solicitor for Mr Finlayson and Mr Brown (Michael McLaughlin of DWF LLP) responded on their behalf to Mr Kolasinski. That email includes the following:

"My clients have resigned amidst your rather obvious efforts to manufacture their dismissals for reasons that are detailed in Mark Finlayson's letter. My

clients have no intention of participating in any process, grievance or disciplinary, that is clearly pre-determined and being conducted in bad faith. Further they have no intention of withdrawing their resignations which took effect immediately."

96. By letters dated 6 October 2017, Mr Kolasinski wrote to each of Mr Finlayson and Mr Brown and informed them that a grievance hearing would be taking place in their absence.

97. On 6 October 2017 a consultant from Peninsula prepared a report following an investigation which had been carried out on 22 September 2017. The consultant had been informed that Mr Finlayson and Mr Brown had been asked to attend an investigation meeting on 22 September 2017 to discuss the following:

"Allegations of taking part in activities which caused the company to lose faith in your integrity and breach of company rules and procedures namely poaching of employees."

98. However, that allegation had only been put to Mr Finlayson, and not to Mr Brown.

99. The consultant carried out an investigation in the absence of Mr Finlayson and Mr Brown. She spoke with Mr Kolasinski, Mr Miller and Ms Salamucha. The consultant noted down what was said to her by each of Mr Kolasinski, Mr Miller and Ms Salamucha. Amongst other things, she noted that:

(a) Ms Salamucha said that on 7 September 2017 Mr Finlayson had stated that he was going to release Mr Miller from his contract and set up a new business; and

(b) Mr Miller said that Mr Finlayson had said to him that Mr Finlayson needed to release him from his contract.

100. The report of the consultant dated 6 October 2017 concludes by recommending that Mr Finlayson and Mr Brown be invited to attend a disciplinary hearing (though by this time their employment had terminated).

101. On 1 November 2017 a company called Verve Energy Limited ("Verve") was incorporated. The directors of Verve are Mr Finlayson and Mr Brown. Verve's activities are largely the same as the respondent's, and Verve is a competitor of the respondent. Initially, from the beginning of November 2017, Mr Finlayson and Mr Brown spent relatively little time working in relation to Verve. This was because they both had consultancy work. The consultancy work is in a different line of business to that of Verve and the respondent. Mr Finlayson and Mr Brown are yet to earn an income from Verve. As at the start of October 2018 they have each earned around £12,000 (gross) since the beginning of November 2017 as a result of the consultancy work.

Observations of the witnesses

102. On the whole, I am satisfied that the witnesses give their evidence to the best of their recollection.

103. With regard to Mr Finlayson's evidence on bonus payments, the following is a summary:

(a) He initially said that bonus payments were sporadic, and then explained they are paid in June and December each year.

(b) He said that he thought that in 2016 bonus was about £6,000 or £7,000 and then £13,000 or £14,000 in 2017.

(c) Later in his evidence he said that he expected £30,000 in bonus for the whole of 2017, with £10,000 - £15,000 being outstanding. His

explanation for being entitled to £30,000 in total for 2017 was his contribution to the business. However, his resignation email refers to a *"planned"* increase in bonus for December 2017 of £20,000 after tax, and questioning around this part of the email referred to the *"proposed increase"*. The schedule of loss included in the bundle (page 564) also refers to a payment of bonus due for December 2017 of £20,000. However, this was inconsistent with his oral evidence (which referred to an amount outstanding of £10,000 - £15,000), and when asked about this he said that £10,000 *"is the fair figure".*

(d) Mr Finlayson said in evidence that his expectation for bonus in 2018 would have been £40,000. This is presumably based on £20,000 in each of June and December of 2018. The schedule of loss in the bundle states that this reflects *"the upward trajectory of the business"*, though there was no evidence regarding any such upward trajectory, beyond perhaps Mr Finlayson stating that for 11 or 12 months sales revenue surpassed target. However, no documentation with regard to this was presented. Further, and as noted above, he revised the December 2017 figure from £20,000 to £10,000, but with no suggestion that a similar revisal should apply for 2018.

104. Mr Kolasinski confirmed that there was nothing in writing about bonus payments and no particular formula. He explained that he and Mr Finlayson would discuss bonus payments, and that Mr Finlayson would normally propose a figure. Mr Kolasinski disagreed with the suggestion that a £30,000 bonus had been agreed for 2017 and that £10,000 remained outstanding. In the same part of his evidence (during cross-examination) he also went into some detail regarding the need to look at profitability and clawback, rather than just turnover. This is arguably relevant to what may or may not be the so-called upward trajectory of the business, and again no documentary evidence regarding the financial position was presented. Mr Kolasinski also disagreed with the suggestion that, subject to performance of the business, a £40,000 bonus had been agreed for 2018.

105. Had Mr Finlayson's claim succeeded, I would not have found that any further bonus payments are due. This is due to Mr Finlayson stating, on two occasions (his resignation email and schedule of loss), that £20,000 is due for December 2017 and then changing that to £10,000, but with no supporting evidence to explain where the figure of £10,000 comes from. I do not accept that an agreement had been reached regarding bonus for December 2017 or that any particular level of bonus had been agreed for 2018. I also do not accept the proposition that if I am unable to make a finding regarding a higher rate of bonus being agreed for 2018 then bonus should simply be awarded to reflect the "status quo" and sums paid in 2017. That would be contrary to the evidence and my findings, which are that bonus payments were agreed between Mr Finlayson and Mr Kolasinski but that no agreement had been reached for 2018.

106. Mr Finlayson was also claiming that his salary would have increased in December 2017 to £60,000 (which would be a £20,000 increase). This is also referred to in his resignation email, and again this was stated as being a *"planned"* increase. Questioning around this part of the email again referred to the *"proposed increase"*. The schedule of loss included in the bundle (page 564) also refers to his salary being due to increase to £60,000 *"in line with growth of the business"*, but again no documentary evidence of any such business growth was presented. Mr Kolasinski disagreed with the suggestion that, subject to performance of the business, a £60,000 salary had been agreed for 2018. I do not accept that an agreement regarding this had been reached. Therefore, had Mr Finlayson's claim succeeded, I would not have found that his salary would have been increased to £60,000.

Relevant law

107. The relevant legislation is the Employment Rights Act 1996 (the "ERA").

Constructive dismissal

108. In terms of section 95 of the ERA:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) −**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

109. In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

110. In **London Borough of Waltham Forest v Omilaju** [2004] EWCA Civ 1493, Lord Justice Dyson summarised the position as follows (paragraph 14):

> **1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct**

itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract - see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such

> **incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.'**

111. In **Omilaju** it is further explained there is no need to characterise the final straw as unreasonable or blameworthy conduct, but that an entirely innocuous act on the part of the employer cannot be a final straw.

112. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, Lord Justice Underhill, at paragraph 55, explains the following:

> **In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:**
>
> **1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **2) Has he or she affirmed the contract since that act?**
>
> **3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[5] breach of the *Malik* term? (If it was, there is no need**

[5] Footnote per Lord Justice Underhill: **"I have included 'repudiatory' in the interest of clarity, but in fact a breach of the trust and confidence term is of its nature repudiatory: see per para. 14 (3) of Dyson LJ's judgment in *Omilaju*."**

for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

Unfair dismissal

113. In terms of section 94(1) of the ERA an employee has the right not to be unfairly dismissed by his employer.

114. In order to determine whether a dismissal (including a constructive dismissal) is fair or unfair, the employer must show the reason for dismissal and that it is a potentially fair reason in terms of section 98(2) of the ERA or some other substantial reason of a kind such as to justify the dismissal. If the employer is able to do so, the question of whether the dismissal is fair or unfair falls to be determined with reference to section 98(4).

115. In terms of section 103A of the ERA, an employee who is dismissed is to be regarded as unfairly dismissed if the reason (or principal reason) for the dismissal is that the employee made a protected disclosure.

Protected disclosure

116. A protected disclosure is a qualifying disclosure which is made in accordance with the relevant statutory provisions.

117. A qualifying disclosure is defined in section 43B of the ERA as follows:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

118. Further to section 43C, a qualifying disclosure is protected if the employee makes the disclosure to his or her employer.

Submissions: the claimants

The following is a summary of the submissions presented by Mr Hay on behalf of the claimants:

119. Both claimants gave evidence in a clear, careful and candid manner, with an impressive amount of detail and recall. They are credible and reliable.

120. Mr Kolasinski's demeanour was extremely broad brush. He provided next to no detail in some respects and at times verged on the flippant.

Mr Finlayson

121. Even though bank statements were produced, there was no attempt to engage in the detail of any of those statements. Mr Kolasinski sought to minimise Mr Finlayson's role, even though Mr Finlayson was a director. The fact he was a director lends support to Mr Finlayson's proposition that they were embarking on a joint venture as equal partners.

122. In Mr Finlayson's case, the first issue is repudiatory breach of contract, being breach of trust and confidence. The "unvarnished" **Malik** test applies. See **Bournemouth University v Buckland** [2010] ICR 908. Fairness of a process can be part of trust and confidence (**Watson v University of Strathclyde** [2011] IRLR 458). There are sufficient warning signs to doubt the faith of the process in this case.

123. The final straw need not be a breach in itself: **Omilaju**. In this case, there was a cumulative breach, comprising the following:

(a) Mr Finlayson was suspended for sending the email of 7 September 2017, very shortly after what was a protected disclosure. Mr Kolasinski confirmed that the subsequent letters were devised by Peninsula with no input from him.

(b) There was no just and proper cause for the suspension. If someone is raising concerns about propriety which had an ex facie basis, it is not clear what just and proper cause there is in suspending the individual in bringing those to Mr Kolasinski's attention.

(c) The reason for the suspension seems to change at the beginning of the disciplinary investigation. If the allegation was one of poaching employees, Mr Finlayson did not have covenants in his contract. It is recognised that Mr Finlayson had a fiduciary duty. In any event, there is no evidence to suggest that Mr Finlayson had approached Mr Miller, or it is a matter of dispute. One cannot safely have regard to the content of the documents setting out what was said during the investigation after the resignation had taken effect. Ms Salamucha and Mr Miller did not give evidence before the Tribunal.

(d) Shortly after the suspension, Mr Ferguson sent emails to third parties to suggest Mr Finlayson had left the business. Mr Finlayson came to learn about comments to that effect having been made. It was foreseeable this would get back to Mr Finlayson, as he was closely connected with suppliers and other stakeholders. This must be likely to seriously damage the trust and confidence between employer and employee.

(e) There are minimal details of the allegation in the correspondence. Further to the ACAS Code of Practice, there is an expectation of some indication of what is to be talked about.

(f) The letter to Mr Finlayson of 21 September 2017 amounted to a unilateral decision that the investigation meeting would go ahead. There is an issue of employee welfare. One would expect some sort of investigation into the fit note. Mr Kolasinski was deciding that it was in Mr Finlayson's best interests to take part in the investigation at that time. The suggestion of written submissions was made, even though Mr Finlayson did not know what he was going to be asked.

(g) The final straw is the letter of 26 September 2017 which treats the concerns raised by Mr Finlayson in his email of 20 September 2017 as

a grievance. One might instead have expected there to be some grappling of the concerns and some form of engagement in the detail of what was being raised. Mr Finlayson viewed the letter of 26 September 2017 as a further deflection. Given Mr Finlayson's position, and his concerns about the propriety of the accounting and transactions, this is not what one would normally expect to be treated as a workplace grievance, and it comes at the end of a course of events.

124. The second issue in Mr Finlayson's case is whether the repudiatory breach played a part in Mr Finlayson's resignation. The breach does not need to be the sole or effective cause. See **Wright v North Ayrshire Council** [2014] ICR 77. The resignation email was adopted by Mr Finlayson as being illustrative of exactly how he felt. The cumulative events surrounding the response to the email of 7 September 2017 satisfy the test of "playing a part".

125. The third issue is whether Mr Finlayson made a protected disclosure. Sections 43B(1)(a) and (b) of the ERA are applicable. There are a number of responsibilities which are part of being a director of a limited company. There is a duty to promote the success of the company. There is an obligation not to approve accounts unless they give a true and fair view of assets, liabilities, financial position and profit and loss. Intromissions within the bank accounts: (a) can indicate whether payments made are relevant to proper liabilities in the company (debts owed), (b) are relevant to profit and loss (expenditure versus income), and (c) are linked to liabilities and the profitable state of the company in any financial year. Directors are obliged to prepare company accounts, and as a matter of commercial sense this will be instructed by what one sees as daily intromissions in the bank accounts. There are also obligations in respect of accounting to HMRC, which is informed by what one sees in the day to day financials. Section 172 of the Companies Act 2006 and paragraph 3(3) of schedule 18 of the Finance Act 1998 are relevant. Further, fraud under the common law is a potential

consequence of a return being provided to HMRC which is incorrect or incomplete and known to be so.

126. One is to consider what the information, at the relevant time, tended to show. The meaning of information is to be construed as conveying facts. Information can also cover allegations. See **Cavendish Munro Risks Management Ltd v Geduld** [2010] IRLR 38 and **Kilraine v Wandsworth LBC** [2018] EWCA Civ 1436. An employee does not require to give chapter and verse – it is not an over exacting test. See **Bolton School v Evans** [2006] IRLR 500. The concept of tending to show that something is "likely" should mean "could well happen" (**SCA Packaging Ltd v Boyle** [2009] UKHL 37).

127. There were two disclosures. The first is what was conveyed at the meeting on 4 September 2017, when taken together with what was said during the phone calls when Mr Kolasinski was abroad. Names and payments were mentioned. It is clear that Mr Finlayson (a director) was querying with Mr Kolasinski (the other director), and therefore also his employer, the propriety of certain payments. This was clear from the context, and it was not necessary for specific reference to be made to the Companies Act 2006 (see again **Evans**). The implications are obvious that the propriety of the payments being queried are relevant to the business and this clearly engages questions about intromissions of the company and how those matters are to be featured in accounting to Companies House and in tax returns to HMRC. Therefore, what was said during the phone calls and in the meeting of 4 September 2017 is sufficient to satisfy section 43B.

128. In any event, the second disclosure is also sufficient to satisfy the test. This is the email of 7 September 2017 from Mr Finlayson to Richard Gibson, and copied to others including Mr Kolasinski. This is couched in a clearer and more pointed manner. The email doesn't set out the detail of the payments. However, it can't be construed in a vacuum without reference to what had been communicated prior to this. The email would be understood to relate

to what had been raised by Mr Finlayson in preceding conversations. The email makes specific reference to Mr Finlayson acting in his capacity as a director. There is reference to the duties of a director.

129. There was no obvious explanation for the intromissions noted. The individuals were understood to have some personal connection with Mr Kolasinski, but no business relationship with the respondent. There was no audit trail. The sums involved were substantial. No explanations were provided by Mr Kolasinski. Even at the Tribunal, there has been nothing other than generalised and unsatisfactory explanations. In the absence of an explanation, there could well have been inaccurate statements made in the accounts in respect of the respondent's assets. The belief of Mr Finlayson is expressed in his email of 7 September 2017.

130. The public interest part of the test is satisfied. The public interest is the duties of directors. There is a legal obligation on directors to ensure the corporate veil is not abused. It is difficult to pierce the corporate veil. There is a strong public interest in relation to company transactions and accounting. Although Mr Finlayson accepted he had a personal concern, he also looked into his obligations as a director and considered he had to draw these matters to Mr Kolasinski's attention. The fact there might be a personal interest does not mean there's no public interest. See **Chesterton Global v Nurmohamed** [2018] ICR 731.

131. With regard to automatic unfair dismissal of Mr Finlayson, there is the necessary causal link between the protected disclosure and the dismissal. See **Kuzel v Roche Products Ltd** [2008] ICR 799. Reference is made to the IDS Employment Law Handbook, Volume 14, paragraph 6.23, which states that the question is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of contract. The burden is on the claimant to demonstrate the necessary inference. In this case, there are a number of factors: the reason for the suspension was the email of 7 September 2017; the disciplinary process then began as a

consequence of the email; shortly after, Mr Finlayson was being represented as having left; Mr Finlayson's concerns were viewed as an annoyance; there was no attempt to explain about the payments in question.

132. If the protected disclosure was not the reason for the breach, or there was no protected disclosure, there is no potentially fair reason for dismissal. There is no evidence about what might have happened in relation to a conduct investigation.

133. With regards to remedy, the statutory cap is to be disapplied. See **Cooper Contracting v Lindsey** UKEAT/0184/15 with regard to mitigation of loss. Alternative work was secured soon after Mr Finlayson's resignation, and it was not unreasonable to set up his own venture with Mr Brown. Evidence needs to be considered with regard to salary and bonus and any future increases. Reference is made to the schedule of loss.

134. The claim for unauthorised deduction from wages is not pursued.

Mr Brown

135. With regard to Mr Brown, the first issue is whether the respondent breached the implied term of trust and confidence. Mr Kolasinski requested reports of his sales performance. More significantly, an investigatory meeting was convened in respect of a completely unparticularised allegation – no allegation was ever provided, which is striking. With regards to whether conduct was "calculated or likely" to destroy trust and confidence, a dismissal letter had been drafted by 11 September 2017, and Mr Ferguson had represented to others that Mr Brown had been suspended.

136. There was a unilateral determination in the letter of 19 September 2017, in the face of a sick note including work place stress, that the investigatory meeting would go ahead. This raises an employee welfare issue and also the ability of Mr Brown to participate where he is unaware of the nature of

the allegation. Mr Brown's health considerations cannot be ignored. He had struggled with depression in the past and had previously advised Mr Kolasinski of this. He was in a more vulnerable position.

137. The final straw is the letter of 19 September 2017. There was no affirmation. The respondent's breach played a part in the resignation. Assuming that Mr Brown was constructively dismissed, no potentially fair reason for dismissal has been demonstrated.

138. Mr Brown's evidence regarding average commission of £200 (gross) per month should be accepted. Compensation should be awarded to Mr Brown as per the schedule of loss.

Submissions: the respondent

The following is a summary of the submissions presented by Mr MacLean on behalf of the respondent:

Mr Finlayson

139. With regard to the issue of the protected disclosure, the question is whether the information provided by Mr Finlayson gets over the barrier of becoming a qualifying disclosure. Refer to **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436. There has to be sufficient factual content and specificity, and Mr Finlayson has not demonstrated that was the case. He was aware of monies coming out of the account. However, he doesn't know what they were used for: he didn't know at the time and doesn't know now. He's asking the Tribunal to infer they were a breach of a legal obligation or of a criminal nature, however there has to be enough there to realise where the potential breach is. We have allegations of misappropriation and possible illegal acts and possible breaches of legal requirements, but they were due to lack of knowledge at the time. Mr Finlayson accepted that during his discussions with Mr Kolasinski he did

not go into the detail. The email of 7 September 2017 demonstrates that Mr Finlayson did not know what the payments were for. The email goes on to say that he has instructed another firm of accountants to review matters with a view to resolving any errors. He has concerns, but there is a lack of detail. This is not a qualifying disclosure. In addition, the public interest test has not been met as Mr Finlayson confirmed in evidence that this was a matter of personal interest.

140. Regarding constructive dismissal, the bulk of Mr Finlayson's reasons for resigning in his email of resignation was his concerns about his payments and bonuses.

141. Suspension was appropriate, given that Mr Finlayson is a director and the email of 7 September 2017 was raising concerns with staff and talked about going to the police. The suggestion is there was no genuine basis for a disciplinary investigation. However, Mr Finlayson's evidence was that he was responsible for issuing contracts. If you look at Mr Finlayson's actions at the time, he put at least two if not three members of staff in a state of anxiety about the future of the company based on his preconception that the company was being raided of funds and would cease trading. He released them from their covenants without discussing it with Mr Kolasinski. It is claimed there was a lack of information, however he did things behind Mr Kolasinski's back, and he has his own fiduciary duties. Mr Finlayson was suspended on the morning of 8 September 2017, and yet on the same afternoon he releases Mr Brown from covenants. Therefore, to say there were no grounds for a disciplinary investigation does not coincide with the evidence which was heard.

142. If there was a dismissal, there is a potentially fair reason, i.e. conduct with regard to spreading rumours and releasing key members of staff which would allow them to walk away. The letters to Mr Finlayson are clear. There are also reports from HR. They were prepared by an independent person

and show a different picture in terms of Mr Miller. However, it may be that little weight can be given to them, and they can potentially be disregarded.

143. The basic award should be based on four years, and not six years.

144. There is no evidence as to how bonuses were calculated, other than the two directors discussed it. Mr Kolasinski did not agree to an increase in the bonus, and in the absence of a formula it would not be appropriate to make any award with regard to future bonus.

145. A salary increase of £60,000 was not agreed. There is nothing in writing. It would be inappropriate to accept that would have taken place.

146. There is no reason to doubt the evidence that his earning level has been approximately £2000 per month. However, in terms of future mitigation Mr Finlayson did not say anything directly about earnings and future prospects. The amount in respect of future mitigation (£6000) is questionable. The sums expected from the consultancy work are halved but with no corresponding uplift in terms of work from the new venture.

147. A reduction in compensation of up to 25% due to the failure by Mr Finlayson to engage in a grievance process should be considered.

Mr Brown

148. Mr Brown has been caught up in the aftermath. He was influenced by being given a negative perception of matters. He's relying on trust and confidence, yet no formal grievance was raised.

149. The letters from the respondent were not up to standard, and there should have been clarity. However, the respondent said it would have an investigation meeting and it may have proved to be the case that the concerns had no basis in fact and that Mr Brown could have refuted them.

150. In Mr Brown's case, it is more difficult to show a potentially fair reason for dismissal, as there are very few facts as to what was happening at the time. However, by seeking to be removed from the covenants, there is at least a suggestion that he was going to a competitor or setting up in competition. There is very little evidence, though this was a concern in the respondent's mind.

151. The figures in the schedule of loss are accepted, except that Mr Brown said (through his solicitor) he would not engage in any discussion, and again a reduction in compensation should be considered.

Submissions: response for the claimants

The following is a summary of Mr Hay's response to Mr MacLean's submissions:

152. With regard to protected disclosure, we are looking at reasonable belief. The fact that one does not have an explanation is not determinative. A person may have a concern which comes to nothing. The issue regarding alleged misappropriation was the absence of an audit trail. The email of 7 September 2017 cannot be construed in a vacuum. The earlier conversations are relevant. There was a personal interest, and also a public one.

153. The formulation of Mr Finlayson putting people in a state of anxiety was not stated at the time. Mr Finlayson entertained beliefs about impropriety and there were actions of Mr Kolasinski which were called into question.

154. There is nothing in the ET3 regarding a potentially fair reason for dismissal. The onus is on the employer to establish a reason for dismissal, and this has not been demonstrated in this case, for either claimant.

155. Evidence of calculation of bonus is not necessary. If the Tribunal accepts Mr Finlayson's evidence, this was agreed. If the Tribunal cannot make a finding of an increased future bonus, then the status quo would be the 2017 figure. This applies to salary as well.

156. With regard to mitigation, there was some discussion around salaries expected to be drawn which would form the basis of future loss.

157. Regarding the ACAS Code of Practice, the failure to comply has to be unreasonable. If it is accepted there were material breaches, it is difficult to say that the failure is unreasonable. In response to the suggestion that the respondent was denied an opportunity to put matters right, the respondent cannot unilaterally remedy its own breach.

158. The reason for the suspension of Mr Finlayson changes, with no explanation. It does not follow that because the status of a person was high then that of itself merited suspension.

159. With regard to the HR report, this cannot be relied upon when at the same time it is recognised it hasn't been spoken to in evidence.

Discussion

Mr Finlayson

160. I will firstly consider the claim brought by Mr Finlayson.

161. The first issue is the following:

Was the claimant constructively dismissed, in that:

a) did the respondent without just and proper cause conduct itself in a manner calculated or likely to destroy the relationship of

mutual trust and confidence between it and the claimant, thus committing a material breach of contract; and

b) if so, did the respondent's breach play a part in the claimant's resignation?

162. It is worth repeating the guidance set out by the Court of Appeal in **Kaur**, in order to ensure the correct questions are asked:

1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

2) Has he or she affirmed the contract since that act?

3) If not, was that act (or omission) by itself a repudiatory breach of contract?

4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

5) Did the employee resign in response (or partly in response) to that breach?

163. With regard to the first question in **Kaur**, the act which it is said triggered the resignation was the letter dated 26 September 2017 from Mr Kolasinski. This letter was sent as a reply to Mr Finlayson's email of 20 September 2017, and explained to Mr Finlayson that the concerns being raised in his email were being treated as a grievance, and that a grievance hearing was being scheduled for 9 October 2017.

164. With regard to the second question in **Kaur**, Mr Finlayson did not affirm the contract after receiving the letter of 26 September 2017. He resigned only three days later when he was still on sick leave.

165. With regard to the third question in **Kaur**, I do not consider the letter of 26 September 2017 to have been, in itself, a repudiatory breach of contract. I do not consider the letter can reasonably be construed as *"conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"* (**Western Excavating**). On the contrary, the letter was inviting Mr Finlayson to attend a meeting at which he would have an opportunity to express his concerns and have them considered in the context of a grievance meeting. This is not evidence of an employer which no longer intends to be bound by an essential term of the contract. It was also not being suggested on behalf of the claimant that the letter was itself a repudiatory breach.

166. It is the fourth question in **Kaur** which is particularly relevant to this claim. This is the question which asks whether the most recent act (in this case the letter of 26 September 2017) was *"nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term".*

167. As set out above, it is argued on behalf of the claimant that the course of conduct is the following (in summary):

(a) Mr Finlayson was suspended for sending the email of 7 September 2017, very shortly after what was a protected disclosure.

(b) Shortly after the suspension, Mr Ferguson sent emails to third parties to suggest Mr Finlayson had left the business.

(c) The reason for the suspension changes. If the allegation was one of poaching employees, Mr Finlayson did not have covenants in his contract (though it is recognised he had a fiduciary duty). In any event, there is no evidence to suggest that Mr Finlayson had approached Mr Miller, or it is a matter of dispute.

(d) There are minimal details of the allegation in the correspondence.

(e) The letter to Mr Finlayson of 21 September 2017 amounted to a unilateral decision that the investigation meeting would go ahead. There is an issue of employee welfare. The suggestion of written submissions was made, even though Mr Finlayson did not know what he was going to be asked.

(f) The letter of 26 September 2017 inviting Mr Finlayson to a grievance meeting. This was the final straw.

168. Mr Kolasinski suspended Mr Finlayson on the morning of 8 September 2017, after seeing the email of 7 September 2017. He felt he had to react to the email. Mr Kolasinski's reasons for suspending Mr Finlayson were that he believed Mr Finlayson was alleging fraudulent activity and he was concerned Mr Finlayson may speak with other members of staff. On one view, Mr Finlayson was perhaps a little heavy handed by stating in his email that he may be bound to report his concerns to the police, particularly because at that point he and Mr Kolasinski had not concluded their discussion which had started on 4 September 2017. Mr Kolasinski was not aware of Mr Finlayson's concerns regarding what he believed may be misappropriation of funds, and it is understandable that the comment about potentially reporting matters to the police was surprising to Mr Kolasinski. Nevertheless, given that Mr Finlayson was raising concerns about expenditure and the company accounts, and doing so directly with the company's accountant, and as the email amounted to a protected disclosure

(as explained later in this Judgment), I agree that the act of suspension was without proper cause. Then, in the afternoon of 8 September 2017, Mr Ferguson informed third parties that Mr Finlayson had left the business, when that was not the case.

169. On 10 September 2017, Mr Finlayson sent an email to Mr Kolasinski in reasonably friendly terms, in an attempt to see if there was some scope for a resolution. The email includes the following:

I am not entirely sure where all this takes us or indeed what we should do to try and find some common ground understanding, but I think I can say without doubt that it is with regret that I felt forced to behave in the manner I have recently.

I hope you can at least see that and perhaps we can sit down and have a coffee and talk our way through this. I am more than happy to do this ourselves or if you think my uncle Mark might assist us both to see some sense, I would be ok with that too.

170. Therefore, notwithstanding his suspension from work, Mr Finlayson chose to try to engage with Mr Kolasinski. Notably, by the time Mr Finlayson had sent the above email on 10 September 2017, he had authorised the amendment of the contracts of employment of both Mr Brown and Mr Miller, but had made no mention of this to Mr Kolasinski.

171. By 12 September 2017 Mr Kolasinski became aware that the contracts of employment of Mr Miller and Mr Brown had been amended, such that the restrictive covenants had been removed. As noted by Mr Hay on behalf of Mr Finlayson, the reason for suspension essentially changed, as evidenced by the letter of 12 September 2017. An allegation of poaching employees was put to Mr Finlayson.

172. It is argued on behalf of Mr Finlayson that putting this allegation contributed to a cumulative breach because: he had no covenants in his contract; there was no evidence that he was actually poaching other employees; and that poaching is different to simply amending the contract without reference to Mr Kolasinski. It is also said that Mr Miller instigated the change to his contract, meaning therefore that Mr Finlayson did not have any intention to procure Mr Miller's services for another venture. I presume the same argument applies in relation to Mr Brown's contract also having been amended.

173. I do not agree with these arguments. Mr Kolasinski had become aware that Mr Finlayson had authorised the material amendment of the contracts of employment of two senior members of staff. He was concerned about the possibility of poaching. He therefore put an allegation which was then to be investigated. The fact that the letter of 12 September 2017 could have been framed differently, such that the allegation could have referred more directly to the removal of covenants, is immaterial. In the context of covenants having been removed, poaching is a legitimate concern and Mr Kolasinski cannot reasonably be criticised for framing the allegation in the way he did. Even though Mr Finlayson was not himself subject to restrictive covenants, he was a director with fiduciary duties (which was acknowledged in the course of submissions), and again the possibility of him poaching employees was a legitimate concern for Mr Kolasinski to have. Further, Mr Kolasinski did not need to have definitive evidence of poaching at that time. At the point of the allegation being made, Mr Kolasinski was not in a position to determine whether Mr Miller and Mr Brown requested that the covenants be removed or whether Mr Finlayson instigated the removal of the covenants. All Mr Kolasinski knew was that contracts had been amended to a material extent. At that time Mr Kolasinski had a legitimate basis on which to commence an investigatory process. Mr Finlayson could have opted to engage in the process and explain his position.

174. However, Mr Finlayson chose not to engage in the investigatory process. This is because, as he said in his email of 20 September 2017, he took the view that being asked to attend an investigation meeting was an example of being persecuted for blowing the whistle. However, this fails to distinguish between the actions of Mr Kolasinski in suspending Mr Finlayson having received the email of 7 September 2017, and the actions of Mr Finlayson himself in authorising the removal of restrictive covenants from the contracts of employment of two senior members of staff. The commencement of the investigatory process is a separate matter from the email of 7 September 2017. Mr Kolasinski was entitled to react to the circumstances around contracts of employment being amended to a material extent without his knowledge or agreement. The fact that Mr Finlayson sent the email of 7 September 2017 did not preclude Mr Kolasinski starting a disciplinary process, as Mr Finlayson had conducted himself in a manner which justified an investigation being started.

175. I also do not accept the suggestion that there were minimal details within the allegation. The allegation was: *"taking part in activities which cause the company to lose faith in your integrity and breach of company rules and procedures namely poaching of employees".* Mr Finlayson was not being invited to attend a disciplinary hearing. He was being invited to attend an investigatory meeting, and I consider that sufficient detail was provided at that stage, bearing in mind a matter of days earlier he had personally authorised the removal of restrictive covenants from the contracts of employment of two senior members of staff.

176. Mr Finlayson's email of 20 September 2017 raises a number of concerns, including the allegation of poaching, though he concludes his email with the following:

I remain a committed to Integra Energy and would be happy to attend any future investigation meetings once I have been given the all clear by my doctor. In the meantime, please make arrangements to have all the financial

information sent to me as a matter of urgency so that we can get to the bottom of this.

177. Mr Finlayson therefore confirms a willingness to engage.

178. Mr Kolasinski replied to this email with two letters. The first was his letter of 21 September 2017. The argument on behalf of Mr Finlayson is that this was Mr Kolasinski essentially making a unilateral decision as to what he felt was in Mr Finlayson's best interests, in circumstances where Mr Finlayson was suffering from work-related stress. The letter states that if Mr Finlayson feels he is unable to attend the investigation meeting then he could send written submissions, send a representative or be available by telephone. In the circumstances, I consider this to have been appropriate particularly given that the allegation of poaching was a serious one and Mr Finlayson was a director with fiduciary duties. It was appropriate for Mr Kolasinski to try to progress matters in the way the letter suggested. I also do not accept the suggestion that Mr Finlayson did not know what the investigation was about, given that he had personally authorised the material amendment of two contracts. His email of 20 September 2017 also stated that he would in due course respond to the suggestion that he had behaved in a way which was against the interests of the business. He was not suggesting in the email that he did not know what was being alleged.

179. Given my findings above in relation to the investigation process, I do not agree that the allegation of poaching or the correspondence which followed amounted to conduct of the respondent which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the respondent and Mr Finlayson. These actions, when viewed objectively, did not amount to or contribute to a breach of the **Malik** term.

180. I have a different view with regards to the suspension on 8 September 2017 and the actions on that date of Mr Ferguson. Therefore, it seems to me that the relevant course of conduct can only be those acts of 8 September 2017

when viewed cumulatively with the letter of 26 September 2017, but only if that letter is a final straw.

181. It is therefore necessary to consider whether the letter of 26 September 2017 is a final straw. In order to determine this, I have regard to the following passages from **Omilaju** (paragraphs 20 – 22):

> **The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.**
>
> **If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.**
>
> **Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer.**

182. The letter of 26 September 2017 states that Mr Finlayson's email of 20 September 2017 outlines several grievances and that Mr Kolasinski considers it appropriate to address the matter through the formal grievance procedure. The letter invites Mr Finlayson to a grievance meeting with an impartial HR consultant, and continues as follows:

"For ease of reference, I have briefly summarised your issues/concerns below:

1. *You have concerns with me handling of the financial accounting of the business which you raised by email on 7th September 2017.*

2. *You believe as a result of raising these concerns you have been prosecuted for blowing the whistle and made homeless and all company benefits have been withdrawn.*

A copy of your email will be provided to the Consultant and will be discussed and considered with the above matters at the meeting. It is important that you contact me 24 hours in advance of the hearing if you deem the above information to be incorrect, or if you wish to add anything further to the above points.

I enclose for your information a copy of the Company's grievance procedure to which the HRFace2Face Consultant will be making reference.

During this meeting the HRFace2Face Consultant will listen carefully to what you have to say and ensure that if any further investigations seem necessary, a note is made for these to be undertaken afterwards. It is therefore important that you bring with you any paperwork or other evidence you would like the HRFace2Face Consultant to consider as they will only be able to base their recommendations on the information available to them."

183. It is argued that this letter is a final straw because, given Mr Finlayson's position and his concerns about the propriety of the accounting and transactions, this is not what one would normally expect to be treated as a workplace grievance, and it comes at the end of a course of events.

184. I do not agree with this argument. The letter of 26 September 2017 makes reference to Mr Finlayson's concerns regarding Mr Kolasinski's handling of the financial accounting of the business which, the letter acknowledges, were raised in the email of 7 September 2017. The letter also acknowledges that Mr Finlayson has other concerns which, according to Mr Finlayson, arise from him having raised questions around the financial accounting of the business. Therefore, Mr Kolasinski is acknowledging the essence of Mr Finlayson's concerns and inviting him to a meeting, with an HR consultant, in order for this to be considered and for any investigations to be carried out. The suggestion being made on behalf of the claimant is that, given the nature of the concerns, this is not a matter which should have been treated as a workplace grievance. It was submitted that there should instead have been some form of engagement in the detail of what was being raised. However, I consider that the letter of 26 September 2017 does just that, as it starts a process which would, on the face of it, have involved an engagement by the respondent in the detail of what was being raised. Therefore, the letter of 26 September 2017 was essentially presenting Mr Finlayson with the very approach which he says the respondent should have taken. The fact that Mr Kolasinski did not engage in the detail at an earlier point to the satisfaction of Mr Finlayson does not mean that the letter of 26 September 2017, which opens up the scope for discussion, can rightly be treated as a final straw.

185. Further, prior to sending the email on 7 September 2017 Mr Finlayson believed that he was going to be prevented from raising his concerns formally. In his apartment that evening, when he was discussing matters with Mr Miller and Mr Brown, he discussed raising his concerns formally, with a view to seeing whether there was a simple explanation. That led to

the email of 7 September 2017. What the letter of 26 September 2017 shows is that the respondent was willing to address Mr Finlayson's concerns in a formal way, which is contrary to what Mr Finlayson believed the respondent would do. In other words, the letter was providing the very approach which Mr Finlayson was initially concerned would not be provided.

186. It is also clear from Mr Finlayson's email of 20 September 2017 that he was not only concerned about financial issues, but also about the way he had been treated by Mr Kolasinski. His email of 20 September 2017 refers to a number of issues, including the investigation into the allegation of poaching employees and Mr Kolasinski's duties as an employer. Mr Finlayson also states that he remains committed to the respondent and would be happy to attend investigation meetings once he has been given the all clear by his doctor. His Statement of Fitness for Work noted that he would be unfit for work until 6 October 2017.

187. This matter needs to be looked at objectively. When I do so, and when I take into account the content of Mr Finlayson's email and his unfitness for work until 6 October 2017, I conclude it was appropriate for Mr Kolasinski to send a letter which invited Mr Finlayson to attend a grievance meeting to discuss his concerns, with an impartial person, on 9 October 2017. Indeed, had the respondent not treated the email of 20 September 2017 as a grievance, that could potentially have been viewed as an omission which amounted to a final straw. I do not consider it would be just for an employer which endeavours to follow due process and procedure (even if it has not done so at an earlier point) to have such actions treated as a trigger for a claim for constructive dismissal. Had Mr Finlayson remained in employment, he may well have found that at some later date an act or omission would have occurred which would have amounted to a final straw and therefore, at least potentially, presented him with the right to resign and claim that he had been constructively dismissed. I do not believe, however, that being sent the letter of 26 September 2017 presented him with that right.

188. I therefore conclude, using the language of **Omilaju**, that the letter of 26 September 2017 is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence. I consider the letter of 26 September 2017 to be entirely innocuous. The claim for constructive (and unfair) dismissal therefore does not succeed.

Alternative conclusion

189. Had I found that the letter of 26 September 2017 was a final straw, then I would have concluded that there was a repudiatory breach which consisted of the following course of conduct:

(a) the suspension of Mr Finlayson on 8 September 2017;

(b) the emails from Mr Ferguson on the same day; and

(c) the letter of 26 September 2017.

190. I would have then gone on to consider the next issue, which is whether the repudiatory breach played a part in the decision to resign.

191. Mr Finlayson's resignation email of 29 September 2017 refers to a number of issues. However, it is sufficient to be able to show that the repudiatory breach played a part in the decision to resign. It does not need to be the sole or predominant reason.

192. Mr Finlayson's email of 29 September 2017 is very detailed and is referred to in more detail above. In summary, a significant part of it relates to his concerns around not being issued shares or given the job title of Managing Director, and the fact that Mr Kolasinski was referring to himself as Managing Director. He refers to his concerns around payments and his belief that Mr Kolasinski had been lying to him. He refers to the meeting on 4 September 2017 and Mr Kolasinski arranging to meet other members of

staff on 8 September 2017. He explains that having concluded that Mr Kolasinski had no intention of entering into a constructive dialogue and listen to his concerns, he sent the email of 7 September 2017. Mr Finlayson states that Mr Kolasinski then manufactured his suspension and began a disciplinary investigation *"without any genuine basis with a view to exiting me from the business before I can discover any more wrongdoing on your part"*. The email goes on to refer to Mr Finlayson having heard that Mr Kolasinski was attempting to set up another business *"to try to dodge liabilities and creditors"* and deprive Mr Finlayson of his 50% share in the business. He states that Mr Kolasinski's behaviour towards him changed when Mr Finlayson told him that he wanted his 50% share in the business and the title of Managing Director. He says that the path of his exit was accelerated when he made a protected disclosure.

193. When referred to this email in evidence, Mr Finlayson confirmed that this was exactly how he felt. It is clear that Mr Finlayson resigned for the reasons set out in his very detailed email of resignation.

194. It was argued that the cumulative events surrounding the response to the email of 7 September 2017 satisfy the test of "playing a part". However, that assumes that all of the stated events were in response to the email of 7 September 2017 and that together they amount to a repudiatory breach. If that had been the case, then the breach would have played a part in the decision to resign, as Mr Finlayson refers to the investigation in his resignation email.

195. However, I have found that it is only certain events, on 8 September 2017, which were in response to the email of 7 September 2017, and for present purposes I will assume the letter of 26 September 2017 was also in response to that email. The difficulty is there is very little, if anything, in the resignation email which suggests that these events played a part in the decision to resign. No mention is made of the actions of Mr Ferguson. No mention is made of the letter of 26 September 2017 inviting Mr Finlayson to attend a

grievance meeting, even though that is stated as being the final straw. Although the suspension is mentioned, this is in the context of a *"disciplinary investigation without any genuine basis"*. I have found that the disciplinary investigation did have a genuine basis and did not amount to or contribute to a breach of trust and confidence.

196. Therefore, of the three events which would amount to a repudiatory breach of contract (had I found that the letter of 26 September 2017 was a final straw), two of them are not mentioned at all in the resignation email, and whilst one of the events (the suspension) is mentioned, this is in the context of the disciplinary investigation which I have concluded did not amount to or contribute to any breach of contract.

197. This leads me to conclude that the three events which I have said would amount to a repudiatory breach (if there had been a final straw) in fact played no part in the decision to resign. Therefore, had I found that the letter of 26 September 2017 was a final straw, I would have concluded that the repudiatory breach did not play a part in the decision to resign and that Mr Finlayson was not constructively dismissed.

Protected disclosure

198. Notwithstanding my findings above, I consider it appropriate to address the question of whether Mr Finlayson had made a protected disclosure. I wish to do this because this issue formed a significant part of the evidence and the submissions.

199. The issue of whether Mr Finlayson had made a protected disclosure is in the following terms:

Did the claimant make a protected disclosure, in that did the claimant disclose to the respondent information which, in the reasonable belief of the claimant, tended to show that:

a) a person had failed, was failing or was likely to fail to comply with a legal obligation; and/or

b) a person had committed, was committing or was likely to commit a criminal offence.

and, if so, was any such disclosure made in the public interest?

200. It was submitted there were two protected disclosures: the meeting of 4 September 2017 and the email of 7 September 2017.

201. The first question is whether the disclosure is a qualifying disclosure under section 43B of the ERA. The Court of Appeal in **Kilraine** says the following (paragraph 35):

The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).

202. During the telephone discussions with Mr Kolasinski in August 2017, and then during the meeting on 4 September 2017, Mr Finlayson referred to certain payments made from the respondent's account. However, all he was

doing at that stage was asking Mr Kolasinski questions in relation to certain payments. On 4 September 2017, they had a relatively light-hearted conversation. Mr Finlayson wanted the conversation to be amicable. He was just looking for an explanation. He did not say anything to Mr Kolasinski regarding his concerns about the possibility of fraudulent activity. Therefore, I am not satisfied that these discussions contained *"sufficient factual content and specificity"* such that what Mr Finlayson said tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject or that a criminal offence had been, was being or was likely to be committed. I do not consider, therefore, that what was said during the meeting on 4 September 2017 amounted to a qualifying disclosure.

203. Mr Finlayson then sent the email of 7 September 2017. The email is written to the respondent's accountant, and copied to Mr Kolasinski and others. Although Mr Finlayson does not refer to specific payments in this email, he does state that he is aware of there being several entries in the respondent's accounts and bank statements which he is *"unable to reconcile against legitimate expenditure"*. He further states that the current audited accounts submitted to Companies House appear to have been approved by the board of directors, even though he (as a director) was unaware of any such board meeting. He goes on to refer to his own fiduciary duties and raises the prospect of being bound to report the matter to the police.

204. It is argued on behalf of the respondent that the email of 7 September 2017 demonstrates that Mr Finlayson did not know what the payments were for, and that although he had concerns there is a lack of detail. However, I agree with the submission on behalf of Mr Finlayson that one is to consider what the information, at the relevant time, tended to show. I also agree there is no requirement to set out exactly what the legal issues are. In **Evans**, the Employment Appeal Tribunal explained the following (paragraph 41):

> **It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability.**

205. Similarly, in the present case it would have been obvious to Mr Kolasinski that Mr Finlayson's concerns related to the legal obligations of directors, including under the Companies Act 2006. Mr Kolasinski is the owner of the respondent, which is a limited company, and he is a director. He has a duty to promote the success of the company (section 172 of the Companies Act 2006). The directors of a limited company have obligations under sections 393 and 394 of the Companies Act 2006 with regard to annual accounts being prepared and providing a true and fair view of the assets, liabilities, financial position and profit or loss of the company. Given that Mr Finlayson was expressing concerns around legitimate expenditure and the approval of the company's accounts, it would have been obvious to Mr Kolasinski that Mr Finlayson was concerned about whether obligations under the Companies Act 2006 were being met.

206. Further to **Kilraine**, the disclosure *"should be assessed in the light of the particular context in which it is made"* (paragraph 41 of **Kilraine**). In the present case, the context includes Mr Finlayson having raised questions around certain payments during discussions with Mr Kolasinski prior to sending the email (the email then referring to the bank statements of the respondent and the issue of legitimate expenditure). Mr Kolasinski was also of the view that Mr Finlayson was, in the email of 7 September 2017, making an allegation of fraudulent activity. Mr Kolasinski therefore recognised from the email that Mr Finlayson was concerned about the possibility of criminal conduct.

207. I conclude, therefore, that the email of 7 September 2017, when taken in context, disclosed information such that it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject or that a criminal act had been, was being or was likely to be committed. It is not necessary for the Tribunal to determine whether there had been non-compliance with a legal obligation or whether any criminal act had been committed. It is sufficient to find that Mr Finlayson at the time disclosed information which tended to show that non-compliance with a legal obligation, or that a criminal act, had happened, was happening or was likely to happen.

208. It is also necessary to consider whether there was a reasonable belief on the part of Mr Finlayson regarding what the disclosure tended to show, and whether the disclosure was made in the public interest.

209. The essence of Mr Finlayson's concerns was, to his knowledge, the lack of any audit trail in relation to the payments in question, some of which involved substantial sums. He did not recognise the individuals and companies to whom the sums were paid as having a business connection with the respondent. He was aware in certain cases that the individuals or companies had some form of personal relationship with Mr Kolasinski. He was concerned, therefore, that the expenditure in question was not legitimate expenditure relating to the business of the respondent.

210. Mr Kolasinski in evidence referred to discussions having previously taken place with Mr Finlayson about payments, and in particular Zhara. However, no detail in relation to this was put to Mr Finlayson. Mr Kolasinski also explained that Zhara is in fact a reference to a person with a different name and he was not sure whether Zhara is a limited company and could not remember the year in which discussions with Mr Finlayson took place. Therefore, Mr Kolasinski's evidence does not lead me to conclude that Mr Finlayson knew what the payments he had identified were for. Taking into account Mr Finlayson's concerns, I am satisfied that Mr Finlayson had

a reasonable belief that the payments tended to show the relevant matters under section 43B(1) of the ERA.

211. With regard to the question of public interest, it was said during submissions that Mr Finlayson made an admission in evidence to the effect that his interest was a personal one. It was submitted, therefore, on behalf of the respondent that the public interest condition had not been met.

212. The following is the relevant passage of evidence from the examination-in-chief of Mr Finlayson:

Mr Finlayson: **I felt the company was being defrauded.**

Mr Hay: **Spell that out for us, why?**

Mr Finlayson: **It seemed to me that these transactions were created and deliberately created to take money out of the business and pass through other parties.**

Mr Hay: **There might be a suggestion that motivation is looked at and it might be said that all you were concerned about was you thought you were a shareholder and you were being defrauded out of money and the concern was personal.**

Mr Finlayson: **Definitely, I see the business as an investment for me personally. I became obsessed about making it more professional. Yes, absolutely I took it personally. It seemed like it was preventing me from having taken the business to where I wanted it to.**

Mr Hay: **You were a director at the end of 2016. By that stage would the financial accounts have been finalised?**

Mr Finlayson: **No**

Mr Hay: **What consideration did you give when you formed the view in relation to your obligations as a company director?**

Mr Finlayson: **At that stage, I didn't know what that entailed, I had to go and read about that.**

Mr Hay: **When?**

Mr Finlayson: **Probably towards the latter part of 7 September 2017.**

Mr Hay: **When you looked it up, what did you learn or realise?**

Mr Finlayson: **That I had a responsibility to disclose and report my concerns.**

213. It is clear that Mr Finlayson was concerned about matters from his own personal perspective. He viewed the business as a personal investment. However, I do not believe that this expression of personal interest should be considered in isolation. The passage quoted above begins by Mr Finlayson expressing concern that the company was being defrauded. He was therefore concerned about the possibility of criminal activity. He goes on to explain that he wanted to make the business more professional and that when he looked into his obligations as a director, he realised that he had a duty to disclose his concerns.

214. The following was said by Lord Justice Underhill in **Nurmohamed** (paragraph 35):

It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest.

215. The Court of Appeal then explains the following (paragraph 37):

In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless 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. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool.

216. Therefore, it is necessary to look at all of the circumstances, including the character of the interest served by the disclosure. I conclude that whilst Mr Finlayson was concerned about his own personal circumstances, he also had wider concerns. These were concerns regarding the company, which has its own legal personality. He was concerned about his obligations as a director and the obligations of Mr Kolasinski. These obligations derive from statutory provisions, which it is in the public interest to ensure are adhered to. In his email of 7 September 2017, he refers to the prospect of going to the police which also demonstrates a concern extending beyond Mr Finlayson personally. I conclude, therefore, that the disclosure made by Mr Finlayson was made in the public interest.

217. This means that the disclosure qualifies for protection under section 43B of the ERA.

218. Further to section 43C, a qualifying disclosure is protected if the employee makes the disclosure to his or her employer. Given that Mr Kolasinski, the owner of the respondent, was copied into the email of 7 September 2017, and as the earlier discussions took place with Mr Kolasinski, I conclude that the disclosure was made to Mr Finlayson's employer.

219. Therefore, I conclude that Mr Finlayson made a protected disclosure.

220. However, given that I have found Mr Finlayson was not constructively dismissed, the question of unfair dismissal does not arise.

Mr Brown

221. I will now consider the claim brought by Mr Brown.

222. The first issue is the following:

Was the claimant constructively dismissed, in that:

a) did the respondent without just and proper cause conduct itself in a manner calculated or likely to destroy the relationship of mutual trust and confidence between it and the claimant, thus committing a material breach of contract; and

b) if so, did the respondent's breach play a part in the claimant's resignation?

223. With regard to the first question in **Kaur**, the act which it is said triggered the resignation was the letter dated 19 September 2017 from Mr Kolasinski. This letter was sent as a reply to Mr Brown's email of the same date. The letter of 19 September 2017 states that if Mr Brown feels he is unable to attend

the investigation meeting then he could send written submissions, send a representative or be available by telephone.

224. With regard to the second question in **Kaur**, Mr Brown did not affirm the contract after receiving the letter of 19 September 2017. He resigned 10 days later when he was still on sick leave. There has been no suggestion there was an unreasonable delay, and I do not believe there was one.

225. With regard to the third question in **Kaur**, I do not consider the letter of 19 September 2017 to have been, in itself, a repudiatory breach of contract. I do not consider the letter can reasonably be construed as *"conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"* (**Western Excavating**). The letter was an attempt to progress an investigation. It was putting forward options for Mr Brown to consider how he might choose to participate in the process, given his absence. This is not evidence of an employer which no longer intends to be bound by an essential term of the contract. It was also not being suggested on behalf of the claimant that the letter was itself a repudiatory breach.

226. As with Mr Finlayson's claim, it is the fourth question in **Kaur** which is particularly relevant to Mr Brown's claim. This is the question which asks whether the most recent act (in this case the letter of 19 September 2017) was *"nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term".*

227. As set out above, it is argued on behalf of the claimant that the course of conduct is the following (in summary):

(a) Mr Kolasinski requested reports of Mr Brown's sales performance.

(b) A dismissal letter had been drafted by 11 September 2017, and Mr Ferguson had represented to others that Mr Brown had been suspended.

(c) An investigatory meeting was convened in respect of a completely unparticularised allegation.

(d) The letter of 19 September 2017 was a unilateral determination, in the face of a sick note including work place stress, that the investigatory meeting would go ahead. Mr Brown's health considerations cannot be ignored. He had struggled with depression in the past and was in a more vulnerable position. This was the final straw.

228. On 30 March 2017 Mr Kolasinski requested sales reports for all employees. On 5 April 2017 he requested a report specifically for Mr Brown and one other employee. There was very little evidence around this, in terms of the detail why these reports were being sought. However, looking at this objectively, I do not believe this was calculated or likely to destroy or seriously damage the relationship of trust and confidence. I do not believe it did so or can be said to be part of a course of conduct which did so.

229. I have a different view in relation to the remaining acts which are said to form the course of conduct.

230. On the morning of 8 September 2017, after being questioned by Mr Kolasinski about Mr Finlayson, Mr Brown left the office. He was then absent from work on sick leave (though this hadn't yet been confirmed by his doctor). That same afternoon, Mr Ferguson sent an email to one of the respondent's partner companies, copying in Mr Kolasinski and Ms Salamucha, stating that Mr Brown had been suspended. However, Mr Brown had not been suspended.

231. No satisfactory explanation (or any explanation at all) has been provided as to why that was said about Mr Brown. I consider it was arguably more damaging for Mr Ferguson to state that Mr Brown had been suspended than it was to state in the same email that Mr Finlayson had left the business. Stating that Mr Finlayson had left does not, in itself, necessarily imply any wrongdoing or suspicion, as an employee can leave for any number of reasons (albeit this act still undermined trust and confidence). Stating that Mr Brown had been suspended, on the other hand, does imply wrongdoing or suspicion. The respondent then went further, and by 11 September 2017 had drafted a letter dismissing Mr Brown, before any procedure had even begun.

232. Mr Brown was not aware of the email or the draft letter at the time. However, looking at these communications objectively, I consider that they amount to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the respondent and Mr Brown.

233. By letter dated 15 September 2017 Mr Brown was asked to attend an investigation meeting. However, it is correct that no particular allegation was put to him. He was simply informed that the respondent *"had some concerns"* about his conduct. No mention is made of what those concerns were. Whereas the equivalent letter to Mr Finlayson, issued on the same date, specifically referred to an allegation of poaching employees, no allegation was put to Mr Brown.

234. Mr Brown then emailed Mr Kolasinski, and was clear about the state of his health, his medication and the need for treatment. This was in circumstances in which Mr Kolasinski was already aware of Mr Brown having suffered from depression in the past. Mr Brown also states in the email that the letter of 15 September 2017 does not outline any particular concerns and that the letter has exacerbated his condition.

235. Notwithstanding Mr Brown's email, Mr Kolasinski replies on the same date stating that the investigation meeting will go ahead and that failure to attend will be classed as failure to follow a reasonable management instruction. Still no allegation is put. Mr Kolasinski gives Mr Brown options, which include sending written submissions or a representative to speak on his behalf. However, Mr Kolasinski was essentially asking Mr Brown to provide written submissions or to send a representative to respond to an unspecified allegation. The third option given to Mr Brown was to participate by telephone. That was failing to recognise Mr Brown's medical condition and absence from work, and still proceeded on the basis he should attend the meeting (albeit by phone) even though no allegation was specified, and despite this having been brought to the attention of Mr Kolasinski.

236. Furthermore, Mr Kolasinski did not even take the decision to start a disciplinary investigation into the conduct of Mr Brown and was unaware why the decision was taken to start that disciplinary investigation. This is despite Mr Kolasinski signing the correspondence.

237. The issue is whether there was a course of conduct which constituted a breach of the **Malik** term. I conclude there was such a course of conduct from 8 September 2017 onwards and which culminated in a final straw, being the letter from Mr Kolasinski of 19 September 2017. The conduct as a whole, looked at objectively, was calculated or likely to destroy or seriously damage the relationship of trust and confidence. The letter of 19 September 2017 was more than innocuous. It continued the failure to specify any allegation, and took no account of the issues being raised by Mr Brown particularly with regard to his personal circumstances. This letter is very different to the equivalent letter in Mr Finlayson's case, not least because in Mr Brown's case no allegation had been specified and Mr Brown had informed Mr Kolasinski that his condition was worsening. However, Mr Kolasinski gave no particular thought to the procedure being invoked in respect of Mr Brown. He paid no attention to what Mr Brown was saying in correspondence. When giving evidence, he couldn't remember seeing

Mr Brown's email of 19 September 2017 and stated that Mr Brown's case baffled him and that he didn't have much to do with it.

238. Having found that there was a repudiatory breach of contract, the next issue is whether the respondent's breach played a part in Mr Brown's resignation. Mr Brown's email of resignation, dated 29 September 2017, refers to a number of issues, some of which do not form part of the repudiatory breach. However, towards the end of his email Mr Brown specifically refers to an arbitrary and generalised HR process involving *"shadowy, undefined accusations"* without taking into account his anxiety related ill health. He says: *"I have asked for clarification on what issues regarding conduct you wish to discuss and have been provided no detail or evidence."* It is clear that the repudiatory breach by the respondent did play a part in Mr Brown's decision to resign. Therefore, Mr Brown was constructively dismissed.

239. The next issue is whether the respondent has established a potentially fair reason for Mr Brown's (constructive) dismissal. It was submitted that by seeking to be removed from the covenants, there is at least a suggestion that Mr Brown was going to a competitor or setting up in competition. I do not agree this provides a potentially fair reason. Mr Brown was not a director. He approached a director, Mr Finlayson, to ask for his covenants to be removed. Mr Brown, as an employee, was entitled to approach his employer and ask for his contract to be amended. He did so, and his employer agreed.

240. The burden is on the respondent to show a potentially fair reason for dismissal. I do not consider it has done so. The respondent has also not attempted to argue that (even if there was a potentially fair reason) it was reasonable for the respondent to treat that reason as sufficient to dismiss Mr Brown in terms of section 98(4) of the ERA.

241. Therefore, I find that Mr Brown was constructively and unfairly dismissed.

Compensation: Mr Brown

242. I will consider the compensation to be awarded to Mr Brown with reference to the updated schedule of loss, emailed to the Tribunal on 13 November 2018. I note that this is in the same terms as the schedule of loss provided during the hearing, except that the claim for an ACAS uplift has been removed.

243. At the hearing, Mr MacLean confirmed on behalf of the respondent that the figures in the schedule of loss were accepted.

Basic award

244. Mr Brown had three complete years of service with the respondent. As at the point his employment terminated, he was 43 years of age. The schedule of loss states that his gross weekly pay, taking into account average gross monthly commission, was £450. Therefore, the basic award is £1,800 (4 x £450).

Compensatory award

245. The schedule of loss claims 52 weeks of past loss at £371.40 per week, plus loss of pension benefit of £151.20. It is explained that £12,000 is to be deducted to reflect income earned. I accept these figures, which means past loss is £7,464.

246. Future loss is claimed for a period of 52 weeks. Whilst Mr MacLean did not challenge the proposed future loss period of 52 weeks, he did question why anticipated future earnings were only £6,000, and not £12,000. No explanation has been provided as to why that is the case. I am therefore prepared to award 52 weeks' future loss, but on the basis that future earnings are assumed to be £12,000 (like the previous 12 months). Future loss is therefore also £7,464.

247. I award loss of statutory rights of £400.

248. The total compensatory award is therefore £15,328.

ACAS Code of Practice

249. It was suggested by Mr MacLean that any award should be reduced to take account of the fact that no grievance was submitted. Mr Hay submitted that, in order for there to be a reduction in compensation, the failure to comply with the ACAS Code of Practice has to be unreasonable. He submitted that if it is accepted there were material breaches by the respondent, it is difficult to say that the failure to comply by Mr Brown is unreasonable.

250. Mr Brown was asked in evidence whether he had asked for matters to considered in the form of a grievance. His answer was *"absolutely not, no"*. It is clear from this that the idea of submitting a grievance was simply not an option for him. There was no further exploration of Mr Brown's reasons for this. However, I take into account the fact that he was on sick leave and, having drawn to the respondent's attention the fact that he was facing an unspecified allegation and that his condition was being exacerbated, he was nevertheless issued with a letter which stated that if he did not participate in the investigation meeting that would be classed as failure to follow a reasonable management instruction. That was the final straw.

251. In these circumstances I conclude that it was not unreasonable for Mr Brown not to submit a grievance before resigning. His employer had breached the implied duty of trust and confidence. As far as Mr Brown was concerned, there was nothing left to resolve.

Polkey deduction and contributory conduct

252. There was no suggestion that, should Mr Brown's claim be successful, his award should be reduced by applying **Polkey** or to reflect contributory conduct. I also do not consider that evidence has been led which would justify any such deductions.

Total award

253. The total monetary award payable to Mr Brown is **£17,128**.

254. There was no evidence regarding the receipt of state benefits. I take it from this, and the fact that Mr Brown started consultancy work in November 2017, that he did not receive any such benefits. Therefore, the recoupment provisions are not applicable.

Employment Judge: G Woolfson
Date of Judgment: 14 December 2018
Entered in register: 14 December 2018
and copied to parties