EMPLOYMENT TRIBUNALS

Claimant: **Mr J Brown**

Respondent: **Premier Pensions Management Limited**

Heard on: **11th, 12th, 13th, 14th and 15th January 2021 by CVP**

Before: **Employment Judge Pritchard**

Representation
Claimant: In person
Respondent: Mr T Sheppard, counsel

RESERVED JUDGMENT

The Claimant's claim that he was constructively and unfairly dismissed is not well-founded and his claim is dismissed.

REASONS

1. The Claimant claims constructive unfair dismissal under ordinary and automatic unfair dismissal principles by reason of having made a protected disclosure. The Respondent resists the claims.

2. The Tribunal heard evidence under oath from the Claimant and from the Respondent's witnesses: Martin Thompson (Consulting Director), David Jarman (Head of Trustee Services), John Herbert (Chief Actuary), and Paul Couchman (Managing Director). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing on 15 January 2021 the parties made oral closing submissions supported by their written submissions presented to the Tribunal in advance.

Applications during proceedings

Claimant's supplementary witness statements

3. At the commencement of the hearing the Respondent made an application for two supplementary witness statements which had been prepared by the Claimant to be excluded from evidence on the basis that they were self-serving and been prepared purely to respond in detail to the content of the Respondent's witness statements following exchange. The Claimant objected to the application on the basis that the Respondent had not hitherto raised any

objection. The Tribunal agreed to read the supplementary statements in order to reach a decision as to whether or not they should be admitted in evidence.

4. The statements essentially set out in writing the Claimant's responses to what the Respondent's witnesses had set out in their witness statements. The Tribunal concluded that it would be more appropriate to consider the Claimant's challenges to the Respondent's evidence on the basis of oral evidence. The supplementary statements were therefore excluded from evidence and the Tribunal informed the Claimant that he should put to the Respondent's witnesses the counter arguments he had set out in his supplementary statements.

Scope of the claims before the Tribunal

5. The Respondent submitted that the Claimant's claim was one of constructive unfair dismissal under ordinary principles only; it was not a whistle blowing claim. The Claimant submitted that it had always been his intention to claim that he been dismissed because he had made a protected disclosure and that both his ET1 claim form and the case management order which had been issued by Employment Judge Andrews following a preliminary hearing identified such a claim. Based on these documents, the Tribunal concluded that an automatic constructive unfair dismissal claim was indeed a live claim before it. The reason why Employment Judge Balogun had not identified such a claim in a later case management order is unknown (the Tribunal suspects it was an oversight). The Respondent clearly understood that such a claim was being made, not least because the Respondent expressly resisted such a claim in its ET3 response form. The Respondent would not suffer prejudice for the claim to be considered.

Claimant's application to amend his claim

6. The Claimant applied to amend his claim to include a claim of detriment for having made a protected disclosure. He alleges Mr Couchman told him he was a troublemaker because he had made a protected disclosure. The Claimant explained that he had made an application to the Tribunal to amend his claim in December 2020 but that he had heard nothing. He submitted that his detriment claim would be a simple relabelling. The Respondent objected to the application.

7. In determining the application the Tribunal had regard to the factors set out in Selkent Bus Company v Moore 1996 ICR 836. In the Tribunal's view this was not a simple relabelling; a detriment claim, as opposed to an unfair dismissal claim, is a separate and discrete head of claim and, if successful, would require a different determination in relation to remedy, namely, injury to feelings. (Although not relevant to the Tribunal's determination of the application, the Tribunal notes here that if the application had been granted, it would have required a full tribunal to consider the claim). The Claimant resigned on 14 June 2018. Such a claim falls well outside the statutory three month time limit. The only explanation provided by the Claimant as to why the application was being made at such a late stage was that he had only recently understood that such a claim could be made. The Tribunal concluded that the balance of prejudice fell in the Respondent's favour. If the amendment were to be granted, the Respondent would be required to resist the claim at this late stage in the proceedings which it had not hitherto anticipated. The application was refused.

Claimant's opening statements

8. The Claimant sent to the Tribunal three documents described as opening statements. The third document, sent to the Tribunal on the first day of the hearing, comprised eight pages. The Respondent objected to the Claimant being permitted make the opening statements: they were lengthy and self-serving, and opening statements in the Employment Tribunal is contrary to accepted practice. The Tribunal explained to the Claimant that it would be more helpful to establish the issues in the case (see below) and informed him that if he wished to make reference to the content of his opening statements when making closing submissions, he was free to do so.

Jurisdiction – ACAS certificate

9. During the course of the Tribunal's preparation during reading time on the first day of the hearing, it came to the Tribunal's attention that the Claimant had ticked the box at item 2.3 in his ET1 form to he say that he did not have an ACAS early conciliation certificate; and by way of explanation ticked the box to say that a ACAS does not have the power to conciliate on a some or all of his claim. The Claimant sought to bring proceedings for unfair dismissal which are relevant proceedings requiring a potential claimant to enter into a ACAS early conciliation and to obtain a certificate before presenting a complaint instituting proceedings. This is made clear by section 18A of the Employment Tribunals Act 1996. Subsection (8) of that section states that a person who is subject to the requirement in subsection (1), namely the requirement to provide to ACAS prescribed information in the prescribed manner about the matter, may not present an application to institute relevant proceedings without a certificate.

10. The Tribunal was unable to contact a member of administrative personnel within the Employment Tribunal and therefore unable to determine why the Claimant's claim had been accepted. However, in response to an email to the parties, the Claimant helpfully provided a copy of a letter from the Tribunal dated 11 July 2018 which informed him that Regional Employment Judge Hildebrand had rejected his claim because he had made a claim containing confirmation that one of the early conciliation exemption applies and an early conciliation exemption does not apply. This was clearly a rejection under rule 12(2) by reference to Rule 12(1)(d). The Claimant had been sent a guidance note explaining that he could apply for reconsideration or that he could appeal to the Employment Appeal Tribunal.

11. In the event, the Claimant had immediately contacted ACAS and obtained an early conciliation certificate the same day. The Claimant then promptly informed the Tribunal that he had received the certificate and provided the reference number. He also enquired of the Tribunal as to whether he needed to re-start his claim or simply provide the number directly to the Tribunal.

12. On 19 July 2018 the Tribunal accepted the Claimant's claim.

13. The Respondent applied to dismiss the Claimant's claim on the basis that the Tribunal has no jurisdiction to consider it because the Claimant failed to make an application in writing for reconsideration of the rejection: that decision to accept the claim was wrong. The Claimant objected to the application and relied upon the former acceptance of his claim.

14. The Claimant was then able to provide a copy of an email he sent to the Tribunal on 11 July 2018 in which he states:

    "Dear Sir/Madam I have now followed the early reconciliation rules so can you please reconsider your earlier decision"

15. The question arises as to the form in which such an application is to be made. Rule 13(1) states that a claimant whose claim has been rejected in a whole or in part under Rule 10 or 12 may apply for a consideration on the basis that either (a) the decision to reject was wrong; or (b) the notified defect can be rectified.

16. In determining the application, the Tribunal had particular regard to the wording of Rule 13. Firstly, it requires an application for reconsideration to be made in writing and presented to the tribunal within 14 days of the date the notice of rejection was sent. The Claimant clearly did this. Rule 13(2) states that the application "shall explain why the decision is said to have been wrong **or rectify the defect**" [emphasis added]. The defect was indeed rectified in that, by contacting ACAS and obtaining a certificate, the Claimant had complied with section 18A of the Employment Tribunals Act 1996. The Tribunal was satisfied that the Claimant did so before presenting his claim: this is clear when one reads the deeming provision in Rule 13(4) which states that if the judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

17. The Tribunal was satisfied that the decision to accept the Claimant's claim was correct and that the Tribunal had jurisdiction to consider his claims.

Without prejudice correspondence

18. The Claimant applied to put in evidence a letter dated 7 June 2018 marked "without prejudice and subject to contract". Having heard submissions as to whether the document attracted privilege, the Respondent withdrew its initial objection and the application was granted.

19. The Claimant had no objection to the Respondent introducing a brief supplemental statement by Paul Couchman in order to give evidence in relation to the without prejudice offer which was the subject matter of the letter.

Report by the Institute and Faculty of Actuaries

20. The evidence before the Tribunal was that the Claimant had reported three of his colleagues to the Institute and Faculty of Actuaries. In cross examination during the third day of the hearing, the Claimant was asked to confirm that the complaints he had made had been dismissed by the Institute; and to confirm that, after he had appealed against that outcome, his appeal had also been dismissed. The Claimant refused to answer the questions and said that he was only prepared to answer if the report issued by the Institute and Faculty of Actuaries was put in evidence. Although the Claimant did not make it entirely clear, it appeared that he was making an application for the report to be produced in evidence. The Tribunal refused the application. The content of the report would appear to be of little or no relevance to the issues in the case and an order for disclosure would be disproportionate.

21. By email to the Tribunal during the evening of 13 January 2021, the Claimant stated that he had no objection to the Respondent referring to the Institute's report in its defence but that if it wished to do so the report should be put in evidence. The Claimant submitted that the acid test to be applied is not "what is the outcome" but "did I have good cause at the time I submitted my allegations?" The Claimant submitted that certain allegations were not investigated because of procedural technicalities and informed the Tribunal that the Institute applied a very high burden of proof. The Claimant expressed his belief that a different reviewer could reach a different conclusion.

22. Upon discussion with the Claimant at the commencement of the on fourth day of the hearing, the Claimant told the Tribunal that he had made further complaints to the Institute about his colleague (referred to as SM in this judgment) which were yet to be investigated. He maintained that the Institute might be in breach of its own rules and that he had informed the Institute that he would be reporting them to the Financial Reporting Council. The Claimant told the Tribunal about his dissatisfaction with the Institute, a dissatisfaction he said is shared by others. The Claimant concluded his remarks by saying that he was making an application for the report to be placed in evidence.

23. The Respondent objected to the application. The Respondent submitted that there was some weight to be attached to the outcome of the report; namely, the dismissal of the Claimant's complaints and the dismissal of his appeal against that outcome. Admitting the document in evidence, however, would be inappropriate in that the Clamant was seeking to undermine the evidence upon which the outcome was based. The Respondent submitted that the "acid test" was not that described by the Claimant.

24. The Tribunal refused the application. The Respondent sought to rely on the outcome of the report as a matter of fact, not the detail of the report itself. In any event, evidence relating to the outcome of a report following investigations by an external body after the Claimant's resignation appeared to be of limited, if any, relevance to the issues in the case. Granting disclosure and admitting the document in evidence in relation to such a marginal issue would be disproportionate. Both parties would have the opportunity to address the Tribunal in submissions as to the weight and relevance, if any, of the outcome of the Institute's investigations.

<u>Further documents added to the bundle on the fourth day of the hearing</u>

25. During cross examination of Mr Jarman by the Claimant on the third day of the hearing, it was established that certain emails which might be relevant to the facts of the case had been omitted from the bundle. Copies of the emails were subsequently provided by the Respondent and were added to the documents before the Tribunal.

Issues

26. The issues were discussed at the commencement of the hearing and were agreed as follows:

    26.1. Can the Claimant show that, objectively judged, the Respondent engaged in a course of conduct which cumulatively amounted to a

breach of the implied term of trust and confidence? The Claimant claims that the Respondent was in breach of the implied term in that:

26.1.1. The Respondent had made it absolutely clear to him that his services were no longer required;

26.1.2. As a result of the hostile and toxic atmosphere created by the Respondent in the period commencing 4 June 2018, he was unable to perform his professional duties; and

26.1.3. The Respondent condoned unethical and unprofessional behaviour on the part of his colleagues.

26.2. The Claimant set out in writing a list of the factual matters he relies on to support his contentions.

26.3. If the Respondent breached the implied term, can the Claimant show that he resigned, at least partially, in response to the breach?

26.4. Can the Claimant show that he did not delay too long before resigning in response to the breach such that he affirmed his contract of employment? With regard to the alleged toxic atmosphere commencing 4 June 2018, the Respondent conceded that if the Claimant established that he had resigned in response to a fundamental breach of contract, he did not delay in resigning.

27. If the Claimant was constructively dismissed, was the dismissal nonetheless a fair dismissal? The Respondent would seek to show the reason for such a dismissal being conduct and/or some other substantial reason. If the Respondent shows such potentially fair reasons, the Tribunal will have to consider whether the dismissal was fair in the circumstances.

28. The Claimant also claims that he was unfairly dismissed because he had made a protected disclosure. The issues falling for consideration are:

28.1. Did the Claimant make a protected disclosure on 11 June 2018 within the meaning of section 43B(1)(b) of the Employment Rights Act 1996, namely that the Respondent failed to comply with a legal obligation to which it was subject?

28.2. Did the Claimant reasonably believe that the disclosure was made in the public interest?

28.3. If so, did the Respondent fundamentally breach the Claimant's contract because he had made the protected disclosure?

29. If the Tribunal concludes that the Claimant made a protected disclosure and was thereby constructively dismissed, was the disclosure made in good faith?

30. If the Claimant was unfairly dismissed, can the Respondent show that it would or might have fairly dismissed the Claimant in any event (Polkey)?

31. Did the Claimant contribute to his dismissal such that any compensation should be reduced?

32. Apart from the last three issues, the Tribunal determined that the question of remedy would be considered at a further hearing if the Claimant were to succeed in his claim.

Findings of fact

33. As its name implies, the Respondent is in the business of pensions management. The Respondent acts as a pension scheme actuary for a number of clients providing actuarial advice to trustees. It also provides actuarial advice to scheme sponsors and undertakes accounting disclosures for employers in relation to pensions. The Respondent employs in the region of 150 individuals.

34. The Claimant commenced employment with the Respondent on 17 October 2011. At material times, and as further described below, he was employed within a team of three Senior Actuaries. The other two Senior Actuaries will be identified in this judgment as SM and RD. The Claimant worked four days each week.

35. The Institute and Faculty of Actuaries regulates the profession whose members are subject to the provisions of The Actuaries Code. Technical standards are regulated by the Financial Reporting Council.

36. The Actuaries Code sets out five principles that actuaries should apply to their work and their professional lives:

    - Integrity
    - Competence and Care
    - Impartiality
    - Compliance
    - Communication

37. The Respondent adopts five core values:

    - Integrity
    - Efficiency
    - Trust
    - Innovation
    - Fun

38. The Respondent had entered into a contract with the Claimant's company, Integrated Actuarial Solutions Limited, for the provision of software known as IAS Calc for making actuarial calculation. At relevant times, the Claimant's wife was involved in Integrated Actuarial Solutions Limited. A significant amount of the Claimant's working time for the Respondent, at the Respondent's behest, was involved in testing IAS Calc and ensuring that it was worked properly and produced the results the Respondent required.

39. In 2017 the Respondent took the decision to bring the actuarial and consulting parts of the business together as Trustee Services under one leader to increase efficiencies and to improve the way the two teams worked together. The Respondent advertised for the role of Head of Trustee Services. Although the Claimant initially applied for the position, he withdrew his application.

40. In September 2017, SM as appointed Scheme Actuary prepared a report for a client (described as Client X in this judgment) titled Review of Cash Conversion Factors. In her report to Client X, SM stated, among other things: *"We are not able to confirm why there are factors for non-increasing benefits".*

41. David Jarman, an external candidate, was appointed to the role of Head of Trustee Services, his employment commencing on 2 January 2018. The three Senior Actuaries now reported to him. The Respondent instructed David Jarman to focus on two main areas of the business: to consider staffing numbers within the actuarial team in light of the fact that the actuarial part of the business was making a loss; and to review IAS Calc which did not seem to be delivering the efficiencies the Respondent expected.

42. In January 2018, while preparing end of year financial statements for Client X, the Claimant identified why the factors for non-increasing benefits were being used. The Claimant raised the issue with SM, informing her that he thought the wording she had used in her report (italicised above) was very misleading. SM responded to the Claimant by email dated 29 January 2018 stating:

    Ask a different actuary and you get a different view! The factors have been implemented and I am comfortable with the approach and report which has been peer reviewed.

43. The Claimant emailed David Jarman on 29 January 2018 to alert him to his concerns about SM's report to Client X which led to a discussion between the Claimant and David Jarman the following day. It was agreed that there was little risk to the client and that overall the factors were reasonable. It was agreed that the Claimant would follow up with SM to see if the wording should be clarified with Client X.

44. On 2 February 2018 David Jarman presented his findings to the Board in relation to the two matters he had been instructed to consider. Because the actuaries team was top heavy, he proposed that it should be rebalanced and one of the three Senior Actuaries placed at risk of redundancy; he recommended that a full review of IAS Calc should take be carried out. The Board approved the proposal and recommendation.

45. Following further investigation of IAS Calc, David Jarman took the view that there were better, less costly alternative systems available.

46. On 6 February 2018, the Claimant asked his colleagues if any of them would be willing to undertake a peer review in relation to an actuarial certificate that he was preparing at the request of a client (described here as Client Y) in relation to the transfer of pension benefits from one scheme to another. David Jarman informed the Claimant that he was happy to carry out the peer review but telling him:

    I had thought these sorts of things were basically on hold until the new Regulations came in – on the grounds that actuaries were required to certify that individuals would be no worse off on the transfer which is practically impossible with a DC scheme.

47. David Jarman carried out the peer review in relation to the certificate for Client Y and discussed the matter with John Herbert, Chief Actuary, who thought a certificate could be issued provided further investigations were carried out. By email dated 8 February 2018, David Jarman informed the Claimant that he did not believe he was in a position to issue a certificate and referred to guidance issued by the Institute and Faculty of Actuaries which set out the difficulties faced by actuaries in interpreting the terms: "accrued rights to be transferred"; "broadly no less favourable"; and "discretionary benefit considerations". David Jarman also felt that a requirement of TAS 300 had not been dealt with. The Claimant could see no reason why a certificate could not be issued.

48. On 8 February the Claimant emailed SM regarding his concerns about her report to Client X. Although the Claimant had no issue with SM's choice of cash factors, he said that since SM knew why there were factors for non-increasing benefits, she should consider giving a further explanation to Client X.

49. On 12 February 2018, the Claimant again met with David Jarman to discuss his concerns about the report SM had provided to Client X because he was not getting a response from SM. It was again agreed that the matter was low client risk but that a belt and braces approach would be to "cover it off" with Client X. The Tribunal heard disputed evidence as to whether it was understood that the Claimant would proceed to discuss the matter with SM (the Claimant's evidence) or whether David Jarman would do so (David Jarman's evidence).

50. On 13 February 2018, the Claimant sent David Jarman a letter he had drafted and which he proposed to send to Client Y to accompany the certificate. The draft letter stated, among other things: *"I have also taken the opportunity to explain that Premier Pensions and I cannot accept any liability for any loss that might be suffered by any member as a consequence of the transfer…"*

51. David Jarman was concerned about the way in which the Claimant proposed to address the problem. David Jarman took the view that the Claimant was seeking to absolve himself from responsibility and also concerned that the Claimant had not carried out all the necessary groundwork which had been suggested by John Herbert. David Jarman took the view that the preferable course of action would be to await the new legislation in April 2018 which would obviate the requirement for the Respondent to provide Client Y with a certificate. David Jarman did not respond the Claimant.

52. On 15 February 2018, in reply to the Claimant's email asking her what she had decided to do about Client X, SM told him that she was meeting them on Monday and identified what she thought to be a greater concern. She said that she was not concerned about the report and that her comment in the report could be explained. The Claimant replied:

    > *… good news – please explain.*

53. The following day SM replied to the Claimant informing him that, given his concerns, she had spoken to David Jarman about the matter. She stated:

    > *The risk is minimal and after asking the* [former] *actuary at the time of reviewing the factors, he also didn't know why the scheme didn't have a fixed 3% factor and a 0% factor….*

I considered this at the time, the issue is not material, we don't have any retirements on this scheme and the agreed factors could lead to slightly higher cash options for members which is not a bad thing.

If you want to discuss this further, please raise the issue with David.

54. The Claimant replied the following day saying he felt the statement in the report was inaccurate and potentially misleading. He suggested there were two possible explanations:

    - that SM did not understand the calculations and failed to recognise how level factors could be applied in practice; or
    - that SM did understand the calculations but for reasons known only to herself decided to provide an incorrect statement to the client.

55. SM raised a concern with David Jarman that the Claimant was harassing her over a trivial issue and this led to discussions between the Claimant and David Jarman. David Jarman noted:

    - It was not unreasonable that SM had failed to identify the use of the nil escalating factor which had been identified by the Claimant since it was contained within a single cell within a multiple spreadsheet;
    - The spreadsheet represented a non-material element of the advice in the report;
    - SM had sought clarification of the use of the factor from the previous actuary;
    - The work had been peer reviewed by RD; and
    - The statement in the report gave rise to a low-level business risk

    David Jarman no longer thought it necessary for SM to clarify the statement in her report to Client X.

56. That evening the Claimant replied to SM:

    You have not explained why you included the statement in your report. It is incorrect and misleading.

57. Shortly afterwards, the Claimant sent an email to David Jarman:

    I'm a bit puzzled by [SM's] *claim that she has discussed this with you and you say it is immaterial. We discussed this issue on 30th Jan and 12th Feb and you were very clear that you agreed with me that there is a client relationship risk and that* [SM] *should be encouraged to communicate the error to the client*

58. By email dated 19 February 2018, David Jarman replied to the Claimant providing in some detail his views about the matter. He concluded that he did

not consider it a material matter and that he would be happy to discuss it further or the Claimant could raise it with John Herbert, Chief Actuary.

59. The Claimant replied to say that he was happy to let the matter drop if he, David Jarman, thought the business risk was minimal. However, it appears that he did not let it drop. He commented on various aspects of the matter:

    - although he had no issues with the technical aspects of the factors, the statement in the report was inaccurate and potentially misleading and could be a business risk if investigated by another pensions professional;

    - he noted what he described as Mr Jarman's comments that he did not expect the Scheme Actuary to review and be familiar with details of the calculations;

    - at no stage had SM suggested that the previous actuary was able to explain the existence of factors for 0% pension increases and was surprised that SM could only recall this now and could not bring it to his attention earlier.

60. David Jarman replied pointing out that in his view the Claimant had taken artistic journalistic licence with second point in his email. David Jarman sought to explain that where calculations had been done and checked within the team then the Scheme Actuary does not necessarily have to check every aspect of every calculation; instead, it was not unreasonable for them to rely to some extent upon the team that prepares the calculation and the process around that calculation. The Claimant told Mr Jarman that he did not want to fall out about the matter and asked if they should have a chat about it.

61. On 20 February 2018, the Claimant emailed Paul Couchman to express his unhappiness about the matter relating to SM's report. He suggested that David Jarman was relying on SM's "*new explanation that the previous scheme actuary couldn't explain the factors* – [SM] *had every opportunity to explain this at a very early stage*". The Claimant sent Paul Couchman a more detailed email later that evening setting out what he believed to be inaccuracies in David Jarman's explanatory email. On 22 February 2018, the Claimant sent a further email to Paul Couchman setting out questions and concerns about David Jarman's responses and approach to the matter. The Claimant also pointed out that the workflow suggested that John Herbert, not RD, had carried out the peer review. During cross examination the Claimant conceded that the identity of the peer reviewer had been a genuine mistake on SM's part.

62. On the morning of Friday 9 March 2018, the Claimant asked to meet David Jarman to discuss the issues he had raised about Client X. The Claimant told David Jarman that what he had written in his email was not correct and that SM had lied because, having reviewed the workflow report, SM herself had checked the calculations; also that John Herbert had carried out the peer review, not RD. David Jarman told the Claimant that he would write to him telling him how he would proceed.

63. At about 10.00 am on the same day, the proposed redundancy was announced to the three Senior Actuaries. By letter of the same date to the Senior Actuaries

the Respondent invited applications for voluntary redundancy on enhanced terms and asked for comments on the proposed selection criteria.

64. The following day, the Claimant raised a formal complaint in writing with David Jarman, copying his email to Martin Thompson, Paul Couchman, Dai Smith (Chairman) and the Respondent's Head of Human Resources. The Claimant's complaint included the following:

> *The basis of my complaint is that in our first meeting (for the benefit of other recipients this was a meeting just between us that started at about 9:15am) it transpired that* [SM] *had previously provided false and misleading information to you. In particular, we discussed the evidence contained in the Workflow reports which indicated that* [SM] *had carried out the checks for* [Client X] *factor report. You acknowledged that this evidence was not consistent with the explanation you had given to me in an earlier exchange of emails and although I can't recall your precise words your comment was something along the lines of "it's not my job to check everything that people tell me". in short, the evidence we discussed indicated that* [SM] *had lied to you.*

65. The Claimant referred to The Actuaries Code and the requirement to adhere to the highest possible ethical standards. He complained that at about 9:30 am Mr Jarman had become aware of a matter that had serious potential consequences and that he, or Martin Thompson, had decided that a redundancy notice meeting should proceed at 10:00 am as planned. The Claimant complained that by allowing the redundancy notice meeting to proceed, David Jarman (or Martin Thompson) appeared to be condoning behaviour that breached the Respondent's core values and the provisions of The Actuaries Code. The Claimant concluded:

> *In short, my complaint is that you (or Martin) were negligent in your managerial and professional responsibilities.*

66. The Claimant told the Tribunal that he thought it bizarre and perverse to continue with the redundancy process when SM might be dismissed for gross misconduct. The Tribunal heard no credible evidence that SM might be dismissed for gross misconduct.

67. In the event, the Claimant decided to withdraw his complaint and he did so shortly after raising it. The Claimant informed the Respondent that he would not be accepting the offer of voluntary redundancy.

68. On Sunday 11 March 2018, the Claimant sent an email to SM as follows:

> *At about 9.30 on Friday – before our 10am meeting – I had a private meeting with David. During this meeting I think he told me a "big" lie. This was not a "white lie" ie a failure to disclose material facts but I believe this was deliberate fabrication with the intention to deceive.*
>
> *I think I can prove this but it will require your full co-operation with emails and questions I will send later today. It will also mean that you will have to admit to a "white lie" in an earlier conversation with David about the* [Client X] *cash factors.*

… are you happy to proceed?

69. The Claimant sent a further email to explain to SM:

> *I should also have added that david's lie is that you told him the* [Client X] *work had been checked in the team before your involvement you weren't familiar with the detailed calculations*

70. SM replied to the Claimant as follows:

> *I don't know what this is all about but I am not getting involved with anything unless it is a face to face meeting with the 3 of us. Please don't send me any emails to today on anything other than the redundancy issue*

71. The Claimant responded:

> *Ok but you should know that David has suggested to me that you lied to him – I'm trying to help you because I think David has lied*

72. In the event, RD volunteered for voluntary redundancy which the Respondent accepted. (His employment ended at the end of March 2018). The Respondent also achieved a reduction in headcount by re-deploying an Actuarial Analyst to another department.

73. During cross examination, the Claimant said that he knew that RD had volunteered for redundancy one or two weeks after the proposed redundancy announcement was made. However, the Tribunal finds it more likely that RD's decision was promptly communicated to the Claimant and SM. This is evidenced by the Claimant's further email to SM on Sunday 11 March 2018:

> [RD's] *decision takes the pressure off but there is still the issue of what David said to me before the big meeting. This still needs to be resolved but can wait until we can chat face to face.*
>
> *Earlier today I accidentally sent you emails to your Premier address - these should be deleted*

74. On 12 March 2018 the Claimant emailed the Respondent's head of Human Resources, copied to senior management and directors, setting out his reasons why he did not believe that the proposed redundancy selection criteria were fair.

75. On 13 March 2018, Martin Thompson informed the Claimant that although he had withdrawn his complaint about the redundancy process, it would not be appropriate or professional to ignore the issues the Claimant had raised and sought to address them. He also informed the Claimant that his concerns regarding Client X were already under investigation.

76. On 14 March 2018, David Jarman sent a long email to John Herbert describing the three meetings he had held with the Claimant in relation to SM's report to Client X.

77. On 16 March 2018, the Respondent's Head of Human Resources asked Martin Thompson to attend a meeting with SM. David Jarman was also present as SM's line manager. SM was very distressed and in tears. She disclosed the emails she had received from the Claimant over the previous weekend and said she felt the Claimant was harassing her at a difficult time. SM said she wanted to raise a formal grievance against the Claimant.

78. On 16 March 2018, David Jarman also raised a formal grievance against the Claimant. He complained of the Claimant's attitude and behaviour concerning SM's report to Client X and the way in which the Claimant complained he had dealt with it. David Jarman also noted that, although withdrawn, the Claimant had said that he and Martin Thompson were negligent in their professional responsibilities.

79. John Herbert, who had already done most of the preparatory work and collated most of the evidence relating to Client X, was instructed to consider the grievances.

80. On 28 March 2018, the Claimant emailed David Jarman, copying John Herbert, saying he now felt "*compelled to let you know that I am appalled by the comments concerning my professionalism in relation to the actuarial certificate*" for Client Y. In particular, the Claimant referred to comments made by David Jarman in his email of 8 February 2018 which, the Claimant said, "*indicated that you believe I have ignored professional guidance and have been reckless in my analysis when I decided I could issue the certificate*". The Claimant challenged David Jarman's view as to the application of the relevant guidance and asked him to respond to a number of questions relating to the certificate.

81. Although David Jarman initially replied to the Claimant saying he would endeavour to respond the following day, having spoken to John Herbert and Martin Thompson in relation to the Claimant's latest communication, David Jarman was told to put on hold any reply to the Claimant because the grievance procedure was progress. Consequently, David Jarman did not reply to the Claimant's questions.

82. John Herbert informed Martin Thompson that there were now a couple more pieces of work where the Claimant had asked him to look at the feedback received or given to David Jarman. Martin Thompson noted that the working relationship between the Claimant and David Jarman was very tense.

83. Before leaving his employment at the end of March 2018, RD had provided Client Z with a transfer value for a scheme member. On 4 April 2018, the Respondent received an email from Client Z querying why the calculations gave rise to a high unreduced transfer value. In David Jarman's absence, the email was picked up by the Claimant who agreed to access the relevant folders the following day.

84. The following day, 5 April 2018, the Claimant sent an email to 14 members of senior management and other members of the team stating his concerns that the calculation did not look 100% right. Dai Smith replied to say that John Herbert will have reviewed the matter as Chief Actuary and suggested he should be left to resolve it. John Herbert explained that because of a potential conflict as a result of being the scheme sponsor, David Jarman had reviewed the matter and said that it should await David Jarman's return to work;

alternatively, the Claimant could deal with it. Dai Smith informed the Claimant that the matter could wait until the following week.

85. On 9 April 2018, upon David Jarman's return, the Claimant informed David Jarman and others why he though the valuation was incorrect. David Jarman stated he had queried the basis of the valuation with RD but that the valuation may have been understated. David Jarman informed the Claimant that he would liaise with Dai Smith and a colleague about how it should be raised with the client.

86. On 9 April 2018, Martin Thompson wrote to the Claimant to inform him that John Herbert had completed his investigation into the business risks arising from the matter the Claimant raised in relation to Client X. John Herbert's recommendation was that although any business risk arising from the matter was very small, and only a reputational risk between the Respondent and Client X, there was a clear opportunity to mitigate the risk further by notifying Client X in respect of the historical use of the non-increasing factors. The board accepted that recommendation. During a discussion with Martin Thompson, the Claimant said he thought that was a good solution. The Claimant agreed in cross examination that he thought that what the Respondent was proposing with regard to both Clients X and Y was sensible.

87. Martin Thompson also informed the Claimant, David Jarman and SM that John Herbert would be investigating their respective grievances. Martin Thompson informed all three complainants that the matters under investigation should not be discussed with the individuals involved or with other colleagues without his express permission. During cross examination, the Claimant said that he did not think this instruction was unreasonable.

88. By email dated 13 April 2018, David Jarman sought to respond to a query raised by Client Z. However, David Jarman did not specifically answer the question Client Z had asked. Client Z sought clarification whereupon David Jarman re-visited the calculations, identified an error, and informed the client accordingly.

89. All three complainants were asked to summarise their respective grievances in writing in advance of grievance meetings held individually with the complainants: with the Claimant on 25 April 2018; and with David Jarman and SM on 26 April 2018. The thrust of SM's grievance was that when the Claimant did not get the response he wanted, he bombarded her with emails regarding the report to Client X five months after the report had been issued and that she found the number of emails she received intimidating and aggressive.

90. On 29 May 2018, the board took the decision to replace the IAS Calc system subject to a legal review of the proposed replacement system.

91. John Herbert concluded his grievance investigation report in May 2018 and shared it with Martin Thompson who briefed the Baord. Paul Couchman was thus aware of John Herbert's recommendation that it would be a decision for the Board to decide whether the Claimant had a disciplinary case to answer.

92. On 4 June 2018, Paul Couchman met with the Claimant and informed him that the Respondent would be ending the contract for the provision of IAS Calc. Paul Couchman also expressed his concern that three Senior Actuaries had

made complaints against each other and that although Martin Thompson had provided the Board with an update on John Herbert's investigation, the next steps had yet to be agreed.

93. The Tribunal heard conflicting evidence as to whether Paul Couchman used the words "gross misconduct" during the meeting. Paul Couchman was adamant that he did not. During cross examination, the Claimant said that he had been told by Paul Couchman that neither David Jarman nor SM had been guilty of any crime; and that it was his "interpretation" that he was going to be charged with gross misconduct. The Claimant relied upon his own subsequent use of the term in emails as evidence that the words were used. The Tribunal finds the Claimant's evidence insufficient to show that Paul Couchman told him he would be facing allegations of gross misconduct. The Tribunal finds nevertheless that Paul Couchman did tell the Claimant that disciplinary action against him was likely.

94. The Tribunal heard conflicting evidence as to whether a further meeting between the Claimant and Paul Couchman took place on 6 June 2018 when financial settlement was discussed or whether such a discussion took place during the meeting of 4 June. Paul Couchman's evidence was clear that a further meeting took place. In his witness statement, the Claimant himself refers to discussions with Paul Couchman on 7 June 2018. In his list of matters the Claimant refers to a meeting on 6 June 2018. The Tribunal finds it more likely than not that a further meeting took place on 6 June 2018.

95. At this second meeting, Paul Couchman asked the Claimant whether he would be interested in leaving amicably with a financial settlement. The Claimant said he would be interested to see what was on offer.

96. By email dated 6 June 2018, the Claimant emailed Paul Couchman asking to discuss the matter concerning the comments he had made on 5 April 2018 about Client Z.

97. On 7 June 2018, the Claimant sent an email to Paul Couchman, copying Martin Thompson, raising a formal grievance in relation to Client Z. In short, the Claimant complained that David Jarman had not responded to him. He said that he had identified a flawed calculation and alerted David Jarman to a systemic error that could be repeated throughout the team. The Claimant's view was that David Jarman should have reviewed the error with him to decide if the Claimant's concerns should be investigated further.

98. By letter dated 7 June 2018, "marked without prejudice and subject to contract", the Respondent set out its financial offer. The letter includes the following:

> *I refer to our recent meeting and write to confirm the terms that the Company is willing to offer you in relation to a mutual termination of your employment. You are under no obligation to enter into settlement discussions with the Company in relation to this offer or to accept the offer being made.*
>
> *The Company has been investigating grievances raised both by you and against you. It has not yet been determined what disciplinary case there may be for you to answer in relation to the grievances against you, however I understand that some of the preliminary findings of the investigation are adverse to you. At this point therefore, in a genuine effort to resolve matters*

amicably, the Company wishes to make an offer to you to bring your employment to an end. The company hopes that you will accept this offer which will give you the opportunity to leave on agreed terms. I am therefore writing to invite you to consider the proposal set out below.

…

This offer is made subject to a final settlement agreement detailing the full terms, and it is open for you to consider until 5:00 PM on Thursday 14 June 2018. You may be granted a period of paid leave during this time to allow you to consider this offer if you wish.

99. On 8 June 2018, the Claimant instigated a discussion with David Jarman suggesting that they meet to discuss their relationship difficulties. The Claimant emailed Paul Couchman, copying Martin Thompson, asking him to put his grievance of 7 June 2018 concerning Client Z "on the back burner" because he and David Jarman had agreed to try to reconcile their differences.

100. However, Martin Thompson told the Claimant that, in accordance with his instruction issued in April, he should not approach David Jarman again in relation to the matter because it might prejudice the grievance process which Martin Thompson anticipated would be concluded in the not too distant future.

101. By email dated 11 June 2018, the Claimant emailed Paul Couchman, David Jarman and John Herbert raising concerns under the Respondent's whistleblowing policy as summarised below:

- He had received no comment about the potential error he had identified in relation to the advice provided to client Z as set out in his email of 5 April 2018;

- David Jarman had been aware of the potential issue but made no attempt to discuss the issue with him and implied to Client Z that the transfer value calculation was correct. David Jarman had both ignored his concerns about the calculation methodology and had not been open and honest with Client Z;

- Having good knowledge of IAS Calc, standard adjustments should apply in relation to the calculation for Client Z and the transfer value calculation was incorrect;

- The transfer value calculation had been based on a model used throughout the actuarial team for several years and a systemic error may have been affecting the Respondent's actuarial clients for several years: members of other schemes may have been issued with incorrect transfer values in the past; and

- Four members of the Respondent's pension schemes may have received incorrect transfer values resulting in clients paying transfer values in excess of the correct amounts.

102. Shortly after issuing his written concerns under the whistleblowing policy, within earshot of John Herbert and David Jarman, the Claimant said words to

the effect of: "Sorry guys, I had to do this because of the way the business is treating me". In evidence, the Claimant maintained that had used the word "forced". In the Tribunal's view, the distinction is without significant difference.

103. Late in the afternoon of 11 June 2018, the Claimant emailed Paul Couchman and Martin Thompson:

> *Gentlemen*
>
> *I am very disappointed by your responses to recent events.*
>
> *In particular, I find your refusal to consider reconciliation discussions with David Jarman to be totally unacceptable. Equally I find your explanation that you are bound by "due process" is also unacceptable.*
>
> *In addition to the above I feel it is also unacceptable that you have threatened Gross Misconduct without specifying the details of these allegations.*

104. Paul Couchman met with the Claimant the following morning to discuss his whistleblowing concerns. The Claimant re-iterated his concerns and handed Paul Couchman two draft letters: to the Institute and Faculty of Actuaries; and to the Pensions Regulator. The Tribunal accepts Paul Couchman's evidence, supported by the minutes of the meeting, that the Claimant said that he did not receive a response from the Respondent by midday on Thursday 14 June 2018, he would issue the letters. Paul Couchman asked the Claimant why he thought it appropriate to threaten the company in this way, bearing in mind he was pursuing a whistle-blowing complaint. The Claimant stated that he thought he was giving sufficient time for the Respondent to respond.

105. The Tribunal heard conflicting evidence as to whether Paul Couchman accused the Claimant that he was a troublemaker and that the atmosphere in the office would improve once he had left. In cross examination the Claimant said he could not recall exactly what was said but that he had "inferred" he was being told he was a troublemaker. He said that at the time he was shocked and could not take it all in. The Tribunal prefers Paul Couchman's evidence that those words were not spoken.

106. The Claimant told Paul Couchman that he would not be accepting the financial settlement being offered. The Claimant's case before the Tribunal was that agreement was reached at this meeting upon payment of 24 months' salary; and that Mr Couchman's rejection of his counter-offer was actually the last straw. Paul Couchman's evidence was that no agreement had been reached. In cross examination, the Claimant said that he had relied on Paul Couchman's body language and facial expressions to infer that a gentleman's agreement had been reached. The Claimant accepted that he had been asked to put a counter-offer in writing. He also said that he expected a counter-offer to be made by the Respondent to his counter-offer. The Tribunal prefers Mr Couchman's evidence. A request to put forward a counter-offer and an expectation that it would be met with a counter-offer militates against a finding that a concluded agreement had been reached or intimated.

107. In the early morning of 13 June 2018, the Claimant emailed Paul Couchman stating that he did not share Paul Couchman's view that the whistle-blowing

concerns should be treated as a separate additional matter. The Claimant asked for his whistleblowing concerns to be included as part of the first investigation.

108. In an email dated 13 June 2018, headed "Legally Privileged – Strictly Private and Confidential", Paul Couchman informed the Claimant, among other things, that his issue of ultimatums and threats of disclosure to third parties if unrealistic demands for immediate responses were not met were unhelpful and unprofessional. The Claimant was informed that his concerns would be investigated and conclusions shared with him in the fullness of time. Paul Couchman noted that the timing of the Claimant's alleged concerns was also something he must consider in circumstances where the Claimant's own conduct was under investigation. The Tribunal accepts Paul Couchman's evidence that the words "legally privileged" were mistakenly pasted into the text copied from a letter provided by the Respondent's legal advisors.

109. In reply, the Claimant informed Paul Couchman that the deadline was not conditional on the outcome of the investigation and that it would be unreasonable to expect a complex investigation to be concluded within 48 hours.

110. On 13 June 2018, the Respondent gave written notice to Integrated Actuarial Solutions Limited of the decision taken at the board meeting of 29 May 2018 to replace IAS Calc.

111. That evening, within a further series of emails from the Claimant to Paul Couchman, the Claimant made reference to vague allegations of gross misconduct having been made against him. He explained that he had said that on Thursday the letters to the Institute and the Pensions Regulator could be issued.

112. The Claimant resigned by letter dated 14 June 2018. He stated that he was fed up with the increasing levels of hostilities that had been created by the Respondent resulting in: its failure to address legitimate concerns; lies; sheer hypocrisy; and blatant attempted cover-ups. He stated that the final straw was: "your correspondence last night in which you included the weasel words 'legally privileged'".

113. The Respondent acknowledged the Claimant's resignation, informed him that he would be paid three months' salary in lieu of notice, and that he would receive written confirmation of the outcome of his grievance and his complaint under the whistleblowing policy in due course.

114. John Herbert's report into the grievances were communicated to the Claimant on 25 June 2018 following his resignation. The Claimant was provided with an interim response to his whistleblowing concerns on 9 July 2018 and final response on 24 September 2018.

Applicable law

<u>Constructive dismissal</u>

115. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract

under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

116. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach). The final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; Walker v Josiah Wedgewood ICR 744. An employee may have multiple reasons which play a part in the decision to resign from their position; the fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

117. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Woods v WM Car Services Peterborough Limited [1981] ICR 666; Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract: Morrow v Safeway Stores plc [2002] IRLR 9.

118. In Woods Mr Justice Brown-Wilkinson stated that the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

119. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

"Ordinary" unfair dismissaL

120. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably.

"Automatic" unfair dismissal

121. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections of 43C to 43H. Section 43C provides, among other things, that a qualifying disclosure is a disclosure made by a worker to his employer.

122. Section 43B(1)(b) of the Act 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 that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

123. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA. In this regard Mr Sheppard cited Chesterton Global Limited v Nurmohamed [2018] ICR 731 CA.

124. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In Kilraine v London Borough of Wandsworth [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

125. Section 103A of the Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator acted as he did, consciously or unconsciously; see West Yorkshire Police v Khan 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in Trustees of Mama East Africa Women's Group v Dobson EAT 0219-20/05. In that case the Employment Appeal Tribunal stated that it would be contrary to the purpose of the whistleblowing legislation if an employer could put forward an explanation for the dismissal which was not the disclosure itself but something intimately connected with it in order to avoid liability. The cases of Orr v Milton Keynes Council [2011] EWCA Civ 62 and Royal Mail Group Ltd

v Jhuti [2017] EWCA Civ 1632 stand as authority for the proposition that an organisation's motivation in relation to the reason for the dismissal is to be taken as that of the person deputed to carry out the employer's functions.

Adjustments/reductions in compensation

126. Under section 122(2) of the Employment Rights Act 1996, where a Tribunal finds that the conduct of the Claimant was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award, the Tribunal shall reduce the amount accordingly. Under section 123(6), where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. The guidance set out in Nelson v BBC (No.2) [1979] IRLR 346 CA would apply to the Tribunal's consideration.

127. The principle established by the House of Lords in Polkey v AE Dayton Services Limited 1988 ICR 142 is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

Legal authorities cited by the parties.

128. The authorities referred to by the Respondent are included in the summary above.

129. The Claimant referred the Tribunal to the following additional cases: Tullet Prebon plc v BGC Brokers LP [2010] IRLR 648; and Robinson v Mind Monmouthshire Ltd [2020] ET1600412/2018

Conclusion

130. The Tribunal addresses the Claimant's allegations in reverse order to those set out in the issues above.

The Respondent condoned unethical and unprofessional behaviour on the part of his colleagues

131. The Tribunal addresses those matters the Claimant relies on as set out in his list.

Matters relating to Client Y

132. These matters are set out in items 1, 2 and 11 of the Claimant's list.

Item 1: 8 February 2018. Mr Jarman knowingly made a false statement to justify his peer review decision in relation to my work on the actuarial certificate.

133. Mr Jarman's email to the Claimant of 8 February 2018 sets out his concerns about the issue of a certificate and itemises the areas requiring consideration before a certificate might be issued. Mr Jarman took the view that further work needed to be done before a certificate could be provided. The Tribunal makes no finding as to the correctness of Mr

Jarman's email, but there is nothing within it to suggest he knowingly made a false statement.

134. The Claimant referred the Tribunal to Mr Jarman's manuscript notes made on an email dated 25 January 2018 from the Claimant to AS (the member of the team who had carried out work in relation to Client Y) in which the Claimant asked AS a number of questions relating to the work undertaken and which had been answered by AS in reply. The Claimant suggested that Mr Jarman's annotations showed that he had seen AS's replies and therefore knew that the issues had been addressed. In evidence to the Tribunal, Mr Jarman stated that in his view the issues had not been adequately addressed.

135. At its highest, the evidence shows that there was a difference of professional opinion as to what work needed to be undertaken, and the adequacy of that work, before a certificate might appropriately be issued. The annotations on the email take the matter no further.

Item 2: 13 February 2018. Mr Jarman was unprofessional and decided not to respond to my email and failed to communicate his reasons.

136. It is not for the Tribunal to determine whether, in the circumstances, Mr Jarman's failure to reply to the Claimant's email was unprofessional; that would be a matter for the professional body. The Tribunal notes, however, that Mr Jarman conceded when giving evidence that his failure to reply to the Claimant's email of 13 February 2018 was "not my proudest moment".

Item 11: 28 March 2018. Mr Jarman was unprofessional and failed to respond to my questions requesting information about his earlier review for my work on an actuarial certificate (despite his written assurance that he would reply)

137. By this stage, the Claimant had made serious allegations of negligence against David Jarman and Martin Thompson (although withdrawn) and, despite having said that he was happy to let the matter regarding SM's advice to Client X drop, had nevertheless pursued the matter, complained to the Managing Director and accused colleagues of lying. David Jarman and SM had raised grievances against the Claimant. Matters were to be considered by way of the grievance procedure. In the circumstances, it was not unreasonable that David Jarman should not answer the questions asked. Further, it is difficult to understand how the work undertaken by SM and David Jarman's involvement in the matter affected the Claimant's contract of employment.

Matters relating to Client X

138. These matters are set out in items 3 to 10 in the Claimant's list.

Item 3: 15 February 2018. SM stated that a comment in her report could be explained but then refused to do so when I asked her to provide an explanation

139. There was no credible evidence before the Tribunal that SM "refused" to provide an explanation. The Claimant's allegation in this regard must be set in context. The email exchanges described above show that there

was a difference of professional opinion between the Claimant and SM. SM was, like the Claimant, a Senior Actuary – a peer. The evidence suggests, however, that the Claimant considered himself in the more superior position. Given the tone of the Claimant's email to SM of 16 February 2018, the Tribunal finds it unsurprising that SM was reluctant to enter into further discussions with the Claimant about the matter and instead referred him to their immediate superior, David Jarman. Nor is it surprising that the content of the Claimant's communications caused her distress and upset.

Item 4: 16 February 2018. SM and Mr Jarman were aware that SM's client report contained a factual error but acted in an unprofessional manner by deciding to withhold this information from the client. Mr Jarman had previously agreed there was an error in the report and SM was aware of the error on account of recent email correspondence. The error was an incorrect statement which was potentially misleading to the client.

140. The Tribunal accepts the evidence of John Herbert, Chief Actuary, that following investigation, an explanation as to SM's comment in her report was provided to the client. However, the Claimant has failed to show anything more than Mr Jarman, having heard what the Claimant had to say, taking the view that that clarification with the client would be the preferred course of action, then, having discussed the matter with SM, deciding that such clarification was unnecessary. It does not demonstrate unethical and unprofessional behaviour such that it might affect the Claimant's contract of employment.

Item 5: 19 February 2018. Mr Jarman provided a false explanation for his decision.

141. Even if the Claimant is correct in his assertion that Mr Jarman provided a false explanation, as to which the Tribunal makes no finding, the evidence before the Tribunal does not lead to the inference that the Mr Jarman's explanation was deliberately false.

Item 6: 20 – 22 February 2018. Mr Couchman became aware of serious issues in the actuarial team but failed to take managerial responsibility in order to resolve the problems in a timely manner. I consider this was unethical as it was in Mr Couchman's control to try to resolve staff difficulties.

142. There was no evidence to suggest Mr Couchman responded to the matters the Claimant raised. However, the Claimant did not challenge Mr Couchman in cross examination and the reasons for Mr Couchman's inaction is unknown. The Tribunal is unable to conclude from the evidence that Mr Couchman was acting "unethically" as alleged. The Tribunal notes that it was only about two weeks later that formal grievances were raised and it is clear that management took the matters seriously and responsibly. This is evidenced by the fact that a formal investigation was commenced under the Respondent's grievance procedure.

Item 7: 9 March 2018. Mr Jarman knowingly provided a false explanation for his earlier decisions.

143. This appears to relate to the fact that the Claimant had identified it was John Herbert who had carried out the peer review, not RD. Also, to Mr Jarman telling the Claimant that the work had been done and checked within the team. The Tribunal accepts Mr Jarman's credible and rational explanation that SM had made a mistake as to who had carried out the peer review (which must have taken place some months beforehand); and that confusion might have arisen about work having been undertaken in the team because of Mr Jarman's assumption that the work would have been prepared and checked before being passed to the Scheme Actuary, an approach with which he was familiar at his previous employer.

Item 8: 9 March. Mr Jarman was unprofessional and failed to write to me (as promised) following our morning meeting prior to the redundancy announcement.

144. Any failure by Mr Jarman to respond to the Claimant must be placed in context. By email at 7.03 am the following morning the Claimant raised a formal complaint because he had not received a "communication before close of play" the day before. It was in this complaint that the Claimant alleged that David Jarman (or Martin Thompson) were negligent in their managerial and professional responsibilities by allowing the redundancy meeting to proceed. Although the Claimant withdrew this grievance, he then entered into email correspondence with SM. This led to upset on her part and her grievance against the Claimant. The Tribunal would find it unsurprising if the Respondent instead decided that issues in relation to SM's report to Client X should be dealt with formally under the grievance procedure rather than enter into further discussions with the Claimant at the time.

*Item 9: 16 March. Mr Jarman knowingly submitted a false statement to Mr Thompson. In his email, Mr Jarman stated **"…At the time I suspected that he was referring to statements that had been made by** **[SM]** **to me which I relayed to Jeff in person and by email".** This statement is a clear contradiction of Mr Jarman's earlier statements on 14 March.*

145. The words referred to in the allegation are included in Mr Jarman's grievance against the Claimant. The evidence showed that the Claimant had seen neither Mr Jarman's grievance before he resigned; therefore, it could have had no bearing on the Claimant's decision to resign.

Item 10: 16 March 2018. Mr Thompson was unethical and failed to take managerial responsibility in order to investigate the obvious inconsistencies in Mr Jarman's email statements.

146. By 16 March, matters had reached a head. It was entirely appropriate for the matters complained of to be considered by way of the Respondent's grievance procedure. No inferences can be drawn that Mr Thompson was unethical or that he failed to investigate matters the Claimant complained about at the time. In any event, the inconsistencies the Claimant complains about are far from "obvious".

Matters relating to Client Z

Item 12: 9 April 2018. Mr Herbert and Mr Jarman became aware that it was likely that certain actuarial calculations had been processed incorrectly (GMP adjustment error) but failed to take managerial responsibility to investigate the issue.

147. The issue with Client Z appears to have been concluded on 13 April 2018 when Mr Jarman provided a response to the client. It was not until June that the Claimant raised grievances in relation to it.

Item 13: 9 April. Mr Herbert became aware of an incorrect calculation (valuation error) affecting the results of report for which he was responsible. I am not aware that Mr Herbert made any attempt to inform the client about his earlier error.

148. If the Claimant was unaware of the matter of which he complains, it can have no relevance as to the reason why he resigned. In any event, Mr Jarman had responded to the client by 13 April.

Item 14: Mr Jarman knowingly provided incorrect information to a client in an attempt to withhold an explanation about earlier calculation errors.

149. The Tribunal accepts Mr Jarman’s evidence that he misunderstood the question being asked of him. As soon as he understood what he was being asked of him, Mr Jarman provided the answer to the client. There was no credible evidence to suggest Mr Jarman knowingly provided incorrect information or sought to withhold an explanation.

Item 15: May. John Herbert's grievance investigation was carried out in an unethical and unprofessional manner.

150. The Claimant was not provided with the outcome of Mr Herbert's grievance investigation until after his employment had ended. Apart from Mr Couchman telling the Claimant of Mr Herbert’s finding that it might be appropriate to consider disciplinary proceedings against the Claimant, the outcome, and the contents of Mr Herbert's report, could have had no bearing on the Claimant’s decision to resign. There was no credible evidence before the Tribunal to suggest that Mr Herbert's investigation was carried out in an unethical or unprofessional manner. (On the contrary, the content of his report, which was included in the bundle, strongly suggests that Mr Herbert carried out a thorough, detailed and fair investigation of the matters and issues forming the subject matter of the grievances and that he reached fair and balanced conclusions in relation to them).

151. The Claimant adduced no credible evidence to support his allegation that Mr Herbert was instructed to exonerate Mr Jarman and SM and portray him as a malicious bully and disaffected employee such that the Respondent had evidence to charge him with gross misconduct.

Other matters set out in the Claimant’s list

Item 16: 6 June. Mr Couchman acted unethically by failing to take managerial responsibility to resolve the matters described in my email and which we also discussed in a very short meeting.

152. It appears that the matters relating to Client Z had been resolved by 13 April 2018. By this time, the Respondent had decided to make a without prejudice offer to the Claimant who was clearly disaffected. In the Tribunal's view, it was not unreasonable for Mr Couchman to seek resolution of the matter by suggesting a financial settlement in the first instance. There was insufficient evidence to support the Claimant's contention that Mr Couchman failed to take managerial responsibility or acted unethically.

Item 17: 8 – 11 June 2018. Mr Thompson refused a request from Mr Jarman and me to meet in order to discuss ways in which we could restore a harmonious working relationship.

153. The Claimant conceded that the instruction that the three complainants should not discuss their grievances between them was reasonable. Even if it might have been reasonable to have allowed discussion between the Claimant and Mr Jarman, there was no evidence to suggest that it would have facilitated a reconciliation of differences between the Claimant and SM. In the circumstances, the Tribunal concludes that it was reasonable for Mr Thompson to refuse the request until decisions had been made, which he anticipated would be in the not too distant future.

Item 18: 12 June. Mr Herbert and Mr Jarman knowingly made false statements in their emails when reporting my comments on 11 June when I submitted my whistle blowing report. paragraph 65 in Mr Jarman's witness statement is accurate (also see item 19)

154. As to the words spoken, the Tribunal finds the distinction is without significant difference. With regard to the statements containing the alleged false statements, the Claimant was unaware of these statements until after he had resigned. They can have no relevance in this case.

Item 19: 13 June. Mr Couchman referred to the incorrect statements (item 18) implying I was wrong to say this in the "open office". at the time I did not recognise the significance of the inaccurate reporting of my statement and I responded to Mr Couchman to justify my "open office" statement.

This is speculation on my part but I suspect Mr Herbert submitted an accurate report of my statement at the time (11 June) but Mr Couchman obtained legal advice and then instructed Mr Herbert and Mr Jarman to submit false statements on 12 June. my reasons for this allegation are:

(i) the timing of Mr Herbert's report;
(ii) Mr Jarman's correct statement in paragraph 65 of his witness statement;
(iii) Mr Couchman's references to "legally privileged";
(iv) The large proportion of blanks on the photo copies on pages 317 – 319 in the bundle

155. The Claimant did not challenge Mr Couchman about this allegation. As above, the Tribunal finds little significance in what the Claimant may or may not have said when submitting his whistleblowing report. The

Claimant's speculation based upon information obtained after his resignation has no relevance as to the reason for his resignation.

156. In light of the foregoing, the Claimant has failed to show that the Respondent was condoning unethical or unprofessional behaviour on the part of his colleagues. At its highest, the evidence shows that the Respondent did not act as quickly as the Claimant demanded.

As a result of the hostile and toxic atmosphere created by the Respondent in the period commencing 4 June 2018, he was unable to perform his professional duties

157. The Tribunal accepts the Claimant's evidence that he had an obligation to raise issues of concern. The technical issues were resolved: with respect to Clients X and Y on 9 April 2018; with respect to Client Z on 13 April 2018.

158. Nevertheless, the Claimant continued to challenge the competence and integrity of his colleagues in their dealings with those matters. Grievances by all three complainants were properly investigated by Mr Herbert. On 4 June Mr Couchman informed the Claimant that disciplinary action against him was likely. Given the adverse findings in Mr Herbert's report it was not unreasonable to inform the Claimant of that likelihood. The Tribunal does not accept that Mr Couchman used the words gross misconduct or that he called the Claimant a troublemaker. The content of the Claimant's emails clearly showed his dissatisfaction with his employment. The Tribunal finds that Mr Couchman was acting in good faith and seeking to find an amicable resolution.

159. Mr Couchman properly decided that the Claimant's whistleblowing complaint should be investigated.

160. The Claimant has failed to establish that the Respondent created a hostile and toxic atmosphere in the period commencing 4 June 2018. Any perceived toxic atmosphere on his part was largely due to the way in which he conducted himself in relation to the concerns he raised, in particular alleging that his colleagues were lying, incompetent and negligent.

The Respondent made it absolutely clear to him that his services were no longer required

161. The Tribunal does not accept that the Respondent made it clear to the Claimant that his services were no longer required. The Tribunal accepts Paul Couchman's evidence that the Claimant was not put under any pressure to accept the offer being made. This is supported by the text of the without prejudice letter of June 2018 which made clear that the Claimant was under no obligation to enter into settlement discussions or to accept the offer.

162. The Tribunal questioned the Respondent's witnesses as to whether the Respondent's actions were done deliberately in preparation for the removal of the Claimant from the business. The Tribunal is satisfied by the answers to those questions that the Respondent had genuine business reasons for the proposals relating to IAS Calc and the redundancy of a Senior Actuary.

163. The Claimant has failed to establish that the Respondent's course of conduct cumulatively amounted to a fundamental breach of contract. The Claimant was not constructively dismissed and his claim for unfair dismissal, under both ordinary and automatic principles, will be dismissed.

164. The further issues set out in the agreed issues above do not fall for consideration.

Note

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 25 January 2021