EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Dr M Parsons	AND	Barnabas Fund

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol ON 3, 4 and 5 August 2020

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: **Mr Blitz (counsel)**
For the Respondent: **Mr Jagpal (consultant)**

JUDGMENT ON LIABILITY

1. The Respondent automatically unfairly dismissed the Claimant.
2. The Claimant's claims under s. 47B of the Employment Rights Act 1996 succeed.
3. Directions for remedy are made under a separate order.

REASONS

1. In this case the Claimant, Mr Parsons, claimed that he had been unfairly dismissed and/or automatically unfairly dismissed and/or subjected to a detriment for making protected disclosures. The Respondent contended that the reason for the dismissal was misconduct.

2. On 15 July 2019, the parties confirmed in an e-mail from the Respondent that neither objected to the claim being heard by a judge sitting alone. Under

s. 4(3)(e) of the Employment Tribunals Act 1996 the claim was heard by a Judge sitting without lay members.

3. The Claimant notified ACAS of the dispute on 10 June 2019 and the certificate was issued on 9 July 2019.

4. The Claimant presented his claim on 14 August 2019.

5. On 7 January 2020, Employment Judge Matthews conducted a Telephone Case Management Preliminary Hearing, at which the issues to be determined were agreed. It was also agreed that the bundle for the final hearing would not exceed 200 pages, including Tribunal documentation and that the Claimant would give evidence and that his word limit was 3,000 words on his statement. The Respondent stated it intended to call 3 to 4 witnesses and it was agreed that the total of all its statements would not exceed 5,000 words.

6. In breach of the directions the parties filed a bundle of at least 344 pages in respect of liability and a 50-page bundle in respect of remedy. On 15 July 2019, the Respondent indicated in an e-mail that it had 5 to 6 witnesses but did not mention that it would exceed the word limit. On 28 July 2020, the Respondent applied to increase the word limit on its statements, stating that it intended to call 7 witnesses and that they had exceeded the word limit by 3,500 words.

7. Employment Judge Livesey refused the application on the basis that it had been made very late and that the Tribunal's order had been broken by over 50%. Witness statements should have been exchanged on 19 June 2019 and it was unfair on the Claimant to serve witness statements in breach of the order. It was ordered that the timetable set out in the case management summary of 7 January 2020 would continue to apply.

8. On checking the total number of words in the Respondent's statements, it appeared to me that there were in excess of 8,900 words. At the start of the hearing the Respondent confirmed that it would only rely upon 4 witnesses, however the total word count of those statements was approximately 7,500. The Respondent was asked to edit the statements further.

9. The Respondent also sought permission for Mr Frith to give his evidence by video-link, to which the Claimant objected. Mr Frith was the dismissal officer and a key witness for the Respondent. On 6 July 2020, the parties were asked by the Tribunal as to how the hearing should be conducted, including whether CVP was a viable alternative. On 15 July 2020, the Respondent informed the Tribunal on behalf of both parties that an in-person hearing was required, but also asked about what arrangements could be made to hear witnesses by CVP. On 28 July 2020, the Respondent asked whether

a witness could give evidence by CVP. Mr Frith lives in the USA. The Claimant relied upon the Respondent's failure to comply with the directions timetable and said that the Claimant would not be able to cross-examine as effectively and the witness evidence would not be so easy to assess. The Respondent said that it would be significantly prejudiced if it could not call Mr Frith. The Respondent's application was granted. Video evidence is available for situations when a witness is in a different country. Taking into account the covid-19 pandemic, that air travel was not encouraged at that time, that the evidence of Mr Frith was likely to take a couple of hours and that giving evidence by video, allows the witness to be seen, the balance of prejudice fell in favour of the Respondent.

10. When the pre-reading had been completed the case commenced. The Respondent said it had been unable to reduce the length of its witness statements, but that it might not call Dr Sookhdeo. It was agreed that the Claimant would give his evidence and then the Respondent would confirm which witnesses it relied upon. The Claimant gave evidence and the Respondent's representative took instructions. The Respondent confirmed that it would not rely on the evidence of Dr Sookhdeo. The Claimant then applied to restrict the Respondent's witness evidence to 5,000 words. The Claimant said that to increase the word limit would involve a reconsideration of Employment Judge Livesey's order. The Claimant was prejudiced because he had complied with the order. The Respondent said that it was too difficult to reduce the statements to that level and that its remaining witnesses were crucial. The Respondent had reduced the witnesses it relied upon and therefore the factual background was a little different. It was considered in the interests of justice to increase the word limit for the Respondent. There appeared to be some background and non-contentious matters in the witness statements. The witnesses sought to be relied upon were relevant. The parties were reminded that orders were to be complied with and were not aspirational. Taking account that there needed to be fairness between the parties, that the remaining witness statements consisted of about 6,500 words and that going part heard was undesirable the order was varied and the Respondent was given permission to rely upon witness statements of a total length of 6,250 words. The Respondent was ordered to send the edited witness statements to the Claimant, the Claimant's Counsel and the Tribunal by 1900.

11. After the Claimant had received the edited statements, Counsel for the Claimant was asked whether there were any matters in the statements for which the Claimant needed to be recalled and it was confirmed that there were not.

12. The evidence of Mr Frith was heard by way of CVP and despite some technical difficulties with feedback, all concerned were able to hear the questions being asked and the answers given.

13. At the end of the evidence, Counsel for the Claimant withdrew the allegations in relation to a protected disclosure made to the Charities Commission and said that no determination needed to be made as to whether such a disclosure had occurred.

14. Submissions were made by the parties in respect of liability. After Judgment was given in relation to liability there was insufficient time to consider remedy and therefore directions were given for a remedy hearing.

The issues

15. The issues were confirmed as being the matters set out by Employment Judge Matthews and the protected disclosures relied upon as set out in the further particulars. The Claimant relied upon 4 disclosures to his employer on 11 September 2018, 3 January 2019, 13 February 2019 and 14 February 2019 all four were in relation to health and safety or that the legal obligation to take reasonable care for an employees' health and safety was being broken or might be broken. The Claimant also alleged that he had made a protected disclosure to his solicitor. The Respondent did not accept that these were protected disclosures. The Claimant also initially relied upon disclosures to the Charity commission on 13 March 2019 and 1 April 2019, which, as set out above, were withdrawn. The Claimant alleged that he had been subjected to detriment for making protected disclosures, in that he had been suspended and subjected to disciplinary proceedings and that he had been dismissed for having made a protected disclosure. The Respondent said that the Claimant had primarily been dismissed for some other substantial reason, although it also relied on conduct.

The evidence

16. I heard from the Claimant. For the Respondent I heard from Mr Frith, Mr Storm (Chief Executive Officer) and Mr Lee.

17. I was provided with a bundle in excess of 350 pages. Any reference in square brackets, in these reasons, is a reference to a page in the bundle.

18. There was a degree of conflict on the evidence.

The facts

19. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

20. The Respondent is a charity, whose main objective is to provide financial support to projects which provide assistance to Christians experiencing discrimination, oppression and persecution as a consequence of their faith.

21. The Claimant was employed by the Respondent as Head of Research and Director of Studies from 1 October 2015. He carried out research into the educational work of the Respondent and helped with academic material as they sought to grow and develop their advocacy department. He was also employed to assist with advocacy matters as the need developed.

22. The Barnabas Fund UK Employee Handbook says, in relation to media and public statements: "You must not make public statements or communicate with the media about any matter relating to our organisation. You must obtain permission before agreeing to give any lecture, media interview or to publish any article or comments. You must not supply information without approval (whether in writing or electronically) which in any way impacts upon our organisation. This extends to comments you make or images you upload to blogs and social networking sites like Facebook, You Tube or Twitter." There is not any other document setting out a policy in relation to external communications.

23. Mr Lee and Mr Frith said it was well known that all external communications should be checked before sending them. I accepted the Claimant's evidence that he had not been informed of such a policy. Further there had been occasions in the past when he had been asked to blind copy in Mr Storm, Ms Kerslake and Dr Sookhdeo into communication so that they could ensure their answers were the same as his [p99]. Further Mr Lee on 18 March 2019, in his meeting with the Claimant [p144], did not believe the requirement related to all communications. I did not accept that there was a blanket requirement for all communications to be checked before being sent. The Claimant had been engaged to undertake advocacy and as evidenced by the e-mail dated 16 February 2018 had a degree of autonomy.

24. It was conceded by the Respondent, that in 2015 Dr Sookhdeo was convicted of offences in the Crown Court, including allegations of intimidating witnesses.

25. In about September 2018, the Respondent started a speaking tour. On 12 September 2018, the Claimant and some colleagues were required to drive from Pewsey to Lancashire to speak at an evening meeting and then return to Pewsey, arriving back at about 0230. The following day they were required to drive to Exeter and return to Pewsey at about midnight. The drivers would have been the Claimant, Mr Storm and the new church partnership manager.

26. The Claimant was concerned that they would be travelling late at night/early in the morning and there would only be three drivers. The Claimant spoke to Mr Storm and he agreed that they should stay overnight in Clitheroe.

27. On 11 September 2018 at 0848, Mr Storm sent an e-mail to those attending the tour and said that due to roadworks he had changed his decision in that the journey time would be halved if there was no traffic and that they would return to Pewsey and then have a late start the following morning.

28. On 11 September 2018, the Claimant sent an e-mail to Mr Storm, Ms Kerslake, Dr Sookhdeo, Mr Mursalin, Mr Hook and Ms Price. The Claimant said that he was concerned that they were still planning to drive to Clitheroe and back. He said, "there is a serious health and safety issue here i.e. undertaking a 16-hour journey, getting back at the earliest 2.30 and the following night getting back sometime around midnight. There are legal limits for driving and working. For professional drivers that legal limit is 11 hours maximum in any one day of any form of work time – whether driving or not. If we ignore this – and we have an accident – either on the way back from Clitheroe or the next night driving back from Exeter at midnight – then the health and safety executive will treat that very seriously – and both you and the trustees will be legally liable. The fact that those limits are designed for professional drivers does not exempt us from them … this is the issue that I raised with you previously." He concluded by saying that because he had already raised the concern and that Mr Storm had reversed the earlier decision to stay overnight, he had no option but to raise it as a formal health and safety concern." The Claimant's evidence, which I accepted was that he was concerned with the amount of driving over two consecutive evenings combined with working long hours and that there were only 3 people insured to drive, one of whom was not confident. He was concerned that the drivers would be excessively tired and that they were risking an accident on the second night.

29. The Claimant was not threatening Mr Storm, but was informing him about his concerns as to what the consequences might be. Mr Storm considered that the Claimant's e-mail was insubordination and a refusal to follow an instruction [p154 paragraph 3(e)].

30. About 15 Minutes later, Dr Sookhdeo accused the Claimant of forcing him to obey his instructions by issuing a formal concern. The Claimant said that he was raising the need to comply with the Health and Safety at Work Act. Dr Sookhdeo told him that he was entitled to ignore that, as were all staff, who choose to work whatever hours they chose. Dr Sookhdeo told the Claimant that he was a snake and was manipulative. The Claimant was told that he was going down a legal route and had put the Respondent in a difficult position and that they could not give in to his request. The Claimant was told that he should have gone to see him again and have voluntarily

withdrawn from the tour. The Claimant was told that he should never have sent the e-mail raising a health and safety concern. The organisation could no longer trust him and if he went to any of the statutory organisations or an Employment Tribunal he would no longer work for the Respondent. The Claimant told Dr Sookhdeo that what was occurring could amount to witness intimidation. The Claimant was taken off the tour. The Claimant recorded the conversation in an e-mail to himself shortly after the incident occurred [p184].

31. Mr Storm e-mailed the Claimant and said that he had raised a health and safety concern and referred to the legislation as referring to commercial drivers and that they were exempt. They would ensure that at least a 30-minute break would be taken after a maximum of 4½ hours in the car. It was important to have at least 11 hours unbroken rest between working days and driving back from Clitheroe gave them longer than 11 hours before having to go to Exeter. It was suggested the Claimant worked from Pewsey as normal and they would cover his slot for the rest of the tour.

32. From then, the Claimant was excluded from meetings with key visitors, Mr Storm and Dr Sookhdeo, which he had previously attended every three to six weeks. Dr Sookhdeo ignored the Claimant for a few months and did not acknowledge him when he said ‘hello’ in the mornings.

33. On 5 December 2018, the Claimant and Mr Storm travelled to a meeting in Scotland in relation to a poster campaign that the Claimant had organised.

34. On 2 January 2019 Mr Storm attended the Claimant’s office and spoke about the Claimant’s future.

35. On 3 January 2019 Mr Storm attended the Claimant’s office and said that they had not cleared up the health and safety concern. He was asked if he had reflected on his actions and regretted stating that Mr Storm’s instruction was against HSE regulations. The Claimant told Mr Storm that employees had a responsibility to raise such concerns. The Claimant was also told that he should not have said to Dr Sookhdeo, that what he had done could amount to witness intimidation. The Claimant told Mr Storm that he had been threatened with the sack and that he had since been treated like a social pariah by Dr Sookhdeo.

36. At the end of the meeting, the Claimant, having previously discovered that there were problems with the launch of the ‘Test Act’ book (which he had written) about 12 days later, was told by Mr Storm that he had cancelled the printing. The printing was cancelled in December. The launch was suspended because the book had not gone through the editorial process with Ms Kerslake, who was senior to Mr Storm. The book was subsequently approved and the launch went ahead as originally planned.

37. On 14 January 2019, Mr Storm authorised the Claimant to undertake FCO diplomacy training, which would consist of 2 hours per week for 6 weeks.

38. On 21 January 2019, the Claimant sent a letter to the Rt Hon Jeremy Hunt MP, Foreign Secretary, in which he thanked him for setting up the independent inquiry into how government can help persecuted Christians. The Claimant provided a copy of the Test Act book.

39. On 22 January 2019, the Respondent, in a press release, said it welcomed the Foreign Secretary's recently launched government review on the global persecution of Christians.

40. In the week commencing 11 February 2019, the Claimant had conversations Mr Mursalin (board member and trustee) and Mr Hauser (director). The Claimant told them about what had happened with Dr Sookhdeo and that he had been threatened with dismissal. Both men sought a reconciliation and urged the Claimant to apologise for suggesting that Dr Sookhdeo's visit could be construed as witness intimidation. The Claimant accepted it might have been unwise to have said it. Mr Hauser urged the Claimant to apologise to Mr Storm and Dr Sookhdeo and said that all would be well again.

41. On 19 February 2019, Mr Storm authorised the Claimant to speak at a conference in March. The Claimant had been asked to speak at this event a year earlier.

42. On 25 February 2019, Mr Storm asked the Claimant to speak at a small conference in May 2019.

43. On 4 March 2019, the Claimant forwarded Mr Hendrick, Dr Sookhdeo and Ms Kerslake a letter he had received from the Foreign Secretary [p123]. The Claimant was asked to forward a copy of what he had said to Mr Hunt MP, which he did.

44. On 5 March 2019, Mr Storm e-mailed the Claimant and said that they were not entirely confident a policy review would achieve anything and would be hesitant in thanking the Foreign Secretary for doing so. The Claimant was asked to check with him or Dr Sookhdeo before writing to an external body, so that they ensured all their communications were aligned. The Claimant responded and asked why he was only now being informed of the decision, when a significant part of his role was advocacy. He said that effective advocacy involved building relationships and when politicians speak out there is a need to immediately thank them and if every advocacy communication had to be run past them, it would be impossible to have an effective advocacy strategy.

45. On 5 March 2019, Ms Price, HR Administrator, told that the Claimant that Mr Storm had instructed her to tell him that he should stop using the director of studies part of his job description with immediate effect and that they would be looking at head of research in due time. The Claimant was told that there had been some restructuring, of which he was unaware. The Clamant referred to the health and safety concern he had raised and was worried that Mr Storm wanted him to leave the business.

46. On 6 March 2019, Mr Storm e-mailed the Claimant and said that the strategy and advocacy needed to be in line with overall strategy. The Claimant was asked to check with Dr Sookhdeo before communicating with all external parties and to check everything advocacy related with him before proceeding. The Claimant responded by asking what the overall strategy was.

47. On 11 March 2019, Mr Storm said that the issue was not the strategy, but the Claimant's willingness to comply with the instruction and asked the Claimant to confirm he was happy to do so.

48. On 11 March 2019, the Claimant said in an e-mail to Mr Storm [p138-139], that he had not been unwilling to follow policy. He said his assumption had been that it was to influence government policy and if that was not the primary aim to tell him what that aim was. He said he had been asked to write the advocacy policy, which had been approved by Mr Storm and Dr Sookhdeo. He said that to suggest he was unwilling to follow the policy, when he had not been told what it was, was unreasonable.

49. On 13 March 2019, Mr Storm e-mailed the Claimant and said that there had not been a change to policy and that it was not suggested it had not been adhered to. The issue was with the process, i.e. before contact was made with external parties, he was to obtain authorisation from Dr Sookhdeo. The Claimant was asked to acknowledge he understood this and whether he was happy to follow the instruction, otherwise it would have to be discussed more formally.

50. On 14 March 2019, the Claimant e-mailed Mr Storm. The Claimant said he had been surprised to be rebuked for the opening line in his letter to the Foreign Secretary. The allegation that he had not been prepared to follow instructions was false and that Mr Storm was escalating the situation. The Claimant referred to the health and safety concern he raised in September 2018, the meeting with Mr Storm on 3 January 2019, being instructed to stop using half of his job description and he had then been accused of not following instructions. He said that his actions in sending the book to the Foreign Secretary was in line with policy. The request to have all external advocacy communications approved, was a significant change to how he

had sought to develop advocacy over the previous 3½ years. That he had been raising professional concerns about the effectiveness of what had been asked and that he was not refusing to follow procedures. He set out some advice on advocacy, including that to be effective there were short timescales and often immediate action was required. The Claimant said that what was proposed raised some regulatory issues and that the need to check first meant they would not be able to respond quickly enough for the advocacy to be effective and that they had to ensure that the charity did not become a vehicle for the views of any trustee or staff member. The Claimant said it was Mr Storm's responsibility to do what was in the best interests of the charity and he could reject the Claimant's advice. The Claimant confirmed that he was happy to follow any instruction that was lawful and compatible with the values set out in the Respondent's handbook.

51. On 15 March 2019, Mr Storm e-mailed the Claimant and said that the Claimant had made veiled threats. He set out his reply to the Claimant's e-mail dated 11 September 2018. In relation to 3 January 2019 he said that he made it clear he was asking whether the Claimant regretted saying that his instruction was against the HSE regulations and the Charity Commission would investigate it. He had been surprised that the Claimant had not answered yes or no to his instruction and not following it was insubordination. It was unacceptable for the Claimant to offer advice. Mr Storm interpreted what the Claimant had said as that if he followed the instruction it would be judged as non-compliant by the Charity Commission.

52. On 18 March 2019, the Claimant attended a meeting with Mr Lee, Head of HR and Ms Price. Mr Lee's line manager was Mr Storm. At the meeting, the Claimant said he had told Mr Hauser and Mr Mursalin that Mr Storm was trying to get rid of him. He described the meeting on 2 January as a good meeting. On 3 January Mr Storm blamed him for letting others down and was rebuked for raising the health and safety issue and that Mr Storm had wanted him to see the error of his ways. Dr Sookhdeo had ignored him for 4 months. Mr Storm was trying to put him in an impossible position and it was obvious he was trying to get rid of him. He said that he was being reduced to a clerk, when he had been recruited as a senior colleague. Mr Lee said that he believed the policy in relation to external communications did not relate to everything.

53. During March 2019, the Respondent sought to reach an agreement with the Claimant, whereby he would leave their employment.

54. On 25 March 2019, the Claimant e-mailed Mr Lee requesting some annual leave so that he could see an employment solicitor.

55. On 26 March 2019, the Claimant attended a meeting with Mr Lee. The Claimant was told that he was being suspended pending further investigations. The Claimant said that it was a malicious allegation against

him about an allegation he had raised. The Claimant asked why he was being suspended and was told that the relationship had broken down so much it was a serious breach of trust. The Claimant suggested that the Respondent had created the circumstances. The Claimant was told by Mr Lee that suspension was not the first option and that the Respondent had offered him a settlement. The Claimant said that he had been threatened with dismissal and had been called a snake.

56. The suspension was confirmed in a letter dated 28 March 2019. The reasons given referred to "continued reluctance to follow what is considered to be a reasonable management instruction. An action that has further raised another allegation of serious breach in confidence and trust which has caused us to question you performing your wider duties and responsibilities."

57. Mr Lee said in evidence that the health and safety concern did not form part of his consideration, however he made been made aware of the issue on 18 March 2019 and he knew that the Claimant was going to see an employment solicitor and further he had not considered suspension as the first option. The Claimant was suspended whilst an investigation took place into whether trust and confidence had been breached. The suspension letter clearly referred to more than one matter which had allegedly damaged trust and confidence. The additional matter was likely to relate to the health and safety concern. There was reference in the invitation to disciplinary hearing letter, that the Claimant had challenged Mr Storm in relation to the health and safety issue, which was considered to be insubordinate and a breach of trust and confidence. I did not accept Mr Lee's evidence that the health and safety concern was not in his mind at the time of the suspension.

58. Mr Lee carried out an investigation which included obtaining statements from the following witnesses:

    a. Mr Storm's evidence [p153-156] said in relation to the health and safety disclosure referred to the Claimant's actions in e-mailing him and by what he said to Dr Sookhdeo as insubordination and a refusal to follow an instruction. He accepted asking the Claimant, on 3 January 2019, whether he regretted saying that his instruction to travel back from Clitheroe was against HSE regulations. He complained that the Claimant still considered that he had acted outside of the law. He set out the e-mails sent in March 2019. He further said that the Claimant strongly resisted any instructions with which he disagreed. This was a reference to more than one instruction.

    b. Mr Hauser's evidence [p157-158], related to the conversation in February 2019 and that it had been suggested to the Claimant that

he apologised to Dr Sookhdeo. The Claimant said that he believed that Mr Storm and Dr Sookhdeo wanted to get rid of him.

c. Dr Sookhdeo said he spoke to the Claimant about the e-mail on 11 September 2018. The Claimant said that the Respondent was breaking laws. The Claimant used words such as whistle-blower. He denied threatening to sack the Claimant.

d. Mr Mursalin's evidence [p181], in relation to the meeting in February 2019 said that the relationship had deteriorated due to insubordination.

59. An account was provided by the Claimant to Mr Lee on 8 April 2019 [p183 to 187]. This included inserting his contemporaneous note of what had occurred with Mr Sookhdeo, what happened with Mr Storm on 3 January 2019, the conversations with Mr Mursalin and Mr Hauser and that he had been enquiring what the policy was in March 2019.

60. On 12 April 2019, the Claimant was invited to attend a disciplinary hearing [p193-197]. The letter referred to both the March 2019 e-mails and the challenging Mr Storm in September 2018. Further, that the Claimant had not attempted to reconcile with Mr Storm or Dr Sookhdeo. It was alleged that the Claimant had been insubordinate and there had been a breach of trust and confidence. It also stated "the hearing will also consider the wider concern that there has since been a fundamental and irretrievable breakdown in work relations between you and you (sic) colleagues… if proven, the termination of your employment could result." The tone of parts of the invitation letter read as though Mr Lee had already decided upon the outcome.

61. On 17 April 2019, the hearing was postponed. The Claimant was informed that he could prepare questions for those who had given statements and bring them to the hearing and that the hearing panel would determine whether it was reasonable to ask the witnesses the questions.

62. On 26 April 2019, the Claimant attended the disciplinary hearing. In the meeting notes [p201 to 268] the Claimant confirmed that he had written some questions to be asked. The Claimant provided his account as to why he thought the disciplinary hearing was because he had raised a health and safety concern. He explained the difficulties with the instruction to get all communications checked and how he thought it might affect the quality of advocacy and the difficulties there were in contacting Dr Sookhdeo when he was overseas. The Claimant stated that he had not refused to comply with Mr Storm's request, but he had pointed out the issues that it raised [p222]. The Claimant pointed out that the Barnabas Prayer for February included thanks for the Government review, which was at odds with what

Mr Storm had said in his e-mail on 5 March 2019. The Claimant also gave evidence that he had complied with the instruction to check before communicating with an external party [p230]. In relation to the second allegation the Claimant said he made a protected disclosure and had been poorly treated as a result.

63. On 15 May 2019, the Claimant was informed that he was dismissed [p289-292]. In relation to allegation 1, the policy from the Handbook was referred to and that another employee had complied in relation to giving a lecture. It was concluded that the Claimant continued to refuse to comply with the instruction and it was a fundamental breach of contract. In relation to the second allegation, in relation to challenging Mr Storm about the external communication instruction and the incident in September 2018, it was said that the manner in which the Claimant raised the concern and that he had not accepted the decision of Mr Storm was pertinent. In relation to the third allegation that there had been a significant breach of trust and confidence, he said he was satisfied that unwarranted veiled threats were made when he was not in agreement with the decision made following his health and safety concern and this was a major contributory factor leading to the breakdown of trust and confidence. Allegation 4 related to whether there had been a fundamental breakdown of trust and confidence and it was concluded that there had been. It was said that the reason for dismissal was on the basis of the first and fourth allegations.

64. Mr Frith's evidence was that the health and safety concern was a contributory factor, but that it was not the major reason, however this was contradicted by his outcome letter, when he concluded that the health and safety concern events were a major contributory factor in the breakdown in trust and confidence. I did not accept his evidence that the e-mail of 11 September 2019 was not a major factor in his decision-making process.

65. On 24 May 2019, the Claimant appealed against his dismissal [p297-303]. He said that he had not refused the instruction in March 2019 and referred to his e-mail in which he said he was willing to follow any lawful instruction compatible with the values of the Respondent. He repeated the history of the events.

66. On 21 June 2019, the Claimant was informed that the decision to dismiss him was upheld [p304]. Mr Dean, who considered the appeal, was not called to give evidence. He concluded that the evidence in relation to first and fourth allegations was substantiated.

The law

67. Under section 43A of the Employment Rights Act 1996 ("the Act"), a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

68. Under Section 43C(1) of the Act a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

69. Under Section 43G of the Act (Disclosure in other cases):
“(1) A qualifying disclosure is made in accordance with this section if—
(a) . . .
(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
(2) The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) in accordance with section 43F.
(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.]

70. Under Section 47B a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This provision does not apply to employees where the alleged detriment amounts to dismissal.

71. Sections 48(1) and (1A) of the Act state that an employee may present a claim that he has been subjected to detriment contrary to s. 44 and 47B of the Act. Under section 48(2) of the Act, on a complaint to an employment tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

72. s. 48(3) of the Act provides: An employment tribunal shall not consider a complaint under this section unless it is presented—
(*a*) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(*b*) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(*a*) where an act extends over a period, the 'date of the act' means the last day of that period, and
(*b*) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer[,a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has

done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.

73. Under section 103A of the Act, an employee is to 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.

74. Under s. 98 of the Act it is for the employer to show the reason or principal reason for the dismissal and that it is either a reason falling within subsection 2, which includes misconduct, or is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

75. I considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

76. I also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

77. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

78. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

79. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Protected disclosures

80. The tests were most recently stated by the Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73.

81. First, I had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of Geduld-v-Cavendish-Munro [2010] ICR 325 in light of the caution urged by the Court of Appeal in Kilraine-v-Wandsworth BC [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances. A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73).

82. Next, I had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (Western Union-v-Anastasiou UKEAT/0135/13/LA).

83. I also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1)(a), (b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that he held it (Babula-v-Waltham Forest College [2007] IRLR 3412 and Korashi-v-Abertawe University Local Health Board [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in Kraus-v-Penna [2004] IRLR 260 EAT).

Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

84. 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (Ibrahim-v-HCA UKEAT/0105/18).

85. Next, I had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, I had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see Babula and Korashi above). That test required me to consider his personal circumstances and ask myself the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made?

86. The '*public interest*' was not defined as a concept within the Act, but the case of Chesterton v Nurmohamed [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

87. The Court of Appeal dismissed the appeal in Chesterton. At paragraph 31, Underhill LJ said that he did not think "*there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That*

clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest."

88. Further at paragraphs 36 and 37:

"36. …*The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*

37. Against that background, in my view the correct approach is as follows. In a whistle-blower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case… "

89. Underhill LJ referred to relevant factors, which are:

(a) the numbers in the group whose interests the disclosure served;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) The nature of the wrongdoing disclosed; and
(d) The identity of the alleged wrongdoer.

90. In order to qualify for protection, the disclosure must be to an appropriate person. There are essentially two types of disclosure relevant to this case: disclosure to the employer under section 43C and disclosure to "other persons" under section 43G.

91. The threshold justifying a disclosure becomes more rigorous where the worker is raising his concerns or allegations beyond the employer. For a section 43C disclosure to the employer, the only constraint on the worker is that his disclosure satisfies the test of a qualifying disclosure in section 43B. No doubt he must at least genuinely suspect that the information is or may be true, otherwise he could not reasonably believe that it tends to show any of the matters identified in section 43B(1). By contrast, the second type of disclosure to other parties under section 43G, also includes the requirement that there must be a reasonable belief that the information is substantially true, that the disclosure is not made for personal gain, that one of the conditions in subsection 2 are satisfied and that in all the circumstances of

the case it was reasonable for him to make the disclosure. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73) In Jesudason at paragraph 25, Sir Patrick Elias said that, *"The structure of the legislation, therefore, is that disclosure to "other bodies" should be a last resort and only justified where disclosures to the employer or a regulated body would, in the circumstances, not be adequate or appropriate."*

92. In a disclosure to other parties the Claimant must believe that the information contained in the disclosure to his solicitor was substantially true. In other words that the Claimant believed on a rational basis that the majority of the information and/or allegations contained within the disclosure were true. In an obiter remark in Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, the EAT said, "On a simple reading of the words in the Statute, the information is in reference to all the information and the allegation must be in reference to the allegations, if any, and not one out of a number."

93. Under s. 43G(1)(c) the Claimant must not have made the disclosure for the purposes of personal gain, the subsection is aimed at discouraging 'cheque-book journalism' by seeking to ensure that the Claimant's primary motive for making a disclosure is the public good, rather than personal gain. It should be noted, however, that the subsection does not exclude personal gain per se. The issue is not whether the Claimant made a personal gain but whether his purpose in making the disclosure was to make a personal gain.

94. S. 43G(1)(d) requires that one of three additional conditions specified in s. 43G(2) is met. The first two conditions concern the situation where the worker perceives a threat, either to himself or to relevant evidence, and require a tribunal to consider whether the worker reasonably believed in that threat. The third condition does not import any test of reasonableness and instead hinges on the worker being able to demonstrate that the information is not being disclosed for the first time. For the avoidance of doubt, s. 43G(4) makes it clear that a subsequent disclosure will be regarded as a disclosure of 'substantially the same information' as the initial disclosure where it includes information about the action taken or not taken by the original recipient.

95. The assessment of reasonableness, in the context of s. 43G, is a matter for the tribunal, based on its own objective judgment. In Jesudason v Alder Hey Children's NHS Foundation Trust, the Court of Appeal stressed that the question of reasonableness must be assessed as at the time the complaint or concern is raised, not with the benefit hindsight after the complaint has been examined. In reaching its decision, there are six factors the tribunal must take into account, but they are not exhaustive. These are:
(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the relevant failure;
(c) whether the relevant failure is continuing or is likely to recur;
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person;
(e) in the case of a previous disclosure to the worker's employer or a prescribed person, the response of the employer or prescribed person; and
(f) in the case of a previous disclosure to the worker's employer, whether the worker complied with an internal procedure authorised by the employer.

Detriment (s. 47B)

96. The next question to determine was whether or not the Claimant suffered detriment as a result of the disclosure. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in Harrow London Borough Council v Knight [2002] UKEAT 80/0790/01).

97. Section 48 (2) was also relevant, in that, "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

98. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

99. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the Claimant genuinely does so, that is enough to amount

to a detriment. The test is not, therefore, wholly subjective. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

100. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01). It will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower (NHS Manchester-v-Fecitt [2012] IRLR 64 and International Petroleum Ltd v Osipov UKEAT 0229/16).

101. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in NHS Manchester-v-Fecitt [2012] IRLR 64). It was important to remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (International Petroleum Ltd v Osipov EAT 0058/17).

102. As observed in (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

"30. *As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Kahn [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:*

> *"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

> *31. Liability is not, therefore, established by the Claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B*."

103. In Arthur v London Eastern Railway Ltd (t/a One Stansted Express) [2007] ICR 193, CA, the Court of Appeal held that s. 48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. It may not be possible to characterise the circumstances as an act extending over a period within the scope of s. 48(4) by reference, for example, to a connecting rule, practice, scheme or policy. Lord Justice Mummery said, 'there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them'. Such a link might be established by considering whether the acts had all been committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised or concerted in some way. It would also be relevant to inquire why the perpetrators did what was alleged.

Dismissal (s. 103A)

104. I considered the test in Kuzel-v-Roche [2008] IRLR 530;

(a) whether the Claimant had showed that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;
(b) if so, had the employer showed its reason for dismissal;
(c) if not, it is open to the tribunal to find that the reason was as asserted by the employee, but that reason does not have to be accepted. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side.

Unfair dismissal

105. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a

band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

106. The correct approach in a misconduct case is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. In cases involving dismissals for reasons relating to an employee's conduct, the tribunal has to consider the three stage test in British Home Stores Ltd v Burchell [1980] ICR 303 (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

(a) did the Respondent genuinely believe that the Claimant was guilty of the misconduct alleged;
(b) was that belief that based upon reasonable grounds;
(c) was there a reasonable investigation prior to the Respondent reaching that view?

The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. Crucially, it is not for the tribunal to decide whether the employee actually committed the act complained of.

107. S. 98(1) ERA provides that in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

108. The question asked by section 98(1) was described in Willow Oak Developments (T/A Windsor Recruitment) v Silverwood [2006] ICR 1552, CA at paragraph 15 as, "*whether the employer's reason is of a kind such as to justify the dismissal. That language clearly indicates that the question is whether the reason falls within a category of reason that is not excluded by law as a ground for dismissal; or, as Burton J (President) put it slightly differently in Scott & Co v Richardson (unreported) 26 April 2005 , whether the reason for which the dismissal took place could be a substantial other reason. Accordingly, if the reason is whimsical or capricious or dishonest (see per Lord McDonald in Harper v National Coal Board [1980] IRLR 260 , para 8), or is based on an inadmissible ground such as race or sex, then it will be excluded by section 98(1) . But if, …[it], is one that can in law form*

a ground for dismissal, then it is necessary to proceed to the second stage of considering whether the employer has, under section 98(4)(a) , acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee."

109. It was held in Harper v National Coal Board [1980] IRLR 260 at paragraph 8, "*If the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (Saunders v Scottish National Camps Association Ltd [1980] IRLR 174).*

110. The employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the tribunal to decide whether the employer acted reasonably under S.98(4) in dismissing for that reason. As in all unfair dismissal claims, a tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. Depending on the circumstances, this may involve consideration of matters such as whether the employee was consulted, warned and given a hearing, and/or whether the employer searched for suitable alternative employment. In other words, to amount to a substantial reason to dismiss, there must be a finding that the reason *could*, but not necessarily does, justify dismissal (Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC).

Conclusions

Did the Claimant make protected disclosures?

Was information disclosed by the Claimant which tended to show the health or safety of an individual was being put at risk or that there had been a breach of legal obligation?

On 11 September 2018 in his e-mail to Mr Storm and others

111. The Claimant's e-mail referred to that he was concerned that the decision to return from Clitheroe after the talk was dangerous from a health and safety perspective. He referred to the amount of time that would be involved in the day and that a similar late journey would be undertaken the following night. The Claimant referred to the possibility of having an

accident. He was concerned that if there was an accident, Mr Storm and the Trustees could be liable. The Respondent relied on the decisions in Goode v Marks and Spencer plc UKEAT/0442/09/DM and Geduld v Cavendish-Munro and submitted that this was an allegation and not information. I rejected that argument. As identified in Kilraine v Wandsworth BC, allegation and information are not mutually exclusive terms. There was sufficient factual specificity in what the Claimant said to suggest that there was a concern that the health and safety of an individual was likely to be endangered. The Claimant explained his reasoning in his e-mail and said that he was concerned that there could be an accident. The Claimant therefore provided information.

On 3 January 2019 to Mr Storm in a meeting in his office

112. This conversation was instigated by Mr Storm. The Claimant told Mr Storm that employees had a duty to raise concerns. It was not apparent from the evidence what information the Claimant was providing. The incident was clearly related to 11 September 2018, however I was not satisfied that the Claimant was providing information that there had been a breach of a legal obligation or that the health and safety of an individual had been endangered. Therefore, a protected disclosure was not made on this occasion.

On about 13 February 2019 to Mr Mursalin and on about 14 February 2019 to Mr Hauser

113. Mr Mursalin spoke to the Claimant about seeking a reconciliation with Dr Sookhdeo. The Claimant had told them about what happened with Dr Sookhdeo. This was also related to 11 September 2018, however there was no evidence given that suggested that information had been given that the health and safety of an individual had been endangered or that there had been a breach of a legal obligation. I was not satisfied that a protected disclosure had been made on these occasions

By reporting to his solicitor what had occurred.

114. The Claimant asked that I drew an inference that when he spoke to his solicitor, he made a further protected disclosure. No evidence was given as to what was said to the solicitor. In the absence of such evidence I was not satisfied that information had been given that tended to show that health and safety had been endangered or that there had been a breach of a legal obligation. It was therefore unnecessary to consider the rest of the test. A protected disclosure was not made on this occasion.

In the Claimant's reasonable belief did the information provided on 11 September 2018 tend to show that the health and safety of an individual had been or could be

<u>endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?</u>

115. The Respondent argued that the Claimant's erroneous reference to the return journey taking 16 hours, rather than 4 showed that he did not have a reasonable belief. I rejected that argument. The Claimant's clear evidence was that he was referring to the working day as a whole, which I accepted. The Claimant had linked the trips to Clitheroe and Exeter together and that it was the combination that provided the danger. He was concerned that on the second trip there could be an accident due to tiredness. The Claimant believed that the health and safety of an individual could be endangered. It is well known that tiredness is something that can be a factor in accidents. An accident would not necessarily only involve the Claimant and his colleagues, but also might involve other road users. I was satisfied that the Claimant had a reasonable belief that an individual's health and safety was endangered.

<u>Did the Claimant reasonably believe the disclosure was made in the public interest?</u>

116. The Respondent argued that the Claimant did not believe that the disclosure was in the public interest and it was a matter personal him, this was not put to the Claimant in cross-examination. I rejected this argument. The Claimant and his colleagues would have been travelling on a public road. If an accident had occurred it would involve the Claimant and his colleagues and potentially members of the public and rescue services. The Claimant's concerns were wider than just his and his colleagues' interests and potentially involved innocent bystanders. The Claimant believed that his disclosure was in the public interest and that belief was reasonable.

<u>Was a disclosure made to the employer?</u>

117. The disclosure on 11 September 2018 was made to the Respondent, the Claimant's employer.

118. The Claimant, therefore made a protected disclosure on 11 September 2018.

Detriment

<u>Was the Claimant subjected to the following detriments by the Respondent on the ground that the Claimant had made a protected disclosure:</u>

By suspending him?

119. Suspension from work is an act that is to the Claimant's disadvantage. The Claimant would be unable to carry out his duties and colleagues and external contacts would be aware that he was not permitted to work. The Respondent argued that the Claimant had not made out the causal link. There is an initial burden on the Claimant to adduce evidence, however s. 48(2) requires the Respondent to show the ground for the act. The Claimant made his protected disclosure in September 2018, immediately following that he was told that he should not have raised the concern and his employment was threatened by Dr Sookhdeo. Mr Storm on 3 January 2019 raised the issue again and sought for the Claimant to confirm that he had regretted raising the concern. In February 2019 Mr Mursalin and Mr Hauser sought to mediate the situation and persuade the Claimant to apologise to Dr Sookhdeo. After the e-mail exchanges in March 2018, the Claimant discussed the matter with Mr Lee on 18 March 2019 when he raised what had happened with Mr Storm and Dr Sookhdeo. Mr Lee was therefore clearly aware that the disclosure had been made. The suspension letter referred to more than one incident of insubordination and the only matters that were referred to were in September 2018 and March 2019. The reference in the suspension letter that the March correspondence had further raised another allegation of serious breach of trust and confidence, was a reference to the health and safety concern. The health and safety concern was specifically referred to in the context of something serious and therefore it was more than a trivial influence. Mr Lee by considering the incident as a serious incident was materially influenced by it and I was satisfied that the Claimant was suspended on the ground that he had made a protected disclosure.

By subjecting the Claimant to disciplinary proceedings?

120. The Respondent made a similar argument in relation to the second detriment. The letter inviting the Claimant to the disciplinary hearing alleged that the Claimant had been insubordinate because he had raised the health and safety concern and that this had been part of the breach of trust and confidence. The sending of the e-mail dated 11 September 2018, i.e. the protected disclosure, was considered to be an act of insubordination and it featured as part of the allegations against the Claimant. The disclosure was therefore more than a trivial influence and the Claimant was subjected to disciplinary proceedings on the ground that he made a protected disclosure.

Automatically Unfair Dismissal

<u>What was the principal reason for the Claimant's dismissal?</u>

121. After the Claimant had made his protected disclosure, he was threatened by Dr Sookhdeo, pressurised by Mr Storm to say he regretted making it and urged by colleagues to apologise a few weeks before he was

suspended and subjected to disciplinary proceedings. There was not a clear policy that all external communications had to be checked before being sent. The Claimant was concerned that such checks would hamper his ability to carry out advocacy on behalf of the Respondent. The Claimant queried this and raised his concerns. Raising concerns is not of itself unreasonable. There was not a meeting between the Claimant and Mr Storm to discuss the issue, which was somewhat surprising and was due to the way in which the relationship had deteriorated after the Claimant raised his protected disclosure. The Claimant said in his last e-mail that he would comply with lawful instructions.

122. I rejected the Respondent's argument that the dismissal for insubordination and a breach of trust and confidence, was wholly unconnected to the health and safety concern. The suspension letter referenced that the health and safety concern was serious in the context of a breach of trust and confidence. The disciplinary invitation made clear references to the health and safety concern being insubordination and a breach of trust and confidence. Mr Frith acknowledged that health and safety concern was a major contributory factor in the breakdown of trust and confidence. The effect of the health and safety concern was inextricably linked to the reason for the Respondent terminating the Claimant's employment and the Respondent was unable to detach that major factor from its decision. The Claimant informed the Respondent that he had since complied with the request to check external communications and no checks were undertaken as to whether that was the case. The evidence against the Claimant referred to his actions in relation to the health and safety complaint as being insubordination.

123. I was satisfied that the Claimant had shown that there was a real issue that the reason for his dismissal was that he had made the protected disclosure. I found that the e-mail of 11 September was a major part of Mr Frith's decision-making process. The burden was on the Respondent to show the reason for dismissal. The threats to the Claimant by Dr Sookhdeo and the attempts to persuade the Clamant to express regret and apologise for making a protected disclosure took place shortly before he was subjected to disciplinary proceedings. The Claimant had said he complied with the instruction in the disciplinary hearing, although that did not seem to have been checked by Mr Frith. There was an element of confusion in the Respondent's evidence as to what the policy regarding external communications was and the Respondent's handbook made no reference to correspondence. The protected disclosure was at least a motivating factor in bringing the disciplinary proceedings against the Claimant and the fact that the Respondent continue to pressurise the Claimant in relation to it in the lead up to the March incident, coupled with the threat to terminate his employment and that the Respondent had sought to seek agreement that he departed all support that the disclosure was inextricably linked to the

Respondent’s conclusion that the Claimant had breached the implied term of trust and confidence. I was not satisfied that the reason for the Claimant’s dismissal only related to the correspondence in March 2019.

124. It was not possible to disentangle the disclosure from the other allegation that the Claimant had damaged the trust and confidence the Respondent had in him. Even Mr Frith identified that it was a major contributory factor. The principal reason for the dismissal was that the Claimant had made the protected disclosure.

Were the detriment claims were presented in time?

125. The Respondent conceded that the suspension would have been an act extending over a period, but said that it ended the day before the disciplinary hearing. I did not accept that argument, the Claimant did not return to work after the disciplinary hearing and remained suspended until his dismissal. Accordingly, this was an act extending over a period.

126. In any event the detriments and the dismissal were linked. There was a history of rebuking and attempting to persuade the Claimant in relation to his disclosure. The incidents all involved employees of the Respondent and related to the same subject matter and process which culminated in the dismissal of the Claimant. Accordingly, the detriments were part of a series of similar acts as they were all motivated by the disclosure.

127. Accordingly, the claims were presented in time.

128. If the claims had not been presented in time, I would not have been satisfied that it was not reasonably practicable for the Claimant to have done so. He had notified ACAS within time for the unfair dismissal claim and was aware of his rights. He was also legally represented by an employment solicitor. Further the Claimant did not give evidence on this matter.

Ordinary unfair dismissal

129. For completeness even if the dismissal were not automatically unfair, I would have found that the dismissal was unfair.

Did the Respondent show the reason for dismissal?

130. A breach of trust and confidence and breakdown in working relationships is a potentially fair reason for dismissal

131. The Respondent primarily relied upon some other substantial reason, namely a breakdown in trust and confidence. The matters identified as constituting the breakdown included that the Claimant had raised a

protected disclosure which on the Respondent's own admission was a major contributory factor to that breakdown. The purpose of the whistleblowing legislation is to protect those who raise concerns; however, it was the raising of a concern that was used against the Claimant. Raising such a concern is not something that breaches trust and confidence. The Respondent also relied upon the Claimant's refusal to check external communications with Dr Sookhdeo. The Respondent considered that the Claimant had refused, however the tenor of what was said was more equivocal.

132. I was not satisfied that the Respondent held a reasonable belief that the Claimant was the cause of the breach of trust and confidence. The major contributory part of the decision was that the Claimant had made the disclosure, which he was entitled to do and to which the Respondent had objected.

Was the dismissal fair within the meaning of s. 98(4) and was it within the band of reasonable responses?

133. The Respondent conducted an investigation and the Claimant had the opportunity to put forward his version of events. However, a major factor was that the Claimant had made the disclosure on 11 September 2018 and would not express regret for doing so. The Claimant said he had since complied and no check was undertaken by Mr Frith. A significant plank of the Respondent's reasoning related to that the Claimant had made a legitimate disclosure. The Claimant had indicated that he would comply with lawful instructions, but this was not taken into account by Mr Frith. The Claimant had raised concerns about what he was being asked to do and this also was not taken into account. In addition to which, there was no evidence that the Claimant was informed of such a requirement to check with Dr Sookhdeo before the e-mail of Mr Storm in March. In the circumstances, taking into account that the significant part of the decision was that the Claimant had made a protected disclosure, a reasonable employer would not have dismissed the Claimant.

134. Accordingly, the Claimant succeeded in his claims of automatically unfair dismissal and detriment for making a protected disclosure.

135. Separate directions were given for a remedy hearing at which submissions could be made in relation to Polkey and contributory fault.

Employment Judge J Bax
Dated 18 November 2020

Judgment sent to Parties on
19th November 2020
By Mr J McCormick

For the tribunal office