EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Bevins

Respondent: Eriks Industrial Services Limited

HELD AT: Liverpool **ON:** 27, 28, 29 & 30 August 2019

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimants: Mr F Edwards, solicitor
Respondent: Mr J Gidney, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent was not in breach of contract and claimant's claim for breach of contract is not well founded and is dismissed.

2. The claimant did not raise a protected disclosure and his claims for detriment brought under section 47B and automatic unfair dismissal under section 103A of the Employment Rights 1996 as amended, are not well-founded and are dismissed.

3. The claimant was not unfairly dismissed and his claim for unfair dismissal brought under section 94 of the Employment Rights Act 1996 is not well-founded and is dismissed.

4. The respondent's application to prevent the draft 16 May 2018 grievance outcome letter be adduced into the evidence is dismissed on the basis that it was in the interests of justice for the claimant to cross-examine on the said letter.

REASONS

Preamble

1. By a claim form received on 17 July 2018 following ACAS Early Conciliation between 15 June and 15 July 2018 the claimant claims he made a protected disclosure on the 20 March 2018 regarding an alleged unilateral change of contract relating to bonus payments, which the claimant maintained, affected a number of employees who were on the same contract as he was. The claimant was continuously employed between the 7 February 2005 as a project manager. He resigned and the effective date of termination was 13 July 2018. The claimant alleges he resigned as a result of the respondent's breach of contract, the last straw being the grievance appeal outcome hearing that was not favourable to him.

2. The claimant brings a complaint of detriment under section 43B of the Employment Rights Act 1996 as amended ("the ERA") and automatic unfair dismissal under section 103A. He also brings a claim of ordinary constructive unfair dismissal arising out of his resignation under section 95(1)(c) of the Employment Rights Act 1996 as amended ("the ERA").

Evidence

3. The Tribunal heard evidence from the claimant on his own behalf. On behalf of the respondent it heard evidence from Joe Parkes, human resources ("HR") director, who heard the claimant's 9 April 2018 grievance, Andrew Firchford, finance director, who heard the grievance appeal, Keith Hardgraves, UK engineering manager responsible for Aintree branch, Victor Harris, senior project manager and the claimant's line manager, Lee Alcock, head of HR and Steve Askins, UK engineering director responsible for the bonus schemes up to 2016.

4. With reference to credibility, the claimant submitted the Tribunal should draw adverse inferences by the respondent's failure to disclose the 16 May 2018 draft grievance letter referred to below and respondent's subsequent application aimed at preventing the claimant from bringing it into evidence at the liability hearing. The Tribunal considered the claimant's arguments carefully, concluding there was no evidence the witnesses, particularly Joe Parkes who had written the grievance outcome letter, intentionally hid the draft so that it could not be disclosed within these proceedings and when it inadvertently came to light, instruct Mr Gidney to seek an order preventing the draft 16 May 2018 grievance letter being referred to by the claimant and cross-examined upon. It appears that the said letter was copied along with a number of other document and inadvertently disclosed prior to a judicial mediation, and the respondent received legal advice on which it relied when the application referred to below was made. Nevertheless, the Tribunal fully appreciated the claimant's disquiet as it appeared the existence of the draft letter would not have been disclosed had it not been for the respondent's decision to produce a bundle for the judicial mediation and for this the respondent can be severely criticised given its obligation to the Tribunal to ensure that all relevant documentation was before it.

5. The credibility of witnesses and conflicts in the evidence have been dealt with further as set out below.

Preliminary hearing: specific disclosure

6. Oral judgement having been given, these are not the full written reasons given on the first day of the final hearing. A preliminary hearing took place to consider an application made on behalf of the respondent seeking an order preventing the claimant using a document inadvertently produced at an earlier mediation. The document in dispute was a different version in draft of the 16 May 2018 grievance outcome letter ("16 May 2018 grievance letter") sent to the claimant, and on the face of it the evidence it was not favourable to the respondent.

7. The basis of the respondent's objection is the mediation process during which the 16 May 2018 grievance letter was inadvertently disclosed was a private and confidential meeting and nothing raised during mediation can be relied on in the further stages of the case, including at final hearing. The respondent relied upon an "indication" given by Regional Employment Judge Parkin in a letter from the Tribunal dated 9 August 2019 which reminded the parties "that the entire content of discussions at the Judicial Mediation on 14 February 2019 is covered by the confidentiality and "without prejudice" privilege that covers settlement discussions." For the avoidance of doubt the Tribunal does not question that the "entire content of discussions" are to be kept confidential; it does not accept that production of a document can be defined as a discussion.

8. The Tribunal heard a number of submissions made by the parties which it does not intend to repeat, and gave oral judgment with reasons refusing the respondent's application in favour of the claimant who was seeking to rely on the 16 May 2018 grievance letter and draw inferences from it. Reasons for the Tribunal's judgement have not been requested by the parties to date. In short and without giving full reasons here, the Tribunal took into account the Guidance on Mediation which explicit the "*The judge will outline what the parties should expect to happen and remind them of the vital confidentiality of the mediation process. The judge will emphasise that if the mediation fails, no mention may be made of it at all in the further stages of the case or at any hearing.* The Tribunal was also referred to Harvey on Industrial Relations and Employment Law which sets out the position at para 470.23 as follows: "*The judicial mediation is confidential and held in private. The parties and their representatives will not be able to refer to anything that was said or occurred at the mediation at any subsequent hearing. The employment judge who conducted the mediation will have no further involvement in the case and will not disclose to any other judge what transpired during the mediation process…"*

9. The respondent emphasised that to allow the Claimant to produce at the substantive hearing documents provided within the confidential mediation will "fatally" undermine trust in Judicial Mediation and risks diluting the efficacy of a useful settlement tool. This would be contrary to the overriding objective and should not be allowed. The Tribunal was invited to refuse the Claimant permission to rely on any document produced in the mediation and thereafter to put any such documents referred to out of their consideration when determining this case.

10. The Tribunal did not accept the respondent had a valid argument in relation to the 16 May 2018 grievance letter, however anything said about the letter by the parties during the judicial mediation should be kept in the strictest of confidence so as not to undermine the process and trust a party can have that anything discussed or said will be kept confidential. In the Skeleton Argument filed on behalf of the

respondent it is submitted the 16 May 2018 grievance letter should remain confidential and this was "vital" within the confidentiality of a Judicial Mediation. The Tribunal did not agree, taking the view that the respondent was under a duty to have disclosed the existence of any relevant documents throughout the litigation until it is finished, and it has breached this duty.

11. The Presidential Guidance on General Case Management for England and Wales (22 January 2018) explains that relevant documents may include 'documents which record events in the employment history: for example, a letter of appointment, statement of particulars or contract of employment; notes of a significant meeting, such as a disciplinary interview; a resignation or dismissal letter; or material such as emails, text messages and social media content (Facebook, Twitter, Instagram, etc)…Such documents may exist in hard copy or in electronic form." Rule 31.11 CPR governs the scope of the Tribunal's power to order disclosure or inspection of information and documents and explicitly provides that: '(1) Any duty of disclosure continues until the proceedings are concluded. (2) If documents to which that duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party.' The respondent had a continuing obligation to disclose and when it "inadvertently" produced the 16 May 2018 grievance letter during judicial mediation it was required to have openly disclose it in any event and not hide behind a confidential process.

12. When giving oral judgement the Tribunal made it clear that it was not undermining or questioning the concept of confidentiality underpinning the mediation process, which is vital and it was not interested in if or how the 16 May 2018 grievance letter was discussed or considered. It agreed with the claimant that the document was relevant and necessary for disposing fairly of the proceedings as the motivation of the writer and changes he made to how the claimant's grievance outcome was decided may be relevant to motivation given the claimant's allegation that he was caused a detriment for whistleblowing and the grievance appeal outcome was a last straw leading to his resignation.

13. In short, a fair trial dictates taking into account the overriding objective and balance between the parties, that the 16 May 2018 grievance letter, now that it has been disclosed, albeit inadvertent, should be accepted in evidence at the liability hearing. It would be prejudicial for the claimant not to be able to rely on it and cross-examine on the differences in the two letters. The Tribunal indicated it was surprised at the extent of the evidence in the bundle used during the mediation process, and whilst it does not assert the respondent had any Machiavellian intent, relying upon the confidentiality of judicial mediation as a shield to prevent open disclosure of detrimental evidence goes against the well-recognised principles in Employment Tribunals that requires all the evidence to be tabled before the liability hearing takes place, and that includes full disclosure of relevant documents which the 16 May 2018 grievance letter clearly was.

Agreed issues

14. An agreed List of Issues recorded by EJ Sherratt in the Case Management Order of 20th November 2018 to be decided by the Tribunal were discussed and are as follows:

Breach of Contract

14.1 Was the Claimant contractually entitled to receive a bonus payment for financial year 2014 (payable in 2015) and a bonus payment for financial year 2017 (payable in 2018)?

14.2 If so, did the Respondent fail to pay the Claimant any such bonus payments?

Constructive Unfair Dismissal

14.3 What was the most recent act (or omission) on the part of the Respondent which the Claimant says caused or triggered his resignation?

14.4 Did the Claimant affirm the employment contract since that date?

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

14.6 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

Automatic Unfair Dismissal – Protected Disclosure

14.7 Did the Claimant's email dated 20th March 2018 amount to a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996 ('ERA') namely:

(a) was there a disclosure of information which in the reasonable belief of the Claimant making the disclosure, was made in the public interest and tended to show that the Respondent had failed, was failing or likely to fail to comply with any legal obligation to which it was subject?

(b) Was the reason or principal reason for the Claimant's alleged dismissal that he had made the protected disclosure (above)?

Detriment – Protected Disclosure

14.8 Did the Respondent subject the Claimant to the following acts or omissions?

(a) Not investigating the Claimant's allegations that he had raised a protected disclosure?

(b) Not paying the Claimant any bonus payment after raising a protected disclosure?

(c) Not inviting the Claimant as Project Manager on the Siemens Project to a trip associated with the project?

14.9 Did the above acts (or omissions) by the Respondent amount to detriments?

14.10 If so, were any of these acts (or omissions) done on the ground that the Claimant had made a protected disclosure?

14.11 Has the Claimant's claim under this head been presented in time in accordance with section 48 of the ERA? Namely, was the Claim presented before the end of the period of three months beginning with the date of each of the alleged acts (of failures to act) giving rise to the alleged detriments?

15 The Tribunal was referred to an agreed bundle of documents plus the claimant's supplementary bundle, witness statements, and written submissions on behalf of the parties, together with closing submissions and opening submissions (written) of the respondent, which the Tribunal does not intend to repeat and has attempted to incorporate into this Judgment with Reasons.

16 The Tribunal had before it two different chronologies which it has reconciled in its findings of facts. Mr Gigney produced a chronology that appeared to be largely undisputed. Mr Edwards was asked to look at the respondent's chronology to indicate which aspects were disputed, Mr Edwards did not follow the Tribunal's order, instead he chose to produce a different chronology which the Tribunal has considered in addition to all of the evidence it has heard and contemporaneous documents. The Tribunal was provided with a lever arch full of copy case law unmarked and relevant paragraphs had not been highlighted. It has only considered the case law to which it was referred to by the parties in submissions and has made the following findings of the relevant facts and resolved conflicts in the evidence.

The Facts

17 The Claimant was born on 6th October 2065 and was 52 years old at his effective date of termination.

18 The Claimant commenced employment with Wyko Industrial Services initially in the role of Commercial Manager on 7 February 2005. He had worked for the company previously before he resigned and set up a new company.

19 The Claimant along with a number of other employees, was entitled to a Branch Bonus Scheme. The Tribunal will refer to this scheme throughout as the Branch Bonus Scheme, which confusingly was also referred to as the "EMS Workshop Branch Bonus Scheme" in a number of documents.

The contract

Branch Bonus Scheme

20 An offer letter incorporating the contract dated 28 January 2005 ("the employment contract") provided to but unsigned by the claimant stated under the heading "Bonus": "You will be eligible to participate in the branch bonus scheme which is subject to annual review. Details of the scheme will be confirmed as soon as possible by your manager." There was no reference in the body of the employment contract to the scheme being discretionary. This is the applicable written contract binding between the parties.

21 A supplement to the contract titled "Alterations to Conditions of Service" issued at the same time as the employment contract read: "Nothing in this contract

shall prevent the parties agreeing in writing to vary any or all the provisions contained. The company serves the right to make reasonable amendments to these conditions of service and rules, **but this will not occur without prior consultation**. **Such changes will be deemed to be accepted and agreed by you unless you notify the company of any objection in writing within one-month of receipt"** [the Tribunal's emphasis].

22 In 2011, 2012, 2013, 2014 and 2015 the respondent provided details of the EMS Workshop Branch Bonus Scheme (the "Branch Bonus Scheme") for each year. 2011, 2012 and 2013 all contained the same statement that **"the bonus scheme is discretional and can be varied at any time by the Board of Directors**" The Tribunal's emphasis. The 2014 and 2015 Branch Bonus Scheme provided "**all bonus payments are discretionary not contractual**" [the Tribunal's emphasis]. The claimant conceded under cross-examination the Branch Bonus Scheme was discretionary and so the Tribunal found. The Branch Bonus Scheme measured branch performance only, made up of a return on sales, credit control and productivity although the key performance indicators could change and did, for example, in 2014 credit control became overdue debt.

23 The Tribunal found the claimant's contractual entitlement was to be part of the branch bonus scheme the terms of which were to be decided by the respondent and nothing else. The branch bonus scheme could be reviewed very year and consultation was not required for this. The claimant accepted in evidence the bonus scheme was discretionary and could be varied by the respondent.

24 The claimant received a bonus in 2007 payable in 2008 the sum of £4820, for 2009 he received a bonus payable in 2010 in the sum of £3170, for 2010 he received a bonus payable in 2011 of £4117, and finally, in 2011 a bonus payable in 2012 in the sum of £374. This was the full extent of the bonus payments made to the claimant throughout his employment and they varied from £374 to £4820.

25 The Tribunal, on the evidence before it, concluded from 2005 to 2018 there were no issues with the claimant concerning his right to bonus and he did not question the fact that for a number of years no bonus was paid to him. Throughout his employment from February 2005 to resignation the claimant had been paid a total of five annual bonuses, the highest sum being £4820 for the year ending 2007 and the lowest £374 for the year ending 2011. Since 2012 the claimant had been paid one bonus only for the year ending 2013 paid in 2014 in the sum of £2463.00. For nine out of the claimant's fourteen years continuous employment no bonus payment had been made to the claimant under the relevant applicable schemes.

26 The Tribunal concluded whilst bonus was a relevant matter for the claimant who kept track of his eligibility and performance throughout his employment, it did not impinge to any great extent on the claimant's salary of a gross weekly wage in the sum of £818.40 plus benefits including a pension, company car, private health and death in service cover. In short, the claimant earned a substantial salary in which bonus payments played very little part, if any.

<u>2006 TUPE transfer to the respondent</u>

27 In 2006 the Claimant employment transferred from Wyko to the Eriks Group under the TUPE provisions. In 2008 the Eriks Group rebranded as Eriks Industrial Services Ltd, the respondent in this action.

28 The claimant was line managed by Victor Harris, senior project manager, who reported directly to Steve Askins, UK managing director for Electrical and Mechanical Services ("EMS"). Steve Askins was responsible for authorising the bonus schemes for the claimant from the outset of the claimant's employment to 2016 until Steve Askins took over the role of UK engineering director, having been employed by the respondent for over 34 years until recently.

<u>Application Engineers New Project Business Bonus Scheme introduced in 2012</u>

29 With the support of Steve Askins and Keith Hargreaves, the operation director for the EMS division, Victor Harris introduced as part of a 5-year business review plan in 2012, a bonus scheme for electronic application engineers referred to as the Application Engineers Bonus Scheme.

30 The Application Engineers Bonus Scheme was set out in a document dated 30 January 2013 sent by Victor Harris to Steve Atkins. The bonus scheme was based on new project business for EMS industrial electronics. "Critical criteria" were set out including a requirement that employees submit a monthly report with details of progress, with reference to marketing two cases per quarter, the project value must be a minimum of £5,000 and there was a sliding scale of percentage bonus against invoices for the 2013 financial year ranging from a 25% bonus for £550,000 business to 10% bonus for £250,000 business. Unlike the bonus scheme for 2014, the 2013 scheme expressly provided for the monthly reports including marketing and the claimant would have been aware of the differences in that he was required to provide this information in 2013 but not in 2014. The Tribunal finds that (a) at no stage was the claimant informed the Application Engineers Bonus Scheme was to run in the next financial year 2014 and (b) he was aware in 2014 the assessment of bonus eligibility had changed. The Tribunal found on the balance of probabilities there was no information before the claimant in 2014 from which he could have reasonably assumed the Application Engineers Bonus Scheme was the applicable scheme, there was no contractual obligation on the respondent to run to scheme a second year and therefore no breach of contract.

31 On 23rd August 2013 the Claimant attended an ERIKS Employee review with Victor Harris. Bonus was not discussed. It is undisputed the claimant was considered to be an outstanding employee and this remained the case throughout his employment. The high regard in which the respondent held the claimant was reflected by the fact that he had worked for the respondent prior to 2005, resigned to set up his own company and was then re-employed on the 7 February 2015.

32 The claimant was not paid a bonus for the 2013 financial year as the terms and conditions were not met; in short, his individual performance had not met the critical criteria necessary to be paid out under the scheme. The bonus threshold was £250,000 of new business and the claimant had invoiced new business totalling £227,862.28. It is not disputed the claimant accepted he had not met the criteria and was not entitled to a bonus under the Application Engineers Bonus Scheme, which

he had accepted as a replacement of the Branch Bonus Scheme. The claimant gave evidence to the effect that he was aware of his own performance and how it met (or in the claimant's case did not meet) the bonus objectives and the Tribunal found the claimant's evidence that he believed he was still entitled to the Application Engineers Bonus Scheme in the tax year 2014 was not credible. He was not given any personal objectives to meet and nor did he provide the same monthly information on his progress and quarterly information on marketing.

33 In September 2013 the Claimant's changed job role, becoming Senior Project Manager Electronics. The Tribunal was satisfied on the balance of probabilities that throughout his employment, and certainly during the relevant period leading up to his resignation, the claimant was a senior employee and his attempts at playing this down at the liability hearing undermined credibility.

Bonus payment in 2015 for financial year 2014

34 The claimant received a bonus in 2015 for financial year 2014 in the sum of £2,463.00. There is an issue between the parties concerning whether the bonus payment was calculated in accordance with the Bonus Branch Scheme or the Application Engineers Bonus Scheme. There is a dispute as to whether the Application Engineers Bonus Scheme was for 12-months only and had replaced the Branch Bonus Scheme for 12-months as maintained by the respondent, or beyond that period as maintained by the claimant. The respondent's position is that the Application Engineers Bonus Scheme was a one-off scheme for 2013 only**,** the claimant's position was that it continued until 2017. On the balance of probabilities, the Tribunal found had the claimant addressed his mind to it he would have realised the payment as a matter of logic could not have not been made under the Application Engineers Bonus Scheme given the fact he had no personal objectives to meet and in the last financial year had not met them and not been paid a bonus. In short, the claimant was pleased to receive £2,463 bonus payment when he had received none the year before with the last payment being £374 for the year ending 2011 payable in 2012. The £2463 payment was accepted on face value and the claimant did not question its basis or how it had been calculated. The Tribunal found there was no breach of contract on the part of the respondent, and if it is wrong on this point, the claimant had accepted the £2,463 without question or raising any issues and in doing so affirmed the contract.

35 Victor Harris in a number of emails dated 1 April 2014 sent to Steve Askins proposed the Application Engineers Bonus Scheme continue into the next financial year. The oral evidence before the Tribunal, which it accepted on the balance of probabilities, was that Steve Askins rejected the proposal and the bonus eventually paid to the claimant in March 2015 for year end 2014 was based on the original Branch Bonus Scheme provisions. Nobody from the respondent informed the claimant that calculation of his bonus payment had changed back to the Branch Bonus Scheme, and the claimant did not question the bonus payment he received of £2463.00. The claimant's evidence was that he believed he was entitled under the Application Engineers Bonus Scheme and the payment made was under that scheme was not credible for the reasons already stated.

36 Victor Harris gave evidence undisputed that he did not inform the claimant the Application Engineers Bonus Scheme was to go into 2014 and beyond, and he was not told it would not. There was a total lack of information that should have been

given to the claimant, and for this the respondent can be criticised but its actions in this regard does not amount to a breach of contract on which the claimant can base a claim of constructive dismissal. It does not make sense for the claimant to have assumed the Application Engineers Bonus Scheme would continue because he was not told the criteria or targets for 2014, as accepted by the claimant in oral evidence on cross-examination. It is notable Victor Harris proposed some different criteria for 2014, which was not accepted. Had the claimant been eligible for the 2014 bonus the Tribunal, on the balance of probabilities accepted the evidence of Victor Harris that the claimant (and other application engineers) had a personal target of £250,000 of new business to be invoiced in the 2014 financial year, they were personally responsible for submitting weekly reports of progress and producing two significant marketing pieces to support marketing, the claimant would not have met his personal targets.

37 The Tribunal concluded on the evidence before it that had the Application Engineers Bonus Scheme been the applicable scheme in the financial year 2014 the criteria to be met were individual and not collective as argued by the claimant, with the result that the claimant did not meet the requirement for producing £250,000 business in 2014 and he would not have been eligible for a bonus payment.

38 Mr Edwards in written submissions correctly confirmed the Branch Bonus contained no personal targets or objectives, but the Application Engineers Bonus did. In written evidence the claimant stated he did achieve the target in 2014 totalling £330,901.48. It is undisputed other employees contributed towards the final figure and the claimant’s personal contribution was less than £250,000. The claimant’s argument that the contribution made by other employees was included within the claimant’s personal target/objective made no sense and there was no satisfactory evidence before the Tribunal to this effect. Had the claimant’s assumption been correct and the Application Engineers Bonus Scheme only was relevant to his bonus entitlement, the claimant on his personal performance would not have qualified for a payment on the balance of probabilities and so the Tribunal found. It concluded that as the Application Engineers Bonus Scheme was assessed on personal and not department performance, the claimant’s evidence that the value of the work generated would not be separated and attributed to individuals was not credible, and the Tribunal preferred the evidence given on behalf of the respondent on this issue. In short, the Application Engineers Bonus Scheme was designed to reward individuals for their individual performance in respect of new business brought into the company that ultimately increased the bottom line profitability.

39 The claimant in oral evidence on cross-examination confirmed he ran a project spreadsheet and knew year-by-year whether he had met his bonus, and for the bonus payment for financial year 2013 payable in 2014 the claimant was aware he had not met the criteria. In oral evidence the claimant contradicted himself, on the one hand he was saying he was too busy to monitor and keep track of his bonus, on the other he confirmed he ran a project spreadsheet and was aware of what amount of bonus should be paid. The claimant’s evidence was not credible on either account, had he assessed his bonus under the Application Engineers Bonus the calculation would have been completely different to the calculation under the Branch Bonus Scheme, in that he had not met his personal target under the former and was eligible to bonus under the latter. The Tribunal found on the balance of probabilities there was no basis on which the claimant could assume the 2014 bonus was to be

calculated under the Application Engineers Bonus, and had that been the case no bonus would have been payable to him.

40 On 19th March 2015 the Claimant attended an ERIKS Employee review with Victor Harris. No bonus was discussed and no issues were raised by the claimant concerning the bonus payment payable for financial year 2014, and had this been an issue for the claimant he would have made the position clear.

One ERIKS Bonus

41 The respondent communicated to its employees about a number of matters including bonuses, using a variety of methods including newsletters and webinars. The claimant was aware of this and he consciously chose not to read the respondent's communications which did not interest him and he found his time could be better used elsewhere. Other employees did read it and took part in discussions, the implication being that they were pleased there was to be a new scheme. There was no evidence whatsoever that employees, such as other Application Engineers, (whose bonuses had previously been calculated under the Application Engineers Bonus Scheme in 2013 and the Branch Bonus Scheme for all other years) were unhappy with the proposed One ERIKS Bonus and believed their contracts to have been breached. The claimant adduced no evidence of any employee who was dissatisfied with the One Eriks Bonus scheme, and the Tribunal found that objectively he had no reasonable basis on which to assume this was the case when he complained about his personal contractual provisions.

42 0n 16th June 2017 the One ERIKS Bonus was announced via a companywide webinar and a news update and this was followed by various meetings, discussions and negotiations between management and employees in which the claimant took no interest and intentionally played no part.

43 On 15 August 2017 Andrew Fitchford submitted a proposal to the board putting forward amendments to the "One ERIKS Bonus Scheme" followed feedback from employees concerning the structure. The objective was to bring together the different bonus categories under the one scheme. The amendments separated levels of employees i.e. D&E level employees from the main pot placing them into a separate pool with a target from which bonus accrued as 85% budgeted profit. Its rules were that grade K and G lower paid employees would receive a bonus of £165 but higher-grade D and E level employees who were paid more would receive no bonus on the basis that the key performance indicator of 85% budgeted profit was not met, when the 80% figure was. The proposal terms were not a document put before the claimant on an individual basis, he showed no interest in the new bonus scheme and did not take part in any discussions.

44 The Tribunal is satisfied on the credible evidence given by the respondent's witnesses, throughout the relevant period the claimant fell into the grade E bracket in the absence of any alternative credible evidence. The claimant and Mr Edwards argued that the claimant was not a Grade E but fell into Grade G. Bonus levels D and E started to pay out at 85% budgeted profit and could be paid out at 35%. Bonus level G paid out at 80% of budgeted profit and could be paid out at 30%. The position of applications engineer was referred to in level G and E. The claimant was a senior application engineer, and on the balance of probabilities the Tribunal

preferred the respondent's evidence that the claimant fell under Grade E due to his seniority and level of pay.

45 It is undisputed the Erics Bonus Scheme Rules 2017/2018 Summary that set out the bonus levels was not provided to the claimant until disclosure on 16 August 2019, but nothing hangs on this because the claimant was ignoring all communications about the One Eriks Bonus and the Tribunal found it would have made no difference had he been included. There is no dispute the claimant's role was an application engineer, he managed projects which suggests a high level of seniority, and immediately before his resignation was invited to carry out the role of project manager for a key client, an offer which the claimant did not accept.

46 Approximately 1533 employees were affected, individual consultation was not practicable and thus took place via various newsletters and webinars and so the Tribunal finds. On 15th September 2017 and 1st December 2017 there were further communications regarding the One Eriks Bonus sent to all employees, including the claimant, which the claimant did not read or act upon.

<u>Payment One ERIKS Scheme 15 March 2018</u>

47 All employees were sent an email dated 15 March 2018 confirming a gross payment bonus of £165.00 was to be made. The claimant's evidence was that he had not read all the emails/communications concerning the One ERIKS Scheme, and he had not read the 15 March email until an employee informed him of the sum to be paid.

48 The respondent's evidence is that the claimant was sent a mail merge letter. In the bundle the letter is an unsigned and undated template not addressed to the claimant. In short, the only evidence before the Tribunal was that Andrew Fitchford had helped draft the letter with the HR director, Denny Wood, and it had been sent via management administrative support according to Denny Wood's email dated 16 August 2019, to all employees including the claimant.

49 The claimant maintained he had not received the letter and invited the Tribunal to accept his evidence in preference to that of Denny Wood who did not appear at the hearing. Denny Wood did not give oral evidence, despite a facility by which oral evidence could be given via Skype or other means, given she was HR director in the respondent covering the Americas based in America. The claimant denies receiving the mail merge letter, and the Tribunal prefers his evidence given under oath to that of Andrew Fitchford who does not know whether administrative support sent out a letter to the claimant or not. The Tribunal accepts the letter was sent out to some employees; it cannot be sure to whom as no copies were retained on individual personnel files. On the balance of probabilities, it is not satisfied it was sent to and received by the claimant. The Tribunal, who has concerns regarding whether the claimant had ignored and then lost the letter given his practice of not reading the respondent's communications, notes in a mail merge letter dated January 2018 regarding investing in people and infrastructure, a copy addressed to the claimant was retained and included in the bundle.

50 The respondent was unaware of the fact that the claimant was not reading communications concerning the One ERIKS Scheme, and the Tribunal considered prior to it finding on the balance of probabilities the claimant had not received the

mail merge letter, the possibility the claimant may have received and ignored it. It is inconceivable the claimant was unaware of the One ERIKS Scheme as communications were frequent, and every month letters were sent to employees and yet the claimant remained silent and asked no questions throughout this period. The Tribunal found the respondent had a contractual responsibility to communicate its intention to introduce a new scheme, which it did and likewise, the claimant has an equal responsibility to engage with that process, which he failed to do.

51 The undated mail merge letter confirmed senior managers would participate in a separate profit related scheme "as a result of having taken all comments into consideration" thus reinforcing the Tribunal's conclusion that employees other than the claimant were actively engaging in the consultation when the claimant was not. The mail merge letter set out how the One ERIKS Scheme consisted of a general pool and a senior managers pool. For the senior managers pool in 2017 the bonus would be paid out "at 85% of budgeted profit…for 2018 it will start to pay out at 95%...**all bonus schemes and payments are non-contractual**" [the Tribunal's emphasis]. The letter did not refer to levels D and E, however it did refer to senior managers and in general terms grades D and E were employees working at a senior level within the Company, such as the claimant and so the Tribunal found. The Tribunal as surprised the letter was not more specific about the eligible group, but nothing hangs on this.

52 The Tribunal was invited by Mr Gidney to find that in March 2018 the Claimant was informed that he would not get a payment for the One Eriks Bonus scheme as only 83.4% of target achieved. The Tribunal did not agree on the evidence before it. The claimant submitted there was no evidence to show the claimant, as a group E employee, would not be getting a bonus. The claimant asserted he was told the respondent had achieved 83.4% of budget and a pay-out was to be made to all employees, and he unaware the threshold for him was 85%, and the Tribunal preferred the claimant's evidence on this point on the balance of probabilities. The claimant's expectation was initially he would receive a bonus payment of £165.00.

53 In a written chronology produced prior to submissions Mr Edwards referred to the claimant raising a grievance with Victor Harris who said he could not deal with it. This was not disputed evidence, and the Tribunal accepts the claimant indicated he would take his grievance to HR. in order that it could be dealt with. The claimant does not claim he made any protected disclosure to Victor Harris at the time.

The alleged protected disclosure 20 March 2018

54 On 19th March 2018 the Claimant asked the Respondent's HR department for a copy of his contract, to which Lee Alcock in an email asked the claimant if there was anything "you are looking for in your terms and conditions?" It is accepted the claimant made no disclosure of information in the 19 March 2018 communication.

55 In direct response to Lee Alcocks question the claimant sent an email headed "Contract of Employment" on 20 March 2018. There was no reference to a protected disclosure being made, and Lee Alcock interpreted the claimant's communication in the light of the question he had initially asked on the 19 March and it did not cross his mind until later that the claimant was whistleblowing. The claimant wrote; "I consider that ERIKS is in breach of contract not paying the contractual bonus through its employees and varying contractual terms without negotiation. I consider

that I and my other fellow employees have suffered an unlawful deduction of wages." This is the extent of the disclosure relied upon by the claimant in his public interest disclosure complaint.

56 On the claimant's own evidence at this liability hearing, he names no other employees who were dissatisfied with the One ERIKS bonus scheme. He had not spoken to anybody else before sending the 20 March 2018 response headed "Contract of Employment" and was unaware whether other employees believed their contracts had breached or not. The Tribunal found there was no evidence the grievance formed part of a collective grievance as maintained by the claimant and Mr Edwards on his behalf. This was the only disclosure relied upon by the claimant, taking into account his evidence and contemporaneous documentation, the Tribunal was satisfied on the balance of probabilities the claimant had in mind his personal contract dispute and there were no grounds for him to conclude that any other employee was dissatisfied with the introduction of the One ERIKS Bonus Scheme. Other employees, unlike the claimant, had been engaging in the process and had they been on the Application Engineers Bonus Scheme as argued by the claimant then no bonus would have been payable in contrast with the One ERIKS Bonus Scheme when a very small bonus was payable to those employees who did not hold senior positions and did not fall into category G or E.

<u>The respondent's grievance policy</u>

57 Under the respondent's grievance policy there was no requirement for the respondent to respond in 5-days to the claimant's initial grievance raised on 20 March 2018 as alleged by the claimant, and so the Tribunal found.

58 Stage 1 set out in the September 2015 Grievance Procedure provides an employee should "raise the matter, either verbally or in writing immediately, with the line-manager/ supervisor who will, with sufficient time to consider the facts of the case, try to resolve the matter…. "If the line manager is unable to resolve the matter the grievance proceeded to the second stage.

59 Stage 2 of the Grievance Procedure provides "the hearing manager will attempt to resolve the [written] grievance. A formal response and full explanation will be give[n] in writing, as will the name of the person to whom they can appeal…within 5-working days." In other words, once the hearing manager has heard the grievance the outcome will be given within 5-working days. There is no requirement for the outcome to be given within 5-working days of the grievance being first raised and so the Tribunal found. Such an expectation on the part of the claimant was unreasonable pointing to the negative manner with which he viewed the respondent that was not entirely attributable to the non-payment of £165 or a greater sum under the One ERIKS scheme as by this stage the claimant was considering starting his own business, which he subsequently did by incorporating a new company and setting up in competition with the respondent.

<u>First alleged detriment: Lee Allock's lack of response</u>

60 Lee Allcock did not respond to the claimant's 20 March 2018. It did not cross his mind the 20 March 2018 email was a grievance or amounted to whistleblowing. During the relevant period Lee Allcock was absent from work a great deal due to attending his terminally ill father who later died, and as best as he could in this

difficult and distressing situation dealt with emails remotely, including the claimant's communication. The Tribunal considered Lee Allcock's reasons and motivation for the delay in responding and accepted his evidence as credible that he did not see it as a grievance or whistleblowing, he was more concerned with family matters and understandably too preoccupied with his dying Father.

61 In an email sent 3 April 2018 to Lee Allcock the claimant referred to the 20 March 2018 email complaining "I have raised serious concerns amounting to a protected disclosure and by not responding to my email in the 5-dayds as stated in the ERIKS Grievance Procedure I have suffered a detriment as ERIKS has not taken the concerns I have raised seriously."

62 Lee Allock for the reasons already stated, was not in a position to deal with the 3 April 2018 email and referred it to Denny Woods as follows "Can you pick this up…so we can go back to Andrew. I am not sure what protective disclosure Andrew is referring to? This is referring to a bonus not being paid but I understand that Andrew has not achieved his targets…"

63 Denny Woods, the head of HR during the relevant period within a few hours telephoned the claimant and asked him to submit more information as a formal written grievance, which the claimant did. It would have been clear to the claimant at that stage when the head of HR made contact and spoke to him by telephone about his concerns his complaint was being taken seriously. The Tribunal did not accept when viewing the matter objectively the claimant suffered a detriment between sending his email on 20 March 2018 and speaking with Denny Woods about it on 3 April 2018.

64 On the 3 April 2018 at 12.36 after speaking with the claimant Denny Wood emailed Gareth Lenton, the manager who held overall responsibility for electronic business and informed him "I have spoken to Andrew [the claimant]. He has a very old contract in which it merely states he is entitled to be part of a bonus – I informed him he is entitled to be a member of a scheme but that is targets were not achieved. It is a moot point but he challenged me and said that the scheme had changed without consultation – I explained that the scheme changed every year and had done since I could recall. He went on to say that over the years the targets have been set higher and higher and hence no pay out. He said he never had his targets communicated to him…we will need to find someone to hear the grievance…"

65 The Tribunal found with reference to the final paragraph, even if the claimant was correct about the 5-day timescale, objectively it is excessive to call a 5-day delay in a grievance to be a detriment, especially given the fact that the 9 April 2018 letter arose as a result of personal contact being made with the claimant by head of HR Denny Woods emphasising the seriousness with which the claimant's complaint was treated.

66 The claimant submitted the further information on the 9 April 2018 concerning "my contract of employment" and bonus. Reference was made to other employees on the "old WYKO contract" who had also allegedly suffered a breach of contract, although none were named. The claimant did not know if any of his colleagues were aggrieved or considered their contract to have been breached in any way. The evidence before the Tribunal was only the claimant raised such an allegation, and the claimant was unable to dispute this. The Tribunal found the claimant's real

concern was his own contract and not the contract of others, and he referred to the other employees solely with the aim of building up a claim of whistleblowing when in reality he had no public interest in mind and was exclusively concerned with a personal employment dispute involving bonus.

Second alleged detriment

67 Initially HR nominated Stephen Askins to deal with the claimant's grievance. In a telephone message on 12 April 2018 an answer machine was left by Jenny Ward who used the term appeal instead of grievance, and she informed Stephen Askins would be dealing with his grievance. Soon after the claimant objected, the hearing officer was changed to Joe Parkes, to which there was no objection.

68 On 16 April 2018 in an email sent to Jenny Ward the claimant alleged he had been subjected to further detriments by stating the meeting was to be an appeal when he had not had a first stage meeting. The clear evidence was that the respondent was not short-cutting the grievance procedure, a wrong word had been used and the grievance proceeded as per the respondent's procedure and so the Tribunal found. The claimant was aware of the true position but his intention was to put as much pressure on the respondent so as to fabricate a detriment and build up his whistleblowing complaint with a view to being paid off and start his own business in competition, and so the Tribunal found.

Grievance hearing 8 May 2019

69 On 8th May 2018 the Claimant's grievance hearing took place before Joe Parkes. The Claimant asserted he should have received a 10% bonus payment in 2014 and 2017 under the Applications Engineer Scheme of 2013. The claimant conceded no targets were met by him, and it common ground that personal targets had been part of the Applications Engineer Scheme, and no targets or objectives had been set for the past 5-years since 2013. When asked about why he had delayed raising a grievance the claimant explained he had been too busy to raise it previously, but his preference was to have agreed targets. The claimant alleged "it's not just me…with the unilateral changes, think ERICS breached contract. I think they've breached everyone's" but no details were given of the individuals involved, and the Tribunal found there was no basis for the claimant's assertion either at the time or now.

Meeting 8 May 2018 and discussion about a key project manager role and linked bonus personal to the claimant

70 Immediately after the grievance hearing the claimant travelled to meet Keith Hargreaves, Victor Harris and Gareth Lenton to discuss him managing a project for the respondent's key client and a bonus payment linked to his personal performance on the project were he to accept the role. For the avoidance of doubt, whilst there may be an issue as to whether the claimant refused the offer it is irrefutable that he did not expressly accept it.

71 There is a conflict in the evidence as to whether the claimant refused the offer project manager role for a high value project together with an individual bonus scheme reflecting the responsibilities entailed in carrying out the role. It is undisputed the claimant questioned the amount of bonus. There is a conflict concerning (a)

whether the claimant expressly rejected the role, and (b) whether the claimant said he would be resigning if the grievance decision went against him. The Tribunal found the claimant did not expressly reject the role and nor or indicate that he would be accepting the offer; he was however disparaging and negative about both the role offered to him and the one-off bonus scheme designed to reward him for specific achievement to be met in the project. The claimant made it clear that the bonus objectives were unrealistic and unacceptable. The claimant did threaten to resign if the grievance went against him, and this concerned Keith Hargreaves who did not want to lose the claimant as he needed him to take up the position of project manager. It was assumed correctly given the claimant's threat to resign, if the grievance went against him he would logically not take up the offer of the project manager position.

10 May 2018 letter

72 Joe Parkes wrote to the claimant on 10 May 2018 as follows; "Further to recent discussions with Keith Hargreaves, I am pleased to confirm below details of …special project bonus scheme…all other details of your original contract remain unaffected. "The letter did not state the claimant turned down the offer at the 8 May 2018 meeting, and the Tribunal took the view that on an ordinary common-sense interpretation of the letter it cannot be the case the claimant expressly rejected the offer of special project manager, otherwise there would be no point in sending him information relating to the bonus scheme relevant to the project only. Considering the contemporaneous evidence, it is not credible a HR director would have sent a letter recording he was "pleased to confirm" details of the bonus scheme if an employee had out rightly rejected the offer of a position with the bonus described, and the Tribunal found, on the balance of probabilities the claimant had not expressly refused the offer preferring the contemporaneous evidence to the oral evidence given by the respondent's witnesses. The claimant had given a very clear indication that he would resign if things did not go his way, and it was not unreasonable for Keith Hargreaves, Victor Harris and Gareth Lenton to conclude the claimant had not accepted their offer, and he would resign as he threatened to do. It is notable despite the claimant's threats the offer remained on the table, which is an indication of the extent to which the respondent wished to retain the services of the claimant and the high regard in which he was held.

73 Keith Hargreaves written evidence to the Tribunal was that the claimant refused the offer and at the 8 May 2018 meeting "also stated he would be resigning his position if his grievance was not upheld." He described how he had telephoned the claimant subsequently and Andrew Fitchford in order to make him aware the claimant was going to resign if his grievance was not upheld. Given the fact that as at 8 May 2018 Joe Parkes was yet to decide on the grievance it the Tribunal could reach no conclusion as to why Keith Hargreaves had not approached Joe Parkes, who had yet to decide on the grievance, but this was not a matter on which Keith Hargreaves was cross-examined.

74 Victor Harris in his witness statement made no mention of the claimant making a threat to resign at the 8 May 2018 meeting, his oral evidence was that the claimant had informed him of his threat to resign whilst working at Aintree. On the face of it there are inconsistencies in the respondent's evidence which pointed away from the possibility of them conspiring in their evidence. The passage of time can give rise to miss-recollection on the part of witnesses, including the claimant, and on

the evidence before it the Tribunal concluded on the balance of probabilities that a joint understanding, however it came about, had been reached in early May 2018 by Keith Hargreaves, Victor Harris and Gareth Lenton that the claimant would resign if the grievance did not go his way. The undisputed facts are that the grievance did not go his way and the claimant resigned, as he had threatened to do so. The Tribunal also found on the balance of probabilities the managers aware through the "grapevine" the claimant was discussing the possibility of setting up his own business, which he did on 17 July 2018 a few weeks after his resignation.

Outcome letter including the draft outcome letter dated 16 May 2018 referred to above under the heading 'Preliminary Hearing'.

75 Following the grievance hearing on 16th May 2018 the Claimant received the grievance outcome letter written by Joe Parkes, the grievance officer, dismissing the grievance as it was found the Claimant had been notified of the change to the bonus scheme. No reference was made to mail-merge letter referred to above, and as submitted on behalf of the claimant the Tribunal accepted this omission pointed to the possibility that the mail merge letter was not sent to the claimant. However, the Tribunal took the view there was no requirement to produce the mail merge letter given the claimant is not objecting about the detail of the scheme, his grievance related to the allegation that the One ERIKS Bonus scheme was introduced unilaterally and without consultation.

76 A draft grievance outcome letter dated 16 May 2018 was initially produced by Joe Parkes who was of the view a bonus of £165 was payable to the claimant under the One ERIKS bonus scheme. On comparing and contrasting the draft letter against the final signed copy sent to the claimant there were many changes and additions. For example, the words "you explained you immersed yourself into every project and therefore did to have the time to take note or consider these matters…It is ultimately your choice not to take note of internal communications, and the company has taken significant steps to increase the level of communication across the business as demonstrated above…" was inserted in the final copy. In general terms the initial draft was changed as one would expect, however, a significant paragraph was taken out, namely, "**I have however identified you should have received the OneERICS bonus payment of £165 in March 2018 for performance in the 2017 calendar year. I believe the payment was stopped pending our grievance meeting, however this payment will now be made on the next payment run**" [the Tribunal's emphasis]. Joe Parkes assumed all employees, including the claimant, were eligible for the £165 bonus.

77 Having written the first draft Joe Parkes, who had joined the respondent business as head of HR on 11 April 2018 possessed very knowledge about the bonus position and he wanted to check his draft letter correctly reflected the position. In order to do, contact was made with Andrew Fitchford who informed Joe Parkes the claimant was a grade E employee and password controlled documents existed setting out the bonus position for grade E. Joe Parkes was aware a number of documents were password protected from discussions with his predecessor Denny Woods, and he was provided with the password by Andrew Fitchford. Joe Parkes accessed the documents, and whilst there appeared to be confusion as to the exact date and time when he did, the Tribunal accepted on the balance of probabilities the pass worded documents resulted in Joe Parkes changing his mind about the claimant's eligibility to receive a bonus of £165.00. The Tribunal in arriving at its

decision took into account the undisputable fact that Joe Parkes had been employed in the business for just over a month and would not have had the opportunity to become familiar with the detail of the respondent's complex present and historical bonus schemes. The Tribunal concluded nothing hinges on the changes in the outcome letters, and no adverse inference can be raised by them as submitted by Mr Edwards on behalf of the claimant.

Appeal

78 On 21st May 2018 the Claimant submitted an appeal against the dismissal of his grievance setting out similar grounds to his grievance and including a further detriment, namely, not being paid any bonus payment for 2017 after he had raised the grievance, and he had been caused a detriment by his grievance not being taken seriously.

79 On 5th June 2018 the Claimant attended his appeal hearing heard by Andrew Fitchford. The appeal was dismissed by letter dated 8th June 2018. Neither at the hearing nor in the outcome letter was there a reference to the claimant being a Grade E employee subject to the 85% threshold set out in a separate scheme, and as a grade E manager he was not available for a bonus. The Tribunal found it surprising, especially given the fact Andrew Fitchford had been involved in designing the scheme, that this point was not clarified to establish the fact that the claimant was not eligible for a payment of £165.00. Andrew Fitchford's oral evidence on cross-examination was that Keith Hargreaves had telephoned him and warned him that the claimant would resign if he lost his grievance. The Tribunal found this evidence to be plausible, it was clear Keith Hargreaves did not want to lose the claimant and needed him to take up the role previously offered together with a bonus calculated outside the One ERIKS bonus scheme.

80 Andrew Fitchford dismissed the claimant's appeal. The 8 June 2018 outcome letter made no reference to the mail-merge letter allegedly sent to the claimant. It is notable Andrew Fitchford did not clarify why the claimant was not eligible for the 2017 bonus, he does not address non-payment of £165 was a detriment for the protected disclosure/grievance and offers no explanation for why the claimant was not paid it. He also confirmed the claimant had agreed the bonus relating to the new client contract, which undermines the evidence that the claimant had turned it down. Andrew Fitchford when he arrived at his decision that the claimant was not entitled to be paid any bonus took into account the terms of the relevant bonus schemes to which he was bound to follow. He was fully aware of the claimant's threat to resign if his grievance was unsuccessful and the implications for the business given the fact the claimant was a valued employee who performed so well that he had been offered the management of a prestigious contract and a possible £8000 bonus, and whilst the respondent's preference was to retain the claimant it could not make any exceptions and pay the claimant a bonus to which he was not entitled. It was not unreasonable for the respondent to take a view that the claimant, according to his threat and in the light of his unsuccessful grievance appeal, may resign and this impacted the steps taken by Keith Hargreaves when booking the client visit.

Respondent's visit to a major client abroad.

81 On 11th June 2018 the Respondent booked flights for Keith Hargreaves and Victor Harris to Dusseldorf to visit a major client for whom the claimant had worked in

the past on behalf of the respondent. Ordinarily, the claimant would have been booked on the visit, but knowing the claimant's plans to resign if the grievance did not go his way, Keith Hargreaves took the view it was not appropriate for the claimant to attend. The Tribunal carefully considered Keith Hargreaves motivation when he took the decision not to invite the claimant and concluded on the factual matrix before it, there existed no causal nexus with the claimant's grievance or the disclosure. The decision not to invite the claimant flowed directly from his threat to resign and objectively it was not unreasonable for Keith Hargreaves to conclude the claimant would not be accepting the offer of project manager. It is notable on the issue of motivation and causation that the claimant had raised the grievance/alleged protected disclosure and yet he had still been offered an important position with the respondent's major client. The decision not include the claimant was made for no other reasons that his expected departure.

Resignation

82 On 14th June 2018 the Claimant gave notice of resignation from his employment with the Respondent. On the same date Keith Hargreaves and Victor Harris visited the major client when it flew out to visits its offices for the day.

83 The resignation letter made no reference to the client visit in Dusseldorf. The claimant relied on the following as the reason for his resignation; "As a result of your repudiatory breach of contract of employment, **which consisted of not adhering to express clauses of my contractual contract, a breach of the implied term of mutual trust and confidence regarding suffering detriments for whistleblowing, the manner my grievance was dealt with and the outcome to my grievance and appeal**" [the Tribunal's emphasis]. The claimant resigned on one-months' notice. The last straw relied on was the grievance appeal outcome letter dated 8 June 2018 as confirmed by Mr Edwards during this liability hearing.

84 The next month in July 2018 the Claimant started up his new business as Managing Director of Rotary Drives & Controls Ltd in direct completion with the respondent. It is notable the 13th July 2018 was the Claimant's effective date of termination of his employment with the respondent, following expiry of his notice to resign.

The Law

Bonus payments

85 On behalf of the claimant the Tribunal was referred to the Court of Appeal decision in Dresner v Kleinwort Limited (1), Commerzbank AG (2) v Richard Attrill & Others **[**2013] EWCA Civ 304 IRLR 548 at paragraphs 54 and 57, reference was made to what constitutes the lawful exercise of discretion in relation to a bonus; an employer can act lawfully if the exercise of discretion is not carried out arbitrarily, capriciously or in bad faith. The right to be considered for a bonus was a valuable right perfectly capable of constituting a contractual term. Mr Edwards submitted that Dresner does not apply to the claimant, who was disadvantaged on the basis that it replaced other bonus schemes, his contract required personal consultation citing the discussion that took place over the Applications Engineers bonus and the bonus offered to the claimant for taking on management of a key client project in May 2018. In contrast, the One ERIKS emails were communication and not consultation. In

relation to those communications it was submitted the claimant never read the notifications until March 2018.

86 On behalf of the claimant the Tribunal was also referred to the Supreme Court decision in Braganza v BP Shipping Ltd [2015] UKSC 17 held there is an implied term in contracts generally, including employment contracts, that where one party (here, the employer) has a discretion under the contract to make a particular decision or determination which may adversely affect the other party (here, the employee), the former must exercise that discretion lawfully and rationally 'in the public law sense that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose' (per Lady Hale at [30]). Affirming that it is not for a court to substitute its decision on a discretionary matter for that of the decision-taker, she said that for some time now the courts have instead exercised some control over the *manner* of exercising that power. Adopting the parallel with administrative discretions, she applied the seminal principle of 'Wednesbury unreasonableness' both of these apply to an employment-related matter.

(1) the decision-taker must take into account relevant factors and ignore irrelevant ones (looking at the *process* behind the decision); and

(2) the actual decision must not be so outrageous that no reasonable decision-taker could have come to it (looking at the *result* of exercising the power).

87 It was submitted by Mr Edwards the first limb focuses on the decision-making process – if the right matters have been considered in reaching the decision, and the second on the outcome, whether the right things have been considered the outcome was so outrageous that no reasonable decision maker could have reached it, the implication being it was not reasonable for the respondent to have not paid the claimant the bonus he was seeking.

88 The House of Lords decision in Investors Compensation Scheme v West Bromwich Building Society [1997] UKHL 28 [1998] 1 all ER 98 [1998] 1 WLR 896. Clarified the construction of the scheme rules falls to be decided by how the words would be understood by a reasonable person having all the background knowledge, which would reasonably have been available to the parties in the situation they were in at the time of the contract. The background includes anything, which would have affected the way in, which the language of the document would have been understood by the reasonable man.

89 The Tribunal were referred to the decision by the Court of Appeal in Commerzband AG v Keen [2006] EWCA 1536 which lay out guidelines as to the circumstances in which the Commercial Court would be willing to intervene in bonus cases where the exercise of discretion was being challenged. At paragraphs 43 and 44 references was made to the dynamics in the employment relationship and the implied mutual duty of trust and confidence between employer and employee. Guidance was laid down as to the circumstances in which the Court will be willing to intervene in bonus cases where the exercise of discretion is being challenged. In assessing the guidelines, the Court of Appeal set out the importance of the employer giving reasons for the exercise of a discretionary power, aligning this with perversity and also with the implied trust and confidence term itself. The Court of Appeal drew distinction between cases where meaningful bonuses had been paid and one in which no bonus at all had been paid. In the latter it would clearly be easier for the

employee to prove irrationality since an employer would need solid grounds to justify paying no bonus at all.

90 On the issue of perversity, the Tribunal were referred on behalf of the claimant to Clarke v Nomura International PLC [2000] IRLR 766 in which the High Court set out the correct test for irrationality or perversity i.e. that no reasonable employer would have exercised his discretion in this way. The Tribunal was also referred to Brogden v Investec Bank [2014] and it was submitted that a contractual decision within an employment relationship must be exercised in good faith "for the purpose in which it was conferred" and not arbitrarily, capriciously or unreasonably the essence of the obligation being one of "fair dealing."

Protected disclosure

91 Section 43B (1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. This requirement applies to all cases where the disclosures were made on or after 25 June 2013.

92 The public interest requirement has not been conceded by the respondent, it applies to all types of relevant failure, including breach of a legal obligation under S.43B(1)(b). The requirement was introduced in 2013 to excluding private employment disputes from the scope of the protected disclosure provisions.

93 The Tribunal was referred to Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, which concerned a number of disclosures about accounting practices at CG Ltd. The EAT observed that the words 'in the public interest' were introduced to do no more than prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In the EAT's view, a relatively small group may be sufficient to satisfy the public interest test — this is a necessarily fact-sensitive question. In the present case, while the tribunal had recognised that the person that N was most concerned about was himself, it had been satisfied that he did have the other office managers in mind and permissibly concluded that a section of the public was affected.

94 The Court of Appeal dismissed CG Ltd's further appeal. It rejected CG Ltd's argument that, for a disclosure to be in the public interest, it must serve the interests of persons outside the workplace, and that mere multiplicity of workers sharing the same interest was not enough. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter 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. In this regard, the following factors suggested by N might be relevant:

(1) the numbers in the group whose interests the disclosure served
(2) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
(3) the nature of the wrongdoing disclosed, and
(4) the identity of the alleged wrongdoer.

95 The Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract 'of the *Parkins v Sodexho* kind' may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. Tribunals should, however, be cautious about reaching such a conclusion — the broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

96 In Underwood v Wincanton plc EAT 0163/15 the EAT held that it was arguable that the 'public interest' test was satisfied by a group of employees raising a matter specific to their terms of employment. The EAT a too narrow a view of the term 'public', failing to recognise that it can refer to a subset of the public, even one composed solely of employees of the same employer, and disputes about terms and conditions of employment could not constitute matters in the public interest.

97 The Tribunal accepts complaints about contracts of employment and working conditions can attract protection, however it found the claimant had not established he held a reasonable belief in the existence of a public interest aspect to the disclosure.

Disclosure of information

98 Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure.

99 What amounts to a 'disclosure of information' for the purposes of S.43B was explored by the EAT in Cavendish Munro Professional Risks Management Ltd v Geduld *2010 ICR 325, EAT*, referred to the Tribunal on behalf of the claimant. The EAT noted the lack of any previous appellate authority on the meaning of 'disclosure of information', and observed that S.43F, which concerns disclosure to a prescribed person (draws a distinction between 'information' and the making of an 'allegation'. In its view, the ordinary meaning of giving 'information' is 'conveying facts'. The solicitor's letter had not conveyed any facts; it simply expressed dissatisfaction with G's treatment. For that reason, it did not amount to a disclosure of information and could not be a protected disclosure.

100 In Kilraine v London Borough of Wandsworth *2018 ICR 1850, CA*, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from Cavendish Munro (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court in Kilraine endorsed observations made by Mr Justice Langstaff when that case was before the EAT — Kilraine v London Borough *of Wandsworth 2016 IRLR 422, EAT* — that 'the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that 'it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined.'

101 The Court of Appeal in Kilraine went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures. Furthermore, as explained by Lord Justice Underhill in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA, this has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

102 The context of any putative disclosure is also highly relevant. The Court of Appeal in *Kilraine* adapted the example given in Cavendish Munro of a hospital worker informing his or her employer that sharps had been left lying around on a hospital ward. The Court explained that if instead the worker had brought his or her manager to the ward and pointed to the abandoned sharps, and then said 'you are not complying with health and safety requirements', the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure. The statement would clearly have been made with reference to the factual matters being indicated by the worker at the time. In bringing a whistleblowing claim in reliance on the disclosure, the worker's claim form and evidence would then need to set out the meaning of the statement *as derived from its context*. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background as claimed.

Constructive dismissal

103 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the 1996 Act") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employers conduct.

104 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or to put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of

Appeal judgment in the case of Paul Buckland –v- Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

105 The House of Lords in Malik –v- Bank of Credit; Mahmud –v- Bank of Credit [1997] UKHL 23, held that the breach occurs when the prescribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited", and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

106 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The Court of Appeal held that an employee can either leave at the instant without giving notice, or may give notice and say that he is leaving at the end of the notice providing the conduct is sufficiently serious to entitle him to leave at once. "Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract". The issues to be decided upon in this respect were: -

(1) Was there a fundamental breach on the part of the employer?

(2) Did the claimant terminate the contract by resigning?

(3) Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation?

(4) Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end?

107 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis –v- Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term".

108 In Omilaju –v- Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy

conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

109 On behalf of the claimant the Tribunal were also referred to Gabb Robbins v Triggs [2008] IRLR 320, Abbey National Plc v Fairbrother [2008] EAT IRLR 320. submitting that the conduct of the grievance procedure must be looked at, and only if it has been conducted in a manner in which no reasonable employer would have conducted it can it be said that he did not have a reasonable and proper cause for his conduct.

Conclusion: applying the law to the facts

Breach of contract

Issue 1

110 With reference to the first issue, namely, was the Claimant contractually entitled to receive a bonus payment for financial year 2014 (payable in 2015) and a bonus payment for financial year 2017 (payable in 2018) the Tribunal found he was not and the Respondent had not failed to pay the Claimant any such bonus payments. The starting point must always be the express terms of the contract of employment. Mrs Justice Slade pointed out in Small v Boots Co plc *[2009] IRLR 328, EAT*, the use of the word discretionary in a bonus scheme can be ambiguous and 'may be attached to the decision to pay a bonus at all, its calculation or its amount'.

111 As indicated above, the Tribunal found the claimant's contractual entitlement was to be part of the branch bonus scheme the terms of which were discretionary and to be decided by the respondent on an annual basis. The bonus scheme was annually reviewable and personal consultation was not required for this. The claimant accepted in evidence the bonus scheme was discretionary and could be varied by the respondent, accordingly the amount of bonus also varied depending on how bonus was to be calculated. Once the bonus scheme calculation had been set for the financial year the respondent had no discretion whether to pay the claimant any bonus at all providing he was entitled to a payment in accordance with the calculation. On this basis the claimant received a bonus in 2007 payable in 2008 the sum of £4820, for 2009 he received a bonus payable in 2010 in the sum of £3170, for 2010 he received a bonus payable in 2011 of £4117, in 2011 a bonus payable in 2012 in the sum of £374 and in 2014 (the last bonus payment made) the sum of £2463.00. This was the full extent of the bonus payments made to the claimant throughout his employment and they varied from nil, £374 to £4820. Mr Gidney submitted that the legal obligation to pay a discretionary bonus is created when it has been declared in accordance with the EAT decision in Farrell Mathews and Weir v Hansen [2005] IRLR 160, individually quantified. The Tribunal agreed, but would add for the avoidance of doubt, it must also be iquantified in accordance with the calculation set out in the relevant scheme created by the respondent for the relevant financial year.

112 As submitted on behalf of the respondent by Mr Gidney, there were four bonus schemes applicable to the claimant at the respondent's discretion; the Branch

Bonus Scheme which ran form 2011, the Application Engineers Bonus Scheme which ran for one year in 2013, the One ERIKS Bonus Scheme introduced in 2017 and continuing and the Siemens Special Projects Bonus offered to the claimant and not taken up by him.

113 The Tribunal found the claimant was not contractually entitled to a payment calculated under the Applications Engineers Bonus in 2014 payable in 2015 and he had received his contractual bonus under the relevant scheme, which he accepted without complaint at the time. Had the respondent unilaterally varied the bonus scheme in 2014 from the Application Engineers Bonus Scheme back to the Branch Bonus Scheme as argued by the claimant, the effect of this would have been to have paid the claimant a bonus to which he was not entitled, as he had not personally performed sufficiently to meet the objectives set out for financial year 2013 under the Application Engineer Bonus Scheme to merit payment of any bonus as found by the Tribunal above. In any event, had the bonus scheme been varied without personal consultation with the claimant the Tribunal would have gone on to find he had accepted those changes when he knowingly accepted the bonus payment calculated under the Branch Bonus Scheme in 2015, the Tribunal having concluded on the balance of probabilities that the claimant, who was in the habit of keeping his personal performance tracked, would have been aware that in 2014 no objectives had been set for him to meet and thus the Application Engineers Bonus Scheme based on personal performance was not applicable.

114 With reference to the One ERIKS Bonus Scheme there existed a contractual right to be eligible if there is to be a bonus, and when the scheme rules were changed this need not be by way of agreement or negotiation, notification is sufficient and various communications were sent to all employees, including the claimant and the Tribunal found these amounted to sufficient notification. In short, the respondent was not contractually required to "negotiate" with the claimant on any changes made to the bonus scheme and so the Tribunal found.

115 The Tribunal found, as conceded by the claimant, the bonus scheme was discretionary. The respondent had a wide contractual discretion to change the schemes. As set out in the case law cited above, this discretion should not be exercised irrationally or perversely and there exists a term implied into the claimant's contract to this effect. Mr Gidney submitted there was an obligation on the respondent to consider the question of payment of a bonus and the amount, as rational and bona fide. In connection with the 2014 bonus payment and the One ERIKS bonus scheme the Tribunal found the respondent was not in breach of the implied term of trust and confidence, and there was no perversity.

116 Taking into account the history of bonus payments made to the claimant, the 2014 bonus amount was meaningful in comparison to bonus payments made in the past and the fact that from 2012 until 2014 targets had not been met. The claimant had accepted the 2014 bonus payment in 2015 without complaint and the claimant has adduced no satisfactory evidence that the respondent had acted in way which was perverse when it paid him £2463.00; which is not surprising given the Tribunal's finding that had the applicable bonus scheme been the Application Engineers Scheme the claimant would not have met his personal targets and he would not have been entitled to any bonus payment and received an unexpected windfall. The reality is that he was paid the bonus to which he was contractually entitled and in paying him so the respondent did not exercise its discretion irrationally or perversely

evidenced by the fact the claimant was completely satisfied with the bonus payment at the time in circumcentres where he kept a monthly track of performance with an eye to bonus eligibility.

117 Turning to the One ERIKS bonus scheme employees affected, including the claimant, were consulted about such changes, and given reasonable notice before the final decision has been made and the changes took place, with a number of employees putting forward representations and being part of the discussion. Thousands of employees were affected and it was not a breach of the implied term of trust and confidence for them to be contacted via emails and other methods of communication rather than face-to-face personal negotiation as suggested by the claimant. The fact the claimant ignored the entire process until he was informed he would be paid a bonus of £165 does not point to the respondent acting irrationally or perversely and breaching the implied term of trust and confidence, it does however reflect the total disinterest the claimant took which further undermines his argument that face-to-face consultation should have taken place. The claimant was held in high regard and got on well with high level managers whom he could have approached about the One ERIKS bonus scheme had he bene interested enough to do so, but he was not.

118 Turning to the sum of £165 the Tribunal found providing the respondent had not acted irrationally or perversely, there was no contractual entitlement to a specific sum of money providing the payments/non-payments were calculated in accordance with the applicable scheme for a particular financial year. There was no assumption on the part of the claimant that he would receive a bonus payment for financial year 2017 payable in 2018 and when it came to the changes made by the respondent to the bonus scheme by the introduction of the One ERIKS Scheme the Tribunal found consultation and communication prior to the changes taking place did take place throughout the workforce and there was no breach of the implied term of trust and confidence by the way the respondent communicated.

Constructive Unfair Dismissal

Issue 2

119 With reference to the second issue, namely, what was the most recent act (or omission) on the part of the Respondent which the Claimant says caused or triggered his resignation, the Tribunal was informed the last straw relied upon by the claimant was the dismissal of his grievance. It was submitted by Mr Edwards that the respondent had committed a repudiatory breach of contract that goes to its root, and the respondent had shown, objectively judged, an intention to abandon and refuse to perform the contract and its subjective intention was to destroy or seriously damage the relationship of mutual trust and confidence. Every breach relied upon of mutual trust and confidence was a repudiatory breach of contract in accordance with Marrow v Safeway Stores [2002] IRLR 9. The Tribunal did not agree, and nor did it find there existed a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence.

120 As indicated above, the Tribunal did not find the respondent had failed to pay the claimant his contractual entitlement to bonus in 2014 (payable 2015) and 2017 (payable 2018). The Tribunal on behalf of the claimant was referred to Brogen v

Investec Bank plc [2016] EWCA Civ 1031, [2017] IRLR 90 Mr Justice Leggatt held that the Bank was require to exercise its discretion to determine the amount of profit, which would in turn establish the size of the bonus pool and following Clark v Nomura International such a discretion was subject to the implied requirements of good faith and rationality, and he found there had been no breach of the implied term on the facts of the case. In the Court of Appeal's view, the Clark v Nomura line of cases was irrelevant as the clause in question did not give rise to any discretion. The issue was simply one of contractual interpretation. Similarly, the Tribunal took the view that once the respondent had decided on the terms applicable to bonus payments for the 2013 and 2017 financial years, there was no discretion in establishing the amount payable to the claimant, all that was required was for the respondent to calculate his entitlement in terms of the applicable rules, and that is exactly what it did with the result that there was no breach of contract. The effective communications made in relation the changes made from the Branch Bonus Scheme to the One ERIK Bonus Scheme, changes discretionary to the respondent, were not in breach of the implied term of trust and confidence.

121 As indicated above the respondent had not failed to deal with the claimant's grievance dated 20 March 2018 in a "timely Manner" and objectively assessed, the fact the claimant "chased" the respondent for a response by his email sent 3 April 2018 was not a matter that is likely to destroy or seriously damage the degree of trust and confidence an employee is reasonable entitled to have in his or her employer. By the 3 April 2018 a discussion had taken place between the claimant and head of HR as a consequence of which the claimant submitted written clarification of his grievances, and he could not have objectively believed (a) he had been caused a detriment and (b) the respondent had shown an intention to abandon and refuse to perform the contract: Tullett Preston Plc v BGC Brokers LP [2011] IRLR 420 and Eminence Properties Developments Ltd v Heaney [2010] ECWA civ 1168 (as relied upon by the respondent). The indication given to the claimant was that the respondent was showing every intention to perform the contract and deal with his grievance, which it did with the claimant taking a full part in the process until his appeal had been heard and dismissed whereupon the claimant resigned.

122 The respondent's act in dismissing the claimant's grievance was not an act calculated or likely to destroy or seriously damage the relationship between employee and employer. Contrary to the claimant's submissions there was no favourable evidence as contained in the contractual terms and no evidence of failure to consult over the contractual terms as alleged. The claimant was not contractually entitled to a bonus payment, and even if he could have established (which he did not) personal consultation over any changes to the bonus schemes over the years should have taken place, he had accepted the 2014 bonus payment and not resigned thus affirming any breach that may have occurred and he refused to take part in any of the communications made in 2017/2018 regarding the One ERIKS bonus scheme. The respondent had reasonable and proper cause for rejecting the claimant's grievance, its conduct was lawful and the Tribunal did not accept based on the evidence before it, that the claimant was entitled to any bonus payment.

123 Turning to the oral submissions made on behalf of the claimant by Mr Edwards, on the evidence before it the Tribunal found as a senior employee the claimant was not entitled to a bonus payment of £165 which in proportion to his generous salary package was not a meaningful sum of money, and the respondent had not without reasonable excuse failed to pay the claimant this sum. As set out

above, the key performance indicators had not been met and senior employees on the same grade as the claimant were not paid any bonus.

124 It was submitted by Mr Edwards that the respondent had failed to provide an outcome on the "collective part" of the claimant's grievance, which the Tribunal found had no merit whatsoever given the very clear indication within the grievance that it was a personal matter with no other employee being cited by name, and nor was the claimant capable of listing those employees who had allegedly formed the collective part of his grievance regarding bonus payments. The Tribunal's finding in this regard was also factored into its conclusion of the protected disclosure and public interest, which was that there was none.

125 Finally, the respondent's failure to invite the claimant to the day trip to Germany to visit the client was not a breach of the claimant's express contractual term or breach of the implied term of trust and confidence. The claimant had not accepted the job offer, he had made it very clear the new position and the special projects bonus were not attractive options for him, and he intended to resign if the grievance did not go his way. By the time the trip to Germany had taken place the grievance outcome decision and appeal had been communicated to the claimant and it cannot be said that the respondent had acted unlawfully and had breached the claimant's trust given all the circumstances, including the fact the claimant had not accepted the offer to take up management of the project for the client visited in Germany. In short, there was no need for him to attend the meeting and there was a need for client damage limitation by the respondent in the event of the claimant resigning as he had threatened.

126 The client visit took place after the outcome of the claimant's grievance appeal was communicated to the claimant and it is the grievance outcome only that is relied upon as a last straw. As a matter of logic if the grievance outcome was the last straw then the client visit was not a matter relied upon by the claimant when he came to resign, and the claimant's omission is supported by his resignation letter that makes no mention of the client visit to Dusseldorf.

127 Turning to the last straw doctrine, Mr Gidney submitted five questions were to be posed by the Tribunal, namely (1) the most recent act relied upon as set out above, (2) whether the claimant affirmed the contract since that act, (3) if not, was the act by itself a repudiatory breach of contract, (4) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions, which viewed objectively, amounted to a repudiatory breach of the Malik term cited above, and (5) did the claimant resign in response or partly in response to that breach? The Tribunal accepted Mr Gidney's submission that the claimant does not get a constructive dismissal claim simply because he does not like the outcome of the grievance. There was no express breach of contract and the grievance rejection could not amount to a last straw as the outcome was reasonable and lawful and in accordance with Lewis –v- Motorworld Garages Limited cited above, there was no breach of the implied obligation of trust and confidence via of a series of actions on the part of the respondent which cumulatively amount to a breach of the term, although each individual incident may not do so. The cumulative series of acts taken together as alleged did not amount to a breach of the implied term and in accordance with Omilaju –v- Waltham Forest London Borough Council the last straw did not even slightly contribute to the breach of the implied term of trust and confidence as it was an entirely innocuous act on the part of the grievance and

appeal officers who decided the outcome based on the information before them, and in the case of the appeal officer, in the knowledge that the claimant had threatened to resign if the grievance outcome was unfavourable.

128 Finally, with reference to the last question, namely, did the claimant resign in response or partly in response to that breach, on the face of it the claimant resigned on 14 June 2018 after the 8 June 2018 outcome letter as amended was sent to him in response to his unsuccessful appeal. The claimant gave one-months' notice and immediately on its expiry he set up a competing business and starting trading on 13 July 2018. It is not credible the claimant would resign from a senior position with commensurate salary and benefits in kind he had held since 7 February 2005 (having previously been employed with the respondent until he started up his own business), where he was well-regarded and had been offered a responsible project manager position for a key client with separate bonus, for the loss of an unpaid bonus in the sum of £165.00. Taking into account the factual matrix as set out above, including the years when the claimant received no bonus payments at all over which he never complained, the Tribunal concluded on the balance of probabilities the claimant did not resign in response to the alleged breaches of contract but as a direct result of his threat to resign over the grievance and then to set a business in competition with the respondent.

Automatic Unfair Dismissal – Protected Disclosure

129 With reference to the third issue, namely, did the Claimant's email dated 20th March 2018 amount to a protected disclosure within the meaning of section 43A of the ERA the Tribunal found it was not a disclosure of information which in the reasonable belief of the claimant making the disclosure, was made in the public interest and tended to show that the respondent had failed, was failing or likely to fail to comply with any legal obligation to which it was subject.

130 Mr Edwards in submissions referred the Tribunal to Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416, in which the EAT set out the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures which the Tribunal has dealt with as follows:

130.1 Each disclosure should be identified by reference to date and content; the disclosure relied on was the 20 March 2018 email recorded above in the findings of facts, which relied on the alleged failure or likely failure to comply with a legal obligation relating to non-payment of contractual bonus payment and varying contractual terms without negotiation. The Tribunal recognises that it was proper for it to have regard to the cumulative effect of both complaints providing all had been identified as protected disclosures.

130.2 Mr Gidney made submissions on whether the 20 March 2018 email was disclosure of information and therefore could constitute a qualifying disclosure, or a mere allegation made against the backdrop of an employment dispute about contractual terms. The Tribunal was referred to Cavendish above and Kilkraine v London Borough of Wandsworth [2018] EWCA Civ 1436. The Tribunal took the view the claimant's reference to the respondent allegedly not paying contractual bonus to employees, varying contractual terms without negotiation and suffering unlawful deduction of wages without any more detail, could amount to information as well as an assertion/allegation and was

theoretically capable of being a protected disclosure. Mr Gidney submitted it disclosed no information as to which bonus was payable, which term breached and what contractual term had been varied, therefore the disclosure was not one of information but an allegation only and did not qualify. He argued in contrast to Kilkraine, the claimant's disclosure could have specified dates and the amount of bonus payment due, was not specific enough and therefore insufficient to bring into question under section 43B (1) a breach of a legal obligation to pay a contractual bonus, not unilaterally change contractual terms and not unlawfully deduct wages. Mr Gidney further submitted there must be an actual or likely breach of a legal obligation, and in relation to this the Tribunal took the view the claimant had not met the burden of proof on the balance of probabilities. In fact, and as a matter of law there could not have been a breach of a legal obligation relating to the 2014 bonus payment, and as indicated above the Tribunal concluded the claimant would have understood he had received his full bonus entitlement, or in the alternative, a windfall, as there was no entitlement other than under the Branch Bonus Scheme.

130.3 Turning to the bonus payment of £165 all employees were sent an email dated 15 March 2018 confirming this bonus payment would be made to all, which the claimant did not read as was his practice, and eventually was made aware of the small bonus payment by an unnamed fellow employee. As a direct result of the 15 March 2018 email the claimant expected his bonus would amount to £165 and was unhappy with the amount, hence the grievance. Joe Parkes in his draft outcome letter also identified the claimant should receive the One ERIKS bonus payment of £165 in March 2018 for performance in 2017 calendar year because he was aware all employees had been sent the email and was unaware that bonus payment relating to senior employees were calculated on a different basis. In all of the circumstances and taking into account the fact the claimant's disclosure was not about the non-payment of £165, which only became an issue after grievance outcome stage, the Tribunal preferred submissions made by Mr Gidney to the effect that the claimant has not established upon the balance of probabilities there was in fact, objectively assessed, and as a matter of law a legal obligation on the respondent to pay to the claimant any additional bonus and the information the claimant disclosed does not tend to show the respondent failed with any legal obligation to which it was subject.

130.4 The Tribunal should then determine whether or not the employee had had the reasonable belief, referred to in s 43B(i) of the 1996 Act and under s 17 of the 2013 Act, whether each disclosure had been made in good faith, and in accordance with the 2013 Act whether it had been made in the public interest and tended to show the respondent was in breach of a legal obligation. This was a fundamental issue in the claimant's case as the Tribunal found he was essentially bringing a private grievance relating to his own personal contractual dispute taking into account the guidance provided by Chesterton Global cited above. Contrary to submissions made by Mr Edwards, the Tribunal took the view the only individual concerned was the claimant who was well aware that this was the case, and for the reasons already stated above, there was no satisfactory evidence that the claimant's disclosure served the interests of any other employees and exclusively concerned the claimant's contract of employment. The fact the claimant used the words "I consider that I and my

fellow employees have suffered an unlawful deduction of wages" is insufficient without evidence that other fellow employees had suffered an unlawful deduction when none was forthcoming as the claimant, who had consulted with none of his colleagues about the matter, was unable to identify individuals at the relevant time or at this liability hearing. Given the factual matrix it is conceivable all other employees were satisfied with the status quo; they had received the 2014 bonus and unlike the claimant, a number chose to become involved in the new One ERIKS Bonus Scheme and its redrafting. Employees were positive about the prospect of one bonus schemes replacing a number of different schemes applicable to individual employees, hence the term "One ERIKS." In short, the Tribunal found the claimant did not have any individuals in mind and he did not permissibly conclude that a section of the public was affected. Taking into account the four factors referred to in Chesterton Global it is clear no other employees other than Mr Bevins interests were served by his disclosure, the disclosure of the wrongdoing at its highest, namely the non-payment of £165 bonus given the claimant could not have objectively believed reasonably he was owed a bonus payment going back to 2015, and was aware the respondent had communicated the One ERIKS bonus proposals regularly to employees before its introduction, would not be in the public interest as it was a relatively trivial matter and there was no deliberate wrongdoing on the part of the respondent or its managers.

130.5 The claimant referred the Tribunal to Underwood v Wincanton cited above, a case which can be differentiated from that of Mr Bevins in that his disclosures did not relate to any other person in contrast to Mr Underwood's protected disclosure that concerned a contractual dispute with three other lorry drivers having an interest, and this was an example of when a dispute concerning terms and conditions of employment could form the basis of a qualifying disclosure under section 43B ERA. The Tribunal took the view on the evidence before it the claimant did not reasonably believe the complaint he made was in the wider interests of employees generally or in the wider public interest.

130.6 Mr Gidney referred to Darnton v University of Surrey [2003] IRLR 133 in which it was held "for there to be a qualifying disclosure it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true and that it tends to show a relevant failure, even if the worker was wrong but reasonably mistaken." The Tribunal, contrary to Mr Gidney's submission, accepted the claimant held a reasonable belief he would receive a bonus payment in the sum of £165.00 for the year 2017. However, he had no reasonable basis for holding the view that other employees believed the respondent was in breach of contract by not paying him or her a further bonus payment in 2014, in excess of £165 in 2017 and varying contractual terms without negotiation. The overwhelming evidence before the Tribunal was that a number of employees took part in discussions about the bonus and it is highly unlikely any believed the respondent to be in breach of contract, and if they did nothing was said or done about it to the respondent or claimant. Taking into account the factual matrix, it appears no other employee held the view their contractual terms had been varied unilaterally without discussion taking place regarding the bonus schemes, and that they had suffered an unlawful deduction of wages as alleged by the claimant.

130.7 Where it was alleged that the employee had suffered a detriment, short of dismissal, it was necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the employee. That was particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act could be ascertained by direct evidence, the failure of the employer to act was deemed to take place when the period expired within which he might reasonably have been expected to have done the failed act. Having found against the claimant in relation to his disclosure, there is no requirement for the Tribunal to consider the alleged detriments. If the Tribunal was wrong on the first issue and had it found the claimant made a protected disclosure (which for the avoidance of doubt it had not) it would have gone on to find for the reasons already stated the claimant had not suffered the detriments alleged. The claimant's grievance was investigated and dealt with through to appeal stage and there was no meaningful delay at the outset; the claimant was not entitled to the bonus payment of £165 or any other payment, and it was not a detriment for bonus not to be paid before a decision had been made on the claimant's grievance dealing with his contractual entitlement to a bonus and the alleged failure to negotiate. Finally, objectively a reasonable employee would not consider him or herself to have been caused a detriment when two other managers took the day-trip to see a client in circumstances where the employee had not accepted an offer to take up a key role in a new project relating to that client and had indicated they intended to resign, which they did.

131 For the reasons already stated the Tribunal did not find the claimant had acted in good faith when he made the disclosure, a finding only relevant to remedy and the assessment of damages.

132 With reference to the fourth issue, namely, was the reason or principal reason for the Claimant's alleged dismissal that he had made the protected disclosure (above) for all the reasons already stated the Tribunal found that it was not; the claimant resigned because he was unhappy with the grievance outcome and to set up a competing company and there was no fundamental breach of contract culminating in a last straw on which the claimant could successfully find he had been constructively dismissed and there was no causal connection with the whistleblowing whatsoever.

Detriment – Protected Disclosure

133 With reference to the first issue relating to the claim for detriment, namely did the Respondent subject the Claimant to the following acts or omissions, the Tribunal found it had not on the balance of probabilities for the reasons already stated. In short, the claimant's allegations/disclosures were investigated, the respondent acted lawfully when it did not pay the claimant a bonus payment for 2017, namely he did not qualify for it and there was no causal connection between non-payment and the protected disclosure. On or around 8 May 2018 the claimant indicated to a number of managers he would resign if his grievance was rejected and he did not accept the project manager role making it clear the applicable bonus was unacceptable.

134 Mr Gidney referred the Tribunal to Fecit & Others v NHS Manchester [2011] IRLR 111 and the guidance given by the EAT that the employer must show that any act or failure to act was in no sense whatsoever on the ground that the claimant had made a protected disclosure. This requires the Tribunal to assess whether the respondent has provided an explanation that is adequate to discharge the burden of proof on the balance of probabilities that the protected disclosures were not the ground for the treatment in question. It is for the claimant to prove facts from which the Tribunal could conclude detriment taking into account all of the evidence before it. In all of the circumstances as set out in the findings of facts, the Tribunal concluded that the claimant had the claimant established he had suffered a detriment (which for the avoidance of doubt the Tribunal found he had not) it would have in the alternative gone on to find the claimant had not discharged the burden of proof, and with the exception of the non-payment of £165 to which the Tribunal will return, he adduced no satisfactory evidence that the respondent had treated him less favourably in the first instance.

135 Turning to the non-payment of £165 and the amended grievance outcome letter promising payment of this sum by way of bonus, the Tribunal accepted on the balance of probabilities, the explanation given by Joe Parkes and Andrew Fitchfork that the claimant was not eligible for this payment, and had he been a lower grade employee or less senior the £165 would have been paid as evidenced in the draft grievance outcome letter before amendment. Taking into account all of the facts above including the claimant's seniority, his standing in the company and high regard in which he was held, the fact an offer of project manager for a key client had been made after the alleged protected disclosures coupled with Keith Hargreaves attempt at warning Andrew Fitchford the claimant would resign it the grievance outcome was not favourable on the basis that he did not want the claimant to resign, led the Tribunal to conclude on the balance of probabilities, the very small sum of £165 bonus was not paid to the claimant because he did not qualify for it and it was in no sense whatsoever on the ground the claimant had made a protected disclosure.

Time limits

136 With reference to the issue relating to time limits, namely, has the Claimant's claim under this head been presented in time in accordance with section 48 of the ERA, the claim was presented before the end of the period of three months beginning with the date of each of the alleged acts (of failures to act) giving rise to the alleged detriments, it is theoretically possible for an alleged failure to investigate the grievance allegations any bonus to have occurred on 8 June 2018 when Andrew Fitchford rejected the claimant's grievance appeal. The applicable date for the non-payment of bonus was the grievance outcome letter dated 16 May 2018 and the failure to invite the claimant on the client trip was 11 June 2018 when flights were booked for Keith Hargreaves and Victor Harris only. The ACAS EC certificate is dated 15 July 2018 and the ET1 received 17 July 2018 well within the 3-month statutory time limit. The Tribunal had the jurisdiction to consider the claimant's complaints.

137 In conclusion, the respondent was not in breach of contract and claimant's claim for breach of contract is not well founded and is dismissed. The claimant did not

raise a protected disclosure and his claims for detriment brought under section 47B and automatic unfair dismissal under section 103A of the Employment Rights 1996 as amended, are not well-founded and are dismissed. The claimant was not unfairly dismissed and his claim for unfair dismissal brought under section 94 of the Employment Rights Act 1996 is not well-founded and is dismissed.

11.10.19
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 October 2019

FOR THE TRIBUNAL OFFICE