EMPLOYMENT TRIBUNALS

Claimant: Mr M Dowding

Respondent: The Character Group PLC

Heard at: London South **On: 1, 2, 3, 7, 8, 9, 10, 11 September & in chambers 14, 15 and 16 September 2020**

Before: Employment Judge Khalil sitting with members
Mr Shaw
Mr Clay

Appearances

For the claimant: Mr D O'Dempsey, Counsel
For the respondent: Mr J Laddie QC, Counsel

RESERVED JUDGMENT

Unanimous Decision:

The claim for Unfair Dismissal under S.103A Employments Rights Act 1996 is not well founded and is dismissed.

The claim for Unfair Dismissal under S.98 (2) / (4) of the Employment Rights act 1996 is not well founded and is dismissed.

The claim for detriment contrary to S.47B/48 Employment Rights Act 1996 is not well founded and is dismissed.

The particulars referred for determination pursuant to S.11/12 Employment Rights Act 1996 are set out below.

Reasons

Appearances, claims and documents

1. The claimant was represented by Mr O'Dempsey, Counsel and the respondent was represented by Mr Laddie, QC, Counsel.

2. The claimant brought claims for a breach of S.1 Employment Rights Act 1996 ('ERA'), automatic unfair dismissal under S.103A ERA, ordinary unfair dismissal under S. 98 (2) & (4) ERA and detriment for making a protected disclosure contrary to S.47B ERA.

3. The claimant also brought a breach of contract claim but that was not pursued before the Tribunal, the claimant expressly reserving the right to do so in another jurisdiction.

4. It was agreed that the hearing was a split trial to determine liability only.

5. The Tribunal had four main Hearing bundles and three supplementary bundles. With the agreement of the parties, the other bundles presented to the Tribunal were discarded, the documentation being duplicate or not relevant.

6. The Tribunal heard from the claimant and from 6 witnesses for the respondent: Mr K Shah (current joint Managing Director, Group Finance Director and Company Secretary), Mr J Kissane (Managing Director of Character Options), Mr R King, Mr Noor Kapadia, Ms Amrit Nahal and Mr David Harris. The claimant, Mr Shah, Mr Kissane and Mr Kapadia gave evidence in person, the other witnesses gave evidence via CVP. There were multiple rebuttal statements from the claimant as well as a supplementary statement. The respondents had single statements with the exception of Mr Shah who had an additional (rebuttal) statement. Mr Laddie for the respondent had also produced an opening note.

7. The Hearing proceeded over 8 days comprising of reading, evidence and submissions. The Tribunal met in chambers over 3 days.

Agreed Issues

Claims under S.1 & S.11 of the Employment Rights Act 1996

8. What contractual terms should have been included in the Claimant's written statement of particulars, as required by S.1 ERA 1996, with regards to the following?

9. The agreed rate of remuneration, including the salary, bonus and benefits in kind that the Claimant was entitled to.

10. The agreed terms and conditions relating to entitlements to holidays. Failing determination of this, the Tribunal was invited to make a ruling based on common law principles and statutory obligations upon an employer.

11. The agreed terms of notice which the Claimant was obliged to give and entitled to receive to terminate his contract of employment. Failing determination of this, the Tribunal was invited to make a ruling based on common law principles and statutory obligations upon an employer.

12. Particulars of pensions and pension schemes.

Whistle-blowing claims

13. Were each, individually or cumulatively, of the following disclosures made by the Claimant in June/July 2017 protected disclosures under the S.43 ERA 1996.

    - The oral discussion between the Claimant and Mr Shah of the Respondent in late June 2017 during which the Claimant informed Mr Shah that the Respondent was in breach of S.228 of the Companies Act 2006.

    - The email sent by the Claimant to Mr Shah on 26 June 2017 in which the Claimant informed Mr Shah that the Respondent was in breach of S.228 of the Companies Act 2006.

    - The email sent by the Claimant to each of the directors of the Respondent on 3 July 2017 in which the Claimant informed each of the directors that the Respondent was in breach of S.228 of the Companies Act 2006.

14. In particular, the Respondent having admitted that (i) there was a disclosure of information; (ii) which disclosed one of the six types of relevant failures; (iii) and that the Claimant had a reasonable belief that the information showed one of the relevant failures, did the Claimant reasonably believe that the disclosure(s) were in the public interest?

15. If the disclosures listed above were protected disclosure(s), did the Claimant suffer a detriment up to the point of dismissal and/or a detriment after dismissal by virtue of one or more of the following examples taking place?

    - Mr Shah excluding the Claimant from the Respondent's business by i) failing to disclose that on behalf of the Respondent he had entered into a price sensitive distribution deal which committed the Respondent to high risk and highly irregular arrangements ("the Pokemon Deal") and ii) by virtue of this, preventing the Claimant from disclosing the Pokemon Deal in a timely basis to the public and the London Stock Exchange as legally required by the AIM Rules and in accordance with his formal responsibilities as Group Finance Director.

    - Mr Shah undermining the Claimant in front of employees and/or suppliers of the Respondent.

    - Mr Shah falsely accusing the Claimant on 24 August 2017 of attacking him with a pen.

    - Mr Shah subjecting the Claimant to closer monitoring, for example Mr Shah demanded emails relating to day-to-day matters which came under the Claimant's job role and had hitherto been dealt with exclusively by the Claimant and carried out a "fishing exercise" designed with the objective of discrediting the Claimant.

    - Mr Shah ostracising the Claimant from the Respondent's business by excluding him from an important meeting with potential investors in August 2017 and attempting to exclude him from a Board meeting in September/October 2017.

    - On 14 July 2017, Mr Shah giving the Claimant a purported statement of the terms of his employment on 14 July 2017 that he knew was contrary to what had been agreed and peremptorily revoking the Respondent's proposal for the Claimant's outstanding January 2017 pay review before the Claimant had been able to properly consider the proposal.

- On 4 September 2017 (without prior warning) the Respondent putting the Claimant on a performance improvement plan with no proper basis for the same.

- On 4 September 2017 (without prior warning) the Respondent inviting the Claimant to a disciplinary hearing with no proper basis for the same and during which a proper process was not followed.

- The Respondent subjecting the Claimant on multiple occasions to pressure to resign from his position at the Respondent.

- Post termination, the Respondent and/or Mr Shah making malicious, false and misleading statements to the media concerning the circumstances of the dismissal which caused the Claimant anxiety, distress and unjust damage to his reputation.

16. In respect of each of the above examples of detriment outlined above, was the Claimant subjected to the detriment because he had made protected disclosure(s)?

17. In respect of each of the above examples of detriment up to the point of dismissal and/or of detriment after dismissal what was the injury to the Claimant's feelings and how serious was that injury?

18. Were there any other reasons why the Claimant was allegedly treated to his detriment in respect of each of the above examples, other than the protected disclosure(s)?

19. Was the reason or the principal reason for the Claimant's dismissal because the Claimant has made protected disclosure(s)?

<u>Ordinary unfair dismissal in the alternative</u>

20. Can the Respondent show that the reason for dismissal was misconduct and/or for some other substantial reason?

21. Did the Respondent have a reasonable belief in misconduct and/or some other substantial reason based on reasonable grounds and having conducted a fair and reasonable investigation?

22. Did the Respondent act reasonably in treating the reason (as set out above) as a sufficient reason for dismissal in accordance with equity and the substantial merits of the case?

Credibility findings

23. It is not every case in which a Tribunal feels compelled to remark on a party or a witness's credibility. However, this is one of those cases.

24. The respondent launched a sustained attack on the credibility of the claimant's evidence as being unbelievable and untruthful.

25. The Tribunal had before it a witness statement and 7 rebuttal witness statements of the respondent's witnesses from the claimant. Each statement was accompanied with a statement of truth. For large parts of the proceedings, the claimant had received legal assistance.

26. The first key area on which the claimant was cross examined was in relation to his multiple allegations of non-disclosure by the respondent in his witness statement. The claimant was challenged in relation to his recollection of emails he had said he did not have but had managed to refer to and quote from in his witness statement. The claimant's evidence was that he had kept notes and it was from those notes that he had compiled his statement. When challenged further by specific reference to his email extract in paragraph 43, which it was suggested was a verbatim recollection, the claimant indicated he had some of the emails on his I-pad. In response to Tribunal questioning, the claimant stated that his position was that he had electronic emails but not physical copies. That is why he said he had requested the emails and had not disclosed emails in his possession. He confirmed in response to Tribunal questioning, that he had all the emails for the period on his I-Pad and other electronic devices. The Tribunal found this testimony remarkable and the claimant's initial position on the documents, dishonest. The Tribunal's conclusion in this regard was unanimous and emphatic. The Tribunal concludes that the claimant had always had all of the emails he had requested of the respondent. Further, that it was unbelievable that he would draw a distinction between his obligation to disclose, or his entitlement to receive, physical not electronic documents. He was a Group Financial Director of a PLC working in an electronic age. This evidence did not go to directly to any specific issue in

the case but was entirely relevant to the Tribunal's assessment of his credibility.

27. Although these matters are addressed below in the Tribunal's findings and conclusions, the matters following also specifically damaged the claimant's credibility.

28. In relation to one of the alleged detriments (NAV/EVO project), the Tribunal found that the claimant's evidence on this was entirely unsatisfactory and was rejected out of hand (paragraph 79).

29. The claimant alleged, in his rebuttal statement of Ms Nahal's witness statement, that she had altered the original version of the email sent on 2 August 2017 when Mr Shah was sent an invitation to a meeting with TOSCA, potential investors. He had said the evidence was fake. This was a serious and unambiguous allegation of fraud/dishonesty against Ms Nahal whose statement had been prepared for litigation to be given under oath. The claimant maintained that the version he had seen was different, yet he confirmed to the Tribunal that he had copies of all emails and failed to provide his version of the original to the Tribunal, or to clearly explain why this could not be done. Whilst the claimant stated in supplementary evidence at the outset of his evidence that he had not intended to make that allegation, up until then, the claimant, despite the Tribunal seeking clarity of his assertion, had maintained the evidence had been tampered with. In any event, the allegation was not withdrawn. The Tribunal concluded that if there was any concession, it was without substance or entirely unclear. In fact, towards the end of the claimant's cross examination (day 7 of the Hearing), the claimant stated that he 'intended to get to the bottom of it'. By reason of such a serious allegation, Ms Nahal had needed to self- report the allegation to her employer (she was not employed by the respondent) because she was FCA regulated. Her evidence was that there was a subsequent investigation into the allegation as a result but that she was exonerated as the original email was found to have been *unaltered*. This evidence was not challenged and was accepted by the Tribunal. In the face of such evidence and a bizarre reference to the alleged 'doctored' email being held with solicitors pending the outcome of this case, it undermined and severely damaged the claimant's credibility.

30. Similarly, the claimant had made a serious allegation against Mr Shah and Mr Ragg that the website information had been altered/falsified. This was

subsequently withdrawn as an allegation during the course of the hearing. This had been the third occasion the Hearing had been listed. There had been a direct rebuttal from the claimant too of Mr Ragg's evidence. As a result, of the claimant's u-turn, the respondent stood down Mr Ragg. The Tribunal found this to be a very ill-timed change in the claimant's belief which also cast a doubt on whether this was an allegation made in good faith in the first place.

31. The claimant also alleged, under cross examination, that when he had discussed with Mr Shah on 14 or 15 June 2017 the requirement to have Directors' service terms available for inspection, Mr Shah had said that he didn't want any of the other Directors to know. That would have constituted highly relevant evidence in the context of the claimant's allegations of detriment for the making of alleged protected disclosures, yet it was made for the first time during the course of cross examination and did not appear in any of the claimant's multiple witness statements; neither was it put to Mr Shah. This evidence was rejected by the Tribunal and not considered to be truthful.

32. The claimant had also made an allegation, for the first time in evidence, that Mr Kissane's diary entries were 'questionable' i.e. that he was out of the business a lot more than what his diary entries portrayed which was another allegation of dishonesty. This was rejected by the Tribunal.

33. The claimant also made references to "coded messages" received from the respondent in relation to the request for Smith and Williamson emails, rearranging a Board meeting and being placed on a PIP. The Tribunal accepted these actions of the respondent at face value and did not find anything sinister or suspicious at all.

Relevant Findings of fact

34. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence and having regard to the above findings on credibility and elsewhere in the judgment.

35. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

36. The respondent is a PLC in the AIM market. It is toy business.

37. Its founding directors were Mr Shah, Mr Diver and Mr Kissane. They are all still Directors. Mr Shah and Mr Diver are joint Managing Directors. The founding Directors are on significantly better contract terms than other Directors.

38. The claimant was employed in 2012 as a Chief Financial Controller. At the time, Mr Shah was the Group Financial Director ('GFD') and company Secretary.

39. The terms of the claimant's employment were disputed save that the claimant was recruited on a salary of £100,000 and a 50% bonus. The Tribunal will return to the disputed terms in relation to holidays and notice. It is not disputed that at this time the claimant was not provided with a s.1 Statement of Terms of employment or a Director's Service Contract.

40. The claimant was known to Mr Shah and other Directors prior to appointment having provided services to the respondent over many years through third party organisations instructed by the respondent largely for accounting purposes. It was not disputed that Mr Shah and the claimant were acquainted for about 18 years.

41. In February 2016, the claimant was appointed as the GFD and Company Secretary. The claimant was offered an increase in his package by way of pension contributions (£10,000) but he requested and was given a salary increase of £10,000 instead.

42. The claimant was supporting the respondent with the defence of a legal claim involving Cepia. The nature of that dispute was not before the Tribunal and in any event was not considered pertinent to the issues before the Tribunal.

43. The respondent was successful in its defence of the legal claim. News of the success broke on 3 December 2016. The Tribunal was taken to a text message exchange at page (1443).

44. Before the news of the respondent's successful defence of the claim, the respondent says the claimant was awarded an additional 50% bonus in recognition of his work in supporting the case, regardless of the outcome. This was agreed, the respondent says in a Board meeting on or before 1 December 2016. There were no minutes before the Tribunal.

45. The claimant asserts that he agreed a permanent variation to his bonus terms orally with Mr Shah from 50% to 100% and that is what the bonus payment agreed in December 2016 was for. It was not a one-off discretionary bonus but an agreed increase to his bonus percentage. He referred to a conversation on page 280 in which he stated that Mr Shah had said as Mr Healy and Mr Banford (Director of Character Options, a UK subsidiary, not the respondent itself) were receiving 100% bonuses, so would the clamant.

46. The Tribunal had regard to Mr Shah's evidence in particular concerning the respondent's payments of significant bonuses comparative to salaries as the respondent was a performance driven/performance rewarding company. The Tribunal did consider that it may go against the grain of that assertion to reward the claimant for effort/work done rather than results achieved. Further, the entire payment of any bonuses was conditional on targets achieved. The Tribunal also noted that Mr Shah's witness statement referred to the bonus being for the 'successful' defence of the legal claim, but accepted his oral evidence that this was because when this statement was written, the successful outcome was known. However, the claimant made repeated references to an 'additional' 50% 'discretionary' bonus in written documentation, including in particular the claimant's own Memorandum of Terms page 301. This was a significant document as it was drafted by the claimant as purported compliance with S.228 Companies Act 2006 (see below). There were other references to an 'additional 50% discretionary bonus' too – pages 307 and 355. The Tribunal did not consider that the claimant would refer to his own bonus terms in this way if he believed the bonus had been varied on a permanent basis to 100%. The Tribunal found on the basis of the claimant's own assertions that the bonus terms were not revised to 100% on a permanent

basis but remained at 50%. The election to pay an additional 50% in December 2016 was discretionary based on the support for the legal case. The Tribunal noted that at the time Mr Hyde, another Director, was also on a 50% bonus.

47. The Tribunal returns to make its finding in relation to agreed terms regarding holidays, notice and the basis of bonus entitlement (not the percentage).

48. Mr Shah's evidence was that he agreed 28 days holidays, being the maximum for any employee of the business save for the 3 founding Directors. The claimant accepts at least that Mr Shah referred to the maximum of 28 days (paragraph 5 of his WS) but goes on to state that Mr Shah said "you can take what you like". The Tribunal had no evidence before it that any other Director (outside of the founding three) had a holiday period beyond 28 days. In fact, Mr Healy's terms, which were before the Tribunal, referred to a holiday entitlement between 22 days and 28 days. There was no evidence before the Tribunal that the respondent was prepared to make an exception, for example to hire an exceptional or sought-after candidate. The Tribunal took notice of the claimant's appointment as a Financial Director as opposed to, for example, a Director responsible to increase the sales of the respondent or to grow the business through marketing and/or advertising. The claimant's role was primarily one involving internal stakeholders rather than external clients. The Tribunal rejects the evidence that Mr Shah would have said the claimant could take what he wished. The Tribunal finds that the claimant was told he could take the maximum entitlement of 28 days from commencement.

49. In relation to notice, Mr Shah said he agreed 3 months' notice period. Again, he stated that no one (with one exception) other than the 3 founding Directors was on a longer notice period. The exception was Mr Hyde, the Managing Director of the respondent's Far East Operations. It was not put, but the Tribunal found that there was a clear logic, in terms of resettlement etc why, a foreign based Director, would be given a notice period beyond the norm. The claimant also accepts that Mr Shah offered the claimant 3 months' notice period but after 'haggling' with in him, a 6 months' notice period was agreed. For reasons explained above, The Tribunal did not find the evidence of the claimant credible. The Tribunal observed that Mr Healy's notice period was set at the statutory maximum of 12 weeks. In addition, the Tribunal took into account in its deliberations that notice

periods operate as form of protection or security especially for candidates venturing into employment with a party or organisation unknown. That was not the case here and this diluted the claimant's need for security and the likelihood of a greater notice period being agreed. He was well known to Mr Shah and others and the respondent. It was not the same risk as an unfamiliar candidate joining who *might* request and have agreed greater protection.

50. The respondent's case for the basis of the bonus was that if group targets were hit, the three founding Directors would be paid their bonus and in turn, the other Directors would receive their bonus. The Tribunal considered the evidence on this, in fact not to be in dispute. The claimant's evidence was that the 'target' was in fact 85% growth in 'EPS' – Earnings Per Share. This was agreed by Mr Shah in evidence. In the memorandum at page 293, the claimant had acknowledged a bonus was payable "in the event a bonus becomes payable to other executive directors". In paragraph 5 of his witness statement, he described the pre-requisite too. The claimant's understanding evolved as the bonus trigger became linked to profit before tax (PBT) as set out in the bonus document at page 356. The Tribunal was not concerned with the precise trigger or when/how this had changed as none of the issues before the Tribunal were contingent on such a finding save for the claimant's understanding of the bonus calculation which is a matter which the Tribunal will address in its analysis below.

51. The Tribunal thus finds that the bonus was not absolute or guaranteed. Neither was it discretionary. It is best described as conditional and Mr Shah agreed with this in evidence in response to questions from the Tribunal.

52. The claimant had requested a Director's Service Agreement to reflect his terms. He emailed Mr Shah about this on 15 March 2017 (page 1032). There was a dispute between the parties about the number of occasions before then a draft had been requested, the claimant stating about 12 times, Mr Shah saying a couple of times. It was not material for the Tribunal to resolve the factual dispute on the number, but the Tribunal did find that a draft had been requested by the claimant on several occasions. In evidence, the claimant said most of these requests were between February 2017 to June 2017.

53. A specimen/template was provided to the claimant on 24 April 2017 from Mr Ray Smyth (a Solicitor at Duane Morris, the respondent's Solicitors).

54. On 2 June 2017, the claimant wrote to Mr Kissane and Mr Diver with his views on why he thought his salary should be reviewed. He copied in Mr Shah (page 205-206). The Tribunal finds there had been an informal approach beforehand to Mr Shah about this.

55. Mr Kissane did respond to the claimant challenging the premise of the claimant's case for an increment, in particular, that the share price of the respondent was subject to ups and downs and the factors relevant to that were many and that a increase in share price was down to team performance and not the actions of an individual. Further, he did not see Mr Healy as an appropriate comparator for two reasons. First because the claimant's comparison of payslips was not comparing like with like as he was comparing with Mr Healy's sale of share options. Second, because Mr Healy was a Main Board Director.

56. The claimant also emailed Mr Shah on 5 June 2017 (page 207) requesting an increment to his basic salary to £170,000 but agreeing to reduce his request to £150,000 to "get things moving on". In addition, a 50% bonus with flexibility to increase this to 100% on a discretionary basis.

57. The claimant was sent a copy of his draft service agreement by Mr Shah on 8 June 2017 (page 210).

58. Thereafter, the claimant sought to get copies of the service agreements of all other Directors of the respondent including bonus terms. He wrote to the respondent's solicitors on 9 June 2017 (page 238).

59. The claimant was provided with some, but not all of the contracts held. Mr Shah, who had been copied in, commented that he believed all agreements were held at the New Malden office in the 'Listing Bible'.

60. On 14 June 2017, the claimant emailed the board in relation to a need for Directors' terms and conditions to be available for inspection at the respondent's registered office (page 265). There was a conversation between the claimant and Mr Shah on either 14 or 15 June 2017. Mr Shah acknowledged that he and the claimant had discussed the issue and stating that there was no urgency and that the matter would be sorted out in the next few weeks.

61. On 16 June 2017, Mr Shah asked the claimant to have a meeting about his terms and conditions and asked for the claimant's comments on the draft which he had sent him (page 242).

62. There was a Board meeting on 22 June 2017. Amongst other matters, the pipeline opportunities were referred to. The 'Pokemon' deal was not expressly referred to (255). This was a distribution agreement between the respondent and Wicked Cool Toys ('WCT') under which the respondent would have distribution rights for Pokemon toys. Mr Shah said Mr Diver made reference to it. Mr Diver did not give evidence. The Tribunal accepts that there would have been some mention of the Pokemon deal at this meeting. It would be irregular for Directors not to mention pipeline deals without citing the brands. However, even if the Tribunal is wrong in its finding on that, the completion of the Pokemon distribution deal was announced at a Board meeting of Character Options Ltd on 17 and 18 July 2017 (page 244). The claimant was present at this meeting too and took the minutes. It appeared in the minutes, the Tribunal finds in error, as a trademark deal. Mr Shah confirmed in evidence there was no trademark deal. The claimant confirmed that it was not part of his case that there was a separate trademark deal which had been withheld from him. No other witness for the respondent made any reference to some other Pokemon trademark deal. There was no announcement or other documentary evidence in this regard either. The Tribunal finds there was no trademark deal.

63. The Tribunal also mentions here that the respondent announced the Pokemon deal to the market on 6 September 2017. This was not considered by the respondent to be a regulatory announcement. Those announcements were limited to financial matters or product related matters which might affect the share price. Mr Shah's evidence was that this deal was just ordinary course of business and fluctuations in the share price were normal. (Mr Kissane confirmed that the share price would be affected by lots of factors too). Further, he would deal with non-regulatory announcements with Mr Diver and that this was such an example. The announcement (RNS) was at page 736. It referred to the claimant as a contact point too. (The Tribunal was also taken to 1467 a regulatory financial RNS and miscellaneous product announcements between 97 and 104 which pre-dated the claimant's directorship).

64. There was an exchange of emails between the claimant and Mr Shah on 26 and 27 June 2017 where there was a difference of opinion and recollection of the claimant's agreed terms of engagement. In an email of 26 June 2017, Mr Shah asked the claimant to revert by 29 June 2017 with suggested amendments to the service agreement. He also confirmed that he would let the claimant know by 6 July the respondent's proposals for salary, bonus, pension and notice period. In a further email of 27 June, Mr Shah asked the claimant to let him have his comments by 29 June too.

65. On 26 June 2017, there was also an email from the claimant to Mr Shah referring to their previous discussion regarding inspection requirements of Directors' service contracts (the Tribunal finds this referred to the discussion on or around 14 June 2017). The claimant's evidence that there was another meeting at which Mr Shah had told the claimant not to discuss it with Mr Kissane or Mr Diver had not previously been referenced and was evidence the claimant gave for the first time under cross examination. It had not been put to Mr Shah. The Tribunal found it incredible that in view of the nature of his claim, the claimant would not have referred to such an instruction in his witness statement and that there was no such meeting or instruction. The claimant cited S.228 Companies Act 2006 ('CA'). Within this email, the claimant also commented: "*the boiler plate agreement you gave looks like it needs wholesale changes…I'll see if I can find something more suitable to mark up. I'll also need a list of terms applicable to each Director to progress this*". (The claimant accepted under cross examination that he was not aware of any shareholder having exercised its right of inspection – save for the claimant himself in September 2018).

66. On 3 July 2017, Mr Shah chased the claimant for his feedback (page 306).

67. Also, on 3 July 2017, the claimant emailed the Board with more detailed thoughts on the requirements of the CA and which agreements were required and for whom, noting that some were out of date too. He stated he had spoken with Ray Smyth (Solicitors) who had informed him that he had never seen a prosecution on this. The claimant stated that was not good enough for him and he observed that the fix was easy enough and he had a strategy to fix the position.

68. On 5 July 2017, the claimant responded that to mark up the service agreement provided would be a breach of the corporate code. The claimant

also requested that the Board provide a proposal, to include revised terms in a draft service agreement and he would then take legal advice (page 315).

69. Mr Shah responded to the claimant stating that he did not believe there to be any breach of the corporate code for the claimant to comment on his service agreement. He didn't believe the claimant would provide any further comments and agreed to go the board as requested (page 319).

70. The claimant responded on 10 July 2017 referring to his many attempts to get a service agreement ('more than a dozen times'). The claimant suggested the Remuneration Committee ('the RemCo') make an offer.

71. On 10 July 2017, the claimant when communicating with the other Directors referred to the requirements of S.228 as a 'technical breach' by the respondent (page 911).

72. Mr Shah did consult with the RemCo (page 339) and an offer was made to the claimant thereafter on 14 July 2017 (page 353). The offer was for £115,000, plus a 100% bonus plus 10% pension contribution. The 100% bonus was conditional on Mr Shah getting that percentage of bonus. If his percentage was lower, that would apply to the claimant too. The claimant was told the offer was open for 14 days. Alternatively, the claimant was told he had 14 days to provide substantive comments. The Tribunal noted the lengthy and drawn out process to date but did not consider this timeframe to be unreasonable particularly in the interests of finality.

73. On 19 July 2017, there was an exchange of emails between the claimant and Mr Shah relating to the discrepancy in the profit figures provided to Barclays (£7.062M) to that produced by Mr Kapadia (£6.262M) page 1150. The claimant believed there to have been a discussion in the previous week (email at page 1150) in which he had explained the variance. This was not disputed by the respondent.

74. On 20 July 2017, Mr Shah queried with the claimant if the bank facility letters were available for him to sign as he would normally do. He also asked the claimant if he had secured a reduction in the fees as had been requested by Mr Shah in May 2017. The claimant said facility letters were no longer issued by the bank and he had not asked for a reduction in fees as he considered it to be "churlish".

75. The claimant requested additional time to respond to his service agreement terms. He also queried the bonus calculation method. Mr Shah replied saying that the request for more time would be referred to the RemCo and that in any case the claimant should provide his comments by 7 August 2017. He also stated that the offer of 14 July had lapsed. He also provided information in relation to his own bonus calculation and referred to having received a 188% bonus (of salary) in the previous year by reference to profit above £7 million.

76. On 25 July 2017, Mr Shah reminded the claimant about a forthcoming cricket match at Lords for which the respondent had tickets. The Tribunal found this to be a corporate hospitality event. This was clear from the previous exchange on 23 and 28 June 2017 when the claimant had first been made aware of the matches. Mr Shah had said he was going with 'Moneycorp'. This was at pages 295 and 296. The claimant asked if Mr Shah could take his ticket to the match and meet him there. Mr Shah did do this.

77. Ms Nahal, of Allenby Capital Ltd, sent an email invitation for a meeting with TOSCA, an interested investor on 2 August 2017 (page 1441). This email was the subject of a dispute between the parties, the claimant claiming the 'original' email had included the claimant too. He thus said the email produced by the respondent was fake and levelled blame for that at Ms Nahal. Ms Nahal denied this robustly both in her statement and in oral testimony. A subsequent email from Ms Nahal had included the claimant in the chain and Mr Diver when trying to set a date for the meeting. According to Ms Nahal, the meeting requirements changed at the instigation of TOSCA to bring it forward. In addition, they wished to meet the executive directors first/only. As a result, Ms Nahal informed Mr Shah who requested date options to be sought. The meeting was thus fixed (page 417). The Tribunal accepted the evidence of Ms Nahal in this regard (paragraph 6 (b)). Her explanation was clear and consistent with the email trail and otherwise innocuous.

78. The claimant replied to Mr Shah on 8 August 2017 stating that his terms were not accurate, that it was unfair to withdraw the offer previously made and asking to deal directly with Mr David Harris of the RemCo.

79. On 8 August 2017, a meeting had been arranged at the New Malden office in relation to the 'NAV'/'EVO' project. This was a change in the respondent's software systems. The parties accepted that the terms were used interchangeably (EVO were the software developers, NAV was the software). The respondent said the claimant had responsibility for the project. This was not challenged by the claimant. Further, there had been concerns raised in February 2017 about the change process, the communications and the degree of involvement of staff at the Oldham office. The Tribunal noted the written complaints relayed by Mr Kissane following at least two staff members expressing their concerns to him (page 193-196). The substance of *that* dispute was not an issue before the Tribunal. The Tribunal noted that the claimant did not accept the criticism of him. There had however, been an acknowledgment by the claimant that he had not kept the Board informed (page197). Mr Shah had asked to be involved in the calls with the software team at least from the June Board meeting. Mr Shah was invited to 2 calls on 14 July 2017 (page 719) and on 19 July 2017 (page 362). The claimant had also received a roadmap from the developers in May 2017 (page 1265) which was sent to the Board on 27 July 2017. In relation to the meeting of 8 August 2017, the claimant was not in attendance; the email trail showed that the planning or occasion of the meeting had been referenced on 3 occasions. The claimant had not said he would not be there. His evidence to the Tribunal was that he had not agreed to the meeting and further that he could have been called in to the meeting remotely. This was flatly rejected by the Tribunal as a plausible explanation.

80. On 8 August 2017 (page 412), Mr Shah maintained his position on the offer of terms but said the claimant's comments could still be reviewed if he provided his comments in a word document with the changes tracked.

81. The claimant was on holiday 10 August 2017 until 24 August 2017. He emailed Mr Shah copying in others announcing his holiday on 8 August 2017. He provided 2 days advance notice, however he did say he could be contacted on his mobile. It was common ground that there had been no earlier indication that the claimant had mentioned that he had intended to take holiday at this time. Whilst the Tribunal noted the issuance of a S.1 Statement of Employment particulars, which contained holiday approval requirements, the evidence of Mr Shah was that in practice, he required reasonable notice on a professional courtesy basis.

82. Between 8 August 2017 and 21 August 2017, a large number of emails were exchanged between the claimant, Mr Kapadia, Mr Shah, Macintyre Hudson ('MHA') and Smith and Williamson ('S&W'). MHA were accountants instructed by the claimant to prepare "tagged" accounts. S&W were consultants instructed by the claimant to advise on the application of the 'Disregard Regulations'. The evidence from Mr Kapadia was that this was a new area of work for everyone and Lubbock Fine, the respondent's accountants, had been struggling to replicate his figures. The email exchange was on a holistic basis in connection with the respondent's Corporation Tax returns the deadline for which was 31 August 2017. The Tribunal did not think it relevant, necessary or proportionate to identify each email exchange and its purpose. There was no dispute between the parties that the emails were exchanged and what their purpose was. Having regard to the issues before the Tribunal however, the Tribunal did make the following relevant findings from its reading of the emails and the evidence of the parties:

- S&W and MHA were appointed to do this work without the knowledge or consent of Mr Shah. The Tribunal will address later under its analysis whether either or both were required.

- The claimant was on holiday during this period but was not incommunicado and still engaged in the process. The claimant had emailed Lubbock Fine, S&W, Mr Kapadia, Mr Shah and MHA in this period.

- Mr Shah had requested the claimant to provide him with all of the S&W emails on 18, 21 and 22 August 2017. Some were provided on 1 September 2017

- The claimant had instructed MHA to send the tagged accounts to him only

- On 21 August S&W asked the claimant if they could communicate with Mr Shah; the claimant instructed them to provide the claimant with all of their advice and in relation to their request, to 'hold the email'

- There was ultimately no delay in the submission of the respondent's Corporation Tax returns by the deadline

83. Upon his return from leave, the claimant wrote to Mr Shah and accused him of being "insidious" and requested to deal with the RemCo directly regarding his service agreement. He did not provide a tracked change document as had been requested.

84. On 22 August 2017, the claimant was included on an email (which included Mr Shah) about a meeting with an insurer of the respondent followed by dinner thereafter. The claimant responded on 31 August 2017 confirming his acceptance (page 1209).

85. On 24 August 2017 (the 'August incident'), there was a work-related meeting between the claimant and Mr Shah. Their discussion became heated and voices were raised. The claimant accepted in evidence he raised his voice first. The claimant had attended a hospital appointment that morning. No-one else was present. It is a matter of dispute as to whether Mr Shah was aware of the hospital appointment before sending his meeting request to the claimant. He had called the meeting at 9.14am; the claimant had told Mr Kapadia by email at 9.07 am about his appointment. Mr Shah maintained in evidence he was unaware at the time he sent his email. Further, that he was not informed of the reason for the appointment. Mr Kapadia's evidence was that he had not told Mr Shah straight away. In addition, that he did not mention anything about the claimant having tests for cancer. He explained he had been through a similar process himself around the same time and it would not be for him to relay that to Mr Shah. Mr Shah also alleged that the claimant had pointed a pen towards him causing Mr Shah to retreat. This was set out in his email which followed this altercation on the same day at page 597. In that email Mr Shah said about the incident "*Your behaviour was inappropriate and unprofessional. You raised your voice towards me in a threatening manner and pointed a pen in my face whilst rolling forward towards me with your chair. I had to roll my chair back to prevent injury to my face."* In the claimant's response (page 598), he accepted and apologised for raising his voice stating that was 'the only' thing he had done. The claimant did not specifically deny the allegation in relation to the pen. The claimant also spoke to Mr Kapadia after the meeting and said words to the effect "I'll do him" though the claimant's evidence was that this was said in a later meeting, some 40 minutes after. The Tribunal will return to this in its analysis below.

86. Mr Harris of the RemCo, suggested a meeting take place on 31 August 2017. He also reiterated Mr Shah's request for a tracked change Word version.

87. On 29 August 2017 the claimant provided a pdf version of his service agreement with changes handwritten in several places which he referred to as 'amended' and deletions elsewhere. There were 36 paragraphs with the word amended in the margin area but with no corresponding amendment. There were 16 other deletions some with comments. There was no tracked change Word version supplied.

88. A meeting did take place regarding the service contract on 31 August 2017, but no tracked change version was supplied. In advance, Mr Harris had repeated the need to do so. The claimant said in evidence the meeting had been positive. Further, the clamant stated in evidence, more than once, that he had always desired to have a meeting, to sit around a table to resolve the matter but he had never suggested this himself. A tracked change version was supplied on 4 September 2017. By that date however a disciplinary process had already commenced against the claimant which included his conduct during the service agreement negotiations.

89. Mr Shah discussed with Mr Kissane the incident/meeting on 24 August 2017. He also provided Mr Kissane with emails which had passed between the claimant and Mr Shah regarding the service agreement and in relation to his requests of the claimant regarding S&W. Mr Kissane was to determine if there was a disciplinary case to answer. Mr Kissane said in evidence that Mr Shah had said he had been distraught by the incident on 24 August 2017. The Tribunal accepted he had said that. [Mr Shah used the same description in his own evidence to the Tribunal].

90. On 15 August 2017, the September Board meeting required to be rearranged because of Mr Diver's unavailability. Mr Shah had emailed Mr Harris proposing 2 alternative dates at Mr Diver's suggestion: 22 September 2017 or 6 October 2017 (page 421). Mr Harris could not do 22 September (there was no challenge to that) so 6 October 2017 was proposed. Mr Shah emailed all proposed attendees about the new date (page 422). The claimant was due to be holiday at that time. The claimant had not however told Mr Shah. He said Mr Shah would have known this as

he was 'rummaging through' Outlook. The claimant did not reply to the email setting the new date.

91. The claimant was invited to a disciplinary hearing by a letter dated 4 September 2017 (page 646-647) which set out five allegations against the claimant: the claimant's conduct during the contract negotiations, not handing over the S&W emails, the taking of holiday without advance notice and the incident on 24 August 2017 and a general loss of trust and confidence. Emails were referred to by date but were not included with the letter. The claimant was given the right to be accompanied and forewarned of the possibility of dismissal.

92. Before the disciplinary process was commenced, Mr Harris had presented a settlement offer to the claimant to leave employment. This was an approach he had discussed and agreed with the Board. In his opinion there were serious concerns of trust and confidence between the claimant and the respondent (see below under admissibility of evidence).

93. The claimant was also placed on a Performance Improvement Plan (PIP). This was in relation to three matters a) the NAV/EVO project b) the claimant's failure to negotiate a fee reduction with Barclays c) Corporation tax issues. The Barclays issue was based on Mr Shah's request of the claimant to seek a reduction in fees in May 2017.

94. The invitation letter to the disciplinary hearing at page 646 was sufficient. It referred to rather than enclosed all supporting evidence. That might have caused the Tribunal concern if the events had not been recent or if the emails included third parties i.e. where the claimant had not been the sender or recipient. That was not however, generally, the case

95. At the disciplinary hearing (page 936), the claimant did not need or seek any clarity around the charges. He did not ask for more time or an adjournment. The Tribunal concluded the minutes were a fair and accurate summary. The claimant had made changes to the notes, some of which were not decipherable, in some places large volumes had simply been struck through. The job of a note taker is to take notes and the Tribunal did not accept that save for a few inaccuracies, there could be changes of the kind inserted/deleted by the claimant. The claimant's changes were rejected.

96. The decision maker for the claimant's dismissal was Mr Kissane. Dismissal was his recommendation to the Board on 14 September 2017. The claimant was informed of the Meeting by Mr Harris. The claimant was not in attendance. The Tribunal did not accept that he did not pick up his messages on 13 September 2017 due to being engaged with his lawyers for most of the day. The Tribunal emphatically rejected that because of the everyday experience of work and life in the modern age, checking emails and messages regularly was daily routine and was so for a claimant who was also contactable whilst on leave. This was also a critical time in the claimant's life. It beggared belief that he would not check his messages.

97. The decision to dismiss was at page 755. The fifth ground had been abandoned during the course of the hearing itself as Mr Kissane took advice and was told it was a conflation of the 4 other grounds. The holiday 'charge' was not upheld but the other 3 were. The decision included a belief that the claimant had been untruthful about saying he sent the S&W emails to Mr Shah upon his return from holiday. It was open to the respondent to reach that view based on the claimant's assertion at the disciplinary hearing and having regard to his email of 1 September 2017 (page 633).

98. The claimant appealed against his dismissal. His appeal grounds were at pages 780-792. The Claimant had also prepared a statement of case (page 942 – 947). This was first occasion the claimant had made reference to a public interest disclosure. He also made reference to this in the plural and alleged, for the first time, that Mr Shah was also misappropriating funds as he had been paying a 'phantom' employee, under-declaring liabilities and excessive expenses claims. These assertions, the Tribunal finds, were not linked by the claimant on a causal basis to his dismissal.

99. The appeal was heard by Mr King on 12 October 2017. The claimant was accompanied by a union representative, Mr Hussain. The appeal was rejected. Mr King commented that the allegation that Mr Shah had fabricated facts about the August incident had not been raised before the appeal process (page 950). Mr King also remarked that the claimant when he provided the S&W emails provided "some but not all" of the emails. The claimant was also disbelieved about not seeing Mr Shah's emails regarding S&W until 5 September 2017. The Tribunal finds that the respondent was entitled to come to this conclusion based on his chronology analysis set out on page 952. The claimant had been corresponding whilst

on holiday, had been asked for the emails up to and including the date when he did send some of the emails on 1 September 2017.

Admissibility of evidence findings

100. The parties were agreed that without prejudice privilege had been waived in relation to pre-termination negotiations.

101. However, there would be no possibility of such a waiver in relation to S.111A ERA which is a statutory bar to admissibility of pre-termination negotiations (***Faithorn Farrell Timms LLP v Bailey UKEAT/0025/16/RN).***

102. S.111A ERA is only applicable to the 'ordinary' unfair dismissal claim under S.98 (2) & (4). It does not apply to the S.103A ERA claim. (S. 111A (3)).

103. The only exception to the inadmissibility of evidence is if the section is disapplied because of 'improper conduct'. In that case inadmissibility only applies to the extent the Tribunal considers just (S.111A (4)). The claimant relies on undue pressure. The Tribunal found the offer on 4 September 2017, with a draft attached settlement agreement, to be an invitation to accept an offer in principle only – not for a signed settlement agreement which would, in accordance with the ACAS guidance, require a 10 day period. This was unambiguous from the wording of the offer. The claimant was free to reject the negotiations or make a counter proposal on either occasion it was made (the discussions were resurrected before the Board Meeting on 14 September 2017). The claimant was a Director and capable of making his position known. There was no undue pressure in the circumstances and thus this evidence was not admissible for the ordinary unfair dismissal claim.

Applicable law

Section 1 Particulars

104. Under S.1 ERA an employee is entitled to receive a written statement of particulars of employment. The required information is contained in that section. Under S.4, any changes need to be notified within one month. A reference can be made to a Tribunal to determine which

particulars ought to have been included under S.11 and under S.12, any such determination can confirm, amend or substitute particulars.

Protected Disclosure claims

105. Under S.103A ERA, an employee shall be regarded 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.

106. By virtue of S.47B ERA, a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. In ***NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

107. A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure). It was agreed in this case that the only issue in dispute in relation to these sections was whether the claimant had a belief that the disclosure was made in the public interest (subjective test) and if so, was his belief that the disclosure was in the public interest, a reasonable one (objective test) ***Chesterons Global Ltd v Nurmohammed 2018 ICR 731 CA and Babula v Waltham Forest College 2007 EWCA Civ 174.*** In, ***Chesterton*** a four- factor test was approved as being a useful tool to analyse the second part of the public interest test.

108. Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

109. In relation to S.103A, if the employee puts forward evidentially that there is an issue which warrants investigation and which is capable of establishing the competing (protected disclosure) reason for dismissal, the burden will fall on the employer to prove the (principal) reason for dismissal.

Unfair Dismissal – S.98 (2) & (4)

110. The respondent relied on S.98 (1) (b) ('Some Other Substantial Reason') ERA, alternatively S. 98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

111. Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case. The test in this case was comparable to the well known ***Burchell*** test: that the respondent genuinely believed that there was a loss of trust and confidence in the claimant, that belief was based on reasonable grounds and that there was as much investigation as was reasonable.

112. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure.

Conclusions and analysis

Section 1 & S.12 ERA 1996

113. Having regard to the findings above, the Tribunal confirms the following particulars in relation to the disputed terms on Bonus, Holidays, Notice and Pension. The Tribunal did not reach any conclusion on other terms as they were not before the Tribunal as disputed:

- The claimant's salary was £100,000 on appointment
- The claimant's bonus on appointment was 50%, conditional on the founding Directors receiving a bonus (which was conditional on targets being met)
- The claimant's salary was increased to £110,000 consequent on his becoming the Group Finance Director in February 2016
- The claimant's annual holiday entitlement, on appointment, was 28 days
- The claimant's notice entitlement on appointment was 3 months
- The respondent was not contributing to an occupational pension scheme. (For the avoidance of doubt, the Tribunal concludes this was

because the claimant requested to receive a salary increment of £10,000 in lieu, which was agreed)

- The claimant opted out of auto enrolment shortly after July 2016, which was the respondent's staging date.

Protected Disclosures

Did the claimant make a qualifying disclosure on 14/15 June 2017 (orally) and/or on 26 June 2017 (in writing) and/or on 3 July 2017 (in writing)?

114. The Tribunal concludes there were 3 occasions when the claimant brought to the respondent's attention that the respondent was in breach of its legal obligation to have available at the registered office the Directors terms and conditions for inspection (by shareholders).

115. The occasions were 14 or 15 June 2017 (orally), 26 June 2017 (in writing) and 3 July 2017 (in writing).

116. The claimant stated in evidence that his email of 14 June 2017 which preceded his conversation on the same or the next day was based on a recollection from his University period whilst studying Company law. The Tribunal concludes that this was not plausible. The wording of the email suggested a more advanced or precise understanding of the requirements. It was not a matter which would be reduced to writing to the Board based on a recollection of the law some 30 years previous especially as the law was likely to have changed, been updated or consolidated in more recent legislation.

117. The disclosure of information on 14 or 15 June 2017 to Mr Shah was in respect of a breach of legislation. That was the conversation referred to in the email of 26 June 2017.

118. The Tribunal further concludes that there was a disclosure of information relating to the breach of S.228 Companies Act 2006 on both 26 June 2017 and 3 July 2017.

119. However, the Tribunal concludes that the claimant did *not* believe that in respect of any of the aforementioned, his disclosures were in the

public interest pursuant to the first part of the public interest test in ***Chesterton***. The Tribunal reached this conclusion for a number of reasons:

- The Tribunal took into consideration the claimant's acknowledgment that he was not aware of any shareholder having ever exercised the right to inspect

- The Tribunal took into consideration the respondent's solicitors view (conveyed by the claimant himself) that he was not aware of any prosecution in relation to S.228 (page 302)

- The Tribunal took into consideration the reference in the claimant's email of 10 July 2017 to the breach being a 'technical' breach. The natural meaning of this word *in context* was that the breach was, to use an explanatory/analogous expression - not a big deal. In fact, under cross examination on this point by Mr Laddie QC he reaffirmed that view when he used the expression "in the eyes of the law". That carries the same meaning as 'technically', in context.

- The claimant sent his memorandum of terms to the Solicitors and copied to Mr Shah in purported compliance with S.228 CA. Most of the terms, apart from salary, were not agreed. This was known to the claimant. The Tribunal questioned the claimant about this document when he confirmed that to be the case. The Tribunal concluded that the claimant could not have believed that it was of major significance that he should provide agreed/up to date terms. If he did, he would have qualified what he said or waited to provide his particulars.

- The claimant's queries of Mr Smyth for Directors' terms comparator information commenced the day after (9 June 2017) Mr Shah had sent him his draft service agreement (8 June 2017). In addition, in his email of 26 June 2017, he stated expressly he needed to see those terms "to progress this" which was a reference to his service agreement negotiations. The claimant's interest was a private one. Whilst that does not exclude a dual/concurrent public interest purpose, for reasons given above/below the Tribunal concludes that wasn't the case at all.

- Whilst it is not a barrier to being a qualifying protected disclosure, the fact that the claimant first alleged he had made a public interest disclosure was not until his appeal against dismissal in October 2017, following advice, suggested to the Tribunal that it was not a thought of the claimant at all.

120. If the Tribunal is wrong in its conclusion regarding the claimant's belief that the disclosure was in the public interest, the Tribunal concludes in the alternative that the claimant's belief was not, objectively, a reasonable one.

121. The court of Appeal provided helpful guidance on this second limb in ***Chesterton*** when it stated***:***

" *…element (b) in that exercise requires the Tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course, we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.*
Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it"

122. The reasons referred to the above in relation to the first limb are repeated. In addition, the Tribunal concluded that the annual reports, which are publicly available, provided the Director's remuneration information (salary and bonus) which would be the information any shareholder (or other interested party) may wish to see to renew, withdraw or vary their investment interest or to make an investment, rather than other terms of appointment. The information over many years would also reveal a pattern if there was one to predict the future financial remuneration risk. Not every breach of legislation, even criminal sanctions, attracts the protection of the Protected Disclosure provisions of the ERA. That was the whole point of the introduction of the public interest test. To use an example, a person employed in a driving role speeding at 71 mph on a motorway would not, on any objective reasonable view, be a matter of public interest of a putative whistle-blower. That the claimant did not even mention the public interest until his appeal against dismissal many months later, did not preclude a conclusion that the claimant's belief was a reasonable one but it cast a doubt on it and also on whether he believed at the time he was making the disclosure that it was in the public interest.

123. Alternatively, analysed through the lens of the 4 part test suggested in ***Chesterton*** (as an aid rather than on any compulsory test), whilst the number of (pre-existing) shareholders who would have rights of inspection was 1000 (this was common ground), the Tribunal recognised that the public interest could extend to a wider community – employees, potential investors, any one dealing with the company. In relation to the nature of the interests affected, based on the findings above, the disclosure was of minor wrong-doing; with regards to the nature of the wrong-doing, this was not deliberate, it was unknown and inadvertent. Regarding the identity of the wrong doer, that posed the question that this could include the claimant himself as the GFD – not exclusively but in conjunction with the

respondent's external advisers and arguably with Mr Shah, the former GFD. But most latterly, the claimant himself. Amongst these factors, the Tribunal concluded that having regard to the relative triviality of the breach and its inadvertency, the Tribunal was reinforced in its conclusion that it was not, objectively, a reasonably held belief.

124. The claims based on protected disclosures can thus proceed no further based on the conclusions reached.

125. However, If the Tribunal is wrong in relation to its conclusions regarding public interest above, the Tribunal concluded as follows in relation to the alleged detriments asserted and the alleged causal link.

'Pokemon' – 4.1

126. The allegation was twofold. First, that the Pokemon deal was withheld from the claimant and it was high risk and highly irregular. The Tribunal heard no evidence that it was high risk or highly irregular. It was a toy deal. At best, the claimant considered the deal to be share price sensitive. That is not the same. Regarding knowledge, the Tribunal has found that the claimant did have knowledge at least at the meeting on 17 and 18 July 2020. It was this not withheld from him. It would be extremely irregular for the claimant to be mentioned on the RNS as a contact point yet have no prior knowledge.

127. The second limb of the allegation regarding the Pokemon deal – that the claimant was deprived from announcing the deal to the market was contingent on the Tribunal upholding the first part of the allegation regarding knowledge. That was how the issue had been worded and agreed by the parties. It was also put to the claimant in cross examination and he agreed with that proposition. The Tribunal nevertheless concludes in any case that the claimant was not involved in the RNS because it was a non-regulatory product announcement which Mr Shah and Mr Diver would lead on. The Tribunal noted the marked difference between the announcement at page 1467 a regulatory (financial) announcement which was put to Mr Shah compared to the Pokemon deal announcement (736). In addition, the announcements between 97 and 104 (which predated the claimant's Directorship), were put to Mr Shah and he considered them all to be non-regulatory announcements save for the one on page 99 which he said was a

'regulatory' product announcement. This was the Teletubbies deal in 2014. This, in contrast to the others, contained financial information regarding turnover/revenue, customer base and monthly viewing audience. The Tribunal concludes that it was within the respondent's discretion or judgment, at Managing Director level, to consider a product announcement to be price sensitive or not. Mr Shah had explained that it was normal to have share price fluctuations. Mr Kissane had also said the share price would be affected by many factors when he responded to the claimant about his remuneration proposals.

Undermining – 4.2

128. The claimant did not clarify his claim in this regard. The issue for the Tribunal to determine was not assisted by the 'agreed issue'. The respondent chose not to cross examine the claimant on this and similarly did not offer closing submissions on the matter due to the lack of particularisation or assertion. The Tribunal identified the allegation relating to the claimant's alleged treatment at the cricket match (corporate hospitality) as the only example pleaded and about which the claimant gave evidence that could fit in to this category. The Tribunal has found above that Mr Shah having initially invited the claimant to the event, reminded him about it in July. Both occurred after the purported protected disclosures. The initial invitation post dated the oral disclosure on 14/15 June 2017 and the reminder post-dated both of the claimant's written disclosures. The claimant said he was ignored at the match itself. The clamant was challenged that if Mr Shah had not wanted him there, it would have been easy to make an excuse. The Tribunal agreed with that proposition and concluded that Mr Shah did not undermine the claimant. He was not ignored. Mr Shah had in fact agreed to take with him the claimant's tickets as the claimant was coming via a different location. It was another opportunity to avoid or excuse the claimant's attendance which would have easier to do so if he was operating with ill motive. The claimant was not subjected to a detriment.

24 August incident – 4.3

129. The Tribunal is left to conclude what happened on 24 August 2017 between Mr Shah and the claimant during their meeting. No-one else was present. For the purposes of the detriment claim, the Tribunal does need to conclude what it believed took place. The Tribunal concludes that the incident as described by Mr Shah did occur, which included the claimant

pointing towards him brandishing a pen in a threatening manner. There were several reasons for the Tribunal's conclusion. First, Mr Shah was found to be a credible witness not just in comparison to the claimant, but without that comparative assessment too. The Tribunal did not think a joint managing director of a PLC would simply invent an allegation unless it did happen. Second, the allegation was a precise allegation, it was not pitched at anything more. If Mr Shah had wished to make up or falsify an allegation the Tribunal concludes he was likely to have exaggerated it more. Third, the claimant did not explicitly reject it. The claimant has placed great emphasis on the use of his word "only" in his denial email. Whilst the Tribunal understood the argument, it was not enough to persuade it away from this conclusion. To use an analogy, if Mr Shah had accused the claimant of say a racial slur which the clamant believed he did not say, the Tribunal concludes that failing to expressly deny the alleged discrimination leaves open the conclusion that it was said, despite an email saying that only part of an accusation was admitted. It begs an express denial and a counter-allegation that a serious false allegation has been made. Fourth, in his rebuttal statement, the claimant accepted he did at least have a pen in his hand. Fifth, the claimant accepted he raised his voice (first); he had attended a hospital appointment that morning; he had expressed his anger to Mr Kapadia after the meeting. This all pointed to a heightened state of anxiety such that the claimant was more likely to have behaved in a threatening way as described and perceived by Mr Shah. The claimant was not subjected to a detriment.

Closer Monitoring – 4.4

130. The claimant's complaint in this regard was in relation to 3 matters. First the enquiry by Mr Shah of the claimant relating to the profit figures submitted to Barclays compared with those produced by Mr Kapadia. This was a sole email exchange at page 1150 on 19 July 2017. The claimant addressed this in paragraph 53 of his witness statement. The Tribunal considered this to be a discrete query triggered by Mr Shah's discovery of the variance from Mr Kapadia. He stated this in response to questions from the Tribunal. It was a significant variance. Whilst the Tribunal accepted that it had been explained by the claimant previously as set out in the claimant's response email of 19 July 2017, it appeared to be no more sinister than seeking that clarification or reminder. The issue went no further than that. There was no further enquiry. It was not information used against the claimant in the disciplinary case against him or the PIP. The claimant was not blamed for the variance. It was not, in the Tribunal's

conclusion evidence of closer scrutiny. The claimant was not subjected to a detriment.

131. There was a second Barclays matter which the claimant was asked about. This was about whether the claimant had requested and secured a reduction in fees in relation to finance facilities**.** Mr Shah had asked the claimant to manage the reduction in bank fees in May 2017. He confirmed this in paragraph 55 of his rebuttal witness statement. He also confirmed that he had both before and after his request of the claimant been able to secure a reduction in fees. This evidence was not challenged. The claimant accepted that he had been asked to do this. He also agreed that Mr Shah signed the bank facility letters and that this was asked of the claimant on 20 July 2017, further that the claimant saw nothing irregular in the query. The claimant explained to Mr Shah that letters were not issued anymore. He confirmed he had not asked Barclays about a fee reduction as he thought it was "churlish". The Tribunal concluded that this was an innocuous query of the claimant triggered by a follow up of Mr Shah's query in May 2017 and because he had been responsible for signing (renewal) facility letters. It was not alleged that Mr Shah knew that letters were no longer issued. The claimant had not done what he had been asked to do. Mr Shah would not have known that when asking the claimant about it. There was no closer monitoring of the claimant in this regard but a legitimate and reasonable request of him. The claimant was not subjected to a detriment.

132. The claimant's stewardship of the NAV/EVO project was alleged to have come under greater scrutiny. The Tribunal did not think this was the case at all. The concerns predated the claimant's disclosures regarding S.228. The concerns relayed by Mr Kissane were in February 2017. At that time, the claimant had accepted "I should have updated you personally, apologies to you for not doing that". Mr Shah's concern to be involved in on going calls was relayed at the June Board meeting which predated the two written disclosures and the 3 July 2017 disclosure in particular which the claimant says was the "watershed" moment in his career with the respondent (paragraph 36 of his witness statement). As stated in Mr Shah's rebuttal statement (paragraph 57), the project was of profound importance to the business, being an upgrade to the business IT systems with go live dates originally set for September 2017 and subsequently for January 2018. Mr Shah queried on 25 July 2017 if there was a further call planned and expressed concern there wasn't a road map (pages 1163 -1165). Thereafter, the claimant provided a roadmap he had been sent about 2 months earlier in

May 2017. There was no reason to think Mr Shah would have known of its existence before. What was sent to the Board by the claimant was also an edited version. Regarding the meeting on 8 August 2017, the Tribunal has found the claimant's evidence for non-attendance entirely unsatisfactory and it was rejected out of hand. The claimant was not subjected to a detriment.

133. The last allegation in relation to closer monitoring was concerning the claimant's involvement in the respondent's corporation tax return in August 2017 and specifically in relation to enquiries of the claimant regarding his instruction of S&W and his email exchanges with them. This was in the context of the claimant having announced his intention to be on holiday on 8 August 2017 from 10 August 2017 for 2 weeks. The claimant accepted this had not previously been discussed with Mr Shah. It was only during the course of the claimant's absence that the involvement of external advisers came to the attention of Mr Shah – S&W (tax advisers) & MHA (auditors). The claimant agreed he had not informed Mr Shah about either. In fact, under cross examination he agreed with Mr Laddie QC that he had "deliberately concealed their identity". Mr Shah and Mr Kapadia said the triggering event was Mr Kapadia informing Mr Shah that he was concerned about the corporation tax deadline because Stephen Wright of Lubbock Fine was due to go on holiday. The Tribunal accepted this corroborating evidence. The Tribunal found Mr Kapadia's evidence to be straight and truthful. He learned of this on 16 August 2017. That created a series of emails in which Mr Shah began to enquire about the tagged accounts and who was carrying out the due diligence as advised by the claimant. These have been referred to above. This was a million miles away from close scrutiny. These were relevant and responsible enquiries of the joint Managing Director who had hitherto had no knowledge of the instruction or retainer of either MHA or S&W during a period when the claimant had decided to go on holiday at 2 days' notice in the run up to the corporation tax deadline. It mattered not, in the Tribunal's conclusion, the degree of outstanding matters which required attention or indeed that the claimant was available to be contacted whilst on holiday. There was no closer monitoring; the claimant was not subjected to a detriment. Alternatively, Mr Shah's 'closer' monitoring was entirely for reasonable and proper cause and unconnected to any disclosures entirely.

<u>TOSCA & Board meeting – 4.5</u>

134. The evidence of Ms Nahal was believed over the claimant in relation to the TOSCA meeting. The Tribunal repeats and cross-refers to its comments above regarding the comparative credibility of the claimant and Ms Nahal and the totally unsatisfactory wavering and ambiguity of the claimant's assertions against Ms Nahal regarding the 2 August 2017 email. In addition, Ms Nahal's testimony had some corroboration following the separate FCA investigation. Although that evidence was not before the Tribunal, Ms Nahal's evidence was accepted. The Tribunal concluded that her anger, frustration and resentment in her oral testimony was plain to see. The allegation in relation to the date change following Ms Nahal's email of 10 August 2017, was adequately explained by her evidence. This change was occasioned by the client. To conclude otherwise would mean that Ms Nahal was involved in a second deceit. The Tribunal rejected that. If Mr Shah had wished to exclude the claimant from any participation in the TOSCA meeting, he could have done this after receiving Ms Nahal's email of 5 July 2017, which the claimant was copied in on. By then, all of the claimant's disclosures had been made. However, the claimant was still included in the email from Ms Nahal of 10 August 2017. The claimant was not subjected to a detriment. The claimant was not ostracised.

Board meeting

135. The Tribunal concluded there was nothing sinister in the rearrangement of the August Board meeting. The Tribunal rejects that Mr Shah knew that the claimant was scheduled to be away on 6 October 2017, one of the proposed new dates. The claimant had not told him. There was no evidence given that the claimant had given access rights to his calendar or that it was a shared calendar. Moreover, this conspiracy theory would have involved Mr Shah knowing in advance or coercing Mr Harris in to refusing the 22 September 2017 date. Had Mr Harris confirmed 22 September 2017, the claimant's allegation would have extinguished. The claimant was not subjected to a detriment – he was not ostracised.

July offer & revocation of 2017 pay review

136. The statement of terms provided to the claimant in the form of his draft service agreement had not been agreed by the claimant. The process had commenced from Mr Shah providing the draft terms on 8 June 2017. On the basis of the findings already reached, the terms for notice and holiday were not incorrect; the bonus percentage had been increased to 100%; the salary had been increased to £115,000, plus a 10% pension. The

offer, universally, was financially more favourable. The claimant agreed this under cross examination. This was an offer which had been approved by the RemCo. It is correct that the offer was said to have lapsed following its non-acceptance by 28 July 2017– which was 14 days from 14 July 2017 - but in both communications – the email of 31 July 2017 (page 389) and 8 August 2017 (page 412), Mr Shah still invited the claimant to provide further comments. On 31 July 2017 he told the claimant to work to a revised deadline of 7 August 2017 and said " I have provided you with a Section 1 statement which, unless and until we can agree terms for a service contract, constitutes the statement of your terms of employment". In the 8 August 2017 email, he said the offer had lapsed "for now" and went on to say "we are willing to review amendments to the service agreement on receipt of a Word tracked document. Please can you email by return". Whilst there may have been some ambiguity, the position was not final. The process remained live. The offer was not peremptorily revoked. The claimant was not subjected to a detriment.

Performance Improvement plan ('PIP')

137. The Tribunal has already reached findings and conclusions above regarding the reasons for which the claimant was put on a PIP. It is not inherently the case that a PIP is an act of detrimental treatment. At face value, it is designed to improve performance and can be an aid to that. Even if the Tribunal's conclusion is wrong in this regard, the Tribunal concluded that there was no causal link to the asserted protected disclosures. That is, they did not materially influence the respondent's treatment of the claimant (***Fecitt*** applied). They all had different triggering events. The Tribunal also concluded there was nothing irregular (and certainly no causal link) with the respondent's reference to the claimant having purchase IRIS software.

Invitation to Disciplinary Hearing

138. The invitation to a disciplinary hearing, without warning, on 4 September 2017 was for four discrete matters (and a fifth conflated reason) a) The repeated refusal to provide changes/comments on his contract in a marked up Word document b) the 24 August incident with Mr Shah c) failure to give sufficient notice of holiday d) the refusal to provide S&W emails as repeatedly requested by Mr Shah. The decision to do so was Mr Kissane's based on his analysis of the email traffic between Mr Shah and the claimant and his conversation with Mr Shah. There was no separate

prior investigation meeting. The Tribunal notes however that under paragraph 5 of the ACAS Code on Discipline, this is not required in every case but in "some cases". As with the Tribunal's comments on a PIP above, a disciplinary procedure is not inherently detrimental, it is corrective in many circumstances. However, as termination of employment was a possible outcome, it was considered by the Tribunal to be a detriment. However, the Tribunal concluded that there was no causal link to the asserted protected disclosures. Each issue had their own triggering events. There was a proper basis for the instigation of the process. It was key part of the claimant's evidence that he was being 'set up'. He said this more than once in relation to the requests made of him during the contract negotiations and the S&W emails. This troubled the Tribunal. The obviously flaw in that conspiracy theory was that if he had provided his comments tracked in a word document and the S&W emails, these 2 charges against him would have been extinguished. It also required foresight that the claimant would persistently refuse to comply. The requests were not difficult to comply with at all. Instead, his refusal put the respondent in an impossible position, and it was inevitable then that his insubordination would lead to a natural progression and elevation of the issue. The claimant was thus the author of his own misfortune in this regard.

Pressure to resign

139. In relation to the attempts by the respondent to find an alternative resolution by reliance on without prejudice or pre termination negotiations, the Tribunal concludes that there was no unfair pressure placed on the claimant to resign. At the time, it was not advanced by the claimant, that the offer itself fell short of what the claimant felt was a reasonable offer. It was part of the claimant's case that the offer on 4 September 2017 was in advance of a disciplinary hearing only 2 days later on 6 September 2017. However, the claimant could have asked for more time. He could have asked for a deferment of the disciplinary hearing. There was no evidence that had he made either request it would have been refused. In fact, the claimant did not provide a response either way. He could also have clearly expressed he was not interested in such dialogue. The claimant was not, in the Tribunal's view, being asked to sign a settlement agreement by the stated deadline of 5 September 2017 – it was about acceptance of the offer in principle. In evidence, the claimant did not complain about a lack of time, but about not being "trodden on". The offer was resurrected after 6 September 2017 too. This could have been a negotiation. It is not an

uncommon scenario; in fact, it is fairly commonplace. It was not evidence of unfair pressure to resign. The claimant was not subjected to a detriment.

Communications with the Media – False & Misleading statements

140. This was addressed in Mr Shah's rebuttal statement, para 121. The Times report was at page 769; contrary to being false or misleading, it was reported that Mr Shah had provided a carefully weighted response, further that he had refused to divulge details. Even if this was more out of self-preservation than care for the claimant, it was neither false nor misleading. In relation to Bloomberg, to whom Mr Shah said the claimant had not done anything unlawful, the Tribunal concluded that this comment taken at face value was evidence of Mr Shah diffusing the situation – he was eliminating any thoughts that there could be any fraudulent or dishonest conduct for example. The claimant was not subjected to a detriment.

Dismissal

141. It was difficult to escape an inevitable conclusion that 2 of the 3 issues for which the claimant was dismissed showed persistent/repeated insubordination towards his boss. The claimant struggled even when giving evidence in Tribunal to accept that he was subordinate. The conspiracy case, as analysed above was hopeless. The claimant accepted in response to Tribunal questions that had he complied with Mr Shah's requests there would have been no case for the respondent to advance in respect of those matters. The Tribunal noted that in fact the claimant's taking of leave, last minute, a few weeks before the Corporation tax deadline was not, ultimately, upheld as a contributing factor to his dismissal. The August incident however was a contributing factor which portrayed a further example of insubordination. The other common factor was that all issues had arisen in a relatively short and very recent period of time. There was no reliance on anything peripheral. The claimant also accepted in evidence that he had deliberately withheld emails from Mr Shah which was what the respondent believed at the time. In fact, at the appeal (against dismissal), Mr King had formed a belief that the claimant had been dishonest in relation to the S&W emails which will be analysed further below. The Tribunal concluded that the claimant was perhaps fortunate that the case against him was not for gross misconduct. The S.228 CA breach did not have any causal relevance to the claimant's dismissal. Its relevance was no more than a chronologically historical fact.

Ordinary unfair dismissal – S.98 ERA

142. The Tribunal repeats to a large extent, its conclusions in paragraph 131 above. The Tribunal reminds itself that it must apply a test not dissimilar to the ***Burchell*** test to the respondent's decision to dismiss the claimant especially as the substantial reason relied upon overlapped considerably if not entirely with matters of conduct. The Tribunal also reminded itself that it must not substitute its view. The range of reasonable responses test also applies both to the decision to dismiss substantively and procedurally. Paragraph 137 above sets out why the Tribunal concludes that the respondent had a genuine belief in the loss of trust and confidence in the claimant and why it had reasonable grounds upon which to hold that belief. In relation to investigation, the Tribunal concluded that the respondent could have spoken with the claimant and Mr Kapadia at least in relation to the August incident and the S&W emails. However, the Tribunal went on to conclude that was not, overall, fatal to the reasonableness of the investigation. This was not about the need to have a pre-disciplinary investigation, but about whether pre-dismissal there was a reasonable investigation. By the time of the disciplinary hearing and indeed by the conclusion of the appeal hearing, the claimant had had a full right of reply including any investigation concerns. It was also apparent to the Tribunal that the email traffic captured a very significant amount of the respondent's concerns and the decision to take the matter further. There was no suggestion that the 'dossier' of evidence given to Mr Kissane by Mr Shah was selective or incomplete.

143. The appeal Hearing was conducted independently and thoroughly. The Tribunal concludes that by the conclusion of the appeal hearing the loss of trust and confidence in the claimant had in fact become more aggravated and had in fact elevated in to disbelief of the claimant – not as a separate charge against him but why his response (s) were rejected. The claimant was disbelieved at the dismissal stage about providing the S&W emails when he returned from leave and by the conclusion of the appeal hearing he was disbelieved about not seeing Mr Shah's emails until 5 September 2017 particularly as the claimant had provided some of the emails on 1 September 2017 and because of the claimant's email of 22 August 2017 (which the Tribunal concluded related to the email at page 516).

144. This dismissal was within the band of reasonable responses both procedurally and substantively. In so far as it might have been alleged, the appeal process through its independence and comprehensiveness, cured any defect with regard to any insufficiency of preparation time, clarity of the case against the claimant or otherwise (which the Tribunal did not find).

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Employment Judge Khalil

2 November 2020