EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr C. Costagliola di Fiore**
(2) Ms H. Qadri
Respondent: **Introhive UK Limited**

London Central remote hearing (CVP) **11-15, 18-21 October 2021**

Employment Judge Goodman
Ms D. Keyms
Mr T. Cook

Representation:
Claimants: Mr Iain Mitchell Q.C. and Ms Alexandra Sidossis, counsel
Respondent: Ms Jen Coyne, counsel

JUDGMENT

1. The first claimant was neither dismissed nor subjected to detriment because he had made protected disclosures.

2. The second claimant was neither dismissed nor subjected to detriment because she had made protected disclosures.

REASONS

1. These are claims for detriment and dismissal for making protected public interest disclosures.

2. In outline, both claimants had short-lived careers as sales directors for the respondent. Having started work in early October, both say they were told on 18 December 2019 not to go ahead with their sales plans. Then the first claimant was dismissed without notice or process for alleged poor performance on 16 January 2020. The second claimant was dismissed for purported redundancy without notice or process on 20 January 2020. Both say this was because they had made disclosures about compliance with GDPR between 16 October and 1 November 2019.

3. The claims are denied. The respondent employer says there were no disclosures, or if there were, they were not protected, and in any case, if protected disclosures were made, the respondent's reasons for any detriment and dismissal in each case had nothing to do with what the claimants had said about GDPR.

4. There was an agreed list of issues which appears at the end of this decision. As the time allocation was tight, it was agreed that remedy was to be postponed to a further hearing.

Evidence

5. The tribunal heard evidence from the following (job titles are stated as at the date of events):

Huma Qadri, Industry Director, Consumer, Healthcare and Marketing, second claimant
Claudio Costagliola di Fiore, Industry Director, Technology, Media and Telecommunications (TMT) first claimant
Benjamin Roles, Director of Technical Solutions
Samuel Collier, Technical Pre-Sales Consultant
David Goyette, General Counsel and Data Privacy Officer
Stewart Walchli, Chief Revenue Officer and co-founder

6. The first claimant also submitted a short witness statement from his former legal representative, Avvocato **Gabriele Giambrone**, about a consultation in November 2019, but he was not called.

7. There was a hearing bundle of 2,619 pages. Unfortunately, and contrary to paragraph 24.4 of the Presidential Guidance on Remote Hearings of 20 September 2020, the 20 page index had not been paginated or delivered separately, so the bundle page numbers were always 20 pages behind the pdf numbering. The claimants had also prepared a supplementary bundle of 99 pages, and another 55 unpaginated pages of additional documents were sent on the first morning of hearing. Other documents were added from time to time as points arose in the course of the evidence. We read those to which we were directed.

8. The hearing was open to the public, and journalists and other members of the public observed from time to time. The arrangement for public access to documents and witness statements referred to in the hearing was for the respondent's solicitor to post in the chatline an email address for requests, and materials were sent on request.

9. The respondent had prepared a written opening. On close of evidence each side submitted a comprehensive written submission. We also heard short oral submissions before reserving judgment.

10. Following dismissal in January 2020 the claimants were represented by

solicitors, who pursued a grievance on their behalf, and drafted the tribunal claims. From February 2021 onward they have instead been assisted by Whistleblowers UK, a not for profit organisation, which has arranged representation by counsel at each of four preliminary hearings and at this final hearing. In April 2021 the claimants were allowed to amend their claims. As was noted at the time, there were some substantial changes in the description of what the claimants said on the occasion of the pleaded disclosures

Preliminary Applications

11. There had already been four preliminary hearings in this case but more case management applications were made on the first, second, third and fourth days of the hearing, some of them in private, about disclosure of documents and matters arising. As issues of privilege and anonymity were involved, which are difficult to disentangle, the reasons for the decisions made are set out in a separate case management summary. Reasons were delivered orally at the time.

Structure of these Reasons

12. The law relevant to what is a disclosure and what is protected is set out first, so that the tribunal can make and explain its findings of fact, and the application of the law to those facts, taking the disclosures one by one as they occurred.

13. For convenience there is then a statement of the law on detriment and dismissal for making protected disclosures. Then the factual findings on events following the disclosures are set out these, then the application of that law to the facts is discussed, leading to our conclusions.

Protected Disclosures - Relevant law

14. The statutory protection of whistleblowers is set out in the Employment Rights Act 1996. The purpose of the legislation is:

> "to protect employees…for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have an early knowledge of them, and protecting the respective interests of employers and employees" –

L. J. Mummery in **ALM Medical Services Ltd v Bladon (2002) IRLR 807.**

15. The "whistleblowing " that is protected is:

> "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

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

…

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

- section 43B Employment Rights Act. The disclosure qualifies for protection if made to the employer (among others) - section 43C.

16. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation.

17. They must then consider whether the worker held a belief that the information tended to show a class of wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element) – which is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in Bolton School v Evans, "it would have been obvious to all but the concern was the private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability".

18. **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it. Public interest need not be the predominant reason for making it. Public interest can be something that is in the "wider interest" than that of the whistleblower- **Ibrahim v HCA International**. The whistleblower may have a different motive for making the disclosure, but the test is whether at the time he believed there was a wider interest in what he was saying was wrong.

19. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

20. By section 47B(1)A:

> " a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

This includes acts done

> "by another worker of W's employer in the course of that other worker's employment" - section 47B (1A).

21. Detriment means being put at a disadvantage. The test of whether someone has been disadvantaged is set out in **Shamoon v Chief Constable of RUC (2003) UKHL 11,** and the test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment - **Jesudason v Alder Hay Children's NHS Foundation Trust (2020) EWCA Civ 73.**

22. The test of whether any detriment was "on the ground that" she had made protected disclosures is whether they were materially influenced by disclosures– **NHS Manchester v Fecitt (2012) ICR 372**. This is less stringent than the sole or principal reason required for claims about dismissal.

23. An employee also has to the right not to be dismissed for making a disclosure, even if he lacks the qualifying service required for other unfair dismissal claims. By section 103A:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

24. Tribunals must look for the reasons why an employer acted as he did. A reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.**

25. In assessing reasons, tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425 (**a victimisation claim). However, it is not necessary to show that the employer acted through conscious motivation – just that a protected disclosure was the reason for the dismissal (or grounds for detriment)– what caused the employer to act as he did - **Nagarajan v London Regional Transport (1999) ITLR 574**. These cases concern the Equality Act, but the same considerations apply to analysis of why the employer acted as it did in the context of a protected disclosure.

26. Thus, when deciding whether disclosures were protected, the tribunal focusses on the employee's state of mind at the time, and when deciding what followed from any disclosures being made, the tribunal examines the employer's state of mind.

Findings of Fact

The Introhive solution

27. The respondent company, Introhive, was founded in New Brunswick, Canada, in 2012, to develop and sell software intended as a solution to the problem of effective collection of information for sales teams about likely prospects and customer contacts, or who within an organisation would best be able to make useful contact with a prospect. It was intended as an addition to customer management software systems, which enable business sales teams to record their contacts and pipeline. Existing systems were limited by having to rely on sales staff manually inputting their contacts and meetings. The respondent's founders identified that this could be automated by additional software to collect data on who within a company's workforce was in contact with whom, especially outside the organisation, principally by reviewing email and Outlook

calendars, and then manipulating the data to show networks of who was in contact with whom, how often, in what organisations, and how to contact them. It could collect addresses and phone numbers. This report was then "enriched" by searching public material, such as Linked In. In mapping relationship patterns, a relationship might be deemed strong if there was frequent contact, weaker if there had been no recent contact. This would improve the efficiency of an organisation's sales operation.

28. The joint founders, owners and directors are Stewart Walchli, Chief Revenue Officer, based in Washington DC, and Jody Glidden, CEO, in Canada. David Goyette, Data Privacy Officer and General Counsel, is also in Canada.

29. Worldwide, there are 2-300 employees, about half in Canada. There are teams of developers in India, some staff in the US, and some in London.

The London Office

30. By the end of 2019 the UK company employed about 30 people, in a serviced office of 4 rooms.

31. The general manager of the UK office was Faisal Abassi. He was recruited in 2017, around the time the respondent signed a global deal for their product with a major consultancy firm, and wanted to expand sales into EMEA (Europe and the Middle East) starting with the UK and Ireland.

32. In 2019 Mr Abassi embarked on recruiting additions to the sales team, who would be assigned 'industry verticals', selling the software product to companies in those industries. It seems he also investigated opening offices elsewhere in Europe, and hired people with this in mind.

33. For selling into industry verticals, he recruited the two claimants, Claudio Costagliore di Fiore and Huma Qadri, and a third Industry Director, Ryan O'Sullivan.

34. The second claimant, Huma Qadri, signed a contract on 8 August 2019 and started work on 8 October 2019 as Industry Director for Consumer Goods, Healthcare and Marketing. She had been working for Salesforce, which supplied sales and marketing software. Her salary was £121,000 per annum, with a bonus scheme related to targets. For the first three months she was not set a target, while she "ramped up" her pipeline of likely deals, but from January 2020 she was expected to achieve a quarterly target for sales revenue.

35. The first claimant signed a contract on 24 September 2019 and started work on 8 October 2019 as Industry Director for Technology, Media and Telecommunications. He had been working as a consultant, after leaving Microsoft in March 2018, so could start soon after signing. His salary was £120,500 per annum, also with a bonus scheme related to targets to be met from January 2020.

36. Ryan O'Sullivan signed a contract dated 3 October 2019, with a start date of 13 January 2020, when his notice period came to an end, as Industry Director for Professional Services, Tax and Accounting. The postponement of the start date meant he only started work a week before the second claimant was made redundant.

Contract Terms Relevant to Privacy

37. The contracts are in standard form. Paragraphs 13 (second claimant) and 14 (first claimant) concern data protection. They say that it will be necessary for the company to keep and process data "in order to keep and maintain any records relating to employment under this agreement and in order to record and monitor attendance". Examples of personal data given include disciplinary record, grievances, the personnel file, diversity monitoring, health, bank details. The employer is said to consent hereby to the processing use and disclosure of personal data as set out, including sensitive personal data.

38. Paragraphs 23 (first claimant) and 24 (second claimant) concern Security. It says "all communications, whether by telephone, email, fax or any other means, which are transmitted, undertaken or received using the company's information technology (IT) or communication systems company property will be treated by the company as work-related and the company's IT systems and network are provided for your use in undertaking your duties". It continues that the employee agrees that the company may intercept, record and monitor communications, and use of the systems "without further notice", and "accordingly, you should not regard any such communications or use as being private, matters which are private should be conducted by you outside of your working hours, away from the company's premises and without use of the company's telecommunications and IT hardware, software, systems and networks." Such interception (et cetera) of communications: "is intended to protect the company's business interests, for example, but without limitation, for the purposes of quality control, security, communication and IT systems, protection of the company's confidential information and legitimate business interests, record keeping and evidential requirements, detection and prevention of criminal activity or misconduct and to assist the company to comply with relevant legal requirements. Intercepts may be used as evidence in disciplinary or legal proceedings."

39. In the context of what follows, the respondent company relied on these clause as showing that employees who use the company's systems could have no expectation of privacy in that communication, further that it relied upon "legitimate business interests" for doing so. The company's position is that they can collect and process their own employees' data found on their systems to build up their sales reports, using the Introhive solution which they use themselves. The claimants dispute that. They say the server could hold private messages, which the company should not access without user consent, and that the company had no legitimate business purpose in doing so. Similar problems could arise within customer organisations buying the solution.

GDPR

40. It is not for this tribunal to find whether the respondent's software solution was in breach of GDPR, or whether, as the respondent argues, the contract of employment provides adequate warning or consent for the reading of emails on its servers and extracting information from them, further, that controllers (themselves or their customers) had a legitimate business purpose which ade it lawful to harvest and process such data. The task of the employment tribunal is to decide what the claimants were saying was being done wrong when they made disclosures, and whether their understanding of wrongdoing and public interest was a reasonable understanding. For that reason we set out here the basic concepts of GDPR, which was the context of the disclosures.

41. We are aware that the detailed exposition of the concepts developed by counsel in the course of the evidence may not have been considered or understood by one side or the other at the time. This summary does however illustrate the concepts which may have been discussed in the conversations pleaded as protected disclosures, and they form the background to the findings the tribunal has to make about what the claimants understood about wrongdoing, or public interest, at the time. Both claimants had worked for some time in software systems, and were well aware of the widespread industry debate about the application of GDPR, as of course as the respondent.

42. The General Data Processing Regulations (GDPR) were adopted by the EU on 14 April 2016 and became directly enforceable in member states from 25 May 2018.

43. The two-year delay before it came into force was to allow businesses and organisations in European Union member states to alter their processes and practices to conform to tighter regulatory control. During that time the respondent, like all businesses involved in the European market, engaged in extensive investigation of how they could achieve compliance. David Goyette was hired to help with that.

44. The Regulations recite that they were made having in mind the protection of the fundamental right of natural persons (i.e., individuals, not corporate bodies) to privacy of correspondence – article 8 (1) of the European Charter. That right is not absolute, but must be balanced against other fundamental rights in accordance with the principle of proportionality. Other fundamental rights recognised in the European Charter and treaties include freedom to conduct a business.

45. Article 4 of GDPR defines *personal data* as "information relating to an identified or identifiable natural person ("data subject"),the identifiers being factors specific to his identity. *Processing* means operations performed on personal data, such as collection, recording, organisation, retrieval, consultation, use, and so on. A *controller* is a person who "determines the purpose and means of the processing of personal data". A *processor* is a

person who processes personal data on behalf of the controller and in accordance with his instructions. A data subject's *consent* means specific and informed indication of the subject's agreement to the processing of their personal data.

46. Article 6 states that processing is only lawful to the extent that at least one of six conditions applies. Two of those conditions are relevant to these claims. The first (a) is that the data subject has given *consent* to processing for one or more specific purposes. The sixth (f) is that "processing is necessary for the purposes of the *legitimate interests* pursued by the controller or by a third party, except where such interests are overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data, in particular whether data subject as a child". As the wording suggests, this requires a balancing of the legitimate interests of the controller or third party, against the interests or rights of the data subject.

47. In closing submissions there was a brief oral reference to a case in the claimant's authorities bundle which illustrated the balancing exercise– **Barbulescu v Romania**, a decision of the European Court of Human Rights at Strasbourg, 61496/08, and so concerning the European Convention on Human Rights, rather than the GDPR itself. It is relevant as an illustration of how to apply proportionality between a legitimate business right and the individual's right to privacy of correspondence. An employee complained that his personal messages on the employer's system had been reviewed by his employer, which saw that he had, contrary to his recent agreement, used their system for his personal messages. It was held that in balancing the employer's interest in the smooth running of his operation against the employee's right to privacy of correspondence, consideration should have been given to minimising the infringement of his right by a less intrusive method of establishing that he had been using the employer's systems for private, not business use, and that there had been no warnings that correspondence might be read. We do not assume that the claimants were not of this case at the material time.

Induction

48. The day after joining, on 9 October 2019, the claimants attended a day-long induction session, which included a technical demonstration by Ben Roles of how the Introhive solution worked. A report was produced on the second claimant's marketing contacts as part of this. The report showed her Gmail address, and that she was employed by Salesforce. She told the tribunal that that she had already updated her LinkedIn profile to show Introhive as her current employer, so she was concerned about the report's accuracy, and also concerned that it threw up her gmail address and contacts with work friends at Salesforce. The second claimant, noting that personal data must have been processed, asked Ben Roles how she was to explain the product's GDPR compliance to customers. She was told that they had SOC 2 certification. In our understanding, this is a reference to audit reports prepared by the American Institute of Certified Public Accountants on compliance with US requirements for data processing, which are used as a quality mark. Ms

Qadri was concerned that there were important differences between US requirements and GDPR, so SOC 2 certification would not satisfy European businesses, but she was given to understand there was no problem.

49. The first claimant has not said there was a similar report on his relationships.

50. On 14 October 2019 the two claimants, who knew each other from previous employment, discussed compliance further. They were concerned how the product could be sold when potential customers would be asking questions about compliance with GDPR. The product harvested data from contacts which might have nothing to do with business and be entirely personal. Both were well aware of the importance of compliance from their experience in the industry over the period from 2016. They decided to speak to their line manager, Faisal Abassi.

51. The claimants also had to complete some online training on data privacy. The first claimant denies having seen the slides that deal with privacy, prepared by David Goyette, but we have concluded that he did see them, and either did not read them with close attention, or has forgotten what they said. On GDPR, they cover bullet point definitions of processing, controlling, balancing legitimate interest against data subject rights, and consent, and state that there must be a data processing agreement between controller and processor which governs what processing is carried out. It asserts that Introhive is a data controller for its own human resources, and some components of the product, and its own marketing operations, and that it is the processor for the products it sells to customers. This training will have been the background to discussion on these issues between the claimants and other Introhive staff.

52. The first claimant's practice was not to separate personal and private. He tried to upload his personal email address to the Introhive server and was told not to. He used and retained Introhive business material on hos personal email address. He exchanaged WhatsApp messages on hos own mobile phone, not the business phone supplied.

First Protected Disclosure – first and second claimants

53. On 16 October 2019 the two claimants went to speak to Faisal Abbasi about their compliance concerns. This is the first protected disclosure of each.

54. The tribunal faces evidential difficulty in this - and later conversations - in deciding what information was disclosed, what it tended to show, and belief in public interest. There is no documentary record of the conversation, and Mr Abbasi has not given evidence. The first claimant does not in his witness statement describe the conversation, or the words used. His evidence simply replicates the pleaded case as summarised in the list of issues. In the grounds of claim, he says he used a hypothetical example of a father who was a CEO in another company sending personal messages to his son. The second claimant is clearer. She says she used words to the effect that there was no clear statement that the solution was GDPR compliant, and that she went on to give examples of personal data being harvested from personal

emails of users. She particularly had in mind that it had scored her own Gmail address when she was negotiating the offer of employment with Mr Abbasi, (using a personal email address so her current employer would not know she as thinking of leaving), and had picked up her personal exchanges with friends at her previous employer, then had wrongly recorded that she was an employee of Salesforce, apparently derived from LinkedIn.

55. According to her witness statement she (and the first claimant) both said a great deal more about failing to protect customers' interests, the risk of large fines for lack of compliance, deceiving customers by licensing a product that was not compliant, and processing sensitive personal data, although the examples given by the second claimant do not in fact mention include "sensitive" data as defined by GDPR. The examples concern private use, not sensitive data.

56. At this point we consider what evidence we have in relation to this and later protected disclosures, and how reliable it is, to explain our findings. Neither claimant made any record for themselves, then or later, until they wrote their witness statements two years after the event. There are no contemporary emails referring to any conversation. The first written record (other than a useful private WhatsApp between the first claimant and Mr Abbasi on 24 October, which is described below), is the lengthy letter of grievance drafted by the claimant's solicitors in March 2020, five months later, and with a lot of water under the bridge, as they had by then been dismissed very suddenly. Human memory is notoriously fallible. It is not necessary to accept the respondent's position in respect of all disclosures that innocuous conversations about customer questions have cynically and for gain been retrospectively fitted up as public interest disclosures, but we have concluded that the claimants' recollection of the substance of what they said on any particular occasion has been overlaid by later discussions of what occurred and must be treated with great care.

57. As examples of the fallibility of memory, we identified that a discussion between the first claimant and Sam Collier on 23 October, the second disclosure, when described both in the grievance and in the pleading, made no mention of any discussion of legitimate business interest or purpose. An amendment to add this was only made after disclosure by the respondent of Sam Collier's own notes of the discussion. This illustrates how the first claimant's recollection of specifics cannot be entirely relied on. Another is that when being cross-examined about his conversation with David Goyette, he agreed that they had not in fact discussed data in the body of the email, rather than metadata, or the signature block, but was saying now that they did because "that's really what we are talking about". A further example is that he denied being shown a data flow diagram of how the solution worked and what the privacy controls were until 5 pm, several hours after his meeting with Sam Collier which started at 9:30 am and ended around 12, even though the grounds of claim state is was sent during the meeting. In fact 5 pm is the time of day when Ms Qadri forwarded it to him two and a half months later, after he had been dismissed. When shown the email which showed Sam Collier sending to him at 9:51, not long after the start of their meeting, he maintained

that when he said he did not get it until after the meeting he had meant he did not *read* it until later. By contrast, Sam Collier says that they referred to it several times during the course of their two and a half hour meeting about the technicalities of the Introhive solution. That made more sense, given the detail of what they discussed and the length of the meeting. We concluded that the only reliable evidence of the first claimant's concerns is in (1) a sequence of WhatsApp message he exchanged with Mr Abassi (on a personal phone, not the company's) on 24 October 2019, and (2) to a lesser extent, (because it was written after the meeting concluded, as a list of action points, rather than a minute), the notes Sam Collier made on 23 October.

58. This imprecision, on the part of the first claimant in particular, makes it difficult to understand what was actually said on any occasion, and especially difficult to identify in what way they understood the product to breach GDPR, or whether they made them in the public interest. We have to make deductions and inferences.

59. Our conclusion on the first disclosures is that between them the claimants disclosed information that the Introhive solution appeared to be processing personal information inaccurately and without the consent of the data subject(s), and that they needed to understand how it could be GDPR compliant because customers would be asking about it. Their ground for this belief was the report on Ms Qadri in Ben Roles's demo. The respondent argues that the disclosure was not made in the public interest, but instead in their private interests in needing to know what to say in order to sell it. In our finding, they were concerned that both their own and their friends' data was being wrongly processed, and that of course this could mean many similar breaches by customers buying the product. We do not accept they spoke of "deceiving" customers, nor that they presented the fully formed analysis set out in the pleaded case. It was made with a wider interest than their own in mind, namely that the content of emails on non-business matters might be read, unknown to the senders and without their consent, if a business address was used, and that email to and from private email addresses could be collected, read and the content processed. That was a wider interest, even though there was a practical purpose in having to be satisfied they could assure customers it was GDPR compliant in order to make sales. In context, they made these disclosures in the public interest, as they were well aware of wide-ranging public and industry concerns about misuse of data, and of the strict provisions of GDPR, even if they did not speak explicitly about controllers, processing, or data subjects. These 16 October disclosures are protected.

60. The claimants asked for some kind of certificate that the product was compliant. Mr Abassi told them this was not his area and that for reassurance they should speak to Sam Collier on the technicalities and David Goyette on the legalities. The first claimant then scheduled a meeting with Sam Collier for 23 October. It does not seem Mr Abassi told Sam Collier much about what the claimants' concerns were, or even that Ms Qadri shared them.

The first claimant's second and third disclosures.

61. On 23 October the claimant had a two and a half hour meeting with Sam Collier. Sam Collier was technical pre-sales consultant, and his job was to support the sales directors by demonstrating the platform, answering technical questions, helping customers complete their data impact assessment questionnaires, and answering customer questions about data privacy and security. Although it was a long meeting about how the product worked, the claimant's statement is bare of detail. He merely reproduces the pleading, and is to the effect that he told Sam Collier personal data was being harvested by the Introhive solution, without the data subject's consent. There is no account of what Sam Collier said, and as noted, the first claimant says he did not get the connectivity and data flows diagrams until after the meeting ended. We conclude he could not in fact remember much of the discussion. Sam Collier says he took the claimant through a detailed account of what data the solution collected from emails and Outlook calendars to build a picture of relationships between users, explaining that it collected names, telephone numbers and email addresses, and frequency of contact, then enriched the picture from public sources like LinkedIn. He sent the claimant the diagrams 20 minutes into their meeting, and they referred to them as he explained the system. In particular, he explained the organisation controls, by which a customer could, as an organisation, restrict what data was collected by the product, for example emails but not meetings, and also limit what to search for - for example, whether to look at subject lines, or whether to read the whole contents of an email, or just the signature block. An organisation could also list particular email domains to block from their searches – usually those most likely to be used for personal rather than business matters, such as Hotmail or Yahoo. An organisation could also choose to block a person or group of people from the processing operations, or emails containing words indicating sensitive content. He confirmed that for GDPR purposes, the customer organisation was the data controller, setting the rules for processing. Introhive then processed the data according to the customer's decisions. In addition to organisational controls, he explained, there were individual user controls, where within an organisation an individual user could choose to hide relationships with specific people, by marking a contact card as confidential, or marking a particular meeting as confidential, or, if the customer organisation permitted it, going into the software solution platform to do the same.

62. Precisely what controls to apply would be decided by the customer when implementing the product, in discussion with Introhive's customer success team.

63. Mr Collier understood this was a meeting to take a new sales director through the technicalities. He was used to sales personnel asking about privacy and GDPR, but he noted that the claimant's interest was more than most. When the meeting ended he spoke to Ben Roles, his manager, about how it had gone, and made a note of topics discussed. These include GDPR review, and "pre-pack GDPR configuration options", against which a note is made "think about purpose", and "Hidden contacts in Cleanse". After discussion with Ben Roles, he made a few more notes, including that for corporate emails there

was a reasonable assumption that they were business communications. There is another note on "privacy settings", and another on legitimate interests - one legitimate interest was to identify the strength of the relationship with actual contacts, and another that they should identify when there was not a legitimate business interest. Sam Collier then got up the text of GDPR on his laptop and went back to the first claimant for a further discussion on compliance. We accept his evidence. His return later in the day is the occasion of the third disclosure pleaded.

64. In our finding, on the first meeting that day, the claimant disclosed information that the Introhive solution was processing personal email from personal contacts of an organisation's users, and that he was concerned this did not comply with GDPR. The claimant does not seem to have conveyed much detail by giving examples drawn from his own experience, relying instead on hypotheticals, but it was more than a bare allegation. He did not give the examples he has in tribunal, that an email from his mother or husband might be sent to his business address but contain entirely personal content. He did not refer specifically to Ms Qadri's experience. He did not consider the possible differences of a sender using a gmail account (likely to be private) and using a business account. It may just be that he did not understand the answers to his questions, remaining concerned that the product could and did read private emails unknown to sender or recipient.

65. At present he does not accept that legitimate business interest is an alternative to specific and informed consent for lawful use, and maintains that personal consent must trump legitimate business interest. We do not know if this was his thinking at the time. He was concerned then about consent, which gave rise to the replies he got about business use, as we can tell from Mr Collier's notes. We concluded he disclosed some, but not much, detailed information that collecting data from emails whose subject was personal, not business matters, without consent, was non-compliant, because Mr Collier understood that he was worried about it when he took it back to Mr Roles, and the notes show the claimant must have put the view that they needed consent. The claimant did not present his concerns in a structured way - he was said to have "bounced around" the topic. Some of the claimant's worry was about how he could convince customers the product was GDPR compliant, but he was also concerned about breach of privacy, both his own (hypothetically) and that of other users, so we conclude he did make them in a wider interest, even if the context was how to sell the product, and in the belief that as it operated the product was breaching GDPR. He may not have been correct, but he did have grounds for that belief in the demo report of Ms Qadri's contacts. Once he had Sam Collier's explanation, his belief may have been less reasonable, but we are not sure he understood the explanation. He made the disclosure in the public interest, that data privacy law should not be broken by specialist companies relying on users not appreciating what the product they were sold actually did.

66. In respect of the second discussion, (the third disclosure) when Sam Collier went back to explain GDPR, there was no further disclosure. It is better understood as a continuation of the earlier discussion of the claimant's

concern about the product not being compliant.

The second claimant's second disclosure

67. The second claimant says she also spoke to Sam Collier about her concern, the next day, 24 October. She gives no context for the meeting, nor does she say what she said, or why she spoke to him, or where. Sam Collier has no recollection of this conversation at all, and we thought he might be expected to have noticed if two sales directors came to him on successive days on the same matter. When challenged on this, the second claimant resorted to saying it was a small open plan office, and everyone knew what she and the first claimant were concerned about. However, Sam Collier and Ben worked in another room. They might come into the sales team's room on occasions, but we could not find that they had overheard what she said, let alone that she had a specific discussion with Sam Collier. We conclude that the second claimant has misremembered a conversation with Sam Collier. We find there was no second disclosure. Her only disclosure was to Faisal Abassi on 16 October.

The first claimant's fourth disclosure

68. After the discussion with Sam Collier on 23 October the claimant continued to reflect on the problem, and early on 24 October he exchanged messages with Faisal Abassi on the subject. The claimant does not rely on this dialogue as a disclosure, but they are useful evidence of what was on his mind between his conversations with Sam Collier on 23 October, and with David Goyette later on 24 October, which are pleaded as disclosures.

69. The sequence begins: "need to talk to and understand our GDPR, story, was the first thing that came out during my meeting and wanna understand how much ground we have covered and if we have a legal review/FAQ we can give the customers". He asked for a 30 minute meeting. Mr Abassi suggested Ben Roles instead: "GDPR, Ben is your man. You will fry my brains..". The claimant said that would take the whole day, and not needed: "it's either covered or not covered". Mr Abassi was discouraging: "you won't like my answers". The claimant answered: "I have already spoken extensively with Sam and him with Ben afterwards… I had a 2.5 hour session with Sam to learn the solution and demo yesterday… I think there is a risk of a hole and if there is we need to patch it and provide guidelines when we accompany our sales, there is no way that UK serious companies won't want that, unless they are mesonite or sold through US. I know you don't want headaches and accept your "leave me alone go sell" attitude but you know how serious shit GDPR is and your lawyers are rubbish". Mr Abassi responded: "David Goyette is your man he has been trained on GDPR. He is the best person to answer it". The claimant agreed they should bring him in: "both Ben, David, you and Huma". The exchanges continued. The claimant said: "GDPR is your issue mate". Mr Abassi said he was not making it into an issue, but "if you make into one then you will have one". The claimant said he was not hunting for issues, "I asked for proof of GDPR, my customer was asking for give me that and I am happy". Mr Abassi said: "most companies have accepted Ben's

answers including massive legal firms and Deloitte, KPMG, PwC who consult on the subject". The claimant mentioned that the subject had been raised by BT (a target customer) at their first meeting. He was told that customer questions should be referred to Ben Roles and David Goyette. The claimant said :"I think we have a gap, you can ignore it, I have raised it… if it blows up in a few months I'll remind you how we both wanted a better day", and then: "one more thing, you told me not to raise these issues not to scare the kids", but many companies did not understand the issues properly. He protested that Mr Abassi "did not want to listen to the possibility of a gap, nor to the need of a mature answer to customers so will raise with your guys until customers and sales or even regulator will make it an issue". Mr Abassi' response was "fair enough. Please just park the issue at David or Ben door".

70. Mr Abassi then emailed David Goyette, copying the claimant, asking him to have "a short conversation with Claudio on GDPR and our solution. He has questions but I can't answer them". The claimant added, copying in the second claimant: "do we have some proof of GDPR compliance of Introhive with an FAQ that we can give to customers asking for that or even done a GDPR review?"

71. This shows the claimant was concerned the product was not compliant – the "hole"- though the email does not say how. It shows he had in mind GDPR breaches, in the reference to the regulator. He also wanted some kind of factsheet or certificate to present, rather than having to explain it to customers himself, but his concern was not just about convincing customers, he was concerned there really *was* a breach, and that the respondent was ignoring it. A certificate would be some reassurance.

72. The exchange also shows that Mr Abassi does not appear to have been concerned. He did not dismiss the concerns, instead he arranged for the Data Protection Officer to talk to him. David Goyette, a lawyer, was familiar with how the product worked, and had studied compliance carefully. He had devised the Introhive privacy policy, which was successively updated.

73. There was then a 14 minute telephone conversation with David Goyette. The claimant says he said the company was misleading and deceiving customers when the product was not GDPR compliant, as employees of their customers would not expect their data to be processed in this way, and that Introhive was a data controller, not just a processor, in the use of the product sold to customers. The claimant said he could find an independent company to do a GDPR audit. We doubt he could have said entered into the level of detail expressed in the pleading in the time available. David Goyette says there was little detail, his concerns were "jumbled", and a "shotgun blast". He was not clear whether the claimant's concern was about Introhive's use of its employees' data, or customers' use of their employees' data. He explained that not all personal data was "sensitive" personal data, and they discussed controllers and processors, and that the customer, as controller, had to decide what privacy settings to use, which Introhive, as processor, would follow. He had tried, he said, to explain GDPR, but the claimant had brushed aside any discussion, saying he understood GDPR, and did not need a

summary. David Goyette ended the call saying the claimant should call him anytime to discuss his concern further, and that he enjoyed “geeking out” with him.

74. David Goyette reported back to Mr Abassi that he had spoken to the claimant as asked. Mr Abassi thanked him, commenting that the claimant was ‘driving everyone crazy’ with his questions. David Goyette said he thought the claimant would be fine once he started to demonstrate the product to customers.

75. In our finding, there was some disclosure of information, namely that the product harvested personal information without explicit consent, although factually the discussion was probably not very coherent, and more in line with the anxiety shown in the WhatsApp exchanges earlier that morning. The claimant was not adding anything to the concern or information already expressed to Faisal Abassi and Sam Collier, if anything, he said less; he had the same belief that collecting emails and contacts from personal emails was a breach of GDPR, and he had some grounds for this belief, and some reason for his belief. Although his refusal to engage in the detail of GDPR when being offered an explanation of how, in Introhive’s view, it did comply, relying on legitimate interest as an alternative to specific consent, could make his belief less reasonable, we accept it was genuine, and based on his very basic understanding of GDPR, and what he had seen in Ms. Qadri’s demo report. He did not understand how a business could have any legitimate purpose in searching emails whose content was private. Finally, there is no doubt that he was anxious, not just that customers could not be convinced, but that the product was not compliant, and he made his disclosure in the public interest. Although the conversation took place in the context of having to sell it, he was discussing his own belief as much as what customers might ask him. We considered his request for some kind of independent audit or certificate demonstrated that he himself did not believe the assurances Introhive was giving him - that legitimate business use did not require user consent - and would find it difficult to convey that assurance to customers.

First Claimant’s Fifth Protected Disclosure

76. On 1 November 2019 the claimant told Faisal Abassi he had discussed the compliance issue with David Goyette and his concern had not been resolved. We conclude he probably went over much of the same ground. We doubt he said the respondent was lying to customers or even that they were being misled. Insofar as it probably repeated much of the same matter, it is protected.

77. Before moving on from whether any disclosure is protected, it should be noted that the claimants did not make any report to the Information Commissioner, the relevant regulator, at the time. After they commenced proceedings, they complained to the Information Commissioner in April 2020 about the respondent not replying to a Data Subject Access request (DSAR), but did not mention the Introhive solution. Then in June 2020 the first claimant wrote to the respondent’s solicitors, in the context of some settlement negotiations,

urging a swift commercial settlement, otherwise he would report the solution to the regulator, and also write to their customers saying the product breached GDPR. In a preliminary decision hearing, E. J Grewal ruled this obvious threat was "unambiguous impropriety", overriding the legal privilege attaching to settlement correspondence. In September 2020 the claimants added to their Information Commissioner complaint about DSAR, part way through a long letter, a short statement that the Introhive solution breached GDPR, but without going on to explain how it did this. Several months later the regulator rejected this complaint, on grounds that the claimants had not given them any information that could be investigated. The respondent argues that this shows that the claimants had no real interest in exposing what they now claim are serious breaches of data privacy, and so could not have been querying privacy in the public interest.

78. The tribunal considers that a whistleblower is given legal protection from adverse consequences at work if he points out wrongdoing, so that employees are not cowed into cover ups. He is not however under any duty to pursue the matter once he has disclosed information. We must consider what the claimants believed at the time. The failure to pursue this weakens their assertions about the seriousness of the breach, but is not a killer point. In our finding they did have the necessary belief in public interest at the time, even though they took no steps to follow it up with the regulator.

The Detriments and Dismissal

79. Having made findings on protected disclosures, we turn to examine what the consequences of those may have been for the two claimants.

80. According to the claimant, in the discussion on 1 November 2019, Mr Abassi referred to his telephone call from David Goyette, who was saying the claimant and Ms Qadri were troublemakers and that had to "manage this situation". The claimant says he understood he had been told to back off. He adds that Mr Abassi went on to say that David Goyette was very close to Stuart Walchli, and he should be careful about raising issues with David Goyette as Mr Walchli would remove people from the company when issues like this one were raised. Then, says the claimant, Mr Abassi explained that US-based managers did not appreciate or understand UK rules, and it could be difficult to get them to change their position. The first claimant was also told to pass this on to Ms Qadri.

81. We lack Mr Abassi's evidence on this conversation, and as already explained we treat the claimant's evidence with caution. Having regard to the WhatsApp discussions of 24 October, we conclude that the claimant was told on 1 November that the company had tried to deal with his concerns by facilitating the discussions with Sam Collier and David Goyette, and he must now focus on selling. Probably Mr Abassi did tell him not to cause trouble, in the sense of their earlier WhatsApp discussion on 24 October, to the effect that if he made it an issue (with customers), it would become one. This was more likely to be guidance that he should leave customers' GDPR compliance questions to the pre-sales technical consultants and the data privacy officer, rather than

convey doubt himself, and was not a threat of reprisal. In our view, if the claimant had understood it as a threat at the time as a threat, it is hard to see why he did pass it on to Ms Qadri. He did not. We also very much doubt that Mr Abassi expressed any opinion about North American managers and GDPR. All the other contemporary evidence is that Mr Abassi had no views of his own on GDPR and left it to the experts. As we know, David Goyette had investigated GDPR carefully in the context of moving on to European markets, as shown by the training slides and Mr Abassi will have believed, even if he did not follow the detail, that his North American colleagues considered not that GDPR should not be taken seriously, but that they had it covered.

82. Ms Qadri says she was told by Mr Abassi that day that David Goyette was calling them troublemakers and that he had to manage the situation. She gives no further information about this conversation. Notably, she does not say there was a warning. We think it more likely than not that she was not told this, but was told about the remark later by the first claimant, who confirmed to us in evidence that he had not passed on any threat to her before 27 November. In addition, David Goyette was unaware that Miss Qadri was also concerned about GDPR compliance. Faisal Abassi only asked him to speak to the first claimant. The first claimant copied his reply to Ms Qadri, but Mr Goyette, who did not know either of them, could not know why she was copied. It is implausible that he should state that she too was a troublemaker.

83. Ms Qadri does give evidence of a further meeting between herself, Faisal Abassi and the first claimant, on 27 November 2019. The first claimant says he asked Mr Abassi to repeat to Ms Qadri what he had said about being careful what they said to Stewart Walchli. The second claimant says Faisal Abassi added that Stuart Walchli would not hesitate to dismiss someone who challenged him. On a balance of probability, we find this addition was not made. Faisal Abassi was probably aware by this point that the London office would be coming under close scrutiny because of their financial performance, and so did not want his staff to step out of line by raising issues about GDPR, but it is wholly implausible (in the context of what else was going on) that he would suggest they were at risk of dismissal. The claimants' assertion on this point is likely to be a reading back from later events.

84. We kept an open mind on the possibility, however, when considering the reasons for dismissal. We do know that neither claimant raised GDPR issues again. The first claimant was still concerned about privacy however, because on 19 November he says he had a meeting with his lawyer, Gabriel Giambrone, on a matter entirely unconnected with Introhive, and there expressed in passing his view that the solution breached GDPR, getting the reply from the Italian lawyer that he was not an expert in the field.

Financial Performance

85. From October 2019 onward Mr Abassi was coordinating preparation of the sales plan for 2020. Each sales director prepared a detailed plan for his industry vertical. The first claimant had a meeting with Sam Collier and others

on 29 November, and updated Mr Abassi on 6 December with activity so far and future plans. The plan was required to build a realistic forecast of revenue in the following year. It would also inform the targets to be set in January for their individual performance quarter by quarter.

86. The respondent's financial year runs from January to December. In the first two quarters of 2019 London office performance was good. In quarter three (ending September 2019) the figures were significantly below target, and in quarter four they continued to be well down. The respondent's directors and senior managers was aware of the trend in revenue in real time, without waiting for the quarter end. As the year end approached, and knowing that few deals are finalised in the holiday season, Stuart Walchli became increasingly anxious about poor performance in London, particularly as the company's next tranche of funding was dependent on showing that the project was on track financially.

87. He was also concerned about a recent staff satisfaction survey, which suggested "autocratic and unsupportive" management in London. Wanting a view other than that of Mr Abassi, he spoke to five longer serving staff in the London office, including Ben Roles, who expressed his own concerns about Mr Abassi's management. He was critical for example of spending time opening offices elsewhere in Europe, extensive hiring, lack of detailed guidance and support for sales teams, and lack of detail about alignment of some of the industry verticals to their targets. In a follow-up email on 6 December, he spoke of "the potential disconnect between introhive strategy and the EMEA execution, and particularly the style in which that execution has manifested." He went on to make a pitch for the role himself, describing in detail his prior experience in operations.

88. Stewart Walchli asked him to look closely at the London operations chart, and also to comment on individual staff members. Ben Roles responded on 16 December saying he could not comment on all individuals, because he would need to discuss them with managerial peers to get a fair view, but did then identify four individuals. He was critical of the first claimant as having no previous sales experience, having a desire to plan as opposed to execute, and that in three months he only had six opportunities identified, all at stage 0. This is the lowest point on the sales journey from identifying a target to a concluding a sale, where signing was stage 6. The journey from 0 to 6 is expected to take 3-6 months. If after three months work all 6 six were at 0, some but not all of the six could have reached stage 6 by the end of the second three months, and inevitably some fall by the wayside along the journey. On the second claimant, she too did not have direct sales experience, and was not building pipeline, with only four recorded opportunities, including two with the NHS where he was doubtful of the respondent's ability to deliver something that met their needs. He was critical of the capability of a third employee, and the work ethic of a fourth. He questioned the competency of some SDR's, naming a number of individuals as a bad fit. Then he mentioned there were two marketing people plus an external marketing agency - they were good people, but "in general it feels like a very flabby organisation". He noted the heavy operational costs impact

of this.

89. In his detailed review of sales targets, he split the industry verticals into three groups. Professional services, accountancy, legal and patent, AEC and commercial real estate were a proven successes and had good product fit. They were 'strong'. The second group he identified as 'targets for expansion' - banking and finance, insurance, and TMT (the first claimant's area). They were a likely fit, with some proven success and potential to refine the product. TMT, he said, might need more product sophistication. A third group of four verticals, including healthcare, the second claimant's area, was identified as 'questionable'. This group were "unproven verticals where appropriate due diligence before entry has not been performed", nor was marketing in place. An example he gave in evidence was that most pharmaceutical companies did not use Salesforce, the software programme engaged by Introhive.

90. Ben Roles had had little to do with either claimant up to this point, other than the initial demo and introduction, and the conversation with Sam Collier on 23 October about how to explain legitimate interest as an alternative to specific consent. We know from evidence to the tribunal, as well as his December report, that he had a poor opinion of Mr Abassi as a manager generally and his sales leadership in particular, and also that within the office the two claimants were seen by other staff as having a superior attitude and not part of the team. This opinion may or may not be true or fair, but we accept it is what he thought, and it is independent of any protected disclosures.

91. On 18 December 2019 there was a meeting in London, which Stuart Walchli attended, where the sales directors presented their plans for 2020. The first claimant says that when he presented his plan, which included targeting Microsoft, he was told to back off this prospect and cancel an impending meeting with them.

92. Stuart Walchli's explanation of why he said this is that while they partnered with Microsoft, who referred opportunities to them, Microsoft was a potential competitor in the introduction of its refinement to Salesforce software. In his view, a meeting with Microsoft to demonstrate the product would enable them to "look under the hood", then go away and develop a similar product of their own. This opinion was based on experience, as is shown in email exchanges on 18 December, immediately after the meeting. Asking the claimant to confirm that he had cancelled the following day's demo, he said: "let's discuss with Jody. No demos to Microsoft unless Jody approves. As discussed and as you know, they have ripped us off in the past." Jody Glidden, CEO, responded "Yes, let's not pursue Microsoft. They and LinkedIn are the only two companies on the planet that we believe pulled nefarious tactics to rip us off".

93. Whatever the truth of the perception of Microsoft as predatory, it is a plausible and contemporary explanation why the claimant was being told to drop this target from his sales plan, rather than any concerns about GDPR that may have been reported to him.

94. Microsoft were named in the opportunities from Paul Catchpole, in the

partnership team, and this went ahead. It was explained this is because Microsoft had identified a third party they dealt with which might be interested in the Introhive solution. It was not a sale to Microsoft.

95. Mr Walchli had not met either of the claimants before this meeting. He knew from the sales records that the first claimant's targets were few, and all at stage 0, so a long way to closing a deal and bringing in revenue. He added that he was especially concerned about the first claimant's competence, when he said in his presentation that the telecom sector presented a particular opportunity with the impending rollout of 5G. Technically, Introhive has nothing to do with 5G. Rollout of 5G was therefore irrelevant. As he had knowledge of the mobile phone industry (coming from Blackberry) he quizzed him on other major telecoms prospects identified and concluded his plans were general and lacked rigour. He decided the first claimant did not know much about the product, or even target customers, and could not therefore be selling it very effectively.

96. The second claimant's plans to sell to NHS England were also questioned on 18 December. Public service procurement processes were seen as a deterrent. Ben Roles did not rule it out, and had in October, while flagging up concern about alignment, proposed a pilot where they would work with some of their data to see if the Introhive product could be used to help identify who in the many NHS Trusts they worked alongside they needed to contact on particular matters. It meant however they were a long way away from making a sale. On 18 December, after the meeting, Ben Roles pointed out that despite proposing this in October, the second claimant had not made much progress, and was talking about a pilot in January. We know that on 3 December she had agreed a proof of concept with the customer, and was awaiting access to NHS data. The discussion focussed on the potential and the timing. Ben Roles did not say she should be dismissed, or the NHS not followed up, only that it might not work and was some way away from bringing in revenue.

97. The crunch came when the funder cancelled the next slice of funding because targets for the year had not been met. Over the holiday period a decision was made that Mr Abassi should be dismissed. He did not return to work in January, and around 14 or 15 January staff were told that he and another manager had been made redundant. Ben Roles continued a detailed examination of sales forecasts, with a view to identifying which of the open opportunities at an early stage were real, and so to be watched if some sales directors left. There is an email of 8 January – "Ben's Op Watch" - listing the two claimants, and several others whose names have been redacted, to show which of their early-stage prospects should be watched in case they developed. This shows that more employees were to be cut. An email of 15 January identifies 12 names, two of them the claimants' - and states the need to make available the employee assistance programme, and allow them access to medical cover for 30 days after leaving. The prospects marked as "watch" were assigned to remaining sales directors

98. These individuals were called to meetings on 16 January; the second

claimant, was taking a day's leave to accompany her mother to hospital, so her meeting was early the next week. The first claimant was told that he was being dismissed for poor performance. The others were told they were dismissed by reason of redundancy. The second claimant was called to a meeting on 20 January and told she was being dismissed by reason of redundancy.

99. No one was expected to work the notice period, and all had to hand in their equipment and leave the office after the meetings. Thus there was no consultation about redundancy. None of the group had qualifying service for an unfair dismissal claim.

100. Ryan O'Sullivan started work in January, as arranged in October. His designated industry was one of those in the "strong" group, so he was not considered for redundancy.

101. The first claimant has not found other work. After a spell of unemployment, the second claimant is now working.

Detriment and Dismissal – Discussion and Conclusion
First Claimant

102. Taking the detriments in order from the list of issues, the first is that on 18 to December Mr Walchli told the first claimant not to engage with "some key customers such as Microsoft", and to cancel the meeting with Microsoft, which effectively blocked the first claimant sales opportunity, and so frustrated and prevented his performance and figures. "The company's inaccurate and unfair assessment of Mr Costagliola's good performance resulted in (him) being unfairly evaluated as underperforming and accordingly resulted in him being unfairly dismissed".

103. We do not accept that ordering the claimant not to pursue Microsoft affected his performance. It was not his only prospect. He was not told to back off any others. Even with Microsoft on the list, it is doubtful that the respondent's assessment that he was unlikely to achieve any sales in the next quarter or even the quarter after that, given that it is estimated that it would take 3 to 6 months to sign a new deal, would have changed. So little progress had been made in his first quarter that it significant revenue was unlikely to come in the second. The respondent's estimation of his ability was based partly on the lack of pipeline (prospects likely to result in a deal), partly on his remark about 5G, and partly on a perception that he was naïve in thinking a large company like Microsoft would buy the product, when the anticipated deals were more likely to be done with smaller companies, where they could interact directly with decision-makers. The only evidence that Mr Walchli knew that the claimant had said anything about GDPR compliance is when he says he asked Mr Abassi in the second half of October how the two claimants were settling in, was told the first claimant was "hung up" on GDPR, and suggested he get him to talk to David Goyette. Even if we then speculated that Stuart Goyette had subsequently fed back to Mr Walchli that

he had spoken to the first claimant, the urgent need to bring in revenue the following quarter, the lack of pipeline to date, and Mr Walchli's observations at 18 December meeting – among others - adequately explain why the first claimant's performance was not rated. As for why he was told to cancel, the exchange of emails with the claimant and Jody Glidden show why the claimant was told to back off Microsoft, and that this had nothing to do with wanting to undermine the claimant performance, let alone that he had made protected disclosures. We might add that there was little time for any meeting to Microsoft to make any difference to his pipeline. At best it would have moved one prospect from 0 to 1. In our finding, there is no evidence that disclosures had any influence on this decision, or on the assessment of the claimant's ability.

104. The second detriment on the list of issues is a separate assertion that the respondent inaccurately or unfairly evaluated the first claimant's performance. As explained, we reject this. The claimant himself rated his six prospects at zero, and we do not accept his contention that 'leads' (suggestions for follow up where no contact had been made with the prospect) should have been taken, or were not taken, into account. Ben Roles compared the claimant's performance in the first hundred days with that of others, and it was wanting.

105. The third and fourth detriments alleged are that the respondent failed to investigate the first claimant's concerns, and then failed to inform him of its investigations, despite asking them to do so. It is hard to understand the claimant's account of what he told Faisal Abassi, Sam Collier or David Goyette, as a request for investigation and report back. They saw it as an opportunity to discuss and explain how the product complied with GDPR. He turned down the offer of time with Ben Roles after his discussion with Sam Collier. David Goyette had left the door open to further discussion. In any case, a protected disclosure is not a grievance. A whistleblower merely reports wrongdoing to his employer and leaves it at his door. He might report again if it continues unabated. An employer is under no obligation to report on any investigation he undertakes The example of reports of financial misconduct shows why this is. If the first claimant was also stating as a *grievance* that his own personal emails were being harvested, he did not say so. His statements dealt in hypotheticals, and the only explicit example was the demo report on the second claimant. The failure to investigate and report back to him is not a detriment.

106. The fifth and sixth detriments alleged are that David Goyette told Mr Abassi that the two claimants were troublemakers, so pressurising Mr Abassi to silence them. As found, we doubt that Mr Goyette said this, and such discussion as there was came from Mr Abassi. Mr Goyette had invited the claimant to discuss matters again, which is hard to read as silencing him. If Mr Abassi told the claimant he must get on and sell, that was a reasonable management instruction, and not to his detriment.

107. The seventh and eighth detriments alleged are that Mr Abassi cautioned the first claimant on 1 November to be careful about raising issues with Mr Goyette, as Mr Walchli would be quick to remove employees raising such

concerns, and that he and Ms Qadri had been flagged as troublemakers and he was being asked to manage the situation. Our finding is that there was no such threat, and at best, Mr Abassi was aware of the continuing poor financial results, and wanted the sales team to make a good impression on the CEO. In any case, if Mr Abassi did discuss with Mr Goyette how to 'manage the situation', the 'situation' would have been the claimant conveying to customers that the product was not GDPR compliant, despite explanation. That does not suggest any plan to remove the first claimant from post, only to steer the claimant away from conveying his doubt to customers.

108. Thus we conclude either that the detriments were not detriments, or that the remarks complained of were not made, and in any case, could not in our view have been influenced by the making of disclosures. What was uppermost in managers' minds at the time was the need to improve London sales.

109. Turning now to the first claimant's dismissal, for the claim to succeed it must be shown the disclosures were the sole or principal reason. It is also alleged that decisions made by individuals leading to dismissal were detriments. In our finding, the respondent was making redundancies because of the urgency of the financial situation resulting from the withdrawal of funding because of poor financial performance. The first claimant himself was not made redundant, but the decision to dismiss him was taken in the context of urgently needing to cut costs and improve revenue, and for the reasons given, Mr Walchli and Ben Roles did not rate his sales ability, and did not see from his pipeline that there was any prospect of achieving any revenue in the next quarter, nor had they the luxury of patience. Their knowledge of any protected disclosures (other than Sam Collier consulting Ben Roles on 23 October on how to explain compliance to the claimant) is entirely speculative, and there is enough evidence of other reasons why they made the decision, unrelated to any concern about GDPR.

110. The first claimant was not redundant, because his industry vertical was in the second, expansion category, but the estimation of his performance meant they did not anticipate he would succeed. If he had had two years' service he could expect to be consulted, or have a performance management plan to see if he could improve. His short service mean neither was not required, and in any case there was little time. In our finding, the reason for dismissal was his lack of pipeline, and the lack of confidence in his sales ability to build it, and disclosures played no part in this conclusion.

Second Claimant

111. Turning to the detriments alleged by the second claimant, in our finding Mr Abassi did not tell her on 27 November not to raise concerns with Mr Walchli, as that would be used as a reason to remove them from the company. In our finding, the threat was fanciful. Mr Abassi knew that Mr Walchli's real concern was about sales performance in the coming quarter, and the discussion took place in the context of preparation of the 2020 sales plan for presentation at the meeting on 18 December. The threat has been read back in the light of

the subsequent dismissals. Nor did he say they had been flagged as troublemakers. Similarly, we do not accept, in the light of what is known about the company's financial performance at the time, that there was a threat to remove them if they mentioned GDPR to Mr Walchli, for the same reasons as we have given in respect of the first claimant.

112. It is then alleged as detriment that on 18 December Mr Walchli was not supportive of the NHS deal she was proposing. It is agreed that he was unsupportive, and the question is what influence protected disclosures had on this. There are good business reasons why Mr Walchli was not supportive: he needed results soon, and success in any deal would depend on the outcome of a pilot project which had not yet started. He was also suspicious of doing deals in the public sector in England, where he understood there were panels of approved suppliers, which would make the process of signing any deal more drawn out. Ben Roles did not discount the NHS altogether, but could see a number of practical problems, including whether the product could be adapted to their non-commercial requirement. There is no indication Mr Walchli knew about protected disclosures. Any speculation that David Goyette might have mentioned them is outweighed by the solid reasons for focusing effort on better prospects. There is no evidence that disclosures about GDPR had any influence at all on this decision.

113. The failure to offer the claimant alternative positions is alleged as detriment. The only alternative position available was that offered to Ryan O'Sullivan and accepted by him in October, had they decided to tell him not to come. There was no business reason why he should be bumped, when he had relevant experience of the sector, and she did not. She was one of a dozen or so staff dismissed, across a range of posts. No other alternative has been suggested. If this was to her detriment, it was not influenced by concern she showed on data privacy to Mr Abassi in October. He played no part in the decision, as he was axed himself. Her experience was in a sector marked as unlikely to see early results, while his lay in the industry sector for which he was hired, which was in the strong group..

114. On the other detriments, our answers on failure to investigate and report back are the same as for the first claimant.

115. Turning finally to dismissal, where protected disclosures must be the sole principal reason for the decision to dismiss, in our finding there is adequate evidence that she was dismissed because she managed an industry vertical whose anticipated results were deemed to be poor, requiring far more development, in the context of an urgent financial squeeze requiring substantial staff reductions. Fourteen people left the London office in January 2020. It cannot be that so many staff were dismissed at once as cover for dismissing the two claimants, and there are good reasons why the second claimant was counted as redundant. There is no evidence to suggest that the second claimant's conversation with Mr Abassi on 16th October had anything to do with this decision. The second claimant did not make disclosures to Sam Collier or David Goyette, and for obvious reasons Mr Abassi himself took no part in the decision to dismiss.

116. In conclusion, all the claims fail.

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Employment Judge Goodman

5 November 2021

JUDGMENT and REASONS SENT to the PARTIES ON

. .08/11/2021.

.....
FOR THE TRIBUNAL OFFICE

APPENDIX
AGREED LIST OF ISSUES

The disclosures relied on by the Claimants

The First Claimant relies on the following disclosures:

1. On 16 October 2019, the First Claimant made an oral disclosure of information to Mr Abbasi in a meeting. While he cannot recall all of the precise language he used, the First Claimant used the following words and/or words to the same effect in respect of the Respondent's software known as the Introhive Software Solution and the Respondent's operation and/or (offering for) sale of the same:

a. The Introhive Solution was not GDPR compliant because it was accessing and processing the Company's employees' or the Customers' end-users' (together the "**data owners**") personal information which was exchanged using their professional emails, without obtaining their consent;

b. The Introhive Solution was not GDPR compliant because it harvested personal information contained in emails exchanged by the data owners using their professional emails and sharing such information with Introhive employees and/or other Introhive Solution users, without obtaining their consent;

c. The Introhive Solution was not GDPR compliant because it was processing sensitive categories of personal data (such as personal emails, personal relationship information ("who knows who") and information about the strength of their relationships) to enable the Customers to exploit such data in order to drive company profits through sales or marketing, without the data owners' consent;

d. The personal data contained in Mr Costagliola's personal emails was being harvested by the Introhive Solution, processed and shared with Introhive's employees, without his consent;

e. Introhive was misleading and deceiving Customers by licensing a product to them (the Introhive Software) which was not GDPR compliant;

f. Introhive was failing to protect the public interest, by failing to act in accordance with GDPR regulations, and by failing to rectify such unlawful practices promptly.

2. During two meetings with Mr Coller, the first on 23 October 2019 and the second later on in the same day or on 24 October 2019, the First Claimant made an oral disclosure of information to Mr Collier in a meeting. While the

First Claimant cannot recall the words he used, he also disclosed information the gist of which was as follows:

a. Words to the same effect as 1.a-1.f above;

b. Introhive was not merely a data processor but was also a data controller, as defined by the GDPR. Consequently, it was accountable for the Introhive Software's GDPR breaches of the data owners' personal data. As a data controller, Introhive was responsible for the lack of GDPR compliance and personal data breaches by customers using the Introhive Software Solution.

c. Introhive was in breach of the GDPR when accessing personal emails as opposed to business emails and it was wrong for Introhive and Introhive's Customers to consider that they could apply the concept of "legitimateinterest" to justify access to personal data without consent; "legitimate interest" cannot be assumed and does not apply to the case of personal emails and personal data where explicit consent is always needed;

d.By accessing and harvesting the data owners' personal emails, Introhive is in breach of the GDPR principles of transparency and purpose that state that data can be used only for the purpose for which they were originally collected, so that personal email data should be used only for the purpose of email.

3. On 24 October 2019, the First Claimant made an oral disclosure of information to Mr Goyette by telephone. While the First Claimant cannot recall the words he used, he also disclosed information the gist of which was as follows:

a. Words to the same effect as 1.a-1.f above;

b. Introhive was not merely a data processor but was also a data controller, as defined by the GDPR. Consequently, it was accountable for the Introhive Software's GDPR breaches of the data owners' personal data. As a data controller, Introhive was responsible for the lack of GDPR compliance and personal data breaches by customers using the Introhive Software Solution;

c. Introhive was in breach of the GDPR when accessing personal emails as opposed to business emails and it was wrong for Introhive and Introhive's Customers to consider that they could apply the concept of "legitimate

interest" to justify access to personal data without consent; "legitimate interest" cannot be assumed and does not apply to the case of personal emails and personal data where explicit consent is always needed.

4. On 1 November 2019, the First Claimant made an oral disclosure of information to Mr Abbasi in a meeting. The First Claimant cannot recall the words he used; the gist of the information disclosed was as follows:

a. Words to the same effect as 1.a-1.f above.

The Second Claimant relies on the following disclosures of information:

5. On 16 October 2019, the Second Claimant made an oral disclosure of information to Mr Abbasi in a meeting. The Second Claimant cannot recall the words she used; the gist of the information disclosed was as follows:

a. The Introhive Solution was not GDPR compliant because it was accessing and processing the Company's employees' or the Customers' end-users' (together the "**data owners**") personal information which was exchanged using their professional emails, without obtaining their consent;

b. The Introhive Solution was not GDPR compliant because it harvested personal information contained in emails exchanged by the data owners using their professional emails and sharing such information with third parties, without obtaining their consent;

c. The Introhive Solution was not GDPR compliant because it was processing sensitive categories of personal data (such as personal emails, personal relationship information ("who knows who") and information about the strength of their relationships) to enable the Customers to exploit such data in order to drive company profits through sales or marketing, without the data owners' consent;

d. The Introhive Software was accessing and harvesting Ms Qadri's personal data from her mailbox and was sharing such data with Introhive's employees without her consent;

e. Introhive was misleading and deceiving Customers by licensing a product to them (the Introhive Software) which was not GDPR compliant;

f. Introhive was failing to protect the public interest, by failing to act in accordance with GDPR regulations, and by failing to rectify such unlawful practices promptly.

6. On 24 October 2019, the Second Claimant made an oral disclosure of information to Mr Collier in a meeting. The Second Claimant cannot recall the words she used; the gist of the information disclosed was as follows:

a. The Introhive Solution was not GDPR compliant because it was harvesting, processing and using data owner's personal data without their consent.

b. Introhive was lying to and defrauding its Customers, by licensing to them softwarethat does not comply with GDPR rules, and was asking its employees to mislead the Customers in such way

c. The Introhive Solution was unlawfully accessing and processing her personal data.

Did the Claimants make "qualifying disclosures"?

7. In respect of each of the disclosures set out at paragraphs 1-4 above, and as a matter of fact, did the First Claimant make the disclosure?

8. In respect of each of the disclosures set out at paragraphs 5 and 6 above, and as a matter of fact, did the Second Claimant make the disclosure?

9. In respect of each of the disclosures found to have been made, did the relevant Claimant believe that:

a. Making the disclosure(s) was in the public interest (regardless of whether or not that was their primary motivation)?

b. The information disclosed tended to show one or more of the matters set out in section 43B(1)(a) and/or (b) and/or (f) of the ERA 1996, namely:

i. that a criminal offence has been committed, is being committed or likely to be committed;

ii. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and/or

iii. that information tending to show any matter falling within the

aforementioned categories of information has been, is being or is likely to be deliberately concealed?

10. If so, was the relevant Claimant's belief in the matters set out at paragraphs 1-6 of this List of Issues reasonable?

11. Was any/each qualifying disclosure which the Tribunal finds to have been made, made to the Claimant's/Claimants' "employer" within the meaning of section 43C ERA 1996, and thus made in accordance with that section?

Were the Claimants subjected to detriments on the ground of having made a protected disclosure or protected disclosures?

<u>The First Claimant</u>:

12. In relation to the alleged detriments pleaded at paragraph 86 and 88 of the Grounds of Complaint ("GoC")

a. Did Mr Walchli take the actions referred to at paragraph 86.4 of the GoC?

b. Did the Respondent inaccurately and/or unfairly assess/evaluate the First Claimant's performance?

c. Did the Respondent fail appropriately to investigate the concerns raised by the First Claimant?

d. Did the Respondent fail to inform the First Claimant of its investigations into the concerns he had raised despite the First Claimant having asked the Respondent to do so?

e. Did Mr Goyette make the remarks referred to at paragraph 88.3 of the GoC?

f. Did Mr Goyette pressure Mr Abbasi to silence the First Claimant?

g. Did Mr Abbasi caution the First Claimant (on 1 November 2019) that he needed to be careful about raising issues with persons such as Mr Goyette, who was close to Mr Walchli, as the latter would be quick to remove employees raising

concerns such as those raised by the First Claimant?

h. Did Mr Abbasi inform the First Claimant (on 1 November 2019) that he and the Second Claimant had been flagged as “troublemakers” by Mr Goyette and that Mr Abbasi was asked by Mr Goyette “to manage this situation”

i. Did Mr Abassi ask the Second Claimant (on 27 November 2019) in the presence of the First Claimant to be careful not to raise concerns with Mr Walchli as this would not be looked on favourably and would be used by Mr Walchli as a reason to remove people from the company?

j. The Respondent accepts that the First Claimant was dismissed.

13. If so, did one or more of these acts or omissions constitute a detriment within the meaning of section 47B(1) and/or 47B(1A) ERA 1996 that is:

a. did the First Claimant genuinely consider this treatment to amount to detriments;

b. would or might a reasonable worker consider the relevant treat to constitute a detriment; and

c. was it done by the Respondent on the ground that the First Claimant made one or more protected disclosures?

i. in relation to his dismissal, for the purposes of sections 47B(1A) ERA 1996:

- which, (if any) worker or agent of the Respondent was responsible for the dismissal;
- did these workers and/or agents take the decision on the ground that the First Claimant made one or more protected disclosures; and
- is the Respondent vicariously liable First Claimant’s dismissal pursuant to section 47(1B) ERA 1996?

<u>The Second Claimant:</u>

14. In relation to the alleged detriments pleaded at paragraph 87 and 88 of the GoC:

a. The Respondent accepts that Mr Walchli did not want to pursue the NHS as a client, as alleged at paragraph 87.4

b. The Respondent accepts that the Second Claimant was not offered alternative positions, as alleged at paragraph 87.5 of the GoC

c. Did the Respondent fail appropriately to investigate the concerns raised by the Second Claimant?

d. Did the Respondent fail to inform the Second Claimant of its investigations into the concerns she had raised despite the Second Claimant having asked the Respondent to do so?

e. Did Mr Goyette make the remarks referred to at paragraph 88.3 of the GoC?

f. Did Mr Goyette pressure Mr Abbasi to silence the Second Claimant?

g. Did Mr Abbasi inform the First Claimant (on 1 November 2019) that he and the Second Claimant had been flagged as troublemakers by Mr Goyette and that Mr Abbasi was asked by Mr Goyette "to manage this situation".

h. Did Mr Abbasi ask the Second Claimant (on 27 November 2019) to be careful not to raise concerns with Mr Walchli as this would not be looked on favourably and would be used by Mr Walchli as a reason to remove people from the company?

i. The Respondent accepts that the Second Claimant was dismissed.

15. If so, did one or more of these acts or omissions constitute a detriment within the meaning of section 47B(1) and/or 47B(1A) ERA 1996 that is:

a. did the Second Claimant genuinely consider this treatment to amount to detriments;

b. would or might a reasonable worker consider the relevant treatment to constitute detriments; and

c. was it done by the Respondent on the ground that the Second Claimant made one or more protected disclosures?

i. in relation to her dismissal, for the purposes of sections 47B(1A) ERA 1996:

- which, (if any) worker or agent of the Respondent was responsible for the dismissal;
- did these workers and/or agents take the decision on the

ground that the Second Claimant made one or more protected disclosures; and

- is the Respondent vicariously liable Second Claimant's dismissal pursuant to section 47(1B) ERA 1996?

Automatic unfair dismissal under section 103A ERA 1996: were the Claimants dismissed by reason of having made a protected disclosure/protected disclosures?

16. To the extent that the Tribunal finds that the First Claimant made one or more protected disclosures, was the reason (or the principal reason) for his dismissal that he made a protected disclosure or protected disclosures?

17. To the extent that the Tribunal finds that the Second Claimant made one or more protected disclosure, was the reason (or the principal reason) for her dismissal that she made a protected disclosure or protected disclosures?

Remedy

18. If either Claimant establishes liability on any of his or her claims, to what remedy is he or she entitled? This will require the Tribunal to consider the following issues on remedy.

For the unfair dismissal claim/s, for each Claimant:

19. What is the basic award that should be awarded pursuant to section 119 ERA 1996 (including consideration of whether the Claimant's conduct was such that it would be just and equitable to reduce the amount of basic award in accordance with s.122(2) ERA 1996)?

20. What is the amount of compensatory award that the Tribunal consider just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the Respondent pursuant to section 123(1) ERA 1996, having regard to the following (*stated in order of relevant adjustments to the compensatory award*):

a. Has the Claimant failed to mitigate his or her loss pursuant to s123(4) ERA and so his/her award needs to be reduced accordingly?

b. What is the chance that the Claimant could and would have been fairly

dismissed in any event and when would this have occurred?

c. Did the Respondent fail to comply with the ACAS Code?

i. The Claimants rely on the following facts and matters; did one or more of the following constitute a failure to comply with the ACAS Code:

- As concerns both Claimants, the failure to have in place any written procedures for handling disciplinary and grievance situations.
- As concerns the First Claimant, the failures to provide any written warning in respect of alleged poor performance, and to hold any meeting to address any such concerns prior to summarily dismissing him.
- As concerns both Claimants, the failure to hold any formal grievance meeting(s) to address the grievances they raised through what they contend are protected disclosures as pleaded at paragraph 78-82 of the GoC.

ii. If so, were any such failures unreasonable?

iii. If so, should any compensatory award be increased pursuant to section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992?

iv. If so, by what amount?

d. Does the Tribunal find that the dismissal was to any extent caused or contributed to by any action of the Claimant and if so by what just and equitable proportion should the award be (further) reduced? i.e. Does the Tribunal find that any of the protected disclosures made by either Claimant were not made in good faith and if so by what just and equitable proportion should the award be (further) reduced?

21.To what declarations, if any, are the Claimants entitled?

For the <u>unlawful detriments claim</u> under section 47B ERA 1996

22.What is the appropriate compensatory award, if any, for the Tribunal to award pursuant to section 49(1) ERA 1996?

23.What is the appropriate award, if any, for injury to feelings for the Tribunal to award?

24.Are the Claimants entitled to aggravated damages, and if so, by how much should the award for injury to feelings be increased to reflect this?

25.To what declarations, if any, are the Claimants entitled?

In respect of the First Claimant's request for reinstatement pursuant to section 114 ERA 1996:

26.Is it practicable for the Respondent to reinstate the First Claimant?

27.In all the circumstances would it be just and equitable for the Tribunal to grant an Order for reinstatement?

28.If the Tribunal grants an Order for the reinstatement of the First Claimant:

a. what amount (if any) is payable by the Respondent to the First Claimant in respect of any sum or benefit which he might reasonably have been expected to have had but for his dismissal, between the date of termination of employment and the date of reinstatement?

b. What rights and privileges (if any) must be restored to the First Claimant?

29.By what amount should the sum referred to a 30.a above be reduced to account for sums and/or other benefits received by the First Claimant between the date of his dismissal and the date of reinstatement?

3 June 2021

Prettys Solicitors LLP