# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr. T Smith**

**Respondent:** **The Rationalist Association**

**Heard at:** **East London Hearing Centre**

**On:** **27, 28 and 29 April 2021 and (in chambers) 10 May 2021**

**Before:** **Employment Judge McLaren**
**Members:** **Mr. J Webb**
**Mr. S Woodhouse**

**Representation**

Claimant: In Person

Respondent: Ms. A Johns (Counsel)

# JUDGMENT

**The judgment of the Tribunal is that: -**

1. **The claimant was an employee from 1 January 2014.**

2. **The claimant made a protected disclosure by email on 15 May 2019.**

3. **The claimant was not subject to any detriment as a result of this protected disclosure and his claims under section 48 of the Employment Rights Act 1996 do not succeed.**

4. **The reason or principal reason for dismissal was not the making of the protected disclosure, but the claimant's conduct. His dismissal was fair. The claim for unfair dismissal does not succeed.**

# REASONS

Background

Issues

1 The claim is about whether the claimant made a protected disclosure on 15 May 2019 and whether he was subjected to detriments on the ground that he did so. He also claims that the reason for his dismissal was that he had done so and, in the alternative, relies on ordinary unfair dismissal. The respondent defends the case by denying that the email relied upon contains sufficient information to amount to disclosure. It states that it dismissed the claimant for gross misconduct after a fair procedure.

2 The list of issues that we should determine had been agreed in outline at a preliminary hearing in May 2020 and confirmed by the parties, with the exception of allegations of bullying which had not been reflected in the list. This omission had been pointed out by the claimant at the time, but had not been addressed by the respondent. I asked the parties to seek to reach agreement as to how this issue should be addressed and for them to advise the tribunal accordingly. It was agreed this should be added.

3 On behalf of the respondent, Ms Jones also confirmed that the respondent now conceded the jurisdiction point on time. The agreed issues list is therefore as set out below.

4 **Length of Continuous Service and Employment Status**

1. When did the claimant commence his contract of employment (within the meaning of section 230 of the Employment Rights Act 1996) with the respondent?

    1.1 the claimant contends his employment began on 1 January 2014.

    1.2 the respondent contends he worked as an independent contract until his contact of employment began on 1 January 2018.

**Protected disclosure**

2. Did the claimant make a qualifying disclosure as defined in section 43B of the ERA?

    2.1 the claimant says he made disclosures in an email of 15 May 2019 to the Chairman of Trustees copied to all other trustees;

    2.2 in that email did the claimant disclose information namely that the claimant has extremely serious concerns about the lack of governance transparency and other specific charity failures, some of which are described in 3.5;

    2.3 if so, did he believe the disclosure of information was made in the public interest? The claimant will say that his disclosures

were in the public interest because the respondents were demonstrably failing in their governance duties as Trustees of a charity registered with and regulated by The Charity 48 Case Number: 3202464/2019 7 Commission of England & Wales. The respondent received funding from the public;

2.4 was that belief reasonable?

2.5 Did he believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation? The claimant says the respondent's failures in their duties included:

2.5.1 lack of trustee recruitment transparency

2.5.2 untruthful submissions to Companies House

2.5.3 untruthful submissions to The Charity Commission

2.5.4 failure to heed a warning from the Auditors concerning the former Chief Executive, who subsequently went on to commit a substantial financial fraud over several years. This gross negligence of Trustee oversight responsibilities was discovered and notified (with evidence) by the claimant on 16 May 2016 (i.e. 2016) to the respondent including the current Chair, Prof Clive Coen

2.5.5 untruthful statements to the Respondent's Members (i.e. Members who fund the Charity)

2.6 was that belief reasonable?

2.7 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

**Detriment (ERA 1996 s48)**

3. Did the respondent do or fail to do the following things:

3.1 suspended the claimant on 28 May 2019 in breach of procedure and without prior discussion.

3.2 Failed to undertake a promised investigation;

3.3 Convened a disciplinary hearing prior to investigating;

3.4 Hacked the claimant's personal email account and taking ownership of the domain Rationalism.co.uk, thereby preventing the claimant from accessing emails from 30 May 2019 onwards;

3.5 Denied the claimant access to documents;

3.6 The claimant asserts the respondent deliberately misaddressed the alleged 'suspension letter' to an incorrect residential address in addition to misaddressing the

associated email alleged to have that 'suspension letter' as an attachment;

3.7 Ignored the claimant's anxiety over alleged governance failures;

3.8 Ignored the claimant's reasons for not attending the disciplinary hearings of 21 June and 28 June 2019;

3.9 Failed to follow its disciplinary procedures.

3.10 Bullied the claimant by ostracising him

4. By doing so, did it subject the claimant to a detriment/s?

5. If so, was it done on the ground that he made a protected disclosure?

**Remedy for Protected Disclosure Detriment**

6. What financial losses has the detrimental treatment caused the claimant?

7. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

8. If not, for what period of loss should the claimant be compensated?

9. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

10. Is it just and equitable to award the claimant other compensation?

11. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

12. Did the respondent or the claimant unreasonably fail to comply with it? The claimant asserts the respondent did not follow:

12.1 their own Grievance and Disciplinary Procedures

12.2 AAS Code of Practice on Disciplinary and Grievance Procedures – during any part of their alleged 'process', either leading up to or after the suspension.

13. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

14. Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

15. Was the protected disclosure made in good faith? The claimant asserts that the protected disclosure was made in good faith to facilitate good governance practices.

16. If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

**Unfair dismissal**

17. Was the reason or principal reason for dismissal that the claimant made the protected disclosure?

    If so, the claimant will be regarded as unfairly dismissed.

18. If no, what was the reason or principal reason for dismissal? The respondent says the reason was misconduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

19. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:

    19.1 there were reasonable grounds for that belief;

    19.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

    19.3 the respondent otherwise acted in a procedurally fair manner;

    19.4 dismissal was within the range of reasonable responses.

**Remedy for unfair dismissal**

20. Does the claimant wish to be reinstated to their previous employment?

21. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

22. Should the tribunal order reinstatement? The tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

23. Should the tribunal order re-engagement? The tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

24. What should the terms of the re-engagement order be?

25. If there is a compensatory award, how much should it be? The tribunal will decide:

    25.1 what financial losses has the dismissal caused to the claimant?

    25.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

    25.3 If not, for what period of loss should the claimant be compensated?

    25.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

25.5 If so, should the claimant's compensation be reduced? By how much?

25.6 Did the Acas Code of practice on Disability and Grievance Procedures apply?

25.7 Did the respondent or the claimant unreasonably fail to comply with it by, the claimant asserts the respondent did not follow:

25.7.1 Their own Grievance and Disciplinary Procedures

25.7.2 ACAS Code of Practice on Disciplinary and Grievance Procedures during any part of their alleged process?

25.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

25.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

25.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

25.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

26. What basic award is payable to the claimant, if any?

27.1 would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so to what extent?

Evidence

5 We heard evidence today from five individuals on behalf of the respondent, Mr Caspar Melville, Mrs Rosemary Emanuel and Mr John Emanuel,] and Professor Clive Coen. We also heard evidence from the claimant on his own behalf.

6 We were provided with a bundle of documents from the respondent of 363 pages and a separate bundle from the claimant of 741 pages. In reaching our decision we considered the evidence before us, together with those pages of the bundle to which we were directed. We did not receive any written submissions from either party.

Finding of facts

7 The claimant was employed as chief executive by the respondent, a registered charity which promotes reason, science and humanism. He was dismissed on 12 July 2019.

Background to the claimant's appointment/date of continuous employment

8 It was common ground that the claimant had a relationship with the respondent prior to him becoming chief executive. The claimant states that he has five years seven months qualifying service, having been in situ since 2014.

9 It was the claimant's evidence that his service began when he was initially engaged for three weeks as a temporary consultant in August 2013. He was then, he says, employed full-time from 1 January 2014. He gave evidence that initially he reported directly to the chief executive officer on all matters, and it was the chief executive who defined his workload and prioritised tasks. His work hours were set by the chief executive and he was required to pre-agree any holiday time or time off for other matters, such as medical appointments. The respondent disputed the point and relied on the fact the claimant had invoiced during this period and had expressly not charged the organisation for days he had taken off on holiday. On balance, we accept the claimant's evidence as to the manner in which he was subject to control and performed his work. He was in a position to provide this evidence and the respondent had no knowledge of this.

10 It was also common ground that Prof Coen, on behalf of the trustees, approached the claimant and asked him to take on the role of chief executive. Prof Coen's evidence was that conversations about this possibility began from around May 2016, following the removal of the previous chief executive officer. While the previous chief executive had been engaged as a self-employed consultant, the respondent intended to engage the claimant as an employee in this role. It was also common ground that the claimant did not accept this status at this point, although he assumed the duties of the role.

11 The parties then negotiated the terms of the claimant's employment and they were agreed between the parties in March 2018. There is a dispute between the parties as to what these terms were. At page 186 of the claimant's bundle there was an email from the claimant to Prof Coen which set out what the claimant was seeking. This included at points numbered 2 and 3, requests by the claimant expressed as "assumptions" in relation to a start date which the claimant was seeking to have backdated to 1 January 2014.

12 Prof Coen accepted that he had received the email, but did not accept that this email represented a minute of their discussion and gave evidence that while the claimant wrote that he "assumed" certain terms, these did not form part of the final contract.

13 It was agreed that the detailed discussions were handed over to a former chair and at Page 211 of the claimant's bundle is an email addressed to Clive Coen, from the former chair, setting out recommendations for the terms and conditions for the claimant. Under the heading "length of service" this is specified to be from 1 January 2014. The recommendation includes the points the claimant wished included. It would appear that the recommendations adopted all the terms the claimant had requested.

14 The final contract was included in the bundle, at page 212 of the claimant's bundle. It was accepted that the new relationship, which was one of employment, started on 1 January 2018, and both agreed that he was an employee from this date. The respondent also agreed to give the claimant back pay to mid May 2016, as it was recognised that the claimant had been carrying out the duties since then. The claimant, however, accepted that he would be responsible for the tax on this back payment as a self-employed consultant.

15 The contract itself does not make any reference to the date of continuous employment. It is accompanied by the table which does suggest that the date of employment is backdated. Prof Coen was taken to page 209 which was an email from him to the claimant headed "attachment Tom Smith terms and conditions recommendations", which confirmed the approval of the board for the attached terms and conditions. Prof Cohen accepted that the attached document included the disputed table. We find, therefore that the table is in fact part of the contract and the respondent had agreed to treat the claimant's employment as backdated to 1 January 2014.

16 It was not disputed that the claimant had sent in invoices prior to the start date of January 2018. Nor was it disputed that in a witness statement the claimant had produced for an employment tribunal claim relating to the former chief executive in November 2017 he stated that he was self-employed.

17 It was the claimant's evidence that from mid-May 2016, that is when he took over the effective role of chief executive, until his dismissal, which was after he had been recognised as an employee by the organisation, nothing was different. He carried out the same tasks in the same way with the same equipment, the same level of control and reporting to the same individual, that is the chair of the board.

18 In answer to my questions Prof Coen also confirmed that there was no difference in the way the claimant operated from May 2016 until after his dismissal in terms of how he carried out the work, where he carried out the work, the expectation of personal service, the obligation for the organisation to provide work and for the claimant to do it. He accepted that to all intents and purposes it was the same both pre-and post-1 January 2018. We accept what is undisputed evidence about the way in which the relationship worked from May 2016 until the date of dismissal.

19 We find, despite Prof Coen's written witness statement, that the table setting out various terms including the date to which services were backdated was included in the contract, as he later agreed in oral evidence. We also find, despite Prof Coen's written statement that the claimant was not an employee before the date on which the new contract started, that he accepted that there was no difference in the way the claimant performed his tasks. He appeared to be relying on the labels given by the parties to the nature of the relationship rather than the way in which the tasks were performed. On this basis, we prefer the claimant's evidence to that of the respondent. They have not disputed that the claimant also performed his tasks in the same way before May 2016. We find therefore that not only was there no difference between the way he performed the tasks between May 2016 and January 2018, but there was also no difference from the date on which he was engaged to May 2016.

Whistleblowing in 2016

20 On 10 March 2016 – page 103 of the respondent's bundle – the claimant sent an email to Prof Coen headed "whistleblowing report". This identified concerns about ongoing financial fraud at the respondent organisation involving two persons, one of whom was the then CEO.

21 The respondent organisation carried out the investigation and the bundle included the report by the respondent to the Charity Commission dated 26 October 2016 in which it sets out the respondent's findings that two individuals had

financially defrauded the respondent's organisation. This report suggested that the best estimate it was possible to make at that time was that over a period about 16 months £15,000 had been inappropriately charged to the organisation. The report noted that the cost of hours invoiced by the chief executive but not worked on for the respondent's business and the loss of rental income were more difficult to quantify, but they were considered to be substantial.

22 The Charity Commission on 27 October 2016 asked for an indication of the suspected amount of the fraudulent payments. This was answered by letter 15 November 2016 in which again it was stated that, because of the degree of autonomy that the CEO enjoyed, it was difficult to estimate, but it was believed that it was in excess of £15,000.

23 On 26 October 2016 at page 106 of the respondent's bundle there is an email from the claimant to Prof Coen thanking him for his efforts on steering and driving this through to a considered conclusion. It notes that claimant thinks it might have fallen by the wayside if Prof Coen had not been at the helm and said it had been a real pleasure to engage.

24 In evidence before the tribunal during this hearing the claimant said that he had not in fact been impressed by Prof Coen's handling of the matter. The email with these positive words was sent only in order to stroke Prof Coen's ego. He was in fact disappointed with Prof Coen's reaction. He considered the investigation of two months took far too long and also considered that the trustees were giving misleading information to the Charity Commission. Far from the amounts being around £15,000, the claimant said that he had prepared a schedule at the time which estimated the loss to be £102,000. This was well known to Prof Cohen and the other trustees and yet they did not provide this information to the Charity Commission.

25 We were taken to page 114 of the claimant's bundle which was a draft letter the claimant had prepared for Prof Coen to send to the Charity Commission in response to their email of 27 October. This sets out a best estimate of the loss between £45,000 and £102,624. The claimant also referred to spreadsheets which set out how this matter was calculated. The same spreadsheets were used and sent to the lawyer in April 2017 as part of the county court counterclaim against the former chief executive. It was put to Prof Coen that he was therefore very well aware that the loss was considerably more than £15,000 and he had misled the Charity Commission.

26 Prof Coen's evidence was that he was grateful to the claimant for his significant efforts in trying to compile the spreadsheet but, as he said they had discussed at the time before the final letter (at page 122 of the claimant's bundle) was sent to the Charity Commission, he did not believe that the spreadsheet and the amount sought was one that would stand up to forensic analysis. On his evidence it was extremely difficult to differentiate between the justified and non-justified payments and the loss of rent and share of service charges was at best an estimate. It was Prof Coen's evidence that it was because the loss was so difficult to calculate in a way that would stand up to forensic analysis that they had settled on identifying the clear-cut loss of £15,000 and identified to the Charity Commission that the remaining loss was substantial. He did not accept that the £102,624 figure was an accurate assessment and was entirely notional. He therefore refuted any allegation that he had misled the Charity Commission.

27 This issue does not appear to have been raised by the claimant with anybody prior to 2019.We accept Prof Coen's evidence that he provided an honest response to the Charity Commission which reflected his reasonable belief as to the quantification of the loss. We accept Prof Coen's explanation as to why he was not comfortable with the figures the claimant provided.

The events of 2019 prior to the "whistleblowing"

28 It was Prof Coen's evidence that until early 2019 he believed the claimant to be functioning satisfactorily as CEO. He had been informed before this by other trustees of inappropriate unpleasant communication from the claimant but, while Prof Cohen had occasionally observed him being sharp and inflexible with other trustees, he had not himself experienced this.

29 He referred in his witness statement to some complaints that he received on the 13 -19 December 2018 (page 162 – 168 of the respondent's bundle) about the claimant's behaviour. This involved a complaint from the manager of the office building that another tenant had complained about the claimant's aggressive behaviour towards her. Prof Coen said that he was disconcerted by the tone adopted by the claimant in his responses to the manager and explanation emails to him. It was at this point he became aware of the addendum to the claimant's signature "NB this is a toneless email. Any misinterpretations are entirely the responsibility of the reader!"

Website meetings

30 On 13 February 2019 there was a meeting of 2 trustees, Mr Emanuel and Dr Melville, which included the claimant, with a promising website builder who had been identified. The respondent wanted to discuss a strategy for rebuilding an effective and alluring website. Mr Emanuel gave evidence that the claimant participated in this meeting and it was agreed that the website builder would make a proposal and if acceptable, the respondent would go ahead with the plan.

31 On 21 February Prof Cohen emailed the claimant to say that he had a very useful meeting with the website designer and asked two financial questions. Mr Emanuel emailed the claimant on 25 February to check that the claimant agreed the output from the meeting which evoked a brief reply from the claimant stating that he thought that this was getting a bit ahead of the situation.

32 On 25 February, the claimant then replied to Prof Coen's email. It did not answer the financial questions asked but instead said "the approach to the web project raises some serious questions concerning ethics, best practice, transparent governance and in simple broader terms, good governance". It concludes by saying the claimant also has some difficulty reconciling what he says are Prof Coen's deliberate absences from meetings with the web designer on the basis of too many cooks yet refers to the email sent on 21 February as suggesting "you were vigorously stirring the pot last week when no one was looking!".

33 Prof Coen responded on 25 February asking the claimant to review the tone that he adopted and stated that his penultimate sentence was not justified and not pleasant. The claimant sent his reply the following day 26 February in which he said, "I naturally apologise for any upset and can honestly say you misjudged my tone – too much is left unsaid in an email hence my request for a face-to-face which remains open." He then does give some answers to the financial questions asked but asked the question back, "what drives the question?"

34 Mr Emanuel then sent an email to the claimant on the 1 March 2019 regarding the proposed meeting with the website designer. This was at page 178 of the respondent's bundle. It stated that the email of 24 January, which sets out what the trustees' hoped to achieve seemed a reasonable briefing for an exploratory meeting and asked the claimant for his response.

35 The claimant replied to Mr Emanuel copied to Mrs Emanuel on 2 March. This email said, "if being right is important to you than I offer up this advice for the future" and set out seven points which the claimant said were the rules he endeavoured to employ in his professional life. They included trying not to forget the facts, having integrity, not spinning the facts/memories, and not misrepresenting the facts. The email stated, "if you want to repeat your request now, I will consider responding, but be aware from what I know and have seen on this particular matter, I will tie you up in knots and cause sleepless nights". It goes on to say, "you've mentioned at least a couple of times now having a thick skin that does not reconcile with you also stating (in our phone chat) you had sleepless nights."

36 Mr Emanuel considered this to be a highly offensive email and he forwarded it to Prof Coen who took the same view. We agree with the respondent on this point, the claimant's emails are objectively offensive and we find that no reasonable provocation had been given which would justify the claimant responding in the way he did.

37 Dr Melville gave evidence that he attempted to mediate with the claimant as a result of the email sent by the claimant after Mr Emanuel had arranged meetings with the website consultant.

Meeting with Dr Melville

38 On 29 March 2019 Dr Melville met with the claimant at the respondent's offices in East London. There were no detailed written notes of this meeting nor was there any prior agenda. Dr Melville explained that during this meeting he wanted to try and find out what was motivating the claimant's frustration, but also to get across the point that the tone and content of much of his communication lacked professionalism, was upsetting to the trustees, interfering with the charity's ability to provide leadership and was therefore unacceptable.

39 The meeting lasted for some two hours during which the claimant told Dr Melville that he had lost confidence in the chair and he felt that Prof Coen was briefing against him. The claimant's witness statement sets out in detail the various matters that he confirms he raised at paragraphs 49 – 55. Dr Melville's account of the meeting is similar except that he does not believe he told the claimant that the Emanuels were Prof Cohen's friends.

40 Dr Melville said that he had been very clear that he had told the claimant numerous times that the way in which he was communicating was unproductive and offensive. At the end of the meeting Dr Melville had some optimism that they had managed to agree some new working principles. The claimant would only write to the board as a group, not to individual trustees and he would meet Mr Emanuel in the light of his threatening email to address the points.

41 In cross examination Dr Melville characterised this meeting as an informal performance meeting. He accepted that there had not been an annual appraisal of the claimant and suggested that this meeting could have been an appraisal were

it not for the things that had happened. We accept Dr Melville's description of this meeting as an informal performance discussion. It is clear that both parties agree that the claimant's conduct was discussed, and a way forward was agreed, albeit this label was not given to the meeting at that time.

42 At page 305 of the claimant's bundle, the claimant sent a follow-up email to Dr Melville thanking him for taking the time out that day. Dr Melville responded the following morning saying, "thank you to you for what I thought was an open and productive discussion which gives some positive ground for moving forward". There is then a further exchange of emails on 1 April, at page 307 of the claimant's bundle, where the claimant states that he has already decided on a more directive style which would help guide the board. In this email he refers to there being an addendum to the board pack in the draft agenda which will give a few pointers. It appears from the claimant's evidence that this was reference to his probity reports.

43 In his evidence, Dr Melville said that he did not think the email sent by the claimant was a genuine offer to help, rather it chides the board and puts them in their place. He felt it was an attempt to continue with the claimant's high-handed attitude.

44 Nonetheless, following his meeting with the claimant, Dr Melville reported back to the board and discussed possible ways forward. This discussion included a recommendation that they should establish more productive communications but also asked the trustees to consider whether they wanted to issue the claimant with a formal warning.

45 Dr Melville confirmed in his evidence that he had thought there was the possibility of some positive way forward but, he then became aware that moments before their meeting the claimant had sent an email to Prof Coen asking if he has been diagnosed with a condition that needed to be notified to other board members. The claimant had not mentioned this during their meeting. This, and other emails that Dr Melville characterised as unnecessary and confusing, and with an overall tone of paranoia and abuse, made him conclude the claimant had no intention of sticking to the agreement that they had made and that the claimant was in fact becoming more obstructive. He referred to the emails about Dr Brewer's age set out below as well as threats made to damage the career prospects both of himself and another trustee Dr Naomi Goulder, also set out below.

<u>Questioning Prof Coen's capacity</u>

46 We were taken to pages 204 – 205 of the respondent's bundle which is the email of 29 March which the claimant sent to Prof Coen in which he claimed that he was "left with little choice other than to formally ask if you have been diagnosed with a condition that should be notified to other board members (e.g. something that might impair your judgement or memory)?"

47 This email was later copied to other trustees on 26 April 2019. Prof Coen found this highly offensive. The claimant explained that he was being diplomatic. He told us that he had spent a couple of days thinking about how to word this email. He had very carefully settled on the word "condition" rather than saying "mental condition" because he wanted to give Prof Coen an opportunity to respond, and he thought that he could be suffering from a physical condition or a mental condition or something such as a hormone imbalance. The claimant's perspective was he sent this email to try to understand exactly what might be causing what he

felt was Prof Coen's change of behaviour. He also suggested that it was reasonable for a chief executive who had concerns about the board chair's behaviour to raise such concerns.

48 While we accept that the chief executive does have an obligation to ensure that the board members have capacity to act, we do not accept that this was a diplomatic email or that there was any justification for the claimant to raise this in the way he did. While he may not have used the word mental condition the reasonable inference of an individual reading it is that he was accusing the chair of the board of mental incapacity. We find that it is a rude and offensive email.

Prof Coen meeting with Dr Stewart

49 Dr Stewart is a long-term member of the respondent organisation and a benefactor. He is a past chair and Prof Coen said that he has known him for several years and they have many academic interests in common. In April 2019, Dr Stewart asked Prof Coen to visit him by himself as he wanted to talk and assess the ways in which he might be able to offer the respondent further financial assistance. Prof Coen advised the claimant of this request by an email 2 April at page 187 of the respondent's bundle. Prof Coen explained that he was going to focus on a request for help to publish Dr Brewer's book, "God is the greatest placebo".

50 Before this meeting, Prof Coen explained that he needed to bother the claimant at the last minute, for which he apologised, as Dr Stewart wanted some information specifically relating to the legal status of the respondent. Dr Stewart had asked Prof Cohen to bring hard copies of various documents including those that demonstrate the charitable status of the respondent and he'd asked what type of company the respondent was, what its current form of association was, who was the company secretary and therefore who was responsible for the production of minutes. Prof Coen asked the claimant if he could email him some attachments that he could print out and take long to reassure Dr Stuart.

51 The claimant responded asking Prof Coen to forward emails from Dr Stewart which included his specific requests for status information. The claimant said that he had already made Prof Coen formally aware of his concerns which had been ignored so he must now question the wisdom of Prof Coen meeting Dr Stewart alone and the real possibility of failing to act appropriately to any requests or the potential for causing confusion. The claimant stated that over the previous few months Prof Cohen adopted a casual approach to protocol and ignored communications from himself and third parties that had been detrimental to the smooth running of the respondent organisation. He asked for the basis of the £38,000 request to publish Dr Brewer's book to be sent to him and stated that for Prof Coen to meet this individual in isolation could not be in the best interests of the respondent in particular when one considered Prof Coen's areas of expertise.

52 Prof Coen responded to this explaining that it was Dr Stewart who had asked for the initial meeting with him alone. The specific request had been made by telephone so he could not forward relevant emails and stated that the basis of £38,000 request was no longer relevant because Dr Stewart had expressly told him he wanted to discuss support at a much higher level. The email concluded by asking the claimant for his cooperation in helping him to proceed as well as possible with this meeting. He explained the last-minute nature of the request to the claimant was not of his making.

53 The claimant accepted that he did not provide all the information requested. He explained that he did not think it likely that the questions had in fact been asked by Dr Stewart. As Dr Stewart was a former chair and a long-standing member of the respondent organisation, he thought that he would be fully aware of all the matters that he had apparently asked. It was for this reason, because he needed to check the questions had in fact been raised, that he had responded in the way he did.

54 We find that throughout this correspondence Prof Coen provided reasonable explanations for his actions and we accept that he was meeting Dr Stewart at that individual's request. We find no basis for the claimant's concern that the questions raised had not been raised by Dr Stewart. Again, we find that the claimant's email on this point was obstructive and offensive with no good reason.

Re-election of Prof Coen.

55 On 25 April 2019 at page 207 of the respondent bundle there is an email from the claimant to Prof Coen advising him that as a long-standing trustee and in accordance with articles he would automatically be retiring at that year's AGM. Prof Cohen responded on 26 April to say that it was the consensus of the trustees that he should stand for re-election as his six-year maximum period of tenure was not complete. In answer to cross examination questions Prof Cohen explained that he had spoken to all the trustees and this was a consensus.

56 The claimant responded on 29 April stating that it was highly unlikely that Prof Coen would attract many votes at the AGM by members when they were made aware of his conduct past and present. Prof Coen found this offensive and we agree that on its face it is an offensive email.

Further correspondence with Mr Emanuel

57 On 28 April Mr Emanuel received an email from the claimant in which the claimant said that he had in the past been subjected to a super injunction and made reference to how he had defended himself. Mr Emanuel replied asking for a reference to that trial. He received a response "your rubbernecking is unwelcome and ill judged. Perhaps you'd also like various crime reference numbers to follow up question number or the name/badge numbers of the policeman who entered our house to open a package and told us it contained a grenade, or the bomb squad unit's details, or on another occasion the biohazard unit?"

58 Following receipt of this email, Mr Emanuel came to the conclusion that it was impossible for him to work with the claimant as each effort to progress was met with obstruction or abuse. We find that there is no reason that the claimant responded as he did to what appears to us to be an innocent request for information. His response was indeed obstructive and abusive.

Possible recruitment of Dr Hobson as a trustee

59 Prof Coen told us that on 11 February 2019 Dr Suzanne Hobson sent an email to himself and another trustee, Dr Goulder, attaching her CV and a statement of interest about joining the respondent's board. Prof Coen told us that the established procedure of co-option to the board involved the chair, plus at least one of the trustees meeting somebody who had applied to be nominated by one or more of the trustees. This meeting is normally for a couple of hours and allows

an extensive discussion of relevant interest, skills and expertise that the person might bring to the board. Prof Coen and Dr Goulder met Dr Hobson on 20 January 2019 to discuss the possibility. This was a successful meeting and Dr Goulder and Prof Coen therefore asked Dr Hobson to provide documents for the board to consider a co-option. These were received on 11 February 2019. They were circulated to trustees and received unanimous positive responses.

60 On 20 February 2019 Prof Coen sent an email to Dr Hobson, copied to all trustees and to the claimant, inviting Dr Hobson to join the board as a co-opted trustee with formal election taking place at the AGM which was listed for 5 o'clock on 21 May. This email asked the claimant to correspond with Dr Hobson on the matter of registration. This exchange of correspondence that then took place is at page 172 – 171 of the respondent's bundle.

61 The claimant responded at 15.15 on the same day and expressed surprise that this had happened so quickly "when newbies have yet to find their feet", a reference to the fact that several other board members had only recently been appointed. Prof Coen responded that he tried to telephone, and his email said that the board wished Dr Hobson to join it and that would involve an initial co-option. On 25 February the claimant replied again saying he thought there had been more than crossed wires involved. His email stated that he had no recollection of Dr Hobson being co-opted at a board meeting which potentially created problems but that could probably be worked around. He also pointed out that it was he who'd introduced Dr Hobson to the Association.

62 Prof Coen responded also on 25 February when he explained that two trustees, including, himself, had met Dr Hobson to discuss the relevant matter. His email stated "this was precisely the manner in which my entry had been initiated by Tess and Sally and in which all trustees have joined in recent years. The extensive discussion was followed by Suzanne's submission of a CV and a statement of interest; again, this has been the only practice I have known".

63 The claimant disputes this vehemently and regarded this statement by Prof Coen to be a blatant lie. It was his evidence that all other co-options that had taken place had involved the candidate meeting the chief executive before they were co-opted. He took Prof Coen to a number of documents within the bundle and put to him that three previous trustees had met with the chief executive prior to their co-option. Prof Coen maintained that it was a discretion of the Board and there was no established procedure other than discussion and a meeting with board members with a CV and supporting statement and it was his evidence that this was always scrupulously followed. He had not been involved in some of the examples given by the claimant.

64 The claimant also gave evidence that the appointment of this individual was void because she was not a member of the Association which was a requirement of the articles of association. We note that the section headed directors in the articles does not make any reference to having to be a member. Under the heading "Disqualification and removal of Directors", a director ceases to hold office if she ceases to be a member of the charity. We conclude on a logical reading of the articles that a director must join once they are appointed and will lose their position if they resign as a member, but there is no requirement that they are member before the co-option process is started.

65 We accept Prof Coen's evidence that the chair of the board and the board itself are entitled to co-opt a trustee without that individual having first met the chief executive. While that may be best practice there is no such requirement. We also accept that in making the statement that he had only known trustees to be appointed in the way that he suggested, Prof Coen was genuinely reporting what he believed to be the case. The examples to which the claimant took him were not all within his own knowledge.

Email to Dr Brewer

66 On 2 May, page 224 respondent's bundle, the respondent received an invitation from the Oxford Forum Society asking one of the members to take part in a debate. It was agreed that Dr Brewer would represent the respondent organisation and he replied to the organiser of the conference on 2 May in which he attached an article he had written about Islam which he thought had been published in the New Humanist magazine, ("NHM") although he was not sure if it had been published or he may simply have submitted it. He also included under his signature a brief biography which referred to a book that he was writing which was due to be published in September.

67 On 9 May the claimant replied to Dr Brewer asking how the debate had gone but also saying that he should remember in future that he had been invited to be a representative of the Association. The claimant also stated, "it's understandable including a brief bio in your acceptance response and perhaps even a past publication to lend some additional gravitas but unfortunately providing a dust cover for a future publication (without any blurb) on an unrelated subject could too easily be perceived as self-promotion. I cannot find any of your NHM articles in the last nine years and given the NHM makeover in 2013, it's probably best not to over egg that link too much".

68 Dr Brewer reacted to this on 9 May responding to the claimant, "you seem to be accusing me of lying and seeking unmerited gravitas when I informed the organiser of the Oxford meeting that I had written for NH and I would appreciate a suitably abject apology".

69 The claimant responded again on 13 May stating that your request for an apology, abject or otherwise is clearly absurd. His email said he was astounded that Dr Brewer could not apparently remember whether his article had been published in NHM or merely submitted, but he chose to overlook this incongruency out of respect for his age. He, however, now regretted that deference and would not be so accommodating in future.

70 His email also said, "less you again misunderstand, let me put it another way – I couldn't care less how you represent yourself in person or as a self-confessed rationalist if you're not doing so as the Association's representative." The email closes by highlighting that Dr Brewer has chosen to focus on what is described as an imagined slight to himself rather than being objective and focusing what is in the best interests of the Association.

71 The exchange of emails continued with Dr Brewer responding on 14 May objecting to the accusations of memory impairment. The claimant responded on the same day stating he was standing by what he said were the unadulterated facts and reminding Dr Brewer and all trustees that filling the governance responsibilities in a transparent and effective manner should be top of the list and very soon.

72 The claimant said that he had sent these emails because the editor of the NHM had been upset and concerned because the organisation who had set up the debate had held Dr Brewer out as representing the NHM rather than the respondent. The editor felt slighted by this. The claimant agreed with the editor that he would address the matter with Dr Brewer and explained to the editor that it was not Dr Brewer's fault that the event organiser had billed him in this way.

73 The claimant decided not to cross-examine Dr Brewer but we were provided with a written statement from him. He explained that he found the claimant's allegations to be offensive and that these were examples of what he characterised as the claimant's numerous highly inappropriate and offensive communications that eventually led to his dismissal for gross misconduct.

74 We share Dr Brewer's view of this exchange. We cannot see that there is anything about how Dr Brewer described his experience that could lead to such a series of offensive comments. This is the case even if the editor had felt irritated by what the claimant himself confirmed was not Dr Brewer's fault i.e. the organiser of the event suggesting that Dr Brewer was representing the NHA rather than the respondent.

Meeting with Mrs Emanuel

75 Mrs Emanuel gave evidence that she observed the behaviour of the claimant since becoming a trustee in September 2018. In February 2019 the claimant began writing emails to some of the trustees copied to others sometimes including herself which she found strange, many of them were obstructive and some were abusive.

76 In correspondence on 24 April 2019, she had suggested some additions to the agenda for the next board meeting and it had provoked a positive response from the claimant on the back of which she suggested meeting with him on 29 April for a chat.

77 Prior to this meeting Mrs Emanuel had received a copy of an email from the claimant dated 28 April 2019 in which he set out some background about himself. This referred him having had three heart attacks in late 2007.

78 This information had made Mrs Emanuel wonder whether the claimant might be wanting to have a less stressful role or possibly leave the respondent. She was concerned with health and stress levels. They met in the crypt of St Martin in the field and Mrs Emanuel said that she discussed the claimant's health with him, but he told her that he was fine.

79 She explained that during the meeting the claimant was angry with the chair and was very disparaging about several other trustees and told her that he was prepared to bring the chair down with a report to be sent out with notice of the AGM.

80 Mrs Emanuel explained that immediately following the meeting she made notes of what the claimant had told her, and she then use these to prepare her formalised report for the trustees which is at page 211 – 212 of the bundle. This notes that the claimant did most of the talking during the meeting that his theme was the incompetence of the trustees and the lack of understanding of their duties and correct procedures.

81 It was Mrs Emanuel's evidence that the claimant brought up early in the meeting that he was thinking of postponing the AGM. He also told her he was planning to send a damning report to members of the Association when announcing the next AGM. He accused Prof Coen of lying and lapses in memory. The memorandum notes that when Mrs Emanuel mentioned the abusive email about Prof Coen's possible condition, the claimant simply said it was his duty to put it in writing for the record. It also records the claimant telling her that he had enough evidence to cause serious trouble for the trustees with the Charity Commission. She asked about policies and procedures which the claimant had told Prof Cohen he had been working on and his reply was that many procedures were in place but it was up to the trustees, not him, to produce policies.

82 On the balance of probabilities, we prefer the evidence of Mrs Emanuel on the question of who raised postponement of the AGM. As a new trustee we find it unlikely she would have been aware that this was a possibility unless the claimant had suggested it. We also find that he first raises the possibility of rescheduling with Prof Coen on the same day.

83 The claimant disputed that he had ever told Prof Coen he was working on policies. He was adamant that these are the responsibility of the board not the chief executive. He was also adamant that he had not suggested that the AGM be cancelled. When this was raised by Mrs Emanuel, he advised her that it was possible, but the suggestion did not come from him. He suggested it was unlikely that he would say this given that he had already sent out the written notices to such members as did not have email addresses and he had prepared and was ready to share what he referred to as the probity reports.

84 These probity reports set out in detail what the claimant characterises as the various wrongdoings by various trustees. He confirmed that he had not sent these to anybody, nor had he shown them to the trustees. He considered it was inappropriate to do so. The only way such reports could be shown was at a meeting which was fully minuted and at which everyone was present. He considered it would be inappropriate for any individual to have had an advance copy of these reports. The trustees were, on the claimant's own evidence, unaware of the detail of these reports and in fact only saw them once they were disclosed as part of this litigation.

85 Mrs Emanuel concluded that the claimant seemed unaware of the destructive effect of his emails and behaviour and that he would find it impossible to change and would not be willing to do so. It was her view that the respondent had little alternative than to dismiss the claimant. It appears that the board did not act on this conclusion. We find that Mrs Emanuel had already reached a conclusion about the claimant and should have had no part in any subsequent dismissal procedure. We note she was originally scheduled to take notes at a disciplinary meeting, but did not in fact do so.

86 On 25 May, after the claimant's suspension, Mrs Emanuel wrote an addendum to her report in which she confirmed that during the meeting he showed no evidence of stress and that he had told her that he was fine when she asked about his health at the meeting. This is in contradiction to the email that he sent on 20 May when he referred to visiting his doctor to register increasing stress.

<u>Policies</u>

87 The claimant maintained that the production of policies was not the responsibility of the chief executive. He referred to an exchange of correspondence in January 2016 (page 136 claimant's bundle) which included a diagram of the roles and responsibilities of the trustee and chair. This shows that managing operating policies and procedures are the responsibility of the chief executive. The claimant said the email chain has him questioning this and accepting the conclusion that while there is board involvement in setting policy and reviewing against these, direct management is by the officers reporting to the board. We accept that Prof Coen would be unaware of this exchange. We find this email chain shows that the CEO is responsible for preparing policies and procedures.

88 The claimant also referred to the Articles which it was agreed provide that it is the trustees who are responsible for the transmission of information to the Charity Commission. Prof Coen accepted that, but considered that it had to start with the chief executive.

89 The claimant referred to a number of submissions made to the Charity Commission over a number of years which are signed by Prof Coen as chair of the board. Pages 102,167,172 & 489 of the claimant's bundle. These contain boxes that the charity is asked to complete indicating whether it has eight different policies. All these are ticked as yes. Prof Coen's evidence was that while the button had been pressed by the management accountant, she had done so having received authority to submit from the claimant. In particular he referred to the document at page 117 – 124 of the respondent's bundle which he said was the draft signed by the claimant on 4 October 2018 as authority to the management accountant to submit the documents. Prof Coen said that this was always the case. As chief executive the claimant signed off the contents of the form which was submitted on the respondent's behalf and on which he, as the chair of the board, relied.

90 The claimant disputed this and said that he did not approve the document which was sent by the management accountant. His evidence was that there were no policies and that this was known to the board. Instead in signing the submission Prof Coen was making an unlawful statement to the Charity Commission. Prof Coen confirmed that as at the date of the claimant's dismissal there were no policies. This had been remedied shortly afterwards as the respondent had instructed a lawyer to prepare these and they were now all in place. We also note page 101 of the claimant's bundle which refers to the management accountant submitting the 2016 annual return once the claimant has given the green light.

91 We accept the evidence in the bundle that the claimant authorised the submission of the Charity Commission annual report for 2017, submitted in 2018 before it was submitted by the management accountant. We think it unlikely that a management accountant would submit such a report without the authorisation of the chief executive, and, on balance, we therefore prefer the respondent's evidence on this point that she only did so only after it been signed off by the chief executive.

92 While clearly it is incumbent upon the chair of the Board of Trustees to check that what their chief executive is sending in is correct, it is equally the responsibility of the chief executive to advise the board about what the correct position is. We therefore find that in signing the submissions Professor Coen acted on the assurances provided to him by the claimant having completed a draft which

said policies existed. We find that he was not making untruthful submissions to the Charities Commission.

93 The respondent also made submissions to company's house and these contain a reference to a risk register, at pages 177 and 132 of the claimant's bundle. Prof Cohen accepted that he had signed a document with a statement "the board identifies the key risks facing the charity which are documented in a risk register and discussed with and approved by the directors on a regular basis". Again, it was common ground that no risk register existed. The claimant stated that in signing the statement Prof Coen had made an unlawful declaration to Companies House. Prof Coen said that a risk register was a matter for the chief executive. The board had discussed the risks on a regular basis and that was the statement that he had signed. He was relying on the claimant to have the risk register in place, the board's responsibility was to discuss the risks which is what did happen.

94 We note at page 261 of the claimant's bundle, in the return for 2018, that the wording under Risk Management has changed. At page 256 is an email from the claimant to all trustees advising them that he has discussed this wording with a third party and has amended it to something that "will pass muster". He comments that he could not let new trustees be parties to what he described as misleading statement signed off by trustees in previous years.

95 As far as the submissions to Companies House are concerned in relation to the risk register, we think it incumbent upon the chair of trustees and the board generally to check that a risk register does exist. However, on the balance of probabilities we accept Prof Coen's evidence that risks were debated at board meetings and his understanding of the statement was that he could rely on the chief executive to complete a risk register, the relevant part that he was signing from his knowledge was that risks were debated. Again, we accept that it would be the chief executive who would have primary responsibility for compiling a risk register and we do not find that in signing the submissions Prof Coen was making untruthful submissions to Companies House. He was relying on the claimant who was able to make a change when he wished. While far from good practice or acting as a responsible chair, we nonetheless find Prof Coen was not acting dishonestly.

<u>Progress of the County Court action brought by the former chief executive and the respondent's counterclaim.</u>

96 Prof Coen told us that on 1 November 2018 the claimant had emailed himself and three other trustees about a court claim being made by the previous CEO. The claimant said that he would file the expected documentation in due course and advised the trustees he had also filed a counterclaim. The claimant had not taken legal advice on this counterclaim.

97 On 1 March 2019 the claimant forwarded a court document relating to the claim against the respondent and Prof Coen emailed back asking for key details. This is a page 180 of the respondent's bundle. The claimant replied in a way characterised by Prof Coen as a bizarre and hostile manner and did not answer the questions. On 4 April the claimant sent the trustees an email attaching a court document "notice of allocation/directions" but did not provide any details to help the trustees understand the situation.

98 On the 16th and 30th of April 2019 Prof Coen advised the claimant that he still needed details of the case to be forwarded to him. This did not happen. Mr Emanuel explained that he had been asked by the trustees to check what was happening with this legal case and asked the claimant to advise. On 1 May he emailed the claimant saying that it appeared that none of the trustees had seen details of the current claims and asking the claimant to send details of any evidence as soon as possible. There was no reply. On 3 May Mr Emanuel emailed the claimant again stating this is now super urgent and asking the claimant to respond to his request that day so that the material could be reviewed over the weekend. The claimant accepted that he did not supply any information despite these requests.

99 It was Mr Brewer's evidence in the absence of a response by the claimant that the trustees decided to appoint a lawyer who emailed the claimant directly on 8 May asking the claimant to provide copies of the pleadings, any correspondence and documents. He asked for information by 9 May. Rather than provide the correspondence as requested the claimant responded to the law firm asking for its terms of business its previous association with any trustees, and advising the lawyer that he might be required to charge the trustees for his time rather than the Association.

100 The lawyer responded on 14 May providing the information requested advising the claimant it was a matter for the trustees who they wish to instruct and asking for all the documents to be sent as a matter of urgency, particularly as there was apparently a directions hearing on 12 June. The lawyer wrote again the following day asking for receipt of the court documents all correspondence by return. He asked a number of questions about the progress of the court case.

101 The claimant responded that in the event the lawyer's appointment was ratified then he, the claimant, would be the main point of contact. He also went on to say that "do also be aware that five of our six trustees are recent appointments and demonstrating minimal awareness nor the seriousness of their governance responsibilities, despite written reminders and continuing showing no inclination to do so. The sixth (i.e. Mr Clive Coen), has demonstrated a remarkable change in character in the last six – eight months as well as being erratic and inconsistent with his communications".

102 The claimant accepted that he did not provide the requested information at any stage to the law firm which obtained it directly from the court. We find that it is a fair and reasonable for a board to make a request to a chief executive for information about the conduct of litigation against it and any counterclaim served. The organisation had asked the claimant for information and his refusal to provide it was unreasonable. It was his actions in not responding that forced the respondent to engage an external lawyer. While it was not inappropriate for a chief executive to check with an external lawyer whose appointment he has not been made aware of that they have been properly appointed, we find that there was no justification to share his negative view of the trustees with a third party and we find that to do so was a breach of confidence. The claimant was being deliberately unhelpful.

Postponement of 30 April 2019 quarterly board meeting and AGM

103 By an email of 16 April (page 313 of the claimant's bundle) Prof Coen asked the claimant to provide information about the topics to be covered at the

meeting. It also explained that he and Dr Melville would meet with the claimant on 30 April and then the trustees only meeting would take place from 4 until 5:30 when the board meeting would take place. The email set out some of the nonroutine points Prof Coen wished to see on the agenda.

104 The claimant responded that this was an untimely surprise and asked on what basis Prof Coen was changing the times of the meetings. The claimant disagreed with Prof Coen's view of how the agenda should be prepared. It referred to the approach being unprofessional. Prof Coen replied, and Dr Melville also emailed the claimant asking him to work with what the board wants and stating that he could not see why it would not be unprofessional or generate email ping-pong to comply. Dr Melville asked the claimant not to throw around accusations of unprofessionalism which he characterised as counterproductive.

105 Dr Brewer also gets involved and in response to him the claimant says the meeting have been in his diary for months and complains about meetings being rearranged for what he calls "the Emanuel's summer migration". "On 23 April the claimant sent out a draft agenda. It was this that led to Mrs Emanuel asking for an additional matter to be raised which prompted her meeting with the claimant referred to above.

106 The emails continue and on 24th April (page 210 of the respondent's bundle) Prof Coen explains that he needs to change the times because of trustee's commitments. The claimant replies on 29th April and says there is no meeting room booked for 4pm and it's not possible to book one. He offers two options, starting at 5pm with the trustees-only meeting at 6pm or rescheduling the quarterly board meeting. Prof Coen replies that the trustees agree to postpone both the next day's meeting and the AGM scheduled for the 21st of May.

Allegation that the respondent had failed to heed a warning from the auditors prior to the 2016 fraud

107 As part of the background to his whistleblowing email the claimant referred to advice from auditors which had been set out in a board paper by the auditors and also discussed at a board meeting on 19th of January 2015. This suggested that the remuneration of the chief executive should be reviewed by the trustees and that the monthly payroll should also be reviewed by the board on a quarterly basis. The minutes of the meeting state that these two recommendations are currently being actioned.

108 The claimant asserted that had this happened, the fraud by the previous chief executive would have been identified before it happened. He also suggested that it was Prof Coen's obligation to have carried out these recommendations and to make sure they were still being done. Prof Coen had not been chairing at the time and this was in fact his first board meeting with the respondent

109 We recognise that Prof Coen was very newly involved with the board at the time of this report and could not recollect the meeting discussions. We find that it was reasonable for him to rely on the assurance in the board minutes that the process had been put in place. We therefore find that he was not responsible for any initial failure to heed a warning from the auditors in 2014. In cross examination, however, Prof Cohen accepted that when he took over as chair of trustees it was reasonable to assume that there was a handover in which he would have been reminded of the recommendation to review the chief executive's pay quarterly No

evidence was provided as to whether this in fact occurred after the board meeting in 2014. We find, it was undisputed that the auditors stated these two recommendations were being actioned in 2014 but can make no finding as to whether this continued.

Bullying/ostracising the claimant

110 The claimant considered that the respondent had ignored communications that would initiate a transparent and formally minuted meeting environment in which the discussion of his whistleblowing reports would be unavoidable.

111 The claimant cited the cancelled quarterly board meeting and cancelled AGM with no suggestion of rescheduling either meeting. He also referred to the fact that Prof Coen had ignored his request for a face-to-face meeting on at least three occasions. Prof Coen accepted that he had not met with the claimant on the £occasions when the claimant had raised this in his emails but believed that he had shortly been going to attend a conference and it was therefore a matter of diary difficulties.

112 We find no evidence the claimant was bullied. We do not accept that cancelling meetings or the failure to respond to requests at a time Prof Coen was unable to meet amounts to the claimant being ostracised.

113 The claimant complains that his anxiety over governance failures were ignored. It is unclear to what he is referring. We find that his concerns led to two separate meetings between him and trustees, that is with Dr Melville and Mrs Emanuel. The claimant agrees that his concerns were listened to during these meetings.

The whistleblowing email

114 On 15 May 2019 the claimant sent an email at 14:10 to Prof Coen and to other trustees. The email was the seventh in a series and starts with the phrase "with respect to your email below" and it was agreed that it was intended to address the contents of the sixth email of the series which Prof Coen sent the claimant on 25 February 2019 at 17:03. That is the email setting out the background to the co-option of Dr Hobson to the board.

115 The whistleblowing email is at page 252 – 253 of the respondent's bundle. It reads as set out below

"*with respect to your email below, I believe this is the most appropriate response:*

- *spinning facts to the public as an accepted part of life*
- *misrepresenting facts to the public is, at best, worst that a grey area*
- *misrepresenting facts to our association members is, at best, definitely in the redline area*
- *Misrepresenting Facts to the Executive crosses the redline I.E.raises serious concerns concerning your integrity.*

*I can work with poor/naïve judgement/decisions but crossing redline is unacceptable. You did not merely overlook the trustee co-option process but*

*deliberately betrayed the trust of our members and more importantly, our most recently resigned trustees.*

*Furthermore, you have been grossly negligent in the past:*

- *by failing to heed the explicit warning from the auditor concerning Jose Gonsalves*
- *by failing to act upon the suggested action by a auditor to address these concerns about Jose Gonsalves*
- *those failures contributed significantly the six-figure fraud by Jose Gonsalves*
- *You withheld the above information from the Charity Commission when the Serious Incident Report was submitted*

*Additionally, you have also made untruthful statements to our members, our auditor, companies house and the Charity Commission.*

*You are party to the terrible difficulties caused by opaque governess when we had primarily non-commercial trustees and the positive difference that our move to transparent governance has made. You are now an active participant in transitioning us back to opaque governance and that is unacceptable on my watch. Be under no illusions about the Charity Commission backing me up on that point.*

*All of the above is the reason you lost my confidence, completely. I have no problem taking up an employed position and inheriting skeletons but when you are dishonest on my watch, it all comes crashing down. Quite simply, I can no longer trust you. Your erratic and inconsistent conduct/behaviour since late last year has not done you any favours either.*

*I presume my absolute silence in all these matters caused you to believe I was unaware of the facts or the records but that is incorrect. I kept quiet because pragmatically, I felt it in the best interests of the Association, despite running counter to my personal values.*

*As previously indicated, I would be making our members aware of your actions /inactions which is why I do not believe you will be re-elected. And also why I believe the Charity Commission will not hesitate to disqualify you as a trustee."*

116 The claimant's evidence was that he had sent many red flag email to trustees at various times which would have been immediately recognised as whistleblowing events by objective individuals. He accepted, however, that the sole issue as whistleblowing that was before this tribunal with the contents of this letter.

117 He explained that he had been triggered to send it because he could not accept what he believed was Prof Coen's lying about the way in which trustees had formally been appointed in the chain of emails that the proposed co-option of Dr Hudson gave rise to.

<u>The claimant's suspension</u>.

118 It is unclear at what point the trustees met to decide on its course of action but it is agreed that they decided to suspend the claimant. They sent a letter on 27 May 2019 by registered post to an address that the organisation had for the

claimant together with an email to an address the claimant was known to have used certainly in January of that year.

119 We find that the board was motivated to suspend the claimant because of the various offensive and obstructive emails that he sent which we have set out above. The claimant considers the suspension was triggered because he had made it clear he was going to disclose trustee wrongdoing. We have accepted that Mrs Emanuel's report of her meeting was an accurate one and have also found, as the claimant agrees, that his detailed probity reports had not been sent to anyone. The trustees were faced with a series of hostile and abusive emails and undisclosed threats. Against this background we find that they decided that disciplinary action was potentially warranted.

120 It was the claimant's conduct in sending the emails and not his threats of undisclosed action relating to undisclosed wrongdoing by the trustees that triggered the suspension and process that led to dismissal. We also find that the letter of 15th May was not the trigger for this action which was instead the multiplicity of emails and obstructive acts.

121 The respondent did not have a detailed written disciplinary policy (outside of a paragraph in the contract) which is where we would expect to see any "rules" or procedure on suspension. The claimant has suggested that the process used for the prior CEO was the agreed policy. There is no evidence of this. We find that there was no reason why the respondent had to discuss the suspension with the claimant in advance. There is no breach of policy.

122 The suspension letter is at pages 257 – 258 of the respondent's bundle. It was common ground that the association had used as a basis for its first draft a letter of suspension that had been sent to the previous chief executive. It was for this reason that the date on the letter used the wrong year. The letter contained a clear instruction not to contact any personnel currently or previously associated with the respondent, not to attend the respondent's premises and not to access or attempt to access any computer systems controlled by the respondent.

123 The claimant said he did not receive this letter or the email. He pointed out, which Prof Coen accepted, that even if sent by registered post it could not have arrived until the Tuesday because it was sent over a bank holiday weekend. He also gave evidence that the email address to which the suspension letter had been sent had not been used by him since January of that year and, because of his personal commitments, he had not seen that email.

124 On the same day – page 259 of the bundle – the claimant had been in touch with the company which manages the respondent's IT infrastructure requesting remote access to his association email account. His email to them asked where he could find a backup of his outlook and said he would shortly be going on holiday where Internet is intermittent, and he would need to research his email. The claimant said that he had not expected to be suspended that day but he believed that it was likely to happen because he had told Mrs Emanuel that he was shortly going to issue his probity reports. He believed that the respondent organisation was terrified by this possibility and therefore took steps to silence him. He told us that he believed that they would be monitoring his email and this request was a warning to them. He already had a backup of his email and it was just to let the respondent know that he was aware of what they might be doing.

125 On balance, we do not accept the claimant's explanation. We think it more likely that he had received the email and was aware that he was suspended and was taking steps to secure access to information.

126 He therefore attended the offices on 28 May. He told us that when he arrived, because of the placement of particular objects he believed that the office had been searched. He also suggested that the respondent had deliberately ensured that he would not get the correspondence about the suspension so that they could find him in the office and take his keys from him. He also questioned why, when the previous chief executive had not been suspended for a number of months, he had been suspended immediately.

127 On the balance of probabilities, we find no reason why the respondent would deliberately send a detailed suspension letter to the wrong addresses. We find that while this was due to errors by the respondent, it was not deliberate. We also find that it is a matter for a respondent to consider whether or not an investigation can happen before an individual is suspended or whether suspension is necessary. Prof Coen gave evidence that they felt that the claimant's suspension was necessary to protect the well-being of other staff and it was felt to be urgent because the trustees feared for the charity. We accept these reasons. We find that there is no requirement to discuss suspension with an individual in advance and do not find that the respondent breached any agreed procedure in the way in which it carried out the suspension.

128 Dr Melville was in the office on 28 May in order to secure the respondent's assets – that is access to the databases and financial information. He was made aware the claimant was in the office and asked a security guard to accompany him to the offices to act as an independent witness. We accept Dr Melville was unaware the claimant had not received the suspension information. Dr Melville showed the claimant the information on his phone and the claimant then logged onto his email account and read and printed the suspension letter. The claimant gathered some possessions, gave up the keys and left the building.

Events after the suspension prior to the disciplinary hearing

129 On 16 May 2019, the day after he sent his alleged whistle-blowing email, the claimant registered a new domain – www.rationalism.co.uk – to his home address. This domain is very close to the one used by the respondent. It was accepted by Dr Melville that the claimant had paid for this account himself and it belonged to him. However, the claimant had set it up using his respondent email address. Once the respondent became aware of the new site on 3 June it discovered that visitors to the site were being redirected to an online legal dictionary definition for "malfeasance". When the respondent removed the claimant's access to his work email account, which it was entitled to do as that email account belonged to the respondent, it also removed the claimant's ability to access the new domain.

130 The claimant stated that they hacked a personal email account and took ownership of this domain preventing him accessing his emails from 30th May onwards. We find that the respondent is entitled to disable an employee's access to the internal email accounts and is also entitled to disable access to a site using that work email. We accept Dr Melville's evidence that it does not dispute the claimant's ownership of the domain name but simply removed access to the site

the claimant owned via the respondent's own email address. We find that there is no question of hacking involved.

131 On 16 May – page 249 of the respondent's bundle – the claimant wrote in his capacity as a member to the organisation asking for a copy of its complaints handling policy. On 18 May – page 250 of the respondent's bundle – he wrote to the trustees again in his capacity as a member asking for a copy of the investment policy. He also questioned the trustee appointment process and asked for a copy of the trustee recruitment policy as well as an indication of when the AGM would be taking place that year. He also asked why policies were not displayed on the website.

132 On 20 May – page 251 of the respondent's bundle – he sent a letter to Mr Emanuel asking him who he should contact to visit the office and inspect the risk register. It was accepted that the claimant was aware at this point that no policies were written and there was no formal risk register. The claimant explained his actions by saying that he was trying to get some communication from the board he had exhausted his routes as the chief executive and was therefore writing in his capacity as a member to see if he could get a response. The respondent's evidence was that they found this conduct strange, particularly as he was asking for things that in the respondent's view the chief executive was responsible for – that is policies and the risk register – which it later became clear he had not created, had not made the board aware of this failure and, as far the respondent was concerned, had completed both companies house and Charity commission filings which confirmed that such existed.

133 On 30 May the claimant sent an email to individuals who were engaged by the respondent and some former trustees. This was at page 263 of the respondent's bundle. This set out the claimant's perspective on his suspension and said the email had two objectives. Firstly, that he would nominate the recipients to adjudicate at any future grievance hearing: he was waiting to hear how his accusers could sit in judgement against him based on spurious allegations to cover up their malfeasance. Secondly a heads up that he was rapidly concluding it was likely he would report Prof Coen to the Charity Commission for past malfeasance. His email contained the line "please do not mistake this for a threat but a reminder of my meticulous record-keeping that backs up any definitive statements I make."

134 Prof Coen responded to this by forwarding onto those individuals a copy of the suspension letter making it clear that it was inappropriate for him to elaborate on any more details. The respondent regarded this as a further breach of the terms of the suspension letter which had required the claimant not to contact individuals currently or previously connected with the Association.

<u>The investigation/disciplinary process</u>

135 Mr Melville confirmed that he had been nominated by the board to lead an investigation into the conduct of the claimant based on a series of email communications and statements gathered by Prof Coen working with lawyers.

136 The claimant's contract of employment contained reference to both the grievance procedure and the disciplinary procedure at page 215 of the claimant's bundle. It was accepted that there had been no prior warning, although we have found that there had been a prior informal performance discussion.

137 The letter of suspension had referred to the period of suspension allowing a full and transparent investigation which would be concluded within reasonable time and full written details would then be provided to the claimant. Dr Melville was identified as the relevant contact.

138 Dr Melville explained that as the respondent is a small organisation and he was tasked with carrying out the procedure as he was the least involved of all the trustees with the claimant's alleged misconduct.

139 On 7 June a letter headed 'Notice of a Disciplinary Hearing' was sent to the claimant in which it was stated that the respondent believed there was credible evidence of gross misconduct and misconduct having been committed by him and he was invited to attend a disciplinary hearing on 14 June 2019. This letter made reference to the ACAS code and informed the claimant of his right to be accompanied.

140 It set out in considerable detail the alleged conduct and misconduct which amounted to offensive, defamatory, discriminatory or inappropriate communications by the claimant to the trustees of which 15 examples were given, breach of confidentiality in writing to former trustees on 30 May 2019, failing to properly update the trustees about the legal claim by the former chief executive and obstructing the trustees from gaining information about this court case. The claimant was also told the meeting would consider as misconduct him causing the postponement of the quarterly board meeting and a complaint from a tenant on 13 December 2018. The letter warned that the outcome of the meeting could be dismissal, a formal warning or some other sanction although there are satisfied that the nation no further discipline reaction would be taken. The claimant was asked to provide any documents you wish to rely on his defence. The claimant was also advised that if he failed to attend the meeting without good reason that could be regarded as further potential misconduct.

141 The claimant sent an email on 13 June to three other staff members complaining that there was no person who was "subjective enough" (sic) to be able to investigate but asking these individuals to cooperate fully with the investigator but also stating that they should note the time/date and a brief summary for the various courts, police etc.

142 The claimant sent an email to Dr Melville on 13 June suggesting that both he and Dr Goulder, who was also part of the disciplinary process although not a decision maker, would suffer career damage. It was said by the claimant that this is a natural consequence of trustee actions/inactions. The claimant accepted, however, that he did not contact Dr Melville or any of the trustees about his attendance at the meeting.

143 The claimant did not attend the meeting on 14 June and it was therefore rescheduled for the following week on 21 June. The claimant was sent a further email on 17 June setting up the revised date and also attaching a full pack of all the evidence on which the respondent was seeking to rely. It explained the purpose of the meeting was for the claimant to respond to these allegations and provide explanations or mitigation as appropriate.

144 A formal letter was also sent on 17 June as a second notice of the disciplinary hearing, which again identified all the matters of which the claimant was accused. The claimant responded to the email of 17 June asking whether the

meeting was fact-finding or investigation. Dr Melville replied on 19 June (page 284 of the respondent's bundle) to explain that the meeting on Friday was precisely to give him a chance to respond to the accusations of misconduct. He could then explain why he considered the suspension unlawful and what he does and does not accept. Dr Melville explained that he and Dr Goulder were involved as neither had been cited in the evidence and so could be objective and independent in all the circumstances. The claimant was told that this is a chance to be heard and he was urged to take it.

145 Again, on 19 June the claimant was asked to confirm that he would be attending and also asked to confirm the receipt of the documents relating to the allegations. The claimant did not attend this meeting. It went ahead in his absence and Dr Melville compiled a disciplinary hearing report. The conclusions he reached in this report were put to the trustees and he told us that they unanimously agreed that there was clear evidence of gross misconduct and that the claimant should therefore be dismissed.

146 The claimant was also sent the report by email on 2 July 2019 at pages 288 – 292 of the bundle. This went through each of the allegations. It did not uphold 5 of the allegations of misconduct, but did uphold the remainder of the misconduct allegations. It upheld a breach of confidentiality as a clear case of gross misconduct. It also upheld the allegation that the claimant had not provided requested information to the trustees and their instructed lawyer and that this constituted multiple instances of gross misconduct.

147 Dr Melville did not uphold the allegations that the claimant had caused the postponement of the AGM or the complaint by the tenant about his conduct. He also did not uphold allegations about comments made to Mr Brewer on 9th May, comments made on 23rd May or requesting policy documents as a member. All other allegations were upheld, and it was concluded that there was a breakdown of trust and confidence between the claimant and the respondent. It was noted that the claimant had himself said that in his email of 15 May. Dr Melville concluded, on behalf of the trustees, that the many cases of misconduct and gross misconduct, as well as the breakdown of trust and confidence, had created a prolonged and serious impediment to the ability of the trustees to discharge the fiduciary duties. He considered that there was adequate grounds for dismissal. A formal notice of dismissal was sent to the claimant on 12 July (page 295 of the respondent's bundle).

148 The claimant included in his bundle sick notes which indicated that he had been signed off by a doctor and therefore was not well enough to attend the disciplinary hearings Dr Melville said that he had not received the sick notes and we accept that he had not done so which is why the hearing went ahead despite evidence of the claimant's ill health. There was nothing in the claimant's conduct to suggest he was unwell. He was contacting the respondent as a member and suggesting he visit the offices. He was also sending many emails.

149 While we find that the respondent was unaware of the sick notes, we have considered whether there were some potential irregularities with the process. The suspension letter refers to a unanimous decision of the trustees that the claimant's conduct has been unacceptable. It then specifies that the suspension is to allow a full and transparent investigation but concludes that they will write to him in due course with a date for the disciplinary hearing. It appears on the face of this document that the trustees as a body, including Dr Melville, had concluded there

was already a case to be answered. Dr Melville appears to have been involved in that decision and then asked to be the decision-maker in the disciplinary hearing.

150 However, we conclude that despite this sentence in the suspension letter, this is not what happened. The suspension letter is adapted from the letter used three years previously in the suspension of the previous chief executive and we find it was not read or amended with any care. We accept Dr Melville's evidence that it was Prof Coen who put together the investigation with lawyers, and that he was tasked only after that point with chairing the disciplinary hearing. We find that he had not on fact prejudged the outcome.

151 In the letter of 7th June Prof Coen then states that the investigation has been concluded and sets out the details of the allegations and the emails relied on. The investigation did not include an interview with the claimant. While it is usual for a claimant to be part of an investigation process, we find that it was reasonable not to do so in the circumstances of this case as the evidence came from emails sent by the claimant. We are unclear what would have been achieved by any interview with the claimant prior to the disciplinary hearing. We accept an investigation did occur and the disciplinary hearing was convened once that investigation was concluded.

152 We acknowledge that this is a small organisation and most of the trustees had been involved in the emails which were the subjects of the complaints. We accept that Dr Melville was the least partial of the trustees and it was reasonable for him to be the decision maker. We find he did so impartially and did not uphold all of the allegations as set out above.

Relevant law

Ordinary unfair dismissal

153 There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).In this case the parties agree that the reason was conduct and it was the respondents position that the conduct included dishonesty.

154 Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

155 Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

156 "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

157 By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Compensation for unfair dismissal

158 I refer to Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) which established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

159 The compensatory award may be reduced where the claimant's conduct has contributed to the dismissal, commonly referred to as "contributory conduct" or "contributory fault". The reduction can be anything up to and including 100%.

160 The basic award may be reduced where the claimant's conduct before the dismissal is such that it would be just and equitable to reduce the award. There is no need for the conduct to have contributed to dismissal or for the employer even to have known about it at the time of dismissal

161 Where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding" (section 123(6), ERA 1996).

162 Three factors must be present for a reduction of the compensatory award for contributory fault: The claimant's conduct must be culpable or blameworthy. It must have caused or contributed to the dismissal. The reduction must be just and equitable (Nelson v BBC (No.2) [1979] IRLR 346 (CA).

Whistleblowing

163 The Public Interest Disclosure Act 1998 (PIDA) came into force on 2 July 1999, inserting sections 43A to 43L and 103A into the ERA 1996 providing protection for workers reporting malpractices by their employers or third parties against victimisation or dismissal.

164 Whether a whistle-blower qualifies for protection depends on satisfying the following tests:

Have they made a qualifying disclosure? There are a number of requirements for a qualifying disclosure (section 43B*, ERA 1996*):

a. Disclosure of information. The worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient.

b. Subject matter of disclosure. The information must relate to one of six types of "relevant failure".

c. Reasonable belief. The worker must have a reasonable belief that the information tends to show one of the relevant failures.

d. Further, the worker must have a reasonable belief that the disclosure is in the public interes.

165 Disclosure must also qualify as a protected disclosure (sections 43C-43H, ERA 1996; which broadly depends on the identity of the person to whom disclosure is made. PIDA encourages disclosure to the worker's employer (internal disclosure) as the primary method of whistleblowing. Disclosure to third parties (external disclosure) may be protected if more stringent conditions are met.

166 The public interest test was considered by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979.. Upholding an employment tribunal's decision that the disclosure was a qualifying disclosure, the court gave the following guidance:

the tribunal has to determine

a. whether the worker subjectively believed at the time that the disclosure was in the public interest; and

b. if so, whether that belief was objectively reasonable.

There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.

167 In assessing the reasonableness of the worker's belief, the Tribunal is not restricted to reasons that were in the mind of the worker at the time. The worker's reasons are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

168 Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".

169 In Ibrahim v HCA International Ltd [2019] EWCA Civ 2007, the Court of Appeal held that a Claimant alleging whistleblowing must have the opportunity to give evidence directly on the point of whether they had a subjective belief that they were acting in the public interest at the time of making a disclosure They can then be cross-examined and a tribunal will be able to evaluate the evidence and make findings as to subjective belief and the reasonableness of that belief.

Burden of proof s103A

170 In Kuzel v Roche Products Limited the EAT considered the approach to the burden of proof in claims for automatically unfair dismissal under section 103A of ERA 1996 for having made a protected disclosure. It rejected the employee's argument that the approach to the burden of proof in discrimination cases, as set out in Igen v Wong, should be applied in whistleblowing cases. However, it did lay down guidance for the tribunal on how to approach the burden of proof.

171 In cases of ordinary unfair dismissal under section 98, it is for the employer to show that the reason for dismissal is one of the potentially fair reasons in section 98(2). If it fails to do so, the dismissal is unfair. If it can establish a potentially fair reason, the tribunal must then decide if the dismissal was fair or unfair, applying section 98(4). At this stage the burden of proof is neutral.

172 Where an employee argues that section 103A applies, if the employee has less than one year's service (and so could not claim under section 98), the employee must first establish that they made a protected disclosure and that this was the reason for the dismissal. The position under S.103A is the same as that which applies to other automatically unfair reasons for dismissal. Technically, the burden is on the employer to show the reason for dismissal. In most cases, the employer seeks to discharge this by showing that, where dismissal is admitted, the reason for it was one of the potentially fair reasons under S.98(1) and (2) ERA. It will therefore normally be the employee who argues that the real reason for dismissal was an automatically unfair reason. In these circumstances, the employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation, and which is capable of establishing the automatically unfair reason advanced. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal

How is an employee relationship determined?

173 The courts and tribunals have developed a number of tests over the years aimed at helping them to identify a contract of service and to distinguish between employees and the self-employed. The approach in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. was confirmed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the Ready Mixed formulation of the multiple test can be boiled down to three questions:

i. did the worker agree to provide his or her own work and skill in return for remuneration?

ii. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

iii. were the other provisions of the contract consistent with its being a contract of service? 85.

174 Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for

a contract of service to exist. It is now widely recognised that this entails three elements, control, personal performance, and mutuality of obligation.

175 On the question of jurisdiction, if we find that the claimant was an employee and he has 2 years continuous service, then we will have jurisdiction to consider a claim for unfair dismissal.

Conclusion

176 We now consider how the relevant law applies to the findings of fact that we have made. We do so, taking the issues in turn.

Jurisdiction/continuity of employment

177 The first dispute is when did the claimant commence his contract of employment (within the meaning of section 230 of the employer rights act 1996) with the respondent? There is claimant contends employment began on 1 January 2014 and the respondent contends that he worked as an independent contractor until his contract employment began on 1 January 2018.

178 We have found that the respondent agreed in the contract of employment that the claimant's continuous employment would be backdated until 2014. Continuity of service is not, however, a matter that the parties can agree .What is relevant is whether the individual was in fact an employee prior to January 2018 or not, regardless of what the contract says.

179 We have considered the matters identified in case law as indicators of employment and have accepted the undisputed evidence of both parties that from May 2016 the claimant provided personal service, the organisation exercised control over what he did to the extent that the chief executive's actions are controlled, and there was mutuality of obligation. We conclude therefore that as the claimant was accepted as an employee from 1 January 2018 by the respondent organisation and the respondent organisation also accepted that nothing changed in the way in which the relationship operated after that date the claimant was an employee from May 2016. This is irrespective of the fact that the claimant made contrary statements and was happy for his tax affairs to be organised on a different basis.

180 For the same reasons we also conclude that the claimant was an employee from 1 January 2014.We therefore have jurisdiction to consider the claim for "ordinary "unfair dismissal.

Protected disclosure

181 We must consider whether the claimant disclosed information or made allegations. We have carefully considered the contents of the email of 15 May. We find that the majority of the email consists of unspecified, vague allegations only. One part, however, does amount to providing information to the respondent body. The claimant spells out three acts, failing to heed an explicit warning from the auditor, failing to act upon the suggested action by an auditor and withholding this

information from the Charity Commission when a serious incident report was submitted and states that the consequence of these failures could have contributed significantly to a six-figure fraud by the former chief executive. We consider that this disclosure is sufficient to amount to information and is not simply allegations.

182 We also considered then whether the claimant's disclosure amounted to a relevant breach listed by the legislation. In the issues list the claimant suggested that his disclosure showed a lack of trustee recruitment transparency, untruths submitted to companies house, untruthful submission to the Charity Commission, gross negligence of trustee oversight responsibilities and untruthful statements to respondent members. We do not accept that the email of 15 May shows such failures. We conclude that the part of the email we consider to be a relevant disclosure does provide information about a breach of duty, that is an obligation to submit accurate reports to the Charity Commission. It is that which is called out in the disclosure itself.

183 Having satisfied ourselves that this is a protected disclosure in the disclosed information which tends to show a breach of legal obligation, we have considered whether or not the claimant had a reasonable belief that the information he disclosed showed this breach. The information which he relies on occurred in 2014. While we have found that the auditors' recommendations were said to be being actioned in October 2014, we have not made any finding as to whether this indeed continued. We conclude, nonetheless that the claimant recently believed that the position had not been monitored thereafter. We find that he therefore had a reasonable belief the information disclosed did indeed show this breach of a legal obligation.

184 The next matter we must consider is did he believe the disclosure of information was made in the public interest. Was that belief reasonable? We find that the claimant is pointing out acts of what he says are financial mismanagement which led to a significant fraud and which he says are effectively concealed from the Charity Commission. We consider that this disclosure is clearly in the public interest. The claimant reasonably believed this to be the case and we also find that belief in the public interest objectively reasonable.

185 We conclude therefore that the email of 15 May is a protected disclosure and that in sending this to the respondent the claimant effectively "blew the whistle".

Whistleblowing detriment

186 the claimant has specified that the respondent did or failed to do a number of matters because of this protected disclosure and that in the doing or not doing of doing these things he was subjected to detriment.

187 The first complaint of detriment is that the respondent suspended the claimant on 28 May in breach of procedure without prior discussion. We have found that there was no breach. There can therefore be no detriment. We have also found that the respondent did undertake investigation and only convened the disciplinary hearing after that investigation. The second and third allegations of detriment also did not occur.

188 The claimant raises as act of detriment what he says was the hacking of his personal email account and taking control of a web domain name he had registered and denying the claimant access to documents which he clarified [claimed?] was because he could not access documents sent to this site. We have found that the respondent did not hack the claimant's personal email account.

189 The claimant cites as an act of detriment what he says was the respondent's mis-addressing of the suspension letter. We have found this did not occur. The claimant cites the respondent's ignoring his anxiety of alleged governance failures. We have found that this did not occur and indeed the claimant had two meetings with individual trustees who discussed his anxieties.

190 The claimant refers to the respondent ignoring his reasons for not attending disciplinary hearings on the 21st and 28th of June. We have found the respondent did not ignore his reasons, it did not receive the medical certificates.

191 We've also found that the respondent did follow its disciplinary procedures and the claimant was neither bullied nor ostracised. We have therefore found that none of the actions or matters the respondent is alleged to have failed to do occurred in the way the claimant has described. Further we would conclude that the events referred to were not connected with the disclosure of 15 May but were as a result of the claimant's conduct.

192 For these reasons claims of detriment under section 48 implant [?] rights act 1996 do not succeed.

The reason for dismissal

193 Having concluded that the claimant did make a qualifying disclosure we have gone on to consider whether the making of the qualifying disclosure was the reason or principal reason for his dismissal? We conclude that it was not. The principal reason for the claimant's dismissal was because of his conduct. Many of the matters on which the respondent relied during its investigation and disciplinary process predated the protected disclosure in any event.

194 The claim for unfair dismissal on the ground that the claimant made a protected disclosure does not succeed.

Unfair dismissal

195 Based on our findings of fact we conclude that the respondent genuinely believed the claimant had committed misconduct. We conclude that there were reasonable grounds for that belief, many of the claimant's emails speak for themselves. We have found them to be rude and obstructive on many occasions. We accept that the respondent's trust and confidence in the claimant had been irretrievably damaged by the claimant's own actions.

196 While we had initial concerns about the investigation, we have found that the respondent did carry out an investigation and that Prof Coen put together a pack of documentation with advice from external lawyers. While

the investigation did not include interviewing the claimant, in the circumstances of this case we feel that the respondent had nonetheless carried out a reasonable investigation. The email correspondence was undisputed and was generated by the claimant. Little would have been gained from interviewing the claimant as part of an investigation

197 We have also concluded the respondent acted in a procedurally fair manner. Again, while we had some initial concerns about the procedure, we have found that there was a separation of roles. Prof Coen investigated the matter, Dr Melville separately made the decision based on the evidence that he assessed at the disciplinary hearing. The claimant was given every opportunity to attend these hearings and to put his side of the case. The respondent was unaware that the claimant's absence was due to ill-health and that he had a relevant doctor's note. The claimant did not bring this to the respondent's attention, despite the fact that he was sending many emails on a variety of topics.

198 Finally, we have considered whether or not dismissal was within the range of reasonable responses. Given the multiple findings by the respondent of both gross misconduct and misconduct and the finding that they had lost all trust and confidence in the claimant we accept that dismissal does fall within this band.

199 For all these reasons we find the dismissal of the claimant was a fair dismissal. If we had reached a different conclusion on the procedure, we would have concluded that the claimant' contribution to his own dismissal would make it appropriate to apply a 100% reduction to any award.

Employment Judge **McLaren**
**Date: 13 May 2021**