EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL BY CVP**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR D CLAY**
MR D KENDALL

BETWEEN:

MR S PERERA **CLAIMANT**

AND

ZENITH BANK (UK) LIMITED **RESPONDENT**

ON: **22ND February – 5th March 2021 and (in chambers12th April)**

Appearances
For the Claimant: **Mr C Milsom , counsel**
For the Respondent: **Ms J Mulcahy QC, counsel**

This has been a remote hearing by video (CVP). The parties did not object to the case being heard remotely. A face-to-face hearing was not held because of the Covid-19 pandemic and because London Central Tribunal is currently shut. The members of the Tribunal had documents in electronic bundles.

. JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant's claim that he was subjected to detriments because he made protected disclosures succeeds in part.
(ii) The Claimant was not dismissed because he made protected disclosures and the claim for dismissal contrary to section 103A of the Employment Rights Act 1996 is dismissed.
(iii) The Clamant was unfairly dismissed.
(iv) The Claimant's claim for breach of contract is not well founded and is dismissed.
(v) The Claimant's claim for unpaid wages succeeds in respect of the period from 1 November 2018 until the termination of his employment.

(vi) A remedy hearing to deal with the successful parts of the Claimant's claim has been listed to be heard by CVP on 9 and 10 September 2021.

REASONS

Introduction and issues

1. The Claimant is a chartered accountant who worked for the Respondent from 15 August 2014 until his dismissal on 22 January 2019. He is Sri Lankan. He has worked in banking and finance for 20 years. Initially he was appointed to the Respondent as Head of Finance and in January 2017 was appointed Chief Financial Officer.

2. He now brings claims of:

   a. whistleblowing detriment;
   b. automatic unfair dismissal for making a protected disclosure;
   c. race discrimination;
   d. harassment related to race;
   e. unfair dismissal;
   f. breach of contract (failure to pay holiday pay)
   g. unpaid wages.

3. The Respondent is the UK arm of Zenith Bank group, a bank headquartered in Nigeria. It is regulated by the Financial Conduct Authority (the FCA) and the Prudential Regulation Authority (the PRA).

4. The agreed issues were lengthy. In the ET1 the Claimant referred to 11 protected disclosures. By the first day of the hearing these had swollen to 29 disclosures. These were set out in a Scott Schedule running to 63 pages. There were also 41 allegations of detriment, as well as numerous allegations of race discrimination and harassment and of breach of contract. During the course of the hearing a number of the discrimination and breach of contract allegations were dropped. The Claimant also reduced slightly the number of protected disclosures relied on and significantly reduced the whistleblowing detriments. However he continues to rely on these matters as part of the factual matrix. For ease of reference the issues are set out in the schedule to this judgment.

5. The Claimant had represented himself until shortly before the hearing. It is likely that this fact had led to a significant and unnecessary proliferation of the issues. The tribunal is grateful to Mr Milsom for bringing some order to what had hitherto been a process that was hard to manage**.** Both counsel have been very helpful in assisting us in this difficult case.

6. The Claimant did not identify the legal obligations alleged to have been breached separately in relation to each protected disclosure. Instead he alleges the following general breaches as set out in the Claimant's amended Scott schedule. In evidence the Claimant was also unclear as to which

disclosures tended to show what breach of a legal obligation and instead chose to refer in generalized terms to fraud, money laundering and so on.

> "Contravention of one or more of the following legal obligations:
> (i) The implied term of trust and confidence as regards the employment contracts of himself and several others and/or common law duty of care where the failure to comply with such obligations had wide implications on the proper functioning of the Bank's activities;
> (ii) The IMF Guidelines which the Claimant reasonably believed were legally binding;
> (iii) The FCA Fundamental Principles and specific principles as regards price publication which the Claimant reasonably believed were legally binding;
> (iv) A contravention of the rules governing the Nigerian stock exchange which the Claimant reasonably believed had legal status;
> (v) The PRA Rulebook, the status of which is recognised in accordance with the Financial Services and Markets Act 2000;
> (vi) Money Laundering Regulations 2017 and the Nigerian Money Laundering (Prohibition) Act, 20111
> (vii) Fraud."

Evidence

7. We heard evidence from the Claimant and, on his behalf, from Mr S Weavis and Ms D Ravagli. In addition the Claimant provided witness statements from Mr Z Liu and Ms B Bentivoglio. As they were not there to give evidence we accorded those statements very little weight. (None of the Claimant's witnesses had provided a witness statement at the time of exchange and Mr Milsom applied, on the 2nd day of the hearing, that we should allow these witnesses to be called and make witness orders in respect of these additional witnesses. We granted that application in respect of Mr Weavis and Ms Ravagli but refused it in respect of Mr Liu and Ms Bentivoglio.)

8. For the Respondent we heard evidence from the following:

   a. Ms Pamela Yough, Chief Executive Officer of the Respondent
   b. Mr Jeffrey Efeyini, a non-executive director of the Respondent and Chairman of the Remuneration and Appointments Committee (Remco).
   c. Mr Henry Onwuzirigbo who, at the time of the relevant events, was the Respondent's Chief Internal Auditor.
   d. Mr Stephen Powell, Head of HR
   e. Mr David Somers, a non-executive director of the Respondent who took the decision to dismiss the Claimant. Mr Somers is also Chairman of the Respondent's Audit and Compliance Committee (RAC)
   f. Mr Andrew Gamble, a non-executive director of the Respondent, who heard the Claimant's appeal.

9. We had various bundles of documents including:

   a. The Agreed disclosure bundle
   b. The pleadings bundle

c. An inter partes correspondence bundle
d. the Claimant's additional disclosure bundle
e. the Respondent's additional disclosure bundle

We were also assisted by a chronology from each of the Respondent and the Claimant.

10. It has been a surprising feature of this case that, despite the Claimant's seniority, the great majority of the alleged protected disclosures were not put into writing but, on the Claimant's case, were made orally to various members of the board. The first allegations which the Claimant committed to writing were made on 8th April 2018 after the relationship with the Respondent had become strained. The allegations of disclosures made by the Claimant to the Respondent do not describe some minor breaches of regulation but allege wholesale fraud, secret passages, money-laundering and general criminal activity. The Respondent denies that most of these alleged protected disclosures were made and, as will become apparent from our findings of fact below, we have for the most part, preferred the evidence of the Respondent. Some of the factual allegations made against Ms Yough, in particular, are incredible and we have not accepted them.

11. Although the Claimant's witness statement is lengthy, much of what he describes is vague and unspecific. His written "disclosures" to the chairman of Zenith Bank plc are equally vague and hard to pin down. In fact the clearest contemporaneous statement we have of the disclosures made by the Claimant come from a note taken by Ms Wiseman (the Respondent's former Head of Compliance) following a conversation which she had with the Claimant on 14 December 2017. Even then, in relation to the "payment loophole" (see below) he did not elaborate to Ms Wiseman as to the basis for his understanding of these "holes".

Findings of relevant fact

12. As set out above the Claimant began work for the Respondent in 2014 as Head of Finance. He reported to Mr John Shea, who at that time was the Chief Finance Officer. He did well and had excellent appraisals from Mr Shea. In January 2017 Mr Shea became Chief Operations Officer and the Claimant was appointed to the position of Chief Finance Officer. In that capacity the Claimant began to attend meetings of the Executive Committee (Exco) and the Asset and Liability Committee (Alco). As the CFO, the Claimant was designated as a Senior Manager (SMF2) for the purposes of the regulatory regime and had a regulatory duty to refer any concerns about the activities of the Bank to the PRA.

13. Ms Yough had worked for Zenith Bank plc in Nigeria from 1999 to 2012. She left in 2012 before being asked to rejoin Zenith in 2017 to replace the CEO in the UK, John Weguelin. Ms Yough and Mr Weguelin worked in parallel for a few months before Ms Yough formally took over as CEO in June 2017.

14. Initially the relationship between the Claimant and Ms Yough was a good one. In the Claimant's June 2017 appraisal, Ms Yough rated the Claimant "significantly above average". (113) During 2017 the Claimant also completed an MBA course at Cambridge, financed by the Respondent with a clawback provision in the event that the Claimant left prior to 2019. The December 2017 appraisal was also positive. Ms Yough rated the Claimant as " Exceeding standard requirements", but noted that he should improve on "team building and working closely with fellow HoD's."

The payment error

15. In October 2017 there was a payment error by the bank. A payment for 1.2 million rupees to a travel agent in India was processed as 1.2 million Singapore dollars, resulting in an overpayment of over $900,000. The Claimant described this as a "fat finger error". The customer had reported the incorrect payment. The issue was reported to Exco by Tania Powell on 17 October 2017, and there was a general discussion about the need to tighten controls so that such an error did not happen again. The minutes show that the Claimant asked a couple of questions about how to rectify the error from a control perspective but he made no disclosures. Others at the meeting also expressed their concerns about the error and the need to tighten controls. Mr Onwuzirigbo was asked to do an internal audit report, and this was issued on 2 November 2017 (275). A number of recommendations were made as to the tightening of controls.

16. At the next Exco meeting on 31 October 2017, the issue was discussed again. By that time it was reported that the erroneous payment had been returned but there was a foreign exchange loss of $9.5K. The Claimant made what he described as a speech about his concerns. He says he typed it up first and gave it to the Exco secretary to ask her to attach it to the meeting but she reproduced it in the minutes. The minutes show that the Claimant said that the error had highlighted "a big hole in our processes and system where money leaves the Bank". He recommended a review by an independent expert and asked whether this "*hole was left open for someone or a team to misuse if an opportunity arose*." He complained about the lack of control, and comments that "after credit risk this area presents a significant threat to the bank". He asked if management in the operations team (John Shea's area) was aware of it and "*how come they haven't fixed it or informed the management"*. No doubt the minutes do not reflect all that was said.

17. Ms Yough was shocked and cross that the Claimant was, in effect, accusing Mr Shea of fraud or other malfeasance. In evidence to this tribunal the Claimant repeatedly referred to "the payment loophole", but we remained unclear what this loophole was beyond a simple failure to ensure adequate checks were made on large payments, or on what basis the Claimant had concluded that there were "no management controls" in the area of payments.

18. In evidence the Claimant said that he was concerned because a "loophole" had been closed 2 years previously and now it was open. When pressed as to what loophole had been closed, and when, the Claimant said he did not know the details but he remembered "*them saying that there was loophole*". This was a surprisingly vague answer for someone who had been alleging fraud, and the siphoning out of money through a loophole. When further pressed as to what the loophole was the Claimant was verbose but remained unclear. For example - *"when you have a loophole in the system it can be anything, so what I'm talking about here is absolute lack of the expected standard controls of – there are 3 types of control preventative, detective and management controls, none of these were not up there."* Despite being pressed the Claimant did not make clear what loophole had been closed and what was now open. Which particular controls was he saying had been removed? Documents we have seen show that the Respondent asked Mr Fetin, Head of Risk, to review the payment process and that he suggested and implemented additional controls. At the Exco meeting on 7th November Mr Fetin told Exco that there had been a review of the payment process "suggesting 8 eyes" (ie that four people would check payments rather than three) and work on rectifying the payment system was continuing. At the Exco meeting on 21 November Ms Yough reported that head Office audit had made recommendations which would be implemented and daily checks were being implemented to ensure any errors were being picked up quickly.

19. It is the Claimant's case that at an Exco meeting a few weeks later Ms Yough shouted at him for requesting an independent expert undertake a risk assessment – and told him that if he were to make any further comment she would take disciplinary action against him for insubordination. Ms Yough says that at one of the Exco meetings the Claimant was embarrassing because he accused Mr Shea of fraud and having deliberately created a hole to defraud the system. The Claimant did accuse Mr Shea of fraud at one of the Exco meetings; and we find he was shouted at by Ms Yough who was clearly impatient of such allegations, though we do not accept that she told him that if he were to make any further comment she would take disciplinary action against him for insubordination.

<u>The MIS discrepancy</u>

20. At about the same time or just before the payment error occurred the finance team observed that the trade services department reported a cumulative loss of some $300,000 from the previous profit position of over $1 million (the MIS discrepancy). It appeared to the Claimant that someone had made a change to the formula included in the spreadsheets for calculating the profits. He asked for a list of all those that had had access to the finance drive and identified that Mr Shea and Mr Cole, who were not members of Finance, both had "read and write" access to the finance drive. The Claimant reported this to Ms Yough who called for an investigation by internal audit.

21. The Claimant says that he also identified that it was John Shea who had modified the formula. The Respondent says that the Claimant could not know this, and that it was impossible to ascertain from their investigation who had modified the formula (see below). We prefer the evidence of the Respondent on this point. We found that Mr Onwuzurigbo was an impressive and essentially honest witness.

22. The Claimant also says that on discovering these matters he had a meeting with Ms Yough and Mr Onwuzurigbo at which he made a protected disclosure. Unfortunately what the Claimant is said to have disclosed is unclear but essentially we understand him to be saying that, by changing the formula, Mr Shea had manipulated the profits to increase the profit of the Trade Finance and Operations department, causing the controls of the bank to fail so that "he would be able to make transactions and then hide them".

23. Ms Yough and Mr Onwuzurigbo denied any such meeting took place but it is apparent that, whether or not there was a meeting, the Claimant reported to both Ms Yough and Mr Onwuzurigbo that Mr Shea had access to the finance drive and it seems likely that he also suggested that Mr Shea had had access to the finance drive in order to manipulate the figures in some illegal way.

24. Mr Onwuzurigbo investigated as requested. His investigation identified that the large difference between the monthly profit figures had occurred because there was a change "in 2 cells relating to the LC yield, leading to an overstatement of the net interest income reported for the months commencing July 2017." On discovery the finance team recorded a journal entry to reverse this overstatement so that the September MIS report would be accurate. (169)

25. A preliminary report was issued on 10 October and the final report issued on 20 October. As part of that report internal audit identified each person who had had access to the finance drive and when. It appeared that the finance drive was modified or amended in July by David Clare (the Claimant's deputy in the finance department at the time) and by Mr Shea in August. Mr Owunzirigbo explained that internal audit identified that in July the template was modified by Mr Clare and that Mr Shea had modified it in August, but internal audit were unable to identify whether the two modifications were connected and whether it was Mr Clare or Mr Shea who caused the problem.

26. Mr Shea's access to the finance drive should have ceased when he moved out of the finance team and into operations. However, when he had become COO his access to the finance drive had not been stopped and he had continued to work on over 20 files in the finance drive because he continued to be in charge of some finance functions such as the Respondent's VAT returns. (One other member of his team, Mr Cole, also continued to have access to the finance drive). Mr Owunzirigbo was of the view that the Claimant should have ensured that leavers from the Finance

Department had their access to the finance drive stopped. Ultimately internal audit was unable to establish who had altered the formula.

27. The final report into the MIS discrepancy identified that there was a material control weakness, which put some business objectives at significant risk. It made a number of recommendations to improve controls including to ensure that all files pertaining to the COO's work function should be moved out of finance to a new folder. They noted that there had been no structured handover when the Claimant took over as CFO from Mr Shea. It criticized some of the controls within Finance and recommended that Mr Shea and the Claimant should meet to conclude any other handovers that were still required.

28. We accept that the Claimant remained convinced that it was Mr Shea who had gone into the finance drive and changed the formula (so that income ordinarily due to Treasury was mapped to trade services in July and August) in order to make trade finance look like they had made monthly profits in 2017. The Claimant believed that Mr Shea did so in order to boost his bonus. However (as Mr Owunzirigbo explained) the operations department was never paid bonus based on notional profit that they made. Further the Claimant must have been aware that the change did not make any change to the profit of the bank as a whole and was an internal accounting matter only.

29. In his witness statement the Claimant said he was extremely concerned about the change to the finance drive. He said that the COO was able to manipulate the reconciliation so he would be able to make transactions then hide it - "this was a fraud, but in my opinion covering it up was an even bigger fraud. Someone was hacking the system and changing profits and the bank didn't investigate." This statement was not wholly true. As the Claimant was aware, the issue had been investigated. It may be that the Claimant did not agree with the outcome of the investigation, and he was not given a copy of the investigation at the time, but there was an investigation

30. It was the Claimant's evidence (paragraph 92) that "*everything really fell into place for me at this point. I realised the whole point was to bring the TSA money in so that it could then be transferred out through the illegitimate loophole that had not been closed*." The Claimant appears to have linked Mr Shea's access to the finance drive and the payment error and concluded that this was a deliberate scheme to deal with the TSA money in an illegal way. (For reference to the TSA see later in the Judgment). However, when this was put to him in cross examination the Claimant said that he had "not really" come to the conclusion that all were connected - but he was concerned that this "hole" which had been closed two years ago had now been opened. As we have said the Claimant failed to clarify what he meant by the payment loophole." He said he wanted to appoint an expert on payments "to fix it", but we remained unclear what hole was alleged.

31. The Claimant told the tribunal that he had kept a detailed report at on his computer at the time with screenprints showing how the COO had been given "secret access" to the finance server "*so that he could change, manipulate and bypass controls and make changes to the accounting and financial information. "* He told the tribunal that all of the evidence was kept in his computer which he had not been able to access since 9 March 2018. However we find it hard to believe, and do not accept, that the Claimant ever had this evidence on his computer. If he had, he should have given it to Mr Onwuzurigbo to investigate, or taken it to the Head of Compliance or to Mr Somers as whistleblowing champion. The Claimant had been making allegations about Mr Shea sometime before 9 March 2018.

32. The accusations which the Claimant made in evidence did not really make sense. He repeatedly referred to Mr Shea having "hacked" the system – when the investigation report had identified that his access had simply never been removed. When the Employment Judge asked him to clarify what he meant by "hacking" - and whether he accepted that what had happened was that the access to the finance drive had simply not been removed when Mr. Shea had left the department - the Claimant said that Mr Shea "*was given a secret passage which the normal IT people can't even see".* Something deliberate had occurred - Mr Shea had been given secret access "*in a way not immediately obvious to an auditor, to the Finance server so that he could change, manipulate, and bypass controls, and make changes to accounting and financial information. It seemed clear that only someone at the top of the bank would do this."* This allegation clearly goes considerably further than an allegation that he had changed a formula on the spreadsheet in order to make the profit of the Operations department look greater than it was.

33. The Claimant said that a few days after his discovery Ms Yough instructed him to drop the issue, told him she had forgiven Mr Shea and asked him to allow finance to take the blame – as a favour. He said that a month later he gave a briefing to Mr Somers when he told him that Mr Shea "and his close family friends" had been too keen to have read and write access to the financial control and profit computation areas of the server." He also said he had briefed Mr Efeyini in the office about this.

34. We do not accept this evidence. As chief financial officer if the Claimant had genuinely believed that Mr Shea had been given some sort of "secret passage" so that he could falsify numbers of the bank then it is extraordinary that this was not subject of a clear written paper at the time, especially if (as the Claimant alleges) he had kept all the evidence on his computer at the time.

35. Equally the Tribunal is surprised that the Claimant was not given a copy of the MIS report prepared by Mr Onwuzurigbo. It was the finance team that had reported the issue, and although Mr Onwuzurigbo said that it was only his duty to report to the CEO, the bank's refusal to share the MIS report with the Claimant at the time seems incomprehensible.

The TSA, forex swaps, large exposure violation and kickback arrangements

36. It has been a significant part of the Claimant's case that he disclosed to the Respondent fraud and illegal activity related to the Treasury Single Account (the TSA) and that he was warned off by Ms Yough and others.

37. A TSA (as described in a paper provided by the Claimant in an annexe to his witness statement) is "an essential tool for consolidating and managing a government's cash resources, thus minimising borrowing costs". At the Respondent, the TSA for the Nigerian government was opened before Ms Yough's time at the bank. In February 2018 the Respondent received notice that the bank should expect an inflow of about US $1.4 billion into the TSA. This was a huge sum.

38. Alco, the finance department (via Mr Weavis), and the risk department were all involved in discussions about the capital adequacy and other regulatory implications of this potential very large deposit. Following an Alco meeting on 5th March (to which the Claimant sent his apologies) Alco gave approval for the US$1.4 billion deposit. A memorandum provided by the Respondent shows that the Claimant himself signed that approval. (RAB 41).

39. It is the Claimant's case that he made protected disclosures orally about the TSA:

    a. To Mr Efeyini in late November 2017 (PD2)
    b. to Mr Somers in November 2017 (PD3)
    c. to the company secretary Ms McBride in quarter 3 2017 (PD4)
    d. in a meeting with Miss Yough and Mr Somers (date not given) (PD13)
    e. in a meeting on 2nd February 2018 with Ms Yough and Mr Somers (PD16)

40. The exact nature of those disclosures was not immediately apparent from the Claimant's witness statement. For example he says *"I started looking at the TSA structure and I had seen data which made me think that the TSA structures are not all clean. I was worried that there would be regulatory and legal implications"*. The Claimant did not state what specific data he had seen, in what respect it was alleged that the structure was not clean, or what the regulatory and legal implications were beyond those that were being properly discussed within the bank.

41. The Respondent denies that the Claimant ever made any disclosures about the TSA. Even after a lengthy witness statement the specific disclosures which the Claimant alleges to have made remain unclear. For example Claimant alleges that he disclosed to Ms McBride "transactions they are planning to bring in, and the fear factor and emphasis on obedience and loyalty that concerned me." What the Claimant does not do is explain exactly what information he gave to her, and the basis of his

suspicion that there were breaches of legal obligations. His evidence in relation to what he said to Miss Yough and Mr Somers is equally opaque.

42. At paragraph 27 of the Claimant's witness statement the Claimant links his concerns about the TSA with concerns about foreign exchange swaps. He alleges that "the CEO had a plan to invest large parts of TSA in Nigerian sovereign bonds (interest at 7%) provide loans to Nigerian government entities and those with the Nigerian government or CBN guarantee (at interest rates of 7 to 10%) and buy more CBN foreign exchange swaps… We would essentially be lending the Nigerian government its own money with interest".

43. In cross-examination the Claimant clarifed that his concerns was not so much about the TSA but about the volume of money that was to be placed in the TSA. Capital adequacy is an important part of the regulation of banks, and from the documents that we have seen we accept the Respondent was properly alive to its capital adequacy requirements and that that this was properly discussed. (See for example memo from Mr Weavis of the finance department dated 22nd February 2018 (688).) His concerns are at odds with the fact that he signed the approval for the deposit. (In the end a deposit of this size was never made.)

44. The Claimant also says that he disclosed to Ms Yough in early February 2018 a "large exposure violation" . He said that he had looked into historical data of the bank and had seen that some 5 or 6 years ago there had been a very large loan to Sahara energy which was above the regulatory threshold of 25% of equity. He said that Mr Shea had filled out the regulatory returns at the time and had lied to the regulator about the amount of the loan . He also says that he repeated the disclosure

    a. In a meeting with Mr Somers and Miss Yough and asked that they should inform the board and the PRA. (PD 15)
    b. In another meeting with Miss Yough Mr Owunzirigbo, Mr Shea, Mr Powell and Tony Uzego (PD 19)
    c. in another meeting with Ms Yough and Mr Somers (PD 20)

and that the Respondent asked him to cover up this exposure.

45. The Claimant also says that in a meeting with Mr Owunzirigbo in early 2018 he told Mr Owunzirigbo that there was "evidence leading to kickback arrangements to some customers with whom the bank had an unusually close relationship". He did not say who these customers were or what the evidence was that the Claimant had uncovered.

46. The Respondent's case is that the Claimant had made no allegations, oral or written, while he was employed about the TSA, the CBN forex swaps, a large exposure regulatory violation or kickback arrangements. Ms Yough's evidence was that the Claimant never raised any concerns, in meetings or otherwise, about the TSA while he was employed. Mr Efeyini, Mr Owunzirigbo and Mr Somers also gave evidence that the Claimant did not

raise any concerns in respect of the TSA structure at any time during his employment .

47. The Tribunal unanimously prefers the evidence of the Respondent's witnesses that the Claimant did not raise any concerns in respect of the TSA at any time during his employment; and that the first time they were aware that this was an allegation was in his claim to the Tribunal. We note in particular that the Claimant had signed the approval for the $1.4 billion deposit – a fact which he did not refer to in his witness statement. We also prefer the Respondent's evidence that the Claimant did not, during the course of his employment, complain about the large exposure regulatory violation, the kickback arrangements or the forex swaps.

48. In relation to the large exposure regulatory violation we accept the evidence of both Ms Yough and Mr Somers that no meeting between the 3 of them took place. We accept the evidence of Mr Owunzirigbo, Mr Somers and Mr Powell that the Claimant did not disclose any such information (PD19 has been withdrawn but the factual allegations as we understand it remain).

49. As for the forex swaps, the Claimant says that he made this disclosure at a meeting with Ms Yough and Mr Somers on 2nd February. The allegation was that the Respondent was discussing using further TSA funds to invest in CBN forex deals and that the Claimant told them that the arrangement was illegal and was "an abuse of a programme introduced by the Nigerian government central bank to improve the country's foreign currency position." He also told them that this was a breach of due care and a requirement to maintain the integrity of its transactions and that the "economic substance of this transaction resulted in looting the Nigerian national wealth". It was his evidence that Ms Yough answered that he was paid to protect the bank's interests.

50. Although there was a meeting on 2 February (to which we will return later on in this judgement) we accept the evidence of Ms Yough and Mr Somers that the Claimant did not raise issues about the TSA or forex swaps at that meeting. Ms Yough's subsequent note does not refer to it and the Claimant himself took no notes. In the Claimant's Scott schedule the Claimant alleges that at the meeting on 2nd February he "*communicated his concerns as to the potential money laundering and fraud implications of the fund structure when combined with the loopholes he also disclosed at the same meeting."* Yet neither in the Scott schedule nor in the grounds of complaint nor in his witness evidence does the Claimant identify – beyond this broad allegation – how the TSA had money-laundering and fraud implications or what specific "loophole" he is referring to.

51. In November 2017 the Claimant travelled to Lagos without Ms Yough. The Claimant alleges, but we do not accept, that Ms Yough called the Claimant soon after he landed threatening him that if he said anything that made her uncomfortable she would "arrange a gang to beat me up."

Meeting with the head of compliance

52. On 13th December 2017 the Claimant stopped Christina Wiseman, the Respondents Head of Compliance, as she was heading out to lunch and asked to speak to her urgently. A note of that conversation (261) was recorded by Ms Wiseman in an email to Mr Somers on 15th December. The Claimant apparently told Ms Wiseman that he had raised serious matters with Mr Somers. Mr Somers denies that the Claimant had spoken to him about any serious matters before the conversation with Ms Wiseman and, given the contemporaneous emails sent by Mr Somers at the time we accept his evidence on this point. In any event the Claimant told Ms Wiseman that he had raised two serious matters with Mr Somers. Her email to Mr Somers records this:

> "*The first related to John Shea and that he had surreptitiously gone into the system and misappropriated bank profits to make Trade Finance look like they had made monthly profits during 2016. He repeatedly referred to this issue as fraud. He does not appear to have raised this with anyone previously. He added that now that he was in charge of finance this was why trade services had reported monthly losses throughout 2017.*
> *The second matter was an even stronger allegation that John Shea and Tania Powell had intentionally left gaps or holes in systems which he believed were there to enable "someone" to commit fraud at a future date. I said that this was a very serious allegation. He did not elaborate much more on this. However, he substantiated this with the recent example of the Indian rupee payment which had been input as Singapore dollars in error. He believes that this system flaw had been intentionally created and that such other holes in systems and processes may still exist."*
> *"At the end of the discussion he then told me that he had been approached in confidence by a staff member in the payments department and was advised that the individual had, on occasions, been told by Tania Powell not to process payment through the compliance system. The individual had been told to push payments through without screening, that it would be okay as Citibank would screen them anyway. As I began to take note of this during the conversation Sam tried to stop me and said that I should not take notes nor identify the individual that they would no longer confide in him! I Further explained that I considered this as whistleblowing and this was a further serious allegation that could have serious repercussions for the bank."*

53. (The third matter reported to Ms Wiseman (above) as fraudulent activity turned out to be ordinary manual payments which are not automatically passed through compliance and for which a process exists. The Claimant does not rely on this as a protected disclosure in these proceedings.)

54. Mr Somers forwarded the email from Ms Wiseman to Mr Onwuzurigbo and asked him to discuss and clarify the allegations with the Claimant and to

do a report. Mr Onwuzurigbo discussed the matter with the Claimant and noted that the Claimant "seemed to be suggesting that Mr Shea had deliberately created some sort of loophole in the payment system to defraud Zenith". We note in passing that Mr Onwuzurigbo himself did not understand what kind of a loophole was being alleged. Mr Onwuzurigbo told the tribunal that he found no evidence when investigating the UML issue (the fat finger error) to suggest any misconduct by Mr Shea or anyone else, and we accept that evidence.

55. Mr Onwuzurigbo spoke to the Claimant and then provided a short report to Mr Somers by way of email dated 22 December 2017. (605) The first issue which the Claimant had raised was in fact the MIS discrepancy issue on which Mr Onwuzurigbo had already done an internal audit report. Mr Onwuzurigbo stated that he still considered that Mr Shea should be asked to "*face Exco committee on the evidence pointing to his and admission of modifying the finance drive"* and that there should be a fence mending meeting between Mr Shea and the Claimant. The second issue raised by the Claimant related to the payment error and this had also been investigated. A new callover policy by the payments team on outgoing payments had been instigated and risk management been encouraged to carry out a comprehensive review of the KPIs. As far as we can tell Mr Onwuzurigbo did not do another investigation into those matters but simply referred back to his earlier investigations.

56. Mr Onwuzurigbo stated that the Claimant had raised other issues, not in Ms Wiseman's email including "an allegation that Mr Shea had planted his cronies in various sensitive *positions in operations. (Paul, (head of IT) Tania Powell (head of trade finance) and Breda (head of Operational Risk))…. He claimed that these people ensure that any issue from operation is covered as they take direct instructions always from John Shea, and that members of the operations team had been warned to stop reporting risk events to the bank's Accelerate platform as it does portray them in a bad light as an error prone unit."* Mr Onwuzurigbo reported that Ms Powell (head of trade finance) had asked the payment team not always to report risk events, that this was an unprofessional act and cast doubt on her integrity. He said he had briefed the Head of Operational risk (Breda) about this and would be raising the issue at the next Exco meeting. A memo would be circulated to staff on the need to act with integrity, good conduct and professional." (604)

57. That email was not sent to the Claimant. However the same day (22nd December) Mr Somers emailed the Claimant to say that he had heard from "various people" that the Claimant had made various allegations about people and business practices within the bank but that it would be better if he could email or speak directly to him about such matters. In his email Mr Somers does not state that he had asked Mr Onwuzurigbo to investigate, nor does he subsequently send that report to the Claimant. Mr Somers said he spoke to the Claimant by telephone to explain that Mr Onwuzurigbo had investigated his concerns but had not found any evidence to support his allegations. We find that surprising. First it was not

wholly correct - Mr Onwuzurigbo had found evidence to support at least one of the Claimant's allegations (the individuals were being encouraged not to report matters to risk, though the manger concerned was TP and not Mr Shea). Secondly, given the level of distrust which the Claimant was showing towards Mr Shea, Mr Somers should clearly have sougth to allay his fears by sharing the investigation reports with the Claimant.

58. The Claimant responded to Mr Somers email on 9 January 2018, apologising for the delay and saying "I'm happy to discuss with you at your convenience". Thereafter neither the Claimant nor Mr Somers sought a meeting to discuss these allegations. As whistleblowing champion Mr Somers should been proactive in pinning down the allegations as far as possible.

59. The non-executive directors of the Respondent had clearly been discussing the Claimant during this period as, on 22 December, Mr Ogilvie (another of the NEDs) sent a cryptic email to Ms McBride, the company secretary, forwarding a copy of Mr Somers 22nd December email to the Claimant and saying that "there is a significant concern about [the Claimant] among the NEDs which you should be aware of."

60. It was Mr Somers evidence that during the course of 2017 concerns had been raised by the Respondent's external auditors, KPMG, about the level of cooperation they received from the Claimant and his leadership of the finance team. There is no documentary evidence of such views. Mr Somers said that the Claimant had failed to take steps to recruit new members of the finance team, with the result that the finance team is understaffed and under resourced going into the "crucial year end..". It is the Respondent's case that the Claimant failed to take ownership of the recruitment drive and had not pushed things along as he should have done.

61. On 15 December 2017 Ms Yough conducted the Claimant's end of year appraisal. As set out above the appraisal was positive. Ms Yough rated the Claimant as " Exceeding standard requirements", but noted that he should improve on "team building and working closely with fellow HoD's." There is no reference in that appraisal to any failure to recruit to the finance department or to concerns expressed by the auditors. The tribunal accepts that the Claimant had been slow to recruit to the finance department, but we heard no evidence that Ms Yough or anyone else had called him to account for this, and the significance of this has been overstated by the Respondent in evidence.

62. On 8 January 2018 Mr Powell sent a letter to the Claimant headed "grievance hearing" inviting him to attend a grievance hearing on 10th of January, the purpose of which was "*to consider allegations that you have made regarding a colleague i.e. John Shea of committing a fraudulent act."* The Claimant was told that Mr Powell would be conducting the hearing together with Mr Onwuzurigbo, Ms Yough and Tony Uzeobo, that he was entitled to bring a colleague or trade union representative and that the

hearing would be held in accordance with the banks Grievance Procedure (a copy of which was not before the Tribunal). The Claimant, at that time, had not presented any formal grievance nor had he put anything in writing. The only records that the Tribunal has had of the Claimant's complaints is the note taken by Ms Wiseman and the email that Mr Onwuzurigbo wrote to Mr Somers on 22nd December. The Claimant responded the following day saying that "many things in this letter is [sic] not clear to me, I'm happy to attend the meeting to understand the matter."

63. The Claimant arrived the meeting at the appointed time. Before the meeting began Ms Yough saw that the Claimant was playing with something in his pocket, asked him if he was recording the meeting and the Claimant said that he was. He then asked to be allowed to record the meeting. Ms Yough did not agree and then decided that the meeting should be cancelled. The Claimant says that he did not try to covertly record the meeting, that he openly asked to record it and that Ms Yough refused. On balance the Tribunal prefers the evidence of the Respondent's witnesses, all of whom say that the Claimant only asked to record once he had been asked by Ms Yough if he was recording. We also reject the Claimant's evidence that before the hearing Ms Yough told him that, if he withdrew "the whistleblowing" he had made in December, she would withdraw the grievance hearing and that she asked him if he was ready to tell the staff that it was on his (the Claimant's) invitation that Mr Shea had accessed the finance drive.

64. On the other hand if this was genuinely intended to be a grievance hearing it was a very odd way to go about matters. The Claimant was not asked to put his grievance in writing or to clarify his allegations. He was not given the Owunzirigbo report. Ms Yough said that they called the meeting because the Claimant had made allegations against Mr Shea and they wanted to know more about those issues "so that we can hear about properly and give them a fair and proper hearing". If that was the intention they failed to do that**.** Even if they were right to be upset that the Claimant was attempting to record the meeting covertly, if the Respondent had genuinely been attempting to get to the bottom of the Claimant's concerns the meeting need not have been aborted. The tone of the letter is combative. We are satisfied that by this time the Respondent was impatient of the Claimant's allegations and considered them without merit.

65. Mr Somers sent an email to Ms Yough on 11th January 2018 expressing his concerns about the Claimant's failure to recruit into the finance team and his performance more generally (347). He said that these matters should be taken into account in any 2017 bonus. The same day he sent an email to KPMG stating that there was a great deal of concern around the CFO and asking if KPMG would be able to second anyone to temporally cover his position. He also asked them to write a note indicating their thoughts about the finance team and the CFO. Mr Somers said he did so because there were rumours that the Claimant wanted to leave the Respondent but in the tribunal's view it was the reverse. The Respondent

had lost faith in the Claimant and was seeking by then actively to engineer his departure.

66. We also note that by the time of Remco meeting on 26 January 2018 (646) moves had already been made to progress a "Finance number 2" on secondment from Lagos. The Respondent denies that this was intended to be a replacement for the Claimant but was genuinely intended to be a "number 2", given that Mr Clare (the previous number 2) had left. We do not accept that. If the secondment from Lagos was genuinely intended to be a "number 2" the Claimant would have been informed. Instead, steps to progress this secondment had been taken without consulting the Claimant.

Issues about holiday

67. The Claimant had accrued 66 days of unused leave over 3 years. On 14 December 2017 the Claimant emailed Ms Yough to say that he had worked for 3 years without a break because of critical issues he had to deal with for the Respondent and had accrued 66 days of unused holiday and that the bank had promised to compensate him for those holidays.

68. It is the Claimant's case that the former CEO Mr Weguelin had agreed that he would be entitled to a payment in lieu of 66 days leave which he had accrued but had not been taken. He said that Ms Yough had agreed to honour this, but that when he asked her to resolve this in December 2017 she told him that it would be linked to the Claimant signing a confirmation that "all transactions and arrangements within the bank were in perfect order".

69. The Claimant's written contract of employment does not provide for more than five days holiday to be carried forward from one holiday year to the next without the prior written consent of his line manager. No such written consent had been obtained. Mr Shea had been the Claimant's previous line manager and, until the events described in this Judgment, they had got on well with Mr Shea. Mr Shea had given the Claimant consistently good performance reviews. In an email from Mr Weguelin to Ms Yough dated 14th June 2017 (just after Mr Weguelin had left the Respondent) Mr Weguelin informed Ms Yough that the Claimant told Mr Weguelin that he had about 50 days leave left over from the last two years. Mr Weguelin then says -"*Obviously it is not possible for him to take that amount of holiday on top of his allowance this year which he must take including his min 10 working days. And obviously policy doesn't allow for that amount of carryover, but it might be possible to buy him out of some of it. Just a couple of suggestions*". This wording does not evidence any promise by Mr Weguelin that the Claimant would be paid for 66 days of unused leave.

70. We do not accept that Ms Yough tried to link payment of the 66 days with a written confirmation that all transactions and arrangements within the bank were in perfect order. On 2 February 2018, she did propose to the Claimant that if he wanted his untaken holiday encashed the Respondent

would agree; with the proviso that he must use the funds to repay the MBA sponsorship funds provided by the bank; which would then free him from the clawback clause in the Sponsorship Agreement (requiring him to repay the sponsorship money if he left the bank before 2019). This was similar to the suggestion which had already been made by Mr Weguelin. The Claimant did not accept this offer.

The 2nd February 2018 meeting

71. On 2nd February 2018 Ms Yough and Mr Somers met with the Claimant. Mr Somers told the Tribunal that the purpose of the meeting was to discuss the Claimant's "apparent animosity towards his fellow senior executives such as Mr Shea" as well as an issue concerning his holiday entitlement. There had already been discussions at Remco concerning whether or not the Claimant could be signed off as a "fit and proper person" for regulatory purposes and Remco considered that the allegations that the Claimant was making threw doubt on his integrity. Mr Somers told the tribunal that in his mind the meeting was to discuss "the constant raising of the same allegations and the constant attack on John Shea in public and in Exco meeting". In fact these issues were not properly discussed and the Claimant primarily wanted to discuss issues of money.

72. We have not seen any email which convenes that meeting but Ms Yough's notes to the board (not copied to the Claimant) (368) identified that the board had mandated Mr Somers and her "to have a formal discussion with the Claimant in respect of his behaviour, allegations, as well as his request for the bank to grant him an exchange of cash in lieu of leave."

73. During the meeting the Claimant asked for a pay rise because the Finance Department was short staffed and asked for 66 days of unused leave to be paid in lieu. Ms Yough offered to pay the Claimant for his un-used leave on the basis set out above. The Claimant subsequently declined that proposal.

74. Ms Yough records that during the meeting the Claimant "went on about" alleged holes in the system which he felt left the Bank vulnerable and the "so-called" fraud in the MIS report which the Claimant felt was not properly investigated. The Claimant was told that they could not prove that Mr Shea was the one responsible for altering the trade finance figures and there was no money missing. The Claimant wanted a forensic investigation to be done.

75. The Claimant also said to Mr Somers that there had been an incident two years previously, which had cost the bank £150,000 and had been covered up. No specifcs were given. Mr Somers asked Mr Onwuzurigbo to investigate this allegation. Mr Onwuzurigbo held interviews with the Claimant and 6 other employees and looked into 3 potential transactions and concluded that the claim lacked any substance. He reported to Mr Somers that the Claimant couldn't remember any particular transaction fraud or payment for £150,000 (365). It was not clear from the evidence

that this report was shared with the Claimant, and we conclude that it was not so shared.

76. The Claimant also alleges that at that meeting he disclosed to Ms Yough and Mr Somers that 5 or 6 years ago the bank had lent Sahara Energy some $70 or $80 million in breach of regulatory requirements and that Mr Shea had filled out the regulatory returns at the time and lied to the regulator. Ms Yough and Mr Somers deny that the Claimant made any such disclosure at 2 February meeting. On the balance of probabilities we find that he did not make such disclosure. We note that the Claimant did not refer to it in any subsequent written correspondence (for example the emails to Mr Amangbo and Mr Ovia- and we have some serious doubts about the Claimant's overall credibility (see below)).

The missing $30 million

77. In his Scott schedule the Claimant alleges that during the 2017 audit he discovered that $30 million was missing and had been transferred out of Zenith plc account without permission from head office. He says that he disclosed this to Mr Shea and Ms Yough in a meeting in February/March 2018 and that, as a result, Ms Yough threatened him, said that the money was allocated for a specific purpose and told him to stay out of operations matters.

78. Ms Yough accepts that the Claimant raised concerns about a sum of $37 million with her. She says that they investigated this and the money was not missing but was moved from an operations account and credited to a collateral account maintained by the Respondent known as the "Zenith Bank plc LC operating account" and the Claimant had been one of the people that authorised the opening of the account. They had explained this to the Claimant at the time and he had "let it go".

79. The Tribunal prefers the evidence of Ms Yough. The Claimant's evidence was unclear. He refers to the money being "missing" but at the same time says that he had complained to her that "the removal of this balance into a different account was a violation of internal regulations and accepted practices and the client engagement contract." He has not explained in what way money being moved into different account was a violation of regulations. There is a big difference between money being missing and money being moved into a different account. If the Claimant genuinely believed that there was money missing, we would have expected this to have been reflected in the accounts or at least for the Claimant to have documented his concerns in writing.

Fit and proper person

80. It was the Respondent's evidence that Ms Wiseman was unwilling to sign the Claimant off as a fit and proper person for regulatory reasons and subsequently left the bank without having done so. There was no documentary evidence that this was the case.

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81. The process for signing off senior management as a fit and proper person for regulatory purposes is that Ms Yough as the Claimant's line manager, the head of HR, and the head of compliance each had to sign off to confirm that the individual was considered fit and proper.

82. The issue of the Claimant's status as a fit and proper person was discussed on 26 January 2018 at Remco. Mr Powell told Remco that he concurred with the head of compliance that they were unable to sign the Claimant off as fit and proper due to "behavioural/conduct matters."

83. The Tribunal found the Respondent's evidence as to this issue unsatisfactory. In his witness statement Mr Efeyini told the tribunal that the concern was "because of his performance as CFO and his ability to maintain appropriate working relationships with fellow executives". However in cross examination he did not suggest that there was any issue with the Claimant's performance as CFO. Instead he told the tribunal that they "had heard" that the Claimant "*was making a lot of allegations of fraud, coverup, rude to his colleagues, rude to the HR committee, as being unethical, negative remarks about it, the bank and its directors and his colleagues."* He said "*they were concerned about whether he was honest enough or had enough integrity and behaving in those ways*." (In re-examination Mr Efeyini said that if the Claimant had grievances he could raise them in a professional and proper manner, but he was not doing that - he was being destructive and difficult and "*creating difficulties or disruption within the system."* Mr Powell described the difficulties as *"the way he was interacting with colleagues including the CEO and on what he was saying and just the various – the friction that was going on at the time."* Ms Yough's evidence was that Ms Wiseman had been unwilling to sign the Claimant off as fit and proper but that she had not discussed it with her. At Remco Ms Yough's issue with the Claimant's behaviour appears to have been that he had "*been invited to a grievance meeting, but was confrontational and she had left the meeting due to refusal for him to record proceedings.*" (646) it is clear that the reluctance to sign the Claimant off as a fit and proper person arose out of the allegations that the Claimant was making, which the Respondent regarded as outlandish.

84. Remco decided that the Claimant should be spoken to by Ms Yough and Mr Somers. This led to the 2 February meeting but Ms Yough's note of the 2nd February meeting does not suggest that the fit and proper test was discussed with the Claimant. The Respondent did not at any time discuss with the Claimant the issues that they had surrounding their concerns about his integrity or honesty and the reluctance to sign him off as fit and proper.

85. Mr Powell told the Tribunal that as a result of this reluctance he took legal advice on 15 February and following that discussion he felt that the bank could sign the Claimant off as fit and proper. After he obtained that advice the Claimant was signed fit and proper at the next board meeting in April.

Events after 2 February

86. By 2 February, if not some time before, the Respondent had lost faith in the Claimant and wished to exit him from the bank. Emails between the non-executive directors refer to the need to agree a compromise agreement with him. In the event the process was delayed because of the need to keep the Claimant in place until the year end accounts had been finalised and audited, and then the Claimant was off for an extensive period of time on sick leave.

87. The Claimant had attended a course at Cambridge University, which he had taken a week off work to attend, and for which the Respondent had provided financial support. When asked to provide proof of attendance on the course the Claimant refused to do so and told Ms Yough to look course up online if she wanted proof. Ms Yough, unsurprisingly, regarded that response as obstructive and rude.

Staffing of the finance team

88. The finance department had reduced in size over the period of the Claimant's tenure as CFO. His deputy, Mr Clare, had left and had not been replaced. Others had also left. Mr Somers told the Tribunal that the Claimant had not been proactive enough in recruiting new staff. It was his evidence that KPMG had also expressed concerns about understaffing within finance. On 11 January 2018 Mr Somers sent an email to Ms Yough stating that "the NEDs have been expressing concern about the performance of the CFO in at least two particular areas:

    a. failure to provide a paper on the accounting treatment of a particular loan
    b. failure to recruit a number 2 to strengthen the finance team.

89. Later that same day the Claimant sent an email to Mr Powell, copied to Ms Yough, the purpose of which appeared to be to put the blame on failure to recruit into the team on Mr Powell, and asking him to put the recruitment process on hold until after the accounts had been signed off. Mr Somers was unimpressed. (351) Mr Somers forwarded this to Ms Yough with a note saying that he thought that this was the opposite of the true position and that it was an attempt to justify bonuses for the Finance department.

90. The Claimant had two weeks holiday planned in March and his last working day 9 March 2018. The Claimant was unhappy that Mr Shea was due to stand in as CFO while he was on holiday and sought to ensure that Mr Shea should not have access to the Finance Drive.

91. On 7th March 2018 the Claimant called Mr Somers to update him about discussions with KPMG over the accounts and asked him to look again into his holiday situation. Mr Somers considered that the tone of the

conversation was negative and that there were no constructive suggestions.

92. On 8 March there was a handover meeting between the Claimant and Mr Shea which resulted in a grievance being made by Mr Shea against the Claimant because of what Mr Shea perceived as personal attacks against him. By then Ms Yough had already decided that a meeting with the Claimant was required to discuss the possibility of his managed exit from the bank.

The Claimant's absence

93. On Friday 9 March shortly after the Claimant had attended the Monthly Performance Review meeting with Ms Yough, Ms Yough telephoned the Claimant to ask him to meet her and Mr Powell.

94. When the Claimant did not arrive for the meeting Ms Yough telephoned the Claimant again and a colleague Ms Bentvoglio answered his phone. She said that the Claimant was in a meeting room lying across two chairs complaining of a headache. Ms Yough went to the finance department and found the Claimant lying across two seats. Ms Yough was furious. She asked whether the Claimant was faking it. She believed that the Claimant had got wind of the fact that they were discussing his exit from the bank and had faked his illness to avoid attending the meeting. We do not accept that it was Ms Yough who instructed that an ambulance be called and prefer the evidence of Mr Weavis that he and his colleagues decided to call an ambulance, and that they received no instructions to do so from Ms Yough. (Nor do we accept that Ms Yough told the Claimant's team not to call an ambulance). The paramedics arrived and took the Claimant out of the building into an ambulance. We have seen no further medical evidence as to what was the cause of the collapse, when or if the Claimant went to hospital and, if he did go to hospital, when he was discharged.

95. The Claimant did not return to work at the Bank after that date. He travelled to Sri Lanka and remained there until some time in September.

96. The Claimant was due back to work on 9 April 2018 but did not return or respond to emails. On 15th April the Claimant emailed to say he was under medical supervision and had been advised to remain off work. On 8th May he sent two medical certificates signed by a doctor in Sri Lanka (dated 11th April and 4th May respectively) each recommending four weeks leave as the Claimant was receiving treatment for "Acute Stress Reaction " and "adjustment reaction". A third medical certificate was provided on 5th June recommending a further 4 weeks leave for Adjustment Disorder". On 9 July he provided a medical note dated 29th June stating that he was suffering from "a mild depressive episode" and (somewhat delphically) that he "may benefit from working in in an appropriate environment".

97. The Respondent's sick pay policy provides for sick pay to be paid at the Respondent's discretion for up to a total of 13 weeks in any 12 month

period. Mr Powell wrote to the Claimant on 6th July to inform the Claimant that he would not be paid in respect of any continuing absence after 5 August 2018. (This would have been 17 weeks after the start of his sickness absence.)

98. The July board minutes record that, as the Claimant had been on sick leave for in excess of 13 weeks, he would be given a further month to provide appropriate documentation and he would then "be given formal notice of the bank's intention to sever employment".

Written disclosures

99. On 8th April while on sick leave the Claimant sent an email to the Chairman of Zenith plc, Mr Ovia and its Managing Director Peter Amangbo (protected disclosure 24) (397). It is long, wordy and uninformative. It is long on allegations and short on specifics. It refers to being instructed by "*a certain executive to perform fraudulent financial and regulatory reporting, which I have expressly refused"* and *"I am often asked to keep quiet in meetings when I attempt to bring up crucial loopholes in systems or matters that could lead to reputational damage"* that "an informant" had provided "*useful information regarding to a string of malpractices within the bank"* –and that unnamed directors demanded that he kept quiet and threatened to deal with him if he did not. The letter does not say what fraudulent reporting he was instructed to do, who instructed him or what the crucial loopholes were.

100. Mr Amangbo responded to the Claimant the next day (496) asking for specific details of the allegations including the names of the executives and other staff who were involved in fraud or preventing him from investigating the fraud. The Claimant did not respond to that email until 8th November - some six months later, and even then he did not provide answers to the questions which had been posed. He simply said he had been unable to respond because he had been ill and had then been instructed to keep away from the office. A fuller (but unclear) response was provided on 27th November – see below. We do not accept the Claimant's evidence that he had to remain in Sri Lanka because he was afraid for his life or that he did not respond to the email sent by Mr Amangbo, because (i) he was afraid for his security and (ii) had been advised by doctors not to engage in any work-related activities.

101. As we have said we do not accept that the Claimant made disclosures about the TSA, or that in response to those disclosures Ms Yough told him that he was putting his life in danger and that "*even the bank would not be able to save me if I go against these deals or if I, for example, blow the whistle, to the PRA."*

102. On 10th April the Claimant sent a WhatsApp message to Mr Shea containing an accusation that he had been "making adjustments to massage March profits" (but without specifying in what respect). Mr Shea sent that to Mr Onwuzurigbo and Ms Yough and said that he suspected

that the Claimant was viewing the finance drive remotely. (Mr Somers was also sent the content of the WhatsApp message and he asked Mr. Onwuzurigbo if it would be prudent to stop the Claimant from accessing the servers remotely, but in fact the Claimant had never had remote access to the servers. (733))

Internal Audit Plan of the Finance Department

103. In late August 2018 internal audit issued a report on the Finance Department whose objective was "to assess whether the Respondent had "established adequate and effective systems and controls over key financial processes and activities within the Finance Department.". This was part of a pre-scheduled internal audit plan which had been approved by the executive committee (including the Claimant) in December 2017.

104. As the Claimant was away from the Respondent on sick leave at the time that the audit was conducted, he was not interviewed as part of the audit.

105. The report rated the finance team as "unsatisfactory". The Audit reported that:
    a. there were a high number of discrepancies the cause of which was lack of skill and competency in the finance team and a lack of appropriate finance policies to guide staff within the team.
    b. the financial procedures were not fit for purpose and had not been reviewed since December 2015.
    c. There was an absence of supervisory controls.
    d. Because of a skills gap within the previous finance team many of whom were not qualified accountants.

    However a new finance team had now been recruited as a result of which it was anticipated that the control framework would improve. A number of audit recommendations were made.

106. It was put to Mr Onwuzurigbo that the internal audit report was designed to undermine the Claimant in order to please Ms Yough/Mr Somers and to assist with his dismissal. We do not accept that. We found Mr Onwuzurigbo to be an honest and credible witness and consider that the findings arose from genuine weaknesses identified by Internal audit. (Although a fairly recent internal audit report into "Financial Controls" in September 2017 had been given an audit rating of satisfactory we note that it had also identified areas for improvement and minor weaknesses including highlighting that the finance procedures were out of date.).

107. This report was not sent to the Claimant, who at the time still in Sri Lanka and on sick leave.

Occupational Health and proposal to return to work

108. The Claimant returned from Sri Lanka in September and, at the Respondent's invitation, attended an occupational health meeting with Dr

Conway on 20th September. She provided a report dated 2nd October which advised that the Claimant would be fit to return to "adjusted duties at the start of November 2018 and would recommend that from "now onwards" he undertakes preliminary office-based meetings to re-acclimatise him with the workplace."

109. She recommended
    a. a temporary phased return over five months starting with two days a week and increasing to 5 days per week over that period
    b. flexibility to work from home days once he was working for a more days a week
    c. staffing issues be addressed
    d. overtime is avoided
    e. addressing patient identified stress factors in the workplace and reducing his exposure to those factors.

110. There was no immediate response from the Respondent on receipt of that report. The Respondent was still hoping for a managed exit. However the Claimant and Mr Powell met on 23rd October during which a discussion took place about a possible exit package. (Privilege has been waived in respect of these discussions.)

111. On 25th October 2018 Remco resolved to withdraw the Claimant's SMF status even though, by then, he had been certified fit to return to work.

112. On 31 October the Claimant emailed Mr Powell to say that he would be starting work in line with the doctors advice on 1st November – but would be doing so from home. There was no response to that email. On 8th November the Claimant wrote to the Respondent to the effect that as from the 1st November he had started working for 2 days a week from home and had done some technical reading to refresh and asked him to ensure that his November salary was paid in time. In that email he also said that factors such as being forced to give up on adequate holiday for 3 years, working 7 days a week for 3 months up to March 2018 constant demands to violate laws and regulations, threats of physical harm, abusive and discriminatory behaviour and harassment in various forms against him made him "finally fall off the cliff." He also said that when he had collapsed on 9th March the CEO had instructed staff not to call a doctor and when she had heard that the doctor had been called she had abused those who had called the ambulance for doing so.

113. On 16th November Mr Powell wrote to the Claimant to say that the Respondent considered that the Claimant remained unfit for work and should not be undertaking any duties, even from home and that any work he had a undertaken while signed off sick and not been approved by the bank and would not be paid. The Respondent also said that they had "serious concerns about how to resolve the ongoing issues relating to your working relationship with the CEO, as it appears that the relationship is fundamentally broken down." They said they would be in touch shortly to

arrange a meeting with him to discuss this as well as a number of concerns relating to his performance as CFO.

114. In the meantime the Respondent sought to effect an agreed termination on terms and on 19th November the Respondent sent a without prejudice letter to the Claimant offering him an exit package. In this letter (privilege having been waived) Mr Powell denied the Claimant's account of the events of 9 March 2018, noted that the Claimant's various allegations (demands to violate laws etc) remained unparticularised and could not be investigated. He commented that had the Claimant raised his allegations with HR previously they would have been dealt with appropriately.

115. The settlement agreement which was enclosed contained at 8.4 the following clause "The Employee in signing this Agreement warrants that there are no circumstances of which he is aware which would amount to a breach of the regulatory requirements applicable to the Company, the Conduct Rules or Senior Manager Conduct Rules or give rise to concerns regarding his fitness and propriety to be an approved person." The Claimant says he could not accept such a warranty; but he did not respond to the offer.

116. On 27 November the Claimant sent an email to Mr Ovia and Mr Amangbo, which he now relies on as a protected disclosure (PD 25). The letter is 11 pages long and hard to summarise. As with the email of 8th April, it is long on allegations and short on information. Most of the allegations that he makes are directed against Ms Yough, rather than Mr Shea, but the Claimant does say that "Some top executives in London make kickbacks organising loans to sub- creditworthy the customers" and that the COO (Mr Shea) "is allegedly manipulating the internal process to support these", which Ms Yough is covering up. He also refers to

    a. fraudulent loans which had cost the bank millions of dollars. The Claimant referred to having investigated claims and had found "*details of a loan approved by MCC and GCC at a higher rate (say) 6% but for years the system has only accrued (say) 3% what's more interesting was the sophistication of this arrangement within the system. On the outset (main client page) the higher rate appears but in a hidden place the 3% appears in this key field has been used by the system to accrue interest on certain loans for this client".* The Claimant also refers to having agreed another large loan facility at the rate of 7% when the final facility document sent to the client had the rate changed to half the approved rate.
    b. the CEO had violent outbursts asking him not interfere
    c. a loophole "allowed any amount of money to be paid to anyone, anywhere in the world provided there was a swift code." Operations/payment staff had said that they were asked to ignore controls.
    d. the COO is allegedly manipulating the internal processes

e. the CEO demanded that he get rid of the former finance manager who had found a large financial fraud of a client which was ignored or concealed by Zenith UK staff
f. CEO requested that he falsify regulatory information
g. he had discovered an even bigger exposure that had potential fraud implications, $30 million had been transferred out of said plc funds without permission from head office.

117. The Claimant also alleges that Ms Yough repeatedly threatened him if he did not pledge allegiance and that if he said anything to Head Office to make her uncomfortable she would send a gang to take him away and beat him up. He alleges that Ms Yough "forcefully instructed" him to carry out certain actions which would have amounted to serious IFRS and regulatory violations including manipulating financial statements. He does not, however, elaborate as to the specific actions or how they were in breach of regulations or laws.

118. In his submissions to the Tribunal Mr Milsom seeks to summarise the allegations made by the Claimant in his letter of 27 November 2018. Even he has difficulty in identifying information that has been disclosed, referring instead to the bank having "near misses due to the absence of adequate control regimes, the payment loophole, profit manipulation, a kickbacks regime and a "bigger arrangement" which he submits must refer to the TSA. None of these allegations contain specific information.

119. Although the Claimant says that he has investigated these loans he declines to identify the client whom the loan was made, or the hidden place where the 3% appears. He says "my informant tells me that the client pays for the savings made for him and are shared by the people who arranges this" which appears to be an allegation of bribery.

120. As far as the Tribunal is aware there was no response to this letter.

121. The Claimant sent a further letter to Mr Amangbo and Mr Ovia on 10th December. The Claimant said:

a. he had sought to do "the right thing for the bank" despite hardships, harassment and threats to his safety
c. his salary had been withheld for 5 months
d. his 2017 bonus had been withheld
e. his holiday payments had been withheld
f. the Respondent had not bridged the salary gap when he took over as CFO
g. that he had been blackmailed to provide written confirmation that he is happy with all the bank's arrangements governance and control.
h. That he had made many and significant contributions to the bank, highlighting potentially fraudulent financial statements, paving the way to end the ill disciplined lending practices and brought in "credit discipline" to the bank.

122. He also set out his complaint about "the incident on 9 March 2018 and said that following his collapse in the office on 9 March 2018 the CEO had told the finance staff that he "deserved this punishment as he was a very bad person" and that no one should call a doctor and that the Claimant should be allowed to suffer.

123. However somewhat contradictorily, despite various extreme allegations he had made on 27 November the Claimant continued that *"I know the values of the entire bank or those in charge of governance and not reflected by the behaviour of a single senior person"* (a reference to Ms Yough.) He asked to be allowed to stay away until matters were fully settled – that this was the safest option given the threats of physical harm that Ms Yough had made in past.

124. As with the letter of 27th November, the tribunal has not seen any response to this letter.

125. Some time in November the Claimant contacted the FCA's Whistleblowing Team. It is not clear exactly what was said but it is apparent that the Claimant was particularly concerned about clause 8.4 of the proposed Settlement Agreement. We do not know what, if anything, the FCA told the Claimant about that clause but the Claimant's response to the Respondent was not to negotiate for its deletion. (The Respondent had in the usual way agreed to contribute £500 plus VAT towards the costs of independent legal advice.) Instead he simply did not respond.

126. On 17th December there was a further without prejudice offer made to the Claimant, noting that the Claimant had not responded to their earlier offer.

127. The Claimant responded on 23 December stating that

    a. he remained fit for work and asking for his holiday payments, salary, bonus and salary gap "promised to bridge for the additional CFO responsibilities undertaken".
    b. In response to the settlement offer the Claimant said "to add to the integrity and credibility of these responses and those who have provided them, would you please remove the legal restriction in the letter (and resend the document)?. The Claimant says that this is a request to remove clause 8.4 but it is hardly clear.

128. At some point in December the Claimant had returned to Sri Lanka.

<u>Dismissal process</u>

129. On 11 January 2019 Mr Powell wrote to the Claimant to invite him to a meeting at 1 pm on 16 January 2019 (520). The purpose of the meeting was said to be to discuss with

a. "our concerns about how to resolve the ongoing issues relating to your working relationship with the CEO, as it appears the relationship is fundamentally broken down. We will discuss your allegations against the CEO, particularly in relation to the moments you were taken ill. There are serious differences of opinion in relation to this."
b. "a number of concerns relating to your performance as CFO and highlighted in the recent Internal Audit report", a copy of which was enclosed.

One possible outcome would be his dismissal from the bank. In relation to the Claimant's request to return to work they said that they considered that the Claimant was at an increased risk of a relapse if he became stressed again and that therefore they were not in a position to facilitate his phased return.

130. The Claimant says that 16 January was chosen because the Respondent knew that he would be in Sri Lanka at that point. It is not clear if this is the case or not, (the Claimant said in cross examination that he told Mr Powell) but in any event, the Claimant did not respond to the email to ask for a postponement, nor did he choose to fly back for the hearing.

131. Instead at 11 o'clock on the day of the meeting 2 hours before the meeting was due to start (and having been chased by Mr Powell) he sent an email to Mr Powell stating that he had been waiting in London "until recent for you to resolve the matter" that he would be willing to participate remotely "on the office phone" but "maybe you have to reactivate it" . From the tone of the letter, and the offer to participate only on the office phone, it is clear that the Claimant had no real intention of participating. (545) He also sent a letter addressing specific concerns raised in the audit report (547) and a further email (561) outlining his contribution to the Respondent, and repeating in vague terms some of his allegations

a. "I blow the whistle on a potential fraudulent pattern we observe."
b. "I expose a massive Operations loophole that may have been created to transfer large sums and traces could be camouflaged".
c. "I then discover potentially fraudulent arrangements and structures that fall within the scope of money-laundering in my opinion."
d. "Finance discovered significant potential fraud may be organised by people within the bank which lost millions of dollars for the bank.
e. "We have found operational loopholes may be left intentionally to potentially siphon out millions."
f. "We discovered Exco members tampering the accounting system to manipulate department profits."
g. "We found people close to the CEO stealing money from company facilities."
h. "My findings on potential fraudulent structures, money-laundering arrangements, regulatory breaches and demand to manipulate

financial regulatory reports are also simply denied but on a document with a seal that makes it legally unenforceable."

Of all of the above only f. Was an allegation of wrongdoing which could be clearly identified.

132. At the same time in the letter the Claimant repeats his allegations that Ms Yough had threatened him:
    a. "CEO threatens me to send the gang to take me away and beat me up – once when I was in Nigeria and once in the UK."
    b. CEO repeatedly said to me… if you are happy to be paid with Nigerian man money do as we say… We will look after you"

133. Mr Somers decided to proceed in the Claimant absence. He decided to dismiss the Claimant. The notes record that Mr Somers and the senior HR manager (who was present as notetaker) "*were in agreement that the many accusations made by SAP against a number of senior staff members were unsubstantiated, and that the audit report was created by qualified professional auditor and there is no evidence that would lead them to question the integrity of the findings. In addition DS expressed his opinion that a relationship of trust and confidence between the Bank and SAP had diminished to a point beyond repair."* In cross-examination Mr Somers told the Tribunal the deciding factor was the "*constant raising of the same allegations… this constant attack on John Shea in public and in Exco meetings."* He also said that *"it wasn't so much the breakdown with Pamela, it was actually the breakdown with all of the executives, as indicated by the fact that nobody wants to sign him off as fit and proper."* Somewhat oddly, Mr Somers also said that it was not he alone that decided to dismiss the Claimant, but that it was a decision taken by him and by Mr Ogilvie. At another point in his cross-examination Mr Somers said that there was a decision taken by the board as a whole.

134. By letter dated 22 January 2019 the Claimant was given notice of termination with immediate effect with payment in lieu of salary. The reasons given were that (i) his performance was below the required standard and (ii) his working relationship with the CEO at the bank had fundamentally broken down. No specifics to illustrate the breakdown are given.

135. Both the notes and the subsequent dismissal letter are inadequate. It is not clear which accusations Mr Somers was referring to, or who the senior staff members were. The notice of hearing referred only to the Claimant's relationship with the CEO and his allegations against her "particularly in relation to the moments you were taken ill." There is nothing in the notice of hearing about allegations against Mr Shea or any other staff. There is nothing about his working relationship with the other executives. Nothing specific is referred to. Most of the letter is concerned with the Internal Audit report.

136. The Claimant appealed (583) . The grounds of his appeal were that the criticisms of his performance had been based on an internal Audit Report

carried out 6 months after he had been away from the bank and his views and those of and the other "auditees" had not been taken into account. As to the allegation that relationship with the CEO had broken down, the Claimant said "denied" the allegation and that dismissing him "*for the behaviour of the CEO and for my unwillingness to perform illegal and unprofessional acts as per my knowledge (I have explained these earlier) doesn't sound professional in my opinion".*

137. His appeal was heard by Mr Gamble on 25 February 2019 and the Claimant attended. From the notes it appears that the Claimant wished to focus on the relationship with the CEO and his view that there were significant fraudulent transactions within the bank. Again he focuses on the allegations and not the specifics. For example he said "he had explained that the behavioural, transactional and internal controls were deteriorating and violating the laws of the country." He refers to "significant fraudulent arrangements leading to money-laundering" and growing irregularities. It is long on rhetoric and short on specifics . He said that he had been threatened with physical harm, and that Ms Yough "asked him to remove the people had found the errors. We accept Mr Gamble's evidence that the Claimant was asserting that the bank was effectively a criminal enterprise, without a proper basis for doing so.

138. In relation to the Audit Report the Claimant said that the usual protocol would be for the report to be presented to the auditees for them to give a detailed answer. The Claimant had not had a chance to do that. If there were performance issues, a verbal or written warning should have been given and performance objectives agreed.

139. The outcome of the appeal was sent to the Claimant on 4 March 2019. Mr Gamble upheld the Claimant's appeal on dismissal insofar as it related to the findings of the Audit Report. He said that he had read the Claimant's response to the Audit report, listened to what the Claimant had to say at the Appeal hearing and spoken to Mr Onwuzurigbo and, while he had no reason to doubt the veracity of the findings in the Audit Report, those findings should have been reviewed with him to consider whether the Claimant was able to turn the position around. If the conclusion had been that he was not able to retrieve the position then that would have merited the termination of his employment. However in the absence of that further step he upheld the appeal against termination of his employment on that ground.

140. However, Mr Gamble was of the view that the working relationship with Ms Yough had fundamentally broken down. *"You have made a number of very serious but unsubstantiated allegations in the papers that I have seen, some of which you repeated in your meeting. I'm aware that in the past you have been asked to substantiate them and failed to do so and the investigations that have been carried out internally have failed to find any support for these allegations." "I will also note that some of these allegations are made not just against the CEO but also members of the Board and are such as to suggest that you have a problem with the Bank*

as a whole or at the very least with other members of staff within the Bank. I conclude that in the circumstances you cannot continue to act as CFO."

141. We accept that Mr Gamble approached the appeal properly with an open mind and that the reason why Mr Gamble did not uphold the appeal was that he considered that the Claimant was making allegations which had no substance and without articulating what they were; and had developed a whole theory regarding corruption and problems with the bank which was not founded in fact was unsustainable**.**

Race discrimination

142. In the Claimant's particulars of claim he alleges that he was directly discriminated against or harassed because of his race/nationality and that "there was a repeated process of negative references to my race referring to me as "the Indian" in an inappropriate context and that the CEO said several times "we have chiefs and Indians here, and you know where you are from." He also alleged that comments were made such as how the Claimant was "the odd one in an African bank in Europe" and that he did not represent either continent, and that Ms Yough had commented that she would not feel comfortable having the Claimant's face on the corporate website under the Senior Management team. (The latter allegation has been withdrawn.)

143. In the witness statement the Claimant said that from around November 2017 Ms Yough would "frequently" make comments about his race, comparing him to Nigerian or European colleagues.. After he became difficult, by raising questions about the TSA transactions and the Forex swaps, she began calling the Claimant "the Indian" and talked about how there were chiefs and Indians and how he knew which one he was. A new allegation in the Claimant's witness statement was that, in a conversation about whether the Claimant should be paid as much as the CRO (who is white), Ms Yough said "shouldn't he deserve to be paid higher? He has got beautiful green eyes."

144. Ms Yough said that she did not recall any comment about chiefs and Indians but that she might have said it. "it's a common expression and its referring to American Indians, not Indians from India. She denied that he she described the Claimant as the odd one out because he was not an African. "There were 70 people in the bank when I joined. There are only 9 Africans. All were European and other, so how could he be the odd one out. There were many other races."

145. We do not accept the Claimant's evidence that Ms Yough described the Claimant as the odd one out in African bank in Europe. We do not accept that she would frequently make comments about his race comparing him to Nigerian or European colleagues and we do not accept that Ms Yough began calling the Claimant "the Indian". If there was a comment about chiefs and Indians, we do not accept that the Claimant regarded it as directed at him or that he was offended by it.

Credibility

146. The Tribunal did not consider the Claimant to be a straightforwardly honest and credible witness. We have set out above our findings of fact but there were significant areas of the Claimant evidence which we do not accept. In particular the Claimant, in his witness statement, repeatedly referred to threats to his life. He explains that that is why he remained in Sri Lanka for so long, and why he was reluctant to attend his disciplinary hearing in person. "*We were worried for my safety. I had to stay away until the dust settled."* The Claimant alleges that:

    a. the day after the Claimant had met with Ms Wiseman Ms Yough shouted at him for having bought a whistleblowing complaint and told him that he knew what would happen if he spoiled matters for the bank. "She said that there are so many powerful people behind this that she cannot even guarantee my life." (WS Parra 58)
    b. in the meeting on 2nd of February Ms Yough said she would destroy his career if he pushed that line. "She warned me of dangerous consequences, including bodily harm and serious danger to my life if the information I had was leaked…. you have no idea what we are capable of"
    c. Ms Yough said "I will destroy you I will crush you to the ground no one who said no to my request has survived here."
    d. After the Claimant had arrived in Nigeria for a business meeting she asked him to take the return flight and that he said "anything that made her uncomfortable she would arrange a gang to beat me up. (This allegation was contained in the Claimant's email to Mr Amangbo of 8th April although the identity of the person who threatened the Claimant was not stated)

147. The Claimant alleged in cross examination that the reason why he did not make a report to the Regulator sooner is that he was told that his life was in danger if he talked about the things that he knew.

148. The Claimant's evidence about what he had reported to the PRA and/or the FCA was confused. He does not identify any disclosure to the regulator in his claim form or his witness statement but in cross examination the Claimant stated that he had alerted the regulator "around Q3 if not Q4 2018. ("When I realised that the way the bank was handling the TSA I had no option but to call the PRA." He told the Tribunal that after he had reported the TSA to the PRA, they (the PRA) had started monitoring the TSA closely." However, in response to a question about why this had not appeared in his particulars of claim or in his witness statement ,he told the tribunal that he did not want the Respondent to know that he had blown the whistle to the regulators and that he had also spoken to the National Crime Agency; he was worried about his safety and had been told that his life could be in danger- that Ms Yough had said "if he goes rogue, we have to deal with him".

149. There are obvious problems with this evidence. First the Claimant says that he had realised difficulties with the TSA back in 2017. It is not clear why in Q3 or Q4 after the Claimant had been effectively out of the business since March 9, 2018 he decided to call the PRA - how he knew that the PRA was monitoring the TSA closely from Q3 and Q4. There was no obvious answer to the question about why he thought it would too risky to his safety to make a call to the PRA, but was not worried about making serious allegations in his ET1.

150. The Claimant also said he had spoken to the NCA and had done a full day presentation in around Q3 2018 after the Claimant and come back from Sri Lanka, that after the presentation the NCA had given him a risk assessment and that they advised him to take precautionary measures such as not staying at the residential address that Zenith knew about. He said he was given numbers to call if he saw anything made him worried and had had guidance about the appeal. None of that we accept. On 2 March 2021 the Claimant produced evidence of his contact with the NCA from which it transpired he had not spoken to them until 27th February, 2019, (following a referral by Protect), 2 days after the appeal hearing.

151. The Claimant also contacted the FCA Whistleblowing Team in early November 2018 (CAD 41) . In early December he complained to the FCA about clause 8.4 of the proposed settlement agreement and provided them with an incomplete copy of the clause (deleting the words or which give rise to concerns regarding his fitness and propriety to be an approved person."

152. The Claimant told the tribunal that he had not signed the proposed settlement agreement because of clause 8.4 which was "illegal" and that he was pressurised to sign by Ms Yough who issued threats against him including bodily harm. However there was no evidence that he had had any contact with Ms Yough after his return from Sri Lanka and he did not take the free independent legal advice that had been offered.

The law

Public Interest Disclosure

153. Employees have the right not to be subjected to detriments or to be dismissed because they have made protected disclosure. Section 47B(1) of the Employment Rights Act 1996 gives a worker the right not to be subjected to a detriment "by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure". Section 47B(1A) extends that protection to acts done by fellow workers and section 47(1B) provides that an employer will have vicarious liability for detriments by fellow workers done under subsection (1A).

154. Section 47B(2) provides that section 47B(1) does not apply where (a) the worker is an employee, and (b) the detriment in question amounts to a dismissal.

155. Section 103A of the ERA provides that:- "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

156. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done. If the employer fails to show an admissible reason the Tribunal is entitled, but not obliged, to infer that the detriment was on the ground that the employee made a protected disclosure (Ibekwe v Sussex Partnership Foundation Trust UKEAT/0072/14)

157. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower, whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. The former however is not a "but for" test.

158. In Timis v Osipov (Protect Intervening) 2019 ICR 655 the Court of Appeal held that it was is open to an employee to bring a claim under section 47B (1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B (1B). It held that all that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.

159. Where a detriment causes dismissal, but the *detriment is not the dismissal itself*, the worker or employee can recover compensation for the consequences of the dismissal as part of a detriment claim under S.47B despite the effect of S.47B(2)

160. The term "protected disclosure" is defined in Section 43A of the Act as a "qualifying disclosure" (as defined in Section 43B) which is made in accordance with sections 43C to 43H. This includes making a disclosure to an employee's employer.

161. The statutory definition of what amounts to "qualifying disclosure" is "any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show ...."that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject". Section 43L specifically provides that a disclosure of information will take place where the information is passed to a person who is already aware of that information.

162. A disclosure must involve the provision of information in the sense of conveying facts. In Kilraine v London Borough of Wandsworth 2018 EWCA civ 1436 the Court of Appeal said that "In order for a statement or disclosure to be a qualifying disclosure., it has to have sufficient factual content and specificity such as is capable of tending to show one of the

matters listed in subsection." Two or more communications can amount to a protected disclosure when aggregated together even if, taken on their own, each would not b protected.

163. Guidance on how to approach the question of whether a protected disclosure has been made was given in Blackbay Ventures Ltd v Gahir 2014 IRLR 416
    a. identify each disclosure by reference to date and content;
    b. identify each alleged failure or likely failure to comply with the legal obligation and/or that matter giving rise to the endangering an individual's health and safety;
    c. Save in obvious cases the source of the obligation should be identified by reference to statute or regulation. It was not enough for the tribunal to lump together a number of complaints, some of which might not show breaches of legal obligations;
    d. determine whether the claimant had the necessary reasonable belief;
    e. where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act;
    f. determine whether the disclosure was made in the public interest.

164. In *Eiger Secrities LLP v Korshunova UKEAT/0149/16* the EAT held that those claiming whistleblowing protection will have to identify the obligation that has or might be breached and show that *"The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation."*

165. To be a protected disclosure an employee must have an objectively reasonable belief that the disclosure was made in the public interest (even if it is wrong), but the disclosure does not need to be in the public interest per se. A worker's individual circumstance are relevant to the assessment of reasonableness and those with professional knowledge can be expected to have the reasonable beliefs of those with their knowledge and expertise. (Korashi v Abertwe Bro Morgannwg University Local Health Board 2012 IRLR 4

166. Nor are the worker's reasons for making the disclosure strictly relevant. A worker making a disclosure can seek to "*justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it."* The necessary belief is that the disclosure is in the public interest. In considering that issue, factors such as the number or workers affected, the nature if the interests affected, the nature if the wrongdoing disclosed and identity of the alleged wrongdoer may all be relevant, (Chesterton Global Limited and anor v Nurmohamed 2017 EWCA Civ 979).

167. Section 103A of the Employment Rights Act 1996 provides that:- "An employee who is dismissed shall be regarded for the purposes of this

part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".

168. The burden of proof is on the employer. Following Kuzel v Roche Products Limited 2008 IRLR 530 then the following analysis of the burden of proof applies:-

a. Has the claimant shown that there is a real issue as to whether the reason put forward by the employer was the true reason?

b. If so, has the employer proved his reason for dismissal?

c. If not has the employer disproved the section103A reason advanced by the Claimant ?

d. If not the dismissal is for the 103A reason.

169. When considering the grounds or the reason for the employer's actions in a whistleblowing claim, a distinction can be drawn between the disclosure of information and the way in which is disclosed (Panayioyou v Kenaghan 2014 ICR 123

Race discrimination

170. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 13 defines direct discrimination as follows:-"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others. Race is a protected characteristic.

171. Section 40 prohibits an employer from harassing its employees. Section 26 (1) defines harassment as follows

"A person (A) harasses another (B) if
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

172. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does

not involve discrimination.

173. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

174. Unfair dismissal.. Section 94 of the Employment Rights Act 1996 sets out the right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). The Respondent submits that the Claimant was dismissed for either capability or for "some other substantial reason" namely a breakdown in the relationship between the Claimant and the management team at the Respondent.

175. If the Respondent can establish that the principal reason for the Claimant's dismissal was a potentially fair one, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

Conclusions

Did the Claimant make protected disclosures?

176. The Claimant made no written disclosures until 8th April 2018, a month after he had begun his sick leave. Before that the only written document that the Tribunal has containing disclosures is the note taken by Ms Wiseman of the Claimant's conversation with her in December 2017. It is surprising, given the Claimant's seniority and the seriousness of the allegations that the Claimant has made against the Respondent, that he put so little in writing.

177. The tribunal finds that the Claimant made no disclosures to the Respondent during the course of his employment about the TSA, the CBN Forex swaps, or a large exposure regulatory violation. We find he did not make an oral disclosure to Mr Owunzirigbo about "kickback arrangements".

178. Protected disclosures 2, 3 4 13,16 and 21 are all oral disclosures said to be made to various executives at the Respondent about the TSA. These disclosures are not documented in writing and we find that they were not

made. Mr Efeyini, Ms Yough, and Mr Somers all denied such disclosures were made. Although we have not heard from Ms McBride we accept as a general proposition that no disclosures were made about the TSA while the Claimant remained in employment with the Respondent. We do not accept that any of these disclosures were made as a matter of fact.

179. We also do not accept that the Claimant made an oral disclosure regarding the CBN forex swap and a large exposure regulatory violation to Ms Yough and Mr Somers (PD 18 and 15),) or a disclosure regarding kickback arrangements and alleged lack of oversight or manipulation of internal processes to Mr Owunzirigbo (PD 22).

180. Disclosures 5 and 14 refer to what the Claimant calls the "payment loophole". He says that the loophole "meant that someone could pay any amount of money to anywhere in the world by-passing almost all controls in the bank.". In evidence he clarified that he had not been concerned with the error itself (which he described as a fat finger error) but with the bank's failure to address the control mechanisms to prevent the error occurring in the future. He said that he understood that "management wanted this loophole left open", and that he had told Ms Yough and Mr Somers that "the loophole" looked like a deliberate unlawful arrangement and explained the extent of it. An experienced COO like John Shea would not leave a significant loophole open in the payment system like that unless it were connected to fraudulent activity".

181. The Claimant no longer relies on the conversation with Ms Yough and Mr Somers as a protected disclosure (PD14 having been withdrawn during the course of the hearing). In relation to PD5 at the Exco meeting on 31st October the Claimant did suggest that Mr Shea was guilty of fraud and was intending to take advantage of the payment error "loophole" . He was not disclosing "information" – the information as to the payment error and any possible hole had been disclosed by others. He was merely expressing his view that the system was inadequate and making assertions as to fraud. In evidence the Claimant said that he believed that "the whole point was to bring the TSA money in, so that it could then be transferred out through the illegitimate loophole that had not been closed". We have failed to understand the basis for that allegation or, for the allegation that there was a payment loophole, what this "loophole" was or how he believed it operated. It was an extremely serious allegation but the Claimant has not explained the basis for that belief and we find that it was not a reasonable belief.

182. Protected disclosures 6,7 and 8 all relate to the alleged "hack" of the finance drive by Mr Shea. Protected disclosure 6 is the alleged meeting with Ms Yough and Mr Onwuzurigbo. PD 7 is an allegation that the Claimant reported the same matter to Mr Somers in October or November 2017 while PD 8 is an alleged oral disclosure at about the same time to Mr Efeyini. Mr Somers and Mr Efeyini both deny that the Claimant made such disclosures to them, although Mr Somers accepts that the Claimant did

make allegations of fraud against Mr Shea in his discussion in December with Ms Wiseman (see above).

183. The Claimant did report to Ms Yough and Mr Onwuzurigbo that there had been discrepancies in the monthly profits and that there had been unauthorised access to the finance drive by Mr Shea. He told Mr Onwuzurigbo in October 2017 that Mr Shea had been manipulating the figures in the finance drive and did allege at this time that this was fraudulent. At that point this was an objectively reasonable belief**.** The Claimant refers to this as a "hack" – which it was not- but the Claimant was not aware at the time that Mr Shea's access to the finance drive had never been withdrawn, and he was aware that the excel cell in the spreadsheet used to prepare the trade department profit had been changed**.**

184. It may be that the Claimant had put 2 and 2 together and made 9 but, although the Respondent had commissioned an internal audit report into both the discrepancy in the reporting, and the access to the Finance drive, the Respondent did not provide that report to the Claimant. If he had been given that report it might have allayed his fears – or his continuing belief that Mr Shea was acting fraudulently might no longer have been reasonable. Mr Somers told him in March 2018 that Mr Onwuzurigbo had done an investigation and had given him the headline points but did not give him that investigation so that his fears might have been allayed.

185. Protected disclosure 15 is an oral disclosure to Ms Yough and Mr Somers about the large exposure violation. Our conclusion is that no such disclosure was made.

186. Protected disclosure 17 is an oral disclosure to Ms Yough and Mr Somers in February or March 2018 regarding the "missing $30 million". We have accepted Ms Yough's account of the disclosure which the Claimant made. The Claimant has not explained to the tribunal in what way the moving of this money was in breach of the regulatory processes. In such circumstances we conclude that he cannot reasonably have believed that there was a breach.

187. Protected disclosure 22 is an oral disclosure said to be made to Mr Onwuzurigbo regarding "alleged kickback operations and the alleged lack of oversight or manipulation of internal processes**".** The Claimant's evidence on this remained vague. He says he told Mr Onwuzurigbo about "several irregularities" and said there was "evidence leading to kickback arrangements to some customers with whom the bank had an unusually close relationship" and that Mr Shea "*was manipulating the internal processes to support these by making changes to the systems and documentation based on the orders from someone higher ranker*." (sic) Mr Owunzirigbo denies that there was a meeting in which the Claimant had raised a "kickback arrangement". Given the vagueness of the Claimant's evidence we prefer the evidence of Mr Owunzirigbo.

188. Protected disclosure 23 is said to be an oral disclosure to Mr Somers in which the Claimant alleged that there had been a demand to violate IFRS standards. In his witness statement the Claimant says that Ms Yough asked the Claimant to produce the profit figure "she wanted" rather than the IFRS profit number and that Ms Yough asked him to manipulate the profits. She wanted to reserve profits for the next year and that he had refused and had told Ms Yough that the request was against Accounting Standards . When he resisted he called Mr Somers and KPMG to get them to explain to her that this could not be done and that when they were alone in her office Ms Yough said to him "*you thought you won? Consider you are dead".*

189. Ms Yough accepts that there was a discussion between her and the Claimant in which she queried whether a loan repayment received in March 2018 should be included in the 2017 accounts as a post balance sheet event. The Claimant made a phone call to Mr Somers about whether or not to include that repayment in the 2017 accounts and Mr Somers telephoned KPMG to discuss the matter. The issue of the accounting treatment of the loan repayment was considered and signed off by the auditors (378). It appears to us that this is a fairly normal discussion about the correct accounting treatment of a particular transaction. We do not accept the Claimant's evidence that there was a demand to violate IFRS standards, that he believed that there was or was going to be a breach of a legal obligation or that Ms Yough said to the Claimant "you thought you won? Consider you are dead.".

190. Protected disclosure 24 is the April letter to Mr Ovia and Mr Amangbo (397). As we said above, it is long on allegations and short on specifics. The Claimant's evidence was that he intended this to refer to the TSA because he did not do so because could not risk the ire of very important people and to do so would have put his life at risk. We do not accept that. He was throwing about very serious allegations and there is no reason why a reference to the TSA would have made matters any worse, nor do we accept he could reasonably have believed his life was at risk. It is more likely that he did not refer to the TSA because he did not have that in mind the time. In any event, the email does not amount to the disclosure of information which contains sufficient factual content or specificity to be capable of tending to show a breach of a legal obligation etc. It does not satisfy the test in Kilraine and does not amount to a protected disclosure within the definition set out in section 47B.

191. The next protected disclosure relied on (protected disclosure 25) is the further email to Mr Ovia and Mr Amangbo dated 27 November 2018.

192. On balance, given the overall context and the history that preceded this letter we conclude that the information in the letter is sufficiently specific to meet the test in Kilraine. However while the Claimant may have had a reasonable belief that Mr Shea was acting improperly/fraudulently when he had accessed the finance drive, we do not accept that the Claimant believed the majority of the allegations set out in the letter. We do not

accept that he (i) genuinely believed that the bank was making fraudulent loans/taking bribes or, if he did (ii) that he had a reasonable belief that the information tend to show one or more of the matters listed in subsections 43B(1)a-f. The Claimant was the Chief Financial Officer, responsible for the accounts and very senior within the management of the Bank. He had not alleged this before and by now he had not been at work for 9 months. If he had genuinely held those beliefs, then it is most unlikely that he would not have been able to express in clear terms what specific information had led him to believe that the bank was acting unlawfully, what specific regulatory breaches had occurred and who was responsible. Instead, although we do have a letter which contains some specific information, it remains rambling and incoherent. It is also, in the view of the Tribunal, most unlikely that, if he did have a reasonable belief that the bank was acting fraudulently and in a way designed to breach legal obligations, that he would have waited until November to provide that information/ make those allegations.

193. In addition, we find that many of the more specific allegations – statements said to be made to him by Ms Yough are not true and that the Claimant must have known that they were not true. We do not accept that Ms Yough told the Claimant that she would send a gang to beat him up if he said anything that might make her feel uncomfortable. The fact that the Claimant is prepared to make these allegations, which we find to be untrue, lends weight to our conclusion that the Claimant did not have a reasonable belief in the numerous other allegations of fraud and criminal activity that he set out in the letter .

194. In the 10th December letter (protected disclosure 26) the Claimant complains about withholding his salary, failure to pay bonus and pay in lieu of holiday accrued but not taken. He also explains at length his achievements with the bank and complains that, when he collapsed on 9 March 2018 Ms Yough had said he “deserved the punishment as he is a very bad person”, that no one should call a doctor and that he should be allowed to suffer. We do not accept that this is what happened (and does not accord with the evidence of Mr Weavis), but we do accept that he may have reasonably believed that this is what had happened, (his information was said to have come from colleagues), given Ms Yough had by then developed a significant distrust of the Claimant. This is a protected disclosure tending to show a breach of trust and confidence.

195. The Claimant’s complaints in this letter about alleged breaches of the Respondent’s contractual obligations to him amount to a disclosure of information that tends to show a breach of a legal obligation (including potentially a breach of the duty of trust and confidence) but it is information which relates only to the Claimant’s personal situation. We do not consider that the Claimant had a reasonable belief that this information was made in the public interest. The letter was largely a plea about what the Claimant described as the “withholding of his employment benefits.”

196. Protected disclosure 27 is said to be the letter written by the Claimant to Mr Powell on 23 December 2018. The letter is a plea for money (holiday payment salary bonus etc). It contains no information which would qualify as protected.

197. Protected disclosure 28 is the Claimant's email dated 16th January 2018 prepared for the disciplinary hearing containing his response to the criticisms made of his department in the internal audit report. Mr Milsom submits that this document was a protected disclosure because the Claimant (i) referred to discussions with "the CEO, NAD and internal audit" as regards "potentially fraudulent arrangements and structures that falls within the scope of money-laundering" (562) and (ii) identified a specific conversation with Mr Onwuzurigbo about "business practices". The Claimant does say in his email that he had discussed with Mr Onwuzurigbo "*the potential money-laundering fraudulent arrangements, money-laundering structures and regulatory violations, in case if IA report is intentionally misstated, a few serious questions may be asked to identify if there is a part of a wider coverup of potential irregularities fraud, money-laundering et cetera mentioned to my knowledge assisting to cover up fraud, irregularities in money-laundering or attempt to make these work is as bad as the act itself."* For an individual who claims to have done an investigation these claims are wholly unspecific and amounts to allegations only. The rest of the document is the Claimant's critique of the internal audit report and provides no relevant information.

198. The second 16th January email (protected disclosure 29) (571) is said to be "relied upon in its entirety". Like much of this case the Claimant does not attempt to identify which specific words contained information, and how that information tends to show the relevant breaches. The first part of the letter set out a chronology of the Claimant's contribution to the Respondent's business, goes on to refer to the fact that he had blown the whistle "on a potential fraudulent pattern we observe" – but with no details. It refers to the threats that the Claimant has received (that the CEO had twice threatened to send a gang to take him away and beat him) and that he was "threatened to sign a document confirming the banks arrangements were in perfect order", and continues to provide a number of accusations in generic terms. In relation to John Shea and the finance drive issue he says "we discovered Exco members tampering the accounting system to manipulate department profits," but neither names Mr Shea nor specifies how the tampering occurred.

199. Summary. Amongst all the noise and distraction we make the following findings:

    a. The Claimant made a disclosure to Mr Onwuzurigbo, Ms Yough and then Ms Wiseman (reported to Mr Somers) that Mr Shea had accessed the finance drive and changed a cell in the spreadsheet causing his department's profits to be overstated and that this was part of a bigger fraudulent operation. We find

that this was a protected disclosure within the definition in section 43B.

b. The Claimant made a disclosure to Exco and Ms Wiseman and others that Mr Shea had created a payment loophole and that this was fraudulent. The Claimant also made a disclosure about a missing $30 million, We find that the Claimant's belief in these matters though genuine at this stage, was not reasonable.

c. The Claimant made no disclosures about the TSA, the CBN Forex swaps, the large exposure regulatory violation or kickback arrangements.

d. The Claimant made disclosures in his letters to Mr Ovia and Mr Amangbo about breaches of contractual obligations, including a breach of the obligation of trust and confidence. The Claimant did not have a reasonable belief that these disclosures were made in the public interest.

200. Did the Respondent subject the Claimant to detriments because of the Claimant's allegations about Mr Shea's access to the finance drive? In relation to the pleadings the tribunal comments that it was not helpful to have broken down the detriments into 41 separate distinct matters..

201. The tribunal finds that Ms Yough's opinion of the Claimant changed following his accusations against John Shea at the Exco meeting at the end of October 2017. We also find that it was the Claimant's disclosure to Christina Wiseman in December that triggered a resolution that the Claimant had to go. Ms Yough, in an appraisal dated 15th December rated the Claimant as "exceeding standard requirements." Although she does suggest that he needed to improve upon teambuilding and working closely with fellow Heads of Department, all it was generally a good appraisal.

202. However just one week later on 22 December 2017 Mr Ogilvie writes to Ms McBride (270) that there was significant concern about the Claimant amongst the NEDs. Shortly after Christmas, on 11th January, Mr Somers emailed Ms Yough to state that the NEDs had been expressing concern about the Claimant's performance. The same day he sought to obtain support from KPMG (350) for his "concerns", as well as seeking a possible KPMG secondee to replace him. He does not convene a meeting with the Claimant following his email of 9th January (731) to discuss the Claimant's allegations, despite being the whistleblowing champion.

203. By the same token, at the January Remco meeting (646) Mr Powell told Remco that he and the Head of Compliance were unable to sign the Claimant off as "fit and proper" "due to behavioural/conduct matters.". The Tribunal found the Respondent's explanation as to what led to this assessment unsatisfactory and we find that this arose because the Claimant had made allegations about Mr Shea some of which amounted to protected disclosures. By this time also proposals (initiated by Mr Somers) had been put in train to bring over a finance number 2 from Lagos . The Claimant remained unaware of this initiative and we conclude that the only explanation for the Respondent's failure to inform him was that the "No 2"

was intended to be a replacement for the Claimant rather than a genuine number 2. After the 2nd February meeting Ms Yough was clear that the Claimant should be "disengaged."

204. In evidence we were taken to the Respondent's Whistleblowing Policy. (633) It was not informative. It simply tells employees to raise their concerns verbally or in writing with the Head of Compliance, their line manager, Head of Department or with David Somers, the banks appointed whistleblowing champion. There is no reference to the bank's obligations following the raising of concerns. It cross refers to the "Policy Hub", a copy of which was not in our bundle, nor were we referred to this in evidence. In any event, the Claimant had raised concerns with the Head of Compliance on 14th December but beyond the abortive meeting of 10th January the Respondent took no action to get to the bottom of the Claimant's concerns. There was no meeting designed to obtain clarification of the Claimant's concerns, no investigation beyond a very brief note to Mr Onwuzurigbo, (who in turn simply referred back to the earlier investigations) and no acknowledgement that the Claimant's complaint was to be treated as a complaint under the whistleblowing procedure and investigated. In our view the Respondent simply decided that the Claimant's concerns threw doubt upon his integrity and that he should be dismissed.

205. At the meeting on 2 February 2018 proposals were put to Claimant to encourage him to leave, and on 5 February Mr Somers writes to the other NEDs that, given the reluctance of the executive to sign the Claimant off as fit and proper, there was no choice but to agree a compromise and to get the Claimant out of the bank "as quickly as possible". Ms Yough's note of 19th February (369) recommends that the Respondent works with the lawyers to disengage the Claimant as soon as possible "because the longer he stays with us, the more disruptive and mischievous he gets."

206. By mid January the Respondent had resolved that the Claimant had to go. We consider that they arrived at this conclusion to a material extent because the Claimant had made allegations amounting to a protected disclosure against Mr Shea. The need for the Claimant to finalise the annual accounts had however delayed further action (See Board Minutes 643) and then the Claimant had been absent in sick leave, with the result that the Claimant remained in employment with the Respondent for a further year.

207. The Claimant relies on detriments 17, 24, 25, 28 to 30 and 33 to 41. Detriments 17 is Ms Yough calling the Claimant to a meeting on 10th January 2018 and then storming out and telling the Claimant he should obey without question. Although inviting an individual to a grievance hearing would not, in normal circumstances, amount to a detriment, in this case we find that it did. The Claimant had not lodged a formal grievance, nor had the Respondent written to the Claimant asking him to clarify the claims that he had made to Ms Wiseman in order that they could investigate his claims under the whistleblowing policy. Instead the tone of the letter inviting the Claimant to the grievance hearing was combative.

The meeting was convened to consider the Claimant "allegations" that Mr Shea had committed an fraudulent act. Although Mr Onwuzurigbo told us that he was invited to attend to explain his findings in the investigation, the letter does not explain why Mr Onwuzurigbo, has been invited nor inform the Claimant of the outcome of his investigation. We do not consider that this was genuinely intended to be a grievance meeting, in the sense of listening carefully to what the Claimant had to say to be followed by an investigation.

208. We have accepted that the Claimant did attempt to record the meeting covertly but we also find that by January Ms Yough had lost confidence in the Claimant because he had made these allegations and that, had he not made such allegations, she might have taken a more measured approach when she discovered that the Claimant was attempting to record the meeting. We therefore find that both the calling of the meeting and her "storming out" were detriments which were materially influenced by the fact that the Claimant had made protected disclosures about Mr Shea. *However, we do not accept that she said "what is your concern about them, we pay you to protect our interest" (WS para 98) or that Ms Yough told the Claimant later that evening that anyone who complained against her "would be crushed."*

209. Detriments 24 and 25 are that the CEO in February 2018 asked the Claimant to drop his comments about the TSA CBN forex deals and the $30 million and making threats if it did not do so. Our difficulty with the Claimant has been that he has sought, throughout this litigation and in evidence, to exaggerate and to some extent fabricate events. While we accept that from late December Ms Yough's attitude towards the Claimant became generally hostile, we do not accept that in the meeting of 2 February he complained about the TSA and the CBN Fx deal. We also do not accept that during this meeting Ms Yough warned him of "*dangerous consequences including bodily harm and serious danger to my life, if the information I held was leaked.. that there were really big people behind these arrangements and that I would put myself in danger if I informed anyone of this nonsense in writing"* (C WS para 67) Nor do we accept that Ms Yough told the Claimant (WS 106) that he should consider his career at Zenith was over, that she said that she would destroy him, that she would crush him into the ground or that she said "no one who said no to my request has survived here".

210. While we do not accept that Ms Yough instructed staff not to call an ambulance, (detriment 28) she did suggest that the Claimant might be faking it and she did not instruct staff to call an ambulance – leaving them to take the decision themselves. This was a detriment and resulted from Ms Yough's extreme irritation about the Claimant's allegations against Mr Shea, some of which were protected.

211. Detriment 29 is said to be a failure to pay the Claimant's amounts due pursuant to his contract. Detriment 30 is the Respondent's failure to allow the Claimant to return to work in November 2018. While we do not accept

that amounts for accrued holiday pay, bonus or salary rises were due (see below) we do consider that once the Claimant had informed the Respondent, with the backing of Occupational Health, that he was ready to return to work from November 2018, the Respondent was obliged either to make arrangements to allow the Claimant to return to work or to suspend him on full pay pending a disciplinary and/or performance process. We consider that their failure to do so was materially influenced by the fact that the Claimant made protected disclosures. There were a lot of other reasons why the Respondent did not wish the Claimant to return to work, not least his increasingly outlandish accusations against the Respondent in his letter to Mr Amangbo, and his failure to keep in touch with the Respondent in any meaningful way during his ill-health – but the accusation against Mr Shea was, we find, a material part of this reasoning. It may be that the Claimant had, as Ms Mulcahy submits, no intention of returning to work (we note his request to Mr Ovia that he be given permission to stay away from work and his exit was formally settled) but he had said that he was fit and the Respondent should either have allowed him to return to work or got to grips properly with the issues.

212. Detriment 32 is failing to provide the Claimant, between April 2018 and February 2019, with a fair hearing or any reasonable investigation of his complaints. The Claimant's email of 8th April was short on specifics and he did not reply to Mr Amangbo's email asking for specific details of the allegations, so that it was not realistically possible for the Respondent to investigate. There should, however, have been a response to the further emails of 27th November and 10th December. We note that Mr Powell had, in the without prejudice letter of 19th November stated that his allegations were too vague to be investigated, but, while this was factually correct, there was no attempt to seek to pin down the Claimant investigations or to treat them as a grievance and the purpose of the letter was evidently to seek a settlement rather than to elicit further information from the Claimant as to his complaints.

213. We considered whether the failure to respond was influenced to any material extent by the disclosures about the access to the finance drive. We concluded that by this stage it was not. The letters were hard to deal with for the reason we have outlined above and the Respondent was waiting for the Claimant to respond to the settlement proposal. Much water had flowed under the bridge since the original disclosures with a number of new, but unspecific, accusations of fraud and money laundering and specific allegations about threats to his life. We conclude that the failure to respond was because the Claimant's allegations had become much stronger, broader and less specific so that the Respondent put the letters into the "too difficult" box and/or was hoping for an agreed exit.

214. Detriments 33 - 37 all relate to settlement discussions. The Claimant says that the Respondent put pressure on him to drop the allegations that he had made against the Respondent in order to enter into a settlement agreement with him. We do not accept that any pressure was put upon the Claimant. An offer was made. The Claimant was free to negotiate to

accept or to refuse. We do not accept that Mr Powell told the Claimant that he should not put his safety in danger by not signing the agreement. We do not accept that the Respondent told the Claimant the he could either confirm in writing that management's conduct was in good order or be dismissed in a manner that would ensure that his career was sabotaged (WS 140).

215. Detriments 38 - 40. We do not accept that the Respondent failed to allow the Claimant to participate in this dismissal meeting (detriment 39). He chose not to attend. However, we do accept that the Respondent did not follow a fair disciplinary process and failed properly to investigate the Claimant's conduct (see below) which led to the breakdown of the relationship. Again, we do not consider that this was on the ground of the protected disclosures. We accept that Mr Somers was not responsible for the process that the Respondent chose to deal with the Claimant, and that this was largely drive by HR

216. Detriment 41 is the Claimant's dismissal. Section 47B(2) excludes dismissal from the protection afforded by section 47B(1). Mr Milsom submits, on behalf of the Claimant, that Timis v Osipov is authority for the proposition that that the Claimant's dismissal can be pursued as a section 47B claim, even where there is no claim against a co-worker, (so that the test for liability is whether or not a protected disclosure materially influenced Mr Somers when he took the decision to dismiss rather than whether it was the "principal reason").

217. However, we do not read Osipov in that way. The ratio of that case is that it is possible to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). However in this case there was no claim against an individual. The only Respondent to these proceedings is the employer. It would be necessary, first of all, to establish another worker's personal liability-in this case that of Mr Somers, before a claim for vicarious liability under section 47B(1A) against the employer could be made out. As there has been no claim against another worker, section 47B(1A) does not apply.

What was the principal reason for the Claimant's dismissal.

218. The 'reason' for dismissal is as 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. *Abernethy v Mott Hay & Anderson* *1974 IRLR 213*.

219. As we have said we do not accept that the Claimant made disclosures about the TSA and various other matters. None of those could have been in the mind of Mr Somers when he dismissed the Claimant. A number of other allegations were made but did not amount protected disclosures. The only protected disclosures which the Claimant made related to the

accessing of the finance drive by Mr Shea and the change in the formula for calculating the profits of the trade finance department.

220. The letter of dismissal states that the reason for termination was that the Claimant's performance as CFO fell below the required standard and that his working relationship with the CEO had fundamentally broken down. The Respondent's case that this is a potentially fair reason for dismissal i.e. capability and/or some other substantial reason.

221. A breakdown in a relationship of trust and confidence cannot found a fair reason for dismissal unless consideration is given to the cause of that breakdown. If the dismissal is because of a breakdown caused by the making of one or more protected disclosures the reason for dismissal is in reality the making of the protected disclosure.

222. The Tribunal found Mr Somers' evidence as to why the Claimant was dismissed unsatisfactory. We considered that the audit report was a red herring in that, while the criticisms in the report were genuine, the Claimant would have been dismissed even had there been no such criticisms. We do not consider that the reason for dismissal was capability. The audit report had been issued in August 2018 and no attempt had been made to discuss this with the Claimant before the hearing in January. In November, after the Claimant had signaled that he was ready to return to work Mr Powell referenced concerns with his performance but did not enclose the audit report.

223. Mr Somers said that it was not he alone that took the decision to dismiss the Claimant. At one point that he made this decision in conjunction with Mr Ogilvie (who was not at the dismissal hearing) and at another point said that it was a board decision. We consider that the decision that the Claimant should leave (whether by agreement or by dismissal) had been made in early 2018 because of the complaints he had made about Mr Shea, (only some of which were protected) and was then reinforced by the Claimant's subsequent behaviour, such as his WhatsApp to Mr Shea, his emails to Mr Amangbo and Mr Ovia and his failure to keep in touch with the Respondent during his time in Sri Lanka.

224. By the dismissal hearing Mr Somers had a mind that was closed to the possibility of retaining the Claimant in employment. He told the tribunal that it was clear that the relationships with the CEO and other senior members of staff had fundamentally broken down and that he had made various serious allegations against both the CEO and other members of the board none of which had been substantiated when the matters were investigated. He said it was not the allegations that it caused him to consider the relationships between the Claimant to the management team had broken down it was rather the Claimant's ability to go "beyond persistence" that was the problem and the fact that he had refused to accept that the Respondent had sufficiently investigated the complaints.

225. We find that the reason that Mr Somers dismissed the Claimant was neither capability nor "some other substantial reason" but was the Claimant's conduct. We find it was the Claimant's allegations against Mr Shea, his confrontational behaviour, his attempt to record the meeting of 10th January, and the very serious allegations about threats to life he had made in his letters to Mr Ovia, Mr Amangbo and Mr Powell.

226. In assessing what was the principal or main reason for dismissal we have had trouble disentangling the one issue on which the Claimant made protected disclosures from (i) the other allegations or assertions about the payment loophole, the $30 million and (ii) the subsequent general allegations about "money-laundering" and "constant demands to violate laws and regulations" which were not protected. The concerns that the Claimant raised at the Exco meeting which so irritated Ms Yough were about "the payment loophole". On balance we conclude that the information which he disclosed about Mr Shea's access to the finance drive and the change to the formula for calculating the profits of the operations department was by the time of his dismissal a minor part of the conduct which led to the Claimant's dismissal. We find that the principal reason for the Claimant's dismissal was not his protected disclosures.

Ordinarily unfair dismissal

227. As we have said we find that the reason for the Claimant's dismissal was neither capability nor a breakdown in trust and confidence but was in fact the Claimant's general conduct (leading to the breakdown in relations) including his accusations against Mr Shea which Ms Yough considered to be "bothersome and unruly", his rudeness in failing to provide any evidence for his stay in Oxford, his attempt to covertly record the 10th January meeting and his subsequent behaviour. Mr Somers says it was his ability to go "beyond persistence" that was the problem - after they had sufficiently investigated his complaints- and his approach and attitude, rather than the fact of any complaints meant that he has burnt his bridges with the executives and the NED.

228. None of this was properly investigated or articulated. The Claimant was told that the issue was the breakdown of the relationship with Ms Yough – but not informed as to the conduct which had led to that breakdown of trust and confidence. Although the Claimant did not help himself by failing to attend, the real case against him was not articulated and he could not respond. The Respondent did not treat the matter as a conduct issue and did not comply with the ACAS Code of Practice by either informing the Claimant of the real problem for establishing the relevant facts. There was therefore no fair process.

229. As for the appeal, while Mr Gamble did approach matters with a more open mind, as we have said the real reasons for the breakdown were not articulated and this failure was not be remedied on appeal. We find that the dismissal was unfair.

Polkey/contribution

230. In assessing the loss flowing from the dismissal tribunal must consider how long the Claimant would have continued in employment absent the unfairness. We find that there was little chance that, had a proper process been followed to investigate the conduct which had led to the breakdown in the relationship between the Claimant and the senior management at the Respondent, the Claimant would have remained in employment. The Claimant was asserting, and continues to assert, that the Respondent had made death threats against him and that his safety was at risk. On the other hand the Claimant had been diagnosed with adjustment disorder/ Acute Stress Reaction and with appropriate treatment may have been able to return successfully. Further submissions on the issue of whether the Claimant would have remained in employment with the Respondent absently unfairness and if so for how long, having regard to our findings above, together with any reduction for contribution will be considered at the remedy hearing.

Harassment related to race

231. The Claimant has made two allegations of direct discrimination because of his Indian heritage and/or harassment related to race. These are:

    a. that in about November 2017 Ms Yough referred to the Claimant as “the Indian”; and
    b. that Ms Yough said that he was the odd one out in an African bank in Europe.

232. We do not accept either allegation as a matter of fact and those claims of race discrimination must fail.

Breach of contract

233. We find that there was no contractual obligation to pay the Claimant for 66 days of holiday accrued but not taken. He was not entitled to this under the terme of his contract of employment and no contractual commitment was made by either Mr Weguelin or Ms Yough.

Unpaid Wages

234. The Claimant informed the Respondent that he was ready to return to work on1st November. The report from OH supported that position. The Respondent did not agree and said that it wanted to obtain further information before allowing the Claimant to return to work on a phased basis. According to Mr Powell this was because the Respondent was concerned about the stress levels that accompanied the role of CFO.

235. We do not accept that. The Respondent failed to allow the Claimant to return to work because of conduct which had led the Respondent to lose faith in him. However, as the Claimant was willing to return to work, and

had an Occupational Health report in support, the Respondent was contractually obliged to pay him. The Claimant's claim for unpaid wages in respect of the period from 1st November 2018 till the termination of his employment succeeds.

Remedy

236. A remedy hearing for those successful part of the Claimant's claim will take place on 9 and 10 September 2021 unless the parties are able to arrive at their own agreement.

Employment Judge F Spencer
10th May 2021
London Central

JUDGMENT SENT TO THE PARTIES ON

.11/05/2021..

FOR THE TRIBUNAL OFFICE

SCHEDULE A

AGREED LIST OF ISSUES

References to PDSS are to the Protected Disclosures Scott schedule.
references to DSS are to the Detriments Scott schedule.
The parties noted that descriptions included in the list of issues are necessarily summary in nature and that full details appear in the relevant Scott schedules.

Time limits/limitation issues

1. Were all of the Claimant's ("**C's**") complaints presented within the time limits[1] set out in:
   1. Sections 23(2), (3), (4) and (4A), 48(3)(a) and (b), and/or 111(2)(a) and (b) of the Employment Rights Act 1996 ("**ERA**");
   2. Sections 123(1)(a) and (b) of the Equality Act 2010 ("**EA**");
   3. Section 11(2) of the Employment Relations Act 1999 ("**ERelA**")?

Section 47B ERA: whistleblowing detriment

Alleged protected disclosures

2. Did C make one or more protected disclosures as set out in paragraphs 14 to 87 of his Grounds of Complaint ("**GoC**") as further particularised in the Scott

Schedule of alleged protected disclosures ("**PDSS**") served by C on 3 December 2019?

3. In particular did C make the following disclosures (identified by reference to the numbered alleged disclosures set out in the PDSS[2] and the response in the Respondent's ("**R's**") Amended Grounds of Resistance ("**GoR**"))?

1. PDSS 1, GoR 33(1): To the then Head of Compliance, Cristina Wiseman at a meeting in Q3 2017, concerning an alleged payment systems loophole, hacking and management cover ups.

2. PDSS 2, GoR 33(2): To the Director of R's Remuneration Committee ("**RemCom**"), Jeffrey Efeyini ("**Mr Efeyini**"), at a meeting in Q3 2017 concerning an alleged deteriorating control environment and the spreading of a fear culture.

3. PDSS 3, GoR 33(3): To the Director of R's Audit Committee ("**AC**"), David Somers ("**Mr Somers**"), at a meeting in Q3 2017 concerning an alleged deteriorating control environment and the spreading of a fear culture.

4. PDSS 4, GoR 33(4): To R's Company Secretary, Susan McBride, at a meeting in Q3 2017 and in subsequent telephone calls concerning an alleged deteriorating control environment and the spreading of a fear culture.

5. PDSS 5, GoR 33(5): To R's Executive Committee ("**ExCo**"), at a meeting in Q3 2017, about an alleged "payment system loophole".

6. PDSS 6, GoR 33(6): To R's Chief Executive Officer ("**CEO**"), Pamela Yough ("**Ms Yough**"), and R's Head of Internal Audit, Henry Onwuzurigbo ("**Mr Onwuzurigbo**"), at a meeting in Ms Yough's office in Q3 2017, about alleged "manipulation of profits".

7. PDSS 7, GoR 33(7): To the Director of the AC, Mr Somers, at a meeting in Q3 2017, about alleged "manipulation of profits".

8. PDSS 8, GoR 33(8): To the Director of the RemCom, Mr Efeyini, at a meeting in a first-floor meeting room in Q3 2017, about alleged "manipulation of profits".

9.10, 11 withdrawn

12. PDSS 12, GoR 33(12): Orally in late Q4 2017 to [whom?] during the MCC (management credit committee) concerning alleged falsified customer credit information. [It is unclear, at the time of drafting this List of Issues, to which alleged matter this refers. The paragraph references to the PDSS appear to be erroneous.]

13. PDSS 13, GoR 33(13): To the CEO, Ms Yough, and the Director of the RemCom, Mr Efeyini, at a meeting in Q3 2017 concerning arrangements for the Treasury Single Account.

14. Withdrawn

15. PDSS 15, GoR para 33(15): To the CEO, Ms Yough, the Executive Director, Tony Uzoebo ("**Mr Uzoebo**"), and the Director of the AC, Mr Somers, in Q1 2018, concerning the alleged "large exposure regulation violation".

16. PDSS 16, GoR 33(16): To the CEO, Ms Yough, and the Director of the AC, Mr Somers, at a meeting in the CEO's office in February 2018, concerning the Treasury Single Account arrangements.

17. PDSS 17, GoR para 33(17): To the CEO, Ms Yough, and the Chief Operating Officer ("**COO**"), John Shea ("**Mr Shea**"), in February/March 2018, concerning the alleged "missing $30m".

18. PDSS 18, GoR para 33(18): To the CEO, Ms Yough, and the Director of the AC, Mr Somers, at a meeting in February 2018, concerning alleged issues in respect of the CBN Forex Swaps.

19. PDSS 19, GoR para 33(19): To the CEO, Ms Yough; the Head of Internal Audit, Mr Onwuzurigbo; the Head of HR, Stephen Powell ("**Mr Powell**"), and the Executive Director, Mr Uzoebo at a meeting in early February 2018 about the alleged "large exposure regulation violation".

20. PDSS 20, GoR para 33(20): To the CEO, Ms Yough, and the Director of the AC, Mr Somers, at a meeting in Ms Yough's office in Q1 2018 concerning the alleged "large exposure regulation violation".

21. PDSS 21, GoR para 33(21): To the CEO, Ms Yough; the COO, Mr Shea, and the Head of Internal Audit, Mr Onwuzurigbo, in a "briefing" in February 2018 concerning alleged issues about Treasury Single Account funds.

22. PDSS 22, GoR para 33(22): To the Head of Internal Audit, Mr Onwuzurigbo, in a meeting in Q1 2018 about alleged "kickback arrangements".

23. PDSS 23, GoR para 33(23): To the Director of the AC, Mr Somers, and a partner of KPMG in March 2018 concerning alleged disclosures in respect of demands to falsify financial statements and regulatory information.

24. PDSS 24, GoR para 33(24): In a letter to the Chairman, Jim Ovia ("**Mr Ovia**"), and General Managing Director ("**GMD**"), Peter Amangbo ("**Mr Amangbo**"), dated 8 April 2018, setting out various allegations.

26. PDSS 25, GoR para 33(25): In writing to Mr Ovia and Mr Amangbo dated 27 November 2018, setting out various allegations.

27. PDSS 26, GoR para 33(26): In writing to Mr Ovia and Mr Amangbo dated 10 December 2018, setting out various allegations.

27. PDSS 27, GoR para 33(27): In writing to the Head of HR, Mr Powell, dated 23 December 2018, setting out various allegations.

28. PDSS 28, GoR para 33(28): In writing to the Head of HR, Mr Powell, dated 16 January 2019, setting out various allegations.

29. PDSS 29, GoR para 33(29): Further disclosures to the Head of HR, Mr Powell, dated 16 January 2019, setting out various allegations.

4. Did each/any of the alleged disclosures include information such that the communication was capable of amounting to a protected disclosure (GoR, para 33(24) to (29))?

5. Did C have a reasonable belief that each/any of the alleged protected disclosures tended to show a relevant breach of a legal obligation under section 43B(1) of the ERA (GoR, para 33(24) to (29))?

6. Did C have a reasonable belief that each/any of the alleged protected disclosures was made in the public interest (GoR, para 33(24) to (29))?

7. If C was subjected to a detriment (paragraph 8 of the List of Issues, below) was he subjected to that detriment on the ground he had had made one or more of the alleged protected disclosures (GoR, para 34)?

Alleged detriments

Note – detriments in italics are withdrawn by reference to freestanding complaints but relied on as part of the factual matrix

8. Do the following - as further particularised in the Scott Schedule of alleged detriments ("**DSS**") served by C on 3 December 2019 (identified by reference to the numbered alleged detriments set out in the DSS and the respective responses in R's GoR) – constitute detriments for the purpose of the ERA[3]?

1. DSS 1, GoR para 35(1): The CEO, Ms Yough, allegedly shouting angrily at C in September/October 2017.

2. DSS 2, GoR para 35(2): On the same day the CEO, Ms Yough, allegedly making comments about C whistleblowing.

3. DSS 3, GoR para 35(3): The CEO, Ms Yough, organising a meeting (at an unspecified time) with C and the Head of HR, Mr Powell, allegedly without sufficient notice (which meeting was in any event curtailed because C

attempted to record the meeting covertly). Further, at an alleged meeting later that evening, Ms Yough allegedly indicated that she required loyalty and obedience.

4. DSS 4, GoR para 35(4): At an ExCo meeting in September/October 2017 the CEO, Ms Yough, allegedly asking C not to make the payment system loophole a big issue.

5. DSS 5, GoR para 35(5): Around 13 November 2017, the CEO, Ms Yough, allegedly ordering C to return from Nigeria to the UK and then stating he could stay but that, if he said anything untoward, he would be beaten up.

6. DSS 6, GoR para 35(6): At a later ExCo meeting, the CEO, Ms Yough, alleged shouting at C for requesting the payment system be checked and threatening disciplinary action.

7. DSS 6B, GoR para 35(6B): Within a month of the meeting, the CEO, Ms Yough, shouting that C had disobeyed her instructions and that he would be made to kneel in front of junior staff in in Nigeria.

8. DSS 7, GoR para 35(7): The CEO, Ms Yough, in Q3 2017, allegedly asking C to drop concerns about the COO, Mr Shea, changing the profit distribution and attempting to blame C.

9. DSS 8, GoR para 35(8): The CEO, Ms Yough, a few days later allegedly telling C not to raise concerns over management's position on the profit distribution issue.

10. DSS 9, GoR para 35(9): The CEO, Ms Yough, and the Director of the RemCom, Mr Efeyini, in August/September 2017, allegedly asking C to help them strengthen the structures around the Treasury Single Account.

11. DSS 10, GoR para 35(10): The CEO, Ms Yough, in Q4 2017, allegedly asking C to falsify regulatory information relating to a liquidity mismatch.

12. DSS 11, GoR para 35(11): The CEO, Ms Yough, in a meeting in November/December 2017, allegedly stating C would be rewarded concerning the Treasury Single Account issue and requesting loyalty.

13. DSS 12, GoR para 35(12): The CEO, Ms Yough, in a meeting in December 2017, allegedly warning C about his comments concerning the Treasury Single Account and requesting his support.

14. DSS 13, GoR para 35(13): The CEO, Ms Yough, and the Director of the RemCom, Mr Efeyini, in Q4 2017 (and presumably not 2018, as it states in the DSS), misleading C as to the nature of the five-year plan for the bank.

15. DSS 14, GoR para 35(14): The CEO, Ms Yough, in December 2017, allegedly placing undue pressure on C to keep quiet about the structure of the Treasury Single Account.

16. DSS 15, GoR para 35(15): The CEO, Ms Yough, in December 2017, allegedly insisting on C's loyalty and obedience.

17. DSS 16, GoR para 35(16): The CEO, Ms Yough, in January 2018, allegedly threatening C after his submitting a draft annual report.

18. DSS 17, GoR para 35(17): The CEO, Ms Yough, allegedly calling C to a meeting on 10 January 2018, and then storming out of the meeting when C requested it be recorded, the next day allegedly telling C he should obey without question. (This meeting is believed by R to be the same one as forms the basis of the allegation at para 8.3 above.)

19. DSS 18, GoR para 35(18): The CEO, Ms Yough, in February 2018, allegedly being angry about C checking concerning alleged "kickback" arrangements.
20. DSS 19, GoR para 35(19): The CEO, Ms Yough, in February 2018, allegedly asking C to maintain the status quo, and preventing hm from communicating with the regulators about the "large exposure regulatory violation".
21. DSS 20, GoR para 35(20): The CEO, Ms Yough, in the middle of February 2018, allegedly ordering C to cover up the "large exposure regulation violation".
22. DSS 21, GoR para 35(21): On the next day the CEO, Ms Yough, allegedly telling C to doctor records and create backdated agreements concerning the "large exposure regulation violation".
23. DSS 22, GoR para 35(22): The CEO, Ms Yough, in late February 2018, allegedly threatening C in respect of CBN Forex Swaps.
24. DSS 23, GoR para 35(23): The CEO, Ms Yough, in mid to end February 2018, allegedly threatening C concerning his attempt to investigate the supposedly missing $30m and other matters.

25. DSS 24, GoR para 35(24): The CEO, Ms Yough, and the Director of the AC, Mr Somers, in February 2018, allegedly asking C to drop his comments about the alleged illegality of the Treasury Single Account and subsequently threatening him if he did not do so.
26. DSS 25, GoR para 35(25): The CEO, in February 2018, allegedly again asking C to drop his comments about the Treasury Single Account as well as about CBN Forex and the $30m, and making threats if he did not do so.

27. DSS 26, GoR para 35(26): The Director of the RemCom, Mr Efeyini, allegedly having a verbal outburst in February 2018 in front of staff, after a greeting from C.
28. DSS 27, GoR para 35(27): The CEO, Ms Yough, in March 2018, allegedly threatening C after a call with the Chairman of the AC, Mr Somers, and a KPMG partner, in which Ms Yough was told she could not make the adjustment she wanted.
29. DSS 28, GoR para 35(28): The CEO, Ms Yough, allegedly instructing staff not to
30. DSS 29, GoR para 35(29): The alleged failure to pay C amounts pursuant to his contract, at various times during his employment.
31. DSS 30, GoR para 35(30): R's alleged failure to allow C to return to work from 1 November 2018.

32. DSS 31, GoR para 35(31): R's alleged failure, in February 2018 and on other occasions, to provide C with a copy of his 2017 appraisal.

33. DSS 32, GoR para 35(32): R's alleged failure, between April 2018 and February 2019, to provide C with a fair hearing or reasonable investigation of his complaints.

34. DSS 33, GoR para 35(33): The Head of HR, Mr Powell, in October 2018, allegedly asking C to drop his allegations and suggesting C enter into a settlement agreement with R.

35. DSS 34, GoR para 35(34): The Head of HR, Mr Powell, in October/November 2018, allegedly suggesting C should accept the terms offered.

36. DSS 35, GoR para 35(35): R, in December 2018 and January 2019, allegedly repeatedly asking C to enter into a settlement agreement. (Insofar as discussion did take place, R maintains it acted wholly appropriately. Notwithstanding that the discussions were without prejudice R waives the privilege on this occasion (only).)

37. DSS 36, GoR para 35(36): R, in December 2018, allegedly forcing C to choose between withdrawing his whistleblowing claims and being dismissed. C further alleges that R made (unparticularised) threats.

38. DSS 37, GoR para 35(37): R, at an unspecified date, allegedly failing to follow a fair disciplinary process.

39. DSS 38, GoR para 35(38): R, in January 2019, allegedly failing to allow C to participate in his dismissal meeting.

40. DSS 39, GoR para 35(39): R, on unspecified dates, allegedly failing to properly investigate C's misconduct and carrying out an unfair process.

41. DSS 40, GoR para 35(40): R allegedly dismissing C wholly or mainly for making protected disclosures.

Section 103A ERA: whistleblowing dismissal

9. Was the sole or principal reason for C's dismissal the fact that he made a protected disclosure or disclosures (as set out in paragraphs 3 to 6 of the List of Issues)?

Section 98 ERA: unfair dismissal

10. What was the reason or principal reason for C's dismissal and was it a potentially fair reason in accordance with sections 98(1) and 98(2) of the ERA?

11. Specifically, was the reason for C's dismissal capability (C's poor performance) or some other substantial reason (being an irretrievable breakdown in trust and confidence between the parties)?

12. If so, was the dismissal fair or unfair in accordance with section 98(4) of the ERA and, in particular, did R act within the band of reasonable responses? C alleges that the process was flawed in the ways set out in paragraphs 164 to 179 of

his GoC (as set out below at paragraph 13 insofar as materially relevant). These allegations are denied by R at paragraph 37 of the GoR.

13. Was the dismissal process procedurally flawed in the following respects?

1. No investigation (adequate or otherwise) of C's alleged misconduct/performance (paragraph 164 of the GoC).

2. Failure to interview witnesses and to obtain/retrieve documents (paragraph 165 of the GoC).

3. No reasonable or proper explanation for failing to carry out a thorough investigation (paragraph 166 of the GoC).

4. No investigation of the real reason for C's dismissal (paragraph 167 of the GoC).

5. Charges or allegations were inadequately put to C (paragraph 168 of the GoC).

6. C was given no opportunity to state his case or respond to the alleged contradictory reasons advanced for his dismissal (paragraph 169 of the GoC).

7. C was denied the opportunity to be accompanied (paragraph 170 of the GoC).

8. C was afforded no fair appeal against dismissal (paragraph 171 of the GoC).

9. There was a wholesale failure to follow relevant policies and procedures (paragraphs 173 and 178 of the GoC).

14. If there was a procedurally unfair dismissal, would C have been fairly dismissed in any event? If so, what adjustment, if any, should be made to any compensatory award?

15. Did C cause or contribute to his dismissal to any extent?

16. If so (or in any event), by what proportion, if at all, would it be just and equitable to reduce the amount of the basic and/or compensatory award?

Section 26 EA: harassment related to race

17. Did R engage in unwanted conduct towards C as particularised in the Scott Schedule served by C on 3 December 2019 (particularising his alleged claims of harassment/discrimination as well as breach of contract (the "**3rdSS**"))?

18. In particular, did R subject C to the following conduct (identified by reference to the numbered allegations set out in the 3rdSS[4] and the response in R's GOR)?

1. 3rdSS 1, GoR para 36(1): Alleged repeated references to C's race by the CEO, Ms Yough, in Q4 2017 and Q1 2018, including references to "chiefs and Indians".
2. 3rdSS 2, GoR para 36(2): Alleged comments by the CEO, Ms Yough, in Q4 2017 and Q1 2018, that C was the odd one in an African bank in Europe.

3. 3rd SS 3, GoR para 36(3): An alleged comment by the CEO, Ms Yough, in Q1 2018, that C's face should not be on the company's website because he did not represent Africa.
4. 3rdSS 4, GoR para 36(4); An alleged comment by the Head of HR, Mr Powell, in Q4 2018, that C might be a misfit in R.
*5. 3rdSS 5, GoR para 36(5): An alleged comment by the CEO, Ms Yough, in Q1 2018, in respect of the Chief Risk Officer, Andrei Fetin ("**Mr Fetin**") deserving to be paid more and having "beautiful green eyes".*
6. 3rdSS 6, GoR para 36(6): An alleged comment by the Head of Internal Audit, Mr Onwuzurigbo, in Q1 2019, concerning C not being a UK-qualified accountant.

19. If so, did the unwanted conduct relate to the protected characteristic of race, i.e. C's South Asian ethnic origin or colour?

20. Did the conduct have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

21. In deciding whether the conduct had this effect the Tribunal must take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13 EA: direct discrimination because of race

22. Did R treat C as follows (identified by reference to allegations concerning harassment above and the numbered allegations set out in the 3rdSS[5] and the response in R's GoR)?

1. As set out above in the List of Issues at paragraphs 18.1 to 18.2

2. 3rdSS second 5, GoR second para 36(5): Allegedly refusing, at an unspecified time, to pay C a fair salary compared to the Chief Risk Officer, Mr Fetin (who R maintains is not an appropriate comparator).
3. *3rdSS 7, GoR para 36(7): Allegedly refusing, at an unspecified time, to provide C with a fair hearing of his complaints*.

23. Was this treatment less favourable treatment, i.e. did R treat C as alleged less favourably than it treated or would have treated others in not materially different circumstances?

24. If so, was this because of C's South Asian ethnic origin or colour?

Breach of contract

25. Did R breach C's contract as follows (identified by reference to numbered allegations set out in the 3rdSS and the response in R's GoR)?

1. 3rdSS 1, GoR para 38(1): Allegedly agreeing to pay C for 66 days of accrued and or carried over holiday and failing to pay. C alleges that the holiday to which this payment relates was accrued between 2015 and 2018.

2-5 Withdrawn .

Section 13 ERA: unauthorised deductions from wages

26. Was C paid less than contractual wages from 1 November 2018 until his dismissal on 22 January 2019 than he was entitled to be paid and, if so, how much less? R repeats paragraph 25.3 of the List of Issues (while accepting that this claim can be argued by C, as stated by the Employment Judge in his order of 22 October 2019).

27.

Section 10 ERelA: right to be accompanied – withdrawn