EMPLOYMENT TRIBUNALS

Claimant:	**Mr S. Grewal**
Respondent:	**(1) Astha Limited** **(2) Ms S. Chakraborty**
Heard at:	**East London Hearing Centre**
On:	**9, 10, 12, 16-18 July 2019** **10 September 2019 (in Chambers)**
Before:	**Employment Judge Massarella**
Members:	**Ms. H. Bharadia** **Ms. T. Alford**
Representation	
Claimant:	**In person**
Respondent:	**Mr. R. Chaudhry (Solicitor advocate)**

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **the Claimant's claim (s.47B Employment Rights Act 1996 ('ERA')) that he was subjected to detriments on the ground that he had made protected disclosures fails and is dismissed;**

2. **the Claimant's claim (s.103A ERA) that he was automatically unfairly dismissed by reason of having made public interest disclosures fails and is dismissed;**

3. **the Claimant's claim (s.94 ERA) that he was unfairly dismissed succeeds;**

4. **the Claimant's claim (s.15 Equality Act 2010) that he was treated unfavourably in that he was dismissed because of something arising in consequence of his disability succeeds against both the First and Second Respondents;**

5. **the Claimant's claim of unauthorised deduction from wages fails and is dismissed.**

REASONS

1. After an ACAS early conciliation procedure between 27 November 2017 and 4 December 2017, the Claimant presented his ET1 on 8 January 2018, his employment having terminated by dismissal on 9 October 2017. The claims were clarified at a Preliminary Hearing before EJ Jones on 9 April 2018, at which the Claimant was professionally represented. The Judge ordered that a final, agreed list of issues be provided by the parties on or before 11 June 2018. That agreed list confirmed that the Claimant brought claims of detriment and automatic unfair dismissal by reason of having made public interest disclosures, discrimination because of something arising in consequence of disability and ordinary unfair dismissal.

2. In the last line of the claim form there was an unparticularised reference to 'unpaid wages, holiday pay, arrears of pay and other payments'. However, there was no subsequent reference, either at the preliminary hearing or in any of the versions of the agreed list of issues (including the list prepared when the Claimant was professionally represented) to claims of this sort. No evidence was led in relation to them at the hearing and no submissions made. Although the claims had not been formally withdrawn, they were not pursued. Insofar as they had ever been raised, and in the interests of finality, the Tribunal dismisses them. For the avoidance of doubt, we did not understand these claims to relate to the Claimant's complaints about unpaid share dividends.

The Hearing

3. The case was originally listed to be heard over 7 days. The Tribunal was unable to sit on the third of the listed days and the hearing was reduced to 6 days. By consent, the hearing was restricted to liability at this stage, although we heard evidence and submissions on the *Polkey/Chagger* issue.

4. We had an agreed bundle of documents, running to just over 3000 pages, consisting of six agreed lever-arch files and an additional, unagreed file of documents provided by the Claimant. This was disproportionate for a case where the issues are relatively narrow. None of the witness statements contained page references. We made it clear to the parties that we would only read documents to which we were specifically referred, either by way of the short, agreed reading list which the parties provided us with at the start of the hearing, or in the course of cross-examination. In the event only a small fraction of the documents were referred to.

5. We heard evidence from the Claimant, by way of a disability impact statement and a main statement on liability which ran to some eighty paragraphs. In support of his case, we also heard from Mr Hans Arnold, a former colleague of his from a previous employment, who attended the investigation meeting on 21 July 2017 as the Claimant's companion.

6. For the Respondent we heard evidence from Ms Sarjit Chakraborty (the Second Respondent); Mr Antony Fergusson (Operations Manager); and Ms Akanksha

Shangvi (who described herself as an independent contractor, specialising in HR).

7. Statements were also served on behalf of Mr Steve Bennett (Registered Manager); Mr Abychan Alex (whose role included HR functions); and Ms Sanusie Sesay (a newly qualified social worker who did a work placement with the Respondent). None of these individuals were called by the Respondents to give evidence. That was especially noteworthy in the case of Mr Bennett, since he was one of the two independent employees appointed to chair the meeting at which the Claimant was dismissed. No satisfactory explanation was provided for the absence of these witnesses and accordingly the Tribunal gave their evidence little weight.

8. There were also two statements from the Second Respondent's daughter, Miss Misti Chakraborty. The first of these was supportive of the Claimant's case and highly critical of the Second Respondent. However, by email dated 11 April 2019, Miss Chakraborty wrote to the Tribunal retracting that statement, stating that she no longer wished to have any involvement in the case and alleging that she felt manipulated by the Claimant into making the first statement. The two statements are so completely at odds one with the other that we find that we cannot place reliance on either of them, especially as Miss Chakraborty did not attend to explain the contradictions in person. The only safe conclusion we could reach is that they reflected a very complex family dynamic.

9. On the last day of the hearing we heard submissions from both parties. Mr Chaudhry, of Peninsula Business Services, provided us with written submissions; the Claimant made his submissions orally. After the end of the hearing, and at the invitation of the Tribunal, both parties provided brief supplementary submissions on the issue of automatically unfair dismissal, which the Tribunal considered had not been sufficiently addressed in closing.

The application for a postponement

10. By email dated 2 July 2019 the Respondents made an application to postpone the hearing on the basis that they had recently changed legal representation. That application was rejected by EJ Russell by an order dated 8 July 2019.

11. The application was renewed on behalf of the Respondents by Mr Chaudhry at the beginning of the hearing. He submitted that Peninsula had only been instructed the previous week; that there was a lack of medical evidence in relation to disability since no expert report had been produced; and that the list of issues in its current state was insufficiently clear. He also relied on the fact that there was other litigation on foot between the parties, including High Court proceedings.

12. We first considered the circumstances in which it would be permissible for us to vary the order already made by EJ Russell. The Tribunal has a general power to vary or revoke a case management where it is in the interests of justice to do so, particularly where a party did not have a reasonable opportunity to make representations before it was made (Rule 29). That second factor did not apply here.

13. In *Serco Ltd v Wells* [2016] ICR 1251 the EAT held that, where a party has had an opportunity to make representations, the power to vary an order should not

be made unless there has been a material change of circumstances. Again, that did not apply here: the factors which Mr Chaudhry raised had not arisen since EJ Russell's order. In the circumstances there would have to be compelling reasons to vary the order. The Tribunal considered that there were not.

14. Dealing first with the issue of the lack of a medical report, the Tribunal reminded itself that the burden was on the Claimant to prove that he was a disabled person at the material time and it was for him to adduce evidence in support. In this instance he elected to do so by way of a disability impact statement and some 300 pages of medical evidence. He took no steps to instruct an expert to prepare a report for the purposes of these proceedings. That was a matter for him. The evidence adduced might or might not be sufficient to discharge the burden. That was something which the Tribunal would determine in due course. We concluded that the absence of a medical report was not good reason to adjourn the case.

15. As for the lack of clarity in the list of issues, it is right that what purported to be an agreed list of issues contained in the bundle did not fully particularise the Claimant's claims, it simply set them out under the relevant causes of action and identified the legal issues which fell to be determined. Nonetheless it was a list which the Respondents' previous legal representatives had agreed and Mr Chaudhry was not aware that any steps had been taken by them to seek further clarification before finalising their statements for the hearing. There was also an earlier draft list of issues, prepared and lodged on 6 April 2018 for the preliminary hearing before EJ Jones, which contained more detail, and which could be supplemented with the observations made by EJ Jones in her order. The Tribunal considered that the parties were capable of putting together an acceptable list of issues for use by the Tribunal, provided we gave them time to do so. The Claimant said that he was able to provide the dates in respect of the alleged protected disclosures, which at that point had not been specified.

16. Mr Chaudhry next relied on the existence of concurrent High Court proceedings. He conceded that there was no overlap between the issues in those proceedings and these, except possibly in terms of remedy. It followed that any potential conflict could be avoided by confining the present hearing to issues of liability, which the Tribunal agreed to do.

17. The Tribunal considered that a further adjournment would not resolve the difficulties which the parties had encountered in preparing for this hearing. There had already been two postponements. The Tribunal had no confidence that, if a further postponement was granted, they would cooperate with each other any more effectively than they had done thus far. Given the current workload of the Tribunal, and limits on resources, if the case were postponed it was unlikely it would be relisted before mid-2020.

18. Having regard to all these factors, we considered that it was not in accordance with the overriding objective to accede to the Respondents' request for a postponement.

19. We ordered the parties to provide us with a reading list of key documents, which could realistically be read by us the following day, the whole of which we would set aside for pre-reading. That would have the additional advantage of giving both parties two further days' preparation time (including the third day on

which the Tribunal was unable to sit). In our view that should remove the prejudice to the Respondent that their representative had been instructed late; it would also give the Claimant, as a litigant in person, additional time to prepare his questions.

20. The parties were given time overnight to cooperate in agreeing a list of issues, which was submitted by email at the beginning of the second day of the hearing, along with the agreed reading list.

The issues

21. Having previously declined to concede that the Claimant was a disabled person by reason of his kidney condition, the Respondents did so at the beginning of the third day of the hearing.

22. Consequently, the issues as agreed by the parties at the beginning of the hearing were as follows.

Public Interest Disclosures

23. Did the Claimant make the following disclosures?

23.1. (A) The Claimant disclosed that the Second Respondent used company money to pay for her housemaid. The disclosure was made verbally by Claimant to the Second Respondent in the last quarter of 2014. The disclosure was also made verbally in April/May 2015. The Second Respondent instructed Mr Fergusson to investigate. The Claimant passed relevant information to Mr Fergusson on 4th August 2015.

23.2. (B) The Claimant disclosed that the Second Respondent had used company money to pay for her aunt's care. The Claimant alleges that the disclosure was made on 4 August 2015.

23.3. (C) The Claimant disclosed that the Respondents failed to pay care workers money which was due to them. The date on which the disclosure was made was not specified by the Claimant.

23.4. (D) The Claimant disclosed that the Respondent was employing people as care workers unlawfully. The Claimant alleges that the disclosure was made verbally on numerous occasions during 2013 and 2014, during a period when these alleged offences were taking place.

24. Were any of these protected qualifying disclosures, that is to say disclosures of information made to the employer which, in the reasonable belief of the Claimant, were made in the public interest and tended to show one or more of the categories of wrongdoing set out in s.43B(1)(a) to (d) ERA?

25. Did the Respondent subject the Claimant to any detriment by any act, or any deliberate failure to act, on the ground that he had made one or more of the protected disclosures?

26. The detriments relied on by the Claimant are as follows:

26.1. preventing the Claimant from accessing the Respondent's Barclays bank account on the 30 [October][1] 2015;

26.2. failing to pay the Claimant dividends from October 2016;

26.3. denying the Claimant Barclays bank statements from 30 October 2015;

26.4. suspending the Claimant on 9 May 2017;

26.5. conducting a disciplinary investigation on 21 July 2017;

26.6. the Second Respondent and Mr Fergusson procuring the Claimant's dismissal.

27. In so far as any alleged detriment is out of time, was it part of a series of similar acts or failures and/or an act extending over a period within the meaning of s 48 ERA 1996?

Automatically unfair dismissal (s.103A ERA 1996)

28. Was the sole or principal reason for the Claimant's dismissal that he made a protected disclosure?

Discrimination because of something arising in consequence of the Claimant's disability (s.15 EqA)

29. The Respondent concedes that the Claimant was a disabled person at all material times.

30. Did the Respondent have knowledge of the Claimant's disability or should it reasonably have known about the Claimant's disability?

31. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability? The 'something' in this case was the Claimant's inability to attend the Leeds office and perform the functions of the Registered Manager role as prescribed by the CQC.

32. If so, was the dismissal a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent was the need to comply with the requirement of the CQC and the regulatory framework for Registered Managers.

Unfair Dismissal

33. What was the reason for the dismissal? The Respondent relies on conduct:

33.1. that the Claimant failed to attend the Leeds office in order to perform his duties as Registered Manger and carry out the functions prescribed by the CQC on a regular basis;

33.2. that the Claimant accessed the emails of other staff members without authority;

33.3. that the Claimant claimed expenses wrongly and without justification.

[1] It was not in dispute that the original date in the list was wrong.

34. Did the First Respondent act reasonably in treating this as sufficient reason for dismissing the Claimant?

35. Did the First Respondent follow a fair procedure?

36. If the Claimant was unfairly dismissed, what was the chance that he would have been fairly dismissed in any event (the *Polkey* issue).

37. If the decision to dismiss was unfair, did the Claimant contribute to his dismissal by any culpable or blameworthy conduct on his part?

Findings of fact

The Claimant's and the Second Respondent's roles within the company

38. The Claimant was the First Respondent's Finance Manager and IT Manager. He later became Registered Manager ('RM') in Leeds in circumstances which are described below.

39. Ms Chakraborty was the Director of the company and was also the RM for London.

The Respondent organisation

40. The First Respondent provides domiciliary care services in London and Leeds. Most of its work was obtained by tendering for business from local authorities.

41. The financial dealings between the Claimant and the Second Respondent in respect of the First Respondent are complex. They have also been, and we understand continue to be, the subject of contested proceedings in other jurisdictions. We have confined our findings to matters which are necessary for the determination of the issues.

42. The First Respondent was formed by the Claimant in September 2003; at that stage he was the Director and sole shareholder. In 2006 Ms Chakraborty became a shareholder; the balance of the shareholding was 51/49 in her favour. In March 2007 the Claimant resigned as a Director. He rejoined the First Respondent as its Finance Manager and IT Manager in July 2007.

43. Between 2006 and 2012 the company experienced financial difficulties. Indeed, we had the strong impression that this was true of the company at most times and that both the Respondents and those managing it, including the Claimant, were prepared to adopt unconventional approaches to managing the company's finances.

44. The business affairs of the Claimant and Second Respondent are further complicated by the fact that they were formerly personal as well as business partners. We heard little evidence from either of them as to the circumstances in which that relationship ended. It was evident from the personal vitriol expressed in much of the contemporaneous documents to which we were taken that, by the material time, theirs was an extremely difficult relationship on every level.

The Claimant's disability

45. The Claimant suffered acute kidney failure in 1985. He was on dialysis for a year until he had a kidney transplant in 1987. This was initially successful but his new kidney gradually began to fail. By 2009 its function had reduced significantly and in 2010 he had to restart dialysis. For three years he was obliged to attend hospital for three days a week for up to five to six hours a day.

46. He required a second transplant, which took place in June 2013. For around three months after that he had a permanent catheter. He then went on to self-catheterisation, which he needed to perform three times a day, which was most safely carried out at home. This lasted until August 2017.

47. To prevent the Claimant from rejecting his new kidney he takes daily medication to suppress his immune system. In a letter dated 14 May 2018 Dr C. Byrne, Consultant Nephrologist, explained that, if the Claimant stopped his immunosuppression medication, he would develop rejection of the kidney transplant which would then fail and he would have to return to dialysis. If he did not return to dialysis, he would die of kidney failure. Dr Byrne also summarised the multiple other forms of medication which the Claimant takes, including medication to prevent stomach ulcers, to regularise his high blood pressure and to help with bladder emptying.

48. The Claimant's evidence was that, as a result of his condition, he experiences breathlessness after walking for 10 to 15 minutes; he cannot work long hours because of fatigue caused by the condition; and he must avoid face-to-face contact with groups of people in order to avoid infection. He must be particularly careful to avoid contact with people who are themselves unwell. This meant that he could not go to service-users' homes because of the risk of infection. This also makes him reluctant to travel. For these reasons the Claimant carried out most of his duties, including his RM duties, from home.

49. The Tribunal accepts the Claimant's account of the effects of his disability. It is consistent with the medical evidence in the bundle and with the Claimant's conduct at the hearing. It was obvious to us that he found attendance at Tribunal very draining, particularly towards the end of each session.

The Respondents' knowledge of the Claimant's disability

50. The Respondents concede that they had actual knowledge of the Claimant's disability at all material times.

51. We further find that Ms Chakraborty was aware of its effects on him, as described above. She knew the Claimant well, was familiar with his medical history and with the limitations which his long-term health condition imposed on him. We find that she knew, and did not object to, the fact that he worked mostly from home as a direct result of those limitations. As Mr Chaudhry acknowledged in his written closing submissions:

> 'C's decision to carry out his RM duties mainly from home had always been accepted by R … C did not seek an occupational health report because he was at liberty to implement his own reasonable adjustments in order to help him perform his role'.

52. Because of this his disability he was unable to perform all the duties of an RM, as required by the CQC. We find that Ms Chakraborty knew this when, with her approval and encouragement, the Claimant applied to be registered as RM.

The events of 2011 onwards

53. There were a number of disputes between the Claimant and Ms Chakraborty in evidence before us about employment practices adopted by Ms Chakraborty. In most instances there was little documentary evidence, at least to which we were referred in the course of the hearing, to assist us in resolving them. In some instances our findings turned on the respective credibility of the two witnesses. For reasons which we set out below we found Ms Chakraborty to be an unreliable witness of fact. By contrast, we found the Claimant to be a largely truthful witness. There were, of course, exceptions to this in respect of both witnesses.

54. In around 2011/12 Ms Chakraborty brought her ailing aunt to live with her in the UK. She took on a housemaid, whom we will refer to as JP, to help care for her aunt. In 2013/14 her aunt's health deteriorated and she required constant care. Ms Chakraborty used company money to pay for JP's services. There is clear evidence of this in an email from Ms Chakraborty dated 17 July 2015, in which she accepts that company money had been used, although she asserts that the Claimant agreed to this. The Claimant disputed this both at the time (in an email of the same date) and before us at the hearing. We preferred his evidence on this issue to that of Ms Chakraborty.

55. We also accepted the Claimant's evidence that Ms Chakraborty used carers employed by the First Respondent to care for her aunt, even though a formal care package was not in place.

56. It was Ms Chakraborty's duty as RM for London only to take on new service-users if the company had staff to provide the service in accordance with the relevant Service Level Agreement. We accept the Claimant's evidence that Ms Chakraborty began to take on more contracts than could properly be serviced by the available staff. In order to service those contracts she took on student visa employees to do more hours than they were permitted to do; she also took on workers who were on benefits, and who were limited in terms of the number of hours they could do without losing their benefits, and she paid them cash in hand; she also started using workers who did not have the right to work in the UK at all, including her aunt's carer, JP.

The appointment of the Claimant as Leeds RM

57. In early 2014 the Respondent found itself without an RM for Leeds because another employee's application for the role had not been approved by the CQC.

58. In March 2014 Mr Abychan Alex joined the First Respondent. The intention was that in due course he would apply for registration as RM. Meanwhile it was agreed that the Claimant would take steps to become registered as RM for Leeds. We find that this was a joint decision by the Claimant and Ms Chakraborty. Without an RM in place, the First Respondent could not tender for business in Leeds, which would impact on its profits. The Claimant was the only available candidate at the time.

59. We find that Ms Chakraborty was aware, given her knowledge of the Claimant's disability and its impact on him, as well as the extent of his other work commitments as Finance Manager/IT Manager, that he would not be able to carry out the RM duties full-time, or discharge in full the responsibilities which were a requirement of the CQC. She knew from the outset that the Claimant would not be able to attend the Leeds service with the required frequency and would not be able to make home visits to many clients because of the risk of infection. Simply put, this was a role which required hands-on involvement by the RM, which could not fully be performed by somebody working primarily from home.

60. The Claimant submitted his application for registration to the CQC on 16 April 2014. Although it was central to his case before us that his disability made it impossible for him to perform all the duties of an RM, in response to a question on the application form which asked whether he had a physical or other condition which was relevant to his ability to carry on, manage or work for the purposes of the regulated activity, the Claimant replied 'No'. We find that he did this because he knew that any other answer might lead to the rejection of his application and he was in a vulnerable position within the organisation at that time. We further find that Ms Chakraborty must have known that the Claimant would have to give misleading information in this regard. The Claimant later did not complete the Level 5 Health and Social Care Course, which was a requirement of his registration. Ms Chakraborty accepted in oral evidence that she knew this and had taken no steps to encourage him to remedy the situation.

61. On 20 August 2014 the Claimant's application to become RM for Leeds was approved by the CQC and his certificate sent to him.

<u>The engagement of Mr Fergusson</u>

62. At a meeting on 20 September 2014 Ms Chakraborty decided to take on a business consultant who could help develop the business. Mr Fergusson was interviewed in October and engaged in November 2014, initially as a consultant project manager.

63. On 14 July 2015 the Claimant raised an invoice on behalf of the company to Ms Chakraborty, seeking reimbursement of the sums owed in respect of domiciliary care provided for Ms Chakraborty's aunt. Although Ms Chakraborty accepted in evidence that this invoice reflected the amount of work done for her aunt, she refused to pay it. Her justification was that, if she was not able to use company carers to look after her aunt, she would have to look after her herself and this would be detrimental to her ability to run the business.

64. By around January 2015 over 2000 hours of holiday, to which the First Respondent's employees were entitled, remained unpaid. In an email dated 20 January 2015 from Parita Daiya to the Claimant, Ms Daiya set out the calculation of holiday entitlement for London staff. What the Claimant then did with this information is set out below in the section dealing with the alleged protected disclosures.

65. Meanwhile, on 9 June 2015 Ms Chakraborty wrote to the Claimant informing him that she had decided to restructure the business and to put Mr Fergusson

in charge of the day-to-day running of the business as Head of Operations. She wrote: 'the only thing left to you is dealing with the bank account and paying salaries'. It is clear from this exchange of emails that the working relationship between Ms Chakraborty and the Claimant had further deteriorated by this point. Both their emails confirm that they were not speaking to each other.

66. On 3 August 2015, the Claimant submitted spreadsheets to Mr Fergusson, which he referred to in the accompanying email as 'part of the arbitration process', showing sums due to the business from Ms Chakraborty's use of the Respondent's workers to provide personal services for her aunt. The arbitration process was an attempt by the Claimant and Ms Chakraborty, with the assistance of Mr Fergusson, to resolve the long-running financial disputes between them in relation to money which each maintained was owed to them by the other. It failed.

The 2015 Leeds inspection

67. A CQC inspection of the Leeds service was due to take place in September 2015. On 13 August 2015 Mr Fergusson sent the Claimant an email in which he passed on to him a proposal by Ms Chakraborty as to how it should be dealt with. He wrote [original format retained]:

> 'Hi Surinder
>
> Some good news with regards to CQC inspection Leeds.
>
> Nickki has thought long and hard, we now have two options to resolve the initial worries.
>
> 1. If before the 11th September we received 48-hour notification of inspection, you will need to go off sick and Nikki can step in as nominated registered manager.
>
> 2. If after 11th September we receive notification of inspection, you will need to go off sick for over 28 days and Aby can step in as nominated registered manager.
>
> Can you ensure we proceed implementing the action plan to completion?'

68. The Tribunal infers from this email that Ms Chakraborty and Mr Fergusson were cognisant of the fact that, given the Claimant's limited attendance in Leeds, his presence at the inspection might not secure a positive outcome. In the Tribunal's view, the email discloses a proposal to further mislead the CQC as to the extent of the Claimant's management of the Leeds service.

The opening of the Barclays bank account

69. The First Respondent did its banking with Santander, through an account to which the Claimant as Finance Manager had access. In September 2015 he transferred £16,000 from the account to his personal account, purporting to be £6,000 by way of salary and £10,000 by way of loan repayment. We find he did so because he was frustrated by the lack of progress being made in achieving a final reconciliation in respect of money which he considered was owed to him through other routes, including the arbitration process referred to above.

Several days later he was persuaded to pay the money back into the Santander account.

70. In October 2015 Ms Chakraborty and Mr Fergusson opened a new bank account with Barclays on behalf of the First Respondent. They did so because of the Claimant's actions described in the previous paragraph. They wished to ensure that he could not do anything similar in the future.

71. On 30 October 2015 Ms Chakraborty wrote to the Claimant informing him that his request for access to the new Barclays account [original format retained]:

> 'has been declined on the grounds of an unnecessary requirement for Astha Limited and also Barclays stipulation for signatories to be directors of the company… I understand the need for clarification regarding the Barclays account, for your held position as finance manager and therefore would instruct monthly statements to be available to you'.

72. The Claimant did not in fact receive any statements in relation to the Barclays account until January 2016. Again, the Tribunal finds that Ms Chakraborty's aim was to restrict the Claimant's access to, and knowledge about, the Barclays account because of his earlier action in withdrawing money from the Santander account (indeed, the Claimant positively advanced this explanation during his questioning of Mr Fergusson).

73. On 2 November 2015 the Claimant wrote to Ms Chakraborty with a proposal 'for us to get back to equal terms and better relationships as business partners and possibly friends'. Ms Chakraborty's response to the proposal was largely negative. In that reply she describes what she regards as the Claimant's poor performance, including as RM in Leeds: 'as the CQC inspection clarified, you have also failed Leeds as their registered manager this year'.

<u>The HMRC inspection and the Funding Circle loan</u>

74. On 23 December 2015 an investigation which had been conducted by HMRC into the Respondents' tax arrangements was concluded. As part of that investigation HMRC concluded that cash withdrawals had been made by Ms Chakraborty which had been recorded as petty cash. HMRC treated these as 'additional pay to the director' (i.e. Ms Chakraborty). They were prepared to reduce the figure by 30% to allow for some business expenses, but that still left a total of £24,647 on which tax was payable. Ms Chakraborty was unable to explain to the Tribunal why she had been withdrawing cash in this way and in this amount. Although she initially accepted that this was her personal liability, she later retracted that admission and asserted that these were the company's liabilities not hers personally. The overall liability was £48,391.

75. In March/April 2016 the Claimant signed as a guarantor for a loan from Funding Circle. In an email of 26 April 2016 from Mr Fergusson to the Claimant he wrote: 'we have received the funding (£60,000) allocated for the tax payment, office refurbishment and cash flow'. The Claimant made no objection to the loan being used for those purposes. In an email to Ms Chakraborty of 30 May 2016 the Claimant himself wrote that 'we have taken a loan of £60K from Funding Circle to help pay tax bill et cetera, this also is now possibly exhausted i.e. used up, however I don't know as I'm not consulted or have access to the required

accounts.' Ms Chakraborty accepted in her witness statement (paragraph 54) that £48,000 of the Funding Circle funds was used to pay HMRC.

76. In an email of 23 May 2016 Ms Chakraborty again complained about the fact that the Claimant was 'hardly doing any work as a registered manager'.

77. In an email of 31 May 2016 Ms Chakraborty wrote to the Claimant informing him that she would no longer be sending him bank statements. The Claimant accepted in cross-examination that Ms Chakraborty did this in retaliation for the fact that he had contacted Funding Circle earlier the same day, informing them that he intended to withdraw as a guarantor for this loan and asking them to recover the loan as soon as possible.

The correspondence between Ms Chakraborty and Mr O'Brien of Barclays

78. On 22 June 2016, in an email from her personal Gmail account, Ms Chakraborty wrote to Patrick O'Brien, Barclays Business Manager, Eastern Region, asking about the possibility of securing a business loan on her home as she wished to buy out the other shareholder, i.e. the Claimant. She wrote [original format retained]:

> 'I hope you are well. Sorry for the delayed response but been really busy with inspection et cetera. The problems we encountered in your absence was definitely in December 2015.
>
> Furthermore, is there a possibility to secure a business loan on my home as I really want to buy out the shareholder. The company has been valued and this I believe would be the best time to get rid of him.
>
> My property is worth £750,000 and I owe approximately £300,000. I have a recent valuation and believe during the market testing I had a doctor who was willing to pay more if I wanted to sell.'

79. Mr Chaudhry submitted that by 'get rid of him' Ms Chakraborty meant 'buy the Claimant out as a shareholder'. The Claimant understood it to mean buying him out and removing him from the company altogether, including as an employee.

80. On the balance of probabilities, the Tribunal accepts the Claimant's interpretation. All the evidence suggests that by this point the relationship, both personal and professional, between the Claimant and Ms Chakraborty was at a low point, even by their standards. We think it more likely than not that it was at this point that Ms Chakraborty decided to end her business association with the Claimant and concluded that the situation could only finally be resolved by his dismissal. We accept the Claimant's evidence that dismissing him, with its inevitable impact on his financial position, would put pressure on him to sell his shares in the business to Ms Chakraborty. In the Claimant's words, Ms Chakraborty intended to 'starve him out'.

81. Mr O'Brien responded later the same day to Ms Chakraborty, asking for further information. These two emails were sent to and from Ms Chakraborty's personal Gmail account. However, on 12 July 2016 she then forwarded the thread to Mr Fergusson at his work email address, commenting simply: 'FYI'.

The Claimant's accessing of emails

82. Some time after Ms Chakraborty forwarded the email to Mr Fergusson, the Claimant accessed Mr Fergusson's work email account and saw the emails to and from Mr O'Brien. The Claimant said that he was looking at Mr Fergusson's email account in his role as IT Manager because Mr Fergusson had asked him to reset his password and there was nothing improper in it. That assertion was not challenged and we are prepared to accept it.

83. However, what he then did was a different matter. Alarmed by Ms Chakraborty's reference to getting rid of him, he took a copy of the email thread and then continued to access Mr Fergusson's and Ms Chakraborty's work email accounts, not for business reasons, but solely for his own purposes. In addition to the email thread referred to above, he also accessed and copied:

    83.1. an email dated 3 November 2016 between Mr Fergusson and Mr Allan Hooper of E. Baring and Co., the solicitor representing Ms Chakraborty in her ongoing disputes with the Claimant;

    83.2. an email dated 7 November 2016 between Mr Fergusson and Mr Hooper;

    83.3. and an email dated 16 November 2016 between Mr Fergusson and Mr Hooper.

84. In response to a question from the Tribunal, the Claimant said that he accessed Mr Fergusson's email account 'about five or six times'. He also accepted that he accessed Ms Chakraborty's email account:

> 'on the odd occasion… I had a look to see what was going on against me, to see what this conspiracy was. It was for my own personal reasons. When I saw the email in July I thought they were working against me. I wanted to keep an eye on how it was developing.'

85. The Tribunal finds that, in accessing and monitoring those email accounts and taking copies of emails, the Claimant acted improperly. We reject his contention that he was entitled to do so because of his position as IT Manager. He was not acting to discharge a function of that role, he was acting in pursuit of how own ends.

The Claimant's resignation from the Leeds RM role

86. On 26 June 2016 the Claimant provided a plan in respect of a possible CQC inspection in September 2016. On 27 June 2016 a management meeting took place at which the Claimant's plan was discussed. The Claimant was not present at this meeting, the thrust of which was that his plan was inadequate. The recommendations were that Ms Chakraborty would revise the plan, Mr Alex would be nominated as the person to lead the inspection and the Claimant would be instructed to resign from his role as RM with immediate effect. There is no doubt that, by this point Ms Chakraborty's frustration at the Claimant's inability properly to perform the RM role had come to a head. It was now imposing considerable additional work on her personally.

87. That decision was communicated to the Claimant who complied with Ms Chakraborty's instruction and, by email dated 12 July 2016, stepped down from the Leeds RM role:

> 'Hi Nikki
>
> From the recent management meeting in London, it was decided that I should end my role as Registered Manager for Leeds (with immediate effect as of 07/07/2016) as I need to commit more to my main role as Finance Manager. Abychan Alex will replace me as Registered Manager for Leeds. Please do the required forms the notification to CQC as required'.

88. On 19 July 2016 the Claimant issued a County Court claim against Ms Chakraborty.

<u>The inflammatory email of 8 August 2016</u>

89. On 8 August 2016 he sent what was effectively an open email to Ms Chakraborty, copying key colleagues in. In it he summarised their relationship going back to 2004, at some length and very much to her disadvantage. He aired his private grievances against her, primarily financial but also personal. In the concluding passage of the long email he wrote:

> 'So, whereas I have come to your aid and also helped your dreams to be fulfilled, you on the other hand have made it your mission to destroy any hope or aspiration that I may have had. You are capable of being a great friend and helpful, however it seems I have mainly experienced mostly your nasty side. You are clearly neither a friend nor a fair business partner.'

90. We find that the clear purpose of this email was to show Ms Chakraborty to their colleagues in an unfavourable light.

91. On 14 October 2016 a mediation meeting took place between the Claimant and Ms Chakraborty. It failed.

<u>The suspension of dividend payments to the Claimant</u>

92. On 24 November 2016, in response to an enquiry from the Claimant asking what had happened to his monthly dividend payment, Mr Fergusson replied: 'I have been notified, with regards to dividends, there have been no dividend payments from September 2016 to present'.

93. It was Ms Chakraborty's evidence that as of October 2016 the Respondent did not have the money to pay staff, let alone to pay dividends. The Tribunal rejects that evidence. Some months later the Claimant discovered the true position when he was given access to the relevant financial information. It is plain from the analysis of payments made to himself, Ms Chakraborty and Mr Fergusson that Ms Chakraborty and Mr Fergusson continued to draw very considerable sums from the business throughout the period when Mr Fergusson said that no dividend payments were being paid. Asked by the Tribunal whether she accepted during this period that she was paid considerably more than the Claimant Ms Chakraborty replied: 'I can't remember receiving all this money'.

Mr Chaudhry later accepted on the Respondents' behalf, having had the opportunity to review the underlying financial documents, that she did.

94. By way of example, in the month of December 2016 the Claimant received £1000, Ms Chakraborty £5503.87 and Mr Fergusson £4695. Looking at the totals in respect of the period covered by the Claimant's figures the Claimant received £4000, Ms Chakraborty £15,850 and Mr Fergusson £20,426. Asked to comment on those figures Ms Chakraborty said: 'I don't know why the money was there to pay me but not the Claimant'.

95. The Claimant put to Ms Chakraborty in cross-examination that she did this because 'you wanted to cripple me financially in order to get the remaining shares'. We accept that this is the likely explanation for Ms Chakraborty's actions. It is consistent with her stated desire to 'get rid of' the Claimant: the greater his financial difficulty, the more likely he would be to sell his shares to her.

96. On 16-23 November 2016 the CQC inspection took place in Leeds. The outcome was that the service failed the inspection. It is clear from the notes of the later disciplinary hearing that Ms Chakraborty blamed the Claimant for this outcome.

97. In an email dated 13 December 2016 addressed to Mr Hooper (the Second Respondent's solicitors) and Mr Oliver Kew (the Claimant's solicitors) the Claimant voluntarily disclosed the emails which he had improperly accessed between Mr Hooper and Mr Ferguson.

98. In February 2017 the Claimant informed the Respondent that he was considering issuing a claim for unfair prejudice regarding the shares.

<u>The initiation of the disciplinary process</u>

99. On 8 May 2017 the solicitors, who by now were representing the Second Respondent in her various disputes with the Claimant (in addition to representing the First Respondent), wrote to the Claimant's solicitors informing them that:

> 'my clients have now concluded the investigation into your client's conduct as an employee of the company and as a result have resolved to call a disciplinary meeting on Tuesday 16 May … for the purpose of considering his employment status within the company … In the spirit of openness I will in the next 24 hours forward a copy of the evidence bundle collated by my client who is happy for the meeting to be attended with or without legal representation.'

100. This was the first the Claimant knew about the possibility of disciplinary action against him. On 9 May 2017 Ms Chakraborty's solicitors sent an email attaching a very substantial PDF file containing 'the bundle of accusations and evidence that my client intends to put to Mr Grewal at the disciplinary meeting next week'.

101. It is clear that Ms Chakraborty's solicitors had been closely involved in collating this material. It ought to have been obvious to the Respondents that it was inappropriate for solicitors who were handling contentious litigation against the Claimant in respect of other matters to be involved in any way in investigations

into disciplinary matters relating to his employment. The inappropriateness of this is illustrated by the fact that the letter suspending the Claimant goes on to refer in some detail to the ongoing financial disputes between him and Ms Chakraborty. By way of example:

> 'Our client is more than happy for your client to appoint a valuer and indeed we have already made it clear that they will have access to all pertinent records … our client would be happy to attend a WP meeting with solicitors and/or counsel present in an effort to thrash out a compromise.'

102. The 'investigation report' which was sent to the Claimant was voluminous, falling into eight separate sections and running to over 150 pages. The disciplinary charges were multiple and each charge was broken down into sub-charges. The supporting evidence included emails, witness statements from members of staff, bank statements, invoices, inspection documents etc. It must have been assembled over the previous weeks (and perhaps even months) without the Claimant's knowledge.

103. The main thrust of the report was that the Claimant had neglected his responsibilities as RM in Leeds; had hacked into emails of other employees (including emails to and from Ms Chakraborty and Mr Fergusson and also including legally privileged correspondence); and had made false expenses claims.

104. On 7 July 2017 the Claimant was permitted to inspect financial documents at Ms. Chakraborty's solicitor's offices. It was then that he discovered the true position in respect of dividends, referred to above.

The investigatory meeting

105. On 21 July 2017 an investigatory meeting took place, which was conducted by Ms Chakraborty and Mr Fergusson. Given the nature of the allegations, and the open hostilities prevailing between the Claimant and Ms Chakraborty, her participation in the meeting was improper. Moreover, given that some of the charges related in part to the Claimant's alleged treatment of Ms Chakraborty and Mr Fergusson, including hacking into their emails, neither of them could be said to be independent.

106. The Claimant submitted documentary material in an attempt to rebut the charges against him but none of it was looked at before the meeting or taken into account at it. Ms Chakraborty and Mr Fergusson repeatedly demanded simple 'yes or no' answers to their questions. As a formal disciplinary investigation meeting it was, in the Tribunal's view and having reviewed the detailed transcript, wholly inadequate and grossly unfair.

107. On 11 August 2017 the Claimant issued further proceedings in the High Court.

The disciplinary hearing

108. On 23 August 2017 the Claimant was invited to a disciplinary meeting. By this stage the charges had been reduced to three:

> '1. Hacking/inappropriate access of emails: you have accessed emails belong to others, to include legally privileged correspondence not only without authority but also for purposes other than for compliance and in doing so have breached the company's email and Internet policy to such a degree that it totally destroys all faith trust and confidence in you.
>
> 2. Leeds Registered Managers Role: it is alleged that you failed and/or neglected to carry out your duties as Registered Manager at the Leeds branch in a reasonable manner and in many instances at all to such a degree that it damaged the company and prejudiced its CQC status. Further you failed to attend that anything like the intervals required and wrongly delegated various tasks to inappropriate persons.
>
> 3. Expenses: you have wrongly claimed expenses that are in no way attributable to the company to include [monetary figures omitted]:
>
> > i. Claiming for two H3G mobile telephones … a month when only one is necessary and reasonable.
> >
> > ii. Putting your personal supermarket shopping through expenses …
> >
> > iii. Claiming various hotels and restaurants …
> >
> > iv. Payments … to a charity, Livability.
> >
> > v. Your Amazon prime membership ....

109. The Claimant was warned that the allegations were regarded as being of a serious nature and, if upheld, might result in disciplinary action including summary dismissal for gross misconduct. The same material was relied on in support of the allegations as had already been emailed to him on 9 May 2017. We find that no regard had been had to the documentary material submitted by the Claimant in his defence.

110. Also attached to the letter was what purported to be the Claimant's job description. We say 'purported' because we accept the Claimant's evidence that this was a fabricated document, which had been created after the investigation meeting, in order to bolster the Respondent's case that he had neglected his duties as RM.

111. The Claimant explained at the subsequent disciplinary hearing why this document, which appears to have been signed by him on 21 August 2014, could not have been created at that time. In brief:

111.1. the job description states that the Claimant was answerable to 'head of service/operations manager'; however, there was no operations manager until Mr Fergusson was appointed to that role in June 2015;

111.2. one of the duties specified in the job description was to maintain full and accurate records 'using QuikPlan'. In 2014 the Respondent was not using the QuikPlan software, it was using CallGuardian. It was not until October 2015 that Mr Fergusson suggested that the company moved across to QuikPlan.

112. The Respondent placed no reliance on this document in the subsequent letter dismissing the Claimant or in closing submissions before us.

113. The disciplinary hearing took place on 14 September 2017. Ms Chakraborty attended the meeting with the Claimant's consent. It seems almost too obvious to say that, in an orderly disciplinary meeting and given the nature of the allegations, it may have been appropriate for her to attend, but strictly in the capacity of a witness, giving evidence in a structured context to a panel of sufficient seniority and independence. That was not what happened.

114. Two junior employees, Ms Paula Merry and Mr Steve Bennett, who had only recently joined the company, were given the unenviable job of chairing the meeting. Ms Chakraborty was present and increasingly dominated the meeting as it went on, frequently interrupting the Claimant to contradict him as he attempted to advance his defence. Ms Merry and Mr Bennett were ineffectual in their attempts to control proceedings. Indeed, according to the verbatim transcript, Mr Bennett stopped contributing altogether after a certain point. Much of the meeting consisted of increasingly heated exchanges between the Claimant and Ms Chakraborty. By the end it had deteriorated into an exchange of verbal abuse between them. As a disciplinary meeting it was wholly unprofessional.

<u>The dismissal</u>

115. The Claimant was dismissed by letter dated 25 September 2017 from Mr Hooper. The conclusions, set out in some detail across five pages, may be summarised as follows.

    115.1. The allegation that the Claimant had failed to carry out the RM position on a full-time basis, involved in day-to-day tasks, management, supervision and regular attendance at the Leeds branch was upheld. The decision-maker found that he could and should have fulfilled his duties from Leeds rather than from his home and that his failure to do so was grossly negligent.

    115.2. With regard to the hacking/inappropriate access of emails, the decision-maker found that in an email dated 13 December 2016 addressed to Allan Hooper (the Respondent's solicitors) and Oliver Kew (the Claimant solicitors) he attached confidential and privileged emails between Mr Hooper and Mr Ferguson. Moreover, the Claimant had admitted accessing the email accounts of Mr Ferguson and Ms Chakraborty, stating that he believed he was entitled to do so. He also sent the email of 8 August 2016 to various employees of the company, the contents of which were inappropriate and designed to inflame relations. The decision-maker concluded that his actions were such as to destroy trust and confidence and amounted to gross misconduct.

    115.3. With regard to expenses, there was a generalised finding that the five specific matters set out above were wrongly claimed.

116. The letter from Mr Hooper is silent as to who took the decision to dismiss. It refers only in neutral terms to the fact that he was acting on instructions and includes phrases such as 'it is the finding of the company that…' and 'it is the view of the company that…'. It concludes:

> 'As a result of the investigation into the issues raised above and having taken into account both the evidence available and your representations at the disciplinary hearing, the company has regrettably taken the decision that your conduct or lack of it is such as to amount to gross misconduct and accordingly your employment is determined with immediate effect.'

117. In response to questions from the Tribunal, Ms Chakraborty volunteered that she oversaw the investigation that gave rise to the investigation report, she drafted the report in part, she conducted the investigation meeting and she attended and took an active part in the disciplinary hearing. Mr Fergusson's evidence, however, was that he prepared the draft report which he then passed to Mr Hooper. They in turn passed it to an employment barrister (who was not identified) who reverted with an opinion that the Respondent 'had a case to go to a disciplinary'. The Tribunal finds, on the balance of probabilities that the report was a joint effort between Ms Chakraborty and Mr Fergusson, with assistance from Ms Chakraborty's legal advisers. It is plain from the language and content of the investigation report, the correspondence and the final outcome letter that there was substantial legal input into the process.

118. Mr Fergusson's oral evidence was that Ms Merry and Mr Bennett made findings to the effect that the Respondent 'can dismiss on gross misconduct'. We have no hesitation in rejecting that evidence. There is no documentary evidence of such findings and, judging by the transcript, both these individuals appeared to be completely out of their depth at the hearing. Although Mr Bennett prepared a witness statement for these proceedings in which he summarised the Claimant's evidence, he makes no mention of making findings or communicating those findings to the Respondents. We infer from this, and from the fact that he did not attend the Tribunal to give evidence, that he took no material part in the decision to dismiss the Claimant.

119. In fact, Ms Chakraborty accepted, in response to questions from the Tribunal, that it was she who made the decision to dismiss the Claimant. It was quite improper for her to be involved in any way with that decision. She was not an independent decision-maker: she had a vested interest in the Claimant's dismissal because of her desire to remove him from the business. We reject her explanation that the Respondent could not afford to engage an external person to conduct the disciplinary hearing. There appeared to have been no lack of funds to instruct solicitors to deal with various stages in the process.

120. The Tribunal finds that the Respondents could also have used Peninsula Business Services to conduct the investigation and disciplinary hearing. We heard different explanations as to why they did not do so. Ms Chakraborty said that there was a contractual dispute on foot between the Respondents and Peninsula at the time. In closing submissions Mr Chaudhry said that Peninsula declined to act because the Claimant was a shareholder employee. In response to a question from the Tribunal, he was unable to explain why it was now acting for the Respondents in these proceedings, given that the same policy considerations presumably continue to apply. We reject both explanations.

121. Ms Chakraborty explained that she did not dismiss the Claimant because of the disclosures: 'I just felt we could not work together. His capabilities were in question. My privacy had been invaded. I could not trust him.'

The Claimant's appeal

122. On 20 September 2017 the Claimant wrote to Mr Hooper asking whether he would be provided with a transcript of the disciplinary meeting. In the letter of dismissal of 25 September 2017 Mr Hooper confirmed that a transcript of the disciplinary hearing was still in the process of being typed and would be provided to him in due course. The transcript was an important document for the purposes of appeal. The version which was ultimately produced ran to some 80 pages and would have been an indispensable tool in the preparation of grounds of appeal. It is right that the Claimant had made his own recording of the meeting but it was wholly unreasonable to expect him to make his own transcript, especially given that the Respondents had undertaken to provide one.

123. The original deadline for the appeal was 4 October 2017. On 17 October 2017 the Claimant chased the transcript. Mr Hooper replied on the same day saying that the transcript been typed but he had not yet had time to check it against the recording. On 27 October 2017 Mr Hooper wrote to the Claimant noting, with some surprise that 'no appeal has been received against the decision to terminate your employment'. Mr Kew replied stating that he had emailed Mr Hooper on 4 October 2017 at 16:08 confirming that Mr Grewal had appealed. He later quoted from that email which contained the following passage:

> 'as your client is unwilling to be cooperative then you may treat this email as confirmation that Mr Grewal will appeal. This is within the time limit and a letter explaining why will be with you shortly'.

124. The Tribunal finds that a valid appeal had been lodged in time, which the Respondent refused to entertain.

The law

Public interest disclosure

125. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> **Disclosures qualifying for protection.**
>
> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> > **(a) that a criminal offence has been committed, is being committed o is likely to be committed,**
> >
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **…**

126. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **…**
>
> **35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard.**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he 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 belief will be a reasonable belief.'**

127. The reference to the amendment in 2013 at para 35 above is to the inclusion of a requirement that the disclosure be one that, in the reasonable belief of the worker in question, is made in the public interest. This requirement was considered by the Court of Appeal in *Chesterton Global Limited (t/a Chestertons) v Nurmohamed* [2018] ICR 731, in which it was held that there may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection: where there are mixed interests, it will be for the ET to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation.

PIDA detriment claims

128. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a

trivial influence on) the employer's treatment of the whistleblower' (per Elias LJ in *Fecitt v NHS Manchester* [2012] IRLR 64).

129. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
> **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period**

PIDA dismissal

130. S.103A ERA provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

131. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor, and dismissal cases where it must be the sole or principal reason.

Discrimination arising from disability

132. S.15 EqA provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

133. Guidance for how Tribunals should approach s.15 claims was set out in *Pnaiser v NHS England and another* [2016] IRLR 170 at para 31 by Simler P (as she then was), who reviewed the authorities and concluded (as relevant):

> **'From these authorities, the proper approach can be summarised as follows:**
>
> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or**

> **cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999]** IRLR **572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).**
>
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **…**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.'**
>
> **…**

134. In assessing compensation for discriminatory acts, it is necessary to ask what would have occurred had there been no unlawful discrimination. In a dismissal case, if there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss (*Chagger v Abbey National PLC and another* [2010] IRLR 47).

Unfair dismissal

135. S.94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer. S.98 ERA provides so far as relevant:

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

> **…**
>
> **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

136. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

137. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

138. The denial of a right of appeal is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation, but not the finding of unfairness itself (*Tarbuck v Sainsbury's Supermarkets Limited* [2006] IRLR 664 at para 80).

139. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

140. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was

foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2) [*1980] ICR 110).

141. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

Submissions

142. Mr Chaudhry relied on two written documents and also made oral submissions. We have had regard to those submissions and refer to them both above and below. We do not further summarise them here.

143. The Claimant made brief oral submissions. He accepted that a number of his disclosures were difficult to prove because they were verbal. With regard to his access to Ms Chakraborty's and Mr Fergusson's emails he submitted that he only looked into emails when he was asked to do so. He explained that when Ms Chakraborty referred in her email to her wish to 'get rid of him' he understood this to mean not only by him out of the company but also dismiss him. He rejected Ms Chakraborty's argument that she could not have used Peninsula to conduct the investigation and disciplinary proceedings.

Conclusions

<u>Did the Claimant make a disclosure of information? If so, were they qualifying disclosures, that is to say disclosures of information which, in the reasonable belief of the Claimant were made in the public interest and tended to show one or more of the categories of wrongdoing set out in s.43B(1)(a) to (d) ERA?</u>

144. We deal below with the disclosures in chronological order.

Disclosure (D) - The *Claimant disclosed that the Respondent was employing people as care workers unlawfully. The Claimant alleges that the disclosure was made verbally on numerous occasions during 2013 and 2014, during a period when these alleged offences were taking place.*

145. The Claimant's evidence that he made these alleged disclosures was weak. The disclosures were not properly particularised before the hearing. The Claimant was given a further opportunity before giving evidence to identify the specific occasions on which he says he made the disclosures. He was unable to give dates; at best he asserted that he made them 'verbally on numerous occasions during 2013 and 2014'.

146. Although we have found that these practices occurred, there is no documentary evidence that the Claimant made disclosures of information in relation to them,

which we would expect to find, given the serious nature of the practices. In his witness statement the Claimant simply says: 'I repeatedly asked Nikki to cut these practices out, as I was worried of the consequences.' In the course of his own evidence he was unable to provide any further detail or describe the circumstances in which the alleged disclosures were made. In cross-examination of Ms Chakraborty he put to her the practices about which he alleges he made disclosures of information, but without being specific as to when the disclosures were made, other than to suggest that it was in 2013/2014. Ms Chakraborty consistently denied that he made the disclosures.

147. In the circumstances, and in view of the vagueness and insufficiency of the Claimant's evidence, we conclude that the Claimant has not discharged the burden on him to show that he made alleged Disclosure (D).

Disclosure (B) - The Claimant disclosed that the Second Respondent had used company money to pay for her aunt's care. The Claimant alleges that the disclosure was made on 4 August 2015.

148. In an email of 17 July 2015 [382] the Claimant wrote:

> '1. I never was in agreement for [JP] to be paid by the company for the care of Nikki's aunt.
>
> 2. Before Dec 2014 and probably to the beginning of 2014 [*sic*] [JP] had been paid £1200 per month.
>
> 3. From what I can recall there has been little if any Tiffin service.
>
> Nikki needs list all payments made to this lady for each month and justify what part of that payment relates to actual service users or for Astha. Anything that cannot be accounted for falls into what Nikki needs to pay back.'

149. Although this was not referred to in the agreed list of issues, Mr Chaudhry referred to it in closing submissions without objection to the Claimant's relying on it.

150. As for the email dated 4 August 2015, which is the email the Claimant originally relied on, in it the Claimant wrote:

> '… I wanted to be transparent as to my calculations.
>
> With regard to Arvind, you can discuss with Arvind himself and also Parita, as they together will be able to identify what was done for Astha and what if anything had been for Nikki's personal needs.
>
> For [JP], Nikki should have kept some records (a) payments made (b) what the split may have been. Again anything mentioned as work for us the like care work or Tiffin service, Parry Taylor would also have record of this and will be able to confirm.'

151. That email must be read against the background of the Claimant's email of 3 August 2015 in which he writes:

> ‘as part of the arbitration process, I attached a spreadsheet showing costs incurred that need to be accounted for.’

152. The spreadsheet attached to the email identified the carers the Claimant said Ms Chakraborty had used for her aunt. We find that in both emails the Claimant disclosed information which he reasonably believed tended to show a breach of a legal obligation by Ms Chakraborty: the obligation not to misuse company funds for her personal ends.

153. We then turned to the Claimant’s reason for making the disclosures and observe that the Claimant referred to a disclosure as being part of the ‘arbitration process’.

154. As we have already found, that was a process which Mr Fergusson carried out with the agreement of Ms Chakraborty. We accept Mr Fergusson’s evidence in cross-examination that this process looked into various monies that the Claimant said were owed to him and that the purpose of the process was to balance monies taken out of the business by Ms Chakraborty and the Claimant and to settle their financial differences with one another.

155. In the light of that evidence, we find that the Claimant did not subjectively believe that the disclosure, whether orally or in the emails of May and August 2015, was in the public interest. He believed it was in his own interest. We find that he took these actions for his own financial interest: he was seeking to recover money which he considered Ms Chakraborty had improperly taken out of the business, thereby disadvantaging him as a shareholder. The public interest played no part in his decisions.

156. Accordingly, Disclosure (B) is not established.

Disclosure (A) - The Claimant disclosed that the Second Respondent used company money to pay for her housemaid. The disclosure was made verbally by the Claimant to the Second Respondent in the last quarter of 2014.The disclosure was also made verbally April/May 2015. The Second Respondent instructed Mr Fergusson to investigate. The Claimant passed relevant information to Mr Fergusson on 4th August 2015.

157. Disclosure (A) adds nothing to Disclosure (B). The Claimant was unable to identify the occasions on which he made these alleged verbal disclosures, nor the precise content of the alleged disclosures. No further detail about them was provided in the Claimant’s witness statement or in his oral evidence. In cross-examination of Ms Chakraborty he was no more precise than to put to her that he made a disclosure ‘in late 2014’, which she denied. There is insufficient evidence to conclude that verbal disclosures were made by the Claimant in 2014 or 2015.

158. The written disclosure have been dealt with above and we have concluded that the Claimant did not subjectively believe that they were made in the public interest.

Disclosure (C) – The Claimant disclosed that the Respondent failed to pay care workers money due to them. The date on which the disclosure was made was not specified by the Claimant.

159. In the course of evidence, the Claimant was able to identify specific documents relating to the alleged disclosures.

160. We were taken first to an email of 20 January 2015 [300] from Parita Dalya to the Claimant:

> 'please find the calculation of the holidays entitled to London staff. Figures in red are the total hours we need to pay the staff as their balance of holiday hours.'

161. Although Ms Chakraborty's evidence initially was that she could not remember having a conversation with him about this, that evidence then changed and she accepted that she did recall the Claimant raising the issue with her and disclosed information about the extent of the non-payment. We find that this occurred shortly after the email from Parita Daiya. We find that he raised it again on or around 13 September 2015:

> 'I have updated my spreadsheet to include hours done till31.07.2015 and the holiday entitlement less any holiday that has been taken/paid.
>
> As of 31.07.2015 –
>
> outstanding hours of holiday not yet paid is 3283.45 hours, money required to pay this off is £24,625.88.
>
> Please give this your urgent attention'.

162. In an email of 14 September 2015, the Claimant forwarded the spreadsheet he had received from Ms Daiya in January to Mr Fergusson. Ms Chakraborty was copied into that email. We find that this was a further disclosure of information.

163. The Tribunal finds that in January and September 2015 the Claimant disclosed information which he reasonably believed tended to show a breach of a legal obligation: the obligation to pay holiday pay to workers/employees. We further find that he subjectively believed that the disclosure of that information was in the public interest. We further find that that belief was objectively reasonable. It was reasonable to disclose the information for the purpose of ensuring workers/employees received the remuneration to which they were entitled and we find that was the Claimant's purpose. We find that, in this respect, he did not act in pursuit of his private financial reckoning with Ms Chakraborty.

164. Accordingly, the only disclosures which remains live for the purposes of the Claimant's detriment/dismissal claims are the disclosures in respect of the failure to pay holiday pay, Disclosure (C).

<u>Did the Respondent subject the Claimant to any detriment by any act, or any deliberate failure to act, on the ground that he had made a qualifying disclosure in relation to the Respondent's failure to pay holiday pay</u>

165. The detriments relied on by the Claimant are shown in italics below.

Preventing the Claimant from accessing the Respondent's Barclays bank account on the 30 [October] 2015

Denying the Claimant Barclays bank statements from 30 October 2015

166. The Tribunal has already found (paras 70 and 72 above) that the reason why Ms Chakraborty sought to prevent the Claimant accessing the Barclays bank account, and restrict his access to information relating to it, including bank statements, was because he had accessed the Santander account and temporarily transferred funds to himself. We find that the Respondent's actions had no connection whatsoever with the Claimant's disclosure about holiday pay.

Failing to pay the Claimant's dividends from October 2016

167. The Tribunal has already found (para 95 above) that the reason why Ms Chakraborty stopped paying dividends to the Claimant was for the reason which the Claimant put to her in cross-examination: 'you wanted to cripple me financially in order to get the remaining shares'. We find that the disclosure about holiday pay played no part in the decisions to stop paying dividends to the Claimant.

168. Even had the Claimant not himself provided the explanation for the treatment, we accept Mr Chaudhry's submission that the remoteness of the alleged detriment in October 2016 onwards from the disclosures in January and September 2015 is strongly supportive of our finding that there was no connection between the two.

Suspending the Claimant on 9 May 2017

Conducting a disciplinary investigation on 21 July 2017

The Second Respondent and Mr Fergusson procuring the Claimant's dismissal

169. The distance between the disclosures about holiday pay in January/September 2015 and the suspension in May 2017 is even greater and the Tribunal concludes that it is even less likely that there was any connection between the two. The disciplinary process which began with the Claimant's suspension, continued with the investigation and concluded with his dismissal was not initiated because the Claimant had raised the issue of holiday pay. By the material time, some twenty months later, we find that the issue played no part whatsoever in the Respondent's thinking. If it was ever a source of irritation for Ms Chakraborty (and there was no compelling evidence that it was) it was soon superseded by other considerations, which we have set out above and below.

<u>The reason for the dismissal</u>

170. The Tribunal finds that this is not a case where there was a single reason for the dismissal.

171. We have found (para 80 above) that the initial decision to secure the Claimant's dismissal was taken in June 2016 around the time Ms Chakraborty wrote to Barclays enquiring about the practicality of 'getting rid' of the Claimant. She took that decision because she wished to end her business association with the Claimant and buy him out of the business. She concluded that dismissing him would drain him of financial resources and make him more likely to cede his interest in the business to her.

172. A second reason for dismissal was that Ms Chakraborty concluded that the Claimant had grossly neglected his duties as Leeds RM, in part because of the fact that he did not attend the Leeds office in person and carry out the functions prescribed by the CQC with sufficient regularity. The Respondent treated that as an issue of conduct. It will be apparent from our findings of fact (paras 67-68, 73 and 76) that Ms Chakraborty's dissatisfaction with how the Claimant had discharged the RM role been brewing for some time. It also came to a head in June 2016, when she required him to step down from the RM role (paras 86-88 above). That displeasure was then reinforced by the negative CQC inspection outcome in November 2016, for which she blamed him.

173. There was then the matter of the sending of the inflammatory email in August 2016 and the discovery in around December 2016 that the Claimant had improperly accessed Mr Fergusson's email account. Those became a third reason in Ms Chakraborty's mind for dismissing him. They were plainly issues of conduct.

174. Fourthly, there were the allegations in relation to expenses, which were also treated as matters of conduct.

175. Where there is more than one operative reason for a dismissal, s.98(1)(a) ERA requires the Tribunal to consider what the principal reason was. We have concluded that it was first of these reasons: the Second Respondent's wish to terminate her business association with the Claimant. We have reached that conclusion in part because of the evidence of the email of 22 June 2016; in part because of the long history of conflict between Ms Chakraborty and the Claimant which, by June 2016, had reached a particular low point; and in part because of the iron determination with which Ms Chakraborty then went about securing the Claimant's dismissal instructing solicitors to marshal evidence in support of a case for dismissal and controlling the process at every stage up to and including taking the decision to dismiss herself.

176. As a reason for dismissal, that does not fall within any of the potentially fair reasons in s.98(2) ERA. For the avoidance of doubt, no case was advanced on behalf of the Respondent that the dismissal was for 'some other substantial reason' within the meaning of s.98(1)(b) ERA 1996.

177. The First Respondent having failed to discharge the burden on it to show that the Claimant was dismissed for a potentially fair reason, his claim of unfair dismissal succeeds.

<u>Was the sole or principal reason for the Claimant's dismissal that he made a protected disclosure? If so, the dismissal is automatically unfair (s.103A ERA 1996)</u>

178. It follows that we conclude that the fact that the Claimant made a disclosure about unpaid holiday pay was not the sole or principal reason for his dismissal. In fact, we find that it formed no part of the reason for the dismissal, for the reasons we have already given. Accordingly, his claim of automatically unfair dismissal fails.

<u>Procedural fairness</u>

179. If we are wrong about the principal reason for the dismissal, and one of the other reasons set out above was the principal reason for dismissal, the Tribunal

has no hesitation in finding that the First Respondent acted unreasonably in procedural terms, having regard to s.98(4) ERA:

179.1. the impropriety of Ms Chakraborty being involved at any stage of the disciplinary process: her vested interest in securing the Claimant's dismissal gave rise to an obvious conflict;

179.2. the impropriety of involving solicitors, who were also instructed in contested proceedings against the Claimant, in the disciplinary process, giving rise to an obvious appearance of bias;

179.3. the impropriety of the same person (Ms Chakraborty) leading on every stage of the process, from the investigation onwards, and then taking the decision to dismiss;

179.4. the grossly unfair conduct of the investigation meeting, at which the Claimant was given no meaningful opportunity to state his case;

179.5. the failure to have regard before convening the disciplinary hearing to the material the Claimant adduced in his defence;

179.6. the fabrication of the 2014 job description;

179.7. the grossly unfair conduct of the disciplinary meeting, at which he was repeatedly hectored and interrupted by Ms Chakraborty;

179.8. the failure to provide a transcript of the disciplinary hearing, despite an undertaking to do so; and

179.9. the failure to allow him to appeal, despite the fact that he had lodged a valid appeal.

180. The Tribunal concluded that the dismissal was so manifestly procedurally unfair at every stage that it fell outside the band of reasonable responses.

<u>Discrimination because of something arising in consequence of the Claimant's disability (s.15 EqA)</u>

Did the Respondents have knowledge of the Claimant's disability or should it reasonably have known about the Claimant's disability?

181. The Respondents have conceded that they had knowledge of the Claimant's disability.

Did the Respondents treat the Claimant unfavourably because of something arising in consequence of his disability? The 'something' in this case was the Claimant's inability to attend the Leeds office and perform the functions of the RM role as prescribed by the CQC.

182. The unfavourable treatment relied on is the Claimant's dismissal.

183. We have already concluded (para 172) that part of the reason for dismissing the Claimant was the fact that he had not fully discharged his duties as RM in Leeds during the period when he had been performing it. We have also already found (paras 48-52 above) that that consequences of his disability placed very substantial limitations on his ability to travel, mix with people, attend the

workplace and attend service-users home. That in turn had an obvious impact, which Ms Chakraborty knew about, on his ability to discharge the RM role. Put simply, he could not discharge it to the full extent required because he could not attend the Leeds service in person and provide the degree of hand-on management which was necessary. We conclude that the dismissal was, in part at least, because of something arising in consequence of the Claimant's disability.

If so, was the dismissal a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent was the need to comply with the requirement of the CQC and the regulatory framework for RMs.

184. Can the Respondents show that its dismissal of the Claimant was a proportionate means of achieving a legitimate aim? In his skeleton argument Mr Chaudhry identified the legitimate aim as: 'the requirement to adhere to the requirements of the CQC and appoint someone who could devote more of their working time towards the administering of care for vulnerable people'. However, the Respondent had already achieved that aim when Ms Chakraborty had instructed the Claimant to resign from the post of RM in Leeds so that she could replace him with someone who was able to be more hands-on. Logically, his dismissal in 2017 could achieve nothing more in furtherance of that aim and the defence fails.

185. Accordingly, the Claimant's claim under s.15 EqA succeeds against the First and Second Respondents.

Would the Claimant have been dismissed in any event, had there been no unfairness (Polkey) and no discrimination (Chagger)

Did the Claimant contribute to his dismissal by his own conduct?

186. The First Respondent has not discharged the burden on it to show that it would fairly have dismissed the Claimant by reason of his failures in discharging the RM role. We do not regard them as matters of misconduct, rather as almost inevitable consequences of the original decision to place him in that role in the first place, despite knowing that his disability impeded him from performing it to the level required. That was a decision in which we have found Ms Chakraborty was complicit.

187. Similarly, the First Respondent has not discharged the burden on it to show that the Claimant could fairly have been dismissed for expenses fraud. The extent of Mr Chaudhry's cross-examination on this issue was limited and hampered by the poor and confused quality of the evidence which the Respondent adduced in relation to this issue and the contradictory evidence given by Ms Chakraborty. By way of example only, a central charge against the Claimant was that he had fraudulently paid for an Amazon Prime account using company funds. Ms Chakraborty had pursued this issue with vigour at the disciplinary hearing. At the hearing before us, she accepted that the Amazon Prime account in question was hers, not his.

188. The question of the improper accessing of emails, and the sending of the inflammatory email, is a very different matter. Given the concessions made the Claimant in the course of evidence, and the supporting documentary evidence, the Tribunal's preliminary view is that the First Respondent may have been able

fairly to dismiss by reason of these matters alone, had it relied solely on the matter of the emails and had there been no unfairness in the procedure.

189. Similarly, had the issue of the Claimant's performance as the Leeds RM been excluded entirely from the process (i.e. had the considerations which tainted the dismissal with discrimination been excluded), the Respondent might have been able to dismiss on the basis of the emails alone without discrimination.

190. However, that is by no means our concluded view and the parties may address us further in argument on this issue at the remedies hearing.

191. As for contribution, given that we have found that the Claimant's conduct in relation to the email issue was blameworthy and formed part of the Respondents' reason for dismissing, it is likely (but not certain) that there will be a reduction of some sort for contribution. The level of that reduction will again be a matter for submissions at the remedies hearing.

Credibility

192. In reaching our conclusions, and particularly where we had to decide whether we preferred the Claimant's account or Ms Chakraborty's account in the absence of relevant contemporaneous documents, we took into account our assessment of their credibility as witnesses.

193. The Tribunal concluded that Ms Chakraborty was not a reliable witness. Her evidence on a number of issues was not credible. The most significant of these was in relation to the HR role purportedly carried out by Ms Akanksha Shangvi. Although this was not a central issue in the case, the Claimant raised it as an indicator of the way that Ms Chakraborty conducted business, going to her credibility on other issues, and the Respondent elected to call Ms Shangvi as a witness.

194. Between 2014 and 2016 Ms Shangvi stated that she worked as an independent HR contractor for the Respondents through her own limited companies.

195. The Claimant alleged that the arrangement between Ms Shangvi and the Respondent was a sham, designed to benefit the Respondent financially and to assist Ms Shangvi in regularising her immigration status. The arrangement was that Ms Shangvi would invoice the company in respect of £4500 per month for 'HR services'. That would be sufficient to take her over the earnings threshold to be able to remain in the UK. The Respondent would pay the invoice but Ms Shangvi would then repay the money directly to the Respondent.

196. We found Ms Shagvi's evidence utterly implausible in every respect. By way of example, Ms Shangvi was unable to give a satisfactory explanation of the duties which she purportedly carried out on behalf of the First Respondent. With the exception of one employee, whose name had been mentioned repeatedly in the course of the evidence which she had just observed, she was unable to name any of the First Respondent's employees.

197. Even if Ms Shangvi did carry out the duties which she described, albeit in very general terms ('auditing personnel files'), the Tribunal found it inherently unlikely that the First Respondent would have paid her nearly £50,000 a year to carry them out, in circumstances where they retained the services of Peninsula

Business Services to provide HR support and already had a permanent member of staff (Mr Alex) in an HR role.

198. Ms Chakraborty strongly denied receiving payments from Ms Shangvi. However, in the course of hearing evidence on other issues, the Tribunal was taken to documents in the bundle which confirmed to us that she did, the most significant of which were the following:

    198.1. an email from Ms Chakraborty to the Claimant dated 3 July 2015 in which she writes: 'Hi I have accepted a payment from Akanksha today of £4500. I will be giving Antony £2000 today and can make another two payments up to the value of £2500. I suggest we use this for ourselves. Akanksha will be invoicing us next week when she returns from holidays …'; and

    198.2. an email exchange between the Claimant and Ms Chakraborty dated 22/23 January 2016 and titled 'Akanksha', in which Ms Chakraborty wrote 'we have received £4500 every month since April last year to date'. Ms Chakraborty in cross-examination stated that this was 'a typo, it should have said received invoices, I was in a rush and very busy'. We reject that explanation.

199. Even in the face of this evidence, which the Tribunal regarded as incontrovertible, Ms Chakraborty stood by her evidence that she did not receive any payments from Ms Shangvi.

200. By contrast, the Tribunal generally found the Claimant to be a more considered and reflective witness. He was at least prepared to make some concessions against his own interest and to acknowledge inconsistencies/contradictions in his case when they were drawn to his attention.

Remedy

201. The case will be listed for a remedies hearing, with a time estimate of one day. By no later than 7 days after this judgment is sent out, the parties are to provide to the Tribunal their dates to avoid from February 2020 onwards, marked for my attention. The hearing will then be listed and I will give directions for preparation.

Employment Judge Massarella
Date: 22 November 2019