Case No: 2202752/20

EMPLOYMENT TRIBUNALS

Claimant: **Mr. D. M. Freeman**
Respondent: **C5 Capital Ltd**

London Central Remote Hearing by video **On: 30 June 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: Mr. R. Leiper Q.C**.**
Respondent: Mr. J. Laddie Q.C.

JUDGMENT

No order is made on the application for interim relief

REASONS

1. This was a hearing of the claimant's application under section 128 of the Employment Rights Act 1996 for interim relief in respect of his claim of unfair dismissal for making protected disclosures.

Conduct of the Hearing

2. The statute requires a tribunal to determine an application for interim relief "as soon as practicable". The administrative difficulties presented to the tribunal service by Covid 19 lockdown have been considerable, especially in setting up public hearings, but these were feasible by the beginning of June. However, at the case management hearing on 2 June, neither party wanted a hearing before the end of June. As a result, unusually for an interim relief hearing, the employer had been able to file a response a few days before. The tribunal had still to bear in mind that the claimant had not seen the response when preparing his witness statement.

3. The hearing was held by CVP remote video. It was confirmed by the clerk at the outset that all participating could see and hear, in conformity with rule 46. The public were able to gain access and two journalists joined the hearing. In compliance with rule 44 the witness statements were displayed online by the claimant's solicitors, together with the written submissions, and the link to this was entered on the hearing chatline. The documents bundle was available for supervised access at the tribunal building, which, fortunately, had at short notice been opened to the public that morning for the first time since the Covid 19 lockdown began. This was a last minute solution to an access problem which had been the subject of some correspondence

leading up to the hearing, the respondent being especially concerned that online display or emailing of the bundle could lead to unauthorised copying and dissemination. All participants were warned, both in the written material used to gain access, and by repetition by the judge at the start, of the prohibition on making audio or visual recordings, screenshots and photographs.

4. I had available a 678 page bundle of pleadings and disclosed documents, together with witness statements from the claimant, and the respondent's Mr. Andre Pienaar, Mr Arno Robertse, and Sir Ian Lobban, of 89 pages. Written submissions (65 pages) were submitted ahead of the hearing. No oral evidence was taken. Both parties made additional oral submissions to the tribunal by reference to selections from the documents and witness statements, and were then able to reply to each other. The decision was reserved, for want of time on the day.

Relevant Law

5. By section 129(1):

"where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—
(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in.. section 103A",

the tribunal is to order reinstatement, or if the employer is unwilling, make an order for continuation of the employee's contract until the final hearing. (There is also an option of reengagement in another role if the employee consents to take what is offered). There is no provision for refund if in the event the employee does not succeed in his claim.

6. What is meant by "likely" to succeed is clarified in **Taplin v C. Shippam Ltd (1978) ICR 1068**. It means: "a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent. probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal". This formulation was affirmed in **Dandpat v University of Bath (2009) UKEAT/0408/09/LA,** where it was said: "there were good reasons of policy for setting the test comparatively high… if relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not (a) consequence that should be imposed lightly". In **Ministry of Justice v Sarfraz (2011) IRLR 562** "likely" meant a "significantly higher degree of likelihood" than "more likely than not". In **Parsons v. Airplus International Ltd UKEAT/0023/16/JOJ,** it was said that the claim should be "clear cut".

7. The task of the tribunal hearing an interim relief application: is "to make an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he or she has… doing the best he or she can with the untested evidence advanced by each party" – **London City Airport v Chacko (2013) IRLR 610**. The tribunal is not required to make findings or reach a final judgment on any point - **Parkins v Sodexho Ltd (2002) IRLR 109.** As stated in **Parsons: "**The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed

reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits".

8. To succeed in the claim of unfair dismissal for making a protected disclosure the claimant must establish three things. He must establish that he made one or more disclosures of information which in his reasonable belief tended to show one of the forms of wrongdoing set out in section 43B (1)(a) to (f) of the Employment Rights Act. He must show that his resignation in fact amounted to a dismissal as defined in section 95(1)(c) – a constructive dismissal. That will mean showing that the employer by conduct repudiated the contract. Finally, he must establish that making a protected disclosure was the reason, or if more than one, the principal reason for the dismissal – section 103A.

The Protected Disclosures

9. The respondent is one of a number of companies which together comprise a specialist technology investment group, focused on cyber security, cloud computing and artificial intelligence. The group's founder and controller is Andre Pienaar.

10. The claimant was the managing partner of C5 Capital Ltd, the respondent company, which functions as the fund manager advising the 3 funds C5 has under management. From May 2016 he was also a director of the company. There were 2 other directors, Mr Pienaar, and Marcos Battisti.

11. The claimant's protected disclosures concerned two of the group's investment projects, Omada and Iron Net.

12. The original $24 million investment in Omada was made in 2015 in equal shares by C5 Partners LP, a fund managed by the respondent, and C5 Holdings Sarl. Sarl sold its interest to Kodori AG, an investment vehicle controlled by Mr Vladimir Kuznetsov. The sale was structured through a special purpose vehicle, C5 Razor Bidco Ltd. The Razor Bidco shareholders' agreement provided that when the interest in Omada was sold, and shareholders receive their dividends, the purchaser, Kodori, was to pay the carried interest (i.e. investor profit on the original investment in Omada), to C5 Founder Partner LP, the carried interest vehicle. The partners of C5 Founder Partner LP are C5 Founder Partner General Partner LLP, its general (i.e unlimited) partner, and several limited partners, which included the claimant, several other individuals, and C5 Holdings Sarl ("Sarl"). The claimant had an 18% stake. By shareholder agreement, the carried interest vehicle was managed by the respondent company, C5 Capital Ltd, to the exclusion of its general partner.

13. When the claimant was carrying out the liquidation of the special purpose vehicle, Razor Bidco, he came across a side letter dated 13th December 2018 signed by Mr Kuznetsov for Kodori, and by Andre Pienaar, in his own name and on behalf of Sarl as a member of the carried interest vehicle, and by both on behalf of Razor Bidco. The side letter provided that on sale of Omada the carried interest would be paid not to the carried interest vehicle, but to Sarl. The letter said that Sarl would be paid "as the owner of the general partner", though according to the claimant, the general partner of the fund is not Sarl but C5 General Partner LLP, whose members are the respondent, C5 Capital Ltd, and Mr Pienaar. The claimant says that this was the first he and Mr Battisti knew of it, though they were the directors of the company managing the carried interest vehicle.

14. The respondent's case, as articulated by Mr Pienaar, is that this arrangement was a deferral of payment to the individual carried interest vehicle investors, as it was

important at the time that the funds were seen to be invested in C5's new project, so as to reassure investors of their commitment to its success. The response, ET3, says that the SPV shareholders agreed the variation, and that there would be distribution to the partners of the carried interest vehicle in due course.

15. When challenged by the claimant, Mr Pienaar indicated he had the support of more than 75% of the current investors for the arrangement. It is the claimant's case that such consent has to be given in writing, further, that he himself was never asked to consent, and although on a number of occasions Mr Pienaar has been asked to look for and produce written consent, to date this has not been done. The claimant is also concerned that the respondent, C5 Capital Ltd, is the FCA regulated investment manager of the carried interest vehicle, and the side letter transaction did not appear to be in the interests of the carried interest vehicle, or its limited partners, and that this put C5 at substantial risk of potential breaches of its regulatory and fiduciary obligations. By its articles of association, C5 decisions had to be made collectively, so Mr Pienaar on his own did not have management authority to sign.

16. The claimant's belief is that this transaction was not a deferral, but a diversion of the carry money, away from the carried interest vehicle, and out of control of its partners, other than Sarl, which now had control of all the profit.

17. In December 2018 the claimant found out from the operations team that the carried interest was to be paid to Sarl. He asked Mr Pienaar to clarify, and said that he needed to disclose the variation. Later, he found out that Mr Pienaar wrote to Mr Kuznetsov on 9th January 2019 on behalf of C5, but without the knowledge of the claimant and Mr Battisti, for payment of £1.284 million, the carried interest, direct from Razor Bidco, rather than from Kodori, as provided by the shareholder agreement.

18. The protected disclosures relied on in this claim start with a letter to Mr Pienaar 18th December 2018, and then an approach on 31st January 2019 to Lord Gold, senior non-executive director of the respondent, and an authority on anticorruption law in the UK.

19. Later that year two of the limited partners in the carried interest vehicle, MM and PO (who as former members do not have to be consulted about changes, according to Mr Pienaar) became concerned. The matter was discussed at a board meeting on 5 November 2019. The claimant says the explanations given at that meeting, including that the carried interest vehicle did not have a bank account, and that there was no obligation to pay MM, were in his reasonable belief, incorrect. He says he therefore took legal advice on his personal position with regard to the regulatory angle. He expressed this concern about regulatory responsibility in an email 11 December 2019 to Mr Pienaar and to Mr Kilmer, a recent appointment to C5's executive directors. From then, through January 2020, he called for an immediate board meeting, which was resisted by Mr Pienaar. At a board meeting on 29 January 2020 Mr Pienaar stated that Sarl had decided to defer distribution of the carry interest at the request of the owners of the general partner, and with the consent for limited partners. The claimant pointed out that he had not even been asked to provide consent, let alone given it. Nor, he understood, had MM and PO. The claimant asserted he was not on the board to represent Sarl but had duties to C5 and its stakeholders, and fiduciary responsibility to the carried interest vehicle as its regulated investment manager. In his view it was not in the best interests of C5 to prefer one of the limited partners (Sarl) over the others. These are said to be further protected disclosures. The claimant's concern was elevated by Mr Pienaar saying that the decision to pay the carried interest to Sarl was made by the board of the general partner; the claimant considered Sarl only one of the partners, without

authority to transfer the carried interest to itself. Further, only C5 could sign on behalf of the carried interest vehicle.

20. The claimant raised his concern again at a further board meeting on 4 March 2020, also pleaded as a protected disclosure. The claimant says that at both the 29 January and 4 March meetings Mr Pienaar was asked to produce to the board the waivers he said he had obtained from the limited partners of the carried interest vehicle. There are no waivers in the bundle.

21. There are further additional disclosures later, when events had moved on – a meeting with Mr Pienaar to discuss the claimant's position, then suspension on full pay pending disciplinary proceedings about IT security breaches. The claimant's solicitors wrote a long letter of 23 April 2020 setting out, among other things, that the claimant had a reasonable belief that the respondent had been in breach of its legal obligations in relation to Omada, and again on 30 April. By this point he also complained that the disciplinary process was flawed and a sham.

22. To establish that these disclosures are protected, the claimant has to show that they meet the requirements of section 43B: that the information tended to show breach of legal obligation, that he had reasonable grounds for this belief, even if he is in fact proved wrong in fact, and that it was a matter of public interest.

23. The respondent argues that the claimant did not have a reasonable belief in it being a matter of public interest, that is, a regulatory breach of the FCA Code, otherwise he would not have let it lie between January and November 2019, further, that when Mr Pienaar asserted the agreement was not suspicious, and challenged him by email on 23 January to make a report to the FCA, he did not do so. It is said that the claimant would have been aware that it could be a prudent decision overall to defer payment pending another investment. On 8 December 2018 the claimant, in the context of a question from his co-director Mr Battisti about financing a further investment, said: "it is possible that fund 1 could invest if we don't distribute all of the Omada proceeds, which is within our right as investment manager and would be a fair call to preserve the value for investors". This predates the side letter, and the respondent says it indicates that at the time the claimant did not think a failure to distribute all the proceeds was a breach of a fiduciary obligation. The respondent also argues that the claimant's concern, when he found the carried interest was being paid to Sarl, not the carried interest vehicle, was for his own financial interest, and that there is no public interest in a private commercial dispute. An email 18 December 2018 shows that the claimant was concerned about his own tax position (if paid from the carried interest vehicle he would only incur capital gains tax; presumably if paid from another source he should pay income tax at a much higher rate). The reply was just that he should take independent tax advice. It did not address why the changes had been made.

24. The claimant's four page letter to Lord Gold of 31 January 2019, carefully sets out step by step and by reference to documents, why the claimant maintained the side letter was signed without authority, and behind the back of the claimant and Mr Battisti, and attaches relevant documents, in particular the agreements and company structure plan. Finances did not allow involving counsel, but he wanted to discuss with him how best to protect the "interests of C5 Ltd, investors in fund 1 and the limited partners in the carried interest vehicle".

25. The respondent denies that disclosures to others - Lord Gold, and the company's D and O insurers, to whom he made a report in February 2019, together with a claim for the cost of the legal advice he had taken - meet the statutory requirements of disclosure to someone other than the employer. Leaving aside the merits of this

argument, these disclosures are at least some evidence of the claimant state of mind at the time, what he believed, and on what basis.

26. The claimant had another discussion with Mr Pienaar on 30 July 2019, which he recorded in an email to himself that day. He asked about the Razor Bidco carried interest payment, as the liquidation accounts had been completed, and he was concerned about the obligation to make payments to the beneficiaries, and that he had said: "it's very important that we are on the right side of this". He was brushed off.

27. By the time of the November 2019 board meeting, the former members, MM and PO, were pressing for payment, after noting that the special purpose vehicle was to be struck off the register. The notetaker's first draft of the board minutes of November 2019 has the claimant saying: "C5 capital is a regulated entity and we have a fiduciary responsibility towards the limited partners of the carried interest vehicle in .. its manager entity to the exclusion of the general partner. Failure to enforce payment of the carry is not in the interest of those limited partners and MM's letter raises serious legal issues that could impact C5 Capital Ltd as a regulated business great risk for us as directors." (The minutes as eventually edited and approved are more succinct).

28. Reviewing the evidence available of what the claimant said or thought at the time, it is likely he will establish that the Omada disclosures were protected. They show he was concerned about breach of legal obligation. The 8 December email does not contemplate that the carry would not be paid to the carried interest vehicle, it is to be about whether part of the proceeds could be held back for another investment. The way his concerns were brushed off will not have allayed his concern. His analysis of the documents showed several errors in the explanations he was given (although there is a document preceding his appointment appointing Mr Pienaar chief executive, one of the details he disputed) and suggest he had reasonable grounds for his belief that wrongdoing was being covered up, even if he was not explicit as to what the breach might be.

29. As to whether it is a matter of private interest, and whether the collective private interest of the limited partners on whether and when they would be paid, can amount to a matter of public interest, following **Nurmohammed v Chesterton 2018 ICR 731**, it may or may not be, and will require assessment of whether wrongdoing was deliberate, and how important it was, but this still leaves the regulatory aspect of C5 being the investment manager, which plainly concerned the claimant in August 2019, and later. The regulatory aspect takes it into the public interest. Whether or not it breached a particular aspect of the FCA Code, the way the arrangement was made, not deferring payment, but diverting it, suggested dishonesty. This would have been apparent to those to whom the disclosure was made, even if they did not accept there was wrongdoing. There may of course be a fuller explanation, and it may be that the claimant was mistaken as to detail, but on what is available at present, this is what it looked like.

30. The regulation of the finance industry by the FCA, to keep it honest, is a matter of public concern, both because of the importance to the UK economy of the financial sector, and trust in the UK as a place to invest, and because of the devastating impact that institutional collapse can have even on those who never invest. It was suggested by the respondent that the claimant's concern was a private commercial dispute, and would not be considered in any way newsworthy, and so not of public interest, but the public interest is not the same thing as what the public are interested in. Many important matters of public interest are not interesting to unsophisticated consumers of news because they do not understand the significance of the detail.

Parliament, however, has provided for regulation, because it is a matter of public interest that commercial dealings are not held to account only by litigation between the parties concerned, which might, for all sorts of reasons, not be effective in keeping the system on the straight and narrow. The claimant's concern about the arrangements to pay the carry to Sarl was about more than the fact he himself might not be paid. It was about regulatory breaches by himself and by C5 as responsible for management of the carried interest vehicle. It looked bad, and reflected on their conduct.

Iron Net

31. The second set of disclosures concern the respondent's valuation of its investment in a project called Iron Net. Put briefly, in the autumn of 2019 the value of its stake had been diluted, from 6.1% to 4.9%, by Iron Net issuing more shares to others. The value of C5's investment was displayed to potential investors in an online due diligence room, as well as current investors. In the Q3 accounts its pre-dilution value was stated. The respondent points to a note to the effect that there had been dilution, but the valuation figure had not been recalculated and the claimant said this still misled potential investors, who might not compare old and new accounts and calculate the reduction. The difference was around $5 million. The claimant also noted the value was based on projected revenue when performance had fallen far short of this. He says C5's figure misled current and potential investors. He raised this with Mr Pienaar on 22 November 2019 and again on 16 and 17 December when the Q3 report had been finalised, but was worried that Mr Pienaar said only that he would speak to investors individually, and on 10 January he called for a board meeting. He was told it was not urgent and a matter for management, not the board, and that the reporting was accurate. At a meeting on 29 January the board agreed the claimant's valuation. By March 2020 the claimant's point had been conceded and the correct figure stated. Meanwhile he had in February notified both this and Omada to his D&O insurers.

32. Assessing the likelihood that these disclosures will be found to be protected, there were disclosures of information, the inaccuracy did have the potential to mislead investors, and the apparent reluctance to do anything to correct the inaccuracy when pointed out, and the lack of transparency of having conversations with individual investors, will have been added grounds for a belief that this could be seen by regulators as deliberate rather than a mistake, so far more damaging. As before, provision of accurate information to investors has long been the subject of regulation because of the public interest in confidence in the financial markets. These are likely to found protected within the meaning of the Act.

Constructive Dismissal

33. Dismissal is defined in section 95 and includes a termination by the employee "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

34. Conduct which entitles the employee treat the contract at an end is "conduct which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract" - **Western Excavating ECC Ltd v Sharp 1978 ICR 221**. In other words, the conduct must be repudiatory. In **Eminence Developments v Heaney 2010 EWCA Civ 1168**, a case about a land sale, the Court of Appeal said the legal test was simply stated as "whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in the position of the innocent party, the contract breaker is clearly shown an intention to abandon and altogether refuse to perform the contract". It went on to say that outcome is a fact sensitive - conduct could be an innocent mistake, or cynical and manipulative. In the employment context, it was said in **Tullett v Prebon plc and another (2011) EWCA**

Civ131: "an employer must demonstrate that it is abandoning and altogether refusing to perform the contract".

35. The importance of the terms of the employment contract as to remuneration is made clear in **Cantor Fitzgerald International the Callaghan and others (1998) ICR 639**, where the dispute arose from an employer's failure to assume responsibility for the tax treatment of an earlier payment which may have been a loan or a bonus: "an emphatic denial by an employer of his obligation to pay the agreed salary or wage, or a determined resolution not comply with his contractual obligations in relation to a remuneration, would normally be regarded as repudiatory". The court went on to say that a failure to comply "maybe no more than a fault in the part of in the employer's technology, an accounting error, or a simple mistake… It would be open to the court to conclude that the breach did not go to the root (of the contract)", to be contrasted with "repeated and persistent, perhaps also unexplained" failures, which would drive an employee to conclude that the breaches were indeed repudiatory. It was said it was "difficult to exaggerate the crucial importance of pay in any contract of employment". In **Gogay v Herefordshire County Council (2000) IRLR 703**, the court said of repudiatory breach that "the test is a severe one".
36. The employee must resign in response to the breach to establish a dismissal. Where an employee resigned for more than one reason, the tribunal must examine whether one or more was in response to the breach, and whether the breach played a part in the decision to resign - **Wright v North Ayrshire (2014) IRLR 4**. It is not necessary to show that the repudiatory breach was the "effective or principal reason for resigning", only that it played a part – **Frankel Topping v King UKEAT/0106/15/LA**. It could also be that the reason for resignation had nothing to do with any breach of contract, as shown in **Ishaq v Royal Mail Group Ltd (2017) IRLR 208**, where a postman resigned to avoid disciplinary action, not because of a breach (given his disability) in relation to the route he was assigned.

37. At this hearing, the claimant's case was that he resigned because his monthly salary was not paid on 30 April 2020 as it should have been, nor was his monthly health insurance premium paid, and that when this was raised with the respondent through solicitors on each side, the response was sluggish.

38. The pleaded case suggests some background to this. Paragraph 42 says that as a result of the employer's conduct on Omada and Iron Net, "as well as his aggressive actions regarding C5's investment in a separate company… the claimant realised in mid-April 2020 that his position at C5 was now untenable". (There may be more to this: at the end of February 2020 Mr Pienaar had made good an earlier promise to increase his annual salary when funds permitted, had backdated the increase, and had increased his entitlement to carried interest in two other projects, so that it was highest in the firm). On 14 April the claimant emailed Mr Pienaar asking to discuss his position in the firm. Paragraph 43 says of this, "it was obvious, and would have been obvious to AP, that the claimant wanted to talk about the impact of net ongoing concerns about the carried interest andh is leaving the business because these matters made his position untenable". He also sent a "statement of entitlement". The respondent thought this was "a transparent attempt to pressurise the respondent to pay him off… with reputational cost of defending a whistleblowing claim". In the bundle is a notice of resignation dated 15 April 2020 which accompanied the statement of entitlement.

39. At about the same time the claimant became aware that the respondent was checking "a significant amount of C5 data flows to (the claimant)'s gmail account over extended periods of time", which had been reported to the board as a cyber incident. According to the respondent, in the pleaded response, on 17 April 20 it seemed that a large number of documents had been downloaded by the claimant,

and his company email account was suspended. On 19 April he was called to a disciplinary meeting on 21 April, he was suspended on full pay pending investigation, and his company credit card was frozen. An email from the finance manager to Mr Pienaar said the card had been frozen that day "because of our inability to reconcile his credit card expenses. As you know we have been struggling for months to get clarity from Daniel on several costs he incurred". Mr Pienaar's witness statement also mentions what is in the documents, which was that on 16 April one of the claimant's emails was sent to a Russian with a Kazakhstan email address. The claimant reported this. Mr Pienaar says this caused concern, because of Russian cyber attacks on work C5 was doing with Czech hospitals. The claimant agreed to look into it; another 320 Russian addresses were found on his contact list. According to Mr Pienaar's witness statement (this is not referenced in the documents) the claimant said they might be there because of his previous employment, but Mr Pienaar says he spoke to the previous employer who denied the claimant did any work with Russia.

40. The claimant was concerned that there were defects in the disciplinary process, such as failing to give him enough information of the charges, and appointing someone to chair whom he thought too close to Mr Pienaar. It was following this that the claimant, through his solicitors, sent the letter of 23 April 2020 setting out his belief that the disciplinary charges against him were a result of protected disclosures. On 30 April there is a further long letter from his solicitors about defects in the disciplinary process and why the claimant had not attended the disciplinary hearing.

41. Whatever the background to the resignation on 5 May, the grounds of claim, under the side heading, repudiatory breaches, lists as breaches only failure to pay April salary and the health insurance premium, and the respondent's response to his enquiries about that, as the repudiatory breaches for which the claimant resigned on 5 May 2020. The letter, which came from his solicitors, said that these actions breached the implied term of trust and confidence, or clauses 8.1 or 8.5 of his contract, or an oral agreement made with Mr Pienaar, and their breaches were accepted with immediate effect.

42. How likely is it that a tribunal will find that these matters amounted to repudiatory breach of contract?

43. The claimant was accustomed to be paid on the last day of each month. He has produced redacted bank statements showing payment for January, February and March 2020. There is no statement for April or May. According to the claimant, no payment came to his account on 30 April, and he waited till next day, and checked with his bank, before approaching the respondent. At 15.25 on 1 May, a Friday afternoon, the claimant's solicitor asked the respondent's solicitor to explain why he had not paid or received a payslip. The immediate reply was that they would take instructions and respond as soon as possible. On Saturday 2 May the claimant was notified by his medical insurers, Allianz, that the monthly premium had not been paid, and must be paid by 13 May or the policy would lapse. On Monday morning, 4 May, the claimant solicitors emailed the respondent's solicitors again that he was very concerned not to have a substantive response to the question about his salary payment, and now his medical insurance had not been paid, "another obvious and very serious breach" of his employment contract. He wanted an immediate substantive response by midday. A few minutes after midday the respondent's solicitors said that their instructions were that the salary had been paid, and he would not be able to access his payslip because of the restrictions, and it was to be sent to him via solicitors. On the health insurance, they said: "our client is unclear why your client believes the premium has not been paid on his BUPA medical insurance. Please would you provide further details". That afternoon, the claimant solicitor said that he had checked again, and there was still no payment. Nor was there any

problem with his account. The respondent was sent the letter from Allianz. On Tuesday, 5 May the claimant's solicitors emailed again mid-morning asking for a substantive response by 5 p.m. Continuing failure to pay, or provide any explanation having failed to pay, was "extraordinary and wholly unacceptable". That afternoon the respondent's solicitors emailed at 14:34 to say that they believed he had been paid in the normal way, but were continuing to investigate, and once was further information they will be updated promptly, and in the meantime the payslip was attached. On the medical insurance, the solicitor said "our understanding is that all premiums are paid directly to the insurer by our client. We are also unaware that premiums are paid by individual employees through their company credit cards. Please explain why your client has a separate private medical scheme and when it was agreed with C5. This will assist our client's investigations." Later that evening the claimant had the message from his bank (the screenshot) saying a payment Had been received).

44. The claimant says this response manifested bad faith. They should have known from his annual P11D (tax declaration of benefit in kind) that the company paid his health insurance, not questioned his entitlement. It is also now said that if they wanted to reassure him they should have sent the Coutts note they had, not just asserted he had been paid. Later that evening the claimant resigned, through his solicitors.

45. To complete the story, the respondent wrote to hm on 28 May saying he had been dismissed for gross misconduct, and he was paid to the end of May.

46. It is clear there is a dispute of fact as to when the claimant was paid his April salary. As noted, his April and May bank statements are not available to the tribunal. There is a document from Coutts, the respondent's bank, showing payment on 30 April 2020 by the respondent to the claimant of £10,340.88, his net salary for the month. There is a screenshot of a message to the claimant on his phone from his bank that a faster payment had been made on 5 May 2020 of £10,340.88, that is, his salary. There is a payslip for April 2020, which was emailed to the claimant just after 5p.m. on 30 April, but as it was to his C5 email address, he will not have seen it, as due to suspension he no longer had access to it.

47. If the money did not come into the claimant's account until 5 May, there might be a number of reasons for that, other than countermanding a payroll instruction and then reinstating it. The respondent had to investigate on a Friday afternoon and over a weekend, at a time of lockdown when staff were working remotely, and through solicitors, who must also have been working remotely, but by Tuesday afternoon he had the money, if not the explanation.

48. On the health insurance the documents indicate that the claimant was entitled to benefit from the company health insurance scheme as part of his contractual emoluments. A payroll instruction from earlier in 2020, at the point when the claimant's salary was being increased and backdated, noted that he had opted out the company scheme, which is with BUPA. No mention is made of Allianz, perhaps because the payroll department did not pay that. The claimant had his own policy with Allianz, and the premiums were paid by a recurring payment on his company credit card. The freezing of the card is why the payment was not made. The respondent neither admits nor denies an agreement to pay premiums to Allianz; the solicitor's wording of the resignation letter indicates the claimant thought there had been an agreement, possibly oral, about keeping up his Allianz policy in place of the company BUPA scheme. There are no documents in the bundle on this. The correspondence indicates that the respondent's initial instructions were that all BUPA payments had been made. The commonsense explanation is that as the payment

was made through the claimant's company credit card, and as Allianz corresponded about non-payment with the claimant direct, not with C5, the payroll and finance teams were not aware of any Allianz policy. Whoever prepared or signed the P11 D may have known, of asked, about health insurance premiums, It is not clear on the available evidence whether the claimant knew that his credit card had been frozen on 21 April when he was suspended. Had he thought about it when suspended, this alternative explanation might have occurred to him.

49. The final leg of the repudiatory breaches is that the respondent was slow to respond to and explain the claimant's solicitor's questions. The correspondence only says that they were taking instructions. The Monday letter said they were still investigating, but BUPA policies had been paid, showing no knowledge of an Allianz policy. They understood he had been paid. The Tuesday afternoon email from the respondent asked for details of the Allianz arrangement to assist investigations. None of these say the claimant was not entitled. They indicate they wanted to investigate. He was not in the BUPA scheme that they knew about. The respondent points out that apart from difficulties investigating during lockdown and remote working, the finance director had left at the end of April, the HR manager was on maternity leave, and Mr Pienaar was stranded in Kentucky where he had gone in March to get married. Some of this came from counsel, not Mr Pienaar's witness statement. It is not clear on the evidence whether all three facts were known to the claimant. As managing partner he may have known these things, which could have impaired the respondent's ability to investigate, especially the health insurance premium issue.
50. The tribunal's decision is that the claimant is not likely to establish that, looking at all the circumstances objectively, from the perspective of a reasonable person in his position, the respondent had clearly shown an intention to abandon and altogether refuse to perform the contract. At the time he resigned, the claimant had in fact been paid, and the respondent was still investigating health insurance. On health insurance, facts were available to the claimant which might suggest the reason why the monthly payment had not been made by the credit card, and there was still over a week to go before the policy lapsed for non-payment. The tone of the correspondence between the 1st and 5th May is unlikely to be found 'obfuscatory', the word used in the resignation letter. Of course the claimant may have been nervous and apprehensive, having been suspended and facing disciplinary investigation in circumstances he found suspicious, as they followed in time his discussion with Mr Pienaar on 14 April, and coincided with disciplinary proceedings he thought trumped up, but it is *likely* that a tribunal will find that, viewed objectively, he misread the position and jumped the gun. On these facts, reasonable people in his position would accept there may have been some mix-up with one or other bank, that the credit card accounted for the health insurance payment, and that the respondent was looking into it. Reasonable people would have waited a bit longer before concluding that non-payment was deliberate, especially when all answers had to come through solicitors, and everyone was having to work from home, which makes it less easy to confer to sort out a problem. Reasonable people would rethink whether what the respondent did was deliberate when they were in fact paid, or wait for an explanation, then judge whether it was plausible.

51. That is the conclusion, even leaving aside the respondent's alternative case that the claimant wanted at all costs to avoid a disciplinary hearing and was looking for a way out. The claimant would not be the first employee to resign rather than be disciplined, nor would he be the first to decide that the process was a sham to get to a decision that had already been made on other grounds (as expressed in the claimant's solicitor's letter of 23 April), but to decide that requires a much closer factual analysis than can be done on what is available now: it remains mere hypothesis.

The Reason for Dismissal

52. If the claimant is able to establish there was a constructive dismissal, the tribunal will have to go on to find whether making a protected disclosure was the reason, or principal reason, for that. Here, the tribunal must examine not the employee's reasons for resigning, but the employer's reasons for the conduct that led him to resign -– the tribunal must ask "why the respondent behaved in a way which gave rise to the fundamental breach of contract" - **Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15.** In **Frankel**, the tribunal is reminded that this is a "reason why" exercise; in section 98 unfair dismissal claims the tribunal can find the dismissal unfair if the employer cannot show one of the potentially fair reasons set out in the section, but for section 103A dismissal, the tribunal must find the reason, and that making a protected disclosure was the sole or principal reason. As classically set out in **Abernethy v Mott, Hay and Anderson (1974) ICR 323**, "the reason for the dismissal of an employee is a set of facts known to the employer, or it may be, of beliefs held by him, which cause him to dismiss the employee". Finding the reason is a finding of fact.

53. This is a difficult assessment to make when in fact the respondent denies deliberately obstructing payment in any way. When he was paid, and why payment was late (if it was) will require more detailed factual examination, but the evidence available points to some technical reason, not deliberate intervention. The freezing of the credit card is the probable cause of non-payment of the health insurance; those instructing the respondent's solicitors on 4 and 5 May appear not to have known of the special position on health insurance payments, and that non-payment an unintended consequence of freezing the card. This makes it unlikely that protected disclosures were the reason. It is possible that the reason given for freezing the card was not the one given - lack of explanation of his entertainment expenses. The finance manager's decision to freeze may have been suggested to him by Mr Pienaar. The suspension could have been the reason, as while he was suspended he would not be doing work that might incur expenses. The freezing decision may also have been made because of the suspected misuse of company data, so anticipating misuse of the company credit card too. It is of course possible that initiating a disciplinary procedure, when his data use had been under review for many months without the claimant being asked about it, was not because of suspected security breaches, but because of making protected disclosures. It is also possible that Mr Pienaar had concluded from the April 15 discussion that the claimant wanted to extract money as a price for not leaving, something he wanted to avoid, as continuity of personnel reassured investors who looked to their rewards in the longer term. The claimant in the pleaded case mentioned dissatisfaction over Panoply (another investment project), but what this was is not known, save that it is not about protected disclosures, and this factor cannot be weighed with protected disclosures as a cause of disagreement. That would however be part of his case for detriment for protected disclosure, not dismissal. Even if it was held that (say) freezing the credit card was nit for the reason given, it cannot be said that it must have been because he had made protected disclosures.

54. In conclusion, were a tribunal to find repudiatory breaches in the unexplained non-payment of salary, or health insurance, it cannot be said on the material available, against the background of the complex set of events leading up to it, that it is clearcut that the sole or principal reason for the conduct found repudiatory was that the claimant had made protected disclosures.

55. To succeed in the section 103A unfair dismissal claim, the claimant must establish all three points. In the assessment of the tribunal, he is not *likely*, to the high bar set by the authorities, to succeed on two of them. The application for interim relief fails.

EMPLOYMENT JUDGE - Goodman

Date 3rd July 2020

JUDGMENT SENT TO THE PARTIES ON

09/07/2020

FOR THE TRIBUNAL OFFICE