Case Number: 2203467/2020
2206537/2020
2206538/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	And	**Respondents:**
Mr H J Moran-Cirkovic		YEO Messaging Ltd **First Respondent**
		Mr Alan Wilson **Second Respondent**
		Mr Alan Jones **Third Respondent**

Heard by CVP **On**: 16 to 25 November 2021
and 26 November 2021 in Chambers.

Before: Employment Judge Nicolle
Nonlegal members Ms G Carpenter and Mr S Godecharle

Representation:

Claimant: Mr B Malik of Counsel
Respondents: Ms. D Grennan of Counsel

JUDGMENT

1. The claims for automatically unfair dismissal under s.103A of the Employment Rights Act 1996 (the ERA) and for suffering detriments under s.47B of the ERA fail and are dismissed.

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties.

6. The Tribunal was provided with three separate bundles. The Respondents' bundle comprising of 550 pages, the Claimant's bundle comprising of 235 pages together with a further supplementary bundle containing the Claimant's unagreed documents comprising of 629 pages. The majority of the documents we were referred to were in the Respondents' bundle.

7. The Claimant gave evidence together with Ms Mirijana Cirkovic, the Claimant's mother (Ms Cirkovic), Alexandra Komissarova, the Claimant's wife (Ms Komissarova) and Peter Rocker, who had been engaged as an independent contractor by the First Respondent between September 2019 and May 2020 (Mr Rocker), on his behalf.

8. Alan Jones, CEO and Co-Founder (Mr Jones), Alan Wilson, COO and from late 2020 CTO (Mr Wilson) and Paul Calver who succeeded the Claimant as a software developer on the iOS App (Mr Calver), gave evidence on the Respondents' behalf.

Procedural background

9. The claim against the First Respondent, the Claimant's employer, was presented on 12 June 2020, alleging detriment and dismissal contrary to section 103A of the ERA for making protected disclosures. The Claimant had been dismissed on 9 June 2020.

10. The Claimant's Application for interim relief against the First Respondent was dismissed by Employment Judge Hodgson on 6 August 2020.

11. The claims against the individual Respondents were presented on 3 October 2020. At a Case Management hearing on 17 November 2020 Employment Judge Palca consolidated the claims.

The Issues

12. At the beginning of the hearing I sought to agree with Mr Malik a consolidated schedule of the alleged protected disclosures. He produced a schedule setting these out. Subsequently I sought clarification from Mr Malik of the schedule of detriments relied upon and clarification as to the Respondent[s] against which the detriment claims were pursued. Mr Malik produced such a document and Ms Grennan accepted that the schedules of protected disclosures and detriments were in an agreed form and therefore it is against these schedules which the Tribunal will set out its conclusions. In the interest of brevity there is no need to set these out at this part of the Judgment, but they will be set out in full in the conclusions.

The Claimant's preliminary application to call expert evidence

13. On the first morning of the hearing Mr Malik gave notice that the Claimant intended to make an application to admit expert witness evidence. This related to a contention that certain documents disclosed by the Respondents were not genuine having been retrospectively created in order to create a false narrative regarding the events culminating in the Claimant's dismissal. Following approximately two hours of submissions from Counsel I gave an oral ruling refusing the application.

14. At the end of the hearing Mr Malik requested written reasons to be incorporated into the Tribunal's reserved judgment. Accordingly these are set out below.

15. The reason for the application was that the Claimant sought to challenge the authenticity of a particular document which the Respondents rely on. It is relevant that the first alleged protected disclosure the Claimant seeks to rely on is on 27 March 2020. There has been a protracted history of disclosure applications and disputes between the parties as to the completeness of the documents disclosed.

16. The particular disputed document is a sequence of what the Respondents say are text messages between Mr Jones and Mr Wilson. The Tribunal was taken to page 198 in the Claimant's bundle of documents, this shows the date of 30 July 2020 and an exchange of text messages between Mr Jones and Mr Wilson containing their views as to the Claimant's performance (the Disputed SMS Messages). This document was in the bundle for the interim relief hearing which took place on 6 August 2020. It was explained that the original sequence of text messages was extracted from Mr Jones' iPhone, however his retention function is set that text messages are automatically deleted after 12 months.

17. Therefore it was necessary for the sequence of text messages to subsequently be accessed via Mr Wilson's phone, which does not have an automatic 12 month deletion setting operative.

18. The Tribunal was taken to page 197 of the Claimant's supplemental bundle of documents. In effect this represents the repeat version of what is on page 198 but it was explained by Mr Malik that when seen in conjunction with not just the screen shot but a video taken of Mr Wilson's phone that potential inconsistencies appear in the chronological sequence of messages. Mr Malik was candid in that the Claimant's contention is that the Disputed SMS Messages were fraudulently created and subsequently interposed into the text dialogue and therefore represents what his client contends is the Respondents having retrospectively created evidence which is material to the issues to be determined. In other words did the Respondents genuinely have pre-existing concerns regarding the Claimant's performance prior to the first of the alleged protected disclosures.

Background

19. The sequence of events giving rise to this acknowledged belated application needs to be set out. The Claimant amongst a number of applications to the Respondents for disclosure, set out in his letter of 6 June 2021 at the section

entitled request for disclosure in relation to the Disputed SMS Messages, "please provide further details and screen shots of the conversation specifically all exchanges that took place since the conversation on the topic started, as this is not currently visible as the page provided only shows the end of the conversation and then in relation to the same SMS conversation please provide an electronic version of it for clarification. Again, please provide any earlier messages relating to the same conversation".

20. The Claimant made a further application regarding disclosure on 19 October 2021. At paragraph 1 he again referred to the Disputed SMS Messages and asked for further details and screen shots of that conversation and then again, he asked for the electronic version of it to be provided. On 26 October 2021 the Respondents' solicitors wrote to the Claimant and stated: "In relation to your request for disclosure please can you confirm and clarify exactly what you are seeking by way of electronic versions of both the SMS conversation as well as the email exchange on 24 March 2020".

21. On 27 October 2021 the Claimant responded stating, "electronic versions saved in email or SMS format to save an email in email format you can use save as in the file". He then continued with technical details regarding what he considered was required which I need not set out. The Respondents' solicitors responded to the Claimant in an email of 5 November 2021. This email attached the electronic version of the email exchange requested and went on to say that Mr Wilson had recorded a video of the relevant text messages on his mobile phone and that was also attached. The Tribunal viewed that video with the parties.

22. On 7 November 2021 the Claimant emailed the Respondents' solicitors. He stated that for the avoidance of doubt he has strong reasons to question the authenticity or relevance of this message exchange. The Claimant believes that the exchange refers to another person or has been forged or tampered with. Also the Claimant says that it is very easy to forge SMS message conversations like the one shown by Mr Wilson in his recent email and he then gave a link to a YouTube video.

23. On 8 November 2021 the Respondents' solicitors replied to the Claimant. They stated that Mr Jones no longer has a copy of the Disputed SMS Messages on his mobile device. However, Mr Wilson was able to provide evidence in relation to the same conversation and had provided the Claimant with a screen shot of the same conversation from his mobile device, a video recording of the same conversation, the original electronic email under cover of which Mr Jones forwarded the screen shot to Mr Wilson in EMI format. The Tribunal was then taken to that document page 230 in the Claimant's bundle and the section which refers to a creation time of 14:49 on 8 November 2021. The Claimant says that this is evidence of fabrication or manipulation of the email and/or original SMS messages. The Respondents say that there is an innocent explanation in that the date of 30 July 2020 was the date upon which material was sent to its solicitors.

<u>The Respondents' position</u>

24. The Respondents' position is that this constitutes trial by ambush and that the Application is far too late. They say that it is self evidently a very serious allegation as it would involve potential criminal conduct. The implications are they say unthinkable because the Company's credibility would potentially be seriously undermined.

25. The Respondents say that the conduct of the hearing would likely to be disrupted and potentially adjourned given that it would be very difficult and potentially prejudicial for the cross examination of witnesses to proceed pending production of an expert report on this issue. They also say that given the lateness of the application, and no criticism is made of Mr Malik, that it should have been made soon after the exchange of witness statements on 30 July 2021. Further, if granted at this late stage there would be no proper directions for the production of an expert report, no opportunity for the Respondents to potentially seek their own expert report or put questions to the expert.

The Claimant's response

26. Mr Malik says the application was made on a timely basis given that the Claimant had requested production of this evidence on 6 June 2021 and it had been in effect the Respondents' delay in providing him with the electronic file on 8 November 2021 which has given rise to the lateness of the application.

Claimant's witness statement

27. It is relevant to consider the position as adopted by the Claimant in his witness statement. The Tribunal was taken to paragraphs 277-284 of the Claimant's witness statement in which he questioned whether it was him in respect of whom the comments were made and this was a point he repeated in a more recent email as well as challenging the provenance of the document. The Respondents' say that the Claimant's position is inconsistent.

Relevant law

28. The relevant discretion the Tribunal is being asked to exercise is pursuant to its general case management powers. There is no specific rule in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules) regarding the admission of expert witnesses. Whilst the use of expert witnesses has undoubtedly become more common in recent years it still very much remains the exception rather than the normal expectation.

29. Guidance on the use of expert witnesses was given in de Keyser Limited v Wilson [2001] IRLR 324 to the effect that there is no presumption that expert evidence will be allowed merely because one party wishes to call an expert and then sets out the general principles applicable to include that where appropriate the parties should use a joint expert, that the tribunal should give directions setting out a timetable for the production of expert evidence and for the other party to call an expert of its own choosing where there is a dispute.

Conclusions

30. The Tribunal has carefully considered this issue, balancing the potential prejudice to both parties in the event of the application either succeeding or failing. In reaching its decision the Tribunal has also considered the provenance of the Disputed SMS Messages in the context of the overall claim and what potential implications any finding from an expert that there was a question mark about the validity of the Disputed SMS Messages to the conduct and outcome of the claim.

31. The unanimous decision of the Tribunal is to refuse the application. The Tribunal reached this decision for the following reasons. First, and perhaps most importantly, is that this in effect represents satellite litigation within the overall case.

32. Secondly looking at the Disputed SMS Messages we do not consider that they are likely to be seminal to our determination of the overall case. There are a number of hurdles in a protected disclosure detriment and dismissal claim which any claimant has to establish. First, they have to establish that they did indeed make qualifying protected disclosures. That is a precursor before going on to consider whether there was a causative link between any such protected disclosures and any resulting detriments and ultimately dismissal. So, whilst there is relevance as to the Respondents' view of the Claimant's performance prior to the first alleged protected disclosure this is unlikely in itself to be determinative.

33. We consider that in the context of the case, and the long witness statements given by Mr Jones, Mr Wilson and the Claimant there would be a plethora of potential material going to that issue. It is not solely a case of the Disputed SMS Messages. Even if the Disputed SMS Messages were to be rendered inadmissible the Respondents' witnesses would still be challenged as to what their views were on the Claimant's performance and what caused any change in approach to him as result of alleged protected disclosures.

34. We consider that the Claimant's application is predicated on looking at things from a micro perspective whereas we will be looking at things from a macro perspective in considering the totality of the evidence, weighing it up and reaching our conclusions based on our findings of fact.

35. Further, we consider that this particular application is highly unusual in its context. It partly arises as result of both the Claimant and the Respondents having an unusual level of technical expertise. Most parties would not be in a position to form their own views as to the authenticity, timing and coding of messages disclosed and thereby seek to challenge their admissibility by way of an expert independent witness as matters going to the credibility of the other party. We consider this to be an important consideration in the exercise of our case management discretion.

36. There is also the question as to the timing of the application. The Claimant, whilst he has made multiple requests in respect of the Disputed SMS Messages has also made multiple other requests in relation to disclosure. It is also relevant in our view that he did not immediately say that is a fraudulent document but rather

he initially argued as set out in his witness statement that the messages were referring to someone else.

37. In our view it is a very late application with very real potential prejudice to the Respondents if it were to be allowed.

38. We then go on to consider what the implications would be for the conduct of the hearing if the application were to be allowed. There would be a major issue as to whether it would be possible to interpose the expert and what effect that would have on the existing timetable. The Tribunal considers that there would be a very high risk of an adjournment if the application succeeded. Both parties would incur substantial wasted costs if the hearing had to be adjourned together with a waste of Tribunal time. That is a relevant factor to be taken into account in the exercise of our discretion. There would undoubtably be very serious prejudice to the Respondents of its preparation and costs associated with a nine day hearing being jeopardised as result of such an application being granted.

39. Therefore, our decision is that the application is not admitted to adduce expert evidence.

40. It appears to us that there is no separate application to admit additional documents. The documents which go to this issue are already before us. It would be open to Mr Malik to cross examine the Respondents' witnesses as to the veracity of these documents. The Tribunal as part of its assessment of the evidence, and in reaching its findings of fact and ultimate conclusions, would clearly take into account its assessment of the credibility of the witnesses and in the weight to be given to the Disputed SMS Messages in the overall chronology of the claim. However, as previously alluded to they would necessarily be seen in context, and not necessarily be determinative of the Respondents' state of mind at the material time.

Findings of fact

The First Respondent

41. The First Respondent is a new, privately owned company which was formed in May 2017 and was originally called Alternative Ideas Limited.

42. The First Respondent' s principal funding was a personal investment of circa £500,000 by Mr Jones. Whilst Mr Jones says that the First Respondent was not solely formed to develop a specific App it is apparent that the development of this App was its primary purpose.

43. By 2019, the First Respondent had secured investment to develop Android and iOS platforms.

44. At the time the Claimant joined the First Respondent in November 2019 its major business opportunity was dependent on the delivery of the new App for both the iOS and the Android platforms. The Respondents say that the timely delivery

of the product was crucial otherwise the funding opportunities would go elsewhere, and the First Respondent's business would fail.

The App

45. The First Respondent was developing, and has now developed, what it describes as a ground-breaking Application platform named "Your Eye Only" or "YEO", for which intellectual property protection is in place (the App). This is essentially a confidential message platform secured through an encrypted private channel, involving sender encryption and continuous facial recognition authentication. The First Respondent says it has a multitude of potential commercial uses.

46. Whilst the App is similar to WhatsApp it has additional security functions to include facial recognition of the recipient of messages. The First Respondent was seeking to develop a product compatible with both Android and iOS (Apple) devices.

47. Mr Jones says that the App has a number of USPs which include facial recognition to confirm the authenticity of the recipient, geolocating of the place at which a message is received, the automatic burning of messages once they have been read and software to prevent screen shots of messages being taken. This later feature has proved the most difficult to develop. He says that none of these features are available on WhatsApp.

The First Respondent's team

48. The First Respondent's team on its inception in May 2017 comprised Mr Jones, Keith Bone, Co-Founder (Mr Bone), Sarah Lawford-Jones, Co-Founder and the daughter of Mr Jones (Ms Lawford-Jones), James Ward, Company Secretary (Mr Ward). Luca Rognoni, (Mr Rognoni), joined in late 2018, Mr Wilson in June 2019 and Davie Janeway (Mr Janeway), Mr Roker, a contractor and Geoff Martin (Mr Martin) also a contractor also joined in 2019.

49. In his role as COO Mr Wilson was hands on. Mr Rognoni had been the CTO but became the Chief Security Officer (CSO). Mr Janeway was responsible for iOS development and Mr Rocker for Android development.

50. A Ukrainian company called Clever Road provided its services between the summer of 2017 and early 2019 in the development of the App.

First Respondent's position as at January 2020

51. Mr Wilson accepted that as at January 2020 the First Respondent was not making any money. It was at a pre revenue stage which is typical for a start-up. He acknowledged that there was significant commercial pressure to deliver a commercially viable product. That is why the Claimant had been brought on board.

The process of app development

52. This initially comprises the architecture and design. The metaphor used is that this represents the foundation of the product. There then follows the server element which in simple terms involves the communication part of the app. Then there is development which is code based. Whilst Mr Jones accepts that the architecture and design are critical he says that these are nevertheless two separate things. He says that this had largely been achieved in 2017. He says that architecture is the technical side which is coded and that design is how it looks and is viewed by the user

53. The various developmental phases were broadly agreed to comprise alpha, which is the very early version of a product (otherwise known as pre-beta), beta which has some level of a functionality for the ultimate end product and pre-release at which stage the product is almost ready to be commercially released.

54. Mr Jones says that there would often be multiple versions of beta, typically between 20 and sometimes as many as 50. These would be released to demonstrate some level of functionality but often there would then be bugs which would need to be fixed. It represents an incremental process which can take many months. Nevertheless, he says the important thing is that a product reaches a stage where its functionality can be demonstrated on devices to potential users and customers.

Depositing of code

55. Mr Wilson had been a developer for 20 years. It never occurred to him that a developer would not post code. He describes this as standard industry practice. He says that Mr Roker and Mr Martin were very open with where they were in contrast to the Claimant.

56. He says that the Claimant kept his code on his own device. Not only did this lack transparency but it rendered the code vulnerable to being irretrievably lost in the event of the Claimant's device being lost or stolen, or the Claimant succumbing to a disabling accident or death.

57. Mr Rocker says that during his time with the First Respondent between September 2019 and May 2020 he would have uploaded code for the Android on approximately 200 occasions averaging twice per day. All employees would have access to code within the repository and it also serves as a backup. A further advantage of regular uploads of code is that it enables changes to be assessed from one upload to another and the ability to go back and ascertain what changes have been made and to what effect on the functionality of the product.

58. The first occasion upon which the Claimant deposited the code was on 20 March 2020. In a subsequent message Mr Jones said to Mr Wilson: "we are in desperate trouble with this clown".

59. Mr Calver says that it is normal practice for there to be a sharing and peer group review of code as produced by a developer.

Version one of the App

60. The initial version of the App, to whose development Clever Road had contributed, was launched in the summer of 2019. Mr Jones says that whilst features have been upgraded it is basically the same App as that which the Claimant was seeking to develop save for the burn after reading function. There were some additional elements of the design which needed upgrading.

61. He says that intellectual property protection was applied for in August 2019 and a patent granted in March 2020.

62. Mr Wilson accepted that version one of the App was not a commercial success only generating revenues of approximately £10,000 from about 2000 users. Nevertheless, he says that the development of a successful App is an incremental process and version one was a steppingstone to version two. The hope was that eventually consumers and investors would be interested in the superior version two of the product.

The Claimant

63. The Claimant was appointed as lead developer for the iOS platform, with effect from 18 November 2019.

The Claimant's Employment Agreement

64. The Claimant's employment agreement dated 16 October 2019 provided that he was employed as Senior Developer and a job description was appended as schedule one.

65. Clause 110 provides that it represents the entire agreement between the parties.

Job description

66. This provides that the Claimant was a lead developer. This was clarified as being in respect of iOS responsible to Mr Rognoni, the Chief Technology Officer (CTO).

67. The job description set out a summary of the Claimant's responsibilities which included:

(a) Developing first class applications for the YEO Messaging Platform to operate on iOS and other platforms. Mr Jones says that this did not include Android.

(b) Whilst the job description set out more generic matters for which the Claimant had responsibility it is the Respondents' position, which we

accept, that his primary function was to develop the YEO messaging platform to operate on iOS.

(c) At the time the Claimant joined he reported to Mr Rognoni together with Mr Janeway, Mr Roker and Mr Martin.

68. The Claimant suggested he was responsible for managing Mr Janeway, Mr Rocker and Mr Martin but this is not accepted by Mr Wilson. He said that they did not need managing and that the Claimant's role was as a lead iOS developer not as a manager.

Mr Janeway

69. Mr Janeway was based in the First Respondent's Nottingham office. It was decided that this would close in late 2018. Whilst he was given the opportunity to relocate to the First Respondent's London office in Hammersmith, he did not wish to do this and the Respondents chose not to replace him.

70. The Respondents say that knowledge of Mr Janeway's impending departure would have been apparent to the Claimant by 18 December 2019. If he had any doubt this would have ceased on 8 January 2020 when Mr Janeway notified the Claimant in a message on the Slack business messaging app (Slack): "I'm sure you all know this by now, but I am moving on at the end of January".

YEO – Tech Development Plan

71. An initial draft was produced by the Claimant on 20 December 2019 and an updated third draft on 15 January 2020 (the Tech Plan).

72. Under the heading current challenges, it is recorded that the current prototype suffers from fundamental design flaws that make it unsuitable for production.

73. The document sets out a proposed strategy and road map which comprised:

- Start with prototype bugs and inefficiencies
- Incremental, "always functioning" approach
- Test-driven development
- Order by Server, Android and iOS.

74. The Claimant set out a provisional time estimate for the various stages of the project. He gave a total estimate for iOS of 51 days.

75. Mr Jones acknowledges that it was an impressive document.

76. Mr Rocker says that the whole team contributed to and bought into the Tech Plan. He described it as a blueprint for the First Respondent's product development.

77. Mr Jones says that whilst the document estimated 51 days for iOS, 28 for Android and 26.5 for server work that work on the different elements of the project could be taken independently and to an extent concurrently. Whilst there were some dependencies there was also scope for independent development on particular elements of the project not conditional on the completion of other elements.

78. He says that the Claimant estimated 51 days to deliver a workable beta. This was in the knowledge that Mr Janeway was leaving and therefore should not have influenced his assessment as to the time required. In any event, it was 51 man days and therefore should not have been influenced by his departure.

79. Mr Wilson says that the dates provided by the Claimant and his colleagues were included on a Gantt chart. This shows a series of horizontal lines indicating the amount of work done, or production completed, in periods of time in relation to the amount planned for those periods.

80. The Claimant says that the timings given were indicative and not intended to be deadlines. He further says that the timings were predicated on the continuing involvement of Mr Janeway. However, given that the final version of Tech Plan is dated 15 January 2020, by which time Mr Janeway's departure was known, we do not accept this. Had the involvement of Mr Janeway been regarded as crucial we consider it inevitable that the Claimant would have set this out in the document. Whilst he says that he was working under the assumption that the First Respondent would recruit a replacement for Mr Janeway again he makes no mention of this.

16 January 2020 First production beta

81. On 16 January 2020 the Claimant produced a document entitled First Production Beta. It gave a timeline up to 31 March 2020 when it was projected that there would be a high quality App. He said that the version should have minimal bugs, high performance and be able to support demos and tests by limited groups, for example potential clients.

Initial working relationship between the Claimant and the Respondents

82. The working relationship was initially good and the Respondents had confidence in the Claimant.

Completion of the Claimant's probation

83. In an email of 12:46pm on 19 February 2020 Mr Jones advised the Claimant that his probation period had been completed. The Claimant responded that day by saying he was very pleased with how things were working between them and that Mr Jones could count on him making YEO a success. Mr Jones concluded by saying:

> "In summary we love working with you and want you to be a key part of YEO Messaging going forward".

84. Mr Wilson says that Mr Jones' comment to the Claimant that "we love working with you" was to massage his ego given that he was a key man in the successful delivery of the product. Nevertheless, he already considered that the Respondents were "treading on eggshells" as he described the Claimant as being unpredictable.

Covid-19

85. Around 11 March 2020, having regard to the restrictions caused by Covid-19, the First Respondent moved to homeworking.

The Claimant and his family suffer from Covid-19

86. The Claimant and his family suffered from Covid 19 for approximately two weeks from about 14 March 2020.

87. At 11:48 on 16 March 2020 Mr Jones messaged the Claimant seeking an update on his health and that of his family. The Claimant responded by saying that he was appreciative of the support and that he knew how important it was to finish the App.

88. During his period of illness the Claimant continued to work as is reflected in a Slack message to Mr Jones and Mr Wilson at 09:46 on 19 March 2020 when he said he had managed to make good progress yesterday and today is looking up as well. In a message to Mr Wilson on Slack at 16:30 on 20 March 2020 the Claimant referenced working over the weekend with a view to meeting the "deadline". The Claimant disputes that there was a hard deadline.

89. Mr Wilson does not accept that the Claimant suffering from Covid-19 provided a valid reason to explain the delay in producing the code. Whilst accepting that the Claimant and his family were ill, and this would have caused some delay, it does not in his view explain why after four months with the First Respondent the Claimant had delivered nothing.

Ongoing communications regarding the development of the App

90. In an email at 20:33 on 22 March 2020 Mr Jones said to Mr Wilson that "the ask will be to deliver a business product within 90 days max". Mr Jones says that this was to be a more advanced service than the initial consumer product, and would not be ready to go live, but the First Respondent needed a functional product which it could demonstrate to potential users in the interim.

91. Mr Jones says that the precursor for the Claimant's work was to complete the consumer version of the App. It would only be once this had been completed that the First Respondent would seek to develop the pro and business versions of the App.

92. The Respondents say that the Claimant in effect hid the code he was working on for the first four months. Further, he provided no communication as to his real progress.

93. Mr Wilson disputes that other members of the team required the Claimant's assistance and believes he was in effect imposing himself on them. He regards this as an excuse not to focus on his primary objective to develop the code.

94. Mr Jones says that he was appalled by the Claimant's performance and inability to deliver anything. The normal expectation is that a developer will produce periodic versions of the product for review. The Claimant failed to do so. He said that the Claimant produced no code and no demo of the product. Therefore, it was difficult to gauge what, if any, progress he was making in his first few months with the First Respondent.

95. Mr Jones says that whilst the Claimant had produced a development plan it was ultimately irrelevant. He says that the key to a delivery was in the coding and that the Claimant never got past the first 10% to 20%. He described the version of the App received from the Claimant as "appalling".

96. Mr Wilson says that he was shocked and horrified to realise the failure by the Claimant at the end of March 2020 to progress the App. He said that whilst there had been lots of verbal conversation which primarily involved the Claimant making generalised optimistic statements such as "I am going to build you a beautiful App" and "you have hired the right person".

97. Mr Wilson disputes that there were shifting goal posts as to the USPs to be included in the App. For example, he says there had been no difficulty including the ability to force the users' photo avatar on the Android version of the App. He says that the Claimant was always promising that he could deliver things, for example, disable the ability of a recipient to take a screen shot but then failing to deliver.

98. Mr Wilson says that it was not an impossible project. Yes, it was difficult, but the issue was the Claimant's failure to deliver any code rather than his inability to produce code which achieved all desired USPs.

99. Mr Wilson accepted that Mr Martin was struggling with the service side of the project. Nevertheless, he says that this should not have had a material impact on the Claimant's ability to deliver his side of the project. He says that the Android product, which relies on the same server, was delivered within, or not far in excess of the estimated 28 days. This therefore did not represent a reason why the Claimant should have been so far behind with his time estimate of 51 days for the iOS product.

<u>The Respondents' view on the Claimant's performance</u>

100. Mr Wilson says that on the Claimant's recruitment and for the first few months that he and Mr Jones really believed in him and wanted it to work. They wanted

to take him on the "journey". However, he says that the penny started dropping that things were not happening in the development of the code. He describes the delivery of code as a very tangible objective. He described the Claimant as liking what he described as more academic or higher level tasks. This was sometimes at the expense of his core function which was to develop code.

Text message from Mr Jones to Mr Wilson on 24 March 2020 at 08:32

101. Mr Jones said:

> "I need to see something from Humberto as a beta this week. He is way behind, does a lot of talking yet neither of us have seen anything, how do we know he is even close? It's about time he delivers a demo to show where he is.

Text message between Mr Jones and Mr Wilson on 25 March 2020

102. In a text message exchanged between Mr Jones and Mr Wilson it states: "One and a half months? Can he count? He has been on this since November? Wtf!".

103. Further in the exchange is the following:

> "We need to get him to put it on the phone for us to see. We need that no matter what functionality it is. It gets updated then on a regular basis".

104. The Claimant disputed the veracity of this text exchange and various documents in the bundle. We find that all documents were almost certainly created on the date stated. We do not accept the Claimant's explanation that there were technical glitches in the documents consistent with them having been retrospectively created and consider that the communications both individually and collectively are of sufficient contextual consistency within the overall chronology that any retrospective embellishment or addition would be highly improbable.

Slack message from Mr Jones on 25 March 2020

105. In a Slack message at 13:39 on 25 March 2020 Mr Jones advised the Claimant and Mr Rognoni as follows:

> "Both, although we are paying full salary for March and you are both diligently working, we have the opportunity to claim for the two weeks isolation following your call to 111 re Covid-19".

26 March 2020

106. In a Slack message to Mr Wilson the Claimant set out the bullet points and timeline for the beta version of the App. He said that 9 April 2020 was the most likely date for pre-beta and beta at the end of April 2020. He concluded by saying these were estimates and the actual dates may vary. He said that Mr Rognoni had

been helping him, but he is not an experienced iOS developer, so his work is rather slow.

The granting of share options to the Claimant

107. On 26 March 2020, Mr Jones wrote to the Claimant and confirmed that he would be offered share options. He says that the Claimant would not acquire a vested entitlement unless he remained employed for at least a year. He said the Claimant had been verbally promised the grant of share options on joining. Whilst he was dissatisfied with the Claimant's performance, he was desperate for him to produce a demonstrable App and thought that this may incentivise him to do so.

Video meeting on 27 March 2020

108. There was a video meeting on 27 March 2020 between the Claimant and Mr Jones and Mr Wilson. The Claimant's wife was in the same room as the Claimant at his home address.

109. The Claimant says that was told by Mr Jones and Mr Wilson that the First Respondent was running low on money and that staff sacrifices were needed. He was asked to reduce his salary by 25%. He says that he accepted a reduction in principle but sought a smaller percentage. The Claimant alleges he was asked to combine 10% deduction and the acceptance of furlough, but he would be required to continue working and must keep it quiet.

110. The Claimant states that he believed that training while furloughed was allowed so he offered this instead. He says he offered to check the government rules. He says the company agreed to promote him to acting Chief Technical Officer (CTO). Later that day he was given the title.

111. Mr Wilson disputes that the Claimant being the "acting CTO" constituted a promotion. He says it would be more correct to describe him as interim rather than acting CTO. His view was very much he can call himself whatever he wants as long as he delivers the product.

112. Mr Jones said that giving the Claimant the title of CTO was not intended as a promotion but rather "stroking his ego". His responsibilities did not change. He was to use any possible means to incentivise him to deliver the product which he had promised.

113. The Claimant says he researched government guidance and at 17:02 on 27 March 2020 phoned Mr Jones to explain that training was within the rules but there were limitations as to the activities he could undertake during training. The Claimant was prepared to be furloughed and continue with online training.

114. It is the Respondents' case that the Claimant's suggestion that he needed to spend up to 80% of his time training caused immense concern, as he had represented himself as being fully competent.

Claimant's email of 27 March 2020

115. The Claimant sent Mr Jones an email at 17:54 on 27 March 2020. He started by saying:

> "Thank you for the opportunity to keep my job and for the promotion to CTO. As discussed, I am willing to be furloughed whilst undertaking online training on the topics that concern the company".

116. Mr Jones says that he found the reference to keeping his job to be extremely surprising. He further says that the title of CTO was not of materiality and did not constitute a promotion. He says that he was desperate to accommodate the Claimant with a view to facilitating his production of the App.

117. The Claimant concluded his email by saying that the training would be to focus on knowledge, skills and examples fully applicable to and easily usable by the company and the development of the App.

118. Mr Jones says that he was suspicious as to why the Claimant wanted furlough. He believed it was a delaying tactic as he considered that the Claimant was aware that he was substantially behind on his promised timetable for delivery of a beta version of the App. He thought the Claimant was looking to have what in effect would be a "furlough holiday".

119. Mr Jones says that the First Respondent's immediate financial difficulties were assuaged within seven days as a result of interest in the App from Rhinoplasty Europe and an investment of £100,000 from two of its members.

120. Mr Wilson says that there was never any suggestion that anyone should continue working whilst on furlough. It was merely an initial discussion on the furlough scheme being outlined in general terms.

28 March 2020 and email to Cyber London

121. In an email of 14:19 from Mr Wilson to Grace Cassy of Cyber London, a business accelerator, he said:

> "We are not quite live yet as we decided to reengineer the product from the ground up to improve the security, performance scalability and usability.
>
> Regarding scale and stability – We are starting to test the early beta app now but performance is not an issue going forward (after the re-engineering work), the issues now are more about usability and ironing out minor bugs and which new features people want to see."

122. Mr Wilson says that the reference to "re-engineering the product from the ground up" was to disguise the reality that the Claimant was already showing signs of being incapable of delivering what he had promised. He says that it would have been totally unacceptable to have communicated this to a potential client. Ms

Cassy had potential business avenues to the Home Office, where she had previously worked, particularly in the context of initiatives such as track and trace. It was therefore an important relationship for the First Respondent to maintain and nurture.

Document entitled User Features and their status for iOS dated 30 March 2020

123. The Claimant says that there had been add-ons to what was originally proposed. Mr Jones says that he was horrified by the status as set out in this document and the apparent lack of progress.

124. He sent a Slack message to the Claimant at 11:52 that day stating:

> "Humberto, given the amount that is to be done are you certain that you as the iOS lead can hit the revised deadline for delivery of this product? There seems a lot more to do than I have been led to believe and some very basic functions not completed".

125. The Claimant replied at 12:46 to include:

> "Software delivery dates are never certain. I am however confident that we will have most functionality ready by the end of April, if not all of it.

126. He concluded by stating:

> "I am nevertheless committed to making the highest possible effort to have a good beta by the end of April".

127. Mr Jones responded at 13:27 that day to include:

> "Your comment "most functionality by the end of April" is again very, very worrying. It sounds like a delivery from Ocado when they can hit the date, but you never know what you will get until it arrives. Not acceptable I am afraid.
>
> When we discussed the furlough arrangement you made a comment to me that you spend a lot of time training in order to do the YEO development. Does this mean that you are having to learn how to implement the features we have before coding them each time?
>
> Your comment, I am nevertheless committed to making the highest possible effort to have a good beta by the end of April, is not what I want to hear, end of April is release not beta".

He concluded by stating:

> "If you are unable to meet the schedule you agreed to last week then now is the time to advise us so we can assess our position".

128. It is the Respondent's case that investors and potential investors were becoming increasingly concerned by the timescales. The App needed to be developed before there was any prospect of an income stream.

Conversation between the Claimant and Mr Rognoni at 17:18 on 30 March 2020

129. At this point the Claimant started covertly recording various conversations. He says that he made covert recordings both to protect himself and the public interest. He says that he was encouraging Mr Rognoni not to commit criminal activity. He says that it was only on 8 April 2020, when he was satisfied that Mr Rognoni was not going to be working while furloughed, that he at least temporarily ceased to covertly record his conversations.

130. He says that this was a purely work conversation. He explains his recording on the basis that he was concerned that Mr Rognoni maybe working whilst on furlough and he was seeking to ascertain whether this was correct. At paragraph 73 of the transcript, which was subsequently typed up by the Claimant, he is recorded as stating that the deadline for the end of March was the beta.

131. There was a further conversation between the Claimant and Mr Rognoni at 16:24 on 1 April 2020.

Claimant's particulars of claim and allegations regarding working whilst furloughed

132. The Claimant's description in his particulars of claim suggests that Mr Jones categorically asked the Claimant to continue working on the App whilst furloughed, and that he understood this was against the rules. The Claimant alleges he reiterated that most of his time could be refocused to online training, which was compliant with the furlough rules. The Claimant says he insisted his furlough should be done in observance with the rules. Mr Wilson said he would consult and revert.

Conversation between the Claimant and Mr Wilson at 16:24 on 1 April 2020

133. Again this was covertly recorded by the Claimant. At paragraph 45 the Claimant says: "I just don't want to be furloughed and break the rules".

134. At paragraph 48 Mr Wilson says that from our perspective the reason for furlough is to help the company and get some contribution to people's salaries.

135. At paragraph 50 he goes on to say, "we can't have a different working practice for people and a loss of productivity".

136. At paragraph 51 the Claimant talked about his suggestion of training and how he could use the time whilst furloughed to develop the product so it could be uploaded to the repo by a colleague.

137. At paragraph 62 the Claimant said that a lot of his existing work involved online research and could be easily refocussed as online training.

138. Mr Wilson said that he would consider and discuss with Mr Jones.

Second conversation of 1 April 2020 at 17:49 between the Claimant and Mr Wilson

139. At paragaraph 14 Mr Wilson said that he did not think the First Respondent was going to go down the furlough route.

140. The Claimant says there was a discussion about the relevant percentage reduction in his salary. The Claimant would not accept more than 10%. The Respondents' say that the Claimant wanted a 5% pay increase by way of reward for any deferment.

141. The Claimant argued for online training furlough on a temporary basis. He says he was shot down and he puts it as follows: "During this second call Mr Wilson insinuated that I either worked illegally while furloughed, took a 20% salary deferral on their terms, or got fired." He says he was left without viable options.

142. The particulars of claim fall short of saying that Mr Wilson used clear words. It is unclear what is meant by "insinuated." There is a fundamental dispute of fact.

143. Mr Wilson alleges the Claimant pressed to be placed on furlough leave during which he could undertake extensive training. Mr Wilson was not happy to agree to those terms, as the Claimant was seen as a key resource, and the App needed to be developed. It is for that reason that the Respondents say that the possibility of furlough was abandoned in the Claimant's case.

144. The conversation then moved on to the Claimant's dissatisfaction with the email he had been sent by Mr Jones. Mr Wilson (at paragraph 50) accepted that it was a "very poor email" that was not justified.

145. Mr Wilson says that the second part of this conversation needs to be seen in context because he was reacting to the Claimant's earlier indication that he was considering resigning. Whilst he had concerns regarding the Claimant's performance it would have been extremely bad from a business perspective if a key man had resigned at that point without a replacement being in situ.

Audio recordings

146. At the beginning of day 8 the Tribunal listened to audio recordings of telephone conversations between the Claimant and Mr Wilson at 16:24 and 17:49 on 1 April 2020. Mr Malik considered it necessary for us to hear these recordings to observe what he described as the intonation of Mr Wilson. However, our view was that Mr Wilson was patient, albeit keen to bring the conversations to an end. We did not consider that anything beyond reading the transcripts was gained from listening to the audio recordings.

Conversation between the Claimant and Mr Rognoni at 15:14 on 2 April 2020

147. This was initiated by the Claimant. At paragaraph 30 he raised the question of Mr Rognoni being furloughed.

148. At paragaraph 31 Mr Rognoni says that officially he was not working but that at the moment he was continuing to work.

149. At paragraph 33 he says that he was not certain as to his future and that in any event he did not think anyone would be able to check up whether he was actually working whilst he was at home.

150. There is significant dispute about this conversation. It is common ground that the Claimant covertly recorded it. The Respondents say that the Claimant sought to lead Mr Rognoni into a number of admissions. It is Respondents' case that Mr Rognoni was not furloughed at that time, but was later furloughed on 10 April 2020. It is the Claimant's case that Mr Rognoni indicated he was furloughed and had been required to continue working.

151. Mr Jones says that Mr Rognoni was furloughed from 10 April 2020 until a date unspecified at the end of April 2020. He says that Mr Rognoni did perform work functions for at least some of this period. He says that once it was realised that Mr Rognoni was continuing to work that the First Respondent then notified HMRC so that the furlough money could be repaid. He denies that there was any intention to claim furlough money illegally.

Conversation between the Claimant, Mr Wilson and Mr Rognoni at 13:45 on 3 April 2020

152. At paragraph 176 Mr Wilson says that they should not let the project slip beyond April and that the App was desperately needed.

Conversation between the Claimant and Mr Rognoni at 10am on 6 April 2020

153. At paragraph 135 Mr Rognoni says that from 10 April 2020 he was furloughed.

154. At paragraph 138 the Claimant asked if he was continuing to work to which Mr Rognoni responded that he was.

155. Mr Rognoni said he would stop working if it crossed the boundary.

Conversation between the Claimant and Mr Rognoni at 11:23 on 8 April 2020

156. At paragraph 7 Mr Rognoni says that his plan was to continue to work and try to help as much as he could.

157. At paragraph 26 the Claimant said to Mr Rognoni that if he refused to work the First Respondent was going to fire him.

158. At paragaraph 28 the Claimant went on to ask a very open question as to what Mr Rognoni's relationship was like with Mr Jones. The Claimant explained this on the basis that he was seeking to establish the extent to which Mr Rognoni was under pressure from Mr Jones to work whilst furloughed.

Progress on the App

159. The Claimant says that he made significant progress on the App in April, but it is common ground he did not deliver the project.

iOS YEO client version 2 release notes dated 4 May 2020

160. The Claimant produced an executive summary. Under the heading of proposed priorities, he said that the backlog is divided into three categories. known bugs, technical debts and missing features. A list of missing features was set out. Mr Jones says that the missing features comprised most of the App's USPs.

161. The Claimant alleges that on 4 May 2020 Mr Wilson stated he was unhappy with his performance and the status of the iOS project. The Claimant said there had been a series of problems including his Covid-19 illness, the time to prepare for lockdown, the flooding of Mr Rocker's property, the Easter break and the pandemic.

162. The Claimant accepts that he did not deliver the product on 4 May 20*20*. The Respondents were horrified by the work produced and considered it had limited functionality and failed to meet expectations in numerous ways.

Conversation between the Claimant and Mr Rognoni of 15:42 on 7 May 2020

163. At paragraph 69 Mr Rognoni says that he was furloughed. The Claimant responded by saying so you are furloughed but they keep asking you to work to which Mr Rognoni affirmed.

Respondents' intention to dismiss the Claimant

164. In answer to a question from the Employment Judge, Mr Wilson said that it was inevitable that the Claimant was going to leave by 4 May 2020 when the process culminating in the recruitment of Mr Calver commenced. He said that the ultimate reason for the Claimant's departure was that he could not deliver code and that everything else was subsidiary to that.

Recruitment of Mr Calver

165. On 7 May 2020, the Respondents interviewed a new senior iOS developer, Mr Paul Calver (Mr Calver). He commenced on 11 May 2020. The Claimant was not informed of this process. The Respondents say that he was employed because it was necessary to employ a new person, despite the expense, given the importance of the project and the fundamental failure of the Claimant.

Stand up meeting at 9:17 on 11 May 2020

166. At paragraph 21 Mr Wilson said that the iOS is taking a huge amount of time more than it should. The Claimant responded by saying it was really good and works really well and it was just a matter adding features. He says that it could all be done in one and a half months.

167. Mr Wilson at paragaraph 23 said that he had hired an iOS developer as of today. This was Mr Calver. Mr Wilson explained that he was coming in to supplement the team.

168. There was no specific reference to any short falls in the Claimant's delivery of the App. The Respondents say that such concerns would not have been raised in a team meeting.

Criticism of the Claimant on 11 May 2020

169. There was specific criticism of the Claimant on 11 May 2020 relating to his failure to deliver features which he had promised would be available.

170. The Claimant says "I came to the realisation that the company decided to replace me upon my refusal to cooperate with their fraudulent furlough initiative and engaged in a strategy of bullying and intimidation to make me resign, also demoting and ostracising me. For this reason, on Monday 11 May 2020 I contacted the whistle-blower charity "Project – Advise" for help."

17 May 2020 emails

171. On 17 May 2020 at 23:38 in reply to an email from Mr Jones some 7 weeks earlier, the Claimant made what he describes as one of his protected disclosures. The Respondents say that this email was a deliberate attempt to revisit a discussion which had been concluded about 6 weeks earlier and was entirely self-serving. It read as follows:

> "My answer: no, I don't need to learn how to implement the features before coding them each time. I proposed the training initiative because on the 27 March you asked me to get furloughed and take a wage deferral on the basis that the company was running out of cash. To my surprise you also asked me to keep working while furloughed. I told you that I needed to get advice on this, and you asked me not to do so because you knew that this was against the rules. You asked me to just do it and not to tell anyone. I said that I didn't want to break the rules because it's not something I do, and more so because I have a family to support. I said that I believed that training was allowed by the furloughing rules and proposed to undertake online training while furloughed because an important part of my work involves research that can be refocused as online training. Initially you seemed to agree and soon after our conversation I sent you an email thanking you and quoting the applicable government rules, which, as I said, allow for online training, but do

> not allow furloughed employees to contribute to revenue or provide services to the company. However, a couple of days later Mr. Wilson told me that you had rejected my training-based furlough initiative, insisting that it was not acceptable because I wouldn't' be undertaking all of my usual work activities. He said that other employees of the company had agreed to be furloughed yet keep working, and insinuated that I should do likewise, or "else". I held my ground and refused to break the rules. Please understand that the government rules are clear in that furloughed employees cannot keep providing services for the company. I believe this to be fraud. Accordingly, no employee of YEO should be working while on furlough: these are critical times for our society and companies should not be profiting from the government's efforts to uphold the economy during the pandemic. Equally, no employee should be put in a situation where they need to decide between breaking the rules or losing their jobs."

172. The First Respondent sought legal advice concerning the Claimant's dismissal. The First Respondent waived privilege in relation to that advice. The Respondents did not consider that any benefit existed in going through a disciplinary or capability process with an employee who was unable or unwilling to accept that his performance was unacceptable and who instead continued to blame others for his failure to deliver the project on time and to a satisfactory standard.

Conversation between the Claimant and Mr Wilson at 16:59 on 18 May 2020

173. Mr Wilson says that he was shocked that the Claimant was still talking about facial recognition. He said: "Your productivity is incredibly slow".

174. The Claimant then reverted to the issue of furlough. Mr Wilson said that the First Respondent had not broken any rules but was merely exploring different avenues.

25 May 2020

175. In an email from Mr Wilson to Mr Jones of 17:23 on 25 May 2020 he said "referencing the Claimant":

> "I do not think he is intentionally delaying the project; it is much more that he is just not very good and not up to standard".

He went on to say:

> "The only option we have is to terminate him".

He concluded by saying:

> "Humberto has a habit of seeing things the way he wants them to be".

27 May 2020

176. In a Slack message from Mr Jones to the Claimant he referred to his behaviour as being "somewhat odd". He said that he was shocked that he was asking for additional holiday by way of compensation for days worked at weekends.

177. In a Slack message from Mr Jones to Mr Wilson (but inadvertently sent to the Claimant) he stated (referencing the Claimant's holiday entitlement):

> "His numbers are also bollocks"

He said:

> "That's 12 days owed to end of May when he gets his notice".

178. The Claimant says that he did not interpret this as an unequivocal statement that his employment was to be terminated. He said that the position remained extremely uncertain. We find that it would have been self-evident to any intelligent employee, and we consider that the Claimant is clearly intelligent, that his days were numbered.

Emails on 29 May 2020

179. On 29 May 2020, there were numerous emails. At 16:24 Mr Jones sent the following email to the Claimant.

> "Given that you are accusing the company of acts of a "criminal" nature we take this very seriously. As a consequence, I am seeking legal advice so please be very clear with your accusation and let me know if I misunderstand. If you wish to pursue this route as a way of ransom of the company to provide additional compensation then I am afraid we will not entertain it in any way and will in any case revert to the disciplinary procedure as referenced in your employment contract. As you were told yesterday, we are unhappy with your performance and believe that you are unhappy being part of our company. To protect the business and the employees we have to act. We chose to offer you a compromise agreement rather than terminate the employment for poor performance, which we have discussed with you several times."

180. The Claimant's email of 29 May 2020 illustrates the breakdown in the relationship. It reads as follows:

> **"**Alan,
>
> I will be uploading the code today.
>
> Again, this email is without prejudice (except for the raising of the Grievance below).

I'm raising a Grievance with immediate effect due to, among other issues, the intimidation, bulling and harassment I have suffered from you and Alan Wilson ever since I refused to cooperate with your Apparently fraudulent furlough scheme and raised a protected disclosure. I have evidence and witnesses to this effect and will not hesitate to action any legal avenues, including criminal procedures, if forced to do so. I have not accused the company of anything but have been advised that the events that occurred are potentially criminal - note the word "potentially".

I am not holding the company to ransom, but if you are going to terminate my contract without me being in breach of contract then I have the right to negotiate a compensation I feel Appropriate, particularly in view of the above and in these challenging times. If you want to action disciplinary procedures then please feel free to do so, keeping in mind that I actioned my Grievance before you suggested this, as per yesterday's conversation and my earlier email. Further, I have replied to your emails in what I consider is Stage 1 of the Grievance procedure in the Employment Contract, but neither Alan Wilson nor You have taken any corrective measures, hence why I'm proceeding formally with Stage 2 of the Grievance procedure as per this email. I have put Sarah Jones in copy as I believe she is the closest to an HR Manager YEO has. Since the law allows me to be accompanied by a colleague or Union representative, yet lockdown conditions are making this unviable, I am Appointing my wife Alexandra as witness and companion in these exchanges.

The main points of my Grievance are:

* I was asked repeatedly to cooperate with an Apparently fraudulent furlough scheme, causing distress to me and my family.

* You and your managers have made unreasonable demands and have blamed me for issues beyond my control. For example, I have been accused of promising hard deadlines and features and not delivering. This is untrue.

* I have had to endure emails and hours of conversations demeaning my performance, work quality, knowledge and expertise.

* I have been promoted to Acting CTO and then demoted without notice both in title, as you later referred to me as Lead iOS Developer, and in action, for example excluding me from meetings relating to server architecture which I used to be involved in.

* I have been ostracised, particularly being excluded from important recruitment activities. To illustrate, the hiring of Paul Calver, an iOS Developer who happens to have skills almost identical to mine, took place behind my back. Further, you have been interviewing several other iOS developers without telling or involving me.

* You have blocked my access to working tools, for example reducing my access rights for Jira and suspending my G Suite account yesterday.

* Yesterday you also sent me an email where you state that you intend to give me notice by the end of May, before having any of these conversations or going through a disciplinary procedure. This clearly shows that you intend to dismiss me regardless of the outcome of any disciplinary procedure.

All these actions started and continued immediately following my refusal to cooperate in a furlough scheme where the expectation was that I keep working while furloughed, which in my view was and is fraudulent. Further, this request and the subsequent mistreatment listed above equal to a breach of trust and a breach of contract. I am not accepting this breach and these changes to my contract, have the right to work without intimidation, bulling or harassment, and am therefore working under protest.

I demand that according to my employment contract and employment rights this situation is corrected immediately. I am not in breach of my contract, YEO is in breach of my contract due to the grievance points above, and if you expect to dismiss me then I am free to negotiate any compensation I consider Appropriate - that's not holding someone to ransom, you don't have to dismiss me. I have not stopped performing my duties and am doing as possible to continue even under the unacceptable detrimental working environment you have created. You had the opportunity to come up with a reasonable agreement but seem to have chosen otherwise.

In the meanwhile, please refrain from calling me on my personal phone. The reason I had to stop working this afternoon when you called was stress, particularly because of your threats with referral to your lawyers, which add to the bullying, intimidation and harassment suffered. Any further calls to my personal phone will be reported to the police as intimidation and harassment.

Humberto"

181. The Claimant says that the delay in uploading the code was a result of an internet outage on talk talk. He finally uploaded it before going on holiday on the evening of 29 May 2020.

Disabling of the Claimant's access to the First Respondent's systems

182. The First Respondent disabled the Claimant's access to its systems. They say that this was a result of him being on holiday the next week and not needing it. However, it was also as a result of the Respondents' concern that he was a disgruntled employee who was acting in a volatile manner and may cause damage to the First Respondent's business.

Claim of constructive unfair dismissal on 8 June 2020

183. The Claimant emailed a letter alleging that he had been constructively dismissed which reads as follows:

> "This morning I tried to start my working day and found that my work accounts remain closed, as they have been since I raised a formal grievance on the evening of the 29 May 2020. As explained to you in numerous communications, I needed my work accounts to be operational before, during and after my leave because, for example, of the following reasons:
>
> - I needed to send follow-up documents to the development team.
> - Some of my work-related online subscriptions will expire.
> - I need to keep receiving work emails and meeting invitations from the team.
> - My reputation with the rest of the team and other people emailing me will be affected.
> - I needed to prepare evidential support for the grievance I just raised.
>
> Despite my repeated requests to restore my work accounts earlier and despite your promise to do so by today before the start of business, these remain closed, so I have not been able to reincorporate to work today. Note that in lockdown conditions I am unable to do any work without my online work accounts. Further, this mistreatment adds to a long list of detrimental actions by you and Alan Wilson as detailed in my grievance and a number of earlier emails. You have now closed my work accounts for more than 10 days, not only during my leave, but also during working hours.
>
> As per your email sent on the 1 June 2020 at 12:37 the reasons why you closed my work accounts, in your own words, were: "*The work you do is confidential, your accusations towards the company are very serious and your emails underpin the breakdown in relationship, this and the fact that you did not respond within the business day to direct requests to upload code, left us with no choice.*" You have made reference to my "serious accusations" in a number of other emails, for example on email sent on the 29 May 2020 at 15:30 where you state: "*I am afraid with your accusations we need to immediately refer this to our lawyers.*".
>
> As you know I uploaded my latest code later that day and explained to you that I had to take a break due to stress. Further, that day my Internet was unreliable due to a country-wide outage and I made Alan Wilson and the team aware of this. It would have been more reasonable to conclude that I did not receive your emails in time or that I did not have Internet access to upload the code. Closing my accounts just because I made the submission somewhat later than your arbitrary 15 minute deadline seems extremely unreasonable and disproportionate - an excuse to be frank, and in any event you closed my accounts after my code submission and refused to restore them even after I informed you of its completion. Further, in your latest email sent on the 4 June 2020 at 09:24 you say that your intent to terminate my employment but provide no reasons for such a decision.

Simply put, it is clear that the principal reason why you closed my work accounts and intent to dismiss me is because of the serious "accusations towards the company" I made in my grievance and protected disclosures. You have not provided any other sensible explanation.

Further, yesterday 7 June 2020, in preparation for my return to work, I tried to connect to my G Suite account, which is used for emails, Appointments, meetings etc., and received an "invalid password" error, specifically: "Your password was changed 3 days ago". This morning the message changed to "Your password was changed 11 hours ago". Initially you disabled my account and there is no need to change its password to either keep it disabled or reinstate it, so I fail to understand why it was necessary to change my password twice - unless you have decided to tamper with my G Suite account. The email address used to reset the password of my account has also been changed by the administrator, so I am unable to correct this myself. I warn you to refrain from sending emails in my name or tampering with my existing emails, Appointments or other G Suite data. For same reason I will not be held responsible for the content of any data that you may currently have relating to my accounts.

To summarise, you took away essential working tools from me after I made protected disclosures and raised a grievance that you mistook for "accusations". You did this without undergoing any disciplinary procedure and right after I submitted a whistleblower grievance. Your long-standing detrimental conduct is forcing me to resign in this Constructive Dismissal. Since the reason of your conduct is the "accusations" I made, in other words my protected disclosures as whistleblower, this dismissal is automatically unfair."

9 June 2020

184. The First Respondent purported to dismiss the Claimant. The letter reads as follows:

"Termination of Employment

Further to my email of 27 May which stated our intent to terminate your employment contract and discussions with you on 28th. I am writing to confirm that we are terminating your employment with effect from today's date in line with clause 102 of your contract of employment.

You will be paid 4 weeks in lieu of notice, which will be made within 28 days of the termination. You have accrued a total of 11 vacation days including 6 days in lieu of weekend working. You will be required to take your holidays during the notice period with the balance of the days as garden leave.

> As in your contract of employment, please return any company property including without limitation all confidential information, security cards, computer equipment and mobile phone. Due to lockdown, if you would kindly box up the equipment safely, we will make arrangement to collect them before Friday 12 June. You should provide a signed statement that you have fully complied. I would also like to remind you of the post- termination restrictive covenants in your contract (clause 106).
>
> I wish you well for the future."

The Claimant and his concerns

185. The Claimant says that he did not initially contact HMRC because it was impossible to do so given that their phones were not being answered. He says that in early May 2020 he contacted a whistle blowing charity and may also have taken legal advice.

186. The Claimant considers that there was a fundamental distinction between what he describes as "legal" and "illegal" furlough. He considers that his training proposal was on the legal side of the demarcation. He says that it would be enriching his knowledge for the benefit of the First Respondent, but it constituted training rather than providing services to the First Respondent.

The Respondents' view of the Claimant

187. Mr Wilson described the Claimant as being a difficult character. He says that the Claimant was constantly going off at tangents. He described this as extremely tiring. He says that to avoid what would be endless conversations he did not argue with everything he said and just wanted conversations to end and to move forward.

Mr Rocker's evidence

188. He described the First Respondent's business as being a high velocity environment working to tight deadlines.

189. He says that the development of the App for Android had a head start of a few weeks on the iOS. Nevertheless, he said that the coding for Android had fundamental problems and significant work was required.

190. In relation to the iOS code he says that it fell behind schedule partly as a result of a lot of unknowns. This included architectural and coding issues. He said that the Claimant had additional responsibility for these architectural issues which delayed his coding.

191. He says that there were effectively four separate tranches of work comprising Android, iOS, server and architecture.

Mr Calver's evidence

192. He was employed by the company between May 2020 and July 2021. He left of his own volition seeking further challenges. He described it as having been a year of intensive work.

193. He says that by early 2021 there was a presentable beta which contained all of the USPs. Whilst there were bugs which needed to be fixed it was demonstrable. Whilst there were some additional functions added to include group chat and media sharing the basic USPs of facial recognition, geo fencing and burn after reading were all in situ.

194. He says that in the recruitment process he was advised by Mr Wilson that there had been concerns regarding the Claimant's performance. However, nothing was said about his personality or any issues regarding furlough.

195. He did not meet the Claimant in person and could not recall any telephone conversations with him. He may have been involved in group video calls in which the Claimant participated.

Letter of 29 July 2020 from Katie Hearst, Director of Elm Financial Solutions Limited

196. Ms Hearst of Elm was engaged as an accountant. In this letter she confirmed that she had processed a claim under the Corona Virus Job Retention Scheme for Mr Rognoni for April 2020. However, due to the rapidly changing circumstances of the First Respondent Mr Rognoni had to return to work during April. She said that no other employee of the First Respondent was placed on furlough leave at any time.

197. In a further letter of 5 August 2020, Ms Hearst explained that to prepare for the eventuality that employees of the First Respondent may need to be furloughed she had prepared the draft March 2020 pay run to include payslips split between furloughed salary and normal salary.

Delivery of version two of the App

198. The App reached beta stage in approximately March 2021 and went live in the summer of 2021. This was largely as a result of the efforts of Mr Calver.

The Law

Protected disclosures

199. Under section 43A of the ERA, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B of the ERA:

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following (with only the potentially relevant subsections being set out):

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

200. The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employee making the disclosure; and fourth, was a belief reasonably held that the disclosure tends to show one or more relevant failing and was made in the public interest. All of these elements must be satisfied if the claim is to succeed.

Disclosure of information

201. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly (see Kilraine v Wandsworth LBC [2018] EWCA Civ1 1436). Each case will turn on its own facts.

202. As noted in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT it is not sufficient that the claimant has simply made *allegations* about the wrongdoer (especially where the claimed whistleblowing occurs within the claimant's own employment, as part of a dispute with his or her employer). According to Slade J:

> "… the ordinary meaning of giving “information” is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating “information” would be “The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around.” Contrasted with that would be a statement that “You are not complying with Health and Safety requirements”. In our view this would be an allegation not information.'

203. In Western Union Payment Services UK Ltd v Anastasiou *UKEAT/0135/13* (21 February 2014, unreported) Judge Eady, following and applying the Cavendish distinction between information on the one hand and the making of an allegation or statement of position on the other, commented that 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The

assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive."

204. This comment was made in the context of possible qualifications to the basic *Cavendish* principle, namely that although the most obvious form of disclosure will concern primary facts, there can also be cases of mixed primary facts and opinion which on balance still qualify.

205. On further appeal to the Court of Appeal, it was held that whatever is claimed to be a protected disclosure must contain sufficient information to qualify under the s.43B(1); the position being that in effect there is a spectrum to be applied and that, although pure allegation is insufficient (the actual result in Cavendish), a disclosure may contain sufficient information even if it also includes allegations. Kilraine was cited and applied subsequently by the Court of Appeal in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601.

206. The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.

Legal obligation relied upon

207. It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see Bolton School v Evans [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made.

208. The case law has established that s 43B places two obligations on the employee. First, the disclosure of information in question must have identified to the employer the breach of legal obligation concerned (Fincham v HM Prison Service UKEAT/0991/01 (3 December 2001, unreported), although this need not be 'in strict legal language'. In Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT, Judge Serota said when it comes to pursuing a claim, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'.

'Likely' failures

209. Although the clear intent of the legislation is for a broad range of information to be capable of falling within the definition of a protected disclosure, there is still

a balance to be struck. Under s 43B(1)(b) it is necessary that the relevant information must tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. In this context the term 'likely' requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation (Kraus v Penna plc [2004] IRLR 260, EAT).

Reasonable belief

210. What is required is that the worker has a *reasonable belief*. It is not necessary for the information itself to be actually true. A disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect *(Darnton v University of Surrey [2003] IRLR 133, EAT)*. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief, the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

211. The test is a subjective one; the ERA referring to the reasonable belief of the worker making the disclosure. It follows that the individual characteristics of the worker need to be taken into account and the relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT).

212. The mental element required by ERA in this context imposes a two stage test: (i) did the claimant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? This point was considered further in Ibrahim v HCA International [2019] EWCA Civ 207, [2019] 1 WLR 3981 where it was held that the claimant's motivation for making the disclosure is not part of this test; the claimant in that case was not necessarily ruled out because at the time he had been concerned to clear his name of slurs and re-establish his reputation; As the judgment of Underhill LJ puts it: 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence."

213. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief. Reasonable belief requires a subjective belief that is objectively reasonable (see Babula v Waltham Forest College [2007] ICR 1026, per Wall LJ).

In the public interest

214. The public interest element was added in 2013 to address the decision in Perkins v Sodexho Ltd [2002] IRLR 109, EAT. This has been considered by the Court of Appeal in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979. Underhill LJ gave the lead judgment and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see paragraph 32). He declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> "The correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), 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… The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case."

215. The tribunal must consider all the circumstances, Underhill LJ gave some general guidance. He said that a tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> "First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula ... The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable."

216. In Parsons v Airplus International Ltd UKEAT/0111/17 (13 October 2017, unreported) the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

Aggregation of disclosures

217. It may be possible to aggregate disclosures, but the scope is not unlimited, and it is a question of fact for the tribunal.

Automatic unfair dismissal

218. Section 103A of the ERA provides:

> 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.

219. In a S103A case, the burden of proving the reason or principal reason remains on the employer unless the claimant lacks the qualifying period of employment (and therefore needs to show that the tribunal has jurisdiction to hear his or her claim) in which case the burden of proof lies on the employee on ordinary principles: Maund v Penwith District Council [1984] ICR 143, CA, applied in the whistleblowing case of Kuzel v Roche Products Ltd [2008] EWCA Civ 380.

220. In Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT, where a tribunal had found automatically unfair dismissal under s.103A because it was satisfied that the whistleblowing had been 'on the respondent's mind' when dismissing, the EAT held that it had applied the wrong test (i.e. the s 47B test) and allowed the employer's appeal. Similarly, in Mid-Essex Hospital Services NHS Trust v Smith UKEAT/0239/17 (5 March 2018, unreported) the EAT allowed an appeal against a tribunal's finding of unfair dismissal under s 103A because it had not applied Kuzel where Mummery LJ said that if the employer fails to establish its alternative reason it will often be the case that the tribunal will find the claimant's automatically unfair reason (here, whistleblowing) established, but that is not a rule of law – it may still be the case that it finds another reason established on the facts, which can still defeat the claimant's claim.

221. When considering the dismissal, it is necessary to consider the thought processes of the individual or individuals who dismissed.

222. The following paragraphs in LJ Mummery's judgment Kuzel are particularly helpful:

223. The unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.

224. The reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

225. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

226. One or more of the protected disclosures must be the sole or principal reason for the dismissal. It is for us to decide, as a question of fact, what is the reason for dismissal. In deciding that reason, it may be appropriate to draw secondary inferences from primary findings of fact. The reason for dismissal is disputed. We are required to draw an inference, or find directly on the primary findings of fact, that the sole or principal reason for the Claimant's dismissal were the protected disclosures.

Burden of proof in an automatically unfair dismissal case

227. Where an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

228. Having heard the evidence of both sides relating to the reason for dismissal we need to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

229. We must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the First Respondent to show what the reason was. If the First Respondent does not show to our satisfaction that the reason was what it asserted it was, it is open to us to find that the reason was what the Claimant asserted it was. But it is not correct to say, either as a matter of law or logic, that we must find that, if the reason was not that asserted by the First Respondent, then it must have been for the reason asserted by the Claimant. That may often be the outcome in practice, but it is not necessarily so.

230. The claimant bears the burden of proof on establishing the relevant failure (Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported) Judge McMullen said:

> *"As to any of the alleged failures, the burden of the proof is upon the claimant to establish upon the balance of probabilities any of the following:*
>
> > *(a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.*
> >
> > *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."*

231. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to us to find that, on a consideration of all the evidence, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

Constructive unfair dismissal

232. Section 95 (1) (c) of the ERA states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

233. The leading authority is Western Excavating ECC Ltd v Sharp [1978] ICR 221. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed."

234. In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

235. We also note Bournemouth University v Buckland *[2010] IRLR 445 CA.* The head note reads:

> "In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.
>
> The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

> It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement…"

236. In Malik v Bank of Credit and Commerce International SA *[1997] IRLR 462.* The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> "the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

237. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [*2005] EWCA Civ 1493.* The legal test entails looking at the circumstances objectively, i.e., from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP *[2011] IRLR 420, CA.)*

Last straw

238. In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

239. In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

240. Omilaju is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable but satisfies the last straw test.

Reason for resignation

241. We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

242. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

243. Where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted.

Waiver

244. The question of waiver must be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

Automatic unfair dismissal under S103A and constructive dismissal

245. This claim of automatic unfair dismissal under S103 depends on whether the reason (or, if more than one, the principal reason) for the dismissal was that the claimant had made one or more protected disclosures as per s.103A of the ERA.

Detriment claims against the individual Respondents

Liability of fellow workers

246. Sub-s (1A) provides that a worker has the right not to be subjected to a detriment on the ground of having made a protected disclosure either by a fellow worker (acting in the course of employment). Where this happens, the act or failure to act in question is treated as also done by the employer (sub-s (1B)). This is so whether or not the act or omission occurred with the employer's knowledge or approval (sub-s (1C)) (subject to the statutory defence).

247. The fellow worker may be liable for the detriment as well as the employer (s.48(5)(b) but it is provided that such worker is not to be liable if: (a) he or she did the thing in question in reliance on a statement by the employer that doing it did not contravene the ERA; and (b) it was reasonable to rely on that statement (s.47B(1E)).

248. The personal liability of a fellow worker (or agent) under under S.47A will normally follow the principles applying to the original action against the employer, but the decision in Timis Sage v Osipov [2018] EWCA Civ 2321 shows that in one way the fellow worker's liability can be wider – unlike the employer, he or she can be liable for detriment consisting of the claimant's dismissal. Thus, when s 47B(2) talks of ruling out a detriment amounting to dismissal, this only applies to an action directly against the employer (which must brought under s 103A). The judgement summarises the position as follows (at [91]):

> "(1) It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.
>
> (2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."

249. Given that the Claimant is pursuing his detriment, save for dismissal, claims against the individual Respondents it is necessary to set out the slightly different legal test which applies.

250. The general right not to suffer detriment due to having blown the whistle is contained at s.47B(1) of the ERA:

> *"A worker has the right not to be subject 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."*

Test to be applied

251. In accordance with the Court of Appeal's decision in Timis the burden of proof is easier to satisfy. In a detriment claim a claimant only need to show that their whistleblowing disclosure materially influenced their colleague's treatment by them. By contrast, in an unfair dismissal claim they need to show that whistleblowing was the reason or principal reason for their dismissal.

252. In Timis the Court of Appeal held: that it is for a claimant to show that the disclosures had more than trivial influence on the detrimental treatment, but also that s.48(2) requires the respondent to show the reasons for their action, and that if they do not do so inferences may be drawn against them.

253. It was held in Fecitt v NHS Manchester [2011] EWCA Civ 1190 that being contained in different parts of the ERA, this is deliberate.

254. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test (Harrow London Borough v Knight [2003] IRLR 140, EAT). The employer must prove on the balance of probabilities that the act, or deliberate failure complained of was not on the ground that the employee had done the protected act; meaning that the protected act did not materially influence the employer's treatment of the whistleblower.

255. The influence of the protected disclosure on the conduct maybe be unconscious: Anya v University of Oxford [2001] ICR 847. Section 48(2) places the burden on the respondent to show the ground on which the act complained of was done.

256. Once a protected disclosure has been found to exist it needs to be shown that:

a) the worker has been subjected to a detriment;
b) detriment arose from an act or deliberate failure to act by the employer, other worker or agent (as the case may be); and
c) the act or omission was done on the ground that the worker had made a protected disclosure.

What conduct constitutes a detriment?

257. Whether the conduct amounts to a detriment depends on whether it is reasonably viewed by the complainant as such: Shamoon v Chief Constable of the RUC [2005] ICR1458.

258. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. This was confirmed in Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, [2020] IRLR 374, where the Court of Appeal approved the application of this mixed subjective/objective test (at [27] and [28]):

> "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases…"

Objection to the means rather than the disclosure

259. Once it is established that there has been a disclosure, the next important point is that these provisions only protect the individual against detriment or dismissal because of that act of disclosure; if therefore the individual used improper means to investigate their suspicions (eg unauthorised hacking into the

employer's computer system) and is disciplined because of that, they will not have the special protection e.g. Bolton School v Evans where the EAT rejected the claim because the claimant had been disciplined for the hacking, not the act of whistleblowing.

260. Similarly, in Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500, the EAT upheld a decision by a tribunal that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints, and not connected with connected with earlier public interest disclosures. Lewis J. stressed that such a finding is entirely logical and is not confined to 'exceptional cases' (disapproving the view of Judge Hand in the earlier discrimination case of Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773, EAT). He noted the following:

> "There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed… Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."

Interrelationship between detriment and automatically unfair dismissal claims

261. S47B(2) provides that where the worker is an *employee* and the detriment complained of is dismissal then the relevant complaint is one of unfair dismissal. The interrelationship between detriment and dismissal in this context was considered by the Court of Appeal in Melia v Magna Kansei Ltd [2005] EWCA Civ 1547. It confirmed that the relevant provisions as to detriment and dismissal must be construed as part of the overriding statutory scheme. Accordingly, an employee who made a complaint of unfair constructive dismissal was entitled to rely upon the statutory protections relating to detriment right up until the effective date of termination when the dismissal in question became effective. It was only after this moment in time that the provisions relating to dismissal came into play. Thus, the employee in question was entitled to remedies relating to detriment throughout the whole period of his employment and he was not prevented from claiming remedies for the detriment which he suffered from the time when the repudiatory conduct of the employer started up until the effective date of termination of his employment.

The Respondents' closing submissions

262. Ms. Grennan produced 85 paragraph closing submissions. She then spoke to these. It is not necessary to summarise these, but the Tribunal took them carefully into account in its deliberations.

263. In her oral submissions Miss Grennan made the following key points: that the Claimant's allegations of fraudery in the creation of documents were entirely erroneous but nevertheless consistent with his jumping to conclusions regarding alleged criminality in respect of furlough.

264. She places considerable emphasis on the importance of the timelines provided in the Plan. She said it is significant that there was never a suggestion that Mr Janeway would be replaced. They represented the Claimant's own timescales and he then subsequently sought to distance himself from the Plan.

265. She emphasises the importance of the depositing of the code. She says that it would make absolutely no commercial sense for the First Respondent to dismiss its key developer at a time of consideration commercial sensitivity and importance as result of a failure to comply with what the Claimant describes as an "illegal furlough" scheme many weeks earlier. By this stage the First Respondent had, in any event, already achieved additional funding.

The Claimant's closing submissions

266. Mr Malik described the furlough "fraud" as an illegal act imbedded in dishonesty.

267. He emphasises the significance of Mr Rognoni not being called as a witness. He says that Mr Rognoni was asked to work whilst on furlough and therefore his evidence would have been unhelpful to the Respondents.

268. He questions the veracity of the Respondents' explanation in relation to the duration of Mr Rognoni's furlough and the subsequent repayment by the First Respondent to HMRC of furlough payments received in respect of his employment. He says that it is significant that the First Respondent's accountant was unable to provide full particulars.

269. He says that it would be a very unlikely coincidence that from the Claimant first making protected disclosures in late March/early April 2020 that he then suffered a series of detriments. He says that there had been little, if any, criticism of the Claimant's performance prior to this time.

Conclusions

The alleged protected disclosures

Generic factors

270. It is necessary to examine each of the relevant stages. The first question is whether the Claimant disclosed information. Not all facts or opinions that will be relevant information. It must be information that tends to show a relevant failure.

Protected disclosure number 1 video conversation between the Claimant and Mr Jones and Mr Wilson on 27 March 2020 when the Claimant said he did not want to break furlough rules with the implication being that the Respondents were asking him to break them (witnessed by Ms Komissarova).

271. It was described by the Claimant as follows:

> I replied that I did not want to do anything against the rules because I do not do that and because I have a family to protect. I told them that I believed that the rules did not allow furloughed employees to undertake work for the company.

272. The Claimant contends that Mr Jones told him that if we kept quiet the First Respondent could receive furlough money from the government whilst he continued working. The Claimant said that he told Mr Jones and Mr Wilson that he believed that the rules pertaining to the Government's Coronavirus Job Retention Scheme (the CJRS) did not allow furloughed employees to undertake work for their employer (subsequently referred to as the Rules).

273. The Claimant accepts that he did not have direct evidence that the First Respondent had done anything wrong. He believed that the proposal in relation to himself would have been a criminal act, but he did not know whether the First Respondent undertook any criminal activity, as he described it. He says that he believed the First Respondent was likely to fail to comply with a legal obligation or that a criminal offence was likely to be committed.

274. The CJRS was announced by the government in Parliament on 20 March 2020 and more details were provided on 26 March 2020. Therefore, at the time of this conversation the scheme was new and the full details of its operation not fully established and known by businesses and the public. Nevertheless, we consider that the basic principles were well established namely that the scheme was intended to maximise the survival of jobs which would otherwise be at risk of being lost because of downturn in trade as the result of the pandemic. It was clearly not intended to provide financial assistance towards the wages of employees who continued to work as normally.

275. We find that this conversation, in respect of which there is no transcript, involved discussion in general terms regarding a number of options to include the use of furlough. The reference to furlough was part of an overall conversation in circumstances where the First Respondent was already facing potential financial difficulties. However, we do not find any evidence exists that during this conversation Mr Wilson and/or Mr Jones insisted that the Claimant should continue to work whilst on furlough.

276. In reaching this view we take account of the Claimant's email sent later that afternoon at 17:54 to Mr Jones in which he somewhat unusually starts by saying "thank you for the opportunity to keep my job and for promotion to CTO". He goes on to discuss the possibility of being furloughed whilst undertaking training. He says that this would allow him to keep the entirety of his current salary. He says that the training would focus on knowledge, skills, development and examples fully applicable to and easily usable by the First Respondent.

277. We consider it significant that he makes no reference to being told that he was required to work as normally whilst furloughed. Had this been proposed to him during the meeting earlier that afternoon we consider it almost inevitable that he would have referred to it and expressed his concern. He failed to do so.

278. Moreover, the Claimant's actions after 27 March 2020 are consistent with exploring options. They are not consistent with a reaction to a Respondent that had formed the view that the Claimant must be furloughed and may be dismissed should he not cooperate.

279. The essence of the disclosure is the Claimant's expression of his own opinion that furloughed employees must not undertake work. We consider this to be common knowledge. Stating there is an obligation does not tend to show a relevant failure.

280. This is in essence an assertion of the nature of the CJRS and his insistence that he did not wish to break its terms. We find that this is not a disclosure of information.

281. We therefore do not find that during this video call that the Claimant disclosed information intending to show that a criminal offence was being or was likely to be committed.

<u>Protected disclosure number 2 telephone conversation with Mr Wilson at 16:24 on 1 April 2020 overheard by Ms Komissarova</u>

282. The Claimant says that during this conversation he clarified the terms of the CJRS and insisted that his furlough should be done in compliance with the Rules.

283. This conversation included a discussion regarding furlough. At paragraph 42 Mr Wilson said that "we would like to furlough". He went on to say that he thought there was a condition that this means that somebody's work had to be changed. The Claimant then spoke at length about the possibility of training whilst furloughed. He insisted that furlough should be done in observance of the Rules. At paragraph 66 he says that he was perfectly happy to assist, support the company but within the Rules. The conversation concluded without any definite outcome.

284. In effect it is a further assertion by the claimant of the Rules and his insistence that he did not wish to break them. We do not consider this is a disclosure of

information, particularly given the categorical statement that he would not be furloughed.

285. The Claimant repeatedly sought to draw a distinction between what he described as “legal” and “illegal” furlough. We consider that this distinction is far too rigid and does not reflect the reality of what was discussed during this and other conversations. We find that the conversation was discursive regarding various proposals and did not involve concrete decisions. There was no ultimation to the Claimant that he had to work whilst furloughed.

286. We find that the Claimant’s proposal that he should continue to undertake training in connection with the development of code for the App whilst furloughed would have been on the wrong side of the line in terms of what was permitted under the Rules. The Rules envisaged generic training to maintain an employee’s professional knowledge. What the Claimant proposed involved an employee in a highly technical and specialised developmental role using the opportunity to progress work, which would largely have been undertaken in any event, and in respect of which his employer had a direct commercial interest.

287. There was a dispute between the parties as to whether the Claimant would be spending 80% of his time training in accordance with what he customarily did. We do not consider this directly material to our decision.

288. We find that the Claimant was primarily motivated by a desire to maintain his existing income but also possibly a wish to obtain an additional period during which he could do background work on the development of the App.

289. The contemporaneous documentation does not support the Claimant’s position. We have considered the transcript of the conversation from 1 April 2020. It is consistent with a general conversation about possibilities, and it is not consistent with the Claimant's account which suggests Mr Wilson was aggressive and insisted on his compliance. We find that the thrust of the conversation revolved around the Claimant saying that he could be furloughed and undertake training. He appears to be encouraging Mr Wilson to furlough him whilst undertaking training. Mr Wilson appears to have serious reservations and wanted to discuss the matter with Mr Jones before making any decisions.

290. The Claimant says that the Respondents "insinuated" that he would be dismissed if he did not agree to work whilst on furlough. We can discern no part of the conversation in which the requirement to work whilst furloughed is an express requirement of the Respondents . We find the Claimant’s evidence, to the extent it makes unsupported allegations that the Respondents insisted he “cooperate with a fraudulent furlough initiative threatening him with dismissal,” to be exaggerated and misleading.

<u>Protected disclosure number 3 conversation with Mr Wilson at 17:49 on 1 April 2020</u>

291. At paragraph 14 Mr Wilson said that the First Respondent was unlikely to go down the furlough route. Nevertheless, it did need to reduce costs. The Claimant went on to express his concern regarding an email he had received from Mr Jones and a general discussion ensued regarding that email suggestions by Mr Wilson as to how the Claimant's general approach could give rise to difficulties.

292. It is significant that this conversation, and some of those which ensued, was covertly recorded. The Claimant therefore had the ability to lead the conversation and potentially entice the other participant to make comments which he could use to his benefit.

293. We find that no protected disclosure was made. The Claimant disclosed no information. A relatively brief part of the conversation involved discussion of furlough and this was rapidly discounted. Whilst Mr Wilson (in paragraph 22) said that Mr Rognoni and himself would be furloughed this represented an indication as to the First Respondent's intention rather than the Claimant disclosing information regarding his opinion that it would constitute a breach of a legal obligation.

294. Whilst we do find that the Respondents were looking to push the boundaries in terms of the potential opportunities to obtain government support whether via the CJRS, or reclaiming pay during the Claimant's period of home isolation as a result of Covid-19 we do not consider that the Claimant made a protected disclosure during this call. It was a general discussion. There was no disclosure of information by the Claimant. He was a party to the conversations. Proposals and counter proposals were made.

<u>Protected disclosure number 4 call with Mr Rognoni on 2 April 2020</u>

295. The Claimant asked Mr Rognoni how much he could count on him for the development because Mr Wilson told him that he was going to be furloughed. Mr Rognoni said that he had agreed to keep working while furloughed and told the Claimant that officially he was not working, but that in reality he was working. The claimant said that the Respondents had proposed the same to him but that he had refused because it is against the Rules.

296. The Claimant argues that the disclosure of information should be inferred. He says that he had been asked to work whilst furloughed.

297. We find it significant that at paragraph 30 the Claimant misled Mr Rognoni in stating that Mr Wilson had asked that he be furloughed. We have found that this was a discussion rather than a definite request.

298. It is apparent from the comments of Mr Rognoni during this and subsequent calls recorded by the Claimant on 6, 8 April and 7 May 2020 that he either was working whilst furloughed, was about to work whilst furloughed or had been working whilst furloughed. We are not in a position to make a finding as to the exact period during which Mr Rognoni was working whilst furloughed. This represents a surprising omission from the Respondents' case. It would have been possible for this information to have been ascertained and included in evidence.

The Respondents do not dispute that Mr Rognoni was working whilst furloughed. They say they then contacted HMRC and the furlough money was repaid. However, the evidence is vague as to exactly when this notification and repayment was made and what was the trigger for it.

299. We find that the Claimant made no protected disclosure during this call. We find that it represented an attempt by the Claimant to gather evidence as to what he perceived to be potential illegality in the Respondents' conduct of the business. It was a discussion based on a false premise i.e. that he had been told that he would be dismissed if he did not work whilst furloughed and the Claimant did not disclose information to Mr Rognoni and nor, in our opinion, would have been an appropriate person to whom to make a disclosure.

300. We consider that the Claimant's concerns were genuine. Nevertheless, his argument that his concern was that he would be breaching a legal obligation by working alongside an employee who was working whilst furloughed is not consistent with his own actions. He proactively sought to engage in broadly work related conversations with Mr Rognoni. This is inconsistent with his stated concern that in doing so he would be a party to alleged illegality. What he could have done, but failed to do, was say to Mr Jones and Mr Wilson that he refused to work whilst Mr Rognoni was furloughed. It would have been apparent to the Claimant from early April 2020 that Mr Rognoni was working, or at least was about to be working whilst furloughed. It was certainly clear that he was doing so from 10 April 2020 as Mr Rognoni advised the Claimant of this fact.

301. We do not consider that a discussion with an employee at a comparable level of seniority within the organisation when that employee divulges that their actions, at the behest of their employer, are arguably contrary to the law can itself amount to the Claimant disclosing information of potential illegality. He was rather the recipient of information pointing to illegality rather than an employee making a disclosure of such information.

<u>Protected disclosure number 5 call with Mr Rognoni on 6 April 2020</u>

302. We find that this was primarily a work related call, or at least ostensibly so. It was not until paragraph 135 that there was a detailed discussion regarding furlough when Mr Rognoni confirmed that he would be furloughed from 10 April 2020. The Claimant then went on to discuss, in ostensibly friendly terms, with Mr Rognoni how he would be able to assist him if he were dismissed and brought tribunal proceedings.

303. We consider that the Claimant was acting as a "false" friend in the initiation and conduct of this call. We find that he had an ulterior and self-serving motive. We consider that he was primarily motivated by looking to protect his own position and seeking to gather evidence in support.

304. We consider that the Claimant placed Mr Rognoni in a potentially comprising position particularly given that the call, at the Claimant's initiative, extended significantly beyond furlough and involved him asking open ended and potentially

comprising questions as to what Mr Rognoni thought about Mr Jones and Mr Wilson. Mr Rognoni was clearly disadvantaged in not knowing the call was being recorded.

305. We do not find that any protected disclosure was made during this call. Quite simply the Claimant disclosed no information.

Protected disclosure number 6 call with Mr Rognoni on 8 April 2020

306. The Claimant accepts that that Mr Rognoni was not at the time furloughed. We find that the Claimant sought to induce Mr Rognoni into making potentially compromising concessions as to his position. For example, at paragraph 6 he asks, "are you still going ahead with your plan of not working whilst furloughed?" This is disingenuous as clearly it would not have been a plan at Mr Rognoni's instigation.

307. At paragraph 23 Mr Rognoni says, "please keep the conversation confidential". The Claimant said that he would but knew he was recording it potentially for subsequent use.

308. At paragraph 26 the Claimant was disingenuous in that he told Mr Rognoni that if he refused to work whilst furloughed that the Respondents would fire him. This is inconsistent with the Respondents' communications to him and we consider that he knew this.

309. For the reasons set out above in respect of that the previous calls with Mr Rognoni we find that no protected disclosure was made during this call.

Protected disclosure number 7 call with Mr Rognoni on 7 May 2020

310. This long conversation only briefly relates to furlough and in particular paragraphs 69-70 in which Mr Rognoni confirmed that he had been, and possibly continued, working whilst furloughed.

311. For the reasons set out above we find there was no disclosure information and therefore no disclosure.

Protected disclosures number 8 to 10 emails to Mr Jones, Mr Wilson and Ms Norford-Jones on 17, 18 and 19 May 2020.

312. The Claimant refers to his email of 23:38 on 7 May 2020 the relevant part being:

> "On the 27 March you asked me to get furloughed and take a wage deferral on the basis that the company was running out of cash. To my surprise you also asked me to keep working while furloughed. I told you that I needed to get advice on this, and you asked me not to do so because you knew that this was against the rules. You asked me to just do it and not to tell anyone.

> I said that I didn't want to break the rules because it's not something I do, and more so because I have a family to support."

313. In is email of 11:26 19 May 2020 the relevant part being:

> "I raised the points during our conversation and on the very same moment you suggested that I kept working while furloughed, that is, on Monday 27 March 2020. You knew then that it was against the rules, and you said so and told me not to tell anyone. It was not an exploration of options; it was an outright proposal. I raised further such concerns to Mr Wilson on the 1 April 2020, and he knew that working while on furlough was against the rules yet said that other employees were doing it and he wanted me to do likewise."

314. As to the alleged disclosures on 17 to 19 May 2020 the position had materially changed. The Claimant's capability had been questioned. Mr Calver had been appointed. It must have been evident to the Claimant that his days were numbered. We find that these disclosures were not founded on a reasonable belief of a relevant failure, or a reasonable belief they were made in the public interest, but instead that they were made purely to bolster the Claimant's negotiating position. As such we do not find that any of them amounted to protected disclosures and therefore that no protected disclosures have been made by the Claimant.

<u>In the public interest</u>

315. For completeness we address generically whether any of the above disclosures would have been made in the public interest had we considered that the Claimant had disclosed information which in his reasonable belief tended to show a relevant failure

316. The Claimant relied on the same allegation of public interest for all disclosures. He stated that furlough requires the use of public money, and that breaching the rules, by requiring an individual to work whilst furloughed, is stealing money from the government. He considered this to be wrong.

317. The need to comply with the Rules has a personal interest as individuals may wish to avoid committing a criminal offence. Whether it is made in the public interest may well depend upon the reasonableness of the belief that there had been illegality or a criminal offence had been committed or if it was likely that there would be illegality or criminal offence.

318. We do not consider any public interest existed in the Claimant disclosing to Mr Rognoni the content of the conversation if that conversation was no more than an exploration of possibilities.

319. We have found that the Claimant has not demonstrated that he believed there had been or would be a relevant failure. Moreover, it is the information

disclosed which must tend to show the relevant failure. And in putting forward that information, the reasonable belief attaches not only to the actual or prospective failure, but also to the public interest. We do not consider that the Claimant believed that there was a public interest in disclosing the possibility of a failure when he knew that he was not to be furloughed. Even on his own case, he was looking only at the potential for failure (see his grievance of 29 May 2020).

Alleged detriments

320. Whilst given our findings above that the Claimant made no protected disclosures it is not strictly necessary for us to consider whether he suffered any detriments we nevertheless have done so for completeness.

The Claimant being asked to work illegally by Mr Jones and Mr Wilson.

321. Given our finding that the Claimant was not asked to work illegally, but rather it formed part of a two way discussion, this could not, in any event, constitute a detriment. Further, we consider that the Claimant's position is confusing and his arguments circular. There can only be a detriment if there has been a protected disclosure. The Claimant seeks to rely on the same alleged act as both a protected disclosure and a detriment. For a detriment to have occurred there must first have been a protected disclosure. The Claimant's position is therefore illogical.

The Claimant being asked to work with Mr Rognoni whilst he was working illegally (Mr Jones and Mr Wilson)

322. We do not accept that the Claimant ever raised a concern that he was being put in a vulnerable position by being required to work alongside a furloughed employee. Again we consider that there is significant circularity in the Claimant's arguments. He contends that this matter represents a protected disclosure and a detriment. Given our finding that there was no protected disclosure there can be no detriment.

Unjustified criticism of the Claimant's work including blaming him for others' failures (Mr Jones and Mr Wilson)

323. We find that there was no unjustified criticism of the Claimant's work. The Respondents were entitled to have concerns regarding his failure to deliver code in the projected timescales. The Respondents were undoubtedly pressurising the Claimant to produce code given the First Respondent's precarious financial situation and the commercial imperative of having a tangible product to show investors and clients. We nevertheless consider that the Claimant had singularly failed to upload code in accordance with the established practice for developers. We accept the evidence of Mr Wilson, Mr Rockwell and Mr Calver that it is best and standard practice for code to be regularly uploaded. The Claimant failed to do so and eventually only did so after considerable pressure on 30 March 2020 and then 29 May 2020.

324. Whilst the Respondents' criticism of the Claimant's general work quality and product may have to a large extent been after the event, and therefore not something we can rely on, we nevertheless consider that they had legitimate concerns regarding his propensity to overpromise and under deliver We also consider that the Claimant was culpable of talking the talk but not delivering what he had promised. We find that he had a tendency to look for and rely on extenuating circumstances to justify delay. For example, we find that his reliance on Mr Janeway's departure as a factor explaining delay to be disingenuous given that he was aware of his departure at the time of the Tech Plan being formulated and certainly by the time of the third and final version on 15 January 2020. At no point either in that plan or in subsequent correspondence regarding timelines did he reference Mr Janeway's departure and the failure by the First Respondent to recruit a replacement.

325. We interpret the Claimant's comment that his failure to deliver in the projected timescales was as a result of the deficiencies of others and he was unfairly being blamed for this. However, we do not accept any argument to this effect. We do not accept that the Respondents blamed the Claimant for others failures. It was rather a case of the Claimant seeking to explain his failures as a result of the deficiencies of others and in particular Mr Martin and Mr Rognoni. It was open to the Claimant to set out on a transparent basis what the realistic timescales were for the delivery of various stages of the project and in doing so make reference to any issues regarding the size and capabilities of his team. He failed to do so.

<u>Plainly unreasonable and unrealistic work demands (Mr Jones and Mr Wilson)</u>

326. We do not find that the Claimant was subject to unreasonable demands. Whilst it is self-apparent that the First Respondent's business involved what was described as a "high velocity" environment and undoubtedly one where there would be significant pressure to deliver a tangible product, we do not consider that the pressure was unreasonable. The Claimant was at liberty, in conjunction with his team members, to set projected timescales. Mr Jones built in a degree of leeway. We find that the Respondents would have adopted a reasonable degree of flexibility. Timelines were intended as indicative rather than hard deadlines. In any event, ultimately the Claimant set the timelines and there is no evidence that he was pressurised to do so. He was positive as to his ability to achieve.

<u>Manipulation of the project plan by representing estimates as deadlines (Mr Jones and Mr Wilson)</u>

327. We consider that this represents a question of communication rather than there being exact deadlines. The Respondents' position is that they relied on timelines provided by the Claimant from a business planning perspective. They expected to see a reasonable continuum of progression in the coding development in the context of those timelines. Their position is that the Claimant failed to do so. They were shocked in particular on 30 March 2020

and 4 May 2020 to receive updated work project/schedules of work completed and to be undertaken which were substantially deficient and completely contrary to the projected timelines. We find there was no such manipulation.

Threat to terminate the Claimant's employment unless he joined furlough initiative re "salary cut or else" (Mr Wilson)

328. We have already found that there was no such threat. The Claimant may have interpreted, whether contemporaneously or subsequently, the conversations to this effect but read in their totality there is no direct threat of work whilst furloughed or be dismissed. A range of options were considered. None of them involved the Claimant's dismissal. It was a pressurised business situation with the First Respondent having limited resources and the unexpected additional contingency of the pandemic to confront.

False accusation that the Claimant faked illness re-food poisoning (Mr Wilson)

329. We find this alleged detriment wholly unmeritorious. The comments were made in a conversation with Mr Wilson on 18 May 2020 which was about 7 weeks after the original discussions regarding furlough. We find Mr Wilson's remarks regarding whether the Claimant had been off work for one or two days with food poisoning to be inconsequential and it to be implausible that in making such comments he was in any way motivated by the Claimant's alleged early reluctance to work whilst furloughed.

Undermining the Claimant by recruiting Mr Calver without his knowledge (Mr Jones and Mr Wilson)

330. We accept that Mr Calver was recruited without the Claimant's knowledge. This undoubtedly created significant workplace trauma as far as the Claimant was concerned. First, he inadvertently discovered that an interview had been arranged for what would inevitably be his replacement. He then had to undergo a transitional period when it must have been obvious that Mr Calver was reviewing and then looking to take over his work. This was a relatively extended period from 11 May until 8 June 2020. However, we do not find this to be a detriment on account of any alleged protective disclosure. The reason why the First Respondent was recruiting Mr Calver was as a result of concerns regarding the Claimant's productivity and approach to his work. It was not as a result of his having objected to working whilst furloughed. If this had been the motivation it is implausible that the Respondents would have waited nearly a month before commencing the process resulting in Mr Calver's appointment.

Suspending the Claimant's work accounts (Mr Jones and Mr Wilson)

331. We find that this would undoubtedly have constituted a detriment if it were materially influenced by a protected disclosure. However, we find that it was not. The reason for this action was that the Claimant was inevitably going to leave either pursuant to a settlement agreement or dismissal. We find that there was no realistic possibility that he would return to active service. He was

about to go on holiday. The point of no return had been reached. His replacement had been recruited. The Claimant was aware from an inadvertent email, and without prejudice discussions, that he had no future and that the working relationship had irretrievably broken down. We find the Claimant's argument that the position was uncertain to be inconsistent with the reality. The Claimant is an intelligent man and whilst it must have been a stressful situation there can have been no genuine doubt as to the outcome.

Constructive dismissal

The Claimant's resignation

332. We find that the Claimant resigned by letter without notice, and he did so prior to being dismissed: that is his case. He would have to establish the First Respondent was in breach of contract.

Reason for resignation

333. We need to consider what the reason was for the Claimant's resignation at the time he resigned. He would have to establish the First Respondent was in breach of contract.

334. In support of his argument that there were no real concerns about his performance the Claimant points to the failure to conduct a capability procedure, or to refer clearly to capability when dismissing him. However, there is no obligation on the First Respondent to behave in a way which may be deemed, in some general sense, fair.

335. The Respondents were disappointed by the Claimant's failure to deliver at the end of March 2020. However, despite the fundamental importance of the Claimant's work to the development of a product essential to the success of the First Respondent, he was given more time.

336. The First Respondent removed his computer access which prevented him from undertaking his role. However, in a situation where there is dispute and a deterioration of the relationship we find that it was not a breach of implied contractual term of trust and confidence to remove privileges to preserve the position. We do not accept that the First Respondent committed a fundamental breach of contract at the point when the Claimant resigned.

337. We find that the Claimant was undoubtably aware that his employment was going to be terminated. We therefore find that he was motivated by wishing to resign before he was dismissed and thereby save face and potential damage to his CV and future employability.

Affirmation

338. Whilst we find that the Claimant had genuine grounds to believe that the relationship had irretrievably broken down, we consider that by remaining in

employment from the recruitment of Mr Calver on 11 May 2020 until 8 June 2020 that he had affirmed this breach. Nothing changed in respect of Mr Calver's position and his inevitable replacement of the Claimant.

339. We find that the Claimant resigned by letter without notice, and he did so prior to being dismissed.

340. Ultimately, whether the Claimant resigned or was dismissed by the First Respondent is largely academic. It cannot be a successful claim for automatically unfair dismissal as we have found that the Claimant made no protected disclosures. We find that on ordinary unfair constructive dismissal principles that the Claimant resigned in circumstances not amounting to constructive dismissal and therefore the subsequent purported express dismissal by the First Respondent in its letter of 9 June 2020 is legally void given that the employment relationship had concluded the previous day on the claimant's resignation.

Sole or principal dismissal for dismissal

341. Given our findings above it is not strictly necessary for us to consider this question but for completeness we do.

342. In support of his argument that there were no real concerns about his performance. The Claimant points to the failure to conduct a capability procedure, or to refer clearly to capability when dismissing him. There is no obligation on the First Respondent to behave in a way which may be deemed, in some general sense, fair.

343. The Claimant asks us to infer that the Respondents believed there was no difficulty with his work. The logic of his position is that as he was performing his duties adequately, dismissing him was irrational and demonstrably unreasonable. He asks us to infer that the true reason must have been the making of protected disclosures.

344. The Respondents were disappointed by the Claimant's failure to deliver by 31 March 2020. However, despite the fundamental importance of the Claimant's work to the development of a product essential to the success of the First Respondent, he was given more time. To the extent there had been delay caused by matters beyond the Claimant's control, the fact that he was given more time suggests an accommodating and reasonable response by the Respondents.

345. We find that the Respondents were not unreasonable in questioning why it was necessary to extend the time period even further.

346. We accept that the problems the Claimant faced may have caused delay. However, it was not irrational for the Respondents to expect the Claimant to deliver, in accordance with his own promises, by the revised timeline of the end of April 2020.

347. The Claimant represented himself as competent and knowledgeable. Following the meeting on 27 March 2020, he appeared to represent to the Respondents, or at least they inferred he did, that he could spend at least 80% of his time training. The Claimant sees no difficulty with this. This was a development company. Individuals were investing to develop an App to take to market. If the Claimant failed to deliver, there would be nothing to sell. He had been employed for his expertise and his ability to deliver. The idea that an individual who professes such expertise, and ability to develop, should spend an indefinite amount of time training is likely to cause any reasonable manager the most serious concern. What was he training to do and why couldn't he do it already?

348. On 4 May 2020, the Claimant delivered the product of his work. He considers that the Respondents' criticism was unreasonable. The First Respondent's response was to employ Mr Calver. On the Claimant's case, this occurred because he had raised concerns about being required to work when furloughed. The Respondents' case is it occurred because the version of the product he had produced was wholly inadequate.

349. The Claimant asks us to accept that the First Respondent, which was increasingly desperate to make progress, would take a backward step by employing another person, who undoubtedly would have to come up to speed in developing the product, simply because the Respondents were unhappy with the Claimant's refusal to accept being furloughed and continuing to work, even though the Respondents had abandoned, by the beginning of April 2020, the idea of furloughing him, and abandoned any salary reduction. We consider the Claimant's position to be irrational.

350. It seems to us that the more probable reason for the Respondents' actions is that Mr Wilson and Mr Jones had reached the view that the Claimant's performance was inadequate, and that the only way of salvaging the position would be to replace him.

351. We do not accept that there is a lack of evidence about the Respondents' true reason. It may be that the reason was not set out adequately in the dismissal letter. It may be that the First Respondent did not go through any form of performance improvement plan. We consider that the development of the product was time critical. The Claimant's role was critical. In those circumstances, simply removing the Claimant and bringing somebody else was both rational and reasonable. Moreover, it is compelling evidence about the true motivation.

352. We do not accept the Claimant's argument that delay was not down to him, that his work was adequate, that there were no performance concerns, and that any indication of performance concerns was produced as a smokescreen in order to dismiss him because of his alleged protected disclosures.

353. We accept that the First Respondent did not set out, the reason for dismissal. However, it does not follow that we must accept the alternative reason he puts forward, namely the making of protected disclosures.

354. We find that the sole or principal reason for the Claimant's dismissal was because his performance, both in terms of keeping to a timetable and delivering a workable product, was seriously inadequate.

Employment Judge Nicolle

Dated: 13 December 2021

Sent to the parties on:
.13/12/2021

For the Tribunal Office