



EMPLOYMENT TRIBUNALS

AT A PRELIMINARY HEARING FOR INTERIM RELIEF

Claimant: Ms S Blair-Manning

Respondent: Nottingham Castle Trust

Heard at: Midlands (East) Region – In person
On: 31 August 2021

Before: Employment Judge Broughton (sitting alone)

Representation

Claimant: Mr Bryant of Counsel
Respondent: Mr Heard of Counsel

Interim Relief Application

RESERVED JUDGMENT

The Claimant's application for interim relief is **not** well founded and is dismissed.

RESERVED REASONS

Background

1. By a Claim Form presented on 19 August 2021, the Claimant made an application for interim relief under section 128 of the Employment Rights Act 1996 (ERA).
2. The Claimant's employment terminated on 13 August 2021 and therefore the claim for interim relief has been brought within time pursuant to section 128(2), namely it was presented to the Tribunal before the end of the period of 7 days immediately following the effective date of termination.
3. The application was served on the Respondent by way of a letter from the Tribunal dated 23 August 2021 and the case was listed for hearing on 31 August 2021, therefore the Respondent was given the appropriate notice of the hearing and a copy of the application within the time prescribed by section 128(4) ERA.

The Issues

4. The relevant issue is whether it appears *likely* that on determination of the complaint to which the application relates the Tribunal will find that the reason for the dismissal (or if more than one, the principal reason) was one or more of the alleged protected disclosures.

Preliminary matter: Rule 50 application

5. At the commencement of the hearing, the Respondent made an application for an Order under Rule 50 for anonymisation of the Respondent's name and the names of its eight Trustees.

The Legal Principles

Rule 50: The Employment Tribunals Rules of Procedure 2013

Privacy and restrictions on disclosure 50:

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. (3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part,

The Human Rights Act 1998

Right to respect for private and family life.

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

British Broadcasting Corporation v Roden 2015 ICR 985, EAT : Mrs Justice Simler;

“21. An order under Rule 50 interferes both with the principle of open justice and the right to freedom of expression. The principle of open justice was considered recently by the Supreme Court in A v British Broadcasting Corporation [2014] 2 WLR 1243 in which Lord Reed said at [23]: UKEAT/0385/14/DA -10- .

The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice”.

6. The Supreme Court established in **In re Guardian News and Media Ltd and ors 2010**

AC 697, SC, that the risk of the public drawing unjustified inferences was not a reason for granting anonymity in a case where the unproven allegations related to terrorism offences.

7. The basis for making this application relates specifically and only to an allegation which is set out in the Claimant's particulars of claim at paragraph 40 (f) which involves an allegation of inappropriate sexual behaviour towards a female external consultant by one of the Trustees.
8. It is argued by the Respondent that an Order is necessary to protect the honour and reputation of the Trustee with reference to Article 8. Human Rights Act

Claimant

9. Counsel for the Claimant, referred me to the case authority of **Fallows & Ors v News Group Newspapers Ltd UKEAT/0075/16/RN** where Simler P noted the high evidential threshold to support the making of an order under Rule 50.
10. Counsel for the Claimant submits that the burden on establishing a derogation is on the person seeking it; established by clear and cogent evidence that harm will be done. The Tribunal should credit the public with the ability to understand that this is an unproven allegation and the Tribunal can mitigate that risk by making it clear that that issue has not been adjudicated upon. The burden is on the Respondent to show that that derogation from open justice is necessary. The Respondent it is submitted, as put nothing forward in submissions to point to any harm that may be done.

Analysis and decision: Rule 50 application

11. The Respondent pointed to the harm that may be done to the reputation and honour of the Trustee. Beyond that bare assertion, the Respondent has not made further submissions or provided any further evidence in terms of what harm may be done.
12. Further, in terms of the allegation itself, it is not a detailed allegation. It is set out in the particulars of claim. I had not read all the documents in this case however I was assured by Counsel for the Claimant that there is no further particularisation of that allegation within the documents to be referred to during this hearing, nor is there identification of the female external consultant whom it is alleged in the disclosure the behaviour was toward, nor the relevant Trustee.
13. In the circumstances, given that there is no particularisation other than a reference to inappropriate sexual behaviour and the consultant is not identified and nor is the particular Trustee and given the absence of any evidence put forward in terms of any harm that may be done, other than a simple reference to Article 8, weighing up the relative importance of the principle of open justice, I gave a determination at the hearing that any risk may be mitigated by the Tribunal making it very clear in its judgment that any allegation in relation to that issue is an unproven allegation at this stage and the application was rejected.

The Materials and Arguments : Interim relief application

14. The Claimant provided a bundle of documents which numbered 84 pages. I was also provided with a guidance document produced by the Charity Commission for England and Wales: "*The essential trustee: what you need to know, what you need to do*". I was also provided with an extract from Harvey on Industrial Relations and Employment

Law on legal professional privilege and a number of case authorities, including:

- Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors [2002] EWCA Civ 780
 - ACD (Landscape Architects) Ltd v (1) Robert Overall (2) Cookham Construction Ltd [2011] EWHC 3362
 - BNP Paribas v Mezzotero [2004] IRLR 508
 - London City Airport Ltd v Chacko [2013] IRLR 610
 - Hancock v Ter-Berg & Anor [2020] IRLR 97
 - Queensgate Investments LLP & others v Millet [2021] IRLR 637
 - Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] IRLR 837
15. I was also provided with extracts from the Companies Act 2006, sections 170 through to 174. The Claimant also provided me with a written skeleton argument, both on the application itself and a separate note on privilege.
16. The Respondent produced a separate bundle of documents which numbered 50 pages and it produced written submissions.
17. Within the Respondent's documents was a document headed: "*Grounds of Resistance to the application for interim relief*" and two witness statements, one from Professor Ted Cante CBE DL and Susan Hallam MBE. Those witnesses did not give oral evidence.
18. The Claimant had not prepared a witness statement and did not give oral evidence.
19. I have not made any findings of fact.
20. I have heard factual and legal submissions from both parties and from these I make a broad assessment on whether the Claimant would have a pretty good chance of succeeding in her claim under section 103A ERA at the final hearing.
21. As a result of detailed submissions and a number of applications, the submissions did not complete until late afternoon, hence the need to reserve the decision.
22. References to numbers in brackets throughout is a reference to the document bundles.

Without prejudice / Litigation Privilege

23. Before addressing the substance of the claim, I need to address the objection raised by the Respondent to the Claimant relying upon documents it alleges are privileged or covered by the without prejudice rule.
24. Counsel for the Respondent was not seeking a final determination on this issue today but invites the Tribunal to consider the likelihood of these documents being admitted into evidence at the final hearing, when determining the application for interim relief.
25. The documents which the application relates to include;
- a) Minutes of the meeting held on 22 July 2021 between the Board of Trustees (Board), Mr Ellis, a solicitor and Mr Barnes, a barrister (R 47-50) (**Minutes**).
 - b) Attendance note of a telephone conversation on 19 July 2021 between the parties

solicitors; (C 58))(Attendance Note)

26. I have considered fully the written and oral submissions of both counsel but set out a summary only below;

Respondent's submissions

The Minutes

27. The Respondent argues that this is a confidential meeting convened they say for the purposes of the Respondent receiving legal advice. The Respondent submits that legal advice was given and therefore everything said in that meeting attracts both legal advice privilege and litigation privilege.
28. The Respondent had disclosed a copy of the minutes of that Board meeting within its own quite limited disclosure for these proceedings. It had not redacted those minutes and the Tribunal understands that it was not until after disclosure that on the Friday prior to this hearing, the Respondent wrote by email asking that the minutes of the meeting on 22 July 2021 and the attendance note of 19 July 2021 be removed from the bundles and that as a result "*some of the documents (witness statements and grounds of resistance) may require redaction*". No redacted statement were produced.

Attendance Note

29. The Respondent submits that the Attendance Note refers to a conversation between the parties solicitors, Mr Barnes for the Respondent and Mr Jennings for the Claimant on 19 July 2021. The respondent's position is that that conversation was held on a without prejudice basis and therefore that conversation and all references to settlement in documents after that date, are not admissible. In terms of which other documents are not admissible, the Respondent identifies in the claimant's bundle only; an email dated 28 July 2021 (C 59), a note of a telephone conversation between the Claimant and Mr Simkin of the Respondent (C69), and a further email of 2 August 2021 between the Claimant and Susan Hallam (C72). The Respondent sought to argue all other documents referring to settlement would be inadmissible but did not identify those other documents and did not have instructions whether or not other discussions after 14 January were explicitly said to be on without prejudice or not.
30. The Respondent accepted that the Respondent has the burden of showing that the without prejudice principle applies however the Respondent submits that at this stage, it cannot be said that *it is likely* that the Tribunal will find that privilege has been waived. Counsel submits that it is for the Claimant to establish for the purposes of this hearing, that her case has a 'pretty good chance' which puts the burden on her of showing that there is a pretty good chance also that the Respondent's objection to the admissibility of these documents will not succeed.
31. The Respondent asserts that the Attendance Note on the face of it is incomplete because the Respondent's case is that at the outset of the conversation the solicitors had both agreed to have the discussion on a without prejudice basis and this is not captured in the notice. Although counsel for the Respondent started out by accepting that the Respondent has the burden of proof in terms of the inadmissibility issue, he later sought to argue that this may not be correct and that the burden is on the Claimant to show the likelihood of successfully opposing the application.

Claimants submissions

32. Counsel for the Claimant argues that the burden is not on the Claimant in terms of the admissibility issue but it is for the Respondent to satisfy the Tribunal that the documents are inadmissible or at least there is a pretty good chance that the Respondent will be able to show that.

Attendance Note

33. Counsel for the Claimant submits that the Claimant's solicitor does not accept the discussion was agreed to be on a without prejudice basis. However, even if that was agreed, it does not necessarily mean the discussions are covered by the without prejudice rule.
34. Counsel argues there was no dispute between the parties: *BNP Paribas v Mezzotero* [2004] IRLR 508. Raising of a grievance does not mean there is a dispute.

The Minutes

35. The Claimant submits that the Respondent's argument that '*any documents*' that follow from 22 July meetings are inadmissible if the Minutes themselves are deemed inadmissible cannot be correct because that would include for example the dismissal letter itself.
36. It is submitted that there is nothing in the minutes to suggest litigation was contemplated at that stage. Whatever legal advice or opinion Mr Barnes or Ms Tolley gave, it is not included in the notes (and in any event could be redacted).
37. Counsel argues that the Respondent cannot rely upon mistake because it is clear that the disclosure of the Minutes was not a mistake because reference is made to them not only in the Respondent's response (1 – 14) to this application but the witness statements.
38. Even if disclosure incidental it is 'too late to pull it back': ***Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors* [2002] EWCA Civ 780**. where the Court of Appeal set out a number of principles (para16) including that where a party has given inspection of documents by mistake, "*it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief*". The court however held that it may intervene where the documents have been made available for inspection by mistake, where justice requires, for example where inspection was procured by fraud. In the absence of fraud, it may grant injunction of there has been an '*obvious mistake*'.

Legal Principles*Legal Advice and Litigation privilege*

39. Communications directly between a party and their legal advisor are privileged from inspection provided they are confidential and written to or by the adviser in their professional capacity for the purpose of obtaining legal advice (legal advice privilege)
40. Confidential communications between a party or his legal adviser and a third party for the dominant purpose of adversarial litigation, existing or contemplated are also

protected (*litigation* privilege).

41. The term legal advisor includes solicitor, barrister or salaried legal advisor *R (on the application of Prudential plc and anor) v Special Commissioner of Income Tax and anor 2013 2 All ER 247, SC*: it does not cover advice from an employment or HR consultant.

Legal Advice Privilege

42. To attract this type of privilege the communication must be made confidentially for the sole or main purpose of giving or receiving legal advice; the dominant purpose test.

Litigation Privilege

43. Unlike legal advice privilege it covers communications between the parties or their lawyers and third parties where the information provided is for the dominant purpose of adversarial litigation which covers court/ Tribunal proceedings but not internal grievance procedures.

Without Prejudice

44. Communications between parties for the purpose of negotiating a settlement or resolving a dispute cannot generally be subject to an order for disclosure.

45. The words 'without prejudice' do not have to be used: *Chocoladefabriken Lindt and Sprungli AG v Nestle Co Ltd 1978 RPC 287, ChD.* / *Independent Research Services Ltd v Catterall 1993 ICR 1, EAT*

46. I have considered: ***Leclerc v BSI Products Services Ltd ET Case No.1201504/07, Portnykh v Nomura International plc 2014 IRLR 251, EAT*** and ***BNP Paribas v Mezzotero 2004 IRLR 508, EAT.***

Waiver of privilege.

47. Waiver requires the agreement of both parties: ***Cowen v Rentokil Initial Facility Services (UK) Ltd (t/a Initial Transport Services) EAT 0473/07.***

48. Legal professional privilege may be waived : ***Paragon Finance Plc V Freshfields [1999] 1 WLR 1183 at 1188. Lord Bingham CJ.***

Analysis

Minutes of 22 July 2021

Legal Advice Privilege

49. The minutes of the meeting are headed 'confidential'
50. The minutes refer to Mr Barnes and Mrs Tolley an HR external Consultant, being present to advise the Trust in connection with the claimant's grievance letter.
51. Mr Barnes, it is not in dispute is a legal advisor for the purposes of legal advice privilege. Mrs Tolley would appear not to be. The notes refer to both of them advising

the Trustees and the Trust in connection with the grievance letter. They gave their observations on the meaning and effect of the letter. Those 'observations' at least as far as Mr Barnes is concerned, are very likely to fall within the meaning of legal advice. However, the minutes do not record what those 'observations' were.

52. The Trustees then comment on their view of the working relationship with the Claimant and of the grievance. It is likely that a Tribunal would find that this part of the discussion was not for the sole or main purpose of giving or receiving legal advice.
53. There is however a section where reference is made to three options. It is likely that a Tribunal would find that those options were advice from Mr Barnes and thus attract legal advice privilege. However, it is likely that a Tribunal will find that the discussions which follow, about which option they have elected to implement, was not for the sole or dominant purpose of receiving or taking advice. The Trustees were at this point now discussing, how to manage the working relationship going forward, with no express reference to the advice they had been given earlier in the meeting.

Litigation Privileged Advice

54. The Claimant had instructed solicitors [C52] who had written a grievance on her behalf however, there was no reference within that grievance to a threat of possible litigation. While the minutes of the 22 July Board meeting, discuss various options, I find that there is insufficient evidence to make it likely that a Tribunal would find that there was at this stage, a real likelihood of litigation (rather than a mere prospect).
55. Even if what was discussed at the meeting, had a dual purpose and protecting against litigation was one of them, I consider that a Tribunal is likely to find that the dominant purpose of the information (outside of what was said by Mr Barnes), was not with a view to litigation but resolving the employment situation with the Claimant and how to respond to her grievance.

Waiver

Minutes 22 July 2021

56. The Claimant argues that the Respondent waived privilege because it disclosed the Minutes of the 22 July during the course of these proceedings. The Respondent argues that such minutes were disclosed in error.
57. I consider that it is likely that a Tribunal will find that the Respondent did not disclose them in error.
58. The particulars of complaint refer to the Board meeting of 22 July 2021 and the decision that was taken at that meeting. The Respondent produced a document setting out its grounds of resistance to this application and at paragraph 16 refers to the Board instructing their solicitors to attempt to reach a settlement with the Claimant. Further at paragraph 18, it refers to the Board convening the meeting on 22 July to discuss the Claimant's future and how best to secure her exit from the Trust, referring to the Respondent being at; "*pains to find a way to secure an exit without damaging the claimant's reputation*".

59. The statement produced by the Respondent for the purposes of this preliminary hearing from the Chair of the Trust, refers expressly at paragraph 17, to the Board meeting on 22 July and the decision they made at that meeting.
60. The statement of Susan Hallam MBE another member of the Board, refers to the decision taken by the Board to terminate the Claimant's employment and refers for example at paragraph 14, to the reasons for that decision . Paragraph 15 of the statement also refers to the Claimant rebuffing offers to negotiate an exit package and the decision to remove her.
61. Further, the Minutes were disclosed by the Respondent and included within the bundle of documents. It is not a large bundle. It consists of only 15 documents and the index clearly refers to "*confidential minutes of the meeting*".
62. I consider that it is *likely* that a Tribunal would find that this document was disclosed deliberately and that privilege had been waived in respect of the entire document. Even if it were a mistake, applying the Al Fayed case, the mistake was neither 'obvious' nor had inspection been procured by fraud and thus I find that it is likely that the document would be held to be admissible even in those circumstances.

Attendance Note: 19 July 2021

63. Counsel for the Claimant submits that the Attendance Note is admissible (and all documents referring to the settlement discussions) because there was no extant dispute and/or genuine attempt to settle it.
64. While the facts of this case are similar to Mezzoterro, there are important distinctions. In the case before us it was not the Claimant who was engaged directly in settlement discussions, she had legal representation. The Respondent also asserts that her solicitor agreed to the discussions taking place on a without prejudice basis. This gives rise to a dispute of fact which could only be resolved at the final hearing.
65. Putting aside the dispute of fact and looking at the documents provided for this hearing; there is an email on 28 July 2021 from Mr Morrell, a Trustee to the Claimant [C59] where he refers to 'without prejudice discussion' between the lawyers. There is an email from the Claimant to Mr Morrell on 28 July 2021 referring to her solicitor 'agreeing' to speak with Mr Barnes at his request. The Claimant in that email does not refute the suggestion her solicitor had 'agreed to talk to Mr Barnes on a without prejudice basis. I find it is likely that a Tribunal would find that the 'agreement' was an agreement to speak on a without prejudice basis.
66. Turning to the contents of the discussion itself, I find that it is likely that a Tribunal will find that there was no attempt to settle the dispute ie the matters raised in the grievance. The note records the solicitor for the Claimant making it clear that she wants to carry on with her role and have the matters set out in her letter resolved.
67. Neither party seek to argue that section 100A ERA applies to this claim under section 103A.
68. I find that in the circumstances, it is likely that a Tribunal will find that there was an agreement between the two legal representatives to discuss the matter on a without prejudice basis, but that there was no genuine attempt to settle the dispute that existed between the parties at that stage i.e. what was raised in the grievance prior to the

decision to terminate her employment.

69. It follows that I find that it is likely that a Tribunal will determine that the Attendance Note and the Minutes of the 22 July 2021 are both admissible.

70. I have therefore gone on to consider the content of those two documents when considering this application.

Interim Relief Application

71. The submissions from the parties on the substantive application are as follows;

The Claimant's Submission

72. The Claimant's case is as follows;

73. That she was employed as the Respondent's Chief Executive Officer from 23 September 2019. She was employed under a contract of employment (C23 to 28) which provides that after a successful probationary period of six months, her employment may be terminated with three months' notice (Clause 9.2).

74. There is also reference within the contract to disciplinary and grievance procedures: "*applicable to your employment*". The contract states that the procedures do not form part of the contract of employment (clause 10.1).

75. I was presented with a copy of the capability policy which the Claimant says applies to her post. Included within this is, under the 'General Principles', it states that problems of poor performance will be dealt "*with quickly and equitably*" and a "*full explanation*" would be given to the employee of why they are not meeting the required standards (page 30).

76. The formal procedure provides that when providing the employee with written confirmation of a meeting to address the performance issue, the written confirmation must set out examples of where the employee has not met the desired performance (C 32). The process allows for a stage 1 formal interview, a stage 2 dismissal hearing and a right of appeal.

77. I was also taken to a copy of the disciplinary procedure within the bundle (C 37). The Claimant's case is that this applied to her and it sets out the procedure to deal with disciplinary hearings, including the right of appeal.

78. I was also taken to the grievance procedure (C45). This provides that the Respondent will:

"... try to resolve grievances as quickly as possible to the satisfaction of the individual(s) concerned. Where this is not possible, every effort will be made to explain the reasons for the decision.

If employees are not satisfied with the outcome, they have the right to pursue their grievance to the next stage. It is hoped that most grievances will be resolved during the informal discussion. Employees who have raised grievances will be treated fairly at all times before, during and after the grievance hearing(s)."

79. The grievance procedure then sets out an informal stage and then a formal stage. The section headed; "Notes" states;

*"If your complaint concerns an alleged wrongdoing or criminal offence by someone within NCT, you should raise it immediately **with a Trustee**, ie at stage 3 of the procedure." (c 46)*

[Tribunal stress]

80. The grievance procedure provides at Stage 2 (C 45) that if the individual is not satisfied with the manager's response, they may raise it in writing with the Chief Executive.
81. The Claimant's case is that although the grievance procedure (C4) , may not apply directly to her, some procedure along those lines would have been applicable and should have been followed but was not. She complains in her Claim Form that in 2020 and 2021, she became aware of inappropriate behaviour, including bullying and harassment by Trustees towards her and other members of staff and external consultants and that she raised those issues, along with issues about governance. That having raised her concerns with members of the Respondent's Board of Trustees on a number of occasions and having unsuccessfully attempted to engage with the Respondent to resolve those concerns, she only then raised a formal grievance on 14 July 2021 in a letter sent from solicitors she had instructed (C52) .
82. The Claimant sets out in her Claim Form that she intends to rely on those alleged protected disclosures that she made before 14 July 2021 for the purposes of a whistleblowing claim that will relate to detrimental treatment that she suffered as a consequence.
83. In terms of the other alleged protected disclosures, I was not provided with any detail about those disclosures or about the treatment that she complains she was subjected to as a consequence.
84. Counsel for the Claimant confirmed that the Claimant's case is that there were continuing conversations into early July 2021 with individual Trustees and that the last informal conversation with one of the Trustees about her ongoing complaints/disclosures was **12 July 2021**.
85. The Claimant's counsel states that the Claimant's case is that the principal reason for dismissal is the grievance but as far as the earlier alleged protected disclosures are concerned, the Respondent could, he accepted say that they formed part of the reason for dismissal, 'but it would not help them to do so'.
86. The Castle then re-opened in June 2021 and we were taken to emails within the bundle from Ted Cantle, the Chair of the Board of Trustees on 26 June 2021 to the Claimant (page 51) congratulating her and the team, including the following comment:

"I have written to Sarah to congratulate both her and her team for organising such a very smooth opening with not a glitch in sight. This really is a remarkable achievement, given that the Castle has been closed for 3 years with open on the basis of a completely new offer, with a very different business model and entirely new team ..."

87. On 14 July 2021, the Claimant makes the protected disclosure that she relies upon for her claim namely the grievance (C 52 to 55).
88. The letter is 3½ pages long and it refers to the Claimant in the absence of a grievance policy, having sought to raise her concerns in the hope that they may be resolved informally but that unfortunately a formal process is necessary.
89. The disclosures fall within two broad subject areas. The first is governance and the second is behaviours.
90. There is then the discussion between Mr Barnes and Mr Jennings which Mr Barnes is recorded as stating: *“Why send that blessed letter”* and *“Does Sarah want an exit package?”* and *“the problem here is that she has gone for the board as a whole”* (C58). The Tribunal was not told that it is disputed that these comments were made.

Board Meeting 22 July 2021

91. The minutes of the meeting of 22 July 2021 refer to a recommendation by one of the Trustees that Mr Cattle do not Chair the meeting as he is the target of some of the accusations. However, he proceeded to do so. It referred to all the Trustees having seen and read the letter before the meeting.
92. The minutes include the following comments;
“Trustees expressed sadness and disappointment that Miss Blair-Manning had instructed lawyers to state a grievance especially as the letter gave no particulars of the behaviours complained of as justification for the grievance.”

“Mr Morrell reminded the Trustees that Miss Blair-Manning had informed him of her intention to resign from her position as Chief Executive of the Trust within 4 weeks.”
93. Mr Cadogan is recorded as stating that:

“It was important to ensure effective leadership of the organisation. A new leader must be in place soon. Moreover, whatever the outcome of the discussion today, an investigation of the allegations is required.”
94. Mr Johal is recorded as referring to the seriousness of the allegations and stated that in his view the CEO and Chair of any organisation must be able to work together. It states that it appeared to him that the relationship had broken down and it was not clear how it could be repaired. He felt that the allegations against the Trustee body as a whole were insulting as they; *“have an obligation not to be a rubber stamp”*.
95. Miss Hallam and Mrs Rose both stated that they felt the relationship between the CEO and the Trust Board had broken down. Mrs Rose stated that she had lost confidence in Miss Blair-Manning, who appeared to her *“not to follow the Board’s instructions”*.
96. The decision was made to enter into settlement discussions and that if that was not possible, in view of the loss of trust and confidence, then the Board approved the last option, which was to dismiss.
97. There is a further email contained within the Claimant’s disclosure of 28 July 2021 (C 59) from one of the Trustees, Mr Morrell, to the Claimant which states:

"We had hoped that the problems between the Board and yourself could remain professional and confidential until matters had been brought to a conclusion hence the without prejudice conversations between the lawyers. However, this will not be possible if you are doing one thing and your lawyer is doing something else. ...In the meantime we could suggest that you take a few days off work until the matter is resolved so please do not attend or communicate with any members of staff until further notice..."

98. The Claimant therefore complains that she was suspended. There is also an email in the Claimant's disclosure (C62) dated 28 July 2021 from the Claimant to Mr Morrell and Mr Simkin, which includes the following:

"My lawyer agreed to speak with Adrian Barnes, at Mr Barnes' request. However, during the course of the second conversation, Mr Barnes explained that, at an emergency Board meeting, the Board formally resolved to terminate my employment".

99. The Claimant tells the Respondent that she had been told that the decision had been made to terminate her employment at an Extraordinary Board Meeting on 22 July 2021.

100. There is then the telephone call with the Claimant and Mrs Simkin on 29 July 2021 at page 69 within which it also states that the Trustees were not considering investigating the grievance.

101. On 2 August 2021, Susan Hallam contacts the Claimant(C 70) instructing her to email her SLT and let them know she is taking some time off effective immediately.

102. On 2 August 2021, the Claimant writes to Susan Hallam (C72) stating that it has been indicated to her through the Respondent's Solicitor that the Board considers the grievances that she has raised have no substance and that the Trustees will not waste time and money on a fair and proper hearing and investigation.

103. In response Miss Hallam on 4 August 2021 replies in an email that the Respondent is following advice (C72)

104. On 9 August 2021, there is an email (C 78) from Ms Hallam to the Claimant inviting her to a meeting at 9 am on Friday 13 August 2021. It does not explain that it is a disciplinary meeting but a *"get together with you to discuss your future with the Trust"*

105. The notes from the disciplinary meeting appear in the bundle at (C82 and 83). Those record that the meeting lasted only 3 minutes and 17 seconds. The notes of the meeting, after an introduction, simply state as follows:

"Sarah, we have asked to meet with us to convey the Board's decision to dismiss you as CEO from the Trust with immediate effect."

106. It goes on to state:

"In principle the Board has for some time felt that you have not aligned with our strategic plans and that you did not respect the Board's decisions. It has meant that the Board has lost trust and confidence in your leadership of the team at the Castle."

107. The Claimant tells the Tribunal that she then received a letter of 13 August 2021 (c 81). It refers to the decision having been taken to terminate her employment

on 22 July 2021, ie before the meeting on 13 August 2021. The decision had been taken at that point to terminate with notice and that “*your last day of work will be 13 August 2021*”.

108. In those circumstances, given that the Claimant says she was not actually notified of the dismissal until the meeting on 13 August 2021, the Claimant complains that she was terminated summarily.

Respondent submissions on substantive issues

109. The Respondent submits that the disclosures themselves had nothing whatsoever to do with the Claimant’s dismissal. The Claimant was dismissed prior to completing two years’ service because the Board lost confidence in her ability to operate the business.

110. The Respondent says that the decision to dismiss was discussed with the HR consultant prior to the grievance being received by them. However, there are no notes disclosed of the discussions in the bundle.

111. The Respondent will say that the Board was shocked to discover for example that the Claimant had applied for planning permission for a new building in 2020 and they did not find out until 28 April 2021. Within the bundle is a copy of minutes of a Board meeting on 28 April 2021 where it refers to:

“Board members expressed concern that they had been unaware of the planning permission submitted and granted for the new structure at a cost of 500,00k... SMB recognised that the planning permission should have been formally authorised by the Board and apologised for the omission.”

112. The Respondent says there were other concerns with regards to the Claimant such that by 6 May 2021, the Respondent sought the advice of an external HR expert and discussed dismissal. The Respondent has not disclosed the notes of any conversation or meeting on 6 May.

113. The Respondent argues that there are multiple disputes of fact and that what the Claimant has not done is join up the ‘dotted lines’ between each of the 13 alleged disclosures to an alleged breach of a legal obligation which she had in mind when she submitted the grievance. Further counsel for the Respondent submits that if the Claimant cannot establish that she had in mind a particular legal obligation when she made the disclosure, her claim must fail.

Malpractice

114. The Respondent argues that the grievance itself only refers to section 43 of the Employment Rights Act and section 27 of the Equality Act 2010, in terms of legal obligations. There is no evidence that the Charity Code which is also referred to, has any legal effect. The Charity Code is distinct from the Guidance. It is the Guidance not the Code which the Claimant refers to in her application for interim relief.

115. The legal obligations she now seeks to rely upon are the Respondent argues, not those set out in the grievance (apart from the Equality Act) which must lower the prospects of her succeeding in her claim.

Public interest

116. The Respondent argues that there is no evidence that the Claimant made any disclosures to any regulatory bodies et cetera and that it the CEO of a Charity held a reasonable belief that the Charity was not complying with the legal obligation and she felt that was in the public interest, she had a professional obligation to report it to the Charity Commission. The fact that she did not, the Respondent argues is a 'knockout' point for the final hearing.

Causation

117. It is submitted that what the Respondent objects to is the fact that the grievance was submitted by a solicitor and that the Claimant did not follow the grievance procedure.
118. The Claimant says she was not obliged to follow the grievance procedure but that what is important of the perception of the Respondent at the time. The Tribunal was referred to the policy which provides for an informal stage of resolution. *"if you have a grievance about your employment you should discuss it informally with your immediate manager. The manager will give a response within five working days."* [C45].
119. It is disputed that the Claimant tried to engage with the Respondent to resolve concerns informally (outside of a general chat with Mr Morrell on 5 July 2021) prior to sending in the grievance letter via a solicitor.
120. The respondent's case is that the Claimant was fearful of a performance review and that she feared that she would be dismissed and that is why she submitted the grievance.
121. Counsel argues that although the Claimant relies one protected disclosure for the purposes of this claim, in the pleadings she referred to other disclosures before 14 July for which she suffered detriments and that is relevant to causation.

Legal Principles

Automatic Unfair Dismissal

Disclosures qualifying for protection

122. The term "protected disclosure" is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:
- (1) Section 43A defines a protected disclosure as a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H .
 - (2) Section 43B defines a qualifying disclosure essentially by reference to the subject-matter of the disclosure: I set it out in full below.
 - (3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

123. The opening words of section 43B of ERA provide that:

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –.”

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(b);

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

Disclosure of information: section 43B ERA

124. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT.**

125. In ***Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA***: The Court of Appeal in *Kilraine* went on to stress that the word ‘information’ in S.43B(1) has to be read with the qualifying phrase ‘tends to show’.

Reasonable belief

126. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *‘reasonable belief’* of the worker:

- *be made in the public interest, and*
- *tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is likely to take place.*

Companies Act 2006

I have considered the contents of 170 Scope and nature of general duties, 171 Duty to act within powers, 172 Duty to promote the success of the company, 173 Duty to exercise independent judgment and 174 Duty to exercise reasonable care, skill and diligence: ***Companies Act 2006***

The Charity Commission Guidance sets out ‘must’ and ‘should’ where ‘must’ refers to a legal or regulatory requirement or duty that trustees must comply with (and should means good practice).What is a ‘ must ‘ includes (page 4 of the Guidance) and counsel refers to this including knowing what the delegated responsibilities are;

- *Make sure that the charity complies with its governing document*
- *Comply with charity law requirements and other laws that apply to your charity* (page 16 of the Guidance) states that the trustees must ;
- *Act within your powers*
- *Act in good faith and only in the interest of your charity*
- *Make sure you are sufficiently informed. Taking any advice you need*
- ...

- *Make decisions that are within the range of decisions that a reasonable trustee could make in the circumstances*

Public Interest

127. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures: I have considered Lord Justice Underhill's comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR 731 CA** at paragraphs 27 to 30.

128. In **Chesterton** the EAT rejected the suggestion that a Tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in *Babula v Waltham Forest College 2007 ICR 1026, CA*. On appeal, the Court of Appeal agreed that the test as set out in *Babula* remains relevant and made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker.

Reasonable belief in the wrongdoing

129. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.

130. As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14***: The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

131. The worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in ***Kraus v Penna plc and anor 2004 IRLR 260, EAT***. In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation'.

132. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. However, this is not to say that the test is entirely subjective section 43B (1) requires a *reasonable* belief of the worker making the disclosure, not a *genuine* belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT***.

Identifying legal obligation

133. In ***Fincham v HM Prison Service EAT 0925/01*** : Mr Justice Elias observed that there must be 'some disclosure which *actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying*'. However, in ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did

not in terms identify any specific legal obligation' and no doubt 'would not have been able to recite chapter and verse', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability

Likelihood of occurrence

134. Under S.43B(1) the worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The EAT considered the meaning of 'likely' in this context in **Kraus v Penna plc and anor 2004 IRLR 260, EAT** : In the EAT's view, 'likely' should be construed as 'requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant legal obligation'. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation' (our stress).

Manner of Disclosure

Disclosure to employer

135. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker's employer will be a protected disclosure.

Dismissal

136. As Lord Justice Elias confirmed in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA**, the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B . A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

Reason – causation

137. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal requires an enquiry into what facts or beliefs caused the decision-maker to decide to dismiss. Where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question of whether that disclosure was protected must be determined objectively by the tribunal, it is not relevant whether the decision maker dismissed believing (wrongly) that the disclosure was not protected.

Burden of Proof

138. Where the employee has less than the requisite continuous service to claim ordinary unfair dismissal, as in the case before us, he or she will acquire the burden of showing, that the reason for dismissal was an automatically unfair reason on the balance of probabilities: **Smith v Hayle Town Council 1978 ICR 996, CA** and **Ross v Eddie Stobart Ltd EAT 0068/13** confirmed that the same approach applies in

whistleblowing claims.

Drawing inferences.

139. In the words of Lord Justice Mummery in **ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA**: '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.'

129 Procedure on hearing of application and making of order

*(1) This section applies where, on hearing an employee's application for interim relief, it appears to the Tribunal **that it is likely** that on determining the complaint to which the application relates the Tribunal will find that the reason (or, if more than one, the principal reason) for his dismissal is one of those specified in section 100(1)(a) and (b), 102(1) or 103.*

140. The provisions dealing with an application for interim relief pursuant to section 128 (1) ERA 1996 are as follows ;

128 Interim relief pending determination of complaint

(1) An employee who presents a complaint to an industrial tribunal—

(a) that he has been unfairly dismissed by his employer, an

(b) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), 102(1) or 103,

may apply to the Tribunal for interim relief.

(2) The Tribunal shall not entertain an application for interim relief unless it is presented to the Tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The Tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The Tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The Tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

141. The leading case on the test for interim relief is **Taplin v Shippam [1978] ICR 1068**. That case summarised the application of the test of "likely" to succeed as follows "the Tribunal should ask themselves whether the employee had established that he had a "pretty good chance of succeeding in his complaint".

142. Another relatively recent case decided in EAT is **Sheikh Khalid Bin Asqr Al Qasimi v Robinson UKEAT/0283/17**, where tribunals were reminded, in a protected disclosure case, that the judge would have to consider whether the Claimant was likely to show they had made a protected disclosure that was likely to meet the public interest test as well as likely to show that was the reason or principal reason for dismissal. This

was said to be a “comparatively high” test, reflecting on what was said in **Dandpat v University of Bath UKEAT/0408/09** that there were “good reasons of policy”, because a finding that the application succeeded would lead to a continuation of a contract and a continuing obligation to pay the Claimant who might not be ultimately successful.

143. In the case of **Parsons v Airplus International Ltd UKEAT/0023/16** the EAT judge recognised the nature to the ET judge’s task on an interim relief application and, whilst that ET judge had stated the Claimant had a “good arguable case”, they had not been able to say it had a “**pretty good chance of success**” and the refusal to grant interim relief was upheld.
144. The task was described in **London City Airport Ltd v Chacko [2013] IRLR 610** as “an expeditious summary assessment” on the material before the judge.
145. The substantive legislation and case law on protected disclosures needs also to be considered. The definition appears at sections 43A and 43B ERA. A qualifying disclosure is disclosure of information (**Kilraine v LB Wandsworth [2018] ICR ICR 1850** which, in the reasonable belief of the worker tends to show is a) in the public interest and b) one or more 6 things – criminal offence; failed to comply with legal obligation; miscarriage of justice; health and safety; environment damage or one of above deliberately concealed. .

Analysis .

146. The malpractice relied upon is the breach of a legal obligation. The grounds of complaint list what the legal obligations relied upon are (C7);
- A) *Their fiduciary duties as charity trustees under common law, as explained the Charity Commission guidance,*
 - B) *The Respondent’s Articles of Association;*
 - C) *Sections 171 – 174 of the Companies Act 2006*
 - D) *The contracts of employment of the Claimant and other individual employees, including the duty to maintain trust and confidence*
 - E) *The Equality Act 2010*
147. The Claimant raised a number of concerns within her grievance. It is not clear whether they are raised as one disclosure alleging a number of breaches or consist of a number of separate disclosures within one document. However, as they are separated out in the grounds of complaint, I shall address them in the same way;

Governance Disclosures

148. The governance issues are summarised in the particulars of claim as follows (paragraphs 13 (a) to (g)):

a)Cancelling training for the Trustees that had been arranged specifically to improve standards of governance at the Respondent, the Claimant having identified a possible gap in the skills and knowledge of the Trustees;

149. The Claimant refers in the grievance letter to training being cancelled which she felt was required to allow the Trustees to understand what skills and expertise would be needed once the Charity moved into the operating phase and that the issues that the training was intended to address are unresolved and continue to “*represent significant reputational and practical risks to the Charity*”

Information

150. I consider that it is likely that a Tribunal would find that this was a disclosure of information. It discloses facts rather than makes a bare allegation.

Wrongdoing

151. It is not obvious to this Tribunal why the Claimant believed that information about the cancellation of this training tended to show a breach of a legal obligation.
152. Neither the grievance itself nor the grounds of complaint, identify what legal obligation the Claimant believed was breached. The grievance letter does not reference the Companies Act or the Charity Commission Guidance (Guidance). The other legal obligations listed in the pleadings do not appear to be applicable.
153. While identification in strict legal language of the legal obligation which a claimant allege he/she believed to be breached, is not required, there is a requirement for some identification of it.
154. The grievance refers to significant 'reputational risk' and 'practical risks' however, it is not obvious how a risk to the Respondent's reputation could give rise to potential legal liability. Further, the grievance does not identify what the practical risks are which are referred to.
155. The Claimant was not only the CEO, she was also in receipt of legal advice and yet the letter of grievance drafted by her solicitor, fails to identify what the legal obligation is which she believed the information she was disclosed tended to show was breached, if any.
156. It is only the grounds of complaint which later identify the; Guidance, the Companies Act and the fiduciary duties. As CEO a Tribunal is likely to find that she had an understanding of what legal obligations the Respondent was subject to and yet there is no identification in the grievance (drafted with the assistance of a solicitor) of any legal obligation.
157. The Respondent's case is that the decision to cancel the training was taken in consultation with Board members. This is addressed in the Chair's witness statement (para 12). The minutes of any Board meeting where this was allegedly discussed however were not disclosed. There is however a fundamental dispute as to the facts and no documentation to support either account
158. Under section 43B(1) the worker must reasonably believe that his or her disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely to occur*. The pleadings refer to the Claimant having identified a '*possible*' gap in the skills and knowledge of the Trustees. I do not consider that it is likely that a Tribunal will find that 'possible', meets the necessary test in terms of likelihood of occurrence in respect of the relevant malpractice. Where the information is alleged to show that a relevant failure is 'likely' to occur, likely has been held to require more than a possibility: *Kraus v Penna Plc*.
159. I do not find that it is *likely* that the Claimant will establish that she held a reasonable belief that the disclosure of this information tended to show a breach of a

legal obligation on the basis of the case as currently pleaded.

Public interest

160. Counsel for the Claimant addressed the public interest point in general terms, he did not address it in relation to each alleged disclosure. It is argued by counsel that in the reasonable belief of the Claimant the disclosures were in the public interest and that the concerns of “*significant reputational and practical risks to the charity*” are not concerns of only a private nature but are wider.

161. The Claimant did not identify within the grievance whether and if so why, she believed that the disclosures were being made in the public interest. There is no statement from the Claimant. The grounds of complaint and application for interim relief simply refer to public interest with no attempt to set out the reasons why the Claimant believed the disclosures were in the public interest. If the Claimant cannot give credible reasons at the hearing why she thought at the time that the disclosure was in the public interest, that may cast doubt on whether she really thought so at all: **Chesterton Global Ltd. v Nurmohamed [2018] ICR 731 CA.**

162. I do not find that it is likely that a Tribunal would find that the Claimant had a reasonable belief that the disclosure was in the public interest.

(b) Attempts to inappropriately influence the content of a report from a financial training company who had been engaged to improve the Trustees’ financial skills and understanding;

Information

163. I do not find that it is likely that Tribunal will find that the Claimant disclosed information which ‘*tended to show*’ some type of malpractice, but rather made an allegation without the necessary factual content to satisfy the requirements of section 43B ERA. .

Wrongdoing

164. Within the grievance letter it refers to the comments being manipulated to avoid scrutiny of the “*tension between the Chairman and the SLT*”. It is unclear whether the report was doctored or not and what form the ‘manipulation’ took.

165. It is not clear why the Claimant believed that this information she disclosed tended to show a breach of a legal obligation. I will not repeat the same points as I made with the respect to the previous disclosure, however there is in respect of this disclosure a similar failure in terms of the grievance and grounds of complaint, to identify the legal obligation which the Claimant reasonably believed the information she was disclosing tended to show had been breached.

166. The conduct may amount to a breach of fiduciary duties (perhaps section 172 or 173) however, as pleaded I am having to guess what the Claimant’s case may be and what she may have reasonably believed at the time she made the disclosure because it is not set out in the documents before me and she has not presented any statement. The grounds of complaint fail to identify which legal obligation she believed had been breached when she made this disclosure.

167. I do not know whether the Claimant relies on a breach of the Charity Governance Code (Code) because other than the Equality Act 2010 that is the only other possible source of a legal obligation referred to in the grievance letter. I was not provided with a copy of the Code. Counsel for the Respondent argues that it has no legal force. The grounds of complaint do not mention the Code as setting out legal obligations which the Claimant relies upon in her claim.
168. There may be legal obligations in the Guidance which are relevant to this disclosure, such as the obligation to make decisions within the range of decisions that a reasonable trustee could make or to act on good faith. However, the Claimant does not refer to the Guidance in the grievance and the grounds of complaint do not identify that it is the Guidance that she reasonably believed had been breached at the time she made the disclosure (if indeed that is her case).
169. The Claimant can be wrong in believing that the Code gave rise to a legal obligation and still have held a reasonable belief however, without sight of the Code or an understanding of why she formed this belief and in the absence of any express reference in the grievance to it, that affect the prospects of her establishing her case.
170. The Respondent also asserts that there is a material dispute of fact which would have to be resolved over the purpose of the consultant's instruction. The Respondent argues that the consultants were instructed with the brief to make *'changes or improvements to the current financial information to ensure the numbers are being effectively communicated to the trustees'* and that it was the Claimant who was manipulating the project. It argues that the reasonableness of her belief that the information she was disclosing tended to show a breach is undermined in circumstances where she knows that the information disclosed is not correct.
171. I was not presented with any documents relating to the feedback which is alleged to have been manipulated. The Claimant does not identify what precisely she alleges was manipulated and nor was I taken to anything in the pleading which details this in order to assist in any evaluation of the reasonableness of her belief that this information tended to show a breach.
172. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the information disclosed tended to show a breach of a legal obligation, where as CEO she has failed to identify even in broad terms what type of legal obligation she believed the information she was disclosing tended to show had been breached.
- Public interest***
173. Neither the grievance nor the pleading address what she considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.
174. It is not obvious what the consequences of this alleged manipulation of the feedback may be and what the public interest would be.
175. I do not find that it is likely that the Claimant will establish that she held a reasonable belief that the disclosure was in the public interest.

(c) *The disproportionately dominant influence of the Chair of Trustees on decision-making by other Trustees;*

Information

176. I consider that it is likely that a Tribunal would find that the Claimant disclosed information about the conduct of the Chair.

Wrongdoing

177. The grievance refers expressly to the Charity Governance Code which makes it clear that the Trustees must take all decisions collectively. As set out above, there is an issue over whether the Code gives rise to any legal obligation, and whether any belief that there had been a breach of a legal obligation based on the Code, was therefore reasonable. There are similar provisions in the Guidance and Companies Act, however the Claimant makes no reference to those in the grievance document. The pleading also fails to identify what the alleged legal obligation is which was breached. This does call into question what the Claimant actually believed at the time she made the disclosure.

178. The alleged conduct of the Chair may amount to a breach of section 173 of the Companies Act (which is concerned with exercising independent judgment) or 172 (concerned with promoting the success of the company) or to act in good faith under the Guidance. However, the Claimant does not identify these in the grievance as the legal obligations she believed at the time were breached. Even the grounds of complaint do not identify them with reference to this specific disclosure. I am extracting the possible legal obligations which may be relevant from a generic list in the grounds of complaint and guessing what the Claimant's case is and what her belief may have been.

179. However, to assess reasonableness of the claimant's own belief requires some evidence of what the Claimant herself believed the legal obligation to be and that is not present in the grievance (outside of the Code) or the pleading. The Claimant has produced no statement and counsel did not address each disclosure other than to identify in broad terms the types of legal obligations at play with respect generally to the disclosures.

180. The case as pleaded is that the Claimant also believed the disclosures amounted to a breach of legal obligations under the Articles of Association however, a copy of the Articles was not included within the documents and there is no reference in the grievance or pleading to which provision of the Articles it is asserted was breached.

181. Further, although the grievance refers to examples of whether the Chair has closed down discussions, blocked submissions and unilaterally influenced outcomes; neither the grievance nor the pleaded case, sets out what those examples are and therefore it is difficult to assess how serious the allegations are and the reasonableness of a belief that they gave rise to a breach of a legal obligation and if so, which.

182. I do not find that it is likely that the Claimant will establish that she had the requisite reasonable belief that the information disclosed tended to show a breach of a

legal obligation.

Public interest

183. I repeat the same point about the public interest above; neither the grievance nor the pleading address what she considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.

184. It is not obvious what the consequences of this alleged dominance of the Chair may be as far as the public is concerned.

185. I do not find that it is likely that the Claimant will establish that she held the required reasonable belief that the disclosure was in the public interest in the absence of any explanation in the grievance or in the pleaded case.

(d) The lack of appropriate experience and expertise on the part of the Trustees as to the Respondent's purpose and the operation of a heritage visitor attraction of international significance;

Information

186. This disclosure consists of an allegation however I find that it is likely that a Tribunal would find that this was both an allegation and a disclosure of facts (albeit disputed ones) over the absence of appropriate experience and expertise of the Trustees.

Wrongdoing

187. The grievance refers to the situation regarding the dominance of the Chair and this being exacerbated due to his lack of expertise and experience and that of the wider Board of Trustees. The Claimant lists a number of examples of what she alleges to be inexpert interference in operation decision making eg changing the external communications agency, obstructing the opportunity to test different options in relation to showing a film and subverting the SLT's role in future planning for galleries and exhibitions.

188. The Claimant refers in the grievance to the Charity Governance Code, which she alleges states that the focus for a Trustee Board is; *"on strategy , performance, and assurance , rather than operational matters , and reflects this in what it delegates."*

189. The Claimant does not refer to the Companies Act or the Guidance document. I was not taken by counsel to any provision in the Guidance or Companies Act which reflects a similar legal obligation. There is the obligation to work within *" your powers"* in the Guidance, to ensure that *" you are sufficiently informed"* and the provisions of section 173 and 172 Companies Act appear to be potentially relevant. However, in terms of assessing the reasonableness of the Claimant's belief, neither the grievance nor the pleading, identifies that she believed those provisions in the Companies Act or Guidance to be the relevant legal obligation and as CEO she would be expected to have a sound understanding of the Respondent's legal obligations.

190. The Respondent, argues that the Code itself is not a legal or regulatory requirement as I have referred to when dealing with the previous disclosure.

191. If the Code is held not to impose any legal obligation, this will be relevant to the reasonableness of her belief; in terms of the evidential issues around what her belief was and the applicable objective assessment of that belief.
192. The Respondent denies the allegation and argues that the Board are highly experienced. The Chair in his statement refers to the Board members being experienced and having a variety of senior executive roles in public service and business however, he does not expand beyond those general observations.
193. There is clearly a dispute of fact over the experience of the Trustees. There is no statement from the Claimant commenting on their experience and nor is this set out in the pleaded case in any detail, nor is it set out in the grievance document itself. There is an absence of detail in the information disclosed about what the experience is of the Chair and Trustees and why she believes it to be lacking. What is relevant is what the Claimant believed (reasonably) the information she was disclosing tended to show, however what she believed in terms of the legal obligation is not clearly pleaded and as far as the grievance is concerned, it appears to relate only to the Code.
194. I do not find that it is likely that the Claimant will establish that she had the requisite reasonable belief that the information disclosed tended to show a breach of a legal obligation.

Public interest

195. This is the only occasion within the grievance letter when the Claimant seeks to explain why she considers the issues she is raising to be in the public interest, namely that the attraction is a public one and that the lack of understanding of the Trustees is directly relevant to the level of risk and compliance. However, in terms of the public interest test and whether she reasonably believed the disclosure to be in the public interest, I have no information about the extent and nature of the alleged lack of understanding and the risk and compliance issues the Claimant believed this gave rise to. This is addressed in both the grievance and pleaded case in very general and undefined terms.
196. I do not find therefore that it is *likely* that the Claimant will establish that she held the required reasonable belief that the disclosure was in the public interest.

(e) A lack of clarity on the part of the Trustees as to the role and authority of the CEO together with inconsistent application of delegated authority agreed at the start of 2021;

Information

197. I find that it is likely that a Tribunal will determine that Claimant be disclosing disclosed information. The disclosure contains facts rather than making a bare allegation.

Wrongdoing

198. It is not clear again from the grievance or the pleading, nor did counsel address

in submissions, what legal obligation the Claimant believed had been breached in relation to this specific disclosure and it is not obvious to me. What legal obligation may be breached by a lack of clarity about the role and authority of the CEO or the inconsistent application of the 'delegated authority' is not set out in terms where I am able to make a finding whether her belief that this amounted to a breach of a legal obligation, was reasonably held.

199. The pleading identifies types of legal obligation but fails to cross reference these to the various 'concerns' raised by the Claimant around governance.
200. A copy of the 'delegated authority' is not enclosed in the documents produced and neither does the grievance or the pleaded case identify what the Authority states and in what way the Authority has been applied inconsistently.
201. I do not find that it is likely that the Claimant will establish that she had the requisite reasonable belief that the information disclosed tended to show a breach of a legal obligation.

Public Interest

202. Neither the grievance nor the pleading address what she considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.
203. The public interest is not obvious.
204. I do not find that it is likely that the Claimant will establish that she held the required reasonable belief that the disclosure was in the public interest.

(f) *Inappropriate interference by the Trustees in operational matters;*

Information

205. It is not clear to me and was not identified by counsel for the Claimant in submissions, where the information is within the grievance that relates to this specific allegation and nor is this identified in the pleading. The grievance refers to lack of experience and training of Trustees and the dominance of the Chair but nowhere within the grievance/disclosure does it refer to interference by the Trustees in operational matters.
206. I do not find that it is likely that the Claimant will establish that there was a disclosure of information.
207. As pleaded, this would appear to be nothing other than a general allegation. There are no facts pleaded and this allegation is not cross referenced to anything in the grievance document itself.
208. I do not find that it is likely that the Claimant will establish that she disclosed information.

Wrongdoing

209. Given the absence of any detail as set out in the pleaded case and no identifiable reference to this in the grievance document, I do not find that it is likely that the Claimant will establish that she reasonably believed that she had disclosed information which tended to show a breach of a legal obligation.

Public interest

210. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest.

(g) *An apparent failure by the Respondent to comply with its own Articles of Association as to the number and terms of office of Trustees.*

Information

211. The grievance document refers to this not being 'central' to her concerns but that "*we note*" that the Respondent's Articles of Association require the Board of Trustees to consist of at least 3 and not more than 7 persons with each Trustee appointed to serve for a fixed term of 3 years albeit they may be reappointed. It goes on to refer to eight Trustees currently registered and have served for more than three years without re-appointment.

212. I find that it is likely that the Claimant will establish that she made a disclosure of information, in that it contains facts and not a bare allegation.

Wrongdoing

213. There is a dispute over what the Articles state. The Respondent asserts that it states that each Trustee appointed after October 2018 are to serve a fixed term of 3 years. That as set out in the Respondents' written submissions and was not addressed or refuted specifically by counsel for the Claimant in his submissions. No copy of the Articles were disclosed in the bundle.

214. As CEO a Tribunal is likely to find that she should reasonably know what the Articles state and if she is making an allegation which is taken to know is incorrect, then this must mean that will not hold a reasonable belief that the information she is disclosing tends to show a breach, where on the face of it, it is inconsistent with the document.

215. Further, the Guidance document also states that Trustees must make sure that the Charity complies with its governing document. However, I was not taken to this particular provision in the Guidance and nowhere does the Claimant identify that this is the provision she relies upon and nor was it confirmed (and it is not clear from the grievance or pleading) that the Articles are the 'governing document'.

216. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the information she disclosed tended to show that the Respondent had breached a legal obligation.

Public interest

217. The Claimant has not identified what she considered to be in the public interest

or whether the Claimant believed that the disclosure served that interest.

218. The reason why she believed it to be in the public interest is not pleaded and this is not addressed in the grievance either. Further, the grievance refers to this not being 'central' to her concerns which would imply that it was not a significant concern or issue. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest.

The Behaviours Disclosures

219. The behaviours as summarised in the particulars of claim (paragraph 14) are as follows:

(a)The aggressive, intimidating, belittling and disrespectful behaviour of the Chair of Trustees towards the Claimant, other staff, and external consultants and partners, and its impact on their wellbeing and the reputation of the Respondent;

Information

220. This disclosure appears to relate to two paragraphs in the grievance letter which makes general allegations about the conduct of the Chair. However, there are no details provided about the alleged conduct (*and I stress these are unproven allegations on which no findings are made during the course of this hearing*). The grievance letter refers to the Claimant being able to give evidence in writing but she does not do so in this document or in the grounds of complaint.

221. I do not find that it is likely that a Tribunal will determine that the allegations about the Chair's conduct amount to information which 'tends to show' one of the relevant failures because there is an insufficient factual content to elevate this beyond an allegation.

Wrongdoing

222. Neither the grievance nor the pleadings identify what legal obligation the Claimant alleges she believed to be breached. There is no specific reference to any protected characteristic to indicate that the disclosure may relate to any conduct protected under the Equality Act 2010.

223. The most obvious legal obligation which may apply would be a breach of the implied duty of mutual trust and confidence or to act in the best interests of the Charity pursuant to the fiduciary duties and the Companies Act.

224. The Claimant states that she is able to provide examples ie facts to support the allegations around the descriptions of the Chair's conduct but does not do so in the grievance or in the pleading. I consider that the complaints about the Chair's conduct, containing no factual details, may be held to amount to an allegation rather than disclosure of information or facts, which in the reasonable belief of the Claimant tends to show a breach of a legal obligation.

225. I do not find that it is likely that a Tribunal would determine that the Claimant had a reasonable belief that the information she disclosed tended to show that the Respondent had breached a legal obligation.

Public Interest

226. The behaviour against the individuals would appear to concern private interests rather than a public interest. In the absence of any details of the nature of the conduct or who was affected, it is not obvious that there was any public interest and neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.
227. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest.

(b) Attempts by the Chair of Trustees to influence reports and updates by the Senior Leadership Team ('SLT') without reference to the Claimant;***Information***

228. The disclosure refers to the Chair influencing reports without reference to the Claimant in her role as CEO. The Claimant does not identify any details in terms of which reports or the type or degree of 'influence' or what was said which was inaccurate or misleading.
229. I find that it is not likely that a Tribunal would determine that the Claimant disclosed information which 'tended to show' a breach of a legal obligation, but rather made an allegation without any factual content .

Wrongdoing

230. Neither the grievance nor the pleading identify what legal obligation the Claimant alleges she believed to be breached. The most obvious would be perhaps a breach of the fiduciary duty to act in the best interests of the Respondent, the duty perhaps to promote the success of the Company or the duty to act within its powers under section 172 and/or 171 of the Companies Act. However, although there is a general reference to the types of legal obligation relied upon there has been no attempt to cross refer the specific disclosures with the legal obligations listed. Further, the disclosure fails to provide details about the degree of influencing of reports and how serious the behaviour is which is being complained about. If the interference were serious then there is a greater prospect of finding that the Claimant had a reasonable belief that the information tended to show a breach of a legal obligation however , the seriousness and significance of the behaviour is not clear from this information and no details or specific examples are provided.
231. Given the general and vague nature of the allegations with no identification of the seriousness or consequences of the alleged behaviour, no specific examples to illustrate the type of 'influence' it is alleged the Chair was attempting to exert and no identification of the legal obligation (even in board terms) the CEO considered was breached, I do not find that it is likely that a Tribunal would determine that the Claimant had a reasonable belief that the information (if it were to be found to be information) she disclosed tended to show that the Respondent had breached a legal obligation.

Public Interest

232. Neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.

233. With respect to any potential breach of the Companies Act or Charity Law, without understanding what the type of reports were which had been allegedly produced, their impact or the way in which they had been influenced, it is not possible to make any meaningful assessment of the likelihood of the Claimant establishing that she held a belief which was reasonable.

234. I do not find that it is likely that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest.

(c) *Inaccurate and/or misleading claims by the Chair of Trustees to other Trustees;*

Information

235. The disclosure follows on from the above complaint. It is alleged that the Chair made inaccurate or misleading claims to the Trustees, however there is again no detail in the grievance itself or the pleading, of what the inaccurate or misleading claims were. This is again an allegation with no factual content.

236. I find that it is likely that a Tribunal will determine that the Claimant did not disclose information but that this amounts to a bare allegation with no supporting factual content.

Wrongdoing

237. Neither the grievance or the pleadings identify what legal obligation the Claimant believed was breached. The most obvious examples would be a breach of fiduciary duties including to act in the best interests of the Respondent, the duty perhaps to promote the success of the Company or the duty to act within powers under section s172 and/or 171 Companies Act 2006 or the duty to act in the Charities best interests as set out in the Guidance document.

238. The Claimant has not sought in the grievance to identify what the legal obligations are which she believed to have been breached. The pleading, while it sets out a list of legal obligations, fails to identify which of those legal obligations she believed had been breached when she made this disclosure/raised which concern. Clearly not all of those legal obligations in the general list in the grounds of complaint apply to every disclosure. The list includes for example, breach of the Claimant's own contract of employment which is patently not relevant to a number of the disclosures.

239. Given the general and vague nature of the allegation as pleaded with no supporting facts, I do not find that it is likely that the Claimant will establish that she disclosed information which she reasonably believed tended show breach of a legal obligation.

Public Interest

240. Neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.

241. Neither the grievance nor pleading identified what the inaccurate or misleading claims were to enable an evaluation of the potential consequences and impact when considering whether any belief that the disclosure was in the public interest, was objectively reasonable.

242. I do not find that it is likely that a Tribunal will determine that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest.

(d) *Inaccurate noting of meetings by the Chair of Trustees and/or misrepresentation of what third parties had said;*

Information

243. The disclosure again does not set out what the Chair had done other than in general terms. It does not contain any factual content about the alleged inaccuracy or misrepresentation or identify even who the third parties are or what they are alleged to have said.

244. I do not find that it is likely that a Tribunal will find that the Claimant has disclosed information for the purposes of section 43B but again, this consists of an allegation without facts to elevate it to a disclosure of information.

Wrongdoing

245. I repeat the same points as above; the absence in the grievance or the pleading identifying what legal obligation is which the Claimant alleges she reasonably believed to be breached.

246. Given the general and vague nature of the allegation as pleaded with no supporting facts set out in the grievance or pleadings, I do not find that it is likely that a Tribunal will determine that the Claimant disclosed information which she reasonably believed tended to show breach of a legal obligation.

Public Interest

247. Neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest.

248. Without understanding what is exactly being alleged, the consequences and impact of the alleged inaccuracies/ misrepresentation and who the third parties are, it is not possible to make any meaningful evaluation of the likelihood of the Claimant establishing that she held a belief which was reasonable that the disclosure was in the public interest.

249. I do not find that it is likely that a Tribunal will determine that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest

(e) ***A lack of trust in the all-female SLT by the Chair of Trustees;***

Information

250. The Claimant states that she can provide examples that give a 'strong impression' that the Chair does not trust the SLT team however, for whatever reason she does not set them out either in this grievance or in the pleaded case. I find that it is likely that a Tribunal will determine that this amounts to an allegation with no factual content. It is not information 'tending to show' a breach.

251. I do not find that it is likely that a Tribunal will find that the Claimant has disclosed information as required by section 43B.

Wrongdoing

252. Neither the grievance nor the pleadings specifically identify what legal obligation the Claimant believed had been breached. However, the grounds of complaint include within the general list, the Equality Act 2010 and the grievance document also expressly refers to it. Although not specifically identified as a direct discrimination claim on the grounds of sex, it is likely that a Tribunal would find that it is obvious that it is.

253. This disclosure may also amount to an allegation that there has been a breach of the implied duty of mutual trust and confidence and the obligation (para 5) under the Guidance to "*comply with other laws that apply to your charity,*" with reference back to the Equality Act 2010.

254. The allegation is disputed and the Claimant has provided no evidence in support of this allegation. There is no statement from the Claimant, no documents provided in support and no further detail set out in the pleading or the grievance document. The Claimant refers to examples but does not set them out in the grievance or in the grounds of complaint.

255. Further, the Claimant within the grievance, refers to there being a '*strong impression*' of this view being held by the Chair. I do not find that it is likely that a Tribunal would determine that a 'strong impression' is sufficient to meet the required 'likelihood' test: *Kraus v Penna*

256. I do not find that it is likely that a Tribunal will determine that the Claimant disclosed information which she reasonably believed tended show breach of a legal obligation.

Public Interest

257. Neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest. The public interest is not obvious given that the behaviour appears to relate to a relatively small number of individuals.

258. I do not find that it is likely that a Tribunal will determine that the Claimant will establish that she had a reasonable belief that the disclosure was in the public interest

(f) Inappropriate sexual behaviour towards a female external consultant by one of the Trustees, and a failure to take any or any appropriate action when this was reported to the Trustees.”

Information

259. It is likely that a Tribunal would determine that the Claimant has disclosed information which satisfies section 43B. This is not a general allegation but relates to a specific event. The contents of the grievance expand and identify the date the Claimant is alleged to have raised this with the Chair and refers to how the Chair described the situation and the steps she has allegedly taken since.

260. I do find that it is likely that a Tribunal will determine that the Claimant has disclosed information for the purposes of section 43B.

Wrongdoing

261. Neither the grievance nor the pleadings specifically identify what legal obligation the Claimant believed the information she disclosed tended to show had been breached. The grounds of complaint however refer to the Equality Act 2010 in general terms and, it is likely that a Tribunal will determine that it is obvious that the disclosure is identifying either direct sex discrimination or harassment. However, it is unclear whether the wrongdoing the Claimant is alleging this information tended to show, is the behaviour by the Trustee or the failure to address it by the Chair.

262. The allegation is disputed and the Claimant has not provided evidence in support of this allegation or evidence that she raised it with the Chair. The Respondent in its written response to the application, states that the Chair denies that anything was reported to him, that he has searched his emails and notes of meetings and can find no record. The Respondent also asserts that none of the Board members are aware of the accusation and the Trust Board manager has no knowledge. The Respondent submits that if this was so important, the Claimant would have followed it up with the Deputy Chair or other board members.

263. The Claimant has not produced any documents recording the alleged concern that she raised with the Chair. If the Claimant did not raise these concerns, the Respondent argues that it undermines the reasonableness of her belief.

264. The Respondent's case is not only that it disputes the allegation but the Claimant's own disclosure does not allege that as CEO she personally took any action which it argues, undermines the reasonableness of any belief in the wrongdoing.

265. However, the issue is fundamentally whether the Claimant reasonably believed that the information tended to show the relevant failure, not whether she reasonably believed that the failure had actually occurred.

266. I do find that it is likely that a Tribunal will determine that the Claimant disclosed information which she reasonably believed tended to show a breach of a legal obligation namely information which she reasonably believed showed that there had been a breach of the Equality Act 2010 direct discrimination and/or harassment.

Public Interest

267. Neither the pleadings nor the grievance identify what the Claimant considered to be in the public interest or whether the Claimant believed that the disclosure served that interest. The public interest is not obvious given that the behaviour related to one individual.
268. I do not find that it is likely that a Tribunal will determine therefore that the Claimant had a reasonable belief that the disclosure was in the public interest on the basis of the claim as currently pleaded.
269. I turn now however, to the issue of causation.

Causation

270. Because I have made a finding that it is **not** likely that the Tribunal when determining the claim will find (based on the information presented at this hearing and the case as pleaded), that the Claimant made any disclosures which would qualify for protection under section 43B ERA, then this application must fail. However, in case I am wrong in respect of any of those disclosures, I shall address the issue of causation and whether it is likely that a Tribunal determining the claim would find that the sole or principal reason for dismissal was one or more of the *alleged* protected disclosures.
271. The Respondent's case is that it was unhappy about the way the Claimant had raised her concerns, because she had not raised them informally with her line manager but via a solicitor. The Claimant case is that she had raised matters prior to this but that they had not been resolved. There is an important factual dispute between the parties. The Claimant did not disclose documents to evidence what issues she had raised with the Respondent previously.
272. Not only is the backdrop to the Claimant raising this grievance in dispute but there are factual disputes over the Claimant's performance. There appears to be at least some evidence of concerns. The Respondents have disclosed a copy of a Board Meeting on 28 April 2021 (R34) in which Board members expressed concern that they had been unaware of planning permission being submitted for a new structure at a cost of £500,000 with the minutes recording the Claimant recognising that planning permission should have been formally approved.
273. During the alleged without prejudice discussions between her solicitor and Mr Barnes on 19 July 2021, Mr Barnes makes the comment that there is concern that the Claimant wants to run things without any oversight. However, there was no performance management or disciplinary process invoked and when the Claimant did not want to engage in discussions on a without prejudice basis about an exit, 3 days later the decision is taken to remove her. On the face of those facts alone, a Tribunal may infer that the reason for the decision is the grievance letter. Added to that we then have the express comments made during the Board meeting itself by various members in response to the grievance, which other than the seriousness of the allegations in the grievance, do not explicitly identify any other cause for the breakdown of the relationship. Mrs Rose comments on the Claimant not following the Board's instructions, but there is no detail of what she is referring to.
274. The Respondent alleges that the dismissal was already being discussed prior to the grievance being received. No documents have been disclosed which supports that. Concerns about the Claimant allegedly discussed at earlier Board meeting have also not been disclosed.

275. The Chair in his witness statement alleges that he had discussed with Ms Hallam the growing likelihood of dismissing the Claimant because the Board had lost confidence in her. The Respondent alleges that advice was sought from an external HR and dismissal was discussed on two occasions, the first being 6 May 2021. However, there are no documents which support that such a discussion took place or indeed Board minutes to evidence the “*number of disagreements with Board Members*”.
276. Further, Ms Susan Hallam MBE makes no mention in her statement of any discussion around dismissal. Her statement is that on 6 May (para 6 page 24) she started discussions with an external HR advisor regarding the Claimant’s performance and a plan for performance management. She states that she believes the grievance was triggered by the Claimant’s fear that the performance review was likely to lead to her removal however, Ms Hallam does not state that there were discussions around her removal. Further, (R42) in an email from Mr Simkin to Ms Hallam, he refers to these 360 reviews being something the CEO wanted to roll across the rest of the organisation as part of a performance appraisal process.
277. On the 26 June 2021 the Chair had sent the email (C 51) “...*This really is a remarkable achievement*”
278. At the Board meeting on the 22 July 2021 Cllr Roberts referred to still having trust and confidence in the Claimant “*because she had done a tremendous job...*” (R49)
279. The Chair who was the focus of the grievance, chaired the meeting of the 22 July 2021 despite what was directed at him in the grievance letter. The obvious question is why he would do so if he was concerned with fairness and impartiality.
280. It is likely that a Tribunal determining this issue will find that there was a desire by the majority of the Trustees to dismiss the Claimant without first investigating her complaints and the documents indicate a reluctance in carrying out any investigation.
281. The strength of feeling about the grievance is not only clear from the 22 July 2021 minutes but the statements produced by the Respondent in response to this application. The Chair refers to the grievance showing her; “*continued disregard and disdain for the whole board*” (para 16 R 19) and Ms Hallam refers to being “*displeased*” (R25 para 11) by the grievance albeit she goes on to refer to being disappointed that she went straight to a solicitor.
282. The Tribunal is likely to find that there was a failure to provide a “*full explanation*” of her performance issues as required under the capability policy and that will require an explanation.
283. The Claimant was suspended on 28 July 2021 and there was a failure by the Respondent to engage with her continued insistence that she wanted her grievance investigated. The Claimant then attended the 13 August 2021 meeting and was dismissed with immediate effect. A Tribunal is likely to find that this process was unfair. She was not told the charges against her, she was not warned that this was a disciplinary hearing, it was over in a few minutes and she was given no right of appeal. Staff were told of her dismissal less than half an hour after the end of the meeting. However, the critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.

284. Although a Tribunal on determining this application is, I find, likely to determine that there is evidence from which an inference may be drawn that the reason for dismissal was the grievance, this is a section 103A claim and not a detriment claim. There are serious and fundamental disputes of fact over issues of performance, interactions with the Board and whether the Claimant had raised concerns before submitting a letter from a solicitor making serious accusations. The content of that grievance would have to be held to be the sole or principal purpose for the dismissal rather than the manner in which those concerns were raised.
285. Further, the Claimant is intending to issue a claim in respect of other alleged protected disclosures which were continuing into the middle of July, with the last conversation about those other complaints taking place only 2 days before the grievance letter. Counsel for the Claimant submitted that those disclosures do not have to be considered as part of this application, however there is an issue about the extent to which those disclosures may have played a part in the breakdown in the relationship with the Board and/or the dismissal.
286. I was not told what those other alleged protected disclosures are ; how serious they were or who they involved. The Claimant will complain that she was subjected to negative treatment because of those other disclosures however I am not aware of the extent or nature of that treatment, who she alleges carried it out and when it took place.
287. I am being asked to decide on the likely merits of the section 103A claim without being told what else the Claimant has complained about, who she has complained about or what the nature of those complaints are. I consider that this is information which is relevant to an assessment of the extent to which the grievance is likely to have caused or contributed to the dismissal.
288. Counsel for the Claimant submits that it does not matter what those other protected disclosures are because if they formed part of the reason for dismissal, the Respondent has still been dismissed for making a protected disclosure. The success of that argument is contingent of course on the Claimant satisfying a Tribunal that those other disclosures also qualified as protected disclosures.
289. The grievance letter has to be the sole or principal reason and I am being asked to form a view on that without knowledge of the other concerns or allegations the Claimant admits to having made during the relevant period.
290. The burden of proving that the sole or principal reason for the dismissal was one or more of the protected disclosures, rests with the Claimant.

Conclusion

291. Taking all the factors into account, including the many disputed facts, the Respondent's claim that it was the manner in which the disclosures were made and the fact that the Claimant made other alleged protected disclosures outside of the grievance and which may have contributed to the breakdown in the relationship and thus the dismissal (the nature and seriousness of which I have not had the opportunity to evaluate), I do **not** find that it is *likely* that on determining the complaint to which the

application relates, a Tribunal would find that the reason (or, if more than one, the principal reason) for the Claimant's dismissal was one or more of the alleged protected disclosures pursuant to section 103A ERA. For the reasons given, even had I found that it is likely that a Tribunal would determine that the Claimant had made one or more protected disclosures, in terms of causation, the claim does not meet the high threshold required by section 128 ERA in any event.

292. The application is dismissed.

Employment Judge Broughton

Date: 26 September 2021

JUDGMENT SENT TO THE PARTIES ON

29 September 2021

FOR THE TRIBUNAL OFFICE

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