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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr I Soanes	**AND**	R1 Stobart Capital Limited R2 William Andrew Tinkler

Heard at: London Central **On**: 18 – 22, 25 & 26 November 2019 & 3 – 6 March 2020

Before: **Employment Judge Brown**

Members: **Mrs M B Pilfold**
Mr S Soskin

Representation

For the Claimant: In person
For the Respondent: Mr A Edge, of Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The First Respondent did not automatically unfair dismiss the Claimant.**

2. **The Respondents did not subject the Claimant to protected disclosure detriments.**

REASONS

Preliminary

1. The Claimant brings complaints of automatic unfair constructive dismissal contrary to *s.103A Employment Rights Act 1996* against the First Respondent, the Claimant's former employer, and protected disclosure detriment complaints against both Respondents, pursuant to *s.47B Employment Rights Act 1996*.

2. This hearing was to determine liability only, including matters of Polkey. A separate provisional remedies hearing was listed to determine remedy, including Mr Tinkler's personal liability for any damages.

3. The parties had agreed a list of issues. The issues were as follows:

Jurisdiction of the Tribunal

1. Pursuant to the time limits set out in section 48(3) and 48(4A) Employment Rights Act 1996 ("ERA") does the Tribunal have jurisdiction to consider each of the Claimant's complaints of detriment (whether brought pursuant to section 47B ERA or section 44 ERA)? In particular:

1.1. Did the Claimant submit his complaint to the Tribunal / commence conciliation 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 the act or failure is part of a series of similar acts or failures, the last of them; or

1.2. 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 have been presented before the end of the period of three months?

The Alleged Protected Disclosures

2. Did the Claimant make each or any of the following alleged "*qualifying disclosures"*:

2.1. Conversation which took place between the Claimant and the Second Respondent on 9 November 2017, in which the Claimant criticised the structure being proposed by the Second Respondent, asserting that the structure was inappropriate and was personally benefitting the Second Respondent and his consortium to the detriment of Stobart Group Limited, and during which the Claimant proposed a structure which achieved all of the legitimate objectives without the step which benefitted the Second Respondent and his consortium ("**the First alleged Protected Disclosure**");

2.2. Conversations, that took place between the Claimant and the Second Respondent between 12 November and 19 November 2018 **[presumably the Claimant means 2017]** in which the Claimant continued to assert that the structure proposed by the Second Respondent was not appropriate and should not be pursued, on the grounds that it benefitted the Second Respondent and his consortium personally and unnecessarily, and so gave rise to related party and conflict of duty issues and also put the First Respondent in breach of its contractual duties to Stobart Group Limited. **("the Second alleged Protected Disclosure"***);*

2.3. The Claimant's email of 20th November 2017 **[728] ("the Third alleged Protected Disclosure").**

2.4. Conversation**s** that took place between the Claimant and Warwick Brady of SGL, in which the Claimant showed Warwick Brady a copy of the attachment to the email dated 20th November 2017, and in which, the Claimant explained his concerns about the structure being proposed by the Second Respondent (including his assertion that it gave rise to related party, conflict of interest and breach of duty issues) **("the Fourth alleged Protected Disclosure").**

2.5. Conversations that took place after the email sent on 20 November 2017, during the remainder of November 2017 and into early December 2017, in which the Claimant and the Second Respondent continued to discuss the proposed structure being promoted by the Second Respondent, and during which the Claimant continued to outline his concerns about the proposed structure, including that the structure gave rise to related party and conflict of duty issues and also put the First Respondent in breach of its contractual duties to Stobart Group Limited ("**the Fifth alleged Protected Disclosure**"); and

2.6. The Claimant's text message of 7th February 2018 **[1162]** in which he stated: "*Ok. Just to explain my concerns from a slightly different perspective. We are a regulated business, as we need to be to do the work we want to do. You and I are regulated persons and we have an obligation, among others, to manage conflicts. The obvious conflict we have is with your various connections to Stobart Group. You have a right to look after your shareholding but through the management agreement with Group we owe a contractual duty of care and we have regulatory obligations to group as a client. Right now, I see Stobart Capital's position as untenable given your issues and I am concerned about our regulatory exposure, so we need to discuss that today…"* ("**the Sixth alleged Protected Disclosure**")

3. Do each (or any) of the above Alleged Disclosures constitute a 'disclosure of information' within the meaning of section 43B ERA?

4. Do each (or any) of the above Alleged Disclosures tend to show a relevant failure within the meaning of section 43L/43B(5) ERA? In particular, did each (or any) of the above Alleged Disclosures tend to show that the Respondent had failed, is failing or is likely to fail to comply with any legal obligation to which he is subject? The legal obligations relied upon by the Claimant are:

4.1. The Second Respondent's fiduciary duties (as statutory director) owed Stobart Group Limited;

4.2. Breach of the Articles of Association of either the First Respondent, or Stobart Group Limited;

4.3. Breach of the FCA rules, in particular those relating to managing conflicts of interest and/or related party transactions; and

4.4. The terms of the Management Agreement.

5. Did the Claimant have a "*reasonable belief*":

5.1. That each or any of the above alleged disclosures tended to show breaches of the above alleged 'relevant failures'; and

5.2. That each or any of the alleged disclosures was made in the public interest.

6. If made, do any of the First, Second, Third, Fifth, or Sixth alleged disclosures constitute a 'protected disclosure' within the meaning of sections 43A and 43C ERA 1996? In particular, were each (or any) of the above alleged disclosures made to the Claimant's employer?

7. Further or alternatively, did the Fourth alleged disclosure constitute a 'protected disclosure' within the meaning of section 43G ERA? In particular:

7.1. Did the Claimant reasonably believe that the information disclosed, and any allegation contained in it, was substantially true;

7.2. Did the Claimant not make the disclosure for purposes of personal gain;

7.3. Were any of the below conditions met:

(i) that, at the time the Claimant made the disclosure, he reasonably believed that he would be subjected to a detriment by the First Respondent if he made a disclosure to his employer or in accordance with section 43F; or

(ii) that the Claimant had previously made a disclosure of substantially the same information to his employer.

7.4. In all the circumstances of the case, with reference to the following matters, was is reasonable for the Claimant to make the disclosure:

(i) the identity of the person to whom the disclosure is made;

(ii) the seriousness of the relevant failure;

(iii) whether the relevant failure is continuing or is likely to occur in the future,

(iv) whether the disclosure was made in breach of a duty of confidentiality owed by the employer to any other person;

(v) in a case falling within subsection 7.3(ii), any action which the employer had taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(vi) in a case falling within subsection 7.3(ii), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

The Alleged detriments

8. In this matter, the Claimant relies upon the following alleged conduct:

8.1. The treatment of the Claimant by the Second Respondent, in particular, by "*becoming increasingly agitated by the Claimant when he would not accept the proposal being promoted by the Second Respondent, which the Claimant believed would result in the breach of legal obligations";*

8.2. By excluding the Claimant from work with effect from 11 February 2018;

8.3. By purporting (by letter) dated 22 February 2018 to suspend the Claimant on allegations of gross misconduct; and

8.4. By constructively dismissing the Claimant.

9. Do each or any of the above instances represent a '*detriment'* within the meaning of section 47B ERA?

10. Was the Claimant subjected to such alleged detriments by any act, or any deliberate failure to act, by the First and/or Second Respondent?

11. If so, was such act, or deliberate failure to act, done by the Respondent 'on the ground that' the Claimant made any of the above alleged protected disclosures?

Automatic Unfair Dismissal (s.103A ERA)

12. The Claimant relies upon the implied term of trust and confidence, that the First Respondent:

"…would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"

13. Accordingly:

13.1. Did the First Respondent subject the Claimant to each or any of the matters set out above at paragraph 8;

13.2. Did the First Respondent have reasonable and proper cause for such proved conduct?

13.3. Was the conduct complained of likely to destroy or seriously damage the employer/employee relationship of trust and confidence?

13.4. Did the Claimant Resign in response to any repudiatory breach of contract on the part of the First Respondent?

14. If constructively dismissed, was such dismissal by the First Respondent automatically unfair by reason of 103A ERA 1996? In particular, was the reason or principal reason for the dismissal the fact that the Claimant had made one or more of the alleged disclosures set out above?

Remedy

15. To what remedy (if any) is the Claimant entitled? In particular:

15.1. Should any award of compensation made in favour of the Claimant be reduced on the grounds of *Polkey*?

15.2. Would it be just and equitable to award the Claimant compensation?

15.3. Did the Claimant cause or contribute to his dismissal?

15.4. Has the Claimant adequately mitigated his losses?

4. The Tribunal heard evidence from the Claimant. For the Claimant, it also heard evidence from Warwick Brady, Executive Director and Group Chief Executive Officer of Stobart Group Limited, and John Coombes, Non-Executive Director of Stobart Group Limited. It heard evidence from Mr Tinkler, the Second Respondent. Mr Tinkler is Chair of Stobart Capital Limited, the First Respondent.

5. For the Respondents, the Tribunal heard evidence from Paul Hodges, Executive Director and Founding Shareholder of Cenkos Securities Plc, the Joint

Stock Corporate Broker to Stobart Group until 30 May 2018; and John Storey, a Non Statutory Director of Stobart Capital Limited.

6. There was a bundle of documents in three volumes, a supplementary bundle of documents and an interparty correspondence bundle. There was a cast list and a Respondents' skeleton argument and chronology. Both parties made written closing submissions and oral submissions. The Tribunal reserved its Judgment.

7. The Tribunal received email correspondence and an affidavit from an observer who had sat in the Tribunal proceedings one day. The email and affidavit made allegations against Mr Tinkler which the Tribunal did not consider to be relevant to any of the issues in this case. The Tribunal therefore disregarded the correspondence and the affidavit. However, given that it was sent to the Tribunal in relation to the case, the Tribunal did provide the parties with copies of the correspondence and affidavit.

Findings of Fact

8. The Second Respondent, Mr Tinkler, is a well known entrepreneur. He purchased what became Stobart Group Limited in 2004 for £1million. Until 1 July 2017 Mr Tinkler was the Chief Executive Officer of Stobart Group Limited. He stepped down as CEO of Stobart Group Limited on 1 July 2017 with the purpose of releasing himself from the significant daily requirements of running a Public Limited Company and to provide him with more freedom to make financial investments on his own behalf and for his own benefit.

9. At that time, Mr Tinkler and Stobart Group Limited agreed to the creation of Stobart Capital Limited, the First Respondent. The purpose of Stobart Capital Limited was set out in a document drafted by the Claimant in November 2016, page 145. This stated that, "A number of factors have come into alignment which offer the Group a seamless transition for Andrew [Mr Tinkler] from CEO to new dual roles being:- a part time executive role (with a title to be agreed) making him available to the Group to share and develop new ideas and initiatives, ensure complete continuity and actively assist with the transition to a new CEO; and – a sustainable long term role originating and developing business ideas in a variety of ways as an advisor, investor, consultant, non-exec or even broker, to suit the situation, with his primary focus on the Group but able also to work independently".

10. In consequence of Mr Tinkler stepping down as Stobart Group CEO, his basic annual salary from Stobart Group halved from £432,600 to £216,300.

11. In essence, the central purpose of Stobart Capital Limited was to allow Mr Tinkler to work for a separate independent entity which would do business on its own account, for its own benefit, and would also allow Mr Tinkler to make personal investments in the opportunities identified. Those opportunities would be shared with, and proposed to, Stobart Group Limited, so that it could invest, if it chose to do so, in those opportunities.

12. Having stepped down as CEO of Stobart Group Limited, Mr Tinkler still retained a substantial shareholding in that Group. However, the intention that Mr

Tinkler would personally invest in, and profit from, business opportunities, which also involved the Stobart Group, created potential conflicts of interest. The potential conflicts of interest included, for example, Mr Tinkler's own interests in making personal investments, and his duties as a continuing Statutory Director of Stobart Group Limited. Nevertheless, the Articles of Association of Stobart Group Limited permitted its Directors, including Mr Tinkler, to have a conflicting interest in a proposed contract involving Stobart Group Limited, providing that such interest was disclosed to the Board.

13. Article 85(1) of Stobart Group Limited's Articles of Association state that, "A Director who to his knowledge is in any way directly or indirectly interested in a contract or arrangement or proposed contract or arrangement with the Company shall disclose the nature of his interest at a meeting of the Board…. For the purpose of the foregoing a general notice given to the Board by a Director to the effect that his is a member of a specified company or firm and is to be regarded as interested in any contract or arrangement which may after the date of the notice being made with that company or firm shall be deemed to be a sufficient disclosure of interest if either it is given at a meeting of the Board or the Director takes reasonable steps to ensure that it is raised and read at the next meeting of the Board after it is given …".

14. Article 85(2) states that a Director may not vote in respect of any resolution of Directors or Committee of Directors concerning a contract, arrangement, transaction, or proposal to which the company is a party and in which the Director has an interest which, to his knowledge, is a material interest.

15. Accordingly, the obligation placed upon Mr Tinkler by Stobart Group Limited's Articles of Association required him to provide the Board of Stobart Group Limited with a general notice that he was a member of Stobart Capital Limited and was to be regarded as interested in any proposed contract to sell an interest of Stobart Group Limited and to recuse himself from Stobart Group Limited Board's decision about whether or not to proceed with such a contract.

16. The potential for conflicts was also expressly recognised by Stobart Capital Limited. The Claimant's November 2016 outline document for Stobart Capital Limited stated, page 150, "3.8 Conflicts. There is potential for conflicts of interest for AT [Mr Tinkler] as between his personal interests in SC [SCL] and his obligations to Group [Stobart Group Limited] and for SC as between its own independent interests and those of the Group… AT will have a partnership interest in SC and in any carry vehicle. He will also have an on-going duty to the Group, which also has interests in SC and via its partnership interests. The Potential for conflict will be managed by complete transparency as to all these interests, in particular, via the partnership interest of Group in SC which gives it access to all information both via AT and the Group representative…. AT would not be able to commit the Group to any Stobart Capital initiative; any commitment would need to be sanctioned by the Group Board or an appointed delegate …".

17. Stobart Capital Limited was incorporated on 10 May 2017. Mr Tinkler invited the Claimant to join him as a Director and substantial minority shareholder of Stobart Capital Limited. The Claimant's employment commenced with Stobart

Capital on 1 August 2017, page 165 and was subject to the terms and conditions set out in the Service Agreement, pages 164-178.

18. Mr Tinkler held 50.1% of the shares in Stobart Capital and the Claimant held 49.9% of the shares.

19. Stobart Capital Limited entered into a Management Agreement with Stobart Group Limited on 22 September 2017, page 209. The manner in which potential conflicts of interest were to be managed was set out in this agreement. It was expressly agreed between Stobart Capital Limited and Stobart Group Limited that Stobart Group would establish a Value Creation Committee (VCC). The VCC was an independent committee of Stobart Group's Board, Chaired by Mr Coombes, and upon which Mr Tinkler was not permitted to sit. Stobart Capital would pitch transaction opportunities to the VCC, which had the right to exercise a "right of first offer". The purpose of the VCC was to consider Stobart Capital's pitch and decide whether Stobart Group ought to take the opportunity forward. This was a formal structure to address any conflict caused by Mr Tinkler's personal position as Statutory Director of Stobart Group, clause 3.8 of the Management Agreement, page 217.

20. Under the terms of the Management Agreement, Stobart Capital owed a duty of care to Stobart Group to act in good faith, to exercise due skill care and diligence and to operate in accordance with good market practice, clause.2.4. Stobart Capital was paid a retainer by Stobart Group of £500,000 per annum, clause.4.

21. One of Stobart Capital's first projects was to look at a way of deconsolidating the Stobart Air Operating Business from the Stobart Group. The plan to deconsolidate the Airline Operating Business from Stobart Group became known as "Project Blue". Stobart Group had committed to underwriting the losses caused by Stobart Air having extended its operations as a developing airline business. Selling Stobart Air in a manner which limited the future obligations of Stobart Group to underwrite these sums would remove losses from Stobart Group's accounts. If Stobart Group earned less than 50% of Stobart Air, it could treat its interest in the business as an investment and not include losses made by that company in its annual accounts. However, the effect of selling such a significant interest in the business would mean that Stobart Group lost control of Stobart Air. As a result, Stobart Group wished to sell the majority interest to a consortium of friendly investors.

22. A proposal paper dated 4 September 2017 explained this, pages 233-240. This proposal paper explained that Mr Tinkler was a potential investor in his personal capacity, and was a related party, so that if he was to own more than 5% of a consortium, that would require shareholder approval. Various proposals and structures were put forward in relation to Project Blue. Mr Tinkler proposed that Mr Tinkler himself, Neil Woodford and Phillip Day would comprise the "friendly consortium" of investors. The intention was that the ownership of Stobart Air's operational business would be transferred to a new private company "Op Co" and this consortium of investors would purchase 60% of the shares of Op Co and thus 60% of Stobart Air's operations.

23. A detailed proposal was presented to Neil Woodford on 6 November 2017, pages 684-705. On 6 November 2017 Mr Soanes and Mr Tinkler met with Mr Woodford and colleagues, to present the Project Blue opportunity by delivering two presentation documents, page 684-706. Mr Woodford was positive about the opportunity, but said he could not invest in the transaction structure proposed because it involved him taking a significant stake in a private company.

24. As a result, Mr Tinkler and Mr Soanes discussed alternative structures. On 7 November 2017 Mr Soanes sent an email to Mr Tinkler and the Stobart Capital team, proposing an alternative structure, pages 567-569, which Mr Soanes felt would meet Mr Woodford's requirements and allow his funds to invest.

25. On 8 November 2017 Mr Tinkler proposed a revised structure for the transaction, in the form of a series of steps, pages 572-572a. This revised structure involved a consortium of investors, Phillip Day, Neil Woodford and Mr Tinkler, first acquiring a controlling 60% stake in Stobart Air, or its newly created holding company OpCo, for £12 million (valuing Stobart Air at £20 million) and then, 3 or 4 months later, selling 49% of that stake (29.4% of Stobart Air) to Asset Co at approximately double the price the consortium had paid for it, valuing Stobart Air at £40 million.

26. This proposal was also sent by Mr Tinkler to Warwick Brady, CEO of the Stobart Group, on 8 November 2017. In Mr Tinkler's email of 18 November 2017 to the proposed investor, Phillip Day, Mr Tinkler summarised the purpose of his proposed variant of the transaction structure as "Step 3 NEX to purchase 49% of Project Blue for 19.6 million, This is a premium to step one as it will have completed certain contracts while being private giving Step 1 investors an uplift of around 100% for a 3 to 4 month holding value of around 20 million which means investors get their money back at that point but still retain control of Project Blue Op Co holding 51%", Volume 1 page 678.

27. The Claimant told the Tribunal that, after Mr Tinkler had proposed his alternative structure, on 9 November 2017 the Claimant telephoned Mr Tinkler to explain his concerns about Mr Tinkler's proposals. On 10 November 2017 the Claimant sent an email to Daniel Shofar and Abdullah Raj, analysist colleagues at Stobart Capital, saying that he had concerns about Mr Tinkler's proposal and had spoken to him at length about it on 9 November.

28. The Claimant sent an alternative structure to Mr Tinkler on 10 November 2017 saying, "I think this works for everyone please give it a fair hearing", pages 578 and 584.

29. In his further particulars of his protected disclosures, the Claimant said that, in the conversation between the Claimant and Mr Tinkler on 9 November 2017, the Claimant "criticised the structure being proposed by the Second Respondent, asserting that the structure was inappropriate and was personally benefitting the Second Respondent and his consortium to the detriment of Stobart Group Limited…." Page 46.

30. It is clear that the Claimant did have concerns about Mr Tinkler's proposal at the time; he told Daniel Shofar and Abdullah Raj this on 10 November 2017 and

said that he had discussed his concerns with Mr Tinkler, page 584. When the Claimant sent his alternative structure to Mr Tinkler, he asked Mr Tinkler to give it a fair hearing, indicating that there was potentially some disagreement between Mr Tinkler and the Claimant in relation to the structure. The Tribunal accepted the Claimant's assertion, as set out in his further information, that he told Mr Tinkler "that the structure was inappropriate and was personally benefiting (Mr Tinkler) and his consortium to the detriment of Stobart Group Limited".

31. During the Claimant's evidence to the Tribunal, the Claimant did not give any more detail of the words that he used to Mr Tinkler. The Tribunal therefore found that the words used by the Claimant on 9 November 2017 were as set out in his further particulars. He did not give any more specific detail about the nature of the inappropriateness, nor any particular contractual, or fiduciary, or regulatory duties, of which Mr Tinkler was potentially in breach.

32. On 12 November 2017, Mr Brady, CEO of Stobart Group, emailed Mr Tinkler, the Claimant and others, saying it was imperative that step 1 of Mr Tinkler's model was completed, at the latest, by the end of November 2017. He said, "There is absolutely nothing stopping Stobart Group reducing our risk and creating the first step for the consolidation of the industry". Page 599. Mr Brady also set out the next steps as envisaged by Mr Tinkler, pages 599-600.

33. On 12 November 2017 at 20:27 the Claimant replied to Mr Brady, asking whether anyone had briefed Stifel (the Group's Sponsor) and saying, "If Andrew is participating the sponsor issues are not trivial and need to be handled with some care if you want the right answer from Stiefel", page 638. Mr Brady replied shortly afterwards, saying that step 1 and step 2 were very straightforward regarding the Sponsor. He said, "It's only when we get to step 3 it becomes a little more challenging re AT and the benefits he receives - need to be the same or less than SG". Page 638.

34. The Claimant then replied further on 12 November 2017 at 21:29, page 637. In this email, the Claimant said "Step 1 is very straightforward if there is no link between steps 1 and 3. I would hope Stifel [SGL's sponsor] will confirm that it's not a related party transaction. If Group is selling shares directly to AT it could be a RPT [related party transaction]. If a NewCo is formed and EHL [the Group entity which owned Stobart Air] is sold to the New Co I think it will be ok if Andrew is at 9%. We should press on assuming its ok and ask them to confirm ASAP". Page 637.

35. The Tribunal was taken to the transcript of High Court Proceedings in which Mr Soanes was asked about specifically having raised, with Mr Tinkler, potential breaches of regulatory obligations, page 1829. The transcript was as follows:

"Q: Were you very concerned there was a very serious regulatory problem at the time in 2017 with the proposal.

A: At the time I was concerned that the transaction was inappropriate and it was flawed …

Q: Flawed? And what Stobart Capital was in breach of its obligations – regulatory obligations in proposing it?

A: At the time yes, I do think that Mr Tinkler was in breach of his regulatory obligations.

Q: Right, well that's what you now say. You never said that at the time, did you?

A: I didn't put it in those terms at the time".

36. On 15 November 2017 Andrew Butters, Interim Finance Projects Manager at the Stobart Group, wrote to the Claimant and Richard Laycock, Group Finance Director, about Mr Tinkler's proposal. He said that step 1 needed to be completed as soon as possible, but that there was a need to delink any initial investment from any guaranteed uplift in value at step 3, or Mr Tinkler could not participate as a related party. He said that the Group could not create value in the Airline by enhancing its profit and loss at cost to the Group after step 1, but before step 3; he said that this would raise fiduciary duty and related party issues. Mr Butters said, therefore, that the initial investors needed to invest on the basis of the Airline alone and the future consolidation opportunities; that is, by assuming that the Extended Southend Operations (the margins on extra flights out of Southend Airport) had no impact on profitability, but did add value by providing scale to the business which increased opportunity for future synergies, page 668.

37. On 15 November 2017 he Claimant emailed Jonathan Brown of Hill Dickinson, Stobart Group's Corporate Solicitors, sending him the Claimant's alternative proposal, pages 662-667.

38. On 19 November 2017 the Claimant emailed Mr Brady in relation to Stobart Group's negotiations with Flybe, copying Mr Tinkler and Jonathan Brown of Hill Dickinson into the email. He said that the figures proposed by Mr Tinkler were based on a 5% margin and he was concerned that that arrangement could destroy value for Stobart Group through Project Blue. The Claimant said that there needed to be clarity regarding where the profit was coming from; that the figures needed to demonstrate sustainability in the business. The Claimant commented that this was a very sensitive area and that there was potential for there being considerable disagreement on the value of the Airline business, page 719.

39. Mr Tinkler replied on 19 November 2017 to the Claimant, Warwick Brady and Jonathan Brown. He said that he had answers regarding the numbers; he said that the Extended Southend Operations needed to make profit for the Airline which, if business did it correctly, would increase the value that the Group received. He said that he had experience of spotting potential for increase in value, which is why he wanted to be involved, giving the Group the benefit of his experience of making money and creating shareholder returns. He said that he wanted to lead on the matter and that the transaction was very frustrating. Mr Tinkler said that step 1 needed to be completed as soon as possible, and that he was meeting with Mr Day that week in order to ensure that that happened, page 718.

40. On 20 November 2017 the Claimant wrote to Mr Tinkler about Mr Tinkler's proposal, compared to the Claimant's proposal. He said,

> "Here are the problems as I see them: the idea of Group selling a business and investing in an entity to (effectively) buy it back at a higher price will be difficult for the Board to accept. Both deals will have to be announced and explained. I know you see it as value creation for everyone but the alternative view is that value is transferred from the Group to the investors. The attached suggests that Group is transferring £12million (or more) to the other investors. You argue that this is a reasonable price to pay for the investors making the deal happen, that's a highly contentious argument.
>
> If there is no link between Step 3 and Step 1 (formal or informal) it is much less of a problem. If Step 3 happens at whatever value is available it might be fine, but then what's the point of two steps rather than one? If the steps are not linked, because Group loses control at step 1 it could get stuck in limbo with no control over consolidation. Will they really agree to that?
>
> If you are an investor the deal will have to be signed off by a sponsor, any related party transaction is controversial. Even if we manage to get below the threshold where it doesn't need approval, any deal with a related party needs to be blessed by a sponsor and announced. If there is any link to Step 3 no sponsor will sign it off. Cenkos have already claimed a conflict. There may be some truth in that but really its too controversial for them.
>
> Even without Project Wright there is a significant risk of the deal attracting very damaging attention…
>
> .. Any long term commitment by Group of the sort that could make the airline worth £40m, would have very negative accounting implications for the Group (the capitalised investment would have to be impairment-tested and written down with a big charge to Group P&L) and for the airline (it would have to report losses annually with no credit from the Group's underwriting). A shorter-term less valuable arrangement would work per Andy's note, but wouldn't justify a £40m valuation.
>
> Your plan involves raising far far more money than mine. The free float alone would be £12m …
>
> You say that my alternative won't work but you've never said why. If there was a value uplift created in the airline in my plan it would still be shared but Group would get a bigger share and therefore suffer less of a value loss overall. I think that if we did the job well and got the Nex company floated will might get the value up without a value transfer from Group, if it's seen as an interesting shell/investment company play. I don't see any reason why we would not get all the investor support we need from my version, and the numbers are so much smaller that Paul could pull in favours if need be.
>
> Could we have a proper discussion about all pros and cons some of this is very serious stuff with potentially huge ramifications", page 728-729.

Mr Soanes attached an analysis showing, numerically, the transfer of value from Stobart Group to the consortium including Mr Tinkler, page 730.

41. Later on, 20 November 2017, the Claimant asked Mr Brady to meet with him. He showed Mr Brady a copy of his analysis showing, numerically, the transfer of value from Stobart Group to the consortium.

42. Mr Brady told the Tribunal that, during this meeting, the Claimant explained to Mr Brady how the valuation of the business in Mr Tinkler's proposal was £20 million at Step 1, but would increase to £40 million within a short space of time at Step 3, without there being any material change to the business, except for the change to the payment from Stobart Group to Stobart Air to provide services from London Southend Airport under the ESO Extended Southend Operations. Mr Brady said that this was new information to him, which contradicted his earlier understanding of Mr Tinkler's presentation of his proposal. Mr Brady said that he had not previously been aware that the increase in value to £40 million was largely funded by Stobart Group through the ESO contract. Mr Brady told the Tribunal that the Claimant also told him, as did Stobart Group's Broker, that the proposal would not meet the criteria required for approval as a Related Party Transaction.

43. Mr Brady told the Tribunal that he therefore formed the view that Mr Tinkler's proposal could not proceed. He told the Tribunal that he considered that Mr Tinkler felt strongly about his proposal and that Mr Brady did not want to get into a row with Mr Tinkler about it, so Mr Brady decided not to tell Mr Tinkler explicitly that he did not want to proceed with Mr Tinkler's proposal.

44. Instead, Mr Brady moved his focus to Private Equity funding. In any event, Mr Brady believed that Mr Tinkler had not produced any evidence of being able to raise the money necessary for his proposal, so Mr Brady believed that his proposal would ultimately wither away, in any event.

45. Around that time, Mr Brady made contact with Cyrus Capital, a Private Equity Investor and began working on a possible joint bid with Cyrus for FlyBe. Mr Brady told the Tribunal that Mr Tinkler was not keen on a deal with Cyrus and did not want to be involved with it.

46. On 26 November 2018 Mr Tinkler told Mr Brady by email, pages 752-753, "If you need Stobart Capital to be involved we need to know we have the keys and the steering wheel to deliver this as I will be getting my close friends to invest". Mr Tinkler said that if Mr Brady felt that this was not the right direction, then Stobart Capital would continue to look for other deals which could create value. Mr Brady told the Tribunal that he took this to mean that Stobart Capital would only be involved in Project Blue and the acquisition of FlyBe if Mr Brady was pursuing Mr Tinkler's proposal.

47. The Claimant told the Tribunal that he was aware of Mr Brady's change in focus and that the Claimant began to pursue the structure that he had proposed, whilst acknowledging the continued existence of the structure proposed by Mr Tinkler.

48. On 22 November 2017, therefore, the Claimant set out a project timetable for his own 1-step plan, pages 737-737. The 1-step plan was designed to move the Airline off the Group's balance sheet. The Claimant also said, "At any point if the stars come into alignment around Andrews's multi step plan and the decision is

taken to pursue step 1 in isolation, the process can be tweaked to deliver that …". Mr Tinkler was one of the recipients of this email.

49. On 26 November 2017 the Claimant sent Mr Tinkler an email saying, "Let's give setting up the consolidation company our best shot. You know how to turn the target business around, I know how to get the company set up, Paul can help. We will set up the quoted company and give buying Orville our best shot. If we fail the downside is limited. Wilbur can be kept or sold", page 749 (Note: Orville was a codename for FlyBe and Wilbur was a code name for the Stobart Airline operating business.) Mr Tinkler replied the same day, saying that he totally agreed with the Claimant, page 749.

50. The Claimant told the Tribunal that this 26 November 2017 email was about the Claimant's version of the plan. The Claimant said that he had told Mr Tinkler that Stobart Capital was now following the Claimant's plan. The Claimant agreed, in evidence, that Mr Tinkler's response was supportive and positive and was not detrimental. The Claimant said that matters between Mr Tinkler and the Claimant had got onto an even keel. He agreed that Mr Tinkler "just wanted to bet the deal done". The Claimant agreed that he was working as a team with Mr Tinkler at this point and that the relationship was a functioning one.

51. Just before Christmas 2017, Mr Brady told Mr Tinkler about a possible deal with Cyrus Capital. He informed him that Mr Brady and the Claimant had met with Cyrus Capital and that Mr Brady intended to appointment Barclays as its advisor regarding a possible deal involving Cyrus, page 823.

52. On 26 December 2017 Mr Tinkler emailed the Claimant about the future for Stobart Capital, page 832. The Claimant replied on 1 January, with his comments on each of Mr Tinkler's paragraphs. Mr Tinkler had said that he was confused with regard to the proposal to acquire the Stobart Operating Airline - Mr Tinkler said he and Mr Soanes had agreed that they would concentrate on their plan and Warwick Brady would continue to work to see if there was a merger deal. Mr Tinkler said that he had found out, after the event, that the Claimant had met Cyrus as a 50% investor. Mr Tinkler said that the Claimant and he had both agreed that they would only be able to make the deal a success if they had control and made the right decisions at the right time. The Claimant replied that private funding for a bid was always a candidate and Cyrus looked like a good candidate, so that the Claimant was keen to get them interested. The Claimant ended his comments by saying, "One thing we did need on is clarity on your issue/relationship with the Board (of Stobart Group). I can't believe that you and the Board would end up in any form of litigation but it would be terminal for Stobart Capital if that were to happen so a positive outcome there is important!". Page 834.

53. On 8 January 2018 the Claimant signed an FCA Attestation form saying that he was not aware of any breaches of policies or other rules in relation to compliance in Stobart Capital Limited in the period 7 September 2017 to 31 December 2017. He also said that the was not aware of any conflicts of interest in that period, page 965. Mr Tinkler also signed an individual attestation form for the FAC in the same terms. Mr Tinkler's form had been prepared and checked by the Claimant, page 1010. The Claimant told the Tribunal that he signed the attestation because he believed that there was no conflict of interest or compliance

breach at the time he signed it. However, the Tribunal noted that the attestation specifically covered the period 7 September 2017 to 31 December 2017.

54. Mr Tinkler continued to believe in December 2017 and January 2018 that his plan and/or the Claimant's version of the proposal continued to be a viable proposal for the acquisition of the Stobart Airline operating business by an investment consortium including Mr Tinkler. Mr Brady told the Tribunal that he led Mr Tinkler to believe that there would be a "race to the finish" - between an investment proposal including Mr Tinkler and a separate proposal involving Private Equity investors, specifically Cyrus Capital.

55. However, the Claimant told the Tribunal that, by the New Year, Cyrus Capital had become the leading candidate to provide the finance for the acquisition of the Stobart Airline operating business.

56. In January 2018 Mr Tinkler's relationship with the Stobart Group deteriorated. Mr Tinkler had a meeting with some of the major shareholders in the Stobart Group with the permission of the Group's Chairman, Mr Ferguson. Mr Brady spoke to representatives of those key shareholders afterwards and believed that Mr Tinkler had been briefing the shareholders against the Board, telling them that he believed that Mr Ferguson should be replaced as Chairman. Mr Tinkler denies that he did this. Nevertheless, the relationship between Mr Tinkler and the Group was clearly precarious at this point.

57. On 20 January 2018 Mr Brady emailed Mr Ferguson, saying that Mr Tinkler should come off the Board of Stobart Group, but that he should be retained through Stobart Capital, page 1079.

58. Unfortunately, in January 2018, the Claimant's sister was very seriously ill. On 26 January 2018 the Claimant told Mr Tinkler and others in Stobart Capital that his family had been advised that his sister had a matter of days to live, page 1093. Mr Tinkler responded sympathetically, saying that the Claimant should not worry about work and that he should take as long as he required to be with his sister and family.

59. At this time, the Stobart Capital team was working on the proposal for the acquisition of the Stobart Airline Operating Business, to be presented to a Stobart Group Board Meeting to be held on 13 February 2018. Mr Storey, of Stobart Capital, told the Tribunal that, in this period, the Claimant was in and out of the office for understandable reasons. Mr Storey and the team were given individual tasks to undertake, but Mr Storey told the Tribunal that they did not have an overview of the work which was being done on the proposal for the acquisition of the Airline operating business. Mr Storey said that the team might be told one thing by Stobart Group, but that the Claimant might then return to the office and give different instructions.

60. On 27 January 2018 Mr Brady emailed Mr Ferguson about Mr Tinkler and Stobart Capital. He said that Stobart Capital had been set up to allow Mr Tinkler to contribute his entrepreneurial approach to business, as well as provide corporate and transaction services to Stobart Group, to allow Mr Tinkler to coinvest with ventures which fitted the Group's strategy; Stobart Capital was another way to

raise capital for ventures that supported the Group and/or supported Mr Tinkler's own investment vehicle. He said that there were a number of issues and principles which were problematic in this regard. Mr Brady said that Stobart Capital as an entity was owned 49% by the Claimant and that Mr Tinkler and the Claimant's relationship seemed to be strained because of those issues, with the Claimant taking a firm stance on some issues around related party and favourable structured deals, and tax, page 1098.

61. On 5 February 2018 the Claimant sent an abrupt email to Mr Tinkler about Mr Storey potentially having a credit card. He said it had not been discussed and that this was not how things worked, page 1137.

62. Mr Brady was obtaining advice in early February about removing Mr Tinkler from the Board of Stobart Group. He had obtained the name of a specialist solicitor to handle the process and he forwarded the relevant email chain to the Claimant on 5 February 2018 "FYI (for your information)", page 1138.

63. On 19 January 2018 the Claimant sent a private text message to Mr Brady saying "… so far, the strategy of perseverance while undeliverable plans run their course has worked. It just takes so much energy and creates so much inefficiency and cost. It cannot continue beyond the short term but you have a plan for the medium term. I wish I did", page 144.

64. Mr Brady responded saying, "Well I think we can find a plan for your medium term! Let's solve this first step. I think you do great work", page 144.

65. There was due to be a meeting between Mr Tinkler and members of the Stobart Group Board on 7 February 2018, to discuss a potential share buyback, as well as Mr Tinkler's ongoing relationship with the Group. On 6 February 2018 Mr Tinkler texted the Claimant about the meeting and asked him whether he wanted to be involved, page 1151. The Claimant replied saying that he was in two minds, that he was not directly involved in Mr Tinkler's issues with the Board, but that there were outcomes which could mean that there was no viable future for Stobart Capital, or at least not one that was of interest to the Claimant. He said that he would be caught in the middle of any discussion in the meeting, which would be very uncomfortable, page 1152. Mr Tinkler then replied saying that, if the Claimant was at the office, then they could see how it went and it might help to get the Claimant's advice, page 1153.

66. Mr Tinkler was in dispute with the Group at the time about a potential tax liability. On 6 February 2018, after that text exchange, the Claimant sent a proposal to Mr Brady about how the tax dispute might be resolved. He proposed that the Group "buy in" Stobart Capital, making it a subsidiary, which would give Mr Tinkler the money to pay the tax liability.

67. The following morning, on 7 February 2018, the Claimant sent a text to Mr Tinkler in which he said, "Just to explain my concerns from a slightly different perspective. We are a regulated business, as we need to be, to do the work we want to do. You and I are regulated persons and we have an obligation, amongst others, to manage conflicts. The obvious conflict we have is with your various connections to Stobart Group. You have a right to look after your shareholding but

through the management agreement with Group we owe a contractual duty of care and we have regulatory obligations to Group as a client. Right now, I see Stobart Capital's position as untenable given your issues and I am concerned about our regulatory exposure, so we need to discuss that today". Page 1162. Mr Tinkler replied saying, "Where do you think the conflict is?" page 1163. The Claimant replied further saying, "Seriously? You wouldn't describe your position as conflicted?" Page 1163.

68. The Claimant told the Tribunal that he sent this text in relation to Mr Tinkler briefing against the Board, its strategy and the Chairman. It was not apparent from that text that this was the case.

69. The Claimant also told the Tribunal that, at this point, he was aware that the dispute between Mr Tinkler and the Group regarding a large tax liability of about £4 million could result in legal action between the parties. He was aware that Mr Tinkler was seeking an award of shares from the Employee Benefit Trust worth millions of pounds and that Mr Tinkler had met with some of Stobart Group's leading shareholders to discuss the award of shares to himself. The Claimant told the Tribunal that Mr Tinkler had told him that Mr Tinkler had sought the support of some of the shareholders for him becoming Executive Chairman of Stobart Group, replacing Mr Ferguson.

70. The meeting on 7 February went ahead between Ian Ferguson, Group Chairman; Warwick Brady, Group CEO; Paul Hodges, Group Corporate Broker and Advisor; and Mr Tinkler, page 1408. Mr Brady produced a note of the meeting. Mr Hodges, who gave evidence to the Tribunal, told the Tribunal that the note was not accurate, in that his recollection of the meeting was that the vast majority of time was spent discussing share buyback. It was agreed that the note did not reflect that. The note said that the meeting was convened to address Mr Tinkler's meetings with key shareholders, where feedback suggested that Mr Tinkler was briefing against the agreed company strategy and saying that he did not support the Board and the direction of the company; that rumours were circling from key individuals that Mr Tinkler was considering an Executive Chairman role. Mr Brady's note said that this was clearly strange, given Mr Tinkler's request to come off the Board. Mr Brady's note said that Mr Tinkler told the meeting that he had not briefed against the Board and explained simply that he was not happy with the company direction and Board strategy. At the 7 February meeting, Mr Tinkler acknowledged that his actions had not been acceptable, but said that he was unhappy with the Board and with Stobart Capital, as he felt that Mr Brady was driving the agenda and not Mr Tinkler. Mr Brady's note of the meeting recorded that all agreed to keep the discussions private and that all Directors had a fiduciary duty to support the agreed Board strategy in external conversations, page 1409.

71. The note of the meeting recorded that Mr Brady raised Project Blue and "the issue of Ian Soanes". The note said that Mr Brady explained that Mr Tinkler "could not buy 51% of Stobart Air as a preferred value and then play a part of the bigger bid vehicle, as this was a related party transaction which Stifel would not support." The note said that this would be "like double dipping from a shareholder perspective", page 1409.

72. Mr Hodges told the Tribunal that he did not recall this part of the conversation.

73. The Claimant told the Tribunal that, on or around 8 February, Mr Coombes, a Director of Stobart Group and Chairman of its Value Creation Committee, asked the Claimant to provide an updated presentation to the Board on Project Blue/Wright. The Claimant told the Tribunal that he worked into the early hours of Sunday 11 February 2018 to prepare the presentation for the Stobart Group Board.

74. The first line of the Board paper reflected the view of the Stobart Group Board at the time and said, "Project Wright has recently become more clearly defined with its focus on a private transaction in partnership with Cyrus Capital Partners reducing the obstacles to implementation and improving the prospects of success". Pages 1319-1335.

75. On 10 February 2018 Mr Brady had emailed the Claimant, not copied to Mr Tinkler, telling the Claimant that the objective for the forthcoming Board meeting was, "To approve my proposal to enter into an agreement with Cyrus Capital as our Private Equity Partner to make a "counter proposal" to (FlyBe)…", page 1273.

76. The paper produced by the Claimant on behalf of Stobart Capital therefore appeared to support the private transaction in partnership with Cyrus Capital Partners, rather than any vehicle involving Mr Tinkler.

77. The Claimant sent the report to the team at Stobart Capital at the same time as sending it to Warwick Brady, John Coombes and Richard Laycock at the Stobart Group. It appears that, as soon as Mr Tinkler saw the report, he emailed the Claimant, saying, "I have had a read through and got to admit I am disappointed that I and the team at Stobart Capital have not had a chance to review before it has gone to the Stobart Group Board. Let's discuss Tuesday how we take things forward". Page 1287.

78. Mr Tinkler told the Tribunal that he was disappointed that he had been excluded from the process. He said that the he was suspicious that the Claimant was acting behind his back in communication with Mr Brady. Mr Tinkler said that he felt that it was inappropriate for him to have been effectively cut out of that workstream. The Tribunal accepted Mr Tinkler's evidence that he felt that the Claimant and Mr Brady were working together and that Mr Brady was giving instructions to the Claimant – that was reflected in the wording of his email, page 1287.

79. Mr Tinkler and the Claimant had a disjointed text exchange on the afternoon of 11 February 2018. The Claimant said that he would call if he could get a decent signal. He texted later saying he had lost signal again; he said, We can't have this conversation on a train. I agree that it isn't working and can't go on. Let's talk later about options …". Page 1295.

80. Later that night, on 11 February 2018, Mr Tinkler told Mr Soanes that Mr Soanes should take 4 weeks' leave with pay. He confirmed this in a text on the morning of 12 February 2018, saying, "As I told you last night take 4 weeks leave with pay because I see you needing a rest. And while on leave have a think about your future involvement in Stobart Capital and what that may be and likewise I will. We can then meet to discuss the outcome after your leave period or before if you wish. In the meantime please pass any commitments to myself or information you

have with Stobart Capital. Please refrain from working as I will delegate all that needs doing to the team. This should clarify my position."

81. On 11 February 2018 Warwick Brady emailed Mr Tinkler and the Claimant at 21:14 concerning the Cyrus Capital deal and referred to the fact that the Claimant had been at a meeting with Cyrus the previous Friday, page 125. Mr Tinkler responded to Mr brady, copying the Claimant in, saying, "I was not aware of Ian meeting Cyrus on Friday and he had no brief from me regarding our Stobart Capital involvement .. I was surprise to find an email this morning from Ian to the Stobart Board that I had no site (sic) of before..", page 1281.

82. Mr Tinkler told the Tribunal that the Claimant had been upset and stressed about his sister's grave illness and that Mr Tinkler believed that this was affecting the Claimant's work. He told the Tribunal that, from what he had seen of the Claimant during this period, the work that he had produced while trying to balance his personal issues and work, meant that that Mr Tinkler felt he would benefit from some time off.

83. During phone call on 11 February 2018 the Claimant had been resistant to taking the leave. Mr Tinkler told the Tribunal that he believed this decision was taken in the Claimant's best interests, but also those of Stobart Capital. Mr Tinkler did not suggest that the Claimant be referred to Occupational Health. When asked in the cross examination what evidence he had about the Claimant not producing work of the required standard, or behaving erratically, Mr Tinkler pointed to one email from the Claimant objecting to the issue of a corporate credit card.

84. Mr Coombes told the Tribunal that the Claimant's report for the Board on 11 February 2018 was prepared to the Claimant's usual high standard.

85. On all the evidence, the Tribunal concluded that Mr Tinkler had very little evidence that the Claimant's quality of work was suffering due to the Claimant's understandable distress about his sister's illness.

86. The Claimant did not want to take time away from work. On 12 February 2018 he wrote to Mr Tinkler, saying that he neither needed nor wanted to take four weeks off work. He said that matters were at a critical point with the project and that for him to be absent would be prejudicial to the interest of the Stobart Group, Stobart Capital and to the Claimant's own interests. He said that Mr Tinkler had suspended him from work. He asked him on what basis, and by what authority, Mr Tinkler had suspended him. The Claimant said that the ACAS Code of Practice on Disciplinary and Grievance Procedures had not been followed. The Claimant said that Mr Tinkler's reliance on the Claimant's sister's illness to justify Mr Tinkler's actions was cynical and disingenuous. The Claimant went on to say that Mr Tinkler's multiple interests in the Stobart Group as a Director, a major shareholder and through Stobart Capital's Management Agreement with Stobart Group and his position as Director and shareholder of Stobart Capital had had the potential to give rise to a conflict. He said, "In recent weeks, the potential has developed into an actual conflict". He said that this was evidenced by, amongst other things, the meeting between Mr Ferguson, Mr Brady and Mr Tinkler, attended by Paul Hodges, which was convened to attempt to resolve the dispute. The Claimant said, "By virtue of your failure to declare your conflict to the Company's Board and

obtain clearance, you are in breach of clause 17.1 of the Company's Articles and s175 of the Companies Act 2006. Were you to seek such clearance, in view of your conduct in recent times, I would not authorise it. Accordingly, you are now instructed that you may not hold yourself out as representing the company in matters relating to Stobart Group in general and Project Wright in particular, nor may you delegate such authority to any other person… A Stobart Group Board Meeting is scheduled for tomorrow … you are not permitted to comment to Stobart Group at the Board meeting or at any other time on matters relating to the Company or its position in relation to Project Wright…". Page 1312.

87. On 11 February 2018 the Claimant had forwarded Mr Tinkler's email expressing disappointment to Warwick Brady. The next day, Mr Brady sent a document to the Claimant, saying, "See the attached. I think this gives you some leverage around change of control." Just after the Claimant had sent his letter of 12 February 2018 to Mr Tinkler, informing Mr Tinkler that Mr Tinkler was not permitted to hold himself out as representing Stobart Capital and should not comment to the Stobart Group at the Board meeting on matters relating to Stobart Capital or its position in relation to Project Right, the Claimant asked to meet Mr Brady early the next morning for 10 minutes. He said, "I think a small thermonuclear device has just detonated in Carlisle". Mr Tinkler lives in the Carlisle area.

88. The Tribunal concluded that the Claimant was intending to tell Warwick Brady about the text of his letter of 12 February 2018 and the fact that he had told Mr Tinkler that he could not represent Stobart Capital. It appeared, from the email exchange between the Claimant and Mr Brady on 11 - 13 February 2018, pages 1336-1338, that the Claimant was keeping Mr Brady informed about the Claimant's interactions with Mr Tinkler and, likewise, Mr Brady was feeding back to the Claimant about Mr Brady's own interactions with Mr Tinkler.

89. After the Board meeting on 13 February 2018 there were email exchanges between Mr Brady, Mr Tinkler and John Storey about the ongoing proposals for Project Wright. Mr Brady copied the Claimant into some of the exchanges, page 1359. On 16 February 2018 Mr Tinkler replied to the Claimant's letter of 12 February, saying that he was taking legal advice but that the position remained that the Claimant should take the next 4 weeks off. He said, "I made the suggestion in your best interests with all you have been going through personally at the present time. I would like to confirm that you are not being suspended", page 1362.

90. Mr Tinkler told the Tribunal, however, that, as a result of the Claimant's paper prepared for the Board on 11 February 2018, he grew suspicious that the Claimant had been acting behind Mr Tinkler's back, in conjunction with Mr Brady. Mr Tinkler told the Tribunal that he obtained authorisation from Stobart Group IT Controllers to look at the Claimant's Stobart Capital email account. Mr Tinkler explained that, because Stobart Capital used Stobart Groups IT systems, it was the Stobart Group IT procedure which needed to be followed.

91. Mr Tinkler carried out a search of the Claimant's Stobart Capital email account and discovered a draft email by the Claimant, page 1367. It appeared to be written a senior person in Stobart Group. The email, drafted on Saturday 17 February 2018, said that the Claimant planned to resign from Stobart Capital "by

Monday morning". It said that the Claimant would make a claim for constructive dismissal to protect himself since Mr Tinkler had breached his contract. The email also said that the Claimant could be available to Stobart Group as a Consultant as of that Monday morning and that there needed to be no cost to the Group if the Claimant was still paid by Stobart Capital for the period of his notice. The email went on to say that, if Mr Tinkler disputed this, the Group could deduct the consultancy cost from the Stobart Capital retainer, on the ground that the Group were still paying Stobart Capital for the Claimant's services, but were no longer receiving them. The Claimant's draft email said, "If I were you, I would make me in charge of all SCL projects on a day to day basis on behalf of Stobart Group so that SCL reports to you through me… AT would enjoy that! It would show AT which of you were calling the shots!". The email said that there would be a suspension of regulated status. The Claimant then set out some possible options regarding his shareholding and Directorship. He said if he walked away and left Mr Tinkler to Stobart Capital, this would open up another front in the battle between Stobart Group and Mr Tinkler. He proposed that they worked together to find a solution instead. He said, "We are only in this situation because I have stood by SGL and not allowed AT to abuse his position so I hope we can find a sensible outcome". The Claimant proposed that they agree a sale of the Claimant's shares in Stobart Capital to Stobart Group for a sum of money, plus additional sums if Project Wright and another project completed. The Claimant suggested that, if the Group bought the Claimant's shares, but also Mr Tinkler's shares in Stobart Capital, this could solve the tax issue between Mr Tinkler and the Group.

92. Mr Brady spoke to Mr Tinkler on 15 February 2018 and recorded his impressions of the telephone call in an email to Ian Ferguson on 16 February. Mr Brady reported that Mr Tinkler had said that the Claimant was not well, but the dispute was all about greed and that the Claimant had turned on Mr Tinkler. Mr Brady urged Mr Tinkler to sort matters out with the Claimant, but Mr Tinkler repeated that the Claimant had turned on him, page 1365.

93. Unbeknownst to Mr Tinkler, the Claimant did send his draft email, saying that he was going to resign, to Mr Brady, later on Saturday 17 February, page 1415. Mr Brady responded, encouraging the Claimant not to resign. Mr Brady said that the Stobart Group would not be interested in buying the Claimant's shares in Stobart Capital. The Claimant responded further on Sunday 18 February 2018, saying that, ordinarily constructive dismissal would not be a smart route, but that he had "another opportunity" which he had to take by the end of the week if he was not needed at Stobart, so he could not be bound by his employment contract. He reiterated that the solution was for Stobart Group to use that as the opportunity to deal with tax and everything else with Mr Tinkler, by effectively buying out the Management Agreement on a tax efficient basis, giving Mr Tinkler a value benefit and releasing the Group from all commitments, pages 1413-1414.

94. On 19 February 2018 the Claimant wrote to Mr Tinkler, resigning from Stobart Capital. He said that Mr Tinkler's requirement for the Claimant to take time away from work amounted to an unwarranted suspension from normal duties and that the manner in which Mr Tinkler had conducted himself was plainly intended to undermine the Claimant's position and prevent him from discharging Stobart Capital's obligations under its Management Agreement with Stobart Group

Limited, for which, as Stobart Capital's senior employee, the Claimant was responsible. The Claimant said that Mr Tinkler's actions had also damaged irrevocably the Claimant's relations with the rest of Stobart Capital's employees. The Claimant said that his suspension did not reflect the Claimant's conduct or his performance and that Mr Tinkler's capricious conduct had significantly undermined the necessary element of trust and confidence. The Claimant said that he reserved his legal rights in relation to the breach of his contract of employment, including the fact that he had raised significant matters concerning the company's obligations to its client and to the relevant regulatory body, pages 1409a-1409c.

95. Mr Tinkler replied on behalf of Stobart Capital on 19 February 2018. He said that it was correct that he had insisted that the Claimant take 4 weeks off work for the benefit of his health and family wellbeing. Mr Tinkler said that he had previously said that he would need to consider the Company's Articles to understand what the process would be if the Claimant continued to refuse to follow Mr Tinkler's instructions. Mr Tinkler said that his invitation to the Claimant to think about his future involvement with Stobart Capital followed from previous text exchanges: when the Claimant had stated that there were outcomes to all of this which meant that there was no viable future with Stobart Capital; and when the Claimant had said that he agreed that things weren't working and could not go on.

96. Mr Tinkler said that the Claimant's resignation, by giving less than 3 months' notice, was a repudiatory breach of the contract, but that the company waived the breach, affirmed the contract and confirmed that the Claimant continued to be bound by the terms of it. He said that he accepted the Claimant's letter as serving 3 months' notice of termination of employment and confirmed that the Claimant would continue to be employed by Stobart Capital until 19 May 2018. He went on, "I do have to advise you, however, that over the course of the weekend some very serious matters have come to light which tend to suggest that you have acted or are proposing to act in breach of the fiduciary duties which you owe to the company as a Director and senior employee. As such I write to confirm that you are suspended with immediate effect on full pay pursuant to clause 12.2 of your service agreement pending an investigation into these matters which is to be conducted by an outside law firm …". Pages 1405-1406.

97. Mr Tinkler arranged for the Claimant's DF30 accreditation to be withdrawn, page 1406.

98. In paragraph 93 of the Claimant's witness statement, the Claimant referred to Mr Tinkler's cross examination in High Court Proceedings when Mr Tinkler said that he believed that that the Claimant was part of a plot of some sort to remove him from Stobart Capital and to promote the Claimant's own interests with Stobart Group. The Claimant referred to the conversation that Mr Tinkler had had with Mr Brady on 15 February 2018, wherein Mr Tinkler said that the Claimant had turned against him and referred to the Claimant as a "double agent". The Claimant told the Tribunal that this was not true in any way. The Claimant explained his draft email to Mr Brady. He said that, at the time, he felt that Mr Tinkler had unilaterally ended a ten year working relationship between the Claimant and Mr Tinkler and that his actions threatened to leave the Claimant with nothing from the interest in Stobart Capital that he had worked for the past 18 months to create. The Claimant said that, naturally, he wished to try to rescue some value from the action that Mr

Tinkler had taken against him. In his witness statement, the Claimant said that the proposals he made to Mr Brady in his draft resignation letter could also potentially have solved the tax dispute between Mr Tinkler and Stobart Group, which the Claimant had previously addressed in his emails of 6 February 2018 and a paper on 8 February 2018, proposing that Mr Tinkler and the Claimant sell their shares to Stobart Group.

99. No investigation into the Claimant's actions was ever concluded by Stobart Capital. Mr Tinkler told the Tribunal that independent investigators had been appointed but that the Claimant did not meet with them and therefore the investigation could not make any progress.

100. The FCA requires firms regulated by it to manage conflicts of interest fairly between themselves and their customers. Mr Tinkler had a fiduciary duty, both in common law and pursuant to s.176 Companies Act 2006, to avoid conflicts of interest.

101. Stobart Capital had contractual obligations, pursuant to s.2.4 of its Management Agreement with Stobart Group, to act in good faith and in accordance with good market practice.

102. On 19 February 2018 Mr Soanes sent Mr Tinkler expressing his distress about the way he felt Mr Tinkler had behaved towards him. Mr Tinkler forwarded it to Mr Storey, saying, "Keep to yourself the man is not well", page 26 supplementary bundle. Mr Tinkler also sent Mr Storey the draft email that he had discovered on the Claimant's Stobart Capital email account regarding his intended resignation, page 27 supplementary bundle. The Claimant relied on these in contending that Mr Tinkler was someone who acted with scant regard for legal duties, including duties regarding data protection.

Relevant Law

Protected Disclosures

103. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, because he has made such a protected disclosure.

104. "Protected disclosure" is defined in s43A Employment Rights Act 1996: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

105. "Qualifying disclosures" are defined by s43B ERA 1996, "43B 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—

……..

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

106. The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations). Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, “You are not complying with health and safety requirements”, will not constitute a valid protected disclosure, Cavendish Munro Professional Risk Management v Geldud [2010] ICR 325 [24] – [25].

107. In order for a statement to be a qualifying disclosure for the purposes of *s43B(1) ERA,* it had to have sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) –(f) of that section, *Kilraine v LB Wandsworth* [2016] IRLR 422.

108. A qualifying disclosure is a protected disclosure if it is made to the employee’s employer, or other responsible person, *s43C ERA 1996.*

109. It is also a protected disclosure if made in accordance with *s43G ERA 1996.*

43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—…

(*b*) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(*c*) he does not make the disclosure for purposes of personal gain,

(*d*) any of the conditions in subsection (2) is met, and

(*e*) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(*d*) are—

(*a*) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(*b*) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(*c*) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(*e*) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(*a*) the identity of the person to whom the disclosure is made,

(*b*) the seriousness of the relevant failure,

(*c*) whether the relevant failure is continuing or is likely to occur in the future,

(*d*) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(*e*) in a case falling within subsection (2)(*c*)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(*f*) in a case falling within subsection (2)(*c*)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(*c*) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

110. Protection from being subjected to a detriment is afforded by s47B ERA 1996, which provides:

"47B Protected disclosures

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

111. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under s48 ERA 1996. On such a complaint, it is for the employer to show the ground upon which any act was done, s48(2) ERA 1996.

112. The term 'detriment has been explained by Lord Hope *in Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 34:“ .. [the] tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. …….. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might

take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment."

Protected Disclosure Detriment – Causation

113. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

114. The making of a protected disclosure cannot shield an employee from disciplinary action, including dismissal, which is taken for reasons other than the fact that the employee has made a protected disclosure, *Bolton School v Evans* [2007] ICR 641.

Unfair Dismissal

115. By s94 Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

Automatically Unfair Dismissal

116. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*, "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."

117. By *section 95(1)(c) ERA 1996,* an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct. This form of dismissal is known as constructive dismissal.

118. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following

a. The employer has committed a repudiatory breach of an express or implied term of the employment contract. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9

b. The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;

c. The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

119. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his

contract, second that he had left because of that breach and third, that he has not waived that breach.

Nature of Repudiatory Breach

120. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606*, Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

121. The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

122. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

Discussion and Decision

Qualifying Disclosures

123. 1. **Conversation which took place between the Claimant and Mr Tinkler on 9 November 2017.** The Tribunal decided that, in a conversation between the Claimant and Second Respondent on 9 November 2017, the Claimant criticised the structure of the proposal put forward by Mr Tinkler for Project Blue and said that the structure was inappropriate and personally benefiting to the Second Respondent and his consortium to the detriment of Stobart Group.

124. The Tribunal did not find the Claimant gave any further detail about any alleged breaches of legal obligations by Mr Tinkler, nor any other factual information.

125. The relevant legal obligations to which the Claimant may have been referring were:

a. Mr Tinkler's fiduciary duty to avoid conflicts of interest;

b. Stobart Capital's regulatory obligation to manage conflicts fairly between itself and its customers;

c. the contractual obligations placed on Stobart Capital pursuant to cl.2.4 Management Agreement to act in good faith and in accordance with good market practice.

126. In order to be a qualifying disclosure, the relevant disclosure must be a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

127. Therefore, in order for this alleged protected disclosure to constitute a protected disclosure, the Claimant must have disclosed information. Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, "You are not complying with health and safety requirements", will not constitute a valid protected disclosure, *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR 325.

128. Further, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the relevant sub section, *Kilraine v London Borough of Wandsworth.*

129. The Tribunal concluded that what the Claimant said on 9 November 2017 was a bare assertion, devoid of any factual content. It did not have sufficient factual content and specificity to be capable of tending to show a breach for legal obligation. The allegation was in general terms. It contained no facts on which the generalized allegation was based and did not refer to any specific obligation. The Tribunal decided that the first alleged protective disclosure did not amount to a qualifying disclosure.

130. **2. Conversations that took place between the Claimant and Second Respondent between 12-19 November 2018 in which the Claimant continued to assert that the structure proposed by the Second Respondent was not appropriate and should not be pursued on the grounds that it benefited the Second Respondent and his consortium personally and unnecessarily and so gave rise to related party and conflict of duty issues and also put the First Respondent in breach of its contractual deities to Stobart Group Limited.** The Tribunal has not made any findings of fact that such conversations took place between the Claimant and the Second Respondent between 12-19 November 2018. There was no evidence on which to do so. The conversations did not take place. These alleged qualifying disclosures did not occur.

131. **3. The Claimant's email of 20 November 2017.** In the Claimant's email, he said that the idea of the Stobart Group selling a business and investing in an entity to effectively buy it back at a high price would be difficult for the Board to accept. He said that an alternative view was that value would be transferred from the Group to the investors. He attached an analysis suggesting that the Group was transferring £12 million pounds or more to the other investors. He said that Mr Tinkler said this was a reasonable price to pay for the investors making the deal happen, but the Claimant said that that was a highly contentious argument. He said that the deal would have to be signed off by a sponsor and any related party transaction was controversial; the Claimant said that Cenkos had already claimed conflict. The Claimant said any long-term commitment by the

Group of the sort that could make the Airline worth £40 million would have very negative accounting implications for the Group and for the Airline.

132. The Tribunal decided that these matters constituted information, which the Claimant disclosed to Mr Tinkler. The Tribunal accepted the Claimant's argument that, in relation to transfer of value from a public listed company, it was in the Claimant's reasonable belief that the information that he was disclosing to Mr Tinkler was made in the public interest; it related to a very large, well-known company in which there were a large number of investors.

133. The Tribunal had to decide whether, in disclosing that information, the Claimant had a reasonable belief that it tended to show that Mr Tinkler was failing or was likely to fail to comply with any legal obligation to which he was subject. The Respondents contended that the Claimant did not have such belief. They pointed to a number of pieces of evidence in this regard:

a. The Claimant agreed, in evidence, that simply by making a proposal, Mr Tinkler was not in breach of any fiduciary duties. He said that if, however, Mr Tinkler had persevered with it in light of the Claimant's objections, then Mr Tinkler would be in breach of fiduciary duties.

b. On 8 January 2018 the Claimant had signed an FCA attestation covering the period 7 September 2017 to 31 December 2017 in relation to Stobart Capital Limited and said that there were no conflict of interests in that period and that he was not aware of any breaches of policies or other rules, page 965.

c. Furthermore, it was the case that, from the inception of Stobart Capital, it was envisaged that there could be conflicts of interest between Mr Tinkler as an individual and investor, compared to Mr Tinkler as a Member of Stobart Group Board and these conflicts were managed by the structure which was introduced, which included a Value Creation Committee to scrutinise any proposal. Mr Tinkler was not permitted to sit on the Value Creation Committee, nor was he permitted to appear before it to propose a proposal.

134. The Respondents therefore contended that, when the Claimant wrote his email on 20 November, he did not believe that Mr Tinkler was breaching his obligations in making the proposal, nor could he reasonably have believed that the information he disclosed tended to show that anybody was likely to be in breach of any legal obligation, given the structures which were in place at Stobart Capital to manage the conflict of interest to ensure that they did not eventuate.

135. However, the Tribunal accepted that it was in the Claimant's reasonable belief that his disclosure of the amount of value transfer from the Group to the investors, who included Mr Tinkler, a Director and Member of the Board of the Group, did tend to show that such a transfer of value would amount to a failing by Mr Tinkler to comply with his fiduciary duties. The Claimant was saying that, if the structure was pursued, it could involve a breach of fiduciary duty on the part of Mr Tinkler.

136. The Tribunal noted that Claimant also spoke to Warwick Brady at the time, disclosing his concerns about Mr Tinkler's proposal. This showed that the Claimant believed that Warwick Brady had not been aware of the potential transfer value. Indeed, in evidence to the Tribunal, Warwick Brady confirmed that he had not hitherto appreciated that this was a risk. Given that the Claimant believed that Warwick Brady wasn't aware of the risks, and that Warwick Brady would have been one of the people who was required to assess Mr Tinkler's plan on the Value Creation Committee, the Tribunal did accept that the Claimant's disclosure of information was made in the Claimant's reasonable belief that there was likely to be a breach of legal obligation by Mr Tinkler, in the circumstances that the Members of the Valuation Committee didn't, at that point, appreciate the risks.

137. The Tribunal therefore found that the Claimant's email of 20 November 2017 did amount to a qualifying disclosure. It was made to Mr Tinkler, of his employer, and it was therefore also a protected disclosure.

138. **4. Conversations which took place between the Claimant and Warwick Brady in which the Claimant showed Mr Brady a copy of the attachment to the email dated 20 November 2017 and at which the Claimant explained his concerns about the structure being proposed by the Second Respondent, including the Claimant's assertion that it gave rise to related party conflict of interest and breach of duty issues**. The Tribunal accepted Mr Brady's evidence that, on 20 November 2017, the Claimant had shown Mr Brady the spreadsheet which he had attached to his email to Mr Tinkler and that the Claimant had explained that, by proceeding with Mr Tinkler's structure, the Stobart Group would be transferring £12 million of value to Mr Tinkler and his consortium, for no real benefit to the Stobart Group. The Tribunal accepted his evidence that the Claimant explained how the valuation in Mr Tinkler's proposal was £20 million at Step 1, but would increase to £40 million within a short space of time at Step 3, without there being any material change to the business, except for the change to the payment from Stobart Group to Stobart Air to provide ESO services from London Southend Airport. It accepted his evidence that this was new information to him, which contradicted his earlier understanding of Mr Tinkler's presentation.

139. Again, the Tribunal decided that this was a disclosure of information which, in the Claimant's reasonable belief was made in the public interest and tended to show that Mr Tinkler was likely to be in breach of his legal obligations. The disclosure was therefore a qualifying disclosure.

140. The Claimant relies on *s.43G Employment Rights Act 1996* in saying that this qualifying disclosure was a protected disclosure. The Tribunal accepted that the Claimant did not make the disclosure to Mr Brady for personal gain.

141. Regarding the conditions in *s.43G(2) ERA*, the Claimant had previously made a disclosure of substantially the same information to his employer (Mr Tinkler of Stobart Capital). The Tribunal then went on to consider whether, in all the circumstances of the case, it was reasonable for the Claimant to make the disclosure under *s.43G(1)(e) Employment Rights Act 1996.* It had to take into account the identity of the person to whom the disclosure was made, the seriousness of the relevant failure, whether the relevant failure was continuing or likely to occur in the future, whether disclosure was made in breach of a duty of

confidentiality owed by the employer to any other person, any action which the employer had taken, or might reasonably have been expected to have taken as a result of the previous disclosure, and whether, in making the disclosure to the employer, the worker had complied with any procedure authorised by the employer.

142. Given that the Claimant's disclosure to Mr Tinkler would have been about Mr Tinkler himself and there was no independent person at the First Respondent employer to make the disclosure to, and that Mr Brady was part of the Value Creation Committee which had responsibility for managing conflicts of interest between Mr Tinkler and Stobart Group, the Tribunal concluded that it was reasonable for the Claimant to make the disclosure to Mr Brady. The Claimant could not necessarily be confident that Mr Tinkler would act independently in relation to the disclosure. Given that the Claimant was attempting to avoid conflicts of interest and breaches of duties, it was reasonable and appropriate for him to alert another person with responsibility for the matter to the potential breach of obligation. The Claimant's disclosure to Mr Brady was therefore a protected disclosure.

143. **5. Conversations which took place after the emails sent on 20 November 2017 during the remainder of November 2017 and into early December 2017 in which the Claimant and Second Respondent continued to discuss the proposed structure and during which the Claimant continued to outline his concerns about the proposed structure including that the structure gave rise to related party and conflict of duty issues and also put the First Respondent in breach of its contractual duties with was Stobart Group Limited.** Given the lack of evidence the Tribunal heard in relation to these alleged protected disclosures, the Tribunal did not make findings of fact about any conversations between the Claimant and Mr Tinkler about these matters during the rest of November 2017 and December 2017. It was unable to find that the Claimant did disclose any particular information to Mr Tinkler in oral conversations during this time.

144. **6. The Claimant's text message of 7 February 2018 in which he stated … "just to explain my concerns from a slightly different perspective we are a regulated business as we need to be to do the work we want to do. You and I are regulated persons and we have an obligation amongst others to manage conflicts. The obvious conflict we have is with your various connections to Stobart Group you have a right to look after your shareholding but through the management agreement with Group we owe a contractual duty of care and we have regulatory obligations to Group as a client. Right now, I see Stobart's position as untenable given your issues and I am concerned about our regulatory exposure so we need to discuss that today…"** .

145. The Claimant told the Tribunal that he sent this text in relation to Mr Tinkler briefing against the Board, its strategy and the Chairman. It was not apparent from that text that this was the case.

146. The Tribunal decided that the text was a mere assertion, without any information. It was impossible to tell from the text what obligations might be

breached or what conflict or issues the Claimant was talking about. That this was the case was revealed by Mr Tinkler's reply, "Where do you think the conflict is?" page 1163. The Tribunal has found that the Claimant had previously made protected disclosures in November 2017, but the 7 February 2018 text was allegedly about entirely different facts. The context and the previous disclosures therefore do not assist in elucidating the 7 February 2018 text.

147. The Claimant's further reply, "Seriously? You wouldn't describe your position as conflicted?" Page 1163, gave no further factual information.

148. The texts did not contain sufficient factual content and specificity so as to be capable of tending to show one of the matters listed in *s43B(1) ERA* and therefore could not amount to a qualifying disclosure.

Detriments

149. The Claimant relied on a number of detriments:

150. **1. The treatment of the Claimant by the Second Respondent in particular by becoming increasingly agitated by the Claimant when he would not accept the proposal being promoted by the Second Respondent which the Claimant believed would result in the breach of legal obligations.**

151. The Tribunal was unable to make to any factual findings that Mr Tinkler had become agitated as a result of the Claimant and his discussions about possible models from Project Blue. Indeed, there was evidence from email exchanges that the Claimant and Mr Tinkler were working together on the Claimant's proposed structure. On 26 November 2017 the Claimant sent Mr Tinkler an email saying, "Let's give setting up the consolidation company our best shot. You know how to turn the target business around, I know how to get the company set up…", page 749. Mr Tinkler replied the same day, saying that he totally agreed with the Claimant, page 749.

152. The Tribunal accepted the Claimant's evidence that he had told Mr Tinkler, that Stobart Capital was now following the Claimant's plan. The Claimant agreed, in evidence, that Mr Tinkler's response was supportive and positive and was not detrimental. The Claimant said that matters between Mr Tinkler and the Claimant had got onto an even keel. He agreed that Mr Tinkler "just wanted to bet the deal done". The Claimant agreed that he was working as a team with Mr Tinkler at this point and that the relationship was a functioning one.

153. There was some evidence from email exchanges at the end of December 2017 that there was tension between the Claimant and Mr Tinkler about the future direction of the company. On 26 December 2017 Mr Tinkler emailed the Claimant about the future for Stobart Capital, page 832. The Claimant replied on 1 January, with his comments on each of Mr Tinkler's paragraphs. Mr Tinkler had said that he was confused with regard to the proposal to acquire the Stobart Operating Airline - Mr Tinkler said that he and Mr Soanes had agreed that they would concentrate on their plan and Warwick Brady would continue to work to see if there was a merger deal. Mr Tinkler said that he had found out, after the event, that the Claimant had met Cyrus Capital as a potential investor. Mr Tinkler said that the

Claimant and he had both agreed that they would only be able to make the deal a success if they had control and made the right decisions at the right time, Page 834

154. The Tribunal did not conclude that this exchange was detrimental treatment of the Claimant, in the sense that the Claimant would have felt disadvantaged in the workplace thereafter. It appeared to be a rational discussion about the future direction of the company. Rational disagreements and discussion do not amount to detriments.

155. On all the evidence, there was no detrimental treatment until 11 February 2018.

156. Insofar as Mr Tinkler became agitated from 11 February 2018, the causation of this is dealt with below.

157. **2. The Claimant contended that Mr Tinkler subjected him to a detriment because of his protected disclosures by excluding the Claimant from work with effect from 11 February 2018.**

158. The Tribunal found that being required to take leave, against the Claimant's will, did amount to a detriment. A reasonable person would consider that being excluded from the workplace was disadvantageous when they were ready and able to work, and there was no medical or other need for him to take leave.

159. Given that the Claimant had previously made protected disclosures and he was thereafter subjected to detrimental treatment by being required to work from home when he did not want to, the burden of proof shifted to the Respondents to show that the Claimant's protected disclosures were not part of the reason for the requirement to take leave.

160. The Tribunal decided that the immediate cause of Mr Tinkler requiring the Claimant to take four weeks leave was the Claimant delivering a strategy document to Stobart Group Board which supported the Cyrus Capital proposal and not any proposal which included Mr Tinkler and his group of investors. This was apparent from the timing of the delivery of the report, from Mr Tinkler's email reaction to the report and the Claimant's exclusion the same day.

161. Mr Tinkler told the Tribunal that he had asked the Claimant to take leave because he was concerned about the Claimant's behaviour and believed that the Claimant did need to take leave in the circumstances of stress of which he found himself. The Tribunal did not accept that Mr Tinkler considered that the Claimant's work was being affected by his sister's illness.

162. However, the Tribunal concluded that Mr Tinkler stated clearly, at the time, that he was disappointed by the report and that he considered that the Claimant had inappropriately excluded him from involvement in its preparation. Mr Tinkler also told the Tribunal that he believed that the Claimant was going behind Mr Tinkler's back, working with Mr Brady and excluding Mr Tinkler.

163. The Claimant had not made a protected disclosure since late November 2017. He told the Tribunal that, shortly thereafter, in November and December 2017, Mr Tinkler and his relationship was on an even keel and they were working together.

164. The Tribunal found that Mr Brady and the Claimant had indeed deliberately kept Mr Tinkler in the dark about the fact that the Cyrus Capital model was the preferred and, indeed, the only model which the Claimant's report would propose to the Stobart Group for approval. The Claimant did not share the report with Mr Tinkler before he sent it to Mr Brady and other Board members. Mr Tinkler's belief that the Claimant was going behind Mr Tinkler's back, working with Mr Brady and excluding Mr Tinkler, was well founded. The Tribunal therefore accepted that this was Mr Tinkler's genuine belief at the time.

165. On all the evidence, the Tribunal found that the only reason that Mr Tinkler required the Claimant to take leave was that he considered the Claimant had been disloyal to him by excluding him, and any potential plans involving Mr Tinkler, from the report for the Board. This was not to do with the protected disclosures; it was because Mr Tinkler believed that the Claimant had failed to work as a partner with him, but had secretly worked with Warwick Brady, to exclude any proposal involving Mr Tinkler.

166. **3. The Claimant contended that suspending the Claimant by letter dated 22 February 2018 on allegations of gross misconduct was because the Claimant had made protected disclosures.**

167. The Tribunal accepted Mr Tinkler's evidence that he suspended the Claimant because he discovered the draft email on the Claimant's Stobart Capital email system which showed the Claimant informing Stobart Group of his plans to resign and the Claimant manoeuvring and making suggestions about what Stobart Group should do with regard to Stobart Capital, which would potentially have excluded Mr Tinkler from Stobart Capital and involvement in its decisions.

168. The Claimant's draft email included the line, "If I were you, I would make me in charge of all SCL projects on a day to day basis on behalf of SGL so that SCL supports to you through me …. AT would enjoy that! It would show AT which of you were calling the shots!". The email also made various proposals, including giving Mr Tinkler formal notice of breach of Articles and triggering a compulsory transfer process. The email suggested moving SCL in house to Stobart Group and ending any obligation to Mr Tinkler. Those were all matters which were contrary to Mr Tinkler's interests. The Tribunal concluded that it was unsurprising that Mr Tinkler would want to suspend the Claimant to protect Mr Tinkler's interests from the Claimant's intended actions.

169. This was nothing to do with the Claimant's protected disclosures.

170. Mr Tinkler did not suspend the Claimant for any reason which was to do with the Claimant's protected disclosures.

Constructive Dismissal

171. The Claimant contended that he was constructively dismissed as a result of his protected disclosures.

172. When the Claimant resigned, he primarily relied on his removal from the business on 11 February 2018 as giving rise to the constructive dismissal. He said that the requirement for the Claimant to take time away from work amounted to an unwarranted suspension from normal duties and that the manner in which Mr Tinkler had conducted himself was plainly intended to undermine the Claimant's position and prevent him from discharging Stobart Capital's obligations under its Management Agreement with Stobart Group Limited, for which, as Stobart Capital's senior employee, the Claimant was responsible. The Claimant said that Mr Tinkler's actions had also damaged irrevocably the Claimant's relations with the rest of Stobart Capital's employees. The Claimant said that his suspension did not reflect the Claimant's conduct or his performance and that Mr Tinkler's capricious conduct had significantly undermined the necessary element of trust and confidence.

173. The Tribunal found that the exclusion of the Claimant from the First Respondent for four weeks did amount to a breach of the duty of trust and confidence. The Claimant was not permitted to attend the workplace, purportedly for reasons relating to his welfare, but he was not referred to occupational health and no reasonable procedure was undertaken. The Tribunal accepted that the Claimant resigned in response to that breach.

174. However, the Tribunal has found that the reason for the Claimant's removal from the business was nothing to do with the protective disclosures. Because the Claimant did not have two years' service, he could not bring a claim for ordinary unfair dismissal and could only succeed in his unfair dismissal claim if his protected disclosures were the only or principal reason for his dismissal. They were not and the Claimant's constructive dismissal claim necessarily fails.

Employment Judge Brown

Dated: 27 April 2020

Sent to the parties on:

28 April 2020

For the Tribunal Office