EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr V Zabelin	**V**	**(1) SPI Spirits (UK) Limited** **(2) Mr Y Schefler** **(3) Ms N Sidorenco**

Heard at: London Central **On**: 22 – 25 November 2021
In Chambers: 26 and 29 November 2021

Before: Employment Judge Lewis
Mr J Ballard
Mr S Pearlman

Representation

For the claimant: Mr N Roberts, Counsel

For the 1st – 3rd respondents: Mr R Leiper, QC

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that

1. The claimant was unfairly dismissed by the 1st respondent contrary to section 98(4) of the Employment Rights Act 1996..

2. The principal reason for the claimant's disclosure was that he had made protected disclosures. His dismissal by the 1st respondent was therefore automatically unfair.

3. Because he made protected disclosures, the claimant was subjected to a detriment by the 1st respondent, ie the 2nd respondent's conduct on 8 June 2020.

4. The claimant was subjected to the following detriments by the 2nd respondent because he made protected disclosures:
    a. The 2nd respondent's conduct on 8 June 2020.
    b. His dismissal.

5. The claimant was not subjected to any detriment by the 1st – 3rd respondents because he made protected disclosures in steps taken to terminate the 1st respondent's operation.

6. The claim for automatic unfair dismissal for asserting a statutory right is not upheld.

Remedy

7. The hearing for remedy will go ahead on **17 March 2022** starting at 10 am. The hearing will be conducted on CVP.

8. A preliminary hearing will be held on **12 January 2022** at 10 am (fixed for 2 hours) to discuss case preparation for the remedy hearing.

REASONS

Introduction (broad summary only)

1. The claimant was Group Chief Investment Officer / Director of Mergers & Acquisitions for an international wine and spirits company. He was employed by the 1st respondent, the Group's wholly owned UK subsidiary. He was dismissed by the 2nd respondent on an impromptu basis during a phone call following on from his objections to unilateral pay cuts and changes to the mode of calculating his bonus. The respondents sought throughout to disguise the role of the 2nd respondent who owned 99% of the Group shares. Nevertheless, and despite the paucity of disclosure by the respondents, the tribunal found that the 2nd respondent had authority to dismiss the claimant, that he had done so, and that the reason he did so was because the claimant had just made protected disclosures which had been conveyed to him. Although the claimant was motivated by the cuts to his own pay, he also had in mind and expressed concern about the unnecessary imposition under the excuse of Covid of 30% pay cuts across the board at a time when the Group appeared to be doing well financially.

Claims and issues

2. The claimant brought claims for ordinary unfair dismissal; detriment and dismissal for whistleblowing; and dismissal for asserting a statutory right. The issues were agreed succinctly as follows, accepting they incorporate sub-issues which we will refer to in the course of our judgment:

2.1. Was the claimant dismissed
   2.1.1. Either expressly on 8 June 2020; or
   2.1.2. Constructively by breach of

2.1.2.1. The implied term of trust and confidence; the 1st respondent's unilateral reduction of the claimant's pay and/or removal of bonus; the 1st and 2nd respondents' conduct on and in relation to 8 June 2020.

2.1.2.2. The claimant's pay and bonus provisions: the 1st respondent's unilateral reduction in the claimant's pay and/or removal of bonus.

Unfair dismissal – ERA 1996 s98(4) (1st respondent)

2.2. Was any dismissal for a fair reason?

2.3. Was the dismissal fair or unfair in all the circumstances?

Protected disclosure detriment (1st – 3rd respondents)

2.4. Did the claimant make protected disclosures?

2.5. Did the claimant disclose the information set out in his further information about the protected disclosure claims (see pages 76-77 of the trial bundle)? These were refined in the claimant's closing submissions to the following:

2.5.1. That the 1st respondent was imposing a unilateral pay cut and this would breach the claimant's contract of employment. ('Claimant's pay')

2.5.2. That the same paycut would breach the contracts of other staff. ('Staff pay')

2.5.3. That the proposed changes to the 2020 bonus allocation would be in breach of the claimant's employment contract. ('Claimant's bonus')

2.5.4. That it would also breach the contracts of other staff. ('Staff bonus')

2.5.5. That the pay cut created a toxic environment, would negatively affect mental health and was bullying in nature; that the bonus decision would have a significant negative effect on employee motivation and morale. ('Staff welfare')

2.5.6. That SPI was not being transparent and was using the pandemic as an excuse to make adverse decisions against staff. ('Covid pretence')

2.6. If so, did the claimant reasonably believe the disclosure(s) tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject ie (i) an obligation to pay staff their contractual entitlements and/or (b) an obligation to treat staff with trust and confidence and to exercise discretion rationally and in good faith.

2.7. If so, did the claimant believe the disclosure(s) were in the public interest?

2.8. If so, was that belief reasonable?

2.9. If so, was the claimant subjected to detriment by:

2.9.1. The 2nd respondent's conduct on 8 June 2020 (1st/2nd respondents)
2.9.2. Dismissing the claimant (2nd respondent)
2.9.3. Taking steps to terminate the 1st respondent's operations (1st – 3rd respondents)

2.10. If so, was that done on the grounds of the claimant's protected disclosure?

Dismissal for protected disclosure (1st respondent)

2.11. Did the claimant make protected disclosure(s) – as above?

2.12. If so, was the principal reason for the claimant's dismissal his protected disclosure?

Dismissal for asserting a statutory right (1st respondent)

2.13. Did the claimant allege that the 1st respondent had infringed a relevant statutory right of his, namely his right not to experience unauthorised deductions?

2.14. If so, was that the principal reason for the claimant's dismissal?

Procedure

3. This hearing was conducted over CVP, a remote video platform.

4. The tribunal heard from the claimant, and on behalf of the respondents, from Natalia Sidorenco (the 3rd respondent), Christopher Caldwell, Sabina Fatkullina and Alexey Oliynik. Each witness also supplied a witness statement. Yuri Schefler (the 2nd respondent) also provided a short witness statement, but as we explain below, did not attend as a witness. We were also shown his witness statement for the preliminary hearing on jurisdiction although we were not invited to read it. There was an agreed trial bundle of 699 pages. The tribunal was also provided with written opening and closing submissions from the representatives, Mr Roberts and Mr Lieper.

5. Mr Lieper (for the respondents) informed the tribunal on day 1 that Mr Schefler wished to speak through a Russian interpreter and that the respondents had arranged for an independent interpreter to attend on day 3 of the hearing. The tribunal told the respondents that this would not be permitted. An interpreter is an officer of the court and is booked through the tribunal. This should have been notified to the tribunal previously. The tribunal then booked a Russian interpreter for Mr Schefler's preferred date of attendance (day 3).

6. Mr Schefler was due to give evidence on the morning of 24 November 2021 (day 3), immediately following evidence from Mr Oliynik. The tribunal took the morning break at the end of Mr Oliynik's evidence. On reconvening, Mr Lieper informed the tribunal that he had just been informed that Mr Schefler would not be attending. Mr Lieper had been told by Mr Schefler that the latter had a heart attack last September/October, following which he had had a stent fitted. Mr Schefler had told his legal advisers that in the course of preparing for his evidence today, his blood pressure was elevated and he spoke to his supervising specialist doctor. Mr Schefler had suggested a written question and answer instead, but Mr Lieper had indicated to him that the tribunal was unlikely to find this acceptable. Mr Lieper did not seek an adjournment either, because he understood the position would be no different on any subsequent occasion. He therefore asked that the case proceeded on the basis that Mr Schefler's evidence was untested, that the tribunal could place the weight it considered appropriate on his written statement, and may draw inferences from the absence of cross-examination.

7. Mr Roberts (for the claimant) was given the opportunity to take instructions. He pointed out that Mr Schefler had not attended the preliminary hearing on jurisdiction either. On that occasion, he had given two days' notice, but had given no reason why he would not be attending. Even though the whole issue related to his own circumstances, he had sent Mr Oliynik to give evidence on his behalf instead.

8. Mr Roberts was prepared to go ahead as things stood, though he requested slightly longer for his closing submissions, as he needed to address matters – particularly relating to disclosure – which he had intended to put to Mr Schefler as the relevant witness on behalf of the company. The tribunal agreed to this.

9. Mr Roberts said that if it was being requested that there be a written question and answer, he would oppose this. It was not a fair way to test evidence in normal circumstances and would clearly lead to substantial delay, because he would need to formulate questions and follow up. He added that this was against a background of no evidence in front of the tribunal in support of the alleged medical grounds for not attending.

10. Mr Lieper said he was not in fact making an application to deal with Mr Schefler's evidence in writing by question and answer. He could see there would be problems in terms of timing, translation, and effectiveness.

11. The tribunal agreed that it would cause all sorts of problems. Given the nature of the issues and conflicts of evidence, it was unlikely to take matters any further. It would cause delay, because it would not be practical to complete it within the time slot this week for dealing with liability. It raised practical issues regarding questions, follow-up, translation, and who might assist the formulation of answers. All this would be against a background of no medical evidence in support of why Mr Schefler could not now – or at any future time – appear in the tribunal.

12. By agreement between the parties therefore, the tribunal decided to proceed in Mr Schefler's absence and on the basis of the other evidence before the tribunal including his witness statement, bearing in mind that his evidence had not been tested in cross-examination.

Fact findings

A note on the evidence

13. We need to make some preliminary observations regarding the evidence. Mr Roberts set out the sequence of events concerning disclosure in his closing submissions. This was not disputed by the respondents. In summary, the respondents originally disclosed seven documents, all of which were either in the public domain or communications with the claimant. After being ordered again at the preliminary hearing on 3 June 2021 to complete general disclosure, the respondents provided four more documents of the same nature. After being pressed by the claimant's solicitors, the respondents produced four more documents, all communications with the claimant. The claimant's solicitors continued to complain about inadequate disclosure. Then on the Thursday evening before this hearing started on a Monday, the respondents provided a further 100 pages, most of which was duplicative or irrelevant (apart from a request for metadata which we refer to below).

14. We note the observation of the Employment Judge at the preliminary hearing on jurisdiction held on 3 June 2021 that the 2nd respondent had disclosed his disclosure obligations 'in a poor and unsatisfactory manner' and that his witness statement was 'scanty' begging more questions than it answered.

15. We were repeatedly surprised through the course of this case at the apparent lack of documentation concerning key decisions.

16. We were also concerned about the reliability of evidence from the respondents' witnesses. The witnesses consistently gave vague and imprecise evidence which, coupled with the lack of documentation disclosed by the respondents, made it difficult for the tribunal to pin down the decision-making structure, who made decisions and when, the grounds for decisions and the underlying factual basis. There were also numerous occasions where such documents as did exist and which had been produced by the claimant contradicted the oral evidence of the respondents' witnesses, as we have set out below.

17. Finally we mention, not by way of criticism, that conversations were usually in Russian and therefore translation into English might not be exact. We have kept this in mind.

The company structure

18. The 1st respondent, SPI Spirits (UK) Limited, is the UK-based subsidiary of Stoli Group Sarl ('the Stoli Group'), which in turn is part of SPI Group Sarl (the SPI Group). The ultimate parent company, the SPI Group, produces, markets, distributes and sells wines and spirits internationally. It has over 2000 employees. At the time the claimant left, the 1st respondent had only three employees, down from a few more in previous years.

19. The SPI Group is headquartered in Luxembourg. It operates in over 170 markets and is active in the production, sale and distribution of 380 brands. It operates a network of 70 retail shops, develops large-scale real estate projects and farms. It has completed 15 acquisitions of spirits and wine companies. Its core division is Stoli Group. The SPI Group has key locations in the USA, UK, Switzerland and Cyprus as well as various international production facilities.

20. The structure of top management is opaque and there was a lack of documentary support for what was rather vague evidence from the respondents' witnesses. There were frequent references to 'top people' without clarity as to who these were, except for a repeated assertion that they were not Mr Schefler. Positions were shifting and unclear.

21. The 2nd respondent, Mr Yuri Schefler, was the main and controlling shareholder of the SPI Group. In June 2018, Mr Schefler was noted at Companies House as a 'person with significant control' (owning 75% or more of the shares and voting rights, and had the right to remove and appoint directors). The notes to the 1st respondent's report and financial statements for the year ended 31 December 2020 record that the ultimate parent undertaking was SPI Group Sarl and the ultimate controlling party was Mr Schefler. The consolidated financial statements 2020 note that in fact Mr Schefler owned 99.9% of SPI Group shares.

22. Mr Schefler in his witness statement, and all the respondents' witnesses, sought to play down Mr Schefler's role in running the company. They attempt to characterise his role as simply 'making suggestions' but leaving it to 'senior managers' ultimately to make the decisions. However, we formed a strong impression from what was said in various emails and other documentary evidence that it was indeed Mr Schefler who made all the key decisions, and that other managers implemented his wishes. We accept the claimant's evidence that Mr Schefler was involved in both day-to-day operations and in strategic management.

<u>The claimant's recruitment</u>

23. The claimant's employment with the 1st respondent started on 1 March 2017. He was employed initially as Director of Mergers and Acquisitions for the SPI Group. From 14 January 2020, he was employed as Group Chief Investment Officer for the SPI Group. Throughout his employment, he was responsible for all aspects of Merger and Acquisition, and investment activity, across the SPI Group.

24. The claimant was interviewed and offered the job exclusively by Mr Schefler. The respondents' witnesses (including Mr Schefler in his witness statement) tried to deny this. They asserted that the claimant travelled to Luxembourg to be interviewed by a number of managers, and that a decision was taken jointly. However, as Sabina Fatkullina eventually accepted under cross-examination, the documents show that the decision was made exclusively by Mr Schefler. Ms Fatkullina sent an email to Mr Culyba (legal adviser), Mr Efimov (CEO), Mr Oliynik (SF Holding Director) and Mr Lek (CFO) on 30 January 2017 at 12.57 which stated, 'Mr Schefler has offered an employment contract to Mr Vlad Zabelin, who is in copy to this message. Please kindly check the tax rulings with PWC … The contract terms agreed are as follows…' A start date, pay and bonus were then set out. The email went on to say that Mr Shefler had asked everyone to meet the claimant in Luxembourg 'and share details of the Group activities'. Clearly this was not a further interview in the recruitment process. It was a meeting of the team and briefing. The email was sent about an hour after Mr Schefler had interviewed the claimant. No other recruitment interviews took place.

25. The contract of employment required the claimant to carry out duties for both the 1st respondent and the SPI Group of companies. It states that the claimant's position was Director of Mergers and Acquisitions 'and shall be directly subordinated to the board of managers'. His duties included achieving and exceeding the annual Key Performance Indicators ('KPIs') 'as may be communicated by the board of managers', and 'reporting to shareholders and managers of the Group on all activities'.

26. The tribunal is unsure as to the true identity of any 'board of managers' at any particular time. The respondents disclosed very few documents as part of this case and the evidence of all their witnesses was vague and inconsistent. In practice, it is evident that the claimant reported and was accountable to Mr Schefler. It is also clear that the true decision-maker on all matters was Mr Schefler, who maintained close day-to-day control. On 26 February 2017, a few days before the claimant started, Ms Fatkullina emailed the claimant saying 'Mr Schefler has asked me to send you a list of the most important projects, which you have to start working on next week. The team is currently working on the following and Mr Schefler wants you to be the leading person for those'.

<u>The claimant's contractual pay and bonus</u>

27. The contract set out the claimant's salary as £180,000 net per year. Clause 5b stated:

> 'The Employee shall also be entitled to a discretionary annual bonus in the amount of up to 100% of his annual salary, the amount to be determined by the Company taking into account, among other things, the achievement by the Employee of the KPIs for the relevant calendar year and satisfactory annual performance appraisals'.

28. The claimant was awarded a bonus of £150,000 in 2017 and £180,000 in 2018. In one of their routine phone calls in around June 2018, the claimant asked Mr Schefler about his bonus, which had not yet been paid. Mr Schefler agreed to give a bonus of £150,000. The claimant asked him how he arrived at the figure. Mr Schefler just said he thought it was the right number and did not think the claimant had earned any more. On 13 May 2019, the claimant was told he would receive the full bonus. Mr Schefler told him a few days later that he had decided to give the claimant a full bonus, 'well done for last year'. The claimant had an even more productive year in 2019 than in 2018 and was expecting to be awarded a full bonus again.

Mr Schefler's role

29. Although the claimant's written contract said he should report to a board of managers, he was never introduced to such a board or told who that comprised. The claimant told the tribunal that in his interview with Mr Schefler on 30 January 2017 when he was offered the job, Mr Schefler said the claimant would be reporting to him. Mr Schefler also worked in the London office, on a different floor from the claimant, and in the first week, he presented himself to the claimant as the Chairman. We accept this evidence, even though it is denied by Mr Schefler and the respondents' witnesses. We accept the claimant's evidence because it is consistent with the emails of 30 January 2017 and 26 February 2017 which we have referred to above, and also with other evidence. For example, on 7 March 2017 the claimant was copied in on a letter from Mr Schefler to a third party on a potential deal which is signed 'Yuri Schefler, Chairman, SPI Group Sarl'.

30. Ms Fatkullina was introduced to the claimant by the headhunter as Mr Schefler's PA. She told the tribunal that she was 'Chief of Staff' throughout her employment, although there is no documentary evidence of that, and that she additionally took on the role of Chief Human Resources Officer of the Stoli Group from March 2020. It appeared to the tribunal, that certainly in her interactions with the claimant, Ms Fatkullina took her instructions primarily from Mr Schefler. Mr Schefler did not put things in writing, and she effectively acted as a conduit between Mr Schefler and the claimant on written matters. For example, she wrote the recruitment email and the work allocation email referred to above, setting out Mr Schefler's decisions. Indeed, she told the tribunal that throughout her employment of nearly two decades, she spoke to Mr Schefler several times/day.

31. Ms Fatkullina worked in the London office with the claimant, and they would occasionally see each other as they worked on different floors.

32. The 3rd respondent, Natalia Sidorenco, was the sole statutory director of the 1st respondent during the claimant's employment. She provided support to Mr Schefler and carried out administrative duties for the 1st respondent (and another company in the group).

33. Alexey Oliynik joined the Group in 1995 and has known Mr Schefler for over 25 years. His job titles have been varied, though at senior levels. He

says in his witness statement that he has worked in the capacity of CEO of the SPI Group in the past and later transitioned to a more supervisory role as a manager/director in various companies in the SPI Group. We were not given exact dates.

34. We accept the claimant's evidence that Mr Schefler made all the decisions about his employment, including the decision to recruit him, the commercial terms of his employment, decisions about his pay and bonus, and approving expenses, travel and holiday arrangements. This was sufficiently supported by the documentary evidence which we have referred to in other parts of this decision for us to have confidence in the claimant's general evidence on this point. Mr Schefler did not attend to give evidence. His witness statement, where it denied, for example, making the decision to recruit, was contrary to contemporaneous emails. There was no specific detail given to us contradicting the claimant's examples. We also lost confidence in the evidence of the other respondents' witnesses, for reasons we set out above.

35. We also accept the claimant's evidence that he reported to Mr Schefler, received instructions from him and was supervised by him throughout his employment. This is consistent, for example, with Ms Fatkullina's email of 26 February 2017 referred to above. It is also consistent with the claimant's evidence, confirmed by the respondents' witnesses while discussing a different point, that Mr Schefler spoke to the claimant several times a day. The respondents' witnesses attempted to say such discussions were purely about Mergers and Acquisitions, in which Mr Schefler had a particular interest. However, there is evidence that the scope of Mr Schefler's authority over the claimant went beyond that field of activity: for example, decisions about whether the claimant could sit on a third party board of directors, and decisions about which office the claimant should use (see below).

36. As well as recruiting the claimant, Mr Schefler told the claimant he had made decisions to hire and fire other senior employees, eg Mr Pietrini, Mr Lek, Mr Knoll or that he intended to do so, eg Mr Costello and Mr Efimov. It was not challenged that Mr Schefler told the claimant these things, or indeed that they were true.

<u>30% pay cut</u>

37. In early March 2020, Ms Fatkullina telephoned the claimant and asked him to agree a 30% pay cut for three months. She said all the SPI Group's top executives were being asked to agree to this because of the difficult economic situation caused by the Covid pandemic. The claimant agreed.

38. On 1 April 2020, Mr Oliynik emailed the claimant and others to say that due to the unprecedented challenges presented by Covid-19, for the next two months Mr Schefler 'will fulfil the function of Global CEO of Stoli Group, during which time the executive management of Stoli Group … will report to him directly'. Also 'in an effort to keep our workforce intact to the maximum extent possible, from April 1, a temporary salary reduction of 30% will be implemented for employees of Stoli Group…we appreciate that this is

unwelcome news, but at the same time we all realise that it is difficult to predict how long it will take for business to return to normal'.

39. Confronted with this clear evidence of Mr Schefler's position at the time of the events leading up to and including the termination of the claimant's employment, the respondents' witnesses came up with a variety of unconvincing explanations as to why it was not what it seemed. This included suggestions that the position was purely 'ceremonial' and that the true (interim) CEO was Mr Buttling, with Mr Schefler simply being in support. However, in the absence of any proper disclosure on this matter, this is not what the 1 April 2020 email says, and it is not how it would appear to the claimant. Moreover, a written communication from Mr Schefler on 18 May 2020 announcing the appointment of Mr Seats, a new Head of HR for the Stoli Group, says 'Tim will report directly to me'. Similarly, on 15 June 2020, Mr Schefler emailed the claimant and others to announce that Mr Caldwell would be joining the company on 1 July 2020 as Global Chief Financial Officer for the Stoli Group. Mr Schefler again added 'He will report to me' and signed the email 'Yuri Schefler, acting global CEO, Stoli Group'.

40. On 5 May 2020, the claimant emailed Mr Oliynik to ask whether the Group would consent to him taking up an offer of non-executive director of another company, which did not have business competing with SPI and would only involve his own time. Mr Oliynik emailed back, 'I have discussed your request at the shareholder's level and the feedback received was a 'NO''. This was a reference to Mr Schefler. Although the claimant was disappointed, he was not seriously upset by this. He emailed back in a friendly way 'Dear Alexey, thanks a lot for the prompt feedback'.

41. On 6 May 2020, Ms Fatkullina emailed the claimant to inform him that, in order to keep expenses down 'in these turbulent times', it had been decided to terminate rental of his first floor office from 1 July. Mr Schefler had suggested that the claimant use his own office on the second floor except when he was in London, which was rarely. The claimant did not think this was sensible decision, but again, he was not seriously upset. He responded 'I truly hope that these measures are interim, and we will get back to normal fairly quickly. Haven't shared an office since 2005.' He then continued regarding necessary practicalities for moving documents and a switching protocol. He finished with 'Dear Natasha, if you could help me with the above at some point, would really appreciate that. Looks like I would also need a key to the office. Hope all this is not a big bother'.

42. On 3 June 2020, Ms Fatkullina emailed the claimant as follows:

> 'As you well aware the decision was made earlier in April by the company's top management, that from April 1st, a temporary wage reduction of 30% was introduced for all Stoli Group and SPI Group employees.
> As we entered June now, after analysing the current situation, regrettably I have to inform you, that this measure will be continued at least until September 1st. Thereafter the situation on the markets and in our company will be addressed again, and we hope, that the positive trend will emerge and thanks to all our joint efforts we will survive these turbulent times.

> We all understand, that these are the news each of us would like to hear last, but at the same time, we all know that it is difficult to predict how long it will take a business to return to normal dynamic.
> I'm grateful for your understanding and team spirit in this difficult times.'

43. The claimant responded in an email the next day, 4 June 2020, at 11.26 am. He said that such measures needed both sides to agree. He said he considered the previous 3-month base salary cut understandable, though extreme and temporary. Before agreeing to any 'further hardships' he asked for information to put them into perspective. What was the company's outlook towards the end of the year and what were its plans for the 2019 bonus? Was it going to be cancelled altogether or just deferred? The claimant said the previous year had been quite productive, with several projects successfully closed with his direct involvement or under his leadership, bringing significant value to the company. The proposed extension was somewhat open-ended The claimant went on:

> 'I have been through at least three different crises before in various capacities, including being the CEO of a quite large holding. I would say that how the company's response is structured and communicated to me as an employee is unprecedented.'

He accepted that 'we are in a harsh situation overall' and that the company required him to make certain concessions, but no one had given him any concessions just a month ago, for example to him taking up a non-executive position on a third party board, which would have made up for some of the loss here.

44. The letter is clearly focussed on the claimant's own concerns and there is no mention of the impact on any other employee.

45. As a result of the letter, Ms Fatkullina arranged a video meeting for 5 June 2020 with the claimant and Mr Oliynik.

46. On around 4 June 2020, the claimant was speaking to Mr Esposito in Stoli's New York office about suitable acquisition targets in the USA. Mr Esposito expressed his irritation that investment opportunities were being explored when employees in New York were facing 'brutal pay cuts'. He felt it was inappropriate. This conversation took place between 1 and 2 pm (as indicated by the time on surrounding emails), ie after the email the claimant had sent to Ms Fatkullina. The claimant had previously spoken to Mr Culyba (Chief Legal Officer in Luxembourg) in May 2020 who described an environment of 'mess and despair' in the Luxembourg office caused by the cuts.

47. The respondents say it is highly unlikely that Mr Culyba, the Group's General Counsel, would make such a statement and that people were not working in the Luxembourg office at the time. The tribunal does not see why it is highly unlikely that Mr Culyba would make such an observation to a senior colleague. The respondents' point about the Luxembourg 'office' appears rather literal. Mr Culyba would have been referring to Luxembourg staff. The

respondents did not call Mr Culyba to deny he had such a conversation. We have no reason to think the claimant made up what was said or what he believed had been said by Mr Culyba.

48. The tribunal accepts that the claimant had these conversations, but had no more detail about exactly what was said on this topic or how much time was spent discussing it.

49. The meeting took place on 5 June 2020 as arranged between the claimant, Ms Fatkullina and Mr Oliynik. They spoke in Russian. Ms Fatkullina did most of the talking and the claimant assumed she was speaking for Mr Schefler. At the end of the conversation, Ms Fatkullina assured the claimant that she would repeat his concerns to Mr Schefler.

50. There is little agreement between the three attendees at the meeting as to exactly what was said. Ms Fatkullina gave a certain amount of detail in her witness statement, but when questioned in the tribunal, said she could remember very little. She told the tribunal this was due to the after-effects of a bout of Covid in August 2021. However, she said that her witness statement – written only 3 weeks ago – was accurate and should be relied on because 'a lot of people had spent time and money contributing to it and putting it together'. This did not give the tribunal much confidence that her evidence was her own or reliable. Mr Oliynik, on the other hand, generally took the position of disagreeing with every part of the claimant's account of the meeting, even where Ms Fatkullina had accepted something, so we found his evidence also unreliable. No minutes were taken of such an important meeting, even though Ms Fatkullina now had a senior HR role. By contrast, the claimant's account of the meeting provides more concrete details.

51. In making our findings regarding the discussion, we have where possible relied on areas where Ms Fatkullina agreed with the claimant's version or where she agreed something similar or agreed that the claimant's version was a possibility although she could not remember. Where there was complete disagreement on certain points, we have tended to prefer the claimant's evidence because of our doubts about the reliability of the evidence of Ms Fatkullina and Mr Oliynik for reasons we have already explained. However, we are also aware that this meeting took place a long time ago and there may be a level of subjective interpretation regarding what was said. We have therefore also considered from the surrounding evidence which account was more inherently likely to be accurate.

52. The meeting discussed the claimant's proposed pay cut and bonus. Ms Fatkullina said the SPI Group's current and future position was precarious. The claimant said that SPI could not impose a unilateral pay cut and it would be a breach of his contract of employment.

53. The claimant asked what the proposal was in relation to his 2019 bonus as he had had a very productive year. Ms Fatkullina said he would get a bonus but emphasised that it was discretionary, (which he took to be a threat) and said Mr Schefler might want to speak to him directly about that. We do

not ourselves take that observation to be a threat. The bonus was as a matter of fact discretionary.

54. Ms Fatkullina said that for 2020 and thereafter, SPI would change the way bonuses were awarded so that an employee would only be paid for something 'extra' rather than simply rewarding good performance. Ms Fatkullina was aware that there were plans for a new scheme linking bonuses to key performance indicators ('KPIs'). The claimant said that changing the way his bonus was calculated in this way would be a breach of his contract of employment.

55. We find that the claimant did also make reference to the effect of pay cuts on other employees in the group. There are several reasons why we believe he did so. Firstly, and importantly, Ms Fatkullina admitted in her witness statement that the claimant made general reference to other employees of the SPI Group in relation to salary reduction, albeit she says the whole purpose was his issue with his own employment contract. In cross-examination, Mr Oliynik also admitted the claimant made reference to other employees, though he said it was in a different context. Given that the discussion was about unilateral cuts to the claimant's pay and bonus, it is difficult to see what any other context could have been. The claimant knew from earlier communications that a 30% cut had already been introduced for all Group employees (not just for himself) and he had seen the 3 June 2020 email which said the measure was being continued at least until 1 September 2020. Also, the afternoon prior to the 5 June 2020 meeting, the claimant had been talking to Mr Esposito who had talked about inappropriate 'brutal pay cuts' for employees in New York. We therefore find it plausible that the claimant would have also referred to the impact on other employees. It would have been fresh in his mind from that conversation.

56. For the same reason, we accept the claimant's evidence that he talked about the previous pay cut having caused a stressful and toxic environment amongst employees and that it could impact on their mental health. Indeed, as Ms Fatkullina said in her evidence, it is hardly rocket science that people are upset about losing money.

57. We also accept that the claimant expressed concern that SPI was using the pandemic as an excuse to cut pay without any transparency. Again, he had just spoken to Mr Esposito who had expressed irritation about the inappropriateness of talk about investment opportunities at the same time as making brutal pay cuts on staff. The claimant himself also knew M&A activity was continuing from his own position at a high level in the company and his close working relationship with Mr Schefler. The claimant believed that indicated the company was still healthy.

58. We further accept that the claimant said something about pressurising or scaring employees (including himself) to agree the pay cut. He translated this to 'bully' in his evidence but explained that they were speaking Russian which has no direct equivalent to that word and translates into 'pressure, scare, intimidate' etc.

59. We do not believe that the claimant explicitly said anything about breaching the contracts (plural) of employment of other employees. That would not have been a natural way to speak of others and he would not even have known about their contractual situation.

60. The claimant says that because he was questioning the need for a pay cut, Ms Fatkullina told him that the pay cut might continue until 31 December 2020, and that he took that as a threat. He also says she threatened him by saying those who did not agree with the pay cut should leave, or words to that effect. Ms Fatkullina denies saying that or making threats.

61. We do not find that Ms Fatkullina made any threats. Both Ms Fatkullina and the claimant agreed that no voices were raised, and the tone of the meeting was amicable and polite. In any event, Ms Fatkullina did not have the power to start talking about a longer salary cut because she did not like the claimant's resistance or to tell him that he should leave. As the claimant was aware, she was simply acting as a conduit for Mr Schefler. She may have observed that people leave when they do not like what is happening, but we do not believe it was a threat.

62. Both sides were disappointed with the outcome of the meeting. Ms Fatkullina had personally volunteered to defer roughly 60% of her salary from 1 April 2020 and she had agreed to waive any potential bonus for 2019. She felt the claimant's approach was self-centred and uncooperative.

63. The claimant admits that he was primarily concerned about the impact these decisions would have on his own personal finances. However, he says he was aware many other employees would be significantly worse off than him, and the conversations he had had with Mr Esposito and Mr Culyba were important considerations for him in raising the issues. This is something we shall consider in our Conclusions below.

<u>Public interest arguments with hindsight</u>

64. The claimant argues that as well as the public interest which he had in mind at the time, as set out above, looking back there are the following further reasons why his disclosures were in the public interest:

    a. There was at the time significant public concern about employers taking advantage of the pandemic for reasons unconnected with it and for example using it as cover for redundancy and pay cuts. The claimant was unable to give any examples of such public concern, though he said he has read some articles about this since.

    b. SPI received public praise for production of alcohol hand sanitisers, which was hypocritical when it was treating its staff unlawfully and badly.

c. The SPI Group was receiving funds from publicly funded government schemes internationally, while at the same time cutting employees' pay. We were not given clear details of how much the respondents had received, or on what basis.

The 8 June 2020 telephone conversation

65. Following the 5 June 2020 meeting, Mr Oliynik told Mr Schefler that, unlike other senior managers, the claimant was against the extension of the temporary pay cut and against not being awarded a bonus in 2019.

66. Ms Fatkullina says she spoke to Mr Schefler several times/day so she probably did relay the claimant's concerns to him after the conversation. We find that she did so, both because if she was talking that frequently to Mr Schefler she was bound to do so, and also because she generally acted as a conduit between Mr Schefler and the claimant.

67. At 9 am on Monday 8 June 2020, Mr Schefler telephoned the claimant. The claimant described the phone call to Mr Oliynik in an email later that day as follows:

> 'This morning at 9.04 am UK time I received a call from the shareholder which I understand was a follow up on the Zoom meeting with you and Sabina last Friday. He started with asking me to put together a list of projects/deals that I had been involved in during 2019 so that he could make a decision on the amount of my 2019 bonus. Then he very briefly discussed the 2020 outlook, calling it a 'lost year' and also asked me to start thinking about my 2021 KPIs. He then told me about his firm plans to revisit the bonus principles altogether. In particular, he said that a bonus would only be considered if a person does some extra, outside of such person's scope of work. When I told him that this was not what my employment contract was saying he told me 'then sign a resignation letter if you don't agree'. When I asked him why I should sign a resignation letter, he told me literally 'forget about everything, I am firing you' and hang up. I understand the shareholder has made up his mind about my employment. Given the above, I would like to understand our next steps as the above exchange and overall recent situation are causing a lot of stress for me, Looking forward to hearing from you. Many thanks.'

68. The claimant emailed Mr Oliynik again at 13.53 on 10 June 2020. He had not yet heard back from Mr Oliynik. He wanted guidance on how he should handle internal and external calls about various projects now that he had been fired. He added, 'In the meantime, I reserve all my legal rights'.

69. Mr Oliynik replied at 14.16 to say that he felt the claimant's interpretation of the conversation with Mr Schefler should have been 'more balanced'. He said the claimant's employment agreement was with the company, not its shareholder, and 'Consequently, statements like 'forget about everything, I am firing you' shall be interpreted and assessed from legal perspective rather than an emotional one'. You will receive an official communication from the company shortly.'

70. Mr Oliynik had spoken to Mr Schefler after receiving the claimant's email of 8 June 2020. He says the delay in replying to the claimant was because he took legal advice. We note that his email does not deny that Mr Schefler had told the claimant he was fired.

71. We also note that there is no explicit denial in the respondents' Grounds of Resistance that Mr Schefler said 'you are fired'. Paragraph 5.2 of the Grounds (4.3 of the amended Grounds) does deny that the claimant was expressly dismissed during the conversation, but then goes on to explain its position is that nothing said by the 2nd respondent was capable of terminating the claimant's contract because he did not have authority to dismiss. It does not address whether the words 'you are fired' were said, but we read the paragraph as avoiding that point.

72. On 10 June 2020, Ms Sidorenco sent the claimant a letter referring to the economic effects of the pandemic worldwide. The letter did not refer to the fact that the claimant believed he had been dismissed. It said that because of future economic risks to the Company, the Company was looking at reducing costs and would be asking highly paid employees to accept cuts in order to preserve lower paid jobs. There was therefore 'a call on you to re-engage on new terms, ie with the new annual salary reduced by 30% on a permanent basis.' Moreover 'these are extremely tough time and the Company is not in a position to have your 2019 bonus being awarded to you. Moreover, it is highly likely that your 2020 discretionary bonus will not be awarded either.' The letter ended, 'Thank you for your support and all you are doing for the Company'.

73. Mr Oliynik and Ms Sidorenko said in their witness statements that this letter was drafted by Mr Oliynik. However, metadata requested by the claimant's solicitors showed that Ms Fatkullina had created it and was the person who last modified it. Ms Fatkullina would not have had the authority to decide on the content of this letter on her own initiative. As we have already stated, she tended to act as a conduit for Mr Schefler's instructions. The attempt to disguise her role in drafting this letter strikes us as another example of the respondents' attempts to hide Mr Scheler's influence.

74. The claimant acknowledged the letter the next day. He said he was considering his position and would reply in due course.

75. We accept that the claimant's 8 June 2020 email was an accurate account of his conversation with Mr Schefler. He put it in writing to Mr Oliynik the same day. He repeated in his chaser email on 10 June that the 'shareholder fired me on Monday'. We would expect Mr Oliynik to have spoken to Mr Schefler immediately he received the claimant's first email saying he had been fired, and Mr Oliynik admits he did speak to Mr Schefler in response. Mr Oliynik did not email straight back and say 'of course you are not fired'. Even after the chaser two days' later, Mr Oliynik's response is fudged. He does not deny that Mr Schefler told the claimant he was fired. He effectively tells the claimant not to be emotional about it. This is sufficient for our conclusion, but we also note that we have not heard oral evidence from Mr Schefler regarding

this crucial conversation and that there was no explicit denial in the Grounds of Resistance.

76. We did consider the fact that the claimant's email was to Mr Oliynik not to Mr Schefler. This did not alter our view. Mr Schefler does not engage in email correspondence. Moreover, Mr Schefler having told him he was fired and put the phone down on him, it is understandable why the claimant would not want to communicate with him at this point. The claimant was asking Mr Oliynik about practicalities.

77. Even if the claimant was unhappy about recent and proposed pay cuts as well as his office situation and the refusal of permission for him to sit on another Board, it does not seem likely to us that he would engineer a dismissal, as the respondents suggest, when he had no job to go to and had been earning, even with a cut, substantial amounts. His solicitors did indeed send a letter attempting to invoke a pay out from his contract for dismissal, but this still would have left him without a job at a very precarious time. As he told Mr Oliynik in his 8 June 2020 email, the situation was causing a lot of stress. It seems unlikely that he would voluntarily have destabilisied his own situation further.

78. On 18 June 2020, Mr Oliynik emailed SPI/Stoli staff to thank them for their 'patience and understanding during this very difficult and volatile time'. The email went on 'As we begin to regain some momentum from the Coronavirus, I am happy to inform you that as of 1st July 2020 we will be reinstating everyone's base salary'. In addition, the company would be repaying the 30% salary reduction in Q4 of 2020 to those who were still employed with the company at the time of repayment. Finally, they planned to pay out the earned 2019 bonus at the discretion of the Group Advisory Board, again to those who were still employed.

79. There was no documentary record of who took this decision or why. Mr Oliynik said it was a decision reached as a result of conversation between 'the people'. When asked who these were, he said Stoli management and 'us in Luxembourg'. It was not explained why, if it had been an economic necessity to cut the claimant's pay 8 days earlier, it was now possible to reverse the position for all other employees.

80. We were unable to get clear and reliable evidence regarding whether any other senior managers had been told unilaterally, at the time the claimant was told, that they would not get their 2019 bonus. Mr Oliynik said he has not been paid his 2019 bonus and some lower managers did not get theirs, but in the absence of documentary evidence and any detail, and given Mr Oliynik's generally unreliable and vague evidence, we are unable to find that is the case, or that it is the permanent arrangement.

<u>The Group financial position</u>

81. It is difficult to establish the precise financial position of the SPI Group at the relevant times because of the lack of disclosure from the respondents.

From the accounts the tribunal has seen, the SPI Group was showing healthy revenue and cash flow.

82. Mr Caldwell, the Global Chief Financial Officer of Stoli Group, gave evidence to the tribunal. In the absence of full financial disclosure, we did not find his evidence particularly helpful. He did not join the Group until July 2020 and we could not distinguish between hearsay, ungrounded observation based on a glance at the trial bundle, and reliable facts and reasoning within his first-hand knowledge based on documentation he had examined when performing tasks in post. For example, his observation that 'the claimant took matters into his own hands by leaving the company before any agreement could be reached as to his permanent salary reduction' was gratuitous, partisan and outside his own knowledge.

Proposed liquidation of the 1st respondent

83. The only documentary information disclosed by the respondents regarding the decision to liquidate the 1st respondent was documents already in the public domain as a result of being filed at Companies House.

84. The claimant alleges that the respondents deliberately took steps to terminate the 1st respondent's operations in order to prevent him being able to enforce any award. The 1st respondent's accounts for the year ended 31 December 2019, which were signed off on 24 September 2020, state that the director took a decision in August 2020, after liaison with group management, to commence proceedings to terminate the company's operations. The 2019 financial accounts were therefore prepared on a non-going concern basis. The 'average' number of employees employed in 2020 including Directors was four, down from eight in 2019.

85. The director was Ms Sidorenco, the sole non-executive director of the 1st respondent. Ms Sidorenco accepted in cross-examination that the decision was not hers and she had just been told what to do. She was unable or unwilling to give any details regarding who took the decision and exactly when. There were no documents regarding this either.

86. In anticipation of the liquidation, discussions took place with Ms Sidorenco in July 2020 about moving her employment to a different company, Cellar Trends Ltd (now known as Amber Beverage UK Limited).

87. The claimant did not know about this decision until his solicitors discovered it in November 2020. As a result of concerns expressed by the claimant regarding whether he would be able to enforce any award, steps towards liquidation have been 'paused'. However, the company has in fact ceased all operations.

88. The SPI Group has been undertaking a corporate restructuring exercise in recent years. Since his appointment in July 2020, Mr Caldwell has led restructuring operations involving liquidation of several entities in the Group, eg SPI Spirit (Ireland) UC and ZXQ Holding DAC. Ms Sidorenco says the

current phase, including liquidating the 1st respondent, had been under discussion since 2018/9. She says it had been considered inefficient to continue with the 1st respondent, which had only three employees, whereas Amber Beverage UK Limited (previously Cellar Trends Ltd) had more employees as well as distribution operations. We accept this evidence, although we do not know all the details. It seems logical, given the 1st respondent's size, and in line with group restructuring.

Law

Agency

89. Mr Roberts set out his submissions on the law of agency in so far as it is relevant to this case in his opening note. Mr Lieper did not dispute the legal principles. I will not repeat Mr Roberts' full explanation here. To summarise, the test for 'agent' is effectively the same as in the common law. An agent is a person acting on behalf of another (the 'principal') with the principal's authority (Kemeh v MOD [2014] ICR 625.) There are commonly three types of authority: (i) express actual authority; (ii) implied actual authority; (iii) apparent/ostensible authority where the person reasonably appears to have authority to do something based on a representation of the employer, even if they do not have that authority.

Protected disclosures

90. Under Employment Rights Act 1996, s103A, it is automatic unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure. Under s47B a worker has a 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.

91. A 'detriment' basically means being put under a disadvantage (Ministry of Defence v Jeremiah [1980] ICR 33, CA). It has the same meaning as in the context of discrimination law (Robinson v Sheikh Khalid bin Saqr al Qasmi [2020] IRLR 345, EAT). Dismissal is simply another form of detriment. However, an employee cannot claim against his employer that his dismissal is a detriment (s47B(2)) – the appropriate claim is for automatic unfair dismissal. On the other hand, a claim can be brought against a co-worker or an agent of the employer for procuring the claimant's dismissal or the dismissal itself (see Timis and another v Osipov [2019] IRLR 52, CA).

92. Under s43B(1), a 'qualifying disclosure' means any disclosure of information which, in the claimant's reasonable belief was made in the public interest and tended to show, inter alia, that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject or that information tending to show this had been or was likely to be deliberately concealed.

93. The question is not whether disclosure was in fact in the public interest, but whether the worker believed at the time that it was, and if so, whether that belief was reasonable. What can reasonably be believed to be in the public interest depends on the circumstances of the case. Relevant factors could include the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer. Where the disclosure relates to a breach of the worker's own contract of employment, tribunals should be cautious, but there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. (Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] IRLR 837, CA.)

94. Asking what was the claimant's motive for making a protected disclosure does not answer whether the claimant subjectively believed that the disclosure was in the public interest. These are two different questions. As the Court of Appeal said in Ibrahim v HCA International [2020] IRLR 224, a tribunal needs explicitly to explore the latter question.

95. ERA 1996 s48(2) states that on a complaint for whistleblowing detriment, an employer must show the ground on which the act was done. The EAT in International Petroleum Limited (2) Timis (3) Sage v Osipov and others UKEAT/0058/17; 0229/16 summarised the proper approach as follows: (a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he has been subjected is a protected disclosure he made (b) by virtue of s48(2) the employer must be prepared to show why the detriment was done. Otherwise an inference can be drawn against them; (c) any such inference must be justified by the facts as found. This case went to the Court of Appeal, but not on this aspect.

96. With regard to the causal link between making a protected disclosure and suffering detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. (Fecitt v NHS Manchester [2012] IRLR 64, CA).

97. Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer. (Fecitt)

98. In Kuzel v Roche Products Ltd [2008] IRLR 530, the CA said this regarding the burden of proof on claims for automatic unfair dismissal for making a protected disclosure. Where an employee positively asserts there was a different and inadmissible reason for his dismissal, eg making protected disclosures, he must produce some evidence supporting the

positive case. However, he does not have to discharge the burden of proving dismissal was for that reason. It is enough to challenge the employer's reason and provide some evidence for doing so. Then having heard the evidence for both sides, the tribunal should make findings of fact based on direct evidence or reasonable inferences from primary facts. The tribunal must then decide what the reason or principal reason for dismissal was. If the employer does not show to the tribunal's satisfaction that the reason was what it asserts, it is open to the tribunal to find it is what the employee asserted. The tribunal is not obliged to so find, although that may often be the case.

Dismissal for asserting a statutory right

99. Under s104(1)(b) of the Employment Rights Act 1996, it is automatic unfair dismissal if the reason or, if there is more than one reason, principal reason for dismissal is that he 'alleged that the employer had infringed a right of his which is a relevant statutory right'. Under s104(2) it does not matter whether or not the employees has the right or whether the right has been infringed, as long as the allegation was made in good faith. Under s104(3) it is sufficient if the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

100. It is necessary that there has already been an infringement of a statutory right, not merely an anticipation or threat of future infringement (Mennell v Newell & Wright (Transport Contractors) Limited [1997] IRLR 519; Spaceman v ISS Mediclean Limited t/a ISS Facility Service Healthcare [2019] IRLR 512. This raises questions of when the 'infringement' takes place. In Simoes v De Sede UK Limited UEAT/0153/20, it was the firm instruction to work a particular shift pattern, even though the claimant had not yet worked it. It was not a case of 'If you ask me to do that, it will be a breach'.

Conclusions

Was the claimant dismissed?

101. We find that the claimant was expressly dismissed on 8 June 2020 when Mr Schefler told him on the telephone (in Russian), 'forget about everything, I am firing you' and hung up the phone.

102. We have explained in our fact-findings above why we accept that Mr Schefler told the claimant he was fired on 8 June 2020.

103. The respondents argue that Mr Schefler was merely the shareholder and had no actual or ostensible authority to dismiss the claimant and moreover, that the claimant knew that. We disagree.

104. We find that Mr Schefler had actual authority to dismiss the claimant. He had an office in London on the same premises as the claimant. He had unilaterally made a decision to recruit the claimant, as Mr Oliynik and other senior managers knew because they were copied in on the relevant email.

There is no evidence that Mr Schefler's authority to do this was challenged. He had a track record of hiring and firing other top managers. There is no evidence that his authority to do so was ever questioned by anyone else in the respondents. He owned 99.9% of SPI Group shares which in turn was the ultimate parent of the 1st respondent, the claimant's formal employer. He made decisions about the claimant's terms of employment, pay and bonus levels. He was asked to, and made, the decision as to whether the claimant could sit as a non-executive director for another company. Mr Schefler was clearly authorised to make all these decisions. The dispute over reducing the claimant's pay and bonus in June 2020 was relayed by Mr Oliynik and Ms Fatkullina to Mr Schefler, who took up the matter the next working day.

105. Quite apart from all this, at the time of the dismissal, Mr Schefler was Acting CEO of the SPI group, the ultimate parent of the 1st respondent.

106. The 1st respondent was a tiny company, whose only director, Ms Sidorenco, also took instructions from Mr Schefler and just did as she was instructed, even when it came to steps towards liquidating the company.

107. Even if we did not consider that Mr Schefler had actual authority to dismiss the claimant, we would say he had ostensible authority for essentially the same reasons. For example, the claimant was copied in on the emails which stated that Mr Schefler had made decisions regarding his recruitment, terms and projects. He saw an email to a third party where Mr Schefler described himself as Chairman. The claimant saw that Ms Fatkullina generally relayed Mr Schefler's instructions in respect of the claimant. He saw the official email describing Mr Schefler as Acting CEO of the SPI Group.

108. We add finally, that Ms Sidorenco's letter of 10 June 2020 states that there was 'a call on you to re-engage on new terms'. Although the letter says nothing explicit about the claimant's contention that he had been dismissed, the reference to 're-engage' would suggest a recognition by the 1st respondent that the claimant had been dismissed.

109. As the claimant was actually dismissed, it is not necessary for us to decide issue 1b, ie whether he was constructively dismissed.

Was the dismissal unfair on ordinary principles?

110. The 1st respondent must prove the reason for dismissal. It has not done so. It has simply denied the dismissal. The dismissal was therefore unfair.

111. It would alternatively be unfair for procedural reasons. No procedures were followed whatsoever. In the middle of a conversation to discuss his concerns about pay and bonus cuts, the claimant was told out of the blue that he was fired.

112. Further, if it is suggested that a fair reason for dismissal was that the claimant would not accept cuts to his pay and changes to his bonus, we would say that was also unfair. This enters the realm of speculation because

the respondents did not argue that he was dismissed for this reason, they merely argued that they were justified in making temporary pay cuts, which is a different point. But given that SPI restored everyone's pay only 8 days after the claimant's dismissal, it is hard to see how a reasonable employer could have reached the point where it would have decided to dismiss the claimant in order to enforce allegedly essential cuts. Moreover, to the extent we were shown accounts, and this was an area where the respondents' evidence was extremely opaque, it was clear the Group had good cash flow and was still making profits. Further, it had not got to the point of the claimant refusing to accept such cuts. He was at the stage of arguing his case and asking for transparency about what was proposed. No reasonable employer would have dismissed for this reason in these circumstances, even had they chosen to follow fair procedures.

Protected disclosures

113. Of the claimant's alleged protected disclosures as set out in Mr Roberts' closing submissions, we found in our fact-finding section that he made the following disclosures to Mr Oliynik and Ms Fatkullina at the meeting on 5 June 2020 (using Mr Roberts' shorthand to refer to these): disclosures regarding the claimant's pay; regarding his 2020 bonus; regarding staff welfare; and regarding Covid pretence.

114. Mr Schefler knew the claimant had made these disclosures. The conversation was relayed to him by both Mr Oliynik and Ms Fatkullina. We infer from the timing and topic of conversation, that this is why he telephoned the claimant on the Monday morning of 8 June 2020. Mr Schefler does not directly address in his witness statement whether he was told that the claimant had made the staff welfare and Covid pretence disclosures. Mr Schefler's witness statement just says 'I understood that the claimant's concerns were about the impact of these changes on himself'. Mr Schefler was not available to be cross-examined on this and the tribunal has not accepted his account of other aspects of this telephone discussion. We therefore give what he says on this point no weight. We find that on the balance of probabilities Mr Schefler did know the claimant had made these disclosures. He received a report back from both Mr Oliynik and Ms Fatkullina, and we do not see why they would have edited their account. They admitted to the tribunal that the claimant had said something about other employees and we believe that they would have told Mr Schefler the same thing but with more detail, since the meeting had just occurred and they would have had no reason to be circumspect.

115. The claimant also directly repeated a disclosure to Mr Schefler on the telephone on 8 June 2020 before he was told he was dismissed ie regarding his 2020 bonus (he said his employment contract did not say his bonus would only be paid if he did something 'extra').

116. The next question is whether the claimant reasonably believed the disclosure(s) tended to show that a person had failed, was failing or was likely

to fail to comply with a legal obligation (issue 1.6). The respondents did not suggest any of the alleged disclosures were not disclosures of 'information'.

Claimant's pay disclosure

117. This is the disclosure that the 1st respondent was imposing a unilateral pay cut and that this would breach the claimant's contract of employment. The pay cut referred to was that set out in the email of 3 June 2020, which stated that the wage reduction of 30% 'will be continued at least until September 1st'.

118. We find that the legal obligation was the obligation to pay the claimant's contractual salary as set out in his contract of employment. We were not shown any legal basis for cutting pay without the claimant's agreement and, more importantly, the claimant was not told of any such lawful basis at the time.

119. The claimant clearly believed that the information he disclosed tended to show such a breach of legal obligation. He was correct. His belief was clearly reasonable.

Claimant's 2020 bonus

120. Ms Fatkullina told the claimant in the 5 June meeting that for 2020 and thereafter, SPI would change the way bonuses were awarded so that an employee would only be paid for something 'extra' rather than simply rewarding good performance. The claimant said this would breach his contract of employment. The disclosed information was therefore that paying his 2020 bonus only for something 'extra' would breach his contract of employment.

121. The claimant believed that the information tended to show breach of a legal obligation.

122. The next question is whether such belief was reasonable. The respondents argue that it was not, because in fact, as the claimant knew, his bonus entitlement was only discretionary. The contract term, clause 5b, does indeed state it is discretionary, but the examples given of relevant factors, albeit 'among other things' refers to achievement of KPIs and satisfactory annual performance appraisals. The benchmark seems to be at the level of 'satisfactory'. We do not accept the respondents' suggestion that bonuses always require something 'extra'. In the industrial experience of the tribunal's non-legal members, bonuses can also be used as a way of incentivising pay, as long as the employee does not fall below a satisfactory standard. There may be an argument that changing this to having to do something 'extra' was outside the contract term. We are not sure if this would succeed but we find it was reasonable for the claimant to believe the reference to 'extra' tended to show a breach of his contract on this point by changing the parameters of the discretion.

Staff welfare

123. The claimant talked in the 5 June 2020 meeting about the previous pay cut having caused a stressful and toxic environment amongst employees and that it could impact on their mental health. He says that this conveyed information which tended to show breach of a legal obligation. The claimant says he had in mind the obligation not to bully (pressurise / scare) staff into accepting severe pay cuts. In the tribunal, that is formulated as an obligation not to breach trust and confidence.

124. The claimant believed that telling people that temporary but open-ended pay cuts were necessary because of the economic effects of Covid tended to show a breach of an obligation not to pressurise and scare staff (or, as is now formulated, breach of trust and confidence). We find it reasonable for him to believe that scaring staff about the state of the business and making a substantial unilateral cut in their pay in times of such uncertainty caused by the pandemic would potentially breach trust and confidence. Moreover the claimant had been told by Mr Culyba about the atmosphere of 'mess and despair' in Luxembourg caused by the cuts.

Covid pretence

125. The claimant expressed concern that SPI was using the pandemic as an excuse to cut pay without any transparency. He believed this tended to show a breach of trust and confidence. It was reasonable for him to believe this. He knew from his own ongoing projects and instructions that SPI was able to continue to engage in expensive Mergers and Acquisitions (M&A). He worked closely with Mr Schefler. Mr Esposito appeared to have expressed a similar view regarding the brutal pay cuts at a time when there appeared to be money for large scale M&A. He was not being given transparent information about the financial basis for these radical pay cuts and he was being given no firm end date. Although the claimant did not know that SPI was going to reverse the cuts on 18 June 2020, the fact that it did so, also gives support to our conclusion that the claimant's earlier assessment on what he was seeing was likely to have been reasonable.

Did the claimant believe disclosure was in the public interest?

126. The next question is whether the disclosure of information was, in the reasonable belief of the claimant, made in the public interest. First we have to decide whether the claimant in fact believed he was making each disclosure in the public interest, and then whether it was reasonable for him to so believe.

127. There is no doubt that the claimant's motive in making the disclosures was concern about his own financial position. It is obvious from his written communications before and after his dismissal and he openly admits it. However, the tribunal has to answer a different question. When he made one or more of the above disclosures of information, did he believe that the disclosure was in the public interest? There are cases where, on the facts, it

is easy to separate motivation from belief in the public interest. This case is not so easy and we have given it very careful thought.

128. We find that the claimant did believe his disclosures were in the public interest. He thought it was a matter of public interest that a company was making non-transparent and significant pay cuts on the pretext of Covid when it did not need to do so and in order to protect its profits. He thought this applied to all his disclosures. In particular, he believed it was in the public interest to disclose facts showing breach of employees' trust and confidence by scaring them in order to justify cuts and potentially damaging their mental health at a vulnerable time.

129. As we have said, we keep in mind that the claimant's motivation in speaking out was wholly his own pay and bonuses. He admits that and it is clear from his 4 June 2020 email. This made us very cautious about concluding that he had in mind any public interest when he made his disclosures on 5 June 2020. However, in between his 4 June 2020 email and his 5 June 2020 conversation, he spoke to Mr Esposito on the phone. That would have put freshly in his mind the wider picture, the impact of 'brutal' pay cuts on employees across the company at a time when there was apparently enough liquidity to continue pursuing M&A. It echoed what Mr Culyba had said a month previously. The claimant expressly referred to other employees on 5 June. He talked about the impact on them. Even if his motive was to bolster his own argument, this suggests that he had in mind that his disclosures were in the wider public interest (ie the effect on a large number of employees of swingeing pay cuts with no transparency on an apparent pretext of Covid-related economic difficulty) as well as in his own interests.

Was it reasonable for the claimant to believe disclosure was in the public interest?

130. We find that it was reasonable to believe the disclosures were in the public interest for these reasons. It was not a purely private matter. The SPI Group is a fairly large international company with high profile products. The cuts appear to have applied to most or all of 2000 employees. It is reasonable to believe that at a time of Covid, there was public interest in the impact on employees including whether employers were unnecessarily cutting pay of staff, and on how employees might have felt about it. An open-ended 30% pay cut was significant.

131. For completeness, we note that we do not have sufficient information to be sure how much SPI was receiving from certain governments by way of support grants, so we make no finding based on that potential public interest. We also do not have enough evidence to find there was any particular public interest in knowing that a company which had been praised for producing alcohol wipes was treating its staff badly. We were not given sufficient information about the level of praise SPI was receiving for the wipes to reach this conclusion.

132. For the above reasons, we find that the claimant did make protected disclosures.

Was the claimant subjected to a detriment?

133. The claimant was subjected to a detriment by the 1st and 2nd respondents (the 1st respondent being vicariously liable for the 2nd respondent as its agent) by the 2nd respondent's conduct on the telephone on 8June 2020, including not having a proper conversation with him and telling him he was fired. Losing his job and not being able to defend himself in the conversation were clearly detriments.

134. The claimant was subjected to a detriment by the 2nd respondent who dismissed him.

135. The claimant was not subjected to a detriment by the 1st to 3rd respondent in steps taken to terminate the 1st respondent's operations. It had not yet happened that the claimant had won his case or sought to enforce and it is unclear exactly how matters would pan out in that event.

Were these detriments because of the protected disclosures?

The 2nd respondent's conduct on 8 June 2020 and dismissal

136. We find that the way the telephone conversation was conducted and the claimant's dismissal were because of the protected disclosures. Mr Schefler had telephoned the claimant at the first opportunity after the claimant's objections had been conveyed to him by Mr Oliynik and Ms Fatkullina. He started by talking about the subject of one of the protected disclosures (the bonus) and lost patience as soon as the claimant referred to his contract of employment. We doubt that Mr Schefler would have lost his patience quite so quickly and to the point of dismissing the claimant if he had not already been annoyed about the claimant's wider position. There is no suggestion of prior conflict between them, so this must have been a response to what he heard about the protected disclosures. Mr Schefler has not provided the tribunal with any other reason for dismissing the claimant out of hand in this way and did not attend the tribunal to be questioned.

137. We also consider that Ms Sidorenco's letter of 10 June 2020, which would have been on the 2nd respondent's instructions as the latter made all these decisions, indicates an escalation in what was required of the claimant which suggests a propensity to 'punish' the claimant for making his protected disclosures. As well as suggesting re-engagement on the basis of a permanent 30% pay cut, it also states that the claimant will not have any 2019 bonus and it is highly likely he will not have his 2020 bonus. This contrasts with the position put to the claimant in the 5 June 2020 meeting, ie a proposed temporary extension to at least 1 September and possibly to the end of the year, a bonus in 2019 (which he should discuss with Mr Schefler) and bonuses from 2020 for something 'extra'.

Taking steps to terminate the 1st respondent's operations

138. As for taking steps to terminate the 1st respondent's operations, we have already said that we do not believe this was a detriment. In case we are wrong on this, we have considered whether these actions were carried out because the claimant had made protected disclosures. The claimant has not raised any prima facie case in our minds. We do not find the fact of the protected disclosures and the coincidence of when steps were taken to liquidate the 1st respondent sufficient. Discussions about moving her employment to another company started with Ms Sidorenco in July, so soon after the claimant's dismissal that a connection actually seems less likely. We feel it is improbable that the 2nd respondent, even with a desire to punish the claimant, would go as far as winding up a company in an attempt to thwart legal proceedings which had not even started. Indeed taking such action made the 2nd respondent vulnerable to being named as an individual respondent, which is exactly what happened.

139. In any event, the respondents have satisfied us that such action was in no way because of the claimant's protected disclosures. We accept the respondents' evidence that they were restructuring and liquidating various companies in the Group. They were able to give specific examples, eg SPI Spirit (Ireland) UC and ZXQ Holding DAC. The 1st respondent was a small company with very few and diminishing employees. It had decided to reduce its office space prior to the claimant's disclosures. By contrast Amber Beverage UK Limited (formerly Cellar Trends Ltd), another UK subsidiary, had more employees as well as distribution operations, and this is where Ms Sidorenco's employment was transferred to. Notwithstanding the lack of documentary evidence in support, we found credible the respondents' oral explanation that it was inefficient to continue with a company as small as the 1st respondent.

140. The claim that taking steps to terminate the 1st respondent's operations was a whistleblowing detriment is not upheld against any of the respondents..

141. For completeness we add that, we would not in any event hold Ms Sidorenco responsible for carrying out any detriment. She simply did what she was told. The decision was taken by the 1st respondent on the 2nd respondent's instructions,

<u>Dismissal for asserting a statutory right</u>

142. On 3 June 2020, Ms Fatkullina sent the claimant an email stating that his 30% wage reduction 'will be continued at least until September 1st'. The claimant emailed on 4 June 2020 to say that such measures needed both sides to agree, and said he required further information before agreeing. At the meeting on 5 June 2020, the claimant said that SPI could not impose a unilateral pay cut and it would be a breach of his contract of employment.

143. Although the claimant did not explicitly refer to an unauthorised deduction from wages (the right in question), he made it reasonably clear to the employer what right he was talking about, ie a 30% cut in his contractual pay.

144. Mr Lieper argues that this claim cannot be made because the breach had not yet taken place. However, the 3 June 2020 email announced a decision which had been taken. The fact that the claimant effectively says this 'will' breach his contract, does not change the fact that the decision had been taken. Mr Schefler put an end to any discussion when he dismissed the claimant.

145. There were several reasons for the claimant's dismissal, ie the four protected disclosures. We cannot say that the particular issue of the 30% pay cut for him was the principal reason. Therefore the claim fails because we do not find that the sole or principal reason for dismissal was that the claimant was asserting that his pay could not be cut without his agreement.

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Employment Judge Lewis
29th Nov 2021

Judgment and Reasons sent to the parties on:

01/12/2021

For the Tribunal Office