Case Number: 2200341/2019 (V)

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Hong Lee		Institute of Directors

Heard at: London Central

On: 6, 7, 8, 11, 12 and 13 January 2021 (and 14 and 15 January 2021 in chambers)

Before: Employment Judge Stout
Mr David Schofield
Mr Ian McLaughlin

Representations
For the claimant: Ms Elaine Banton (counsel)
For the respondent: Ms Sheryn Omeri (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Claimant's claim for unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded;

(2) The Claimant's claim for automatic unfair dismissal contrary to s 103A ERA 1996 is outside the jurisdiction of the Tribunal as it was not brought within the time limit in s 111 and is any event not well-founded and is dismissed;

(3) It is not just and equitable for there to be any deduction from any compensation awarded to the Claimant for contributory fault;

(4) It is just and equitable that there should be a 10% deduction to any compensation awarded to the Claimant for the period January 2019 onwards to reflect the chance that he could fairly have been made redundant in December 2018;

(5) It is just and equitable that any compensation awarded to the Claimant should be uplifted by 25% under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to reflect the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

REASONS

1. Mr Hong Siong Lee (or Sean Lee, as he was referred to at work) (the Claimant) was employed by the Institute of Directors (the Respondent) as a Finance Business Partner from 17 October 2016 until 2 November 2018 when he was dismissed, the Respondent says, because of a breakdown in working relations between him and another employee, Scott Gregory. In these proceedings, the Claimant claims that he was unfairly dismissed and/or that the real reason for his dismissal was that he had made protected disclosures (whistleblowing).

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: Fully Video by Cloud Video Platform (CVP). A face to face hearing was not held because of the pandemic and the parties agreed that the case could be dealt with remotely.

3. The public was invited to observe via a notice on Courtserve.net. Some members of the public joined. There were a number of issues during the hearing as to connectivity. Mr McLaughlin's connection was particularly poor and he 'dropped out' of the hearing on a few occasions over the course of the five days of evidence. For the most part, these were very brief interruptions and nothing significant was missed. On one occasion, he missed 10 minutes before anyone noticed and it was agreed that the Judge would summarise the evidence given, with each advocate providing comments as they wished. The same procedure was adopted on one or two other occasions when the Respondent's counsel's connection was interrupted. The Judge made clear when the connectivity issues started that although she was monitoring to ensure that the fairness of the hearing was

not jeopardised, the parties also bore responsibility for alerting the Tribunal if they considered that the fairness of the hearing was being compromised by the connectivity issues. In the event, neither party raised any complaint in the course of the hearing and the Tribunal was satisfied that the fairness of the hearing had not been compromised.

4. The participants were told at the outset that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera, and that they had access to clean copies of the bundle and witness statements.

The issues

5. The issues to be determined were agreed to be as follows:-

Unfair Dismissal

(1) What was the reason for the Claimant's dismissal? The Respondent contends that it was the potentially fair reason of some other substantial reason ('SOSR') set out in s.98(1)(b) of the Employment Rights Act 1996 ('ERA'), namely the irreparable breakdown in relations between the Claimant and his colleague, Scott Gregory;

(2) In the circumstances, did the Respondent act reasonably or unreasonably in treating SOSR as a sufficient reason for dismissing the Claimant? The Claimant contends that it did not for the following reasons:

a. The Respondent made factual inaccuracies in its reasons for concluding that there had been a disruptive impact on the business of the alleged poor working relationship with the Claimant's colleague, Scott Gregory;

b. The Respondent wrongly concluded that the business was not able to resolve the relationship issues without significant business impact or cost;

c. The Respondent exaggerated the disruptive impact of the poor relationship between the Claimant and Mr. Gregory on its business;

d. The Respondent mischaracterised the poor relationship between the Claimant and Mr. Gregory as a "complete breakdown" in their relationship;

e. The Respondent did not make clear at the earliest point in time that the ongoing irreconcilable differences (the Claimant's expression) between the Claimant and Mr. Gregory could result in the Claimant's dismissal;

f. The Respondent failed to give timely warnings when shortcomings in the Claimant's conduct/irreconcilable differences (Claimant's expression) first emerged;

g. The Respondent did not give the Claimant sufficient warning that a meeting was scheduled at which he could be dismissed;

h. The Respondent did not inform the Claimant of the detail of the complaint made against him, thereby denying him the opportunity to prepare and to make full representations;

i. The Respondent, by doing h. above, denied the Claimant the opportunity to suggest mediation;

j. The Respondent had pre-determined the decision to dismiss the Claimant;

k. The appeal process did not remedy the procedural and substantive unfairnesses in the Claimant's dismissal (set out above);

l. The Respondent failed to give appropriate consideration to mediation at the appeal stage, when the Claimant had been denied proper opportunity to raise it at the dismissal stage;

m. The Respondent, at the appeal stage, wrongly concluded that the Claimant's manager, Chee Lam, had attempted informal mediation between the Claimant and Mr. Gregory;

n. The appeal officer wrongly concluded that Human Resources (HR) had made the Claimant aware that a possible outcome of the process was dismissal;

o. The Claimant was dismissed without prior warning, either verbal or written.

(3) Did any of the matters at (2).a – o. above take place?

(4) If so, did they render the Claimant's dismissal unfair, that is, outside the range of reasonable responses to the situation prevailing at the Respondent?

(5) The Respondent asserts that disciplinary procedures of the kind applied when allegations of misconduct are made against a Claimant do not apply to a case of this kind where the reason for dismissal was SOSR: see for example *Ezsias v North Glamorgan NHS Trust* UKEAT/0399/09/CEA.

(6) If the Claimant was unfairly dismissed, to what remedy is he entitled?

(7) If the Claimant's dismissal is found to have been procedurally unfair (bearing in mind that disciplinary procedures as applied when

allegations of misconduct are made do not apply in cases of SOSR), would the Claimant have been fairly dismissed in any event had the Respondent followed a fair procedure?

(8) Did the Claimant's own actions cause or contribute to the dismissal such as to warrant a reduction in any compensation awarded to him?

(9) Has the Claimant met his duty to mitigate his loss?

Automatic Unfair Dismissal

(10) Is the Claimant's claim for automatic unfair dismissal contrary to s.103A of the ERA (brought by way of amendment application made on 28 June 2019) out of time?

(11) Was it reasonably practicable for the Claimant to have brought his claim within the primary limitation period of 3 months from the date of his dismissal, namely by 1 March 2019?

(12) If not, did the Claimant present his claim within such further period as the Tribunal considers reasonable?

(13) Did the Claimant make one or more protected disclosures as set out below:

a. Matters set out at paragraphs 13.5 – 13.8 of his Statement of Case ('Disclosure 1')

b. Matters set out at paragraphs 13.14 – 13.16 of his Statement of Case ('Disclosure 2');

c. Matters set out at paragraphs 14.9 – 14.12 of his Statement of Case ('Disclosure 3').

(14) The Claimant relies upon s.43B(1)(b) of the ERA.

(15) What is the legal obligation on which the Claimant relies for the purposes of s.43B(1)(b)? The Claimant suggests that it is the obligation to prepare the Respondent's accounts in accordance with accounting standards.

(16) Did the Claimant make any disclosures of information?

(17) Did the Claimant have a reasonable belief (applying a mixed objective/subjective test) that any alleged disclosure tended to show that a person has failed, is failing or is likely to fail to comply with the legal obligation to which the Claimant contends he or she is subject?

(18) Did the Claimant have a reasonable belief that any alleged disclosure was made in the public interest?

(19) If the answer to questions 13-18 above is 'yes' was the fact of the Claimant having made disclosures of information qualifying for protection the sole or principal reason for his dismissal?

(20) If the Claimant's claim for automatic unfair dismissal succeeds, to what remedy is he entitled?

6. It was agreed that at this hearing the Tribunal would deal with the issues of liability and the following remedy issues:

    a. Should there be any deduction for contributory fault?

    b. Should there be any *Polkey* reduction to reflect:

        i. The chance that the Claimant would have been fairly dismissed at some point if a fair procedure had been followed; or

        ii. The chance that the Claimant would have been made redundant in any event within a short period.

    c. Should there be any uplift for failure to follow the ACAS Code on Disciplinary and Grievance Procedures?

7. In the course of evidence, it also emerged that a redundancy situation had also affected the whole department following a TUPE transfer in August 2020. That issue was not fully explored at this hearing and remains a live issue for the Remedy Hearing.

The Evidence and Hearing

8. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

9. We explained our reasons for various case management decisions carefully as we went along. These included:-

    a. Our decision to permit Mr Lam to give evidence (although we excluded all paragraphs of his witness statement other than paragraphs 1 and 5 as being not relevant and/or unnecessary to the proceedings); and

    b. Our decision that the Claimant had waived privilege in relation to the advice he received from ACAS and from a legal charity (FLAC) by answering questions as to the content of that advice put to him by his counsel in cross-examination.

10. We heard evidence from the Claimant and Mr Chee Lam. For the Respondent we heard evidence from the following witnesses:-

    a. Jim Jordan (Chief Finance Officer, employed by the Respondent since March 2017 and in his current role since 1 January 2018);

    b. Lauren Snape (Human Resources Business Partner from 26 March 2018 until October 2019);

    c. Vicky Taylor (employed by the Respondent since April 2003 and Director of People and Culture since June 2018);

    d. Edwin Morgan (Director of Policy since February 2019);

    e. Nia Griffiths (Human Resources Advisor since December 2017);

    f. Jeremy Warrilow (Head of Hospitality since 29 August 2017).

11. At the Claimant's request, we issued a witness order for Mr Lam as although he was willing to give evidence, he is working for a new employer and we were told that it was required to enable his employer to permit him to give evidence.

Adjustments

12. English is not the Claimant's first language, but he was able to manage the proceedings in English and we did not detect any difficulties in comprehension or expression. No adjustments were made for him, other than to ensure that questions were put clearly and simply.

The facts

13. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

<u>The Respondent's business and the Claimant's role</u>

14. The Respondent is a professional body established by Royal Charter to provide support and advice to company directors in their professional development and to represent the views of company directors and businesses. The Respondent is based in Pall Mall, London. In its ET3 it states it has 160 employees in Great Britain and 120 at Pall Mall.

15. The Claimant started work with the Respondent as a Finance Business Partner on 17 October 2016. He was initially taken on as a temporary employee. After six weeks he was offered a six month fixed term contract and thereafter an extension of that contract to 31 December 2017. Before the end of December 2017, the Claimant accepted the Respondent's offer of a full-time permanent employee role.

16. The Claimant is a qualified accountant and Fellow member of The Association of Chartered Certified Accountants (ACCA). The Claimant was never provided with a formal job description for his role, although one dating from 2017 was produced by the Respondent in the course of these proceedings and we will refer to this later in our judgment. The Claimant's own description of his role was for the most part not challenged by the Respondent. The Claimant was responsible for the Regions and Nations offices and Hospitality department business partnering functions. He was required to prepare management accounts, partner with the businesses and lead projects. On a monthly basis (prior to the events recounted below) he prepared a total of 30 management accounts. He was also responsible for reconciling the balance sheet accounts related to his portfolio. He was budget and forecast lead for the Respondent and consolidated the operation of the Respondent's 50 department budgets and forecasts.

17. As a body established by Royal Charter, the Respondent is not subject to the duties in the Companies Act 2006. Its constitution is set out in By-laws which are formally made by the Privy Council. The current By-Laws were made on 27 July 2015. By-Law 69 requires the Respondent to prepare its Annual Report and Accounts in accordance with the accounting standards and practices generally accepted in the United Kingdom to the extent that they are relevant to the Respondent. We note in passing that this means that in many respects the requirements of the Companies Act 2006 do apply to the Respondent, even though it is not directly subject to that Act. By-law 67 further provides that the Board *"shall ensure that accounting records are kept which: a. disclose with reasonable accuracy, at any time, the financial position of the [Respondent] at that time; and b. enable the Board to ensure that the Annual Report and Accounts give a true and fair view of the affairs of the [Respondent] for the relevant period".* By-law 67 is in particular relied on by the Claimant in relation to his alleged protected disclosures in these proceedings.

The Respondent's finance team

18. During the first half of 2018 there were two other Finance Business Partners employed by the Respondent: Mr Scott Gregory and Mr Andrew West. There was also an assistant Finance Business Partner, Ms Lydia Li.

19. Mr West left in around July 2018. All the Finance Business Partners had similar duties but dealt with different areas of the Respondent's business. There were also other more junior employees in the finance team. The more junior employees had responsibilities of a more daily transactional nature such as entering payroll data, issuing invoices and so on, whereas the

Finance Business Partners dealt with the Respondent's accounts at a higher level and liaised directly with the various other departments in the Respondent.

20. All members of the finance team, including the Claimant, reported directly to the Financial Controller, Mr Chee Lam. Above Mr Lam sat Mr Jim Jordan as the Chief Finance Officer (CFO).

21. The Claimant was the most senior and experienced of the Finance Business Partners, and was paid about £5,000 or 10% more than Mr Gregory to reflect this. As part of his role he was expected to work closely with, and supervise and support, the more junior members of his team. He had no managerial responsibility, however, and was not expected to train other team members.

22. One of the financial controls that Mr Lam had put in place was that each month the Finance Business Partners should peer review each other's contribution to the monthly management accounts.

23. The Respondent's business was struggling financially in 2018, and finished with a deficit of about £4.2 million. The finance team as a whole had a considerable workload, and was struggling with manual systems that were out of date. Mr Jordan considered that the workload was manageable for the size and skill set team, but only if all members of the team worked well together.

24. The finance team sat together on five banks of desks in a room that was separate from the rest of the organisation and on a different floor to the majority of other staff.

<u>Mr Lam and the Claimant, and Mr Lam's evidence in these proceedings</u>

25. Mr Lam and the Claimant had been friends before joining the Respondent and it was Mr Lam who introduced the Claimant to the Respondent.

26. Mr Lam worked for the Respondent until 7 August 2020 when his employment transferred to a third party (Equium) along with that of everyone then remaining in the finance team (apart from Mr Jordan). He was subsequently made redundant by Equium and has brought two Tribunal claims against the Respondent, including a whistleblowing claim which is in part based on the matters that were dealt with in his witness statement, but which we excluded from evidence in these proceedings when deciding to permit him to give evidence. It was put to him in cross-examination that he would not be prepared to make any concession about the part of his witness statement we did admit (paragraph 5) because that would prejudice his own case before the employment tribunal. Mr Lam denied that saying that his own case concerned the issue to do with being asked by the Respondent to sign a witness statement that he did not consider to be true, rather than what he said in paragraph 5 of his statement.

27. Given Mr Lam's circumstances as we have set out above, we have found it necessary to consider in general terms whether he is or is not a reliable witness and it is convenient to set our conclusions on this point out at this point in our judgment. We must emphasise, however, that our conclusions in this regard have been reached taking into account the totality of the evidence.

28. As a result of his own claims, there is no doubt that Mr Lam currently has an animus against the Respondent. He is also friends with the Claimant. In the course of his oral evidence, he did occasionally appear to give evidence in favour of the Claimant which was outside his knowledge (such as his speculation as to the reason that Mr Jordan dismissed the Claimant), and which we have given no weight in our decision-making. However, we have asked ourselves whether the fact that Mr Lam was willing to give such evidence (which appeared designed solely to assist the Claimant and was not his own genuine recollection), or the fact that he currently has an animus against the Respondent for the reasons we have set out, or that he was and appears to remain a friend of the Claimant, should lead us to reject his evidence wholesale. We have concluded that it does not. While we deal with each particular conflict of evidence below, we record here our overall impression of Mr Lam that, so far as concerns the matters of central relevance in these proceedings, namely the relationship between the Claimant and Mr Gregory, the handling of Mr Gregory's complaints, and the interaction between Mr Lam and Mr Jordan, we found what Mr Lam said in evidence was consistent with the documentary evidence, measured and in our judgment plausible, credible and reliable.

<u>The relationship between the Claimant and Mr Gregory</u>

29. One of the other Finance Business Partners was Mr Scott Gregory. He commenced employment in around May or June 2017. He had about 20 years experience of working in accounts, but most of that experience (apart from the last four years) had been in America. The job description for the Finance Business Partner role that has been produced by the Respondent in these proceedings states that the individual should *"Be CIMA / ACCA / ACA qualfieid or near qualified"*. Mr Gregory did not have any such qualifications, but Mr Jordan and Mr Lam when deciding to recruit him considered that his twenty years of experience made him appropriate for the job. Mr Jordan regarded Mr Gregory as being 'qualified by experience'. Mr Lam gave evidence, which we accept as it is consistent with the Claimant's evidence (and broadly consistent with Mr Jordan's view that the Claimant had *"superior knowledge"* to Mr Gregory), that in time it became apparent that there were significant gaps in Mr Gregory's knowledge as a result at least in part of a lack of familiarity with United Kingdom accounting standards and tax rules.

30. Mr Gregory was responsible for the Membership, Marketing, Affinity and Event departments. On a monthly basis Mr Gregory was required to prepare nine sets of management accounts for the businesses for which he was responsible, and he was also responsible for reconciling balance sheet accounts related to his portfolio.

31. In January 2018 the Claimant was in a Malaysia for a month. This was in part a holiday that he had booked before knowing that he was to be confirmed as a permanent employee of the Respondent. He had booked the holiday because his mother (who lives there) was due to have an operation and he wanted to be with her to support her. It had then been agreed between the Claimant and Mr Lam that while in Malaysia he could have two weeks' holiday and two weeks' working from home. This was the Respondent's financial year end period, however, and the Claimant worked when he could, including during his holiday.

32. It was suggested to the Claimant in cross-examination, in the light of the evidence given by Mr Jordan, that his relationship with Mr Gregory soured on his return. Ms Omeri submitted that the Claimant had conceded this in cross-examination, but our note of his answer was that he disagreed with that proposition. What he said was, and we accept as it is consistent with the documentary evidence, that it was on his return from Malaysia (in around February/March 2018) that he was asked by Mr Lam to take over the Affinity and Events departments from Mr Gregory as Mr Gregory was struggling with them. On taking over those departments, the Claimant began to find problems with the way the accounts had been dealt with by Mr Gregory and he began to ask questions about Mr Gregory's accounting. The Claimant said, however, that it was nothing personal, he was just doing his job and he did not understand the relationship to have 'soured'. We accept his evidence in this regard as it is consistent with the documentary evidence which shows (as we set out below) the Claimant raising queries about those departments, but does not show anything that could be described as animosity prior to 22/23 August 2018.

33. That said, it is clear from the documentary record that Mr Gregory was resentful of the Claimant's month in Malaysia since (as we set out below) he complained about it repeatedly between June and August 2018, suggesting that it was 'favouritism' that the Claimant had been allowed to do this. It is also apparent that Mr Gregory began taking complaints about the Claimant to Human Resources from about this time onwards, but there is no evidence that anyone told the Claimant about Mr Gregory's complaints. In those circumstances, we do not accept the Respondent's description of the relationship between the Claimant and Mr Gregory as having 'soured' from February 2018. What appears to us to have happened was that from this period onward, Mr Gregory had a developing grievance about various aspects of his work with, and treatment by, the Respondent, and Mr Lam in particular.

34. At a meeting on 13 June 2018 Mr Gregory raised a number of concerns directly with Mr Lam. Mr Lam recorded these concerns in emails at the time, from which we can see that the particular issues included concerns about work allocation and responsibilities, pay (Mr Gregory being aware that the Claimant was paid much more even though he had the same job title) and working from home (including the month in Malaysia). Mr Gregory also complained that the other Finance Business Partner Mr West had a higher

frequency of work from home. Mr Gregory complained that the Claimant had access to more resources at work with assistance from a number of other employees on certain matters. He also complained that the Claimant did not share detailed knowledge with Mr Gregory when he had questions about VAT. Mr Lam had among other things identified that Mr Gregory would benefit from some training to improve his accounting knowledge. Mr Gregory agreed with this and said that he would like to pursue formal UK accounting qualifications (CIMA). Mr Lam reported this to Mr Jordan and Ms Taylor on 15 June 2018.

35. At around the same time HR reported that Mr Gregory had also complained to them about the Claimant's behaviour and approach towards him, for example that the Claimant was being patronising and that he felt belittled and overly criticised. HR did nothing about this, however, and the Claimant was not made aware of any complaints.

36. Mr Jordan was aware of the friendship between the Claimant and Mr Lam, but had not observed any unprofessional behaviour by Mr Lam, or any behavioural actions that could be regarded as favouritism by him towards the Claimant or against Mr Gregory. However, following Mr Gregory's complaint, and on the advice of HR (in particular Ms Vicky Taylor), Mr Lam stopped socialising with the Claimant during working hours, and reviewed the finance team's working from home arrangements to ensure that they were fair across the team. As Mr Gregory was stressed, Mr Lam also reduced his workload by moving the two departments, Affinity and Events, from Mr Gregory to the Claimant on a permanent basis.

37. During this period the Claimant says that he was struggling with his own work and felt overburdened by responsibility for the additional two departments and during the course of the summer he began to take more time off through ill health.

38. It was suggested by Ms Omeri that various emails in the bundle indicating that the Claimant on a number of occasions told, and sometimes asked, Mr Lam if he could work from home or be late because he had a medical appointment or was expecting a delivery or some such, showed that he was exploiting his relationship with Mr Lam. We stopped this line of questioning because none of the Respondent's witnesses had given evidence about these emails or said that they were in any way out of the ordinary. They are not obviously out of the ordinary and we find no assistance in them as to the matters that are at issue in these proceedings.

<u>The Claimant's relationship with other employees</u>

39. We heard evidence from the Respondent's witnesses that concerns had been raised by a number of other employees at different times about the Claimant's behaviour. This evidence included evidence from Ms Taylor that in early 2017 two leavers raised concerns about the Claimant in their exit

interviews, but at the time it was put down to poor performance of those individuals who were being managed out of the business through the capability procedure.

40. In July 2018 Ms Snape was involved in the decision to dismiss another member of the finance team, following an unsuccessful probationary period. In this meeting, the individual expressed concern about the lack of support that the Claimant provided to the team and his general attitude towards them, saying that he was often belittling towards them and looked down on them.

41. We also heard evidence from Mr Warrilow, Ms Griffiths and Ms Snape about difficult interactions that they had on occasion had with the Claimant. Mr Warrilow found the Claimant difficult to work with and said he was not collegiate. He said the Claimant's attitude also led to a poor working relationship with his two heads of department. He gave a particular example of an occasion when he said that the Claimant had had a 'heated' exchange in front of Mr Jordan because the Claimant would not admit a 'clear error' in his way of thinking. The Claimant did not recall this incident. Ms Snape and Miss Griffiths described interactions with the Claimant in relation to a query about his Private Medical Insurance (PMI) cover and a request he made for Human Resources (HR) support with the roll out of the Benugo Black Cards, which the Respondent was providing to senior members of staff to enable them to purchase Food & Drink in the Respondent's building when hosting guests. Both of them confirmed that they considered the Claimant had been very rude on those occasions and that they did not recall more than perhaps one other occasion where an employee had been that rude to them. They did not give evidence of anything specific the Claimant had said that was inappropriate, they just found his tone and language to be (variously) 'belittling', 'sarcastic', 'disrespectful'. On both occasions, Ms Taylor had considered it necessary to speak to the Claimant as she was concerned about the way Mr Griffiths and Ms Snape were being spoken to. On the occasion when Miss Griffiths was with the Claimant on her own, Ms Snape felt the need to intervene.

42. These incidents with Ms Snape and Miss Griffiths were put to the Claimant and he denied being rude on either occasion. It was not put to him that Ms Taylor had had to speak to him about these incidents; we have not been given any evidence of what she says she said to him on these occasions, and the Respondent does not rely on these conversations as constituting any sort of warning to the Claimant. Nor has the Respondent advanced any positive case that they form any part of the reasons for dismissal as set out in the dismissal letter. Rather, these incidents are relied on as part of the Respondent's argument as to the fairness of the dismissal and in relation to contributory conduct by the Claimant towards his dismissal. We deal with this argument at the appropriate point below. For present purposes, it suffices to record that in general terms we accept the Respondent's evidence in relation to these incidents. We do not, however, find that anything much was made of them at the time or that the Claimant's behaviour was at the time regarded by the Respondent as particularly serious or inappropriate. Had it been, we

would have expected to see it dealt with more formally, with at least some documentary record of the incident(s) and some guidance being given to him as to how to deal with other employees in the workplace, even if it was deemed not to merit formal disciplinary action.

The Claimant's first two alleged protected disclosures

43. In around February or March 2018 when the Claimant had taken over the Affinity department from Mr Gregory, he identified what he described as a 'VAT irregularity' and informed Mr Gregory, but Mr Gregory refused to take any action, saying that he would deal with it when he had to do a full review of VAT in September 2018. The nature of the issue was that VAT had not been charged or paid on Affinity commissions. This issue is relied on as the substance of the Claimant's first alleged protected disclosure. We record here that in relation to all his protected disclosures, the Claimant gave evidence in his witness statement, which in general terms we accept, that the various accounting irregularities he identified were matters he believed to be of public interest because he considered that accounting rules are there to protect the public interest in the proper running of organisations and the proper payment of tax when it falls due.

44. The Claimant considered the VAT issue to be serious and on 27 June 2018 (p 391) the Claimant emailed Mr Jordan regarding it and two other matters, one of which was the Claimant's second alleged protected disclosure concerning sponsorship income for a DMCC road show of £3,000 (which we deal with below). The relevant parts of his email read as follows:

> Hi Jim,
>
> … I have a few issues that need som guidance from you.
>
> After Scott handover Affinity, Event and VAT to me, there are some queries and concerns raised by the business where Scott didn't resolve.
>
> 1. Affinity
>
> Amanda has requested clarification for commission received from the partnership programme (eg Avondale) since April/May, if Affinity commissions are 'Vatable'. Amanda claimed that the FD at the time about 15 years ago has investigated the situation but she doesn't know what the outcome was. Shall we engage Buzzacott to review the commission VAT? We might need to send Affinity contracts to Buzzacott for review.
>
> 2. Event/Seven
>
> I have received complaints from Scotland, a sponsorship income of £3k was promised by Events/Seven in Mar 18 but no CRM invoice raised or allocation to Scotland. Scotland has engaged a supplier and need to pay about £1,500 but still not sure what to do. I will attach the email for your reference. Appreciate you could share with me what is the arrangement for Seven to pay the sponsorship to Scotland.

Alleged second protected disclosure

45. The chronology requires us to deal with the second alleged protected disclosure first. As to this, the Claimant attached to his email a chain in which the Seven sponsorship issue had been discussed between various parties. Neither party has relied on anything in that attached chain, but we note from it that it is apparent that the matter had come to the Claimant's attention on 25 June 2018 when he had been asked by Laura Jumnoodoo to look into whether IoD Scotland had received the DMCC sponsorship money of £3,000. He then asked Ms Jumnoodoo for the CRM invoice number and was told by her that she did not raise an invoice for it.

46. In oral evidence regarding the Events/Seven sponsorship income, there was no dispute between the Claimant and Mr Jordan that this was a question of internal allocation within the Respondent's accounts. They agreed that the £3,000 was in the Respondent's accounts, just not allocated to Scotland at this point. Mr Jordan in his statement explained, with reference to an Invoice to Seven from the Respondent numbered INV-0010034309, that the £3,000 had been included in a larger invoice to Seven and that the Claimant acknowledged this in an email of 14 August 2018 to Mr Jordan, Ms Willenberg, Scott Gregory and Ms Jumnoodo when he asked if they could agree to an internal reallocation of certain sponsorship monies (including the £3,000).

47. However, the Claimant in cross-examination maintained that the problem was that no CRM invoice had been raised in March 2018 and that there had been a breach of a legal obligation because that had not happened. His point in this respect, as explained orally, was that this resulted in a failure to pay VAT in the correct period in breach of HMRC rules. In this respect he drew our attention to a different version of INV-0010034309 that was in the bundle and in which the invoice had been amended so as to show all the income relating to later periods and being due in later periods. The Claimant accepted, however, that this alternative version of the invoice was not disclosed to him until some time after he commenced these proceedings and so it could not have either been the subject of any disclosure he made at the time or contributed to any belief he held at the time. In his witness statement, the Claimant also referred in this regard to manual invoices created by Mr Jordan for Seven, which he said violated VAT rules on tax point, but these were not raised by him at the time, were not dealt with by Mr Jordan in his witness statement and not put to him in cross-examination. We should further record at this point that in his witness statement the Claimant acknowledges (and the Respondent has not disputed) that HMRC permits errors of less than £2,000 to be corrected, and VAT on £3,000 would be less than this threshold. It was also the Claimant's position, by reference in particular to the Respondent's By-law 67 that the Respondent's accounts were required to be reasonably accurate at all times and that this issue with the £3,000 led to a breach of that requirement. He maintained that this was the case in relation to the £3,000 even though he accepted that this particular issue concerned the internal allocation of the £3,000 between departments rather than the

Respondent's accounts overall. He said this was because the failure to issue a CRM invoice meant that it was not accounted for at the right time.

48. In his witness statement (and in particular in the Scott Schedule appended to his statement) the Claimant describes a second part of his second protected disclosure, which he views as more serious as it involves much more substantial sums. He says that he made the second part of his second protected disclosure in a meeting on 28 June 2018 with Mr Lam, Mr Alan Fitzwater, Ms Amie Willenberg and Ms Laura Jumnoodoo. At that meeting, he says that the £3,000 DMCC sponsorship income was discussed, but that he also disclosed a bigger flaw in relation to the DMCC income with approximately £500,000 income and £300,000 expenses not being recognised in the correct period in the management accounts for the Events Department. He says that this again was a breach among other things of By-law 67 and would have resulted in VAT being paid in the wrong period.

49. We address the extent to which the second alleged protected disclosure meets the statutory criteria in our Conclusions section below. However, it is right to record here as part of our findings of fact that, so far as the Claimant's subjective belief is concerned, we accept that he subjectively believed at the time that a failure to account for income and expenditure in the period to which it was properly attributable or to pay VAT on income in the period in which the income was received was a breach of a legal obligation. We do not accept that the Claimant had in mind at the time of his alleged protected disclosures any of the specific legal obligations that he has now listed in his witness statement, but we accept his evidence that this was his understanding from the accountancy training that he had done. We do not consider, however, that the Claimant considered that issues to do with internal allocation of income and expenses engaged any legal obligation; we understood the Claimant to accept as much in cross-examination. In oral evidence Mr Jordan told us, and we accept, that the Respondent's materiality threshold for its annual accounts was generally in the region of £230,000-£250,000. It was suggested to the Claimant in cross-examination that he was aware of this and that he could not reasonably have believed that accounting discrepancies below that threshold was material (or, by implication, a breach of a legal obligation). However, the Claimant disagree with this. He said, and we accept as there is no evidence to counter it, that he was unaware of the level of materiality for the Respondent's annual accounts as he was not involved in their preparation. He also said that he did not in any event think that it could apply to monthly accounts as accounts that were out on a monthly basis by up to £250,000 would be out by up to 12 times that over the course of a year. The Claimant's evidence in this respect makes sense and we accept that the Respondent's level of materiality had no bearing on the Claimant's subjective belief in general terms that a failure to record income and expenditure in the right period in the Respondent's accounts was a breach of a legal obligation. However, we do not accept that the Claimant even subjectively considered that the failure to allocate the £3,000 sponsorship monies to IoD Scotland was in and of itself a breach of a legal obligation. His email of 27 June 2018 to Mr Jordan where he first raises the

subject indicates merely that he is unsure what to do about the £3,000 and it is clear from his own email of 14 August 2018 to Mr Jordan, Ms Willenberg, Mr Gregory and Ms Jumnoodoo that he accepted that this was a matter of internal allocation that they could agree between themselves. The VAT on £3,000 is also below the VAT threshold for corrections (of which the Claimant was aware at the time). There is no hint that at the time the Claimant regarded this particular matter as being in and of itself a breach of a legal obligation. The position is different for the second part of his second protected disclosure in the meeting on 28 June 2018 with Ms Jumnoodoo and others: the income and expenditure discrepancies he raised there involved large sums and we accept that his subjective belief was that there had been in relation to those a failure to comply with legal obligations.

Alleged first protected disclosure

50. As already set out above, the Claimant made what he contends was his first protected disclosure about a VAT issue with Affinity commissions in his email to Mr Jordan of 27 June 2018.

51. On 2 July 2018 the Claimant contacted an external consultant and outlined the possible VAT issue with the Affinity commissions, in response to which the consultant indicated that it appeared likely from what the Claimant had said that the commissions were subject to VAT at 20%. The Claimant forwarded the consultant's email to Mr Jordan who agreed that the Claimant should discuss it further with the consultant and should ensure that he provides full disclosure to the consultant so that he could advise properly. This the Claimant then did.

52. On 12 July 2018 the consultant advised that the World First agreement transactions with Affinity were not subject to VAT, but that other services being supplied pursuant to that same agreement were marketing services which were liable to VAT. This confirmed that what the Respondent was already doing in terms of charging VAT was correct.

53. On 18 July 2019 the Claimant then wrote to Mr Jordon, Mr Lam and others, forwarding the consultant's advice, and saying that they now have confirmation that the commission of Affinity on World First is 'VAT Exempt' and asking them to issue a CRM invoice to match the World First commission and select 'VAT Exempt' in the VAT option. The Claimant in his witness statement (in particular in the Scott Schedule) contended that it was a legal requirement to issue an invoice even for VAT Exempt commissions and suggested that the Respondent's previous practice had constituted 'malpractice'. He did not maintain this position under cross-examination, however. Under cross-examination, he accepted that he understood it was a matter of choice whether or not an invoice was raised, although he thought it was good practice to raise an invoice and as a matter of fact this was accepted by the Respondent. In the premises, we do not accept that the Claimant subjectively believed at the time that the Respondent was in breach

of any legal obligation in not raising an invoice for a commission that was VAT Exempt. We can accept that when he found that VAT was not being charged or paid on some elements of the Affinity commissions that he subjectively believed that this was likely to be unlawful and this is why he sought permission to take advice from an external consultant. We find that his subjective belief was strong enough to amount to a belief that it was likely to be unlawful rather than merely a risk that it was unlawful because the way he described the transactions to the the consultant in his email of 2 July 2018 did make it appear to the consultant that the transactions were liable to VAT (and therefore that the Respondent had likely been breaching its legal obligations). Once the consultant was provided with the full picture, however, as set out above the consultant's view was that the Respondent's past practice regarding commission for Affinity was lawful.

Mr Gregory's continued informal grievance

54. In an email of 13 August 2018 from Mr Lam to Ms Taylor and Mr Jordan, Mr Lam indicates that, having reduced Mr Gregory's workload, stopped socialising with the Claimant during work hours, and approved Mr Gregory commencing the CIMA accounting qualification, he felt he had addressed Mr Gregory's concerns and wanted to bring the matter to a close, but he reported that this had been to no avail as Mr Gregory now wished to pursue "next steps" with HR. Mr Lam in his email describes how he has spent a considerable amount of time with Mr Gregory to address his issues. He said that he was supportive of Mr Gregory's complaints now being dealt with as a grievance as the complaints were adversely affecting him, the Claimant and Ms Li (the Finance Business Partner assistant).

55. Mr Jordan met with Mr Gregory on 15 August 2018. He had a long conversation with him about his complaints. During this meeting Mr Gregory confirmed he was not raising a grievance, this was never his intention, but he did still have issues that needed to be resolved. Mr Jordan informed Ms Taylor and Mr Lam of this outcome by email later that day. On the email he added: *"Chee – we can go through the conversation I had with Scott in more detail, as there are some things that you and he need to discuss further".* During this meeting Mr Jordan made clear to Mr Gregory that they both needed to start behaving and if things did not improve he would need to get involved more formally. Although this evidence was not in Mr Jordan's witness statement, we accept it in broad terms because there is some evidence that thereafter Mr Gregory did make an effort to 'behave', in that over the course of the next couple of weeks he finally accepted 'closure' on his long-standing grievances and gave the impression to HR and Mr Jordan that he was willing to do anything to mend what they perceived as a breakdown in his relationship with the Claimant. Mr Jordan in oral evidence initially suggested that he had given the message about 'start behaving' to the whole team, but not the Claimant who was not in that day. However, we do not accept this evidence as it was not in his witness statement, is not supported by any document or the evidence of any other witness and it

sounds implausible that he would have told the whole team to 'start behaving' if he thought the problem was one between Mr Gregory and the Claimant.

56. Mr Jordan says that he asked Mr Lam to convey the 'start behaving' message to the Claimant the following day. However, Mr Lam said he did not recall being asked to do this and had not done it and the Claimant never got this message. We accept the Claimant and Mr Lam's evidence on this point. Their evidence is mutually supportive and consistent with the documentary evidence which does not indicate that anyone had sought to raise any issues with the Claimant at this point. Further, unlike with the emails of 22/23 August 2018 which we deal with below, there is not a trace in Mr Jordan's own emails to suggest that he had by 15 August reached a point where he considered some sort of warning or action was warranted. On the contrary, Mr Jordan's e-mail to Mr Lam following his conversation with Mr Gregory says nothing at all about Mr Jordan wanting him to speak to the Claimant. Mr Jordan says that email that there are more issues that Mr Lam and Mr Gregory need to discuss. He does not mention the Claimant.

57. In reaching our conclusions here and elsewhere in this judgment, we have taken into account Mr Jordan's assertion that the reason why there is no documentation to suggest that Mr Lam had any discussion with the Claimant about his working relationship with Mr Gregory, whereas he meticulously documented his dealings with Mr Gregory on the favouritism complaints, is because he had been accused of favouritism previously and was seeking to protect himself. This was denied by Mr Lam who said that he was a person who always documented meetings of any importance meticulously (he gave the example of weekly finance meetings) and that the reason there was no documentary evidence of his discussions with the Claimant was because there were no such discussions. We accept his evidence in his regard not only because it is consistent with the documents in the bundle, but also because Mr Lam was able to give examples of other meetings where he kept careful records and because it is implausible that if he was concerned to protect himself against allegations of favouritism he would not also have documented discussions in which he warned the Claimant about his conduct toward, or relationship with, Mr Gregory since, if such discussions had happened, this would have been important evidence to contradict a favouritism allegation. In the circumstances, we find that there is no documentary evidence of Mr Lam discussing the Claimant's conduct toward or relationship with Mr Gregory because no such discussions happened. We reject Mr Jordan's evidence in this respect.

58. What happened next was that, as instructed by Mr Jordan, Mr Lam had a further discussion with Mr Gregory about his complaints the very next day (16 August) when he had a one-to-one meeting with Mr Gregory which lasted for three hours. Mr Lam hoped again that this would finally resolve Mr Gregory's complaints, which had remained the same since June 2018, but he was unable to conclude matters as Mr Gregory asked for there to be further investigation of favouritism within finance.

The meeting of 20 August 2018

59. Mr Lam therefore arranged a further meeting on 20 August 2018, this time with the Claimant and Ms Li also present. (There are different dates for this meeting in the documents, but we consider it must have taken place on 20 August as this is the date in Mr Lam's email of 29 August to Ms Taylor and Mr Jordan and Ms Taylor recalls the Claimant coming to speak to her the next day, which she said was 21 August.) This was the first time that the Claimant was told of Mr Gregory's long-standing complaints.

60. The notes that Mr Lam took of this meeting show that each of Mr Gregory's complaints were discussed. The first issue concerned the Claimant working from home while in Malaysia in January 2018. This was the first time that the Claimant knew that Mr Gregory was complaining about this, or that Mr Gregory had been given the personal information about the Claimant's mother being ill, and the Claimant questioned (reasonably in our judgment) why it was open to Mr Gregory to complain about something personal to the Claimant in this way. The Claimant felt there might have been a breach of the General Data Protection Regulation (GDPR). This part of the notes includes in the Outcome column (among other things) a question from Mr Lam: "*My question to Scott /Sean – Can Sean & Scott work together?"* The Claimant did not recall this being asked in the meeting, but Mr Lam said he did ask it in the meeting and we accept it was asked. It was put to Mr Lam that he had asked this question because he considered the working relationship had broken down, but he denied this. He said it was more a question of their professional working styles. He was very clear that the working relationship had not broken down. He said that there had been differences of professional opinion between them.

61. We find that Mr Lam's description of the issues between the Claimant and Mr Gregory as merely differences of professional opinion mischaracterises the position somewhat, but not significantly. In this meeting, the question about whether they can work together comes after a discussion of the Malaysia issue in which Mr Gregory makes what is on the face of it an unreasonable complaint and the Claimant is reasonably put out. We infer that there was some acrimony in the meeting between them and it is in that context Mr Lam raised the question. The Claimant did not recall the question being asked, however, and we accept his evidence on this point as our impression is that the Claimant is not a good listener generally and he was also probably distracted and upset at this point in the meeting having been confronted for the first time with what Mr Jordan later described as Mr Gregory's *"petty issues"*. We further find that this line in the meeting notes (*"Can Sean & Scott work together?"*) does not bear the weight that the Respondent has sought to place on it. As set out above, we have found that there was nothing that had happened up to this point that could be described as a breakdown in working relationships. All we have seen is that the Claimant had identified some potential errors in Mr Gregory's work which he appears on the evidence before us to have dealt with professionally and in the ordinary course of his job. Mr Gregory had been pursuing an informal grievance about (principally)

Mr Lam's conduct for two months and had been complaining in more general terms to HR about both Mr Lam and the Claimant and thus was evidently unhappy about the Claimant, but none of this had been conveyed to the Claimant who was (reasonably in our judgment) unaware that there were any problems at all until he was confronted for the first time with Mr Gregory's complaints in this meeting on 20 August. Further, this question (*"Can Sean & Scott work together?"*) is clearly not the main point of the meeting. It is one very small element of the meeting. The meeting was concerned with Mr Gregory's six heads of complaint, only one of which (the sharing of VAT knowledge) actually had anything to do with the Claimant's conduct, rather than that of Mr Lam or other members of the finance department. In the circumstances, we do not accept that the *"Can Sean & Scott work together"* question indicates that there had been a breakdown in working relationships by this point. Rather, it is the very first time that it is acknowledged by Mr Lam that there is tension between them, and the very first time that he seeks to draw this to the Claimant's attention and to encourage them to work better together.

62. The Respondent has suggested that this meeting on 20 August was an informal mediation between the Claimant and Mr Gregory. We find that no reasonable employer could regard it as such. A mediation is a meeting at which two opposing parties explore the possibility of resolving their issues. This was not such a meeting so far as the Claimant and Mr Gregory were concerned as is absolutely clear both from the documents and the oral evidence we have heard. It was a meeting held by Mr Lam in order to address complaints by Mr Gregory about favouritism, all but one element of which were complaints about Mr Lam and not the Claimant, and none of which had been communicated to the Claimant before the meeting. There had been no acknowledgement by anyone at this stage that there were any issues between the Claimant and Mr Gregory, the Claimant was completely unaware that Mr Gregory had complained about him previously and the purpose of the meeting was not to resolve any issues between the Claimant and Mr Gregory, but to deal with Mr Gregory's long-standing favouritism allegations against Mr Lam.

63. Mr Lam shared the notes of this meeting with Mr Taylor and Mr Jordan, but not the Claimant or Mr Gregory.

64. The Claimant was by this time already feeling under strain as a result of his own workload and tired of dealing with what he regarded as problems in Mr Gregory's work. He was having difficulty sleeping. He did not deal in his witness statement with the meeting of 20 August, but we infer that it upset him because Ms Taylor's evidence (which there is no reason for us not to accept) was that he went to speak to her about it the following day and raised concerns with her about how the matters raised by Mr Gregory in the meeting the previous day reflected on him. Before going to see Ms Taylor, the Claimant tried to speak to Mr Lam about his concerns about Mr Gregory generally but Mr Lam told him that he could not deal with the Claimant's concerns because of Mr Gregory's accusations of favouritism. It was Mr Lam

who said the Claimant should speak direct to HR. Ms Taylor talked through the Claimant's options, which included raising concerns with his line manager or with HR to seek an informal resolution, to speak directly to Mr Gregory or to raise a formal grievance. The Claimant said he would decide and come back to HR. Ms Taylor said he should contact Ms Snape if he wanted further advice.

Alleged third protected disclosure

65. On 22 August 2018, the Claimant was undertaking the usual monthly peer review of Mr Gregory's management accounts. He identified a large number of transactions as appearing in the purchase order system (IPos) but not in the management accounts. He wrote an email to Mr Gregory, copying in Mr Lam and Mr Jordan, heading his email *"Unaccounted IPos transaction P7"* and including a table of figures with transactions from various dates from March through to August 2018 (and not just "P7" which was July). The Claimant's email said that he could not understand the transactions and recommended that Mr Gregory revisit the account. He provided no further explanation, but in oral evidence he said that the extract from the management account he provided contained further data 'behind it' in the excel document which showed that the IPos transactions he had listed were not included in the management accounts for July.

66. Mr Gregory replied later that day providing comments, which included the following: *"The report you had provided covers Period 8 (P8); therefore approximately £155,000 is not applicable to Period 7 (P7)".* He also said: *"I appreciate you for providing the review notes, but please provide these back to me on time as they were due yesterday close of business. This will allow me to have time to review and make any potential accounting entries within SUN"*. This last comment 'needled' the Claimant and we consider that it is reflective of Mr Gregory 'going on the defensive'.

67. The Claimant's response the next day (23 August) included the following: *"I think you are completely missing the point and you don't understand IPOs and accrual. It is quite easy to spot from the description, those expenses are related to April, May, June and July are not accounted. My initial review and just add this up in excel are over £71,000. If you believed these are all future expenses and should be ignored or immaterial to be accounted for as marketing has a big budget, then it would be meaningless to review your account."* The Claimant's reply here was described by Mr Morgan at the appeal stage as *"curt and unhelpful"* and we agree that this is an appropriate description of it. We would add that the Claimant here makes his frustration with Mr Gregory plain. We infer that part of the reason for this is because the Claimant had been genuinely upset by the meeting of 20 August at which he had been confronted with Mr Gregory's *"petty issues"* for the first time and it is partly for this reason that he lets his frustration show.

68. Mr Gregory responded 20 minutes later: *"your comment is rather offensive and I would rather focus on the transactions versus responding to your opinion. I believe we are professionals and we respect each other*

accordingly. As for the accruals, these expenses were not put into IPOs on time and the organisation is aware that these will be going into August."

69. Mr Gregory replied again at 12.32 on 23 August, commenting: *"The first two lines you had mentioned have already been captured in MAs. August iPos has not."*

70. The Claimant then responded at 16.17 stating that he had completed the full review for the Marketing department and attaching a report, the summary of which was a table that he put in his email which explained his concerns that in total about £155,000 that should have been included in the July or earlier management accounts was not. He stated that: *"Potentially over £71k marketing cost understated in marketing department management account July 18 Period"*, *"July 18 management account for marketing department is inaccurate and it might mislead the management who [rely] on the management accounts to make informed business decision. It doesn't comply with the accounting accrual standard, expenses incurred in the period not being recognised in the same period. As a result, error of omission has an adverse impact for IoD as an organsiation"*. He also said that: *"Over £83k expenses in August unclear if it should be accounted for in July 18 period"* and identified concerns as: *"There are transactions date registered in the system dated as earlier as March 2018 which raise concerns for appropriateness and accountability As a result, cost incurred not being accounted correctly in the right period and IoD management account could be further impact by under reported cost."*

71. Mr Jordon and Mr Lam were copied in on all the above emails.

72. The Claimant said in his oral and written evidence that Mr Gregory was here denying his errors and insisting that the organisation was aware of the expenses going into the wrong period, but that in his view this was a breach of accounting standards and the Respondent failed to rectify this issue. Mr Jordan said that there was no breach of accounting standards because the transactions that had been omitted from the management accounts *"would have related to costs where we had received the goods or service but were waiting to receive the supplier invoice, so would have to be accrued",* that it did not in any event matter if the monthly reporting was not fully accurate because monthly reporting was only to the Management Team (and to the Board at scheduled Board meetings) and further the potential errors identified by the Claimant were below the Respondent's level of materiality (£230-£250,000). For the purposes of these proceedings, we do not have to decide who was actually right about these matters. However, we find that the Claimant did subjectively believe that the errors he had identified amounted to breaches of legal obligations. We have already set out above in relation to the Claimant's alleged second protected disclosure that in general terms the Claimant subjectively believed that failure to account for income and expenditure in the proper period was a breach of legal obligations, and for this third alleged protected disclosure he said as much in his 'summary report' email at 16.17 on 23 August 2018, using terms such as *"misleading"*, *"not being accounted correctly"* and *"doesn't comply with the accounting accrual*

standard". The Claimant further gave evidence that he believed that these were matters of public interest because the Respondent is a public (or 'not private') organisation, and has 30,000 members and the Respondent is obliged both to its members and the public to produce accurate financial statements which are relied on by HMRC for tax purposes. We deal with the reasonableness of the Claimant's subjective belief in this respect in our Conclusions section.

73. Mr Jordan was concerned about the exchange between the Claimant and Mr Gregory set out above and late on the evening of 23 August 2018 he forwarded some of the emails to Ms Taylor saying: *"Sorry … see below emails between Scott and Sean today. Totally unacceptable, but just demonstrates where the relationship is at."* What he sent to Ms Taylor beneath that email did not include the last two emails in the chain. As a result, it did not include the Claimant's final report and summary of that which identified his concerns about financial irregularities very clearly. Nor did it include the tables of figures that the Claimant had included in his emails. Mr Jordan removed all of this information because he considered it was the Claimant's behaviour that was relevant, not the numbers. (We should add that there are also figures redacted from the version of Mr Gregory's email at p 227 in the bundle, but we accept that these redactions were done by the Respondent's lawyers for the purposes of disclosure in these proceedings and not by Mr Jordan at the time.)

74. We have considered carefully whether Mr Jordan's decision not to forward the last email from the Claimant at 16.17 – an email which has at least the 'hallmarks' of being a 'protected disclosure' or 'act of whistleblowing' – was because he wished to hide potential protected disclosures from Ms Taylor and present to her only what he regarded as evidence of the Claimant's poor behaviour. However, we do not consider that is what happened in this case. We accept Mr Jordan's evidence that he was dismayed by the tone of the email exchange between the Claimant and Mr Gregory and genuinely considered it to be, as he said in his email to Ms Taylor, *"totally unacceptable"* and confirmation of what was in his mind a breakdown in their working relationship. We are strengthened in our conclusion that Mr Jordan was not seeking to hide the Claimant's alleged protected disclosure from Ms Taylor or present her with a false picture, by what Mr Jordan said in evidence about the substance of the Claimant's concerns. His evidence was that there was the possibility for different views to be taken of how transactions from the IPos system should be accrued; management accounts were relatively unimportant as errors in them could be corrected before year end; and his view of the level of materiality for the Respondent meant that the issues the Claimant had identified fell below the materiality threshold (a point he made both in his witness statement and in oral evidence, albeit that he did not give the figure for materiality in his witness statement). For reasons which we set out in our Conclusions section, we do not consider that Mr Jordan's view about the substance of the Claimant's concerns means that the Claimant's subjective belief about the Respondent's legal obligations was unreasonable, but we do find that Mr Jordan's view explains why he did not give much weight

to the issues that the Claimant was raising and focused instead on the way that the Claimant and Mr Gregory communicated in these emails.

Conclusion of Mr Gregory's informal grievance

75. On 29 August 2018 Mr Lam emailed Ms Taylor and Miss Jordan again with an update as to what had happened in the previous two weeks, including the meetings of 16 and 20 August. He said that he had been dealing with Mr Gregory's complaints for the past 2.5 months, but they were still unresolved. He said that since 15 June he had made the personal adjustment of not having lunch with the Claimant at work, but this had not resulted in any positive impact. He said that he was no longer comfortable for the Claimant to report to him as it made him an "easy target" for other finance staff to claim favouritism.

76. On 4 September Mr Lam wrote to Mr Gregory setting out the steps that he felt had been taken with regard to his favouritism complaint and his view that all items were now closed. Mr Gregory responded on 5 September asking Mr Lam to accept the complaint as closed. On 6 September, Mr Lam then forwarded that to Ms Taylor and Mr Jordan, reiterating again that much time had been spent in reaching a 'closed' position on Mr Gregory's favouritism complaints. Ms Taylor in turn shared this with Ms Snape.

Interaction between the Claimant and Mr Gregory after 23 August

77. On 7 September the Claimant emailed Mr Gregory, copying in other members of the finance team (Ms Li, Slatko Viskovic and Mr Lam) querying Mr Gregory's expenses template for membership stating *"the submitted version is cost uplift £30,254 vs £65,647 cost uplift. Can you verify why you send a different file for upload?"*. Mr Gregory responded stating that the £30k was a draft version and the final version was £65k, which he had spoken to Mr Jordan about and which Mr Jordan had approved. The Claimant replied *"As a forecast and Budget lead, I am not aware that you have spoken to Jim and by passed the process and without updating myself. The file that we have submitted to ExCo is below."* Mr Gregory responded: *"A bit of miscommunication but hopefully this helps resolve any confusion."* His email suggests that Mr Gregory had used a draft figure by accident and did not realise until the Claimant pointed it out. He had then checked with Mr Jordan who approved use of the £65k figure, but Mr Jordan then intervened by email to say that in fact he had not understood what Mr Gregory was talking about and the figure should stay as £30k. Mr Jordan's email begins: *"Miscommunication all round, in part because being a Friday so many people are not in the office to be able to have face to face conversations. There has been no bypassing of process."* The Claimant thanked Mr Jordan for the clarification and asked Mr Gregory to resubmit the original file for forecast consolidation purposes.

78. On 12 September 2018 Mr Gregory sent an email to another employee, Zlatko, asking for updates with regard to a project. Zlatko replied the same day providing some information and concluding *"As soon as I return, I will*

continue the research and present the results". The next day the Claimant emailed Mr Gregory *"We understand Zlatko is on holiday, why are you asking Zlatko to work during his holiday? I believe we need to respect our colleagues while they are on holiday"*, to which Mr Gregory replied, *"Sean please do not send emails like this. The email never stated for him to work on holiday."* The Claimant in cross-examination said, and we accept as there is no reason not to believe him on this, that he sent this email because he was concerned to protect Zlatko as it was the first holiday he had had since losing both his parents. This email chain was not copied to Mr Jordan.

79. Ms Omeri submits that the above two exchanges, together with the previous email exchange on 22/23 August 2018 (which the Claimant relies on as his third protected disclosure) show that the Claimant was consistently the aggressor, and was rude and antagonistic towards Mr Gregory. We do not accept this submission. For a start, these are only three emails. We do not accept that they reflect anything like the full extent of the interaction between the two of them during this period. Regarding the 22/23 August exchange, what we see is the Claimant raising concerns initially on a neutral basis and asking Mr Gregory to look at it again, Mr Gregory's response is not friendly in tone and includes a criticism of the Claimant being late, so it could be said that Mr Gregory 'started' the antagonistic tone on this occasion. As already noted above, the Claimant's reply was regarded by Mr Morgan at the appeal stage as *"curt and unhelpful"* and we agree that this is an accurate description of it and that it is more antagonistic than Mr Gregory's email. However, it is clearly born of professional frustration with Mr Gregory and it has to be viewed in the context of the audience for the email being familiar with the Claimant's normal mode of expression which is, from what we have seen, generally very direct and he does not deploy the nuanced forms of expression which we might expect from a native English speaker. Equally, Mr Gregory does not help matters by responding that he finds the email *"offensive"* rather than, for example, using more measured language such as 'unhelpful' or 'unnecessary'. As to the email exchange on 7 September, we can see nothing particularly exceptional in this, bearing in mind what we have observed about the Claimant's general mode of expression. Again, it is the Claimant reasonably picking Mr Gregory up on an apparent error (which Mr Jordan accepts). Mr Gregory does not like this, but it is professionally handled and cannot reasonably be regarded as rude. Much the same applies to the exchange on 12 September. We add that we place no weight on who is copied in to all these emails. From what we have seen, exchanges about accounts issues or matters relevant to the team (such as who is on holiday) are normally copied to several team members.

80. Mr Jordan said that by this time the impact on the finance team of what he perceived to be the breakdown in the working relationship between Mr Gregory and the Claimant was significant. He said that he believed that the two of them were not working effectively together and had stopped communicating with each other verbally. He said that this was extremely uncomfortable for other team members given the close proximity in which they sat to each other and created a bad atmosphere in the team generally,

negatively impacting on employee morale. However, Mr Jordan did not witness any such behaviour between the two of them himself. His evidence in this respect is second-hand. He said that he was told about this by the Respondent's Ex Procurement Manager Alison Challis (who has since retired) who said that the Claimant and Mr Gregory would frequently make snarky comments to each other and talk to others in the team but then fall silent when the other one walked into the room. Ms Challis told Mr Jordan that they did not ever do this when Mr Jordan was in the room because of his seniority. Ms Challis has not, however, been tendered as a witness, so we can place little weight on this evidence.

81. Mr Jordan said that the impact of the relationship breakdown was also being felt outside the finance team, for example by the Head of Hospitality, Jeremy Warrilow, who said it was clear that there was tension in the team. Mr Warrilow gave evidence that his impression was that the Claimant disliked several of his team members (but particularly Mr Gregory) and was 'not a team player or positive addition to the IoD'. His impression in this respect was based on certain 'comments' by the Claimant (he gave no examples) and the Claimant's body language (such as 'shoulder shrugs') when other members of the team were speaking. Mr Warrilow conveyed his impressions to Mr Jordan.

82. Ms Snape gave evidence that Alison Challis and Mr Jordan also approached her to complain about the breakdown in working relations between the Claimant and Mr Gregory. She also said that Mr Gregory approached the HR team regularly, saying that he did not know what to do but wanted to fix the situation. Ms Snape said that Mr Gregory was very concerned about the impact that the situation was having on the team, he was willing to try mediation although he was worried that the Claimant would not want to engage with this or take it seriously.

83. We have no reason not to accept the above evidence from the Respondent's witnesses as to their *perception* of the working relationship between the Claimant and Mr Gregory, but as evidence of what was actually happening at this time, it is very limited in its extent and the weight we can place on it. Essentially, it comprises some anecdotal evidence from Ms Challis who has not been a witness in these proceedings, together with evidence from Mr Warrilow as to his impression of the Claimant's views of his team members based on certain non-specific comments and generic body language. It does not follow from our acceptance of the genuineness of the Respondent's witnesses perceptions that we find there had been a breakdown in working relations, or that it was reasonable so to conclude, or that the Claimant's perception of the situation was or ought to have been the same, or that he should or ought to have been aware of the views of the Respondent's witnesses.

84. The Claimant in his appeal hearing after dismissal acknowledged that after the email exchange of 22/23 August 2018 the relationship between him and Mr Gregory had become 'very difficult' and he felt that Mr Gregory had stopped communicating with him. In cross-examination, it was suggested to

him that in the course of that appeal hearing he had accepted that there had been a breakdown in working relations with Mr Gregory. We do note that in the appeal hearing he often uses that language, but we find that this was because he had by that time adopted the terminology used by Mr Jordan in the dismissal letter to describe the situation between him and Mr Gregory, rather than this being how he saw the position at the time. It does not appear that Mr Morgan (who chaired the appeal hearing) thought the Claimant was accepting that there had been a breakdown in working relations either because the outcome letter records the Claimant as having described the relationship as *"tense but professional"*. A further reason for finding that the Claimant was not in his appeal hearing accepting there had been a breakdown in working relations (and certainly not that there had been irreparable breakdown) is that several times in the course of that hearing he said that he thought mediation could work and was the appropriate way forward.

85. The Claimant in oral evidence denied feeling any personal animosity toward Mr Gregory, although he was clearly fed up with having to deal with what he regarded as mistakes in Mr Gregory's work. This is consistent with what he said at the appeal hearing. Prior to the 20 August 2018 meeting the Claimant had simply dealt with what he perceived as being mistakes by Mr Gregory as part of his day-to-day job. He was until that point unaware of Mr Gregory's complaints of favouritism, and even after that point still largely unaware of Mr Gregory's complaints about him personally. The Claimant never sought to complain about Mr Gregory personally (as opposed to about his work) and there is no evidence presented to us of the Claimant being antagonistic to Mr Gregory prior to the emails of 22/23 August 2018 we have set out above. Even after that he said that one or other of them was often working from home, but when in the office he would still offer to get coffee for Mr Gregory and things like that. We have no reason not to accept the Claimant's evidence about working from home, especially given Mr Jordan's own email of 7 September 2018 we have referred to above where he acknowledges that there was a miscommunication between team members as a result of people working at home. Nor do we have any reason to reject the Claimant's that he made small gestures like that, despite recognising the difficulty and strain in their relationship at this point.

86. We must also deal with the evidence of Mr Jordan and Ms Snape as to what they say Mr Lam said to them at this time about the impact of what they describe as *"the relationship breakdown"*. They say that Mr Lam talked to them about this frequently and said that he had sought to reconcile the Claimant and Mr Gregory. Mr Lam was clear that he had not had such discussions with Mr Jordan and Ms Snape. We have already dealt with this point to an extent at paragraph 57 above. What he had been discussing with them was the impact that Mr Gregory's complaints had had on him and the team. We accept his evidence in this regard, as it is consistent with the documentary record, which shows Mr Lam having spent a very considerable amount of time and effort dealing with Mr Gregory's complaints between 13 June 2018 and 6 September 2018 when Mr Gregory finally accepted his

grievance as being 'closed'. Mr Lam did not regard Mr Gregory's complaints as being particularly focused on the Claimant. Consistent with his documentary record, Mr Lam regarded Mr Gregory's complaints as being directed at him, with complaints about other members of the team (including the Claimant) being, relatively speaking, 'side issues'. Further, Mr Lam saw Mr Gregory as being a relatively poor performer in comparison to the Claimant. Mr Lam was of the view that the Claimant's knowledge and skills were superior, and the Claimant was of course a fully qualified accountant. Mr Lam said that although he had been persuaded by Mr Gregory when he interviewed him that he was the right person for the job, in time it had become apparent that, as a result of most of his experience being with the US accounting system there were significant gaps in Mr Gregory's knowledge, in particular in relation to VAT. Mr Lam thus saw Mr Gregory as someone who was a weak performer, struggling with his work, who had persisted in raising complaints of favouritism over a long period – complaints which although Mr Lam regarded as unjustified he had nonetheless sought to address by supporting Mr Gregory to pursue the CIMA qualification, transferring part of his work responsibilities to the Claimant and ceasing having lunch with the Claimant. In other words, Mr Gregory had for some months made Mr Lam's life difficult and we do not find that Mr Lam described this situation to Mr Jordan and Ms Snape as a being a breakdown in working relations between the Claimant and Mr Gregory. (We make clear that in reaching this finding about Mr Lam's evidence at this stage, we have taken into account the evidence regarding the conversation between Mr Jordan and Mr Lam on 6 September 2018, which we deal with below.)

87. What we find has happened here is that Mr Gregory had been taking his complaints about the Claimant direct to HR and Mr Jordan rather than to Mr Lam and so discussions between Mr Jordan, Ms Snape and Mr Lam about the situation were discussions that were to a certain extent at 'cross purposes', where the two sides were approaching the situation from very different perspectives. Mr Jordan and Ms Snape perceived there to have been a breakdown in working relations between the Claimant and Mr Gregory and viewed the Claimant as having been the 'aggressor' in that respect because of both what Mr Gregory had said to them and their own experiences of the Claimant's occasionally difficult interactions with them and other members of staff on other issues. They heard what Mr Lam said about the situation through the 'prism' of their very different perspective. However, while we accept Ms Snape and Mr Jordan's evidence as to their understanding of what Mr Lam was telling them as genuine and honest, it was not reasonable. They should have appreciated that as a result of their interactions with Mr Gregory, they had had a one-sided account of the situation and Mr Jordan, in particular, ought to have been aware as a result of his email correspondence with Mr Lam about Mr Gregory's complaints that Mr Lam considered that the main problem he was dealing with was Mr Gregory's complaints of favouritism, not any problem between the Claimant and Mr Gregory.

The Claimant's conversations with Lauren Snape

88. Following his conversation with Ms Taylor on 21 August the Claimant reflected on what to do and decided to approach Ms Snape for further guidance. He wrote to her on 3 September 2018 asking about the Respondent's grievance procedures.

89. There is a dispute between the Claimant and Ms Snape as to how many meetings there were between them following this email. The Claimant was very sure there was only one. Ms Snape appears to describe three in her statement, although it is not entirely clear. From the emails in the bundle, we conclude that there was a short meeting on 6 September 2018 at which the Claimant's options concerning raising a grievance were discussed; a meeting on 11 September 2018 which was the 'main' meeting and the one where the Claimant gave Ms Snape the chain of emails comprising his third protected disclosure and they had a discussion about issues arising from that; and then there was a third short meeting on 14 September when Ms Snape arranged on the day what she described as a 'catch-up' with the Claimant at which she communicated to him that there was a letter ready to be sent to him. We deal with the 14 September meeting below. So far as concerns the meetings of 6 September and 11 September, the facts that we have found to be material to our decision are as follows:-

    (1) When the Claimant asked Ms Snape about the possibility of raising a formal grievance, she discouraged him from doing this, saying that if he raised a formal grievance about Mr Gregory the possible outcomes included that one or both of them could be dismissed. This was the Claimant's evidence in his witness statement, which he maintained under cross-examination. It was what Mr Morgan said Ms Snape had said in the appeal outcome letter (see p 176). It was also effectively what Ms Snape said in her witness statement, although she added there that she had said dismissal was a possibility if a formal grievance was raised and *"if the breakdown wasn't resolved"*. However, we do not accept that she used this language at the time. The Claimant had come to her to raise what he regarded as a serious issue about Mr Gregory's work. We do not accept that she used the language of relationship breakdown to him. We find that the Claimant's evidence on this, which is consistent with what Mr Morgan said in the appeal letter, is to be preferred. Ms Snape said that if a formal grievance was raised one of the outcomes, depending on the findings, could be dismissal. The Respondent is relying on what Ms Snape said as being a 'warning' to the Claimant about the possibility of dismissal, and as part of its case as to why the dismissal was fair. However, we find that what Ms Snape said to the Claimant on this occasion was not a warning that he might be dismissed if he continued behaving toward Mr Gregory in the way that he was, or even a waning that he may be dismissed if he failed to resolve his differences with Mr Gregory. It was simply a warning that if he raised

a formal grievance about Mr Gregory one of the outcomes might be that he was dismissed.

(2) The Claimant did say to Ms Snape that he could 'no longer work with Mr Gregory'. Although it was denied by the Claimant, we find that this is because he now sees the reliance that the Respondent has placed on this and sees the potential damage that this does to his case. However, we consider that this is another example of the two sides of a conversation having different perspectives on it and so understanding it in different ways. We accept Ms Snape's evidence that the Claimant said that he could no longer work with Mr Gregory as it is plausible that the Claimant did say such a thing in the context of presenting to Ms Snape what he perceived as being clear evidence of Mr Gregory's incompetence in relation in particular to the errors he had identified in the marketing management accounts on 22/23 August. We therefore find on the balance of probabilities that the Claimant did say to Ms Snape that he could not work with Mr Gregory. For him, it was a way of making clear to Ms Taylor that he viewed Mr Gregory as a poor performer, who was making his own job much harder and he wanted HR to do something about it. For Ms Snape, on the other hand, who had been the recipient for months of complaints by Mr Gregory about the Claimant, who had heard some of the reports from some of their colleagues, and who knew that Mr Jordan was considering dismissing one or both of them, it came across as confirmation from the Claimant that he accepted there was a breakdown in their working relationship.

(3) We find that what the Claimant said could also have been interpreted by Ms Snape as him not taking any responsibility for the matters about which Mr Gregory had been complaining, or what she perceived to be a breakdown in their working relationships. This is not surprising because, so far as the Claimant was aware, the only complaint that Mr Gregory had made about him was that he did not share his knowledge about VAT and all of Mr Gregory's other complaints were about Mr Lam or other people. There was no reason for the Claimant to accept 'responsibility' for these matters. Given that the Claimant perceived the issue with Mr Gregory to be one of his poor performance rather than anything personal there was also no reason for him to accept 'responsibility' for Mr Gregory's poor performance.

(4) Mediation was not discussed and the Claimant did not refuse mediation. In this respect, we accept the Claimant's evidence which has been consistent from his appeal onwards. Although it was suggested to the Claimant in cross-examination that he had been offered and refused mediation by Ms Snape, Ms Snape's witness statement does not say in terms that she offered mediation; she says that the Claimant was 'clear that he was not open to mediation'. Mr Morgan's finding at the appeal stage was that *"while no formal*

mediation was offered, Jim, Chee and HR made every effort to encourage you and Scott to find a resolution to the situation". (We note that Mr Morgan elaborated on this considerably in his witness statement, but we consider it likely that what he put in his appeal outcome letter better reflects his understanding at the time.) Mr Morgan also stated in the appeal outcome letter that *"Chee attempted informal mediation on a number of occasions"*, which is simply incorrect on the basis of the evidence that we have received in these proceedings. He does not suggest in the appeal outcome letter that 'mediation' in terms had been raised with the Claimant and we find that it was not and the Claimant accordingly did not refuse mediation or say he was 'not open' to it. We do, however, accept that the Claimant gave the impression that he was not interested in working on a 'resolution' with Mr Gregory as this position would have been consistent with his view that the problem was Mr Gregory's performance and it does not make sense to 'mediate' a performance issue. We therefore also accept Ms Snape's evidence that she made clear to the Claimant in response to his expressing this view that the Respondent did not have an issue with Mr Gregory's ability to do his role.

(5) In the course of the meeting on 11 September the Claimant told Ms Snape that he did not want to raise a formal grievance, but he did want her to look into the matters that he had raised about Mr Gregory's performance, in particular the problems he had identified in his third protected disclosure, and he gave her a copy of the email chain of 22/23 August 2018.

90. The Claimant came away from his meetings with Ms Snape under the impression that she was going to discuss with Mr Jordan and Ms Taylor the matters that he had raised concerning Mr Gregory's performance and in particular the issues he had raised in his third protected disclosure. There is also evidence that he was by this stage feeling very stressed by the situation. He went to his GP on 7 September 2018 (the day after his initial discussion with Ms Snape) reporting what his GP recorded as a 'new' problem of stress at work relating to difficulties with 'his closest team' and feeling 'overwhelmed about work load'.

<u>Mr Jordan's investigation</u>

91. Mr Jordan in his witness statement describes how by early September 2018 it had become clear to him as a result of the matters set out above of which he was aware (in particular the email exchanges between the Claimant and Mr Gregory and the reports he was receiving from colleagues) that the relationship between the Claimant and Mr Gregory *"had completely broken down"* and that this was having a negative impact on the performance of the finance team. The team was also under pressure because of the Respondent's financial difficulties and he considered that what he perceived to be the relationship breakdown was affecting the finance team's service delivery to the wider business. The issue had also come to the attention of

the Respondent's Director General Stephen Martin, who urged Mr Jordan to do something about it.

92. Mr Jordan therefore decided to commence what he describes as an investigation into the issues. As part of his investigation, he reviewed all of the documentary evidence, such as the emails between Mr Gregory and the Claimant, and spoke to Mr Lam, Alison Challis (Ex Head of Procurement), Jeremy Warrilow (Head of Hospitality), Stephen Martin, Vicky Taylor, and Lauren Snape. In his witness statement he said that he also spoke to *"Scott, Sean and Andrew"* but we reject his evidence in this respect because in oral evidence he confirmed to us that he did not speak to the Claimant himself at any point about the issue, that the only conversation he had with Mr Gregory about it was on 15 August as we have set out above and Andrew West had left the organisation in July 2019 so could not have been spoken to at this point. With those people he did speak to, Mr Jordan did not carry out formal interviews, and did not take notes of any of his conversations.

93. Mr Jordan did not tell the Claimant that he was commencing an investigation. He said that he asked Mr Lam to do this, but Mr Lam said he was not even told about an investigation and did not tell the Claimant. This is consistent with the Claimant's evidence that he knew nothing about it either and we accept the evidence of Mr Lam and the Claimant on this point.

94. As part of this investigation, Mr Jordan had a conversation with Mr Lam on or about 6 September 2019. Mr Lam recalled that conversation and said that in that conversation he expressed the view that in fairness either both the Claimant and Mr Gregory should be dismissed, or neither. When questioned as to why he expressed that view if he did not consider there had been a breakdown in working relations, he said that it was in his view more a matter of professional disagreements and his concern that they could not work together because of professional incompatibility. We have considered whether Mr Lam's evidence about what he said to Mr Jordan undermines his evidence that he did not consider there to have been a breakdown in working relations, as the Respondent suggests, but we do not find it does. What he said, and his explanation for it are consistent with his view all along that the problem had been Mr Gregory's complaints of favouritism by him, while the Claimant's concerns about Mr Gregory related to his ability to do his job. At this stage, so far as Mr Lam was concerned, he had finally (after three months) reached a resolution of Mr Gregory's complaints and there is no suggestion anywhere that Mr Lam considered any further action was needed either with regard to Mr Gregory or the Claimant. Mr Gregory's complaints and the Claimant's concerns about Mr Gregory were in his view different issues which did not add up to a breakdown in working relations between the Claimant and Mr Gregory. Mr Jordan, however, had taken it upon himself to conduct an investigation and had gone to Mr Lam to canvass his views on the situation as he (Mr Jordan) perceived it to be, i.e. that there had been a complete breakdown in working relations which was badly affecting the Respondent's business and could not continue. Mr Lam's view was thus expressed in response to an invitation from Mr Jordan based on a premise of

Mr Jordan's that the situation was unworkable. In that context, Mr Lam's concern was to emphasise to Mr Jordan that if he was going to take action, he should act fairly.

95. Mr Jordan in oral evidence said that in the course of this conversation on 6 September 2018 Mr Lam had come round to his view that it was the Claimant who should be dismissed, but we do not accept this evidence. From what Mr Jordan said in oral evidence, it was clear that his belief that Mr Lam agreed with him was based on the fact that Mr Lam sat next to him on 2 November while he communicated the decision to dismiss the Claimant and did not object. Mr Lam, however, had not heard from Mr Jordan on this issue since 6 September and did not know until 11am on 2 November that Mr Jordan planned to dismiss the Claimant. He was, we accept, shocked by Mr Jordan's decision and actions and we find that no inference as to his agreement with Mr Jordan's decision can be taken from the fact that he sat next to him while he communicated that decision.

96. By 14 September 2019 Mr Jordan had decided to dismiss the Claimant and had drafted a dismissal letter setting out his reasons for that decision. Although the letter was headed "Grievance outcome" and purported to be a response to a grievance raised by the Claimant, the Claimant had not in fact raised a formal grievance. A similar letter had been drafted to Mr Gregory, although he had not raised a formal grievance either and the informal grievance that he *had* raised he had accepted in an email to Mr Lam on 5 September 2018 had been concluded. The letter to Mr Gregory explained that Mr Jordan had decided to dismiss the Claimant. The letter as drafted to the Claimant by 14 September 2019 was materially identical to that eventually sent to the Claimant on 5 November 2019.

97. Ms Snape, Ms Taylor and Mr Jordan all agreed with the decision to dismiss the Claimant, but they were all clear that it was ultimately Mr Jordan's decision and he accepted full responsibility for it. Other possibilities were discussed, but rejected. Ms Taylor and Mr Jordan discussed whether the Claimant or Mr Gregory could be moved to sit in another area of the business or if either or both could be relocated to a different role within the business, or if Mr Lam or Mr Jordan could sit next to them and/or whether either or both could work from home full-time or part-time and not be in the office on the same days. However Mr Jordan's conclusion, with which Ms Taylor agreed, was that this was not viable for the business and none of these options would solve the issue, in terms of the significant impact on both the individuals, the wider team and business generally. They also agreed that if both the Claimant and Mr Gregory were dismissed it would have too great an impact on the team in terms of workload, and they both felt that Mr Gregory had raised genuine concerns that he had tried to resolve, but the Claimant had not reacted appropriately. Ms Taylor did not advise Mr Jordan to follow any particular procedure with regard to dismissing the Claimant because she considered that this was a 'some other substantial reason' dismissal to which the procedures did not apply.

98. On 14 September 2018, Ms Snape asked the Claimant to meet her for a 'catch up' and verbally communicated to the Claimant that Mr Jordan would send him a letter on 17 September regarding the issues he had been investigating and that she and Mr Jordan would like to meet with the Claimant to talk it through. The Claimant, unaware of what Mr Jordan had been doing, believed that this letter related to the matters he had discussed with Ms Snape on 11 September 2018, i.e. his third protected disclosure and concerns about Mr Gregory's performance.

Claimant signed off sick

99. On 17 September 2018 the Claimant was not feeling well and informed Ms Snape and Mr Lam that he would not be coming in and was seeing his GP. He then forwarded a sick certificate from his GP which gave work-related stress as reason for absence and signed him off for three weeks. He had been due to take holiday and he asked if he could still take that holiday whilst signed off sick. Ms Snape agreed to this. She also wrote: *"although I can appreciate that this will be a difficult time for you, given that you write below that you have been signed off for work related stress, I think it would be a good idea to still share the letter with you that we discussed last week. Would you be comfortable me sending this through to you? I am happy to discuss the letter once you have read this through if you wish, however this is also something that we are able to pick up on your return to whatever approach you wish to adopt will be fine with us."* The Respondent's intention at this point was to send the Claimant the dismissal letter by email without any meeting first. The Claimant had no way of knowing that the letter was a dismissal letter. The Claimant still thought that the letter to which Ms Snape was referring in these emails was a letter in response to the matters he had raised with her about Mr Gregory's performance and his financial concerns. The Claimant responded to Ms Snape that he needed to *"take a break from the stressful environment here"*. Regarding the letter he said, *"I think best if I can see you face-to-face. As we discussed last week, I would like to work with you."*

100. The correspondence between Ms Snape and the Claimant continued on 18 and 20 September. In that she asked him how he would like to approach the face to face meeting or whether he would like the letter ahead of the meeting. The Claimant asked her to hold the letter until his return.

101. On 4 October 2018 the Claimant was signed off sick by his GP for a further four weeks. He had been diagnosed with depression and was on medication.

102. On 1 November 2018 the Claimant's GP recommended that he commence a phased return to work, although he continued to suffer from depression and was still on medication. The Claimant therefore contacted the Respondent to arrange a return.

The Claimant's dismissal

103. On 2 November 2018 the Claimant returned to work. Mr Lam and Mr Jordan were meeting that morning about budget. Shortly before 11am Mr Jordan told Mr Lam that he was going to dismiss the Claimant and asked him to email the Claimant to invite him to a meeting. Mr Lam was shocked as he had never known a senior manager behave like this, but did as he was asked. At 11am Mr Lam emailed the Claimant inviting him to a meeting. The email reasonably gave the Claimant the impression he was being asked to a meeting to discuss the 2019 budget.

104. Once in the meeting, Mr Jordan proceeded to read out the dismissal letter verbatim. He then said that if the Claimant wished to say anything he could, but that he would have the right to appeal and that this would be set out in writing. The Claimant did not say anything substantive in response, but decided to await the written confirmation of the decision. We find that it was reasonable for the Claimant not to respond at this stage. No one can reasonably be expected to respond on the spot to a lengthy letter such as this setting out a concluded view on multiple issues and communicating a decision to dismiss. Likewise, we do not consider that Mr Lam could reasonably be expected to have protested about this in the circumstances. He was shocked, and we accept his evidence on this. Mr Jordan was his superior and the process by which Mr Jordan arrived at his decision and decided to communicate it would have shocked any reasonable person. No one from HR was present at the meeting. Mr Jordan had not asked for support and none was offered by HR.

105. The Claimant returned to the office to collect his things and told those in the office that Mr Jordan had just dismissed him.

106. The decision to dismiss the Claimant was confirmed to the Claimant in a letter of 5 November 2018 from Mr Jordan.

107. The letter of 5 November 2018, which (as already noted) was materially identical to the draft prepared by 14 September 2018, is headed "Grievance Outcome". The letter begins by summarising the grievances that Mr Jordan had identified the Claimant and Mr Gregory as raising against each other. It then sets out Mr Jordan's findings, which may be summarised as follows:

    (1) Mr Jordan found that Mr Gregory had behaved inappropriately because he had raised largely petty issues which had needlessly been escalated to a formal senior level, being disruptive to the rest of the wider finance team and impacted the Respondent's ability effectively to deliver its business. However the Claimant had also played a significant part in this and had not been as supportive of his team members as the Respondent would expect for someone in his role, on his pay grade and with his experience. The Claimant had not reacted to Mr Gregory's complaints in a professional and mature manner, but had allowed it unnecessarily to escalate. Mr Jordan stated that it was untenable for the business to have senior finance

team members who cannot work effectively together and take up a significant amount of time of other senior members of the business such as Mr Jordan, Mr Lam and HR.

(2) Although the team has a substantial workload, the Claimant had been well supported by Mr Lam and had always been allowed to work from home when he requested it, including from Malaysia when required.

(3) Mr Jordan did not find any evidence that there had been an invasion of the Claimant's privacy or a GDPR breach by Mr Gregory (or any other member of the finance team) regarding the Claimant's arrangement working from Malaysia in January 2018 as there had been a clear business need to ensure that the team were aware Claimant's working arrangements and the Claimant had not requested that the information be kept confidential.

(4) Mr Jordan considered that the Claimant had had an appropriate opportunity to respond formally to the grievances raised against him by Mr Gregory.

(5) Although the Claimant had had to check through Mr Gregory's work, this was part of his role and something that was expected of him as a senior member of the finance team. If there was an issue with Mr Gregory's performance, it was part of the Claimant's responsibility (as well as Mr Lam's and Mr Jordan's) to support him to address issues and his refusal to do this was disappointing.

108. Mr Jordan concluded that the reason that the Claimant had raised concerns about Mr Gregory was because of a personality clash and a desire not to work with him going forward, rather than a genuine belief that he had been unfairly treated. The fact that the Claimant had resorted to formally reporting the matter to Mr Lam and then having it escalated to Mr Jordan at a time when the team was under significant pressure was disappointing and frustrating to Mr Jordan. He said there was an urgent need to address the unhappy and uncomfortable working relationship and the behaviours that the Claimant had demonstrated that were not appropriate to a senior team member. He stated that the situation was too far gone to attempt resolution. He said that mediation would not be successful, given that informal attempts had already been made by Mr Lam and HR. He did not think that the status quo with the two of them working separately was a viable option. He said that the business was in a position where it was forced to dismiss one or both of them, and he had decided that it should be the Claimant who was dismissed. He stated that Mr Gregory was a 'team player', who worked *"extremely hard over the last few weeks to demonstrate that he is a team player and will do everything possible to move forward and find a constructive resolution to the current situation"* and 'deserved a second chance'. Regarding the Claimant he wrote as follows:

Unfortunately this is in direct comparison to the evidence that I have found of your behaviour, which shows a complete lack of being a team player on more than one occasion, to the detriment of the Finance Team. As you aware, the business is going through a challenging time financially and it is essential to me as CFO that I have a team who will genuinely work together to assist each other with any issues or queries they might have. Your failure on a number of occasions to share your superior knowledge with other members of the team, which could have helped resolve or deal with work related issues and instead your antagonistic behaviour towards them when receiving requests for assistance, causes me significant concern. This is particularly the case given your seniority – as you are well aware, you are not a junior employee and I expect you to behave in a positive and constructive manner when dealing with requests for assistance from your colleagues. As well as being unprofessional and generally unacceptable behaviour, this is in complete contrast to the IoD's values and has had a negative impact on team morale at a time when as a business we really need the team to pull together. As CFO and head of the team, I cannot be seen to tolerate this type of behaviour.

109. The Claimant was very distressed by Mr Jordan's decision. In his witness statement he said that he suffered a panic attack and an NHS medical report at this time records the Claimant as suffering severe depression and he had been prescribed an increased dose of medication. The Claimant felt that the Respondent chose to dismiss the competent employee who had reported financial irregularities, while keeping the incompetent employee who violated rules and regulations. He considered it was unfair that he had been regarded as not being team player as in around August 2018 he had received a thank you note placed on the "wall of wow" on the fifth floor noticeboard and believed that he was the first member of the finance team to receive such recognition. In these proceedings, he has also pointed as evidence of being a 'team player' to the work that he did while supposed to be on holiday in Malaysia in January 2018. Since his dismissal the Claimant has received counselling to help cope with depression. He stopped taking medication after a time as he considered it was not working, but has since suffered severe withdrawal symptoms from the antidepressants.

Appeal

110. On 8 November 2018 the Claimant appealed against his dismissal and asked if the Respondent would withdraw the dismissal and accept his resignation instead. In this letter, the Claimant says that he had taken legal advice. This was from ACAS and just related to ordinary dismissal issues. The Claimant did not say to ACAS that he considered he had been dismissed for raising protected disclosures (or anything like it) and therefore received no advice on that. In this letter the Claimant said that the procedure followed by the Respondent had been unfair. He also stated there were many substantive factual inaccuracies in Mr Jordan's letter, including particular regarding the Claimant's team working with most members of the team (he referred in particular to the "wall of wow" post) and he wrote *"I do not think you have taken into full account my very real efforts to help Scott before the relationship became very difficult; and then afterwards as best possible in a rather more strained context which I do not consider to be of my making or desire. I do not therefore accept your judgment as fair or well-substantiated regarding*

your decision to retain the services of Scott rather than myself. This seems unfair and not well-judged as a professional outcome". He also stated *"I do accept, however, that it has become untenable for me to continue employment with IoD since as you will understand my own trust in the working environment is now severely compromised"*. It was suggested to the Claimant in cross-examination that this latter sentence indicated an acceptance that his relationship with Mr Gregory could not be repaired. We do not read it as such. In context, this is clearly a reference to the fact that he considered he had been unfairly dismissed and there had 'now' lost trust in the working environment. We do note, however, the Claimant's acceptance in the preceding sentence that the relationship between him and Mr Gregory had become 'very difficult'.

111. Ms Taylor replied to say that it was not possible to withdraw the dismissal and accept his resignation. This was because she was concerned not to be in a position where the Respondent might have to give seemingly 'false' information on any future reference. We accept her evidence as to her reasons for this decision. She confirmed that the Claimant could exercise a right of appeal. On 22 November 2018 the Claimant sent a further letter of appeal to Mr Jordan. This was outside the time limit that had been set by the Respondent. He did not in his appeal letter contend that he had been dismissed for making protected disclosures. He repeated the points he had made in his letter of 8 November 2018.

112. An appeal meeting took place on 3 December 2018. This was chaired by Edwin Morgan (Director of Policy), with Nia Griffiths providing HR support (and recording the meeting). Mr Morgan did not know the Claimant well, although he had occasionally interacted with him previously. Although Mr Morgan and Mr Jordan were both members of the Executive Team, Mr Morgan regarded himself as senior to Mr Jordan as he acted as spokesperson for the Respondent when required. He had also subsequently been made Interim Director General, which he regarded as indicative of his perceived seniority at the Respondent.

113. The Claimant was given an opportunity to bring a companion to the appeal meeting, but was unable in the end to do so and agreed to the meeting going ahead in any event. At the appeal meeting the Claimant had the opportunity to say whatever he wanted to say.

114. At the appeal meeting the Claimant acknowledged that his working relationship with Mr Gregory had got worse, particularly after the email exchange of 22/23 August 2018. He said that he had tried to follow the right process with Mr Lam and HR with an informal grievance. He said that he did not understand why he had not been seen as a 'team player' and gave examples of the ways in which he thought he was a 'team player'. He said that his working relationship with Mr Gregory had been 'business professional' until he had pointed out Mr Gregory's mistakes in the 22/23 August email exchange. He said several times that he thought mediation was a good idea and that he thought it could work. He indicated that no one had

tried to mediate previously. He said that he had been overloaded with work in part as a result of having to take over departments from Mr Gregory.

115. The Claimant also told Ms Griffiths and Mr Morgan about his alleged third protected disclosure and specifically asserted that this was the reason for his dismissal. Mr Morgan's impression, however, was that the Claimant only raised this issue in the context of explaining the reasons for what the Respondent regarded as the breakdown in the relationship between him and Mr Gregory and/or Mr Gregory's poor performance. He did not understand the Claimant at any point to be alleging that the reason for his dismissal was anything other than the breakdown in working relationships. We find that Mr Morgan's understanding in this regard was reasonable as we do not consider that the Claimant himself at that stage really thought that he had been dismissed *because* of the matters he raised in his protected disclosures. His point was more that by raising these matters he had shown himself to be the better and/or more conscientious employee and that it was unfair for him to be dismissed when that was the case.

116. Following the meeting Mr Morgan undertook an investigation into his appeal, which included reviewing the documentary evidence and also speaking to Mr Jordan, Mr Lam and Ms Snape. While we accept that Mr Morgan spoke to Mr Lam, it was clear from his oral evidence that he took most of the information on the basis of which he reached his appeal decision from Mr Jordan and could not remember what Mr Lam had said to him. On 18 December 2018 the Claimant was informed by letter from Mr Morgan that the dismissal decision would be upheld. Mr Morgan set out his conclusions in detail.

117. Mr Morgan's appeal outcome letter includes a number of findings which are inconsistent with the facts as we have found them to be in these proceedings. This includes statements such as that Mr Lam and Mr Jordan *"both regularly communicated to you that the situation was untenable"*, when there is no evidence before us that they communicated this to the Claimant at any point. Mr Jordan even accepted he had not spoken to the Claimant at all about the situation with Mr Gregory. The letter suggests that the Claimant had been told that Mr Jordan was investigating the 'grievance' and that an outcome of that investigation could be dismissal for either the Claimant or Mr Gregory, when there is no evidence that the Claimant was told about Mr Jordan's investigation. The letter suggests that the Claimant had in fact raised a grievance about Mr Gregory, when he did not. The letter also suggests that the Claimant had 'requested' not to have notice of the 'grievance outcome letter' and that 'any deviation from the IoD's standard disciplinary process in this respect was made at your request'. This appears to be a finding that the Claimant had requested not to have any notice of the meeting at which he was to be dismissed. This is baffling. There is no evidence that the Claimant had been warned of the impending dismissal at all or had any idea what was in the letter that Ms Snape offered to send him on 17 September 2019, so he can hardly be taken to have 'requested' not to have that notice.

118. Mr Morgan rejected the Claimant's suggestion of mediation because he found that *"while no formal mediation was offered, Jim Chee and JR made*

every effort to encourage you and Scott to find a resolution to the situation. Chee attempted informal mediation on a number of occasions, and this didn't result in a long-term resolution." This repeats a point that Mr Jordan made in the dismissal letter, but it is not correct on the basis of the evidence before us. The suggestion that there had been informal mediation attempted by Mr Lam on a number of occasions goes beyond the Respondent's evidence even as it has been advanced in this hearing, which was confined to the suggestion that the meeting about Mr Gregory's favouritism complaints on 20 August was an informal mediation meeting (a contention we have rejected for the reasons set out above).

119. We find that Mr Morgan made these errors in the dismissal letter because this is what he was told, or thought he had been told, by Mr Jordan.

Redundancies/alternative bases for dismissal

120. Mr Jordan in his witness statement states that because of what he regarded as the Claimant's unwillingness to mediate or compromise, given the disruptive impact he considered the situation was having on the team and the wider business and the pressure he was facing from the Director General to resolve the situation, if he had not dismissed him on 2 November, he would have dismissed him before the end of the year and nothing that the Claimant said or did could have changed this conclusion. There is no reason for us not to accept this evidence because it is clear from the way that Mr Jordan conducted his investigation (without telling the Claimant about it or conducting any proper interviews) and made his decision to dismiss six weeks before the meeting at which he communicated it to the Claimant, that Mr Jordan had closed his mind to any possibility of doing anything other than dismissing the Claimant at an early stage.

121. Mr Jordan further states that the Claimant would have been made redundant in December 2018 because he would have scored him lower than Mr Gregory against the Respondent's standard redundancy criteria and made him redundant as part of a redundancy exercise that the Respondent carried out at the end of 2018. The evidence we have about the redundancy exercise is as follows:-

122. On 1 November 2018, while he was still on sick leave, the Claimant was informed by Vicky Taylor that Stephen Martin, Director-General of the Respondent, had announced the previous day that there would be a restructuring and a reduction in staff numbers, although no decision had yet been made. The Respondent subsequently commenced collective redundancy consultation and made 21 employees redundant in December 2018/early January 2019. None of those employees were from the finance department. Mr Jordan's oral evidence to the Tribunal was that this was because the finance department had already made sufficient savings as a result of Mr West leaving earlier in the year and as a result of the Claimant's dismissal. However, he provided no evidence to support this assertion such as details as to the level of financial savings that were required generally or from the finance department in particular or as to the basis on which the 21

employees who were made redundant were chosen. We do not therefore accept that the Respondent has demonstrated on the balance of probabilities that if the Claimant was not dismissed there would have had to be a redundancy from the finance department at the end of the year. Following his dismissal, the Claimant's position was not replaced immediately, but at some point after the Claimant's dismissal, Ms Li completed her formal accountancy qualifications and was promoted to Finance Business Partner so that within a matter of months the Respondent had two people employed in the Finance Business Partner role as it had at the time the Claimant was dismissed.

123. On 29 October 2018 Mr Jordan sat down and carried out an exercise where he scored the Claimant and Mr Gregory against the Respondent's then draft redundancy selection criteria. He did this because he and Ms Taylor had discussed whether they should in fact make the Claimant redundant rather than dismiss him for the reasons Mr Jordan had already set out in the dismissal letter that he had prepared by 14 September. They had decided that it was not appropriate to do that because the real reason for dismissing the Claimant, so far as they were concerned, was what they perceived to be the breakdown in working relations. However, Mr Jordan carried out the scoring exercise just to see whether it would be the Claimant who would be selected if it came to it or not. He did it on his own and did not discuss it with Mr Lam. The scoring was not disclosed to the Claimant until it was set out in Mr Jordan's witness statement in these proceedings, and the actual score sheet was not disclosed until we asked in the course of the hearing whether it existed.

124. Mr Jordan said in answer to our hypothetical question in oral evidence that if there had been no perceived difficulties between the Claimant and Mr Gregory, and he had been carrying out a redundancy exercise at this time, he would still have identified the Finance Business Partner roles as being those that should be placed at risk of redundancy. There were only two people in those roles at this time and the roles were more senior to those of other employees in the finance department. In his view they were less necessary to the day-to-day functioning of the Respondent because they fulfilled an oversight function rather than having day-to-day transactional responsibilities. He did not consider that it would have been right to include Ms Li in the pool at this stage as she was not as senior and not as qualified.

125. We do not wholly accept Mr Jordan's evidence as to this hypothetical scenario, which we find to be coloured by the decision he had already taken to dismiss the Claimant. As already noted, we do not accept that Mr Jordan would in fact have made any redundancies from the finance department at the end of 2018 even if he had not dismissed the Claimant because the Respondent has not provided the evidence to support that position. Even if there needed to be a redundancy from the finance department, if the issue between the Claimant and Mr Gregory had not arisen, we are not satisfied that the pool for redundancies would have been limited to the Finance Business Partner roles. It seems obvious given that ultimately the Respondent reached a position where it had two Finance Business Partner

roles (Mr Gregory and Ms Li) but no assistant, that in our hypothetical scenario the assistant role would probably have been included in the 'pool'.

126. As to the scoring exercise itself, the criteria were: performance; qualifications; knowledge and skills positive demonstration of core IOD values (passionate, inclusive, integrity, commercial and enterprising, professional); positive demonstration of other IOD behaviours (accountable/proactive, positive, agile and driven); disciplinary record and attendance. There was scoring scheme for each. Mr Jordan scored the Claimant as follows:

    (1) Performance: 8 ("Good - above required standard in some areas");

    (2) Qualifications: 5 ("Fully qualified or equivalent");

    (3) Knowledge and Skills: 3 ("Displays some of the required knowledge and skills, but there are identifiable gaps as required for the role")

    (4) IOD core values: 4 ("Demonstrates the core IOD behaviours some of the time)

    (5) Other IOD behaviours: 4 ("Demonstrates some of the other IOD behaviours");

    (6) Disciplinary record: 4 ("No current disciplinary on file")

    (7) Attendance: 2 ("Attendance record and punctuality is adequate").

127. Mr Gregory was scored as follows:

    (1) Performance: 5 ("Meets required standards in all areas");

    (2) Qualifications: 5 ("Fully qualified or equivalent");

    (3) Knowledge and Skills: 3 ("Displays some of the required knowledge and skills, but there are identifiable gaps as required for the role")

    (4) IOD core values: 4 ("Demonstrates the core IOD behaviours some of the time)

    (5) Other IOD behaviours: 8 ("Demonstrates other IOD behaviours most of the time");

    (6) Disciplinary record: 4 ("No current disciplinary on file")

    (7) Attendance: 5 ("Attendance record and punctuality is exemplary").

128. The scoring criteria state as follows regarding qualifications: *"NB this criteria will only be used in respect of roles where there are either specific requirements for particular qualifications or where the business, acting reasonably considers that qualiications could be helpful for the successful performance of role"*. Objectively that sounds like where a role has a

requirement for qualifications in the job description (as the Finance Business Partner role did) that *"fully qualified"* should refer to someone who has those qualifications. Mr Jordan, however, said that he considered Mr Gregory to be *"fully qualified"* as he had appointed him to the role on the basis of 20 years' accounting experience and therefore considered that to be *"equivalent"* to being *"fully qualified"*. As to knowledge and skills, Mr Gregory acknowledged that in his dismissal letter he had described the Claimant as having 'superior knowledge' to Mr Gregory, but he considered the Claimant and Mr Gregory to be equal on the scoring matrix because in his view they both had identifiable gaps in their knowledge. He gave no examples. There were no appraisals to draw on. He did not obtain any input from Mr Lam. As to IOD values and IOD behaviours, his evidence was that they were both marked down on IOD values as a result of the falling out between them (including Mr Gregory's raising of what he described in the dismissal letter as 'petty issues'). We infer that the Claimant was marked down on IOD behaviours because of the view that Mr Jordan had taken of the Claimant's behaviour as set out in the dismissal letter and perhaps because of the matters that the Respondent's other witnesses have referred to in terms of the Claimant's difficult interactions with them. It is not clear, however, precisely what was taken into account and Mr Jordan did not elaborate when given the opportunity to do so in oral evidence.

129. Finally, we note that we have heard evidence that in August 2020 the whole of the Respondent's finance team was contracted out (under a TUPE transfer) to a third party called Equium, who subsequently made the whole team redundant, apparently because they were transferring operations to Inverness. The Claimant told us that as a single man he would have been willing to move to Inverness. We canvassed the parties at the end of the hearing as to whether we should decide as part of this liability judgment what the percentage chance was of the Claimant being made redundant at that stage if he had not already been made redundant or dismissed fairly previously, but it became apparent from that discussion that the parties had not focused on this sufficiently in the hearing as it was not one of the agreed issues (or a pleaded issue) and we therefore decided that this issue, if it is pursued, could be canvassed at the remedy stage, if there was one.

<u>These proceedings</u>

130. The Claimant contacted ACAS on 19 December 2018 and ACAS issued a certificate on 16 January 2019. The Claimant's claim form in these proceedings was received by the Employment Tribunal on 1 February 2019. That claim included a claim for ordinary unfair dismissal but not (in express terms) a whistleblowing claim, although it included within the narrative the matters that the Claimant now relies on as protected disclosures. The Claimant was not represented at that stage.

131. The Claimant was not very well during this period and was prioritising looking after his own health. In or around April 2019 he considered seeking further advice from a CAB, but there was not one in his area giving employment advice. He later heard about another charity (FLAC) and contacted them in around May 2019 and made the first possible appointment in June 2019. The

person who advised him there looked at his ET1 and told him that he appeared to be raising protected disclosures and advised him to apply to amend his claim at the forthcoming case management hearing then listed for 28 June 2019. In fact that hearing was postponed due to lack of judicial resource and so the Claimant made a written application to amend his claim on 29 June 2019.

132. A preliminary hearing took place on 23 September 2019 before Employment Judge Isaacson. At that hearing Judge Isaacson permitted the amendment application. She 'decided' (paragraph 7) that the application to amend fell within the category of amendment which adds a new cause of action but which is linked to or arises out of the same facts as the original claim. However, in permitting the amendment, she did not decide whether the new claim was brought out of time and that point remains for us to decide at this hearing.

133. At that hearing the Respondent also conceded (although it is not recorded in the case management summary of that hearing) that the Claimant does have sufficient qualifying service to bring a claim of unfair dismissal under s 108 ERA 1996 (something which the Respondent had disputed when filing its original grounds of resistance to the claim).

134. The full merits hearing was originally listed to take place on 24 and 25 June 2018. This was then postponed to take place over five days commencing 12 March 2020. However, on that occasion, Employment Judge Lewis was only available for four days and she decided that there was insufficient time for the case to be completed within the four days that she was available and so the case was relisted for this hearing, with an additional three days to enable time for remedy to be decided in addition to liability if the Claimant is successful.

Conclusions

Protected disclosures

The law

135. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"*.

136. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

137. Guidelines as to the approach that employment tribunals should take in whistleblowing cases were set out by the Employment Appeal Tribunal in *Blackbay Ventures (trading as Chemistree) v Gahir* (UKEAT/0449/12/JOJ) [2014] ICR 747 (against which judgment the Court of Appeal refused permission to appeal: [2015] EWCA Civ 1506). At para 98 Judge Serota QC gave guidance as follows (so far as relevant to the present claim):

> 1. Each disclosure should be identified by reference to date and content.
>
> 2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.
>
> 3. The basis on which the disclosure is said to be protected and qualifying should be addressed.
>
> 4. Each failure or likely failure should be separately identified.
>
> 5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. …
>
> 6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and … whether it was made in the public interest.

138. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, paras 24-26, it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified (at paras 30-36) that *"allegation"* and *"disclosure of information"* are not mutually exclusive categories. What matters is the wording of the statute; some 'information' must be 'disclosed' and that requires that the communication have sufficient *"specific factual content".* The case of *Dray Simpson v Cantor Fitzgerald Europe* (UKEAT/0016/18/DA), unreported 21 June 2019, makes a similar point in relation to the use of questions in an alleged protected disclosure. In that case, the Employment Appeal Tribunal held (para 42) that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it *"sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation"*.

139. The statute does not require that the Claimant identify or otherwise refer to the legal obligation when making the disclosure (a point that was accepted by the Employment Appeal Tribunal in *Bolton School v Evans* [2006] IRLR 500 at para 41 and not questioned on appeal by the Court of Appeal in that case: [2007] EWCA Civ 1653, [2007] ICR 641).

140. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with one of the legal obligations set out there. The word *"likely"* appears in the section in connection with future failures only, not past or current failings where what is required is that the Claimant reasonably believe that the information disclosed 'tends to show' actual failures. In *Kraus v Penna Plc* [2004] IRLR 260 at para 24 the Employment Appeal Tribunal held that *"likely"* in this context means *"more probable than not"*. On this particular point, *Kraus v Penna* was not over-ruled by *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026, but in *Babula* the Court of Appeal did over-rule *Kraus* in relation to the approach to be taken to assessing the reasonableness of the Claimant's belief.

141. In the light of *Babula* (ibid, paras 74-81), what is necessary is that the Tribunal first ascertain what the Claimant subjectively believed. The Tribunal must then consider whether that belief was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied, i.e. that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with a relevant legal obligation. The Court of Appeal emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not.

142. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615.

143. The Court of Appeal in *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, [2020] IRLR 224 (see especially paras 14-17 and 25) has confirmed that it is the Claimant's subjective belief that must be assessed when considering the public interest element as well. Again, the Tribunal must first ascertain what that subjective belief is, and must then assess whether the Claimant's subjective belief in this respect is objectively reasonable. The Court of Appeal emphasised that the Claimant's motive in making the disclosure is not necessarily relevant to this assessment: in an appropriate case, a claimant may be motivated by personal interest but still have a reasonable belief that the disclosure is in the public interest.

144. Prior to the amendment to s 43B of the ERA 1996 (by the Employment and Regulatory Reform Act 2013, s 17) to introduce the 'public interest' requirement, it had been held (in *Parkins v Sodexho* [2002] IRLR 109) that a disclosure concerning a breach of the employee's own contract could be a protected disclosure. In *Chesterton Global and anor v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731 the Court of Appeal (*per* Underhill LJ at para 36) made the following observations about the policy intent of the introduction of the 'public interest' requirement:

> The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers—even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

145. The Court of Appeal in that case approved guidance formulated by counsel as to the matters that may be relevant to assessing the reasonableness of the Claimant's belief in the matter being a matter of public interest which included the following (para 34):

> (a) the numbers in the group whose interests the disclosure served [see above];
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
> (c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
> (d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.

Conclusions on the Claimant's protected disclosures

146. For his first protected disclosure concerning liability for VAT on the Affinity commissions, the Claimant relies on his email to Mr Jordan of 27 June 2018, his email to Peter Bright (external consultant) on 2 July 2018 and his email to Mr Jordan and others forwarding his own email of 2 July 2018 and Mr Bright's advice. We find that on this VAT issue the Claimant's email of 27 June 2018 simply asks a question about VAT. Although we accept he was asking the question because he believed that not paying VAT might be a breach of a legal obligation, there is no disclosure of information that tends to show any breach of a legal obligation. What he sends to Mr Bright is different however as initially Mr Bright considers on the basis of the information that the Claimant has provided that the commissions are subject to VAT and it is for this reason that Mr Jordan gives the Claimant approval to take full advice from Mr Bright, the outcome of which is that the Respondent is not doing any thing unlawful. Given that the Claimant's email of 2 July 2018 does give the impression to the consultant that VAT is payable and the consultant advises to that effect, we find that this chain (as forwarded to Mr Jordan) does

constitute a protected disclosure since the effect of the consultant's initial advice is that the Respondent is not charging (and paying) VAT when it should do. In forwarding this to Mr Jordan the Claimant was disclosing information which objectively did show to an expert that there was a breach of a legal obligation, and which the Claimant thus reasonably believed showed the same. Further, we find that the Claimant's belief that it is in the public interest for VAT to be paid where it is due is obviously reasonable (especially in this context where sizeable sums were potentially involved).

147. As to the second protected disclosure, this has two parts. First, the £3k sponsorship from Seven and what the Claimant said in his email of 27 June 2018. The Claimant maintained at the hearing that even though this was an issue of internal allocation, there was still a breach of a legal obligation because of the failure to issue a CRM invoice in March 2018. However, we have already found as a fact that this was not his subjective belief at the time. Nor would such a belief have been reasonable. It is by no means obvious that a failure to issue an invoice at the time that payment is due is a breach of a legal obligation, Mr Jordan did not see it as such and there is nothing in the Claimant's email of 27 June 2018 that suggests that he saw it as such. This is on its face an administrative issue. Even if it resulted in payment of VAT in the wrong period (which we are not satisfied it did) the VAT on £3k is below the £2,000 level that the Claimant says HMRC allows for correction of errors. In the circumstances, we find that there is no disclosure of information that tends to show a breach of a legal obligation, nor could the Claimant reasonably have believed that he had made such a disclosure, whatever his view of the underlying issue.

148. As to the verbal disclosure on 28 June 2018 to Ms Jumnoodoo and others, the evidence that the Claimant gave in his witness statement as to this conversation and which we have set out in our findings of fact above went unchallenged by the Respondent's witnesses. The sums involved (c£500,000 income and £300,000 expenses wrongly accounted for) were significant and we accept that simply identifying accounting errors of this magnitude would tend to suggest there was a failure to comply with the Respondent's legal obligations in relation to preparation of accounts, in particular its By-law 67 which requires the Respondent to keep accounts that *"disclose, with reasonable accuracy, at any time"* its financial position. (It may also be a breach of various other accounting and companies act obligations as the Claimant maintains, but there is no need for us to go further given the terms of the Respondent's By-law 67.) It follows from our conclusion in this respect that the Claimant's subjective belief that the information he disclosed tended to show breaches of legal obligations was reasonable. We are further satisfied that his subjective belief that it was in the public interest to disclose accounting errors of this sort was also reasonable, given their magnitude and the potential for there to have been a failure to pay VAT when it properly fell due.

149. As to the third alleged protected disclosure in the emails of 22/23 August 2018 from the Claimant to Mr Gregory, Mr Lam and Mr Jordon, given to Ms

Snape on 11 September 2018 and to Mr Morgan and Ms Griffiths at the appeal on 3 December 2018, the Claimant says that he had a reasonable belief that the accounting irregularities he had identified constituted breaches among other things of the Respondent's By-law 67. The last email in this chain makes his point particularly clear where he identifies a total of about £155,000 that had not been included in July or earlier management accounts when it should have been and says that *"might mislead the management who [rely] on the management accounts to make informed business decision … doesn't comply with the accounting accrual standard, expenses incurred in the period not being recognised in the same period"* and *"as a result, cost incurred not being accounted correctly in the right period and IoD management account could be further impact by under reported cost."*

150. It follows from our findings in relation to the previous alleged protected disclosures that we find this third alleged protected disclosure did disclose information that tended to show a breach of (at least) By-law 67 and accordingly the Claimant's subjective belief to this effect was reasonable. We do not consider that the fact that irregularities identified by the Claimant fell below the Respondent's materiality level for the purposes of its annual accounts makes any difference in this respect. Mr Jordan did not suggest that that the materiality threshold was applied to monthly management accounts and the Claimant was not even aware of it so it could not have affected the reasonableness of his belief. We further accept that the Claimant's belief that this was a matter of public interest was reasonable. The sum in question is not insignificant in ordinary terms (especially not when an organisation is in financial difficulties); the Respondent is a large quasi-public membership organisation and the probity of its accounts is of interest to its 30,000 members as well to HMRC and the public in general through the taxes it may be liable to pay. Finally, we do not consider that the fact that when the Claimant made the disclosure at the appeal stage he was trying to get his job back makes any difference to the fact that the email chain satisfies the statutory requirements for a protected disclosure.

151. It follows that we accept that the Claimant's first and third disclosures were qualifying protected disclosures under s 43B(1) ERA 1996, as was the second part of the second diclosure (but not the first part of the second disclosure relating to the the £3k Seven sponsorship).

Unfair dismissal (including automatic unfair dismissal)

The law

152. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct, capability, redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf

Abertnethy v Mott, Hay and Anderson [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at paragraph 44). (There are exceptions to that approach, as identified in *Jhuti*, but it is not suggested they are relevant here.)

153. In this case, the Claimant must raise a *prima facie* case that the sole or principal reason for his dismissal was that he had made protected disclosures (s 103A(1)). If he does, then it is for the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81. As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

154. Careful consideration needs to be given to cases where the employer's defence to a whistleblowing claim is that the dismissal was not because of the protected disclosure but because of the way in which the protected disclosure was made. The question in such cases is *"whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and, if so, whether those factors were, in fact, the reasons why the employer acted as he did"*: *Panayiotou v Chief Constable Kernaghan* [2014] IRLR 500 *per* Lewis J at para 54. However, the EAT in *Martin v Devonshires* [2011] ICR 352 warned (in a discrimination context) that Tribunals should bear in mind the policy of the anti-victimisation provisions (which policy also underlies the protected disclosures legislation) and *"be slow to recognise a distinction between the complaint and the way it is made save in clear cases"* (per Underhill P, as he then was, at para 22).

155. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

156. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors,

focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at para 54 *per* HHJ Eady QC. We further accept Ms Omeri's submission that it follows from *OCS* that a fair appeal may remedy even wholesale unfairness at the first stage, but whether it does or not is a question of fact to be determined by the Tribunal in all the circumstances of the particular case.

157. Where, as here, a breakdown in working relationships is relied on as the reason for dismissal, the EAT in *Stockman v Phoenix House Ltd* [2017] ICR 84 at paragraph 21, indicated that, as a minimum, an employer is required to: *"fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker … of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair … to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary common sense fairness requires that … [an] employee [should be given] the opportunity to demonstrate that she can fit back into the workplace without undue disruption"*. In that case, the EAT upheld the Tribunal's conclusion that the employee had been dismissed unfairly where the Tribunal had found that the employer's conclusion that there had been an irretrievable breakdown in working relations was not within the range of reasonable conclusions open to them, and the Tribunal had found that the employer's approach of placing the onus on the claimant to prove that the relationship had *not* broken down irretrievably demonstrated at least a partly closed mind, which was a factor in the Tribunal's conclusion that the dismissal was substantively unfair.

158. Ms Omeri for the Respondent has placed considerable reliance on the case of *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 and so it is necessary for us to set out the facts of it in some detail.

159. *Ezsias* concerned a consultant surgeon who had from the beginning of his employment expressed concerns in writing about the competence of colleagues and management. By March 2001 there were clear difficulties between the claimant and two other colleagues; an inquiry panel was which reported on the situation and laid the blame for the breakdown in working relations at the door of the claimant. Following the report, Mr Ezsias had not

been willing to resolve the interpersonal difficulties as he believed the problem to be about wider issues in the Department. In April 2002 an independent consultant psychologist was asked to review working relationships in the Department. He met with many members of the Department including Mr Ezsias and concluded that many of the difficulties in the Department appeared to revolve around the behaviour of Mr Ezsias. He concluded that the long-standing issues indicated that total retrieval of good working relationships was extremely unlikely. Mr Ezsias complained to the police that the consultant had claimed higher fees than he was entitled to and made another allegation of fraud against another employee in relation to holiday pay. Both allegations were investigated and found to be without substance, but Mr Ezsias had raised other allegations which the Respondent was minded to investigate independently. At this point, nine senior members of the department signed a petition which stated among other things that there was *"a complete lack of confidence in, and a total breakdown of the relationships between"* Mr Ezsias and other senior staff, and that this was affecting the quality of patient care. The respondent decided to commission a senior independent human resources professional to undertake an investigation into the breakdown in working relations and also suspended Mr Ezsias, notifying him that the reason for the suspension was the fact that *"serious concerns have been raised with the Trust concerning an apparent total breakdown in the working relationship"* between Mr Ezsias and other senior staff. The respondent also commissioned an independent inquiry to investigate Mr Ezsias' protected disclosures, but Mr Ezsias refused to participate in that. The detail of the independent human resources professional's investigation does not appear in the EAT's decision, but he concluded that the working relationships had broken down irretrievably and there was little, if any, prospect of good relations ever being restored. He recommended (so far as is relevant to our present case) that the respondent consider whether to instigate disciplinary proceedings or take steps to terminate his employment on the basis of a breakdown in working relationships. A copy of the independent report was sent to Mr Ezsias who thereafter had three meetings with the Chief Executive to discuss the report, and the respondent's HR director met with eight of the nine signatories to the original petition, all of whom made clear that they could no longer work with Mr Ezsias, and would consider resigning if he was reinstated. Following these meetings the Chief Executive decided that Mr Ezsias should be dismissed and he wrote to Mr Ezsias to that effect on 1 February 2005 without following any disciplinary procedure or inviting Mr Ezsias to a further meeting, although he was offered a right of appeal. The Tribunal found that the dismissal was fair notwithstanding the lack of formal procedure, or even a final meeting in relation to the dismissal itself. The Tribunal that the reason or principal reason for the dismissal was the breakdown of relationships with his colleagues caused, in the main, by the behaviour of Mr Ezsias. As the dismissal was not found to be for 'conduct', the Tribunal held that the Whitley Council disciplinary procedures that would otherwise have applied to the case did not apply.

160. The Respondent does not in this case rely on conduct as the reason for dismissal, but the Claimant asserts that was the true reason for dismissal. On this point, it is the Claimant who relies on the *Ezsias* case. One of the issues on appeal in that case was whether the Tribunal had rightly classified the reason for dismissal as being 'some other substantial reason' rather than Mr Ezsias's conduct. The EAT (Keith J) upheld the Tribunal's decision, essentially on the basis that the reason for dismissal is a question of fact for the Tribunal and, on analysis, the Tribunal's conclusion was unassailable (see paras 48-58). However, referring to the judgment of Judge Serota QC granting permission to appeal, the EAT cautioned as follows at paras 57-58:

> We can see where Judge Serota QC was coming from. The concern he expressed was driven, we think, by the worry that if the Trust's approach in Mr Ezsias' case is sanctioned, an unscrupulous NHS Trust which wants to get rid of a medical or dental professional who may be a thorn in its side will be able to avoid the need for the kind of external scrutiny which the Whitley Council terms provide for by dismissing the member of staff in the way Mr Ezsias was. That raises the spectre of the Whitley Council terms being bypassed in cases to which they were intended to apply.
>
> 58. We understand that concern, but the fact is that the Whitley Council terms only apply when it is the employee's conduct or competence which is the real reason for why the action was taken against him. Although as a matter of history Mr Ezsias' conduct was blamed for the breakdown, the Tribunal's finding in the present case was that his contribution to that breakdown was not the reason for his dismissal. We do not suppose that those who were responsible for negotiating the Whitley Council terms had this in mind, but the fact is that the Whitley Council terms do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal.

161. In this case, it is not the 'Whitley Council terms' that may apply, but the ACAS Code of Practice on Disciplinary and Grievance Procedures which applies if we find the real reason for the dismissal to be conduct, but not if we accept the Respondent's case that the reason for dismissal was the breakdown in working relations (SOSR). The Code does not apply to SOSR dismissals: see *Stockman v Phoenix House Ltd* [2017] ICR 84 at paragraph 21, where Mitting J held: *"In my judgment, clear words in the code are required to give effect to that sanction [i.e. the uplift for failure to follow the procedures], otherwise an employer may well be at risk of what is in reality a punitive element of a basic and compensatory award in circumstances in which he has not been clearly forewarned by Parliament and by Acas that that would be the effect of failing to heed the code"*. Mitting J made that observation in the context of an argument as to whether the Code applies to SOSR dismissals, but it seems to us that it is an important point to bear in mind when deciding, as we must, whether the real reason for dismissal in this case was conduct or SOSR. It is the corollary to the point made in *Ezsias* that Tribunals must be alert to employers using the rubric of SOSR as a pretext to conceal the real reason for an employee's dismissal and avoid following proper procedures. Likewise, Tribunals must take care not to label a dismissal as a conduct dismissal when

it is properly an SOSR dismissal because of the likely penalty the employer will then incur for not having followed a Code of Practice that it did not know applied.

162. If we conclude that conduct was the real reason for dismissal, then in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

Conclusions on the unfair dismissal claim

163. We begin with the question of the reason for the Claimant's dismissal. We decide this applying the legal principles that we have set out above. We recognise and acknowledge that the Respondent has from the outset classified the Claimant's dismissal as being for 'some other substantial reason' and that this is why the Respondent's HR department did not advise Mr Jordan to follow the Respondent's disciplinary procedure (or any other procedure) when dismissing the Claimant. However, we have to consider what the reasons were operating on Mr Jordan's mind that caused him to dismiss the Claimant.

164. We have considered, first, whether it was one or more of the protected disclosures that we have found were made by the Claimant. We have decided not. In this respect, we refer back to our reasoning at paragraphs 73-74 for finding that Mr Jordan was not seeking to hide the Claimant's third protected disclosure from Ms Taylor when he deliberately did not forward parts of the email chain that day, including the last email which we have now concluded not only had 'all the hallmarks' of being a protected disclosure, but was in fact a protected disclosure. While Mr Jordan's action in not forwarding the most significant parts of the Claimant's emails to HR is the sort of evidence from which we could draw an inference that Mr Jordan's real reason for dismissing the Claimant was the protected disclosures he had made (in particular the third protected disclosure which was part of the trigger for Mr Jordan's investigation), we decline to draw such an inference in this case. We do so essentially for the same reasons that we set out at paragraphs 73-74 above, i.e. that we find as a matter of fact in this case Mr Jordan was not motivated to penalise the Claimant for his protected disclosures. His concern throughout was the conduct of the Claimant and Mr Gregory and the state of their relationship. We accept that this was genuinely the reason why he commenced his investigation and ultimately why he dismissed the Claimant. The fact that the Claimant had identified and brought to Mr Jordan's attention matters that we have found constituted in law protected disclosures did not play any significant part in Mr Jordan's reasons for acting, and were certainly not the sole or principal cause.

165. We have then considered whether the reason for the Claimant's dismissal was 'some other substantial reason' or 'conduct'. In this respect, the label

that the Respondent has chosen to put on the dismissal is not conclusive, we have to consider what Mr Jordan's sole or principal reason was. In this respect, the best evidence is the dismissal letter itself. It is clear from that (and from the Respondent's evidence in these proceedings more generally) that Mr Jordan would not have dismissed the Claimant 'but for' what he perceived to be the breakdown in working relations between and Mr Gregory. This point has been reinforced by the fact that the Respondent has not in these proceedings contended that it would have dismissed the Claimant in due course for his conduct had it not dismissed him (ostensibly) because of the breakdown in working relationships.

166. However, the statute does not ask us to apply a 'but for' test. It requires us to look into Mr Gregory's mind and decide what genuinely was the sole or principal reason for dismissing the Claimant at the time that he took the decision. In that respect, we find that the reasons that Mr Gregory gives in the dismissal letter are reasons related to Mr Gregory's conduct. The crucial reasoning begins on the penultimate page of the letter. In the fourth and largest paragraph on that page, Mr Gregory gives what can only properly be categorised as the Claimant's conduct (his *"failure to act as a team player and support members of your team when required"*) as part of his reason for rejecting alternative options to dismissal. He states that alternative options to dismissal would *"fail to address the very serious concerns"* that he has about the Claimant's conduct in those respects. In other words, part of the reason why he rules out options other than dismissal is because he considers that only dismissal will properly enable him to deal with his concerns about the Claimant's conduct.

167. Mr Jordan then sets out his reasons for choosing the Claimant for dismissal rather than Mr Gregory and these reasons are all, we find, related to the Claimant's conduct. In the letter, the Claimant's conduct is contrasted with that of Mr Gregory's (which Mr Jordan describes as *"one off out of character behaviour for him"*) as a result of which Mr Jordan concludes that *"he deserves a second chance"*. The Claimant's *"behaviour"*, on the other hand, Mr Jordan finds is not deserving of a second chance: he is not a 'team player' and Mr Jordan elaborates on that. Mr Jordan does not limit his findings at this point to the Claimant's conduct towards Mr Gregory; he widens it to other members of the team, referring to the Claimant's *"failure on a number of occasions to share your superior knowledge with other members of the team … antagonistic behaviour …unprofessional and generally unacceptable behaviour … in complete contrast to the IoD's values …"*. Mr Jordan concludes *"As CFO and head of the team, I cannot be seen to tolerate this type of behaviour. Accordingly, I have come to the unfortunate conclusion that it is not viable for the business to retain you as an employee of the IoD".* We find that the reasons Mr Jordan gives for deciding to dismiss the Claimant in his dismissal letter are reasons that can only properly be categorised as relating to the conduct of the Claimant. Further, our impression of Mr Jordan's evidence (written and oral) in these proceedings was that it was the Claimant's conduct that was at the forefront of his mind when he decided to dismiss him. This impression was reinforced by the fact that much of the

Respondent's evidence was directed toward demonstrating that the Claimant had a poor record of conduct towards other members of staff: Mr Warrillow and Ms Griffiths were apparently called principally for this reason, while Ms Snape and Ms Taylor also gave evidence to that effect. In Closing Submissions, the Respondent relied on this evidence as going to the reasonableness of the dismissal and/or as evidence of contributory conduct by the Claimant (on the basis that the Claimant was the 'aggressor/antagoniser' in his relationship with Mr Gregory). However, the Respondent's submissions cannot limit our findings as to the role that evidence of this sort played in Mr Jordan's reasons for dismissing the Claimant. We find that in general terms Mr Jordan had this evidence from colleagues in mind when deciding to dismiss the Claimant. We find as a fact that Mr Jordan's principal reason for dismissing the Claimant was his conduct towards Mr Gregory and other members of staff. It was not Mr Jordan's perception as to the breakdown in relationships. That was a subsidiary factor in Mr Jordan's reasoning and a 'but for' cause, but not ultimately the principal reason why Mr Jordan dismissed the Claimant.

168. Although we have found that the principal reason for the Claimant's dismissal was related to his conduct and was not SOSR, we have nonetheless gone on to consider the fairness of the Claimant's dismissal both on the basis that conduct was the reason for dismissal, and on the basis that SOSR was the reason for dismissal.

169. As to the position if conduct was (as we have found it was) the reason for dismissal, this is still a potentially fair reason for dismissal within s 98(2)(b), even though it was not the reason relied on by the Respondent. However, the Respondent has not sought to maintain an alternative case that it would have been fair to dismiss the Claimant for conduct in the way that it did and we find that the dismissal of the Claimant for his conduct was wholly unfair both as a matter of substance and procedure. In particular:

    (1) The matters relied on by Mr Gregory as constituting poor conduct are not matters that are obviously misconduct: not being a 'team player', not sharing superior knowledge, not being 'constructive', etc. The high point of the case against the Claimant in this respect is the email exchange of 22/23 August which was described by Mr Morgan at the appeal stage as *"curt and unhelpful"*. That is hardly 'misconduct';

    (2) Conduct of this sort could become 'misconduct' if it had been properly handled by an employer over an extended period through an informal and then formal warning system. An employee who carried on regardless of such warnings could be regarded as 'misconducting' himself, but there was absolutely no such management or warning process here;

    (3) No procedure at all was followed in relation to the Claimant's dismissal: the most basic principles of fairness were not adhered to: he was not told the case against him; he was not given an opportunity to make representations; the decision was completely

predetermined, having been made by 14 September 2018 when the Claimant was not dismissed until 2 November 2018;

(4) Further, there were many other aspects of the procedure that fell well outside that range of reasonable approaches that an employer might take to dismissal: the decision to dismiss was made following an investigation the Claimant was not told about, conducted into a 'grievance' that no one had raised; Mr Jordan decided to dismiss the Claimant without even speaking to him; the Claimant was misled as to the reason for the meeting in which the decision to dismiss was communicated; he was not warned that he might be dismissed for the reasons for which he was dismissed; and the Claimant was not given an opportunity to bring a companion to the dismissal meeting (the Respondent's attempt to suggest that as Mr Lam was a 'friend' that was sufficient is absurd: Mr Lam was there to accompany Mr Jordan and regarded by him as agreeing with the decision to dismiss);

(5) As this was a dismissal for reasons relating to conduct, the ACAS Code of Practice applied, but there was a failure to comply with almost all of that Code, save for the sending of a written letter of dismissal and affording a right of appeal;

(6) The unfairness at the dismissal stage was not in any way cured on appeal. Although the Claimant did have the opportunity to say everything he wanted to say about his dismissal to Mr Morgan, the failures of procedure and substance at the first stage undermined the fairness of the appeal. This is because Mr Morgan relied on what he was told by Mr Jordan to contradict what the Claimant said at the appeal stage and reject his appeal, but Mr Jordan's views had been formed on the basis of a one-sided, closed-mind, unfair process as set out above. As a result, Mr Morgan relied in rejecting the appeal on a number of key factual errors which we have identified at paragraphs 116-119 above, and which are all errors which we find fall outside the range of reasonable responses open to an employer. If there had been a fair process and a reasonable investigation, it would have been impossible for Mr Morgan to reach the conclusions that he did at the appeal stage about the 'warnings' that had been given the Claimant, the efforts (or lack of efforts) that had been made towards mediation and the procedure that had been followed.

170. It follows that we find the Claimant's dismissal for reasons relating to his conduct was unfair both as a matter of substance and procedure.

171. We have also considered whether we would have found the dismissal to be fair even if we had accepted that SOSR was the principal reason for dismissal. We would not. Much of what we have said above would apply equally to an SOSR dismissal. This is especially so given that if we had accepted SOSR as being the principal reason for dismissal, it would still have been the case that the reasons that Mr Jordan chose to dismiss the Claimant

rather than Mr Gregory were reasons relating to his conduct and, although the ACAS Code of Practice would not have applied, ordinary principles of fairness would have required that these matters be fairly investigated and put to the Claimant. All the other errors of procedure we have identified above would therefore have applied equally to an SOSR dismissal. This case is a world away from the *Ezsias* case on which the Respondent relied, as is apparent from our recital of the facts of that case above.

172. Further, if SOSR had been the principal reason for dismissal, then we would have found that the Claimant's dismissal for that reason fell outside the range of reasonable responses for the following additional reasons:

(1) The Respondent fell into the trap identified in the *Stockman* case of effectively requiring the Claimant to prove that the relationship had not broken down, rather than the other way round. This case was worse than *Stockman*, though, because here the Respondent actually dismissed the Claimant before even giving him an opportunity to give his views on the state of the relationship. His appeal was also dismissed by Mr Morgan in part because the Claimant's views on the state of the relationship were rejected on the basis of Mr Jordan's unfairly predetermined view that there had been an irretrievable breakdown in working relations;

(2) The Respondent made no effort to see if the relationship could be repaired before moving to dismissal. The meeting of 20 August 2018 relied on by the Respondent as an informal mediation meeting could not reasonably have been regarded as such for the reasons we have set out in our findings of fact. Ms Snape's conversations with the Claimant at the beginning of September 2018 were not an attempt to mediate; nor did Ms Snape communicate to the Claimant that the Respondent regarded the relationship as broken down, or that a resolution was required. Those conversations were conversations in which the Claimant took his concerns about Mr Gregory's performance to HR for the first time and sought advice as to what to do about the situation. Although we have accepted that the Claimant said in the course of those conversations that he did not wish to work with Mr Gregory and gave the impression that he was not interested in working on a resolution, these conversations would have been regarded by a reasonable employer as only the start of a process of identifying that a relationship problem had arisen and then looking at possible ways of resolving that, not as the end point;

(3) While we accept the Respondent's evidence of the impact that the working relationship between the Claimant and Mr Gregory was having on the team by the end of August 2018, we find that provides no justification for the Respondent's failure to follow a fair and reasonable process. After the email exchange of 22/23 August 2018 any reasonable employer would have communicated in writing with both the Claimant and Mr Gregory about the issue, formally articulated to them both that matters could not continue and, if

matters still did not improve, mediation should then have been explored. All of this could have been done in the time it took Mr Jordan to conduct his investigation and draft his dismissal letter. The Respondent's case as to the impact on the rest of the finance team in any event rings hollow given that the Claimant was in fact dismissed when he had been away for six weeks, during which time the relationship breakdown can have had no impact on the team at all;

(4) In the circumstances, we consider that no reasonable employer would have concluded as at 14 September 2018 (when Mr Jordan made his decision) that there had been an *irretrievable* breakdown in working relations, and the case law makes clear that that is what is generally required before an SOSR dismissal for relationship breakdown can be fair as a matter of substance. Further, had the Respondent gone through the appropriate steps to address the relationship difficulties that had arisen by the end of August, or had the Respondent even followed a fairer dismissal procedure and at least given the Claimant an opportunity to comment on a draft of the findings in the dismissal letter before a decision was actually made, the evidence before us suggests that the Claimant would then have offered to mediate *before* he was dismissed. The only reason why his offer of mediation was rejected by Mr Morgan at the appeal stage was because the Claimant had not made it earlier and therefore Mr Morgan saw it as not being genuine, but had his offer been made earlier there would have been no basis for a reasonable employer to reject it.

173. It follows that even if we had accepted that the principal reason for dismissal was the SOSR of breakdown in working relations, we would still have found the Claimant's dismissal to be unfair both as to substance and as to procedure.

Contributory fault

The law

174. Section 122(2) ERA 1996 provides that:

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

175. Section 123(1) ERA 1996 provides that, subject to the provisions of that section (and sections 124, 124A and 126) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in*

consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

176. Section 123(6) further provides:

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

177. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to a reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal's 'just and equitable' discretion under s 123(1) as to what compensation, overall, is appropriate. Reductions can, therefore, be made for conduct which did not causally contribute to the dismissal, such as may be the case where misconduct occurring prior to the dismissal is discovered after dismissal: see *W Devis and Sons Ltd v Atkins* [1977] ICR 662 and cf *Soros v Davison* [1994] ICR 590. However, in cases where the conduct is known about prior to dismissal, the Tribunal must generally be satisfied that the conduct caused or contributed to the dismissal to some extent: see *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 per Brandon LJ at p 122 and *Frith Accountants Ltd v Law* [2014] ICR 805 at para 4.

178. Further, in every case, it must be established that there has been culpable or blameworthy conduct on the part of the employee. Giving the leading judgment of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 Brandon LJ gave further guidance at pp 121-122 as follows on what constitutes culpable or blameworthy conduct and how contributory fault should be approached by Tribunals:

> It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.
>
> It follows from what I have said that it was necessary for the industrial tribunal in this case, in order to justify the reduction of Mr. Nelson's compensation which they made, to make three findings as follows. First, a finding that there was conduct of Mr. Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to to some extent by that conduct. Thirdly, that it was just and equitable, having regard to the first and second findings, to reduce the assessment of Mr. Nelson's loss ….

Conclusions on contributory fault

179. We have considered whether any of the conduct of the Claimant is culpable or blameworthy applying the guidance in the case law set out above. We have decided it is not. The Claimant did at times act unreasonably. The evidence of the Respondent's witnesses as to his interactions on occasions with other employees such as Ms Griffiths and Ms Snape is evidence of unreasonable conduct, as are his *"curt and unhelpful"* emails to Mr Gregory of 22/23 August 2019. However, not all unreasonable conduct is culpable or blameworthy. As we have noted above when considering the fairness of the Claimant's dismissal for what we have found to be reasons relating to conduct, conduct of the sort relied on by the Respondent in these proceedings could become 'misconduct' if it is properly handled by an employer over an extended period through an informal and then formal warning system. An employee who carried on regardless of such warnings could be regarded as 'misconducting' himself, and likewise be guilty of 'culpable or blameworthy' conduct for the purposes of a finding of contributory fault, but nothing like that happened here. We therefore decline to make any reduction for contributory fault.

Polkey (redundancy / procedure)

The law

180. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place or, alternatively, what was the percentage chance of a fair dismissal taking place at that point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46.

181. In this case the Respondent maintains that it would have made the Claimant redundant in December 2018 and so we have to consider whether or not that would have been a fair dismissal or not. That requires us to apply the usual principles in relation to considering the fairness of redundancy dismissals.

182. This requires us, first, to be satisfied that the Respondent has proved that the definition of 'redundancy' in s 139(1)(b)(i) ERA 1996 is met, i.e. (in this case) whether the requirements of the Respondent *"for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for us as a Tribunal.

183. Then we have to consider whether the dismissal is fair in all the circumstances within s 98(4) applying the principles we have already set out

above, but also the case law specific to redundancy situations. In particular, the principles in *Williams v Compair Maxam* [1982] ICR 156 apply (as adjusted to dismissals where there is not union involvement), i.e.:

(1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered;

(2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible;

(3) The employer must establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service;

(4) The employer must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection;

(5) The employer must see whether instead of dismissing an employee he could offer him alternative employment.

184. We note that although selection criteria must not depend solely on the opinion of the person making the selection, there is no rule of law that they must be exclusively objective: *Ball v Balfour Kilpatrick Ltd* (EAT/823/95) per HHR Smith, cited with approval in *Morgan v The Welsh Rugby Union* [2011] IRLR 376 at paragraph 32 *per* HHJ Richardson. Where new roles are available to employees in a redundancy situation an employer is entitled to make an assessment as to which candidate will perform best in a new role in the same way as it would if it were making an external appointment and Tribunals should recognise that such a decision *"is likely to involve a substantial element of judgment"*: *Morgan*, ibid, at para 36. However, the EAT in that case emphasised that even where a new role is available, s 98(4) still applies and *"A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; … how far the employer established and followed through procedures when making an appointment, and whether they were fair …* [and] *whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)."* Ms Omeri referred us to *Green v London Borough of Barking and Dagenham* (UKEAT/157/16/DM), a case in which she appeared, for the proposition that the EAT's observations in *Morgan* about the approach to redundancy dismissals where new jobs are available to be applied for by those at risk of redundancy apply equally to cases where the number of roles is reduced. What the EAT (HHJ Eady QC) in that case held was as follows:-

> 40. We can see that, where a redundancy arises in the context of a reorganisation or restructuring that sees old jobs disappear and new jobs created, the selection

> process that the employer will carry out may be hard to characterise in *Williams* terms; that was the point being made in Morgan relevant to the particular facts of that case. In the present case, however, the redundancy arose in the context of a much larger collective redundancy situation, quite unlike Morgan . The reduction of three jobs into two was part of the restructuring, but it was not the creation of a different job as such. It is hard to see why this should not simply be characterised in terms of a selection pool of three, from which two employees were to be retained and one would be selected for redundancy.
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> 41. That is not to say, however, that the Respondent was not entitled to carry out its selection process in the way that it did; we do not say it was required to apply the criteria identified at paragraph 3 of the *Williams* guidelines. The question for the ET was whether the Respondent thus acted within the range of reasonable responses. So, even if distinguishable from Morgan - in that this was not a case involving the creation of a new position - that would not have prevented the ET concluding that a process that looked forward - seeking to determine who would be best qualified and who had the most relevant abilities and skillset - fell within the range of reasonable responses. Similarly, it would be open to the ET to consider that the process of selection - here carried out by means of an assessment and interview - was also fair.
>
> 42. At all times, the touchstone would need to be section 98(4) ; the ET would keep in mind the need not to fall into the error of substitution, but it would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses. Here, we do not consider we can be satisfied that the ET adopted this approach. We consider it became blinkered by what it felt was the requirement to apply Morgan as if it laid down a rule of law. That was an error: first, because this was not a case on all fours with Morgan ; and second, Morgan should have directed the ET back to section 98(4) - it did not provide a means of short-circuiting that assessment.

185. What we take from the *Green* case is accordingly that where an employer applies selection criteria with a view to identifying who should stay and who should go where it wishes simply to reduce the number of employees doing a particular kind of job, the 'traditional' *Williams v Compair Maxam* approach applies, but that does not mean that in that situation an employer cannot choose to carry out instead a forward-looking exercise of deciding who would be most suited to remaining in the roles within the organisation, in which case the observations in *Morgan* about the substantial element of judgment that should be afforded to an employer would apply. In all cases, however, what matters is that the Tribunal should judge the actions of the employer by reference to the 'reasonable range of responses' test.

Conclusions on Polkey (redundancy / procedure)

186. We have considered first whether if the Respondent had followed a fair procedure in dismissing the Claimant it could fairly have dismissed him for conduct or SOSR as a later date. We find that this would not have happened and is so unlikely that we are not prepared to make even a small percentage reduction to reflect this chance. This is because we found the Claimant's dismissal to be unfair as a matter of substance. We consider that had the Respondent followed a fair procedure, and given the Claimant fair warning in relation to his conduct, in relation to its views as to the relationship breakdown and the potential for dismissal, and made reasonable attempts to resolve and

mediate the breakdown, on the balance of probabilities these would have been successful and there would have been no dismissal. In any event, we are not prepared to speculate on what we regard as the very small chance that we are wrong about that.

187. We have then considered whether the Respondent has satisfied us that if it had not dismissed the Claimant on 2 November 2018 it would nonetheless have fairly dismissed him for redundancy at the end of December 2018. There are a number of stages to this as follows:-

    (1) *Redundancy situation* - We have already set out in our findings of fact the reasons why we are not satisfied that the Respondent has demonstrated on the balance of probabilities that there would have been a redundancy situation for the finance department at the end of December 2018. However, we are prepared to accept that there is a chance that the Respondent would have sought to make a redundancy from the finance department;

    (2) *Selection of pool* - We are further prepared to accept that there is a chance that the pool for redundancy would have been restricted to just the Finance Business Partners, although we also consider that had Mr Jordan given objective evidence on this issue (rather than evidence that was heavily coloured by the decision he had already taken to dismiss the Claimant) he would have said that the pool for redundancy should include Ms Li as well as Mr Gregory and the Claimant. Alternatively, in any event, we consider that fairness would probably have required Ms Li's role be included in the pool given that ultimately this was the role that the Respondent decided it could do without. There is also a chance that the pool would only have included Mr Gregory and the Claimant as the Respondent has maintained in these proceedings.

    (3) *Scoring if there was a pool of three* - It follows from the above that we consider that there was at least a chance that any redundancy selection exercise should have included scoring Ms Li. The Respondent has not done that exercise so we do not know how she would have scored in comparison to Mr Gregory and the Claimant. Being less experienced, she may have scored lower and therefore there is a chance that she would have been the one selected.

    (4) *Scoring if there was a pool of two* – If the pool were just Mr Gregory and the Claimant, we then have to consider whether in that case the selection of the Claimant for redundancy would have been fair in all the circumstances. We find that there is a high probability that it would not have been fair. This is because we find that Mr Jordan's scoring of the Claimant and Mr Gregory was unfairly coloured by the decision he had already made to dismiss the Claimant and was to a significant extent an exercise in retrospective justification of his decision. We note that he was not purporting to make an assessment of their suitability for a future role in the department, so the point

made in *Green* about allowing more than the usual scope for judgment does not apply here. Regarding the particular scores, we further find:

i. In relation to the scores for IOD values and behaviours, these were wholly subjective and Mr Jordan's decision to score the Claimant four marks lower than Mr Gregory in this area was, we find, based on his assessment of the conduct of the Claimant and Mr Gregory as set out in the dismissal letter. However, that assessment had been arrived at on an unfair basis, having not spoken to the Claimant and having unreasonably misunderstood certain important facts, especially regarding what had and had not happened in terms attempts at mediation and the Claimant's attitude to that;

ii. In relation to the score for Qualifications, we find Mr Gregory simply misapplied the criteria and/or unfairly turned what should have been an objective criterion into a subjective one. The criterion states that it is to be used where the business has specific requirements for qualifications for the role. The job description for Finance Business Partner required qualifications. The Claimant was fully qualified by reference to that requirement. Mr Gregory was actively training towards full qualification, this having been identified and approved by the Respondent (acting through Mr Lam) as a training need for the job. It was irrational for Mr Jordan in those circumstances to classify Mr Gregory as "Fully qualified or equivalent". The fact that Mr Jordan regarded him as sufficiently qualified by experience to appoint him to the role did not mean that when applying these criteria that it was open to Mr Jordan to treat Mr Gregory's experience as "equivalent" to full qualification. Doing so rendered the rest of the scoring criteria meaningless. The only rational score for Mr Gregory here was a '4';

iii. In relation to the score for Knowledge and Skills, it was perverse for Mr Jordan to score both the Claimant and Mr Gregory equally. Mr Jordan did not in evidence point to anything specific to justify this score and it is inexplicable given Mr Lam's view that the Claimant was much more competent than Mr Gregory, and Mr Jordan's view as set out in the dismissal letter that the Claimant had 'superior knowledge'. The only rational result was that the Claimant should have scored higher than Mr Gregory on this criterion.

188. Given the process adopted by the Respondent, it is difficult for us to say what would have happened if the Claimant and Mr Gregory had been scored fairly and rationally, but it seems to us that the most likely outcome would have been that the Claimant would have scored more, although equally there is still a chance that Mr Gregory would have scored more given the heavy

weighting of the scores towards the subjective criteria of IOD values and other IOD behaviours.

189. In the premises, the assessment of the appropriate *Polkey* reduction to reflect the chance that the Claimant could have been fairly dismissed for redundancy at the end of December 2018 involves a number of possible sequential chances. We understand that it is in theory possible to calculate an overall percentage chance by putting a percentage on each of the chances in the sequence and multiplying, as a statistician would do. However, we do not consider that this would be the appropriate approach to adopt as a Tribunal exercising a 'just and equitable' jurisdiction. We have therefore made a broad-brush assessment taking into account all the above elements and we consider that it would be appropriate for the Claimant's compensation from January 2019 onwards to be reduced by 10% to reflect the chance that he would have been fairly dismissed for redundancy at the end of December 2018.

Uplift for failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures

The law

190. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) *"it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"*.

Conclusions

191. We have decided that the real reason for the Claimant's dismissal was related to his conduct and accordingly the ACAS Code of Practice applies. The Respondent failed to comply with many paragraphs of that Code, including:

    (1) Paragraph 9 – notification in writing of the case to answer;

    (2) Paragraph 10 – notice of time and venue of disciplinary meeting and right to be accompanied;

    (3) Paragraph 11 – allow employee a reasonable time to prepare their case;

    (4) Paragraph 12 – allow employee to set out their case and answer any allegations that have been made; reasonable opportunity to ask

questions, present evidence and call relevant witnesses; opportunity to raise points about any information provided by witnesses;

(5) Paragraph 13 – right to be accompanied;

(6) Paragraph 18 – make the decision about dismissal after the meeting (rather than before as in this case);

(7) Paragraphs 19-21 – warnings for misconduct/unsatisfactory performance and possibility of dismissal/time to improve.

192. The Respondent did inform the Claimant in writing of the dismissal decision (paragraph 18) and offered him a right of appeal which complied with the Code (paragraphs 26-29). This was not therefore a wholesale failure to comply with the Code of Practice, but in our judgment the breaches of the Code by the Respondent in this case were egregious and of the most serious kind. As a panel, we consider it to be one of the most procedurally unfair dismissals we have ever seen. The breaches are in our judgment particularly serious because the Respondent is not a small, ill-equipped high street business, but a professional body established by Royal Charter to provide support and advice to company directors in their professional development. As such, it is a body that could reasonably be expected to lead by example in workforce matters. It is well-resourced in comparison to many employers with multi-million pound budgets, an HR department and over 100 employees. We take into account that the Respondent did not believe that the Code applied because it considered that it was dismissing the Claimant for SOSR. However, we do not consider that this excuses the breaches of the Code in this case. Had the Respondent followed basic principles of fairness (as the law requires for SOSR dismissals as for any other) it would likely also have complied with Code, if not in letter, at least in spirit. It did not do so. In the circumstances, we consider that it is just and equitable to award the maximum 25% uplift.

Time limits

The law

193. If a new claim is added by way of amendment, then the Tribunal must consider whether the complaint is out of time (*Galilee v Comr of Police of the Metropolis* [2018] ICR 634 and *Reuters Ltd v Cole* (Appeal No. UKEAT/0258/17/BA at para 31). For this purpose, the new claim is deemed received at the time at which permission is given to amend (*Galilee* at para 109(a)) (or possibly the date on which the application to amend is made, but not earlier).

194. If the proposed amendment is simply relabelling of existing pleaded facts with new legal labels, there is no need to consider the question of timings (*Foxtons Ltd v Ruwiel* UKEAT/0056/08 (18 March 2008) per Elias P at paragraph 13, which was common ground between the parties, post *Galilee*, in *Reuters v Cole* at paras 15 and 27). In *Reuters v Cole* Soole J specifically considered

what is necessary to make something a new claim and concluded that a relabelling of already pleaded facts with a new legal label does not make it a new claim, but if additional facts are pleaded with the new legal label such that the 'new' claim involves a different factual enquiry, then it will be a new claim. In that case, it was held that a different reason for treatment, and a different causation issue, made it a new claim, not a relabelling: see paras 28-30.

195. Under s 111(2)(a) ERA 1996 there is a primary time limit of three months beginning with the effective date of termination. By virtue of s 111(2)(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period.

196. The tribunal must first consider whether it was reasonably feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. Where an employee has knowledge of the relevant facts and the right to bring a claim there is an onus on them to make enquiries as to the process for enforcing those rights: *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488.

197. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

198. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53: *"If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them."* This rule is commonly referred to as the 'Dedman principle'.

199. The scope of the Dedman principle was revisited by the EAT in *Northamptonshire County Council v Entwhistle* [2010] IRLR 740 where Mr Justice Underhill, then President of the EAT, summarised the judicial treatment of — and ultimately confirmed — the principle. Nevertheless, he

went on to note that, subject to the Dedman principle, the authorities — including *Williams-Ryan* — also emphasised that the question of reasonable practicability is one of fact for the tribunal that falls to be decided on the particular circumstances of the case.

200. In *Remploy Ltd v Brain* (UKEAT/0465/10) following her dismissal, the claimant received informal advice from a solicitor whom she met in a café over a cup of coffee that she should follow the employer's internal appeal procedures before submitting a tribunal claim. After the time limit expired, but before the final stages of the internal procedures were completed, she was told about the limitation period for unfair dismissal claims by a former colleague. The claimant then presented her claim, which was almost two-and-a-half months late. Despite the delay, the employment judge accepted jurisdiction on the basis that, it being 'highly unlikely' that the claimant would have any remedy against the solicitor, it was not unreasonable for her to have acted on the informal advice. Thus, it was not reasonably practicable for her to have presented her claim in time and, once she had been made aware of the time limit for submitting a claim, she had acted promptly. On appeal, the EAT refused to interfere with the decision on the basis that it was a matter of fact for the tribunal.

201. In *Adams v BT plc* [2017] ICR 382, the EAT held that there is no rule of law that where a claim has already been presented once within the time limit, by a litigant in person, albeit defectively, it must follow automatically that it was reasonably practicable to have submitted any second claim in time. It is a question of fact for the ET.

Conclusions on time limits

202. The Claimant in this case brought an unfair dismissal claim within the primary time limit. He was at that stage in possession of all the facts that he now relies for his claim of automatically unfair dismissal. Had he considered that the reason why he was dismissed was because he had raised the matters that he now relies on as protected disclosures, he could easily have said so in the claim form, but he did not. (In this respect, we agree with Judge Isaacson that there is nothing in the claim form that makes that connection.) The Claimant did not need legal advice to make that causal connection and had he made that causal connection he would in law have brought a whistleblowing claim. The subsequent legal advice would have enabled him to put a label on it, but if all that needed to happen at that point was a re-labelling then it would not have been a 'new claim' and the time limit issue would not have arisen. In the circumstances, we conclude that it was reasonably practicable for the Claimant to bring a claim for automatic unfair dismissal within the primary time limit because the reason he did not bring that claim did not depend on legal advice but on facts that were within his own knowledge.

Overall conclusion

203. The unanimous judgment of the Tribunal is:

(1) The Claimant's claim for unfair dismissal under Part X of the ERA 1996 is well-founded;

(2) The Claimant's claim for automatic unfair dismissal contrary to s 103A ERA 1996 is outside the jurisdiction of the Tribunal as it was not brought within the time limit in s 111 and is any event not well-founded and is dismissed;

(3) It is not just and equitable for there to be any deduction from any compensation awarded to the Claimant for contributory fault;

(4) It is just and equitable that there should be a 10% deduction to any compensation awarded to the Claimant for the period January 2019 onwards to reflect the chance that he could fairly have been made redundant in December 2018;

(5) It is just and equitable that any compensation awarded to the Claimant should be uplifted by 25% under section 207A(2) of TULR(C)A 1992 to reflect the Respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

204. The Remedy Hearing will take place on 22 and 23 April 2021 by Cloud Video Platform, as agreed at the hearing.

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Employment Judge Stout

27 January 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

29/1/2021.

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FOR THE TRIBUNAL OFFICE