EMPLOYMENT TRIBUNALS

Claimant:	**Mr K Roberts**		
Respondent:	**AKARI CARE LTD**		
Heard at:	**Leeds**	**On:**	**12,13,14 November 2019 and 14,15 January 2020**
Before:	**Employment Judge O'Neill**		
Representation			
Claimant:	Mr Nuttman, Solicitor		
Respondent:	Ms T Barsam of Counsel		

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds.
2. The claim for unfair dismissal – public interest disclosure fails
3. There is no finding of contribution.

REASONS

Background and overview

1. The Claimant was the Chief Executive Officer of the respondent company which operates care homes. At a Board meeting on 23 January 2019 he submitted his resignation and claimed constructive dismissal when Mr Jackson (the director representative of the major shareholder) declined to retract a letter dated 13 January 2019 in which the claimant had been set targets which he contends were unreasonable and unachievable and likely to create a health and safety risk for residents of the homes and had been given in effect a final written warning. The refusal to withdraw the letter was the last act of a series which constituted a breach of the fundamental term of trust and confidence as between the respondent and the claimant. The claimant alleges that the respondent treated him in this way because he had raised concerns which amounted to public interest disclosures relating to the health and safety of residents and expenditure in excess of the financial limits agreed with Carlyle the investment company which controls the respondent.

Issues

2. The issues for determination at the current hearing are as follows:

Protected disclosure

2.1. Whether the Claimant made disclosures to the Respondent as follows:

(a) In December, to Ian Jackson, verbally and by email that it was wrong to spend the Respondent's funds on Mr Tolhurst and that his fees should come out of Carlyle's fixed management costs ("the MR TOLHURST disclosures").

(b) That imposing a weekly agency cap would risk the provision of care, encourage negative behaviour and compliance with fire regulations in terms of the ability to safely evacuate vulnerable elderly residents.

(i) On 14, 16, 18 and 22 January to Oliver Lightowlers;

(ii) On 14 and 22 January to Karen Harkin;

(iii) On 14 and 16 January to Les Summers; and

(iv) On 23 January to the Board of the Respondent.

2.2. In relation to each disclosure:

(a) What, as a matter of fact, was communicated by the Claimant?

(b) Was the communication a disclosure of information?

(c) Did the Claimant believe that the information disclosed tended to show matters referred to in s.43B(1)(b) and/or (d) of ERA?

(d) Did the Claimant believe that the disclosure was made in the public interest?

(e) Was the Claimant's belief in the matters at (c) and (d) of this paragraph reasonable?

2.3 In respect of 2.1(a) The Claimant alleges that the information tended to show that Ian Jackson and/or Carlyle and/or the Respondent had failed to comply with the legal obligation not to exceed the agreed Carlyle management charge and/or hide additional management cost over and above the agreed management charge?

2.4 In respect of 2.1(b) The Claimant alleges that the information tended to show that by imposing a weekly cap on agency hours the business was likely on occasion to be understaffed which in turn was likely to jeopardise the health and safety of the residents.

3. **Constructive unfair dismissal (s.98 of ERA)** are as follows

The issues as identified are as follows: -

3.1. Did the Respondent without reasonable and proper cause act in a way likely or calculated to destroy or seriously damage mutual trust and confidence and did so.

3.2 The Claimant relies on the following matters as collectively giving rise to a cumulative breach of contract and /or of the fundamental term of mutual trust and confidence adopting the last straw doctrine:

a) The imposition of MR TOLHURST onto the business in June 2018 and thereafter despite his objection;

b) Issuing a letter dated 13 January 2019 under clause 16.1 of the Claimant's contract (the equivalent of a Final Warning) without any warning and/or being invited to a meeting to discuss and/or at a time when the company and the Claimant were exceeding targets;

c) The fact that objectives in the letter of 13 January 2019, were unreasonable including, but not limited to, the fact that they were set higher than the agreed budgets;

d) The capping of agency use in the letter of 13 January 2019;

e) Refusing to withdraw the letter at the meeting on 23 January 2019; and

f) Refusing to withdraw the cap on agency use at the meeting on 23 January 2019;

3.3 Did the Claimant resign in response to such a fundamental breach or for some other reason?

3.4 Did the Claimant act in a way such as to waive such a breach/breaches as the Tribunal may find and affirm his contract of employment.

3.5 If the Respondent dismissed the Claimant was its reason for dismissing him potentially fair.

3.6 If the Respondent dismissed the Claimant for a potentially fair reason did the Respondent act reasonably in treating it as a sufficient reason to dismiss him in all the circumstances.

3.7 Did the Claimant cause or contribute to his dismissal by culpable or blameworthy conduct?

4 **Automatically Unfair Dismissal PID S103A ERA 1996**

4.1 Whether the reason (or, if more than one, the principal reason) for the Claimant's dismissal was that he had made a protected disclosure.

Law

Unfair Dismissal

5 The relevant statutory provisions are within the Employment Rights Act 1996 (ERA 1996) sections 95, 98, 122 and 123. These sections are well known and as both parties are represented, I do not set them out in full.

6 The leading case on constructive dismissal is **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27 which sets out guidance summarised as follows: -

The Claimant must show that there was a fundamental breach ie a serious breach by the employer, that the Claimant resigned in response to that breach and not for any other reason, that the Claimant resigned promptly in response to that breach and did not waive the breach through delay or any other reason.

7 The leading authority on breach of the implied term of mutual trust and confidence is **Malik and Another v The Bank of Credit and Commerce International SA** [1997] IRLR 462 HL. In that case the House of Lords confirm that the following implied term was a well-established principal and fundamental term in an employment contract:

"*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee"*.

It is widely accepted that the above wording is better expressed as calculated or likely and I have adopted such an approach.

Public Interest Disclosure

Under section 43B of the Employment Rights Act 1996:

(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]2 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,

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

8 Under section 43C of the Employment Rights Act 1996:

(*1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—*

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person

9 Under section 103A of the Employment Rights Act 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.

10 Counsel for the Parties have referred me to a number of additional authorities which I have taken into account and I found the following of assistance:

Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436

Babula v Waltham Forest College [2007] IRLR 346 (CA

Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA 979.

Fincham v HM Prison Service 2003 All ER 2003

Tullett Prebon Plc v BCG Brokers LP 2011 IRLR 420

Burden of Proof

11 The burden of proof falls to the claimant to show that there has been a dismissal. Having established dismissal then the burden passes to the employer to show the reason for dismissal.

Evidence

12 There was an agreed bundle of documents of over 1200 pages.

13 Oral testimony was given by the Claimant and the following Respondent witness namely:

Mr I Jackson - non-executive director of Akari and employee of Carlyle

Mr M Goulding - non-executive director of Akari and employee of Carlyle

Mr O Lightowlers - director of Akari - formerly chief finance officer now CEO

Mr L Summers - procurement manager of Akari

Mrs K Harkin - chief operating officer and now a director of Akari

The Claimant and the Respondent's witnesses each produced a written statement and were cross-examined.

14 The Representatives for each party provided very helpful written and oral submissions.

Disclosure of Documents

15 Disclosure of documents has been somewhat problematic throughout this case. The claimant has made a number of applications for orders relating to disclosure on the basis that the respondent has failed to produce documents which the claimant believed to exist. Mr Jackson revealed that no one had explained to him the duties of the respondent in disclosure. Disclosure appears to have been left to the legal and compliance department of Carlyle without any direct oversight from the directors involved in the case. As a consequence, I was astonished to learn that no searches had been made against the outbox of the claimant on the respondent system. Disclosure did not produce copies of the redacted documents obtained by the claimant in a subject access request. Disclosure did not produce copies of the emails between the Claimant and Mr Jackson in January 2019 or Mr Jackson's email of 9 March which were subsequently found by the claimant. Although I find the respondent's approach to disclosure to be unsatisfactory with the senior managers appearing to delegate responsibility for it without retaining oversight I do not attribute to Mr Jackson any personal intention to conceal documents.

16 On the third day of hearing Mr Lightowlers produced a highlighted note which he said had been written by the claimant for the purposes of drafting the minutes of the board meeting on 23 January 2019. The claimant agreed that he had provided such a note but there was a dispute between the claimant and Mr Lightowlers as to whether the note now produced was the original copy written by the claimant. Given that the board meeting minutes were in dispute this was a potentially important document. It was completely unsatisfactory that it was

produced so late in the day and the claimant was somewhat ambushed by it. Mr Lightowlers explained that as a consequence of sitting through the tribunal hearing he recognised the importance of disclosure and therefore went through all the documents in his office to doublecheck there were none relating to the claimant's case which were not in the bundle and in that process he found and produced the note. Although I find it unsatisfactory that Mr Lightowlers did not undertake such a thorough search earlier I am satisfied that he was not acting dishonestly with the intention of concealing the document. It has been a feature of this case that the key senior managers appear not to have understood the respondent's duties in disclosure.

17 The claimant also alleges that Mr Lightowlers dishonestly presented the figures relating to the respondent's performance in order to place the claimant in an unfavourable light. Mr Lightowlers explained to the tribunal how and why he put together his graphs and tables showing performance and why he had taken out some care homes in order to achieve a like-for-like comparison. I accept Mr Lightowlers explanation and do not find any dishonesty on his part.

18 The claimant also alleges that despite his solicitor's request to reduce the number of technical financial documents to keep pages the respondent failed to do so and produced a bundle of some 1300 pages deliberately with a view to swamping the tribunal with material so that one could not see the wood for the trees. Although I share Mr Nuttman's view that the bundle was excessively long and difficult to navigate because of its lack of focus on the key financial documents I do not attribute that to any sharp practice on the part of the respondent.

19 I do not make any adverse findings as to the credibility of the respondent witnesses as a consequence of their unsatisfactory approach to disclosure.

Findings of fact

20 **General**

Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

21 **The Carlyle Business Model**

The Carlyle group is an investment fund management company (commonly known as a private equity house). Its investors include members of the public and pension funds. It charges its investors a fee for managing their funds. Additional fees (as charged to the Companies held in the Fund portfolio) are shared with the investors provided the growth in the particular fund exceeds an agreed percentage. These additional fees come from the management fees charged to the companies acquired.

Carlyle aims to achieve growth by identifying companies whose value Carlyle believes can be improved and sold on. Carlyle do this by acquiring the company, installing a new management team, identifying ways in which to improve EBITDA (earnings before interest taxation depreciation and amortisation) and thus the value of the company and then selling on at a profit in as fast a turn over time as possible. EBITDA is an indicator of the overall profitability of the company and therefore the basis of the value calculation for selling on.

22 **Akari Care Ltd – the Respondent**

Akari Care Ltd (Akari) by which the claimant was employed was one such company acquired by Carlyle in August 2016. Akari had failed as a business and had been taken over by its bankers in 2011 who in turn had outsourced the management of the business until February 2017 when the new Akari management team (led by the Claimant) took over. The first six months after takeover in August had been spent setting up the head office and the new structures and strategies for the business.

Akari's business was residential care homes at a number of sites nationwide.

Carlyle charged a capped management fee of £350,000 to Akari which constitute the additional fees referred to above. The fee for the services of the consultant Peter Tolhurst did not come from the Carlyle management fee but was charged to Akari.

The shareholders were Carlyle (90%), the claimant 5%, Alistair Howe (AH) 2.5%, Oliver Lightowlers (OL) 2.5%.

The Akari Board comprised the executive Board members namely the claimant, AH and OL and Ian Jackson and Merrill Goulding representing Carlyle and Dr Clive Bowman.

(When AH left the company, he was removed from the Board in or about March 2018.When the claimant left the Board Mrs K Harkin was made a Board member).

I am told that Akari has been structured by Carlyle such that a Board is not quorate without a Carlyle director and such is the shareholding of Carlyle that its directors can always carry the Akari Board.

The financial year runs from 1 November to 31 October and each year an annual budget is presented by the CEO approval by the Board for the financial year ahead.

23 **People**

a) **The claimant:** was installed by Carlyle as the chief executive officer (CEO) of Akari. The claimant had had a background in senior management in the healthcare sector. He was originally brought in during the acquisition stage to advise on the potential of Akari, he was then appointed CEO on 3 August 2016 to set up the new management structure, run the business and improve its performance with a view to sale.

The claimant was employed by Akari under a contract of employment and was accountable to the Akari Board of which he was also a member. He was not directly accountable to Carlyle or Mr Jackson or to Mr Goulding.

The contract of employment provided at clause 17 that the claimant's employment would be governed by the same disciplinary and grievance procedure as other members of staff. That procedure was not in the bundle but Mr Jackson agreed conformed with the ACAS code. Clause 17 further provided that the procedure would be modified to take account of the fact that the claimant was the most senior executive in the business. Such modification never took place. Clause 16 of the contract provides for summary dismissal.

b) **Ian Jackson:** is employed by Carlyle and was charged among other things with the acquisition and thereafter oversight of Akari. He was a non-Executive Director on the Akari Board. His background is in finance and he had no particular expertise in the care field and relied on the claimant and the senior management team in technical and specialist matters. He was the principal contact between Akari and Carlyle.

c) **Mr M Goulding:** is employed by Carlyle and was a non-executive director on the Akari Board. He worked closely with Mr Jackson and was involved in the decisions relating to Akari but was less involved the Mr Jackson.

d) **Oliver Lightowlers:** was the chief finance officer and a member of the Board and the senior management team. He was recruited by the claimant with whom he had previously worked. He is now CEO.

e) **Karen Harkin:** was a member of the senior management team at Akari, recruited by the claimant with whom she had previously worked, with particular responsibility for quality and compliance in respect of which she had experience and expertise. During the claimant's employment she was not a member of the Board. Since then she has been promoted to chief operating officer and placed on the Board.

f) **Les Summers**: was employed as head of procurement, was part of the claimant's management team but not a Board member.

g) **Dr Clive Bowman**: The only other Board Member and a non-executive director.

h) **Peter Tolhurst**: A consultant selected by Carlyle but engaged under a contract with Akari. He is an old friend and colleague of Mr Jackson. He has no particular experience in the Care sector but has experience in the finance sector of turning around companies for selling on.

i) **AH:** a former employee and shareholder in Akari appointed by Carlyle as chief operating officer alongside the claimant to run the business with particular responsibility for improving agency and occupancy rates. He left the company in March 2018.

The Business 2016 to 2018

24 The claimant was initially charged with setting up the back-office, recruiting a new senior management team and revising the operation of the company to make it more profitable and ready for resale. Mr Goulding agreed that the claimant had established the new management team and the new approach and procedures efficiently and ahead of time. He was able to bring into his senior management team people with whom he had worked in the past in the sector who were pleased to join him. The business also met its targets for the financial year ending October 2017. Some criticism has been levelled against the claimant during the course of the hearing by Mr Jackson to the effect that the claimant blamed others and implied that his relationships were poor. I can find no evidence of any criticism being made to this effect during the course of the claimant's employment and I do not accept that the Claimant failed in that respect and I note that the Senior Management Team had both a history of working with the Claimant and were anxious to support him to the end of his employment and prevent his resignation.

25 When Carlyle took over the business it set out projections for 2016 to 2019. This included a rapid increase in EBITDA figures from £5.6 million in 2016 to £19.1 million in 2019 based on assumptions that Akari would acquire similar businesses to bolt on. This proved not to be the case and one acquisition fell through and the Carlyle directors determined that such a rapid expansion plan was not feasible. By 2019 they were very far from the £19.1 million projected at the start.

26 The claimant, the senior management team and the consultant Peter Tolhurst in his email of 21 August 2018 all confirm that the business was in a much worse state than Carlyle and the Akari Board realised at the date of acquisition. The pre-acquisition management team was worse than expected, management were firefighting quality issues, the care quality council (CQC) assessments were out of date and overrated and the business would suffer a major setback in quality ratings when the homes came to be reassessed. In addition, AH, who had been a Carlyle appointment and not an appointment made by the claimant was regarded as having failed to address improvements in occupancy and therefore income left the business. These issues would prove to have a major impact on EBITDA and the timeframe in which the business could be sold on.

27 Some criticism has been levelled against the claimant during the course of the hearing by Mr Jackson to the effect that the claimant failed to grasp the nettle and dispense with AH at an earlier stage. I can find no evidence of any criticism being made to this effect during the course of the claimant's employment and I do not accept that the Claimant failed in that respect.

28 After AH left the business, Mr Jackson met up with the senior management team in March 2018. It was obvious that the budget set for 2017 to 18 would not be met. At that meeting Mr Jackson used words to the effect that they would have a fresh start and he would wipe the slate clean. I find that Mr Jackson gave assurances to the management team that they would not be judged on past results but on the progress going forward and therefore the targets would be to

all intents and purposes adjusted and the budget reset for all practical purposes even though not officially amended by the Board.

29 The Carlyle directors' principal concern was building the EBITDA of the business for the purposes of resale and realisation of the profit. It was clear that they were disappointed that the projections they had hoped for in the base case were unlikely to materialise in the timeframe they had first envisaged or at all.

30 Meanwhile the claimant and the senior management team were working to improve the situation on the ground by introducing a number of initiatives including managing agency hours, increasing occupancy rates, marketing the accommodation at variable and enhanced rates. The senior management team realised that this would take some time.

31 The Carlyle appointed directors were under pressure from their own management to secure some results from Akari. Mr Jackson therefore decided to put his friend Mr Peter Tolhurst into the business to try and improve delivery on expectations of the EBITDA. Mr Tolhurst had absolutely no experience of the care industry but had had experience within banking of turning companies around. He was introduced into the business in the summer of 2018 and among other things, assisted in the presentation to the bankers later that year. He attended the Board Meetings. The claimant was not-at all pleased to have Mr Tolhurst imposed upon him and I find that the primary reason for his concern had nothing to do with how Mr Tolhurst was paid or the amount he was being paid but because the claimant felt undermined by his insertion into the business by Mr Jackson who was known to be friends with Mr Tolhurst.

32 As the end of the financial year 2017/18 approached the directors and the senior management team realised that they were unlikely to meet the covenants made to the bankers. Having anticipated this, they initiated an approach to the bankers and renegotiated the covenant. There was no breach of any covenants as a consequence. At the October 2018 Board meeting the Board adopted a dual set of targets, one set were less challenging and called The Soft Budget but was accepted by the banks, the other was called The Hard budget which was intended to be a more stretching set of targets for the management team to drive the improvements within the company. At the October 2018 Board meeting no criticism was levelled at the claimant.

33 From October 2018 to January 2019 the senior management team led by the claimant continued to make progress in improving the key metrics of the business although they remained both below 2017/ 2018 budget and initial aspirations. Before 13 January 2019 no emails had been sent to the claimant criticising his performance in any way, no such criticisms appear at Board level in the minutes, no criticisms appear in emails between the Carlyle appointed directors or their senior managers, no instructions or directions given to the claimant indicating areas of concern.

The Letter – 13 January 2019 –

34 Without any prior warning Mr Jackson issued the claimant with a letter dated 13 January 2019 (the Letter) which reads as follows

'*I am writing to you in my capacity as a representative of the ultimate, sole, 100% shareholder of Akari…. following Akari's recent performance and in particular its financial position and recent bank covenant breaches.*

We had a conversation in March in Leeds shortly after Alistair Howe's departure when I outlined my expectation for performance over the next 9 to 12-month period. At that time, we discussed that this was the time period over which Akari should be addressing its problems and specifically in relation to driving occupancy levels and reducing agency costs.

I am disappointed that the increase in occupancy since that time has been at best marginal. You will be aware that your contract of employment provides that where you fail to carry out your duties to the reasonable satisfaction of the Board of Akari you should be provided with a reasonable opportunity to rectify any concerns. That is the purpose of this letter. Having seen no significant improvement in performance over the last nine months I am concerned to set some specific targets that I would expect to be met these targets are primarily based around the key performance metrics we have discussed previously.

We expect to see a material improvement in the overall operating performance of the business for the next three months and in particular with respect to the following key parameters

1. *Akari achieving occupancy of 88%*
2. *Akari not exceeding 2250 hours of agency staffing per week*
3. *Akari achieving LTM EBITDA (last 12 months EBITDA) in excess of £5750*

Given the lead time you have had since March to start working on these objectives I believe it is reasonable that improvement should be forthcoming. I would also note that in achieving improvements in the areas identified it should not be at the expense of or any deterioration in quality or CQC ratings.

In the light of other missed targets such as the original investment underwriting case at the time of the 2016 acquisition, the subsequent underwrite case at the time of the 2017 …. Project Dragon, the 2017 bank refinancing case (which resulted in breach of banking covenants) and the FY 18 Board approved budget all of which you were involved in preparing and signing off, I consider these targets to have been set at a reasonable level.

With this letter, I am providing you with a reasonable opportunity to rectify concerns over the performance of Akari in line with clause 16.1 of your contract of employment.

You have the full support and commitment of the Akari shareholders to helping you achieve the targets set and to drive forward Akari's performance. With that in mind I will be monitoring the performance

closely over the next three months and will as usual be maintaining an ongoing dialogue with you.''

35 The claimant and his colleagues in the senior management team were all shocked that he should receive a letter of this kind. Mr Lightowlers described it as coming out of the blue. On a reasonable reading of this letter, by reason of its reference to clause 16.1 of the claimants contract it was in effect a final written warning given without notice, prior discussion or disciplinary hearing and without any specific matter arising so as to trigger it. In the circumstances I find such a letter likely to seriously damage or destroy the relationship of trust and confidence and it did.

36 Clause 16.1 reads as follows.

'*Notwithstanding the provisions of clauses 4.2 (notice clause), 16.3(payment in notice), and 16.5 (termination on account of illness or injury) the company may by written notice to the executive forthwith terminate the employment (without being under any obligation to pay any further sums to the executive whether by way of compensation, damages or otherwise in respect of or in lieu of any notice period or unexpired term of this agreement and without prejudice to any other rights of the company) if the executive*

16.1.1 fails or neglects efficiently and diligently to carry out his duties to the reasonable satisfaction of the board provided that the executive has first heard a reasonable opportunity to rectify any concerns of the board in this regard

16.1.2 does not materially comply with any reasonable law for order or reasonable direction given to him by the Board

16.1.3 is guilty of any material or persistent breach or nonobservance of any of the provisions of this agreement

16.1.4 in the performances of his duties or otherwise commits a) any act of gross misconduct or b) act of misconduct having already received a final warning

16.1.5 through his acts or omissions …… adversely prejudices….. the interests or reputation of the group

16.1.6 resigns as a director of the company without the consent of the board or is disqualified ……

16.1.7 defaults by way of a material and/ or persistent breach of the investment agreement ……

16.1.8 is convicted of any criminal offence ……

16.1.9 is made the subject of a bankruptcy order etc …..

16.1.10 becomes addicted to is habitually under the influence of alcohol etc …

16.1.11 fails to comply with any obligation set out in clause 5.8 (antibribery and corruption etc)'

37 Mr Jackson accepted that the Letter had been sent by without the knowledge or approval of the Board. Mr Jackson accepted that he was a non-executive director as was Mr Goulding. He did not dispute that the disciplinary and grievance procedure had not been modified. The Akari Board had not endowed him with any general authority to manage the Claimant in this way. He accepted that the claimant was accountable to the Board. He did not explain whether or how he had special authority as representative of Carlyle to act in this way save that Carlyle as the majority shareholder could always out vote the other directors.

In the circumstances I find that he had no authority to issue unilaterally such a letter to the CEO and that would be a matter for the Board or for a person assigned that responsibility under a modified procedure or by the Board. This I find it to be a breach of contract and a course of action likely to seriously damage or destroy the relationship of trust and confidence, which it did.

38 Mr Jackson told us that the Letter had been constructed over a long period from November 2018 to January 2019 by him in conjunction with Mr Goulding and the legal advisers of Carlyle. The emails relating to the construction of the Letter have been disclosed in a highly redacted form relying on legal privilege which the respondent is entitled to do.

Mr Jackson was not unfamiliar with the process of 'exiting' people from the business. I accept the proposition put by the claimant that it would be unusual to involve lawyers in a straightforward target setting process even if the targets were to be applied to the CEO.

When Mr Lightowlers saw the letter, he formed the view that this was either the first shot fired by the Carlyle directors to get rid of the claimant or a very crass attempt, directed at the team, to improve results. I find this is a reasonable interpretation of this letter by an employee and as such a course of action likely to undermine the relationship of trust and confidence between the Claimant and his employers, which it did.

39 Mr Jackson told me that the purpose of the Letter was to improve communication between him and the claimant because he was concerned that the claimant was not communicating openly and frankly with Mr Jackson or providing him with the information he was requesting in a straightforward manner. The Letter expressly refers to improving performance as its purpose.

Mr Jackson accepted that there was nothing in the Letter which addressed any issue relating to a breakdown in communication, nor did it contain any proposals which might improve communications between them if that was a problem. In his statement Mr Jackson had given only one example of a communication problem which occurred some months before and related to whether the sale of a particular Care Home had been placed with Agents. I asked him if he had any other examples and he struggled to produce another which related to an idea to introduce retention bonuses for Home managers which the Claimant rejected. There is no evidence in the documents of any criticism being levelled against the claimant or concerns put to him relating to his failure to communicate appropriately with Mr Jackson during the course of the claimant's service.

Mr Jackson in his statement at paragraphs 39 and 40 does not give communication as the reason for the Letter.

I do not accept the Letter was sent because of communication issues.

40 The letter states it is being sent because *'in particular its financial position and recent bank covenant breaches' and 'the subsequent underwrite case at the time of the 2017 …. Project Dragon, the 2017 bank refinancing case (which resulted in breach of banking covenants)'.* There had been two occasions when the Bank Covenants might have been breached.

The first breach related to a technical drafting issue within the covenant linked to cash flow which was agreed by Mr Jackson, not to have been any fault of the Claimant and which was resolved with the Bank. It is completely understandable that the Claimant took exception to this reference in the Letter.

The second potential covenant breach was identified in advance of the breach and in 2018 a presentation was made to the bank which agreed to the covenant being adjusted and therefore no breach occurred. It is completely understandable that the Claimant took exception to this reference in the Letter particularly as Mr Jackson had given the reassurances at a dinner in March 2018 which in his words were designed to 'clear the slate' and 'start afresh'.

In the circumstances I do not find that the letter was sent because *'in particular its financial position and recent bank covenant breaches' and 'the subsequent underwrite case at the time of the 2017 …. Project Dragon, the 2017 bank refinancing case (which resulted in breach of banking covenants)'*.

Alternatively, if it was sent for that reason then it was unreasonable to do so in the circumstances and by wrongly suggesting that the Claimant was blameworthy when he was plainly not responsible for any breach of covenant (which would be a very serious matter for the reputation of a CEO) likely to contribute to the claimant's loss of trust and confidence and did so.

41 The claimant asserts that the targets set are unachievable and have never been achieved by anyone in the history of the respondent company including the period after he left, save that in one or two months the agency hours fell below 2250. Mr Nuttman took us meticulously through the figures and I accept the general proposition that save for one or two months where the agency hours fell below the target cap, the targets in the Letter have never been achieved. In respect of the Agency hours cap I find it likely that in order to run the Homes safely the limit on the number of weekly agency hours would have to be exceeded from time to time.

42 Mr Jackson does not accept that the targets were unachievable or set to cause the claimant to fail. He said in terms that they were set as targets designed to stretch the chief executive and drive the performance of the whole company. A Budget for 2018/19 had only just been set in October when figures were agreed by the Board on the advice of the Senior Management Team and I infer rolled out across the business. The targets in the Letter were higher than the October 2018 budget figures and were set without discussion with the Claimant or reference to anyone with any expertise.

43 Mr Jackson asserts that they were not significantly above the October budget figures to put them into the realm of unachievable as opposed to stretching. The May figures for occupancy reached 88%. I find that they were not merely stretching targets but, even if not completely unachievable, were set at a rate at which failure was more likely to happen than achievement.

44 Nevertheless, there is considerable force in the claimant's criticism of the targets which were unilaterally imposed by the Carlyle directors without consulting him or the senior management team part way through a Budget year when other figures had been agreed and management plans put in place. Such a unilateral approach is contrary to good industrial practice. Further that in the context of the relationship of a CEO with his Board directors such conduct is very likely to result in the breakdown of that relationship unless it was handled with some care and unless the targets were arrived at consensually or at least after having taken into account the CEOs concerns and the Senior Team's advice. In this case it was crass and likely to damage or destroy trust and confidence which it did.

45 I also find that the letter was in effect a final written warning because of its reference to paragraph 16.1 of the contract of employment. To impose such a warning without any prior discussion, disciplinary hearing or opportunity to improve is contrary to good industrial relations practice and contrary to the ACAS guidance on performance management and the Acas Code on warnings.

46 The respondent has argued that there was no attempt intention to put a cap on the number of agency hours per week and it was merely a target. The claimant says that he interpreted it as a cap. Mr Lightowlers and Ms Harkin also gave evidence to the effect that on an ordinary reading the words '*not exceeding 2250 hours of agency staffing per week'* they understood it imposed a cap.

47 I find that the claimant's criticisms of the agency staffing cap to be well founded and not a measure that could be applied without the risk of jeopardising the safety of the residents and it would not have been supported by Ms Harkin had she been consulted. Ms Harkin was responsible for quality and safety within the establishments. In the circumstances imposing on the claimant an unreasonable instruction by way of this cap is a factor likely to contribute to the loss of trust and confidence and it did.

48 I find the claimant's criticisms of the target 'Akari achieving LTM EBITDA (last 12 months EBITDA) in excess of £5750' to be well founded as it is a backward - looking measure based on past results in respect of which the claimant could not introduce improvements measures.'

49 In the circumstances I find that the claimant was entitled to treat the Letter as a breach of the implied fundamental term of trust and confidence. The claimant did not do so immediately but took the Letter to the Board meeting on 23 January 2019. By so doing he acted promptly enough and did not delay his resignation or affirm his contract.

50 At the end of the Board meeting on 23 January 2019 under AOB (any other business) the claimant addressed the Board members about the Letter, they

confirmed no knowledge of it and the Claimant that Mr Jackson rescind the letter and remove the targets. Mr Jackson refused to do so and the claimant presented his signed letter of resignation at a side meeting which followed.

Appointment of Mr Tolhurst

51 The claimant had asked Mr Jackson to define the scope and purpose of MR TOLHURST's appointment. Mr Jackson failed to do this. To insist on MR TOLHURSTs appointment notwithstanding the objections of the CEO in situ and without defining with some precision the purpose of the appointment was bound to impact adversely on their relationship. Mr Jackson accepted that he relied on MR TOLHURST to tell him what was going on in the business when he felt that the claimant was being less open. Mr Jackson recognised but did not address the risk that the claimant would see MR TOLHURST as a spy in the camp and feel insecure as a consequence. Such a course of action is likely to damage trust and confidence which it did.

52 In his statement Mr Jackson volunteers in terms that it was his belief that the claimant began to feel insecure when MR TOLHURST was introduced to the business as a consultant. At the hearing Mr Jackson accepted that resignation was one likely outcome to such a letter, if sent to a person already insecure (framed as the Letter was framed and containing as it did a reference to the summary dismissal clause in the contract). I find that Mr Jackson was conscious of that as a possibility but careless of it as an outcome and such a disposition is consistent with a plan to manage the claimant out of the business one way or another.

Appointment of Peter Tolhurst – Unlawful Payments?

53 Mr Jackson insisted on the appointment of MR TOLHURST as a consultant to Akari. The claimant was reluctant to do so. Although the claimant initially sought to defer MR TOLHURST's engagement he reluctantly agreed to his appointment and the claimant signed the contract with MR TOLHURST on behalf of Akari.

MR TOLHURST was a friend and former colleague of Mr Jackson. MR TOLHURST attended the Board meetings and I infer that his engagement must have been known to all the directors on Board and condoned. In any event the structure of the Board and the voting power of Mr Goulding and Mr Jackson was such that they could have insisted on the appointment.

MR TOLHURST charged out at over £2000 a day. However, I have been told by Mr Jackson which I accept that MR TOLHURST's total charges had no impact on the value of the business. I also accept Mr Jackson's evidence that MR TOLHURST had experience within the banking sector for turning around companies and was a resource for Akari and provided to Mr Jackson a second opinion on the ways in which to get Akari ready for sale. While I accept that the claimant was of the view that Mr Tolhurst brought no additional value to the business, I do not accept that the Akari Board obtained no value from him.

It would not be unusual for consultants to be brought into a company to assist the existing management team in a change management or performance

improvement project. Indeed, in his letter of resignation the claimant accepts the Company's right to do so.

The claimant appears to have made no formal complaint about the Tolhurst contract and did not bring any concerns to the Board before 23 January 2019.

54 The claimant now contends that because Mr Jackson was a friend of Mr Tolhurst it was incumbent upon Mr Jackson to inform the Akari Board to prevent a conflict of interest arising because of nepotism. I can find no evidence that the claimant made any kind of disclosure to the Board or anyone else to that effect which would amount to a protected disclosure. That may well have been the claimant's view but I can find no evidence that he took it any further and I conclude there is no disclosure to that effect and none is pleaded.

55 The claimant also contends that the payments made by Akari to Mr Tolhurst under the contract were unlawful because they diverted cash from Akari and affected the value of the investment funds members of the public and pension funds placed with Carlyle for management. I accept the evidence of Mr Jackson that relatively small payments to Mr Tolhurst would have no impact on the value of such investments.

56 The claimant's own evidence, was that Akari did not get any value out of Mr Tolhurst and if any entity did obtain value from Mr Tolhurst services it was Carlyle. If the situation was as the Claimant perceived it, then I cannot understand how that can be a breach of any legal obligation to the Carlyle investors, they appear to be benefitting. In respect of any alleged breach to the Carlyle investors including pension funds, on the claimant's own evidence, I find that such an assertion was not made on reasonable grounds and I doubt was genuinely held by the Claimant at the time.

The shareholders of Akari are Carlyle (90%) and the Akari management team including the claimant. The claimant has not shown on the balance of probability that there is any breach of a legal duty to the Akari shareholders. While I accept that the claimant was of the view that Mr Tolhurst brought no additional value to the business, I do not accept that the Akari Board obtained no value from him. It may well be that the claimant was strongly of the view that he did not need the help of Mr Tolhurst in running the business but that was not the view of the major shareholder or the Akari Board who must have condoned his appointment, given Mr Tolhurst's attendance at and involvement with the Board.

The Akari senior management team could have been in no doubt that the major shareholder was looking to turn the business around for the purposes of resale and the Senior Management Team were joined in a common purpose to that effect. In the circumstances it is too crude to equate Mr Tolhurst's rates to the number of rooms that might be decorated or the number of ordinary staff hours and assert that the payments to him are wrongfully taking money out of the business. I find that the engagement of the consultant at the expense of Akari not to be an unusual or unreasonable expense in the circumstances. I find that the claimant's primary concern was having Mr Tolhurst imposed on himself and the cost of Mr Tolhurst was a secondary matter.

However, I do not conclude that the claimant was making a cynical attempt to bolster up his claim in bad faith when he submitted his tribunal application but at that point, he believed with the benefit of hindsight that the facts as he viewed them might fit into the requirements of automatic dismissal by reason of having made a protected disclosure under section 43 and section 103A.

57 I find that on or about 5 August 2018 the claimant by email asked Mr Lightowlers to investigate the limits applicable to the management fee charged by Carlyle to Akari and I find it probable that he did so as a fishing expedition in the hope that an additional financial argument could be put to the Board and/or Mr Jackson to justify discontinuing with Mr Tolhurst. However, at that time (August 2018) the claimant was exploring the situation and there is no evidence that Mr Lightowlers responded with any useful 'ammunition' to the effect that this was an unlawful payment. The claimant's representative in his submission put forward the proposition that there must have been a response from Mr Lightowlers and that this document is one that the respondents have failed to provide in the disclosure process. I do not accept that proposition given how closely they worked together and especially if Mr Lightowlers had not come up with any advice. In respect of this particular document (an email reply from Mr Lightowlers) I cannot find any reference in the claimant's statement or oral evidence to the effect that he asserted that Mr Lightowlers had sent a reply by email or other means. I note the claimant's evidence that at about this time he and Mr Lightowlers had a discussion about Mr Tolhurst and neither wanted to retain him. In the circumstances I find it unlikely that there was an email from Mr Lightowlers on the legality of the payments to Mr Tolhurst from Akari funds rather than out of Carlyle's management fee or that Mr Lightowlers had advised the claimant that the payments to Mr Tolhurst were unlawful. The claimant has not claimed to have received any such advice.

58 There is no record of the conversation between the claimant and Mr Jackson in or about August 2018 relied on by the claimant. The Claimant has produced a personal diary note which he says he made in preparation for a meeting with Mr Jackson. It is clear that the claimant did not want Mr Tolhurst in the business. The claimant felt that he was better equipped to turn the business around than Mr Tolhurst, having had substantial experience of the care sector. The claimant was mindful to tread carefully because he knew Mr Tolhurst was a friend of Mr Jackson. The introduction of Mr Tolhurst (who had the ear of Mr Jackson) into the business clearly made the claimant uncomfortable. The diary note was a document made in preparation of a discussion with Mr Jackson and the is not purported to be a record of what was actually said. In any event there is no reference in the diary note to any complaint that payments to Mr Tolhurst are unlawful.

59 Although Mr Jackson cannot recall the conversation relied on by the claimant, I find that there probably was some kind of conversation around that time. However, given that the claimant was aware of the relationship between Mr Jackson and Mr Tolhurst, aware that Mr Jackson represented the major shareholder, and not wishing to act in a way that might be 'career limiting' (to use his words) I do not believe that the claimant went farther than to suggest that Mr

Tolhurst was of little value to the business at that time, having none of the expertise in the care sector which the claimant and his management team possessed. I am strengthened in that finding because of the circumspect wording adopted by the claimant in his email of 19 January 2019, (sent after the Letter when the claimant might be expected to have little to lose).

60 As the claimant failed to make an express allegation in the email of 19 January 2019 that the payments to Mr Tolhurst were unlawful then I find it most unlikely that he would have said this in plain terms in any discussion with Mr Jackson in August 2018 or at any time before 13 January 2019 (the date of the Letter) and thus I find it unlikely that a disclosure has been made in respect of the payments to Mr Tolhurst which satisfies the definition of a protected disclosure within the meaning of section 43 ERA 1996 in August.

61 I am also strengthened in that finding by the wording of the claimant's resignation letter dated 23 January 2019 in which he writes '*further you have imposed a number of additional costs onto us, such as Peter Tolhurst's costs … Which will affect the figures and other costs without at least consulting with management of the likely spend. It doesn't help our cash flow or monthly EBITDA tracking when we are often only informed of such spend when we receive the invoice. I objected to the appointment of Peter at the time, he had no experience of our sector, multisite operations or managing an hourly paid workforce, and is actually a time drain but I recognise Carlyle's right to do so. I subsequently found out that he was your family friend which was not helpful. Again, I put up with its but the fact remains he is a cost and provides no benefit to Akari*'. I find it most unlikely that, if in his letter of resignation, the claimant says only the above (which falls short of a section 43 disclosure), that in any discussion with Mr Jackson before 13 January 2019 (in August or in December or at all) a disclosure was made in relation to the payments to Mr Tolhurst's which satisfies the definition of a protected disclosure within the meaning of section 43 ERA 1996

62 The Claimant claims to have raised his concerns with Ian Jackson on several occasions and he says he eventually e-mailed Ian Jackson around November/December time to put his belief that it was not appropriate for Mr Tolhurst's costs to be charged to Akari given their duty to maximise the Akari performance return for investors. This e-mail has not been produced on disclosure by the Respondent which the claimant alleges has been conducted by the respondent in bad faith. The claimant further claims that this email triggered the Letter.

63 The claimant has consistently alleged that this email existed and there have been a number of difficulties relating to disclosure necessitating several tribunal hearings and orders requiring the respondent to take further steps. Despite that the email of November / December 2018 has not been produced.

For the reasons set out above I find on the balance of probability that, even if an email had been sent by the claimant to Mr Jackson in November or December 2018 complaining about the employment of and payments to Mr Tolhurst by Akari, it is unlikely to have been written in stronger terms than the claimant's

resignation letter. That being the case it falls short of being a protected disclosure within the definition of section 43.

64 Nor can I find any evidence to link the Letter and Mr Jackson's reasons for sending it, to anything said or written by the Claimant about Mr Tolhurst.

65 The claimant submitted his resignation letter on 23 January 2019 in response to Mr Jackson's refusal to retract the Letter. There is no evidence to link Mr Jackson's decision not to retract the Letter to the Claimant's position on Mr Tolhurst. In his statement when describing the Board meeting on 23 January 2019 and the side meeting with Mr Jackson the claimant does not claim that he or Mr Jackson made reference to Mr Tolhurst and I find he was not mentioned at all and from that context I infer that Mr Tolhurst's position was not within the contemplation of either the claimant nor Mr Jackson on 23 January 2019 .

Agency Hours

66 The claimant told the tribunal that the target in the Letter relating to agency hours amounted to a cap and would have the effect of putting residents at risk through understaffing and gave as an example night-time evacuation in the event of fire. The senior management team now in place ie Mr Lightowlers and Ms Harkin were also of the view that on an ordinary reading of the Letter that because the words 'not exceeding' were used this was a cap rather than a target and that such a cap if strictly applied could amount to a health and safety risk to residents.

I accept that unless minimum staffing levels can be ensured the safety of residents is likely to be jeopardised. Agency staff are brought in by the home managers (in accordance with the policy implemented by the claimant which required scrutiny and authority of Ms Harkin and another) to make up any shortfall in the minimum staffing requirement. Although the business can take steps to mitigate the dependence on agency working and the claimant has implemented a number of initiatives to improve the agency figures, the business cannot control the circumstances in which they may have to call upon agency workers. They may be circumstances for example where a virus has quarantined a number of staff, there may be circumstances where individual staff members are unavoidably sick or have childcare problems, there may be circumstances where complaints have been made and staff have had to be suspended. In these circumstances (which is not an exhaustive list) the staff complement may fall below the minimum required and agency workers will be called in.

67 In the period 14 to 23 January 2019 after the claimant received the Letter and shared its contents with Mr Lightowlers and Ms Harkin and Mr Summers there were a considerable number of conversations about it. Ms Harkin and Mr Lightowlers have worked with the claimant before and had been brought in by him to form the senior management team. They were loyal to the claimant, concerned about what this letter meant for him and for themselves and concerned about the practicability of meeting the so-called targets and did not want to lose the Claimant.

68 In respect of what was said and done as between the team during the course of that week I prefer the evidence of the claimant to that of Ms Harkin in so far as it

conflicts. Before giving her evidence, Ms Harkin corrected her statement in a very significant way. Right up to the time of giving evidence her statement said in terms that the claimant had not expressed any view to her that the so-called target in the Letter relating to agency hours amounted to a cap or exposed residents to any health and safety risk. At the hearing she completely changed her evidence to the effect the claimant has in fact said both things to her and she agreed with them. In that respect her evidence aligned with the claimant's and Mr Lightowlers and Mr Summers.

69 The Letter clearly states, *'I would also note that in achieving improvements in the areas identified it should not be at the expense of or any deterioration in quality or CQC ratings.'* I find that on an ordinary reading of the Letter that although the words 'not exceeding' were perceived as a cap by the senior management team I also find that it was mitigated by the above wording to the effect that in the event of a conflict between the Agency hours and quality the latter would prevail. It is a matter of regret that Mr Jackson did not introduce the targets more carefully underlining this assurance but at the time the Claimant and the rest of the Team had genuine concerns that safety could be compromised by the imposition of a cap.

70 CQC ratings are very important to a business such as a care home and will have a direct impact on occupancy and income. It is clear from the evidence of both the claimant and Mr Jackson that Karen Harkin (who was in charge of improving quality) was effective, well-respected and ethical and unlikely to sacrifice quality or safety. It was her evidence that she had no intention of applying any cap if it compromised safety.

I find that this was a genuine and well-founded concern of the claimant and team. Had the targets been set through a reasonable process in consultation with the experts within the business such as Ms Harkin, no reasonable employer would have expressed the agency hours targets in this way.

71 The management team discussed the Letter amongst themselves, their view that the agency hours target posed a health and safety risk to residents if applied as a cap was not relayed to Mr Jackson before 23 January 2019. On the day of the Board meeting it was agreed between them that, Mr Lightowlers and Ms Harkin would see Mr Jackson before the Board meeting began, to try to persuade him to withdraw the Letter. Mr Jackson refused to give a commitment to withdraw the Letter but said he would discuss the matter with the claimant personally. It is unlikely that the agency hours cap was put to Mr Jackson as a Health and Safety matter in that premeeting which lasted only about 15 minutes.

72 The Board meeting then followed, the minutes of which are in the bundle as prepared by Mr Lightowlers. The minutes are not agreed by the Claimant and it became evident that there were some omissions. The Board meeting divided into sections the final section being AOB (any other business). In the first half of the meeting the claimant says that he made a point of deliberately mentioning the risk to residents in not having enough staffing especially at night and the dangers of placing a cap on agency use in any week. The claimant says that Mr Goulding responded by saying we should not be doing anything to put people at risk. Mr

Goulding cannot specifically recall making this remark but does not dispute it. Ms Harkin confirmed that agency hours were a subject of discussion at every Board meeting. The claimant in making a reference to staffing and safety does not claim to have said it in the first part of the meeting expressly by reference to the Letter. Given the claimant's concerns and the evidence that agency hours are always a matter of discussion I find that the claimant probably made these comments about minimum safety levels, whether or not that they are fully captured in the minute. At that stage I find he probably made general remarks of principal (laying the foundation to the discussion to follow in AOB) but did not refer to the letter or the cap within it.

73 At the end of the meeting under the heading AOB the claimant requested that Mr Tolhurst and Ms Harkin, who were not directors, be asked to leave and they did so. The claimant then presented the Letter and established that it had not been approved by the Board and that only the Carlyle directors has had sight of it. The claimant relayed to the Board his shock and disappointment to receive such a letter, the absence of consultation, improving business trends, that they were on target with the Budget agreed by the Board. The claimant also says that he pointed out that the cap on weekly Agency use was dangerous. The claimant asked Mr Jackson if he was willing to retract the letter but Mr Jackson declined to do so and insisted the targets were reasonable and as the lead investor, he was entitled to set targets at any time.

74 The minutes of the Board meeting were not agreed by the claimant and were prepared by Mr Lightowlers. A disputed document was produced on the third day of hearing by Mr Lightowlers which he says comprised a set of notes given to him by the claimant after the Board meeting as an aide memoire for him to compile the minutes. The claimant accepts that he had given Mr Lightowlers a set of notes for this purpose but the notes produced were not the full notes he had prepared. Despite the fact that these notes were not produced until the third day of hearing after Mr Lightowlers made an exhaustive search of the paperwork in his office, given the uncertainties of the claimant as to when, how and on what machine he produced them, I find it more probable than not that these were the notes he passed to Mr Lightowlers and the claimant simply misremembers having had the notes sprung on him after 10 months.

Whether or not it is recorded in the minutes I find it likely that the claimant did raise the cap on agency hours as a matter of health and safety for residents during the AOB section of the Board meeting given the concerns of the whole team and the conversations they had had during the course of the week.

75 At the suggestion of Mr Lightowlers, Mr Jackson and the claimant had a side meeting on their own. The claimant told Mr Lightowlers that although he would speak to Mr Jackson 'unless something changed my resignation stood'. The claimant had therefore already made up his mind to resign in response to the Letter.

76 The claimant in his statement describes the content of the conversation. The focus of the discussion was all about performance with Mr Jackson expressing disappointment that the company was not in a better place some three years on from acquisition. The claimant did his best to explain the progress he felt the

management team were making and the unfairness of the criticisms and the targets. The claimant pointed out that the target in relation to agency hours amounted to a cap and that minimum staffing levels had to be met if necessary, through agency working and if they were not met there would be a foreseeable danger to residents. The claimant, on his own evidence, does not appear to have made any allegation about the payments to Mr Tolhurst. The two men were unable to build any bridges and following Mr Jackson's repeated refusal to retract the Letter the claimant signed and presented his letter of resignation. The claimant describes the final exchange between them as arising from his demand that the agency hours cap be removed.

77 The impression that the claimant gives of Mr Jackson in the AOB section of the Board meeting and in the side meeting which followed is that there were no circumstances in which Mr Jackson intended to back down in front of the rest of the Board and the claimant and retract the Letter. He set about underlining to the claimant that as the representative of the majority shareholder he could do pretty well what he liked, including setting targets for the claimant as chief executive. The claimant had wider concerns about his treatment than the agency hours cap which was but one aspect, as reflected in his own account of what he said at the Board meeting and in the side meeting that followed. In addition, from the claimant's own account I do not discern that Mr Jackson focused in any way on the agency hours cap, Mr Jackson's emphasis was on overall performance. I find that it is unrealistic to isolate the claimant's concerns about the cap on agency hours from his other concerns. I do not find that Mr Jackson was motivated in his decision not to revoke the letter because the claimant had raised the agency hours. Had the claimant never mentioned that he believed the cap on agency hours to be a health and safety risk I find in all probability that Mr Jackson would not have retracted the letter in any event. In the circumstances I do not find that the principal reason for refusing to retract the letter was because the claimant had raised the cap on agency hours as a health and safety concern but was due to a general standoff.

Conclusions

Dismissal

78 I find the claimant has been constructively dismissal. His letter of resignation is dated 23rd of January 2019 and was delivered to Mr Jackson during a side meeting to the Board held on that day. The resignation letter was deleivered in response to the Letter from Mr Jackson dated 13 January 2019 which amongst other things set the claimant personal targets and issued a final warning by referring to clause 16.1 of the claimant's contract of employment which provided for summary dismissal. The letter of resignation was submitted at the end of the side meeting on 23 January 2019 after Mr Jackson declined to retract his letter or the targets.

79 The factors which culminated in a fundamental breach of the implied term of trust and confidence relied on by the Claimant may be summarised as follows

a) Mr Jackson had no authority or power to issue the letter of 13 January 2019 (the Letter) and therefore it was issued in breach of contract

b) The acts likely or calculated to seriously damage or destroy the fundamental term of mutual trust and confidence which culminated in Mr Jackson's refusal to retract the letter or the targets
and included
   i) the tone and content of the Letter and its threat of summary dismissal which was issued without notice, discussion or previous warning.
   ii) the setting of targets which were unreasonable and likely to set the claimant up for failure
   iii) the imposition of such targets without a reasonable process, the Board having only recently set an annual Budget, these targets were set above those set by the Board, without consultation with the Claimant or the Senior Management Team.
   iv) the imposition of a cap on Agency Use which posed an unacceptable potential health and safety risk to residents for which the Claimant would be ultimately responsible
   v) the imposition of Peter Tolhurst on the Claimant without defining the scope of his purpose in circumstances likely to undermine the Claimant's confidence and damage trust and confidence
   vi) Mr Jackson's refusal to retract the Letter

80 I find that the Claimant has shown that he has been constructively dismissed having resigned promptly in response to the Letter and Mr Jackson's stand at the side meeting.

Reason for Dismissal

81 Performance was the express reason for sending the Letter which reads as follows *'Having seen no significant improvement in performance over the last nine months I am concerned to set some specific targets that I would expect to be met these targets are primarily based around the key performance metrics we have discussed previously'.*

82 In the Letter Mr Jackson states that he *has 'seen no significant improvement in performance over the last nine months.* The key metrics in the business are agreed to be occupancy rates, agency costs, quality rating and EBITDA. Mr Jackson accepted that the claimant was adopting the right strategy to lead the company to improvement as set out in the claimant's email of 9 May 2018. In October 2018 a new budget was agreed by the Board which set 'softer targets' which met with the approval of the bank but in parallel the management team had adopted harder and more stretching targets to drive improvements. At the hearing Mr Nuttman took Mr Jackson through a number of accounts and statistics for the period following March 2018 to January 2019. Mr Jackson agreed that quality was on an upward trend as was occupancy, fee income was up, agency was improving and below national average. Because of capitalisation decisions the company had become cash rich and able to discharge debt. The banks had been satisfied with the company's progress. It is completely understandable and reasonable that the Claimant took exception to the assertion in the Letter that progress and therefore his performance was a matter of

concern to the Board, required rectifying and that failure to do so (by implication from the reference to paragraph 16.1) would lead to summary dismissal.

83 Until the Letter the claimant had had no personal targets but adopted as his own targets the budget set by the Board each October. In October 2018 a new budget was approved. The targets in the Letter are above those in the budget recently agreed. It is completely understandable and reasonable for the claimant to regard this as unfair and designed to be impossible to reach.

84 In evidence Mr Jackson said that the letter was issued because of communication difficulties. For the reasons set out above in the findings section I do not accept that communication was the reason for sending the Letter or the reason for the dismissal.

85 For the reasons set out below I do not find the real reason for the dismissal to be because the claimant had raised a protected public interest disclosure. I find that the Letter was sent and Mr Jackson refused to retract it because of Carlyle's impatience to improve the performance of the business and his intention to be more directive of the claimant. Notwithstanding that reason I find the dismissal unfair in all the circumstances and that the Letter and the manner in which it was constructed and issued amounted to a breach of the fundamental term of trust and confidence.

Was the Reason for Dismissal because the Claimant had made a protected disclosure

Disclosures

86 The claimant asserts that the reason for his dismissal is that he had made a public interest disclosure. The public interest disclosures relied on are

a) Informing Ian Jackson verbally in August 2019 that Mr Tolhurst brought no value to the business of Akari, that it was wrong and in breach of duty to shareholders and investors to pay for him and if Carlyle required his services then he should be paid out of the Carlyle management fee.
b) Informing Ian Jackson by email in December 2019 that Mr Tolhurst brought no value to the business of Akari, that it was wrong and in breach of duty to shareholders and investors to pay for him and if Carlyle required MR TOLHURST's services then he should be paid out of the Carlyle management fee.
c) Informing the following people on the dates set out below in terms that the Agency hours target set by Mr Jackson in the Letter amounted to a cap on agency use and as such posed a danger to residents

i) Oliver Lightowlers, Finance Director, on 14th January 2019, 16th January 2019, 18th January 2019, 22nd January 2019
ii) Karen Harkin, COO on: 14th January 2019 and 22 January 2019
iii) Les Summers, Head of Procurement on 14th January 2019 and 16 January 2019
iv) The Board of the Respondent, namely Ian Jackson, Merrill Goulding, Dr Clive Bowman and Oliver Lightowlers on 23 January 2019.

Payments to Mr Tolhurst

87 The claimant contends that he informed Ian Jackson verbally in August 2019 that Mr Tolhurst brought no value to the business of Akari, that it was wrong and in breach of duty to shareholders and investors to pay for him and if Carlyle required his services then he should be paid out of the Carlyle management fee.
For the reasons set out in my Findings above although I accept that a conversation probably did take place between him and Mr Jackson in August but it fell short of being a protected disclosure.
I do not believe that the claimant went farther than to suggest that Mr Tolhurst was of little value to the business. I am strengthened in that finding because of the circumspect wording adopted by the claimant in his email of 19 January 2019, (sent after the Letter when the claimant might be expected to have little to lose). That email merely complains about Mr Tolhurst's lack of expertise and questions his value for money.

As the claimant failed to make an express allegation in the email of 19 January 2019 that the payments to Mr Tolhurst were unlawful then I find it most unlikely that he would have said this in plain terms in any discussion with Mr Jackson in August 2018 or at any time before 13 January 2019 (the date of the Letter) and thus I find it unlikely that a disclosure has been made in respect of the payments to Mr Tolhurst which satisfies the definition of a protected disclosure within the meaning of section 43 ERA 1996 in August.

I am also strengthened in that finding by the wording of the claimant's resignation letter dated 23 January 2019 in which he writes '*further you have imposed a number of additional costs onto us, such as Peter Tolhurst's costs … which will affect the figures and other costs …..he is a cost and provides no benefit to Akari''*. I find it most unlikely that in any discussion with Mr Jackson before January 2019 (in August or in December or at all) that a disclosure has been made that the payments to Mr Tolhurst's are unlawful or which otherwise satisfies the definition of a protected disclosure within the meaning of section 43 ERA 1996 if he did not say so in his letter of resignation.

88 The claimant contends that in December he sent, by email to Mr Jackson, another complaint about Mr Tolhurst which amounted to a protected disclosure. This email has not been produced and among other documents, has been a subject of the disputed disclosure process between the parties.

In the letter of resignation, the Claimant's reference to Mr Tolhurst follows and appears part of the claimant's discussion of the EBITDA target. It falls under the heading ''Targets'. The resignation letter says *'Further, you have imposed a number of additional costs onto us such as MR TOLHURSTs costs…. Which will affect the figures and other costs without at least consulting with management of the likely spend. It doesn't help cash flow or monthly EBITDA figures when we are often only informed of such spend when we receive the invoice.'* Although that is clearly a complaint it falls short of a protected disclosure.

The letter goes on to say 'I *objected to the appointment of Peter at the time, he had no experience of our sector …. and is actually a time drain, but I recognised*

Carlyle's right to do so. Subsequently found out he was your family friend which was not helpful. Again, I put up with it but the fact remains he is a cost and provides no benefit to Akari'.

89 Given that these passages are from the claimant's resignation letter, when he had no constraints upon him, the tone and content of these passages fall short of a protected disclosure and the particular disclosure that he now relies on. They are merely a complaint that MR Tolhurst's cost is a factor which adversely impacts on the claimant's ability to control costs and that his enquiries take managers time out of the business.

I also note an email dated 19 January 2019 in which the claimant states 'I *am aware of Peter is your friend which is why I find this matter extremely difficult to raise….'*

Had the claimant in the December email, made criticisms about the engagement of MR Tolhurst which amounted to a protected disclosure, then I can see no reason why he should make the comment set out above. If the claimant had made a protected disclosure in December or at any other time previously, it is most unlikely that he would have remarked in January that he found this matter extremely difficult to raise.

90 The respondents do not accept that such an email was sent in December 2018 in any event. The search of their systems did not produce a copy. The search of their systems has been the subject of a number of references to the tribunal and complaints of defective disclosure as set out below. However, my conclusions are that however defective their search may have been and I do not draw an adverse inference as to the personal credibility of Mr Jackson because of it. Although I have some concerns about the Respondent's conduct of the Disclosure process.

If such an email was sent in December then taking into account the claimant's previous comments about treading carefully and not taking steps which might be 'career limiting' and the tone and content of the passages referred to above in the email of 19 January 2019, the letter of resignation, together with paragraph 28 of the grounds of claim itself which says merely ' the claimant did not believe he added any value to Akari and it was wrong to spend resources on him given duties as directors to shareholders including Carlyle' I find it unlikely that any email sent in November or December 2018 would be written in terms which would satisfy section 43.

91 I have been told by Mr Jackson (and I accept) that MR TOLHURST's total charges have no impact on the value of the business. This was a business which Carlyle had acquired for £42 million. The total fees paid to MR TOLHURST were £62,000. Mr Jackson said that this would not impact on the value of the business and that no purchaser would be likely to be put off from buying because of this cost which was finite and not ongoing. In the scheme of things this was 'small beer' in cash terms and not an unusual expenditure in the circumstances nor a device for diverting funds from Akari in bad faith. This was not something which had an adverse impact on the investors in the Carlyle fund who according to the

Claimant stood to benefit if the fees were paid from Akari funds rather than from the Carlyle management fee.

92 Although now, with the benefit of hindsight, the Claimant is asserting that he had concerns about the expenditure on Mr Tolhurst's fees as unlawful in respect of the Akari shareholders and the impact of such costs on members of the public and pension funds who were the ultimate investors in the Carlyle fund, I do not believe that was his sincere concern in December or January 2019 for the reasons set out above. I find that at that time the Claimant's principal concern was that he wanted to be left alone to run the business without the interference of Mr Tolhurst who he regarded as a waste of money.

93 In addition, if disclosure was made to protect the Akari shareholders then they comprised at the time only Carlyle (90%), the Claimant (5%) Mr Lightowler (2.5%) and 2.5% previously distributed to AH but now recovered. This is too narrow a group to be classed as being in the public interest as required by S 43.

94 In the circumstances the claimant has failed to show that he made a protected disclosure under section 43 of the ERA. The real reason for his dismissal was not because he had made a protected disclosure about Mr Tolhurst's fees none having been made. In the circumstances his claim of automatic unfair dismissal under S103A for having raised this particular disclosure fails. In addition, I make no finding of any link between the complaints raised by the claimant and the decision to issue the Letter or to Mr Jackson's decision to refuse to retract it.

Disclosures re Agency Cap / Risk to Residents

95 The other protected disclosure relied on by the claimant was that he informed Mr Jackson, the Board and the senior management team that the Agency hours target set by Mr Jackson in the Letter amounted to a cap on agency use and as such posed a danger to residents. The targets relating to agency was expressed in the letters follows 'Akari not exceeding 2250 hours of agency staffing per week.

96 Although it was agreed by all parties that agency use was a key metric which the company had to take steps to reduce as a matter of priority, the claimant objected to the targets being expressed as hours of agency staffing per week. The claimant took the view that the words 'not exceeding' amounted to an absolute cap on the hours Akari was permitted to call on. The claimant argues that an absolute cap would put residents at risk.

97 The claimant explained that agency use is influenced by staff sickness, suspensions (not uncommon in the care industry when concerns have been raised) training, vacancies and holiday periods. There are some matters over which management has some control and the management team had been working on more robust policies for effectively managing short-term sickness absence and holiday arrangements. However unexpected long-term sickness and suspension or a sickness epidemic might well create problems for the home manager's rostering arrangements which would necessitate calling on agency workers. For safety reasons it is necessary to maintain a minimum level of staffing which is not simply a ratio of staff to residents applicable across the board but tailored where the layout of a home calls for idiosyncratic staffing

arrangements. Management may take steps to minimise Agency use but it cannot be avoided and quality and health and safety risk take priority.

98 I find that this was a genuine concern of the claimant, and was raised by him, to Oliver Lightowlers, Finance Director, to Karen Harkin, COO on 14th January 2019 and in the period leading up to the Board Meeting on 23 January 2019 who shared his views and in his resignation letter to the Board of the Respondent, on 23 January 2019. Although they met with Mr Jackson before the Board meeting in order to try to persuade him to retract the letter and talk to the claimant and the senior management team there is no evidence that they specifically put to Mr Jackson the claimant's concerns that this was a health and safety risk. The claimant concedes that before the Board meeting Mr Jackson may not have known this was being asserted by the claimant.

99 Although Mr Lightowlers and Ms Harkin and Mr Summers all knew the claimant's views on the health and safety issue, they had no influence over the issuing of the letter and they had taken steps to try to prevent the claimant's departure. There is no connection between any disclosure made by the Claimant to them and his dismissal.

100 At the Board meeting the claimant's own version of events is that under the heading of any other business he tabled the Letter and the directors Bowman and Lightowlers confirmed that they had not seen or approved the Letter before it was sent; he pointed out among other things that it included a weekly cap on agency use which was dangerous; he asked Mr Jackson to retract the letter but he refused to do so.

The Board minutes for the meeting of 23 January 2019 make no reference to the claimant having raised concerns about an agency cap and the risk to residents. Whether or not it is recorded in the minutes I find it likely that the claimant did raise the cap on agency hours as a matter of health and safety given the concerns of the whole team and the conversations they had had during the course of the week.

101 In the circumstances the claimant has shown that at the board meeting on 23 January 2019 he made a protected disclosure under section 43 to the effect that the agency hours cap posed a health and safety risk to residents and this was a well-founded view genuinely held and was clearly in the public interest and satisfies section 43.

Was the Disclosure re Health and Safety the Real Reason for Dismissal?

102 The claimant handed over his signed letter of resignation to Mr Jackson in the side meeting when Mr Jackson refused to retract the letter.

103 The impression that the claimant has given of Mr Jackson in the AOB section of the Board meeting and in the side meeting which followed is that there were no circumstances in which Mr Jackson intended to back down in front of the rest of the Board and the claimant and retract the Letter. He set about underlining to the claimant that as the representative of the majority shareholder he could do pretty well what he liked, including setting targets for the claimant as chief executive. The claimant had wider concerns about his treatment than the agency hours cap

which was but one aspect, as reflected in his own account of what he said at the Board meeting and in the side meeting that followed. In addition, from the claimant's own account I do not discern that Mr Jackson focused in any way on the agency hours cap, Mr Jackson's emphasis was on overall performance. I find that it is unrealistic to isolate the claimant's concerns about the cap on agency hours from his other concerns. I do not find that Mr Jackson was motivated in his decision not to retract the letter because the claimant had raised the agency hours in the Board Meeting as a health and safety issue for residents. Had the claimant never mentioned that he believed the cap on agency hours to be a health and safety risk I find in all probability that Mr Jackson would not have retracted the letter. In the circumstances I do not find that the principal reason for refusing to retract the letter was because the claimant had raised the cap on agency hours as a health and safety concern.

104 I find that the Letter was sent and Mr Jackson refused to retract it because of Carlyle's impatience to improve the performance of the business and his intention to be more directive of the claimant.

Summary of Conclusions

105 The claim for unfair dismissal contrary to section 98 succeeds

a) the claimant has established constructive dismissal in that he resigned promptly in response to a breach of the implied fundamental term of trust and confidence

b) the reason for the dismissal was the major shareholder's impatience to improve the performance of the respondent company

c) the dismissal was unfair and no reasonable employer would have acted in this way

106 The claim for automatic unfair dismissal contrary to section 103 A fails

a) the claimant has failed to show that he made a protected public interest disclosure relating to the appointment of Mr Tolhurst and payment of his fees

b) the claimant has shown that he has made a protected public interest disclosure to the Board of 23 January 2019 in respect of the unacceptable health and safety risk to residents of the care homes arising out of a cap on agency hours.

c) The claimant has failed to show that the Letter was issued because of that disclosure (the disclosure having been made after the Letter) or that Mr Jackson declined to retract the latter principally because of that disclosure, and thus he has failed to show that he was dismissed because of his public interest disclosure.

Contribution

107 I make no finding of contribution. During the course of the hearing respondent made a concession that it was not part of their case that sooner or later the claimant would be dismissed in any event. Although the claimant was the chief executive officer of the company and ultimately responsible for its success or failure, the criticisms levelled against him in the letter were ill founded in respect

of the bank covenants as explained above. The claimant and his senior management team were already operating to the targets set in October 2018 and I infer had rolled out those targets through the business. The company appeared to be on track with those operating targets set by the Board. The targets set out in the Letter were above those set by the Board and were ill considered, the experts in the senior management team having not been consulted about them.

Employment Judge O'Neill

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Date 30 January 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

03 February 2020