EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Mr P Warr	AND Pivotal Professional Services Ltd (1)
	Pivotal Homes Group Ltd (2)
	Pivotal Development Services Ltd (3)
	Mr Denis Dixon (4)
	Mr Stephen Fowley (5)
	Mrs Fiona Dixon (6)
	Mrs Elizabeth Fowley (7)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (by CVP) ON 19 October 2020 to 28 October 2020

EMPLOYMENT JUDGE GRAY **MEMBERS: MS LLOYD-JENNINGS**
MR M RICHARDSON

Representation

For the Claimant: **Mr R Johns (Counsel)**
For the Respondents: **Ms D Masters (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

- **All claims against the Third, Fourth, Fifth, Sixth and Seventh Respondents are dismissed on withdrawal.**
- **All the complaints of detriment on the grounds of making a protected disclosure are dismissed on withdrawal.**
- **The complaint for payment of accrued but untaken holiday is dismissed on withdrawal.**

- **The complaint of whether the Claimant should have been automatically enrolled on a pension scheme is dismissed on withdrawal.**

- **The complaint of automatic unfair dismissal for the reason (or principal reason) of making a protected disclosure fails and is dismissed.**

- **The complaint for breach of section 10 of the Employment Relations Act 1999, refusing to allow a requested companion, fails and is dismissed.**

- **Therefore, for the complaint of failure to give written particulars of employment, albeit it is found that a section 1 Employment Rights Act 1996 compliant set of particulars was not provided, there can be no award of compensation for this.**

JUDGMENT having been delivered orally on the 28 October 2020 and written reasons then having been requested at the hearing on the 28 October 2020, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this claim (as it now stands for final determination) the Claimant, Mr Warr claims that he has been automatically unfairly dismissed, and that the principal reason for this was because he had made a protected disclosure. He also claims he was not given written particulars of employment.

2. In addition, there is a complaint that Section 10 of the Employment Relations Act 1999 was breached, although it is acknowledged that the Claimant did not request a companion, to then be denied one, so Claimant's Counsel has confirmed this is an issue relevant to remedy, if the Claimant's dismissal was found to be unfair and the relevant Respondent had not followed the ACAS code.

3. We are also being asked to determine whether the Claimant was employed by the First or Second Respondent. The Claimant says he was an employee of the Second Respondent at all times.

4. The Respondents contend that at the point of dismissal the First Respondent was the Claimant's employer so the Second Respondent cannot be liable, and that the reason for the dismissal was not for the reason or principal reason of the alleged disclosures (which are disputed were protected qualifying disclosures).

5. The Respondents submit that there were three matters that were the catalysts for the decision to dismiss the Claimant:

    a. £3million going "missing".

    b. The Claimant's email of 21 August 2018.

    c. The Claimant's conduct at the meeting on the 3 September 2018.

THE HEARING

6. The hearing was conducted by CVP.

7. For the hearing we were presented with:

    a. An agreed bundle of 2,087 pages (both hard copies and pdfs were in use, so where appropriate the parties referred to both page numbers – and this is continued in these reasons, with hard copy number followed by PDF number).

    b. A pleadings bundle and we were asked to add a copy of the most recent Case Management Order from the hearing before Employment Judge Emerton to this.

    c. A witness statement bundle, consisting of 7 witness statements and 103 pages.

    d. A working file which includes the Respondents' opening note, Respondents' chronology, joint chronology, cast list (noted as not yet being agreed), list of issues (noted as not yet being agreed), reading list, timetable and index for the core bundle.

    e. The Claimant's opening statement.

    f. An extra document from the Respondents which is purported to be a hand-written minute of a meeting in August 2017 (numbered page 4389).

8. At the commencement of the hearing Claimant's Counsel confirmed that the Claimant withdrew all complaints against the Sixth and Seventh Respondents. So, these were dismissed on withdrawal. The parties confirmed that it meant these Respondents would no longer be giving witness statements, so these were not read.

9. The issues were then discussed. Claimant's Counsel confirmed that the list of issues and cast list included in the working file were now agreed.

10. It was noted from the agreed list of issues that there were six alleged protected disclosures, seven alleged detriments, a complaint of automatic unfair dismissal for making a protected disclosure, as well as four further complaints, namely a failure to give written particulars, not being auto-enrolled into a pension, not allowing a companion and for payment of accrued but untaken holiday pay.

11. Claimant's Counsel confirmed that in line with his opening note only three of the detriments were now being pursued. These were in relation to the Loan, Shares and Goodwood. The other four detriments were no longer pursued, namely dividends, diversion of profits, intimidating emails and "cold shouldering". Those were withdrawn so we were therefore not considering those four.

12. Respondents' Counsel noted that there may be a need to submit a further witness statement as the authenticity of the extra document submitted, which is purported to be a hand-written minute of a meeting in August 2017 (numbered page 4389), is disputed by the Claimant. Respondents' Counsel confirmed that the position would be confirmed at the start of day two.

13. We then discussed the timetable and that Employment Judge confirmed to the parties that he would not be available for the currently listed days 9 and 10, although noting this was set as deliberation days in the timetable, it should be possible to arrange these quickly and for delivery of judgment to be undertaken possibly as a reserved judgment. It seemed sensible to address this timetabling issue as the hearing progressed. The parties expressed and acknowledged that as now the sixth and seventh Respondents were no longer giving evidence, and some of the detriments were not being pursued, submissions can potentially be done on the afternoon of day six and that may allow sufficient deliberation time to deliver judgment by day eight.

14. The hearing was then adjourned for the Panel to read.

15. At the start of the second day a witness statement of Mike King was submitted by the Respondents and not objected to by the Claimant. Also, a typed version of handwritten notes of the 6 September 2018 meeting were

resubmitted by the Respondents for the agreed bundle as the previous version had typos, together with the handwritten version that was transcribed. Claimant's Counsel confirmed he did not object to their inclusion, but wanted to flag he did not believe he had seen the handwritten version previously, when disclosure took place. However, no issue was subsequently taken on this.

16. It was confirmed that the parties wanted us to determine liability and remedy at the same time and to enable this the Claimant was to submit a supplemental witness statement setting out mitigation evidence (this was provided on the fourth day and was sworn in as evidence by the Claimant after cross examination on his main witness statement).

17. After discussion with the parties of the relevance of the Third Respondent, as it did not appear to be cited in the evidence or the agreed list of issues, Claimant's Counsel confirmed that all claims were withdrawn against the Third Respondent.

18. During the second day and the cross examination of the Claimant it became necessary to have a short adjournment for around 15 minutes, with permission given (with agreement of Respondents' Counsel), for Claimant's Counsel to take instructions as to the status of the detriment complaints. This was towards the end of the second day in view of answers given by the Claimant during cross examination as to the alleged detriments and the chronology of the alleged disclosures. On resumption it was confirmed by Claimant's Counsel that all the detriment complaints were withdrawn, so these were all dismissed on withdrawal.

19. At the start of the third day it was queried, in view of the withdrawal of all the detriment complaints made the day before, whether proceedings should also now be withdrawn against the remaining individual Respondents, (the fourth and fifth). Claimant's Counsel confirmed this was correct so it was agreed they would be dismissed from these proceedings.

20. During the fourth day it was confirmed that the Claimant was not seeking the Tribunal to decide if the alleged first, second, third and sixth disclosures were protected qualifying disclosures. We were only being asked to determine this for the fourth and fifth alleged disclosures. It was these the Claimant seeks to rely upon as being the reason or principal reason for his dismissal.

21. At the commencement of the fifth day Respondents' Counsel confirmed that the Respondents would not be calling Mike King to give evidence. His witness statement was therefore not considered by the Panel.

22. The evidence was then concluded at the end of the fifth day. Discussion was then had to confirm the final issues requiring determination for the focus of Counsel's written submissions.

23. Claimant's Counsel confirmed that the holiday pay complaint was withdrawn as we had not been presented any evidence on what was claimed, as to amounts and value, so we could not make any finding about this. This was therefore dismissed on withdrawal.

24. On the sixth day we were presented with written submissions to then be supplemented with short oral submissions.

25. Before hearing the oral submissions, the hearing was commenced at 10am to confirm to the parties that the Panel would need a further 30 minutes to finish its reading of the submissions (which had been submitted at around 9:30am).

26. Before adjourning to read, Respondents' Counsel objected to the assertions made by Claimant's Counsel in his written submissions as to credibility of the Respondents' witnesses around the loan and shares issues, as these had not been fully pursued in evidence in view of the withdrawal of the detriment complaints. Further, the Employment Judge noted that both Counsel were asking us not to making findings of fact as to what had been agreed in 2017 as this was a matter relevant to the High Court proceedings and not what the Tribunal had to determine. It was agreed that Claimant's Counsel's written submissions should be amended in the following way to resolve this issue, that we should not consider paragraphs 6, 7 and 10 of the submissions and ignore the first 2 lines of paragraph 3 and delete the words "consistency of witnesses" from paragraph 4.

27. A short discussion also took place about the submissions made about the Claimant's pension claim. The Employment Judge sought clarification on these as they appeared to suggest whether the Claimant was enrolled or not was a discretionary matter, so we would want to be addressed on what basis this complaint was being put. Claimant's Counsel confirmed that he would confirm instructions on this and confirm the position before oral submissions were delivered.

28. Upon resumption Claimant's Counsel confirmed that the complaint about pensions was withdrawn. This was therefore dismissed on withdrawal.

29. During his oral submissions Claimant's Counsel also confirmed that it was accepted that the consultancy agreement was not something which is relied upon in this case, so we are being asked to consider the employment contract alone.

30. Claimant's Counsel also confirmed that the complaint of being denied a requested companion (section 10 of Employment Relations Act 1999) could not be put as a discrete complaint as the Claimant had not asked and been refused. Claimant's Counsel submitted it was relevant to the question of remedy. If we found the dismissal was unfair, and that the ACAS code had not been followed, then we could recognise this issue in the up to 25% we could uplift, i.e. because the Respondent had not notified the Claimant he had a right to ask for a companion.

31. We were cautioned by both Counsel to not make findings of fact that would stray into the matters only relevant to the High Court action, unless relevant to the case we had to decide. This did not prove to be an issue for the Tribunal as the complaints we are now being asked to determine do not require us to consider those facts (i.e. what was agreed contractually between the parties as to the £400,000, shares and notice). For completeness it was confirmed with the parties that the issues the Tribunal understood it was required to determine during its deliberations were in summary:

    a. Whether it was the First or Second Respondent that employed the Claimant at the point of dismissal.

    b. Whether the alleged fourth and/or fifth disclosures were protected qualifying disclosures. In respect of the alleged fifth disclosure the Respondents accept that if it is a qualifying disclosure then it was made to the employer so would be protected.

    c. If the reason or principal reason for the dismissal was the alleged fourth and/or fifth disclosures (if found to be protected qualifying disclosures).

    d. Whether the Claimant was not given Section 1 Employment Rights Act 1996 compliant written employment particulars.

    e. Whether, if relevant, any identified breaches of the ACAS code can reflect in remedy that the Claimant was not reminded and so denied a companion under section 10 of the Employment Relations Act 1999.

    f. Further remedy related issues, if relevant, whether the dismissal would have happened anyway, whether the alleged fourth disclosure was made in bad faith (resulting in up to a 25% reduction), and for the Claimant, if it is found to be an automatic unfair dismissal, whether that was in breach of the ACAS code and so there should be up to a 25% uplift.

The agreed list of issues

32. The issues therefore relevant to the above, as extracted from the agreed list of issues, are as follows (numbering is as per the agreed list of issues):

"Employer

1. Which Respondent was the Claimant's employer at the material time?

(a) The Claimant's case is that he was employed by R2. His salary was paid by R2 until 31st December 2017. From 1st January 2018 his salary was paid by R1. He did not transfer his employment to R1. He was Chief Executive for the Pivotal Group of companies.

(b) The Respondents' case is that the Claimant was employed by R2 from 1 September 2017 to 1 January 2018 when the Claimant transferred his own employment to R1. The claims are properly brought against R2[1] only since the alleged detriments and the dismissal postdate 1 January 2018.

Protected Disclosures (s.43A/B/C ERA 1996)

Fourth Protected Disclosure: Kristina Hall on 16 August 2018.

20. On 16 August 2018, did the Claimant say to Kristina Hall (Director of Housing at Pivotal Housing Association) that there were unsafe floors and unprotected apertures through which a person could easily fall? (POC, para 8)

21. Did the Claimant reasonably believe that the said disclosure was in the public interest as per s.43B (1) ERA 1996 on the basis that there was a risk of death or serious injury? (POC, para 16)

22. Did said disclosure of information, in the Claimant's reasonable belief, tend to show that a criminal offence was being committed namely breaches of the Construction (Design & Management) Regulations 2015 (regs 12, 15, 17, 18) as per s.43B (1) (a) ERA 1996? (POC, para 15a)

23. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that a criminal offence was being committed namely breaches of the Health and Safety at Work etc Act 1974 (s.2, 3 and 4) as per s.43B (1) (a) ERA 1996? (POC, para 15a)

24. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that the Second Respondent was failing to comply with a legal obligation derived from the Health and Safety at Work

etc Act 1974 and the Occupiers Liability Act 1957 to ensure as far as possible the safety of its employees as per s.43B (1) (b) ERA 1996? (POC, para 15b & F&BP, para 4c-d)

25. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that the health and safety of visitors, employees and workers at the Anchor House site was being endangered such that a fatal fall might occur as per s.43B(1)(d) ERA 1996? (POC, para 15c)

26. If so, was Kristina Hall a "responsible person" within the meaning of s.43C (1) (b) (i) and / or (ii) ERA 1996 by virtue of being an "employer" under the CDM Regulations 2015? (POC, para 17).

Fifth Protected Disclosure: Denis Dixon on 17 August 2018

27. On 17 August 2018, did the Claimant say to Denis Dixon that there were unsafe floors and unprotected apertures through which a person could easily fall? (POC, para 12 / 22 & GOR, paras 71 - 72)

28. Did the Claimant reasonably believe that the said disclosure was in the public interest as per s.43B (1) ERA 1996 on the basis that there was a risk of death or serious injury? (POC, para 16)

29. Did said disclosure of information, in the Claimant's reasonable belief, tend to show that a criminal offence was being committed namely breaches of the Construction (Design & Management) Regulations 2015 (regs 12, 15, 17, 18) as per s.43B (1) (a) ERA 1996? (POC, para 15a)

30. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that a criminal offence was being committed namely breaches of the Health and Safety at Work etc Act 1974 (s.2, 3 and 4) as per s.43B (1) (a) ERA 1996? (POC, para 15a)

31. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that the Second Respondent was failing to comply with a legal obligation derived from the Health and Safety at Work etc Act 1974 and the Occupiers Liability Act 1957 to ensure as far as possible the safety of its employees as per s.43B (1) (b) ERA 1996? (POC, para 15b & F&BP, para 4c-d)

32. Alternatively, did the said disclosure of information, in the Claimant's reasonable belief, tend to show that the health and safety of visitors, employees and workers at the Anchor House site was being endangered such that a fatal fall might occur as per s.43B(1)(d) ERA 1996? (POC, para 15c)

33. Was the said disclosure made to the Claimant's employer as per s.43C (1) (a) ERA 1996? The Respondents' position is that Denis Dixon was not the Claimant's employer, but he was its "agent" and as such this provision is satisfied.

Automatic unfair dismissal claim (s.103A ERA 1996) - [Claim against the Claimant's employer only] - If a valid Protected Disclosure was made by the Claimant:

56. Was the reason for the Claimant's dismissal (or if more than one reason, the principal reason) the fact that he had made the alleged Protected Acts?

If the dismissal was automatically unfair:

57. Would the Claimant have been dismissed in any event in relation to matters identified by the Denis Dixon and Stephen Fowley post dismissal? Specifically:

(a) Did the Claimant organize a double payment for himself in June 2018?

(b) Did the Claimant seek to conceal a bonus payment from Denis Dixon / Stephen Fowley which was provided to Kristina Hall?

(c) Did the Claimant organise for Shindy Dosanjh to be paid an unauthorised and forbidden bonus of £20k?

58. Should any basic award be reduced under s.122(2) ERA 1996 for the reasons outlined in paragraph 57 above?

59. Did the Claimant contribute to his dismissal?

60. What compensation is the Claimant entitled to recover?

61. Should any compensatory award be reduced under s.123 (6A) ERA 1996 on the basis that alleged Protected Disclosure 4 was not made in good faith? (GOR, para 110).

62. Should there be any uplift in compensation under s207(2) TULR(C)A 1992? Right to be accompanied claim (s.10 ERA 1999)

63. Did the Claimant's employer act in breach of s.10 ERA 1999? (GOR, para 103) –

(a) The Claimant's' position is he was not given the right to be accompanied or that made clear to him in breach of the ACAS Code of Guidance.

(b) The Respondents' position is that the Claimant did not ask to be accompanied and so there has been no breach.

64. If so, what compensation is the Claimant entitled to recover?

Written particulars of employment claim (s.1 ERA 1996)

68. At the time that the Claimant brought proceedings (30 January 2019), was the Claimant's employer in breach of s.1(1) or 4(1) of the ERA 1996?

(a) The Claimant's position is that written particulars had not been provided by the time of dismissal.

(b) The Respondents'' position is that written particulars had been provided by the time of dismissal.

69. Is s.38 EA 2002 satisfied such that the Claimant is entitled to compensation?

70. If so, how much compensation?"

Witnesses

33. We have heard from the Claimant, and we have heard from Ms H Dosanjh and Ms N Southwell for the Claimant.

34. For the First and Second Respondents we have heard from Mr S Fowley and Mr D Dixon.

35. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after reading and listening to the factual and legal submissions made by and on behalf of the respective parties.

FINDINGS OF FACTS

36. It is acknowledged by the Claimant and Mr Fowley that they have had a close relationship since 2007 as is set out in paragraph 1 of the Claimant's witness statement and paragraph 10 of Mr Fowley's witness statement.

37. Mr Fowley describes in his evidence how through a combination of corporate entities and a charitable arm, they provide housing for vulnerable adults. The various entities have evolved over time from being known as Providers of Accommodation and Support for Political Asylum Seekers, and then Providers of Accommodation and Support (PAS), before settling on the "Pivotal" group format in 2017 (he sets this out in paragraphs 1 to 5 of his witness statement).

38. It is on the 1st of February 2017 that the Claimant starts consulting for PAS Limited (paragraph 5 of Claimant's witness statement and as confirmed in the agreed chronology).

39. It is then on the 18th July 2017 that the Second Respondent is incorporated and the Claimant becomes a director (paragraph 12 of Claimant's statement and as confirmed in the agreed chronology).

The Claimant's employer and employment start date

40. We now come to a divergence of the facts that we are being asked to find.

41. The Claimant asserts that he was employed by the Second Respondent from the 1st August 2017 and was employed by the Second Respondent up to and including his dismissal.

42. The Respondents position is that the Claimant was employed by the Second Respondent from the 1st September 2017 and then transferred to the First Respondent on the 1st January 2018, so it was from this employment he was dismissed.

43. The Claimant refers in his witness statement at paragraphs 14 and 35 that he believes it was agreed on the 24th August 2017 that his employment with the Second Respondent would be backdated to the 1st August 2017. He then confirmed in answer to questions during cross examination that it was the discovery he had not been paid for August 2017 that prompted him to backdate his pay with a double monthly salary payment in June 2018 (as shown in his payslip for June 2018 at page 4295 /1994).

44. The other relevant documents we have been referred to suggest a different position to that asserted by the Claimant. There is the Claimant's signed Inland Revenue Starter Form (pages 4290 / 1989 and 4291 / 1990) and a

first pay slip dated 30 September 2017 (page 196 / 58) which state and support the start date as the 1st September 2017. Also, there is the email at page 477 / 230 dated the 18 May 2018 from Lynn Cooke (accountants) to the Claimant's PA, Ms Southwell that confirms the Claimant's employment started with the Second Respondent on the 1 September 2017. Further, the Claimant did acknowledge in cross examination that he had not sought permission or confirmation for the back payment he made in June 2018 relating to August 2017.

45. As the documentation we have been referred to, including the Claimant's own Inland Revenue Starter Form that he signed, supports a start date of 1 September 2017, we find on the balance of probabilities that this was when the Claimant's employment started with the Second Respondent.

46. As to the potential transfer of his employment from the Second Respondent to the First Respondent this is also referred to in the email at page 477 / 230 dated the 18 May 2018 from Lynn Cooke to the Claimant's PA. It confirms the Claimant's employment was transferred on 1 January 2018 to the First Respondent. This email is forwarded to the Claimant and in reply the Claimant says … "so,,,, was I paid a salary in August?". The Claimant makes no comment about being transferred, which would be expected if it were incorrect, and the Claimant acknowledged in cross-examination that he did not challenge the accuracy of the email that noted his transfer to the First Respondent.

47. The terms of employment that we were referred to in the agreed hearing bundle also refer to the Claimant's employer being the First Respondent (page 3579 / 1469). This was a document sent by the Claimant to Mr Fowley and Mr Dixon for discussion between them as we refer to below.

48. We have also noted that the payslip making the double payment to the Claimant in June 2018 (page 4295 / 1994) refers to the Claimant's employer as the First Respondent.

49. We have also noted that the Claimant's appeal letter at page 3323 / 1425 says "……. I wish to raise an appeal against a decision to terminate my employment with Pivotal Professional Services Limited……". He is therefore appealing against his dismissal from the First Respondent.

50. The extent of this documentation, that was either produced by the Claimant himself or was not challenged by the Claimant at the relevant time, in our view supports that the Claimant's employment did transfer to the First Respondent and it was from this employment that he was then dismissed.

The employment particulars

51. On the 26th March 2018 the Claimant is appointed CEO of the Pivotal Homes Group (page 4123 / 1854) as referred to in the agreed chronology and at paragraph 17 of the Claimant's witness statement. We have noted that the Claimant accepted during cross-examination that he did have overall responsibility for all health and safety matters with the Group.

52. It appears that around 16 May 2018 the need for contracts of employment was on the Claimant's radar (see page 4345 / 2044).

53. On 16 May 2018, Dorothy Westerman emailed the Claimant with "… the last version of your contract as requested" as can be seen from the email at page 4344 / 2043. It was confirmed to us in evidence that the document attached to that email is the one commencing at page 3578 / 1468.

54. The Claimant refers to this in paragraph 20 of his witness statement "….. A template employment contract was sent to me by Dorothy Westerman in May 2018 in the name of Pivotal Professional Services Limited (see page 3578 of the bundle) as a basis of discussion between Stephen, Denis and I at a meeting on 15th June 2018. But this draft contract did not reflect any final agreement made between the parties, including for example in relation to holidays or the notice period, nor was it actually discussed at that meeting, as Stephen and Denis had forgotten to bring their copies (see pages 2740 & 3678 of the bundle).".

55. The Claimant acknowledged in his oral evidence that he provided that document to Mr Fowley and Mr Dixon but did not indicate to them that it was something which he was not happy with. The Claimant further accepted that Mr Fowley and Mr Dixon never subsequently discussed the document with him or indicated that they were unhappy with it. We have noted that the email at page 2740 / 1161 notes Mr Fowley saying about the contract that "Philip provided it but we never got round to signing it or discussing it.".

56. The complaint by the Claimant is that he was never provided with written particulars of employment in accordance with section 1 of the Employment

Rights Act 1996. Such written particulars need to confirm certain things in writing, such as the date when the employment began. We have noted that there is no start date in the agreement we were referred to (see page 3579 / 1469).

Loan/Gift and Shares

57. As is recorded in the agreed chronology there is a meeting on the 24th August 2017 at Limewood Hotel between the Claimant, Mr Dixon and Mr Fowley. We are not being asked to determine what was agreed at this meeting, this is a matter for the parties High Court litigation.

58. As noted in the agreed chronology and confirmed in the witness statement of the Claimant at paragraph 41, on the 25th August 2017 the Claimant receives £400,000 (the Claimant acknowledges the money by email dated 5 September 2017 (page 208/63)).

59. We have noted that the Claimant says at paragraph 58 of his witness statement that the question of whether the £400,000 was a "a gift or a loan" arose in early March 2018 "(see pages 348 onwards of the bundle)". We note that page 348 / 162, as referred to by the Claimant, suggests it was from late February 2018 that Mr Fowley and Mr Dixon refer to it being a loan. We have also noted that the Claimant says he never handed over a signed copy of a loan agreement circulated between the parties around that time (see paragraphs 58 and 59 of the Claimant's witness statement).

60. We therefore find as fact, being relevant to the issues to be determined in this claim, that the potential status of this money is in dispute between the parties at this time.

61. As to the alleged promised shareholding, we are directed by the parties to not find facts as to what was actually agreed. However, we have been presented evidence about a meeting in June 2018 between the Claimant, Mr Fowley and Mr Dixon where shares were discussed, to give context to the email sent by the Claimant on 21 August 2018 (referred to as the "Rocket Fuel" email).

62. Mr Fowley describes the June meeting with the Claimant at paragraph 52 of his statement "……We met in Portugal over 14–15 June 2018. I was angry and it was a difficult conversation. I repeated that I had made it clear

that if he wanted shares, he would need to buy them and, if so, he needed to come up with a proposal which we would consider. He accepted the position. This explains why Philip messaged me on 16 June 2018 referring to getting the business valued [760 / 329] and paying for shares out of his taxed income. However, he never actually made any type of offer to me or Denis. There were no more discussions about the shareholding or the loan until August 2018 and the "rocket fuel" email which I will come to later.".

63. Mr Dixon confirmed in cross examination what he thought of this June meeting when he was asked to agree that it was not a hostile meeting. Mr Dixon replied by saying that on the business side it was verbally hostile. He said that Mr Fowley had had enough of the nonsense, gave the Claimant a damn good slap, no shares and afterwards we moved on.

64. The meeting is described by the Claimant at paragraph 60 of his statement "Stephen, Denis and I then decided to look at a larger group structure, where the Pivotal companies would be integrated into a single group …. The idea of buying into this group was first mooted when we were having lunch when I was last in Portugal, on 15th June 2018. Stephen had then suggested an alternative enhanced arrangement whereby I became a shareholder in the larger group structure that we were musing implementing, for which there would then be an element of consideration, and hence the valuation work that I was asked to procure from Inspire accountants……".

65. Although there are different recollections about this June meeting, what we do find as fact is that there does not seem to be a consensus between the parties on the shareholding issue. We also note that the next correspondence between the parties about what their respective understandings are is the "Rocket fuel" email and the reply to this, as detailed below.

The fourth alleged protected disclosure

66. It has been set out in the agreed list of issues that the Claimant asserts that on 16 August 2018 he said to Kristina Hall (Director of Housing at Pivotal Housing Association) that there were unsafe floors and unprotected apertures through which a person could easily fall.

67. Details of this alleged fourth disclosure have been set out by the Claimant in his witness statement at paragraphs 75 to 80. At this time the Claimant

was accompanied at work by his and Mr Fowley's daughters who were undertaking work experience.

68. Before confirming his witness statement, the Claimant amended paragraph 75 so that it referred to Tuesday 14 August not Wednesday 15 August. Paragraph 75 therefore read "……. We visited Anchor House on ~~Wednesday~~ Tuesday afternoon (~~15~~ 14 August 2018) and when we arrived, there was very little activity happening. That did concern me because the work was supposed to have commenced in earnest around 2 weeks earlier. Eoghan met us, and explained that there would be more men on site the following day.".

69. Then at paragraph 76 the Claimant states "On 15 August 2018 Greg Aston emailed John Mills, who worked for Eoghan, copying in Katie Luxton and I about the Asbestos Containing Materials (ACM) at Anchor House; see page 2066 [pdf 869] of the bundle. I encouraged Eoghan to get some help through Stephen. I said he needed his own quantity surveyor.".

70. Then at paragraph 77 the Claimant says "I decided to check that there were more men on site, as Eoghan had promised, by visiting the site again the next morning because I had quickly learned that much of what Eoghan had previously promised didn't materialise in the way expected. We arrived at the site, and perhaps because I was extra conscious of health and safety with Stephen's and my daughter with me, I immediately stopped them from walking into the building because there was an unguarded hole in the middle of the timber ground floor. Someone could easily have fallen through into the basement below. This was obviously completely unacceptable.".

71. Then at paragraph 78 the Claimant says… "I immediately telephoned Kristina Hall and Greg Aston. Greg was the (outsourced) project manager, who worked for Ridge. I wanted to discuss what we should do. Everyone was mindful of the fact that Eoghan was Stephen's brother and that Eoghan and Stephen spoke every day. Eoghan was constantly feeding Stephen (often false) information to cover for his poor conduct, and I knew that we had to balance our responsibilities under the law with the fact that Stephen wouldn't have wanted us to do anything that could be construed as deleterious to Eoghan. It was an incredibly difficult situation. My immediate suggestion was that Eoghan be given 48 hours to rectify things. In my call with Greg Aston, I was then made aware of the fact that there was no construction phase Health & Safety plan in place. There was also a suspicion that the men on site were not in possession of Construction Skills

Certification Scheme cards, and it later transpired that Eoghan himself was also working on site without a CSCS card (see pages 2135, 2140, 2201 & 2330 of the bundle).".

72. Then at paragraph 79 the Claimant says…. "A construction phase Health and Safety plan is required on all schemes, and is vitally important. See page 2205 of the bundle.".

73. Then at paragraph 80 the Claimant says…. "Kristina did not know about the hole in the floor until I made her aware. As I was still with the two girls, I left Kristina and Greg to deal with the situation. I had no further input after that. I saw an email from Greg to EPF Building Limited saying I'd given 36 hours for EPF to sort things out (I had in fact suggested 48 hours, see paragraph 78 above); see page 2197a of the bundle. As there was also an almighty mess in the street, with plasterboard thrown on the pavement and material getting engrained in the pavement (see page 2036 of the bundle), this email also referred to the Considerate Constructors Scheme.".

74. From this account the Claimant reports about the hole in the floor to Kristina but what is not clear is when he does this. The reference to the next morning in paragraph 77 of his statement, following the reference to the 15 August 2018 email at paragraph 76, suggests that this would be the 16th August 2018 when he visited the site and discovered the hole. However, the Claimant confirmed in oral evidence that he meant the 15th of August 2018 when he visited the site and that therefore when he says, "I immediately telephoned Kristina Hall and Greg Aston" in paragraph 78, he confirmed that he also means the 15th August 2018 when he told Kristina about the hole.

75. We are urged by Respondents' Counsel to find that it cannot be right that the Claimant reported it on the 15th. It is asserted by Respondents' Counsel that the Claimant discovers the issue on the 15th but didn't report it until the 16th. To support this, we are referred to the particulars of claim and the agreed list of issues which state the disclosure was made on the 16th of August. This is a fundamental ingredient to the Claimant's complaint so it would be surprising if such an error in the pleadings and agreed list of issues only came to light during cross-examination.

76. Further, the email at page 2135 / 901 dated 16 August 2018 and timed at 09:05, which appears to be the only contemporaneous written record of what Claimant said, records "Further to a conversation with Philip Warr this morning, and his recent visit to site, he is very concerned about the basic

health and safety provision on site.". This email goes on to say "There were clearly some fundamental issues with structural floors, and apertures within them were not fully protected or safety barriers erected around them to prevent falls et al. Furthermore, general health and safety provisions and site supervision did not appear adequate.". The Claimant confirmed in answer to questions from the Panel that the gist of what he says he disclosed, is contained in these quoted paragraphs.

77. It is our view this leads us to find on the balance of probability that the Claimant discovered the hole in the floor on the 15th August 2018, but reported it to Kristina on the 16th August 2018.

78. From the Claimant's account of the alleged disclosure we also note that he suggests "My immediate suggestion was that Eoghan be given 48 hours to rectify things". There is no suggestion by the Claimant that the site should be immediately shut because of the hole, or safety barriers erected around the hole to prevent falls.

79. The Claimant leaves Kristina and Greg of PHA to deal with it and his evidence is he had no further input. As he confirms in his email dated 16 August 2018 (page 2246 / 940) that "PHA are now the employer…".

80. It is then later on the 16th August 2018 that the decision to suspend work on site is then made by PHA (as evidenced at page 2245 / 939), until the requested health and safety documentation is received.

81. What is clear from the evidence we have been asked to consider about the Claimant's alleged disclosure is that the Claimant did not contact Mr Fowley directly about it.

82. What Mr Fowley says about this alleged disclosure (and in particular about what is asserted in the issues as being the information disclosed, that "there were unsafe floors and unprotected apertures through which a person could easily fall"), is set out in paragraphs 81 to 82 of his witness statement. At paragraph 81 he says … "On the morning of 16 August 2018, Philip instructed Greg Aston (Ridge who had been tasked by Philip with project management at Anchor House in August 2018 [2197b /918]) to tell Eoghan to close the site within 36 hours unless certain information was provided [2135 / 901].".

83. Then at paragraph 82 he says … "I learnt about this decision at 10:04am on that day [2197a / 917]. One of the points which Philip had raised was that there was no Construction Phase and Health and Safety Plan in place. John Mills emailed Eoghan on 16 August 2018 to explain that this was right,

one was needed, and to start the process [2201 / 921]. I understand that a Construction Phase Health and Safety Plan is a practical plan mapping out what health and safety steps should be taken before work starts e.g. safety signs, availability of toilet facilities etc. I knew about this failing as Eoghan also forwarded this email to me on 16 August 2018 [2201 / 921]. Later, John emailed Greg Aston to explain that Eoghan would take remedial steps but that he had not known that the CDM Regulations applied and explaining that no Pre-Construction Health and Safety Plan had been received [2204a/ 924]. He complained that Eoghan had been pushed onto site with less than 24hrs notice, leaving inadequate time to make proper preparations. Eoghan again forwarded this email to me which I, in turn, sent to Denis [2335a / 948]. In other words, we knew at the time that some serious errors had happened at Anchor House as to health and safety planning. I was also aware that there was asbestos at the site as Greg referred to it in his initial email. My view at the time was that Eoghan was obviously at fault but that so was Philip. I felt he had pressured Eoghan and not provided him with the full picture. But at the same time, I also completely agreed that the site needed to be closed as health and safety was so important and took priority.".

84. It is clear from this evidence that Mr Fowley's knowledge about what the Claimant says he disclosed as relevant to this alleged disclosure, which is "there were unsafe floors and unprotected apertures through which a person could easily fall", is contained in the email at page 2135 / 901 dated 16 August 2018 and timed at 09:05. As already noted, this appears to be the only contemporaneous written record of what the Claimant said about the hole. However, this piece of information about the hole in the floor, does not then appear to factor in Mr Fowley's understanding of why Anchor House was closed, which he says focuses on a lack of health and safety documentation and in particular, the lack of a Construction Phase and Health and Safety Plan.

The fifth alleged protected disclosure

85. It has been set out in the agreed list of issues that the Claimant asserts that on 17 August 2018 he said to Denis Dixon that there were unsafe floors and unprotected apertures through which a person could easily fall.

86. Details of the alleged fifth disclosure have been set out by the Claimant in his witness statement at paragraphs 83 to 84.

87. At paragraph 83 the Claimant says… “Denis sent me a text on 17 August 2018 saying "Please ring me ASAP"; see page 3609 of the bundle. I rang him straight back, and he berated me for Eoghan's suspension from site, citing the word "brand". He was concerned about the company's brand in the eyes of builders generally (see for example page 378 of the bundle). I therefore sent him by email some examples of H&S prosecutions to try to show the seriousness of the problem (see pages 3604 / [1484], 3605 / [1485 to 1488] & 3608 of the bundle). I followed this up by text message that day.”.

88. Then at paragraph 84 “By sending the emails to Denis with the H&S prosecutions. I tried to explain that, if anything, the brand risk here was if we ended up in court for health and safety breaches, but I didn't feel Denis was getting the gravity of the situation. Denis and Stephen were not on top of contemporary legislation. They had been out of the business for a long time and they did little building work while they were living in Portugal. Denis replied by text message on 19th August thanking me; see page 2377 of the bundle.”.

89. Mr Dixon address this issue in his statement at paragraphs 7, 8 and 9. At paragraph 7 he says …. “On 17 August 2018 I learnt from Eoghan Fowley that there had been an issue on site at Anchor House. He said he had been removed from site for allegedly not having the appropriate health and safety plan in place in circumstances where he did not believe it was required. He felt that his business, EPF, was being blamed for Philip’s chaotic handling of the property. I was in Portugal and spoke to Philip the same day who confirmed that the Anchor House site had been closed due to health and safety concerns, a step I would expect him to take. He also said that Anchor House was the responsibility of PHA, which I did not and still do not understand. I asked Philip what the situation was and whether he could work around it. Philip said it wasn’t possible and the site had to be closed. There is more detail about this conversation at para 71 in the Grounds of Resistance and in Stephen’s statement.”.

90. Then at paragraph 8 … “I didn’t fully understand the nature of the issue (other than it being something about a hole in the floor) but completely accepted the decision. Philip is a Chartered Surveyor, so I wasn’t going to argue about it. On health and safety, I have to go with the flow and let it get resolved. I agreed he had done the right thing in closing the site.”.

91. Then paragraph 9… “For reasons that remain unclear to me, on 19 August 2018, Philip proceed to send me three emails to show that people had gone

to jail or been issued with heavy fines for not closing sites [3604-3608 / 1484-1488]. I messaged Philip to thank him for the information and, as previously discussed, said I totally agreed that health and safety must come first [2377 / 971].".

92. What Mr Fowley says about this matter is at paragraph 89 of his statement "Denis and I spoke later that day and I reminded Denis that Anchor House had not been sold and was still a PHG property and its responsibility. We were perplexed as to why Philip would be shifting responsibility for Anchor House to PHA. We felt that this was wrong and made no sense. That aside, we take any health and safety issues very seriously and Denis and I agreed that the site should be closed immediately, and Philip was messaged to this effect [2377 / 971]. We were completely clear that health and safety needed to come first.".

93. From this witness statement evidential account, it is not stated by the Claimant that he said to Denis Dixon on the 17 August 2018 that "there were unsafe floors and unprotected apertures through which a person could easily fall". It can potentially be inferred that something about this may have been said to Mr Dixon where Mr Dixon says in his statement … "I didn't fully understand the nature of the issue (other than it being something about a hole in the floor) but completely accepted the decision.". It is clear also, that it is not the Claimant seeking to disclose this information to Mr Dixon, it only potentially comes up on the 17th August 2018 because Mr Dixon asks the Claimant to call him as he wants to find out what has happened. As the Claimant focuses on in his statement … "I rang him straight back, and he berated me for Eoghan's suspension from site, citing the word "brand". He was concerned about the company's brand in the eyes of builders generally…". The Claimant does not appear to have been berated at all about any references he may have made in his call with Mr Dixon about him saying (if he did) that "that there were unsafe floors and unprotected apertures through which a person could easily fall".

94. As we have already found the decision to suspend work on the site was made by PHA on the 16th August 2018 and as noted in the witness statements, Eoghan had been removed from site. Therefore, by the 17th August 2018 there can be no risk due to a hole in the floor, and it does not appear from the evidence of the Claimant that he believed this when he spoke to Mr Dixon on the 17th August 2018. His communications with Mr Dixon are focused on managing "brand" damage, not seeking to make sure Anchor House was closed or, any hole at the site had signage or safety barriers erected around it.

Reaction to the alleged disclosures

95. It is at paragraphs 86 and 94 of the Claimant's witness statement where he sets out what he perceives to be Mr Fowley' immediate reaction to his alleged disclosures.

96. At paragraph 86 he says …. "Stephen and I were very good friends for a long period of time. That's why I found it so bizarre and upsetting that, all of a sudden, after 16 August 2018, the shutters came down. I don't understand how someone can suddenly switch like that. On Saturday 18 August, I sent a WhatsApp message to him to suggest we speak. I asked whether we could catch up about a few things; the EPF strategy was one of them. I got no response. It was then I realised I had a significant problem. Until that time, Stephen and I hyper-communicated. He wouldn't always pick up the phone to speak, but he would respond to WhatsApp wherever a response was warranted. This suggested to me that he was enraged by his brother's suspension from the site, when as explained it wasn't actually my decision. Stephen has since asserted that he didn't know anything about the safety issues at Anchor House until I raised my appeal against dismissal (see page 3816 of the bundle), but I can't believe that Denis didn't speak to him about it at the time.".

97. Mr Fowley was challenged about what the Claimant asserts in cross examination. Mr Fowley responded by saying that he would not normally respond to work messages on a Saturday, at that time he was away and had family around him. As to not knowing about safety issues at Anchor House, by his reference to page 3816 / 1581 (which are notes of his appeal interview) he confirmed that what he did not understand was what the Claimant was "whistleblowing about". Also, we have noted from the Claimant's own witness evidence that the Claimant's assertions do not refer to Mr Fowley having a reaction to what the Claimant asserts he told Mr Dixon on the 17 August 2018.

98. Then at paragraph 94 the Claimant says … "At 3.07pm on 16th August the email suspending Eoghan was sent (see page 2330 of the bundle), at 3.12pm Eoghan forwarded that on to Stephen (see page 2335a of the bundle), and at 3.35pm my PA received an email from Stephen (page 2415 of the bundle) asking what the cancellation policy was for the Goodwood Revival. I was perturbed by this, but I hadn't at that stage put 2 and 2 together. I hadn't realised that his brother's suspension from the site would

have so enraged Stephen to the extent that he was looking to cancel the weekend away and dismiss me.".

99. Mr Fowley addresses this Goodwood matter at paragraph 102 of his witness statement "On 16 August 2018 I emailed Philip's PA to get further details of weekend extra costs [2407 / 977] [2416 / 986] and how to pay for the tickets. Importantly this was after I learnt about the health and safety issues at Anchor House. In a following email I asked her about the cancellation policy and bad weather cover [2415 / 985]. I discussed with my wife whether we should make a weekend of it and pay for the extras. The tickets, costing £2,950 per couple, were ordered by Nicky and bought by PDS around 17 August 2018 [2413 / 983]. I was slightly baffled at this as it was a purely personal trip and I repaid PDS for my tickets the same day [2413 / 983]. The organisers got in touch to confirm our details for attending on 22 August 2018, but the camping part was subsequently cancelled, and the organisers got in touch to reimburse us for that element and my wife gave our account details to the organisers on 28 August 2018 [1435 / 721]. At the meeting when his employment was terminated Philip asked if I would give him our 2-day entrance tickets to the Revival (not the camping), which I gave to him and did not attend the event myself. I do not understand how Philip is now seemingly claiming this as a detriment to him.".

100. On considering this evidence the Claimant says he is perturbed by "an email from Stephen … asking what the cancellation policy was for the Goodwood Revival". However, Mr Fowley has provided explanation for this which we accept and we note that Mr Fowley purchased the tickets after the alleged disclosures and then at the Claimant's request gave the Claimant his 2-day entrance tickets.

The "Rocket Fuel" email

101. On the 21 August 2018 the Claimant sends what has been referred to as the "rocket fuel" email and we were referred to this at page 2555 / 1087. The Claimant describes this email as a "seeking clarification email" as set out in paragraphs 90 to 92 of his statement.

102. This is a key document in this claim so it has been considered very carefully by us. It is dated 21 August with the heading "Bank Balances" and the text reads:

"Dear Denis,

Duly noted – all issues raised in your email need to be added to the agenda as discussion points for when we meet and please let/Nicky know of any other items you or Stephen wish to be added to the agenda.

In the meantime I would really welcome a call with you and/or Stephen prior to that in order to clarify my own position within Pivotal as we now embark on our next phase of growth of the business so that I have a clear understanding of what my future looks like as this has taken on an increasingly occluded outlook for me as the past 7 months have elapsed.

We had agreed what my package would include when the three of us met at Limewood on the 27th August last year but we may have delayed documenting our agreement given more pressing priorities in the intervening period. At your request I did provide 2 copies of a draft contract relating to my position in Pivotal in May this year but have hitherto received no response. My salary is also now overdue for a review but has not yet been mentioned - I'm sure that this is just an oversight. I'm too embarrassed to keep chasing up the issuance of shares so would ask that you and/or Stephen undertake that role so that I don't please need to cause any further embarrassment. I have worked mentally (and literally too!) as a shareholder for 11 months and have a fiduciary duty to inform you that owing to the prolonged absence of a long anticipated share certificate, this ethic has just started to wane. You may recall that Mike King was instructed, at Limewood after our meeting on 27 August 2017, to issue me with a share certificate for a third of PHGL albeit in non-voting shares, but that we subsequently discussed that this is commuted to me 'buying' into the group. That was a year ago next Monday! I have to confess that I have found the delay to me becoming a shareholder has, since the 27th of January this year when for example I corresponded with Stephen on the subject of progress with my share certificate, increasingly become an ever larger boulder that I've had to drag behind me through this year. I sense a reluctance on the part of the current shareholders to progress this transfer of rocket fuel. Therefore if I'm not now to be a shareholder I would appreciate transparency on this point so I can tell my family and the business and who I therefore owe an explanation, that I got it wrong as I can't credibly continue to perpetuate such a spectre beyond the looming 12 months. I've also requested a payment on account of my share of the profits emanating from the 2/7/18 transaction several times and feel too embarrassed to have to ask again, notwithstanding I acknowledge that you're awaiting a dead reckoning from Mike King. In the absence

> of much paperwork an act of such interim payment would be greatly reassuring to ones mind that has, with passage of time, become increasingly less sure of your intentions.
>
> I would really welcome some clarity around these points to assist me in remaining undistracted in my, albeit recently blunted, uninhibited rocket fuelled focus on building the business. Please understand that I am merely requesting clarity as to your intentions so I know where I stand and any action that you and Stephen want to take, be now taken. Thank you."

103. About this email the Claimant says at paragraph 91 of his witness statement … "The email also sets out my understanding of the discussion we had had about me 'buying' into the group". This appears to be reference to the meeting in June which we have referred to above. The Claimant says about this in his email … "You may recall that Mike King was instructed, at Limewood after our meeting on 27 August 2017, to issue me with a share certificate for a third of PHGL albeit in non-voting shares, but that we subsequently discussed that this is commuted to me 'buying' into the group.". We also note that this email is sent as part of the "Bank Balances" chain of emails relating to the "missing" £3million.

104. Mr Dixon then replies by email dated 29th August 2018 (see page 2757 / 1180) of the bundle).". The text of this reads:

> "Thank you for your email dated 21st August. I am concerned to read its content and it is clear there is still misunderstanding of your position within the Pivotal Group, even though we have discussed this on numerous occasions, including the meeting with Mike King on 27 August 2017. We have, subsequent to that meeting, had further discussions with you about your package, including trying to help you mitigate your tax liabilities through holding non-voting shares. As you know we have been advised against this. At no time have we offered to give you a partnership in the business, instead we have discussed options for performance -related bonuses. I suggest that we clarify all areas concerning your contract of employment, salary, other remuneration and outstanding loan at our meeting on Monday."

105. We find that the two emails clearly show there is a mismatch between what the parties each think they have agreed, and we have been told that this disagreement is now being litigated in the High Court.

The Respondents asserted reason for dismissal

106. The reason asserted by the Respondent's for the Claimant's dismissal is set out in detail in Mr Fowley's witness statement at paragraphs 107 to 122.

107. At paragraph 107 he says …. "… the key catalysts for terminating Philip's employment were £3m going missing, his threatening email of 21 August 2018 (the rocket fuel email) and his refusal to speak to either Denis or me at the meeting on 3 September 2018 (I comment on each of these catalysts below).".

108. Then at paragraph 108 he says…. "We felt there was a complete breakdown of trust and Philip was continuing to display unpleasant and threatening signs of greed. He was not the man we had known for so many years. The professionalism was all a façade and he appeared to be more trouble than he was worth.".

109. Then at paragraph 109 he says …. "PHG is funded by a loan from Charles Terence Estates Limited (CTE) of which Denis and I are both the sole shareholders. We also provided PHG with cash as required to fund its operations. In August 2017 we offered to fund purchases so that there was less pressure to do back to back deals.".

110. At paragraph 110 he says …. "After completion of the Henley tranche 1 deal Philip knew Denis and I each expected to receive £1.5m towards discharging our director loans in favour of PHG and CTE in July 2018 [1047 / 514] [1030 / 497][4342-4343 / 2041-2042]. Due to the uncertainty of the business' cash flow needs, we each agreed to reduce this to £1m [1925 / 808]. On 26 July 2018, I messaged Philip because he told us the money had been received from Henley and yet I could not see it in the bank account [1314 / 639]. I was very concerned that I was unable to access the accounts and couldn't understand how/why this had occurred [4178 / 1906]. Eventually the money appeared. Denis accessed the accounts on 4 August 2018 and was concerned to see that cash was depleting fast [1409 / 703]. On 10 August 2019 Philip was instructed to pay £1m directly to us and £1m to the Pivotal trading account i.e. £3m in total [1925 808]. Instead, alarmingly, he transferred the £3m to another Pivotal Homes account to which neither Denis nor I had access. This caused significant concern at the time. On 20 August 2018, Denis told me that he could not see or access the £3m. We were particularly concerned to receive an email from Tracee

Lee, PHG Financial Administrator, to say that she could not get all the bank balances on that day [2513 / 1068]. Philip then tried to blame Tracee for simply being honest with us [2512 / 1068]. He said he could not transfer the funds back as no one had access to the account. This made no sense to us.".

111. At paragraph 111 he says …. "There was an anxious period while we waited to learn the updated bank balances and to understand why Denis and I could not see and access all company accounts. This was highly unusual. We felt that Philip had not listened to us, was treating the business as his own and that we could not control him [1030 / 497]. We were beginning to feel strongly that we could not trust him.".

112. At paragraph 112 he says …. "We later learned that a new bank account for Pivotal Homes, to which Denis and I did not have access, had been opened on 9 August 2018 and Philip instructed Emma Lumm to transfer £3 million into this account on 13 August 2018 [3980 / 1741]. There has never been any satisfactory explanation of this. On 31 August 2018 as soon as Emma Lumm had access, the money was transferred back to the Pivotal trading account [2904 /1223] [2908-2910 / 1227-1229] [3980 / 1741][2920 / 1237]"."

113. At paragraph 113 he says …. "We were getting nervous now. We felt vulnerable. We were in Portugal. Philip was in charge and strange things were happening to our money and he was not listening to us and still making wild demands.".

114. At paragraph 114 he says ….. "On 21 August 2018 in response to Denis's email about the bank balances and the £3m [4332-4334 / 2031-2033], Philip emailed Denis seeking clarification about his position in the business and his remuneration [2555 / 1087]. He again pushed the point about being issued with shares even though he knew nothing had been agreed. We felt this letter was very passive aggressive and really demonstrated, in my view, Philip's greed. He said he needed "rocket fuel". It was clear from the email that he had not listened or understood our conversations over the last 18 months about his remuneration and we felt threatened by his demands as we felt disconnected from the business and he had all the control including of the money.".

115. At paragraph 115 he says …. "Denis and I met in Portugal to discuss whether we could manage him and if he was the right guy. We started to

consider whether we should dismiss Philip. As non-executive directors, living in Portugal, we needed someone we could trust. Denis and I had taken turns in trying to manage him (see below). We should have tackled the issues earlier, but he was a friend and neighbour, we were in Portugal and it was a big decision and hassle to remove our most senior manager and friend.".

116. At paragraph 116 he says …. "The next morning on the 22 August 2018, I reached out to Peter Levaggi, our friend and legal advisor, as I wanted to talk the situation through with him [3080 / 1381]. He was away on holiday, so we spoke later in the week. I explained that we were at our wits end with Philip. On 27 August 2018, I emailed Peter to say we were inclined to "part ways" with Philip and sent him our draft response to Philip's email of 21 August 2018 [2736 / 1160]. The response to the "rocket fuel" email was eventually sent to Philip on 29 August 2018 [2757 / 1180]. We also discussed the £3m being moved and the fact that Philip was the sole director of the business as Nigel had left. We decided we urgently needed to get control of our company and become directors as we were concerned Philip might remove the money from the business and we could have a long battle to get it back. We immediately began the process of becoming directors. [3080 / 1381].".

117. At paragraph 117 he says …. "Upon Peter's return, we met at Denis' house in the UK on 2 September 2018 to discuss our options. There was a lot happening at a time when Eoghan was pointing out mismanagement by Philip beyond Anchor House [3027 / 1336] [3028 / 1337]. Due to the long-standing relationship between Philip and my family I really was not sure what to do. It was a hard decision, we had employed a friend to run our business, who we had also invested 18 months of our time to try and make a success. Although we had issues with his management style, we had always tolerated these in the past. Having to terminate Philip's employment was a last resort but we decided that ultimately, we could not risk the business for a friendship.".

118. At paragraph 118 he says …. "We subsequently arranged to meet Philip on 3 September 2018 in the hope of finding a final resolution to his concerns and ours. We met at Mike King's offices [158 / 33]. Mike and Peter Levaggi also attended this meeting. Philip refused to speak to Denis and me about his remuneration even though he had raised it on 21 August 2018 and stated at the meeting that we were "unqualified" and that "his" Chairman, Mike Jeffries, should discuss it with him. We had no Chairman and were extremely unhappy about this (see below). He asked us to leave

the room and continued the meeting with Mike and Peter Levaggi and confirmed to them that he realised "nothing had been agreed" about the shares (even though he had raised it in the "rocket fuel" email of 21 August 2018) and said this was why he wanted clarity about our intentions. He felt we had been uncooperative about the valuation of the business [3051 / 1358]. Peter also told us later that Philip said he did not think the personal loan we had given him of £400k was in fact a loan [3811, line 200 / 1576]. This surprised and concerned us and his behaviour made us feel even more uneasy [4331 / 2030].".

119. At paragraph 119 he says …. "It was disrespectful to us as shareholders that he would not talk to us and demonstrated how far the relationship had broken down by that point. We were quite shocked that he was not prepared to communicate with us and engage with us directly. Philip did not mention health and safety, whistleblowing or Anchor House in this meeting (or in the subsequent meeting on 6 September 2018) [158 / 33]. He did, however, come prepared with a self-serving selection of documents relating to his claim as a shareholder which he presented to Peter Levaggi at that time [3051 / 1358].".

120. At paragraph 120 he says …. "When we re-joined Peter and Philip after their meeting we all agreed to reconvene on 6 September 2018.".

121. At paragraph 121 he says …. "On the evening of 3 September 2018 Philip texted Peter Levaggi suggesting a joint appointment to "resolve the matter and avert any unnecessary complications" [3082 / 1383]. We felt this was another passive aggressive threat. The trust had gone and the relationship broken down, prompting me to reply to Peter saying "Lol. Decision is made! He is gone. Timing is all that is left to be decided" [3082 / 1383].".

122. At paragraph 122 he says …. "Over the next few days, Denis and I continued to discuss whether to dismiss Philip. I was still not completely decided by the evening of 5 September 2018 [3815, line 414 / 1580], but it seemed that, in truth, there was no other option. He had become unmanageable and we no longer trusted him to take our business forward. Neither my wife, nor Denis', were involved in the decision to dismiss Philip. This was a decision taken solely by Denis and me. It was a difficult decision to make because of our personal history but we ultimately felt that we had no choice. The dismissal letter is at [3108 / 1397] [3172 / 1399] [3173 / 1400].".

123. Mr Dixon in his witness statement refers to these matters at paragraphs 12 d and e. At paragraph 12 d he says... “On 20 August 2018 I expressed my concerns about not being able to see the bank balances or access the accounts. I told Philip that things must change as I couldn’t work this way [2505 / 1063] [2506 / 1064] [2512 / 1068].”.

124. At paragraph 12 e he says…. “Matters came to a head following receipt of his “rocket-fuel” email dated 21 August 2018, and Philip moving £3m of company funds without our permission and which neither Stephen nor I could see or access. These were major reasons for the decision to dismiss him, occurring as they did against a backdrop of concerns about financial information, transparency and trust.”.

The Claimant’s asserted reason for the dismissal

125. At paragraph 97 of the Claimant’s witness statement he says… “It’s now clear steps were being taken to dismiss me by at the latest 27 August 2018 (see pages 2736, 3080 & 3082 of the bundle). On 26 August, Stephen and Denis started communicating using private email specifically so that their communications would not appear on the Pivotal records (see page 2744 of the bundle). On Tuesday 28 August, Denis contacted my PA, Nicky Southwell to say that Stephen and he were coming in to see me at 9am on Monday 3rd September. Nicky tried to tell Denis that I was already fully booked up but Denis's reaction and tone made Nicky decide to reorder my diary. Nicky was unsettled by that tone and when she relayed to me the call she seemed upset. She too sensed something was wrong.”.

126. What we note here is that the actions of the Respondents as asserted by the Claimant, i.e. taking steps to dismiss the Claimant on the 27 August 2018 and setting up private emails to communicate about it on the 26 August 2018 fall after the issues with the £3million and the “Rocket Fuel” email. It is therefore not obvious from the Claimant’s own evidence that these actions are because he reported a hole in the floor at Anchor House, as other things have happened between the parties before the Respondents start to take action.

127. What the Claimant says about the £3million issue is set out at paragraph 88 of his statement… “In the week beginning 20 August Stephen and Denis started calling Shindy and Emma Lumm, and were desperately trying to move millions of pounds out of the company bank account into their

own. Normally they only ever called my PA, Nicky Southwell or me about this, and this was another example of Stephen not talking to me after the 16 August.".

128. As the £3million does not belong to the Claimant it may explain why he appears less concerned by this incident than Mr Fowley and Mr Dixon were. We accept though Mr Fowley's and Mr Dixon's account of their concern about this matter, which is reasoned and substantiated by contemporaneous documents.

129. About the meeting on the 3 September 2018 the Claimant says at paragraph 99 .... "I went to Mike King's office for 10am. I walked into the meeting room and was surprised to see four people in the room: Denis, Stephen, Peter Levaggi and Mike. It felt like an ambush. Peter led the meeting and said "What's this email all about?", referring to the "rocket fuel" email. I was immediately put off balance by the tone and direction of the question. I politely responded that I was merely seeking clarification. I didn't want to get drawn into an argument, which felt like their plan.".

130. Then at paragraph 100 he says… "I therefore suggested an adjournment very early in the meeting. When the meeting adjourned, I produced the various emails showing that I was a 1/3 shareholder to Peter Levaggi and Mike King. I didn't want to put these documents on the table with Stephen and Denis in the room.".

131. Then at paragraph 101 he says…. "When I showed Peter these, he suggested that I wait outside or sit in another room so that he could invite the others in to consider what I had said and shown him. The others then came back into the room. I waited in another room for about 40 minutes. Then I was called back in, and it was simply agreed we that we'd reconvene on Thursday.".

132. The Claimant was challenged about his conduct at this meeting during cross-examination. He confirmed that he had asked to have a private conversation with fellow professionals, meaning Peter a qualified lawyer and Mike a qualified accountant. He did agree initially that he may have referred to Mike Jefferies as his Chairman. About this meeting Mr Dixon in response to cross examination, said he thought the Claimant was insulting, he recalls being told by the Claimant that he was not qualified to discuss matters and Mr Dixon found this offensive, also that he was asked to leave the room.

133. By Panel questions Mr Fowley and Mr Dixon were asked about their decision to dismiss the Claimant. Mr Fowley confirmed with reference to his email dated 27 August 2018 at page 2736 / 1160, that says "We have reached a conclusion and wish to part ways with Philip", that the "We" refers to him and Mr Dixon and that part ways means dismiss. However, he went on to explain that he did change his mind and he remained uncertain about the decision until after the meeting on the 3rd September 2018. Mr Dixon in response to Panel questions confirmed that it was a joint decision to dismiss the Claimant and it was his view it was finally reached after the meeting on the 3rd September 2018.

134. As confirmed in the agreed chronology and set out by the Claimant in paragraph 102 of his witness statement the Claimant is dismissed by Peter Levaggi at Mike King's offices on the 6 September 2018.

135. We have noted that the dismissal letter does not provide a reason for the dismissal (this document is at page 3108/ 1397). Mr Fowley explains this in answer to questions that he did not want to get into arguments on the detail as he needed to live with the Claimant, who lives opposite him. He said he was also told he did not need to as the Claimant had less than 2 years' service.

136. Not giving the reason in writing does cause ambiguity however we have noted the Claimant's WhatsApp message dated 8 September 2018 (at page 3172 / 1399) …. "Morning Gentlemen, I acknowledge that my contract has been terminated (which was obviously a bit of a shock). Having had time to reflect I woke up this morning wanting the job I loved back. I appreciate I need to listen more to the shareholders and wonder whether you would be amenable to discussing a possible fresh start on whatever terms you'd have in mind?". This seems to suggest that the Claimant understands at that time that the reason he is dismissed is due to the misunderstandings between him and the shareholders as articulated by the "rocket fuel" email and the reply to it, and as were discussed on the 3rd September 2018.

137. By letter dated 13 September 2018 the Claimant appeals against his dismissal and this can be seen at page 3323 / 1425, the relevant text of which reads:

> "……. I wish to raise an appeal against a decision to terminate my employment with Pivotal Professional Services Limited.
>
> As you will be aware, it came as a complete shock to be informed last week of my dismissal, with no prior warning and with no reason being provided. I inherited a business which you described as 'broken' and you have acknowledged had a bad reputation, yet I and my team put it on a path of complete transformation. To dismiss me with immediate effect in these circumstances would therefore seem completely irrational.
>
> It is notable that my dismissal came only shortly following my raising of health and safety issues with Pivotal Housing Association regarding the Anchor House site. As you are aware, as a consequence of the concerns I raised, Pivotal Housing Association decided that it would have been illegal for the works to have continued and then instructed that the works must be stopped immediately……"

138. We have noted that this appeal letter is the first time the Claimant asserts that he was dismissed for a reason other than that which was the subject matter of discussion on the 3rd of September 2018. What it does not expressly say though is the Claimant believes he was dismissed for saying to Katrina on the 16 August 2018 and/or to Mr Dixon on the 17 August 2018 that "there were unsafe floors and unprotected apertures through which a person could easily fall".

139. As is noted in the agreed chronology the outcome of the appeal is on the 26 August 2019 and the Claimant's appeal is rejected.

140. We have noted that on a number of occasions when the Claimant was asked in cross examination to confirm what he thought the reason for his dismissal was he refers to the Respondents "decided to dismiss me because Stephen's brother was suspended from Anchor House" … and "I think the reason to dismiss me was Stephen blew a fuse when he found out that his brother was suspended from site on the 16 August 2018, I think the decision was already made prior to the "Rocket Fuel" email.". In reply to Panel questions the Claimant confirmed that the decision to close the site was made by Kristina as a result of other information coming to light such as the lack of construction certification. Therefore, the reason the Claimant says he was dismissed is not because he reported a hole in the floor but as a consequence of Mr Fowley's reaction to the suspension of his brother which was not a decision made by the Claimant.

141. For completeness we have noted that as the Respondents did not appear to treat the meetings on the 3rd and 6th of September 2018 as disciplinaries, there was no reminder the Claimant could bring a companion, and as a consequence the Claimant did not ask for one, which as has been acknowledged by Claimant's Counsel, means the ingredients for a claim under section 10 of the Employment Relations Act 1999 are not made out.

THE LAW

142. Having established the above facts, we now apply the law.

143. Under section 43A of the Employment Rights Act 1996 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.

144. We have noted from the written submissions of Respondents' Counsel that when determining the "reasonable belief" requirement, it is a mixed subjective / objective test. Respondents' Counsel refers us to **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**.

145. Under Section 43C(1) 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.

146. We have noted from the written submissions of Respondents' Counsel that if relevant for us to consider the question of remedy we should also consider whether the disclosure has been made in "bad faith". Respondents' Counsel refers us to **Street v Derbyshire Unemployed Workers' Centre [2005] ICR 97)**.

147. Under section 103A of the Employment Rights Act 1996, 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.

148. We have noted from the written submissions of Respondents' Counsel that when determining this issue, the Claimant must prove on the balance of probabilities that the reason or principal reason for dismissal was one of the alleged protected disclosures. Respondents' Counsel refers us to **Smith v Hayle Town [1978] ICR 996**.

149. Section 10 Employment Relations Act 1999 requires:

"10 Right to be accompanied

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing…"

150. Section 1 of the Employment Rights Act 1996 requires:

"**1 Statement of initial employment particulars**

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) Subject to sections 2(2) to (4)—

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker,

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period) …"

151. Compensation for a failure in respect of Section 1 of the Employment Rights Act 1996 is only payable where Section 38 of the Employment Act 2002 is satisfied. As has been helpfully summarised in the written submissions of Respondents' Counsel… "a claim under s.1 ERA 1996 is "parasitic" on a successful claim in relation to the jurisdictions listed in Schedule 5 to EA 2002." Therefore, the Claimant needs to have a successful other claim (such as the automatic unfair dismissal claim) to recover compensation, even if there has been a breach of Section 1 of the Employment Rights Act 1996.

152. The Key considerations for this Tribunal are therefore:

a. Has there been a protected disclosure? We need to consider:

i. Did the Claimant disclose any information?

ii. If so did he reasonably believe the information tended to show at least one of the relevant failures?

iii. If so did he reasonably believe that the disclosure was made in the public interest?

b. Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

c. The Claimant did not have at least two years' continuous employment so the burden is therefore on them to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s)

THE DECISION

153. In our decision-making process we have therefore started with determining whether there had been a protected disclosure. We need to consider:

i. Did the Claimant disclose any information?

ii. If so did he reasonably believe the information tended to show at least one of the relevant failures?

iii. If so did he reasonably believe that the disclosure was made in the public interest?

The Fourth Alleged disclosure

154. We have found on the balance of probability that the Claimant discovered the hole in the floor on the 15th August 2018, and reported it to Kristina on the 16th August 2018. This is a disclosure of information.

155. Going on to consider if the Claimant reasonably believed that the information tended to show at least one of the relevant failures and if so did he reasonably believe that the disclosure was made in the public interest?

156. The Claimant sets out in the agreed list of issues that he asserts the information he discloses tends to show:

a. that a criminal offence was being committed namely breaches of the Construction (Design & Management) Regulations 2015 (regs 12, 15, 17, 18) as per s.43B (1) (a) ERA 1996?

b. that a criminal offence was being committed namely breaches of the Health and Safety at Work etc Act 1974 (s.2, 3 and 4) as per s.43B (1) (a) ERA 1996?

c. that the Second Respondent was failing to comply with a legal obligation derived from the Health and Safety at Work etc Act 1974 and the Occupiers Liability Act 1957 to ensure as far as possible the safety of its employees as per s.43B (1) (b) ERA 1996?

d. that the health and safety of visitors, employees and workers at the Anchor House site was being endangered such that a fatal fall might occur as per s.43B(1)(d) ERA 1996?

157. The Claimant asserts he believes it was in the public interest on the basis that there was a risk of death or serious injury.

158. From the Claimant's account of the alleged disclosure we have noted that he suggests "My immediate suggestion was that Eoghan be given 48 hours to rectify things". There is no suggestion by the Claimant that the site should be immediately shut because of the hole, or safety barriers erected around the hole to prevent falls.

159. The Claimant leaves Kristina and Greg of PHA to deal with it and his evidence is he had no further input. As he confirms in his email dated 16 August 2018 (page 2246 / 940) that "PHA are now the employer…".

160. It is then later on the 16th August 2018 that the decision to suspend work on site is then made by PHA (as evidenced at page 2245 / 939), until the requested health and safety documentation is received.

161. Reminding ourselves of the question of "reasonable belief" being a mixed subjective / objective test (**Korashi**). We have noted that the Claimant was CEO of the Pivotal Homes Group (page 4123 / 1854). We have also noted that the Claimant accepted during cross-examination that he did have overall responsibility for all health and safety matters with the Group. Then considering **Korashi**, since the test is the Claimant's "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing. The Claimant's belief is therefore to be judged by looking at him as a CEO with overall responsibility for all health and safety matters within the Group.

162. The Claimant makes no reference in his witness statement to the criminality or illegality of what he discloses to support that this was in his subjective belief.

163. Further, if the Claimant saw the issue on 15 August 2018 but did not raise it until 16 August 2018 then we do not find that he could have subjectively believed that, as asserted by the Claimant, there was the risk of serious injury or death such that the "public interest" test is satisfied. Further, the Claimant suggested 48 hours to "rectify things" and he does not specify what those "things" are, which in our view is completely counter to there being a risk of death or serious injury. The Claimant goes to great

lengths to make it clear it is not his decision what happens next and it was in the hands of PHA.

164. For these reasons we do not find that the Claimant subjectively believed that the disclosure was made in the public interest for the reasons he asserts. We therefore do not need to go on and consider the question of the status of Kristina Hall as a "responsible person" within the meaning of s.43C (1) (b) (i) and / or (ii) Employment Rights Act 1996 by virtue of being an "employer" under the CDM Regulations 2015. Although, it must follow that on the Claimant's evidence of divesting himself of all responsibility for what he is reporting and Kristina accepting that responsibility, that if necessary this aspect could be made out.

The Fifth Alleged Disclosure

165. As to the Fifth alleged disclosure, we have found the evidence on what information the Claimant alleges he disclosed to be very thin.

166. From the witness statement evidential account, it is not stated by the Claimant that he said to Denis Dixon on the 17 August 2018 that "there were unsafe floors and unprotected apertures through which a person could easily fall.". It can potentially be inferred that something about this may have been said to Mr Dixon where Mr Dixon says in his statement … "I didn't fully understand the nature of the issue (other than it being something about a hole in the floor) but completely accepted the decision.". It is clear also, that it is not the Claimant seeking to disclose this information to Mr Dixon, it only potentially comes up on the 17th August 2018 because Mr Dixon asks the Claimant to call him as he wants to find out what has happened. As the Claimant focuses on in his witness statement "I rang him straight back, and he berated me for Eoghan's suspension from site, citing the word "brand". He was concerned about the company's brand in the eyes of builders generally". The Claimant does not appear to have been berated at all about any references he may have made in his call with Mr Dixon about him saying (if he did) that "that there were unsafe floors and unprotected apertures through which a person could easily fall.".

167. As we have found the decision to suspend work on the site was made by PHA on the 16th August 2018 and as noted in the witness statements, Eoghan had been removed from site. Therefore, by the 17th August 2018 there can be no risk due to a hole in the floor, and it does not appear from the evidence of the Claimant that he believed this when he spoke to Mr Dixon on the 17th August 2018. His communications with Mr Dixon are

focused on managing "brand" damage, not seeking to make sure Anchor House was closed or, any hole at the site had signage or safety barriers erected around it.

168. For these reasons we do not find that the Claimant disclosed information on the 17 August 2018 to Mr Dixon that he subjectively believed tended to show at least one of the asserted relevant failures and that he reasonably believed was made in the public interest.

The Reason for the dismissal

169. We have therefore not found that the Claimant has made a qualifying disclosure that then qualifies for protection. However, if we are wrong in that we have gone on to consider what the reason or principal reason for the dismissal was and was it because of the alleged disclosures.

170. In this regard we do not find that the Claimant has proven on the balance of probabilities that the reason or principal reason is the alleged disclosures for the following reasons:

171. In respect of the back drop around the loan/gift and shares we have found that the potential status of the £400,000 is in dispute between the parties at the relevant times.

172. Although there are different recollections about the June meeting, what we do find as fact is that there does not seem to be a consensus between the parties on the shareholding issue. We also note that the next correspondence between the parties about what their respective understandings are is the "Rocket fuel" email and the reply to this.

173. We have found that the "Rocket fuel" email and the reply clearly show there is a mismatch between what the parties each think they have agreed, and we have been told that this disagreement is now being litigated in the High Court.

174. We have further found that Mr Fowley's knowledge about what the Claimant says he disclosed as relevant to the alleged disclosure, that "there were unsafe floors and unprotected apertures through which a person could easily fall", is contained in the email at page 2135 / 901 dated 16 August

2018 and timed at 09:05. As already noted, this appears to be the only contemporaneous written record of what the Claimant said about the hole. However, this piece of information about the hole in the floor, does not then appear to factor in Mr Fowley's understanding of why Anchor House was closed, which he says focuses on a lack of health and safety documentation and in particular, the lack of a Construction Phase and Health and Safety Plan. Also, we have noted from the Claimant's own witness evidence that the Claimant's assertions as to how Mr Fowley immediately reacted to the alleged disclosures do not refer to Mr Fowley having a reaction to what the Claimant asserts he told Mr Dixon on the 17 August 2018.

175. Mr Fowley was challenged about what the Claimant asserts about him not replying to the WhatsApp message sent on the 18 August 2018 in cross examination. He responded by saying that he would not normally respond to work messages on a Saturday, at that time he was away and had family around him. As to not knowing about safety issues at Anchor House, by his reference to page 3816 / 1581 (which are notes of his appeal interview) he confirmed that what he did not understand was what the Claimant was "whistleblowing about". This all seems credible to us.

176. On considering the Goodwood matter, the Claimant says he is perturbed by "an email from Stephen … asking what the cancellation policy was for the Goodwood Revival". However, Mr Fowley has provided explanation for this which we accept and we note that Mr Fowley purchased the tickets after the alleged disclosures and then at the Claimant's request gave the Claimant his 2-day entrance tickets.

177. As to the actions of the Respondent as asserted by the Claimant, i.e. taking steps to dismiss the Claimant on the 27 August 2018 and setting up private emails to communicate about it on the 26 August 2018, these fall after the issues with the £3million and the "Rocket Fuel" email. It is therefore not obvious from the Claimant's own evidence that these actions are because he reported a hole in the floor at Anchor House, as other things have happened between the parties before the Respondents start to take these actions.

178. We also find that the Claimant does appears less concerned by the £3milllion incident than the Respondents' were. However, it was Mr Fowley's and Mr Dixon's money and we accept their account of their concern about this matter, which is reasoned and substantiated by contemporaneous documents. Further, we have also noted that the "Rocket

Fuel" email is sent as part of the "Bank Balances" chain of emails relating to the "missing" £3million.

179. The Claimant was challenged about his conduct at the 3 September 2018 meeting during cross-examination. He confirmed that he had asked to have a private conversation with fellow professionals, meaning Peter a qualified lawyer and Mike a qualified accountant. He did agree initially that he may have referred to Mike Jefferies as his Chairman. About this meeting Mr Dixon in response to cross examination, said he thought the Claimant was insulting, he recalls being told by the Claimant that he was not qualified to discuss matters and Mr Dixon found this offensive, also that he was asked to leave the room. This does not appear to be a trivial issue for the Mr Fowley and Mr Dixon and we accept that this combined with the £3million matter and the "Rocket Fuel" email present a coherent and plausible explanation for the Claimant's dismissal.

180. By panel questions Mr Fowley and Mr Dixon were asked about their decision to dismiss the Claimant. Mr Fowley confirmed with reference to his email dated 27 August 2018 at page 2736 / 1160, that says "We have reached a conclusion and wish to part ways with Philip", that the "We" refers to him and Mr Dixon and that part ways means dismiss. However, he went on to explain that he did change his mind and he remained uncertain about the decision until after the meeting on the 3rd September 2018. Mr Dixon in response to Panel questions confirmed that it was a joint decision to dismiss the Claimant and it was his view it was finally reached after the meeting on the 3rd September 2018.

181. We have noted that on a number of occasions when the Claimant was asked in cross examination to confirm what he thought the reason for his dismissal was he refers to the Respondents "decided to dismiss me because Stephen's brother was suspended from Anchor House" … and "I think the reason to dismiss me was Stephen blew a fuse when he found out that his brother was suspended from site on the 16 August 2018, I think the decision was already made prior to the "Rocket Fuel" email.". In reply to Panel questions the Claimant confirmed that the decision to close the Anchor House site was made by Kristina as a result of other information coming to light such as the lack of construction certification. Therefore, the reason the Claimant says he was dismissed is not because he reported a hole in the floor but as a consequence of Mr Fowley's reaction to the suspension of his brother which was not a decision made by the Claimant. It is therefore not the Claimant's own evidence that he was dismissed for

the reason or principal reason that he disclosed "there were unsafe floors and unprotected apertures through which a person could easily fall.".

Section 10 Employment Relations Act 1999

182. For completeness we have noted that as the Respondents' did not appear to treat the meetings on the 3rd and 6th of September 2018 as disciplinaries, there was no reminder the Claimant could bring a companion, and consequently the Claimant did not ask for one, which as has been acknowledged by Claimant's Counsel, means the ingredients for a claim under section 10 of the Employment Relations Act 1999 are not made out.

Section 1 Employment Rights Act 1996

183. As to the particulars of employment, we have found that the Claimant's employment started on the 1st September 2017 and that he was transferred to the First Respondent on the 1st January 2018. However, the contract we were shown does not appear finished and is missing the start date, which would mean it is not a complete set of particulars for section 1 of the Employment Rights Act 1996. However, we are unable to award any compensation for this as the Claimant has not succeeded with any of his other complaints.

184. It is therefore the unanimous judgment of the Tribunal on the complaints we had to determine that:

a. The complaint of automatic unfair dismissal for the reason (or principal reason) of making a protected disclosure fails and is dismissed.

b. The complaint for breach of section 10 of the Employment Relations Act 1999, refusing to allow a requested companion, fails and is dismissed.

c. Therefore, for the complaint of failure to give written particulars of employment, albeit it is found that a section 1 Employment Rights Act 1996 compliant set of particulars was not provided, there can be no award of compensation for this.

185. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 31 and 32; the findings of fact made in relation to those issues are at paragraphs 36 to 141; a concise identification of the relevant law is at paragraphs 143 to 152; how that law has been applied to those findings in order to decide the issues is at paragraphs 154 to 183.

_____
Employment Judge Gray
Dated: 2 November 2020